

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
CASE NO. _____

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff/Appellee,

v

DEMARIOL BOYKIN,

Defendant/Appellant.

MI COA: 335862
Kent Cty. Circuit Ct.
#03-004460-FC

APPLICATION FOR LEAVE TO APPEAL

Oral Argument Requested

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STATEMENT OF JURISDICTION

Demariol Boykin was convicted of first degree murder from an incident on January 29, 2003 when he was 17.

On December 4, 2003 he was sentenced to life plus two years for felony firearm.

Due to *Miller v Alabama*, 567 U.S. ____ (2012), an inter alios resentencing was ordered. The prosecutor did not seek a life sentence. On October 28, 2016 Demariol Boykin was sentenced to 40-60 years.

On October 22, 2016 Appellate counsel was appointed.

On March 20, 2018 the Court of Appeals filed a Per Curiam Decision affirming the trial judge (attached hereto as Exhibit A). A dissent was filed noting that the sentencing judge was unable or unwilling to consider the Miller factors (attached hereto as Exhibit B). In the Court of Appeals, Demariol Boykin was represented by court assigned counsel; his indigence status has not changed.

This is Demariol Boykin's Application for Leave to Appeal to the Michigan Supreme Court.

STATEMENT OF QUESTIONS PRESENTED

- I. DOES JUVENILE LIFER RESENTENCING TO 40-60 YEARS FAIL WHEN IT IGNORES THE MANDATE THAT FOR SENTENCING PURPOSES CHILDREN ARE CONSTITUTIONALLY DIFFERENT THAN ADULTS?**

Defendant/Appellant says, "Yes."

- II. DOES MCL 769.259 FAIL IN THAT IT DOES NOT COMPLY WITH THE MANDATE OF MILLER V ALABAMA AND THE VIII AMENDMENT. U.S. CONST. AMENDS V, VI, VII AND XIV?**

Defendant/Appellant says, "Yes."

STATEMENT OF THE CASE

Demariol Boykin was convicted of first degree murder from an incident on January 29, 2003 when he was 17.

On December 4, 2003 he was sentenced to life plus two years for felony firearm.

Due to *Miller v Alabama*, 567 U.S. ____ (2012) inter alios resentencing was ordered. The prosecutor did not seek a life sentence. On October 28, 2016 Demariol Boykin was sentenced to 40-60 years.

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This is Demariol Boykin's Application for Leave to Appeal to the Michigan Supreme Court.

STATEMENT OF FACTS

Demariol Boykin spent most of his childhood on the west side of Chicago with a caring mother and mostly absent father due to multiple incarcerations in Michigan. He became involved in the drug culture in Chicago and acquired convictions for possession and sale of drugs at the ages of 14 and 15. His mother realized his downward path and arranged for him to move in with his father in July of 2000. He joined a family of half-siblings but unfortunately, he found himself living in the heart of the gang environment in Grand Rapids, Michigan. Even so, his only brush with law enforcement occurred in 2002 with a misdemeanor charge of “frequenting an illegal business.” Still, as so many of our youth have done, he acquired a gun “for protection” during his stay with his father. Sadly, only five months after he moved in with his father, his mother passed away from a brain aneurysm. (Defendant’s Sentencing Memorandum, p. 2; Pre-sentence pre-investigation report, agent and Defendant’s description of the offense, page 2; and DOC psychological report, p. 1.).

On the date of the shooting, the Defendant’s half-brother was involved in the altercation of the victim. Apparently, the deceased was more physically imposing than Mr. Boykin’s half-brother, so he retreated and called his other half-brother. He, in turn, called the Defendant and they all eventually got into a car with their

father and drove to confront the deceased for a “fair fight.” “Whatever the circumstances, the Defendant does not dispute that eventually all three brothers, with tacit approval from their father, began to assault the deceased.” In the heat of the encounter, the Defendant pulled out his gun, the deceased began to flee, but the Defendant fired some shots at him and eventually hit him in the abdomen and arm. The three of them started kicking the deceased on the ground. The Defendant admits to attempting to shoot him again, but the gun apparently jammed. The three brothers then left with their father. *Id.*

