STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

DEMARIOL DONTAYE BOYKIN,

Defendant-Appellant.
_____/

Supreme Court No. 157738

Court of Appeals No. 335862

Kent CC No. 03-004460-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

TYLER MAURICE TATE,

Defendant-Appellant.
_____/

Supreme Court No. 158695

Court of Appeals No. 338360

Wayne CC No. 16-010656-FJ

Brief of the State Appellate Defender Office and Criminal Defense Attorneys of Michigan as Amici Curiae in support of Appellants Tate and Boykin

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Interest and identity of amici.

Founded in 1969, the Michigan State Appellate Defender Office ("SADO") provides representation to no less than 25 percent of Michigan's indigent persons on appeal. In the wake of the Supreme Court of the United States' decisions in *Miller v Alabama* and *Montgomery v Louisiana,* SADO coordinated with other stakeholders to ensure that Michigan's 360-plus "juvenile lifers" would be represented for their resentencing hearings pursuant to MCL 769.25a. SADO formed a dedicated Juvenile Lifer Unit with attorneys, mitigation specialists, and support staff.

Initially, in 2016, SADO was appointed to 193 juvenile lifer cases. Of that number, over 40 individuals still await resentencing, and SADO also provides appellate representation to a number of people who were resentenced to life without the possibility of parole (LWOP) and some resentenced to a term of years (TOY) sentence. Due to the volume of juvenile lifer cases, SADO has a unique perspective and experience with the inconsistent and disproportionate results in many cases.

Criminal Defense Attorneys of Michigan was invited by the Court's Order to submit amicus briefing. The Court' Order in *Tate* ordered appointment of SADO, but SADO was unable to accept appointment due to a conflict of interest. SADO and CDAM therefore join their interests as amici herein.

Statement of Questions Presented

I. Do the state and federal constitutions and Michigan's jurisprudence require consideration of mitigating factors in sentencing, including the distinctive mitigating attributes of youth?

The Trial Court did not answer this question.

The Court of Appeals did not answer this question.

Plaintiff-Appellees answered "No".

Defendant-Appellants answered "Yes".

Amici Curiae answers, "Yes".

II. Must sentencing courts explicitly set forth their analysis of how age impacted their sentencing discretion to ensure consistency and fairness in sentencing and facilitate appellate review?

The Trial Court did not answer this question.

The Court of Appeals did not answer this question.

Plaintiff-Appellees answered "No".

Defendant-Appellants answered "Yes".

Amici Curiae answers, "Yes".

Summary of argument.

In *Miller v Alabama,* 567 US 460 (2012), *Montgomery v Louisiana,* 577 US 190 (2016), and *Jones v Mississippi*, 141 S Ct 1307 (2021), the Supreme Court of the United States has repeatedly and unequivocally stated that the hallmark features of youth must be taken into account when sentencing children for convictions that expose them to the sentence of life without parole. Sentencing schemes which mandate sentences of life without parole are unconstitutional because they preclude consideration of these hallmark features of youth.

This Court must now address what consideration sentencing courts must give to children who have been convicted of first-degree murder when the prosecution does not seek to sentence them to life without parole. To deprive children facing a term of years sentence the consideration of the hallmark features of youth is illogical. It punishes the child who has been acknowledged by the prosecution to be less culpable than those others for whom the prosecution seeks life without the possibility of parole. The same consideration of the hallmark features of youth must be required for every child facing sentencing under MCL 769.25 and 25a.

I. The state and federal constitutions and Michigan's jurisprudence require consideration of mitigating factors in sentencing, including the distinctive mitigating attributes of youth.

Michigan jurisprudence establishes that sentencing courts must consider facts concerning the offense and offender, which must necessarily include those which mitigate culpability, whenever the court exercises discretion in choosing a sentence. See *People v Milbourn*, 435 Mich 630, 636 (1990). Thus, in *People v Wines*, 323 Mich App 343 (2018), the Court of Appeals correctly decided that trial courts must consider the distinctive attributes of youth when conducting a term of years sentencing hearing pursuant to MCL 769.25 and 25a.[1]

The principle of proportionality requires that the trial court consider mitigating factors. The Eighth Amendment's prohibition of cruel and unusual punishment guarantees the right not to be subjected to excessive sanctions, and that right flows from the precept that punishment for crime should be graduated and proportionate to both the offender and the offense. The concept of proportionality under the Eighth Amendment is viewed according to "the evolving standards of decency that mark the progress of a maturing society." *Miller,* 567 US at 469 (cleaned up). The Michigan Constitution, art. 1, § 16, includes the principle of proportionality and additionally affords more protection than the Eighth Amendment. *People v Bullock,* 440 Mich 15 (1992). While a punishment that is

[1] As these statutes are substantively the same as to sentencing factors and ranges, references to MCL 769.25 hereafter also encompass 769.25a.

cruel but not unusual is permitted under the federal constitution, *Harmelin v Michigan,* 501 US 957, 994-995 (1991), it is forbidden by Michigan's prohibition of cruel *or* unusual punishment. *Bullock,* 440 Mich at 30.

