STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No. 154994
Plaintiff-Appellee,	Court of Appeals No. 325834
v.	Macomb Circuit No. 09-5243-FC
ROBERT TAYLOR,	
Defendant-Appellant.	

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

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DID THE TRIAL COURT PROPERLY WEIGH THE FACTORS ENUNCIATED IN *MILLER V ALABAMA* AND MCL § 769.25 AND DID IT ABUSE ITS DISCRETION IN SENTENCING THE DEFENDANT TO A TERM OF LIFE IMPRISONMENT WITHOUT PAROLE FOR HIS CONVICTION FOR FIRST-DEGREE FELONY MURDER?

Court of Appeals' Answer: "No"

Trial Court's Answer: "No"

Defendant-Appellant's Answer: "Yes"

Plaintiff-Appellee's Answer: "No"

COUNTER-STATEMENT OF FACTS

After a trial before Macomb County Circuit Court Judge Diane M. Druzinski ("Judge Druzinski") in December of 2010, a jury convicted Robert Taylor ("Taylor") of First-Degree Felony Murder (MCL § 750.316), Carjacking (MCL § 750.529a), Conspiracy to Commit Carjacking (MCL § 750.157a), Kidnapping (MCL § 750.349), Conspiracy to Commit Kidnapping, and Felony Firearm (MCL § 750.227b). (Appendix 18).

On February 3, 2011, Judge Druzinski sentenced Taylor to a term of life imprisonment without the possibility of parole on his First-Degree Felony Murder conviction, terms of 25 years to 50 years imprisonment on the Carjacking, Conspiracy to Commit Carjacking, Kidnapping, and Conspiracy to Commit Kidnapping convictions, and two years' imprisonment on the Felony Firearm conviction. (Appendix 21).

Taylor appealed as of right. The Michigan Court of Appeals ("Court of Appeals") affirmed his convictions, but vacated Judge Druzinski's sentence on Taylor's conviction for First-Degree Felony Murder and remanded for resentencing consistent with *Miller v Alabama*, 132 SCt 2455; 183 LEd2d 407 (2012) and *People v Carp*, 298 Mich App 472; 828 NW2d 685 (2012) (affirmed at 496 Mich 440; 852 NW2d 801 (2014)). See Opinion (3/21/13)- COA No. 303208. (Appendix 33-40).

In early 2014, the Michigan Legislature passed MCL § 769.25, which took effect on March 4, 2014. In April of 2014, the prosecution filed a motion under MCL § 769.25(3) requesting imposition of a sentence of life

imprisonment without the possibility of parole on the defendant's First-Degree Felony Murder conviction. (Appendix 44-45). Judge Druzinski conducted a three-day hearing in late October of 2014. (Appendix 41-239).

The defense called two witnesses. Dr. Daniel P. Keating, a psychology professor at the University of Michigan and an expert in adolescent brain development, testified regarding the scientific underpinnings of the United States Supreme Court's ruling in *Miller*. (Appendix 51-114). Kathleen Schaefer, a former parole/probation officer and counselor, testified as an expert in parole/probation regarding Taylor's circumstances. (Appendix 188-215). In addition to this testimony, the parties stipulated to the admission of numerous exhibits during this hearing, including Taylor's disciplinary records from the Michigan Department of Corrections. (Appendix 222-226).

Taylor appealed as of right. The Court of Appeals affirmed Judge Druzinski's sentence in a per curiam opinion. (Appendix 353-360). In late 2016, Taylor sought leave to appeal with this Court. This Court, on September 22, 2021, directed its Clerk to schedule oral argument on Taylor's application for leave to appeal. Further, this Court granted Taylor's motion to supplement:

> . . . to the extent that the appellant, by counsel of record, shall file a supplemental brief addressing whether, in exercising its discretion to impose a sentence of life without parole (LWOP), the trial court properly considered the "factors listed in *Miller v Alabama*, [567 US 460] (2012)" as potentially mitigating circumstances. MCL 769.25(6). See also *People v Skinner*, 502 Mich 89, 113-116 (2018). In particular, the parties shall address: (1) which party, if any, bears the burden of proof showing that a *Miller* factor does or not suggest a LWOP sentence; (2)

> whether the sentencing court gave proper consideration to the defendant's "chronological age and its hallmark features," *Miller*, 567 US at 477-478, by focusing on his proximity to the bright line age of 18 rather than individual characteristics; and (3) whether the court properly considered the defendant's family and home environment, which the court characterized as "far from optimal," as weighing against his potential for rehabilitation.

