STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v

KENYA ALI HYATT
Defendant-Appellee. **No. 153081**

Genesee Circuit Court No. 13–032654–FC
COA No. 325741

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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I.

***Miller* and *Montgomery* required individualized sentencing at which the sentencer must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles, and mitigating circumstances are not circumstance the prosecution must present or prove, but are to be weighed by the trial court in reaching its sentencing decision. Is there is any basis in *Miller* and *Montgomery* to review a sentence of a juvenile to life without parole with a presumption that it is erroneous rather than to review for abuse of discretion?**

Amicus answers NO.

Statement of Facts

Amicus joins the statement of facts of the People of the State of Michigan.

Argument

I.

Miller and _Montgomery_ required individualized sentencing at which the sentencer must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles, and mitigating circumstances are not circumstance the prosecution must present or prove, but are to be weighed by the trial court in reaching its sentencing decision. There is no basis in _Miller_ and _Montgomery_ to review a sentence of a juvenile to life without parole with a presumption that it is erroneous rather than to review for abuse of discretion.

A. The *Hyatt* review requirement is not the standard of abuse of discretion

"The first step to wisdom is calling a thing by its right name."[1] The *Hyatt* conflict-resolution panel concluded that "the appropriate standard of review in cases where a judge imposes a sentence of life without parole on a juvenile defendant is a common three-fold standard . . . . Any factfinding by the trial court is to be reviewed for clear error, any questions of law are to be reviewed de novo, and the court's ultimate determination as to the sentence imposed is for an abuse of discretion."[2] This makes perfect sense. But the abuse of discretion standard as "further explained" by the court is not one with which our jurisprudence is familiar,[3] that

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[1] *Roulette v. City of Seattle*, 97 F.3d 300, 302 (CA 9, 1996). Said to be drawn from Confucius saying that "If names be not correct, language is not in accordance with the truth of things." *The Analects of Confucius*, Book 13, Chapter 3.

[2] *People v. Hyatt*, __Mich. App,__ (No. 325741, 7-21-2016), slip opinion, p.25.

[3] As said by Justice Scalia in an analogous context, "It seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis,* and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 993, 112 S. Ct. 2791, 2881, 120 L. Ed. 2d 674 (1992) (Scalia, J., dissenting).

standard being understood to be that a discretionary decision will be affirmed unless it is "outside the range of principled outcomes."[4]

The review standard of abuse of discretion is highly deferential to the trial court.[5] It is quite possible, where the question is whether the trial judge's decision was within the range of principled outcomes, "for two judges, confronted with the identical record, to come to opposite conclusions and *for the appellate court to affirm both.* That possibility is implicit in the concept of a discretionary judgment. If the judge could decide only one way he would not be able lawfully to exercise discretion; either he would be following a rule, or the circumstances would be so one-sided that deciding the other way would be an abuse of discretion. . . . this implies that two judges faced with the identical record could come to opposite conclusions yet both be affirmed."[6] But this is not the standard of review as "further explained" by *Hyatt*.

Under *Hyatt*, the appellate court should begin with the operating review principle that any sentence to life without parole is "inherently suspect"[7]; that is to say, the process begins with an appellate thumb on the scale *against* the decision of the trial judge. In other words, rather than examining whether the sentence given, based on the facts found and the reasons supplied, is

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[4] See e.g. *People v. March*, 499 Mich. 389, 397 (2016); *People v. Musser,* 494 Mich. 337, 348 (2013).

[5] See e.g. *People v. Lett*, 466 Mich. 206 (2002); *United States v. Abrica-Sanchez*, 808 F.3d 330, 334 (CA 8, 2015) ("We review the reasonableness of a sentence under a highly deferential abuse-of-discretion standard").