A. Michigan sentencing jurisprudence mandates that the mitigating qualities of youth be considered.

In *Steanhouse,* this Court reaffirmed that sentences must be proportionate to the offense and the offender in order to comply with Michigan's prohibition on cruel *or* unusual punishment. *People v Steanhouse*, 500 Mich 453, 473 (2017). See *Milbourn*, 435 Mich at 636. For children facing term-of-year sentences under MCL 769.25, this necessarily includes the distinctive and mitigating attributes of youth.

There is a "lengthy jurisprudential history" of the principle of proportionality in Michigan. *Steanhouse*, 500 Mich at 472, citing *Milbourn*, 435 Mich at 650, and *Weems v United States*, 217 US 349, 367 (1910). The principle of proportionality is one in which "a judge helps to fulfill the overall legislative scheme of criminal punishment by taking care to assure that the sentences imposed across the discretionary range are proportionate to the seriousness of the matters that come before the court for sentencing. In making this assessment, the judge, of course, must take into account the nature of the offense and the background of the offender." *Milbourn*, 435 Mich at 651. The "background of the offender" as well as the "nature of the offense" are synonymous to the distinctive attributes of youth described in *Miller* and now at issue here.

The *Milbourn* proportionality analysis is applicable to sentences imposed pursuant to the sentencing guidelines, *Steanhous*e, 500 Mich at 473, and to sentences imposed under MCL 769.25 when the prosecution seeks life without parole, *People v Skinner*, 502 Mich 89, 131 (2018), and likewise must apply to term-of-years sentences under MCL 769.25. While the question at hand arises because of perceived ambiguity in MCL 769.25, cases applying *Milbourn* proportionality show that youth is and has long been a settled factor for consideration under Michigan sentencing law. *See People v Fields*, 448 Mich 58, 77 & n12 (1995) (considering age as one of several factors justifying departure from the sentencing guidelines). *Miller* works in harmony with this, to provide specificity in considerations of the mitigating qualities of youth for those under 18.[2]

When considering a child's youth at sentencing, courts must consider more than just their age. "Youth is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuousness, and recklessness. It is a moment and condition of life when a person may be most susceptible to influence and to psychological damage. And its signature qualities are all transient." *Miller,* 567 US at 476 (cleaned up).

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[2] Although outside the scope of *Boykin* and *Tate*, several other cases before this Court ask whether the *Miller* factors should be considered when sentencing a child under the age of 18 for the crime of second degree murder. See *People v Stovall*, MSC 162425, lv granted April 30, 2021; *People v Logan*, MSC 162715, lv app filed March 11, 2021.

The "distinctive attributes of youth" discussed in *Miller* and recognized by the *Wines* court were threefold. The first is the lack of maturity and undeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures from peers and family members. Children have little control over their own environment and lack the ability to extricate themselves from horrific settings. Third, a child's character is not as well-formed as an adult's, their traits are less fixed, and their actions are less likely to be evidence of irretrievable depravity. *Wines,* 323 Mich App at 347 (citations and quotations omitted).

None of the foregoing traits are tied to any particular statute or sentencing scheme. Their consideration is part of a proportionality analysis involving a youthful offender. The *Wines* court was correct when it observed that "the prosecution offers no legal or precedential support from which to conclude that the attributes of youth… should be considered only when the sentence of life without parole is sought." *Wines,* 323 Mich App at 350. The *Wines* decision ensures that children facing a lengthy term of years sentence receive the protection and consideration due them as trial courts fashion proportionate and constitutional sentences.

B. The state and federal constitutions require consideration of youth at a term-of-years sentencing.

Consideration of the mitigating qualities of youth is required in a term-of-years sentencing by the Eighth Amendment to the US Constitution and art. 1, § 16,

of the Michigan Constitution. The Supreme Court of the United States has been crystal clear: "Youth matters in sentencing." *Jones*, 141 S Ct at 1316. And, youth does not only matter in a death penalty case, see *Roper v Simmons*, 543 US 551 (2005), or only when the prosecution seeks life without parole, see *Graham v Florida*, 560 US 48 (2010); *Miller*, 567 US 460. Youth matters in a term-of-years sentencing under MCL 769.25 because children – all children – are "constitutionally different from adults for purposes of sentencing." *Miller*, 567 US at 471.

