STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KENYA ALI HYATT,

Defendant-Appellee.
_____/

Supreme Court No. 153081

Court of Appeals No. 325741

Genesee Circuit Court
No. 13-032654-FC

**BRIEF OF AMICUS ATTORNEY GENERAL
IN SUPPORT OF GENESEE COUNTY PROSECUTOR**

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STATEMENT OF QUESTION PRESENTED

In its January 24, 2017 order granting argument on application, this Court asked the parties to brief the following question:

1. Whether the conflict-resolution panel of the Court of Appeals erred by applying a heightened standard of review for sentences imposed under MCL 769.25.

Appellant's answer:	Yes.
Attorney General answers:	Yes.
Appellee's answer:	No.
Trial court's answer:	Did not answer.
Court of Appeals' answer:	No.

INTRODUCTION

The Legislature has provided for two possible types of sentence for a juvenile who is convicted of first-degree murder: a life-without-parole sentence or a term-of-years' sentence. The latter includes a minimum range of 25-to-40 years. While the U.S. Supreme Court has predicted that it will be the "rare" juvenile murderer who will merit a life-without-parole sentence in *Miller v Alabama,* 132 S Ct 2455 (2012), the Legislature has assigned the task of making that decision to the sentencing court. In most respects, this sentencing is like other sentences that are reviewed for proportionality, and the appellate courts thus review for an abuse of discretion. Three points weigh against imposing some heightened standard of review.

First, the Court need not recreate the wheel to find a process to review these sentences. There is already a template from which to work. Before the creation of the legislative guidelines, the appellate courts reviewed for proportionality in cases in which there were no guidelines for the habitual offender. This review applied the abuse-of-discretion standard. The same applies here. In reviewing for constitutional proportionality, the appellate court determines whether the sentencing court considered the *Miller* factors, with the understanding that unless the crime reflects irreparable corruption, life without parole would be disproportionate. Like these past cases reviewing for proportionality, the review ensures that the constitutional limitations on sentencing have been met and otherwise leaves judgments about the seriousness of the sentence to the sentencing court. The decision in *Miller,* as well as in *Montgomery v Louisiana,* 136 S Ct 718 (2016), did not change the framework of appellate review for constitutional proportionality.

Second, the prognostication from the U.S. Supreme Court that these life-without-parole sentences would be rare is not a legal standard, and it is not a metric by which courts may review the sentences on appeal. The prediction looks to the whole – whether the group is all juveniles or all juvenile offenders or even all juvenile first-degree murderers – whereas an appeal of a defendant's sentence looks to that individual, here Mr. Hyatt. And the Court's prediction of rarity reflects a reality that those under 18 years of age do not ordinarily commit brutal murders. It is the rare person. Hyatt is such a rare person. And the sentencing court properly exercised its discretion when it concluded that his crime reflected irreparable corruption. This Court should not second guess this conclusion.

It is also important to address the rarity of these juvenile offenders in Michigan. Hyatt notes that prosecutors in six counties have sought life without parole against 168 juvenile first-degree murderers, which is a high percentage of those in Michigan who need to be resentenced. But this is not the true universe of offenders against which to measure whether any particular LWOP sentencing is rare. This final group already reflects several rounds of culling. Setting aside all of the youth in Michigan, or even youths who commit crimes, the number of juveniles who committed first-degree murder since 1960 likely numbers in the thousands. The prosecution already pled down a majority of these offenders, the jury verdicts reduced the number further, and then the prosecutors sought life without parole for only a subset of that group. The final culling is the sentencing itself, leaving those who receive LWOP as the worst of the worst. These *are* the rare offenders.

One final point in response to the amicus brief from the Juvenile Law Center. The rarity of the sentence does not create a presumption against life without parole, and does not change the nature of appellate review. This Court should reverse.

STATEMENT OF FACTS AND PROCEEDINGS

The Attorney General adopts the statement of facts and proceedings of the Genesee County Prosecutor's brief.

