300 Mich.App. 293
Court of Appeals of Michigan.

PEOPLE
v.

ELIASON.
Docket No. 302353. | Submitted Jan. 9, 2013, at Grand Rapids. | Decided April 4, 2013, at 9:05 a.m.

Synopsis
Background: Juvenile was convicted in the Berrien Circuit Court, Scott Schofield, J., of first-degree premeditated murder, and possessing a firearm during the commission of a felony, and he received a mandatory sentence of life imprisonment without possibility of parole. Juvenile appealed.

Holdings: The Court of Appeals, Murray, J. held that:

[1] defense counselôs decision not to call an expert witness to testify at trial to explain juvenileôs lack of remorse after he fatally shot his step-grandfather was a matter of reasonable trial strategy;

[2] probative value of juvenileôs conversation with deputy in which he espoused his views on capital punishment substantially outweighed danger of unfair prejudice to juvenile stemming from its admission;

[3] even if defense counselôs failure to object to prosecutorôs references during trial to Charles Manson was deficient performance, juvenile was not prejudiced thereby;

[4] juvenile knowingly and intelligently waived his *Miranda* rights;

[5] juvenile, voluntarily waived his *Miranda* rights;

[6] juvenileôs sentence violated Eighth Amendment; and

[7] appropriate remedy for imposition of unconstitutional sentence was to remand the matter for trial court to conduct an individualized assessment of juvenileôs case for sentencing purposes.

Affirmed in part, vacated in part, and remanded.

Gleicher, P.J., concurred in part and dissented in part, with opinion.

West Codenotes

Limited on Constitutional Grounds
M.C.L.A. §§ 769.1(1)(g), 791.234(6)(a)

Attorneys and Law Firms

****361** Bill Schuette, Attorney General, John J. Bursch, Solicitor General, Arthur J. Cotter, Prosecuting Attorney, and Elizabeth A. Wild, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by Jonathan Sacks) for defendant.

Before: GLEICHER, P.J., and OôCONNELL and MURRAY, JJ.

Opinion

Opinion of the Court

MURRAY, J.

***295** Defendant appeals as of right his convictions for first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b(1). Defendant, who was 14 years old at the time he committed these crimes, was sentenced to mandatory life in prison without the possibility of parole for his first-degree murder conviction and two yearsô imprisonment for his felony-firearm conviction. We affirm defendantôs convictions but remand for resentencing on his first-degree premeditated murder conviction in accordance with this opinion.

I. FACTS

The material facts of this case were essentially undisputed, and at trial those facts revealed the following course of events. On March 5, 2010, defendant, along with his sister, went to spend the weekend at the home of Jean and Jesse ñPapaò Miles, their grandmother and step-grandfather. Defendant often spent weekends at his

grandparentsô home. Jean described defendant as a ñgood grandson,ò and testified that she and Jesse had ***296** always been involved in defendantôs life. She explained that defendant had a ñgoodò relationship with her and Jesse, and that nothing appeared to be out of the ordinary during this particular weekend.

On March 6, 2010, defendantôs sister returned to their fatherôs home while defendant remained at his grandparentsô house. Jean saw defendant during the evening and briefly spoke with him when he came downstairs to use the restroom; defendant did not at the time appear angry or upset. At approximately 7:30 p.m. that ****362** evening, Jean went to her bedroom to watch television; Jesse was in the living room, where he slept, watching television. Defendant was in an upstairs bedroom.

Jean awoke at approximately 3:00 a.m. the next morning when she heard a ñpop.ò Upon awakening, she heard defendantôs voice, and thought defendant told her, ñI shot Papa.ò The next thing she remembered was that she had a gun in her hands; she could not recall whether defendant gave her the gun or whether she picked it up. After discovering what happened, she instructed defendant to call 9ï 1ï 1, and paramedics responded to the call but were unable to save Jesse.

Michigan State Police Trooper Brenda Kiefer[1] and Deputy Eugene Casto of the Berrien County Sheriffôs Department responded to the scene and arrested defendant. Kiefer initially interviewed defendant at the home; she read defendant his *Miranda*[2] warnings and defendant agreed to waive his rights and to speak to her without having a parent present.[3] Defendant told Kiefer ***297** that late in the evening on March 6 or early in the morning on March 7, he went downstairs to get a handgun that Jesse kept on the hook of a coat rack. Afterwards, defendant went back up to his room and sat in a chair with the gun for approximately two to three hours. While he sat upstairs with the gun, defendant ñwas contemplating homicide or suicide.ò Defendant told Kiefer that he went downstairs and shot Jesse with the handgun while he was sleeping on the couch. Although defendant told Kiefer that he shot Jesse out of ñsadnessò and ñpent up anger,ò he was not angry with Jesse or Jean, but instead was angry with his own parents.

Defendant also spoke with Casto on the night of his arrest as defendant sat in Castoôs patrol car.[4] Among other things, defendant informed Casto that he neglected to tell Kiefer about two knives he had placed in the living room near the staircase, and that he realized that his ñlife just turned into Law & Order, but without commercials.ò Additionally, in referencing the killing, defendant stated, ñ[y]ou know I wish I could take it back but now I understand the feeling that people get when they do that. Now I understand how they feel.ò Continuing, defendant commented to Casto about the feeling, ñwhen you hit that point of realization for that split second you feel like nothing could ever hurt you. Just for that split second. Once you realize what youôve done.ò Defendant also described to Casto a paper his father, Steven Eliason, had written for a criminology class about various forms of execution.[5]

***298** Shortly thereafter, defendant was brought to a police station for interrogation by Detective Fabian Suarez. With everyoneôs permission, Eliason was present during some portions of the interview, but was not in the same room as defendant and Suarez for the entire interview. During the interview, Eliason and defendant ****363** acknowledged that they understood the *Miranda* warnings and defendant agreed to waive his rights. Defendant explained to Suarez that he had not slept much before the shooting, and that he shot Jesse after taking the loaded handgun from the coat rack. He could not explain why he shot Jesse, and indicated that Jesse never harmed him physically or emotionally. However, defendant indicated that he was contemplating either committing suicide or shooting Jesse that night, but decided to kill Jesse because he was not ready to die. And, in a sense admitting to a self-awareness of his actions, defendant stated that at one point he thought to himself, ñwhat am I doing, why do I have to do this, why do I have the gun, I know better than this....ò

As to the shooting, defendant was in the living room looking at Jesse for approximately 45 minutes trying to decide what to do before he shot Jesse. Defendant then aimed the gun at Jesse from approximately seven feet away and pulled the trigger, shooting him in the head.[6] Defendant had not previously considered hurting Jesse, but ñ[s]omething snappedò that night because everything he had been thinking of that evening ñjust buil[t] up to the point that you donôt know what youôre doing.ò ***299** According to defendant he ñblacked out for a couple minutesò before he shot Jesse.

With these essential facts in mind we now turn to defendantôs challenges to his convictions and sentences.

II. ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he was denied the effective assistance of trial counsel because his trial counsel should have presented an expert witness to rebut testimony offered by the prosecution that he lacked remorse after the shooting. At a *Ginther*[7] hearing on this matter, Dr. James Henry testified that defendant experienced significant emotional trauma before the shooting and that this caused him to dissociate from reality. As a result, defendant often had trouble expressing his feelings, including remorse. Defendant contends that his trial counsel was ineffective for failing to call an expert witness, such as Dr. Henry, to explain his alleged lack of remorse.

[1] A defendant is denied the effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution if ñcounselôs performance fell below an objective standard of reasonableness ... [and] the representation so prejudiced the defendant as to deprive him of a fair trial.ò *People v. Pickens,* 446 Mich. 298, 309, 521 N.W.2d 797 (1994). This Court presumes that trial counsel was effective, and in order to show that counselôs performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counselôs conduct constituted reasonable trial strategy. *People v.* ***300** *Carbin,* 463 Mich. 590, 600, 623 N.W.2d 884 (2001). ñAn attorneyôs decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy.ò *People v. Payne,* 285 Mich.App. 181, 190, 774 N.W.2d 714 (2009).

[2] Defendant cannot overcome the presumption that his trial counselôs decision ****364** not to call an expert witness was the product of trial strategy. Rather than calling an expert witness, defendantôs trial counsel attempted to rebut the prosecutionôs arguments that defendant lacked remorse by impeaching witnesses who testified that defendant lacked remorse, and highlighting evidence that arguably showed defendant did have remorse. This Court will not second-guess trial counselôs strategy to rebut the evidence in this manner rather than calling an expert witness. *People v. Cooper,* 236 Mich.App. 643, 658, 601 N.W.2d 409 (1999). Just as importantly, we cannot conclude that defendantôs trial counsel performed in an objectively unreasonable manner when the record reveals that he consulted with three mental health experts before trial, none of whom concluded that defendantôs lack of remorse was caused by dissociation with reality. Although these experts evaluated defendant for purposes of raising an insanity defense or for mitigating the killing, they nonetheless concluded that defendant did not suffer from a mental health disorder. We cannot hold that trial counsel was constitutionally ineffective by not seeking out a fourth expert witness when the first three he consulted did not indicate that defendant suffered from an underlying mental health condition that caused him to appear to lack remorse for his actions. The record unequivocally shows that trial counsel thoroughly examined options regarding the use of expert witnesses and what, in the end, would be the best trial strategy. His performance ***301** on behalf of defendant was anything but ineffective as defined by the Supreme Court.