Criminal laws have been concerned with addressing the differences between youth and adults for more than one hundred years, beginning with the creation of the first juvenile courts in Illinois in 1899. See *Application of Gault*, 387 US 1, 15 (1967) (summarizing the history of juvenile courts in support of holding that due process protections are required in juvenile delinquency proceedings). "The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals." *Id.* Early juvenile justice pioneers "believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.'" *Id.*

No less than the same remains true today: "'[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may

dominate in younger years can subside.'" *Roper*, 543 US at 570, quoting *Johnson v Texas*, 509 US 350, 368 (1993). "The Eighth Amendment does not excuse children's crimes, nor does it shield them from all punishment. It does, however, demand that most children be spared from punishments that 'giv[e] no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.'" *Jones,* 141 S Ct at 1340 (Sotomayor, J, dissenting), quoting *Graham*, 560 US at 79. The Eighth Amendment's prohibition on "cruel or unusual punishment" requires consideration of the attributes of youth at a term-of-years sentencing under MCL 769.25 because sentencing a child to a prison term two or three times longer than his life to date, without considering his age and its attendant characteristics, would defy the Supreme Court's mandate that "youth matters" in sentencing.

Beyond the federal requirements, Michigan's prohibition on "cruel or unusual punishment" is broader and also requires consideration of youth. If youth and its attendant characteristics are not considered at a term-of-years sentencing under MCL 769.25, then the trial court will be required only to consider the traditional *Snow* sentencing objectives: (1) reformation of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses. *People v Snow*, 386 Mich 586, 592 (1972). Trial courts would be free to exclude arguments, testimony, or documents regarding adolescent brain science and how it may have contributed to the child's commission of the offense, including how trauma, compounding traumas, and multigenerational trauma affected a child's brain development or how the child may have been influenced by adults or peers in

the commission of the offense. This would lead to arbitrary application of a broad, 15-year sentencing range upon children who have already been deemed less culpable than some of their peers for whom the prosecution seeks life without parole – and who are *per se* less culpable than adults convicted of the same offense.

Trial courts must consider youth and its attendant characteristics at a term-of-years sentencing under MCL 769.25 and 25a and failure to do so violates the Eighth Amendment to the United States Constitution and the cruel or unusual punishment clause of the Michigan Constitution.

C. A sentence of 40-to-60 years in prison may be a *de facto* life sentence for a child. Consideration of the mitigating qualities of youth is required.

As the Court of Appeals pointed out in *Wines*, for a child sentenced to 40 years to 60 years in prison, "release at a first parole date is by no means assured, and inmate life expectancy is statistically low," so a "40-year minimum sentence virtually ensures that the defendant will not be released until he or she is geriatric." *Wines*, 323 Mich App at 357. For the majority of children sentenced to a 40-year minimum term in prison, there will be no meaningful opportunity for release, as their life expectancy is substantially reduced by the fact that they have been incarcerated since childhood. Life expectancy for African American males sentenced as juveniles to life in prison in Michigan is 50 ½ years. *Kelly v Brown*, 851 F3d 686, 688 (CA 7 2017) (Posner, R. dissenting). See also *Wines*, 323 Mich App at 357 n6, quoting *People v Sanders*, 2016 IL App. (1st) 121732-b, ¶ 26, 56 N.E.3d 563, 571 (2016) ("'The United States Sentencing Commission Preliminary Quarterly Data Report

(through June 30, 2012) indicates that a person held in a general prison population has a life expectancy of about 64 years. This estimate probably overstates the average life expectancy for minors committed to prison for lengthy terms.'").

Twelve state Supreme Courts have concluded that sentences not technically labeled "life without parole" are cruel and unusual punishment as applied to children if those sentences do not provide a realistic opportunity to obtain release as required by *Graham, Miller*, and *Montgomery*. *State v Ramos*, 187 Wash 2d 420, 445-46 (2017); *State v Zuber*, 227 NJ 422, 429 (2017); *State v Moore*, 149 Ohio St 3d 557, 579 (2016); *People v Buffer*, 2019 IL 122327 (2019); *Casiano v Comm'r of Corrections*, 115 A3d 1031, 1033-34, 1045 (Conn 2015), cert denied, 136 S Ct 1364 (2016); *Henry v State*, 175 So3d 675, 680 (Fla 2015); *State v Boston*, 363 P3d 453, 457 (Nev 2015); *Bear Cloud v State*, 334 P3d 132, 136, 142 (Wy 2014); *Brown v State*, 10 NE3d 1 (Ind 2014); *State v Ragland*, 836 NW2d 107, 110-11, 121 (Iowa 2013); *Commonwealth v Brown*, 1 NE3d 259, 261, 270 n 11 (Mass 2013); *People v Contreras*, 411 P3d 445 (Cal 2018). In three cases, the federal Courts of Appeals have recognized that sentences functionally equivalent to life without parole are unconstitutional for children. *McKinley v Butler*, 809 F3d 908, 911 (7th Cir 2016); *Budder v Addison*, 851 F3d 1047, 1057 (10th Cir 2017); *Moore v Biter*, 725 F3d 1184, 1192 (9th Cir 2013).