Taylor filed his supplemental brief on December 20, 2021. Now, the prosecution files its response.

ISSUE I

THE TRIAL COURT PROPERLY WEIGHED THE FACTORS ENUNCIATED IN *MILLER V ALABAMA* AND MCL § 769.25 AND DID NOT ABUSE ITS DISCRETION IN SENTENCING THE DEFENDANT TO A TERM OF LIFE IMPRISONMENT WITHOUT PAROLE FOR HIS CONVICTION FOR FIRST-DEGREE FELONY MURDER.

STANDARD OF REVIEW

An appellate court reviews a trial court's decision to sentence a juvenile to life imprisonment without parole for an abuse of discretion. *People v Skinner*, 502 Mich 89, 131-137; 917 NW2d 292 (2018). An appellate court reviews findings of fact by a trial court for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). An appellate court reviews issues of statutory interpretation de novo. *People v Idziak*, 484 Mich 549, 553; 773 NW2d 616 (2009). Questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246, 249 (2002).

ARGUMENT

In *Miller*, supra at 2467-2475, the United States Supreme Court held that mandatory life sentences without the possibility of parole for individuals under the age of 18 were "cruel and unusual" and violated the Eighth Amendment to the United States Constitution. The *Miller* Court observed:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It

> prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for 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. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. *Id.* at 2468.

Miller, however, rejected arguments for a categorical bar to sentencing juveniles to life in prison without parole, observing that it did not "foreclose a sentencer's ability to make that judgment in homicide cases." *Id.* at 2469. Instead, the opinion emphasized that its holding served to "mandate[] only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* at 2471.

The Michigan Court of Appeals ("Court of Appeals") subsequently addressed *Miller* as it applied to Michigan's sentencing scheme in *People v Carp*, 298 Mich App 472; 828 NW2d 685 (2012). In *Carp*, 298 Mich App at 531, the Court of Appeals held that MCL § 791.234(6)(a), which provides that a prisoner sentenced to life imprisonment for First-Degree Murder "is not eligible for parole," was unconstitutional "as written and as applied to juvenile offenders convicted of homicide." According to the *Carp* Court, the statute "fail[ed] to acknowledge a sentencing court's discretion to determine that a convicted juvenile homicide offender may be eligible for parole. *Id.* Ultimately,

the Court of Appeals in *Carp* directed that a trial court, in sentencing a juvenile convicted of First-Degree Murder, must "evaluate and review those characteristics of youth and the circumstances of the offense as delineated in *Miller* and this opinion in determining whether following the imposition of a life sentence the juvenile is to be deemed eligible or not eligible for parole." *Id.* at 538.

After the Court of Appeals' decision in *Carp*, the Michigan Legislature passed MCL § 769.25, which took effect on March 4, 2014. The statute applies to criminal defendants who were less than 18 years of age at the time he or she committed an offense punishable by life imprisonment without the possibility of parole before the act's effective date and "[o]n June 25, 2012 the case was pending in the trial court or the applicable time periods for direct appellate review by state or federal courts have not expired." MCL § 769.25(1)(b)(ii). The statute provides that "[i]f the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described under subsection (1)(b), the prosecuting attorney shall file the motion within 90 days after the effective date of the amendatory act that added this section." Further, the statute indicates that if the assistant prosecuting attorney files such a motion: "the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in *Miller v Alabama*, 576 US ___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated." MCL § 769.25(6). Finally, "the court

shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing." MCL § 769.25(7).

This Court weighed in on this issue in *People v Carp*, 496 Mich 440; 852 NW2d 801 (2014), affirming the Court of Appeals' decision. In addition, however, this Court, echoing language in *Miller* itself, emphasized that neither the Eighth Amendment to the United States Constitution nor the Michigan Constitution categorically bars a life-without-parole sentence for juvenile homicide offenders, even if that juvenile was convicted on an aiding and abetting theory. *Id.* at 528.

