STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN
Petitioner-Appellee,
V.
ROBERT TAYLOR,
Defendant-Appellant.

Supreme Court No. 154994
Court of Appeals No. 325834
Circuit Court No. 2009-005243-FC

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***AMICUS CURIAE* OF JUVENILE JUSTICE CLINIC FOR ROBERT TAYLOR**

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QUESTIONS PRESENTED

I. **Does the prosecutor bear the burden of proof at a *Miller* sentencing hearing and by what legal standard is that burden borne?**
Court of Appeals answered: No
Appellant answers: Yes
Appellee answers: No
Amici answers: Yes

II. **Whether the trial court must give individualized, mitigating effect to the *Miller* factors, including "chronological age and its hallmark features" and the defendant's family and home environment, at a *Miller* sentencing hearing in Michigan?**
Court of Appeals answered: No
Appellant answers: Yes
Appellee answers: No
Amici answers: Yes

INTERESTS OF AMICUS CURIAE

The Juvenile Justice Clinic is a law school clinic at the University of Michigan Law School which advocates for youth charged with criminal offenses and strives to develop student lawyers who meet the highest standards of professional representation. The JJC represents youth in trial and appellate courts in Michigan, as well as engages in public education, training, and study of best practices in youth justice, both nationally and in Michigan. *Amicus* does not speak for or represent the views of any entity with which it is affiliated.

The Court invited a brief from amicus in its September 22, 2021 order; therefore a motion for permission is not required. MCR 7.312(H).

ARGUMENT

Introduction

Michigan is the de facto world leader for the jurisdiction with the most children serving life without parole. The implementation of *Miller* and *Montgomery* in Michigan has been characterized by disparate interpretations by local prosecutors and judges and a resistance to

constitutional rules, which has led to the arbitrary and geographically and racially disparate sentencing of children to die in prison in our state.

This Court can and must provide uniform procedural guidance for our trial courts, so that youth facing the possibility of death in prison can be sentenced based on accurate, reliable and complete information, that provide for uniformity and statewide consistency, in hearings that are constitutionally compliant and consistent with prior state law.

This amicus brief describes who must bear the burden of proof at *Miller* as a matter of fundamental state law; determines that this burden must be, at least, by a clear and convincing evidence standard, highlights failures of the current implementation of *Miller* in Michigan and describes procedural rules that must be adopted to ensure that, if we persist in leading the world in children sentenced to die in prison, we do so in ways that comport with state law and our state and federal constitutions.

ARGUMENT

I. The Imposition of Life Without Parole on Children in Michigan since *Miller v Alabama* Shows the Need for This Court to Establish Procedural Rules to Ensure that *Miller* Hearings and Sentencings are Constitutionally Compliant.

A. Since *Miller*, Michigan has not yet developed a sentencing system that is compliant with state law, the Eighth Amendment or Michigan's greater constitutional protection against "cruel or unusual" punishment and has become the world leader in juvenile life without parole sentences.

Since *Miller*, Michigan has become the world leader for the jurisdiction with the most juveniles serving life without parole sentences. Life without parole is barred by the UN Convention on the Rights of the Child, which has been ratified by every country in the world except the United

States.[1] The "United States remains the only country in the world to sentence individuals to life without parole for crimes committed before turning 18." IACHR *Juvenile Offenders Sentenced to Life Imprisonment Without Parole: United States of America*, at 6, Rep No 448/21 (Nov 19, 2021).

When *Miller* was decided, 28 states had mandatory life without parole and over 2500 people were serving life without parole for homicides committed as a juvenile, with 2000 of those sentences mandatorily imposed. See *Miller*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012)); see also *id.* (ROBERTS, C.J., dissenting). Pennsylvania was the jurisdiction with the largest number of juveniles serving life without parole, with over 500 individuals, with Michigan in second place. Michigan's high numbers were attributable in part to unreviewable direct file laws, automatic prosecution of 17-year-old juveniles as adults, the inclusion of both premeditated and felony murder in our first-degree murder statute, as well as life without parole as the mandatory penalty for all first-degree murder.[2]

Nationally, the pendulum has swung to where the majority of states do not impose the

[1] The UN Convention on the Rights of the Child, art 37 (1989) (stating: "(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment *nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age*") (emphasis added). Until 2014, the United States, Somalia and South Sudan were the countries that had not ratified the CRC; Somalia and South Sudan have since ratified the CRC. See, e.g., Human Rights Watch, *25th Anniversary of the Convention on the Rights of the Child (2014)*, available at <https://www.hrw.org/news/2014/11/17/25th-anniversary-convention-rights-child> (accessed February 17, 2022). The sentencing of youth to "life without parole has also been found incompatible with the International Covenant on Civil and Political Rights, a human rights treaty ratified by the United States." IACHR report at 13 (citing Human Rights Committee, Concluding observations of the Human Rights Committee: United States of American, U.N. Doc. CCPR/C/USA/CO3 2395 (Sept. 15, 2006), para.34).

[2] Kimberly Thomas, *Juvenile Life Without Parole: Unconstitutional in Michigan*, 90(2) MICH BAR J 34, 35 (2011) (describing the "perfect storm" of statutes that combine to create the high numbers of youth sentenced to life without parole in Michigan); Fair Punishment Project, *Juvenile Life Without Parole in Wayne County*, available at <http://fairpunishment.org/wp-content/uploads/2016/07/FPP-WayneCountyReport-Final.pdf> (accessed January 22, 2020).

sentence. As of February 2022, 32 states either ban or have no one serving juvenile life without parole.[3]

Two years ago, Michigan and Pennsylvania were the only states with more than 100 juvenile life without parole sentences.[4] Michigan's prosecutors pressed for the most extreme sentence for two-thirds of our cases, and resentencing hearings, when so many are facing LWOP, have been slow.[5] As of 2020, "approximately half of the individuals eligible for resentencing under Michigan's new statute were still waiting for their cases to be reviewed" IACHR, at 15. Pennsylvania, by contrast, has implemented *Miller* and *Montgomery*. See *Miller*, *supra*; *Montgomery v Louisiana*, 577 US __; 136 S Ct 718, 726; 193 L Ed 2d 599 (2016). Of the 521 identified juvenile lifers in Pennsylvania, 472 have been resentenced.[6] As of 2018**,** of the over 300 individuals resentenced at that time, 5 had received a new life without parole sentence.[7] At the resentencing, an individual in Pennsylvania must be shown to be "incapable of rehabilitation;" *Commonwealth v Batts*, 163 A3d 410, 416; 640 Pa 401 (2017) (effectively narrowing the

[3] Campaign for Fair Sentencing of Youth, *32 States and DC Ban or Have No One Serving Life Without Parole for Children* (map showing 25 states that ban and 7 states that have no one serving JLWOP sentence), available at https://cfsy.org/ (accessed February 6, 2022).