Before imposing what may be a de facto life sentence on a child, articulation of how the distinctive attributes of youth impacted the sentencing should occur.

D. The landscape of juvenile justice continues to evolve and supports consideration of youth in sentencing.

Developments in both Michigan and other states echo *Roper, Graham, Miller, Montgomery,* and *Jones'* recognition that youth matters and that children are different.

- 25 states and the District of Columbia ban juvenile life without parole, and six more states have no juveniles serving life without parole sentences. In 2021, Ohio and Maryland became the 24th and 25th states to abolish this sentence.[3]

- On October 1, 2021, Michigan's "Raise the Age"[4] law went into effect, bringing Michigan into step with the vast majority of states which set age 18 as the beginning of adult criminal liability. Except for prosecutorial decisions on the most serious offenses, children who are 17 years of age at the time of offense are no longer automatically processed into the adult criminal legal system.

- In June 2021, Governor Whitmer signed Executive Order 2021-6 creating the Task Force on Juvenile Justice Reform. The Task Force is focused, among other things, on building and delivering reforms that will improve outcomes for children while keeping communities safe.[5]

- Eighteen states, including Michigan, have defended 18 USC 922(b)(1) (regarding prohibition of sale of guns to those under 21) in an amicus brief filed in the United States Court of Appeals for the Fourth Circuit in September 2021. The States explained that brain science supports limiting access to firearms by people under 21: "Contemporary scientific evidence explains why this conclusion was a reasonable one for Congress to draw: Because the human brain does not fully develop

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3 National Campaign for the Fair Sentencing of Youth (thecfsy.org) (last accessed 12/13/2021).

4 MCL 712A.2.

5 A June 2020 assessment by the National Juvenile Defender Center revealed numerous issues with Michigan's juvenile justice system. Michigan Assessment – NJDC (last accessed November 29, 2021).

until one's mid-to-late twenties, young people tend to have lower self-control and make more impulsive decisions."[6]

- "Second look" laws are increasingly gaining traction in the states.[7] This type of legislation allows consideration of youth at the time of the conviction for a crime in later modifying lengthy sentences after a period of incarceration has been served. In the case of Washington D.C.'s "Second Look Amendment Act" which went into effect April 27, 2021, that consideration extends to those under the age of 25.

- This Court continues to explore issues regarding adolescent and early adult culpability, as demonstrated in its Orders granting leave to appeal in *People v Poole*, SC No. 161529 and *People v Parks*, SC No. 162086 (whether *Miller* and *Montgomery* should be applied to those over 17 under the federal and Michigan constitutions), and *People v Stovall*, SC No. 162425 (whether, pursuant to *Miller* and *Montgomery*, the trial court was required to take youth into account when accepting Mr. Stovall's plea for paroleable life and ruling on his motion for relief from judgment).

As the Supreme Court noted in *Miller,* "The concept of proportionality [is] view[ed] less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society." *Miller,* 567 US at 469–70 (cleaned up). In the nine years since *Miller* was decided, the clear trend in Michigan and nationwide has been to consider children separately in the criminal legal

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6 Brief of Amici Curiae Illinois, California, Connecticut, Delaware, the District of Columbia, Hawaii, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington in Support of Defendants-Appellees' Petition for Rehearing or Rehearing En Banc, Hirschfeld v Bureau of Alcohol, Firearms, Tobacco, & Explosives, No. 3:19-cv-05106-JCC, September 3, 2021.

7 NACDL - Second Look Sentencing (last accessed 12/6/2021)

system. This consideration is undoubtedly because our society, nationally and locally in Michigan, agrees that youth matters and that children are different.

The evolving landscape shows that the legislative branch, executive branch, and judicial branch in Michigan, and in other states across the country, are moving away from treating children like adults in criminal sentencing. *Wines* was correctly decided, and this Court should affirm that trial courts must consider youth and its attendant characteristics in sentencing a child to a term of years under MCL 769.25.