STANDARD OF REVIEW

Like other appeals examining whether a sentence violates the Eighth Amendment, this Court reviews the sentence for an abuse of discretion. *People v Hansford,* 454 Mich 320, 326 (1997), citing *People v Milbourn,* 435 Mich 630 (1990).

ARGUMENT

I. In reviewing for an abuse of discretion, the appellate court's review is confined to evaluating whether the sentencing court considered the *Miller* factors and to determining whether the sentence was within the range of principled outcomes.

The reach of appellate review for these sentencings is limited. The court determines whether the sentencing court abused its discretion, where the standard of proportionality is examined through the prism of irreparable corruption. The key is to ensure that the sentencing court examined the *Miller* factors as required by law. And reviewing for constitutional proportionality is not new to Michigan. This Court engaged in this type of review as a routine matter before the advent of the legislative guidelines. This Court should reverse the decision of the Court of Appeals and clarify the standards for *Miller* and *Montgomery* juvenile offender sentences. Abuse of discretion is the standard.

A. The appellate court reviews for an abuse of discretion.

The gold standard for whether a sentence is constitutionally appropriate is proportionality. See *Milbourn,* 435 Mich at 636 ("a given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender"). Proportionality is the "central" concept in examining sentences under the Eighth Amendment. *Miller,* 132 S Ct at 2463. And the principle is well established in this Court's case law in examining sentences separate from questions about whether the guidelines were scored correctly. For this reason, the issue arose with regularity before the legislative guidelines were established, particularly for habitual sentences where the judicial guidelines did not apply. See, e.g., *Hansford,* 454 Mich at 463 (affirming a sentence of 40-to-60 years for a conviction of receiving and concealing stolen property over $100 as an habitual offender fourth).

For juveniles convicted of first-degree murder, the U.S. Supreme Court has made clear that a sentence of life without parole may be imposed only after an individualized sentencing, allowing for review of the offender's youthful characteristics because otherwise there was the danger of disproportionate sentences. *Miller,* 132 S Ct at 2469. It did not foreclose life without parole, noting it could be imposed on "the rare juvenile offender whose crime reflects irreparable corruption." *Id.* In making *Miller* retroactive, it further elaborated that while *Miller* did not categorically bar LWOP, it did bar it "for all but the rarest juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery,* 136 S Ct at 734.

In response to *Miller,* the Legislature revised Michigan law to ensure an individualized sentencing for juvenile first-degree murderers, providing for either a term-of-years' sentence or a life-without-parole option where the prosecution seeks by motion to request this sentence. MCL 769.25(2), (3), (9). The prosecution filed such a motion here. §25(9). In response to the prosecution's motion, the trial court is required by statute to "consider the factors" listed in *Miller,* and "may consider any other criteria relevant to its decision[.]" §25(6). The sentencing court is then invested with the authority to make the final sentencing decision:

> [T]he 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 consider evidence presented at trial together with any evidence presented at the sentencing hearing. . . .
>
> If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years. [MCL 769.25(7), (9).]

The factors in *Miller* include the offender's "immaturity, impetuosity, and failure to appreciate risks and consequences," "the family and home environment that surrounds him," "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him," and "the possibility of rehabilitation." 132 S Ct at 2468.

In this way, the statute's reference to *Miller* factors requires the sentencing court to evaluate different factors in fashioning the proper sentence. Thus, the statute ensures that the sentence will be individualized for the particular offender and that offender's crime.

The decision about the appropriate sentence, therefore, is for the sentencing judge to make. And it is well established that this Court reviews the sentencing decision for an abuse of discretion. *Milbourn,* 435 Mich at 636. It is the traditional standard applied by the federal courts in reviewing a sentence. See *Gall v United States,* 552 US 38, 41, 49 (2007) ("We now hold that . . . courts of appeals must review all sentences . . . under a deferential abuse-of-discretion standard."). This is because of the superior position that the sentencing court has to judge both the nature of the offense and of the offender:

> The sentencing judge is in a superior position to find facts and judge their import under [the federal sentencing statute] in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record. *The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court.* [*Gall,* 552 US at 597 (citation, internal quotes omitted; emphasis added).]

