STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

KENYA ALI HYATT,

Defendant-Appellant.
_____/

Supreme Court No. 153081

Court of Appeals No. 325741

Circuit Court No. 13-032654-FC

BRIEF OF AMICUS CURIAE STATE APPELLATE DEFENDER OFFICE IN SUPPORT OF KENYA ALI HYATT

STATE APPELLATE DEFENDER OFFICE

BY: DAWN VAN HOEK (P26614)
Appellate Defender

MICHAEL MITTLESTAT (P68478)
Deputy Director

JESSICA ZIMBELMAN (P72042)
Assistant Defender
State Appellate Defender Office
200 North Washington, Suite 250
Lansing, MI 48913
(517) 334-6069
jzimbelman@sado.org

Counsel for Amicus Curiae SADO

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INTEREST AND IDENTITY OF AMICUS CURIAE

The State Appellate Defender Office (SADO) is the only statewide public defender office in Michigan. SADO's statutory mandate is to provide quality, efficient legal representation to indigent criminal defendants in post-conviction matters, and educational resources and trainings to the criminal defense bar.

The United States Supreme Court's decision in *Montgomery v Louisiana*, __ US __; 136 S Ct 718; 193 L Ed 2d (2016), in January 2016, entitled Michigan's approximately 363 juveniles serving life without parole to resentencing hearings. After receiving authorization from the Appellate Defender Commission, SADO was appointed to represent approximately 200 of those individuals for their resentencing hearings. SADO created a Juvenile Lifer Unit to ensure that the attorneys and staff representing these individuals had access to the resources, trainings, and information necessary to be effective in the new, post-*Montgomery* legal landscape. SADO continues to litigate a variety of legal issues surrounding juvenile life without parole resentencing hearings.

I. The Court of Appeals was correct to hold that a traditional abuse of discretion standard is insufficient to review the constitutionality of a life without parole sentence because such a sentence involves a mixed question of fact and constitutional law.

A heightened standard of review is proper when reviewing a sentence of life without parole imposed against a juvenile because such a sentence is cruel and unusual punishment and unconstitutional for all but the very rare juvenile who is permanently incapable of rehabilitation. Such a sentence should be reviewed de novo because it is a mixed question of fact and law. The abuse of discretion standard as traditionally used by appellate courts to review sentencing decisions in Michigan is insufficient to safeguard the Eighth Amendment rights of juveniles.

The Court of Appeals correctly stated that factual questions are reviewed for clear error, legal questions are reviewed de novo, and in the context of proportionality review, sentences are reviewed for abuse of discretion. *People v Hyatt*, 316 Mich App 368, 423; 891 NW2d 549 (2016). The Court of Appeals further explained what the abuse of discretion standard would look like in the juvenile life without parole context. This was unnecessary. The court should have called its standard of review what it is: de novo review of the constitutionality of a life without parole sentence.

The type of sentencing hearing described in *Miller v Alabama*, 567 US 460, 477-478; 132 S Ct 2455; 183 L Ed 2d 407 (2012) and *Montgomery v Louisiana*, __ US __; 136 S Ct 718, 731; 193 L Ed 2d (2016), is new to Michigan, and the Court of Appeals provided instruction to the trial courts regarding how to sentence juveniles in a post-*Montgomery* world. Whether a juvenile can be constitutionally sentenced to life without parole does not fit neatly into the traditional abuse of discretion standard used by Michigan's appellate courts for two reasons. First, the sentence presents a binary choice (a term of years *or* life without parole) to a sentencer, rather than a range of principled outcomes. Second, and more importantly, the sentence involves a question of constitutional law.

A. The instructions in *Miller* regarding the rarity or uncommon nature of the imposition of a life without parole sentence on a juvenile are not dicta because of the Court's decision in *Montgomery*.

Contrary to the prosecution's assertion, the language in *Miller* regarding the "uncommon" nature of a life without parole sentence is not obiter dictum.[1] See *Plaintiff-Appellant's Supplemental Brief in Support of our Application for Leave to Appeal*, pp. 6-19; *Plaintiff-Appellant's Second Supplemental Authority*. Even if the statements in *Miller* were dicta, the *Montgomery* Court held that *Miller* created a substantive rule of law: only a rare juvenile could be constitutionally sentenced to life without parole. *Montgomery*, 136 S Ct at 731.