Two years later, the United States Supreme Court held in *Montgomery v Louisiana*, 136 SCt 718; 193 LEd2d 599 (2016), that its decision in *Miller* had retroactive application. In preparation for this eventuality, the State Legislature, in passing MCL § 769.25, had passed MCL § 769.25a, which sets forth a mechanism for resentencing affected defendants. In 2018, in *Skinner*, 502 Mich App at 96-97, 110-126, this Court held that a judge, not a jury, must determine whether to impose a sentence of life imprisonment without parole under MCL § 769.25.

Against this backdrop, this Court has granted leave to appeal "limited to the issue whether, in exercising its discretion to impose a sentence of life without parole (LWOP), the trial court properly considered the "factors listed in *Miller v Alabama*, [567 US 460] (2012)" as potentially mitigating circumstances.

MCL 769.25(6). See also *Skinner*, 502 Mich at 113-116." In particular, this Court has ordered that the parties address: "(1) which party, if any, bears the burden of proof showing that a *Miller* factor does or not suggest a LWOP sentence; (2) whether the sentencing court gave proper consideration to the defendant's 'chronological age and its hallmark features,' *Miller*, 567 US at 477-478, by focusing on his proximity to the bright line age of 18 rather than individual characteristics; and (3) whether the court properly considered the defendant's family and home environment, which the court characterized as 'far from optimal,' as weighing against his potential for rehabilitation."

I. A Review of *Miller*, *Montgomery*, and Applicable Michigan Law Reveals that Neither the Prosecution Nor the Defendant Bears the Burden of Proof of Showing that a *Miller* Factor Does or Does Not Suggest a LWOP Sentence and No Constitutional Basis Exists to Impose Such a Burden on the Prosecution.

In its grant of the defendant's application for leave to appeal, this Court asked the parties to address "which party, if any, bears the burden of proof of showing that a *Miller* factor does or does not suggest a LWOP sentence." In *Miller*, the United States Supreme Court did not discuss a burden of proof at such sentencings. Rather, the *Miller* Court simply stated that mandatory life imprisonment without parole for a juvenile precludes the trial court's "consideration" of these factors. 567 US at 477. In that regard, *Miller* holds 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." 567 US at 488.

Similarly, the applicable Michigan statute, MCL § 769.25a does not reference a burden of proof at these sentencing. The relevant statute, MCL § 769.25a(6) merely instructs the trial court to conduct a hearing on the prosecuting attorney's motion "as part of the sentencing process" and "consider the factors listed in *Miller v Alabama*, 576 US . . . ; 183 L Ed 2d 407; 132 S Ct 2455 (2012), any may consider any other criteria relevant to its decision, including the individual's record while incarcerated." Further, MCL § 769.25a(7) provides that the trial court "shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." Finally, the trial court "may consider evidence presented at trial together with any evidence presented at the sentencing hearing." MCL § 769.25a(7)

Only in *Montgomery*, 136 SCt at 736, does the United States Supreme Court allude to a burden of proof at a *Miller* hearing. At the end of the opinion, Justice Kennedy observed that "[i]n light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, however, prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 736-737. Indeed, this Court, in *Skinner*, 502 Mich at 131, made this observation, noting that "there is language in *Montgomery* that suggests that the juvenile offender bears the burden of showing that life

without parole is not the appropriate sentence by introducing mitigating evidence."

Given the overarching thrust of the language in *Miller*/*Montgomery* and MCL § 769.25a, the prosecution submits that neither party bears the burden of showing that a *Miller* factor does or does not suggest a sentence of life imprisonment without the possibility of parole. Traditionally, in the State of Michigan, neither party carries a burden of proof regarding the trial court's imposition of sentence. This interpretation is buoyed by the discussion of *Miller*/*Mongtomery* in *Skinner*, 502 Mich at 131, in which this Court stated:

> Similarly, neither *Miller* nor *Montgomery* imposes a presumption *against* life without parole for those juveniles who have been convicted of first-degree murder on either the trial court or the appellate court. *Miller* and *Montgomery* simply require that the trial court consider "an offender's youth and attendant characteristics" before imposing life without parole. *Miller*, 567 US at 483.