However, defendant also argues that his trial counsel was ineffective for failing to object to irrelevant and prejudicial evidence, as well as the prosecutorôs argument that utilized that evidence. Defendant notes that the prosecution introduced evidenceð without objection from his counselð of his conversation with Deputy Casto in which he espoused his views on capital punishment, and told Casto about a criminology paper his father had written that discussed various forms of execution.

[3] [4] Evidence is relevant if it has ñany tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.ò MRE 401. ñAlternatively stated, the general rule is that evidence is admissible if helpful in throwing light upon any material point in issue.ò *People v. Murphy (On Remand),* 282 Mich.App. 571, 580, 766 N.W.2d 303 (2009) (quotation marks and citation omitted). ñA material fact is one that is óin issueô in the sense that it is within the range of litigated matters in controversy.ò *Id.* (quotation marks and citation omitted). Pursuant to MRE 402, ñ[a]ll relevant evidence is admissible,ò unless it is otherwise deemed inadmissible. Here, defendantôs statements to Casto were relevant to a matter in controversy because they tended to show defendantôs state of mind prior to the killing. Given that the statements were made shortly after defendant shot Jesse, they were relevant to prove the issue of premeditation because they demonstrate that defendant considered the consequences of killing before he committed the murder. Those statements also showed that soon after the killing, defendant was able to clearly articulate thoughts, even about matters associated with killing and punishment. ***302** Defendantôs trial counsel was not ineffective for failing to raise a meritless objection. *People v. Ericksen,* 288 Mich.App. 192, 201, 793 N.W.2d 120 (2010).

[5] [6] Defendant also contends that his trial counsel should have moved to exclude his statements to Casto under MRE 403 ****365** because the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. An analysis under MRE 403 requires balancing several factors, *People v. Blackston,* 481 Mich. 451, 462, 751 N.W.2d 408 (2008), which include

> the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. [*Id.*]

The mere fact that evidence is damaging to a defendant does not make the evidence *unfairly* prejudicial. *Murphy (On Remand),* 282 Mich.App. at 582ï583, 766 N.W.2d 303.

[7] [8] In consideration of these factors, we conclude that any objection to defendantôs statements about capital punishment under MRE 403 would have been unsuccessful. Although a slight danger existed that the jury might have been misled by comments about capital punishment, the evidence nonetheless tended to show that defendant acted with premeditation and the evidence was not particularly inflammatory. Therefore, trial counsel was not ineffective for failing to raise an objection to the evidence or to the prosecutorôs argument as any such objections would have been meritless. *Ericksen,* 288 Mich.App. at 201, 793 N.W.2d 120. Relative to the prosecutorôs reference to Charles Manson, although the prosecutorôs question was irrelevant and his comments during closing arguments improper, defendantôs trial ***303** counselôs performance did not fall below an objective standard of reasonableness by failing to raise an objection. Defendantôs trial counsel, as an experienced attorney, ñwas certainly aware that there are times when it is better not to object and draw attention to an improper comment.ò *People v. Unger,* 278 Mich.App. 210, 242, 749 N.W.2d 272 (2008) (quotation marks and citation omitted). ñFurthermore, declining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy.ò *Id.*

[9] Nevertheless, even if trial counsel acted in an objectively unreasonable manner by failing to object to this evidence, defendant would not be entitled to relief because he cannot demonstrate prejudice. *Carbin,* 463 Mich. at 600, 623 N.W.2d 884. Indeed, even if this evidence had been excluded, the prosecution presented overwhelming evidence of defendantôs guilt. The prosecution introduced evidence that defendant admitted to pondering the killing for approximately two to three hours, and that he sat in the living room next to Jesse for approximately 45 minutes as he contemplated what to do. Further, defendant told police officers that he pondered whether to use knives, a gun, or even a pillow. Given the amount of contemplation and planning by defendant, there is overwhelming evidence that he had more than a ñsufficient time to ... take a second lookò and that he was guilty of first-degree premeditated murder. *People v. Jackson,* 292 Mich.App. 583, 588, 808 N.W.2d 541 (2011) (quotation marks and citation omitted).

B. WAIVER OF DEFENDANT'S FIFTH AMENDMENT RIGHT AGAINST SELF–INCRIMINATION

[10] [11] [12] [13] [14] Defendant also challenges the trial courtôs failure to suppress his confessions to Kiefer and Suarez because, ***304** although he waived his Fifth Amendment ****366** rights[8] before giving his confessions, his waivers were neither knowing nor voluntary. Defendant preserved this issue for appeal by challenging the admissibility of his statements in a pretrial motion. *Unger,* 278 Mich.App. at 243, 749 N.W.2d 272. ñWe review de novo a trial courtôs determination that a waiver was knowing, intelligent, and voluntary.ò *People v. Gipson,* 287 Mich.App. 261, 264, 787 N.W.2d 126 (2010). However, we defer to the trial courtôs factual findings so long as they are not clearly erroneous. *People v. Herndon,* 246 Mich.App. 371, 395, 633 N.W.2d 376 (2001). ñ[T]he analysis must be bifurcated, i.e., considering (1) whether the waiver was voluntary, and (2) whether the waiver was knowing and intelligent.ò *People v. Tierney,* 266 Mich.App. 687, 707, 703 N.W.2d 204 (2005). Whether a waiver is knowing and intelligent ñrequires an inquiry into [a] defendantôs level of understanding, irrespective of police conduct.ò *Gipson,* 287 Mich.App. at 265, 787 N.W.2d 126. ñA defendant does not need to understand the consequences and ramifications of waiving his or her rights. A very basic understanding of those rights is all that is necessary.ò *Id.* Meanwhile, whether the waiver was voluntary depends on the absence of police coercion; the defendantôs waiver must be his or her own ñfree and deliberate choice,ò rather than the product of intimidation. *Id.* at 264ï265, 787 N.W.2d 126.

[15] Initially, we conclude that record evidence supported all of the trial courtôs findings, so we use those facts in analyzing the legal issues presented. In doing so, we hold that defendant knowingly and intelligently waived his right against self-incrimination after his *Miranda* ***305** warnings because the totality of the circumstances demonstrates that defendant understood his rights. Kiefer

and Suarez testified that defendant appeared intelligent and articulate and that he twice stated he understood the nature of his rights. Although defendant was only 14 years old, the record reveals that he performed well in school. Additionally, the trial court rejected defendantôs testimony at the suppression hearing that he did not understand his rights, finding that defendant was not credible as he was unable to articulate exactly what he did not understand about his rights. We defer to the trial courtôs credibility determinations. *Gipson,* 287 Mich.App. at 264, 787 N.W.2d 126. Because the trial court found that defendant appeared intelligent and articulate and that he twice indicated he understood his rights, we cannot hold that his waiver was not knowing and intelligent. See *People v. Abraham,* 234 Mich.App. 640, 649ï650, 599 N.W.2d 736 (1999); *People v. Fike,* 228 Mich.App. 178, 182, 577 N.W.2d 903 (1998).

[16] We likewise reject defendantôs argument that his waivers were involuntary. The voluntariness of a *Miranda* waiver is evaluated under a totality of the circumstances test, but also includes additional safeguards for juveniles. *In re SLL,* 246 Mich.App. 204, 209, 631 N.W.2d 775 (2001); *People v. Givans,* 227 Mich.App. 113, 121, 575 N.W.2d 84 (1997). In *Givans,* 227 Mich.App. at 121, 575 N.W.2d 84, this Court explained that the trial court must consider extra factors in deciding whether a juvenileôs waiver was voluntary:

> (1) whether the requirements of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), have been ****367** met and the defendant clearly understands and waives those rights, (2) the degree of police compliance with MCL 764.27; MSA 28.886 and the juvenile court rules, (3) the presence of an adult parent, custodian, or guardian, (4) the juvenile defendantôs personal background, (5) the accusedôs ***306** age, education, and intelligence level, (6) the extent of the defendantôs prior experience with the police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention.

[17] Considering the factors articulated in *Givans,*[9] and keeping in mind the deference we give to the trial courtôs findings of fact, we hold that defendant voluntarily waived his Fifth Amendment rights before he spoke with Kiefer and Suarez. Regarding the first factor, the officers complied with *Miranda* ós requirements and defendant understood his *Miranda* rights.[10] As to the third factor, Eliason was present during defendantôs interview with Suarez, and although he was not present during defendantôs interview with Kiefer, that was at defendantôs request.

Likewise, we find nothing in the next three factorsð defendantôs background, age, education, intelligence, and the extent of his prior experience with the policeð to suggest that defendantôs waiver was involuntary. Kiefer described defendant as ñintelligent and articulate,ò and Suarez opined that defendant was ñprobably above average [intelligence] for his age....ò Additionally, the record reveals that defendant earned mostly Aôs and Bôs in school, and that he did not have difficulty understanding the police officers who interviewed him. Further, defendant had some familiarity with the police as a result of prior questioning by police officers on another occasion.