A review of Demariol Boykin’s prison conduct history reveals a fair number of documented misconducts. He has incurred 16 incidents: 5 were for possession of alcohol (1 of which included possession of rolling papers and a cell phone); 4 were for being out of place (2 of which were for playing chess); 1 was for possession of unknown blue pills; 1 possession of a gambling betting slip; 2 possession of homemade knives; 1 misuse of a phone PIN; 1 consensual sexual misconduct with another prisoner; and 1 incident involving photographs of people wearing gang symbols as well as drawings as well as paper related to the gang symbols. THERE ARE NO ASSUALTS, NO ISSUES OF ARGUMENTS OR EVEN DISTURBING THE PEACE OF ANY FACILITY. TO BE SURE, THESE INCIDENTS REFLECT IMPROPER BEHAVIOR, BUT NONE OF THEM IDENTIFY THE DEFENDANT AS BEING LIKELY TO REPEAT VIOLENT

BEHAVIOR OR TO BE AN UNLIKELY CANDIDATE FOR REHABILITATION. MDOC case report, 8/16/2016.

Demariol Boykin was a 17 year-old man who had been involved in gang activity since he was 9 years old. His environment was so bad that his mother sent him away to Michigan, despite the fact that she was the only solid base he could rely on in life. He moved to Grand Rapids and within six months, his mother suddenly died. Demariol Boykin was surrounded by half-siblings that he did not know that well, and he recognized the need to protect the family. There can be little doubt that family pressure played a role in this offense. Even his father played a role, driving him to the scene knowing that at least the assaults were likely and driving him away from the scene. *Id.* Demariol Boykin's description of the offense in the original pre-sentence report is illustrative. He remembers that "everything happened so fast, and I was so mad." *Id.* These are not indicators of someone who is incapable or even unlikely to become rehabilitative. Demariol Boykin does not diminish the severity of this offense. The deceased and his family have suffered the ultimate loss. The quick escalation to violence was alarming. However, Demariol Boykin's record since his imprisonment should be reassuring. Despite the unlikelihood of his ever being released, he has not committed one violent act during his stay with the MDOC. At Brooks Correctional Facility he

was housed in the lowest management level available to “lifers” in the MDOC: Level II.

Demariol Boykin is truly remorseful for his actions as indicated in his allocution. (Resentencing p. 13-14). Letters of support from family members were included for the sentencing Judge’s review. It is particularly noteworthy that Demariol Boykin’s major motivation is to provide whatever support he can to his now 13 year old daughter.

I. JUVENILE LIFER RESENTENCING TO 40-60 YEARS FAILS WHEN IT IGNORES THE MANDATE THAT FOR SENTENCING PURPOSES CHILDREN ARE CONSTITUTIONALLY DIFFERENT THAN ADULTS

A. INTRODUCTION

The United States Supreme Court has signaled that whatever sentence is imposed on a juvenile offender, the juvenile must be afforded a “meaningful opportunity to obtain release based on a demonstrated maturity and rehabilitation.” U.S. Const. Amends. V, VI, VIII and XIV; *Graham v Florida*, 560 U.S. 48 (2010); *Miller v Alabama*, 567 U.S. _____ (2012); *Montgomery v Louisiana*, ____ U.S. _____ (2016); and *Roper v Simmons*, 543 U.S. 551 (2004). Here, Demariol Boykin has been resentenced to 40-60 years, the maximum; at 30 years of age, he

will likely die in prison – something the Miller Court stated should be an uncommon outcome:

[G]iven all we have said in *Roper*, *Graham* and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest, possible penalty will be uncommon. *Miller, supra*.

Demariol Boykin was tried and convicted of first degree murder for an incident that occurred on January 29, 2003 when he was 17. On October 28, 2016 resentencing occurred. See, *Miller, supra*; and *Montgomery, supra*; and MCL 769.259. At resentencing, the prosecutor opined that Demariol Boykin probably did not qualify for a light sentence and deserves the maximum the court can give him. (Resentencing p. 4).

