STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ROBERT TAYLOR, Defendant-Appellant. /	Supreme Court No. 154994 Court of Appeals No. 325834 Macomb County Circuit Court No. 2009-005243-FC Hon. Diane M. Druzinski

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APPELLANT ROBERT TAYLOR'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

The Court of Appeals issued its unpublished decision on September 22, 2016. Defendant-Appellant Robert Taylor timely filed his pro se Application for Leave to Appeal on December 22, 2016. This Court has jurisdiction under MCL 600.215 and MCR 7.303(B)(1) to grant leave to appeal.

JUDGMENT APPEALED AND RELIEF SOUGHT

Taylor seeks leave to appeal the Court of Appeals' September 22, 2016 unpublished opinion affirming the trial court's imposition of a sentence of life without the possibility of parole ("LWOP").

Taylor respectfully requests that this Court grant leave to appeal and reverse the Court of Appeals and the trial court. In the alternative, Taylor requests that this Court summarily reverse the Court of Appeals.

STATEMENT OF QUESTIONS PRESENTED

1. In *Miller v Alabama*, the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" and determined that the "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." 567 US 460, 479 (2012). This means that "the sentence of life without parole is *disproportionate for the vast majority of juvenile offenders*." *Montgomery v Louisiana*, 577 US 190, 212 (2016) (emphasis added). Here, the trial court sentenced Defendant-Appellant Robert Taylor to a sentence of LWOP. In imposing that sentence, the trial court placed the burden of proof on Taylor, employed some of the factors established in *Miller* as aggravators rather than mitigators, and failed to examine Taylor's individual characteristics. Did the trial court err when it sentenced Taylor to LWOP?

   The Court of Appeals answered: No.

   Appellant answers: Yes.

   Appellee answers: No.

2. Did the trial court violate the Michigan Constitution when it imposed a LWOP sentence on Taylor?

   The Court of Appeals answered: Did not answer (despite Taylor having raised it in his brief).

   Appellant answers: Yes.

   Appellee answers: No.

REASONS FOR GRANTING LEAVE

In recent years, the question of when juveniles can be sentenced to life without parole has riven courts across the nation. The United States Supreme Court has made clear that "[y]outh matters in sentencing," *Jones v Mississippi*, 141 S Ct 1307, 1316 (2021), and that the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children," *Miller*, 567 US at 474. But courts have struggled to apply the guarantees of the Eighth Amendment. This case presents another opportunity for this Court to bring clarity to juvenile sentencing. This Court should grant the application for leave to appeal for several reasons.

First, this case involves several legal principles of major significance to Michigan's jurisprudence. MCR 7.305(B)(3). It presents again a question of how to implement the United States Supreme Court's decision in *Miller* in the sentencing decisions of Michigan trial courts. Michigan trial courts have struggled since *Miller* to effectuate its conclusion that LWOP sentences for juveniles should be rare. Indeed, since *Miller*, Michigan's prosecutors have moved to impose LWOP sentences in nearly 70% of the *Miller* resentencing hearings, and the imposition of such sentences varies from county-to-county and court-to-court. This case provides a vehicle for this Court to offer clear and uniform guidance to trial courts who urgently need it. There are lingering questions about how to apply *Miller*, even after *Jones*. These lingering questions are critical to uniform sentencing. They include whether *Miller* places a burden of proof on the prosecution or defendant, whether the *Miller* factors are mitigators or aggravators, and whether proximity to the age of 18 allows a trial court to discount its consideration of the *Miller* factors.

Moreover, this case also presents an ideal opportunity for this Court to consider whether the Michigan Constitution requires more than the federal constitution vis-à-vis sentencing

juveniles. This Court has recognized that Michigan's prohibition on "cruel or unusual" punishments is broader than the Eighth Amendment's prohibitions. A natural corollary of that is that Michigan's Constitution requires more of trial courts in sentencing juvenile offenders. The Court can address that question here.

Second, the Court of Appeals' decision is clearly erroneous and will cause material injustice. MCR 7.305(B)(5)(a). The Court of Appeals affirmed the trial court where that court failed to apply *Miller* properly. The Court of Appeals failed to recognize the necessary implication of *Miller*'s holding: that the *prosecution* must bear the burden of proving a juvenile is the rare offender upon whom a LWOP sentence should be imposed. *Miller*'s factors are also mitigating factors. They cannot serve as aggravating factors. Yet here, both the trial court and Court of Appeals considered Taylor's poor family background and proximity to the age of 18 as *reasons to* sentence him to LWOP. Moreover, the Court of Appeals also failed to address Taylor's argument that his sentencing violated the Michigan Constitution's ban on cruel or unusual punishments.

And these errors were far from harmless. Indeed, it is hard to imagine a decision that could cause more material injustice than a juvenile sentenced to LWOP in violation of the federal and state constitutions.

Accordingly, this Court should grant Taylor's application for leave to appeal and bring clarity to this area of the law.

STATEMENT OF FACTS

Taylor's underlying conviction and sentence

In 2009, Taylor, then a 16-year old boy, was arrested in connection with the kidnapping and murder of Matthew Landry. The mastermind of the scheme was Taylor's co-defendant, 17-year old Ihab Masalmani. As the Michigan Court of Appeals stated, the "prosecutor's theory was that [Taylor] aided and abetted Masalmani in carjacking and abducting" Landry. *People v Taylor*, No. 303208, 2016 WL 5328632, at *1 (Mich Ct App Sept 22, 2016) (App 353). A Macomb County jury convicted Taylor of first-degree felony murder, carjacking, conspiracy to commit carjacking, kidnapping, conspiracy to commit kidnapping, and possession of a firearm during the commission of a felony. (Presentence Investigation Report, App 291.) While the underlying murder was undeniably brutal, Masalmani has stated that "Taylor was neither involved with, nor aware of, what was going to happen to Mr. Landry." (See Masalmani Sentencing Mem 2 n 1, App 257.) After his conviction, Taylor was sentenced to a mandatory term of life in prison without parole. *Taylor*, 2016 WL 5328632, at *1 (App 353). Today, Taylor, who is African American, is 29 years old. (Presentence Investigation Report, App 297.)

Taylor appeals after the U.S. Supreme Court decides *Miller v Alabama*

After Taylor's conviction, the United States Supreme Court decided *Miller v.* Alabama, 567 US 460 (2012). In *Miller*, the Court held that *mandatory* life without parole (LWOP) sentences for juveniles convicted of murder violated the cruel and unusual clause of the Eighth Amendment. *Miller*, 567 US at 489. Taylor appealed his conviction. The Michigan Court of Appeals affirmed Taylor's conviction but "vacat[ed] his mandatory life sentence" without the possibility of parole and remanded for sentencing in light of the United States Supreme Court's decision in *Miller*. *People v Taylor*, 2013 WL 1165239, at *1 (Mich Ct App Mar 21, 2013).