Moreover, the *Skinner* Court's holding that "neither Miller nor Montgomery requires this Court to deviate from its traditional abuse-of-discretion standard in reviewing a trial court's decision to impose life without parole" further buttresses the view that a *Miller* hearing is sentencing hearing like any other in the State of Michigan and does not carry with it an applicable burden of proof.

On remand in *Skinner III* (*People v. Skinner*, COA No. 317892), the Court of Appeals seized on this language in addressing the defendant's contention that the prosecution carried the burden of proof at a *Miller* hearing:

> Defendant also argues on appeal that the trial court violated her due process rights when it declined to

> impose a burden of proof on the prosecution. However, this argument is governed by our Supreme Court's holding in *Skinner*, 502 Mich at 131. Specifically, our Supreme Court explained that, in sentencing a juvenile defendant under MCL 769.25, a trial court is not required to may any explicit findings. *Id*. The trial court need not find that a defendant is irreparably corrupt or that a defendant is a rare juvenile offender. *Id*. Rather, a trial court must simply consider "an offender's youth and attendant characteristics . . . *Id*. at 131 (quotation marks and citation omitted). Moreover, MCL 769.25 does not require the prosecution to meet a burden of proof. Accordingly, the trial court did not err in declining to impose a burden of proof at sentencing.

Under the circumstances, the prosecution maintains that neither party carries a burden of proof at a *Miller* hearing. Given that Judge Druzinski did not impose a burden of proof on either party at the *Miller* hearing in 2014, no error occurred requiring reversal.

As indicated, the defendant does not root his argument in a discussion of *Miller*, *Montgomery*, or even the applicable Michigan statute. Instead, he relies wholly on case law from a small number of other States. Notably, each of the cases cited by the defendant is distinguishable because the burden of proof (or presumption) was assigned, either explicitly or implicitly, based on a specific state sentencing statute, a misreading of *Miller* and *Montgomery*, or an entirely different constitutional analysis. See *Stevens v Oklahoma*, 422 P3d 741, 750; 2018 OK CR 11 (Okla Crim App, 2018) (explaining that finding of irreparable corruption increases maximum punishment authorized by verdict, and, as a result, must be proved by prosecutor beyond a reasonable doubt); *Davis v Wyoming*, 415 P3d 666, 681; 2018 WY (2018) (holding that *Miller* and

Montgomery require trial court to start with presumption against LWOP that may be rebutted by prosecutor); *Pennsylvania v Batts*, 640 Pa 401, 471-472; 163 A3d 410 (2017) (find that *Miller* and *Montgomery* require presumption against LWOP for juvenile defendants); *Iowa v Seats*, 865 NW2d 545, 555 (Iowa, 2015) (interpreting *Miller* as creating presumption that juvenile defendants should be parole eligible); *Utah v Houston*, 353 P3d 55, 69-70; 2015 UT 40 (2015) (stating that Utah Legislature "determined that a jury may sentence a defendant to life without parole if it determines that the State has satisfied its burden to demonstrate that this is the 'appropriate' sentence to impose"); *Missouri v Hayes*, 404 SW3d 232, 241 (Mo, 2013) (allocating burden of proof to prosecution with only reference to case law regarding constitutional implications of increasing sentence on basis of judge-found facts); *Conley v Indiana*, 972 NE2d 864, 871 (Ind, 2012) (placing burden on prosecutor based on state statute).

Finally, the United States Supreme Court's recent decision in *Jones v Mississippi*, 141 SCt 1307; 209 LEd2d 390 (2021), further supports this position in its emphasis on the narrowness of the holdings in *Miller* and *Montgomery*. In declining to hold that *Miller* or *Montgomery* required the trial court to make a separate factual finding of permanent incorrigibility before imposing a discretionary sentence of LWOP on a juvenile offender, the *Jones* Court emphasized that *Miller* "simply required that a sentence consider youth as a mitigating factor when deciding whether to impose a life-without-parole sentence." *Id.* at 1316. In that regard, "*Montgomery* did not purport to add to

Miller's requirements. *Id.* As *Jones* stressed, *Miller* and *Montgomery* merely require that a hearing where youth and its attendant characteristics are considered as sentencing factors is to separate those juveniles who may be sentenced to life without parole from those who may not. *Id.* at 1316.