[6] *United States v. Williams,* 81 F.3d 1434, 1437 (CA 7, 1996) (emphasis in original)

[7] "[A]n appellate court, in order to give effect to our Supreme Court's decision in *Milbourn* and the United States Supreme Court's direction in *Miller* and *Montgomery,* is to conduct a searching inquiry and view as inherently suspect any life-without-parole sentence imposed on a juvenile offender." *People v. Hyatt*, slip opinion, p. 27.

within the range of principled outcomes, a highly deferential standard, an appellate court is to begin review with a presumption that any sentence of life without parole constitutes error.[8] Though the conflict panel disclaimed any such presumption—"While we do not suggest a presumption against the constitutionality of such a sentence"—the court also said that the appellate court should being with "the understanding that, *more likely than not, the sentence imposed is disproportionate.*"[9] This is nothing other than a presumption that the trial judge erred,[10] and is inconsistent with review for an abuse of discretion.

Amicus has no concern with the court's statement that the appellate court must give meaningful review to a juvenile life-without-parole sentence and cannot merely rubber-stamp the trial court's sentencing decision,"[11] nor with its quotation from the Eighth Circuit decision in *United States v. Haack*[12] identifying circumstances where a trial judge may, in fact, abuse its discretion in making a discretionary ruling: "A discretionary sentencing ruling, similarly, may be [an abuse of discretion] if a sentencing court fails to consider a relevant factor that should have

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[8] "Inherently" means "involved in the constitution or essential character of something," and "suspect" means to "doubt the genuineness or truth of," so that the appellate court is to believe from the outset that it is in the essential character of any life without parole sentence for a juvenile that it is doubtfully "genuine" or correct. See *Oxford English Dictionary*.

[9] *People v. Hyatt*, slip opinion, p. 26.

[10] A presumption in this context is an assumption that something is true in the absence of proof to the contrary, which is the appellate standard of review advocated by *Hyatt*; that is, the appellate court is to assume that the trial court's sentence to life without parole is more likely erroneous than correct, so that this assumption of error must be overcome. See *Merriam-Webster Dictionary*.

[11] *People v. Hyatt*, slip opinion, p. 27.

[12] *United States v. Haack,* 403 F.3d 997, 1004 (CA 8, 2005).

received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case."[13] This is a commonplace description of errors that may cause an abuse of discretion in *any* circumstance where the decision is discretionary—but the ultimate question remains whether the decision of the trial judge is outside the range of principles outcomes, and one of these errors may simply result in it so being.

B. Neither *Miller* nor *Montgomery* require a standard of review of a sentence of a juvenile murderer to life without parole other than abuse of discretion

As discussed in greater detail in the brief of amicus in support of the People in the *Skinner*[14] case on leave granted in this Court, neither *Miller*[15] nor *Montgomery*,[16] separately or together, impose a heightened standard of review beyond an abuse of discretion for review of a sentence of life without parole for a juvenile murderer. Both cases concern a perceived constitutional requirement for individualized sentencing of juveniles convicted of murder before a sentence of life without parole is imposed, at which the "mitigating factors of youth" must be considered by the sentencing judge. But "absence of mitigation" is not a burden thrust on the People, but rather demonstration of its presence is a responsibility of the defense, and

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[13] *People v. Hyatt*, slip opinion, p. 27.

[14] *People v. Skinner*, 312 Mich. App. 15 (2015) (lv grted 1-24-2017, No. 152448).

[15] *Miller v. Alabama*, 567 U.S. ——, 132 S. Ct. 2455, 183 L.Ed. 2d 407 (2012).

[16] *Montgomery v. Louisiana*, —— U.S. ——, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016).

consideration of that which is presented by way of mitigation—and that in aggravation, which may counter possibly mitigating facts—is the obligation of the judge.