Resentencing hearing on remand

On remand, the Macomb County Circuit Court held a multi-day resentencing hearing. During the hearing, Taylor presented experts on brain science and the various factors influencing Taylor at the time of the crime. First, Taylor presented Dr. Daniel Keating, an "expert in cognitive and brain development in adolescents." (10/21/2014 Hr'g Tr 16, App 56.)[1] Dr. Keating, a professor of Psychology, Psychiatry, and Pediatrics at the University of Michigan, testified that based on "what we know about the brain," "adolescen[t] behavior" differs from adult behavior. (*Id*. at 25, App 65.) In particular, Dr. Keating testified that when adolescents are faced with "high emotion situations" their "impulsivity is more likely to prevail than good judgment." (*Id*.) This stems from what Dr. Keating described as a "developmental maturity mismatch," where there is a gap between the limbic system—the brain's "arousal" or "incentive" system, which develops more rapidly—and the prefrontal cortex, which acts as a brake on the limbic system. (*Id*. at 19–25, App 59–65.) This gap has implications for both an initial decision to engage in risky or criminal behavior and the ability to stop engaging in such behavior after it has begun. As Dr. Keating testified, "the ability both to resist getting onto a path that . . . is bad . . . reflects poor impulsive judgment" and the "capacity to change that path, get off the train at some later point, is another version of that developmental maturity mismatch." (*Id*. at 26, App 66.)

Dr. Keating also testified that "early experiences" shape the brain, and that "harsh versus gentle environments . . . will have an impact on how the brain is shaped." (*Id*. at 32, App 72.) Further, Dr. Keating explained that "science does not support . . . bright line divisions" between

[1] Dr. Newman testified during the sentencing hearing of Taylor's co-defendant, Ihab Masalmani, but Taylor and the prosecution incorporated that testimony by reference during Taylor's hearing. (10/23/2014 Hr'g Tr 6, App 184.)

differentiating between an adolescent who is 17 years old and an adult who is 18 years old and one day. (*Id*. at 42, App 82.) In truth, "there is a lot of plasticity even at 18, 19, 20, 21 and into the mid-20s." (*Id*. at 43, App 83.) Dr. Keating also stated that based on his "expertise" and the brain science, he would have a "higher concern for a nonparticipant"—an aider and abettor—to be punished with life than the person who actually pulled the trigger. (*Id*. at 47, App 87.)

Taylor also presented testimony from Kathleen Schaefer, a licensed professional counselor and an expert in parole and probation issues who testified about Taylor's upbringing and background. (10/23/2014 Hr'g Tr 12, App 190.) Schaefer testified that Taylor "was the product of a very unfortunate background," with "a number of risk factors" or "exposures that would be connected with delinquency." (*Id*. at 15, App 193.)

Schaefer detailed how Taylor's family environment affected him. She testified that Taylor's mother was only "13-years old when she had her first child," and consequently Taylor "grew up in a very unstable and unsafe environment." (*Id*. at 16, App 194.) From the time Taylor was 6 years old, "his family had an active child protective care record." (*Id*.) In particular, Schaefer testified that:

> [Taylor's] father was not present. He did not receive any emotional or physical support from his father of *any* kind. There was ineffective parenting. The home environment was unstable. There was a lack of structure in the home. There was a lack of discipline and rules. . . . [Taylor] was exposed to physical neglect and violence in the home . . . [and] significant . . . substance abuse. [*Id*. (emphasis added).]

Taylor's father struggled with alcohol and crack cocaine. (*Id*.) Schaefer testified that essentially Taylor "and his siblings were raised . . . without parental supervision in neighborhoods where there [was] a lot of crime and open violence." (*Id*. at 29, App 207.) Furthermore, Taylor's mother had threatened to give Taylor and his siblings away. (*Id*. at 31, App 209.) According to Schaefer, these were "very significant risk factors." (*Id*. at 16, App 194.) Research demonstrates

that "children that are exposed to these kinds of traumas and risks growing up experience all kinds of problems and difficulties in their lives." (*Id*. at 17, App 195.)

Schaefer also testified that peer pressure "is a significant factor for juveniles." (*Id*. at 18, App 196.) And Schaefer was convinced that peer pressure "was a significant issue" in Taylor's case. (*Id*.)

Despite all these challenges, Schaefer believed that Taylor's entry into the corrections system at a young age provided Taylor an "opportunity" to mature and "make . . . positive changes." (*Id*. at 19, App 197.) Indeed, Schaefer testified from her own experience working in corrections she had "seen very, very challenging cases where people have come from very, very difficult circumstances and . . . over their life-span [have] made through maturity . . . positive changes and [are] successful upon release." (*Id*. at 27, App 205.) And, with respect to Taylor in particular, Schaefer testified that his "behavior has changed from the time he" entered the corrections system. (*Id*. at 28, App 206.)

Finally, Schaefer testified as to the numerous structured programs that exist to support Taylor if he were ever paroled. Schaefer stated that the Michigan Department of Corrections ("MDOC") is "very serious about re-entry initiatives to assist people in being successful upon receiving parole." (*Id*. at 32, App 210.) MDOC would give Taylor tools to succeed and avoid recidivism such as "job training, employment services, and housing." (*Id*. at 33, App 211.) "Parole is very structured." (*Id*. at 34, App 212.)

Schaefer's written report reiterated her testimony. It stated that Taylor was "one year old when his biological father went to prison the first time" and that Taylor's father was "incarcerated for most" of his life. (Schaefer Report 1, App 240.) The report further noted that Taylor's "living conditions were strikingly unstable with frequent housing changes" when he was growing

up." (*Id*.) The report also stated that Taylor's "mother had a long history of instability, that she often left the children without food and proper supervision, that she did not provide sufficient care, failed to enroll the children in school and failed to consistently provide food, stable shelter and parental support for the children." (*Id*. at 7, App 246.)

The report concluded:

> The combined physiological, social and educational challenges due to [Taylor's] history of coming from a dysfunctional home in which he was exposed to neglect and violence, may have further inhibited [his] cognitive development delaying his maturity, impulse control and understanding of consequences and increasing his vulnerability to psychological distress and vulnerability to substance abuse and criminal thinking. [*Id*. at 2, App 241.]

Schaefer explained that Taylor's "offense can be best understood due in part to his developmental stage in life and the struggles he was facing in his life and continues to address." (*Id*. at 9–10, App 248–249.) Schaefer also wrote that Taylor was "gaining a deeper insight regarding the gravity of his behavior and poor choices" and that for these "same reasons [Taylor] has . . . a greater ability to learn from his bad choices." (*Id*. at 10, App 249.) The prosecution offered no experts to rebut Taylor's experts.

After the hearing, Taylor's attorney argued that the *Miller* "factors . . . militate[d] toward [an] indeterminate sentence." (10/24/2014 Hr'g Tr 8, App 227.) Taylor's attorney did not discount the serious nature of Taylor's conviction but emphasized that "Taylor's involvement was peripheral" and that the jury "found him guilty" of "being an aider and abettor" and that there was no "finding of premeditation." (*Id*.) Taylor's counsel also noted that Taylor was only 16 at the time of the murder and argued that that "pushes him . . . lower in . . . the scale in terms of the level of maturity." (*Id*. at 9, App 228.) Taylor's attorney also pointed to Taylor's home and family life and the structured parole he would have as reasons to give an indeterminate sentence. (*Id*. at 9–10, App 228–229.) In conclusion, Taylor's attorney stated that if the trial

court imposed an indeterminate sentence, it could have "assurances . . . that the public is protected and that there will be every reason to believe that this is something that will not occur again." (*Id*. at 12, App 230.)[2]

The prosecution argued for a sentence of LWOP. In its argument, the prosecution argued that the brain science expertise focused on "normal circumstances" and "normal homes," whereas Taylor had suffered from an "awful home" life which served as an aggravating factor. (*Id*. at 14, App 233 ("Adding to those [aggravating] factors then for both of these individuals, Mr. Taylor especially[, are] these awful home lives.").) The prosecution also argued—contrary to the testimony—that there was not "anything on this record that . . . Taylor . . . will have any structure, any support, anything once" he was released to help him "in progressing." (*Id*. at 17, App 236.)