[4] Campaign for Fair Sentencing of Youth, *Does Your State Still Use Life-Without-Parole Sentences For Kids?*, available at <https://www.fairsentencingofyouth.org/does-your-state-use-juvenile-life-without-parole-jlwop/> (accessed January 22, 2020).

[5] In 2019, more than half of Michigan's juvenile lifers were still serving LWOP sentences. See Allie Gross, *More Than Half of Michigan's Juvenile Lifers Still Wait for Resentencing*, DETROIT FREE PRESS (August 16, 2019) (stating that prosecutors requested LWOP in 66% of cases, and that approximately 55% of all of Michigan juvenile lifers are still serving LWOP over seven years after *Miller*), available at https://www.freep.com/in-depth/news/local/michigan/2019/08/15/juvenile-lifers-michigan/1370127001/..

[6] See Pennsylvania Department of Corrections, Juvenile Lifers Information (updated December 31, 2021), available at <https://www.cor.pa.gov/About%20Us/Initiatives/Pages/Juvenile-Lifers-Information.aspx> (accessed January 28, 2022).

[7] Samantha Melamed, *Why are Juvenile Lifers From Philly Getting Radically Different Sentences From Those in the Rest of Pennsylvania?*, PHILADELPHIA INQUIRER (July 10, 2018), available at <https://www.inquirer.com/philly/news/philly-bucks-county-pennsylvania-juvenile-lifers-jlwop-juvenile-law-center-life-without-parole-20180710.html>.

imposition of life without parole to a class of defendants and limiting the arbitrary imposition of life without parole). Of those resentenced in Pennsylvania, at least 270 people have already been released from custody; a 68% parole rate.[8] See *id.*

In addition to *Miller* being applied differently in Michigan than other states, the burden of a life without parole sentence does not fall evenly on all youth who are alleged to have committed homicide offenses. Many individuals would not even be serving life without parole if they had taken plea offers given to them – even though *Miller* explicitly acknowledges the difficulty that young people have working with and trusting their attorneys and understanding the choices before them. *Miller*, 567 US at 477-78. In Wayne County, which has the largest juvenile lifer population in Michigan, nearly 1/3 of the juvenile lifers were offered term-of-years plea agreements, averaging about 20 years.[9] The Wayne County report stated that "[m]ore than one in four persons serving a JLWOP sentence had co-defendants who, though not necessarily less culpable, are serving less time or have already been released," which is also in line with *Miller*'s teachings on young people's comparative difficulty making decisions about their cases given their short-term time horizon and challenges young people have working in a trusting relationship with their counsel.

The zip code in which an individual committed his crime affects the likelihood that he will be offered a plea agreement to a lesser homicide, as well as the likelihood that, if convicted of first-degree murder, a life without parole sentence will be sought. After the passage of Michigan's *Miller* statute in some counties, prosecutors requested new life without parole sentences for all or nearly every single individual case. See, e.g., NY Times Opinion, *Michigan Prosecutors Defy the*

[8] See Pennsylvania Department of Corrections, *supra*.
[9] Fair Punishment Project, Wayne County report, *supra* at 9.

Supreme Court, NEW YORK TIMES (September 11, 2016).

Black youth are sentenced to life without parole in disproportionate numbers nationally and in Michigan. "[A]lthough Blacks constitute only about 13 percent of the U.S. population, as of 2009, Blacks constitute 28.3 percent of all lifers, 56.4 percent of those serving LWOP, and 56.1 percent of those who received LWOP for offenses committed as juveniles," according to a national ACLU report.[10] In Wayne County, Michigan, 39% of the population is African-American, but 93% of 150 people sentenced to life as juveniles are African American.[11]

Black youth are sentenced to life without parole at a greater rate than white youth. In Michigan prior to *Miller*, Black youth were serving LWOP sentences at a rate 10 times that of their white counterparts.[12] Nationally, in 2018, for every eight Black youth arrested for murder, one was sentenced to life without parole, but for white youth, for every 12 youth arrested for murder, one was sentenced to life without parole.[13] In other words, of youth arrested for murder, Black youth were 1.59 times more likely to receive a life without parole sentence than white youth.[14] In addition to the race of the youth arrested for murder, the race of the homicide victim also appears to affect

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[10] 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 (relying on data from Ashley Nellis & Ryan S. King, The Sentencing Project, No Exit: The Expanding Use of Life Sentences in America 11-14, 17, 20-23 (2009), available at <http://www.sentencingproject.org/doc/publications/inc_NoExitSept2009.pdf> (accessed February 17, 2022).

[11] Fair Punishment Project, *supra*, p 8.

[12] Human Rights Watch, *The Rest of Their Lives: Life without Parole for Youth Offenders in the United States in 2008*, available at <https://www.hrw.org/sites/default/files/reports/us1005execsum.pdf> (accessed February 17, 2022).

[13] *Id.* at p 7 (reporting on average of data collected from 25 states).

[14] See *id.*

who receives life without parole sentences.[15]

In 1972, the Court in *Furman* announced that the death penalty was unconstitutional because it constituted cruel and unusual punishment in violation of the Eighth Amendment. *Furman v Georgia*, 408 US 238, 239; 92 S Ct 2726; 33 L Ed 2d 346 (1972). In large part, the Court's concerns centered on the fact that the death penalty was applied "wantonly and [so] freakishly"[16] and that state statutes failed to provide coherent procedures or criteria for its application.[17]

The landmark ruling required that states create narrowing criteria to limit the categories of those eligible for sentences of death. Numerous states appeared before the Court in subsequent years to test the constitutionality of new state statutes, but many were struck down for failing to

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[15] Ashley Nellis, *The Lives of Juvenile Lifers: Findings from a National Survey* (March 2012) (The Sentencing Project) ("While 23.2% of juvenile arrests for murder involve an African American suspected of killing a white person, 42.4% of JLWOP sentences are for an African American convicted of this crime. White juvenile offenders with African American victims are only about half as likely (3.6%) to receive a JWLOP sentence as their proportion of arrests for killing an African American (6.4%).").

[16] *Id.* at 309-10 (STEWART, J., concurring).

[17] See *Gregg v Georgia*, 428 US 153, 189; 96 S Ct 2909; 49 L Ed 2d 859 (1976) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); Furman, 408 US at 309-10 (STEWART, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual… . I simply conclude that [the constitution] cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."). See also Betty B. Fletcher, *The Death Penalty in America: Can Justice Be Done?*, 70 NYU L REV 811, 813-19 (1995) (discussing the evolution of the death penalty in America, and citing reasons for the drop in executions prior to *Furman* as including the rise in habeas corpus petitions for state prisoners and Civil Rights Movement leaders' growing concerns that the death penalty could be easily applied in a racially discriminatory fashion by juries); Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB LJ 347, 369-72 (1999) (noting that although federal executions in the pre-*Furman* twentieth century were "relatively infrequent," a growing concern mounted that the "absolute and unguided discretion granted to federal juries in capital punishment cases would follow discriminatory patterns).