In 2000 at 15 years old, Demariol Boykin had moved from his mother’s house in Chicago to his father’s house in Grand Rapids. He joined a family of half-siblings, and unfortunately found himself living in a gang environment. He acquired a gun, “for protection” (Defendant’s Memorandum on Sentencing).

On the date of the shooting, the Defendant’s half-brother was involved in an altercation with the deceased. Apparently, the deceased was more physically imposing than Mr. Boykin’s half-brother, so he retreated and called his other half-

brother. He, in turn, called the Defendant and they all eventually got into a car with their father and drove to confront the deceased for a “fair fight.”

The sentence is 40-60 years. The Judge proceeded to impose the most severe penalty possible as though Demariol Boykin was not a child. The sentence is contrary to the considerations stated in *Graham* and *Roper* that children are constitutionally different from adults for sentencing purposes. Their “lack of maturity”, and “underdeveloped sense of responsibility” lead to recklessness, impulsivity, and heedless risk taking. They “are more vulnerable....to negative influences and outside pressures,” including from their family and peers; they have limited “control over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings. *Id.* And because a child’s character is not as “formed” as an adults, his traits are “less fixed” and his actions are less likely to be “evidence of irretrievable depravity.” *Id.* *Roper* and *Graham* emphasize that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.

While *Graham*’s flat ban on life without parole was for non-homicide crimes, nothing that *Graham* said about children is crime-specific. Thus, its reasoning implicates any life without parole sentence for a juvenile even as it’s categorical bar relates only to non-homicide offenses. Most fundamentally,

Graham insists that youth matters in determining the appropriate necessity of a life time of incarceration without the possibility of parole.

Instead, the Judge focused on his,

1. Disagreement with United States Supreme Court;
2. Assessment of facts that failed to recognize that children are constitutionally different from adults for sentencing purposes;
3. Assessment of a 2003 Michigan Department of Corrections evaluation that fails to recognize that children are constitutionally different from adults for sentencing purposes; and
4. Assessment of Demariol Boykin's prison record which fails to recognize that for sentencing purposes children are constitutionally different from adults.

The Michigan Court of Appeals filed a Per Curiam Opinion with a Dissent. Two Judges found that the *Miller* factors do not apply in that this record represents no abuse of discretion.

The dissent notes that *People v Wines*, ____ Mich App ____ (Dkt 336550, 2018) requires the resentencing court to balance the factors set out in *People v Snow*, 386 Mich App 586 (1972) and in that context must consider the attributes of youth such as articulated in underlying *Miller*.

The Judge's explicit agreement with the view that a 16 year old "is a grown man" leaves little doubt that he either did not understand *Miller* or was unwilling to follow." Dissent Op. 2. (Opinion and Dissent attached).

B. DEMARIOL BOYKIN¹

Demariol Boykin spent most of his childhood on the west side of Chicago with a caring mother and mostly absent father due to multiple incarcerations in Michigan. He became involved in the drug culture in Chicago and acquired convictions for possession and sale of drugs at the ages of 14 and 15. His mother realized his downward path and arranged for him to move in with his father in July of 2000. He joined a family of half-siblings but unfortunately, he found himself living in the heart of the gang environment in Grand Rapids, Michigan. Even so, his only brush with law enforcement occurred in 2002 with a misdemeanor charge of "frequenting an illegal business." Still, as so many of our youth have done, he acquired a gun "for protection" during his stay with his father. Sadly, only five months after he moved in with his father, his mother passed away from a brain aneurysm. (Defendant's Sentencing Memorandum, p. 2; Pre-sentence pre-investigation report, agent and Defendant's description of the offense, page 2; and DOC psychological report, p. 1.).

¹ This section is substantially taken from attorney Charles Boekeloo's sentencing memorandum.