The trial court resentences Taylor to life without parole

On January 6, 2015, the trial court resentenced Taylor to LWOP. (See 1/6/2015 Sentencing Hr'g Tr, App 327.) The trial court prepared a written sentencing opinion and order and read that from the bench. (*Id*. at 5, App 331.) In the trial court's sentencing opinion, it first laid out the holding in *Miller* and what the trial court believed it required. (1/6/2015 Taylor Sentencing Op & Order 2–3, App 320–321.) The trial court then turned to apply the *Miller* factors.

First, the trial court looked at Taylor's age and the "hallmark features" of his age. (*Id*. 3, App 321.) While the trial court acknowledged that Taylor was "16 years and 10 months old at the time of his offense" and younger than his co-defendant Masalmani, the trial court stated that

[2] Taylor also submitted a short sentencing memorandum reiterating these points. (See 12/15/2014 Sentencing Mem, App 288.)

Taylor "was still *much* older than the 14 year old defendants in *Miller*." (*Id*. (emphasis added).) The trial court then distilled Dr. Keating's testimony to conclusion that "teenagers tend to engage in 'generally reckless behavior.' " (*Id*. at 4, App 322 (quoting 10/21/2014 Hr'g Tr 28, App 68).) The trial court concluded that Taylor's age and hallmark features "do not significantly mitigate defendant's culpability." (*Id*.) Indeed, the trial court thought Taylor's case was "readily distinguishable from *Miller*" because Taylor was closer to 18 years old than the *Miller* defendants. (*Id*.) The trial court stated, "While the testimony established that the prefrontal cortex continues to develop into one's mid-twenties, the Court is not free to take this developmental disconnect into consideration when a criminal defendant is over 18." (*Id*.) Because Taylor "was a mere 14 months shy of his 18th birthday the time of his offense," this "suggest[ed] that this developmental disconnect between his prefrontal cortex and his limbic system was not much more pronounced than that of an 18 year old." (*Id*.) Indeed, the trial stated that "while" the developmental disconnect "does not *weigh as heavily against* [Taylor] as it did against his co-defendant, Masalmani," it nevertheless weighed against Taylor. (*Id.* (emphasis added).) Accordingly, Taylor's age and hallmark characteristics did not "mitigate[] against a sentence of life without the possibility of parole." (*Id*.)

Next, the trial court looked at Taylor's family and home environment. The trial court stated that there was "no question" that Taylor's "family and home environment was far from optimal." (*Id*. at 5, App 323.) "Accordingly, this factor *could arguably* favor some leniency for defendant." (*Id*. (emphasis added).)

Third, the trial court examined the circumstances of the underlying offense, Taylor's participation, and familial and peer pressure. (*Id*.) The trial court concluded that there "was no evidence or testimony tying any of defendant's criminal activity to direct peer or family

pressure." (*Id*.) Moreover, the trial court stated that while Taylor did not "literally" pull the "trigger, his actions were still quite culpable." (*Id*. at 6, App 324.) Despite Masalmani's sentencing memorandum in which he stated that Taylor did not participate in the murder nor know it was going to happen, the trial court concluded that "[t]here is *no* evidence that defendant did not expect the murder to occur." (*Id*. (emphasis added).) Rather than view this as a minimally persuasive mitigating factor, however, the trial court treated this factor as aggravating, and, concluded that this factor weighed in favor of sentencing Taylor to LWOP. (*Id*.)

Fourth, the trial court stated that there was no evidence that the "incapacities of youth" prevented Taylor from participating in his defense. (*Id*.) Thus, the trial court again converted this mitigating factor into an aggravating factor, and found that it weighed *in favor* of sentencing Taylor to LWOP. (*Id*.)

Finally, the trial court turned to the possibility-of-rehabilitation factor. The trial court concluded that "this factor *favors* a sentence of life without the possibility of parole." (*Id*. at 7, App 325 (emphasis added).) The trial court pointed to testimony that showed that one could not predict the possibility of rehabilitation with certainty. (*Id*. at 6–7, App 324–325.) And it noted several other reasons that this factor *favored* LWOP. The trial court stated that the "difficulty of defendant's upbringing . . . suggest that defendant's prospects for rehabilitation are minimal." (*Id*. at 7, App 325.) And, despite Schaefer's testimony of Taylor's growth since he was incarcerated, the trial court stated that it was "particularly telling that there was *no* testimony or evidence suggesting that defendant has shown signs of rehabilitation to date." (*Id*. (emphasis added).)

Based on its review of the *Miller* factors, the trial court concluded that Taylor's case "presents precisely what the Supreme Court characterized as the 'rare juvenile offender whose

crime reflects irreparable corruption.' " (*Id*. (quoting *Roper v Simmons*, 543 US 551, 573 (2004)).) Accordingly, the trial court concluded that Taylor was "properly sentenced to life in prison without the possibility of parole." (*Id*.)

Taylor appeals

Taylor filed a timely appeal. In his appellate brief, Taylor argued that a LWOP "for a juvenile offender on an aiding [and] abetting theory for felony murder violates" the Eighth Amendment and the Michigan Constitution's bar on "cruel or unusual punishment under Article I, § 16." (Taylor App Br 10; see also *id*. at 11–14.) Taylor also argued that "on the particular facts" of his case a LWOP sentence was "disproportionate." (*Id*. at 10; see also *id*. at 14–15.)

The Michigan Court of Appeals affirmed the trial court. It concluded that "the trial court did not err in analyzing each of the *Miller* factors and finding that defendant is the rare juvenile offender who is irreparably corrupt." *Taylor*, 2016 WL 5328632, at *3 (App 355). In particular, the Court of Appeals agreed with the trial court that Taylor's difficult upbringing "indicates that he faces significant challenges in improving himself." *Id*. at *6 (App 358). The Michigan Court of Appeals did not address Taylor's argument that his sentence was cruel or unusual under the Michigan Constitution.

Taylor timely moved for reconsideration. On October 27, 2016, the Court of Appeals denied his motion.

Taylor files a pro per application in the Michigan Supreme Court

In December 2016, Taylor filed a timely pro per application with this Court. In his application, Taylor argued the LWOP sentence he received as a juvenile convicted of felony murder as an aider and abettor was unwarranted under *Miller*. (Appl 3.) Taylor further argued that LWOP "is a cruel and unusual punishment in Michigan and as applied" to him. (*Id*. 8.)

On May 2, 2017, this Court issued an order holding Taylor's application in abeyance pending the resolution of *People v Skinner*, 502 Mich 89, 99; 917 NW2d 292 (2018). After *Skinner* was decided, on April 5, 2019, this Court again ordered Taylor's application held in abeyance pending consideration of his co-defendant's application in *People v Masalmani*, which this Court granted that same day. On May 29, 2020, this Court issued an order vacating the order granting Masalmani's application and stated it was "no longer persuaded that the questions presented should be reviewed by this Court." *People v Masalmani*, 505 Mich 1090; 943 NW2d 359 (2020).