"fulfill *Furman's* basic requirement [to] replac[e] arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." *Woodson v North Carolina*, 428 US 280, 303; 96 S Ct 2978; 49 L Ed 2d 944 (1976).

In *Gregg v Georgia*, the Court reinstated the death penalty. 428 US 153 (1976). The Court found in *Gregg* that the inclusion of narrowing aggravating factors in the new state legislation addressed the Court's central concern: that the death penalty was being applied in an arbitrary and capricious manner.

Death penalty jurisprudence and sentencing practices are relevant to the juvenile LWOP context because they informed the Court's Eighth Amendment analyses of juvenile sentencing practices in *Miller* and *Montgomery*. Notably, the Court in both cases recognized that sentencing juveniles to life without parole bears a strong resemblance to sentencing adults to death. In both cases, the defendant is receiving the most severe, constitutionally permissible sentence, and therefore Eighth Amendment considerations are heightened. *Roper v Simmons*, 543 US 551, 568; 125 S Ct 1183; 161 L Ed 2d 1 (2005) ("Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force.") (citing *Thompson v Okla*, 487 US 815, 856; 108 S Ct 2687; 101 L Ed 2d 702 (1988) (O'CONNOR, J., concurring). The Court in *Miller* used this analogy to find that mandatory LWOP sentences for juveniles violate the Eighth Amendment protection against cruel and unusual punishment. *Miller v Alabama*, 567 US 460, 474-75; 132 S Ct 2455; 183 L Ed 2d 407 (2012) . Moreover, the Court has relied upon its most pivotal Eighth Amendment cases—*Lockett*, *Tison*, *Enmund*, *Kennedy*, *Atkins*, and *Coker*—to discuss juvenile LWOP sentences, suggesting their relevance and importance to this area of law.

Just as the Court's concern in *Furman* was about preventing an unfair and arbitrary application of severe punishment, so too must this Court be concerned with ensuring fairness in juveniles facing life without the possibility of parole in line with *Miller* and *Montgomery* and the Michigan constitution. See *Miller*, supra; *Montgomery*, supra; *Jones v. Mississippi*, 141 S Ct 1307, 1321; 209 LEd 2d 390 (2021) (affirming *Miller* and *Montgomery* and finding that no specific factual finding on irreparable corruption is required by the Eighth Amendment).

As this Court recognized in *Skinner*, "courts are not allowed to sentence juveniles who are not irreparably corrupt to life without parole." *People v Skinner*, 502 Mich 89, 125; 917 NW2d 292 (2018); See also US Const, Am VIII; Mich Const 1963, art 1, § 16. And, as *Jones*, reiterates, states can enforce sentencing schemes that are more protective than what is required by the federal Constitution. The Court states: "[i]mportantly, like *Miller* and *Montgomery*, our holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder." *Id.* at 1323. Michigan's current procedures fail to comply with state law, *Miller*, and Michigan's greater constitutional protection against "cruel or unusual" punishment. In Michigan, there is no objective criteria required to narrow those who are subjected to the possibility of, and who actually receive, a life without parole sentence. *Cf. Godfrey v. Georgia*, 446 US 420, 428; 100 SCt 1759; 64 LEd 2d 398 (1980) (plurality opinion) (stating that a constitutionally compliant death penalty system must "channel the sentencer's discretion by clear and objective standards and provide specific and detailed guidance, and that make rationally reviewable the process"). Neither the statute nor its implementation requires life without parole to be imposed on the "worst of the worst," nor does the statute, as currently implemented, give mitigating effect to youth and its attendant characteristics. Instead, our statute allows life without parole to be imposed on any youth regardless of their role, prior record, ability to work with their

counsel and make long-term decisions in their case, influence of others, family and home environment, or other factors. There is no uniform process or consistent outcomes as to which youth receive a meaningful opportunity for release and those who do not. As currently implemented, this contravenes the Eighth Amendment and the Michigan Constitutional ban on cruel or unusual punishment. *See* Mich Const 1963, art 1, §16.

The questions on which this Court has granted leave must place these necessary parameters so that "courts are not allowed to sentence juveniles who are not irreparably corrupt to life without parole." *Skinner*, 502 Mich at 125; See also US Const, Am VIII; Const 1963, art 1, § 16.

II. The Government Must Bear the Burden at *Miller* Motion and Sentencing Hearings and That Burden, At a Minimum, is Clear and Convincing Evidence.

This Court's first question in its order[18] contains two separate inquiries: First, who bears the burden of proof at a motions hearing under MCL 769.25 and/or MCL 769.25a? Second, what is the standard of proof at that hearing?

A. As a matter of basic state law, the burden must be borne by the prosecution.

Under the juvenile sentencing statute, the prosecuting attorney must file a "motion" to seek "to sentence a defendant...to imprisonment for life without the possibility of parole." MCL 769.25(2). This motion "shall specify the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole." *Id.* at (3). As a result of the state filing this motion, "the court shall conduct a hearing on the motion as part of the sentencing process." MCL 769.25(6). During that motion hearing, at a minimum, the burden of proof is a preponderance of the evidence and is placed on the prosecutor. The court's

[18] This Court's order states: "In particular, the parties shall address: (1) which party, if any, bears the burden of proof of showing that a Miller factor does or does not suggest a LWOP sentence . . ." Order, *People v. Robert Taylor*, No. 154994 (Sept. 22, 2021).

failure to follow this motion practice and place the burden on the prosecuting attorney violated basic state law and Taylor's right to due process of law as guaranteed by US Const, Am XIV and Const 1963, art 1, § 17.

As an initial matter, the language of MCL 769.25 is clear and unambiguous and does not require judicial interpretation. See *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004) ("[W]hen statutory language is unambiguous, judicial construction is not required or permitted because the Legislature is presumed to have intended the meaning it plainly expressed."). The statute requires that the state file a motion, specifying the grounds that it seeks to establish justifying a life without parole sentence. The language requiring a "motion" is unambiguous and must be enforced as written. *People v Gardner*, 482 Mich 41, 50; 735 NW2d 78 (2008) (stating that if statutory language is unambiguous, courts must enforce its plain meaning).

1. In Michigan, the moving party bears the burden of proof; nothing about the process set up by our legislature changes this basic principle.

Well-established state motion practice rules require the movant to bear the burden and at this hearing, the prosecuting attorney should be required to bear the burden. *See People v Van Camp*, 356 Mich 593, 602–03; 97 NW2d 726 (1959) (holding that the burden was on the movant of a motion in a criminal proceeding); *Schaffer ex rel Schaffer v Weast*, 546 US 49, 56-57; 126 S Ct 528; 163 L Ed 2d 387 (2005) ("[T]he ordinary default rule is that plaintiffs bear the risk of failing to prove their claims."); *see also* C. Mueller & L. Kirkpatrick, Evidence § 3.1, p 104 (3d ed 2003) ("Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request.").

