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

Joshua D. Abbott (P53528) Macomb County Prosecutor's Office 1 South Main Street, Floor 3 Mount Clemens, Michigan 48043-2375 586.469.7307 joshua.abbott@macombgov.org	Conor B. Dugan (P66901) WARNER NORCROSS + JUDD LLP 150 Ottawa Avenue NW, Suite 1500 Grand Rapids, Michigan 49503 616.752.2000 conor.dugan@wnj.com
Attorneys for Plaintiff-Appellee	*Attorneys for Defendant-Appellant*

APPELLANT ROBERT TAYLOR'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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INTRODUCTION

In 25 pages of briefing, it is what the prosecution does *not* say that demonstrates the fatal weaknesses of its position. The prosecution resolutely maintains that the trial court engaged in the required individualized assessment of Defendant Robert Taylor. Yet, nowhere in its brief does the prosecution mention, let alone address the most salient fact that the trial court failed to consider: "[Robert] Taylor was neither involved with, nor aware of, what was going to happen to Mr. Landry." (Masalmani Sentencing Memo 2 n 1, App 257.) Rather, the prosecution simply doubles-down on the narrative that the brutal nature of the underlying murder justifies the trial court's imposition on Taylor of a sentence of life without the possibility of parole ("LWOP"). (See Appellee's Suppl Br 15, 18-19.) Nor does the prosecution address the fact that the trial court essentially used the exact same language in sentencing Ihab Masalmani as it did in sentencing Taylor. (See Taylor's Suppl Br 22-23.) But, by failing to even consider Masalmani's claim that Taylor was not involved, the trial court failed to engage in the individualized considerations that the prosecution *agrees* are required under *Miller v Alabama*, 567 US 460 (2012). And, by failing to differentiate Taylor from his co-defendant, the trial court further demonstrated that it failed to engage in *Miller*'s individualized considerations. The prosecution's silence on these points speaks volumes.

But that is not all. The prosecution contends that there is no constitutional basis to impose on the prosecution the burden of proving that a juvenile defendant should be sentenced to LWOP. But there is a basis both in United States *and* Michigan constitutional law. And there is a basis in the normal burdens and presumptions that are imposed on moving parties—burdens and presumptions that are only heightened by the sort of liberty interest at issue in a LWOP sentence. While the prosecution argues that the burden of proof should be on neither the

criminal defendant nor the prosecution, the practical effect of the prosecution's argument is that a LWOP sentence will be the *default* sentence rather than the *rare* sentence. Because there is no burden on the prosecution, all a prosecutor has to do is essentially move to sentence a juvenile to LWOP and then argue that a defendant's evidence of mitigation is unpersuasive. Under the prosecution's theory, *Miller*'s promise is illusory. But constitutional rights are not illusory. They are real rights that create real obligations.

Indeed, that points to yet another error in the prosecution's argument. Despite this Court's clear holding that the *Miller* factors are mitigators, *People v Skinner*, 502 Mich 89, 115; 917 NW2d 292 (2018), the prosecution argues that the trial court's conclusion that Taylor's family and home life weighed *in favor* of a LWOP sentence is "fully supported." (See Appellee's Suppl Br 22.) According to the prosecution, the *Miller* mitigating factors can be used to *enhance* a sentence.

Finally, the prosecution's flawed arguments are marred by its misstatements of the record. For instance, the prosecution contends that at resentencing Taylor put forward no evidence of the real possibility of rehabilitation, no evidence of any rehabilitative efforts, and that no party contested that the Michigan Department of Corrections ("MDOC") did not have any proper rehabilitative programs. (*Id.* at 20, 24.) But Taylor's expert witness on parole and probation issues testified about MDOC's rehabilitation programs, the positive changes Taylor had made since being in prison, and that Taylor's early entry into MDOC actually increased his chances of rehabilitation. (See Taylor's Suppl Br 6 (discussing expert's testimony).)

Any one of these flawed arguments or misstatements alone is reason enough to grant Taylor's Application for Leave to Appeal. Taken together, they overwhelmingly support granting the Application, ordering full briefing and argument, and concluding that the trial court

violated the requirements of *Miller* and its progeny (and the Michigan Constitution). Taylor's future and the future of numerous other convicted juveniles hang in the balance.