II. In Exercising Its Discretion to Impose a LWOP Sentence, the Trial Court Properly Considered the *Miller* Factors as Potentially Mitigating Circumstances.

A. Chronological Age and Hallmark Features.

In its seminal decision in *Miller*, *supra* at 2468, the United States Supreme Court decided that state criminal sentencing schemes that mandate sentences of life imprisonment without the possibility of parole amount to unconstitutional cruel and unusual punishment, noting, in part, that such statutes "preclude[] consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate the risks and consequences." The *Miller* Court provided a bright-line in considering the defendant's chronological age and his juvenile psychological disposition—18 years old.

i. The Trial Court Gave Proper Consideration to the Defendant's Chronological Age and Its Hallmark Features.

In granting leave to appeal, this Court requested that the parties address "whether the sentencing court gave proper consideration to the defendant's 'chronological age and its hallmark features,' *Miller*, 567 US at 477-478, by focusing on his proximity to the bright line age of 18 rather than his individual characteristics." See Order (4/5/19)- MSC No. 154773.

Here, Judge Druzinski, in her written opinion, specifically acknowledged the "hallmark features" of youth and the brain science that underpin the United States Supreme Court's decision in *Miller*:

> With respect to the "hallmark features" of the defendant's age, including immaturity, impetuosity, and failure to appreciate risks, defendant's attorney indicated that defendant would rely on the testimony of Masalmani's expert, Dr. Daniel Keating. See Trans. of 10/24/14 at 3-4 (Simon). Dr. Keating testified that the limbic system—which serves as an "arousal system, . . . an incentive system, and a reward system"—is much more active during one's teenage years than as an adult. Trans. Of 10/21/14 at 20-21 (Keating). Dr. Keating further testified that the prefrontal cortex governs "executive function" and "is designed as a brake on the [limbic] system but it develops much more slowly than the limbic system. *Id.* at 23 (Keating). He explained that there is a "developmental maturity mismatch" between the limbic system and the prefrontal cortex. *Id.* at 24-25 (Keating). He explained that "[t]he prefrontal cortex . . . doesn't reach full maturity until the mid-20s." *Id.* at 23 (Keating). As a result, teenagers tend to engage in "generally reckless behavior." *Id.* at 28 (Keating). (Appendix 321-322).

Given the foregoing, Judge Druzinski carefully considered" the "hallmark features" of chronological age at the *Miller* hearing.

Trial courts applying the *Miller* factors are confined by the 18-year age limit and the brain science is, in effect, baked into the holdings in *Miller*/*Montgomery*. As a result, expert testimony like Dr. Keating's is of limited utility at a *Miller* hearing where every defendant's limbic system will be overly active and every defendant's prefrontal cortex will be developing. Instead, at a *Miller* hearing, trial courts must examine to evidence adduced regarding the

defendant's own chronological age/maturity and determine whether the "hallmark features" of adolescence discussed in *Miller*, including immaturity, impetuosity, and a failure to appreciate risks in consequences, played any role in the defendant's crimes.

Here, the defendant was 16 years and ten months old when he and his co-defendant ruthlessly executed Matthew Landry in a secluded Detroit drug den several hours after abducting him and methodically using him to obtain cash and a vehicle. (Appendix 355-356). By contrast, as Judge Druzinski observed, *Miller* "is readily distinguishable" given that "*Miller* dealt with juvenile defendants who were 14 years old at the time of their offenses—roughly two years younger than defendant." (Appendix 322). The defense introduced no testimony or evidence at the resentencing hearing demonstrating that the defendant was unusually immature or impetuous for a nearly-17-year-old.