***307** The remaining three factorsð the length of the detention, the nature of the questioning, and whether defendant was coerced, threatened, or deprived of food, water, sleep, or medical attentionð also support the conclusion that defendantôs waivers were voluntary. Neither the detention nor the questioning in this case was prolonged, as defendant confessed to Kiefer almost immediately after he was arrested. His subsequent confession to Suarez followed approximately two hours later. Moreover, there is no indication in the record, nor does defendant allege, that Kiefer or Suarez coerced or threatened him into making a confession and waiving his rights. Although defendant notes that he had not slept for a considerable amount of time before the interviews, the officers testified that defendant was articulate and that he did not have difficulty answering their questions. Accordingly, in light of each of the factors noted above, we hold that defendantôs waivers were voluntary. See *Givans,* 227 Mich.App. at 122, 575 N.W.2d 84; *People v. Good,* 186 Mich.App. 180, 189, 463 N.W.2d 213 (1990).[11]

****368 C. CRUEL AND UNUSUAL PUNISHMENT

Defendantôs final argument[12] is that his mandatory sentence of life imprisonment without the possibility of

***308** parole is cruel and unusual punishment under U.S. Const., Am. VIII and Const. 1963, art. 1, § 16. At sentencing, the trial court imposed a mandatory sentence of life without the possibility of parole pursuant to MCL 750.316(1), MCL 769.1(1)(g), and MCL 791. 234(6)(a). Defendant preserved this issue by raising it at his sentencing hearing. *People v. Pipes,* 475 Mich. 267, 277, 715 N.W.2d 290 (2006). ñ This Court reviews constitutional questions de novo.ò *People v. Dipiazza,* 286 Mich.App. 137, 144, 778 N.W.2d 264 (2009).

In *Miller v. Alabama,* 567 U.S. ïïïï, 132 S.Ct. 2455, 2469, 183 L.Ed.2d 407 (2012), the United States Supreme Court ruled ñthat the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.ò[13] The *Miller* Court noted that juveniles and adults are different for purposes of sentencing, and explained that sentencing schemes that *mandate* life without parole for juveniles convicted of homicide offenses do not take into account a juvenileôs individual characteristics and thus are unconstitutional. *Id.* at ïïïï, 132 S.Ct. at 2466ï2469. The Court added:

> [T]he mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balanceð by subjecting a juvenile to the same life-without-parole sentence applicable to an adultð these laws prohibit a sentencing authority from assessing whether the lawôs harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes ... [the] foundational principle [found in *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), and ***309** *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)]: that imposition of a Stateôs most severe penalties on juvenile offenders cannot proceed as though they were not children. [*Id.* at ïïïï, 132 S.Ct. at 2466.]

[18] In *People v. Carp,* 298 Mich.App. 472, 526ï527, 828 N.W.2d 685 (2012) this Court explained that the limited holding in *Miller* was that a juvenile cannot be *automatically* subjected to a punishment of life imprisonment without the possibility of parole. The holding of *Carp,* however, was that *Miller* did not apply retroactively to collateral challenges to sentences. *Id.* at 522, 828 N.W.2d 685. Here, defendantôs case was pending on direct review at the time *Miller* was decided; therefore, *Miller* applies and defendantôs mandatory sentence of life imprisonment without the possibility of parole constitutes cruel and unusual punishment under the Eighth Amendment. *Id.*

[19] However, contrary to defendantôs assertions, he is not entitled to a remand at which the trial court has unfettered discretion to impose a sentence for any term of years. In fact, he could still receive the same sentence on remand, as the ****369** *Miller* Court did not ñforeclose a sentencerôs abilityò to sentence a juvenile in a homicide case to life imprisonment without parole, so long as the sentence ñtake[s] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.ò *Id.* at ïïïï, 132 S.Ct. at 2469. In other words, a trial court can still sentence a juvenile who committed a homicide to life in prison without the possibility of parole, so long as that sentence is an individualized one that takes into consideration the factors outlined in *Miller. Id.* at ïïïï, 132 S.Ct. at 2466ï2467, 2471. We recognized as much in *Carp,* 298 Mich.App. at 525, 828 N.W.2d 685, where we opined in dicta that the rule from *Miller* ñdoes not ... imply that a sentencing court has unfettered discretion when sentencing ***310** a juvenile. Rather, the focus is on the discretion of the sentencer to determine whether to impose the harshest penalty of life without the possibility of parole on a juvenile convicted of a homicide offense.ò

[20] Therefore, the only discretion afforded to the trial court in light of our first-degree murder statutes and *Miller* is whether to impose a penalty of life imprisonment without the possibility of parole or life imprisonment with the possibility of parole. *Carp,* 298 Mich.App. at 527, 828 N.W.2d 685. In deciding whether to impose a life sentence with or without the possibility of parole, the trial court is to be guided by the following nonexclusive list of factors:

> (a) the character and record of the individual offender [and] the circumstances of the offense, (b) the chronological age of the minor, (c) the background and mental and emotional development of a youthful defendant, (d) the family and home environment, (e) the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected [the juvenile], (f) whether the juvenile might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with youth, and (g) the potential for rehabilitation. [*Id.* at 532, 828 N.W.2d 685, citing *Miller,* 567

> U.S. at ïïïï, 132 S.Ct. at 2467ï2468 (quotation marks and citations omitted).]

As the prosecutor has noted, under MCR 6.425(E)(1), a trial court is already required to hold a sentencing hearing, and so this remedyð rather than the one suggested by defendant[14]ð is expressly permitted by ***311** court rule and is not an unconstitutional trip by the judiciary into the legislative realm. We therefore vacate defendantôs mandatory sentence of life without the possibility of parole and remand for an individualized sentence within the strictures of *Miller.*

Our dissenting colleague is of the opinion that (1) under the federal constitution as interpreted in *Miller* a trial court has complete freedom to resentence a juvenile to any sentence, except those actually provided for by the Legislature, and (2) that a sentence of life *with* the possibility of parole is cruel or unusual punishment under Const. 1963, art. 1, § 16. With all due ****370** respect, we explain below why we disagree with these propositions.

1. *MILLER* AND THE SEPARATION OF POWERS

The dissent argues that our application (consistent with the dicta of *Carp*) of *Miller* ós holdingð i.e., that the appropriate sentencing remedy is to remand for a life sentence, with the trial court exercising discretion as to whether the sentence should be with or without the possibility of paroleð is too narrow. Instead, relying on *Miller,* the dissent would create a rule providing trial courts with the ñdiscretion to fashion a sentence that takes into account an offenderôs youth....ò Essentially the dissent would give unfettered discretion (except for use of *Miller* ós criteria) to trial courts when sentencing juveniles lawfully convicted of first-degree premeditated murder. But in coming to this conclusion, the dissent has failed to heed (1) the actual holding of *Miller,* (2) the context in which *Miller* ós ruling was made, and (3) the Michigan Legislatureôs judgment of the appropriate punishment for first-degree murderers.

***312** There is no disagreement that *Miller* provides the precedent for addressing whether defendantôs current sentenceð one that was mandatorily imposedð is constitutionally valid under the federal constitution. But precedent, of course, has its limitations. As one court has accurately stated:

> The essence of the common law doctrine of precedent or *stare decisis* is that the rule of the case creates a binding legal precept. The doctrine is so central to Angloï American jurisprudence that it scarcely need be mentioned, let alone discussed at length. A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy. [*Allegheny Gen. Hosp. v. NLRB,* 608 F.2d 965, 969ï970 (C.A.3, 1979) abrogated on other grounds *St. Margaret Mem. Hosp. v. NLRB,* 991 F.2d 1146 (C.A.3, 1993) (footnote omitted).]

At the outset of her opinion, Justice Kagan made clear the holding in *Miller:* ñWe ... hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendmentôs prohibition on ócruel and unusual punishments.ô ò *Miller,* 567 U.S. at ïïïï, 132 S.Ct. at 2460.[15] That holding was necessarily limited by the fact that the Court was reviewing the validity of statutes enacted in Alabama and Arkansas that *required* the sentence of life without the possibility of parole without a trial court considering *any* factors unique to the defendant ***313** and his crime. Justice Kagan was equally specific when she declared for the Court that it was not invalidating discretionary life-without-parole sentences imposed on juveniles convicted of murder: ñBecause that holding is sufficient to decide these cases, we do not consider ... [the] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger.ò *Id.* 2455, 132 S.Ct. at 2469. Importantly, the *Miller* ****371** Court did not strike down the statutes in their entirety, but instead merely ruled that their mandatory nature violated the Eighth Amendment when applied to juveniles.

As a result of *Miller* ós limited holding, the state statutes under which the trial court sentenced defendant to life in prison without the possibility of paroleð MCL 750.316(1)(a), MCL 769.1(1)(g), and MCL 791.234(6)(a)ð cannot on remand *mandate* the same sentence. Instead, the trial court is required to consider the factors surrounding defendantôs age when exercising the

discretion to determine whether the same sentence should be imposed again. *Miller* requires nothing more, and certainly did not invalidate the Michigan Legislatureôs judgment that a life sentence is the appropriate punishment for a juvenile who is lawfully convicted of first-degree murder.[16]

Contrary to the dissentôs view, the *Miller* Courtôs recitation of factors it considered relevant to youth did ***314** not create a new mandatory sentencing guideline in place of sentencing statutes like those at issue here. Rather, because it was addressing whether *mandatory* life in prison without the possibility of parole was constitutional, the *Miller* Court recited factors that distinguish juveniles from adults both as evidence of what important factors could not be considered under these mandatory schemes and to provide guidance to lower courts when determining if ña Stateôs most severe penalties on juvenile offendersò should be imposed:

> But the *mandatory penalty schemes* at issue here prevent the sentencer from taking account of these central considerations. *By removing youth from the balance*ð by subjecting a juvenile to the same life-without-parole sentence applicable to an adultð *these laws* prohibit a sentencing authority from assessing whether the *law's harshest term of imprisonment* proportionately punishes a juvenile offender. That contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a Stateôs most severe penalties on juvenile offenders cannot proceed as though they were not children. [*Miller,* 567 U.S. at ï ï ï ï , 132 S.Ct. at 2466 (emphasis added).]