REPLY ARGUMENT

I. The burden of proof belongs on the prosecution.

The prosecution states that there is no constitutional basis to impose on the prosecution the burden of proving that the *Miller* mitigating factors do not support a LWOP sentence. (Appellee's Suppl Br 8.) Curiously, the prosecution argues that Taylor "does not root his argument in a discussion of *Miller*, *Montgomery* [*v Louisiana*, 577 US 190 (2016)], or even the applicable Michigan statute" but rather "relies on case law from a small number of other States." (*Id.* at 11.) These contentions are not true. Indeed, the entire premise of Taylor's argument is that to vindicate the Constitutional right articulated in *Miller* the burden of proof *must* be on the prosecution. (See Taylor's Suppl Br 15-17.) And it is not clear how the prosecution can claim that Taylor's argument is rooted in out-of-state cases when Taylor spent nearly four pages of his supplemental brief arguing why *Miller*, Michigan's normal presumptions regarding burdens of proof, *and* Due Process *require* that burden of proving a LWOP sentence is be on the prosecution. (*Id.* at 15-19.) Indeed, it is only *after* arguing that *Miller*, Due Process, and Michigan's normal burdens require the burden of proof to be on the prosecution that Taylor cites to a string of out-of-state cases that have reached the same conclusion. (*Id.* at 19.) The decisions of other state courts that have addressed the same or similar issue and concluded that the burden of proof is on the prosecution are both relevant and persuasive for this Court's analysis.

And the conclusion of those other state courts makes sense. At issue is a fundamental liberty: whether a juvenile criminal defendant will spend the rest of his or her life in prison or have an opportunity to leave prison alive. If a juvenile defendant bears the burden of proving he

or she is entitled to an indeterminate sentence, the risk to the defendant is great and will increase the possibility and frequency of juveniles who are entitled to indeterminate sentences receiving a LWOP sentences. The government does not have an interest in making LWOP sentences frequent; it has an interest in getting things right. 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"). That is why in "the administration of criminal justice, our society" typically "imposes almost the entire risk of error upon itself." *Addington v Texas*, 441 US 418, 423–424 (1979).

A contrary conclusion is nonsensical. To ensure that LWOP sentences for juveniles are "rare" cannot mean that the burden is on the defendant to show that he or she is entitled to an indeterminate sentence. But it also requires something more than having the parties begin in equipoise—the position for which the prosecution argues. (Appellee's Suppl Br 10.) Rare means of "a kind seldom found" or "exceptional." *Shorter Oxford English Dictionary*, p 2464 (6th ed, 2007). Under the prosecution's theory, equipoise essentially means that LWOP is justified *unless* the defendant can bring forward some evidence establishing some or all of the mitigators in *Miller*. All the prosecution needs to do is move for a LWOP sentence and if the *defendant* fails to establish that some mitigators are present, the trial court will be justified in imposing LWOP. Thus, even the supposed lack of burden is converted into the *defendant's* burden. That *Miller*, *Montgomery*, and *Jones v Mississippi*, 141 S Ct 1307 (2021), do not place the burden is on the prosecution is not dispositive. That question was *not* presented in those cases. But that conclusion is required by their logic. As the United States Supreme Court said in *Montgomery*, *Miller* "did *bar* life without parole" except in the rarest of circumstances. *Id.* at 209 (emphasis added). To ensure that prohibition has teeth, the prosecution must bear the

burden of proving that a defendant is one of the *rare* juvenile defendants who can be sentenced to LWOP.

Attempting to overcome the clear implication of *Miller*, the normal allocations of burdens of proof on a moving party, and the requirements of Due Process, the prosecution grasps at stray comments from *Montgomery* and *Skinner* to support its position. (Appellee's Suppl Br 9-11.) But they do not advance the ball. In *Montgomery*, the prosecution points to the Court's opinion stating that in light of *Miller* and its forerunners, prisoners, such as the petitioner in *Montgomery* "must be given the opportunity to show their crime did not reflect irreparable corruption." *Montgomery*, 577 US at 213. That line stands for the straightforward proposition that juveniles, like the petitioner in that case who had been sentenced to LWOP *prior* to *Miller*, were entitled to a resentencing hearing because *Miller* applied retroactively. That category of defendant was constitutionally entitled to "the opportunity" to be resentenced under *Miller*'s standard. The statement in *Skinner* to which the prosecution points stands for the unremarkable observation that neither *Miller* nor *Montgomery* decided the burden of proof question. *Skinner*, 502 Mich 131.