Michigan case law has firmly established that the moving party bears the original burden.[19] For example, during a Motion to Change Venue, the burden of showing that a fair trial cannot be obtained is on the party seeking the change of venue. *See People v Florinchi*, 84 Mich App 128, 136; 269 NW2d 500 (1978). As another example, if the government moves to admit other acts as evidence in a criminal trial, it bears the burden of establishing the relevance of that evidence. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Similarly, in civil cases, the original burden falls on the movant. *See e.g.*, *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475; 776 NW2d 398 (2009) ("The moving party…has the initial burden [in a Motion for Summary Judgment]."); *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003) ("The movant, of course, has the burden of proving by a preponderance of the evidence…").

In passing MCL 769.25, the Michigan Legislature understood and presumed that either the prosecuting attorney would file a motion and bear the burden, or if no motion was filed, the court would sentence the defendant to a term of years. See *People v Likine*, 492 Mich 367, 426; 832 NW2d 50 (2012) ("The Legislature is presumed to know the law, including decisions of our courts.").

2. Allegations to support a sentence must be proven by the prosecution.

At a sentencing hearing under MCL 769.25, the court must make findings, and is asked to "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." MCL 769.25(7). In other sentencing hearings in Michigan, the prosecutor must prove facts or circumstances supporting the sentence

[19] As there is no court rule of criminal procedure on point, the default rule is that "the rules of civil procedure apply to a criminal case. . . ." See MCR 6.001(D); see also *People v Holtzman*, 234 Mich App 166, 176; 593 NW2d 617 (1999). The Michigan Court Rule on Motion Practice is silent on burden. See MCR 2.119.

imposed. For example, the Michigan Supreme Court upheld a trial court's sentence because it found the prosecuting attorney established allegations by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 448; 835 NW2d 340 (2013). Additionally, the Court stated that "[the sentence] must be supported by a preponderance of the evidence." *Id.* at 439.

Relatedly, at a probation revocation hearing the court is asked to find facts or circumstances about the alleged violation without the rules of evidence, and the burden is on the government to prove the violation. See MCR 6.445(E)(1) ("The state has the burden of proving a [probation] violation by a preponderance of the evidence."). These analogous hearings demonstrate that the court, in conducting a MCL 769.25 resentencing hearing, must require that the government bear the burden.

Additionally, in juvenile court, the prosecution bears the burden of proof at waiver and designation hearings to have young people treated like adults or waived to adult criminal court. Waiver hearings are divided into two phases, and the prosecution bears the burden at each phase. MCL 712A.4; MCR 3.950(D). At the first phase probable cause hearing, "the prosecuting attorney has the burden to present legally admissible evidence to establish each element of the offense and to establish probable cause that the juvenile committed the offense." MCR 3.950(D)(1)(b). In the second phase, "[t]he prosecuting attorney has the burden of establishing by a preponderance of the evidence that the best interests of the juvenile and the public would be served by waiver." MCR 3.950(D)(2)(c). The Michigan Court Rules also place the burden of proof on the prosecution at designation hearings, requiring the prosecuting attorney to "prov[e] by a preponderance of evidence that the best interests of the juvenile and the public would be served by designation." MCR 3.952(C)(2); MCL 712A.2d(2).

B. The government's proposed "no burden, no standard" system is unworkable and invites constitutional error.

The government asserts in its brief that its position is that no one bears the burden in a *Miller* motion and resentencing hearing. Appellee Br at 10. This standard is unworkable and unsupported in law. The government, for example, later in the brief, argues that defendant has not "introduced" evidence "demonstrating" particular conclusions, effectively placing the burden on the defense. Appellee Br. at 15 ("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").

A "no burden, no standard" system allows individual trial courts in individual cases to choose which side to place the burden on and what standard to impose; exactly what this Court should not do. A "no burden, no standard" system exacerbates the existing procedural confusion over *Miller* motions and resentencing hearings and invites arbitrary and discriminatory application and the imposition of life without parole in violation of constitutional requirements.

C. The burden of proof must be, at a minimum, clear and convincing evidence.

This Court has left undecided the important question of who bears the burden at a *Miller* hearing. *Skinner*, 917 NW2d at 314.[20] The *Skinner* Court stated in dicta that there is no substantive constitutional presumption against life without parole imposed by *Miller* and *Montgomery*. See *Skinner*, *supra* at 314 ("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"). The Court neither reached whether or not there was a procedural presumption against life without parole, nor who bore a burden and

[20] This Court noted 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." *Id.* ('[P]risoners ... must be given the opportunity to show their crime did not reflect irreparable corruption....')." *Montgomery*, 136 S Ct at 736.

by what evidentiary standard. Merely because *Skinner* mentioned a lack of a substantive federal constitutional presumption does not answer whether the procedural burden of proof is borne by the government or even whether there is a procedural presumption in Michigan against life without parole once there is some mitigating evidence about age and its attendant circumstances.

This brief now addresses what standard of proof is required. Adopting a "standard of proof is more than an empty semantic exercise" (quotation omitted). *Addington v Texas*, 441 US 418, 425; 99 S Ct 1804; 60 L Ed 2d 323 (1979). Instead, the standard of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington*, *supra* at 423.[21] As our legislature is silent on the burden of proof in the statute, it is for this Court to prescribe. See, e.g., *Herman & MacLean v Huddleston*, 459 US 375, 389; 103 S Ct 683; 74 L Ed 2d 548 (1983); see also *In re Martin*, 450 Mich 204, 225; 538 NW2d 399 (1995) (deciding the burden of proof necessary when "assessing whether a patient's statements, made while competent, indicate a desire to have treatment withheld," and determining that the correct standard is clear and convincing evidence).

There are three common standards of proof – preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt. In *People v Skinner*, this Court found that the burden of proof was not a beyond a reasonable doubt standard as a matter of Sixth Amendment constitutional law. 502 Mich at 97. Amicus supports those arguments that a beyond a reasonable doubt standard is supported by the state and federal constitution, but does not otherwise restate them here. At the other end of the spectrum, a preponderance of the evidence standard is the lowest

[21] See also *In re Winship*, 397 US 358, 370; 90 S Ct 1068; 25 L Ed 2d 368 (1970) (HARLAN, J., concurring) ("the standard of proof represents an attempt to instruct the fact finder concerning the degree of confidence our society thinks he [or she] should have in the correctness of [his or her] factual conclusions").

standard of proof – requiring only that something is more likely than not – and is used in the most everyday civil court decisions in the law. "A preponderance-of-the-evidence standard allows both parties to 'share the risk of error in roughly equal fashion.'" *Herman*, 459 US at 390 (quoting *Addington v Texas*, *supra* at 423).

In the middle, the U.S. Supreme Court has characterized the "clear and convincing evidence" standard as appropriate where "particularly important individual interests or rights are at stake." *Herman*, *supra* at 389 (allowing a preponderance standard in a securities fraud matter).[22] The use of a heightened standard – even when beyond a reasonable doubt is not imposed – is appropriate when the interests at stake are "more substantial . . . than those involved in a run-of-the-mine civil dispute." *Cruzan by Cruzan v Dir, Mo Dept of Health*, 497 US 261, 283; 110 S Ct 2841; 111 L Ed 2d 224 (1990) ("We think it self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mine civil dispute.").