The analogy to the death penalty, as well as specific statements in *Miller* and *Montgomery,* make the point. With the death penalty, the sentencing hearing consists of two phases, the eligibility phase and the selection phase.[17] Conviction of an accused for homicide carrying the possibility of the penalty of death is insufficient to render the convicted murderer eligible for the death penalty. Rather, some "binary fact" or facts concerning the *commission of the offense* must then be determined by the jury, and beyond a reasonable doubt,[18] to render the convicted murderer eligible for the death penalty. A determination that an appropriate aggravating fact or facts has been proven beyond a reasonable doubt does not result, then, in the death penalty; rather, the defendant is then eligible for the death penalty, and at the selection phase of sentence mitigating facts may be presented. *"This 'selection' decision is not one of finding fact."*[19] Indeed, the burden of persuasion on mitigating factors may constitutionally be placed *on the defendant* by at least a standard of a preponderance of the evidence. In rejecting a claim that the jury must be instructed that it need not find mitigating circumstances beyond a reasonable doubt, the Supreme Court not long ago said that:

> Approaching the question in the abstract, and without reference to our capital-sentencing case law, *we doubt whether it is even possible to apply a standard of proof to the mitigating-factor*

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[17] See *Kansas v. Carr*, —U.S.—, 136 S. Ct. 633, 642, 193 L. Ed. 2d 535 (2016).

[18] *Ring v. Arizona,* 536 U.S. 584 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *Hurst v. Florida*, __U.S.__, 136 S. Ct. 616, 620, 193 L. Ed. 2d 504 (2016).

[19] LaFave, Israel, King, & Kerr, *6 Criminal Procedure* (4th Ed.), § 26.4(i) (emphasis supplied).

> *determination* (the so-called 'selection phase' of a capital-sentencing proceeding). It is possible to do so for the aggravating-factor determination (the so-called 'eligibility phase'), *because that is a purely factual determination*. The facts justifying death set forth in the Kansas statute either did or did not exist—and one can require the finding that they did exist to be made beyond a reasonable doubt. *Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not*.[20]

And the en banc Sixth Circuit not long ago held that at the selection phase of a death-penalty sentencing hearing, "the result is one of judgment, of shades of gray; like saying that Beethoven was a better composer than Brahms. Here, *the judgment is moral* . . . . What [is required] is not a finding of fact, *but a moral judgment*."[21] In other words, said the court, what is required "is not a finding of fact in support of a particular sentence. . . . [It] requires. . . a determination of *the sentence itself,* within a range for which the defendant is already eligible."[22]

Here, and under *Miller* and *Montgomery*, a juvenile convicted of 1st-degree murder is "life-without-parole eligible" upon conviction of the crime. Nothing in *Miller* or *Montgomery* requires an eligibility-type hearing where aggravating facts concerning the commission of the crime must be proven beyond a reasonable doubt. Rather, the sentencing proceeding is a "selection-type" hearing where individualized sentencing occurs, and the sentencing judge hears and considers mitigating facts—and factors in aggravating that may counter them. The

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[20] *Kansas v. Carr*, __U.S.__, 136 S.Ct. 633, 642, __L.Ed.2d__ (2016) (emphasis supplied); see also *Kansas v. Marsh*, 548 U.S. 163, 171, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006).

[21] *United States v. Gabrion*, 719 F.3d 511, 532-533 (CA 6, 2013) (en banc) (emphasis supplied).

[22] *United States v. Gabrion*, 719 F.3d at 533 (emphasis supplied).

sentencing judge's determination, then, is "the result is one of judgment, of shades of gray; like saying that Beethoven was a better composer than Brahms. . . . *the judgment is moral* . . . . What [is required] is not a finding of fact, *but a moral judgment*. . . . a determination of *the sentence itself,* within a range for which the defendant is already eligible."

That *Miller* and *Montgomery* are all about the opportunity for the defendant to present factors in mitigation and the obligation of the sentencing judge to consider mitigation is plain from those decisions. *Miller* concludes that the sentencer "must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles,"[23] just as when the death penalty is under consideration for an adult murderer the sentencer must have the same opportunity, where the burden of establishing mitigation is generally placed—and constitutionally so—on the convicted defendant, with the sentencer then not making a finding of fact, but determining the sentence. And *Montgomery* said that the convicted juvenile murder "must be given the *opportunity to show their crime* did not reflect irreparable corruption."[24]

Substantive review of a death penalty for abuse of discretion does not occur; review is for flaws in the procedure (and perhaps even review of the sufficiency of the evidence at the aggravation phase), but the "moral judgment" of the sentencer—a second-guessing of the individualized sentencing through consideration of factors in mitigation and facts in aggravation—does not occur. The statutory scheme here appears to anticipate appellate review, providing that "the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may

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[23] *Miller v. Alabama*, 132 S. Ct. at 2475.