II. Sentencing courts must explicitly set forth their analysis of how age impacted their sentencing discretion to ensure consistency and fairness in sentencing and facilitate appellate review.

A. Without guidance from this Court requiring articulation of how the distinctive qualities of youth were considered, sentencing under MCL 769.25 will remain arbitrary.

"[S]entencing courts must justify the sentence imposed in order to facilitate appellate review." *People v Lockridge*, 498 Mich 358, 392 (2015). "[A] lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption." *Montgomery*, 577 US at 195 (cleaned up). *Miller* and its progeny require that there must be justification for such an extreme sentence to be imposed. Likewise, before a child is sentenced to a term of years—a term that could have a minimum of 40 years, more than twice the number of years such a child will have lived at that point—there must be justification. The record must reflect that justification.

"[T]he chronological age of a minor itself is a relevant mitigating factor of great weight" in assessing culpability and in meting out the appropriate sentence for a child. *Miller,* 567 US at 476-77 (cleaned up). In the absence of guidance from this Court, trial courts throughout the state are free to use proximity to age 18 or being older than 14 — the age of Evan Miller — to aggravate instead of mitigate sentences, rather than applying the distinctive attributes of youth in a meaningful manner.[8]

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[8] See, e.g., *People v Taylor,* 964 NW 2d 38 (2021).

A sentence is invalid when it conforms to local sentencing policy rather than individualized facts. *People v Miles,* 454 Mich 90, 96 (1997) (citations omitted). The nature of JLWOP litigation invites the error of local sentencing policy and arbitrary use of prosecutorial discretion. For example, in 2016, Oakland County had 48 "juvenile lifers." The former Oakland County prosecutor sought life without parole in all but five cases. Now, after a different prosecutor was elected and extensively reviewed the cases, all but a few have reached term-of-years resolutions. Likewise, in Ingham County, the only two cases were initially designated for life without parole, but after a different prosecutor was elected, both of those people were resentenced to a term of years.[9] But the next concern, after motions seeking LWOP are withdrawn, is ensuring consistency in application of the term-of-years sentencing range provided by MCL 769.25.

Most trial courts in Michigan have limited exposure to sentencing under MCL 769.25, whether in a term-of-years sentencing or a *Miller* hearing; in many counties, there were but one or two such cases in the wake of *Montgomery.*[10] With the prosecution pressing forward in these cases, either seeking LWOP or insisting on a maximum term-of-years sentence, sentencing courts lack guidance in how to exercise discretion in these complex cases. Requiring articulation of how the

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9 Nearly 200 Michigan juvenile lifers still wait for resentencing (freep.com); Prosecutor Karen McDonald Reviews Cases for Juvenile Lifers • Oakland County Times (oaklandcounty115.com) (last accessed 12/13/2021).

10 Nearly 200 Michigan juvenile lifers still wait for resentencing (freep.com)

distinctive attributes of youth were considered by the sentencing court will ensure that sentencing is individualized as required by Michigan jurisprudence and will further provide concrete guidance to courts which approach these cases in the future.

Appellate courts give deference under the "abuse of discretion" standard of review to the decisions of the sentencing court. This is because it is presumed that the sentencing court has heard the evidence and reviewed all the facts necessary to make a reasoned decision as to an appropriate sentence. "It is clear that the Legislature has imposed on the trial court the responsibility of making difficult decisions concerning criminal sentencing, largely on the basis of what has taken place in its direct observation." *People v Babcock*, 469 Mich 247, 268 (2003). For almost all offenses, there are guidelines in place to direct the sentencing court's discretion.

But for those sentenced under MCL 769.25, there are no sentencing guidelines and some of the individuals facing sentencing hearings are being sentenced long after their original sentencing judge has left the bench. Conceivably, these individuals could be sentenced with virtually nothing to guide the court's discretion. If there is no requirement of application and articulation of the distinctive attributes of youth, the sentencing court may have nothing before it regarding the person's impulsivity, immaturity, susceptibility to peer pressure and more. There will be no assurance these attributes are considered in crafting an

appropriate sentence. When there are no guidelines, then the requirement of articulation should apply with even greater force. See *People v Coles,* 417 Mich 523, 543 (1983).

B. Juvenile life without parole has been applied in a racially disparate manner. Requiring findings will help to alleviate this injustice.

