STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Elizabeth L. Gleicher, P.J., Christopher M. Murray and Peter D. O'Connell, JJ.

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee, Docket No. 147428

-v-

DAKOTAH WOLFGANG ELIASON,

Defendant-Appellant.

Lower Ct. No. 10-015309-FC
Court of Appeals No. 302353

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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COUNTERSTATEMENT OF JURISDICTION

Plaintiff agrees that this Court has jurisdiction to consider Defendant's appeal by leave granted.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS IN *ELIASON* CORRECTLY APPLIED *MILLER V ALABAMA* TO MICHIGAN'S SENTENCING SCHEME FOR FIRST DEGREE MURDER.

Plaintiff-Appellee answers: "YES"
Defendant-Appellant answers: "NO"

II. WHETHER DEFENDANT HAS NOT MET HIS BURDEN OF PROVING THE *ELIASON* SENTENCING SCHEME AMOUNTS TO CRUEL OR UNUSUAL PUNISHMENT UNDER CONST 1963, ART 1, § 16, AS APPLIED TO DEFENDANTS UNDER THE AGE OF 18, AND THIS ISSUE IS NOT RIPE FOR DETERMINATION.

Plaintiff-Appellee answers: "YES"
Defendant-Appellant answers: "NO"

III. WHETHER REMAND FOR RESENTENCING PURSUANT TO STATE LAW AND *MILLER V ALABAMA* IS REQUIRED FOR THOSE DEFENDANTS WHOSE SENTENCES ARE FOUND INVALID UNDER *MILLER* OR CONST 1963, ART 1, § 16.

Plaintiff-Appellee answers: "YES"
Defendant-Appellant answers: "NO"

COUNTERSTATEMENT OF FACTS

On August 17, 2010, a jury convicted Defendant of first-degree premeditated murder of his step-grandfather and possession of a firearm in the commission of a felony. The trial court sentenced him on October 25, 2010, to a sentence of life, with a recommendation of "life without the possibility of parole," for the murder conviction, and to a mandatory consecutive two years for the felony firearm conviction (21a). The Court of Appeals remanded for an evidentiary hearing, after which the trial court denied a new trial (37a-56a). The Court of Appeals affirmed Defendant's convictions but remanded for resentencing on his first-degree murder conviction. *People v Eliason*, 300 Mich App 293; 833 NW2d 357 (2013). This Court granted his application for leave to appeal. *People v Eliason*, ___ Mich ___; 839 NW2d 193 (2013).

On Friday, March 5, 2010, then 14-year-old Defendant, Dakotah Eliason, lived with his father, Steven Eliason, his step-mother, and his younger sister (91a-92a). That day, Defendant and his sister went to stay the weekend at the home of his grandmother, Jean Miles, and the victim, his step-grandfather Jesse "Papa" Miles (89a-93a, 101a). While at the Miles home, Defendant usually watched television and played video games in an upstairs bedroom (94a-95a). His relationships with Jean and Jesse were good (97a). Defendant had no mental health problems, never used drugs or alcohol, and had always seemed normal (98a).

On Saturday, March 6th, Defendant's sister went home (92a-93a). At around 7 or 7:30 p.m. that evening, Jean went to her bedroom to watch TV, Jesse was in the living room watching TV, and Defendant was upstairs (98a-99a). At some point, Defendant came down to use the restroom and talked with Jean for a minute (99a). He did not seem upset or angry, nothing seemed wrong, and he had not had any arguments with either grandparent (96a-100a).

While asleep, Jean heard a pop and then Defendant's voice, saying what sounded like, "I shot Papa" (101a). Jean got out of bed, and the next thing she knew, she had the gun in her hands. *Id.* She went into the living room, saw her husband and blood, and hollered "call 911" (101a-102a). Defendant went to the phone, and Jean put the gun on a chair in the dining room (102a, 105a). Jesse was still breathing but was in critical condition (102a-103a, 156a).

Jean told the 911 dispatcher that her grandson had just shot her husband (1b). She said, "It's a handgun." "I was in bed." "I heard a little pop." She told the dispatcher that Defendant came running in to her and said, "Mam, I shot Papa." *Id.*

Dispatched to the Miles home, Michigan State Police Troopers Brenda Keifer and Chris Shoemaker saw Defendant outside with Jean, who said, "[T]his is my grandson" (123a-125a).

Keifer handcuffed Defendant and read him his *Miranda*[1] rights (125a-126a). He indicated he understood his rights and was willing to give them up and talk to her (127a). Determining Defendant was 14½ years old, Keifer told him that, as a juvenile, he had a right to have his parent with him when questioned. She asked if he wanted that, and he said "[N]o." *Id.* Defendant told Keifer that, around midnight, he went downstairs and retrieved a gun Jesse kept on a hook in the hallway (128a). He took the gun up to his room and sat for about 2 to 3 hours, thinking about life and death and contemplating homicide or suicide (128a-129a, 144a). Defendant said he did that because of sadness and pent up anger at his parents (129a). He told Keifer that he shot his grandfather, who was asleep on the couch, with a six-shot Colt .38 that he knew was loaded and in which there would be five rounds and one spent round (129a-131a). He also said that, after shooting his grandfather, he was shaking, and he went and told his

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

grandmother (131a-132a). Defendant said he was not on any medication and did not use drugs or alcohol (140a).

While Keifer talked to Defendant, Shoemaker went inside with Jean (161a). Alive but unresponsive, Jesse was on the living room couch bleeding heavily from his head (162a). Officer Michael Troup followed Shoemaker inside and found the gun on a dining room chair (131a, 168a-171a). The hammer of the six-shot revolver was cocked back, and Troup removed one spent shell casing and five live rounds (172a). To cock the revolver, a person would have to manually pull it back; pulling the trigger would fire, but not cock, the gun (173a).

While sitting in Deputy Eugene Casto's patrol car after the shooting, Defendant mentioned that he had forgotten to tell Keifer about two knives sitting on the staircase (2b, 52:10 – 53:15). He told Casto, "You 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." (2b, 1:05:06 – 1:05:17). "You know when you hit that point of realization for that split second you feel like nothing could ever hurt you." (2b, 1:06:48 – 1:07:06). Defendant also talked about a paper his father had done on forms of execution. (2b, 39:00 – 41:00).