The holding of *Montgomery* was echoed in *Tatum v Arizona*, __ US __; 137 S Ct 11; 196 L Ed 2d (2016). There, the United States Supreme Court remanded several cases to the trial courts in Arizona for resentencing after the trial courts imposed life without parole sentences. *Id.* The sentences were imposed after *Miller*, but prior to *Montgomery*. In her concurrence, Justice Sotomayor reemphasized the holdings of *Miller* and *Montgomery* and clarified that a life without parole sentence was constitutional only for "the very 'rarest of juvenile offenders, those whose crime reflects permanent incorrigibility.'" *Id.* at 12, quoting *Montgomery*, 136 S Ct at 734 (Sotomayor, J., concurring). Resentencing hearings were necessary because *Montgomery* clarified the standards at sentencing for trial courts—namely that the constitution allows only the very rare juvenile to be sentenced to life without parole.

The prosecution ignores the holding of *Montgomery* and cites to decisions from other states to support the idea that the rarity language from *Miller* is dicta. But all of the cases relied upon, except

[1] The interplay between obiter dictum and standards of review is minimal at best. Obiter dictum concerns the relevance of a given statement to the holding of a case. *Black's Law Dictionary* (9th ed). A standard of review is a device governing the scope of an appellate court's authority on review. *Id.*

one, were decided prior to *Montgomery* and are thus irrelevant.[2] The exception is *State v Valencia*, 241 Ariz 206; 386 P3d 392 (2016). The prosecution asserts that in *Valencia* the Arizona Supreme Court treated the *Miller* language regarding rarity as dicta because the court used words like "noted" and "suggest." *Plaintiff-Appellant's Supplemental Brief*, p. 12. These references are taken out of context. Only two paragraphs later in its decision, the Arizona Supreme Court stated the substantive holding of *Montgomery* that a life without parole sentence is unconstitutional for all but the rare juvenile:

> *Montgomery* resolved this conflict by clarifying that *Miller* is a new substantive rule of constitutional law that must be given retroactive effect by state courts. 136 S.Ct. at 729, 732. *Miller*, as interpreted by the majority in *Montgomery*, did not adopt merely a procedural rule requiring individualized sentencing (as distinct from mandatory sentences of life without parole), but instead recognized that "sentencing a child to life without parole is excessive for all but the 'rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* at 734 (quoting *Miller*, 132 S.Ct. at 2469). [*Valencia*, 241 Ariz at 209.]

The prosecution ignores the impact and holding of *Montgomery* that *Miller* announced a substantive rule of law regarding the rarity of juvenile life without parole sentences.

B. Because a sentence of life without parole involves a question of constitutional law under the Eighth Amendment, de novo review is proper.

Whether life without parole is a valid, proportionate sentence is ultimately a question of constitutional law. The United States Supreme Court was explicit on this point in *Montgomery*, repeatedly citing the Eighth Amendment and the unconstitutional nature of the penalty for all but the rarest juvenile. *Montgomery*, 136 S Ct at 734-736. It is a substantive rule of law that life without parole is constitutionally prohibited "for all but the rarest of juvenile offenders." *Id.* at 734.

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[2] See, e.g., *Veal v State*, 298 Ga 691, 700-703; 784 SE2d 403 (2016) (acknowledging the impact of *Montgomery*, the subsequent limits on a trial court's discretion, and whether a juvenile is the "exceptionally rare" juvenile for whom life without parole is constitutional depends "on a specific determination that he is irreparably corrupt.")

Here, the Court of Appeals understood the constitutional dimension of a life without parole sentence:

> A sentencing court must operate under the understanding that life without parole is, more often than not, not just inappropriate, but a violation of the juvenile's **constitutional rights**.
>
> * * *
>
> The court must undertake a searching inquiry into the particular juvenile, as well as the particular offense, and make the admittedly difficult decision of determining whether this is the truly rare juvenile for whom life without parole is **constitutionally proportionate** as compared to the more common and **constitutionally protected** juvenile whose conduct was due to transient immaturity. [*Hyatt*, 316 Mich App at 420-421 (emphasis added).]

Other jurisdictions have also recognized the constitutional issues inherent to juvenile life without parole sentences and applied a de novo review: [3]

- Florida: Applying a de novo review to a life without parole sentence because it is a "pure question of law." [*Landrum v State*, 192 So3d 459, 463 (Fla, 2016).]

- Iowa: "Our standard of review when a defendant attacks his or her sentence on constitutional grounds is de novo." [*State v Sweet*, 879 NW2d 811, 816 (Iowa, 2016).]