The *Miller* motion and sentencing hearing is a quintessential example of a hearing in which "particularly important interests [and] rights are at stake" and an intermediate standard of proof, at a minimum, must be borne by the government.

As stated by Appellant, defendants retain a Due Process right throughout trial and sentencing. See Appellant Br at 28. This right extends through the sentencing proceeding. As the U.S. Supreme Court has stated in the Sixth Amendment context, "we recognized in *Apprendi* and *Alleyne*, a 'criminal prosecution' continues and the defendant remains an

[22] Citing, as examples, *Santosky v Kramer*, 455 US 745; 102 S Ct 1388; 71 L Ed 2d 599 (1982) (proceeding to terminate parental rights); *Addington v Texas*, *supra* (involuntary commitment proceeding); *Woodby v INS*, 385 US 276, 285-86; 87 S Ct 483; 17 L Ed 2d 362 (1966) (deportation).

'accused' with all the rights provided by the Sixth Amendment, until a final sentence is imposed." *United States v Haymond*, __ US__; 139 S Ct 2369, 2379; 204 L Ed 2d 897 (2019) (finding a Due Process and Sixth Amendment right to a jury finding beyond a reasonable doubt for a revocation of supervised release determination that subjected the defendant to a new mandatory minimum sentence).

The liberty interest in death in prison for a teenager in a *Miller* motion and sentencing hearing, under the Due Process Clause, requires the application of a heightened standard of review. See *Matthews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976).

The liberty interest at stake is tremendous – the question is whether or not a teenager will spend his or her entire natural life and will, without a chance for parole, die in prison, regardless of whether that individual shows remorse, rehabilitation, or reform. See *id*. (requiring the court to consider "the private interest that will be affected" by government action). As the U.S. Supreme Court stated in *Graham*,

> "life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration…"
>
> *Graham v Florida*, 560 US 48, 69-70; 130 S Ct 2011; 176 L Ed 2d 825 (2010).

In Michigan, which does not have a death penalty, a sentence of life without parole is the ultimate punishment. In these hearings, the sentencer must decide whether or not he may impose this harshest punishment on an individual whom the U.S. Supreme Court has deemed categorically less morally blameworthy than a similarly situated adult defendant. See, e.g., *id.* at 69 (noting "twice diminished moral culpability" of a youth who commits a nonhomicide offense).

This Court must also consider the risk of an erroneous deprivation by the trial court of a lifetime of freedom and the hope of living outside of prison and whether greater procedural

protections would lessen this risk. See *Matthews*, 424 US at 319 (court must second consider "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"). As the Supreme Court noted in imposing a categorical ban on the death penalty for juveniles in *Roper*, there is a significant risk an individual factfinder, presented only with one homicide case and one defendant at a particular point in time will erroneously impose the harshest sentence available. "An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course," *Roper*, *supra* at 573. This likelihood – exemplified by the Michigan cases on appeal in this Court and the Court of Appeals – must be counterbalanced by a heightened burden of proof. Further, under *Miller* and *Montgomery*, the risk of erroneous lifetime imprisonment has an Eighth Amendment constitutional dimension and cannot be borne by the young person - as these youth have a substantive constitutional right to not be sentenced to life without parole if they are among the vast majority of youth who have the possibility of rehabilitation. *Miller*, 132 S Ct at 2469; *Montgomery*, 136 S Ct at 726; *Skinner*, 502 Mich at 125. A standard lower than clear and convincing results in this constitutionally protected youth impermissibly "shar[ing] equally with society the risk of error." *Addington*, 441 US at 427. The Eighth Amendment right at stake in these hearings demands a heightened burden of proof. For example, other states have applied clear and convincing in other situations where there is another constitutional right implicated, as here. *State ex rel Montgomery v Padilla*, 371 P3d 642; 239 Ariz 314 (Ariz App, 2016) (clear and convincing evidence required for state's burden of proving the need for accommodation of a child witness in an abuse case, in part because of the confrontation right implicated).

A number of other state high courts have held the prosecution to a beyond a reasonable doubt burden in their hearings under *Miller*.[23] Among the reasons for using this highest standard, sister courts have given weight to the significance of the interest of the youth at stake in these hearings. *Davis*, 415 P3d at 682 (using a *Matthews v. Eldridge* test); *Batts*, 163 A3d at 475 (same). "[L]ife without parole is a proportionately harsher sentence for juveniles than for adults." *Davis*, 415 P3d at 682. Due to the harshness of the punishment of life without parole, an erroneous decision carries substantial risk, justifying a high standard. "In contrast, minimal risk is associated with an erroneous decision in favor of the juvenile." *Id.* If a juvenile incapable of rehabilitation is sentenced to a term of years with the possibility of parole, the juvenile would not be granted parole and spend life in prison. *Id.* The balance of risks combined with the interest at stake justifies a heavy burden that should be borne by the prosecution. *Id.* The *Batts* court reasoned that because the Supreme Court "has clearly and unambiguously instructed" that only the rare juvenile who is incapable of rehabilitation can constitutionally be sentenced to life without parole, there is a presumption against imposing a life without parole sentence on juveniles. *Batts*, 163 A3d at 454–55. To overcome this presumption, the government "must prove that the juvenile is constitutionally eligible for the sentence beyond a reasonable doubt." *Id.* The weighty interest at stake and the significance of the risk of error in *Miller* motion and resentencing hearings resemble other proceedings in which the U.S. Supreme Court has determined that a minimum clear and convincing evidence standard is necessary. *See, e.g.*, *Santosky v Kramer*, 455 US 745, 758-69; 102 S Ct 1388; 71 L Ed 2d 599 (1982) (termination of parental rights); *Addington*, *supra* at 427-33

[23] *See, e.g.*, *Davis v State*, 415 P3d 666, 682; 2018 WY 40 (2018) (state bears burden beyond a reasonable doubt); *Batts*, *supra*, 640 Pa at 476; (government bears burden beyond a reasonable doubt); *State v Hart*, 404 SW3d 232, 241 (Mo, 2013) (government bears burden beyond a reasonable doubt).