II. The *Miller* factors are mitigators not aggravators.

The prosecution does not explicitly contend that the *Miller* factors can be employed by a trial court as aggravators. Such a position would run smack into this Court's holding in *Skinner*: "It is undisputed that all of [the *Miller*] factors are mitigating factors." *Skinner*, 502 Mich at 115. And into Miller's own language: "[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). Yet, at the same time, the prosecution contends that the trial

court was justified in the two places where it employed the *Miller* factors as aggravators—age and family. (Appellee's Suppl Br 13-17, 22-24.)

The prosecution cannot have it both ways. If the *Miller* factors are mitigating factors, as the prosecution implicitly concedes, that means *using* them to justify a LWOP sentence for a juvenile is error. (See Taylor's Suppl Br 20-21.) But that is exactly what the trial court did. The trial court held that Taylor's closeness to the age of 18 supported a LWOP sentence even though *Miller* said age and its attendant circumstances serve as a mitigator. And the trial court used Taylor's family circumstances and history as a reason *to sentence* him to LWOP. That flips the *Miller* factors on their head and is another reason that this Court should grant the Application.

III. The trial court erred by failing to take Taylor's individual characteristics into account.

A. Taylor's age.

The prosecution contends that the trial court properly considered Taylor's age. Its evidence? A block quotation from the trial court's opinion. (Appellee's Suppl Br 14.) But that block quotation simply recounts testimony that the trial court believed it could *reject* because of Taylor's proximity to the age of 18. Because Taylor was a "mere 14 months shy of his 18th birthday at the time of his offense," the trial court believed that it could simply conclude that Taylor's "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.) In other words, the trial court believed that as a juvenile gets closer to the age of 18, it could discount the *Miller* factors and employ a more superficial approach to engaging those factors.

The prosecution does not deny that the trial court employed such a discount; it *leans* into it. It agrees with the trial court that *Miller* is readily distinguishable because there the juvenile

defendants were only 14 years old. (Appellee's Suppl Br 15.) Indeed, the prosecution states that "treating 14-year-olds the same as 17-year-olds is *exactly* what the ruling in *Miller* sought to end." (*Id.* at 16.) But that is not what *Miller* requires. Rather, it requires that *any* trial court sentencing *any* defendant under 18 must take the defendant's individual characteristics into account. It cannot scrimp on engaging the individualized considerations required by *Miller* just because a juvenile is 17 years and 11 months old rather than 14 years and 11 months old. The trial court *must* engage *all* of *Miller*'s individual considerations, whether the juvenile being sentenced is 14 years and one day or 17 years and 364 days. Here, the trial court failed to engage in that process fully because it thought Taylor's age allowed it to put a discount on the *Miller* factors. That error requires that this Court grant the application and reverse the decisions below.[1]

B. Taylor's prospects for rehabilitation.

It is with respect to the possibility-of-rehabilitation *Miller* factor that both the trial court's decision and the prosecution's arguments most run aground. Highlighting the weakness of its argument, the prosecution begins by pointing to evidence in the record that it believes supports the trial court's sentencing decision but which the trial court *did not consider* when it imposed the LWOP sentence. The prosecution cites misconduct evidence in Taylor's file from MDOC. (Appellee's Suppl Br 20.) The prosecution also cites Taylor's juvenile record. (*Id.*) But the trial court's opinion does not even mention, let alone ground its conclusion that this factor weighs against Taylor in any of that record evidence. (1/6/2015 Taylor Sentencing Op & Order 4-5, App 324-325.)

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[1] Nor is the prosecution correct to suggest that Taylor failed to introduce testimony or evidence demonstrating he was "unusually immature or impetuous for a nearly-17-year-old." (Appellee's Suppl Br 15.) The record was replete with Taylor's complete lack of any sort of normal upbringing. His was a youth of truancy and neglect, the very sort of things that lead to developmental delays and impetuousness.

Moreover, the prosecution wholly mischaracterizes the evidence elicited at Taylor's resentencing hearing. The prosecution asserts that Taylor was "entirely unable to introduce any testimony or evidence tending to show that the defendant had any real prospects for rehabilitation." (Appellee's Suppl Br 20.) And it claims that the record "is barren of any evidence or testimony regarding the defendant's rehabilitative efforts," and perhaps, more strikingly, that "neither party appears to contest that the Michigan Department of Corrections lacks available treatment programs." (*Id.* at 24.)