It is no secret that racial disparities plague the criminal legal system, and there is a particularly severe impact on Black youth. See, *e.g.*, Wendy Sawyer, *Youth Confinement: The Whole Pie,* Prison Policy Initiative (December 19, 2019).[11] Racial disparities are even more pronounced with regard to JLWOP sentences. In the years before *Graham* and *Miller,* Black children were sentenced to LWOP ten times more often than white juveniles. Ltr. From United States & Int'l Human Rights Orgs. To the U.N. Comm on the Elimination of Racial Discrimination 2 (June 4, 2009).[12] This unjust racial disparity was even more evident when Black youth were convicted of killing white victims. "The proportion of African Americans serving JLWOP sentences for the killing of a white person (43.4%) is nearly twice the rate at which African American juveniles are arrested for taking a white person's life (23.2%). Conversely, white juvenile offenders with black victims are only about half as likely (3.6%) to receive a JLWOP sentence as their proportion of

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[11] Youth Confinement: The Whole Pie 2019 | Prison Policy Initiative (Last accessed 11/27/2021).

[12] Letter from Human Rights Organizations to CERD regarding Juvenile Life Without Parole in the US | Human Rights Watch (hrw.org) (last accessed 12/7/2021).

arrests for killing blacks." See The Sentencing Project, *Shadow Report of The Sentencing Project to the Committee on the Elimination of Racial Discrimination* 3 (2014).[13]

Implicit biases against Black children are widely held. One study found that people are likely to perceive Black children as older, less innocent, and more culpable than similarly situated white children. See Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children.*[14]

Another study found that when presented with a scenario involving a Black juvenile, people are significantly more likely to view them to be as culpable as adults, and to favor harsher sentencing, than when presented with the same scenario involving a white juvenile. See Aneeta Rattan et al, *Race and the Fragility of the Legal Distinction Between Juveniles and Adults,* 7 PLoS One 1, 2, (2012).[15]

Far too many people in our society and in our criminal legal system have internalized false stereotypes regarding Black children, such as the "super-predator" myth. Such "powerful racial stereotypes" are very likely to affect

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13 Shadow Report to the Committee on the Elimination of Racial Discrimination - The Sentencing Project (last accessed 12/7/2021).

14 The Essence of Innocence: Consequences of Dehumanizing Black Children (apa.org) (last access 12/7/2021)

15 As the procedure section of the article describes, the researchers "manipulated just one word across the two study conditions…the juvenile was described as either Black or White…"

sentencing, and yet it is constitutionally impermissible for race to be used in this way. *Buck v Davis,* 137 S Ct 759, 776-777 (2017). Requiring findings before a judge may sentence a child to spend the next 40 years of their life behind bars will help to eradicate racial disparities in the application of MCL 769.25.

Disparity in sentences resulting from considerations such as race are unjustified and impermissible. *People v Coles*, 417 Mich 523, 546 (1983). Yet data shows just such disparity in juvenile lifer sentencings. Application and articulation of the sentencing court's reason is needed.

C. Explicit application of the distinctive, mitigating qualities of youth in term-of-years sentencings will ensure that the severity of the crime alone does not lead to imposition of the maximum sentence allowed.

As recognized by the Supreme Court, a child's limited role in an offense mitigates their culpability. *Miller,* 567 US at 477-478 (explaining that a juvenile who did not pull the trigger and did not intend for the victim to die had diminished culpability). Nonetheless, courts in Michigan have too often relied upon the circumstances of the offense to justify the harshest sentence available, whether that be a term of years sentence, where no prosecution motion seeking LWOP has been filed, or LWOP, when such a motion has been filed. This is what happened to Mr. Wines himself. "The court's reasoning [in sentencing Mr. Wines to not less than 40 nor more than 60 years] was based overwhelmingly on the seriousness of the crime and the state's interest in imposing punishment." *Wines,* 323 Mich App at 355.

That the circumstances of the homicide offense have an undue weight is demonstrated time and again when LWOP is imposed upon those who were children at the time of their crimes. See, e.g., *People v Nunez,* unpublished opinion of the Court of Appeals, issued October 22, 2020 (No. 349035), p. 5 (the trial court found Mr. Nunez to be immature and impulsive at the time of the homicide, but recited in support of imposition of LWOP that "Defendant actively planned the armed robbery, carried a loaded lethal weapon, led the robbery…caused Richardson to beg for her life, killed Anderson, barricaded the restaurant staff in the restaurant bathroom…"); *People v Musselman,* unpublished opinion of the Court of Appeals, issued May 20, 2021 (No. 351700) (where the defense presented a favorable psychological evaluation and testimony that Mr. Musselman could safely reintegrate into society, and the prosecution presented no witnesses, LWOP was imposed and the trial court's decision repeatedly mentioned the circumstances of the homicide offense).[16]

