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 County Circuit
Court No. 03-04460-FC

PLAINTIFF-APPELLEE'S RESPONSE IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF APPELLATE JURISDICTION

The People accept Defendant's Statement of Appellate Jurisdiction.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Did the trial court abuse its discretion in choosing to impose a sentence of 40-60 years in prison for Defendant?

The Court of Appeals said, "No."
Defendant-Appellant says, "Yes."
Plaintiff-Appellee says, "No."

II. Do MCL 769.25 and MCL 769.25a violate the Eighth Amendment's prohibition on cruel and unusual punishment by permitting juveniles convicted of first degree murder to receive a minimum sentence between 25 and 40 years in prison if the juvenile murderer is not sentenced to life without the possibility of parole?

The Court of Appeals said, "No."
Defendant-Appellant says, "Yes."
Plaintiff-Appellee says, "No."

COUNTER-STATEMENT OF FACTS

Defendant was convicted by jury of first degree murder, MCL 750.316(1)(c), and possession of a firearm in the commission of that felony, MCL 750.227b, and sentenced on December 4, 2003, to two years in prison for the felony firearm offense, consecutive to and preceding his then-mandatory sentence of life without parole for the murder (12/4/02 Judgment of Sentence). He appealed his conviction, challenging the sufficiency of evidence of premeditation and deliberation; the Court of Appeals affirmed (*People v Boykin*, unpublished opinion per curiam of the Court of Appeals, issued July 14, 2005 (Docket No. 253224), p 1). The panel noted the following facts from the case:

> The prosecution presented sufficient evidence of premeditation and deliberation. First, defendant's thought processes were undisturbed by hot blood. The victim, Shawn Broyles, and defendant's brother Marvin were engaged in a fist-fight. Broyles' two friends were present, but did not think the fight was serious enough to merit their involvement. Defendant, his father, and defendant's brother Charles were present. Neither defendant's father nor Charles thought the fight was serious enough to merit their intervention either. At no time did Broyles attack or threaten to attack defendant. In fact, Broyles had already begun running from the scene of the altercation when defendant started shooting at him.
>
> Second, defendant had time in which to consider his actions. Broyles pleaded with defendant to "Come on, stop," presumably after he saw the gun in defendant's hand. Defendant, however, did not stop. Broyles turned and ran from defendant. Defendant raised his gun and fired three to four shots at Broyles. Broyles fell after being shot twice. One witness testified that defendant lifted Broyles up by his jacket hood, put the gun to his cheek, and pulled the trigger, but the gun did not fire. The gun, found by Broyles' cousin, was determined to be jammed. After attempting to shoot Broyles again, defendant and his two brothers kicked Broyles as he lay dying on the sidewalk. Defendant's brother Marvin testified that defendant said he shot Broyles because Broyles had jumped him a few years before. [*Id.*, pp 1-2.]

This Court denied his application for leave to appeal. *People v Boykin*, 474 Mich 941; 706 NW2d 17 (2005).

After *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 LEd2d 407 (2012), and *Montgomery v Louisiana*, ___ US ___; 136 S Ct 718; 193 LEd2d 599 (2016), held that mandatory

imposition of life without parole for a juvenile offender was a violation of the Eighth Amendment's ban on cruel and unusual punishment and that the decision was to be given retroactive effect, the provisions of MCL 769.25a(3) were triggered. Pursuant to MCL 769.25a(4)(b), the People had 180 days to file motions for resentencing for those juvenile murderers for whom a life in prison without parole sentence would be sought; for those for whom the People did not seek a life sentence, such as Defendant, "the court shall sentence the individual to a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years." MCL 769.25a(4)(c).

At the resentencing hearing, the trial court imposed a sentence of 40-60 years in prison for Defendant for the offense of first degree murder (10/28/16 Resentencing Tr, 22). Defendant appealed his new sentence, and the Court of Appeals affirmed, 2-1. *People v Boykin (Boykin II)*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2018 (Docket No. 335862), p 1.

