No.18-

IN THE

SUPREME COURT OF THE UNITED STATES

TIA SKINNER

Petitioner,

V.

STATE OF MICHIGAN

Respondent.

On Petition for a Writ of Certiorari to the

Supreme Court of Michigan

APPENDIX

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APPENDICES

APPENDIX A

People v. Skinner, 502 Mich. 89 (2018)
917 N.W.2d 292

502 Mich. 89
Supreme Court of Michigan.

PEOPLE of the State of Michigan,
Plaintiff-Appellant,
v.
Tia Marie-Mitchell SKINNER,
Defendant-Appellee.
People of the State of Michigan,
Plaintiff-Appellant,
v.
Kenya Ali Hyatt, Defendant-Appellee.
People of the State of Michigan, Plaintiff-Appellee,
v.
Kenya Ali Hyatt, Defendant-Appellant.

No. 152448, No. 153081, No. 153345
|
Argued October 12, 2017
|
Filed June 20, 2018

Synopsis
Background: In first case, defendant was convicted of first-degree murder and other crimes committed when defendant was juvenile. Defendant appealed, and on remand from the Court of Appeals, 2013 WL 951265, for resentencing following affirmance of convictions, the Circuit Court, St. Clair County, Daniel J. Kelly, J., sentenced defendant to life without parole. Defendant appealed, and the Court of Appeals, 312 Mich.App. 15, 877 N.W.2d 482, vacated and remanded. Prosecution's application for leave to appeal was granted. In second case, another defendant was convicted in the Genesee Circuit Court, Judith A. Fullerton, J., of first-degree felony murder, conspiracy to commit armed robbery, armed robbery, and possession of firearm during commission of felony, and was sentenced to life without possibility of parole. He appealed. The Court of Appeals, 314 Mich.App. 140, 885 N.W.2d 900, reversed but declared conflict. Special conflict panel was convened. The Court of Appeals, 316 Mich.App. 368, 891 N.W.2d 549, vacated and remanded. Prosecution's application for leave to appeal was granted.

Holdings: The Supreme Court, Markman, C.J., held that:

[1] life without parole for juveniles is authorized by the jury's verdict alone and does not require finding of fact regarding juvenile's incorrigibility, and

[2] decision to sentence a juvenile to life without parole is to be reviewed under the traditional abuse-of-discretion standard.

Affirmed in part, reversed in part, and remanded.

McCormack, J., filed dissenting opinion in which Bernstein, J., joined.

West Headnotes (17)

[1] **Jury**
Sentencing Matters
Sentencing and Punishment
Validity
Sentencing and Punishment
Juvenile offenders

Statute governing life without parole for defendant less than 18 years old does not violate the Sixth Amendment, and thus sentence of life without parole is authorized by the jury's verdict alone and does not require finding of fact regarding child's incorrigibility, since neither the statute nor the Eighth Amendment requires a judge to find any particular fact before imposing life without parole. U.S. Const. Amends. 6, 8; Mich. Comp. Laws Ann. § 769.25.

Cases that cite this headnote

[2] **Criminal Law**

Review De Novo

Matters of constitutional and statutory interpretation are reviewed de novo.

Cases that cite this headnote

[3] **Constitutional Law**
Judicial Authority and Duty in General
Constitutional Law
Clearly, positively, or unmistakably unconstitutional

In analyzing constitutional challenges to statutes, the Supreme Court's authority to invalidate laws is limited and must be predicated on a clearly apparent demonstration of unconstitutionality.

Cases that cite this headnote

[4] **Jury**
Sentencing Matters

Any fact that exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict is an "element" that must be submitted to a jury.

Cases that cite this headnote

[5] **Constitutional Law**
Presumptions and Construction as to Constitutionality
Constitutional Law
Clearly, positively, or unmistakably unconstitutional

Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.

Cases that cite this headnote

[6] **Jury**
Sentencing Matters
Sentencing and Punishment
Factors enhancing sentence

If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.

Cases that cite this headnote

[7] **Jury**
Sentencing Matters

The Sixth Amendment only prohibits trial courts' fact-finding that increases a defendant's sentence; it does not prohibit fact-finding that reduces a defendant's sentence. U.S. Const. Amend. 6.

Cases that cite this headnote

[8] **Jury**
Sentencing Matters

A factual finding made by the court that an aggravating circumstance exists does not violate the Sixth Amendment as it does not expose the defendant to an enhanced sentence, that is, a sentence that exceeds the one authorized by the

jury's verdict alone. U.S. Const. Amend. 6.

Cases that cite this headnote

[9] **Sentencing and Punishment**
Necessity

Statute governing life without parole for defendant less than 18 years old does not require the trial court to make any particular factual finding before it can impose a life-without-parole sentence. Mich. Comp. Laws Ann. § 769.25.

1 Cases that cite this headnote

[10] **Sentencing and Punishment**
Juvenile offenders

Just as courts are not allowed, under the Eighth Amendment, to impose disproportionate sentences, courts are not allowed to sentence juveniles who are not irreparably corrupt as determined by *Miller v. Alabama* to life without parole. U.S. Const. Amend. 8.

Cases that cite this headnote

[11] **Sentencing and Punishment**
Juvenile offenders

Just as whether a sentence is proportionate is not a factual finding, whether a juvenile is "irreparably corrupt" as determined by *Miller v. Alabama*, so as to be sentenced to life without parole, is not a factual finding required by the Eighth Amendment. U.S. Const. Amend. 8.

Cases that cite this headnote

[12] **Jury**
Sentencing Matters
Sentencing and Punishment
Juvenile offenders

The Eighth Amendment does not require the finding of any particular fact before imposing a life-without-parole sentence against a juvenile, and therefore the Sixth Amendment is not violated by allowing the trial court to decide whether to impose life without parole. U.S. Const. Amends. 6, 8.

1 Cases that cite this headnote

[13] **Sentencing and Punishment**
Juvenile offenders

Statute governing life without parole for defendant less than 18 years old requires trial courts to consider the *Miller v. Alabama* factors before imposing life without parole in order to ensure that only those juveniles who are irreparably corrupt are so sentenced; whether a juvenile is irreparably corrupt is not a factual finding, but is a moral judgment that is made after considering and weighing the *Miller v. Alabama* factors. Mich. Comp. Laws Ann. § 769.25.

Cases that cite this headnote

[14] **Criminal Law**
Application of guidelines
Criminal Law
Review De Novo

Review de novo, in which a panel of appellate judges could substitute its own judgment for that of the trial court, is not the appropriate standard by which to review a determination that a substantial and compelling reason exists to justify a departure from the guidelines range; instead, the appellate court must accord this determination some degree of deference.

Cases that cite this headnote

[15] **Criminal Law**
Discretion of Lower Court

At its core, an "abuse of discretion" standard of appellate review acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.

Cases that cite this headnote

[16] **Criminal Law**
Sentencing

Because of the trial court's familiarity with the facts and its experience in sentencing, the trial court is better situated than the appellate court to determine whether a life-without-parole sentence is warranted in a particular case.

Cases that cite this headnote

[17] **Criminal Law**
Sentencing
Jury
Sentencing Matters

Decision to sentence a juvenile to life without parole is to be made by a judge and this decision is to be reviewed under the traditional abuse-of-discretion standard. Mich. Comp. Laws Ann. § 769.25.

1 Cases that cite this headnote

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BEFORE THE ENTIRE BENCH (except Clement, J.)

OPINION

Markman, C.J.

***96 **295** [1]At issue here is whether MCL 769.25 violates the Sixth Amendment because it allows the decision whether to impose a sentence of life without ***97** parole to be made by a judge, rather than by a jury beyond a reasonable doubt. We hold that MCL 769.25 does not violate the Sixth Amendment because neither the statute nor the Eighth Amendment requires a judge to find any particular fact before imposing life without parole; instead, life without parole is authorized by the jury's verdict alone. Therefore, we reverse the judgment of the Court of Appeals in *Skinner* and affirm the part of *Hyatt* that held that "[a] judge, not a jury, must determine whether to impose a life-without-parole sentence or a term-of-years sentence under MCL 769.25." *People v. Hyatt*, 316 Mich. App. 368, 415, 891 N.W.2d 549 (2016). However, we reverse the part of *Hyatt* that adopted a heightened standard of review for life-without-parole sentences imposed under MCL 769.25 and that remanded this case to the trial court for it to "decide whether defendant Hyatt is the truly rare juvenile mentioned in [*Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)] who is incorrigible and incapable of reform." *Hyatt*, 316 Mich. App. at 429, 891 N.W.2d 549. No such explicit finding is required. Finally, we remand both of these cases to the Court of Appeals for it to review defendants' sentences under the traditional abuse-of-discretion standard of review.

I. FACTS AND HISTORY

A. *SKINNER*

Following a jury trial, defendant was convicted of first-degree premeditated murder, conspiracy to commit murder, and attempted murder for acts committed ****296** when defendant was 17 years old. Defendant was sentenced to life in prison without the possibility of parole. The Court of Appeals remanded for resentencing under *Miller*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407, which held that mandatory life-without-parole sentences for offenders under ***98** 18 years old violate the Eighth Amendment. *People v. Skinner*, unpublished per curiam opinion of the Court of Appeals, issued February 21, 2013, 2013 WL 951265 (Docket No. 306903). This Court denied leave to appeal. *People v. Skinner*, 494 Mich. 872, 832 N.W.2d 237 (2013). On remand, the trial court reimposed a life-without-parole sentence. After defendant was resentenced, MCL 769.25 took effect, setting forth a new framework for sentencing juveniles convicted of first-degree murder. The Court of Appeals remanded for resentencing under MCL 769.25. *People v. Skinner*, unpublished order of the Court of Appeals, entered July 30, 2014 (Docket No. 317892). On remand, the trial court again sentenced defendant to life without parole.

In a split, published decision, the Court of Appeals again remanded for resentencing, holding that a jury must decide whether defendant should be sentenced to life without parole and that, to the extent that MCL 769.25 requires the trial court to make this determination, it is unconstitutional. *People v. Skinner*, 312 Mich. App. 15, 877 N.W.2d 482 (2015). This Court granted the prosecutor's application for leave to appeal and directed the parties to address "whether the decision to sentence a

person under the age of 18 to a prison term of life without parole under MCL 769.25 must be made by a jury beyond a reasonable doubt[.]" *People v. Skinner*, 500 Mich. 929, 929, 889 N.W.2d 487 (2017).

B. *HYATT*

Following a jury trial, defendant was convicted of first-degree felony murder, armed robbery, conspiracy to commit armed robbery, and possessing a firearm during the commission of a felony for acts committed when defendant was 17 years old. Following an evidentiary hearing at which the trial court considered the ***99** *Miller* factors, defendant was sentenced to life in prison without the possibility of parole. In a published opinion, the Court of Appeals affirmed defendant's convictions and would have affirmed his sentence but for *Skinner*, which held that a jury must decide whether to impose a life-without-parole sentence on a juvenile. *People v. Hyatt*, 314 Mich. App. 140, 885 N.W.2d 900 (2016).

The Court of Appeals declared a conflict pursuant to MCR 7.215(J) and, in a published decision, the conflict panel unanimously disagreed with *Skinner* and held that a judge may decide whether to impose a nonparolable life sentence on a juvenile. *Hyatt*, 316 Mich. App. at 415, 891 N.W.2d 549. However, the Court of Appeals reversed defendant's life-without-parole sentence and remanded the case to the trial court for resentencing at which "the trial court must not only consider the *Miller* factors, but decide whether defendant Hyatt is the truly rare juvenile mentioned in *Miller* who is incorrigible and incapable of reform." *Id*. at 429, 891 N.W.2d 549. We directed that oral argument be heard on the prosecutor's application for leave to appeal and instructed the parties to address "whether the conflict-resolution panel of the Court of Appeals erred by applying a heightened standard of review for sentences imposed under MCL 769.25." *People v. Hyatt*, 500 Mich. 929, 929-930, 889 N.W.2d 487 (2017).

II. STANDARD OF REVIEW

[2] [3]Matters of constitutional and statutory interpretation are reviewed de novo. ****297** *People v. Hall*, 499 Mich. 446, 452, 884 N.W.2d 561 (2016). In analyzing constitutional challenges to statutes, this Court's "authority to invalidate laws is limited and must be predicated on a clearly apparent demonstration of unconstitutionality." ***100** *People v. Harris*, 495 Mich. 120, 134, 845 N.W.2d 477 (2014). We require these challenges to meet such a high standard because "[s]tatutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *In re Sanders*, 495 Mich. 394, 404, 852 N.W.2d 524 (2014), citing *Taylor v. Gate Pharm.*, 468 Mich. 1, 6, 658 N.W.2d 127 (2003).

III. BACKGROUND

The issue here involves the interplay between the Sixth and Eighth Amendments of the United States Constitution. The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed.... [U.S. Const., Am. VI.]

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. [U.S. Const., Am. VIII.]

Specifically, the issue here is whether *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and its progeny require jury findings beyond a reasonable doubt before a sentence of life without parole

may be imposed on a person under the age of 18 under MCL 769.25.

MCL 750.316(1) provides, in pertinent part:

> Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, a person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life without eligibility for parole:
>
> ***101** (a) Murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing.
>
> (b) Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, vulnerable adult abuse in the first or second degree under [MCL 750.145n], torture under [MCL 750.85], aggravated stalking under [MCL 750.411i], or unlawful imprisonment under [MCL 750.349b].

MCL 769.25, which was enacted in the wake of *Miller*, provides, in pertinent part:

> (1) This section applies to a criminal defendant who was less than 18 years of age at the time he or she committed an offense described in subsection (2)....
>
> * * *
>
> (2) The prosecuting attorney may file a motion under this section to sentence a defendant described in subsection (1) to imprisonment for life without the possibility of ****298** parole if the individual is or was convicted of any of the following violations:
>
> * * *
>
> (d) Any violation of law involving the death of another person for which parole eligibility is expressly denied under state law.
>
> (3) ... If the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described under subsection (1)(b), the prosecuting attorney shall file the motion within 90 days after the effective date of the amendatory act that added this section. The motion shall specify the grounds on ***102** which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole.
>
> (4) If the prosecuting attorney does not file a motion under subsection (3) within the time periods provided for in that subsection, the court shall sentence the defendant to a term of years as provided in subsection (9).
>
> * * *
>
> (6) 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*] and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.
>
> (7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.
>
> * * *
>
> (9) If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years.

In *People v. Carp*, 496 Mich. 440, 852 N.W.2d 801 (2014), this Court noted that

> [r]ather than imposing fixed sentences of life without parole on all defendants convicted of violating MCL 750.316, MCL 769.25 now establishes a default sentencing range for individuals who commit first-degree murder ***103** before turning 18 years of age. Pursuant to the new law, absent a motion by the prosecutor seeking a sentence of life without parole,

> the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years. [*Id*. at 440, 852 N.W.2d 801, quoting MCL 769.25.]

A. UNITED STATES SUPREME COURT PRECEDENT

[4]*Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348, held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." (Emphasis added.) In other words, any fact that "expose[s] the defendant to a greater punishment than that *authorized by the jury's guilty verdict*" is an "element" that must be submitted to a jury. *Id*. at 494, 120 S.Ct. 2348 (emphasis added). See also *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the *facts reflected in the jury verdict* or admitted by the defendant.") (emphasis altered).

In *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the Court held that the jury, rather than the judge, must determine whether an aggravating circumstance exists in order to impose ****299** the death penalty.[1] In addition, in *Hurst v. Florida*, 577 U.S. ——, ——, 136 S.Ct. 616, 619, 193 L.Ed.2d 504 (2016), the Court held that "[t]he Sixth Amendment requires a ***104** jury, not a judge, to find each fact necessary to impose a sentence of death" and that "[a] jury's mere recommendation [of a death sentence] is not enough" to satisfy the Sixth Amendment.[2]

Miller, 567 U.S. at 465, 132 S.Ct. 2455, held that "*mandatory* life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " (Emphasis added.) Instead, "a *judge or jury* must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id*. at 489, 132 S.Ct. 2455 (emphasis added).[3] The Court indicated that the following factors should be taken into consideration: "[defendant's] chronological age and its hallmark features—among them, immaturity, impetuosity, ***105** and failure to appreciate risks and consequences"; "the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; whether "he might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and "the possibility of rehabilitation...." *Id*. at 477-478, 132 S.Ct. 2455. Although the Court declined to address the "alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger," it stated:

> But given all we have said in *Roper*,[4] *Graham*,[5] and this decision about children's ****300** diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Although we do not foreclose a sentencer's ability to make that judgment in ***106** homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. [*Id*. at 479-480, 132 S.Ct. 2455 (citation omitted).]

Subsequently, in *Montgomery v. Louisiana*, 577 U.S. ——, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), the Court held that *Miller* applies retroactively to juvenile offenders whose convictions and sentences were final when *Miller* was decided because *Miller* announced a new substantive rule by rendering life without parole an unconstitutional penalty for a specific class of juvenile defendants. *Id*. at ——, 136 S.Ct. at 734 (citation omitted). *Montgomery* noted that *Miller* indicated that it would be the "rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without

parole is justified" and that "*Miller* made clear that 'appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.' " *Id.* at ——, 136 S.Ct. at 733-734, quoting *Miller*, 567 U.S. at 479, 132 S.Ct. 2455. On this basis, *Montgomery* concluded:

> *Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects " 'unfortunate yet transient immaturity.' " Because *Miller* determined that sentencing a child to life without parole is excessive for all but " 'the rare juvenile offender whose crime reflects irreparable corruption,' " it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. [*Id.* at ——, 136 S.Ct. at 734 (citations omitted).]

***107** In response to the state's argument that "*Miller* cannot have made a constitutional distinction between children whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption because *Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility," the Court stated:

> That this finding is not required ... speaks only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee. When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems. See ****301** *Ford* [*v. Wainwright*, 477 U.S. 399, 416-417, 106 S.Ct. 2595, 91 L.Ed.2d 335] (1986) ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences[.]"). Fidelity to this important principle of federalism, however, should not be construed to demean the substantive character of the federal right at issue. That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment. [*Id.* at ——, 136 S.Ct. at 735.]

The Court concluded that "prisoners like *Montgomery* must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at —— 136 S.Ct. at 736-737.

B. MICHIGAN COURT OF APPEALS

The Court of Appeals in *Skinner* held that MCL 769.25 violates the Sixth Amendment because it allows the decision whether to impose a sentence of life ***108** without parole to be made by a judge, rather than by a jury beyond a reasonable doubt. The Court of Appeals reasoned that, pursuant to MCL 769.25, "following the jury's verdict and absent a prosecution motion seeking a life-without-parole sentence followed by additional findings by the trial court, the legally prescribed maximum punishment that defendant faced for her first-degree-murder conviction was imprisonment for a term of years." *Skinner*, 312 Mich. App. at 43, 877 N.W.2d 482. In other words, the jury's verdict only supported a term-of-years sentence. In order to impose a life-without-parole sentence, the trial court has to engage in fact-finding, and this violates defendant's Sixth Amendment right to a jury because any fact that increases a defendant's sentence must be decided by the jury.

The Court of Appeals further held that the statutory maximum penalty for first-degree murder for juveniles cannot be life without parole because this would violate *Miller* given that, under *Miller*, a mandatory default life-without-parole sentence for juveniles violates the Eighth Amendment. *Miller* requires additional fact-finding before a life-without-parole sentence can be imposed. More specifically, *Miller* requires the trial court to find that the defendant is one of those rare juvenile defendants that is irreparably corrupt and incapable of rehabilitation before the trial court can impose a life-without-parole sentence.

The *Skinner* dissent, on the other hand, concluded that

there was no Sixth Amendment violation because "neither *Miller* nor the statute sets forth any particular facts that must be found before a sentence of life without parole may be imposed." *Id.* at 74, 877 N.W.2d 482 (SAWYER, J., dissenting). The dissent rejected the majority's conclusion that *Miller* requires a finding of "irreparable corruption" in order for the Eighth Amendment to ***109** allow the imposition of a life-without-parole sentence for a juvenile. *Id.* at 76, 877 N.W.2d 482. It also rejected the majority's conclusion that MCL 769.25 creates a default term-of-years sentence, at least after the prosecutor moves for a life-without-parole sentence. *Id.* at 77, 877 N.W.2d 482.