While few federal appellate courts have had occasion to examine the standard under *Miller*, the Eighth Circuit examined whether a federal sentencing court properly gave a juvenile convicted of homicide a 50-year sentence. *United States v Jefferson,* 816 F3d 1016, 1018 (CA 8, 2016). That court rejected, de novo, the claim that *Miller* applied to "de facto life sentences" as the sentencing at issue was discretionary, not mandatory. *Id.* at 1019. Once that claim was resolved, the court then applied the abuse-of-discretion standard for reviewing the sentencing itself for its "substantive reasonableness." *Id.* And the court noted that a federal court's sentence to life without parole would have to weigh the federal statutory sentencing factors as informed by its Eighth Amendment jurisprudence, including *Miller*. *Id.*

The application in *Jefferson* of the abuse-of-discretion standard is illustrative. *Jefferson* noted that the sentencing court took full account of "the distinctive attributes of youth," identifying both mitigating factors of the defendant's rehabilitation that militated against a life sentence, as against the seriousness of the offense – firebombing of a home killing five children – and the criminal defendant's refusal "to accept responsibility for the murders." *Id.* at 1020. The sentencing court decided to depart downward from the advisory life sentence based on the "extraordinary success" that occurred post-conviction, a period of more than 15 years. *Id.* It then reasoned that the sentence of 50 years in prison was not an abuse of discretion, given the sentencing court's "substantial sentencing deference." *Id.*

The same review process is applicable here. The abuse-of-discretion standard in Michigan is one of long standing, applied more than 25 years ago in *Milbourn* for constitutional review. And the meaning of the standard was given further definition when this Court explained that the standard requires the reviewing court to determine whether the decision falls outside the range of principled outcomes. *People v Babcock,* 469 Mich 247, 269 (2003). While it is possible a court might abuse its discretion in imposing a life-without-parole sentence, the appellate court must determine that an error occurred, and not merely disagree with the sentencing court's discretionary judgment. The standard is designed to foreclose second guessing, which makes sense, because of the greater knowledge the sentencing court will have of the case, *Gall,* 552 US at 597, and because the Legislature entrusted this decision to the sentencing court. There is nothing new in this type of review.

B. The Court of Appeals did not apply this standard.

By requiring the appellate court to apply a "heightened degree of scrutiny" that views "as inherently suspect" any life-without-parole sentence, the holding from the Court of Appeals contradicted this longstanding abuse-of-discretion standard and provided for a different kind of appellate review. Slip op, p 26, (Beckering, J., majority opinion en banc). The basis for this lack of deference is predicated on analysis from *Miller* and *Montgomery* recognizing the way youthful offenders are different from adults, particularly in their ability to reform. In digesting *Miller,* the U.S. Supreme Court noted that the sentencing court is required to consider how the differences "counsel against irrevocably sentencing them to a lifetime in prison." *Montgomery,* 136 S Ct at 733, citing *Miller,* 132 S Ct at 2469. But these considerations – as noted by the Supreme Court – are for "the *sentencing judge*" in the first instance. *Montgomery,* 136 S Ct at 733 (emphasis added). Nothing in *Miller* and *Montgomery* changes the nature of appellate review.

As noted, this Court need not create an entirely new review scheme to address the considerations articulated in *Miller* and *Montgomery* about the differences of youth and the unique opportunities that such characteristics provide for possible rehabilitation. The reviewing court does not make the decision itself but only reviews for whether a life-without-parole sentence fell within the range of principled outcomes. *Babcock,* 469 Mich at 269. The constitutional nature of the question on appeal does not change the discretion invested in the sentencing court for life-without-parole sentences, just as the appellate courts did not substitute their judgment when applying *Milbourn.* 430 Mich at 636. This is not new.