Further facts, as needed, will be included in the argument section below.[1]

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[1] Defendant's Statement of Facts contains numerous statements, assumptions, and arguments that are not supported by the record. For example, he states, "Still, as so many of our youth have done, he acquired a gun 'for protection' during his stay with his father" (Defendant's Application, 1). While it is certainly common sense that people acquire guns for numerous reasons, and Defendant claimed the gun was acquired "for protection," there is nothing in the record to indicate how common or rare it is for a juvenile to acquire a firearm for any reason. Similarly, Defendant asserts that his "half-brother was involved in the altercation of the victim [sic]. Apparently, the deceased was more physically imposing that Mr. Boykin's half-brother, so he retreated and called his other half-brother" (Defendant's Application, 1). As noted *supra*, the original decision of the Court of Appeals summarized the facts in a far more objective manner based on the trial record. To the extent Defendant's statement of facts does not comply with MCR 7.305(A)(1)(d) and MCR 7.212(C)(6), requiring that "[a]ll material facts, both favorable and unfavorable, must be fairly stated without argument or bias [with] specific page references," the People ask that this Court disregard those portions.

ARGUMENT

I. The trial court did not abuse its discretion in imposing a sentence of 40-60 years in prison for Defendant's conviction of first degree murder.

Standard of Review: Factual findings of a trial court are reviewed for clear error, its legal conclusions are reviewed de novo, and the ultimate review of any sentence is for an abuse of discretion. MCR 2.613(C); *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004); *People v Milbourn*, 435 Mich 630, 634-635; 461 NW2d 1 (1990).

A trial court's ultimate decision when imposing a sentence is reviewed for an abuse of discretion, and "[t]his Court has historically cautioned appellate courts not to substitute their judgment in matters falling within the discretion of the trial court, and has insisted upon deference to the trial court in such matters." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 228; 600 NW2d 638 (1999).

Discussion: Defendant argues that the trial court did not properly apply the factors discussed in *Miller* and *Montgomery* when resentencing Defendant, and therefore the sentence did not comply with what he argues is a constitutional mandate to treat children differently than adults. Defendant's argument is without support in the law or in the record, and therefore must be rejected.

Miller does not apply to sentencing proceedings of minors[2] that do not involve life without parole. As noted *supra*, *Miller* held that a mandatory sentence of life without parole for a minor is unconstitutional, and *Montgomery* held that the decision was to be given retroactive application. These decisions triggered the application of MCL 769.25a to Defendant, who had been convicted of first degree murder for an offense committed when he was under the age of 18. In *Miller*,

[2] The People will generally use the term minor rather than juvenile as Michigan otherwise defines anyone 17 years of age as an adult for purposes of criminal court proceedings.

however, the Supreme Court was not addressing a sentencing scheme for a term of years for a minor such as that provided for in MCL 769.25a. *Miller* repeatedly, and emphatically, limited its holding to sentences of life without parole.

- "Most fundamentally, [*Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 LEd2d 875 (2010)] insists that youth matters in determining the appropriateness of a lifetime of incarceration *without the possibility of parole*." [*Miller*, 567 US at 473; emphasis added.]
- "[R]emoving youth from the balance – by subjecting a juvenile to the same *life-without-parole sentence* applicable to an adult – these laws prohibit a sentencing authority from assessing whether the law's *harshest term of imprisonment* proportionately punishes a juvenile offender." [*Id.* at 474; emphases added.]
- "*Graham* makes plain these mandatory schemes' defects in another way: by likening *life-without-parole* sentences imposed on juveniles to the death penalty itself." [*Id.*; emphasis added.]
- "In part because we viewed this *ultimate penalty for juveniles* as akin to the death penalty, we treated it similarly to that most severe punishment." [*Id.* at 475; emphasis added.]
- "[T]hese decisions too show the flaws of imposing mandatory *life-without-parole* sentences on juvenile homicide offenders." [*Id.* at 476; emphasis added.]
- "*Graham* indicates that that a similar rule should apply when a juvenile confronts *a sentence of life (and death) in prison*." [*Id.* at 477; emphasis added.]
- "To recap: Mandatory *life without parole* for a juvenile precludes consideration of his chronological age and its hallmark features[.]" [*Id.* at 477; emphasis added.]
- "[T]his *mandatory punishment* [of life without parole] disregards the possibility of rehabilitation[.]" [*Id.* at 478; emphasis added.]

