STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

DEMARIOL BOYKIN,

Defendant-Appellant.

Supreme Court Case No. 157738

Court of Appeals No. 335862

Circuit Court Case No. 03-04460-FC

Filed under AO 2019-6

Plaintiff-Appellee's Supplemental Brief on Appeal

Oral Argument Requested

Christopher R. Becker (P53752)
Kent County Prosecutor

James K. Benison (P54429)
Chief Appellate Attorney

82 Ionia Avenue NW – Suite 450
Grand Rapids, MI 49503
(616) 632-6710
james.benison@kentcountymi.gov

Date: October 14, 2021

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STATEMENT OF JURISDICTION

This Court has jurisdiction to consider Defendant-Appellant's Application for Leave to Appeal pursuant to MCR 7.303(B)(1), and this Court's order for supplemental briefing and argument on the application pursuant to MCR 7.305(H)(1), *People v Boykin*, ___ Mich ___; 959 NW2d 532 (2021), provides this Court with jurisdiction to review the issues raised.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I. The Court of Appeals decision in *People v Wines*, 323 Mich App 343; 916 NW2d 855 (2018), rev'd on other gds 506 Mich 954; 950 NW2d 242 (2020), requires a sentencing court to, in effect, hold a *Miller* hearing for every juvenile first-degree murderer being sentenced to a term of years. Where that requirement is grounded in neither the statute nor the Constitution, should its attempt to create a new sentencing structure for a class of cases be overruled? [Court's requested issues I and II.]

The sentencing court was not asked this question.

The Court of Appeals was not asked this question.

Defendant-Appellant answers: No.

Plaintiff-Appellee answers: Yes.

II. To the extent that a sentencing court should discuss the attributes of youth in sentencing a juvenile murderer to a term of years, did the sentencing court in this case properly do so [Court's requested Issue III]?

The sentencing court was not asked this question.

The Court of Appeals answered: Yes.

Defendant-Appellant answers: No.

Plaintiff-Appellee answers: Yes.

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, for a crime that occurred when he was less than three months from his 18th birthday; he was sentenced to two years in prison for the felony firearm offense, consecutive to the then-mandatory sentence of life without parole for the murder (10/28/16 Amended Judgment of Sentence; Defendant's Appendix 23a). 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), 1; People's Appendix 2b). 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.[1] One witness testified that defendant lifted Broyles up by his jacket hood, put the gun to his cheek, and pulled the trigger,

[1] The forensic pathologist testified at trial that one bullet entered "in the back of the right arm … [and one] entered in the right back portion of the chest" (9/29/03 Tr, 57; People's Appendix 8b).

> but the gun did not fire.[2] 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; People's Appendix 2b-3b.]

This Court denied Defendant's 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*, 577 US 190; 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 a motion for resentencing for any 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, "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).

The People decided not to seek life without parole for Defendant as "it was our position that Mr. Boykin probably didn't qualify for a mandatory life sentence," but advocated for a sentence of 40-60 years in prison (10/28/16 Tr, 3; Defense Appendix 17a). Defense counsel advocated for a sentence of 25-60 years, including discussion of some of the factors mentioned in *Miller* (*Id.,* 5-6; Defense Appendix 18a). The sentencing court heard from two victim representatives who asked that the court maintain a sentence of life without parole, and the sentencing court explained that it was not legally able to do so; the sentencing court also made additional comments to the family members about the circumstances of the resentencing (*Id.*, 7-13; Defense Appendix 18a-20a). Defendant then made

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[2] The forensic pathologist saw a circular imprint on the cheek of the victim, but there was no gunshot wound (9/29/03 Tr, 57; People's Appendix 8b).

a statement (*Id.*, 13-14; Defense Appendix 20). The sentencing court then detailed the procedural history including the *Miller* decision, the facts of the case, and the updated sentencing materials, and ultimately stated that the appropriate sentence "for punishment, for the protection of this community, and the hope of Mr. Boykin's rehabilitation in a more controlled environment" was 40 to 60 years in prison, consecutive to the felony firearm offense (*Id.*, 14-23; Defense Appendix 20a-22a).[3]

Defendant appealed, and the Court of Appeals, in a 2-1 decision, affirmed. *People v Demariol Boykin*, unpublished per curiam opinion of the Court of Appeals, issued March 28, 2018 (Docket No. 335862) (Defense Appendix 24a-31a).