Sergeant Fabian Suarez, the detective in charge, transported Steven Eliason to the Niles Law Enforcement Center, where Defendant had been taken (165a, 227a-229a). At about 4 or 5 a.m., Suarez read Defendant his rights again, in the presence of his father (230a, 234a-235a). Defendant revealed that he started having thoughts about shooting his grandfather around 1 a.m., two hours before the homicide (3b, 9:15 – 9:20). At various points during those two hours, he got his grandfather's gun, which he knew was loaded; he had or obtained one knife, and then went and got two different ones (telling Casto about the blades and their one or two degrees of "bend" (2b)); he contemplated whether to use the gun or the knives to make it loud or quiet; he

considered gagging his grandparents with hand cloths that he got from the bathroom; he also thought about using a pillow from his room; he went downstairs and walked around for quite a bit, using the bathroom, looking at himself, and thinking "what am I doing, why do I have this, why do I have the gun, I know better than this but..."; he sat on the chair next to his grandfather for 45 minutes, just thinking, trying to figure out what he should do; with the hammer on the gun cocked, he sat at the bottom of the steps just looking at his grandfather; he walked to the stairs, went up to the third or fourth step, and more than once aimed the gun at his grandfather, making his own heart start to race; he knew that when he fired the gun something bad could happen; and, finally, he stepped down to the third or second step, aimed the gun at his grandfather, and from about seven feet away, pulled the trigger and shot his grandfather in the head (3b, 5:15 – 6:13, 8:53 – 8:59, 29:32 – 29:36, 29:48 – 30:09, 30:12 – 30:33, 31:28 – 31:35, 31:41 – 31:49, 31:50 – 32:01, 32:10 – 32-39, 32:49 – 33:09, 34:34 – 34:36, 39:49 – 39:55). At some point, either before or after he shot his grandfather, Defendant intended to shoot his grandmother, but that went away (3b, 34: 55 – 34:58, 36:30 – 36:44). Lastly, Defendant was able to describe how he felt when he shot his grandfather: "The thing is when you actually do kill somebody whether you have an emotional attachment or not you get about five seconds where you feel like nothing can hurt you, and then when the realization hits, all the tension goes away...." (3b, 33:38 – 33:57).

Taken off life support that afternoon, Jesse died as a result of the gunshot wound to his head (107a, 186a, 231a). The absence of soot or stippling around the entrance wound was consistent with the shots having been fired from a distance of over 3 feet (183a-184a).

Two kitchen knives were found on the seat of a living room chair (135a). No evidence of a struggle, alcohol, drugs, or drug paraphernalia were found in the house (223a-224a).

[In Defendant's statement of facts, he offers those parts of the hearing testimony by his expert, Dr. James Henry, supporting Henry's views of Defendant and his actions at the time and after he murdered Jesse (Defendant's brief, pp 5-8). While appropriately considered by the trial court in resentencing Defendant, that testimony appears irrelevant to this Court's questions, and Defendant refers to Dr. Henry's testimony only in a footnote. Notably, the trial court found Henry's "leap from the facts to his conclusions was a leap over – to use the language of *Gilbert [v DaimlerChrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004)] – a 'yawning analytical gap'." (53a and n 14). The trial court also concluded Dr. Henry's testimony had little persuasive value, stating:

> The court had an opportunity to observe and listen to Dr. Henry while he was on the witness stand. His demeanor was unimpressive. His logic seemed strained. He acted more like a cheerleader for the defense than a disinterested professional.... [53a.]

This Court should also know that Dr. Henry's 2 ½ to 3 hour evaluation of Defendant was performed 17 months after the shooting, after he had been incarcerated and placed on two antidepressants (360a, 367a, 369a-371a). Although an earlier evaluator[2] opined that Defendant was making up symptomatology, Henry ignored that opinion and instead assumed that all of Defendant's statements were credible (366a-367a, 381a-382a). Lastly, Henry's conclusion that Defendant was dissociating is strongly contradicted by the latter's behavior, appearance, and statements in the hours after he shot his step-grandfather (449a-475a; 2b, 3b).]

[2] The reports of the three evaluators who saw Defendant before trial are under seal as ordered by the Court of Appeals.

SUMMARY OF ARGUMENT

The holding in *Miller v Alabama*, 567 US ___; 132 S Ct 2455, 2459, 2475; 183 L Ed 2d 407 (2012), both prohibits the imposition of a mandatory sentence of life without parole for a person under 18 years of age and requires the sentencer to consider mitigating factors in determining whether life without parole is appropriate punishment for a particular juvenile.

Here, the Court of Appeals, agreeing with *dicta* in *People v Carp*, 298 Mich App 472, 526-527; 828 NW2d 685 (2012), correctly applied *Miller* to Michigan's sentencing scheme. *People v Eliason*, 300 Mich App 293; 833 NW2d 357 (2013). The *Eliason* majority concluded *Miller* limited the application of MCL 791.234(6)(a), and only that statute, to certain adolescents. The Court of Appeals also determined remand for resentencing here, as in those cases to which *Miller* applied prospectively, was allowed by MCR 6.425 and was required by *Miller*. Once a sentencing judge determines that a life without parole recommendation is appropriate for a particular juvenile, MCL 791.234(6)(a) can be lawfully applied by the parole board.

Defendant has not met his burden of overcoming the presumption that a life without parole sentence imposed on a person under 18 years of age is, with the application of *Miller*, constitutional under the "cruel or unusual punishment" clause. Although that penalty may be more harsh because of his youth, first degree murder is the most serious of offenses. Michigan imposes the same sentence for other serious crimes that do not involve the death of another, and a large number of other states continue to impose life without parole sentences on some juvenile murderers after applying *Miller*. Lastly, although the rehabilitative function of sentences is not present in nonparolable life sentences, a life without parole sentence does promote the protection of society, deterrence of others from committing murder, and discipline of the offender.

Finally, the lawful and appropriate remedy for a juvenile whose sentence has been invalidated by *Miller* or Const 1963, art 1, § 16 is remand for resentencing. Although a sentencing judge has no statutory authority to impose any sentence but life, the judge may have, as here, recommended life without parole without considering that life with parole was an option and without giving the defendant a recognized opportunity to prove his entitlement to a life with parole sentence. Certainly a sentencing judge would now be required to comply with *Miller*. In this case, Defendant agrees to resentencing, and he has not offered any sound reason not to be resentenced by the same judge.

This Court may also have to consider the possible passage of Senate Bill 319 (16b-22b), if that happens before oral argument. That proposed law provides for the imposition of a term of years sentence on a juvenile convicted of first degree murder unless the prosecutor actively seeks a life without parole sentence and the trial court, after a hearing consistent with *Miller*'s holding, determines such a sentence should be imposed (17b-19b).

ARGUMENT

I. THE COURT OF APPEALS IN *ELIASON* CORRECTLY APPLIED MILLER V ALABAMA TO MICHIGAN'S SENTENCING SCHEME FOR FIRST DEGREE MURDER.

The Court of Appeals in *People v Eliason*, 300 Mich App 293; 833 NW2d 357 (2013), agreeing with the *dicta* in *People v Carp*, 298 Mich App 472, 526-527; 828 NW2d 685 (2012), correctly applied *Miller v Alabama*, 567 US ___; 132 S Ct 2455, 2459, 2475; 183 L Ed 2d 407 (2012), to Michigan sentencing law.

A. Miller Bars A Mandatory Sentence of Life without Parole And Requires The Judge or Jury to Consider Mitigating Factors before Imposing Life without Parole.

In both *Miller* and its companion case of *Jackson v Arkansas*, fourteen-year-olds were convicted of first-degree murder and sentenced pursuant to their respective state statutes, both of which mandated life without parole. See Ala Code § 13A-6-2(c) (1982); Ark Code Ann § 5-4-104(b). The United States Supreme Court determined that the Eighth Amendment's prohibition against cruel and unusual punishment barred the imposition of a mandatory sentence of life without parole on a person under the age of eighteen. *Miller*, 132 S Ct 2460. In reaching that conclusion, the Court relied on two types of Eighth Amendment cases: those adopting categorical bans on sentencing practices, and those demanding individualized sentencing when imposing the ultimate penalty of death. 132 S Ct at 2463-2464, 2467.