II. The question whether the sentence is rare or uncommon is not reviewed on appeal, and, in any event, Hyatt is the rare case.

In surmising that life-without-parole sentences would be "rare" or "uncommon," the U.S. Supreme Court did not create a legal standard or even a principle that the lower courts are bound to follow. This reference to rare does not apply to a particular juvenile murderer. Rather, the sentencing court makes an individual determination, which enables it to consider the unique nature of youth and their capacity to reform. And even the prediction that it is only the rare offender that is so depraved as to merit a life-without-parole sentence does not impeach the fact that the prosecutors in Michigan have filed a motion for a life-without-parole sentence against scores of these offenders. When examined against the universe of juvenile offenders, or even juvenile murderers, these murderers as a cohort are some of the most dangerous in Michigan over the last 55 years. These *are* the rare offenders. The sentencing court did not abuse its discretion in concluding that Hyatt's depraved crime placed him among them.

A. Whether a sentence is rare or uncommon is not a consideration for appellate review.

The Court of Appeals justified the appellate standard it articulated of a "searching inquiry," in which life-without-parole as a sentence was "inherently suspect," based on the U.S. Supreme Court statements in *Miller* and *Montgomery* that this sentence is constitutionally proportionate for the "truly rare juvenile." Slip op, p 27. But this analysis misconstrues the significance of the statements from *Miller* and *Montgomery* regarding the rarity or uncommon nature of the sentence. See *Miller,* 132 S Ct at 2469 ("uncommon"); *Montgomery,* 136 S Ct at 726 ("rare").

Without repeating the arguments advanced by the Genesee County Prosecutor on this point, see pp 6–19 – arguments with which the Attorney General agrees – this brief emphasizes the argument that the statements from the Supreme Court do not establish a standard or some measure against which the sentencing decision in any particular case may be evaluated. The statements were a part of the Supreme Court's global assessment of the offenders in this category, noting that the largest number of offenders were concentrated in states with automatic sentencing laws. *Miller,* 567 U.S. at 2473 ("Of the 29 jurisdictions mandating life without parole for children, more than half do so by virtue of generally applicable penalty provisions, imposing the sentence without regard to age."). As a result, the Court determined that an individualized sentencing process would substantially reduce the number of juvenile murderers who would receive the life-without-parole sentence. The statement of rarity thus is an extrapolation, or a prediction.

The U.S. Supreme Court also matched this expectation to the point that juveniles have a greater ability to change than adults, listing this consideration among others for a court to weigh in considering a sentence that permanently forecloses release. The "distinctive attributes of youth" makes it less likely, the Court reasoned, that a juvenile offender will present an ongoing danger to the community. See *Montgomery,* 136 S Ct at 733. But this reasoning confirms the fact that rarity is not the standard. An offender is entitled to an individual sentencing process to enable the sentencing court to look at all facets, including the issue of rehabilitation. *Miller,* 132 S Ct at 2468. That is the point.

And one further point. The rarity of this occurrence is not a standard and does not create a presumption when reviewing a sentence insofar as the rarity analysis examines the country's whole youth population, not the individual offender. It does not create a ceiling in the absolute number of juveniles who may receive a life-without-parole sentence. In this regard, the total numbers are irrelevant to the proper sentencing of *this* particular offender. For proper review under *Miller* and *Montgomery*, and under the general proportionality standard in *Milbourn,* the sentencing reflects the specific offender and the specific offender's crime. See *id.,* 435 Mich at 636. While consideration of proportionality examines whether other similar offenses receive comparable sentences, *id.* ("[proportionality] will provide better protection against unjustified sentence disparity between similarly situated offenders"), a brutal slaying such as the one here, see p 16 below describing the crime, would not foreclose the possibility that an LWOP sentence might be appropriate. The crime that led to this life-parole-sentence was vicious.