• "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates *life in prison without possibility of parole* for juvenile offenders." [*Id.* at 479**Error! Bookmark not defined.**; emphasis added.]

• "Our decision does not categorically bar a penalty for a class of offenders or type of crime – as, for example, we did in [*Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005)] 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*." [*Id.* at 483; emphasis added.]

• "*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." [*Id.* at 489; emphases added.]

Justice Kagan, writing for the majority in *Miller*, could not have been clearer that the decision was based on the sentencing of a minor to the particular sentence of life without the possibility of parole, and that a sentence which precludes any possibility of rehabilitation or release without an individualized determination was the problem. It was not a pronouncement on all sentencings of all minors: "Instead, it mandates only that a sentence follow a certain process – considering an offender's youth and attendant characteristics – before imposing *a particular penalty*." *Id.* at 483 (emphasis added). The process it discussed was only for "a particular penalty," that being life without the possibility of parole. Defendant attempts to incorporate all of the process of *Miller*

into a discretionary sentencing scheme for a term of years, but this is beyond how Justice Kagan said the decision was to be construed. Defendant's argument rewrites the opinion from saying "before imposing a particular penalty" to "before imposing *any* penalty," and this Court obviously does not have the authority to rewrite a decision of the United States Supreme Court. *Miller* was rooted in the Eighth Amendment and found the mandatory imposition of a "life (and death) sentence," *id.* at 477, on a minor to be unconstitutional. It did not invalidate any other sentencing scheme for offenders under the age of 18, nor did it create "a certain process" to be followed in any other sort of case.

This principle was reiterated by the Supreme Court four years later when it decided *Montgomery*. "The Court now holds that *Miller* announced a substantive rule of constitutional law…. *Miller*'s conclusion that *the sentence of life without parole* is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution." 136 S Ct at 736 (emphasis added).

As a result, to the extent Defendant argues that the trial court was required to apply the *Miller* framework in determining what term of years sentence to impose, his argument has no support in that decision or in *Montgomery*. The Supreme Court's comparison of life without parole sentences for minors to death penalty sentences for adults adds confirmation to the unique nature of the process to be employed only when the ultimate penalty is possibly on the table. In a death penalty jurisdiction, prior to determining if the person will be sentenced to death, there is a particular process that must occur. See, e.g., *Kansas v Carr*, ___ US ___; 136 S Ct 633, 640; 193 LEd2d 535 (2016) (discussing evidence introduced in the guilt-phase of the trial at the separate sentencing proceeding); *State v Phillips*, 74 Ohio St 3d 72, 76; 656 NE2d 643 (1995) (discussing how an Ohio grand jury returned an indictment with a death penalty specification, and following

a trial convicting the defendant of the crimes, a mitigation hearing was held to determine if the death penalty should be imposed). In a death penalty jurisdiction, if the prosecution does not seek to impose a death sentence in a given case, the sentencing simply does not proceed with the same enhanced process.

The flaw in Defendant's theory is evident at the beginning of his argument. He begins by saying that "[t]he 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[']" (Defendant's Brief, 4). Defendant does not provide a specific citation to his partial quotation, but in looking at *Miller*, the source is clear and the context makes evident that the discussion was not "whatever sentence is imposed":

> We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates *life in prison without possibility of parole* for juvenile offenders. Cf. *Graham*, 560 US at 75; 130 S Ct at 2030 ("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. [*Miller*, 567 US at 479 (emphases added).]

The full context of *Miller*'s quotation from *Graham* further reinforces the idea that the Supreme Court was not discussing "whatever sentence is imposed" but only the specific sentence of life without parole.

> A sentence of *life imprisonment without parole*, however, cannot be justified by the goal of rehabilitation…. In sum, penological theory is not adequate to justify *life without parole* for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of *life without parole* sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of *life without parole*…. A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing *a life without*

> *parole sentence* on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society. [*Graham*, 560 US at 74-75 (emphases added).]