On September 1, 2020, after Mr. Taylor retained counsel pro bono, counsel filed a motion to file a supplemental application and for an extension of time in which to file that supplemental application. On October 21, 2020, this Court issued an order denying that motion but holding Taylor's application in abeyance because of the then-pending case of *Jones v Mississippi*, cert granted, ____US____; 140 S Ct 1293 (Mar 9, 2020) in the United States Supreme Court. On April 22, 2021, the United States Supreme Court issued its decision in *Jones*. See 141 S Ct 1307 (2021). After the United States Supreme Court issued its decision in *Jones*, Taylor's counsel again moved to file a supplemental application. On September 22, 2021, this Court granted the motion to supplement and directed the clerk to schedule argument on the application. This supplemental application follows.

STANDARD OF REVIEW

This Court reviews "constitutional questions" and "legal questions" under a de novo standard. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013); *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004); see also *In re Certified Questions From*

United States Dist Court, *W Dist of Michigan, S Div*, 506 Mich 332, 340; 958 NW2d 1 (2020) ("Matters of constitutional and statutory interpretation are reviewed de novo." (cleaned up).[3]

ARGUMENT

I. The trial court erred by failing to adhere to the requirements established by the United States Supreme Court in *Miller*.

The trial court failed to follow the United States Supreme Court's dictates in *Miller*. The trial court made three distinct legal errors when it sentenced Taylor to LWOP. First, it erred by placing the burden of proof with respect to the *Miller* factors on Taylor rather than the prosecution. *Miller*'s factors, to have any meaning, require the *prosecution* to demonstrate that a defendant is one of those rare juvenile offenders whose crime and personal characteristics require a sentence of LWOP. Here, the trial court placed the burden squarely on Taylor, contrary to what *Miller* requires. Second, the trial court erred by considering Taylor's background and family situation and his age to constitute *aggravating* factors. In other words, the trial court examined the testimony concerning Taylor's difficult childhood and his age at the time offense, 16 years, 10 months, and concluded that these weighed *in favor* of a LWOP. But *Miller*, and this Court in *Skinner*, made clear that the *Miller* factors are *mitigating* factors. Third, the trial court erred by taking *Miller*'s discussion about the line between majority and minority as a mechanical test of a defendant's closeness to the age of 18. In the trial court's opinion, the closer a juvenile

[3] While it is true that this Court reviews a trial court's imposition of a criminal sentence under an abuse-of-discretion standard, *People v Steanhouse*, 500 Mich 453, 459–460; 902 NW2d 327 (2017), the questions presented in this case involve what constitutes the proper legal framework under which to impose a LWOP sentence. In other words, this case is about whether the trial court even employed *the proper standard* when it imposed its sentence. But even under an abuse of discretion standard, this Court should reverse because a "trial court necessarily abuses its discretion when it makes an error of law." *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013).

is to the age of majority, the more a court can discount the *Miller* factors. But *Miller* was clear that a trial court must consider a defendant's *particular* characteristics rather than generic traits. A court cannot discount this individualized assessment as a child moves closer to the age of 18. Any of these errors alone requires reversal.

A. What *Miller* requires.

The trial court's errors stem largely from its misunderstanding of the holding and import of *Miller*. Beginning from a flawed premise, it necessarily misapplied *Miller*'s various factors. Thus, it is important to begin with what *Miller* held and how the United States Supreme Court understands the case.

In *Miller*, the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 567 US at 479. But the Supreme Court said more than that. It determined that the "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* And while it would not go so far as to "foreclose a sentencer's ability to make that judgment in homicide cases," it did "require" a sentencer "to take into account how children are different, and how those differences *counsel against* irrevocably sentencing them to a lifetime in prison." *Id.* at 480 (emphasis added).

Four years later, the Supreme Court clarified what *Miller* stood for in *Montgomery v Louisiana*, 577 US 190 (2016). In *Montgomery*, the Supreme Court held that *Miller* was retroactive because it was a substantive rule of constitutional law. *Id*. at 212. In reaching that conclusion, *Montgomery* repeatedly underscored the *Miller* holding: "*Miller* did *bar* life without parole . . . for all but the *rarest* of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id*. at 209 (emphasis added). Indeed, *Miller* "did *more* than require a sentencer

to *consider* a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole *collapse* in light of 'the distinctive attributes of youth.' " *Id.* at 208 (emphasis added (quoting *Miller*, 567 US at 472)). *Montgomery* underscored the change *Miller* brought about in practical terms: "Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, *it will be the rare juvenile offender who can receive that same sentence*." *Id*. at 209 (emphasis added). In short, *Miller*'s takeaway "conclusion" was that "the sentence of life without parole is *disproportionate for the vast majority of juvenile offenders*." *Id*. at 212 (emphasis added).

The recent decision in *Jones v Mississippi*, 141 S Ct 1307 (2021) did not change any of this. *Jones* involved the narrow question whether a sentencer must make a specific, "separate factual finding of permanent incorrigibility" prior to imposing a LWOP sentence on juvenile. *Id*. at 1314. The answer was no. That is unsurprising given that the *Montgomery* Court stated that "*Miller* did not impose a formal fact finding requirement." *Montgomery*, 577 US at 211. Rather, *Miller* established procedural safeguards to breathe life into its "substantive holding." *Id*. at 210 (stating that the sentencing "hearing . . . gives effect to *Miller's* substantive holding"). In short, while *Miller* does not demand the magic incantation of certain words, it does demand a fair process to vindicate a juvenile's substantive right against being sentenced to LWOP absent a showing of particular circumstances and traits that make him or her among the "rarest of juvenile offenders" subject to a LWOP sentence.

B. *Miller* requires the burden of proof to be on the prosecution.

The trial court first erred by placing the burden to prove the *Miller* mitigating factors on Taylor. *Miller* and its progeny make clear that a LWOP sentence for a juvenile will be the "rare" one. And rare means of "a kind seldom found" or "exceptional." *Shorter Oxford English*

Dictionary, p 2464 (6th ed, 2007). The only way to vindicate the substantive right articulated by *Miller*—to ensure that a LWOP sentence is "seldom found" and only imposed in "exceptional" circumstances—is by placing the burden on the prosecution. In short, for the substantive right to have any meaningful import, the burden must be on the prosecution to prove that the juvenile being sentenced is one of the rare children whose offense demands LWOP.

This is the intent behind MCL 769.25. To even be considered for a LWOP, the "prosecuting attorney" must "file a motion." MCL 769.25(2). In other words, by filing a motion seeking a life without parole sentence in a particular case, the prosecution is necessarily alleging that the juvenile is one of the "rare" juveniles "who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Montgomery*, 577 US at 208. The ball is in the prosecutor's court and *Miller* requires the ball to stay there. Indeed, requiring the burden to be on the prosecution is consistent with normal allocations of burdens found in the Michigan Court Rules and practice. And, more importantly, it is the only way to vindicate a juvenile's due process rights.