On the date of the shooting, the Defendant's half-brother was involved in the altercation of the victim. Apparently, the deceased was more physically imposing than Mr. Boykin's half-brother, so he retreated and called his other half-brother. He, in turn, called the Defendant and they all eventually got into a car with their father and drove to confront the deceased for a "fair fight." Whatever the circumstances, the Defendant does not dispute that eventually all three brothers, with tacit approval from their father, began to assault the deceased. In the heat of the encounter, the Defendant pulled out his gun, the deceased began to flee, but the Defendant fired some shots at him and eventually hit him in the abdomen and arm. The three of them started kicking the deceased on the ground. The Defendant admits to attempting to shoot him again, but the gun apparently jammed. The three brothers then left with their father. *Id.*

A review of Demariol Boykin's prison conduct history reveals a fair number of documented misconducts. He has incurred 16 incidents: 5 were for possession of alcohol (1 of which included possession of rolling papers and a cell phone); 4 were for being out of place (2 of which were for playing chess); 1 for possession of unknown blue pills; 1 for possession of a gambling betting slip; 2 for possession of homemade knives; 1 misuse of a phone PIN; 1 consensual sexual misconduct with another prisoner; and 1 incident involving photographs of people wearing gang symbols as well as paper drawings related to the gang symbols. THERE ARE NO

ASSAULTS, NO ISSUES OF ARGUMENTS OR EVEN DISTURBING THE PEACE OF ANY FACILITY. TO BE SURE, THESE INCIDENTS REFLECT IMPROPER BEHAVIOR, BUT NONE OF THEM IDENTIFY THE DEFENDANT AS BEING LIKELY TO REPEAT VIOLENT BEHAVIOR OR TO BE AN UNLIKELY CANDIDATE FOR REHABILITATION. MDOC case report, 8/16/2016.

Demariol Boykin was a 17 year-old man who had been involved in gang activity since he was 9 years old. His environment was so bad that his mother sent him away to Michigan, despite the fact that she was the only solid base he could rely on in life. He moved to Grand Rapids and within six months, his mother suddenly died. Demariol Boykin was surrounded by half-siblings that he did not know that well, and he recognized the need to protect the family. There can be little doubt that family pressure played a role in this offense. Even his father played a role, driving him to the scene knowing that at least the assaults were likely and driving him away from the scene. *Id.* Demariol Boykin's description of the offense in the original pre-sentence report is illustrative. He remembers that "everything happened so fast, and I was so mad." *Id.* These are not indicators of someone who is incapable or even unlikely to become rehabilitative. Demariol Boykin does not diminish the severity of this offense. The deceased and his family have suffered the ultimate loss. The quick escalation to violence was alarming.

However, Demariol Boykin's record since his imprisonment should be reassuring. Despite the unlikelihood of his ever being released, he has not committed one violent act during his stay with the MDOC. At Brooks Correctional Facility he was housed in the lowest management level available to "lifers" in the MDOC: Level II.

Demariol Boykin is truly remorseful for his actions as indicated in his allocution. (Resentencing p. 13-14). Letters of support from family members were included for the sentencing Judge's review. It is particularly noteworthy that Demariol Boykin's major motivation is to provide whatever support he can to his now 13 year old daughter.

C. RESENTENCING TO 40-60 YEARS

The sentence is 40-60 years. The Judge proceeded to impose the most severe penalty possible as though Demariol Boykin was not a child. The sentence is contrary to the considerations stated in *Graham* and *Roper* that children are constitutionally different from adults for sentencing purposes. Their "lack of maturity," and "underdeveloped sense of responsibility" lead to recklessness, impulsivity, and heedless risk taking. They "are more vulnerable....to negative influences and outside pressures," including from their family and peers; they have limited "control over their own environment" and lack the ability of extricate

themselves from horrific, crime-producing settings. *Id.* And because a child's character is not as "formed" as an adults, his traits are "less fixed" and his actions are less likely to be "evidence of irretrievable depravity." *Id.* *Roper* and *Graham* emphasize that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. This record fails to present the constitutionally required resentencing for juvenile lifers; additionally, it fails to present the considerations and due process requirements of any resentencing:

1. Judge's stated disagreement with the United States supreme court:

I appreciate the pain that you continue to suffer, especially in light of the decision of the United States Supreme Court. Perhaps someone will secure a transcript of your remarks and send them to the majority of the United State Supreme Court so they can understand the consequence of their far-reaching decision in your case.