The first set of cases included *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010) (invalidating a life without parole sentence for juvenile non-homicide offenders), and *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005) (invalidating the death penalty for all juvenile offenders under 18 years of age). As *Miller* explained, juveniles have diminished culpability and greater prospects for reform, making them constitutionally different

from adults for purposes of sentencing. 132 S Ct 2464. Although the Court recognized that youth mattered to a significant degree, it concluded the Eighth Amendment did not require an outright ban on juvenile sentences of life without parole. *Id.* at 2465.

Recognizing that some juveniles lawfully could be sentenced to life without parole, the Court bypassed a categorical ban by requiring individualized sentencing, in accord with death penalty cases. See *Miller*, 132 S Ct at 2463-2464, 2467, citing *Woodson v North Carolina*, 428 US 280; 96 S Ct 2978; 49 L Ed 2d 944 (1976), *Lockett v Ohio*, 438 US 586; 98 S Ct 2954; 57 L Ed 2d 973 (1978), and other cases. As the Court explained, capital defendants must "have an opportunity to advance, and the judge or jury[3] a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses." 132 S Ct at 2467; emphasis added; case citations omitted. *Miller* applied that principle to life without parole cases involving juveniles: "Of special pertinence here, we insisted in these rulings that a sentencer have the ability to consider the 'mitigating qualities of youth.'" *Id.*; emphasis added. "[A] sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty." *Id.* at 2469. The Court also implied a constitutional necessity for the evaluation of youths at the time of their convictions by quoting Alabama Court of Criminal Appeals Judge Cobb, who stated, "[A]lthough a later mental evaluation as an adult affords some semblance of procedural due process, it is, in effect, too little, too late." *Id.* at 2463, quoting *EJM v State*, 928 So 2d 1077, 1081 (Ala Crim App, 2004) (Cobb, J., concurring in result).

[3] The Court's reference to "the judge or jury" showed it meant to require individualized consideration of mitigating factors at the time of sentencing. The statutory schemes of both Alabama and Arkansas included sentencing by the trial judge, not by the jury, indicating the Court meant to adopt a rule that was beyond the scope of the two cases before it.

Miller found the Eighth Amendment's ban on mandatory life without parole sentences for juveniles stemmed from both the length of the sentence and the need for an individualized sentence. The Court held:

> [T[he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. Cf *Graham*, 560 US, at ___ (slip op, at 24) ("A State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"). By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.... Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. [*Miller*, 132 S Ct at 2469; emphasis added.]

And in conclusion, the Court stated:

> *Graham*, *Roper*, and our individualized sentencing decisions make clear that **a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.** By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.... [132 S Ct at 2475; emphasis added.]

The *Miller* Court's holding was not simply that the Eighth Amendment banned a mandatory life sentence without parole for a juvenile, but also that the Eighth Amendment required "a judge or jury" to have the opportunity to consider mitigating circumstances before imposing such a sentence.

B. The *Eliason* Court Correctly Concluded That *Miller* Limited Application of MCL 791.234(6)(a) And Required Resentencing.

To apply *Miller* to Michigan's sentencing scheme, the *Eliason* court correctly determined that both the limited application of MCL 791.234(6)(a) and resentencing were required.

MCL 791.234(6)(a) provides in relevant part:

> A prisoner sentenced to imprisonment for life for any of the following **is not eligible** for parole and is instead subject to the provisions of section 44:
>
> (a) First degree murder in violation of section 316 of the Michigan penal code, 1931 PA 328, MCL 750.316. [Emphasis added.]

Removing the "not" from the statutory language would go too far, as *Miller* expressly stated that a life without parole sentence for a juvenile would not be unconstitutional in some cases. *Miller*, 132 S Ct at 2469. But MCL 791.234(6)(a) can be limited in application in accord with *Miller*. MCL 8.5 provides:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> If any portion of an act **or the application thereof** to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable. [Emphasis added.]

See also *Midland Cogeneration Venture Limited Partnership v Naftaly*, 489 Mich 83, 95-96; 803 NW2d 674 (2011).

When a general class of offenses is plainly within a statute's terms but marginal cases may lead to unconstitutionality, this Court has a duty to give a reasonable statutory construction to the statute to prevent the entire statute from being rendered unconstitutional. *People v Gagnon*, 129 Mich App 678, 684; 341 NW2d 867 (1983). Because MCL 791.234(6)(a) would not offend the Eighth Amendment when applied to adults and to juveniles sentenced to life without parole consistent with *Miller*'s requirements, accommodating *Miller*'s dictates did not require the *Eliason* court to entirely delete the "not" in the phrase "is not eligible." *Id.*

Instead, the obligation of the Michigan courts where an intervening United States Supreme Court decision has rendered some applications of Michigan law constitutionally infirm

is to give effect to Michigan law "as far as it can" as reflected in Michigan's public policy. See, e.g., *People v Bricker*, 389 Mich 524, 530; 208 NW2d 172 (1973), quoting Cooley, Constitutional Limitations (5th ed), pp 215-216. That approach is consistent with the plain language of MCL 8.5.

The provision in MCL 791.234(6) making life without parole mandatory cannot be applied to a juvenile unless the trial judge holds a hearing at which the defendant has a reasonable opportunity to advance any mitigating factors and the judge assesses those and the *Miller* factors. After doing so, the judge may determine whether a life without parole sentence would be lawful. There is nothing constitutionally inappropriate in imposing a life without parole sentence on a juvenile murderer who reflects "irreparable corruption." *Miller*, 132 S Ct 2469. As the Court stated:

> Our decision does not categorically bar a penalty for a class of offenders or type of crime – as, for example, we did in *Roper* or *Graham*. Instead, **it mandates only that a sentence follow a certain process** – considering an offender's youth and attendant characteristics – before imposing a particular penalty. [132 S Ct at 2471.]

The *Eliason* court also recognized that Michigan's sentencing judges could, in accord with state law, follow *Miller*'s dictate that a judge or jury make an individualized determination before subjecting a juvenile to life without parole.

MCL 769.1 confers on trial courts the power to impose, and methods for imposing, criminal sentences. See *People v Coles*, 417 Mich 523, 536; 339 NW2d 440 (1983), overruled on other grounds *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). MCL 769.1(1)(g) provides:

> (1) A judge of a court having jurisdiction may pronounce judgment against and pass sentence upon a person convicted of an offense in that court. The sentence shall not exceed the sentence prescribed by law. The court shall

sentence a juvenile convicted of any of the following crimes in the same manner as an adult:

* * *

(g) First degree murder in violation of section 316 of the Michigan penal code, 1931 PA 328, MCL 750.316.

MCL 750.316(1)(a) authorizes the judge to impose a life sentence for first degree murder:

(1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:

(a) Murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing.

A circuit judge faced with sentencing a juvenile convicted of first degree murder post-*Miller* must comply with those statutes, as well as MCR 6.425 and *Miller*. MCR 6.425 specifies the procedures a sentencing court must follow. Relevant to a court's consideration of information in imposing sentence, MCR 6.425(E)(1) requires the court at sentencing to "give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence...." *Miller* mandates that, before a sentence of life without parole may be imposed, the defendant "have an opportunity to advance ... any mitigating factors," and the sentencing judge or jury has a chance to assess those factors. 132 S Ct at 2467. As noted in *Eliason*, 300 Mich App at 310, quoting *Carp*, 298 Mich App at 532, the *Miller* Court specified a nonexclusive list of factors for the sentencer to consider.