In this regard, the United State Supreme Court expressly indicated in *Miller* that it was appropriate to take into account the differences between juveniles of different ages. More specifically, in explaining the defects of a scheme mandating life imprisonment without the possibility of parole for juveniles, the Court stated: "Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." *Miller*, 132 S Ct at 2467-2468. In fact, Justice Kennedy criticized the dissents in *Miller* for continually referring to 17-year-olds who have committed brutal crimes and comparing those defendants to the

14-year-old defendants in *Miller*, explaining: "Our holding requires factfinders to attend to exactly such circumstances—to take into account the differences among defendants and crimes. By contrast, the sentencing schemes that the dissents find permissible altogether preclude considering these factors." *Id.* at 2469 n 8. In other words, treating 14-year-olds the same as 17-year-olds is exactly what the ruling in *Miller* sought to end and, thus, Judge Druzinski did not err in focusing on the defendant's individual age/maturity in analyzing the *Miller* factors.

The most significant aspect of this factor lies, however, in the line that *Miller* "drew . . . between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery*, 577 US at ___. Notably, the Court of Appeals stated:

> The record refutes any claim that the hallmark features of adolescence identified in *Miller*, 132 S Ct at 2468, including immaturity, impetuosity, and a failure to appreciate risks and consequences, played any role in defendant's crimes. This was not, as in *Miller*, 132 S Ct at 2465, a mere botched robbery that turned into a killing. Defendant and his codefendant, Ihab Masalmani, brazenly and forcibly kidnapped and carjacked Matt Landry in broad daylight outside a restaurant, with defendant acting as a lookout while armed with a weapon. Defendant and Masalmani held Landry captive for hours, took him to a drug house in a drug-infested area of Detroit where defendant sat on a couch with Landry while Masalmani used drugs, and then took Landry to a nearly abandoned house at which Masalmani killed Landry in a brutal execution style shooting him in the back of the head. Defendant's criminal actions over an extended period of time are not reflective of a merely immature or impetuous adolescent who fails to appreciate risks and consequences. (Appendix 356).

Working within *Miller*'s framework, Judge Druzinski did not err in concluding that the defendant's chronological age and its hallmark features did not weigh in favor of mitigation.

B. Family and Home Environment

Also in *Miller, supra* at 2468, the United States Supreme Court observed that such mandatory sentencing schemes for juveniles "prevent[] taking into account the family and home environment that surrounds him—and from he cannot usually extricate himself—no matter how brutal or dysfunctional."

Here, Judge Druzinski noted at the resentencing hearing that the defendant "grew up in a very unstable and unsafe environment." (Appendix 335). The defendant was "exposed to physical neglect and violence in the home," and "[t]here was significant exposure to substance abuse." (Appendix 335). The defendant's father, who was generally not present, "abused alcohol and crack cocaine." (Appendix 335-336). The defendant's mother, who gave birth to him at age 13, "did not provide adequate food and shelter at times." (Appendix 335-336).

In light of the testimony and evidence adduced at the *Miller* hearing, Judge Druzinski concluded that the "defendant's family and home environment were very far from optimal." (Appendix 336). As a result, the trial court did not err in concluding that this factor "arguably" weighs in defendant's favor against a life sentence without the possibility of parole." (Appendix 336).

C. Circumstances of the Homicide Offense

The *Miller* court, in holding that mandatorily sentencing a juvenile to life imprisonment without the possibility of parole violated the Eight Amendment, observed that such a scheme "neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and way familial and peer pressures may have affected him." *Id.* at 2468. The defendant, along with his co-defendant, brazenly kidnapped and carjacked Matthew Landry in broad daylight in Eastpointe and, several hours later, brutally executed him inside a burnt-out drug in Detroit. (Appendix 336). Nothing in the testimony or evidence from the resentencing hearing suggested that the defendant's crime spree was the result of familial or peer pressure—as Judge Druzinski stated, "[t]here is no evidence or testimony tying any of defendant's criminal activity." (Appendix 337).

Judge Druzinski observed that the defendant "drove Matt Landry around town for hours and facilitated his murder in cold blood. While the evidence did not establish that defendant literally pulled the trigger, his actions were still quite culpable." (Appendix 337). Moreover, there "[wa]s no evidence that defendant did not expect the murder to occur, or that he attempted to remove himself from the situation or dissuade his codefendant from his course of action" and, instead, "willfully engaged in the criminal activity which led to Matthew Landry's death." (Appendix 337). In other words, the circumstances surrounding this murder were not a mitigating factor under *Miller*: "[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." (Appendix 337). As the Court of Appeals observed: "The evidence supports the conclusion that defendant was actively and extensively involved in committing these crimes, and there is no indication that defendant was subjected to any family or peer pressure." (Appendix 357).