Thus, *Graham*'s use of the phrase "meaningful opportunity for release" was used in conjunction with a non-homicide offender receiving a life without parole sentence. Defendant Boykin was convicted of a homicide offense, but did not receive a sentence of life without parole on resentencing. Thus, neither of the criteria *Graham* noted as significant for its decision applies to Defendant, and he cannot credibly claim that *Miller* or *Graham* apply to his situation.

Defendant also asserts that "he will likely die in prison" (Defendant's Brief, 4-5). No explanation is given of this claim, and certainly nothing that is in the record on appeal supports this claim. Defendant was nearly 18 years old at the time of his crime, so with the consecutive felony firearm sentence, he will be just shy of his 60th birthday when he is first eligible for parole. While obviously no one is guaranteed any number of days on this earth, it is not unreasonable to assume that a person will live past the age of 60, and Defendant provided nothing in the record below to contradict that claim. To the contrary, the "Presentence Case Report" dated August 16, 2016, stated, "Mr. Boykin does not have any medical documentation of note and is in good health according to the Michigan Department of Corrections."

Defendant's other arguments are essentially arguments that he merited a lower sentence because of his circumstances and background. He has not attempted to establish that the trial court abused its discretion, but appears to be requesting that this Court engage in a de novo review of the sentence imposed. This, of course, is not the standard for evaluating a discretionary decision of a trial court, and is not an appropriate use of the limited cases this Court accepts for argument.

As prudent advocates, however, we will briefly address the substance of Defendant's other arguments regarding the propriety of the sentence imposed.

Defendant now argues that he experienced a difficult childhood. In the Michigan Department of Corrections Psychological Report, however, prepared upon Defendant's admission to prison, Defendant "stated he was disciplined by his mother and she never abused him. He stated his childhood was good and his family is close and supportive…. He denied having any mental health problems. He denied having any serious physical problems[.]" (1/8/04 MDOC Psychological Report, 1).

Defendant acknowledges his history of misconducts in prison, but tries to argue that none of the misconduct tickets were assaultive and none identify him as being likely to repeat violent behavior (Defendant's Brief, 9-10). While the People agree that none of his misconducts were assaultive, several incidents do reflect a violent tendency. These include his June 12, 2007, incident for having three weapons hidden in a heater vent, and his March 2, 2016, incident for having information about gangs, and at the same time having a 5 ¼ inch piece of steel that sharpened to a point with a rubber handle hidden in his shoe that Defendant admitted he carried for protection (8/16/16 Presentence Case Report, 1-2). The March 2016 misconduct, less than 6 months before his resentencing hearing, is particularly noteworthy, since Defendant claimed at his original sentencing that he carried the gun that was used in the murder "for protection" and "[e]verything happened so quickly" (Original PSI, Defendant's Description of Offense). The fact that Defendant previously murdered another human being with a weapon he said he carried for protection, after he got mad and things happened "so quickly," should have taught him that carrying an illegal weapon for protection was a bad idea that could result in tragic consequences. While the People continue to assert that Defendant's actions of bringing the gun to the fistfight

was properly found by the trial court to have been more calculated and deliberate, if one looks only at Defendant's own words, he was setting himself up to potentially repeat history in prison 13 years after he should have learned his lesson; this is not indicative of a good candidate for rehabilitation.

Defendant asserts that family influence, including his father, "played a role in this offense" (Defendant's Brief, 10). No other family member, however, brought a gun to the fistfight, no other family member shot an unarmed man in the back multiple times, and no family member encouraged him to do what he told police he did, which was to point the gun at the face of the fallen victim and try to shoot him at point-blank range with the gun misfiring, prior to kicking and stomping on the victim (10/28/16 Resentencing Tr, 15-17, 20).