In *Hyatt*, the Court of Appeals agreed with the Court of Appeals dissent in *Skinner* and therefore declared a conflict with *Skinner*. The conflict panel also agreed with the Court of Appeals dissent in *Skinner*. *Hyatt*, 316 Mich. App. at 403, 891 N.W.2d 549, held that "[t]he considerations required by *Miller* 's individualized sentencing ****302** guarantee are sentencing factors, not elements that must be found before a more severe punishment is authorized." It held that although "a sentencing judge will necessarily engage in fact-finding during the *Miller* analysis," this fact-finding will not increase the defendant's sentence beyond that authorized by the jury's verdict because the jury's verdict alone authorizes a life-without-parole sentence. *Id.* at 406, 891 N.W.2d 549. In other words, "[t]he analysis involving the *Miller* factors does not aggravate punishment; instead, the analysis acts as a means of *mitigating* punishment because it acts to caution the sentencing judge against imposing the maximum punishment authorized by the jury's verdict, a sentence which *Montgomery* cautioned is disproportionate for the vast majority of juvenile offenders[.]" *Id.* at 409, 891 N.W.2d 549 (quotation marks and citation omitted).

However, *Hyatt* also held that "a sentencing court must begin its analysis with the understanding that life without parole is, unequivocally, only appropriate in rare cases." *Id.* at 419-420, 891 N.W.2d 549. In addition, with regard to the appellate standard of review, *Hyatt* held that "the imposition of a life-without-parole sentence on a juvenile requires a heightened degree of scrutiny regarding whether a life-without-parole sentence is proportionate ***110** to a particular juvenile offender, and even under this deferential standard, an appellate court should view such a sentence as inherently suspect." *Id.* at 424, 891 N.W.2d 549. Finally, *Hyatt* reversed defendant's sentence and remanded the case to the trial court for reconsideration because although the trial court considered the *Miller* factors, it did not consider whether Hyatt was "the truly rare juvenile mentioned in *Miller* who is incorrigible and incapable of reform," which the trial court must do before imposing a life-without-parole sentence. *Id.* at 429, 891 N.W.2d 549.[6]

IV. ANALYSIS

A. JUDGE OR JURY

[5]These cases present a difficult issue because the pertinent United States Supreme Court opinions are not models of clarity, nor is the Legislature's response to *Miller*, i.e., MCL 769.25. Under these circumstances, it is especially important to remember that "[s]tatutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *In re Sanders*, 495 Mich. at 404, 852 N.W.2d 524, citing *Taylor*, 468 Mich. at 6, 658 N.W.2d 127. That is, ***111** assuming that there are two reasonable ways of interpreting MCL 769.25—one that renders the statute unconstitutional and one that renders it constitutional—we should choose the interpretation that renders the statute constitutional. *Evans Prod. Co. v. Fry*, 307 Mich. 506, 533-534, 12 N.W.2d 448 (1943) ("[I]t is our duty to adopt such a construction, if admissible, which will uphold validity ****303** rather than destroy a legislative enactment" and " '[i]n cases of doubt, every possible presumption, not clearly inconsistent with the language and the subject matter, is to be made in favor of the constitutionality of the act.' ") (citation omitted); *Grebner v. State*, 480 Mich. 939, 940, 744 N.W.2d 123 (2007) ("This Court 'must presume a statute is constitutional and construe it as such, unless the only proper construction renders the statute unconstitutional.' ") (citation omitted); *Greater Bible Way Temple of Jackson v. City of Jackson*, 478 Mich. 373, 408 n. 27, 733 N.W.2d 734 (2007) ("Whenever possible, courts should construe statutes in a manner that renders them constitutional.") In the end, we do not believe that it

is "clearly apparent" that MCL 769.25 is unconstitutional. *In re Sanders*, 495 Mich. at 404, 852 N.W.2d 524.

[6]The precise issue here is whether MCL 769.25 "removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone" in violation of the Sixth Amendment. *Apprendi*, 530 U.S. at 482-483, 120 S.Ct. 2348 (emphasis omitted). In other words, "[i]f the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." *Cunningham v. California*, 549 U.S. 270, 290, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007). Therefore, the pertinent question ***112** is whether MCL 769.25 requires the trial court to find an additional fact before it can sentence a juvenile to life without parole or whether the jury's verdict alone exposes a juvenile to a life-without-parole sentence. MCL 769.25 certainly does not expressly require the court to find any particular fact before imposing life without parole and we should not read such a requirement into the statute, especially given that doing so would render the statute unconstitutional because "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602, 122 S.Ct. 2428.[7]

MCL 769.25(3) does require the prosecutor to file a motion to seek a life-without-parole sentence for a defendant less than 18 years old, and this motion must specify the grounds on which the prosecutor is requesting such a sentence. If such a motion is not filed, the trial court must sentence the juvenile to a term-of-years sentence. MCL 769.25(4) and (9). It is argued that because the "default" sentence is a term-of-years sentence, see *Carp*, 496 Mich. at 458, 852 N.W.2d 801,[8] anything ****304** other ***113** than a term-of-years sentence, i.e., life without parole, requires that facts be found by the jury. However, this is too simplistic a view. The real question is whether, for Sixth Amendment purposes, some sort of factual finding is required to go above the "default" sentence. Just because the prosecutor has to file a motion to seek a life-without-parole sentence in order to avoid the default term-of-years sentence does not mean that additional fact-finding is required before a life-without-parole sentence can be imposed. That is, the mere fact that a term-of-years sentence constitutes the default sentence in the absence of a motion filed by the prosecutor seeking a life-without-parole sentence does not mean that the jury must find additional facts before a life-without-parole sentence can be imposed. In other words, just because some legislative procedural precondition must be satisfied after the jury renders its verdict before a life-without-parole sentence can be imposed does not mean that the facts reflected in the jury verdict alone do not authorize the imposition of a life-without-parole sentence. The critical question is whether additional factual findings have to be made, not whether an additional motion has to be filed.

However, MCL 769.25 requires more than that a motion be filed. It also requires the court to conduct a hearing to consider the *Miller* factors, MCL 769.25(6), and to "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed," MCL 769.25(7). While the statute does not expressly ***114** require any specific finding of fact to be made before a life-without-parole sentence can be imposed, it is argued by defendants and the dissent that the statute implicitly requires a finding of fact to be made before a life-without-parole sentence can be imposed given that the statute requires the court to specify the aggravating and mitigating circumstances considered by the court and its reasons supporting the sentence imposed. In other words, although the statute does not expressly state that the trial court must find an aggravating circumstance before it imposes a life-without-parole sentence, it implicitly requires such a finding. While this argument is not unreasonable, it is also not "clearly apparent" that such a finding is required. *In re Sanders*, 495 Mich. at 404, 852 N.W.2d 524.

[7]To begin with, MCL 769.25(6) merely requires the trial court to "consider the factors listed in *Miller*...."[9] The following are the factors listed in *Miller*: (1) "his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "the family and home environment that surrounds him—and from which he cannot usually extricate ****305** himself—no matter how brutal or dysfunctional"; (3) "the circumstances of the ***115** homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; (4) whether "he might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with

youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and (5) "the possibility of rehabilitation...." *Miller*, 567 U.S. at 477-478, 132 S.Ct. 2455. It is undisputed that all of these factors are mitigating factors. *Id.* at 489, 132 S.Ct. 2455 ("[A] judge or jury must have the opportunity to consider *mitigating* circumstances before imposing the harshest possible penalty for juveniles.") (emphasis added). That is, these are factors that "counsel against irrevocably sentencing [juveniles] to a lifetime in prison." *Id.* at 480, 132 S.Ct. 2455. The Sixth Amendment does not prohibit trial courts from considering mitigating circumstances in choosing an appropriate sentence because the consideration of mitigating circumstances does not expose a defendant to a sentence that exceeds the sentence that is authorized by the jury's verdict.[10] In other words, the Sixth Amendment only prohibits fact-finding that *increases* a defendant's sentence; it does not prohibit fact-finding ***116** that *reduces* a defendant's sentence.[11] Therefore, the requirement in ****306** MCL 769.25(6) that the court consider the *Miller* factors does not violate the Sixth Amendment.

MCL 769.25(7), however, requires still more. It requires the court to "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence ***117** imposed." *Id.* Aggravating circumstances, unlike mitigating circumstances, do have the effect of increasing a defendant's sentence. The question at issue here, however, is whether aggravating circumstances increase a defendant's sentence beyond that authorized by the jury's verdict. The answer to that question is "no," because the trial court does not have to find an aggravating circumstance in order to sentence a juvenile to life without parole.[12] If the trial court simply finds that there are no mitigating circumstances, it can sentence a juvenile to life without parole. There is nothing in the statute that prohibits this.

[8] [9]While the statute requires the trial court to consider the aggravating and mitigating circumstances and to specify the court's reasons supporting the sentence imposed, the court could find that there are no mitigating or aggravating circumstances and *that* is why it is imposing a life-without-parole sentence. This demonstrates that a life-without-parole sentence is authorized by the jury's verdict alone. That is, given that the statute does not require the trial court to affirmatively find an aggravating circumstance in order to impose a life-without-parole sentence, such a sentence is necessarily ***118** authorized by the jury's verdict alone.[13] And given that a life-without-parole sentence is authorized by the jury's verdict alone, additional fact-finding by the court is not prohibited by the Sixth Amendment.[14] In other words, a ****307** factual finding made by the court that an aggravating circumstance exists does not violate the Sixth Amendment because it does not expose the defendant to an enhanced sentence, i.e., a sentence that exceeds the one authorized by the jury's verdict alone. See *Apprendi*, 530 U.S. at 481, 120 S.Ct. 2348 ("We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking ***119** into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute.") (emphasis omitted); *Alleyne v. United States*, 570 U.S. 99, 116, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) ("Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."). The United States Supreme Court's "Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." *Rita v. United States*, 551 U.S. 338, 352, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007). Instead, "[t]he Sixth Amendment question, the Court has said, is whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede)." *Id.* Nothing within MCL 769.25 forbids the judge from imposing a life-without-parole sentence unless the judge finds facts that the jury did not find (and the offender did not concede). In other words, MCL 769.25 does not require the trial court to make any particular factual finding before it can impose a life-without-parole sentence.

The next question is whether the Eighth Amendment, under *Miller* or *Montgomery*, requires additional fact-finding before a life-without-parole sentence can be imposed. On the one hand, there is language in both *Miller* and *Montgomery* that at least arguably would suggest that a finding of irreparable corruption is required before a life-without-parole sentence can be imposed. For example, *Miller*, 567 U.S. at 479-480, 132 S.Ct. 2455, stated:

> [G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and ***120** heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. [Citations omitted.]

This language conceivably could be read to suggest that the sentencer must find that the juvenile offender's crime reflects irreparable corruption before a life-without-parole sentence can be imposed.

However, *Miller* clarified that it was only holding that "*mandatory* life-without-parole ****308** sentences for juveniles violate the Eighth Amendment," *id*. at 470, 132 S.Ct. 2455 (emphasis added), and that "a sentencer [must] have the ability to consider the mitigating qualities of youth," *id*. at 476, 132 S.Ct. 2455 (quotation marks and citation omitted). The Court expressly stated that *Miller* "does not categorically bar a penalty for a class of offenders or type of crime...." *Id*. at 483, 132 S.Ct. 2455. "Instead, it mandates only that a sentencer follow a certain *process*—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id*. (emphasis added). In other words, *Miller* simply held that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment and that before such a sentence can be imposed on a juvenile, the sentencer must consider the mitigating qualities of youth. *Miller* thus did not hold that a finding of "irreparable corruption" must be made before a life-without-parole sentence can be imposed on a juvenile.

***121** As noted earlier, there is also language in *Montgomery* that arguably would seem to suggest that a finding of irreparable corruption is required before a life-without-parole sentence can be imposed. For example, *Montgomery*, 577 U.S. at ——, 136 S.Ct. at 732, 734, held that "*Miller* announced a substantive rule," rather than a procedural rule, because *Miller* "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.' " (Citation omitted.) Therefore, "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity." *Id*. at ——, 136 S.Ct. at 734 (quotation marks and citations omitted). In other words, "[b]ecause *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect transient immaturity of youth." *Id*. at ——, 136 S.Ct. at 734 (quotation marks and citations omitted). See also *id*. at ——, 136 S.Ct. at 734 ("*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."). This language could also be read as suggesting that a finding of irreparable corruption or permanent incorrigibility must be made before a life-without-parole sentence can be imposed on a juvenile.

However, *Montgomery* itself expressly stated that this is not the case: "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility." *Id*. at ——, 136 S.Ct. at 735. *Montgomery* further explained:

> ***122** That this finding is not required, however, speaks only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee. When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems. See *Ford* [*v. Wainwright*, 477 U.S. 399, 416-417, 106 S.Ct. 2595, 91 L.Ed.2d 335] (1986) ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."). Fidelity to this important principle of federalism, however, should not be construed to demean the substantive character of the ****309** federal right at issue. That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary,

Miller established that this punishment is disproportionate under the Eighth Amendment. [*Id.* at ——, 136 S.Ct. at 735 (alterations in original).]

Given that *Montgomery* expressly held that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility," *id.* at ——, 136 S.Ct. at 735,[15] we likewise hold that *Miller* does not require trial courts to make a finding of fact regarding a child's incorrigibility.[16]

***123** [10] [11] [12] [13]*Montgomery* held that while the substantive rule is that juveniles who are not "irreparably corrupt" cannot be sentenced to life without parole, the states are free to develop their own procedures to enforce this new substantive rule.[17] In ****310** this sense, the "irreparable corruption" ***125** standard is analogous to the proportionality standard that applies to all criminal sentences. See *Montgomery*, 577 U.S. at ——, 136 S.Ct. at 726 ("[A] lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption.' ") (quotation marks and citations omitted). Just as courts are not allowed to impose disproportionate sentences, courts are not allowed to sentence juveniles who are not irreparably corrupt to life without parole. And just as whether a sentence is proportionate is not a factual finding, whether a juvenile is "irreparably corrupt" is not a factual finding.[18] In other words, the Eighth Amendment does not require the finding of any particular fact before imposing a life-without-parole sentence, and ****311** therefore the Sixth Amendment is not violated by allowing the trial court to decide whether to impose life without parole.[19]

***126** This conclusion is further supported by the fact that all the courts that have considered this issue have likewise concluded that the Sixth Amendment is not violated by allowing the trial court to decide whether to impose life without parole. See, for example, *State v. Lovette*, 233 N.C. App. 706, 719, 758 S.E.2d 399 (2014) ("[A] finding of irreparable corruption is not required...."); *State v. Fletcher*, 149 So.3d 934, 943 (La App., 2014) ("*Miller* does not require proof of an additional element of 'irretrievable depravity' or 'irrevocable corruption' "); *Commonwealth v. Batts*, 640 Pa. 401, 478, 163 A.3d 410, 456 (2017) ("We further disagree with [the defendant] that a jury must make the finding regarding a juvenile's eligibility to be sentenced to life without parole.");[20] *People v. Blackwell*, 3 Cal. App. 5th 166, 194, 207 Cal.Rptr.3d 444 (2016) ("*Miller* does not require irreparable corruption be proved to a jury beyond a reasonable doubt in order to 'aggravate' or ***127** 'enhance' the sentence for [a] juvenile offender convicted of homicide.");[21] *State v. Ramos*, 187 Wash. 2d 420, 436-437, 387 P.3d 650 (2017) ("*Miller* ... does not require the sentencing court ... to make an explicit finding that the offense reflects irreparable corruption on the part of the juvenile.").

B. IMPOSITION OF LIFE WITHOUT PAROLE

Hyatt, 316 Mich. App. at 421, 891 N.W.2d 549, held that "the sentencing court must operate under the notion that more likely than not, life without parole is not proportionate." *Hyatt* also held that "the trial court committed an error of law by failing to adhere to *Miller* 's and *Montgomery* 's directives about the rarity with which a life-without-parole sentence should be imposed." *Id.* at 428, 891 N.W.2d 549. That is, "[w]hen deciding to sentence defendant Hyatt to life without parole, the ****312** trial court focused on the *Miller* factors[;] [h]owever, the court gave no credence to *Miller* 's repeated warnings that a life-without-parole sentence should only be imposed on the rare or uncommon juvenile offender." *Id.* Therefore, the Court of Appeals "reverse[d] defendant Hyatt's sentence and remand[ed] to the trial court for resentencing" and directed the trial court to "not only consider the *Miller* factors, but decide whether defendant Hyatt is the truly rare juvenile mentioned in *Miller* who is incorrigible and incapable of reform." *Id.* at 429, 891 N.W.2d 549.[22]

***128** In addition, while *Hyatt* initially held that "appellate review of the sentence imposed is for abuse of discretion," *id.* at 423, 891 N.W.2d 549, it subsequently held that "the imposition of a life-without-parole sentence on a juvenile requires a heightened degree of scrutiny regarding whether a life-without-parole sentence is proportionate to a particular juvenile offender, and even under this deferential standard, an appellate court should view such a sentence as inherently suspect," *id.* at 424, 891 N.W.2d 549. The Court of Appeals stated, "While we do not suggest a presumption against the constitutionality of that sentence, we would be remiss not to note that review of that sentence requires a searching inquiry into

the record with the understanding that, more likely than not, a life-without-parole sentence imposed on a juvenile is disproportionate." *Id.* at 425-426, 891 N.W.2d 549. Contrary to the Court of Appeals' own contention, this sounds tantamount to a presumption against life-without-parole sentences.

The Court of Appeals' opinion in *Hyatt* is internally inconsistent. On the one hand, it held that no factual finding of irreparable corruption must be made and thus that no jury is required. On the other hand, it held that the trial court erred by not explicitly deciding whether defendant is the truly rare juvenile who is irreparably corrupt. We hold that the latter conclusion is erroneous. For the reasons discussed earlier, the trial court is not obligated to explicitly find that defendant is irreparably corrupt. See *Montgomery*, 577 U.S. at ——, 136 S.Ct. at 735 ("*Miller* did not require trial courts to make a finding regarding a child's incorrigibility."). The trial court also does not have to explicitly find that defendant is "rare." Indeed, we cannot even imagine how a trial court would go about determining whether a particular defendant is "rare" or not.

***129** *Miller* used the word "uncommon" only once and the word "rare" only once, and when those words are read in context it is clear that the Court did not hold that a trial court must explicitly find that a defendant is "rare" or "uncommon" before it can impose life without parole. *Miller*, 567 U.S. at 479-480, 132 S.Ct. 2455, stated:

> [G]iven all we have said ... about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon*. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the *rare* juvenile offender whose crime reflects irreparable corruption." Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably ****313** sentencing them to a lifetime in prison. [Emphasis added; citations omitted.]

The first sentence of this paragraph was simply the Court's prediction that the imposition of life without parole on juveniles will be "uncommon."[23] This is demonstrated by the use of the word "think" rather ***130** than "hold." The second sentence simply makes the point that juveniles who are irreparably corrupt are assertedly "rare." And the third sentence makes it clear that all *Miller* requires sentencing courts to do is to consider how children are different before imposing life without parole on a juvenile.