Defendant sought leave to appeal the decision, and this Court ordered argument on the application, directing the parties to address

> (1) whether the Court of Appeals correctly held in *People v Wines*, 323 Mich App 343 (2018), rev'd in nonrelevant part 506 Mich 954 (2020), that trial courts must consider the distinctive attributes of youth, such as those discussed in *Miller v Alabama*, 567 US 460 (2012), when sentencing a minor to a term of years pursuant to MCL 769.25a; (2) if *Wines* was correctly decided, whether sentencing judges have an obligation to explicitly set forth their analysis of how the defendant's age impacted their sentencing discretion when proceeding under MCL 769.25a or MCL 769.25; and (3) if *Wines* applies to this case, whether the trial court complied with its requirements, and if it did not, what more the court was required to do. [*People v Boykin*, ___ Mich ___; 959 NW2d 532 (2021).]

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

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[3] There was some discussion about the proper felony firearm sentence and whether it was to be enhanced (10/28/16 Tr, 21-23; Defense Appendix 22a). Ultimately, the revised judgment of sentence correctly listed the punishment for felony firearm as a consecutive two-year sentence (10/28/16 Amended Judgment of Sentence; Defense Appendix 23a).

ARGUMENT

I. **The Court of Appeals decision in *Wines* ignored the legislative sentencing framework and improperly added requirements that are not grounded in the Constitution or the statute. To the extent the decision adds a requirement that sentencing courts need to do more than a normal sentencing, it was wrongly decided. [Court's requested issues I and II.]**

Standard of Review: Factual findings of a sentencing 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). "[Q]uestions of law regarding statutory interpretation and the application of our state and federal Constitutions [are reviewed] de novo." *People v Miller*, 498 Mich 13, 16-17; 869 NW2d 204 (2015).

Discussion: In *Wines*, the Court of Appeals held that a sentencing court "is *required* to take into account the attributes of youth, such as those described in *Miller*." *Wines*, 323 Mich App at 352 (emphasis added). If this Court determines that the decision of the Court of Appeals should simply mean that the considerations of youth are among the many factors a sentencing court must consider when sentencing a defendant, the decision breaks no new ground and it is unobjectionable.[4]

However, the People submit that the Court of Appeals attempted to go further and graft additional requirements onto the resentencing hearing, effectively requiring a *Miller* hearing even when imposing a term of years sentence. Such a decision is contrary to the language used by the Michigan Legislature, and to the holding of *Miller*. The Court of Appeals expanded the scope of *Miller* without any authority or basis to do so, and its decision should be overturned.

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[4] This is the reading espoused by one member of this Court in denying the People's application for leave to appeal in that case. *People v Wines*, 506 Mich 954, ___; 950 NW2d 252 (2020) (Clement J, concurring).

As noted above, when a life without parole sentence is not sought for a minor previously convicted of first-degree murder, MCL 769.25a(4)(c) controls: "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. Each victim shall be afforded the right under section 15 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.765, to appear before the court and make an oral impact statement at any resentencing of the defendant under this subdivision." MCL 769.25(4), (8), and (9) provides essentially the same framework for cases that postdate *Miller*. In none of these statutory subsections did the Legislature mention *Miller*, let alone require that the sentencing court make an explicit determination regarding the factors discussed in *Miller*.

In contrast, the Legislature specifically referenced those requirements when the prosecution chooses to seek a life without parole sentence for a minor convicted of first-degree murder:

> If the prosecuting attorney files a motion under subsection (2), the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in *Miller v Alabama*, 576 US ___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated. [MCL 769.25(6) (incorporated to retroactive sentencing decisions by MCL 769.25a(4)(b)).]