Defendant also complains about comments the trial court made at his resentencing, expressing a disagreement with the result in *Miller****Error! Bookmark not defined.*** and/or *Montgomery* (Defendant's Brief, 11-12). Because there were four dissenters in *Miller*, 567 US at 493, and three dissenters in *Montgomery*, 136 S Ct at 737, it is fair to say that, if the trial court disagreed with the substance of either or both decisions, it was not on some fringe ground. More importantly, however, while the trial court noted that "the majority of the United States Supreme Court [might not] understand the consequence of their far-reaching decision in your case" (10/28/16 Resentencing Tr, 11), the trial court also stated that "I took an oath to follow the law, not to create it" (*Id.*). Regardless of the judge's personal preferences on what the law should be, the trial court recognized that its obligation was to follow the law as it exists and "create a sentence within the law as given to me" (*Id.*). Mere expression of disagreement with a legal principle does not mean that the trial court cannot or will not follow the law; the trial court here acknowledged disagreement but also acknowledged that it did not have the authority to change the law, and

therefore it must follow it. Defendant does not point to anything in the trial court's reasoning which indicated it did not understand it had discretion to choose an appropriate sentence, or that it refused to consider any relevant facts in imposing a sentence. All Defendant argues is that the trial court should have reached a different conclusion, which does not establish an abuse of discretion or that the trial court acted under a misapprehension of the law.

Defendant then argues that the trial court failed to recognize that children are constitutionally different from adults. While the People think that such difference, to the extent it is relevant, was accounted for when the People chose to have Defendant resentenced to a term of years and not face life without parole, and no specific further inquiry was needed on this point, the trial court took into account the various concerns addressed by the *Miller****Error! Bookmark not defined.*** Court. The trial court noted Defendant's age, that he was 80 days from his 18th birthday at the time of the crime (10/28/16 Resentencing Tr, 15), and that "[t]he circumstances of this crime are indeed horrendous, and there's no justification or excuse for this premeditated torture and killing of Mr. Broyles" (*Id.*, 21). The relative age of the offender and the circumstances of the offense were exactly factors that the *Miller* Court said could and should be considered by a sentencing court:

> Given our holding, and the dissents' competing position, we see a certain irony in their repeated references to 17-year-olds who have committed the "most heinous" offenses, and their comparison of those defendants to the 14-year-olds here. See *post,* at 2477 (opinion of ROBERTS, C.J.) (noting the "17-year old [who] is convicted of deliberately murdering an innocent victim"); *post*, at 2478 ("the most heinous murders"); *post*, at 2480 ("the worst types of murder"); *post*, at 2489 (opinion of ALITO, J.) (warning the reader not to be "confused by the particulars" of these two cases); *post*, at 2489 (discussing the "17 ½ -year-old who sets off a bomb in a crowded mall"). *Our holding requires factfinders to attend to exactly such circumstances—to take into account the differences among defendants and crimes.* [*Miller*, 567 US at 480 n 8 (emphasis added).]

Thus, the trial court noting how close Defendant was to being 18 years old, and the heinousness of the offense, are some of the ways a trial court is supposed to "take into account differences

among defendants and crimes." *Id.* The trial court's discussion of Defendant's age relative to the 14-year-old offenders in *Miller* was not only permissible, it was encouraged by the *Miller* decision. The dissenter in the Court of Appeals took the trial court to task for engaging in exactly the sort of analysis called for by the United States Supreme Court. *Boykin II*, slip op at 2 (Shapiro, J, dissenting). The dissenter's objection, however, is simply not supported by the case law; the trial court was not ignoring the law but following it by discussing how close Defendant was to eighteen at the time of his crime, nor did he clearly err in stating that Defendant was less than three months away from being over the line established by the Supreme Court.

Defendant next criticizes the trial court's reliance on Defendant's psychological assessment upon placement in prison, but the trial court did not simply note the assessment from 2004. It also commented on how the psychologist's findings that Defendant was "likely to be defiant against authority, paranoid, and impulsive" were supported by Defendant's subsequent 13-year history of misconducts (10/28/16 Resentencing Tr, 19). Thus, it was not solely about Defendant's youth, but how his subsequent conduct showed a lack of progress and rehabilitation, all proper considerations for a trial court in making a discretionary sentencing decision.