[24] *Montgomery v. Louisiana*, 136 S. Ct. at 736 (emphasis added).

consider evidence presented at trial together with any evidence presented at the sentencing hearing."[25] Amicus thus agrees with the *Hyatt* panel that review is for abuse of discretion by the trial judge, but under the actual abuse-of-discretion standard; that is, whether the determination of the trial judge is within the range of principled outcomes. Recently, a district judge in the federal system re-sentenced a juvenile murderer from life without parole to 600 months in prison for five homicides. Defendant argued that his 50-year sentence constituted a *de facto* sentence of life without parole, and was substantively unreasonable under *Miller*. Essentially accepting this formulation of the question, the Eighth Circuit held that it reviewed "the substantive reasonableness of a sentence under a deferential abuse-of-discretion standard."[26] Looking to the "*Miller* factors" the court said that the sentencing court was required to take into account the "distinctive attributes of youth," and abused its discretion if it failed to "consider a relevant factor that should have received significant weight."[27] The sentencing court, then, was to consider, in exercising its sentencing discretion, all factors relevant to sentencing, "as informed by the Supreme Court's Eighth Amendment jurisprudence."[28] The sentence was affirmed because the district judge "made an individualized sentencing decision that took full account of 'the distinctive attributes of youth,' explaining its sentence in a thorough, 24-page Memorandum of Law and order."[29] The district judge did not fail "to consider a relevant factor, Jefferson's youth,

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[25] MCL 769.25(7).

[26] *United States v. Jefferson*, 816 F.3d 1016, 1019 (CA 8, 2016);

[27] *Id.*

[28] *Id.* at 1020.

[29] *Id.*

that should have received significant weight," and also "properly gave significant weight to the extreme severity of Jefferson's crimes."[30] Applying, then, the established abuse-of-discretion standard, the Eighth Circuit affirmed the sentence.[31]

C. Conclusion

Review here should be for unreasonableness, which is for an abuse of discretion.[32] Certainly the decision of the trial court should be considered and careful. That court must consider appropriate factors, follow the statute in making a record, and its consideration must be "informed by the Eighth Amendment decisions" of the Supreme Court, which is required by the statute itself. As the *Hyatt* panel said, "A discretionary sentencing ruling . . . may be [an abuse of discretion] if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case," which is to say the decision is an abuse of discretion if "outside the range of principled outcomes." The sentence, being the harshest possible, must be considered by the trial judge in that light, the judge also considering that the *crime* is the most serious possible, and deprived the victim of his or her life

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[30] *Id*, at 1021.

[31] See also *Com. v. Batts*, 125 A.3d 33 (Superior Ct. Pa, 2015), appeal granted in part, 135 A.3d 176 (Pa. 2016), rejecting a heightened standard of review beyond abuse of discretion. The Pennsylvania Supreme Court has granted review on this question and heard argument. Should that court overturn the lower court, amicus submits that it will be mistaken for the reasons stated here.

[32] See the brief and argument of the People in *People v. Steanhouse*, No. 152849, pending before this Court on leave granted and after oral argument, on the meaning of reasonableness review.

forevermore, and his or her relatives and friends of the enjoyment of the victim's company, companionship, friendship, and love forever. And review should be equally as careful—but under the established deferential standard of abuse of discretion, with no accompanying presumption that the trial judge erred.

Relief

Wherefore, amicus respectfully requests that this Court find that there is not a "heightened" review standard for the trial judge's sentencing decision.

Respectfully submitted,

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