The difference between the two subsections must be considered in interpreting the statute as a whole. "When the legislature includes language in one part of a statute that it omits in another, it is assumed that the omission was intentional." *People v Lewis*, 503 Mich 162, 167; 926 NW2d 796 (2018). The plain language of MCL 769.25a(4)(c) does not require that the sentencing court, when imposing a term of years sentence, discuss the *Miller* decision or any of the factors in that opinion, but it does require a sentencing court do so when considering life without parole. Based on this difference in language, the People submit that a term of years sentencing should be nothing more than a sentencing of a minor in adult court.

The Court of Appeals recognized the lack of a statutory mandate when it noted that "[t]he statute does not define any special considerations to be applied at a resentencing." *Wines*, 323 Mich App at 348. Despite the Legislature not authorizing a different sentencing procedure, the Court of Appeals decided to create one. *Wines* stated that failure to take the *Miller* factors into account when sentencing a minor to a term of years under MCL 769.25a was per se "reversible error." *Id.* at 352.

The decision to override the Legislature's policy choice on the procedure to be used in sentencing minors, and graft on additional requirements beyond a normal sentencing hearing, is an improper act of judicial legislation, unless there was a constitutional mandate requiring such a procedure when imposing a term of years sentence. There is not.

To the contrary, *Miller* not only fails to support a claim that it applies to all sentencings of minors convicted of murder, but the opinion also 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 a similar rule should apply when a juvenile confronts *a sentence of life (and death) in prison*." [*Miller*, 567 US 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; 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*." [*Miller*, 567 US 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." [*Miller*, 567 US at 489; emphases added.]

Justice Kagan, writing for the majority in *Miller*, could not have been clearer that the Court's decision was based on the sentencing of a juvenile 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 addressing. It was not a pronouncement on all sentencing of all juveniles: "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.

Wines effectively rewrote *Miller*, changing it from "before imposing a particular penalty" to "before imposing *any* penalty." *Miller* was rooted in the Eighth Amendment and found the mandatory imposition of a "life (and death) sentence," 567 US at 477, on a minor to be unconstitutional. It did not invalidate any other sentencing scheme for juvenile offenders, 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). *Montgomery* did not prohibit life without parole sentences, let alone any particular term of years sentence. It simply reaffirmed that a hearing was "necessary to separate those juveniles who may be sentenced to *life without parole* from those who may not." *Id.* at 735 (emphasis added).

As a result, to the extent the Court of Appeals held that the sentencing court was required to apply the *Miller* framework in some way to determine what term of years sentence to impose, the argument has no support in that decision or in *Montgomery*. The Supreme Court's comparison of life without parole sentences for juveniles to death penalty sentences for adults

adds confirmation to the unique nature of the process to be employed only when the ultimate penalty is 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 being presented at the separate sentencing phase); *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 where the defendant was convicted 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 trial does not proceed with the same enhanced process of a guilt phase followed by a sentencing phase with aggravation and mitigation evidence. Similarly, with juveniles who are potentially subject to a life without parole sentence based on their crime, but for whom the prosecution does not seek that highest punishment, the additional procedures of *Miller* simply do not apply.

Defendant seeks to incorporate the holding of *Miller* into a case like this by claiming that *Graham* and *Miller* hold that "whatever sentence is imposed on a juvenile offender, the juvenile must be given a 'meaningful opportunity to obtain release based on a demonstrated maturity and rehabilitation'" (Defendant's Supplemental Brief, 4; citations omitted). The full context of the quotation from *Miller*, however, again reinforces that the discussion was about a mandatory sentence of life without parole, and not "whatever sentence might be 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 the *Graham* quotation in *Miller* further highlights 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. [*Graham*, 560 US at 74-75 (emphases added).]

Thus, *Graham*'s use of the phrase "meaningful opportunity for release" was done for a non-homicide offender receiving a life without parole sentence. Defendant was convicted of a homicide offense, and he 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.