Defendant then provides a lengthy discussion of the history of cases invalidating life without parole sentences for minors who did not commit homicide (Defendant's Brief, 15-18). The People do not dispute that a life without parole sentence is not available as a mandatory sentence for a minor, but note that in this case, the trial court did not "[i]mpos[e] the harshest punishment Michigan can impose on a child" (Defendant's Brief, 17).[3] The particular process laid out in *Miller* for such a sentence does not apply.

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[3] Defendant also argues that a life without parole sentence is disproportionate to a juvenile regardless of the underlying offense (Defendant's Brief, 17). The People briefly note that *Miller*

Undoubtedly, the concerns raised in *Miller* are, in a sense, among the general totality of the circumstances that a trial court should consider in any sentencing of any defendant: the person's age, maturity, family background, criminal history, degree of participation in the underlying crime, etc. "'An offender's age,' we made clear in *Graham*, 'is relevant to the Eighth Amendment,' and so 'criminal procedure laws that fail to take defendants' youthfulness into account *at all* would be flawed.'" *Miller*, 132 S Ct at 2466 (emphasis added). But the fact that age is one of a nearly infinite number of factors which might be considered by a trial court does not mandate that the trial court provide a check list on the *Miller* factors. The general sentencing process for offenders under the age of 18 in an adult criminal proceeding was not altered for any punishment other than life without the possibility of parole. As such, almost all such sentencing hearings where the defendant is being sentenced as an adult remain the same basic summary proceedings used for all sentencings, not ones following a process that the Supreme Court limited to "a particular penalty." Because the United States Supreme Court noted that life without parole sentences should be reserved for the worst offenders, it makes sense that "the distinctive attributes of youth" would need to be given particular weight in deciding whether to impose the ultimate punishment available to a minor, but there is nothing in the opinion that applies the rubric to a general sentencing proceeding. In this case, the trial court noted the concerns raised in *Miller*, even if it was not required to do so, and concluded that Defendant merited the sentence it imposed based on the degree to which Defendant was not representative of the general concerns raised in *Miller*, and the

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did not categorically prohibit life without parole for all minors who commit murder. 567 US at 480 ("[W]e do not foreclose a sentencer's ability to [impose such a sentence] in homicide cases[.]"). Because the issue is irrelevant in a case where Defendant received a term of years sentence within the legislatively authorized range rather than a life without parole sentence, however, the People will not argue the matter further.

concerns that a trial court typically needs to consider (see, e.g., 10/28/16 Resentencing Tr, 19-21). Based on the record, the trial court did not clearly err in finding that the murder "was an intentional act" (10/28/16 Resentencing Tr, 20), rather than Defendant's claim that the situation was "classic recklessness, impulsivity and heedless risk taking" (Defendant's Brief, 17). With the record before it, and having sat through the trial, the trial court cannot be said to have clearly erred in its factual finding that Defendant's shooting at the back of a man running away was intentional was clearly erroneous. Further, it properly applied the general concerns of sentencing in the resentencing hearing, and it imposed a sentence that was not an abuse of discretion. Defendant is not entitled to any relief on this claim.

Defendant's Application cites two additional cases in support of his claim that the trial court erred in its conclusion to impose the sentence it chose. He partially cites *People v Hyatt*, 316 Mich App 368, 426; 891 NW2d 549 (2016), writing that the Court of Appeals "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" (Defendant's Application, 18; emphasis added). In reality, the quoted section does not say "the sentence imposed," but rather it states that "*a life-without-parole sentence* imposed on a juvenile is disproportionate." *Hyatt*, 316 Mich App at 426 (emphasis added). As the People have noted, Defendant did not receive a life without parole sentence, so this quotation has no bearing on the analysis of Defendant's sentence. Additionally, as this Court of course knows, the decision in *Hyatt* was reversed in part, including on this issue, in this Court's decision in *People v Skinner*, ___ Mich ___, ___; ___ NW2d ___ (2018) (slip op, 35), where this Court held that "neither *Miller* nor *Montgomery* imposes a presumption *against* life without parole for those juveniles who have been convicted of first-degree murder." Defendant's argument is tantamount to an argument that should be a presumption against a 40-60

year sentence, or in favor of a 25-60 year sentence. There is no such requirement in the statute, nor is one proper given *Miller* and the cases interpreting it.