See, also, *id.* at ï ï ï ï , 132 S.Ct. at 2467 (ñSuch mandatory penalties, by their nature, preclude a sentencer from taking account of an offenderôs age and the wealth of characteristics and circumstances attendant to it.ò). We reemphasize, then, by repeating that *Miller* did ñnot foreclose a sentencerôs ability to make that judgment [life without parole] in homicide cases,ò but instead merely required sentencing courts ñto take into account how children are different, and how those differences counsel against *irrevocably* sentencing them to a lifetime in prison.ò *Id.* at ï ï ï ï , 132 S.Ct. at 2469 (emphasis added).

The dissent fails to acknowledge this specific holding, and the context within which the *Miller* Court reached ***315** it. Yes, the factors that come into play when sentencing juveniles are important, but *Miller* only requires those to be considered when the juvenile is convicted of murder *and* the stateôs ñmost severe penaltyò is being considered, ****372** i.e., life without the possibility of parole. Just last month the Wyoming Supreme Court, in *Bear Cloud v. State,* 2013 Wy 18, ¶ 44, 294 P.3d 36, 47 (Wyo.2013), recognized this same point:

> In sum, *Miller* requires an individualized sentencing hearing for every juvenile convicted of first-degree murder at which the sentencing court must consider the individual, the factors of youth, and the nature of the homicide in determining whether to order a sentence that includes the possibility of parole. *Miller* does not guarantee the possibility of parole for a convicted juvenile homicide offender, but *Miller* does mandate that a meaningful review and consideration be afforded by the sentencing court.

The *Miller* Court was unquestionably *not* offering these factors so that courts could fashion *any* sentence for a juvenile, which is made clear by the limited holding and issue before that Court.

But that is what is urged by the dissent, and in doing so it is stretching *Miller* well beyond the precedent that it established. Perhaps granting trial courts wide discretion in sentencing a juvenile would be good policy (though we certainly offer no opinion on that subject), but as of today Michigan lawð in conjunction with *Miller*ð is clear as to what sentences can be imposed upon a juvenile for a first-degree-murder conviction. If a different policy decision is to be made regarding the appropriate sentences for juveniles convicted of murder, it is best ñto allow the legislative process to work than to engage in an expansive and unnecessary interpretation of *Miller.*ò *State v. Riley,* 140 Conn.App. 1, 15 n. 8, 58 A3d 304 (2013), lv. gtd. in part 308 Conn. 910 (2013). Again, *Miller* unquestionably did *not* invalidate state ***316** statutes when construed (pursuant to *Miller*) to *allow* first-degree murderers to be sentenced to life in prison without parole, and so we must continue to enforce our Legislatureôs policy choice in that regard, see *Davis v. Detroit Financial Review Team,* 296 Mich.App. 568, 628ï 629, 821 N.W.2d 896 (2012) (OôCONNELL, J., concurring in part and dissenting in

part) (recognizing the inherent limitations on the judiciary under the separation of powers).

2. THE STATE CONSTITUTION

Defendant and the dissent also argue that a sentence of life in prison with *or without* the possibility of parole runs afoul of our state constitutionôs prohibition against ñcruel or unusual punishment[.]ò Const. 1963, art. 1, § 16. It is certainly true that this state provision, with the use of ñorò rather than the Eighth Amendmentôs prohibition containing ñand,ò has been interpreted more broadly than the federal prohibition. *People v. Bullock,* 440 Mich. 15, 30, 485 N.W.2d 866 (1992).[17] However, because it is unknown what sentence on remand will be imposed upon defendant, and for what reasons, it is best to leave this issue to another day. See *People v. Oswald (After Remand),* 188 Mich.App. 1, 12ï13, 469 N.W.2d 306 (1991). Nevertheless, because ***317** the dissent has gone to great lengths in addressing this issue, ****373** we feel compelled to offer a few comments on the subject.

Our dissenting colleague concludes, based primarily on *Bullock* and *People v. Lorentzen,* 387 Mich. 167, 194 N.W.2d 827 (1972), that the Michigan Legislature cannot constitutionally set the punishment of life in prison with or without the possibility of parole for a juvenile convicted of first-degree murder. To reach this result, the dissent employs the vague and subjective proportionality tests set forth in those cases, while failing to note caselaw that tends to preclude the conclusion reached.

[21] For example, it is well settled that ñ[l]egislatively mandated sentences are presumptively proportional and presumptively valid.ò *People v. Brown,* 294 Mich.App. 377, 390, 811 N.W.2d 531 (2011). Nowhere does the dissent mention these constitutionally important presumptions. Likewise, how can it be that our state constitution prohibits a sentence for a juvenile of life *with* parole when our Supreme Court has held that life *without* parole is constitutional for the crimes of felony-murder and conspiracy to commit murder? See *People v. Hall,* 396 Mich. 650, 657ï658, 242 N.W.2d 377 (1976) and *People v. Fernandez,* 427 Mich. 321, 335, 398 N.W.2d 311 (1986). One reason why the *Hall* Court rejected the state constitutional challenge was because defendant had not shown that ñMichiganôs punishment for felony murder is widely divergent from any sister jurisdiction.ò *Hall,* 396 Mich. at 658, 242 N.W.2d 377. Nowhere does the dissent address this relevant factor.[18] See *Bullock,* 440 Mich. at 33ï34, 485 N.W.2d 866 (recognizing under *Lorentzen* that how other ***318** states penalize the conduct must be considered in the proportionality analysis); *Brown,* 294 Mich.App. at 390, 811 N.W.2d 531 (how other states penalize similar conduct must be considered in the state constitutional analysis); *People v. Launsburry,* 217 Mich.App. 358, 363, 551 N.W.2d 460 (1996) (same). Finally, our Supreme Court in *People v. Lemons,* 454 Mich. 234, 258ï259, 562 N.W.2d 447 (1997), rejected an argument that an offenderôs young age, by itself, renders a particular sentence disproportionate.[19]

It is apparent that the dissent believes that it is immoral to punish a juvenile for murder with a life sentence, even when given the chance of parole. As explained earlier, the *Miller* Court failed to invalidate *all* juvenile life sentences with no chance of parole, and failed to address juvenile life sentences *with* the opportunity for parole. Moreover, no Michigan Supreme Court case has held such a sentence unconstitutional. Accordingly, the dissentôs argument turns solely on policy[20] and an overly broad reading and application of *Miller* and *Bullock.*

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

OôCONNELL, J., concurred with MURRAY, J.

****374** GLEICHER, P.J. (concurring in part and dissenting in part).

I concur with the result reached by the majority regarding defendant Dakotah Eliasonôs challenges to ***319** his first-degree-murder conviction. I write separately to respectfully express my belief that the Michigan Constitution forbids the trial court from resentencing Dakotah to imprisonment for life without the possibility of parole. Furthermore, because Michiganôs parole guidelines do not take into account Dakotahôs youth at the time he committed the crime, I believe that both the United States and Michigan Constitutions mandate that the trial court consider sentencing Dakotah to a term of years that affords him a realistic opportunity for release.

I. THE EIGHTH AMENDMENT, PROPORTIONALITY, AND JUVENILE OFFENDERS

The Eighth Amendment of the United States Constitution embodies the basic precept that punishment for crime

should be proportioned to both the offender and the offense. *Miller v. Alabama,* 567 U.S. ïïïï, 132 S.Ct. 2455, 2463, 183 L.Ed.2d 407 (2012). ñThe concept of proportionality is central to the Eighth Amendment.ò *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011, 2021, 176 L.Ed.2d 825 (2010). Applying proportionality principles, the Supreme Court held in *Miller* that a mandatory sentence of life imprisonment without the possibility of parole violates the Eighth Amendmentôs prohibition of ñcruel and unusual punishmentsò when imposed on an offender who had not reached the age of 18 at the time of his crime. *Miller,* 567 U.S. at ïïïï, 132 S.Ct. at 2469.

Miller ós holding flows from two precedential strands of Eighth Amendment jurisprudence: ñcategorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty,ò *Miller,* 567 U.S. at ïïïï, 132 S.Ct. at 2463, and the requirement ñthat sentencing authorities consider the characteristics of a defendant and the details of his ***320** offense before sentencing him to deathò *id.* at ïïïï, 132 S.Ct. at 2463ï2464. ñ[T]he confluence of these two lines of precedent,ò the Supreme Court explained, ñleads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.ò *Id.* at ïïïï, 132 S.Ct. at 2464.