Part of the flaw in the reasoning in *Wines* is based on its invocation of case law which has since been overturned on the points for which it was cited. *Wines* noted the Court of Appeals' earlier decision in *People v Garay*, 320 Mich App 29; 903 NW2d 863 (2017), rev'd in part 506 Mich 936 (2020), and that case's holding that a sentencing court, in deciding whether to impose life without parole, could *only* consider the *Miller* factors and could not "rely on broader sentencing goals such as rehabilitation,

punishment, deterrence, and protection." *Wines*, 323 Mich App at 348-349. Any citation to a life without parole decision in a non-life without parole sentencing decision is problematic, but it is worse here since this Court later unanimously reversed *Garay* regarding this very point.

> [W]e REVERSE the judgment of the Court of Appeals to the extent that it would broadly preclude sentencing courts from considering, at all, the traditional objectives of sentencing – punishment, deterrence, protection, retribution, and rehabilitation – when considering whether to sentence persons who were under the age of 18 when they committed their offenses to a term of life without parole. Although reliance on other criteria to the exclusion of, or without proper consideration of, *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 LEd2d 407 (2012), would be an abuse of discretion, mere consideration of the traditional objectives of sentencing or other factors is not, *per se*, an error of law. See MCL 769.25(6)-(7). [*People v Garay*, 506 Mich 936; 949 NW2d 673 (2020).]

While the Court of Appeals did not specifically hold that the decision in *Garay* controlled its decision in *Wines*, it is clear that the since-overruled concept in *Garay* was animating the reasoning in *Wines*. "We agree with the prosecution that the constitutional holding in *Miller* applied only in life-without-parole decisions and does not constitutionally compel a judge to consider *only* the factors defined in *Miller* when the sentence of life imprisonment without parole is not sought by the prosecution[.]" 322 Mich App at 350 (emphasis added). The use of the word "only" highlights that the Court of Appeals was relying on the holding of *Garay*, and believed that its permitting a sentencing court to consider more than just the *Miller* factors made its decision more generous than the law for life without parole evaluations. After this Court rejected that artificially narrow reading of sentencing hearings considering life without parole, *Wines* provides no distinction between a term of years sentencing and a life without parole evaluation. Its holding that "a failure to consider the distinctive attributes of youth, such as those discussed in *Miller*, when sentencing a minor to a term of years pursuant to MCL 769.25a so undermines a sentencing judge's exercise of his or her discretion as to constitute reversible error," *Wines*, 323

Mich App at 352, turns every term of years sentencing into a *Miller* hearing without a basis in law to do so.

Further, *Garay* relied on the reasoning of the Court of Appeals decision in *People v Hyatt*, 316 Mich App 368; 891 NW2d 549 (2016), rev'd in part by *People v Skinner*, 502 Mich 89; 917 NW2d 292 (2018). In *Hyatt*, the Court of Appeals imposed a standard of review for life without parole decisions that involved "a heightened degree of scrutiny" for sentences of life without parole. 316 Mich App at 424. This Court, however, rejected that approach, and held that the traditional abuse of discretion standard was to be used in life without parole decisions for minors. *People v Skinner*, 502 Mich 89, 137; 917 NW2d 292 (2018). *Wines* effectively creates that same heightened standard of review for non-*Miller* sentencing hearings, imposing a heightened legal standard on sentencing courts to do more than they would otherwise have to do for any other sentence, when the law does not call for it.

Apparently recognizing the lack of support for its additional procedures, the Court of Appeals set up a straw man to provide support to its conclusion. It "agree[d] with the prosecution that the constitutional holding in *Miller* applied only in life-without-parole decisions, and does not constitutionally compel a sentencing judge to consider *only* the factors defined in *Miller* when the sentence of life-without-parole is not sought by the prosecution per MCL 769.25a." *Wines*, 323 Mich App at 350 (emphasis added). It then stated the People argued that *Miller* "has *no* application to these sentencing decisions." *Id.* (emphasis in original). That is not what the People argued in *Wines*, nor is it being argued here.