(civil commitment); *Woodby v INS*, 385 US 276, 285–286; 87 S Ct 483; 17 L Ed 2d 362 (1966) (deportation); *Chaunt v United States*, 364 US 350, 353; 81 S Ct 147; 5 L Ed 2d 120 (1960) (denaturalization). Similarly, the federal courts of appeals "overwhelmingly" require the government to bear the burden of proof by clear and convincing evidence when it seeks to forcibly medicate a defendant against her will. *See United States v James*, 938 F3d 719, 721 (CA 5, 2019) (adopting clear and convincing standard as in sister circuits). A number of sister state courts have required this heightened burden of proof be met by the government in proceedings related to Sex Offender Registration Act cases. See, e.g., *Doe v Sex Offender Registry Bd.*, 480 Mass 212, 213–14; 102 NE3d 950 (2018) (finding that due process requires clear and convincing evidence standard, and burden borne by parole board, in termination proceeding); *Noe v Sex Offender Registry Bd*, 480 Mass 195, 207-208; 102 NE3d 409 (2018) (requiring clear and convincing evidence in SORA reclassification proceedings); *State v Campbell*, 436 NJ Super 264, 270; 93 A3d 416 (App Div 2014) (requiring clear and convincing evidence of sexual contact in a registration hearing under the Sex Offender Registration Act); *State v Norman*, 282 Neb 990; 808 NW2d 48 (2012).

When sentencing questions have been deemed weighty – no more true than here – likewise courts have required an intermediate clear and convincing evidence standard. See, e.g., *United States v Valle*, 940 F3d 473, 479 (2019) (requiring clear and convincing evidence for a sentencing guideline enhancement and stating that the "burden of proof for a factual finding underlying a sentencing enhancement under the Sentencing Guidelines depends on the magnitude of the finding's effect on the sentencing range").

The government interests at stake do not argue against a higher standard. See *Matthews*, 424 US at 391. The application of a slightly higher standard of review by the court would have a

minimal – if any – impact on the "fiscal and administrative burden," as the evidence is being presented regardless, and clear and convincing evidence is a familiar standard of proof for courts to apply. *See id.* The government has an interest in youth not being unconstitutionally sentenced to life without parole. Additionally, there is not a significant public safety interest as the parole board will evaluate whether or not the prisoner can be safely released into society as a productive citizen after serving decades in prison to pay for his offense. Finally, the government has a fiscal interest in not incarcerating the youth beyond the point at which it serves any legitimate penological purpose.

III. Without Procedural Rules From this Court to Implement the Substantive Guarantee of *Miller* and *Montgomery*, Michigan's Statute Violates the the Ban on Cruel or Unusual Punishment and the Due Process Clause.

A. Children are constitutionally different, and we are bound by *Miller* and *Montgomery* to give mitigating effect to age. This Court must insist that trial courts comply with *Miller* and give mitigating effect to youth.

A hearing at which the trial court fails to give mitigating consideration to the youthfulness of a child – as was done in this case where the Court weighed Taylor's age "against" him – is per se an error of law and an abuse of discretion. See Appellant Supp Br at 8-9, 20-21. *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." *Montgomery*, 136 S Ct at 734 (quoting *Miller*, 567 US at 472).

The *Roper* Court anticipated the unconstitutional trap that our trial courts have fallen into. *Roper*, 543 US at 572-73. Our Michigan courts, presented with one case and only one individual to be sentenced in a hearing without any guiding procedural parameters have, in some instances, ignored the mitigation of youth and, in other instances, like that of Mr. Taylor, made youth an aggravating factor. The *Roper* Court recognized the "unacceptable likelihood [] that the brutality

or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *Roper*, 543 US at 573. *Roper* fretted that "[i]n some cases a defendant's youth may even be counted against him" despite the constitutional requirement otherwise. *Id.* The *Roper* Court chose a categorical ban, but also noted that "this sort of overreaching could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked." *Id.* This is exactly the rule that the Court must implement now.

This Court must require that lower courts comply with the Constitution and give mitigating effect to youth. The fact that a youth is under 18 at the time of the offense – no matter how close to his 18th birthday – diminishes the youth's moral culpability and militates in favor of a term of years sentence. "*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account 'how children are different, and how those differences counsel *against* irrevocably sentencing them to a lifetime in prison.'" *Montgomery*, 136 S Ct at 733 (quoting *Miller*) (emphasis added). However, in the case before this Court, the trial court "distinguished" *Miller* because Taylor was "much older" than the defendant in *Miller*. App. Supp. Br. at 9. This distinction between the defendant in *Miller* and Mr. Taylor based solely on their chronological difference in age evidences that Mr. Taylor's age was not considered mitigating, in direct violation of the mandate in *Miller*. Michigan courts have repeatedly committed this error: the trial courts are giving aggravating effect to the proximity of a 17 year old to his or her 18th

birthday[24] or are failing to give mitigating effect to child status because the child before the court is not unusually or exceptionally immature.[25] Social scientists have shown that adolescence lasts well into the early twenties, nonetheless, the U.S. Supreme Court has given particular federal constitutional protection to youth under 18. *Miller*, 567 US at 465, 471 ("children are constitutionally different from adults for purposes of sentencing"). The features of youth that mitigate their culpability and the ensuing U.S. Supreme Court demand that children be treated differently does not depend on "proximity to 18" or atypicality of the youth. "The 'foundation stone' for *Miller*'s analysis was this Court's line of precedent holding certain punishments disproportionate when applied to juveniles." *Montgomery*, 136 S Ct at 732 (quoting *Miller*, 567 US at 470 n.4).

B. Mitigation is a broad concept that encompasses facts beyond the offense of conviction and includes (all) facts about the offender that suggest that he has a lesser moral culpability.

[24] For other examples, see: *People v. Osborne*, 2021 WL 941437 (Mich Ct App No. 346867) ("The defendant was not much under the age of 18. He was 17 years old, ten months and 11 days. He was 50 days shy of being an 18-year-old"); *People v Hickerson*, 2019 WL 5061189 (Mich Ct App No. 322891) ("It is important to note that defendant was only three weeks away from his 18th birthday when he chose to go forward with the robbery. Had the crime been committed a month later, defendant would have received a mandatory sentence of life without parole, and there would be no further discussion. . . . Logically, it seems unlikely that anything would have changed in the last month or so of defendant's childhood that would have significantly altered his thought process or decision-making with respect to whether to commit such a crime."); *People v McDade*, 2019 WL 286681 (Mich Ct App No. 323614) ("With respect to age, the trial court noted that defendant was only four months shy of being 18 when he committed the offense"); *People v Hyatt (After Remand)*, 2018 WL 6331314 (Mich Ct App No. 325741) ("The trial court observed that while defendant had an unstable family background, he was over seventeen when the crime was committed.") *People v Skinner*, 502 Mich 89; 917 NW2d 85 (2012) (court repeatedly referred to fact that defendant was "27 days shy of her 18th birthday" as evidence of culpability, rather than evidence of capacity for rehabilitation or mitigating effect).

[25] *People v Washington*, 2019 WL 3369770 (Mich Ct App No. 343987) ("Defendant's age at the time of the offense would be a mitigating factor in light of the immaturity, impetuousness, and recklessness often associated with youth. However, there is no evidence that the defendant was immature for his age or that he suffered from a learning disability or emotional impairment.").