The ñcategorical banò authorities cited by the Supreme Court, *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), and *Graham,* 560 U.S. 48, 130 S.Ct. 2011, ñestablish that children are constitutionally different from adults for the purposes of sentencing.ò *Miller,* 567 U.S. at ïïïï, 132 S.Ct. at 2464. Recklessness, impulsivity, and thoughtlessly engaging in risk-taking behaviors are but three unpleasant hallmarks of adolescent behavior. These characteristics of youth render children ñless culpable than adults[.]ò *Graham,* 560 U.S. at ïïïï, 130 S.Ct. at 2028 (quotation marks and citation omitted). Accordingly, a convicted defendantôs age figures prominently in the Eighth Amendmentôs proportionality analysis. *Miller,* 567 U.S. at ïïïï, 132 S.Ct. at 2465ï2466.

Because ñyouth mattersò in determining whether lifetime incarceration without the possibility of parole is warranted, ñcriminal procedure laws that fail to take defendantsô youthfulness into account at all would be flawed.ò *Id.* at ïïïï, 132 S.Ct. at 2465ï2466 (quotation marks and citation omitted). Thus, mandatory penalty provisions contravene the fundamental constitutional principle ñthat imposition of a Stateôs most severe penalties on juvenile offenders cannot proceed as though they were not children.ò ****375** *Id.* at ïïïï, 132 S.Ct. at 2466. Likening life-without-parole sentences to the death penalty, the Supreme Court reasoned that juveniles convicted of homicide must be sentenced individually and in a manner that recognizes ñthe mitigating ***321** qualities of youth.ò *Id.* at ïïïï, 132 S.Ct. at 2467 (quotation marks and citation omitted). The Supreme Court elaborated:

> [M]andatory penalties, by their nature, preclude a sentencer from taking account of an offenderôs age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every otherð the 17ï yearï old and the 14ï yearï old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile ... will receive the same sentence as the vast majority of adults committing similar homicide offenseð but really, as *Graham* noted, a *greater* sentence than those adults will serve. [*Id.* at ïïïï, 132 S.Ct. at 2467ï2468.]

Juveniles convicted of even the most serious offenses may redeem themselves in prison and thereby demonstrate an ability to rejoin society as productive members. For this reason, the Eighth Amendment requires that states provide ñ ósome meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.ô ò *Id.* at ïïïï, 132 S.Ct. at 2469, quoting *Graham,* 560 U.S. at ïïïï, 130 S.Ct. at 2030. And although the Supreme Court refused to ñforeclose a sentencerôs abilityò to impose on a juvenile a punishment of life without parole, the Court emphasized that ñappropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.ò *Miller,* 567 U.S. at ïïïï, 132 S.Ct. at 2469.

The majority recognizes that *Miller* sets forth a new constitutional rule governing the process of sentencing juveniles convicted of first-degree murder in Michigan. Citing this Courtôs opinion in *People v. Carp,* 298 Mich.App. 472, 828 N.W.2d 685 (2012), the majority holds that Dakotah is entitled to resentencing following a hearing after which the trial court must impose a sentence of ***322** either life without the possibility of parole, or life imprisonment with the possibility of parole. According to dicta contained in *Carp* and adopted by the majority, *Miller* ñdoes not ... imply that a sentencing court has unfettered discretion when sentencing a juvenile. Rather,

the focus is on the discretion of the sentencer to determine whether to impose the harshest penalty of life without the possibility of parole on a juvenile convicted of a homicide offense.ò *Id.* at 525, 828 N.W.2d 685.

In accordance with *Carp,* the majority circumscribes Dakotahôs sentence alternatives to life imprisonment without parole or life imprisonment with parole. The majority predicates this rule on ñthe Michigan Legislatureôs judgment that a life sentence is the appropriate punishment for a juvenile who is lawfully convicted of first-degree murder.ò Contrary to *Carp* and the majority, *Miller* mandates that a sentencing court retain discretion to fashion an individualized sentence that takes into account an offenderôs youth and ñdistinctive (and transitory) mental traits and environmental vulnerabilities,ò and also affords young offenders a ñmeaningful opportunity to obtain release.ò *Miller,* 567 U.S. at ïïïï, ïïïï, 132 S.Ct. at 2465, 2469 (quotation marks and citation omitted). The sentencing calculus crafted by *Carp* violates *Miller* because it eliminates individualized sentencing and (as *Carp* concedes) it forecloses any meaningful opportunity for a reformed juvenile to obtain his or her freedom.

Furthermore, while professing fidelity to legislative sentencing judgments, the majority ****376** (and *Carp*) fail to identify any statutory provision permitting a trial court to sentence a defendant convicted of first-degree murder to life imprisonment with the possibility of parole. Our Legislature has defined only one sentence for first-degree murder, and that sentence simply does not contemplate life with parole.

***323** The majority insists that *Miller* requires that when resentencing juveniles, judges must apply the legislative ñpolicy choiceò most consistent with life without parole. I find nothing in *Miller* even remotely consistent with this view. To the contrary, *Miller* holds that proportionality principles must guide juvenile sentencing, and that laws that disregard the characteristics of youth are flawed. *Miller,* 567 U.S. at ïïïï, 132 S.Ct. at 2465ï2466. Moreover, the majorityôs newly created life-sentence option is no more tethered to Michiganôs legislative sentencing scheme than a term-of-years sentence. Absent any legislatively approved sentence for first-degree murder other than life without parole, the real question is whether affording a sentencing court the ability to impose a term-of-years sentence is required to fulfill *Miller* ós mandate. In my view, only this option permits an individualized sentence and offers a juvenile ñ ósome *meaningful* opportunity to obtain release.ô ò *Miller,* 567 U.S. at ïïïï, 132 S.Ct. at 2469 (citation omitted; emphasis added).

Furthermore, article 1, § 16 of the Michigan Constitution precludes sentencing Dakotah to life imprisonment. Michiganôs constitutional prohibition of cruel or unusual punishment incorporates a proportionality analysis emphasizing evolving sentencing standards ñenlightened by a humane justice,ò and focusing on rehabilitation rather than retribution. *People v. Lorentzen,* 387 Mich. 167, 178, 179ï181, 194 N.W.2d 827 (1972) (quotation marks and citation omitted). Measured against this framework, a life sentence with or without the possibility of parole exceeds constitutional bounds.

II. THE EIGHTH AMENDMENT, JUVENILE OFFENDERS, AND MICHIGAN'S SENTENCING SCHEME

In *Carp,* this Court elected to ñprovide guidanceò to courts that would in the future sentence juveniles ***324** convicted of first-degree murder, despite that the sole issue presented was whether *Miller* applied retroactively. *Carp,* 298 Mich.App. at 523, 828 N.W.2d 685. In dicta adopted uncritically by the majority, *Carp* limited sentencing courtsô range of options to life imprisonment with parole, or life without parole. *Id.* at 527, 828 N.W.2d 685. *Carp* based this commandment on its own determination that ñ[i]t would ... be inconsistent to sentence juveniles who commit murder to a sentence that is not proportional to the severity of the crime.ò *Id.* at 528, 828 N.W.2d 685.

This new rule is incorrect for two reasons. First, it ignores the United States Supreme Courtôs admonition in *Miller, Graham*, and *Roper* that a youthful offenderôs sentence must be proportioned *to the offender* as well as the offense. While an automatic life sentence may be proportionate to the crime of murder, a life sentence may not be imposed on a juvenile absent meaningful consideration of whether such punishment fits the *juvenile criminal. Carp* ós prescriptionð life with or without paroleð nullifies the ñfoundational principle[ ] that imposition of a Stateôs most severe penalties on juvenile offenders cannot proceed as though they were not children.ò[1] *Miller,* 567 U.S. at ïïïï, 132 S.Ct. at 2466.

****377** Pursuant to *Miller* ós core proportionality principles, an offenderôs age possesses special relevance that necessarily factors prominently in a sentencing calculation. ***325** *Id.* at ïïïï, 132 S.Ct. at 2469. *Miller* instructs that because ñyouth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole,ò sentencing courts must consider

ñthe background and mental and emotional developmentò of each individual youthful offender before passing sentence. *Id.* at ïïïï, ïïïï, 132 S.Ct. at 2465, 2467 (quotation marks and citation omitted). In other words, *Miller* compels a sentencing court to tailor punishment to an offenderôs *personal* responsibility and *singular* moral guilt. To comply with *Miller,* a judge must bear in mind that children under age 18 are ñcategorically less culpable,ò *Roper,* 543 U.S. at 567, 125 S.Ct. 1183 (quotation marks and citation omitted), and more amenable to rehabilitation than adults who commit the same crimes. A sentencing scheme that forecloses sentencing proportionate to a childôs culpability violates *Graham, Roper*, and *Miller.*

For this reason, *Carp* ós circumscription of sentence options to either of two life terms cannot be reconciled with *Miller* ós central teaching: children are constitutionally unique. Judges sentencing children must consider the mitigating effects of youth and the specific circumstances of their crimes. These factors may counsel strongly against a life term, either with or without the possibility of parole. A sentencing rubric that fails to permit proportional and individualized mitigation does not pass constitutional muster.