In *Wines*, the People did not advocate that a defendant's youth or other characteristics could not be considered at all; the People were arguing against the defense claim that *Miller* should be applied *in toto* to a term of years sentence, or that only the *Miller* factors could be considered and only for mitigation.[5] The People were arguing against creating a framework above and beyond a standard sentencing. The People argued there, and argue here, that the typical concerns of a sentencing court should be evaluated in a term of years sentencing, including the seriousness of the

[5] People's Brief on Appeal in *Wines*; People's Appendix 29b-37b).

offense, the relative culpability of the offender, and the background of the offender. See, *e.g.*, *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990).

> Thus, 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.

The proportionality standard does not disappear when sentencing a minor to an adult sentence. While a defendant's age as someone under 18 years old is undoubtedly relevant to "the background of the offender", and therefore one factor for the sentencing court to consider, it is not given preemptive weight over all other sentencing considerations, and it certainly does not create a presumption for a bottom of the range sentence. The legislative authorization for a minimum sentence between 25 and 40 years indicates that the Legislature anticipated a range of sentences for those not sentenced to life without parole. There was not a legislative or constitutional pronouncement that only a sentence at the bottom of the sentencing range would be presumptively proportionate. The Legislature wanted to provide a range of sentencing options for those defendants benefiting from *Miller* who would not be receiving life without parole. As required by *Miller*, however, all minors sentenced to a term of years for first-degree murder will be given a meaningful opportunity for release.

Defendant asserts that "he will likely die in prison" with his sentence (Defendant's Supplemental Brief, 4). There is nothing in the record to support his claim. He was nearly 18 years of age at the time of the crime, and it was 11 days after his 18th birthday when he was first incarcerated for this crime (10/28/16 Amended Judgment of Sentence; Defendant's Appendix 23a). Including the felony firearm sentence, he will be sixty years of age at the time of parole eligibility. While certainly 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 updated "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 Appendix 10a).

In *Wines*, the Court of Appeals did not say a 17-year-old Defendant would likely die in prison, but it did assert that "inmate life expectancy is statistically low," *Wines*, 323 Mich App at 351, citing a case from Illinois which neither party had mentioned in the sentencing court or the Court of Appeals, and whose underlying claims had not been subjected to any scrutiny by the parties.[6] Further, relying on generalized statistics runs contrary to the admonition in *Miller* that sentences should be made based on individualized determinations, not categorical lumping of all offenders together. With Defendant still in good health, there is no reason of record to conclude that he will not survive through his parole eligibility date such that a 40-year minimum sentence is the functional equivalent of life without parole for him.

The Court of Appeals also stated that the legislative authorization of a minimum sentence between 25 and 40 years was "very substantial [and t]here are no sentencing guidelines to guide a trial court's exercise of discretion within that very substantial range." *Wines*, 323 Mich App at 350. Of course, in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), this Court held that our system would trust sentencing courts to determine a proportionate sentence guided by the principle of reasonableness. This is true whether the guidelines do not exist, such as for a misdemeanor carrying no more than one year in jail, or for a person with three high-severity felonies who commits second degree murder (potential guidelines of 365-1200 months [or more than 30 years – 100 years] or life; MCL 777.61) or a violent armed robbery (potential guidelines of 270-900 months [or 22 ½ years – 75 years]or life; MCL 777.62). In other words, sentencing courts routinely sentence defendants with potential sentencing ranges far broader than the 15-year range between 25 and 40 years. The large discretion provided to our circuit courts extends far beyond the narrow range of cases of minors receiving a term of years sentence for first-degree murder, and

[6] The defendant in *Wines* had referenced a study in a different Illinois case, and the People noted in their brief on appeal that the study could not be located to even begin to vet its accuracy. See People's Court of Appeals Brief in *Wines*; People's Appendix 37b-40b).

neither the Legislature nor the courts have imposed restrictions on that discretion akin to what *Wines* has ordered. This is true whether the offender was a minor designated for prosecution in the adult courts or for anyone 18 years of age or older.

There is, of course, a check on the decision of a sentencing court. It is the traditional abuse of discretion standard, guided by this Court's discussion of proportionality in *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017), and *Milbourn*. There is no basis for an artificial standard that requires more for these cases than for any other sentencing hearing.