As the prosecution has pointed out, this crime occurred 80 days short of the Defendant's 18th birthday. When I became Judge, I took an oath to follow the law not to create it. And in situations of this, it strains and breaks my little heart to do what I'm mandated to do, and that is to create a sentence within the law as given to me.

(Resentencing p. 11).

. . . .

Well, I can encourage you to express this message to the United States Supreme Court and the justices who made this resentencing possible. I think sometimes analyzing a situation in a vacuum doesn't product justice, but it is the rule of law which I am obliged to follow.

(Resentencing p. 12).

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The State of Michigan accords adulthood to those who are 17 years of age or older, the United States Supreme Court, seemingly without any explanation, developed a bright line of 18 years of age. The Defendant certainly was of a mature age and cannot blame youth or immaturity as an excuse for this conduct.

(Resentencing p. 20).

2. Judge's assessment of facts that fail to recognize that children are constitutionally different from adults for sentencing purposes:

The totality of circumstances here leads the court to draw certain conclusions, he was, as I say, of an age far older than the two Defendants who were the subject of the Supreme Court Opinion.

(Resentencing p. 19).

.

This was an intentional act. It wasn't a provocation given over a short period of time. He was summoned to the scene, and his half-brother was enlisted and a ride was secured by his father. And, he brought again, I emphasize, the only weapon that was involved in this episode.

(Resentencing p. 20).

3. Judge's assessment of 2003 Michigan Department of Corrections Evaluation of Demariol Boykin that children are constitutionally different from adults for sentencing purposes:

The clinical test concluded that he's likely to be defiant against authority, paranoid and impulsive. And that was not an idle conclusion as we look at Defendant's prison record.

(Resentencing p. 19).

4. Judge's assessment of Demariol Boykin's prison record fails to recognize that children are constitutionally different from adults for sentencing purposes.

Since entering the prison some 13 years ago, he's earned a number of misconducts, spent a considerable amount of time in administrative segregation due to his behavior. Numbers of these misconducts had to do with ingesting intoxicating substances or making intoxicating substance, having gambling paraphernalia, unauthorized use of – I mean, unauthorized placement and the like.

(Resentencing p. 19).

And so it went with the Judge reading from the 2003 MDOC Psychological evaluation some things about Demariol Boykin's circumstances as a child but the Judge's conclusions are virtually 100% distracted by his disagreement with *Miller* and his assessment of the facts of conviction that failed to recognize that children are constitutionally different from adults for sentencing purposes.

D. CONSTITUTIONALLY REQUIRED SENTENCING.²

In a series of ground-breaking decisions, the Supreme Court has recognized that “children cannot be viewed as simply miniature adults.” *J.D.B. v North Carolina*, 564 U.S. _____, (2011). In the Eighth Amendment context in particular, the “evolving standards of decency that mark the progress of a maturing society,” have lead the court to strike down state laws that impose society’s harshest punishments on children who break the law. *Estelle v Gamble*, 429 U.S. 97 (1976).

In *Roper* citing two development in neuroscience and psychology, the court observed that children in the criminal justice context are fundamentally different from adults, and held therefore that the Eighth Amendment prohibits the execution of anyone whose offense was committed before the age of 18. 543 U.S. at 569-70. Due to their lack of maturity and underdeveloped sense of responsibility, children are more likely than adults to act recklessly and without considering or even understanding the probable consequences of their actions. *Id.* At 569. They are also more vulnerable than are adults to peer pressure and negative family influences, and less able to extricate themselves from such settings. *Id.* And their

² This section is substantially taken from Plaintiff’s Motion for Summary Judgment and Equitable relief in *Hill v Snyder*, No. 10-14568, 2011, WestLaw 2788205 (E.D.Mich, August 12, 2013); attorneys Debra Labelle, Steven M. Watt, and Daniel S. Korobkin, Ronald Reosti, Michael Steinberg and Ezekiel Edwards.

characters are not as fully formed as those of adults, meaning they are more capable of reform and rehabilitation over time. *Id.* At 570. These differences, the Court concluded render young offenders less culpable for their criminal acts than adults, and thus less deserving of society's harshest punishments. *Id.* at 571.