Montgomery quoted *Miller* 's references to "uncommon" and "rare." In addition, it stated: (1) "Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the *rarest* of children, those whose crimes reflect 'irreparable corruption' "; (2) *Miller* "recognized that a sentencer might encounter the *rare* juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified"; (3) "*Miller* did bar life without parole, however, for all but the *rarest* of juvenile offenders, those whose crimes reflect permanent incorrigibility"; (4) "After *Miller*, it will be the *rare* juvenile offender who can receive that same sentence"; and (5) "*Miller* drew a line between children whose crimes reflect transient immaturity and those *rare* children whose crimes reflect irreparable corruption." *Montgomery*, 577 U.S. at ——, 136 S.Ct. at 733-734 (quotation marks and citations omitted; emphasis added). Again, these statements simply make the point that juvenile offenders who are deserving of life without parole are rare. To begin with, only those juvenile offenders who have been convicted of first-degree murder can be subject to life without parole, which is a small percentage of juvenile offenders. In addition, since *Miller*, the only juvenile offenders who can be sentenced to life without parole are those who have been convicted of first-degree murder and whose mitigating circumstances do not require a lesser sentence. In other words, *Miller* ***131** and *Montgomery* simply noted that those juvenile offenders who are deserving of life-without-parole sentences are rare; they did not impose any requirement on sentencing courts to explicitly find that a juvenile offender is or is not "rare" before imposing life without parole.[24]

****314** Similarly, neither *Miller* nor *Montgomery* imposes a presumption *against* life without parole for those juveniles who have been convicted of first-degree murder on either the trial court or the appellate court. *Miller* and *Montgomery* simply require that the trial court consider "an offender's youth and attendant characteristics" before

imposing life without parole. *Miller*, 567 U.S. at 483, 132 S.Ct. 2455. Indeed, there is language in *Montgomery* that suggests that the juvenile offender bears the burden of showing that life without parole is not the appropriate sentence by introducing mitigating evidence. *Montgomery*, 577 U.S. at ——, 136 S.Ct. at 736 ("[P]risoners ... must be given the opportunity to show their crime did not reflect irreparable corruption....").

[14] [15]Finally, neither *Miller* nor *Montgomery* requires this Court to deviate from its traditional abuse-of-discretion standard in reviewing a trial court's decision to impose life without parole. This Court reviews sentencing decisions for an abuse of discretion. See *People v. Milbourn*, 435 Mich. 630, 636, 461 N.W.2d 1 (1990) ("[A] given sentence can be said to constitute an ***132** abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender."); *People v. Steanhouse*, 500 Mich. 453, 471, 902 N.W.2d 327 (2017) ("[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion."). This Court has refused to review sentencing decisions de novo.

> We do not suggest that in the day-in-day-out review of sentencing issues appellate courts should simply substitute their judgment for that of the trial court. Indeed, such de novo review of sentences would be unprecedented in the realm of criminal appeals and at odds with any reasonable construction of the term "abuse of discretion." [*Milbourn*, 435 Mich. at 666, 461 N.W.2d 1.]

In *People v. Babcock*, 469 Mich. 247, 265, 666 N.W.2d 231 (2003), this Court held that a trial court's decision to depart from the guidelines will be reviewed for an abuse of discretion. As this Court explained:

> [T]he trial court is optimally situated to understand a criminal case and to craft an appropriate sentence for one convicted in such a case....
>
> 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. Review de novo is a form of review primarily reserved for questions of law, the determination of which is not hindered by the appellate court's distance and separation from the testimony and evidence produced at trial. The application of the statutory sentencing guidelines to the facts is
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> > not a generally recurring, purely legal matter, such as interpreting a set of legal words, say, those of an individual guideline, in order to determine their ***133** basic intent. Nor is that question readily resolved by reference to general legal principles and standards alone. Rather, the question at issue grows out of, and is bounded by, case-specific detailed factual circumstances. [*Buford v. United States*, 532 U.S. 59, 65, 121 S.Ct. 1276, 149 L.Ed.2d 197 (2001).]
>
> Because of the trial court's familiarity with the facts and its experience in sentencing, the trial court is better situated than the appellate court to determine whether a departure is warranted in a ****315** particular case. Accordingly, review de novo, in which a panel of appellate judges could substitute its own judgment for that of the trial court, is surely not the appropriate standard by which to review the determination that a substantial and compelling reason exists to justify a departure from the guidelines range. Instead, the appellate court must accord this determination some degree of deference.
>
> .... At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes....
>
> Accordingly, the Court of Appeals must determine, upon a review of the record, whether the trial court had a substantial and compelling reason to depart from the guidelines, recognizing that the trial court was in the better position to make such a determination and giving this determination appropriate deference. The deference

> that is due is an acknowledgment of the trial court's extensive knowledge of the facts and that court's direct familiarity with the circumstances of the offender. The Court of Appeals is to conduct the thorough review required by MCL 769.34(11), honoring the prohibition against departures not grounded in a substantial and compelling reason. MCL 769.34(3). In doing so, however, ***134** the Court must proceed with a caution grounded in the inherent limitations of the appellate perspective. [*Id.* at 267-270, 666 N.W.2d 231 (citations omitted).] [25]

[16]The same is true here. The Legislature has imposed on the trial court the responsibility of making the difficult decision regarding whether to impose a sentence of life without parole or a term of years. This decision should be based on the " 'case-specific detailed factual circumstances.' " *Id.* at 268, 666 N.W.2d 231, quoting *Buford*, 532 U.S. at 65, 121 S.Ct. 1276. "Because of the trial court's familiarity with the facts and its experience in sentencing, the trial court is better situated than the appellate court to determine" whether a life-without-parole sentence is warranted in a particular case. *Babcock*, 469 Mich. at 268, 666 N.W.2d 231. "Accordingly, review de novo, in which a panel of appellate judges could substitute its own judgment for that of the trial court, is surely not the appropriate standard by which to review the determination" that a life-without-parole sentence is warranted. *Id.* "Instead, the appellate court must accord this determination some degree of deference." *Id.* at 269, 666 N.W.2d 231. "The deference that is due is an acknowledgment of the trial court's extensive knowledge of the facts and that court's direct familiarity with the circumstances of the offender." *Id.* at 270, 666 N.W.2d 231.

The United States Supreme Court has also adopted an abuse-of-discretion standard for reviewing a trial court's sentencing decisions. See ****316** *Koon v. United States*, 518 U.S. 81, 97, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996) ("[I]t is not the role of an appellate court to substitute ***135** its judgment for that of the sentencing court as to the appropriateness of a particular sentence.") (quotation marks and citations omitted); *Gall v. United States*, 552 U.S. 38, 41, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007) ("[C]ourts of appeals must review all sentences ... under a deferential abuse-of-discretion standard."). In *Gall*, 552 U.S. at 49, 128 S.Ct. 586, the Court expressly rejected the practice of "applying a heightened standard of review to sentences outside the Guidelines range," explaining that this is "inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range." As *Gall* explained:

> The sentencing judge is in a superior position to find facts and judge their import ... in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record. The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court. Moreover, [d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do. [*Id.* at 51-52, 128 S.Ct. 586 (quotation marks and citations omitted).]

Particularly relevant to the instant case, *Gall* held that, since *Koon*, the Court had been "satisfied that a more deferential abuse-of-discretion standard could successfully balance the need to 'reduce unjustified disparities' across the Nation and 'consider every convicted person as an individual.' " *Id.* at 53 n. 8, 128 S.Ct. 586, quoting *Koon*, 518 U.S. at 113, 116 S.Ct. 2035. The whole point of *Miller* is that mandatory life-without-parole sentences with regard to juveniles are unconstitutional and that such mandatory sentencing schemes must be replaced with ***136** individualized sentencing schemes. See *Miller*, 567 U.S. at 465, 132 S.Ct. 2455 ("Such a scheme prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties.") (citation omitted). And the Court has already held that a deferential abuse-of-discretion standard is compatible with a sentencing scheme that considers every convicted person as an individual. See

49, 128 S.Ct. 586; see also *United States v. Jefferson*, 816 F.3d 1016, 1019 (C.A. 8, 2016) (applying *Miller* to a 600-month sentence and holding that "[w]e review the substantive reasonableness of a sentence under a deferential abuse-of-discretion standard"). *Miller* called for individualized sentences, and the trial court is in a better position than an appellate court to carry this task out because the trial court will almost always be more familiar with each individual defendant than is an appellate court.[26]

***137 **317** *Miller* 's and *Montgomery* 's emphasis on the rarity of juveniles deserving of life-without-parole sentences does not counsel against applying an abuse-of-discretion standard. The trial court remains in the best position to determine whether each particular defendant is deserving of life without parole. All crimes have a maximum possible penalty, and when trial judges have discretion to impose a sentence, the imposition of the maximum possible penalty for any crime is presumably "uncommon" or "rare." Yet this Court has never imposed a heightened standard of appellate review, and it should not do so in this instance.[27]

V. CONCLUSION

[17]For these reasons, we hold that the decision to sentence a juvenile to life without parole is to be made by a judge and that this decision is to be reviewed under the traditional abuse-of-discretion standard. Therefore, we reverse the judgment of the Court of Appeals in *Skinner* and affirm that part of *Hyatt* that held that "[a] judge, not a jury, must determine whether to impose a life-without-parole sentence or a term-of-years sentence under MCL 769.25." *Hyatt*, 316 Mich. App. at 415, 891 N.W.2d 549. However, we reverse the part of *Hyatt* that adopted a heightened standard of review for life-without-parole sentences imposed under MCL 769.25 ***138** and that remanded that case to the trial court for it to "decide whether defendant Hyatt is the truly rare juvenile mentioned in *Miller* who is incorrigible and incapable of reform." *Id.* at 429, 891 N.W.2d 549. No such explicit finding is required. Finally, we remand both of these cases to the Court of Appeals for it to review defendants' sentences under the traditional abuse-of-discretion standard.[28]

McCormack, J. (dissenting).

There is much in the majority opinion with which I agree. For example, I agree that if MCL 769.25 can reasonably be construed in a constitutional manner, we should so construe it. And I generally agree with the majority's discussion of the applicable legal principles. But I respectfully dissent from the majority's conclusion that there are two reasonable ways of interpreting MCL 769.25, one of which is constitutional. Reading the statute as "murder-plus"[1] would violate the Sixth Amendment under ****318** *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and its progeny. And I disagree with the majority that reading the statute as "murder-minus"[2] cures all its constitutional deficiencies. In my view, reading the statute as murder-minus ***139** renders it unconstitutional under the Eighth Amendment as interpreted by the United States Supreme Court in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and *Montgomery v. Louisiana*, 577 U.S. ——, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016). Read either way, MCL 769.25 suffers from a constitutional deficiency.

I. MURDER-PLUS VIOLATES THE SIXTH AMENDMENT

As the majority thoroughly explains, MCL 769.25 requires a prosecutor and a trial court to take additional steps after a jury has reached a guilty verdict in order for the court to impose a sentence of life without parole (LWOP) on a juvenile offender. The prosecutor must file a motion within the applicable time, the court must conduct a hearing at which it considers the *Miller* factors, and the court must "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." MCL 769.25(7). As the majority appears to recognize, if

that last step requires a trial court to make a factual finding beyond that inherent in the jury's verdict before it can impose an LWOP sentence on a juvenile, the statute would violate *Apprendi* and its progeny. See *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348 (holding that "[o]ther than the fact of a prior conviction, *any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury*, and proved beyond a reasonable doubt") (emphasis added).

The majority concludes that reading the statute as "implicitly" requiring trial courts to find an aggravating circumstance—a fact that increases the sentence beyond that authorized by the jury verdict—before it can impose an LWOP sentence on a juvenile is "not ***140** unreasonable...." *Ante* at 304. I agree; it is not. In fact it is the *more* reasonable reading of MCL 769.25(7). The plain text of that subsection requires a trial court to specify the aggravating and mitigating circumstances it considered and its reasons supporting the sentence imposed. Thus, at minimum when the trial court finds at least one aggravating circumstance as a basis to impose an LWOP sentence on a juvenile, the statute violates the Sixth Amendment by allowing the trial court to increase the defendant's sentence on the basis of facts not found by a jury.

The majority suggests that a trial court could make *no* factual findings before imposing an LWOP sentence, revealing there is no Sixth Amendment flaw in the statute. I disagree. MCL 769.25 *mandates* that the court "specify" circumstances considered and "reasons supporting" its sentencing decision as part of the hearing *mandated* before the court can impose an LWOP sentence on juvenile. It must follow that a failure to abide by the statute—imposing an LWOP sentence on a juvenile without providing such reasons—would result in an invalid sentence. I see no way to conclude that the jury verdict *alone* authorizes an LWOP juvenile sentence under the statute's plain language.

****319** The conflict panel in *People v. Hyatt*, 316 Mich. App. 368, 405, 891 N.W.2d 549 (2016), erroneously focused on the *prosecutor's* filing of a motion under MCL 769.25(2) as a significant moment resulting "in the statutory maximum [becoming] life without parole, and the trial court [having] discretion to sentence up to that statutory maximum." The flaw in that argument is that while the filing of that motion opens the door to a *potential* LWOP sentence for a juvenile, it does not alone establish a sufficient basis for a trial court to ***141** impose such a sentence. MCL 769.25(7) does that work. Only if a trial court makes the necessary findings under Subsection (7) does the potential for punishment increase; that is, the potential for increase depends on those findings. It is the court's factual findings made under that subsection, not the prosecutor's filing of a motion under MCL 769.25(2), that "increases the penalty for a crime beyond the prescribed statutory maximum ...." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348. Without those findings only a term-of-years sentence is permitted. MCL 769.25(9).[3]

MCL 769.25 is not materially distinguishable from the Arizona statute held unconstitutional in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In *Ring*, as here, the statute required the trial court to determine the existence of aggravating or mitigating circumstances. Indeed, in *Ring* the statute provided that first-degree murder " 'is punishable by death or life imprisonment as provided by § 13–703.' " *Id*. at 592, 122 S.Ct. 2428 (citation omitted). The statute in *Ring* thus presented the more severe punishment of death as an equally available alternative more explicitly than MCL 769.25 does with LWOP. Yet the United States Supreme Court rejected the state's argument that the defendant had been "sentenced within the range of punishment authorized by the jury verdict." *Id*. at 604, 122 S.Ct. 2428. The statutes at issue both in *Ring* and here provided ***142** for one punishment based on the jury verdict (in *Ring*, LWOP; here, a term of years), with an enhanced punishment available only after more proceedings and fact-finding. See also *Hurst v. Florida*, 577 U.S. ——, 136 S.Ct. 616, 621-622, 193 L.Ed.2d 504 (2016) ("The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts.").

The majority believes that *Ring* is distinguishable because the statute in that case expressly required the finding of an aggravating circumstance before the trial court could impose the death penalty and MCL 769.25 does not require such a finding before a trial court can impose LWOP. This distinction lacks significance; in both cases the authority to impose the increased maximum hinges on the trial court's holding a hearing and making additional findings beyond those found by a jury. That MCL 769.25 does not say that a trial court cannot impose LWOP unless it first finds an aggravating circumstance makes the

enhanced sentence no less contingent on the trial court's making additional findings. "When a judge's finding based on a mere ****320** preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a tail which wags the dog of the substantive offense.' " *Apprendi*, 530 U.S. at 495, 120 S.Ct. 2348, quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

Nor does the fact that the statute does not require a *particular* factual finding before a trial court may impose LWOP save it from Sixth Amendment peril. *Hyatt*, 316 Mich. App. at 399, 891 N.W.2d 549 (finding no Sixth Amendment ***143** flaw in MCL 769.25 in part because it is not "a statutory scheme that makes the imposition of life without parole contingent on any particular finding"). This feature simply does not help the statute square with the applicable Sixth Amendment jurisprudence. "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." *Blakely v. Washington*, 542 U.S. 296, 305, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Finally, the *Hyatt* panel's attempt to sidestep the Sixth Amendment flaw in MCL 769.25 because the *Miller* factors are mere "sentencing factors" rather than elements that a jury must find before the court may impose an LWOP sentence does not help. *Hyatt*, 316 Mich. App. at 403, 891 N.W.2d 549. The United States Supreme Court has repeatedly rejected this label-based distinction because the "inquiry is one not of form, but of effect." *Apprendi*, 530 U.S. at 494, 120 S.Ct. 2348; *Ring*, 536 U.S. at 604, 122 S.Ct. 2428 (quoting *Apprendi*). "[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 610, 122 S.Ct. 2428 (Scalia, J., concurring).

The factual findings required by MCL 769.25(7) are essentially a prerequisite to a trial court's ability to sentence a juvenile to LWOP; the statute tells us so. See MCL 769.25(3) through (7) (if the prosecutor moves ***144** to have the trial court sentence the defendant to LWOP, the court shall hold a hearing and shall make findings; otherwise the trial court must sentence the defendant to the default term-of-years sentence provided in MCL 769.25(9)). The court's authority to sentence the defendant to LWOP is not "derive[d] wholly from the jury's verdict." *Blakely*, 542 U.S. at 306, 124 S.Ct. 2531. Instead, it arises only after the court makes additional factual findings that go beyond the elements of the convicted offense. The effect of those findings is the authority to impose an LWOP sentence on a juvenile. So the statutory scheme falls within the *Apprendi* rule: "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348.

In short, MCL 769.25(9) authorizes a maximum term-of-years sentence for juveniles convicted of the enumerated offenses based solely on the jury's verdict. The remainder of the statute requires motion + hearing + consideration of the *Miller* factors + a statement of aggravated and mitigating circumstances considered by the court and reasons supporting its sentence before a trial court can impose LWOP on a juvenile. For these reasons, the most reasonable reading of ****321** MCL 769.25, reading it as murder-plus, violates the Sixth Amendment of the United States Constitution under *Apprendi* and its progeny.

II. MURDER-MINUS VIOLATES THE EIGHTH AMENDMENT

But, the majority concludes, even if reading the statute as murder-plus would create a Sixth Amendment obstacle, we need not be concerned. We just read it as murder-minus instead. For the majority this is a reasonable (and constitutional) alternative reading because ***145** "the court could find that there are no mitigating or aggravating circumstances and *that* is why it is imposing a life-without-parole sentence." *Ante* at 306. That interpretation, however, suffers from its own constitutional flaw—it violates the Eighth Amendment as interpreted in *Miller* and *Montgomery*.

In *Miller*, 567 U.S. at 465, 132 S.Ct. 2455, the United States Supreme Court held that mandatory LWOP sentences for juveniles violated the requirement of "individualized sentencing for defendants facing the most serious penalties." The majority's interpretation of MCL 769.25 as murder-minus, or as allowing a trial court to impose a sentence of LWOP without making any additional findings, flouts the individualized sentencing and rigorous inquiry requirements of *Miller* and *Montgomery*.

The majority disagrees that reading the statute in this way violates *Miller* because neither *Miller* nor *Montgomery* requires a trial court to make a specific factual finding that the juvenile is "irreparably corrupt." It is right about that. See *Montgomery*, 577 U.S. at ——, 136 S.Ct. at 735 (stating that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility");[4] but see, e.g., *Veal v. State*, 298 Ga. 691, 702, 784 S.E.2d 403 (2016) (concluding that *Miller* and *Montgomery* require "a specific determination that [a defendant] is *irreparably corrupt*" before a court may impose an LWOP sentence on a juvenile). But it does not follow that the court can find nothing beyond the jury's verdict before it can impose an LWOP sentence. *Montgomery* stated that the *Miller* hearing ***146** "gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 577 U.S. at ——, 136 S.Ct. at 735. So the majority's observation that *Miller* did not impose a specific formal fact-finding requirement is beside the point; what matters is that the Eighth Amendment requires *some* additional finding(s) supporting the legal conclusion that a juvenile's offense is unusual enough to warrant an LWOP sentence before a court may impose such a sentence. *Montgomery*, 577 U.S. at ——, 136 S.Ct. at 734;[5] see ****322** also *Hyatt*, 316 Mich. App. at 411, 891 N.W.2d 549 ("Viewing the *Miller* factors as a means of mitigation is not to suggest, however, that life without parole remains the default sentence for juveniles convicted of first-degree murder.... Indeed, it is doubtful whether that result could be squared with *Miller*'s conclusions about the ***147** constitutional infirmities inherent in a mandatory life-without-parole sentencing scheme for juveniles.").

For this reason, the split of authority in state courts post-*Miller* on whether a court must make a specific "finding" of irreparable corruption misses the larger point. Before a court can sentence a juvenile to LWOP, the court must make a finding that an LWOP sentence complies with the dictates of *Miller* (whatever label or form that "finding" takes). And, as discussed later, appellate courts must review that finding de novo because it is a legal conclusion about whether the sentence is constitutional under the Eighth Amendment (while reviewing the underlying facts supporting that "finding" for clear error).