In light of the ñdiminish[ed] ... penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes,ò *Miller,* 567 U.S. at ïïïï, 132 S.Ct. at 2465, different sentencing principles apply. Despite that Michigan law demands that an adult murderer serve a mandatory life sentence, *Miller* obligates sentencing courts to exercise meaningful discretion when sentencing a child who ***326** committed that same crime. Exercising discretion involves thoughtfully considering ñthe wealth of characteristics and circumstances attendant toò a defendantôs youth, *id.* at ïïïï, 132 S.Ct. at 2467, which in turn means that a court must be permitted to reject that a child deserves to serve a life term. In my view, the exercise of discretion contemplated in *Miller* is simply inconsistent with a rule allowing only for life imprisonment with or without parole. The ñ two-sizes-fit-allò approach embraced by *Carp* offends the Eighth Amendment because it forecloses proportionality.[2]

****378** I respectfully take issue with *Carp* for a second reason. In *Carp,* this Court acknowledged that a parolable life sentence likely results in lifetime imprisonment. *Carp,* 298 Mich.App. at 533ï535, 828 N.W.2d 685.[3] This reality compels the conclusion that a sentence of life with parole is just as final as one that denies the possibility of parole at the outset. Although *Carp* urges that the Parole Board provide ña meaningful determination and review when parole eligibility arises,ò *id.* at 536, 828 N.W.2d 685, *Miller* instructs that removing youth from the balance *at the time of sentencing* contravenes the Eighth Amendment by prohibiting a judge ñfrom assessing whether the ***327** lawôs harshest term of imprisonment proportionately punishes a juvenile offender.ò *Miller,* 567 U.S. at ïïïï, 132 S.Ct. at 2466.

Postponing proportionality analysis until parole eligibility is simply inconsistent with *Miller.* This is particularly true in Michigan, as the statutory and administrative standards governing our parole boardôs decision-making bear no resemblance to the most relevant mitigating factors identified in *Miller:* a juvenileôs diminished moral culpability, the ñwealth of characteristics and circumstances attendant toò an offenderôs youth at the time the crime was committed, and the harshness of a life sentence imposed on, for example, a 14ï yearï old child. *Miller,* 567 U.S. at ïïïï, 132 S.Ct. at 2467. Instead, Michiganôs parole system focuses on ñthe prisonerôs mental and social attitudeò *at the time parole is considered.* MCL 791.233(1)(a). Although the parole guidelines examine the severity of the crime, they omit regard for a youthful offenderôs unique characteristics. See *In re Parole of Elias,* 294 Mich.App. 507, 512ï517, 811 N.W.2d 541 (2011). Uncertain, unpredictable, and unlikely parole does not substitute for factoring in on the ñfront endò a juvenileôs lessened culpability. *Miller* does not contemplate that a parole board may substitute for a sentencing judge.

Because the alternative sentencing options set forth in *Carp* are materially indistinguishable and discretionary in name only, they do not satisfy *Miller.* In practice, they are but two sides of the same life-imprisonment coin. Confining a sentencing courtôs ability to commit a juvenile to life without parole or to life with but the barest possible prospect of parole defies *Miller* ós mandate that when passing sentence, judges must ñtake into account how children are different, and how those differences counsel against irrevocably sentencing them ***328** to a lifetime in prison.ò *Miller,* 567 U.S. at ïïïï, 132 S.Ct. at 2469. Accordingly, implementing *Miller* entails more than mechanically applying adult sentencing practices to child offenders.

Carp declares that *Miller* ñdoes not require Michigan or other states with similar mandatory sentencing schemes to abrogate or abandon a hierarchical methodology of sentencing for those convicted of first-degree murder or to necessitate a term of years sentence consistent with a lesser offense, such as second-degree murder.ò *Carp,* 298 Mich.App. at 527, 828 N.W.2d 685. I respectfully submit that this statement reflects a misunderstanding of *Miller. Miller* does not ñabrogate or abandonò any stateôs

sentencing methodology. It simply requires that every state adjust that methodology in a manner that recognizes that ñyouth matters,ò allowing judges to implement that recognition by ****379** tailoring a sentence to fit the offender as well as the offense. Because a parolable life sentence in Michigan actually amounts to the imposition of a life-without-parole sentence, *Carp* has simply written mitigation out of the equation. Regardless whether a ñterm of yearsò sentence would correspond with a conviction of second-degree murder, it must remain an option for a sentencing court.

III. THE MICHIGAN CONSTITUTION

Const. 1963, art. 1, § 16 prohibits the infliction of cruel or unusual punishment. In *People v. Bullock,* 440 Mich. 15, 30, 485 N.W.2d 866 (1992), our Supreme Court held that this provision should be interpreted more expansively than the United States Supreme Court interprets the Eighth Amendment. Three ñcompelling reasonsò guided the *Bullock* Courtôs decision to construe the provisions differently. First, Michiganôs Constitution bars ñcruel *or* unusualò punishments, while ***329** the federal constitution addresses ñcruel *and* unusualò punishments. *Id.* This textual variance ñdoes not appear to be accidental or inadvertent.ò *Id.* at 30, 485 N.W.2d 866. The *Bullock* Court restated *Lorentzen* ós observation that ñthis difference in phraseology ... might well lead to different results with regard to allegedly disproportionate prison terms.ò *Id.* at 31, 485 N.W.2d 866. Quoting *Lorentzen,* 387 Mich. at 172, 194 N.W.2d 827, the Court explained that ñ ó[t]he prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition.ô ò *Bullock,* 440 Mich. at 31, 485 N.W.2d 866.

Next, *Bullock* drew on ñhistorical factorsò suggesting that the framers of Michiganôs Constitution understood the meaning of the clause differently than did the United States Supreme Court. In contrast with the United States Supreme Court, by 1963 the Michigan Supreme Court had determined that the cruel and unusual punishment ban ñinclude[d] a prohibition on grossly disproportionate sentences.ò *Id.* at 32, 485 N.W.2d 866. ñLongstanding Michigan precedentò guided the *Bullock* Courtôs conclusion that the Michigan Supreme Court has historically interpreted the operative words through the prism of proportionality. *Id.* at 33ï 34, 485 N.W.2d 866 (formatting altered).

After establishing the interpretive independence of the Michigan Supreme Court concerning our Constitutionôs ñcruel or unusual punishmentò provision, the Court struck down as unconstitutionally disproportionate a mandatory sentence of life without possibility of parole for conviction of knowing possession of 650 grams or more of cocaine. *Id.* at 40, 485 N.W.2d 866. Notably, the United States Supreme Court had rebuffed an Eighth Amendment challenge to precisely the same sentence less than one year earlier in ***330** *Harmelin v. Michigan,* 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). The Michigan Supreme Court specifically embraced Justice Byron Whiteôs dissenting opinion in *Harmelin,* ruling that ñ[t]o be constitutionally proportionate, punishment must be tailored to a defendantôs personal responsibility and moral guilt.ò *Bullock,* 440 Mich. at 39, 485 N.W.2d 866, quoting *Harmelin,* 501 U.S. at 1023, 111 S.Ct. 2680 (White, J., dissenting).

Bullock thereby invalidated the life-without-parole sentences for the two defendants in that case, as well as all others ñcurrently incarcerated under the same penalty, and for committing the same offense[.]ò *Bullock,* 440 Mich. at 42, 485 N.W.2d 866. The ñmost appropriate remedyò for the disproportionate life sentences imposed on those offenders, the Court concluded, was to ñameliorate the no-parole ****380** feature of the penaltyò and to require that ñsuch defendants [receive] the parole consideration otherwise available upon completion of ten calendar years of the sentenceò in accordance with MCL 791.234(4), which is now MCL 791.234(7)(a). *Bullock,* 440 Mich. at 42, 485 N.W.2d 866.

In *Bullock,* 440 Mich. at 34, 485 N.W.2d 866, the Court acknowledged that its proportionality analysis derived from *Lorentzen.* The 23ï yearï old defendant in *Lorentzen* was convicted of ñthe unlicensed sale, dispensation or otherwise giving away of any quantity of marijuana,ò and was sentenced to the mandatory minimum for that offense: 20 yearsô imprisonment. *Lorentzen,* 387 Mich. at 170ï 171, 194 N.W.2d 827. The defendant lived with his parents, worked at General Motors, and had no other criminal convictions. *Id.* at 170, 194 N.W.2d 827. The Supreme Court held the defendantôs sentence unconstitutional under the Michigan Constitution, explaining that ñ[a] compulsory prison sentence of 20 years for a nonviolent crime imposed without consideration for defendantôs individual personality and history is so excessive that it óshocks the conscience.ô ò *Id.* at 181, 194 N.W.2d 827.

***331** *Lorentzen* fashioned a three-factor test for evaluating proportionality under the Michigan Constitution. First, a court must weigh the gravity of the offense against the severity of the punishment. *Id.* at 176, 194 N.W.2d 827. Next, a court applies the ñdecency test,ò

which compares the sentences for other similar and different crimes, in Michigan and in other states. *Id.* at 179, 194 N.W.2d 827. Finally, a court looks to ñrehabilitative considerations in criminal punishment,ò recognizing that Michiganôs sentencing scheme is designed ñ ótó reform criminals and to convert bad citizens into good citizens, and thus protect society[.]ô ò *Id.* at 179ï 180, 194 N.W.2d 827, quoting *People v. Cook,* 147 Mich. 127, 132, 110 N.W. 514 (1907). Specifically,

> ñ[t]his test looks to a consideration of the modern policy factors underlying criminal penaltiesð rehabilitation of the individual offender, societyôs need to deter similar proscribed behavior in others, and the need to prevent the individual offender from causing further injury to society.ò [*Lorentzen,* 387 Mich. at 180, 194 N.W.2d 827, quoting *In re Southard,* 298 Mich. 75, 82, 298 N.W. 457 (1941).]