B. These offenders are the rare and uncommon ones, as they reflect the most dangerous of all youthful offenders.

Even examining the issue of rarity from the aggregate level, the claim that the prosecutors in some counties have sought life-without-parole against too many juvenile offenders is not well taken. Hyatt's brief, p 16 ("It is hardly rare when the above prosecutors are advocating for 168 of 269 (62%) juvenile lifers to remain in prison until death"). The statistics cited by Hyatt are taken without context and provide a misleading picture. When examined in context, these offenders – even numbered at 168 – may well all reflect the rare offenders for whom LWOP is proper.

The first question is what is the universe of offenders for the time-period when these crimes occurred. In examining six of the largest counties in Michigan (Genesee, Kalamazoo, Macomb, Oakland, Saginaw, Wayne), see Hyatt's Brief, p 16, it encompasses millions of Michigan citizens across the last 55 years (with Sheldry Topp, who was convicted of first-degree murder in 1961, being the oldest offender). If this comparison is against the youth of Michigan, or youthful offenders in Michigan over the last 55 years, these offenders would represent only a tiny percentage of Michigan population. But even limiting the universe to youthful offenders who commit the most serious crime in Michigan – first-degree murder – this group still represents a small percentage.

These first-degree murderers counted above reflect three distinct rounds of culling. In the first, the prosecution had to decide to charge them as an adult and with first-degree murder. In the second, for those charged with first-degree murder, the prosecution had to decide not to offer a reduction as a plea to reduce the charge, allowing a lesser sentence. And finally, in the third, the jury had to decide to convict these juvenile offenders of first-degree murder, when it could have convicted the offender of second-degree murder. The same considerations at play in *Miller* informed these decisions. For one county with a significant number of offenders, Berrien County, the actual numbers are known. For that county, since 1980, there have been 36 juveniles charged with first-degree murder. Of these, 12 – or only 33% – were convicted of first-degree murder. This same culling has occurred in all of the six counties identified in Hyatt's brief.

Tens of thousands of murders have occurred in Michigan in the last 55 years. Reducing this number to only the juvenile murderers by assuming 10% of all murders,[1] the number of juvenile murders is still in the thousands. Specifically, the total number of murders for this 55-year period is 42,331,[2] and calculating 10% of this total yields 4,231 juvenile murders, of which 168 offenders represents ***only 4%.*** This group remains a small, rare subset of Michigan citizens, numbering some of the most dangerous of all its criminals. Hyatt is one of these rare offenders. This Court should affirm Hyatt's sentence.

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[1] One scholarly article from 1998 evaluated the question and determined that one of ten homicides are committed by juveniles less than eighteen years of age. See Philip J. Cook and John H. Laub, "The Unprecedented Epidemic in Youth Violence," *Crime and Justice* 24 (1998). The abstract of this document is available at the following website, which was last accessed on July 14, 2017:

http://www.journals.uchicago.edu/doi/abs/10.1086/449277

[2] See the number of Michigan murders each year beginning in 1960:

Year	**#**	*Year*	**#**	*Year*	**#**	*Year*	**#**	*Year*	**#**	*Year*	**#**
1960	**353**	*1970*	**853**	*1980*	**940**	*1990*	**971**	*2000*	**669**	*2010*	**580**
1961	**326**	*1971*	**942**	*1981*	**861**	*1991*	**1,009**	*2001*	**672**	*2011*	**617**
1962	**275**	*1972*	**999**	*1982*	**827**	*1992*	**938**	*2002*	**678**	*2012*	**701**
1963	**283**	*1973*	**1,096**	*1983*	**910**	*1993*	**933**	*2003*	**612**	*2013*	**625**
1964	**284**	*1974*	**1,186**	*1984*	**879**	*1994*	**927**	*2004*	**643**	*2014*	**544**
1965	**378**	*1975*	**1,086**	*1985*	**1,018**	*1995*	**808**	*2005*	**629**	*2015*	**571**
1966	**415**	*1976*	**1,014**	*1986*	**1,032**	*1996*	**722**	*2006*	**713**		
1967	**560**	*1977*	**853**	*1987*	**1,124**	*1997*	**759**	*2007*	**676**		
1968	**669**	*1978*	**972**	*1988*	**1,009**	*1998*	**721**	*2008*	**554**		
1969	**770**	*1979*	**834**	*1989*	**993**	*1999*	**695**	*2009*	**623**		