Miller requires something beyond merely a finding that all the elements of an offense are proved to sentence a juvenile to LWOP. Instead, "an offender's age" matters in determining the appropriateness of an LWOP sentence, as does "the wealth of characteristics and circumstances attendant to" youth. *Miller*, 567 U.S. at 476, 132 S.Ct. 2455. The facts necessary to establish the appropriateness of an LWOP sentence for a juvenile are therefore specific to each offender, and the facts found as part of the jury verdict itself therefore will not, standing alone, sustain such a sentence.[6] A murder-minus ***148** reading of the statute violates *Miller* because it is the very Sixth Amendment violation MCL 769.25 creates—requiring the trial court to make additional findings before sentencing a juvenile to LWOP—that the Eighth Amendment requires.[7]

****323** Reading the statute as the majority does renders meaningless the individualized sentencing required by *Miller* by allowing LWOP effectively to serve as the default sentence as long as the prosecutor files the motion required under MCL 769.25(2). After all, if a trial court can simply hold the required hearing, consider the *Miller* factors, and declare "I find no mitigating or aggravating circumstances, so I sentence the defendant to life without parole," nothing would preclude trial courts from doing so in every case. I cannot see how *Miller*'s dictates are satisfied by the hollow formality to which the majority's holding would reduce the hearing mandated by MCL 769.25(6). And if that is the result, the statutory scheme necessarily violates the "foundational principle" that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 567 U.S. at 474, 132 S.Ct. 2455; see also *Landrum v. State*, 192 So.3d 459, 460 (Fla., 2016) (holding that "[*e*]*ven in a* ***149** *discretionary sentencing scheme*, the sentencing court's exercise of discretion before imposing a life sentence must be informed by consideration of the juvenile offender's 'youth and its attendant circumstances' as articulated in *Miller* and now codified in section 921.1401, Florida Statutes (2014)") (emphasis added).

Finally, for what it is worth, the *Miller* Court's statement that LWOP sentences for juveniles should be "uncommon" is entitled to some weight in analyzing this issue. *Miller*, 567 U.S. at 479, 132 S.Ct. 2455. Yes, those statements in *Miller* were a prediction, or dictum, and not a rule of law. But *Montgomery* made them harder to shrug off. See *Montgomery*, 577 U.S. at ——, 136 S.Ct. at 734 (stating that "*Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption' ") (quotation marks and citations omitted); *id.* at ——, 136 S.Ct. at 734 (stating that "*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders"); *id.* at ——, 136 S.Ct. at 743 (Scalia, J., dissenting) (asserting that "[i]t is plain as day that the majority is not applying *Miller*, but rewriting it"); see also, e.g., *Veal*, 298 Ga. at 702, 784 S.E.2d 403 (characterizing *Montgomery* as further "explain[ing]" *Miller*'s requirements, including that "by *uncommon*, *Miller* meant *exceptionally rare*").[8]

***150** In my view, interpreting the statute as murder-minus renders it constitutionally flawed under the Eighth Amendment. Instead, I believe that "a faithful application of the holding in *Miller*, as clarified in *Montgomery*, requires the creation of a presumption against sentencing a juvenile offender to life in prison without the possibility of parole." *Commonwealth v. Batts*, 640 Pa. 401, 472, 163 A.3d 410, 452 (2017);[9] see also *Atwell v. State*, 197 So.3d 1040, 1050 (Fla., 2016) (invalidating under the ****324** Eighth Amendment a defendant's sentence because he "did not receive the type of individualized sentencing consideration *Miller* requires"). Because a murder-minus interpretation of MCL 769.25 does not allow for such a presumption, I conclude that the majority's interpretation violates *Miller*.

III. *MILLER* REQUIRES A HEIGHTENED STANDARD OF REVIEW FOR JUVENILE LWOP SENTENCES

Even if I could agree with the majority that MCL 769.25 is constitutional, in my view *Miller* requires appellate courts to apply a more searching review to juvenile LWOP sentences than our traditional abuse-of-discretion standard. This is so because the review is of the *legality* of the sentence; if the sentence is illegal, the court has no discretion to impose it. "[I]n the absence of the sentencing court reaching a conclusion, supported by competent evidence, that the defendant will forever be incorrigible, without any hope for rehabilitation, ***151** a life-without-parole sentence imposed on a juvenile is illegal, as it is beyond the court's power to impose." *Batts*, 163 A.3d at 435.

Whether a juvenile LWOP sentence is a proper exercise of a sentencing judge's *discretion* therefore is the wrong inquiry; the correct inquiry is whether such a sentence is constitutional under the Eighth Amendment and *Miller*. We review constitutional questions de novo. Why would we make an exception to that rule here? And other courts have rightly recognized that de novo review of such sentences is appropriate. "[W]e must review the sentencing court's legal conclusion that [the defendant] is eligible to receive a sentence of life without parole pursuant to a de novo standard and plenary scope of review." *Id.*; see also *Seats*, 865 N.W.2d at 553 (stating that "[w]hen a defendant attacks the constitutionality of a sentence, our review is de novo"); *Davis*, 2018 WY 40, 415 P.3d at 676 (stating that "we review a constitutional challenge to a sentence de novo").

Such a conclusion is consistent with the majority's discussion of the traditional abuse-of-discretion standard and why we apply it to sentencing decisions in the ordinary course. In *People v. Babcock*, 469 Mich. 247, 268-269, 666 N.W.2d 231 (2003), we observed that "[r]eview de novo is a form of review primarily reserved for questions of law" and that "an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." But a decision whether a particular sentence satisfies *constitutional* scrutiny under *Miller* is precisely the sort of question of law to which there is only one correct answer—the sentence is either constitutional or it is not. There is no room for ***152** discretion and therefore no reason for an appellate court to defer to the trial court's decision when reviewing the sentence for Eighth Amendment compliance.[10]

As a result, while I disagree with the *Hyatt* conflict panel's decision to cast the ****325** standard of review applicable to juvenile LWOP sentences as a heightened

version of the traditional abuse-of-discretion standard, I agree with its bottom line: Appellate courts should apply a less deferential review to juvenile LWOP sentences. I would simply call the standard what it is—de novo review.

IV. CONCLUSION

I respectfully dissent from each of the majority's holdings. I would conclude that MCL 769.25 is unconstitutional because its most natural reading requires a ***153** trial court to make factual findings beyond those found by the jury before it can impose an LWOP sentence on a juvenile. I would decline to read the statute not to require such findings before a court can impose an LWOP sentence on a juvenile because I believe such a reading violates the Eighth Amendment as the United States Supreme Court has made plain in *Miller* and *Montgomery*. Finally, given that the majority holds the statute constitutional, I also dissent from its conclusion that traditional abuse-of-discretion review applies to juvenile LWOP sentences. Whether the sentence is constitutional, like any constitutional question, requires our de novo review.

Clement, J., took no part in the decision of this case.

All Citations

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Footnotes

1 The statute at issue in *Ring* expressly required the finding of an aggravating circumstance before the death penalty could be imposed. *Id*. at 592, 122 S.Ct. 2428.

2 The sentencing scheme at issue in *Hurst* required the jury to render an "advisory sentence" of life imprisonment or death without specifying the factual basis of its recommendation. Although the court had the ultimate authority to impose a sentence of life imprisonment or death, if the court imposed death, it had to set forth its findings in support of that decision. *Hurst*, 577 U.S. at ——, 136 S.Ct. at 622.

3 In *Carp*, 496 Mich. at 491 n. 20, 852 N.W.2d 801, this Court noted *Miller*'s reference to "judge or jury" and indicated that this

> tend[s] to suggest that *Miller* did not make age or incorrigibility aggravating elements because under *Alleyne* [*v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013)] aggravating elements that raise the mandatory minimum sentence "must be submitted to the jury and found beyond a reasonable doubt[.]" However, because *Alleyne* was decided after *Miller*, *Miller*'s reference to individualized sentencing being performed by a "judge or jury" might merely be instructive on the issue but not dispositive. As none of the defendants before this Court asserts that his sentence is deficient because it was not the product of a jury determination, we find it unnecessary to further opine on this issue and leave it to another day to determine whether the individualized sentencing procedures required by *Miller* must be performed by a jury in light of *Alleyne*. [Citation and emphasis omitted.]

4 In *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), the Court held that the Eighth Amendment forbids imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.

5 In *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), the Court held that the Eighth Amendment forbids imposition of a sentence of life without the possibility of parole for people who committed nonhomicide offenses when they were under the age of 18.

6 Judge BECKERING, joined by Judge SHAPIRO, wrote a concurring opinion in which she expressed her view that "a sentence of life without parole for a juvenile offender constitutes cruel or unusual punishment in violation of the Michigan Constitution," even though she recognized that this issue was "unpreserved, scantily briefed, and better left

for another day." *Id.* at 430, 891 N.W.2d 549 (BECKERING, J., concurring). Judge METER, joined by Judges M. J. KELLY and RIORDAN, agreed with the majority opinion's conclusion that a judge, not a jury, is to determine whether to sentence a juvenile to life without parole. *Id.* at 447, 891 N.W.2d 549 (METER, J., concurring in part and dissenting in part). However, he dissented from the majority's review of the judge's decision to impose life without parole and its decision to remand for resentencing. Instead, he would have simply affirmed defendant's sentence. *Id.* at 448-449, 891 N.W.2d 549.

7 The instant cases are distinguishable from *Ring* because while the statute at issue in *Ring* expressly required the finding of an aggravating circumstance before the death penalty could be imposed, MCL 769.25 does not expressly (or otherwise) require the finding of an aggravating circumstance before life without parole can be imposed.

8 As noted earlier, *Carp* explained that "[r]ather than imposing fixed sentences of life without parole on all defendants convicted of violating MCL 750.316, MCL 769.25 now establishes a default sentencing range for individuals who commit first-degree murder before turning 18 years of age" because "[p]ursuant to the new law, absent a motion by the prosecutor seeking a sentence of life without parole, 'the court shall sentence the individual to a term of [years].' " *Carp*, 496 Mich. at 458, 852 N.W.2d 801, quoting MCL 769.25(9). A term-of-years sentence is only the "default" under MCL 769.25 when the prosecutor does not file a motion seeking a life-without-parole sentence. Once the prosecutor files such a motion, there is no longer any "default" sentence. Instead, the trial court must then consider the *Miller* factors and any other relevant factors and exercise its discretion by choosing either a term-of-years sentence or a life-without-parole sentence.

9 Italics added. In addition, MCL 769.25(6) provides that the court "*may* consider any other criteria relevant to its decision, including the individual's record while incarcerated." (Emphasis added.) Given that "may" is permissive, *In re Bail Bond Forfeiture*, 496 Mich. 320, 328, 852 N.W.2d 747 (2014), this language clearly does not require the trial court to engage in fact-finding in violation of the Sixth Amendment. Cf. *People v. Lockridge*, 498 Mich. 358, 364, 870 N.W.2d 502 (2015) (explaining that the statutory sentencing guidelines violate the Sixth Amendment because "the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that mandatorily increase the floor of the guidelines minimum sentence range, i.e., the 'mandatory minimum' sentence under *Alleyne*.") (emphasis altered).

10 In *Apprendi*, 530 U.S. at 491 n. 16, 120 S.Ct. 2348, the Court emphasized the important distinction "between facts in aggravation of punishment and facts in mitigation," and it explained:

> If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.

11 Furthermore, the United States Supreme Court does not even view the "mitigating-factor determination" (at least in the context of death penalty cases) to constitute a factual finding. In *Kansas v. Carr*, 577 U.S. ——, 136 S.Ct. 633, 193 L.Ed.2d 535 (2016), the Court held that mitigating circumstances, unlike aggravating circumstances, do not need to be proven beyond a reasonable doubt. In doing so, it explained that

> [w]hether mitigation exists ... is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. [*Id.* at ——, 136 S.Ct. at 642.]

Similarly, in *United States v. Gabrion*, 719 F.3d 511, 532-533 (C.A. 6, 2013), the Sixth Circuit held that whether the aggravating circumstances outweigh the mitigating circumstances is not a fact that must be proved beyond a reasonable doubt. It explained:

> *Apprendi* findings are binary—whether a particular fact existed or not. [18 USC] 3593(e), in contrast, requires the jury to "consider" whether one type of "factor" "sufficiently outweigh[s]" another so as to "justify" a particular sentence. Those terms—consider, justify, outweigh—reflect a process of assigning weights to competing interests, and then determining, based upon some criterion, which of those interests predominates. The result is one of judgment, of shades of gray; like saying that Beethoven was a better composer than Brahms. Here, the judgment is moral—for

the root of "justify" is "just." What § 3593(e) requires, therefore, is not a finding of fact, but a moral judgment. [*Id.*]

For the same reasons, a trial court's decision to impose life without parole after considering the mitigating and aggravating circumstances is not a factual finding, but a moral judgment.

12 This perhaps is the critical point at which we and the dissent disagree. The dissent concludes that because MCL 769.25(7) requires the trial court to "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed," the statute necessarily requires the trial court "to find an aggravating circumstance—a fact that increases the sentence beyond that authorized by the jury verdict—before it can impose [a life-without-parole] sentence on a juvenile...." We respectfully disagree. Although the statute requires the trial court to "specify on the record the aggravating and mitigating circumstances considered by the trial court," that does not necessarily mean that the trial court must specify an aggravating circumstance before it can impose a life-without-parole sentence upon a juvenile. Rather, that means simply that if the trial court *does* consider any aggravating (or mitigating) circumstances, it must specify those circumstances on the record.

13 As the Court of Appeals dissent in *Skinner* noted, that the Legislature did not include any burden of proof in the statute "further supports the conclusion that the statute does not require any particular finding of fact." *Skinner*, 312 Mich. App. at 74, 877 N.W.2d 482 (SAWYER, J., dissenting). As the dissent explained:

> I would suggest that the Legislature did not include a burden of proof out of oversight or a desire to leave it to the courts to fashion one, but because it was unnecessary because the statute does not require anything to be proved. Rather, it only requires consideration of the relevant criteria to guide the trial court in determining the appropriate individualized sentence for the defendant before it. [*Id.* at 74-75, 877 N.W.2d 482.]

14 In *Blakely*, 542 U.S. at 309, 124 S.Ct. 2531, the Court explained:

> Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a *legal right to a lesser sentence*—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. [Emphasis altered.]

Under Michigan's statutory scheme, in the absence of a finding of an aggravating circumstance, a juvenile does not have a "legal right to a lesser sentence," i.e., a term of years rather than life without parole. Therefore, a judge is not precluded from considering aggravating circumstances in deciding whether to sentence a juvenile to either a term of years or life without parole because both of those sentences are within the range prescribed by Michigan's statutory scheme.

15 *Montgomery*, 577 U.S. at ——, 136 S.Ct. at 726, noted that "*Miller* required that sentencing *courts* consider a child's diminished culpability and heightened capacity for change before condemning him or her to die in prison." (Emphasis added; quotation marks and citation omitted.) See also *id.* at ——, 136 S.Ct. at 733 ("*Miller* requires that before sentencing a juvenile to life without parole, the sentencing *judge* take into account how children are different, and how those differences counsel against irrevocably sentencing them to lifetime in prison.") (emphasis added; quotation marks and citation omitted). Just as with the similar language in *Miller*, we do not place too much weight on this language given that *Montgomery*, as with *Miller*, was not addressing the Sixth Amendment issue. See note 3 of this opinion.

16 While the dissent agrees with us that "neither *Miller* nor *Montgomery* requires a trial court to make a specific factual finding that the juvenile is 'irreparably corrupt,' " it concludes that those cases require "*some* additional finding(s)," yet it does not identify *what* specifically that additional finding is other than that the juvenile's offense must be "unusual enough to warrant [a life-without-parole] sentence...."

17 Similarly, in *Atkins v. Virginia*, 536 U.S. 304, 317, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the Court held that the Eighth Amendment bars the imposition of the death penalty on defendants who are intellectually disabled, but it left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." (Quotation marks and citation omitted; alterations in original.) Subsequently, in *Schriro v. Smith*, 546 U.S. 6, 7, 126 S.Ct. 7, 163 L.Ed.2d 6 (2005), the Court held that "[t]he Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim." Although the Court did not expressly hold that a jury trial is not required, it noted that "Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit pre-emptively imposed its jury trial condition." *Id.* at 7-8. State and lower federal courts have held that a jury

need not decide whether a defendant is intellectually disabled. See, for example, *State v. Agee*, 358 Or. 325, 364, 364 P.3d 971 (2015), amended 358 Or 749, 370 P.3d 476 (2016) ("[B]ecause intellectual disability is a fact that operates to reduce rather than to increase the maximum punishment permitted by a verdict of guilt, the Sixth Amendment does not require the fact of intellectual disability to be decided by a jury beyond a reasonable doubt."); *Commonwealth v. Bracey*, 604 Pa. 459, 474, 986 A.2d 128 (2009) ("[T]here is no Sixth Amendment right to a jury on the question of mental retardation."); *State v. Hill*, 177 Ohio App. 3d 171, 187, 2008-Ohio-3509, 894 N.E.2d 108 (2008) ("[W]e reject the argument that the *Apprendi*/*Ring* line of cases requires the issue of an offender's mental retardation to be decided by a jury under a reasonable-doubt standard."); *State v. Johnson*, 244 S.W.3d 144, 151 (Mo, 2008) ("The Supreme Court's holding in *Ring* requiring a jury to find statutory aggravating circumstances beyond a reasonable doubt does not apply to the issue of mental retardation" because "[d]etermining a defendant is mentally retarded is not a finding of fact that increases the potential range of punishment; it is a finding that removes the defendant from consideration of the death penalty."); *State v. Grell*, 212 Ariz. 516, 526, 135 P.3d 696 (2006) ("*Ring* does not require that a jury find the absence of mental retardation."); *Walker v. True*, 399 F.3d 315, 326 (C.A. 4, 2005) (A jury does not have to determine whether a defendant is mentally retarded because "an *increase* in a defendant's sentence is not predicated on the outcome of the mental retardation determination; only a decrease.") (quotation marks omitted); *Head v. Hill*, 277 Ga. 255, 258, 587 S.E.2d 613 (2003) ("[T]he absence of mental retardation is not the functional equivalent of an element of an offense such that determining its absence or presence requires a jury trial under *Ring*."); *In re Johnson*, 334 F.3d 403, 405 (C.A. 5, 2003) ("[N]either *Ring* and *Apprendi* nor *Atkins* render the absence of mental retardation the functional equivalent of an element of capital murder which the state must prove beyond a reasonable doubt.").

Also somewhat similarly, in *Tison v. Arizona*, 481 U.S. 137, 158, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), the Court held that the Eighth Amendment bars the imposition of the death penalty in felony-murder cases unless the defendant himself killed, intended to kill, attempted to kill, or was a major participant in the offense and acted with at least a reckless indifference to human life. In *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), the Court discussed a case that served as a precursor to *Tison*, *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and held that the offender's role in the offense did not concern guilt or innocence and did not establish an element of capital murder that had to be found by a jury. While *Cabana* was decided before *Apprendi*, state and lower federal courts since *Apprendi* have held that the Sixth Amendment does not require that a jury make the *Enmund*/*Tison* findings. See, for example, *State v. Galindo*, 278 Neb 599, 656, 774 N.W.2d 190 (2009) ("*Ring* [does] not require a jury determination of *Enmund*-*Tison* findings" because "the *Enmund*/*Tison* determination is a limiting factor, not an enhancing factor.") (quotation marks and citations omitted); *State v. Nichols*, 219 Ariz. 170, 172, 195 P.3d 207 (2008) ("[T]he Sixth Amendment does not require that a jury, rather than a judge, make *Enmund*-*Tison* findings.") (quotation marks and citation omitted). See also 6 LaFave et al., Criminal Procedure (4th ed.), § 26.4(i), pp. 1018-1019 ("So far, lower courts have rejected arguments to equate the factors which as a matter of Eighth Amendment law are required for death eligibility with elements. The rules in *Tison* and *Atkins* have instead been treated as defenses to, not elements of, capital murder.").