This final criterion, the *Bullock* Court explained, is ñrooted in Michiganôs legal traditions[.]ò *Bullock,* 440 Mich. at 34, 485 N.W.2d 866.

Bullock and *Lorentzen* stand for the proposition that Const. 1963, art. 1, § 16 prohibits both an unusually excessive period of imprisonment when compared with the seriousness of the crime, and a punishment that qualifies as disproportionately cruel considering the characteristics of the offender. In my view, sentencing a juvenile to life imprisonment with or without parole effectively trumps *Lorentzen* ós ñdecency testò and casts aside the mainstay rehabilitative ideals encompassed within article 1, § 16.[4]

*332 IV. MICHIGAN'S CONSTITUTION AND JUVENILE HOMICIDE OFFENDERS

The Michigan Supreme Court explicitly recognized in *Lorentzen* and *Bullock* that ****381** ñmoral guiltò and ñthe moral sense of the peopleò inform proportionality. *Bullock,* 440 Mich. at 39, 35 n. 18, 485 N.W.2d 866 (quotation marks and citations omitted). This acknowledgment corresponds with the United States Supreme Courtôs portrayal of the evolving nature of Eighth Amendment jurisprudence: ñThe standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.ò *Furman v. Georgia,* 408 U.S. 238, 382, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Burger, C.J., dissenting). *Roper, Graham*, and *Miller* ore that the need to sentence children differently than adults has achieved acceptance as a moral imperative.

In *Lorentzen* and *Bullock,* as in *Graham* and *Miller,* the Courts exercised ñindependent judgment requir[ing] consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.ò *Graham,* 560 U.S. at ï ï ï ï , 130 S.Ct. at 2026. In these cases, the United States Supreme Court struck down sentences deemed excessive in light of contemporary norms and discordant with the penological goals sentencing should fulfill. All four cases agreed that as a matter of constitutional law, mandatory punishments insufficiently corresponding with a defendantôs individual ***333** blameworthiness and the legitimate purposes of punishment do not pass muster. In this regard, as *Bullock* explicitly recognized, Michiganôs proportionality jurisprudence foreshadowed the development of federal Eighth Amendment law. While the United States Supreme Court in *Miller* declined to categorically ban lifetime imprisonment for juveniles who have committed murder, I believe that pursuant to *Bullock* and *Lorentzen,* Const. 1963, art. 1, § 16 commands this result in Michigan.

Mandatory life imprisonment constitutes the single harshest sentence that can be imposed by a Michigan judge. Lifetime incarceration of a juvenile, imposed without regard to his or her individual background and emotional development, is morally insupportable for the host of reasons discussed in *Roper, Graham,* and *Miller.* ñFrom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minorôs character deficiencies will be reformed.ò *Roper,* 543 U.S. at 570, 125 S.Ct. 1183. To protect the community, it may be rational to deprive an adult murderer of any hope of freedom. The morality of such a severe sentence rests on the need to incapacitate a dangerous person, to exact retribution, and to deter others from committing the same heinous crime. Those ethical considerations ring hollow when applied to a youth such as Dakotah.

Dakotah is not a hardened criminal; when he killed his grandfather, he was an extremely troubled young man. As quoted in Dakotaôs supplemental brief supporting his motion for a new trial the forensic report addressing his criminal responsibility elucidated that Dakotah

> experienced a significant amount of loss in a relatively short period of time, namely the deaths of his cousin, dog ***334** and friend to suicide, not to mention the back drop of the very significant and

> repeated loss of his mother via abandonment. These losses would be difficult for any adolescent to cope with, but Mr. Eliason seems to have lacked the supports and guidance many others receive from their parents/family and even friends. As a result he appears to have been left to his own devices and he appears to have lacked the capabilities to gradually come to terms with these ****382** losses. Rather, they were forces which overwhelmed him.

Additionally, defense counsel elicited testimony from the forensic examiner at the posttrial evidentiary hearing that the trauma Dakotah experienced triggered him to view the world ñlike he was watching a movieò so that ñeverything appear[ed] to be fantasy,ò thereby explaining Dakotahôs actions.

Given Dakotahôs emotional limitations at age 14, officially pronouncing that he is and forever will be irretrievably depraved flies in the face of common sense. Dakotahôs maturational shortcomings mirror those of the youthful offenders described in *Roper, Graham*, and *Miller.* These defendants lacked the ability to regulate negative and destructive behaviorð a defining feature of adolescence. It is simply impossible to predict whether Dakotah will someday develop the ability to grasp the full horror of his crime and to employ that knowledge in his emotional growth. ñMaturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.ò *Graham,* 560 U.S. at ïïïï, 130 S.Ct. at 2032. Because youthful offenders may grow and change, ñirrevocable judgment[s] aboutò their characters offend our Constitutionôs proportionality guarantee. *Id.* at ïïïï, 130 S.Ct. at 2030.

Furthermore, mandatory lifetime incarceration of a teenager serves no valid penological purpose. ñA sentence lacking any legitimate penological justification is ***335** by its nature disproportionate to the offense.ò *Id.* at ïïïï, 130 S.Ct. at 2028. In *Lorentzen,* our Supreme Court described three primary ñpolicy factors underlying criminal penaltiesò: rehabilitation, deterrence, and prevention. *Lorentzen,* 387 Mich. at 180, 194 N.W.2d 827.[5] A mandatory lifetime sentence ñdoes not even purport to serve a rehabilitative function.ò *Harmelin,* 501 U.S. at 1028, 111 S.Ct. 2680 (Stevens, J., dissenting). As *Graham* explained, juvenile offenders are generally not susceptible to being deterred based on their propensity for making ñimpetuous and ill-consideredò decisions. *Graham,* 560 U.S. at ïïïï, 130 S.Ct. at 2028ï2029 (quotation marks and citation omitted). And while permanently incarcerating a juvenile likely eliminates the possibility that he or she will commit another homicide, this is an extraordinarily drastic measure given the very real possibility that age would accomplish the same result. ñ*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.ò *Miller,* 567 U.S. at ïïïï, 132 S.Ct. at 2465.

Lorentzen and *Bullock* support that mandatory lifetime prison sentences may not be imposed on homicide offenders under age 18. By forbidding cruel punishment regardless of its commonality, Michiganôs Constitution prohibits imposing a severe, mandatory sentence that ignores both an offenderôs circumstances and lacks applicability to the goals of punishment recognized in this state. The evolving standards of decency elegantly articulated in *Graham* and *Miller* represent ñthe moral sense of the peopleò that imprisoning children for life is ***336** a disproportionate penalty regardless of the crime. Furthermore, lifetime imprisonment of a child serves no rational purpose. Accordingly, I would hold that lifetime imprisonment of a juvenile offender violates Const. 1963, art. 1, § 16.

****383 V. RESENTENCING DAKOTAH

When the trial court sentenced Dakotah to life imprisonment without possibility of parole, it rejected his counselôs argument that this sentence constituted a cruel or unusual punishment. ñOther than his juvenile status,ò the trial court opined, ñthereôs really nothing about Mr. Eliason that makes him less culpable than any other person who has murdered another human being in cold blood.ò The trial court spoke these words before the Supreme Court issued its decision in *Miller.* Accordingly, the majority correctly recognizes that Dakotah must be resentenced.

Despite that the trial court lacked the benefit of *Miller* ós reasoning when it imposed sentence, I believe that the trial court has clearly and unequivocally expressed its opposition to any sentence less than mandatory life. I quote the courtôs sentencing rationale at length here because I believe it demonstrates that the trial court has made up its mind about Dakotah, regardless of *Miller:*

> In this case the defendant was examined by two mental health profession[al]s, including one selected by the

defense. Thereôs been no showing that the defendant suffered from any mental health or intellectual deficiency. To the contrary, all the evidence has been that Mr. Eliason is an intelligent and articulate young man. There was some testimony that Mr. Eliason was going through some personal problems. But other than the recent suicide of a close friend, which the court concedes is a major event in the life of any young person, any ***337** one, but otherwise he was attempting to work through problems common to many 14 year old boys.

His parents separated when he was young. He didnôt get to spend enough time with his mother or his half-brother. He had some difficulty in meeting his fatherôs expectations. His pet died. These are problems that certainly areð Iôm not saying theyôre insubstantial, but theyôre certainly common to many 14 year old boys.

* * *

There are factors which in the courtôs view might make, and do make the defendant more culpable than perhaps other defendants who have committed first degree murder. He enjoyed a close relationship with his victim, and enjoyedð and had the benefit of his grandfatherôs frequent hospitality. Mr. Eliason was welcomed almost every weekend into the victimôs home and treated [it] as a weekend refuge from his ownð life with his own family.

There has been no mitigating explanation provided for the murder. And the reason for the killing apparently remains a mystery to this day.