The circumstances of the crime have led to imposition of sentence without understanding or concern for the mitigating attributes of youth and the rehabilitative capacity of the individual. See *People v Musselman, supra; People v Granger,* unpublished decision of the 42nd Circuit Court, entered May 5, 2020 (Docket No. 83-4565-FY) (trial court noted that it could not find Mr. Granger

[16] These opinions also reflect fundamental misconceptions about mitigating evidence held by many judges in the trial court, but that is outside the scope of the questions presented here.

irreparably corrupt or incapable of reform, and yet sentenced Mr. Granger to LWOP). When evidence before the trial court shows that a child has grown into a responsible, considerate, rule-following adult, the only reasonable conclusion is that they are capable of rehabilitation, if not already rehabilitated. See, e.g., *Wines*, 323 Mich App at 353 n8 (Mr. Wines completed his GED and several programs while incarcerated and had no misconduct tickets at all in the 5 years before his resentencing hearing). Imposition of the most severe term-of-years sentence in such a case is arbitrary and contrary to the law.

It is undoubtedly the purview of the judiciary to say what the law is, and it cannot be the law that children who are capable of rehabilitation can be locked up and thrown away before they are permitted to buy cigarettes. Undue reliance on the circumstances of the homicide offense occurs in term of years sentencings, just as it does when the child is sentenced to LWOP. Specific articulation of the analysis of how the distinctive attributes of youth impacted sentencing will help to address this overarching problem.

D. Explicit analysis of the distinctive attributes of youth are necessary to ensure meaningful appellate review.

A person convicted by trial is entitled to appeal a criminal conviction and sentence as a matter of right. Mich Const of 1963, Art I, § 20. The trial court's imposition of sentence is reviewed for abuse of discretion. *Steanhouse*, 500 Mich at 471. An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled outcomes. *People v March*, 499 Mich 389, 397 (2016)

(cleaned up). An appellate court cannot know whether a sentence imposed under MCL 769.25 or 25a is "principled" unless the reasoning for the imposed sentence is explicitly stated on the record or in a written opinion or order.

While the "abuse of discretion" standard is deferential, it is not a blank check afforded to sentencing courts. "With regard to the principle of proportionality, it is our judgment that the imposition of the maximum possible sentence in the face of compelling mitigating circumstances would run against this principle and the legislative scheme. Such a sentence would represent an abdication— and therefore an abuse—of discretion." *Milbourn*, 435 Mich at 653. The state constitutional right to appellate review would be meaningless if the trial court were not obligated to articulate its reasoning at sentencing: "A silent record precludes the appellate court from determining whether the trial court considered impermissible factors or whether an ostensibly harsh or disparate sentence is justified by permissible considerations." *People v Broden*, 428 Mich 343, 350–51 (1987), citing *People v Coles*, 417 Mich 523 (1983). See also *Lockridge*, 498 Mich at 392. "The articulation-of-reasons requirement further acts as a safeguard against rash and arbitrary decisions by forcing the sentencing judge to focus on relevant factors, and it also reduces the risk that inaccurate information will be considered." *Broden,* 428 Mich at 350-51. In order for this state's appellate courts to do their jobs in reviewing the sentencing decisions of the trial court, the trial court must be required to explain its reasoning at sentencing.

E. Requiring findings would support the Constitutional right to effective assistance of counsel.

This Court must also require sentencing courts to issue findings at a term-of-years sentencing in order to support every child's right to effective assistance of counsel in their criminal proceedings. US Const, Amend VI; Const 1963, Art 1, § 20; *Strickland v Washington*, 466 US 668, 698 (1984). This includes a right to effective assistance of counsel at sentencing or resentencing under MCL 769.25 and 25a.

"To establish ineffective assistance of counsel, a defendant must show: (1) that the attorney's performance was not based on strategic decisions but was objectively unreasonable in light of prevailing professional norms; and (2) that, but for the attorney's error, a different outcome was reasonably probable." *People v Terrell*, 495 Mich 869 (2013) (citation omitted). For an appellate court to determine whether counsel's error prejudiced a child at sentencing, it follows that there must be a record of the trial court's reasoning for imposing the sentence it chose.

Several juvenile lifer cases have already been remanded back to the trial court by the Court of Appeals for *Ginther* hearings regarding counsel's alleged ineffectiveness at resentencing.[17] See *People v Ginther*, 390 Mich 436 (1973). This

[17] See *People v Warren*, unpublished order of the Court of Appeals, entered January 15, 2020 (No. 346432); *People v Seay*, unpublished order of the Court of Appeals, entered October 14, 2020 (No. 350724); *People v Osborne*, unpublished Order of the Court of Appeals, entered December 10, 2019 (No. 346867); *People v Evans*, unpublished Order of the Court of Appeals, entered October 30, 2019 (No. 343544); and *People v Moore,* unpublished Order of the Court of Appeals, entered February 12, 2020 (No. 349584).