D. Incapacities of Youth

In *Miller*, *supra* at 2468, the United States Supreme Court, in striking down sentencing schemes that mandate life in prison without the possibility of parole for juvenile offenders, observed that such systems "ignore[] that [the defendant] 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." Here, at the resentencing hearing, the defense did not even contest that the defendant may have been charged with a lesser crime if not for his age. As Judge Druzinski concluded, "[t]here is no evidence that at the incapacities of youth caused defendant to be unable to participate in his defense . . . [n]or is there any evidence that he implicated himself due to youthful incapacities." (Appendix 337). As a result, she did not err in determining that this *Miller* factor did not weigh in favor of mitigation.

E. Possibility of Rehabilitation

Finally, *Miller*, *supra* at 2468, in ruling that a juvenile offender may not be automatically sentenced to life without the possibility of parole without offending the Eighth Amendment, stated that "this mandatory punishment

disregards the possibility of rehabilitation even when the circumstances most suggest it."

Judge Druzinski did not err in concluding that this *Miller* factor did not weigh in favor of mitigation. (Appendix 325). The utter depravity of the defendant's crimes suggests that the defendant is wholly incapable of rehabilitation. Moreover, the relevant statute, MCL § 769.25(6), provides that, at a resentencing hearing, the trial court must consider the *Miller* factors, as well as "any other criteria relevant to its decision, including the individual's record while incarcerated." Notably, by the date of the *Miller* hearing in 2014, the defendant had already accumulated five Major Misconducts within the Michigan Department of Corrections, with three of them being for "fighting." (Appendix, 293). Further, the defendant's juvenile record "included arrests for truancies, curfew violations, trespass, assaults, entry without permission, and unarmed robbery. (Appendix 358). Given the foregoing, the appellate record fully supports Judge Druzinski's determination that the "defendant's prospects for rehabilitation are negligible." (Appendix 325).

Significantly, the defense at the *Miller* hearing was entirely unable to introduce any testimony or evidence tending to show that the defendant had any real prospects for rehabilitation. Dr. Keating conceded that it was difficult to make any predictions regarding rehabilitation for any juvenile LWOP defendant. (Appendix 324). Even so, as Judge Druzinski noted in her ruling, Dr. Keating "acknowledged that the rehabilitation challenges are certainly higher in the case of a juvenile who is capable of pulling a trigger" and that "the

worse the circumstances, the more likely it is for nonresilience, no rehabilitation to be the case." (Appendix 325).

Similarly, Kathleen Schaefer ("Schaefer"), the defendant's expert on parole and probation, who interviewed the defendant, agreed with Dr. Keating that "there is no test that can indicate whether a person can be rehabilitated" and carefully declined to make any specific pronouncements regarding the defendant's capacity for rehabilitation. (Appendix 325). As the Court of Appeals noted:

> . . . Schaefer indicated that a percentage of juveniles will continue on a path of chronic violent behavior. Schaefer agreed with a study indicating that a large proportion of those involved in violent behavior at an early age eventually become chronic violent offenders. She noted than impaired development as well as psychological and emotional difficulties can arise from child abuse and neglect, and such conditions can exist on a long-term basis. Schaefer agreed that some people change and some people do not change . . . Schaefer agreed that [the defendant's juvenile and criminal history] reflected a type of progression which is not uncommon. Schaefer was not making a prediction about defendant but said that people have the capacity to change. Schaefer said that defendant was introspective in meetings and seemed to understand the gravity of what occurred. Schaefer hopes defendant will build on these developments but lacked proof that he would do so . . . (Appendix 358).

Surely such testimony does not constitute evidence that the defendant has any real prospects for rehabilitation.

i. The Trial Court Properly Considered the Defendant's Family/Home Environment As It Relates to the Defendant's Potential for Rehabilitation.

In its grant of leave to appeal, this Court directed the parties to address "whether the trial court properly considered the defendant's family and home environment, which the court characterized as "far from optimal," as weighing against his potential for rehabilitation."