Mr. Eliasonôs testimony showed he spent several hours quietly contemplating whether or not to kill his grandfather. And then after that period of contemplation was over, shot his grandfather in the head while his grandfather slept. When the murder weapon was found the hammer on the revolver was cocked, and there were five live rounds in the chamber.

And the court, along with the jury, listened carefully to the recorded statements given by Mr. Eliason at the scene, later at the law enforcement complex, and remarks that he made to Deputy Casto while he was seated in the back of Deputy Castoôs patrol car. Mr. Eliason showed a remarkable lack of emotion or remorse after the shooting and talked about the situation in a very calm and matter of fact way.[6]

****384 *338** Thereð the court has been presented with nothing to convince [sic] that a life without parole sentence is particularly cruel and unusual when imposed upon Mr. Eliason in particular. *And as I said, certain aspects of the case show that such a sentence is particularly appropriate when applied to Mr. Eliason.* So the court does not find that a life without parole sentence for Mr. Eliason, convicted of first degree murder is in violation of the constitution as cruel and unusual. [Emphasis added.]

It is unreasonable to expect that the trial court will simply discard these sincerely held views in light of *Miller.* The trial courtôs words make abundantly clear its rejection that the mitigating factors of youth described in *Miller, Graham*, and *Roper* should be applied to Dakotah. To preserve the appearance of fairness and justice, a different judge should resentence Dakotah. See *People v. Evans,* 156 Mich.App. 68, 71ï 72, 401 N.W.2d 312 (1986).

Parallel Citations

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Footnotes

1 Kieferôs name appears in the trial transcripts as ñKeifer.ò

2 *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

3 Kiefer described defendant as ñrespectfulò during the interview. As to defendantôs demeanor, Kiefer testified that defendant ñwas very matter of fact and showed no emotion or remorse for what happened. And he had a steady, calm voice when he answered all of my questions.ò

4 The patrol car was equipped with a camera and defendantôs statements to Casto were recorded and played for the jury at trial.

5 According to Casto, during this conversation defendant ñseemed basically kind of calm; [he] was not upset, [and he] didnôt show any signs of remorse to me, didnôt cry at all. [He] [w]as more inquisitive on what was going on than what may happen.ò

6 Defendant told Suarez that he considered using knives rather than the gun because he was not sure whether he wanted the killing to be quiet or loud. Defendant also considered using either a pillow to smother Jesse or washcloths to gag him.

7 *People v. Ginther,* 390 Mich. 436, 212 N.W.2d 922 (1973).

8 The warnings required by *Miranda* do not grant independent rights to defendant. Rather, *Miranda* warnings are measures taken to provide ñpractical reinforcementò of a defendantôs Fifth Amendment rights. *Michigan v. Tucker,* 417 U.S. 433, 444, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974).

9 When rendering its decision on defendantôs motion to suppress, the trial court thoroughly examined all of these factors.

10 Defendant does not challenge the second *Givans* factor, compliance with MCL 764.27.

11 Additionally, we reject defendantôs contention that Eliason exerted pressure on him and coerced him into confessing to Suarez. The record reveals that defendant confessed to Suarez at the outset of the interview; Eliason did not speak with defendant or ask him any questions until after defendant already confessed. Any claim that Eliason forced defendant to confess is disingenuous.

12 We note that defendant initially argued that he was entitled to a new trial because the trial court violated his right to due process by shackling him at trial. Defendant expressly abandoned this issue after the prosecution presented evidence at a posttrial evidentiary hearing that none of the jurors saw defendantôs shackles.

13 The Eighth Amendment of the United States Constitution provides the following guarantees: ñExcessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted.ò US Const., Am. VIII.

14 Defendant proposes that the most palatable remedy consistent with the role of the judiciary is to vacate his first-degree murder conviction and remand for entry of a second-degree murder conviction, which allows for a term-of-years sentence. However, the cases defendant relies upon provide that specific remedy when the conviction was not based on sufficient facts for the higher charged crime. That is not what we are faced with here, as overwhelming facts supported the first-degree-murder conviction. To do as suggested by defendant would require us to ignore the jury findings and the prosecutorôs charging discretion.

15 Though the limited nature of the *Miller* holding is abundantly clear, we point out that numerous other state courts have recently made the same observation as we do today. See, e.g., *Conley v. State,* 972 N.E.2d 864, 879 (Ind., 2012); *State v. Williams,* 108 So.3d 1169 (La., 2013); *State v. Riley,* 140 Conn.App. 1, 13ï 16, 58 A3d 304 (2013) lv. gtd. in part 308 Conn. 910 (2013).

16 It is true, as the dissent states, that no statute provides life with parole as a punishment for first-degree murder. However, life in prison without parole is still the legislatively prescribed punishment for this most heinous crime, and can still be the sentence for a juvenile. But, as we have exhaustively discussed, *Miller* requires discretion when determining whether a juvenile should be sentenced to this most severe penalty. If a juvenile should not receive life without parole, certainly life with parole is the sentence most consistent with the Legislatureôs declared punishment.

17 We note that the *Bullock* Courtôs use of a proportionality analysis for determining whether a sentence constitutes cruel or unusual punishment was eloquently challenged in a dissent written by Justice RILEY, see *Bullock,* 440 Mich. at 46ï 67, 485 N.W.2d 866, and has been more recently called into question on those same grounds. *People v. Correa,* 488 Mich. 989, 989ï 992, 791 N.W.2d 285 (2010) (MARKMAN, J., joined by YOUNG and CORRIGAN, JJ., concurring). The issues raised by Justice RILEY address what is the required test under Const. 1963, art. 1, § 16. No one questions the principle that the Michigan Constitution trumps an inconsistent statute, or that the judiciary is empowered to declare when such a conflict exists. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

18 *Miller* recognized, however, that 29 jurisdictions (28 states and the federal government) provided life *without* parole for some juveniles convicted of murder. *Miller,* 567 U.S. at ï ï ï ï , 132 S.Ct. at 2471.

19 The proportionality analysis is made at the time the defendant is sentenced, so what the parole board may do some years down the road, or even what rules and regulations are in place when a defendant is later considered for parole, is merely speculative at the time of sentencing.

20 And, as we emphasized earlier, those policy decisions are constitutionally left to debate within the halls of the Legislature. *Curry v. Meijer, Inc.,* 286 Mich.App. 586, 599, 780 N.W.2d 603 (2009).

1 *Carp* ós conclusion that juveniles who commit murder deserve a life sentence because only a life sentence is proportionate to that crime disregards that just as all juveniles are not alike, neither are all murders. Kuntrell Jackson, one of the *Miller* defendants, had not fired the bullet that killed the victim and did not intend her death. He was convicted solely as an aider and abettor. *Miller,* 567 U.S. at ï ï ï ï , 132 S.Ct. at 2468. These mitigating circumstances ñgo to Jacksonôs culpability for the offense.ò *Id.* Thus, sentencing a juvenile convicted of first-degree murder to life imprisonment without parole may sometimes qualify as inconsistent with substantial justice. Ultimately, that question is for a sentencing court to decide, not the Michigan Court of Appeals.

2 Like the California Court of Appeal, I believe that a ñpresumptive penaltyò of life imprisonment cannot be ñconstitutionally square[d]ò with *Miller. People v. Siackasorn,* 211 Cal.App.4th 909, 912, 149 Cal.Rptr.3d 918 (2012) lv. gtd. 154 Cal.Rptr.3d 73, 296 P.3d 974 (2013). In *Siackasorn,* the court held that a sentencing judge has ñequal discretion to imposeò either life without parole or the 25ï yearsï toï life penalty permitted by a California statute. *Id.* Michigan lacks a complementary statutory provision. But that hardly means that a sentencing court has ñunfetteredò discretion to sentence a juvenile convicted of first-degree murder. A sentence of life or a term of years is well known in this state. See MCL 750.317; *People v. Moore,* 432 Mich. 311, 439 N.W.2d 684 (1989). A disproportionately light sentence is as objectionable as a disproportionately onerous one.

3 See also *Alexander v. Birkett,* 228 Fed.Appx. 534 (C.A.6, 2007).

4 The majority implies a preference that the current Supreme Court overrule *Bullock* and *Lorentzen.* I find this preference quite ironic in light of the majorityôs paean to precedent from *Allegheny Gen. Hosp. v. NLRB,* 608 F.2d 965, 969ï 970 (C.A.3, 1979). I remind the majority that despite the Legislatureôs power to fashion sentences for crimes, the people of this state limited that authority by ratifying article 1, § 16 of Michiganôs Constitution. To hold otherwise denigrates our Constitution and disregards the judiciaryôs role in constitutional enforcement.

5 Retribution constitutes a fourth. The arguments supporting purely retributive justice lose their power when applied to offenders who lack the ability to regulate their behavior. See *Roper,* 543 U.S. at 571, 125 S.Ct. 1183.

6 Lack of demonstrated remorse is yet another feature of a childôs immaturity. For a full discussion of this subject, see Duncan, *"So young and so untender": Remorseless children and the expectations of the law,* 102 Colum. L. Rev. 1469 (2002). Judge Richard Posner has also written, quite persuasively, that an apparent absence of remorse (ña mitigating factorò) does not automatically translate for sentencing purposes to the presence of an aggravating factor. *United States v. Mikos,* 539 F.3d 706, 721ï 724 (C.A.7, 2008) (Posner, J., dissenting).

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