Finally, as the Court of Appeals explained in *Hyatt*, 316 Mich. App. at 411-412, 891 N.W.2d 549:

> The consensus in these cases is that when the Eighth Amendment's proportionality requirement has barred imposition of the death penalty because of a certain factor or factors that suggested diminished culpability, the determination of whether those certain factors exist is not one that is subject to a jury determination. Stated differently, the Eighth Amendment prohibitions are considered to be mitigating factors that act as a bar against imposing the statutory maximum penalty, rather than as elements that enhance the maximum possible penalty, and the determination of whether those mitigating factors exist need not, under *Apprendi* and its progeny, be made by a jury.

18 MCL 769.25 requires trial courts to consider the *Miller* factors before imposing life without parole in order to ensure that only those juveniles who are irreparably corrupt are sentenced to life without parole. Whether a juvenile is irreparably corrupt is not a factual finding; instead, it is a moral judgment that is made after considering and weighing the *Miller* factors. See note 11 of this opinion.

19 The Court of Appeals in *Skinner*, 312 Mich. App. at 49, 877 N.W.2d 482, stated:

> [I]f, as the prosecution and the Attorney General contend, the "maximum allowable punishment" at the point of defendant's conviction is life without parole, then that sentence would offend the Constitution. Under *Miller*, a mandatory default sentence for juveniles *cannot* be life imprisonment without the possibility of parole. Such a sentence would not be an individualized sentence taking into account the factors enumerated in *Miller*.

Similarly, the dissent contends that "[r]eading the statute as [we do] renders meaningless the individualized sentencing

required by *Miller* by allowing [life without parole] effectively to serve as the default sentence as long as the prosecutor files the motion required under MCL 769.25(2)." However, what the Court of Appeals and the dissent fail to recognize is that Michigan's statutory scheme does not create a mandatory default sentence of life without parole for juveniles. Rather, it authorizes the trial court to sentence a juvenile to life without parole as long as the trial court takes into account the *Miller* factors. In other words, Michigan's statutory scheme is absolutely *consistent* with *Miller* because instead of imposing a mandatory sentence of life without parole, it requires the trial court to impose an individualized sentence by requiring the trial court to consider the factors enumerated in *Miller*. Therefore, contrary to the dissent's suggestion, our interpretation of MCL 769.25 most certainly does not "flout[ ] the individualized sentencing ... requirement[ ] of *Miller*...."

20 The Supreme Court of Pennsylvania held that although a finding of "permanent incorrigibility" is required, this finding can be made by the trial court because "[a] finding of 'permanent incorrigibility' cannot be said to be an element of the crime committed; it is instead an immutable characteristic of the juvenile offender." *Id*. at 456.

21 As *Blackwell* put it, " '[I]rreparable corruption' is not a factual finding, but merely 'encapsulates the [absence] of youth-based mitigation.' " *Id*. at 192 (alteration in original).

22 Judge METER, joined by Judges M. J. KELLY and RIORDAN, would not have reversed defendant's sentence and remanded to the trial court for further consideration. Instead, they would have affirmed defendant's sentence of life without parole.

23 Justice Roberts, joined by Justices Scalia, Thomas, and Alito, referred to this as "the Court's gratuitous prediction." *Miller*, 567 U.S. at 501, 132 S.Ct. 2455 (Roberts, C.J., dissenting). See also *State v. Valencia*, 241 Ariz. 206, 212, 386 P.3d 392 (2016) (Bolick, J., concurring) ("We should treat the Court's forecast that irreparable corruption will not be found in the 'vast majority' of cases as speculative and dictum.... Our system's integrity and constitutionality depend not on whether the overall number of sentences of life without parole meted out to youthful murderers are many or few. They depend primarily on whether justice is rendered in individual cases."). Furthermore, it is difficult to understand what particular insights or data the United States Supreme Court, or any other court, would possess concerning the *Miller*/*Montgomery* juvenile populations of this state, much less those of all fifty states, that would sustain such a prediction.

24 *Miller* 's and *Montgomery* 's references to "rare" are somewhat analogous to this Court's reference to "exceptional" in *People v. Babcock*, 469 Mich. 247, 257, 666 N.W.2d 231 (2003). In *Babcock*, we stated, " 'the Legislature intended "substantial and compelling reasons" to exist only in exceptional cases.' " *Id*., quoting *People v. Fields*, 448 Mich. 58, 68, 528 N.W.2d 176 (1995). Post-*Babcock*, we certainly did not require trial courts to explicitly find that a defendant's case was "exceptional" before imposing a sentence outside the statutory sentencing guidelines.

25 Although trial courts are no longer required to articulate substantial and compelling reasons to justify departures, they are still required to articulate "adequate reasons" to justify departures, and such departures are still reviewed for an abuse of discretion. *Steanhouse*, 500 Mich. at 476, 902 N.W.2d 327.

26 As discussed earlier and as also recognized by the dissent, the United States Supreme Court expressly left it to the states to adopt procedures to satisfy the requirements of the Eighth Amendment. Where the issue is whether those procedures sufficiently satisfy the requirements of the Eighth Amendment, the de novo standard of review is applicable because that is a question of law. However, contrary to the dissent's position, where the issue pertains to the trial court's ultimate decision between a life-without-parole sentence and a term-of-years sentence, the traditional abuse-of-discretion standard of review is applicable. We are not aware of any other situation in this state in which a trial court's sentencing decision is reviewed de novo, and we see no reason why it should be in this particular situation. As discussed earlier, *Miller* requires individualized sentences and the trial court is in a better position than an appellate court to carry out this task. And *Miller* requires the trial court to consider such factors as the defendant's maturity, impetuosity, ability to appreciate risks and consequences, ability to deal with police officers or prosecutors, capacity to assist his own attorneys, and possibility of rehabilitation. The trial court is obviously in a far better position than the appellate court to assess such factors, and thus the latter must review the trial court's consideration of these factors and its ultimate decision whether to impose a life-without-parole or a term-of-years sentence under a deferential abuse-of-discretion standard of review.

27 Although the Court of Appeals in *Hyatt* erred by adopting a heightened standard of review with regard to the trial court's ultimate decision to impose a sentence of life without parole, it did correctly hold that "[a]ny fact-finding by the trial court is to be reviewed for clear error" and that "any questions of law are to be reviewed de novo...." *Hyatt*, 316 Mich. App. at 423, 891 N.W.2d 549.

28 Defendant Hyatt's application for leave to appeal is otherwise denied.

1 I use the term "murder-plus" to mean interpreting the statute to require the trial court to find facts beyond those inherent in the jury verdict before it can impose a sentence of life without parole on a juvenile.

2 I use the term "murder-minus" to mean interpreting the statute to allow the trial court to impose a sentence of life without parole on a juvenile based solely on the jury's verdict, without finding any additional facts, and to ratchet downward to impose a term-of-years sentence.

3 The *Hyatt* panel's focus on the motion permitting a *prosecutor* to *seek* an LWOP sentence as increasing the maximum is flawed, *Hyatt*, 316 Mich. App. at 405, 891 N.W.2d 549, because it is the *trial court's authority* to impose such a sentence that matters. And even if the prosecutor's filing of a motion under MCL 769.25(2) were considered, it would further support the conclusion that the statute violates the Sixth Amendment. The jury verdict alone does not authorize a sentence of LWOP. As conceded by the prosecutor, LWOP is only available if the prosecutor files a motion seeking an enhanced sentence.

4 Given this statement, I find questionable the majority's assertion that "[w]hether a juvenile is irreparably corrupt is not a factual finding[.]" *Ante* at 310 n. 18. But I acknowledge that other courts have reached the same conclusion. See, e.g., *People v. Blackwell*, 3 Cal. App. 5th 166, 192, 194, 207 Cal.Rptr.3d 444 (2016) (concluding that "irreparable corruption" is not a factual finding, but a "moral judgment").

5 The United States Supreme Court in *Montgomery* recognized that there might be more than one procedural way to satisfy its dictates and left it to the states to implement. *Montgomery*, 577 U.S. at ——, 136 S.Ct. at 735 ("That this finding [of incorrigibility] is not required, however, speaks only to the degree of procedure *Miller* mandated in order to implement its substantive guarantee.... [T]his Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems."). I read the substantive rule of *Miller* and *Montgomery* as: whatever label a state puts on the "finding" a court must make as a procedural matter before it can constitutionally sentence a juvenile to LWOP (whether it be "irreparable corruption" or some proxy of that status), the court must make the finding at least cautiously and at most rarely. *Id*. at ——, 136 S.Ct. at 735 (describing "*Miller* 's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity"); *id*. at ——, 136 S.Ct. at 734 ("*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption."). And of course, states can avoid concerns about what procedural protections are enough to satisfy *Miller* "by permitting juvenile homicide offenders to be considered for parole." *Id*. at ——, 136 S.Ct. at 736.

6 Thus, I cannot accept the majority's and the *Hyatt* panel's conclusion that there is no Sixth Amendment flaw in MCL 769.25 because the *Miller* factors all involve *mitigating* factors, which a jury need not find. What *Miller* and *Montgomery* require trial courts to do before imposing an LWOP sentence on a juvenile is explain why the juvenile's offense is the unusual one that warrants it; in other words, why is it *worse* than the typical juvenile offense? See *Black's Law Dictionary* (7th ed.), p. 236, which defines "aggravating circumstance" as "[a] fact or situation that increases the degree of liability or culpability for a tortious or criminal act"; see also *Montgomery*, 577 U.S. at ——, 136 S.Ct. at 726 (stating that LWOP is inappropriate "for all but the rarest of children, *those whose crimes reflect 'irreparable corruption*' ") (citations omitted; emphasis added). So while *Miller* may require trial courts to consider the mitigating effects of youth in determining an appropriate sentence generally, perhaps the Eighth Amendment requirement includes a finding of *aggravation* of some kind, whether it is irreparable corruption or something else.

7 It would seem hard to dispute that the Legislature created the motion, hearing, and on-the-record findings requirements in MCL 769.25(3), (6), and (7) precisely to satisfy *Miller* 's dictates for individualized consideration of juveniles

convicted of enumerated crimes. The irony that in doing so, it created a Sixth Amendment problem is not lost on me. But this result is still the one that I read the applicable United States Supreme Court precedent to require given this particular statute.

8 *Montgomery* 's sharpening of *Miller* 's requirements also undermines the majority's conclusion that a murder-minus reading of the statute is constitutionally sufficient because it requires sentencing courts to "consider" the *Miller* factors. *Montgomery*, 577 U.S. at ——, 136 S.Ct. at 734 (stating that "because *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth") (cleaned up). In other words, the Eighth Amendment requires the sentencing court to find *some facts* about a particular juvenile's crime that distinguish it from the typical juvenile offense before it may impose an LWOP sentence.

9 Other state supreme courts have similarly concluded that *Miller* requires a presumption against imposing LWOP on a juvenile offender. See, e.g., *Davis v. State*, 2018 WY 40, ¶ 45, 415 P.3d 666, 681 (2018), citing *State v. Riley*, 315 Conn. 637, 655, 110 A.3d 1205 (2015); *State v. Seats*, 865 N.W.2d 545, 555 (Iowa, 2015).

10 The majority replies by conceding that de novo review applies to questions of law, but denies that a trial court's sentencing decision to impose an LWOP sentence on a juvenile is such a question. That conclusion, frankly, simply ignores that *Miller* constitutionalized this particular area of law and that *Montgomery* declared it a substantive, rather than a procedural, rule of law. See *Montgomery*, 577 U.S. at ——, 136 S.Ct. at 736 (stating that "[t]he Court now holds that *Miller* announced a substantive rule of constitutional law"); see also *id*. at ——, 136 S.Ct. at 735 (stating that "[t]he hearing does not replace but rather gives effect to *Miller* 's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity"). Even the *Montgomery* primary dissent, albeit begrudgingly, acknowledged this. See *id*., 577 U.S. at ——, 136 S.Ct. at 743-744 (Scalia, J., dissenting) (asserting that "the rewriting [of *Miller*] has consequences beyond merely making *Miller* 's procedural guarantee retroactive. *If, indeed, a State is categorically prohibited from imposing life without parole on juvenile offenders whose crimes do not 'reflect permanent incorrigibility,'' then even when the procedures that Miller demands are provided the constitutional requirement is not necessarily satisfied. It remains available for the defendant sentenced to life without parole to argue that his crimes did not in fact 'reflect permanent incorrigibility*' ") (emphasis added).

1

499 Mich. 903

Karen GORSKI, Plaintiff–Appellee,

v.

AT & T MICHIGAN, Defendant/Third–Party Plaintiff–Appellant,

and

Johnson Controls, Inc., Defendant/Third–Party Defendant.

Docket No. 153441.
COA No. 329039.

Supreme Court of Michigan.

April 15, 2016.

Order

On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the March 15, 2016 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should now be reviewed by this Court. The motion for a stay of proceedings is DENIED.

2

Demareo Jamine ALLEN, Plaintiff–Appellant,

v.

KINROSS CORRECTIONAL FACILITY WARDEN, Defendant–Appellee.

Docket No. 153300.
COA No. 330153.

Supreme Court of Michigan.

April 19, 2016.

Order

On order of the Chief Justice, plaintiff-appellant having failed to pay the partial filing fee as required by the order of March 28, 2016, the Clerk of the Court is hereby directed to close this file.

3

312 Mich.App. 15

PEOPLE

v.

SKINNER.

Docket No. 317892.

Court of Appeals of Michigan.

Submitted May 8, 2015, at Detroit.

Decided Aug. 20, 2015, at 9:05 a.m.

Background: On second remand from Court of Appeals for resentencing following affirmance of convictions for first-degree murder and other crimes committed when defendant was juvenile, 2013 WL 951265, the Circuit Court, St. Clair County, Daniel J. Kelly, J., sentenced defendant to life without parole. Defendant appealed.

Holdings: The Court of Appeals, Borrello, J., held that:

(1) as an issue of first impression, statute authorizing trial court to enhance default sentence of term-of-years for murder committed as juvenile to life without parole based on findings made by trial court and not jury violated Sixth Amendment right to jury trial, but

(2) although portions of statute were unconstitutional, statute was not void entirely, but instead remained operable such that jury could make findings

supporting sentence of life without parole for murder committed as juvenile.

Vacated and remanded.

Sawyer, J., filed dissenting opinion.

1. Criminal Law ⚿1139

Court of Appeals reviews constitutional issues de novo.

2. Criminal Law ⚿1139

Issues of statutory construction are reviewed de novo.

3. Constitutional Law ⚿4694, 4752
Jury ⚿34(2)

Taken together, the rights afforded under the Sixth Amendment and Due Process clause indisputably entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. U.S.C.A. Const.Amends. 6, 14.

4. Jury ⚿34(6)
Sentencing and Punishment ⚿322.5

Under the Sixth Amendment right to a jury trial, other than a prior conviction, any fact that increases either the floor or the ceiling of a criminal defendant's sentence beyond that which a court may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant must be submitted to a jury and proved beyond a reasonable doubt. U.S.C.A. Const.Amend. 6.

5. Jury ⚿31.1
Sentencing and Punishment ⚿8

Statute authorizing trial court, on prosecution's motion, to enhance default sentence of term-of-years for defendant convicted of first-degree murder committed as juvenile to life without parole on basis of factual findings not made by jury, but rather found by trial court, violated Sixth Amendment right to jury trial, though trial court had discretion to impose harsher sentence; at point of conviction, maximum punishment was term-of-years prison sentence, once prosecution filed motion, defendant was exposed to potentially harsher penalty contingent on findings made by trial court, any fact that exposed defendant to greater potential sentence had to be found by jury, and trial court's discretion was not substitute for right to a jury. U.S.C.A. Const.Amend. 6; M.C.L.A. §§ 750.316, 769.25(6).

6. Jury ⚿34(6)

In the context of increasing a maximum sentence using judicially found facts, judicial discretion cannot substitute for a defendant's Sixth Amendment right to a jury. U.S.C.A. Const.Amend. 6.

7. Infants ⚿3011

To enhance a juvenile's default sentence to life without parole, absent a waiver, a jury must make findings on the relevant statutory factors to determine beyond a reasonable doubt whether the juvenile's crime reflects irreparable corruption. M.C.L.A. § 769.25(6).

8. Infants ⚿3011
Jury ⚿31.1
Sentencing and Punishment ⚿322.5

Although portions of statute authorizing trial court, on prosecution's motion, to enhance default sentence of term-of-years for defendant convicted of first-degree murder committed as juvenile to life without parole on basis of factual findings by trial court, rather than jury, violated Sixth Amendment right to a jury trial, statute was not void entirely but instead remained operable such that, following conviction and motion by prosecuting attorney for sentence of life without parole, absent defendant's waiver, trial court could empanel a jury and hold sentencing hearing at which prosecution would be tasked with proving that relevant factors supported

that offenses reflected irreparable corruption beyond a reasonable doubt sufficient to impose sentence of life without parole. U.S.C.A. Const.Amend. 6; M.C.L.A. §§ 750.316, 769.25(6).

9. Municipal Corporations ⚿111(4)

If invalid or unconstitutional language can be deleted from an ordinance and still leave it complete and operative, then such remainder of the ordinance be permitted to stand. M.C.L.A. § 8.5.

10. Jury ⚿34(6)

Sixth Amendment does not require the jury to articulate mitigating and aggravating circumstances when sentencing a defendant. U.S.C.A. Const.Amend. 6.

West Codenotes

Held Unconstitutional

M.C.L.A. § 769.25(6, 7)

Recognized as Unconstitutional

M.C.L.A. § 769.34(2, 3); West's RCWA 9.94A.120(2)

Bill Schuette, Attorney General, Aaron D. Lindstrom, Solicitor General, Michael D. Wendling, Prosecuting Attorney, and Hilary B. Georgia, Senior Assistant Prosecuting Attorney, for the people.

University of Michigan Juvenile Justice Clinic (by Kimberly Thomas and Frank E. Vandervort) for defendant.

Bill Schuette, Attorney General, Aaron D. Lindstrom, Solicitor General, and iLinus Banghart–Linn, Assistant Attorney General, for the Attorney General.

Before: HOEKSTRA, P.J., and SAWYER and BORRELLO, JJ.

BORRELLO, J.

This case presents a constitutional issue of first impression concerning whether the Sixth Amendment mandates that a jury make findings on the factors set forth in *Miller v. Alabama*, 567 U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), as codified in MCL 769.25(6), before sentencing a juvenile homicide offender to life imprisonment without the possibility of parole. We hold that the Sixth Amendment mandates that juveniles convicted of homicide who face the possibility of a sentence of life without the possibility of parole have a right to have their sentences determined by a jury. In so holding, we expressly reserve the issue of whether *this* defendant should receive the penalty of life in prison without the possibility of parole for a jury. In this case, defendant requested and was denied her right to have a jury decide any facts mandated by MCL 769.25(6) with respect to her sentence. Accordingly, we vacate her sentence for first-degree murder and remand for resentencing on that offense consistent with this opinion.

I. BACKGROUND

In November 2010, at the age of 17, defendant arranged to have her parents, Paul and Mara Skinner, murdered. Specifically,

> [t]he victims, defendant's parents, were viciously attacked in their bed in November 2010. Defendant's father was killed in the attack and defendant's mother suffered roughly 25 stab wounds. An investigation led to Jonathan Kurtz, defendant's boyfriend, and James Preston. The investigation also led to the discovery of a map of the neighborhood and a note containing tips on how to break into defendant's house and commit the murders. Cell phone

records revealed text messages between defendant, Kurtz, and Preston that indicated that the crime had been planned by all three. During an interview with police, defendant implicated Preston, then implicated Kurtz and Preston, and then admitted that she had talked to Kurtz about killing her parents. Defendant said that Kurtz was going to seek Preston's help.[1]

Defendant was charged in connection with the attacks and, following a trial, a jury convicted her of first-degree premeditated murder, MCL 750.316(1)(a), attempted murder, MCL 750.91, and conspiracy to commit murder, MCL 750.157a. On September 16, 2011, the trial court sentenced defendant to mandatory life without parole for the first-degree-murder conviction and life sentences each for the attempted-murder and conspiracy-to-commit-murder convictions. Defendant appealed her convictions and sentences.