1. A fair reading of Miller *requires the burden to be on the prosecution.*

That the burden is on the prosecution is seen by any fair-minded consideration of the language from *Miller* and *Montgomery*. If the "penological justifications for life without parole *collapse* in light of 'the distinctive attributes of youth,' " then it cannot be the juvenile criminal defendant's burden to establish that those justifications are not present. *Montgomery*, 577 US at 208 (emphasis added (quoting *Miller*, 567 US at 472)). Rather, it must be on the prosecution to prove that *this* particular juvenile is the rare offender who deserves the all-but-barred-sentence of LWOP. This is because *Miller* "did *bar* life without parole" except in the rarest of circumstances. *Id*. at 209 (emphasis added). Placing the burden on the defendant—or even

saying that neither side has a burden—guts *Miller*'s core holding. If there is no burden to prove the factors do not support an indeterminate sentence—if the parties begin in equipoise—then there really is not a bar against LWOP sentences except in the rarest of circumstances. But that is not what *Miller* and *Montgomery* require. Indeed, after *Miller* it is clear that the Eighth Amendment puts the LWOP sentence out-of-bounds unless very limited factors are proven. That means the scale begins on the side of an indeterminate sentence.

2. *A moving party traditionally bears the burden of supporting its request and the government traditionally bears the burden of proof in criminal proceedings.*

It is axiomatic that the moving party bears the burden of proof related to the relief it is seeking. See, e.g., *Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit*, 482 Mich 18, 34; 753 NW2d 579 (2008) (discussing burden on party seeking a preliminary injunction); *Shallal v Catholic Soc Services of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997) (discussing burden on party moving for summary disposition); *Butler v Simmons-Butler*, 308 Mich App 195, 227; 863 NW2d 677 97 (2014) ("The party moving for disqualification bears the burden of proving that the motion is justified.") (cleaned up). This carries over into the criminal context. Thus, when the prosecution moves to admit evidence of other prior bad acts, it bears the burden of establishing the relevance. See, e.g., *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Likewise, the prosecution bears the burden of showing that evidence is admissible for a proper purpose. See, e.g., *People v Denson*, 500 Mich 385, 398; 902 NW2d 306 (2017). Particularly relevant to this context is that when the State seeks to prosecute juveniles for certain offenses through Michigan's traditional waiver process, the prosecution bears the burden of establishing that the best interests of the juvenile and the public would be served by waiver. MCR 3.950(D)(1)(b). The prosecution also bears the burden of proof when seeking designation,

MCR 3.952(C)(2), and in several other stages of juvenile proceedings, MCR 3.955(B); MCR 6.937(A)(4).

Here, the prosecution was necessarily the moving party. Pursuant to *Miller* and MCL 769.25 and MCL 769.25a, the prosecution had to move to have Taylor sentenced to LWOP. Taylor had no choice in the decision. This Court should not upset the normal burden imposed on a moving party.

3. Due process requires that the prosecution bear the burden of proving that LWOP sentence is appropriate.

"Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden … of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt." *Speiser v Randall*, 357 US 513, 525–526 (1958). And while here the issue involves the imposition of a sentence, rather than a finding of guilt, a criminal defendant's due process rights extend beyond trial and through sentencing. E.g., *Betterman v Montana*, 578 US 437, 448 (2016) ("After conviction, a defendant's due process right to liberty, while diminished, is still present. He retains an interest in a sentencing proceeding that is fundamentally fair."); see also, US Const, Am XIV; Mich Const 1963, art 1, § 17.

The United Supreme Court has stated that the "identification of the specific dictates of due process generally requires consideration of three distinct factors." *Mathews v Eldridge*, 424 US 319, 335 (1976). These are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Id.*]

Here, all these factors support requiring placing the burden of proof on the prosecution. The interest affected by a hearing to impose LWOP is stark: liberty—whether one ever has the chance to leave prison alive. The risk of erroneous deprivation of that interest is also great if juvenile defendants are required to bear the burden at the *Miller* hearing. On the other hand, placing that burden on the prosecution lessens the chance that a juvenile, who is not the rare offender, will be sentenced to LWOP erroneously. Finally, the governmental interest at stake in *Miller* hearing is that justice be done, not that any particular defendant is sentenced to LWOP. See *Berger v United States*, 295 US 78, 88 (1935) (stating that government's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done").

Accordingly, in order to vindicate juvenile defendants' due process rights, the burden must be on the prosecution at the *Miller* hearing. Indeed, this is the approach taken by at least several state Supreme Courts of appeals. See, e.g., *Commonwealth v Batts*, 640 Pa 401, 471; 163 A3d 410 (2017) ("Any suggestion of placing the burden on the juvenile offender is belied by the central premise of *Roper*, *Graham [v. Graham v Florida*, 560 US 48, 70 (2010).], *Miller* and *Montgomery*—that as a matter of law, juveniles are categorically less culpable than adults.") (cleaned up); *State v Hart*, 404 SW3d 232, 241 (Mo, 2013) (noting that after *Miller* "no consensus" had "emerged" regarding who bears burden or level of proof applicable and holding that "[u]ntil further guidance is received, a juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances")[4]

[4] And to be clear, *Jones* does not preclude this conclusion. As discussed above, *Jones* involved a very narrow question: whether a sentence must make a specific factual finding of "permanent incorrigibility" prior to imposing a LWOP sentence on juvenile. See 141 S Ct at 1314. It did not. But the burden of proof question is a question of what procedures must be in place to

C. The *Miller* factors are *mitigating* factors, not aggravating factors.

The trial court legally erred when it considered Taylor's family and home environment as an aggravating—rather than mitigating—factor under *Miller*. The trial court likewise erred when it considered Taylor's age an aggravating factor.

The trial court stated that Taylor's difficult "upbringing . . . suggests the defendant's prospects for rehabilitation are minimal." (1/6/2015 Taylor Sentencing Op & Order 7, App 325.) In other words, while acknowledging an argument could be made for that upbringing as a mitigating factor, (*id.* ("defendant's upbringing is the only factor which *could* be said to weigh in favor of an indeterminate sentence" (emphasis added))), the trial court instead employed it as an *aggravating* factor—a factor that supported sentencing Taylor to LWOP. Likewise, the trial court used Taylor's age as an aggravating factor. It stated that the "developmental disconnect between his prefrontal cortex and his limbic system was not much more pronounced than that of an 18 year old" and concluded that "while this factor does not *weigh as heavily against* defendant as it did against his co-defendant, Masalmani," it nevertheless weighed against Taylor. (*Id.* at 4, App 322 (emphasis added).)

But the *Miller* factors are not aggravating factors. That is, they cannot serve to enhance a penalty from indeterminate *to* LWOP. *Miller* stated that "*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider *mitigating* circumstances before imposing the harshest possible penalty for juveniles." *Miller*, 567 US at 489 (emphasis added). And, as this Court stated just three years ago, "[i]t is undisputed that all of these [*Miller*] factors are mitigating factors." *Skinner*, 502 Mich at 115.

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vindicate the substantive right articulated by *Miller*. *Miller*'s substantive right is meaningless without placing the burden on the prosecution.

The trial court turned these mitigating factors on their head. It used a factor—home and family environment—that the Supreme Court said could be considered to mitigate a LWOP sentence as a *justification* for that sentence. It similarly used the age factor—the whole rationale behind *Miller*—as justification for enhancing Taylor's sentence. While *Miller* may not require a specific fact-finding of incorrigibility, it *does* require that the factors it articulated be employed as mitigators—not aggravators. The trial court failed to recognize this and, instead, used what are clearly required to be mitigators as aggravators. That was error.