Defendant, and the dissent in the Court of Appeals, also cites to *People v Wines*, ___ Mich App ___; ___ NW2d ___ (2018) (Docket No. 336550), in support of his argument that the sentence was unconstitutionally imposed (Defendant's Application, 19-20). The People first note that this office has filed an application for leave to appeal the *Wines* decision, which is pending before this Court in Docket No. 157667, and continue to assert that the *Wines* decision incorrectly applied *Miller* to non-life without parole sentences without constitutional or statutory authority to do so. The People would have no objection to this Court holding this case in abeyance pending a decision either peremptorily reversing *Wines* in light of the contours of resentencing a minor as discussed in *Skinner*, or one granting leave to appeal in that case to better articulate the standards to be used in sentencing those under the age of 18 to a term of years sentence for first degree murder. The People do note, however, that the panel in this case was the exact same three-judge panel in *Wines*, and two of the judges, clearly understanding the import of the published decision to which they had just agreed, still found no basis to reverse this Defendant's sentence under *Wines*. As such, the People submit that the *Wines* decision, even if correct, does not preclude a 40-60 year sentence from being imposed, and the Court of Appeals panel here found that the trial court did not abuse its discretion on these facts with this Defendant in choosing the sentence it did. Therefore, the People argue that there is no reason to grant Defendant's application for leave to appeal.

II. MCL 769.25 and MCL 769.25a comport with *Miller* and the Eighth Amendment.

Standard of Review: In general, this Court reviews constitutional questions de novo. *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). "'Statutes are presumed to be constitutional, and the courts have a duty to construe a statute as constitutional unless its

unconstitutionality is clearly apparent.'" *Id.*, quoting *People v Dipiazza*, 286 Mich App 137, 144; 778 NW2d 264 (2009) (citation and quotation marks omitted).

Discussion: Defendant asserts that MCL 769.25 and MCL 769.25a are unconstitutional because they provide the trial court with a minimum sentence to be imposed for any juvenile murderer that the trial court may not depart below.

The People question whether Defendant can raise this challenge as the trial court did not sentence Defendant to the bottom of the sentencing range, nor did it comment on how it was constrained to impose a minimum sentence of more years than the trial court deemed appropriate because of the Legislature's policy decision. Whether a particular 25-year minimum sentence would survive constitutional scrutiny is irrelevant where the trial court, after discussing the *Miller* decision, opted to impose a 40-year minimum sentence. As such, the People submit that the issue is not one this Court should review in this case.

Further, while Defendant's brief cites a Washington State court's decision interpreting that state's statutes (Defendant's Application, 22), the US Supreme Court has approved the use of mandatory minimum sentences for murderers under the age of 18. In *Montgomery*, the Court noted that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, e.g., Wyo. Stat. Ann. § 6–10–301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years)." *Montgomery*, 136 S Ct at 736. Thus, the nation's highest court has not prohibited all sentencing schemes for minors that require a minimum period of incarceration, even a lengthy one of 25 years. Defendant has not advanced an argument for overturning this pronouncement in *Montgomery* (assuming this Court even could overturn a decision of the US Supreme Court), and this Court should not do so.

Defendant's argument is not with the range established by the Legislature, but with any minimum range of sentencing for a minor. Since the US Supreme Court has approved of a potential minimum range, and the issue is not relevant given the trial court's decision to not sentence at the minimum of the range, this Court should reject Defendant's argument, and not grant leave to appeal on this issue.

RELIEF REQUESTED

WHEREFORE, for the reasons stated herein, the People respectfully pray that Defendant-Appellant's Application for Leave to Appeal be DENIED.

Respectfully submitted,

Christopher R. Becker (P53752)
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Dated: September 21, 2018

By: /s/ James K. Benison
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