Court also has applications for leave to appeal pending from juvenile lifer resentencing hearings which claim that counsel at the *Miller* hearing or term-of-years sentencing hearing provided ineffective assistance of counsel.[18]

The question of the standard of care for defense counsel at a *Miller* hearing or term-of-years resentencing proceeding pursuant to MCL 769.25 is unsettled in Michigan. However, there are professional guidelines from national organizations which have stated the requirements for investigation, preparation and presentation by counsel for a child facing life without parole, such as the American Bar Association's Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases[19] and the Campaign for the Fair Sentencing of Youth's Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence.[20]

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[18] See *People v Osborne*, MSC No. 162969, lv app filed May 6, 2021; *People v Hickerson*, MSC No. 322891, lv app filed December 12, 2019, held in abeyance pending a decision in MSC No. 154994, *People v Taylor*; *People v Watson*, MSC No. 163293, lv app filed July 15, 2021; *People v Clemons*, MSC No. 162597, lv app filed February 10, 2021, held in abeyance pending *Taylor* (*supra*); *People v Nunez*, MSC No. 162372, lv app filed December 20, 2020, held in abeyance pending *Taylor* (*supra*).

[19] American Bar Association, Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008), available at https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/2008-supplementary-guidelines/.

[20] Campaign for the Fair Sentencing of Youth, Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence (Mar. 2015), available at https://www.fairsentencingofyouth.org/wp-content/uploads/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf.

Counsel's duties include obtaining and reviewing the entire trial record, including transcripts, pleadings, exhibits, and discovery; interviewing and advising the client; conducting a thorough mitigation investigation including collection and review of educational records, juvenile and family court records, medical, mental health and substance abuse records, and interviews with the client's family members, loved ones, and people who knew the client before the offense and at present; investigating, requesting funds, and presenting experts in a diverse array of topics such as adolescent brain science, psychology, neuropsychology, prison adjustment, trauma, or other issues relevant to a particular case; investigating options for housing and employment in the community and preparing supportive documentation for presentation of those reentry plans to the trial court; and, preparing the client and other witnesses to testify or allocute. The distinctive attributes of youth must be uncovered and presented, not just in a *Miller* hearing, but also when a child is being sentenced to a term of years. The appellate courts of this state need a clear and thorough record, not only when considering LWOP sentences, but also when considering the wide range of term-of-years sentences that can be imposed.

Counsel has a duty to present evidence of the child's youth and its attendant characteristics in a *Miller* hearing. *Jones,*141 S Ct at 1319 n6 ("If defense counsel fails to make the sentencer aware of the defendant's youth… the defendant may have a potential ineffective-assistance-of-counsel claim… just as defense counsel's failure to raise relevant mitigating circumstances in a death penalty sentencing

proceeding can constitute a potential ineffective-assistance-of-counsel problem….”). If this Court finds that the same factors must be considered at a term-of-years sentencing hearing pursuant to MCL 769.25, then the same duty of care must be required of counsel in these proceedings. Requiring the trial court to make findings on the record as part of its sentencing decision pursuant to MCL 769.25 will ensure that there is a record for appellate review of what evidence and arguments the trial court relied on in reaching its sentence, and therefore ensure that children can challenge their sentencing counsel’s effectiveness on appeal.

Conclusion

For these reasons, this Court must renew and amplify the simple refrain which the Supreme Court of the United States has repeated again and again: Youth matters. Youth matters to sentencing of children under the Eighth Amendment and under Article 1, section 16, of our Constitution, and under Michigan sentencing jurisprudence.

If this Court does not require consideration of the attributes of youth and judicial findings in term-of-year sentencings, trial courts will have nearly unbounded discretion to sentence children to the maximum of 40 years to 60 years in prison with hardly any explanation. Such opaque discretion in term-of-year sentencing would add to the appearance of arbitrariness in JLWOP sentencing because it makes it impossible for appellate courts and the public to discern if only the rare irretrievably corrupt child is receiving the sentence of life without parole

and, more generally, if only the most culpable children are receiving the most severe sentences.

This Court should affirm the decision of the Court of Appeals in *Wines*, requiring consideration of the distinctive attributes of youth in a term-of-years sentencing under MCL 769.25 and 25a, and require articulation of how the application of the distinctive qualities of youth impacted the exercise of sentencing discretion.

Respectfully submitted,

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