Thus, to the extent this Court holds that the distinctive attributes of youth should or must be considered in a term of years sentencing for a minor convicted of first-degree murder and facing a term of years, the lack of statutory or constitutional authority for a broader mandate means this Court should not effectively order a *Miller* hearing in this context nor dictate the minutiae to the sentencing courts. In some cases, a *Miller* factor might be totally irrelevant (a case where a defendant acts completely alone and therefore not because of any peer pressure, for instance). If this Court creates a rule that all the *Miller* factors or other attributes of youth must be discussed rather than trusting the sentencing courts to perform their duties, it will risk creating a checklist sentencing process rather than encouraging the courts to grapple with the particular facts in each of their cases.

A sentencing 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). There is no rational basis offered for this Court to alter that traditional standard and have the appellate courts engage in de novo sentencing review or some form of stricter scrutiny of a term of years sentence. The lower courts hear the trials, they are able to perceive the demeanor of the defendant, the witnesses, and others involved in the case, and our system is set up to rely on those courts to perform their duty in sentencing offenders. To the extent *Wines* attempts to rewrite the law, it should be overruled.

II. **To the extent this Court determines that certain steps are required in articulating a term of years sentence, the sentencing court did so. [Court Issue III.]**

Standard of Review: Presumably, the same framework of clear error review for factual determinations, de novo review for legal issues, and abuse of discretion for the ultimate sentence would apply.

Discussion: In this case, the sentencing court properly discussed Defendant's history and the facts of the case before imposing sentence. Its discussion of the distinctive attributes of youth, as defined by *Miller*, was more than sufficient to enable the Court of Appeals to decide that there was not an abuse of discretion.

Defendant argues that the sentencing 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 sentencing court took into account the various concerns addressed by *Miller*. The sentencing 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; Defendant's Appendix 20a), 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; Defendant's Appendix 22a).

Defendant repeatedly complains about the sentencing court noting his age relative to other juvenile offenders (Defendant's Supplemental Brief, 14-15). The relative age of the offender, however, 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 sentencing court noting how close Defendant was to being 18, and the heinousness of the offense, are some of the ways a sentencing court is supposed to "take into account differences among defendants and crimes." *Id*. The sentencing 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. Defendant, and the dissenter in the Court of Appeals, complain that the sentencing court cannot consider the relative age of a juvenile when deciding what sentence is appropriate for a term of years sentence, but their complaint is with Justice Kagan and her opinion in *Miller*, not the sentencing court. Certainly, a sentencing court should not reflexively sentence all 17-year-old offenders to 40 years and all 14-year-old offenders to 25 years, but there is no basis in the record to say that is what occurred here. The sentencing court, given a range less than life without parole, had to determine where Defendant fit in that range. Defendant's age relative to other juvenile offenders was one relevant factor for it to consider.

Defendant also criticizes the sentencing court's reliance on Defendant's psychological assessment upon placement in prison, but the sentencing 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 in prison (10/28/16 Resentencing Tr, 19; Defendant's Appendix 21a). 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 sentencing court in making a discretionary sentencing decision.

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, his childhood was good and his family was close and supportive, and he was an average student in school and never suspended (10/28/16 Resentencing Tr, 17; Defendant's Appendix 21a). It was not clear error for the trial court, relying on this information, to opine that it could not "say or point to anything that would suggest his early childhood was brutal or dysfunctional" (10/28/16 Resentencing Tr, 20; Defendant's Appendix 21a).

Defendant acknowledges he has a 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 Supplemental Brief, 20-21). 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 was sharpened to a point hidden in his shoe, which Defendant admitted he carried for protection (8/16/16 Presentence Case Report, 1-2; Defendant's Appendix 9a-10a). 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; People's Appendix 51b-52b).[7] 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 action of bringing a gun to the fistfight and then shooting the fleeing victim in the back was properly found by the sentencing 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

[7] The Presentence Investigation Report is numbered sequentially to the other items in the People's Appendix, but is being electronically filed as a separate document due to its confidential nature).