[http://www.disastercenter.com/crime/micrime.htm, taken from the Federal Bureau of Investigation's annual crime reports, last accessed July 14, 2017.]

C. The statements from *Miller* and *Montgomery* that life without parole sentences would be rare neither creates a presumption against LWOP nor changes the nature of appellate review.

The amicus for the Juvenile Law Center advances two basic arguments, contending that the Supreme Court has created a presumption against life without parole, see pp 3–8, and that this presumption requires a de novo review based on the need for a more probing review, see pp 9–17. This brief disputes both points.

As an initial matter, it is unmistakable that the Supreme Court has emphasized the rarity of the life-without-parole sentence. The amicus correctly argues that if anything *Montgomery* uses even stronger language than *Miller* about its rarity. 136 S Ct at 733 ("all but the rarest of juvenile offenders"). But this prediction is linked to a legal principle, namely only those whose crimes "reflect permanent incorrigibility" may be subject to life without parole. *Id.* That is the point. The Court's perception of how many offenders fall into this category is not the standard. Instead, the issue is whether a trial court properly exercises its sentencing discretion and determines that someone's crime reflects "permanent incorrigibility," or "irreparable corruption" as stated in *Miller*.

The conclusion that Hyatt's amicus reaches from this standard is effectively that no juvenile's corruption is permanent or irreparable. Juvenile Law Center's Brief, p 8 ("Life without parole sentences are developmentally inappropriate and constitutionally disproportionate when applied to juveniles who are amenable to change"). But that point proves too much. The Supreme Court makes clear that some juvenile murderers' crimes fit this description.

The truth is that a reasonable sentencing judge could rightly conclude that an unprovoked, vicious murder is a crime that reflects the kind of malice in a perpetrator, disclosing either a lack of empathy or a deliberate intent to cause deep harm, which supports the view that the perpetrator cannot be safely in the community again. The U.S. Supreme Court has explained that juveniles have a greater capacity for change than do adults. *Montgomery,* 136 S Ct at 726, citing *Miller,* 132 S Ct at 2469. That is true. But *Miller* and *Montgomery* nonetheless held that life without parole remains appropriate for some juvenile murderers whose crimes reflect irreformable corruption, leaving that decision to the trial courts.

In emphasizing the rarity of the appropriateness of a life-without-parole sentence for a juvenile offender, the Supreme Court did not create a presumption against life without parole, but instead explained the high standard necessary to impose it. *Montgomery,* 136 S Ct at 733 ("a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified"). Yet there is a fundamental difference between a demanding standard and a presumption. In fact, there is language in *Miller* and *Montgomery* suggesting that the juvenile offender has the burden of showing that LWOP is not the appropriate sentence by introducing mitigating evidence. *Miller,* 132 S Ct at 2475 ("a judge or jury must have the *opportunity to consider mitigating circumstances* before imposing the harshest possible penalty for juveniles"); *Montgomery,* 136 S Ct at 736 ("prisoners . . . must be given *the opportunity to show* their crime did not reflect irreparable corruption.")