Applying and relying on the same principles, *Graham* held that juveniles under the age of 18 who did not kill or intend to kill cannot be punished with life sentences with no opportunity for release. A life sentence without the possibility of parole is similar to the death penalty, the court noted, in so far as it represents a deprivation of liberty that is irrevocable, leaving the offender without hope of ever returning to society. Such harsh punishment is not appropriate for children given their diminished culpability and unique capacity for change and rehabilitation as compared to adults. *Id.*

The Supreme Court's reasoning in *Roper* for prohibiting the death penalty for juveniles, and then applying *Graham* to strike down life without parole sentences imposed on children who commit non-homicide crimes, applies with equal force here. In the post-*Graham* Michigan case involving the resentencing of a youth convicted of a First-Degree homicide, the court in vacating the life without parole sentence held:

While this court recognizes the *Graham* Court considered these factors in a non-homicide context, the underlying *Roper* Court

considered persuasive, those same factors while considering the culpability of a juvenile murderer. Thus, the differences that exist between juveniles and adults neither change nor become less persuasive whether the underlying conviction is for a homicide or otherwise.

People v Jones, (No. 1979-1104-FC), Unpublished Opinion and Order Granting Defendant's Motion for Relief from Judgment of the State of Michigan 9th Circuit Court issued Dec. 2, 2011.

These traits are not peculiar to certain children or subsets of children but rather describe youth as a class. *See J.D.B., supra*. Accordingly, when evaluating any child offender's culpability, youth is, in every case, a significant mitigating factor, its universal relevance "deriving from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside, and indeed they usually do. *Roper, supra*. Imposing the harshest punishment Michigan can impose on a child is therefore disproportionate no matter of a child's offense.

Here, the Judge's sentence is the antithesis of the United States Supreme Court mandate that:

[G]iven all we have said in *Roper, Graham* and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest, possible penalty will be uncommon. *Miller, supra*.

The Judge's measure of this situation is basically that there is a lack of self-defense; an adult sentence assessment. The Judge is obsessed with his

disagreement with the underlying *Miller* and, ultimately, the Judge fails to engage in the United States Supreme Court's constitutionally mandated analysis.

Standard of Review

Here, Demariol Boykin's circumstances reflect Demariol Boykin's vulnerability to outside pressures, being called to the scene by his father and step-brothers to defend their family. The situation is classic recklessness, impulsivity and heedless risk taking. *People v Hyatt*, ____ Mich App ____ (2016) No. 325741, stated that a reviewing court should apply a "searching inquiry into the record and understanding that, more likely than not, the sentence imposed is disproportionate." *Id.*, at 26. The panel noted that MCL 769.25 requires discretion of the sentencing court in weighing a variety of factors in determining a juvenile life without parole sentence. However, upon appellate review, the court must be cautious of an abuse of discretion if "a sentencing court fails to consider a relevant factor that should give significant weight to an improper or irrelevant factor." See, *United States v Haack*, 403 F.3d. 997, 1004 (8th Circuit 2005). See also U.S. Const. Amends V, VI, VIII and XIV; see also *Graham, supra*. The factors relied on by the Judge base this sentence on prohibitive inaccurate information. *Townsend v Burke*, 334 U.S. 736 (1948).

E. COURT OF APPEALS

This resentencing fails to consider the sentencing factors and procedures required by an underlying *Miller* and also by General Michigan Sentencing Law; the sentence lack accurate information, fundamental fairness and due process of law. U.S. Const. Amends V, VI and XIV. *See Townsend v Burke, supra*, and the Court of Appeals Dissent herein attached.

The Per Curium Opinion affirms the record and sentence herein:

The trial court, therefore, was not compelled to consider the *Miller* factors.

We conclude that the trial court did not abuse its discretion in imposing a sentence of 40 – 60 years imprisonment for Defendant’s conviction of First Degree Murder.