Admittedly, a sentencing judge does not have statutory authority to impose a life without parole sentence. MCL 750.316(1)(a) allows the judge to impose a sentence of "life," and the parole board has exclusive power over the release of a prisoner on parole. *In re Parole of Bivings*, 242 Mich App 363, 372-373; 619 NW2d 163 (2000). However, although a judge has no

authority to order a juvenile to serve life without parole, the judge does have the power to rule that a juvenile should not be sentenced to life without parole. A sentencing judge has the authority to bar a life without parole sentence. The judge could rule that the "cruel and unusual" provision of the Eighth Amendment, the "cruel or unusual" provision of the Michigan Constitution, or both prohibit life without parole in a particular case. Such a ruling would follow *Miller* by having the sentencer determine that MCL 791.234(6)(a) is unconstitutional as applied to a particular juvenile.

But if the sentencing judge instead makes individualized findings (as prescribed by *Miller*) and concluded that life without parole is appropriate for a particular juvenile, then there is no constitutional bar to the parole board's application of MCL 791.234(6)(a) to that juvenile. In fact, in that situation, the parole board is bound by the statutory declaration that the juvenile is not eligible for parole. Only where the judge rules that life without parole is not warranted is the parole board excused from following the statutory mandate of MCL 791.234(6)(a).

In addition, the current absence of a mechanism for the parole board to decide whether a juvenile will or will not be paroled is not problematic for those recent cases to which Miller applies prospectively, like this one. Those defendants will not be considered for parole for years, allowing the legislature time to create a remedy for the problem.

C. *Miller* Did Not Invalidate Imposition of a Life Sentence for First Degree Murder or a Sentencing Judge's Authority to Sentence a Juvenile in The Same Manner As An Adult.

Only wishful thinking supports Defendant's argument that, in addition to MCL 791.234(6)(a), *Miller* rendered MCL 750.316(1)(a) and MCL 769.1 unconstitutional.

A statute is presumed to be constitutional, and the party challenging the statute has the burden of proving the contrary. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009); *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004). Courts should "'exercise the

power to declare a law unconstitutional with extreme caution'" and only exercise that power if a statute's unconstitutionality is clearly apparent. *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007), quoting *Phillips v Mirac Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004).

Nothing in the *Miller* decision rendered any part of MCL 750.316(1)(a) unconstitutional. The statute requires a sentence of life, not life without parole, and *Miller* did not rule that imposing a life sentence on a juvenile convicted of first degree murder was unconstitutional. As the *Eliason* Court stated, *Miller* "certainly did not invalidate the Michigan Legislature's judgment that a life sentence is the appropriate punishment for a juvenile who is lawfully convicted of first-degree murder." 300 Mich App at 313; footnote omitted. The statute also does not preclude a sentencing judge from holding the hearing required by *Miller*.

Not surprisingly, Defendant would like an opportunity for a lesser sentence, such as a term of years available under MCL 750.317. But the Michigan Legislature has made it clear that life is the appropriate punishment for first degree murderers. Defendant has not shown that *Miller* requires less than that. The *Eliason* majority recognized that giving judges discretion to impose a lesser sentence would violate the separation of powers:

> If a different policy decision is to be made regarding the appropriate sentences for juveniles convicted of murder, it is best "to allow the legislative process to work than to engage in an expansive and unnecessary interpretation of *Miller*." [300 Mich App at 315; citation omitted.]

Certainly a lesser sentence than life would negate the jury's determination that Defendant was guilty of first degree – not second degree – murder.

The *Miller* holding also did not affect MCL 769.1, which gives trial courts the power to impose criminal sentences and the method for doing so. See *Coles*, 417 Mich at 536. Nothing in that statute is undermined by the *Miller* decision. MCL 769.1 does not require that a juvenile convicted of first degree murder be sentenced to life without parole. One aim of the statute is to

require the sentencing court to impose sentence on such a juvenile in the same manner as it imposes sentences in adult court. Paragraph (1) makes it clear that any sentence imposed shall not exceed the sentence prescribed by law. Simply put, the statute allows the trial court to conduct an adult sentencing hearing and impose a sentence that does not exceed that prescribed by law. Nothing in *Miller* disallows that.

Defendant also argues that Michigan case law somehow authorizes this Court to ignore the legislated dictates of MCL 750.316 and require him to be sentenced under MCL 750.317. There is no authority that would allow a trial court to sentence a juvenile to a term of years for a first-degree murder conviction. To the contrary, the "power to define crime and fix punishment is wholly legislative." *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003); *People v Smith*, 94 Mich 644, 646; 54 NW 487 (1893).

> The courts have no discretionary power in this respect unless it be conferred upon them by law. Under its mandate, murder in the first degree is punished by life imprisonment. Courts have no inherent power to modify a statute in this respect to meet exceptional cases. [*People v Palm*, 245 Mich 396, 404; 223 NW 67 (1929).]

Finally, Defendant points to a number of cases where, he asserts, the courts resentenced defendants to lesser offenses. See *People v Williams*, 475 Mich 101, 103; 715 NW2d 24 (2006) (conviction on offense underlying felony murder conviction vacated); *People v Randolph*, 466 Mich 532, 552; 648 NW2d 164 (2002) (insufficient evidence to support unarmed robbery, conviction reduced to larceny in a building); *People v Hutcherson*, 415 Mich 854; 327 NW2d 922 (1982) (remedy for inadequate jury instructions required either vacating conviction on greater offense or retrial on greater conviction); *People v Lockett*, 295 Mich App 165, 171-173; 814 NW2d 295 (2012) (insufficient evidence that victim of sexual penetration was impacted by circumstances of underlying felony); *People v Todd*, 444 Mich 936; 509 NW2d 772 (1994)

(insufficient evidence of second degree child abuse). However, what the courts did in the latter four cases was to recognize infirmities in the **convictions** on the greater offenses, vacate those convictions, and enter convictions for the lesser offenses. In those cases and in *Williams*, *supra*, the procedure used at sentencing was not before the courts. Unlike all of those cases, there was no infirmity in Defendant's first-degree murder conviction. As discussed above, *Miller* did not render the sentence of life under MCL 750.316 unconstitutional.

Defendant also points to cases from three other states in which the defendants' convictions were vacated and/or reduced to a lesser sentence to remedy unconstitutional death penalty schemes. See *People v Davis*, 43 NY2d 17, 29-36 (1977) (New York statute requiring death penalty for certain crimes was unconstitutional, and there were no provisions in statutory framework for imposition of death penalty); *State v Lee*, 340 So 2d 180, 184 (La,1976); *State v Jenkins*, 340 So 2d 157, 179 (La 1976); *Boyd v Commonwealth*, 550 SW2d 507 (Ky, 1977) (Attorney General conceded the unconstitutionality of Kentucky's mandatory death penalty). Unlike the death penalty statutes in the above states, the life sentence imposed by MCL 750.316 for first-degree murder is not unconstitutional under *Miller*. In addition, Michigan law provides for the imposition of individualized sentences upon consideration of relevant circumstances. See MCL 769.1; MCR 6.425.