- Pennsylvania: "[W]e must review the sentencing court's legal conclusion that Batts is eligible to receive a sentence of life without parole pursuant to a de novo standard." [*Commonwealth v Batts*, 163 A3d 410, 435 (Pa, 2017).]

"[D]e novo is a form of review primarily reserved for questions of law, the determination of which is not hindered by the appellate court's distance and separation from the testimony and evidence produced at trial." *People v Babcock*, 469 Mich 247, 268; 666 NW2d 231 (2003). First,

[3] This is becoming irrelevant in a growing number of jurisdictions, given that currently 19 states and the District of Columbia ban life without parole sentences for juveniles. Four additional states ban juvenile life without parole sentences in most circumstances. The Campaign for the Fair Sentencing of Youth, *States that ban life without parole for children* <http://fairsentencingofyouth.org/reports-and-research/sentenceeliminated/> (accessed August 22, 2017).

because the Supreme Court's opinions in *Miller* and *Montgomery* are grounded in the Eighth Amendment, the constitutionality of a life without parole sentence involves a question of law. Second, the distance and separation inherent to an appellate court do not hinder the reviewing court's ability to answer this question of law. Any factual determinations that might depend on the credibility of a witness or a trial court's direct observations would be reviewed by an appellate court for clear error. See part I.C., *infra*. The distance from the trial court proceedings will aid the reviewing court in making an objective legal ruling on the legal questions presented. The reviewing court can ensure the sentence is in accord with the Supreme Court's holdings in *Miller* and *Montgomery*—that such a sentence is constitutionally reserved for the very rarest of juveniles incapable of rehabilitation.

C. Michigan's existing standards of review for sentencing decisions, mixed questions of fact and law, and specific guidance from this Court can be adapted to the review of juvenile life without parole sentences.

Michigan's sentencing jurisprudence provides guidance on the proper standards for appellate review of life without parole sentences for juveniles. Trial courts are already familiar with these standards of review, and applying them to the juvenile life without parole context is workable.

1. *Review of sentences under the legislative sentencing guidelines and mixed questions of fact and law*

After the Legislature enacted the sentencing guidelines, it "reduc[ed] the circumstances under which a judge could exercise discretion during sentencing." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). For challenges to the scoring of guidelines variables, this Court reviews factual findings for clear error and reviews de novo whether the facts were sufficient to score a variable. *Id.* The factual findings must be supported by a preponderance of the evidence. *Id.* This remains the process for reviewing guidelines challenges post-*Lockridge*. The guidelines must still be scored accurately, and trial courts must take them into consideration when determining a proper

sentence.[4] *People v Lockridge*, 498 Mich 358, 391-392; 870 NW2d 502 (2015). See also *People v Steanhouse*, __ Mich__; __ NW2d__ (2017) (Docket No. 152849), slip op at 18; *People v Biddles*, 316 Mich App 148, 161-162; 896 NW2d 461 (2016).

The standard of review for challenges to the sentencing guidelines remains as it has always been: clear error for factual findings supported by a preponderance of the evidence and de novo for the legal question of whether those facts can be properly applied to the statute to score a variable. For example, in *Hardy*, this Court applied the clearly erroneous standard to determine if the defendants' actions (racking a shotgun and striking complainants with a weapon) "were designed to substantially increase the fear and anxiety of their victims." *Hardy*, 494 Mich at 439. Then, this Court reviewed de novo whether these actions were sufficient to score points under MCL 777.37 (Offense Variable 7). *Id.*[5]

This Court noted in *Hardy* that the Legislature limited the discretion of trial courts upon enactment of the sentencing guidelines. *Hardy*, 494 Mich at 438. Similarly, the United States Supreme Court, via the Eighth Amendment, limited the discretion of the trial court in the juvenile life without

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[4] Sentences within the guidelines range are presumed to be proper, as long as the sentences are based on accurate information and properly scored guidelines. MCL 769.34(10). Departure sentences are reviewed for reasonableness, proportionality, and an abuse of discretion. *Steanhouse*, __ Mich at __; slip op at 14-15.