But that simply is not true. Kathleen Schaefer, a licensed professional counselor and expert in parole and probation issues, testified that Taylor's early entry into the corrections system provided him an "opportunity" to mature and "make . . . positive changes." (10/23/2014 Hr'g Tr 19, App 197.) From her own experience working in corrections, Schaefer testified that she had witnessed "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.) Schaefer also testified that Taylor's "behavior has changed from the time he" entered the corrections system. (*Id*. at 28, App 206.) Moreover, Schaefer testified about the varied and numerous structured programs provided by MDOC that existed to support Taylor if he were ever paroled. (*Id.* at 32-34, App 210-212.) Perhaps the prosecution believes MDOC lacks any sort of actual support for Taylor. But Taylor and his expert witness do not. And significantly, Taylor's expert testified to the specific support MDOC could provide Taylor.

The prosecution also employs Taylor's expert witness's careful and judicious testimony as a sword against him. Taylor's expert Dr. Keating made the unremarkable conclusion that science cannot "predict . . . the distant future," and its prospects for rehabilitation with any

absolute certainty. (10/21/14 Hr'g Tr 70, App 110.). In the prosecution's world, science's inability to be clairvoyant means a juvenile defendant is out of luck. (Appellee's Suppl Br 20.) The prosecution seizes on this lack of absolute certainty as proof that this mitigating factor did not support an indeterminate sentence. But *Miller* said nothing about requiring evidence that proved its factors with absolute certainty. Indeed, all criminal sentencing is in part a guessing game.

When it comes to *imposing* a LWOP sentence, a modicum of proof will do. The prosecution views Taylor's difficult family circumstances and history as almost certain proof that Taylor cannot be rehabilitated. (Appellee's Suppl Br 24.) As indicated in Taylor's supplemental brief (Taylor's Suppl Br 20-21), and *supra* Section II, family history and circumstances *cannot* be used as aggravators. But even if they could be used as aggravators, the prosecution and courts cannot have it both ways. They cannot take the lack of perfect predictive evidence for future prospects of rehabilitation to cut against a defendant and turn around and use evidence about a difficult family history to provide almost certain proof that the same defendant has no hope of rehabilitation.

C. The trial court improperly applied the factor regarding circumstances of the offense.

Like the trial court, the prosecution simply ignores the statement made by Masalmani in his sentencing memorandum that "Taylor was neither involved with, nor aware of, what was going to happen to Mr. Landry." (Masalmani Sentencing Memo 2 n 1, App 257.) The trial court's conclusion that the circumstances of *Taylor's* involvement in the crime were not a mitigating factor cannot be trusted because the trial court failed even to acknowledge this clear statement from Masalmani.

IV. The trial court's sentencing determination violates the Michigan Constitution.

As argued at length in Taylor's supplemental brief, this Court should accept *Jones*'s invitation to determine whether Michigan State Constitution's bar of "cruel *or* unusual" punishment provider stricter safeguards for juvenile defendants than the United States Constitution. It clearly does. Applying those stricter safeguards to this case demonstrates that the trial court violated the Michigan Constitution in its sentencing determination. Accordingly, this provides an additional reason for this Court to grant the application and consider how Michigan's Constitution safeguards juvenile defendants.

CONCLUSION AND REQUESTED RELIEF

Here, the trial court employed the wrong standards under *Miller* when it resentenced Taylor to LWOP. It failed to place the burden of proof on the prosecution, employed the *Miller* factors as aggravators rather than mitigators, and failed to engage in *Miller*'s particularized sentencing determination. The trial court's action's also implicate the *Michigan* Constitution. The Court should grant Taylor's Application for Leave to Appeal and use this case as a vehicle to bring clarity to this area of the law for Taylor and countless other criminal juvenile defendants.

Respectfully submitted,

WARNER NORCROSS + JUDD LLP

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By */s/ Conor B. Dugan*

Conor B. Dugan (P66901)
150 Ottawa Avenue NW, Suite 1500
Grand Rapids, Michigan 49503
616.752.2000
conor.dugan@wnj.*com*
Attorneys for Defendant-Appellant