(emphases added). Other courts have agreed that *Miller* and *Montgomery* do not impose a presumption against life without parole for the sentencing court. See, e.g., *State v Ramos,* 387 P3d 650, 663 (Wash 2017) (rejecting claim that a life-without-parole sentence cannot be "presumptive" sentence because it will be uncommon); *State v James,* 786 SE2d 73, 79 (NC Ct App 2016) (statutory presumption *in favor* of life-without-parole sentence not unconstitutional where offender may provide mitigating evidence); see also Genesee Co Prosecutor's Br., pp 10–12 (citing cases). But see *Pennsylvania v Batts,* ___ A 3d ___ (Pa 2017) (June 26, 2017), slip op, p 71 ("*Miller* . . . requires the creation of a presumption against sentencing a juvenile offender to life in prison without the possibility of parole").

The central point of *Miller* and *Montgomery* is that the sentencing court must engage in an individual sentencing proceeding and make a decision about whether the murder committed by the juvenile showed that offender to be permanently or irreparably or irretrievably corrupt. And that decision has been given to the judge.

The judge here reasonably concluded that the crime reflected such corruption: 17-year old Hyatt shot a retired older man, John Andrew Mick, who was serving as a security officer, four times, twice in the back of the head. (Trial, June 19, 2014, pp 15–16; June 24, 2014, pp 133–145.) While he claimed that the shooting came as a result of the struggle over Mick's gun, Hyatt participated in the plan to commit the robbery (Ex 190) and expressed no remorse. (*Miller* Hearing, Nov. 21, 2014, pp 12–13.) The psychologist provided an ambivalent answer regarding Hyatt's ability to show remorse more generally ("I am not sure. I think he is

capable of remorse. I am not sure if he is capable of remorse prior to an incident") and noted that Hyatt was detached from social moral standards ("pretty disconnected . . . from societal morals"). (*Id.* at 44–45, 51). The record supports the judge's decision that this vicious murder merited a life-without-parole sentence. Nothing from the Supreme Court states otherwise.

And this leads to the second point. The U.S. Supreme Court identified the *sentencing judge* as the one to make this decision:

> *Miller* required that *sentencing courts* consider a child's "diminished culpability and heightened capacity for change" before condemning him or her to die in prison. Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect "'irreparable corruption.' " [*Montgomery,* 136 S Ct at 726 (emphasis added), quoting *Miller,* 132 S Ct at 2469.]

This analysis places the decision directly in the sentencing judge's hands. It provides no guidance about the standard that should be employed in reviewing the decision on appeal.

The Juvenile Law Center argues (at 10) that a de novo appellate review is necessary to ensure a uniformity of outcomes among similar cases. But as already noted, the problem with this claim is that the reviewing court is in an inferior position to the sentencing court to make this decision. For example, in this case, Judge Fullerton had the opportunity to preside over the trial, to see all of the evidence, and then to conduct the *Miller* hearing. A half-hour oral argument in the Court of Appeals cannot replace a nine-day jury trial, followed by a *Miller* hearing at which multiple witnesses testify, including the defendant himself.

And de novo review on appeal does not ensure uniformity as the judges of the Court of Appeals sit in rotating panels of three, and these panels render diverse decisions, just as different trial court judges do. While it reduces the number of judges making these decisions, it does not guarantee uniformity.

And de novo review also does not necessarily reduce the number of life-without-parole sentences. An appellate body that is more inclined to conclude that a crime merits life without parole may overturn a decision to impose a term of years.

In the final analysis, the proper standard – the abuse-of-discretion standard – places the decision exactly where it belongs, with the sentencing court. These are not easy decisions, yet they should not be second-guessed on appeal simply because a reviewing court might have issued a different sentence if it were the one authorized to sentence the defendant. Instead, review for proportionality is the proper (and longstanding) role of the appellate court.

Proportionality has been used by this Court and the Court of Appeals for decades to review sentences at the trial-court level. This Court should reverse, affirm the trial court's sentence because it did not abuse its discretion in imposing a life-without-parole sentence, and clarify the standards on appeal.

CONCLUSION AND RELIEF REQUESTED

This Court should reverse the Court of Appeals and reinstate the life-without-parole sentence for Hyatt.

Respectfully submitted,

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