"Mitigation" is not limited to a rationale for a defendant's conduct in committing a crime. Instead, the U.S. Supreme Court has long provided a much broader definition and role for mitigating evidence. In *Lockett v Ohio*, 438 US 586; 98 S Ct 2954; L Ed 973 (1978) (plurality opinion), the Court held that the sentencer in a capital case must be given a full opportunity to consider, as a mitigating factor, "any aspect of a defendant's character or record," in addition to "any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 603-05. The Court emphasized the "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual." *Id.* at 587. The Court recognized that justice requires not only taking into account the circumstances of the offense, but also the character and propensities of the offender. *Eddings v Oklahoma*, 455 US 104, 112; 102 S Ct 869; L Ed 2d 1 (1982).

This broad understanding of mitigation is necessary so that the youth is sentenced to a constitutionally proportionate sentence. In addition to the *Miller* jurisprudence specific to the ban on unconstitutional life without parole sentences on juveniles described in Appellant's brief, the Eighth Amendment ban on cruel and unusual punishment requires that "all penalties be proportioned to the nature of the offense." *Weems v United States*, 217 US 349, 394; 30 S Ct 544; 54 L Ed 793(1910). Like the federal Constitution, the Michigan Constitution similarly prohibits "cruel or unusual" punishment that is grossly disproportionate. Mich Const, art 1, 16; *People v Bullock*, 440 Mich 15, 32; 485 NW2d 866 (1992). Individual characteristics of a defendant must be considered to ensure that punishments are "tailored to reflect a defendant's personal responsibility and moral guilt." *Bullock*, 440 Mich at 39 (quoting dissent in *Harmelin v Michigan*, 501 US 957, 1023; 111 S Ct 2680; 2716 L Ed (1991)). Only when a sentencer, who is asked to impose a sentence of life without parole, can consider as a mitigating factor "any aspect of a

defendant's character or record," in addition to "any of the circumstances of the offense that the defendant proffers" for a lesser sentence, can the defendant receive a constitutionally proportionate sentence. *Lockett*, 438 US at 603-05.

The consideration, as mitigation, of a broad range of evidence also supports Michigan's non-constitutional requirement of proportionality and individualized sentencing. *People v Milbourn*, 435 Mich 630, 636-51; 461 NW2d 1 (1990) (proportionality analysis "must take into account the nature of the offense and the background of the offender"). As this Court stated in *McFarlin*:

> "[T]he sentence should be tailored to the *particular* circumstances of the case and the offender in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential…A judge needs complete information to set a proper individualized sentence…[a] host of [other] facts are *essential* to an informed sentencing decision, especially if the offender is a young adult."
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> 389 Mich 557, 574; 208 NW2d 504 (1973) (emphases added).

C. As they have for youth, Michigan courts have failed to give mitigating effect to evidence of peer pressure, family and home environment, childhood trauma, and potential for rehabilitation, in violation of *Miller*, the ban on cruel or unusual punishment and the Due Process right to be sentenced on accurate and proven facts.

Instead of using information about youth in mitigation by *Miller*, our courts risk sentencing based on unfounded assumptions and unconstitutionally increasing punishment absent parameters from this Court about the need to sentence on proven facts and to give mitigating weight to *Miller* evidence. This Court must ensure procedures by which sentences in *Miller* motion hearings and resentences are based on accurate factual information, in compliance with Due Process and the ban on cruel or unusual punishment. See, e.g., *Townsend v Burke*, 334 US 736, 741; 68 S Ct 1252; 92 L Ed 1690 (1948) ("this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or

design, is inconsistent with due process of law"); *People v Miles*, 454 Mich 90; 559 NW2d 299 (1997) ("This Court has also repeatedly held that a sentence is invalid if it is based on inaccurate information.").

This Court specifically asked in this case whether the court below "properly considered [Taylor's] family and home environment, which the court characterized as 'far from optimal,' as weighing against his potential for rehabilitation." See Order, People v. Taylor, No. 154994 (Sept 22, 2021). The court below erred as a matter of law by failing to give mitigating effect to Taylor's family and home environment.

Sister supreme courts have recognized and reversed the error that the trial court below made. For example, in *State v Bassett*, 192 Wash 2d 67, 428 P3d 343 (2018), the Supreme Court of Washington found the sentencing court's use of a youth's home environment as an aggravating factor in supporting his life without parole sentence to be erroneous. The Washington supreme court highlighted that the resentencing judge used Bassett's homelessness as "evidence that he was more mature than 'kids who are not in that situation'" *Id.* at 89. "[The defendant's] resentencing hearing provides an illustration of the imprecise and subjective judgments a sentencing court could make regarding transient immaturity and irreparable corruption." *Id.*[26] Similarly, the Iowa Supreme Court remanded for a new sentencing when the trial court in a pre-*Miller* case used the defendant's family and home environment as aggravating factors. *State v Seats,* 865 NW2d 545

[26] Ultimately, the *Bassett* court found that the lack of procedural safeguards in applying *Miller* factors at sentencing produced an "unacceptable risk that children undeserving of a life without parole sentence will receive one" and barred the imposition of life without parole sentences. *Id.* at 90.

(Iowa 2015). Finding this to be erroneous in light of *Miller*, the *Seats* court remanded the case to the district court for a resentencing hearing. *Id.* at 558.[27]

The same kinds of errors are seen when trial courts err as a matter of law in using a history of trauma and mental health as justification for imposing a life without parole sentence. *Miller* requires that courts consider the defendant's possibility of rehabilitation as a *mitigating* rather than aggravating factor at sentencing. *Miller*, 567 US at 477-78. This is especially important because life without parole sentences "forswear[] altogether the rehabilitative ideal." *Graham*, 560 US at 74. By imposing even a discretionary life without parole sentence which "den[ies] the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society" at odds with a child's capacity for change. *Id.* Rather than using information about the individual as a mitigating factor in his sentencing, the court used it as a means to justify sentencing Taylor to the harshest possible sentence. Other sentencing cases also discourage the use of mental health as a reason to aggravate a sentence. For example, in *US v Arnold*, the Sixth Circuit held that the lower court abused its discretion when it imposed a higher sentence based upon the defendant's possible need for mental health treatment. 630 Fed Appx 432 (2015). Similarly, in *Moses*, the Sixth Circuit, by Judge Boggs, struck down a lower court's sentence in part because it rejected the notion that the presence of mental illness inherently creates an extraordinary danger to the community which justifies a hike in sentencing when there is a post-incarceration commitment statute in place. *United States v Moses*, 106 F3d 1273, 1280 (CTA 6 1997).

[27] After *Seats*, in *Sweet*, the Iowa Supreme Court determined that the cruel and unusual punishment clause of the Iowa Constitution prohibited the imposition of life without the possibility of parole sentences on juvenile offenders. *State v Sweet*, 879 NW2d 811 (Iowa 2016).

In addition to its disregard for *Miller*'s holding and other sentencing law, aggravating a sentence based on trauma and mental health– without any evidence that the defendant's mental health will impact the community – risks discriminating against those with mental illness and is not based on reliable evidence, but preconceptions about mental health. Even with the best of intentions, psychiatrists have long noted the challenges in predicting someone's future propensity for violent behavior.[28] There is little reason to believe that judges are better equipped to make such an assessment. This case, and others, show the risk of using *Miller* evidence in aggravation and of *Miller* hearing outcomes based on incomplete and unreliable evidence.