D. *Miller* requires a sentencer to consider the specific characteristics attendant to the individual being sentenced.

Secondly, the trial court erred by focusing generically on Taylor's proximity to the age of 18 rather than on his specific characteristics. The trial court stated that Taylor was a "mere 14 months shy of his 18th birthday at the time of his offense, suggesting that this developmental disconnect between his prefrontal cortex and his limbic system was not much more pronounced than that of an 18 year old." (1/6/2015 Taylor Sentencing Op & Order 4, App 322.) The trial court confused the bright-line rule established by the United States Supreme Court—sentencers *must* treat those under 18 differently—with a relaxing of the *Miller* considerations the closer a child is to 18 years old. But *Miller* said nothing of the sort. And, indeed, the United States Supreme Court previously indicated that even after 18 such factors have relevance. *Roper*, 543 US at 574 ("The qualities that distinguish juveniles from adults do not disappear when an individual turns 18.").

Indeed, "*Miller* requires a sentencer to consider *a* juvenile offender's *youth* and *attendant characteristics* before determining that life without parole is a proportionate sentence." *Montgomery*, 577 US at 209–210 (emphasis added). In other words, if a defendant is under 18, a trial court must employ *Miller*'s rigorous, defendant-specific analysis. A trial court must ask

whether *this particular* defendant's youth and specific characteristics make him or her the rare case where a LWOP sentence is justified or whether he or she is the normal case whose offense cannot justify a LWOP sentence. There is not a discount on the *Miller* factors because someone is 17 years and 364 days old. Rather, *Miller* applies as equally to that juvenile as it does to the 14-year-old. And that means the trial court was required to consider *Taylor's* attendant characteristics, not his age in a vacuum.

The trial court acknowledged that the "testimony established that the prefrontal cortex continues to develop into one's mid-twenties," but stated that it was "not free to take this developmental disconnect into consideration when a criminal defendant is over 18." (1/6/2015 Taylor Sentencing Op & Order 4, App 322.) That may or may not be true as a matter of law. See, e.g., *Roper*, 543 US at 574; *State v O'Dell*, 183 Wash 2d 680, 695; 358 P3d 359 (2015) ("Thus, we now know that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18.") But that there might not be a requirement for a court to consider the developmental disconnect for a 19-year old defendant does not excuse a court from considering that disconnect when it is constitutionally-mandated to do so. By failing to do so, the trial court erred.

Moreover, even a brief comparison of the trial court's sentencing opinion for Taylor with that of his co-defendant Masalmani demonstrates the trial court's failure to look at Taylor's specific characteristics. For instance, the trial court used essentially the same language to discuss Taylor and Masalmani's proximity to the age of 18. With respect to Masalmani, the trial court stated:

> *Miller* dealt with juvenile defendants who were a mere 14 years old at the time of their offenses—a far cry from this case. [Mr. Masalmani] was only 4 months away from being an adult." [Masalmani Sentencing Op & Order 4, App 344.]

With respect to Taylor, the trial court stated:

> *Miller* dealt with juvenile defendants who were 14 years old at the time of their offenses—roughly two years younger than defendant…[Mr. Taylor] was a mere 14 months shy of his 18th birthday at the time of his offense. [1/6/2015 Taylor Sentencing Op & Order 4, App 320.]

Likewise with respect to the circumstances of the crime, the trial court rotely reached the same conclusions with respect to both defendants:

> There is nothing in the fact and circumstances of the crime which would warrant anything less than life in prison without the possibility of parole [for Mr. Masalmani]. [Masalmani Sentencing Op & Order 6, App 346.]
>
> [T]here is nothing in the facts and circumstances of the crime which would warrant anything less than life in prison without the possibility of parole [for Mr. Taylor]. [1/6/2015 Taylor Sentencing Op & Order 6, App 322.]

This is not what *Miller* requires, however. It requires *individualized* determinations. This only underscores the trial court's error.

E. The trial court abused its discretion in applying the factor regarding the circumstances of the offense.

There is one additional determination by the trial court that constituted error—in this case an abuse of discretion. The trial court concluded that circumstances of the offense favored a sentence of LWOP. (1/6/2015 Taylor Sentencing Op & Order 6, App 324.) In particular, the trial court stated that there was "no evidence that defendant did not expect the murder to occur." (*Id.*) That error is mindboggling given that the court sentenced both Taylor *and* Masalmani, and Masalmani submitted his sentencing memorandum *prior* to Taylor's sentencing. (See generally Masalmani Sentencing Memo, App 256.) On the second page of Masalmani's brief, he states: "Taylor was neither involved with, nor aware of, what was going to happen to Mr. Landry." (*Id*.

at 2 n 1, App 257.) That the trial court missed or ignored this admission and used the nature of the offense to *enhance* Taylor's sentence was a clear abuse of discretion.

II. The trial court's sentencing determination violated the Michigan Constitution.

A. This Court should accept *Jones'* invitation to consider whether Michigan's Constitution places more stringent limits on sentencing juveniles.

In *Jones*, the United States Supreme Court stated that its holding did not:

> preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder. States may categorically prohibit life without parole for all offenders under 18. Or States may require sentencers to make extra factual findings before sentencing an offender under 18 to life without parole. Or States may direct sentencers to formally explain on the record why a life-without-parole sentence is appropriate notwithstanding the defendant's youth. States may also establish rigorous proportionality or other substantive appellate review of life-without-parole sentences. All of those options, and others, remain available to the States. See generally J. Sutton, *51 Imperfect Solutions* (2018). Indeed, many States have recently adopted one or more of those reforms. [*Jones*, 141 S Ct at 1323.]

This comported with its recognition in *Montgomery* that "[w]hen a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid *intruding more than necessary* upon the States' sovereign administration of their criminal justice systems." *Montgomery*, 577 US at 211 (emphasis added). Here, this Court should take up the United Supreme Court's invitation and conclude that Michigan's prohibition on "cruel *or* unusual" punishment provides greater protections to juveniles than the United States Constitution.

As Judge Jeffrey Sutton of the United States Court of Appeals for the Sixth Circuit has written, "There is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed in

the same way." J. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (New York: Oxford University Press, 2018), 174. And he has cautioned state supreme courts from "borrow[ing] in particular from the larger, far larger, jurisdiction" that is the United States. *Id.* at 175. In particular, he notes that "[f]ederalism considerations may lead the U.S. Supreme Court to underenforce (or at least not to overenforce) constitutional guarantees in view of the number of people affected and the range of jurisdictions implicated." *Id.* State Supreme Courts do not face this danger. "No state supreme court by contrast has any reason to apply a 'federalism discount' to its decisions." *Id.* And Judge Sutton encouraged state supreme courts to take up the mantle of independent state constitutions. *Id.* at 185 ("Nothing prevents a state court from identifying an area or areas that are particularly amenable to independent state constitutionalism in this State or that one.") (cleaned up)); *Mays v Governor of Mich*, 506 Mich 157, 219; 954 NW2d 139 (2020) (McCormack, C.J., concurring) ("[O]ne of the 'happy incidents' of our federalist system is that it permits states to forge their own paths . . . and function as laboratories of experiments."). Indeed, nothing prevents this Court from determining that Michigan's bar on "cruel or unusual punishment" provides juveniles greater protections than the federal constitution. This Court should use this case to reach that conclusion. See *id.* at 222 ("[T]his Court has a duty to protect the state constitutional rights of Michiganders.")