The dissent notes this record shows the trial judge was either unable or unwilling to conduct a proper resentencing:

I respectfully dissent. In *People v Wines*, ___ Mich App ___, ___; ___ NW2d ___(2018) (Docket No. 336550); slip op. at 4, we held that when sentencing a person who was less than 18 years old at the time of the crime, the court should balance the factors set out in *People v Snow*, 386 Mich App 586; 194 NW2d 314 (1972), and in that context, consider the attributes of youth such as those articulated by the Supreme Court in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012).¹ In this case, the sentencing judge was either unwilling or unable to do so.² Accordingly, I would vacate defendant’s sentence and remand for sentencing before a different judge.

....

The judge's explicit agreement with the view that a 16 year old is a "grown man" leaves little doubt that he either did not understand *Miller* or was unwilling to follow it.

Further, on several occasions, the trial court noted that defendant was only 80 days short of his 18th birthday when the crime occurred, and suggested that his proximity to that birthday lessened the need to consider the attributes of youth. This is plainly wrong. *Miller* defines a bright line at age 18, which we adopted in *Wines*. The judge repeated this view twice more during sentencing, stating that the defendant was "far older" than the defendants in *Miller*. Perhaps, most compelling was the trial court's conclusion that "[t]he defendant was certainly of a mature age and cannot blame youth or immaturity . . . for this conduct." The trial court's conclusion that at age 17, the "defendant was certainly of a mature age" is *completely* contrary to *Miller* in which the Supreme Court opined:

[Minors] are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, they are less deserving of the most severe punishments. Those cases relied on three significant gaps between juveniles and adults. First, children have a lack of maturity and an undeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited control over their environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievabl[e] deprav[ity]. [*Miller*, 567 US at 471 (quotation marks and citations omitted)].

This issue involves legal principals of major significance to the State's jurisprudence.

Resentencing is required.

II. MCL 769.259 FAILS IN THAT IT DOES NOT COMPLY WITH THE MANDATE OF *MILLER V ALABAMA* AND THE VIII AMENDMENT. U.S. CONST. AMENDS V, VI, VII AND XIV.

Miller v Alabama, 567 U.S. ____ (2012) primarily rests on the insight that Youth are generally less culpable **at the time of their crimes** and culpability is of primary relevance at sentencing.

MCL 769.259 is Michigan's *Miller* fix statute setting forth a procedure for processing cases including prosecutor discretion to request a sentence of life without parole and victim rights to make an oral impact statement. MCL 769.259(b). The statute fails to address the *Miller* sentencing factors that the sentencing court must consider as mitigating circumstances related to the consideration of the Defendant's youth and its "hallmark features," such as the juvenile's "immaturity and failure to appreciate risks and consequences." At sentencing and in Defendant's Memorandum, the defense raised the statute's infirmity:

The statute sets a mandatory minimum sentencing range of 24-40 years and a mandatory minimum sentence of 60 years of imprisonment. Defendant specifically asserts that this statutory scheme violates the provisions of *Miller*, by removing the discretion from the sentencing Judge, and is therefore, unconstitutional. The mandatory minimum range and the mandatory maximum still do not allow for a sufficient analysis by the sentencing Judge of the factors that must be considered in this resentencing.

Defendant's Memorandum, p. 1-2.

Here, MCL 7769.259 fails to allow full discretion in juvenile sentencing. In *Washington v Houston-Sconiers, et al.*, Supreme Court of Washington, No. 92605-1 (2017), En Banc, the Court followed the complete sentencing discretion required by *Miller*:

In accordance with *Miller*, we hold that sentencing court's must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile Defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not. To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled. Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable S.R.A. range and/or sentence enhancements. *Id* at 20.

Similarly, here the statute fails to abide by the VIII Amendment and *Miller*. U.S. Const. Amends V, VI, VIII and XIV; 1963 Mich Const.; *Miller v Alabama, supra*; *People v Lorentzen*, 387 Mich 167 (1972).

Standard of Review. Statutory construction and constitutional review of MCL 769.259 is review de novo. *People Humphry*, 312 Mich App 309 (2015); *People v Al-Shara*, 311 Mich App 560 (2015).

The statute fails to pass constitutional muster. This case presents legal principals of major significance to the State's jurisprudence.

Resentencing is required.

CONCLUSION

For the reasons stated in Issues I and II, resentencing before a new judge is required.

Dated:

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