This Court simply has no authority under Michigan law to allow the trial judge to sentence Defendant to a term of years under MCL 750.317.

II. DEFENDANT HAS NOT MET HIS BURDEN OF PROVING THE *ELIASON* SENTENCING SCHEME AMOUNTS TO CRUEL OR UNUSUAL PUNISHMENT UNDER CONST 1963, ART 1, § 16, AS APPLIED TO DEFENDANTS UNDER THE AGE OF 18, AND THIS ISSUE IS NOT RIPE FOR DETERMINATION.

A. The Issue of the Constitutionality of a Life without Parole Sentence for Adolescents Is Not Ripe.

Defendant's request for a ruling that the Michigan Constitution prohibits a life without parole sentence for juveniles is premature. He is not serving such a sentence, but is serving life pursuant to MCL 750.316 (21a). The application of MCL 791.234(6)(a) has been limited in scope by *Miller*. A sentencing judge can rule that a life without parole sentence for a particular juvenile is unconstitutional or find such a sentence is appropriate for that juvenile after holding the hearing required by Miller. Once the judge has determine the latter, the parole board could lawfully apply MCL 791.234(6)(a) to deny parole.

The passage of Senate Bill 319, which would enact MCL 769.25 and 769.25a (16b-22b), would also make this issue premature. Proposed MCL 769.25(1)(B)(ii) (16b-17b) would apply to Defendant, because he committed first degree murder when he was less than 18 years old and his case was pending on direct appeal on June 25, 2012. MCL 769.25(4) (18b) would require the trial court to sentence Defendant to a term of years unless the prosecutor filed a motion to have him sentenced to life without parole under MCL 769.25(2)(B) and (3) (17b-18b). Even if such a motion was filed, the sentencing judge need not grant it after holding a sentencing hearing and considering *Miller's* mitigating factors, among others. Proposed MCL 769.25(5) – (9) (18b-19b). Therefore, Defendant could not be deprived of parole and would be sentenced to a term of years if the prosecutor did not move for a life without parole sentence or the trial court chose not to impose it.

All parties agree that Defendant must be resentenced. The constitutionality of a life without parole sentence under the Michigan Constitution will not be ripe until and unless Defendant is resentenced to life without parole consistent with the findings prescribed by *Miller*.

B. Defendant's Claim of Unconstitutionality under Const 1963, art 1, § 16 Is Not Preserved.

Questions of constitutional law are generally reviewed *de novo*. *People v Shafier*, 483 Mich 205, 211; 768 NW2d 305 (2009). However, an unpreserved constitutional issue is considered only to ascertain whether plain error affected the defendant's substantial rights. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007); *Carines*, 460 Mich at 752-753, 763-764. To meet that burden, Defendant must show that (1) error occurred, (2) the error was plain, that is, clear or obvious, and (3) the plain error affected substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *Carines*, 460 Mich at 763. Reversal is warranted only when plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Carines*, 460 Mich at 763; *Thomas*, 260 Mich App at 453-454.

Defendant did not argue in the trial court that the Michigan Constitution, Const 1963, art 1, § 16, prohibits a life without parole sentence for a juvenile first degree murderer (22a-36a; 4b-15b). Therefore, he has the burden of showing plain error that affected his substantial rights.

C. The Cruel or Unusual Punishment Clause of the Michigan Constitution Does Not Prohibit Life Without Parole Sentences for All Persons under 18 Years of Age.

Arguing a life without parole sentence is unconstitutional under Const 1963, art 1, § 16, Defendant points to *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992), and *People v Lorentzen*, 387 Mich 167; 194 NW2d 827 (1972).

As argued in the Wayne County Prosecutor's brief in *People v Cortez Davis*, No. 146819, this Court should reconsider the addition by *Lorentzen*, 387 Mich at 176, and retention by *Bullock* , 440 Mich at 34-38, of a proportionality component to the test for determining whether a punishment is cruel or unusual under Const 1963, art 1, § 16. As Justice Riley's urged in her partial concurrence and dissent in *Bullock*, 440 Mich at 46-67, the conclusion that "unusual" includes grossly disproportionate sentences has no basis in Michigan law. Moreover, unlike the judiciary, the legislative branch has not only the authority but also the ability to consider, through extended research and discussion of opposing views, whether a particular punishment is proportional to the offense and offender, and not "unusual."

Recently, in Justice Markman's concurring opinion in *People v Correa*, 488 Mich 989; 791 NW2d 285 (2010), he expressed concern with establishment of proportionality review of sentences under that provision of the constitution. The justice encouraged this Court as follows: "at some point, this Court should revisit Bullock's establishment of proportionality review of criminal sentences, and reconsider Justice RILEY'S dissenting opinion in that case." *Id.* at 992.

Even if this Court does not revisit the *Bullock* decision, Defendant has not overcome the presumption that Const 1963, art 1, § 16 is constitutional as applied to first degree murderers under the age of 18 years.

The United States Constitution provides that cruel and unusual punishment "shall not be inflicted," and the Michigan Constitution prohibits "cruel or unusual punishment." United States Const, Am VIII; Const 1963, art 1, § 16. Although this Court has the authority to interpret the Michigan Constitution more expansively than the United States Constitution in that regard, the Court may also agree with the reasoning of the United States Supreme Court and choose not to give broader protection. *Bullock*, 440 Mich at 28-30.

Questions of the constitutionality of a statute are reviewed *de novo*. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). A statute is presumed to be constitutional, and the party challenging the statute has the burden of proving the contrary. *Sadows*, 283 Mich App at 67; *Sands*, 261 Mich App at 160. Courts should "'exercise the power to declare a law unconstitutional with extreme caution'" and only exercise that power if a statute's unconstitutionality is clearly apparent. *Harper*, 479 Mich at 621.

To determine whether a punishment is unconstitutionally cruel or unusual, this Court considers (a) the gravity of the offense and the harshness of the penalty; (b) the sentences imposed on other criminals in the same jurisdiction; (c) the sentences imposed for commission of the same crime in other jurisdictions; and, (d) the penological purpose of the punishment. *People v Fernandez*, 427 Mich 321, 335; 398 NW2d 311 (1986).

a. The Gravity of the Offense and the Harshness of the Penalty

The nature of the offense in this case equates with the harshness of the penalty. First degree premeditated murder is the worst of crimes. See *Fernandez*, 427 Mich at 336; *People v Perry*, 218 Mich App 520, 533; 554 NW2d 362 (1996). Murder is irrevocable, and the loss of the victim is a loss to all. For the victim's family, it is a natural life sentence. As the court in *Perry* recognized:

> The societal interests in making murder a crime and subjecting a murderer to drastic punishment as part of that classification are to deter the killing of human beings by other human beings, with all the great loss and upheaval that results, and to punish severely those who murder, in an effort to render justice. Murder not only unnaturally takes the life of a human being, but also concomitantly engenders great emotional pain and leaves a great emotional burden and sense of loss carried by the family and loved ones of the victim. Additionally, very often there is a loss to society of the future productive potential of the victim, both economically and also as contributor to family and community in all of the many and immeasurable ways that people enrich and contribute to the lives and welfare of other people. Moreover, the law makes murder the very gravest offense, because, without such laws, experience teaches that the act of murder provokes

> retaliation from the victim's immediate family, extended kinship groups, and friends.... [218 Mich App at 533-534.]