[5] Examples of this Court applying this standard to the scoring of offense variables abound. See, e.g., *People v Osantowski*, 481 Mich 103; 748 NW2d 799 (2008) (determining under de novo review when OV 20 can be properly scored); *People v Carr*, 489 Mich 855; 795 NW2d 12 (2011) ("The trial court committed plain legal error in scoring Offense Variable (OV 1) because the defendant did not use the methadone against her child as a weapon."); *People v Barrera*, 500 Mich 14; 892 NW2d 789 (2017) (holding after de novo review that incidental movement is sufficient under the statute to score points under OV 8); *People v Bonilla-Machado*, 489 Mich 412; 803 NW2d 217 (2011) (determining under de novo review when OV 13 can be scored); *People v Gloster*, 499 Mich 199; 880 NW2d 776 (2016) (determining under de novo review when OV 10 can be scored); *People v Johnson*, 474 Mich 96; 712 NW2d 703 (2006) (determining under de novo review when OV 11 can be scored).

parole context. As such, the same review used for challenges to the sentencing guidelines is the review that appellate courts should use to review life without parole sentences. Factual findings are reviewed for clear error, the factual findings must be supported by a preponderance of the evidence, and whether the facts were sufficient to constitutionally impose a life without parole sentence is reviewed de novo. The "searching inquiry" described by the Court of Appeals, *Hyatt*, 316 Mich App at 420, 426, is equivalent to a de novo review of the trial court's reasons for imposing a life without parole sentence to ensure those reasons constitutionally allow a life without parole sentence.

The factual findings in the juvenile life without parole context include, at a minimum, the *Miller* factors[6] and a juvenile's record while incarcerated. Our statute requires these things be considered at sentencing. MCL 769.25(6); MCL 769.25a(4)(b). The Eighth Amendment also requires a sentencer to determine that a juvenile is irreparably corrupt before a sentence of life without parole is authorized. See *Miller*, 567 US at 477-478; *Montgomery*, 136 S Ct at 734; *Tatum*, 137 S Ct at 12.

The legal questions include whether the trial court properly deemed facts as aggravating and/or mitigating and whether there was a constitutional basis to impose a life without parole sentence. See MCL 769.25(7) (requiring the trial court to "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed.") The legal question of whether the life without parole sentence was constitutional is reviewed de novo.

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[6] The *Miller* factors include: "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences . . . family and home environment that surrounds him—and from which he cannot usually extricate himself—not matter how brutal or dysfunctional . . . circumstances of the homicide offense . . . the way familial and peer pressures may have affected him . . . . he might have been charged and convicted of a lesser offense, if not for the incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys . . . the possibility of rehabilitation." *Miller v Alabama*, 567 US at 477-478.

At any sentencing hearing in Michigan's trial courts, prior record variables and offense variables may only be scored after the trial court finds sufficient facts, by a preponderance of the evidence, to justify the scoring. Upon challenge, an appellate court reviews the factual findings made by the trial court for clear error and will review de novo the legal determination of whether those facts were sufficient under the statute to score, or not score, the variable.

Also comparable is this Court's standard of review for claims of ineffective assistance of counsel. Such a claim is a mixed question of constitutional law and fact. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). The trial court "'must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel.'" *Id.*, quoting *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). On appeal, those factual findings are reviewed for clear error, and the questions of constitutional law are reviewed de novo. *Id.*

Appellate courts can follow the same process—used for both guidelines challenges and ineffective assistance of counsel claims—when reviewing a sentence of life without parole for a juvenile. A trial court first finds facts, and then decides whether those facts establish that life without parole is a constitutional sentence. On appeal, any factual findings—for example, that a juvenile had suffered from sexual abuse prior to the offense, that a juvenile was offered a favorable plea bargain but rejected it based on his age/cognitive functioning, or that a juvenile was subjected to the influence of older adults—would be reviewed for clear error and to ensure that the facts were supported by a preponderance of the evidence. Applying the strong presumption against life without parole, see part II., *infra*, the reviewing court would then determine de novo whether the facts as found by the sentencer were sufficient to constitutionally impose a life without parole sentence on a juvenile under the Eighth Amendment.

Such a review of a juvenile life without parole sentence has already occurred in *People v Garay*, __ Mich App __; __ NW2d __ (2017) (Docket No. 329091). The Court of Appeals noted two errors of law committed by the trial court: (1) the trial court erroneously "consider[ed] the goals of sentencing: rehabilitation, punishment, deterrence, protection, and retribution" and (2) "the trial court did not sentence defendant to life without parole with the understanding that such sentences are reserved for the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at __; slip op at 9-10. The Court of Appeals, in remanding for resentencing, did not disturb the factual findings of the trial court, thus demonstrating the workability of adapting the standards of review used in guidelines challenges to the juvenile life without parole context.