While defendant's appeal was pending, on June 25, 2012, the United States Supreme Court decided *Miller*, 567 U.S. at ——, 132 S.Ct. at 2460, wherein the Court held that mandatory sentences of life without parole for juvenile offenders violated the Eighth Amendment. Subsequently, this Court affirmed defendant's convictions and life sentences for attempted murder and conspiracy, but remanded for resentencing on defendant's first-degree-murder conviction to consider the factors set forth in *Miller*.[2]

On July 11, 2013, the trial court held a resentencing hearing and again sentenced defendant to life without parole for the first-degree-murder conviction. Defendant again appealed her sentence. On March 4, 2014, while defendant's appeal was pending, MCL 769.25 took effect, which had been enacted in response to *Miller* and established a framework for imposing a sentence of life without parole on a juvenile convicted of, *inter alia*, first-degree murder. Meanwhile, this Court ordered defendant's appeal held in abeyance pending our Supreme Court's decision in *People v. Carp,* 496 Mich. 440, 852 N.W.2d 801 (2014), which concerned the retroactivity of *Miller*. Following the decision in *Carp,* this Court remanded defendant's case to the trial court for a second resentencing—third sentencing—hearing to be conducted in accordance with MCL 769.25; this Court retained jurisdiction.[3]

On second remand, defendant moved to empanel a jury, arguing at the resentencing hearing that a jury should make the factual findings mandated by MCL 769.25(6). The trial court denied defendant's motion, and this Court denied defendant's emergency application for leave to appeal that order.[4] Thereafter, the trial court held the second resentencing hearing on September 18, 19, and 24, 2014, and, after hearing evidence from both defendant and the prosecution, the court again sentenced defendant to life without parole for the first-degree-murder conviction. Defendant now appeals that sentence as of right, arguing, *inter alia*, that MCL 769.25 violates her Sixth Amendment right to a jury because it exposes her to a harsher penalty than was otherwise authorized by the jury verdict.

1. *People v. Skinner,* unpublished opinion per curiam of the Court of Appeals, issued February 21, 2013 (Docket No. 306903), p. 1, 2013 WL 951265.

2. *Id.*

3. *People v. Skinner,* unpublished order of the Court of Appeals, entered July 30, 2014 (Docket No. 317892).

4. *People v. Skinner,* unpublished order of the Court of Appeals, entered September 17, 2014 (Docket No. 323509).

II. STANDARD OF REVIEW

[1, 2] We review constitutional issues de novo. *People v. Nutt*, 469 Mich. 565, 573, 677 N.W.2d 1 (2004). Issues of statutory construction are also reviewed de novo. *People v. Williams*, 483 Mich. 226, 231, 769 N.W.2d 605 (2009).

III. GOVERNING LAW

This case brings us to the intersection of the Sixth and Eighth Amendments of the United States Constitution. Specifically, the issue before us illustrates, following *Miller*, the interplay between the Eighth Amendment's limitations with respect to sentencing a juvenile to life imprisonment without the possibility of parole and a juvenile's right to a jury trial under the Sixth Amendment. We proceed with a review of the seminal case of *Miller* before discussing *Miller*'s impact on Michigan's sentencing scheme; we then review relevant United States Supreme Court Sixth Amendment jurisprudence before applying that precedent to Michigan's post-*Miller* juvenile-sentencing scheme.

A. *MILLER v. ALABAMA*

Miller is part of a line of growth in the Supreme Court's Eighth Amendment jurisprudence relative to juvenile offenders. This precedent can in part be traced back to *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), wherein a plurality of the Court held that the Eighth Amendment categorically barred "the execution of any offender under the age of 16 at the time of the crime." *Roper v. Simmons*, 543 U.S. 551, 561, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), citing *Thompson*, 487 U.S. at 818–838, 108 S.Ct. 2687 (opinion by Stevens, J.). Subsequently, in *Roper*, 543 U.S. at 568–579, 125 S.Ct. 1183, the Court expanded on the rationale in the *Thompson* plurality and held that the Eighth Amendment categorically barred imposition of the death penalty on all juveniles under the age of 18 when their crimes were committed, irrespective of the offense. The Court reasoned that "[c]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Id.* at 568, 125 S.Ct. 1183 (quotation marks and citation omitted). The Court reasoned that because of the unique differences between juveniles and adults, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569, 125 S.Ct. 1183. In particular, the Court noted, juveniles exhibit " '[a] lack of maturity and underdeveloped sense of responsibility' " that " 'often result in impetuous and ill-considered actions and decisions.' " *Id.* (citation omitted) (alteration in original). Additionally, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and "the character of a juvenile is not as well formed as that of an adult." *Id.* at 569–570, 125 S.Ct. 1183. Thus, "neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders . . . ." *Id.* at 572, 125 S.Ct. 1183.

Following *Roper*, under the Eighth Amendment the maximum penalty that could be imposed on a juvenile offender was life imprisonment without the possibility of parole. The Court further limited that form of punishment in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), and *Miller*. Specifically, in *Graham*, the Court held that the Eighth Amendment categorically barred a sentence of life without parole for juvenile "nonhomicide offenders." *Graham*, 560 U.S. at 74, 130 S.Ct. 2011. The *Graham* Court reasoned that juveniles "who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving

of the most serious forms of punishment. . . ." *Id.* at 69, 130 S.Ct. 2011. The Court explained that, unlike "nonhomicide" offenses, homicide is unique with respect to its "moral depravity" and the injury it inflicts on its victim and the public and concluded: "It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis." *Id.* (quotation marks and citations omitted). The Court proceeded to establish a bright-line categorical bar on sentences of life without parole for juvenile nonhomicide offenders. *Id.* at 74, 130 S.Ct. 2011. Although a state was not "required to guarantee eventual freedom," juveniles convicted of nonhomicide offenses were to be afforded "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75, 130 S.Ct. 2011.

Building on *Roper* and *Graham*, the Supreme Court held in *Miller* that, irrespective of the offense, *mandatory* life sentences without the possibility of parole for juvenile offenders violated the Eighth Amendment. *Miller*, 567 U.S. at ——, 132 S.Ct. at 2460. Given the unique characteristics of juveniles, the Court reasoned, the Eighth Amendment required consideration of an offender's youthfulness during sentencing, something that mandatory sentencing schemes failed to do. *Id.* at ——, 132 S.Ct. at 2464–2466. The Court explained:

> Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. In the circumstances there, juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime. And in other contexts as well, the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate. "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." [*Id.* at ——, 132 S.Ct. at 2465–2466 (citation omitted).]

Drawing from capital punishment cases, the Supreme Court reasoned that life-without-parole sentences were analogous to capital punishment for juveniles and, therefore, the Eighth Amendment mandated individualized sentencing for this particularly harsh form of punishment. *Id.* at ——, 132 S.Ct. at 2466–2467. The *Miller* Court referred to *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), wherein the Supreme Court struck down a mandatory death-penalty sentencing scheme because the scheme "gave no significance to 'the character and record of the individual offender or the circumstances' of the offense, and 'exclude[ed] from consideration . . . the possibility of compassionate or mitigating factors.' " *Miller*, 567 U.S. at ——, 132 S.Ct. at 2467 (alteration in original). Additionally, the Supreme Court noted that

> [s]ubsequent decisions have elaborated on the requirement that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses. [*Id.* at ——, 132 S.Ct. at 2467 (citations omitted).]

In the context of juveniles, the Supreme Court's individualized sentencing jurisprudence illustrated the importance that "a sentencer have the ability to consider the mitigating qualities of youth" in assessing

culpability including, among other things, age, background, and mental and emotional development. *Id.* at ——, 132 S.Ct. at 2467 (quotation marks and citation omitted).

The Supreme Court concluded that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at ——, 132 S.Ct. at 2469. However, the Supreme Court did not categorically bar life-without-parole sentences for juveniles convicted of a homicide offense provided that the sentencer "take[s] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at ——, 132 S.Ct. at 2469. The Supreme Court cautioned that

> appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and *the rare juvenile offender whose crime reflects irreparable corruption.*" [*Id.* at ——, 132 S.Ct. at 2469, quoting *Roper*, 543 U.S. at 573, 125 S.Ct. 1183 (emphasis added).]

Thus, after *Miller*, mandatory life-without-parole sentences for juvenile offenders are unconstitutional in all cases; however, in homicide cases, an individualized life-without-parole sentence may be imposed when the crime reflects "irreparable corruption." The *Miller* Court did not establish a bright-line test to determine whether a juvenile's crime reflects irreparable corruption; instead, "*Miller* discussed a range of factors relevant to a sentencer's determination of whether a particular defendant is a " 'rare juvenile offender whose crime reflects irreparable corruption.' " ' *People v. Gutierrez*, 58 Cal.4th 1354, 1388, 171 Cal.Rptr.3d 421, 324 P.3d 245 (2014), quoting *Miller*, 567 U.S. at ——, 132 S.Ct. at 2469. Those factors were set forth as follows:

> . . . Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. [*Miller*, 567 U.S. at ——, 132 S.Ct. at 2468.]

Miller, therefore, categorically barred mandatory life-without-parole sentences for juveniles, but in doing so, the Supreme Court also set forth a framework for imposing that sentence when a juvenile's homicide offense reflects irreparable corruption. That is, the Supreme Court provided factors to be used during sentencing that serve as a guidepost for determining whether a juvenile's homicide offense reflects irreparable corruption.

B. MICHIGAN'S SENTENCING SCHEME POST–*MILLER*

Miller had a wide-ranging effect nationwide in that, with respect to juvenile of-

fenders, it invalidated state statutes that imposed mandatory life-without-parole-sentences.[5] In Michigan, the Legislature enacted 2014 PA 22, codified at MCL 769.25 and MCL 769.25a,[6] in response to *Miller*. Relevant to this case, MCL 769.25 provides in pertinent part:

> (1) This section applies to a criminal defendant who was less than 18 years of age at the time he or she committed an offense described in subsection (2) if either of the following circumstances exists:
>
> (a) The defendant is convicted of the offense on or after [March 4, 2014].
>
> (b) The defendant was convicted of the offense before [March 4, 2014] and either of the following applies:
>
> (*i*) The case is still pending in the trial court or the applicable time periods for direct appellate review by state or federal courts have not expired.
>
> (*ii*) On June 25, 2012 the case was pending in the trial court or the applicable time periods for direct appellate review by state or federal courts had not expired.
>
> (2) The prosecuting attorney may file a motion under this section to sentence a defendant described in subsection (1) to imprisonment for life without the possibility of parole if the individual is or was convicted of any of the following violations:
>
> * * *
>
> (b) A violation of ... [MCL 750.316]....[7]
>
> * * *
>
> (3) ... If the prosecuting attorney intends to seek a sentence of imprison-

5. See, e.g., Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 BC L. Rev. 553, 583 (2015) (noting that "in the mere two years since *Miller* was decided, the decision has been cited in more than 1000 cases nationwide" and that "sixteen state legislatures have enacted statutes in response to *Graham* and *Miller*, and many others are considering bills").

6. MCL 769.25a concerns the retroactivity of MCL 769.25, and it is not at issue in this case.

7. In addition to first-degree murder, MCL 769.25(2)(a) through (d) provide that a prosecuting attorney may move for imposition of a life-without-parole sentence for juveniles convicted of several other offenses. Subdivision (a) includes MCL 333.17764(7) (mislabeling drugs with intent to kill). Besides first-degree murder, Subdivision (b) includes MCL 750.16(5) (adulteration of drugs with intent to kill); MCL 750.18(7) (mixing drugs improperly with intent to kill); MCL 750.436(2)(e) (poisoning), and MCL 750.543f (terrorism). Subdivision (c) includes Chapter XXIII of the Michigan Penal Code, MCL 750.200 to MCL 750.212a, concerning explosives. And finally, Subdivision (d) includes any other violation involving the death of another for which parole eligibility is expressly denied by law. The issue of whether these offenses constitute "homicide offenses" under *Graham* and *Miller* for purposes of sentencing juvenile offenders to life without parole is not before this Court. See, e.g., *Graham*, 560 U.S. at 68–69, 130 S.Ct. 2011 (noting in categorically barring life-without-parole sentences for juveniles convicted of nonhomicide offenses that "because juveniles have lessened culpability they are less deserving of the most severe punishments" and that "defendants *who do not kill, intend to kill, or foresee that life will be taken* are categorically less deserving of the most serious forms of punishment than are murderers") (emphasis added). See also *Miller*, 567 U.S. at ——, 132 S.Ct. at 2475–2476 (Breyer, J., concurring) (stating that "[g]iven *Graham*'s reasoning, the kinds of homicide that can subject a juvenile offender to life without parole *must exclude instances where the juvenile himself neither kills nor intends to kill the victim*") (emphasis added). For purposes of this case, there is no dispute that premeditated first-degree murder constitutes a homicide offense under *Graham* and *Miller* for which defendant is eligible to receive life without parole.

ment for life without the possibility of parole for a case described under subsection (1)(b), the prosecuting attorney shall file the motion within 90 days after [March 4, 2014]. The motion shall specify the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole.

(4) If the prosecuting attorney does not file a motion under subsection (3) within the time periods provided for in that subsection, *the court shall sentence the defendant to a term of years* as provided in subsection (9).

* * *

(6) 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[sic] U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.

(7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.

* * *

(9) If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years. [Emphasis added.]

This legislation "significantly altered Michigan's sentencing scheme for juvenile offenders convicted of crimes that had previously carried a sentence of life without parole." *Carp,* 496 Mich. at 456, 852 N.W.2d 801. Specifically, under this new scheme,

> [r]ather than imposing fixed sentences of life without parole on all defendants convicted of violating MCL 750.316, *MCL 769.25 now establishes a default sentencing range* for individuals who commit first-degree murder before turning 18 years of age. Pursuant to the new law, absent a motion by the prosecutor seeking a sentence of life without parole,
>
> > *the court shall sentence the individual to a term of imprisonment* for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years. [MCL 769.25(4) and (9).]
>
> When, however, the prosecutor does file a motion seeking a life-without-parole sentence, the trial court "shall conduct a hearing on the motion as part of the sentencing process" and "shall consider the factors listed in *Miller v. Alabama*. . . ." MCL 769.25(6). Accordingly, the sentencing of juvenile first-degree-murder offenders now provides for the so-called "individualized sentencing" procedures of *Miller.* [*Id.* at 458–459, 852 N.W.2d 801 (emphasis added) (bracketed citation in original).]

Thus, in response to *Miller,* and as explained in *Carp,* the Michigan Legislature created a default sentence for juvenile defendants convicted of first-degree murder. The default sentence is a term of years. See MCL 769.25(4) (providing that absent the prosecution's motion for a life-without-

parole sentence, "the court *shall sentence the defendant to a term of years* as provided in subsection (9)") (emphasis added). Alternatively, a life-without-parole sentence may be imposed if the following framework is adhered to: (1) the prosecution timely files a motion seeking a life-without-parole sentence, (2) the trial court holds a sentencing hearing, (3) at the hearing, the trial court considers the factors listed in *Miller* (and "may consider any other criteria relevant to its decision"), and (4) the trial court specifies "the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed" (and "may consider evidence presented at trial *together with any evidence presented at the sentencing hearing*"). MCL 769.25(3), (6), and (7) (emphasis added).

Defendant contends that this sentencing scheme violates her Sixth Amendment right to a jury because it exposes her to a potential life-without-parole sentence, which is greater than the sentence otherwise authorized by the jury verdict standing alone.

The *Miller* Court did not address the issue of *who* should decide whether a juvenile offender receives a life-without-parole sentence, and we are unaware of any court that has addressed the issue. In the final paragraph of its opinion, the Court stated: "*Graham*, *Roper*, and our individualized sentencing decisions make clear that *a judge or jury* must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller*, 567 U.S. at ——, 132 S.Ct. at 2475 (emphasis added). This passing reference to "a judge or jury" is not dispositive of the issue. "The Court's decision in *Miller* does not discuss who is empowered to make the sentencing decision that the case involves a 'rare' instance where the juvenile is 'irreparably corrupt' and may be sentenced to life without parole." Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 BC L. Rev. 553, 569 (2015). Instead, "*Miller* generally avoids the issue by referencing the 'sentencer' throughout the opinion, rather than specifying a judge or a jury." *Id.* Moreover, "[b]ecause Sixth Amendment jury rights can be waived, *Miller*'s reference to the judge as a possible sentencer is hardly dispositive." *Id.* (citation omitted). Indeed, in declining to address this issue,[8] our Supreme Court noted in *Carp* that, given recent Sixth Amendment jurisprudence, "*Miller*'s reference to individualized sentencing being performed by a '*judge* or jury' might merely be instructive on the issue but not dispositive." *Carp*, 496 Mich. at 491 n. 20, 852 N.W.2d 801.

Because *Miller* did not directly address the issue of who decides a life sentence without the possibility of parole, and because there is no caselaw on point, we turn to the United States Supreme Court's relevant Sixth Amendment jurisprudence for guidance.

C. SIXTH AMENDMENT RIGHT TO A JURY

[3] In relevant part, the Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the

8. In *Carp,* our Supreme Court noted:

> As none of the defendants before this Court asserts that his sentence is deficient because it was not the product of a jury determination, we find it unnecessary to further opine on this issue and leave it to another day to determine whether the individualized sentencing procedures required by *Miller* must be performed by a jury in light of *Alleyne* [*v. United States,* 570 U.S. ——, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013)]. [*Carp,* 496 Mich. at 491 n. 20, 852 N.W.2d 801.]

accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." U.S. Const. Am. VI. The rights afforded under the Sixth Amendment are incorporated to the states by the Due Process Clause of the Fourteenth Amendment. *Presley v. Georgia*, 558 U.S. 209, 211–212, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010). "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt' " and are deeply rooted in our nation's jurisprudence:

> [T]he historical foundation for our recognition of these principles extends down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540–541 (4th ed. 1873), trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours. . . ." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769). . . . [*Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (citation omitted) (all alterations but first in original).]

Cognizant of this historical backdrop, the United States Supreme Court has recently expanded the scope of a criminal defendant's Sixth Amendment right to a jury in several cases commencing with *Apprendi*. In that case, the defendant pleaded guilty of, *inter alia*, a second-degree weapons offense, which carried a maximum penalty of between 5 and 10 years' imprisonment under New Jersey law. *Id.* at 469–470, 120 S.Ct. 2348. Thereafter, the prosecutor filed a motion to enhance the defendant's sentence under a New Jersey hate-crime statute that permitted a sentencing judge to impose an enhanced sentence of up to 20 years upon a finding that the offender acted "with a purpose to intimidate an individual or group" because of membership in a protected class. *Id.* Following a hearing, the sentencing judge found by a preponderance of the evidence that the defendant had been motivated by racial animus and sentenced him to 12 years' imprisonment, 2 more than the maximum authorized under the law without the enhancement. *Id.* at 471, 120 S.Ct. 2348.

On appeal, the defendant argued, in part, that racial animus had to be proved to a jury beyond a reasonable doubt. *Id.* The Supreme Court agreed, holding that the sentence violated the defendant's right to " 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' " *Id.* at 477, 120 S.Ct. 2348 (citation omitted) (alteration in original). The Court reasoned that the defendant's Sixth Amendment jury right attached to both the weapon offense and the hate-crime enhancement because "New Jersey threatened [the defendant] with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race." *Id.* at 476, 120 S.Ct. 2348. "Merely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently." *Id.* Rather, "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494, 120 S.Ct. 2348. This is because "[o]ther than the fact of a prior

conviction, *any fact that increases the penalty for a crime* beyond the prescribed statutory maximum *must be submitted to a jury* and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. 2348 (emphasis added).