B. Michigan's bar on cruel or unusual punishment provides broader protections than the Eighth Amendment.

Michigan's Constitution states that "cruel *or* unusual punishment shall not be inflicted." Mich Const, art 1, § 16 (emphasis added). That "or" makes a difference. In *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992), this Court stated concluded that there were "compelling reasons . . . to interpret our state constitutional provision more broadly . . . than the United States Supreme Court [has] interpreted the Eighth Amendment." Indeed, the "prohibition

of punishment that is *unusual* but not necessarily cruel *carries an implication that unusually excessive imprisonment* is included in that prohibition." *People v Lorentzen*, 387 Mich 167, 172; 194 NW2d 827 (1972) (emphasis added). By necessary implication, then, this means that the Michigan Constitution requires *more* than the *Miller* Court determined was required under the Eighth Amendment. The Michigan Constitution's broader protections mean that the trial court erred in sentencing Taylor.

C. The trial court erred by imposing a cruel or unusual sentence on Taylor.

In addition to violating the Eighth Amendment, the trial court's sentencing decision was in error because it violated the Michigan Constitution's bar on cruel or unusual punishments. To determine whether a sentence under Article I, Section 16 is cruel or unusual, Michigan courts employ a proportionality analysis. See *Bullock*, 440 Mich at 32 (Michigan's Constitution prohibits "grossly disproportionate sentences"). The "basic concept" underlying the proportionality analysis is human dignity and the proportionality analysis draws "its meaning from the evolving standards of decency that mark the progress of a maturing society." *Atkins v Virginia*, 536 US 304, 311–312 (2002) (cleaned up). In other words, the phrase "cruel or unusual" is "progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v United States*, 217 US 349, 378 (1910).

To determine whether a sentence is proportionate to the offense, Michigan courts consider four factors: (1) the severity of the sentence relative to the gravity of the offense; (2) the sentences imposed in the same jurisdiction for the same offense; (3) sentences imposed in other jurisdictions for the same offense; and (4) the goal of sentencing, especially rehabilitation. *Bullock*, 440 Mich at 33–34; (citing *Lorentzen*, 387 Mich at 177–181). Furthermore, as this

Court stated in *Bullock*: "To be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt." *Bullock*, 440 Mich at 39. Finally, there is a "fourth criterion rooted in Michigan's legal traditions . . . the goal of rehabilitation." *Id.* at 34.

Here, the trial court's sentencing decision violated these principles. As initial matter, the trial court was required to tie the punishment to Taylor's personal involvement in the crime. The trial court failed to do so, primarily because it failed to acknowledge Taylor's lack of knowledge that Landry might be murdered. This also shows that Taylor's sentence was disproportionately severe given his reduced culpability. Taylor was sentenced to the *same* sentence as Masalmani, who was the undisputed leader of the kidnapping and carjacking, and the one who shot Landry in cold blood.

Second, Taylor's sentence is unusual and disproportionate within the state of Michigan in this sense: Michigan does not impose the death penalty. Taylor, as a juvenile, received the *exact* same sentence as the most culpable adult offender. Indeed, given that Taylor was incarcerated *prior* to turning 18, his sentence is more severe when compared to adult offenders. Taylor will spend a far longer proportion of his life in jail than an adult offender sentenced to LWOP at age 49. As the United States Supreme Court has stated:

> Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16–year–old and a 75–year–old each sentenced to life without parole receive the same punishment in name only. [*Graham v Florida*, 560 US 48, 70 (2010).]

Third, Taylor's sentence is unusual and disproportionate as compared against other jurisdictions. Twenty-five states and the District of Columbia prohibit juvenile LWOP

sentences.[5] In "nine additional states, no one is serving life without parole for offenses committed before age 18."[6] Two state Supreme Courts have held that their state constitutions categorically bar such sentences. See *Washington v Bassett*, 192 Wash2d 67; 428 P3d 343 (2018); *Iowa v Sweet*, 879 NW2d 811 (Iowa 2016). Another has adopted a presumption against such sentences. See *Batts*, 640 Pa 401. Standards of decency are evolving to end LWOP sentences for juveniles. And, when examining those evolving standards, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins*, 536 US at 315. Here, there is a consistent push to categorically ban such sentences. Thus, Taylor's sentence to LWOP for felony murder is disproportionate when compared against other jurisdictions and the trends in other jurisdictions.

Finally, the trial court erred because its sentencing decision ignored the goal of rehabilitation. It is "only the rarest individual" who "is wholly bereft of the capacity for redemption." *Bullock*, 440 Mich at 39 n 23 (cleaned up). "To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable." *Graham*, 560 US at 72–73. Indeed, as the United States Supreme Court has stated, a "sentence of life imprisonment without parole, however, cannot be justified by the goal of rehabilitation" because that "penalty forswears altogether the rehabilitative ideal." *Id.* at 74. The trial court's sentencing decision

[5] The Sentencing Project, *Juvenile Life Without Parole: An Overview* (May 24, 2021), available at https://www.sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf (accessed December 16, 2021).

[6] *Id.*

foreswears any such possibility and therefore violates Michigan's prohibition on cruel or unusual punishments.[7]

D. The Michigan Constitution categorically bars LWOP sentences for juveniles.

But this Court should go further. It should follow the Washington and Iowa State Supreme Courts and recognize that LWOP sentences for juveniles are categorically barred; that is, it should hold that they are per se cruel or unusual. There are several reasons for this conclusion, some of which have already been discussed *supra*.

First, because there is no death penalty in Michigan, a child sentenced to LWOP receives the *exact* same punishment as the most culpable adult offender. Second, Michigan's prosecutors are undeterred in seeking LWOP sentences. In 2017, the United States Court of Appeals for the Sixth Circuit noted that since *Montgomery* Michigan's prosecutors have sought LWOP sentences ***in 70%*** of the Miller resentencing hearings. *Hill v Snyder*, 878 F3d 193, 202 (CA 6, 2017) ("Michigan prosecutors apparently believe that seventy percent of the Plaintiffs present rare and uncommon cases of 'irreparable corruption.' ") At the very least, Michigan's prosecutors have a different definition of rare than that found in the dictionary. This prosecutorial push for LWOP sentences coupled with the uneven application of *Miller*, counsel adoption of a categorical ban on LWOP sentences for juveniles.

[7] At the very least, the *Miller* factors establish the floor of Michigan's constitutional protections in sentencing juveniles. Thus, the trial court's failure to follow those protections clearly violated Taylor's Michigan constitutional rights. Moreover, even if under *Miller* in the *Eighth Amendment* context the burden of proving mitigating factors is not on the prosecutor and the factors can be mitigating or aggravating factors, this Court should hold that under the *Michigan* Constitution the burden *is* on the prosecution and the factors must be mitigators.

Third, as described *supra* 27-28, evolving standards of decency suggest that LWOP sentences for juveniles are not only cruel but also unusual. Michigan is increasingly the outlier. Whereas Michigan once set the pace for evolving standards of decency by being the *first* government in the English-speaking world to outlaw capital punishment,[8] it now is lagging. This Court should remedy that and bring Michigan in-line with the evolving standards of decency which are pushing towards the abolition of LWOP sentences for juveniles.