Such a review is also consistent with the appellate review of juvenile life without parole sentences in Pennsylvania. The Supreme Court of Pennsylvania recognized the interplay between questions of fact and law involved with these particular sentencing hearings:

> Because this legal conclusion is premised upon the presentation of testimony and the sentencing court's credibility determinations, it presents a mixed question of fact and law. In such circumstances, we defer to the findings of fact made by the sentencing court as long as they are supported by competent evidence, but give no deference to that court's legal conclusions. [*Batts*, 163 A3d at 435-436.]

2. *Review of sentences under the* Milbourn *principle of proportionality*

Here, in labeling its standard of review an abuse of discretion, the Court of Appeals cited the principle of proportionality, as typically understood in Michigan: "appellate review of the sentence imposed is for abuse of discretion, to determine whether the 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.'" *Hyatt*, 316 Mich App

at 423, quoting *People v Milbourn*, 435 Mich 630, 636, 654; 461 NW2d 1 (1990).[7]

While the *Milbourn* proportionality analysis once again guides sentencing decisions post-*Lockridge*, when there is a departure from the properly-scored guidelines range, *Steanhouse*, __ Mich at __; slip op at 15, *Milbourn* proportionality is not the *only* consideration for appellate courts when reviewing a juvenile life without parole sentence, or even the preeminent one. An abuse of discretion standard is not automatically triggered whenever proportionality considerations are at play. It is true that the United States Supreme Court's decisions in both *Miller* and *Montgomery* were rooted in a proportionality analysis, but this analysis was within the confines of the Court's Eighth Amendment jurisprudence. This is different than proportionality review under *Milbourn*. Compare *Graham v Florida*, 560 US 48, 59-62; 130 S Ct 2011; 176 L Ed 2d 825 (2010) and *People v Bullock*, 440 Mich 15, 33-35; 485 NW2d 866 (1992), with *Milbourn*, 435 Mich at 659-661. As such, for juvenile lifers, their sentences are being reviewed by this Court, and the Court of Appeals, for far more than reasonableness and proportionality: the *constitutionality* of these sentences is what appellate courts must review. And to determine the constitutionality of a sentence, appellate courts must, and always have, employed a de novo review. *Lockridge*, 498 Mich at 373; *People v Francisco,* 474 Mich 82, 85, 89-90; 711 NW2d 44 (2006); *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

3. *Review of pre-*Lockridge *departure sentences under* Fields *and* Babcock

Like the Court of Appeals did below, this Court has given detailed instructions to trial courts regarding how sentences should be determined, and that the imposition of a departure sentence should be "exceptional." Prior to the existence of the legislative sentencing guidelines, trial courts needed guidance for when a departure from a statutory minimum would have been proper: "the

[7] This Court recently reviewed the history of proportionality review in Michigan and affirmed the decisions and principles from *Milbourn* and *Babcock*. *Steanhouse*, __ Mich at __; slip op at 14-18.

reasons justifying departure should 'keenly' or 'irresistibly' grab our attention, and we should recognize them as being 'of considerable worth' in deciding the length of the sentence," *and* that departures should "exist only in exceptional cases." *People v Fields*, 448 Mich 58, 67-68; 528 NW2d 176 (1995). This Court's definitions of "substantial and compelling" in the context of a departure sentence were, "to some extent," "judicially concocted boundaries." *Id.* at 69. This Court defined those words because it would have been improper for trial judges to "regularly use broad discretion to deviate from the statutory minimum." *Id.* at 68. This Court required de novo review to determine whether a reason for a departure was objective and verifiable. In so doing, this Court adopted a heightened standard of review for departure sentences and expressed concerns about the subjective sentencing power of judges being subject "only" to a review for abuse of discretion and proportionality. *Id.* at 69-70.

After the Legislature enacted the sentencing guidelines, this Court adopted the *Fields* definitions and mixed standards of review: "whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion." *Babcock*, 469 Mich at 265. By adopting the standards of review, this Court accepted the limitations on a trial court's discretion announced in *Fields*. This Court adopted the commonly used definition of abuse of discretion by abandoning the "extremely high level of deference" from *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959): the trial court abuses its discretion when it "chooses an outcome falling outside this principled range of outcomes." *Babcock*, 469 Mich at 266-267, 270.