A life without parole sentence can be an appropriate response to a juvenile's commission of first-degree murder. Although science is learning more about the development of the brains of humans, and juveniles in particular, one wonders to what degree the final development of their brains figures into the crimes they commit. Ninety percent – 90 % – of brain growth occurs between the ages of 0 and 3 years of age (368a). As children develop into adolescents, they learn from what they see adults do and not do. They learn the lessons they are taught, and most learn the physical abuse of others is wrong and punishable.

At 14 years of age, adolescents can be intelligent, educated, empathetic, responsible, and moral. Defendant appeared to be one of those adolescents (98a-100a, 210a, 241a-242a, 245a, 249a). For reasons yet to be discerned, he got a gun and other potential weapons, thought for hours about killing himself or his grandparents, and after 45 minutes of additional contemplation, shot his sleeping step-grandfather in the head (121a, 128a-131a, 135a, 144a; 3b). Defendant was not an aider and abettor, and he was acting alone, not encouraged by another peer or adult to do what he did. He was not under the influence of any substance beyond Mountain Dew (98a, 119a, 223a-224a). He was not seeking revenge or spurred on by thoughts of self-defense or anger at the victim (96a-97a). Defendant loved his step-grandfather and appeared to feel secure and happy in that home (94a-95a, 97a, 119a-120a). Given the circumstances surrounding his crime, whatever minute part of his brain was still undergoing development has not been shown to have been responsible for his actions.

b. The Sentences Imposed on Other Criminals in Michigan.

Before *Miller*, Michigan also imposed mandatory life without parole sentences on juveniles for a number of crimes, including the adulteration or mixing of medicine with intent to

kill or cause serious impairment of two or more persons, MCL 750.16(5) and 750.18(7); the adulteration or sale of a drug or device with the intent to kill or cause serious impairment of two or more persons, MCL 333.17764(7); poisoning of food, drink, medicine, or the public water supply when a death results, MCL 750.436(2)(e); terrorism causing a death, MCL 750.543f(2); crimes involving explosives and bombs, MCL 750.200 to 750.212a; first degree criminal sexual conduct, MCL 750.520b(2)(c); and, "[a]ny other violation for which parole eligibility is expressly denied under state law." MCL 791.234(6)(b) – (f).

Miller has called into question those mandatory punishments in the same manner a mandatory life without parole sentence for a juvenile has been invalidated. However, the *Miller* holding did not prohibit a life without parole sentence, after a sentencer's consideration of mitigating factors advanced by the juvenile. First degree murder is not less culpable than those crimes listed that do not require a death.

As discussed above, *supra* at 17-18, if the Governor signs SB 319 (16b-22b) as passed by both the House and Senate, a life without parole sentence would be allowed only if the prosecutor moved for it, and only if the trial judge, after considering necessary and appropriate mitigating factors, concluded it was the appropriate sentence for that particular juvenile. SB 319 would also apply to the statutes listed above (17b).

c. The Sentences Imposed for Commission of the Same Crime in Other Jurisdictions.

Before *Miller* was decided, "26 States and the Federal Government [made] life without parole the mandatory (or mandatory minimum) punishment for some form of murder, and would apply the relevant provisions to 14-year-olds (with many applying it to even younger

defendants)." 132 S Ct at 2471 n 9. In addition, 15 jurisdictions[4] made life without parole for juveniles discretionary, *id.* at 2472 n 10, making *Miller* inapplicable to their sentencing schemes.

In the wake of *Miller*, courts and legislatures in at least 14 states have retained or enacted non-mandatory life without parole sentences for certain juveniles. Those include: *State v Riley*, 140 Conn 1, 3-4; 58 A3d 304 (Conn, 2013) (imposition of 100 year sentence, equivalent to life without parole, not unconstitutional where sentencing court exercised its discretion); Delaware Code, tit 11, § 4209A (enacted in response to *Miller*) provides for a sentence of up to life without parole for a person under 18 years of age; *People v Johnson*, 375 Ill Dec 893, 903; 998 NE2d 185 (Ill, 2013) (natural life sentence still allowed); *State v Null*, 836 NW2d 41, 75 (Iowa, 2013) (eventual release of youthful offenders not guaranteed); *State v Tate*, ___ So 3d ___, 2013 WL 5912118 (La, 2013) (first and second degree murder punishable by life without parole per LSA – C Cr P Art 878.1); *Chambers v State*, 831 NW2d 311 (Minn, 2012) (recognized *Miller* did not categorically prohibit life without parole for juveniles); *Parker v State*, 119 So 3d 987, 998-999 (Miss, 2013) (sentencer could impose sentence of life which carried with it the possibility of life without parole under the parole statutes); *State v Hart*, 404 SW3d 232, 238-239 (Miss, 2013) (sentence can still impose life without parole where appropriate); *State v Pemberton*, 743 SE2d 719, 728 (NC, 2013) (NC Gen Stat § 15A-1340.19B allowed sentencing judge to impose life without parole on juvenile convicted of premeditated murder); Ohio RC §§ 2929.03(A)(1) and 2929.03(E)(2) afford discretion to impose life without parole sentence; *Commonwealth v Batts*, 66 A3d 286, 295 (Pa, 2013) (resentencing juvenile to life without parole still an option);

[4] Those included Cal Penal Code Ann § 190.5(b) (West 2008); Ga Code Ann § 17-10-31; Ind Code § 35-50-2-3(b) (2011); Md Code Ann, Crim Law § 2-202; *State v St Pierre*, 584 A2d 618, 621 (Me, 1990); Nev Rev Stat Ann § 176.025 and 200.030(4); ND Cent Code §§ 12.1-32-01 and -09.1; NM Stat § 31-18-13(B), § 31-18-14, §31-18-15.2 (2010); Okla Stat Ann tit 21, §§ 13.1 and 701.9; RI Gen Laws § 11-23-2; SC Code Ann § 16-3-20; Tenn Code Ann § 39-13-202; Utah Code Ann § 76-3-206; W Va Code Ann § 62-3-15; Wis Stat Ann § 939.50.

Arredondo v State, 406 SW3d 300, 306 (Tex, 2013) (discretionary sentence of life without parole allowed after *Miller*); *Williams v Virgin Islands*, ___ VI ___, 2013 WL 5913305 (2013) (sentence of life without parole not categorically prohibited); *Sen v State*, 301 P3d 106, 127 (Wy, 2013) (life without parole sentence discretionary after new sentencing hearing).

Thus, a substantial number of jurisdictions still allow a life sentence without parole for some juveniles, just as Michigan should under *Miller*.