D. This Court should set forth clear rules that tailor Michigan's process to comply with *Miller, Montgomery,* our state's constitutional protection against "cruel or unusual" punishment, as well as Due Process.

This Court's decision must bring our statute into compliance with state law, and state and federal constitutional requirements. These requirements are clear. Children who are found guilty of first-degree murder are "constitutionally different" than similarly situated adults and it is the rare child whose crime reflects irreparable corruption. *Miller*, 567 US at 471; *Roper*, 543 US at 573.

At a hearing following conviction, the trial court must give mitigating effect to youth and its attendant circumstances. See *People v Skinner*, 502 Mich 89, 917 NW2d 292 (2018). The presence of any of these mitigating facts or circumstances counsels toward a term of years' sentence.

The government must bear the burden of proof on its motion to seek a life without parole sentence. *See supra* at Part II. The prosecution's burden cannot be met by restating the facts of the

[28] Erica Beecher-Monas & Edgar Garcia-Rill, Ph.D., *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World*, 24 CARDOZO L REV 1845 (2003).

offense. *Cf. Black's Law Dictionary* (11th ed) (defining "aggravating circumstance" as "a fact or situation that increases the degree of liability or culpability for a criminal act.") (emphasis added). For example, the U.S. Supreme Court in death penalty cases has counseled against the imposition of death based on the fact of the conviction or circumstances that apply to every person eligible. "Our precedents make clear that a State's capital sentence scheme also must 'genuinely narrow the class of persons eligible for the death penalty.' … If the sentence fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." *Arave v. Creech*, 507 US 463, 474; 113 SCt 1534; 123 LEd 2d 188 (1993). Additionally, it should be clear to trial courts that the absence of information on one of the *Miller* factors is not a factor in aggravation – it is merely what it is; the absence of information on one of the possible mitigating factors. In sum, there must be something aggravating shown to support the imposition of this rare sentence and to carry the government's burden on their motion.

Finally, amici encourage this Court to consider a requirement that this Court review all JLWOP sentences imposed to ensure that there is some minimal uniformity and proportionality across the state. When the U.S. Supreme Court reinstated the death penalty in *Gregg*, a key provision that helped assuage Eighth Amendment concerns was the ability of the state supreme court to review all death sentences to ensure a lack of arbitrariness. "As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed

in similar cases." *Gregg*, 428 US at 198. In light of *Gregg* and the Eighth Amendment, state supreme courts now review death sentences routinely, usually through procedures that grant automatic review.[29] Review by this Court of life without parole sentences would serve a similar function – to ensure that the implementation of juvenile life without parole is not arbitrary, discriminatory or disproportionate.

E. In the alternative, this Court should consider whether or not life without parole can be constitutionally imposed under our current system which does not narrow or guide discretion, allows for disparity, and does not give mitigating effect to youth and its attendant circumstances.

The uneven geographic and racial imposition of life without parole, the misreading of *Miller* to aggravate sentences based on age and its attendant circumstances, and the haphazard procedures used in juvenile life without parole sentences in Michigan pose a pressing and fundamental challenge that case-by-case error correction cannot address. Up to this point, this brief has suggested that this Court can strive to, with clear guidance that complies with state and federal constitutional mandates, push Michigan to have a system that is fair, nondiscriminatory, and constitutionally compliant.

[29] See, e.g., Arizona, (Ariz Rev Stat Ann § 13-703.01(A) (West 2001) (providing automatic state supreme court review of all death sentences); California, (Cal Const art VI, § 11) (providing the state supreme court with appellate jurisdiction in death penalty cases whereas courts of appeals have appellate jurisdiction in all other cases); Florida, (*Profitt v Fla*, 428 US 242, 250; 96 S Ct 2960; 49 L Ed 2d 913 (1976)) (Florida death penalty statute, § 921.141(4) (Supp 1976-1977) (required automatic review by the supreme court for all death sentences); Ohio, (Ohio Rev Code Ann § 2929.05(A) (West 2012)) (stating that the Supreme Court of Ohio "shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases."); Oregon, (Or Rev Stat §_138.012 (2001)) (providing that automatic and direct review in state supreme court of death penalty cases "has priority over all other cases"); Pennsylvania, (42 Pa Const Stat Sec 9711) (requiring state supreme court review); Tennessee, (Tenn Code Ann § 39-13-206(a)(1) (2016)) (providing for automatic review by the state court of criminal appeals and, if the sentence is affirmed, by the state supreme court) and Texas (Crim Proc Code Ann Art 37.071 § 2(h) (Vernon 1981 & Supp 2002)) (providing for "automatic review [of conviction and death sentence] by the Court of Criminal Appeals").

Yet, in light of the evidence of the implementation of our current system, the hurdles are undeniable. Ten years after *Miller*, we have not been able to put in place a system which gives meaning to the command that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 US at 471. We have not devised rules or procedures that hold the government, factfinders, or appellate courts to narrowing the number of children eligible for life without parole in a way that reflect their relative moral and legal culpability or that make sure that those who receive life without parole do not do so because of accidents of geography, judicial personality, race, or other irrelevant factors.

Even if our law narrowed in a meaningful way the people who may receive life without parole, as described above and in the other pleadings before the Court, Michigan's current implementation of *Miller* also does not provide that the features of youth that entitle children to a sentence with a meaningful opportunity for release are given consistent and significant mitigating effect. Michigan has not followed the national trend to eliminate life without parole for children; instead we have taken on the mantle of the world's leader in the number of children serving life without parole sentences.

With this ten years of post-*Miller* evidence, this Court could conclude that the attempt to implement a constitutionally-compliant method of imposing life without parole on children is a legal and moral failure.

As Justice Blackmun so eloquently stated with respect to the death penalty in *Callins v. Collins*,

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see *Furman* v. *Georgia*, 408 U.S. 238 (1972), and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty

> today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form.
>
> …..
>
> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored--indeed, I have struggled--along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. . . . It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question--does the system accurately and consistently determine which defendants "deserve" to die?--cannot be answered in the affirmative.
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> *Callins v. Collins*, 510 US 1141 (1994) (Blackmun, J., dissenting).

In the alternative, therefore, Amicus asks this Court to recognize the inability under our current law of devising a sentencing system compliant with the Michigan constitution that gives mitigating effect to youth and its attendant circumstances and consistently only imposes life without parole sentences on the rare individual whose crime is a reflection of irreparable corruption.

CONCLUSION

For the reasons stated above, and for the reasons stated in Appellant's brief and other amici for Appellant, Amicus requests this Court to reverse Mr. Taylor's life without parole sentence and remand for resentencing.

Respectfully submitted,

JUVENILE JUSTICE CLINIC

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