The court in *Hyatt* was correct to describe a heightened level of scrutiny for life without parole sentences for juveniles because the common, standalone abuse of discretion standard is not workable in these circumstances. There is not actually a "range of outcomes" to choose from here.

Trial courts have only one option: if the juvenile is capable of rehabilitation and if the transience of youth was in any way a factor in the offense, the only constitutional option for the trial court is a sentence to a term of years. *Montgomery*, 136 S Ct at 733-735. For those juveniles where the prosecutors are not seeking life without parole and the minimum sentence is between the statutory limits of 25 years to 40 years, there *is* a range, there are not the same constitutional questions as those presented with a juvenile life without parole sentence, and thus the traditional abuse of discretion review may be proper. But to impose a juvenile life without parole sentence, the discretion of the trial court is circumscribed by the Eighth Amendment, as described in *Montgomery*. Life without parole is the principled outcome only for the very rare juvenile incapable of rehabilitation.

II. The Court in *Hyatt* properly recognized a strong presumption against life without parole for juveniles, which is consistent with *Miller* and *Montgomery* and jurisprudence from other jurisdictions.

Without explicitly labeling it as such, the Court of Appeals essentially and correctly recognized that a constitutional presumption against life without parole sentences for juveniles exists and should be folded into the standard of review:

> [A] sentencing court must begin its analysis with the understanding that life without parole is, unequivocally, appropriate only in rare cases.
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> * * *
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> A sentencing court must operate under the understanding that life without parole is, more often than not, not just inappropriate, but a violation of the juvenile's constitutional rights.
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> * * *
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> [T]he sentencing court must operate under the notion that more likely than not, life without parole is not proportionate.
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> * * *
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> Because MCL 769.25 permits a case-by-case determination upon the filing of the requisite motion, trial courts must operate with the understanding that, more likely than not, a life-without-parole sentence is disproportionate for the juvenile offender being sentenced.
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> * * *
>
> [A]n appellate court should view such a sentence as inherently suspect.
>
> * * *
>
> [A]n appellate court must conduct a searching inquiry and view as inherently suspect any life-without-parole sentence imposed on a juvenile offender under MCL 769.25. [*Hyatt*, 316 Mich App at 419-421, 424, 426-427.]

The Prosecuting Attorneys Association of Michigan (PAAM) agrees that the court recognized a presumption. See *Brief of the Prosecuting Attorneys Association of Michigan as Amicus Curiae in Support of the People of the State of Michigan*, p. 4. PAAM also provides a definition of this presumption:

> 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. [*Id.* at n 4.]

There is nothing improper about an appellate court applying a presumption that is consistent with clear constitutional precedent. For example, in the context of ineffective assistance of counsel claims, there is a "strong presumption that counsel's assistance constituted sound trial strategy." *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). This presumption is derived from *Strickland v Washington*, 466 US 668, 669; 104 S Ct 2052; 80 L Ed 2d 674 (1984), in which the United States Supreme Court reasoned: "[b]ecause of the difficulties inherent in making the evaluation [of counsel's performance], a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; this is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"

What *Strickland* did with the Sixth Amendment, both *Miller* and *Montgomery* did with the Eighth Amendment with regard to juvenile life without parole sentences. See *Brief of Amicus Curiae Juvenile Law Center in Support of Defendant-Appellee Hyatt*, pp. 3-8. Similar to the difficulties in turning back the clock to judge trial counsel's performance, "'[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Hyatt*, 316 Mich App at 418, quoting *Roper v Simmons*, 543 US 551, 573; 125 S Ct 1183; 161 L Ed 2d 1 (2005). Here, the Court of Appeals was concerned about trial courts being able to make judgments consistent with the Eighth Amendment when even psychologists struggle with these determinations. *Id.* at 417-418.