In her ruling, Judge Druzinski stated:

> . . . The difficulty of defendant's upbringing is the only factor which could be said to weigh in favor of an indeterminate sentence, but this factor also suggests that defendant's prospects for rehabilitation are minimal. It is particularly telling that there was no testimony or evidence suggesting that defendant has shown any signs of rehabilitation to date. Nor is there even any evidence that defendant has accepted responsibility for his part in the offense. (Appendix 325).

A review of the appellate record demonstrates that Judge Druzinski's findings are fully supported by the witnesses presented by the defense at the *Miller* hearing.

As indicated, this final *Miller* factor focuses on the defendant's potential for rehabilitation. Further, it is undisputed that the defendant experienced a "far from optimal" family and home environment. However, Dr. Keating testified on cross-examination:

> It is certainly the case that patterns of behavior are predictive. Whether they're predictive with any certainty in a particular case is something that would be much harder to say. So it's certainly the case just like the more risks there are or the more negative experiences that an individual has had during their developmental period, on average that will indicate a

> higher risk for not good outcome for that individual, but the distinction between those individuals who will potentially rise above those early very serious difficulties and those who don't is very hard to discern at that point in time. That's always a retrospective thing. So the area of literature in this respect is what's known as the resilience literature. Resilience indicates that individuals who have had very negative experiences and themselves have been involved in variety of negative kinds of behaviors, the prediction on average is that there is a lower probability that they will in fact be able to succeed. Nevertheless, there's always a percentage of such individuals who do, nevertheless succeed. The distinction between resilient and nonresilient individuals, the resilient individuals would be a minority, the nonresilient individuals would be the majority, and the more exposures to bad stuff or bad actions the individual had committed are – increases the percentage of nonresilient versus resilient, right. (Appendix 95-96).

Further, as indicated, Dr. Keating told Judge Druzinski that "[g]reater rehabilitation challenges exist for someone who purposely shot another." (Appendix 324).

Subsequent to Dr. Keating's testimony for the defendant's prospects for rehabilitation, Schaefer, as indicated, testified that "a large proportion of those involved in violent behavior at an early age eventually become chronic violent offenders." (Appendix 358). She admitted that "impaired development as well as psychological and emotional difficulties can arise from child abuse and neglect, and such conditions can exist on a long-term basis." (Appendix 358). At the *Miller* hearing, the defense presented no evidence whatsoever the defendant was undergoing intensive psychotherapy of any kind in the Michigan Department of Corrections or that the defendant intended to engage in intensive psychotherapy while inside the Michigan Department of Corrections.

As the Court of Appeals wrote, the defendant's upbringing indicates "that he faces significant challenges in improving himself, as reflected in the testimony of Dr. Keating and Schaefer." (Appendix 358). At the same time, the appellate record is barren of any evidence or testimony regarding the defendant's rehabilitative efforts and neither party appears to contest that the Michigan Department of Corrections lacks available treatment programs. As a result, the trial court, based on the defense testimony at the *Miller* hearing, properly considered the defendant's family and home environment, at least in part, as not favoring mitigation as it relates to his potential for rehabilitation.

As above, the United States Supreme Court's decision in *Jones* buttresses this entire calculus, rejecting numerous arguments that *Miller* "requires more than just a discretionary sentencing procedure." 141 SCt at 1314. As the *Jones* Court stated: "*Miller* followed the Court's many death penalty cases and required that a sentencer consider youth as a mitigating factor when deciding whether to impose life-without-parole sentence . . . And *Montgomery* did not purport to add to Miller's requirements. *Id.* 1316. In the case at bar, Judge Druzinski wholly complied with the mandates of *Miller*/*Montgomery*/*Jones*, conducting a hearing and resentencing "where youth and its attendant characteristics are considered as sentencing factors" to determine whether the defendant was a "juvenile[] who may be sentenced to life without parole . . . . [or] not. *Miller*, 567 US at 210.

RELIEF REQUESTED

Given the foregoing, Plaintiff respectfully urges this Honorable Court to **DENY** Defendant's Application.

Respectfully Submitted,

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