Two years later, in *Ring v. Arizona*, 536 U.S. 584, 588, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the Supreme Court applied *Apprendi* to Arizona's death-penalty sentencing scheme, which authorized a trial judge to increase a capital defendant's maximum sentence from life imprisonment to death on the basis of judicially found aggravating factors. The Supreme Court concluded that, " '[i]n effect, the required finding . . . expose[d] [the defendant] to a greater punishment than that authorized by the jury's guilty verdict.' " *Id.* at 604, 122 S.Ct. 2428 (citation omitted) (second alteration in original). Thus, the aggravating factors acted as the "functional equivalent" of elements of a greater offense and were required to be proved to a jury beyond a reasonable doubt. *Id.* at 609, 122 S.Ct. 2428. The Court explained that when " 'the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.' " *Id.* at 605, 122 S.Ct. 2428, quoting *Apprendi*, 530 U.S. at 494 n. 19, 120 S.Ct. 2348. The relevant inquiry, the Supreme Court noted, was "one not of form but of effect," and "[*i*]*f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact*—no matter how the State labels it—*must be found by a jury beyond a reasonable doubt.*" *Id.* at 602, 122 S.Ct. 2428 (quotation marks and citation omitted) (emphasis added).[9]

Taken together, *Apprendi* established and *Ring* reaffirmed that other than a prior conviction, *any* finding of fact that increases a criminal defendant's maximum sentence must be proved to a jury beyond a reasonable doubt. "In each case, we concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding." *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In the years following, the Supreme Court applied *Apprendi* to invalidate two state sentencing schemes in Washington and California, both of which share similarities with the sentencing scheme at issue in this case.

In *Blakely*, the Supreme Court held that Washington's determinate sentencing scheme ran afoul of *Apprendi*. In that case, the defendant pleaded guilty of, *inter alia*, second-degree kidnapping with a firearm, a Class B felony. *Id.* at 299, 124 S.Ct. 2531. State law provided that Class B felonies in general carried a statutory maximum of 10 years' imprisonment; however, under the state's sentencing reform act, the standard sentence range for the second-degree kidnapping offense was 49 to 53 months. *Id.* The reform act authorized, but did not require, the sentencing judge to make an upward departure from the standard range upon a finding of " 'substantial and compelling reasons justi-

9. In arriving at its holding, the *Ring* Court overruled, in part, *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), which had rejected a Sixth Amendment challenge to the same sentencing scheme approximately 12 years earlier. The Court reasoned that *Walton* and *Apprendi* were "irreconcilable," explaining that "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536 U.S. at 589, 122 S.Ct. 2428.

fying an exceptional sentence.' " *Id.*, quoting Wash. Rev. Code 9.94A.120(2). The act listed nonexhaustive aggravating factors justifying such a departure. *Blakely*, 542 U.S. at 299, 124 S.Ct. 2531.

Relying on the reform act, the sentencing judge departed from the recommended standard sentence range and sentenced the defendant to 90 months' imprisonment—37 months more than the upper limit of the standard range—after finding that the defendant had acted with "deliberate cruelty," one of the statutory grounds for departure. *Id.* at 300, 124 S.Ct. 2531. The state argued, in part, that there was no *Apprendi* violation because the statutory maximum authorized by law was the general 10–year maximum for Class B felonies as opposed to the 49 to 53 month standard range for second-degree kidnapping. *Id.* at 303, 124 S.Ct. 2531. The Supreme Court rejected this argument, explaining that for purposes of *Apprendi*, the "statutory maximum" is the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* The Supreme Court stated:

> In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment" and the judge exceeds his proper authority. [*Id.* at 303–304, 124 S.Ct. 2531 (citation omitted).]

The Court also rejected the state's argument that the reform act did not violate *Apprendi* because the sentencing judge retained discretion regarding whether to impose an enhanced sentence, as explained in more detail in a subsequent case:

> The State in *Blakely* had endeavored to distinguish *Apprendi* on the ground that "[u]nder the Washington guidelines, an exceptional sentence is within the court's discretion as a result of a guilty verdict." We rejected that argument. The judge could not have sentenced Blakely above the standard range without finding the additional fact of deliberate cruelty. Consequently, that fact was subject to the Sixth Amendment's jury-trial guarantee. [*Cunningham v. California*, 549 U.S. 270, 283, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007), citing *Blakely*, 542 U.S. at 304–314, 124 S.Ct. 2531 (citation omitted).]

The *Blakely* Court concluded that because "[t]he judge in this case could not have imposed the exceptional 90–month sentence solely on the basis of the facts admitted in the guilty plea," the sentence ran afoul of the Sixth Amendment. *Blakely*, 542 U.S. at 304–305, 124 S.Ct. 2531.

After deciding *Blakely*, the Supreme Court held in *Cunningham* that California's determinate sentencing law (DSL) violated the Sixth Amendment.[10] In *Cunningham*, the defendant had been convicted of a sex offense. *Cunningham*, 549 U.S. at 275, 127 S.Ct. 856. Under the DSL, the offense was punishable by a lower (6–year), middle, (12–year) and upper (16–year) sentence. *Id.* The DSL provided that " 'the court shall order im-

10. In another case following *Blakely*, the Supreme Court struck down certain provisions of the Federal Sentencing Guidelines on grounds that they violated the Sixth Amendment to the extent that they mandated enhanced sentences based on judicially found facts. *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Given that this case does not involve sentencing guidelines, *Booker* is not highly instructive for purposes of our analysis.

position of the middle term, unless there are circumstances in aggravation or mitigation of the crime.' " *Id.* at 277, 127 S.Ct. 856 (citation omitted). At a posttrial sentencing hearing, the sentencing judge departed from the 12–year middle term and imposed the 16–year upper term after finding by a preponderance of the evidence that there were six aggravating circumstances. *Id.* at 275–276, 127 S.Ct. 856.

On appeal, the Supreme Court held that the DSL violated the Sixth Amendment, explaining, "This Court has repeatedly held that, under the Sixth Amendment, *any fact that exposes a defendant to a greater potential sentence must be found by a jury,* not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Id.* at 281, 127 S.Ct. 856 (emphasis added). The Court concluded that "[b]ecause the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment." *Id.* at 293, 127 S.Ct. 856.

In arriving at its holding, the *Cunningham* Court rejected the California Supreme Court's view that the DSL resembled a permissible "advisory system," explaining:

> Under California's system, judges are not free to exercise their discretion to select a specific sentence within a defined range. California's Legislature has adopted sentencing triads, three fixed sentences with no ranges between them. Cunningham's sentencing judge had no discretion to select a sentence within a range of 6 to 16 years. Her instruction was to select 12 years, nothing less and nothing more, unless she found facts allowing the imposition of a sentence of 6 or 16 years. Factfinding to elevate a sentence from 12 to 16 years, our decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies. [*Id.* at 292, 127 S.Ct. 856 (quotation marks and citation omitted).]

The *Cunningham* Court concluded, "Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." *Id.* at 293, 127 S.Ct. 856.

Apprendi and its progeny concerned judicial fact-finding in the context of a criminal defendant's maximum sentence. In *Alleyne v. United States,* 570 U.S. ——, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), the Supreme Court applied *Apprendi* in the context of mandatory minimum sentences. In *Alleyne,* a jury convicted the defendant of a federal robbery offense. The sentencing court increased the defendant's mandatory minimum sentence from five to seven years after finding that the defendant had brandished a weapon during the commission of the robbery. The defendant argued that the jury had not determined that he brandished a weapon and therefore he was not subject to the higher sentence. *Id.* at ——, 133 S.Ct. at 2155–2156. The Supreme Court agreed, rejecting the previous distinction it had drawn in *Harris v. United States,* 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002)—one that distinguished "between facts that increase the statutory maximum and facts that increase only the mandatory minimum." *Alleyne,* 570 U.S. at ——, 133 S.Ct. at 2155. Instead, the *Alleyne* Court explained that "[t]he touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense." *Id.* at ——, 133 S.Ct. at 2158. And "a fact is by definition an element of the offense and must be submitted

to the jury *if it increases the punishment above what is otherwise legally prescribed.*" *Id.* at ——, 133 S.Ct. at 2158 (emphasis added). This "definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor." *Id.* at ——, 133 S.Ct. at 2158. The Supreme Court concluded:

> [T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact. [*Id.* at ——, 133 S.Ct. at 2162.]

[4] *Apprendi* through *Alleyne* represents a line of growth in the Supreme Court's Sixth Amendment jurisprudence concerning the scope of a criminal defendant's right to a jury. This jurisprudence can be summarized as follows: Other than a prior conviction, *any fact* that increases either the floor or the ceiling of a criminal defendant's sentence beyond that which a court may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant must be submitted to a jury and proved beyond a reasonable doubt. See *Blakely,* 542 U.S. 296, 124 S.Ct. 2531; *Apprendi,* 530 U.S. 466, 120 S.Ct. 2348; *Ring,* 536 U.S. 584, 122 S.Ct. 2428; *Cunningham,* 549 U.S. 270, 127 S.Ct. 856; *Alleyne,* 570 U.S. ——, 133 S.Ct. 2151. We proceed by applying this jurisprudence to the sentencing scheme at issue in this case.

IV. APPLICATION

A. MCL 769.25 VIOLATES THE SIXTH AMENDMENT

[5] Our application of the Supreme Court's Sixth Amendment jurisprudence begins with a determination of whether the findings mandated by MCL 769.25 constitute elements of the offense. *Alleyne,* 570 U.S. at ——, 133 S.Ct. at 2162. To answer that question, we must determine whether the findings "alter[ ] the legally prescribed punishment so as to aggravate it" and, if so, whether the findings "necessarily form[ ] a constituent part of a new offense and must be submitted to the jury" and proved beyond a reasonable doubt. *Id.* at ——, 133 S.Ct. at 2162.

In this case, following the jury's verdict and absent a prosecution motion seeking a life-without-parole sentence followed by additional findings by the trial court, the legally prescribed maximum punishment that defendant faced for her first-degree-murder conviction was imprisonment for a term of years. Specifically, MCL 750.316 provides in relevant part as follows:

> (1) *Except as provided in* ... MCL 769.25 and 769.25a, a person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life without eligibility for parole:
>
> (a) Murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing. [Emphasis added.]

The phrase "[e]xcept as provided in" means that punishment for first-degree murder is contingent on the provisions of MCL 769.25. As noted, MCL 769.25 contains provisions that establish a default term-of-years prison sentence for a juvenile convicted of first-degree murder. Specifically, the statute provides in pertinent part that "[t]he prosecuting attorney may file a motion under this section to sentence a [juvenile defendant] to imprisonment for life without the possibility of

parole if the individual is or was convicted of" first-degree murder. MCL 769.25(2)(b). Absent this motion, "the court *shall sentence the defendant to a term of years*...." MCL 769.25(4) (emphasis added). The effect of this sentencing scheme clearly establishes a default term-of-years sentence for juvenile defendants convicted of first-degree murder. See *Carp,* 496 Mich. at 458, 852 N.W.2d 801 (explaining that "MCL 769.25 now *establishes a default sentencing range* for individuals who commit first-degree murder before turning 18 years of age") (emphasis added); [11] MCL 769.25(4) (providing that, absent the prosecution's motion to impose a sentence of life without parole, "*the court shall sentence the defendant to a term of years* as provided in subsection (9)") (emphasis added).[12]

Stated differently, at the point of conviction, absent a motion by the prosecution and without additional findings on the *Miller* factors, the maximum punishment that a trial court may impose on a juvenile convicted of first-degree murder is a term-of-years prison sentence. See *Blakely,* 542 U.S. at 303–304, 124 S.Ct. 2531 (holding that for purposes of *Apprendi,* the " 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings"). Thus, following her jury conviction, defendant was subject to a term-of-years prison sentence. Once the prosecuting attorney filed a motion to impose a life-without-parole sentence, defendant was exposed to a potentially harsher penalty contingent on findings made by the trial court. This violated defendant's right to " 'a jury determination that [she] is guilty of every element of the crime with which [she] is charged, beyond a reasonable doubt,' " because "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 477, 490, 120 S.Ct. 2348 (citation omitted).

The Legislature conditioned defendant's life-without-parole sentence on two things: (1) the prosecution's filing of a motion to impose the sentence and (2) the trial court's findings with respect to the *Miller* factors and "any other criteria relevant to its decision...." MCL 769.25(6). This scheme authorized the trial court to enhance defendant's sentence from a term of years to life without parole on the basis of findings made by the court, not a jury. Therefore, the sentencing scheme is akin to the schemes at issue in *Apprendi, Ring, Blakely*, and *Cunningham.* Each of those cases involved a sentencing scheme that authorized a court to enhance a defendant's maximum sentence solely on the basis of judicial fact-finding. The United States Supreme Court found these schemes unconstitutional, explaining, "This Court has repeatedly held that, under the Sixth Amendment, *any fact that exposes a*

11. Our dissenting colleague erroneously contends that we "conflate" the language in *Carp. Post* at 513–15. To the contrary, Justice MARKMAN, writing for the majority in *Carp,* described MCL 769.25 as follows: "Rather than imposing fixed sentences of life without parole on all defendants convicted of violating MCL 750.316, MCL 769.25 now *establishes a default sentencing range* for individuals who commit first-degree murder before turning 18 years of age." *Carp,* 496 Mich. at 458, 852 N.W.2d 801 (emphasis added). The dissent fails to articulate what part of this language we "conflate."

12. MCL 769.25(9) governs a term-of-years sentence for a juvenile defendant, and it requires a sentencing court to impose "a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years."

defendant to a greater potential sentence must be found by a jury, not a judge. . . ." *Cunningham,* 549 U.S. at 281, 127 S.Ct. 856 (emphasis added). Similarly, the sentencing scheme in this case cannot stand when examined under the lens of the Supreme Court's Sixth Amendment jurisprudence.

Clearly, the findings mandated by MCL 769.25(6) "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict," *Apprendi,* 530 U.S. at 494, 120 S.Ct. 2348, and therefore act as the "functional equivalent" of elements of a greater offense that must be proved to a jury beyond a reasonable doubt, *Ring,* 536 U.S. at 609, 122 S.Ct. 2428. An enhanced punishment under MCL 769.25 is not based merely on defendant's prior convictions, on facts admitted by defendant, or on facts that are part and parcel of the elements that were submitted to the jury during the guilt-phase of the proceeding Rather, like in *Apprendi,* 530 U.S. at 476, 120 S.Ct. 2348, in this case the state threatened defendant with certain pains—i.e., a term-of-years sentence—following her jury conviction of first-degree murder and with additional pains—i.e., life without parole—following additional findings by the trial court. "Merely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently." *Id.* The effect of MCL 769.25 plainly subjects defendant to harsher punishment on the basis of judicially found facts in contravention of the Sixth Amendment.

We note that MCL 769.25 is unique to Michigan's sentencing scheme, so our Supreme Court's recent decision in *People v. Lockridge,* 498 Mich. 358, 870 N.W.2d 502 (2015), while not directly on point, lends support to our conclusion that a defendant's maximum sentence cannot be increased on the basis of judicial fact-finding. In *Lockridge,* our Supreme Court was tasked in relevant part with addressing whether, for purposes of *Alleyne,* "a judge's determination of the appropriate sentencing guidelines range ... establishes a 'mandatory minimum sentence,' such that the facts used to score the offense variables must be admitted by the defendant or established beyond a reasonable doubt to the trier of fact. . . ." *People v. Lockridge,* 496 Mich. 852, 846 N.W.2d 925 (2014). The *Lockridge* Court answered this question in the affirmative, holding that Michigan's sentencing guidelines were constitutionally deficient under *Apprendi* as extended by *Alleyne. Lockridge,* 498 Mich. at 364, 870 N.W.2d 502. The deficiency was "the extent to which the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e., the 'mandatory minimum' sentence under *Alleyne.*" *Id.*

As a remedy, the *Lockridge* Court severed MCL 769.34(2) "to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory" and struck down the requirement in MCL 769.34(3) "that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure." *Id.* at 364–365, 870 N.W.2d 502. Going forward, "a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence," but "a guidelines minimum sentence range calculated in violation of *Apprendi* and *Alleyne* is advisory only and ... sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness." *Id.* at 365, 870 N.W.2d 502.

Lockridge concerned the constitutionality of Michigan's sentencing guidelines—guidelines that govern a defendant's mandatory-minimum sentence. Importantly, however, the *Lockridge* Court addressed the constitutionality of the guidelines with the understanding that a defendant's *maximum* sentence is fixed by law and not affected by the guidelines. See *id.* at 377–378, 870 N.W.2d 502 (noting that "scoring the sentencing guidelines and establishing the guidelines minimum sentence range does not alter the maximum sentence"). In contrast, this case concerns the enhancement of a juvenile defendant's *maximum* sentence for first-degree murder under MCL 750.316 and MCL 769.25. An enhanced maximum sentence imposed under this statute is not governed by the sentencing guidelines, but rather is part of a legislative response to the United States Supreme Court's holding in *Miller.* Indeed, this case is unlike any other sentencing case decided in Michigan in that MCL 769.25 is a sui generis exception to the rule in Michigan that apart from the habitual-offender statutes, maximum sentences are fixed by law and cannot be increased on the basis of judicially found facts. See, e.g., *People v. McCuller,* 479 Mich. 672, 694, 739 N.W.2d 563 (2007) (noting that apart from the habitual-offender statutes, a criminal defendant's maximum sentence in Michigan is "prescribed by MCL 769.8, which requires a sentencing judge to impose no less than the prescribed statutory maximum sentence as the maximum sentence for every felony conviction") (quotation marks and citation omitted).

[6] That this case does not involve the scoring of sentencing guidelines to fix a mandatory minimum sentence, but rather involves the constitutionality of increasing a maximum sentence, places it squarely within the familiar purview of *Apprendi, Ring, Blakely,* and *Cunningham.* The analysis, therefore, is simple: Apart from a prior conviction or a fact admitted by the defendant, any fact that exposes a defendant to an increased maximum sentence beyond that which is authorized by the jury's verdict standing alone must be submitted to a jury and proved beyond a reasonable doubt. Moreover, in the context of increasing a maximum sentence using judicially found facts, judicial discretion cannot substitute for a defendant's constitutional right to a jury. See, e.g., *Alleyne,* 570 U.S. at ——, 133 S.Ct. at 2162 (observing that "if a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment, even if the defendant ultimately received a sentence falling within the original sentencing range (*i.e.,* the range applicable without that aggravating fact")); *Blakely,* 542 U.S. at 305, 305 n. 8, 124 S.Ct. 2531 (noting that when a court acquires the authority to impose an enhanced sentence "only upon finding some additional fact," "[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence" and it is therefore constitutionally deficient).

The prosecution argues that MCL 769.25 does not expose defendant to an increased penalty because "[a]t the time of conviction, [defendant] faced the potential penalty of life without possibility of parole" and the "maximum allowable punishment is—at both the point of conviction and at sentencing—life without the possibility of parole." Similarly, the Attorney General, as amicus curiae, argues: "The statutory maximum penalty for first-degree murder—even for minors—is life without parole. . . . No facts are needed to authorize the sentence, beyond those contained in the jury's verdict." However, if as the prosecution and the Attorney General contend, the "maximum allowable punishment" at the point of defendant's

conviction is life without parole, then that sentence would offend the Constitution. Under *Miller,* a mandatory *default sentence* for juveniles *cannot* be life imprisonment without the possibility of parole. Such a sentence would not be an individualized sentence taking into account the factors enumerated in *Miller.* See, e.g., Russell, 56 BC L. Rev. at 582 (explaining that under *Miller,* "[t]he default is *not* life without parole" and that "[i]t is only in the rare or unusual case—where a factual finding of irreparable corruption is made—that a juvenile may be exposed to life without parole"). This is why MCL 769.25 creates a default term-of-years sentence for juveniles convicted under MCL 750.316. That is, at the point of conviction the maximum sentence that defendant faced, absent additional findings by the trial court, was a term-of-years sentence. Like in *Apprendi, Ring, Blakely*, and *Cunningham,* defendant's maximum sentence here could only be enhanced following findings made by the court.