Defendant points to *Diatchenko v District Attorney for Suffolk District*, 466 Mass 655, 669; 1 NE3d 270 (Mass, 2013), in which the court held a juvenile life without parole sentence was unconstitutional under Art 26 of the Massachusetts Declaration of Rights. Like Michigan's constitutional provision, that of Massachusetts prohibited the infliction of "cruel or unusual punishments." However, the *Diatchenko* court reached that conclusion by applying a different test for determining whether a punishment was cruel or unusual:

> [W]ith respect to art. 26, this court has recognized that "it is possible that imprisonment for a long term of years might be so disproportionate to the offense as to constitute cruel [or] unusual punishment." *Cepulonis v. Commonwealth*, 384 Mass. 495, 496, 427 N.E.2d 17 (1981), and cases cited. "To reach the level of cruel [or] unusual, the punishment must be so disproportionate to the crime that it 'shocks the conscience and offends fundamental notions of human dignity.'" Id. at 497, 427 N.E.2d 17, quoting *Commonwealth v. Jackson*, 369 Mass. 904, 910, 344 N.E.2d 166 (1976). [*Diatchenko*, 466 Mass at 669; emphasis added.]

The *Diatchenko* test is entirely subjective and emotional. This Court should retain the reasoned, more objective test set forth in *Fernandez*, 427 Mich at 335 (unless of course it decides to revisit the addition of the fourth proportionality factor in *Lorentzen* and *Bullock*).

d. The Penological Purpose of the Punishment.

In *Fernandez*, 427 Mich at 338-339, this Court analyzed the final factor considered in *Lorentzen*, 397 Mich at 180, the penological considerations of a given sentence. Those include "(i) the reformation of the offender, (ii) protection of society, (iii) the disciplining of the

wrongdoer, and (iv) the deterrence of others from committing like offenses." *Fernandez*, 427 Mich at 339, quoting *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972).

As this Court noted in *Fernandez*, 427 Mich at 339, the rehabilitative function of sentences is not present in nonparolable life sentences. But a life without parole sentence does promote the other *Snow* factors. Society is protected from a juvenile who simply cannot control his or her criminal behavior. The juvenile is certainly disciplined, and most of those persons aware of the crime and punishment would be deterred from committing murder themselves.

Considering these factors, Defendant has not overcome the presumption that a life without parole sentence is constitutional under Const 1963, art 1, § 16. Although imposition of such a sentence on adolescents is a harsh penalty, it is no longer mandatory. The sentencing judge has discretion to recommend it or veto it. That allows a life without parole sentence to be carefully considered and, as *Miller* suggested, limited in application. The harshness of the penalty is commensurate with the nature of first degree murder. Similar sentences for other serious crimes, some not involving a death, are imposed in Michigan. In addition, most states appear to have retained life without parole sentences for juveniles in line with *Miller*'s dictates. Finally, only the goal of rehabilitation is not served by a life without parole sentence, which does serve to promote the protection of society, deterrence, and the discipline of the offender.

Therefore, Defendant has not met his burden of overcoming the presumption that a life without parole sentence, imposed consistently with the requirements of *Miller*, is constitutional under the Michigan Constitution.

III. REMAND FOR RESENTENCING PURSUANT TO STATE LAW AND MILLER V ALABAMA IS APPROPRIATE FOR THOSE DEFENDANTS WHOSE SENTENCES ARE FOUND INVALID UNDER MILLER OR CONST 1963, ART 1, § 16.

Like Defendant here, remand for resentencing by the same judge, pursuant to state law and the requirements of *Miller,* is lawful and appropriate for those defendants whose sentences are found invalid under *Miller* or Const 1963, art 1, §16.

As a threshold matter, if SB 319 becomes law, this Court should remand the case to the trial court. Pursuant to that proposed law, the prosecutor would then have 90 days after the effective date of the act to decide whether to file a motion asking the trial court to impose a life without parole sentence (17b-18b). If the prosecutor does not file such a motion, the trial court would be required to sentence Defendant to a term of years, specifically, a 25- to 40-year minimum and a not less than 60-year maximum (19b). If the prosecutor does file such a motion, the trial court would then hold a hearing and decide whether to impose the requested sentence or whether to impose a term of years (17b-19b).

If SB 319 has not been enacted, remand for resentencing pursuant to *Miller* is the most appropriate remedy. As discussed in Argument I, *Miller* prohibits the imposition of life without parole on a juvenile without an individualized sentencing hearing at which the defendant must "have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors...." 132 S Ct at 2467. Because Michigan law allows for such a hearing, remand for resentencing would give effect to the holding in *Miller.*

When Defendant was first sentenced, the Honorable Scott Schofield knew the law at the time mandated a life without parole sentence, and he ruled consistently with that law that the Eighth Amendment did not bar a life sentence without parole for a juvenile. From the judge's

point of view, he was barred from imposing a life sentence with a recommendation that parole be granted. In addition, the judge did not have the benefit of the holding in *Miller*. While he considered some of the factors mentioned in that case, he may not have considered others, and he may not have considered those factors mitigating.

Furthermore, defense counsel also believed that life without parole was a foregone conclusion, and a life with parole sentence was unattainable. As a result, Defendant was deprived of the opportunity to offer, and to have the judge consider, those mitigating circumstances that argue for a parolable life sentence. Realizing *Miller* made such a sentence possible, Defendant could present evidence to support good reasons for one.

A case on remand to a trial court for resentencing is in a "presentence posture." *People v Rosenberg*, 477 Mich 1076; 729 NW2d 222 (2007), citing *People v Ezell*, 446 Mich 869; 522 NW2d 632 (1994). A hearing is required pursuant to MCR 6.429(A), *People v Thomas*, 223 Mich App 9, 17; 566 NW2d 13 (1997), and at resentencing, "every aspect of the sentence is before the judge de novo...." *People v Williams (After Second Remand)*, 208 Mich App 60, 65; 526 NW2d 614 (1994).

> In re-sentencing, the judge shall impose sentence after due and careful consideration of all of the factors which are proper to be taken into consideration upon imposing sentence, such as defendant's previous record, if any, the probation officer's report to the circuit judge, the nature and circumstances of the offense of which defendant is guilty, need of imprisonment as punishment or as a rehabilitative factor, etc. He shall give defendant credit for the time he has already served. Otherwise he shall not—either one way or the other—take into consideration the erroneous sentence which is hereby vacated. [*People v Earegood*, 383 Mich 82, 86; 173 NW2d 205 (1970).]

By remanding for resentencing under MCL 750.316, this Court will require the trial judge to do what state law dictates. The trial judge must also follow the requirements set out in *Miller*: state courts are bound by the decisions of the United States Supreme Court construing

federal law. *Jaqua v Canadian National Railroad Inc*, 274 Mich App 540, 546; 734 NW2d 228 (2007), citing *Chesapeake & O R Co v Martin*, 283 US 209, 220-221; 51 S Ct 453; 75 L Ed 2d 983 (1931). In other words, state courts need no legislatively created list of factors to consider at adult sentence hearings; this Court has already provided those by court rule and case law.

On remand, the trial judge can, consistent with current law, impose a life sentence with a recommendation of parole (not an option before *Miller*), find a life without parole sentence for a particular juvenile unconstitutional based on mitigating factors, or find that life without parole is the appropriate sentence for Defendant.