Several states have recognized a presumption against life without parole for juveniles:

> Pennsylvania: "We recognize a presumption against the imposition of a sentence of life without parole for a juvenile offender. To rebut the presumption, the Commonwealth bears the burden of proving, beyond a reasonable doubt, that the juvenile offender is incapable of rehabilitation." [*Commonwealth v Batts*, 163 A3d 410, 416 (Pa, 2017).]
>
> California: A presumption in favor of life without parole would be "in serious tension with *Miller*'s categorical reasoning about the differences between juveniles and adults." [*People v Gutierrez*, 58 Cal 4th 1354, 1380; 171 Cal Rptr 3d 421; 324 P3d 245 (Cal, 2014).]
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> Connecticut: The language in *Miller* "suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender." [*State v Riley*, 315 Conn 637, 655; 110 A3d 1205 (2015).]
>
> Iowa: "First, the court must start with the Supreme Court's pronouncement that sentencing a juvenile to life in prison without the possibility of parole should be rare and uncommon. Thus, the presumption for any sentencing judge is that the judge should sentence juveniles to life in prison without the possibility of parole for murder unless the other factors require a different sentence." "[T]he judge must make specific findings of fact discussing why the record rebuts the presumption." [*State v Seats*, 865 NW2d 545, 555, 557 (Iowa, 2015).][8]

This Court came close to recognizing a presumption in *Milbourn* against the imposition of the maximum allowable penalty. *Milbourn*, 435 Mich at 645-646, 653-654. In coming to its decision to employ a heightened standard of review, the Court of Appeals in *Hyatt* referenced language from *Milbourn* regarding this Court's skepticism of maximum penalties.[9] *Hyatt*, 316 Mich App at 424-425 ("[I]n terms of appellate review, a reviewing court is justifiably skeptical of a sentence that represents

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[8] The Supreme Court of Iowa subsequently categorically barred the imposition of life without parole for a juvenile as the sentence violated the Iowa Constitution. See *State v Sweet*, 879 NW2d 811 (Iowa, 2016) (acknowledging the presumption recognized in *Seats* and that the burden rested with the State to prove irreparable corruption).

[9] The language from *Milbourn* the *Hyatt* Court referenced in its decision was regarding the danger of imposing the maximum available penalty, *not* the language regarding any alleged presumption of unreasonableness for departure sentences, as asserted by the prosecution in *Plaintiff-Appellant's Supplemental Authority*.

the maximum available punishment, because such punishment is only available in limited, i.e., the most serious and extreme, circumstances.").[10] The comparison between *Milbourn* and juvenile life without parole is not exactly apples-to-apples because here the sentencer is not immediately confronted with a range of sentencing outcomes. Rather, the sentencer has an initial, binary decision—a term of years *or* life without parole. Even so, this Court's acknowledgment of the need to sparingly impose the most serious punishment in a given scheme is persuasive, especially in light of the Supreme Court's holdings regarding the rarity of a life without parole sentence for a juvenile.

To provide guidance moving forward, this Court should combine the constitutional principles that the *Hyatt* panel correctly recognized with the framework laid out by *Strickland*, to articulate a standard of review that applies the required presumption against life without parole sentences. Such a presumption could be phrased as follows:

> Because of the difficulties inherent in making the evaluation of whether a juvenile is permanently incapable of ever rehabilitating, a court must indulge a strong presumption that the juvenile is capable of rehabilitating, and thus is not the rare juvenile for which a life without parole sentence would be constitutionally proportionate.

This is essentially what the Court of Appeals recognized in *Hyatt*, and is consistent with *Miller* and *Montgomery*. The United States Supreme Court's continued instructions that a life without parole sentence be imposed on only the "very rare" juvenile is tantamount to a presumption. Such a presumption would also give trial courts clearer direction, which would uphold *Montgomery*'s constitutional mandate and reduce the risk of geographic disparity in sentencing.

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[10] "In *Milbourn*, our Supreme Court repeatedly warned that the maximum penalty available under the law is to be imposed for only the most serious offenders and the most serious offenses, or it would risk failing the proportionality test." *Hyatt*, 316 Mich App at 424. "To impose the maximum possible penalty 'in the face of compelling mitigating circumstances would run against this principle [of proportionality] and the legislative scheme.'" *Id.*, quoting *Milbourn*, 435 Mich at 653.

SUMMARY AND RELIEF

WHEREFORE, amicus respectfully requests, for the foregoing reasons, that this Honorable Court hold that de novo review of a juvenile life without parole sentence is proper in order to determine the constitutionality of the sentence and to recognize a presumption against the imposition of a life without parole sentence for a juvenile.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: /s/ Jessica Zimbelman

JESSICA L. ZIMBELMAN (P72042)
Assistant Defender
200 North Washington
Suite 250
Lansing, MI 48913
(517) 334-6069
jzimbelman@sado.org

DAWN VAN HOEK (P26614)
Appellate Defender

MICHAEL MITTLESTAT (P68478)
Deputy Director

Counsel for Amicus Curiae SADO

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