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 Supplemental Brief, 21). No other family member, however, brought a gun to the fistfight, no family member asked him to intervene in 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 Mr. Broyles after he had fallen to the ground and try to shoot him at point-blank range with the gun misfiring, prior to then kicking and stomping the dying victim (10/28/16 Resentencing Tr, 15-17, 20; Defendant's Appendix 20a, 21a).

Defendant also complains about comments the sentencing court made at his resentencing, expressing a disagreement with the result in *Miller* and/or *Montgomery* (Defendant's Supplemental Brief, 23-24). 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 sentencing court disagreed with the substance of either or both decisions, he was not alone. More importantly, however, while the sentencing 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; Defendant's Appendix 19a), the sentencing court also stated, "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 sentencing 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 sentencing court cannot or will not follow the law; the sentencing 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 sentencing 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 sentencing court should have reached a different conclusion, which does not establish an abuse of discretion or that the sentencing court acted under a misapprehension of the law.

Further, it should be noted that the sentencing court's comments about *Miller* were made to the grieving family members who had just asked him to maintain the sentence of life without parole, "begging" the court to keep the original sentence, saying "[a]nything less than that would be cruel and unusual punishment for myself and my family" (10/28/16 Resentencing Tr, 10; Defendant's Appendix 19a). The sentencing court responded with compassion to grieving family members, sympathizing with their agony at having to relive an experience again that they thought was done, while explaining that the law had changed and he was bound to follow it regardless of his personal preferences (*Id.* at 11). This was not improper, but rather consistent with the constitutional mandate to treat the victim's family members with dignity and respect, while informing them of the law he was bound to follow. MI Const 1963, Art I, § 24.

The sentencing court spent nine pages of transcript discussing the procedural history of the case, the facts of what occurred, and detailed information about Defendant and his history. That Defendant disagrees with the interpretations of that information provided by the sentencing court does not mean it was an abuse of discretion. It was within the range of principled outcomes to find that shooting an unarmed man in the back who was running away from him, attempting to shoot him with a contact shot to the face, and then stomping on the victim while he lay there dying, was a deliberate act. It was not clear error to find that Defendant had possessed weapons in prison, including recently. With all this history, it was not an abuse of discretion to decide on a sentence of 40-60 years in prison.

The sentencing court provided a thorough statement of what it was considering and why. It is hard to imagine what more the sentencing court needed to say to comply with his obligations to permit appellate review of his sentence. The majority in the Court of Appeals correctly found that the sentencing court's decision was within the range of principled outcomes.

Part of the difficulty with *Wines* is that it was so ambiguous, holding that *Miller* needs to be considered somehow in some way but without any clarity on what that means. Rather than create a new system for a form of sentencing or impose requirements not grounded in the statute or the Constitution, this Court should hold that a normal sentencing is required

for a term of years, and the trial court need only provide sufficient information to permit appellate review, like any other sentencing decision.

The decision of the sentencing court should be affirmed.[8]

[8] Defendant has requested resentencing before another judge. If this Court decides resentencing is required, the original judge has since left the bench after being ineligible to run for reelection due to age. Since a new judge would handle any proceedings, there is no need to assign it to someone other than the successor judge.

CONCLUSION AND RELIEF REQUESTED

Therefore, the People respectfully request that this Court overrule *Wines* to the extent it adds anything to the resentencing process beyond a general reminder that age and its characteristics are relevant in imposing a term of years sentence, and ultimately to affirm the decision of the sentencing court and the Court of Appeals in this case that Defendant is not entitled to another resentencing.

Respectfully submitted,

Christopher R. Becker (P53752)
Kent County Prosecutor

/s/ James K. Benison (P54429)
James K. Benison (P54429)
Chief Appellate Attorney
82 Ionia Avenue NW – Suite 450
Grand Rapids, MI 49503
(616) 632-6710
james.benison@kentcountymi.gov

Date: October 14, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 7,526 countable words. The document is set in Georgia, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

/s/ James K. Benison
James K. Benison (P54429)
Chief Appellate Attorney
82 Ionia Avenue NW – Suite 450
Grand Rapids, MI 49503
(616) 632-6710
james.benison@kentcountymi.gov