Defendant's concerns that the parole board will not act consistent with *Miller*, even if the judge recommends parole – that life means life – are mere speculation. At this time, he has served little more than 2 years of his sentences, which include a consecutive 2-year sentence for felony firearm and the life sentence for murder. Any claim that Defendant will not be given a genuine opportunity for parole is premature and not ripe for review. *Haring Charter Township v Cadillac*, 290 Mich App 728, 752; 811 NW2d 74 (2010) ("The ripeness doctrine requires the judiciary to refrain from giving advisory opinions on hypothetical issues").

If the Legislature does not act to bring Michigan's parole statute into compliance with *Miller*, and the trial court resentences him to life with an opportunity for parole, Defendant would be able to challenge the parole board's failure to parole him when he has served the default minimum of 15 years. Because, as the law currently stands, such a defendant cannot be sentenced to life with parole under MCL 791.234(6)(a), he could reasonably argue that MCL 791.234(7)(a) would apply to him. That provision provides:

> **A prisoner sentenced to imprisonment for life**, other than a prisoner described in subsection (6), is subject to the jurisdiction of the parole board and **may be placed on parole** according to the conditions prescribed in subsection (8) if he or she meets any of the following criteria:

(a) Except as provided in subdivision (b) or (c), **the prisoner has served** 10 calendar years of the sentence for a crime committed before October 1, 1992 or **15 calendar years** of the sentence for a crime committed on or after October 1, 1992.

In other words, Defendant can reasonably argue that the effect of prohibiting application of the unconstitutional language of paragraph (6) of MCL 791.234 to him would be to apply the language of paragraph (7)(a). Under the latter provision, if Defendant is sentenced to life with parole, he would be eligible for parole when he has served 15 years of his life sentence. At that time, the parole board can solicit comments and recommendations from various parties concerned, including the sentencing judge. See MCL 791.234(8).

Finally, this case should be remanded for resentencing by the same judge.

A judge is disqualified when he or she cannot impartially hear a case. MCR 2.003(B). A party challenging a judge for personal bias or prejudice must overcome a heavy presumption of judicial impartiality. *Cain v Department of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). Generally, that party must prove the judge harbors actual bias in favor of, or prejudice against, a party that is both personal and extrajudicial. *Van Buren Township v Garter Belt Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003). Opinions formed by a judge based on record facts or events do not constitute bias or prejudice unless the judge exhibits deep-seated favoritism or antagonism that makes the exercise of fair judgment impossible. *Cain*, 451 Mich at 496, quoting *Liteky v United States*, 510 US 540, 550; 114 SCt 1147; 127 L Ed 2d 474 (1994).

In deciding whether a different judge should resentence a defendant, this Court considers:

(a) Whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected;

(b) Whether reassignment is advisable to preserve the appearance of justice; and,

(c) Whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

People v Hill, 221 Mich App 391, 398; 561 NW2d 862 (1997).

Judge Schofield stated the following before imposing sentence:

> I am going to sentence, after giving due consideration to the requirements of the law and the facts contained in the pre-sentence report, the facts as brought out at the jury trial in your case, and the facts brought to the court's attention today, and in the letters that the court received.
>
> * * *
>
> You shot your grandfather in cold blood. You put a bullet through his head as he slept. Your culpability might have been mitigated somewhat if there had been something that would indicate that you had somehow been victimized, or abused.... The path that takes you to prison is the product of your poor choices. But what path lies before you is also the product of your choices. The choices that you'll make in the future.
>
> You can chose (sic) to merely exist, just to be a warm body in a warehouse in a state prison, or you can chose (sic) to give your life some meaning and purpose. Your life doesn't have to be over. No one of us is irredeemable. No one of us is beyond redemption.
>
> We are created and put here on earth for a purpose. It is not too late for you to give your life meaning or to achieve your life's purpose, whatever that might be...." [297a-299a; emphasis added.]

Judge Schofield's comments on the day of sentencing do not reveal a judge who harbors actual prejudice against Defendant that is both personal and extrajudicial. See *Garter Belt Inc*, 258 Mich App at 598. Moreover, his opinion was based on the record and did not show deep-seated favoritism or antagonism. See *Cain*, 451 Mich at 496. Judge Schofield would not reasonably be expected to have substantial difficulty in putting his expressed views or findings, even if erroneous, out of his mind. See *Hill*, 221 Mich App at 398.

Judge Schofield did rule, consistent with case law at the time, that imposing a life without parole sentence on Defendant was constitutional. Nothing the judge said suggested that he

would refuse or be unable to apply the holding in *Miller*. And the fact that the judge found as a matter of law that a mandatory life sentence without parole was constitutional does not mean he could not reasonably set aside that opinion. Adverse decisions alone do not indicate bias or require disqualification, even if they are erroneous. See *People v Houston*, 179 Mich App 753, 759; 446 NW2d 543 (1989); *Band v Livonia Associates*, 176 Mich App 95, 116; 439 NW2d 285 (1989).

Furthermore, the judge's remarks and factual findings were based on information gleaned from the record and parties. They reflect no evidence of personal bias or prejudice and raise no question about the judge's impartiality or taint the appearance of justice. See *People v Hegwood*, 465 Mich 432, 440 n 17; 636 NW2d 127 (2001); *People v Gomez*, 229 Mich App 329, 331; 581 NW2d 289 (1998). Judge Schofield's comments reveal not a hint of personal animus, antipathy, disdain, intractability, or inappropriate vigor. See *People v Antoine*, 194 Mich App 189, 191; 486 NW2d 92 (1992).

Finally, reassignment certainly would entail a waste and duplication of effort out of proportion to any gain in preserving the appearance of fairness. See *Hill*, 221 Mich App at 398. "Generally, a defendant should be sentenced by the judge who presided at his trial, provided that the judge is reasonably available." *People v Pierce*, 158 Mich App 113, 115; 404 NW2d 230 (1987). Judge Schofield presided over the preliminary examination, pretrial motions, trial, and extensive post-sentencing proceedings. A different judge would be unlikely to gain the familiarity with the evidence and Defendant's background that Judge Schofield has.

Judge Schofield is presumed to know the law governing resentencings. He must follow the requirements set out in *Miller*, as discussed in the majority opinion. See *Jaqua*, 274 Mich App at 546. "[E]very aspect of the sentence is before the judge de novo...." *Williams*, 208 Mich

App at 65. And as stated in *Earegood*, 383 Mich at 86, a judge resentencing a defendant "shall not—either one way or the other—take into consideration the erroneous sentence...."

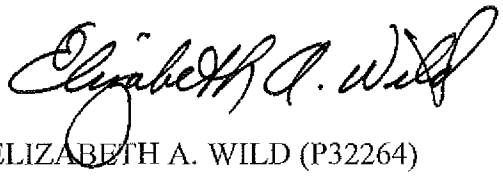
At Defendant's original sentencing, Judge Schofield did not have the guidance of *Miller* and this Court's application of *Miller* to Michigan law. Neither his ruling before sentencing nor his comments at sentencing meet the *Hill* test. Defendant has not demonstrated "palpable error" in the majority's decision simply to remand for resentencing.

REQUEST FOR RELIEF

For these reasons, this Court should declare life without parole sentences for certain juveniles constitutional under Const 1963, art 1, § 16 and remand this case for resentencing pursuant to state law and *Miller* by the same judge.

DATED: Feb. 18, 2014

Respectfully submitted,



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