Fourth, a categorical ban would ensure fairness across the state of Michigan. Currently, there are no objective criteria—either by statute or by caselaw—limiting the children with qualifying convictions under MCL 769.25 who may be subjected to life without parole. And as the Sixth Circuit has noted, *Hill*, 878 F3d at 202, Michigan prosecutors seem inclined to consider every juvenile murder the rare case deserving a sentence of LWOP. Rather than reserving life without parole for rare cases, the actions of Michigan prosecutors and courts' actions since *Miller* and the passage of MCL 769.25 and MCL 769.25a have resulted in imposition of the sentence in an arbitrary and unusual manner. Indeed, it seems that the zip-code and county in which an individual commits his or her crime affects the likelihood that prosecutors will seek life without parole in *Miller* resentencing hearings. See NY Times Opinion, *Michigan Prosecutors Defy the Supreme Court*, NEW YORK TIMES (Sept 11, 2016) (noting, for example, that Oakland County prosecutor was seeking life without parole for 44 of 49 juvenile lifers); Allie Gross, *More Than Half of Michigan Juvenile Lifers Still Wait for Resentencing*, DETROIT FREE PRESS (Aug 11, 2019). And Michigan courts have also imposed the sentence based on other factors, such as an offender's mental illness, without any link to *Miller*. See, e.g., *People v Nunez*, No.

[8] Dan Austin, *The day Michigan became 1st state to ban death penalty*, Detroit Free Press (May 4, 2015), available at https://www.freep.com/story/news/2015/05/04/death-penalty/26879705/.

349035, 2020 WL 6231209, at *3 (Mich Ct App Oct 22, 2020) (affirming trial court that imposed a LWOP sentence in part because of "defendant's diagnosis of antisocial personality disorder").

Moreover, a categorical ban would avoid the racial disparities inherent in LWOP sentences. African-Americans, such as Taylor, are disproportionately likely to receive a LWOP sentence in Michigan and throughout the country.[9] According to a 2016 study, 93% of Wayne County's juvenile lifers are African-American, despite African Americans making up only 39% of the county's population.[10] These continued issues in applying constitutional protections to Michigan juveniles indicate that a categorical rule prohibiting LWOP sentences is needed. The arbitrariness of LWOP sentencing post-*Miller* demonstrates that case-by-case determinations are insufficient and are creating a situation in which these sentencing decisions routinely violate Michigan's prohibition on cruel or unusual punishment.[11] A "clear line is necessary to prevent the possibility that life without parole sentences will be imposed on" juvenile offenders "who are not sufficiently culpable to merit that punishment." *Graham*, 560 US at 74. It has become evident that "courts taking a case-by-case proportionality approach" cannot "with sufficient

[9] See, e.g., ACLU, *Racial Disparities in Sentencing, Written Submission of the American Civil Liberties Union on Racial Disparities in Sentencing Hearing on Reports of Racism in the Justice System of the United States Submitted to the Inter-American Commission on Human Rights 153rd Session*, October 27, 2014, at 4 (noting that "in Michigan…while youth of color comprise only 29 percent of Michigan's children, they are 73 percent of the state's child offenders serving life without parole"), available at https://tinyurl.com/2buduyub (last accessed 12/20/2021).

[10] Fair Punishment Project, *Juvenile Life Without Parole in Wayne County*, at 4, 8 (July 2016), available at https://tinyurl.com/4vka6rhk (last accessed 12/20/2021).

[11] It bears mentioning that a categorical ban "does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." *Graham*, 560 US at 75. Rather, a categorical ban would prohibit courts "from making the judgment at the outset that" a juvenile "never will be fit to reenter society." *Id.*

accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Id.* at 77.

E. At the very least, the Michigan Constitution categorically bars LWOP sentences for juveniles convicted of felony murder.

Even if this Court does not adopt a categorical ban on LWOP sentences for all juveniles, it should adopt a categorical ban on such sentences for juveniles convicted of felony murder.

As this Court has stated "first-degree murder is almost certainly the gravest and most serious offense that an individual can commit under the laws of Michigan—the premeditated taking of an innocent human life." *People v Carp*, 496 Mich 440, 514–515; 852 NW2d 801 (2014), vacated on other grounds by *Montgomery*, 577 US 190. Felony murder results in a first-degree murder conviction. But felony murder is unlike first-degree premeditated murder because a prosecutor need not establish a "willful, deliberate, and premeditated killing." MCL 750.316. Nor is the factfinder required to find that the defendant possessed the intent to kill to convict for felony murder. See *Atkins*, 536 US at 311–312; *Bullock*, 440 Mich at 30; *People v Dumas*, 454 Mich 390, 396; 63 NW2d 31 (1997) (the prosecutor must prove the defendant acted with malice, which may be the intent to kill, the intent to do great bodily harm, or a wanton and willful disregard of the likelihood that the natural tendency of the defendant's act is to cause death or great bodily harm). With respect to juveniles then, a minor convicted of felony murder has double-diminished culpability because he or she was a juvenile at the time of the offense *and* the fact-finder was not required to find the requisite intent for premeditated first-degree murder at the time of conviction. *Graham*, 560 US at 48; see also *Atkins*, 536 US at 311–312; *Bullock*, 440 Mich at 30; *Dumas*, 454 Mich 390. That means that a juvenile defendant convicted of being an aider and abettor to a felony murder—such as Taylor—has *thrice* the diminished culpability. As the United States Supreme Court has recognized that "those who do not kill or foresee that life

will be taken are *categorically* less deserving of the most serious forms of punishment than are murderers." *Graham, supra* at 69 (emphasis added). As Justice Breyer explained in his concurring opinion in *Miller*, "given *Graham*'s reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim." 567 US at 490–491 (Breyer J., concurring) (cleaned up).

And this is all the more the case for a juvenile convicted of felony murder as an aider and abettor. As this Court stated over 40 years ago:

> It is fundamentally unfair and in violation of basic principles of individual criminal culpability to hold one felon liable for the unforeseen and unagreed-to results of another felon. In cases where the felons are acting intentionally or recklessly in pursuit of a common plan, the felony-murder rule is unnecessary because liability may be established on agency principles." [*People v Aaron*, 409 Mich 672, 731; 299 NW2d 304 (1980).]

In short, a child convicted of aiding and abetting a felony murder cannot possibly be the most heinous youthful defendant for which life without parole sentences are reserved. Here, Masalmani, Taylor's co-defendant, stated bluntly: "Taylor was neither involved with, nor aware of, what was going to happen to Mr. Landry." (See Masalmani Sentencing Mem 2 n 1, App 257.) To avoid such circumstances and to align Michigan with evolving standards of decency, this Court, at the very least, should adopt a categorical rule that Michigan's Constitution bars LWOP sentences for juveniles convicted of felony murder.

CONCLUSION AND REQUESTED RELIEF

The trial court erred by employing the wrong standards under *Miller* when it resentenced Taylor to LWOP. The trial court failed to place the burden of proof on the prosecution, employed the *Miller* factors as aggravators rather than mitigators, and failed to employ the

particularized sentencing determination required by *Miller*. Taylor is not one of the rare juveniles for whom a sentence of LWOP is justified. But this Court should go further. It should accept the U.S. Supreme Court's invitation in *Jones* to impose additional sentencing limits for juveniles convicted of murder. This Court should exercise its independent obligation to construe the Michigan Constitution and hold that the Michigan Constitution categorically bars LWOP sentences for juveniles—or, at the very least, for juveniles convicted of felony murder.

Respectfully submitted,

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