Furthermore, the United States Supreme Court rejected a similar argument in *Ring.* In that case, Arizona argued in part that its capital punishment was constitutional because Arizona's first-degree-murder statute specified that "death or life imprisonment" were the only sentencing options. *Ring,* 536 U.S. at 603–604, 122 S.Ct. 2428. Therefore, according to Arizona, when the sentencing judge sentenced the defendant to death, he was "sentenced within the range of punishment authorized by the jury verdict." *Id.* at 604, 122 S.Ct. 2428. The Supreme Court rejected this argument, explaining that "[t]he Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense . . . ." *Id.* (quotation marks and citation omitted). Instead, the Supreme Court examined the effect of the statute over its form, noting that, "[i]n effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' " *Id.,* quoting *Apprendi,* 530 U.S. at 494, 120 S.Ct. 2348 (second, third, and fourth alterations in original). Similarly, in this case, MCL 750.316 authorizes a life-without-parole sentence for juveniles "only in a formal sense," and, in effect, the findings mandated by MCL 769.25(6) subjected defendant to greater punishment than that authorized by the jury's guilty verdict.

The prosecution and the Attorney General attempt to distinguish *Ring* from the present case by arguing that, unlike in *Ring,* which required the sentencing judge to find one of several specified aggravating factors, MCL 769.25 does not mandate the presence of any factor before authorizing a life-without-parole sentence. This is a distinction without any real meaning that was rejected in *Blakely,* wherein the Court explained:

> Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact. [*Blakely,* 542 U.S. at 305, 124 S.Ct. 2531.]

As in *Blakely,* what is critical is that the trial court in this case acquired authority to enhance defendant's sentence from a term of years to life without parole "only upon finding some additional fact." *Id.* In that respect, this case is not distinguishable from *Ring, Blakely*, or any of the other United States Supreme Court decisions relative to defendant's Sixth Amendment rights discussed earlier.

The Attorney General also argues that *Ring* is distinguishable because, unlike in *Ring,* in this case the factors in MCL 769.25(6) do not enhance the sentence, but instead act as mitigating factors that can bring the sentence down to a term of years. The Attorney General reads the statute backwards. The term-of-years sentence is the default that can be enhanced on the basis of judicial findings. Thus, under the statutory configuration, the *Miller* factors are used to seek enhancement of defendant's punishment.

Similarly, the Attorney General argues that neither MCL 769.25 nor *Miller* "requires any fact to be found before a trial court imposes a sentence of life without parole" and, therefore, the life-without-parole sentence was available at the time of conviction. This argument ignores the plain language of the statute and misconstrues *Miller.* Specifically, MCL 769.25(6) provides that upon the prosecution's motion, "the court *shall* conduct a hearing . . . as part of the sentencing process" and "*shall consider the factors* listed in [*Miller*]." (Emphasis added.) By their very nature, the factors enumerated in *Miller* necessitate factual findings. See, e.g., *Gutierrez,* 58 Cal.4th at 1388, 171 Cal.Rptr.3d 421, 324 P.3d 245 (explaining that "*Miller* discussed a range of factors relevant to a sentencer's determination of whether a particular defendant is a rare juvenile offender whose crime reflects irreparable corruption") (emphasis added) (quotation marks and citation omitted); Russell, 56 BC L. Rev. at 581 ("[T]he consideration of mitigation and aggravation under *Miller* is part of making a particular factual determination: is the juvenile irreparably corrupt and incapable of rehabilitation?"). Moreover, "*Miller* concludes that life without parole is an inappropriate sentence for most juveniles, and may be given only in rare circumstances where certain facts are established. Thus, the factual finding of 'irreparable corruption' aggravates—not mitigates—the penalty." Russell, 56 BC L. Rev. at 582.[13]

In addition, as noted, MCL 769.25(7) provides that in imposing the sentence, "the court *shall specify* on the record *the aggravating and mitigating circumstances considered* by the court and the court's reasons supporting the sentence imposed." (Emphasis added.) Thus, the language of the statute necessarily requires the trial court to make findings of fact before imposing a sentence of life without parole.[14]

13. Our dissenting colleague erroneously posits that we "latch[ ] onto a statement in a law review article" to support the proposition that "irreparable corruption" is an "aggravating factor." *Post* at 513–14. To the contrary, we do not hold that "irreparable corruption" is an "aggravating factor." Rather, the *Miller* Court held that life imprisonment without parole for juvenile homicide offenders is constitutionally permissible only in those rare cases in which a juvenile's crime reflects irreparable corruption. *Miller,* 567 U.S. at ——, 132 S.Ct. at 2469. The factors provided by the *Miller* Court serve as a guidepost during the sentencing phase to determine if the juvenile's offense reflects irreparable corruption. Absent this determination, life imprisonment without parole violates the Eighth Amendment. Moreover, this is not a maxim derived from a law review article. See, e.g., *Gutierrez,* 58 Cal.4th at 1388, 171 Cal.Rptr.3d 421, 324 P.3d 245 (explaining that "*Miller* discussed a range of factors relevant to a sentencer's determination of whether a particular defendant is a " 'rare juvenile offender whose crime reflects irreparable corruption.' "'), quoting *Miller,* 567 U.S. at ——, 132 S.Ct. at 2469.

14. The dissent acknowledges that MCL 769.25(7) requires the sentencing court to "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." However, the dissent states, "But nowhere does the statute require the trial court to make any particular finding of fact before it is authorized to impose a

In a similar argument, the dissent posits that *Miller* "hardly establishes a list of factors that must be met before a sentence of life without parole may be imposed" and states that *Miller* does not "set[ ] forth any particular facts that must be found before a sentence of life without parole may be imposed." *Post* at 512. Instead, according to the dissent, *Miller* "merely require[s] the sentencing court to take into account the individual circumstances of the juvenile offender before determining whether a sentence of life without parole is appropriate in each particular case." *Post* at 513. The dissent concludes that because a sentencing court need only "consider" the *Miller* factors as opposed to make findings on the factors, MCL 769.25 does not violate *Apprendi* and its progeny. Conveniently, the dissent fails to articulate how the court should take into account, without making any findings of fact, a juvenile's immaturity, impetuosity, his or her failure to appreciate risks and consequences, his or her family and home environment, whether the home environment is brutal or dysfunctional, whether the juvenile could extricate herself from the home environment, the circumstances of the offense, the extent of the juvenile's participation in the offense conduct, whether familial and peer pressures may have affected the juvenile, whether the juvenile might have been charged and convicted of a lesser offense if not for youthful incompetence, whether the juvenile was able to deal with police officers or prosecutors, whether the juvenile was able to assist trial counsel, and, importantly, whether the juvenile exhibits potential for rehabilitation. See *Miller*, 567 U.S. at ——, 132 S.Ct. at 2468. The dissent's contention that there exists a means by which all these factors must be "considered" without leading to a single finding of fact defies logic.[15]

In an attempt to bolster its flawed analysis, the dissent focuses on the word "consider" in MCL 769.25(6). Specifically, the statute provides that "[a]t the hearing, the trial court shall *consider* the factors listed in [*Miller*]. . . ." (Emphasis added.) The dissent contends that because the statute directs a court to "consider" the factors as opposed to make findings on the factors, the statute therefore does not require judicial fact-finding to increase a juvenile homicide offender's maximum sentence to life without parole. However, consider-

sentence of life without parole." *Post* at 512. The fallacy in this statement, of course, is that it fails to recognize that, in order to consider and specify an aggravating circumstance on the record, a trial court necessarily must first make findings as to the presence and relevance of the aggravating circumstance. Moreover, if the dissent were correct in its contention that MCL 769.25(7) did not require the sentencing court to make any findings of fact, then the statute would offend the Eighth Amendment because, as discussed in detail above, *Miller* requires an individualized factual inquiry before a juvenile may be sentenced to life without parole. Furthermore, the dissent's argument "overlooks *Apprendi*'s instruction that the relevant inquiry is one not of form, but of effect." *Ring*, 536 U.S. at 604, 122 S.Ct. 2428 (quotation marks and citation omitted). In effect, by directing the sentencing court to "consider" the *Miller* factors and specify the aggravating and mitigating circumstances on the record, the statute requires the sentencing court to make findings of fact before imposing the harsher sentence of life without parole.

15. In addition, the basic assertion of the dissent is that we reach our conclusions based on what the dissent labels "a false premise." *Post* at 506. Specifically, the dissent contends that our opinion states that "*Apprendi* and its progeny require that *all* facts relating to a sentence must be found by a jury." *Post* at 506. However the dissent fails to cite where that statement is made, we presume because our opinion does not so state, leading, of course, to the inescapable conclusion that it is the dissent whose argument is based entirely on a false premise.

ation of factors necessarily requires fact-finding, and the terms are often used interchangeably in the law. For example, in the context of child custody proceedings, MCL 722.23 sets forth best-interest factors "to be *considered*, evaluated, and determined" by the trial court, and it is certainly well-settled law that this legislative mandate requires a trial court to make factual findings on these factors. (Emphasis added.) See, e.g., *Bowers v. Bowers*, 198 Mich.App. 320, 328, 497 N.W.2d 602 (1993) (noting that in a child custody case, "[t]he trial court must consider each of these [best-interest] factors and explicitly state its *findings* and conclusions regarding each") (emphasis added). Similarly, in deciding whether to award alimony, "trial courts should *consider*" several spousal support factors, *Berger v. Berger*, 277 Mich.App. 700, 726–727, 747 N.W.2d 336 (2008) (emphasis added), and in considering those factors, trial courts should "'*make specific factual findings* regarding the factors that are relevant to the particular case,'" *Myland v. Myland*, 290 Mich. App. 691, 695, 804 N.W.2d 124 (2010) (emphasis added) (citation omitted). Moreover, in the criminal context, "consideration" of factors implies fact-finding. See, e.g., *People v. Cipriano*, 431 Mich. 315, 334, 429 N.W.2d 781 (1988) (setting forth factors that a trial court "should *consider*" in determining whether a statement was voluntary) (emphasis added); *People v. Gipson*, 287 Mich.App. 261, 264, 787 N.W.2d 126 (2010) (noting that a trial court's factual findings during a voluntariness inquiry are reviewed for clear error).

In short, the dissent's contention that consideration of factors is distinct from making findings about those factors is a difference without any real meaning, illustrates the tenuous nature of the dissent's flawed analysis, and "ignore[s] reality and the actual text of the statute." *Potter v. McLeary*, 484 Mich. 397, 438, 774 N.W.2d 1 (2009) (YOUNG, J., concurring in part and dissenting in part).

The prosecution also argues that, unlike in *Cunningham*, 549 U.S. 270, 127 S.Ct. 856, in which findings of certain aggravating factors required the sentencing court to impose an increased sentence, in this case the sentencing court has discretion under MCL 769.25 to impose the harsher sentence. However, merely because the sentencing court has discretion to impose a harsher penalty does not save MCL 769.25 from being unconstitutional because "[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." *Blakely*, 542 U.S. at 305 n. 8, 124 S.Ct. 2531. Indeed, in *Blakely* the Court rejected the state of Washington's attempt to distinguish *Apprendi* from that state's sentencing scheme on the grounds that sentencing courts had discretion to impose an exceptional sentence. See *Cunningham*, 549 U.S. at 283, 127 S.Ct. 856, citing *Blakely*, 542 U.S. at 305, 124 S.Ct. 2531. The *Blakely* Court explained that judicial discretion cannot serve as a substitute for the Sixth Amendment, explaining:

> JUSTICE O'CONNOR argues that, because determinate sentencing schemes involving judicial factfinding entail less judicial discretion than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. This argument is flawed on a number of levels. First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function

of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. *But the facts do not pertain to whether the defendant has a legal right to a lesser sentence—and that makes all the difference* insofar as judicial impingement upon the traditional role of the jury is concerned. [*Blakely,* 542 U.S. at 308–309, 124 S.Ct. 2531 (citation omitted) (emphasis added).]

In this case, based solely on the facts that were decided by the jury, defendant was entitled to a term-of-years sentence. Therefore, because the factual findings required by *Miller* and MCL 769.25(6) were not part and parcel of the elements submitted to the jury, these facts "pertain to whether the defendant has a legal *right* to a lesser sentence," and merely because the sentencing court has discretion to impose the harsher sentence cannot serve as a substitute for defendant's Sixth Amendment right to a jury. *Id.* at 309, 124 S.Ct. 2531.

Finally, in an argument that can best be described as a Herculean attempt at linguistic gymnastics, the Attorney General argues that the default term-of-years sentence mandated by MCL 769.25(9) is not actually the default sentence because "[i]f . . . the prosecutor moves for a life sentence, then the term of years is not the default." This argument misconstrues the meaning of the word "default." "Default" is defined in relevant part as "a selection made [usually] automatically or without active consideration due to lack of a viable alternative[.]" *Merriam Webster's Collegiate Dictionary* (11th ed.). Under MCL 769.25, a term-of-years sentence is automatic, and there is no alternative absent the prosecution's motion for a life-without-parole sentence and additional findings by the court. Accordingly and as specifically stated in *Carp,* 496 Mich. at 458, 852 N.W.2d 801, a term of years is the default sentence.[16]

[7] To summarize, the default sentence for a juvenile convicted of first-degree murder under MCL 750.316 is a term-of-years prison sentence. MCL 769.25 authorizes a trial court to enhance that sentence to life without parole on the basis of factual findings that were not made by a jury but rather were found by the court. In this respect, the statute offends the Sixth Amendment as articulated in *Apprendi* and its progeny. In order to enhance a juvenile's default sentence to life without parole, absent a waiver,[17] a jury must make findings on the *Miller* factors as codified at MCL 769.25(6) to determine beyond a reasonable doubt whether the juvenile's crime reflects irreparable corruption. Accordingly, because defendant's sentence for first-degree murder was imposed in a manner that violated the Sixth Amendment, she is entitled to resentencing on that offense.[18]

16. Moreover, as already explained, life without parole can never be the default sentence for juveniles under *Graham* and *Miller.*

17. See *Blakely,* 542 U.S. at 310, 124 S.Ct. 2531 (noting that "nothing prevents a defendant from waiving his *Apprendi* rights" and that "[w]hen a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding").

18. Given our resolution of this issue, we need not address the other issues defendant raises on appeal. We note that we reject defendant's argument that she should be resentenced in front of a different judge on remand. Although resentencing before a different judge may be "warranted by the

B. SEVERABILITY AND SENTENCING OF JUVENILES GOING FORWARD

[8, 9] Although portions of MCL 769.25 are unconstitutional, this does not necessarily render the statute void in its entirety. Rather, MCL 8.5 provides:

> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

Indeed, "[i]t is the law of this State that if invalid or unconstitutional language can be deleted from an ordinance and still leave it complete and operative then such remainder of the ordinance be permitted to stand." *Eastwood Park Amusement Co. v. East Detroit Mayor*, 325 Mich. 60, 72, 38 N.W.2d 77 (1949).

[10] In this case, apart from the provision in Subsection (6) directing the trial court to consider the *Miller* factors and the provision in Subsection (7) directing the court to articulate aggravating and mitigating circumstances on the record, MCL 769.25 remains operable in the event that the findings on the *Miller* factors are made by a jury beyond a reasonable doubt.[19] That is, following a conviction of first-degree murder and a motion by the prosecuting attorney for a sentence of life without parole, absent defendant's waiver, the court should empanel a jury [20] and hold a sentencing hearing at which the prosecution is tasked with proving that the factors in *Miller* support that the juvenile's offense reflects irreparable corruption beyond a reasonable doubt. During this hearing, both sides must be afforded the opportunity to present relevant evidence, and each victim must be afforded the opportunity to offer testimony in accordance with MCL 769.25(8). Following the close of proofs, the trial court should instruct the jury that it must consider whether in light of the factors set forth in *Miller* and any other relevant evidence, the defendant's offense reflects irreparable corruption beyond a reasonable doubt sufficient to impose a sentence of life without parole. Alternatively, if the jury decides this question in the negative, then the court should use its discretion to sentence the juvenile to a term of years in accordance with MCL 769.25(9).

V. CONCLUSIONS

The Sixth Amendment requires that other than a prior conviction, any fact that

circumstances'' on some occasions, defendant here has not articulated any circumstances that warrant resentencing before a different judge. *People v. Coles*, 417 Mich. 523, 536, 339 N.W.2d 440 (1983), overruled in part on other grounds, *People v. Milbourn*, 435 Mich. 630, 461 N.W.2d 1 (1990).

19. The Sixth Amendment does not require the jury to articulate mitigating and aggravating circumstances, so Subsection (7) is inoperable.

20. We note that this hearing may be conducted before the jury that determined the defendant's guilt in the event that the prosecution moves to impose a life-without-parole sentence after the jury verdict but before the jury is dismissed. See, e.g., 18 USC 3593(b) (providing that the sentencing hearing in a federal death-penalty case may be conducted before the jury that determined the defendant's guilt or, in certain circumstances, before a jury empaneled ''for the purpose of'' the sentencing hearing). Alternatively, the court may empanel a new jury for the purpose of the sentencing hearing in accordance with the court rules governing empaneling a jury for the guilt phase of the proceeding. See MCR 6.410; MCR 6.412.

increases either the floor or the ceiling of a criminal defendant's sentence beyond that which a court may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant must be submitted to a jury and proved beyond a reasonable doubt. See *Apprendi,* 530 U.S. 466, 120 S.Ct. 2348; *Ring,* 536 U.S. 584, 122 S.Ct. 2428; *Blakely,* 542 U.S. 296, 124 S.Ct. 2531; *Cunningham,* 549 U.S. 270, 127 S.Ct. 856; *Alleyne,* 570 U.S. ——, 133 S.Ct. 2151. The default sentence for juveniles convicted of first-degree murder—i.e. the sentence authorized by the jury verdict—is a term of years. MCL 769.25 authorizes a trial court to increase that sentence to life without the possibility of parole contingent on the trial court's findings with respect to the *Miller* factors and any other relevant criteria. Because MCL 769.25 makes an increase in a juvenile defendant's sentence contingent on factual findings, those findings must be made by a jury beyond a reasonable doubt. Accordingly, in this case, because defendant was denied her right to have a jury make the requisite findings under MCL 769.25, she is entitled to resentencing on her first-degree-murder conviction.

Vacated and remanded for resentencing consistent with this opinion. Jurisdiction is not retained.

HOEKSTRA, P.J., concurred with BORRELLO, J.

SAWYER, J. (dissenting).

I respectfully dissent.

While the majority sets forth a strong argument, it ultimately fails because it is based on a false premise: that *Apprendi* [1] and its progeny require that *all* facts relating to a sentence must be found by a jury. Rather, the principle set forth in those cases establishes only that the Sixth Amendment right to a jury trial requires the jury to find those facts necessary to impose a sentence greater than that authorized by the legislature in the statute itself on the basis of the conviction itself. And the statute adopted by the Michigan Legislature with respect to juvenile lifers does not fit within that category.

Looking first to *Apprendi* itself, the defendant was convicted under a New Jersey statute of possession of a firearm for an unlawful purpose and that statute authorized a sentence of between 5 and 10 years in prison.[2] A separate statute, described as a "hate crime" statute, authorized an extended term of imprisonment of between 10 and 20 years if the defendant committed the crime with a purpose to intimidate a person or group because of their membership in a specified protected class.[3] The statute directed that the finding had to be made by the trial judge and the burden of proof was by a preponderance of the evidence.[4]

The *Apprendi* Court found this statutory scheme invalid, concluding as follows: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." [5] The majority in the case before us ignores this ultimate conclusion in *Apprendi,* that the facts that must be submitted to the jury are those that increase the prescribed maximum sentence.

1. *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

2. *Id.* at 468, 120 S.Ct. 2348.

3. *Id.* at 468–469, 120 S.Ct. 2348.

4. *Id.* at 468, 120 S.Ct. 2348.

5. *Id.* at 490, 120 S.Ct. 2348.

But facts that the trial court considers in fixing a sentence that is within the maximum authorized by the statute (without additional facts found by the jury) need not be determined by the jury. The *Apprendi* majority distinguished between fact-finding that authorizes a court to impose a greater sentence than the prescribed statutory maximum and a "sentencing factor." It did so in the context of distinguishing *Apprendi* from the earlier decision in *McMillan v. Pennsylvania*.[6] *Apprendi*[7] explained the distinction as follows:

> It was in *McMillan v. Pennsylvania*, 477 U.S. 79 [106 S.Ct. 2411, 91 L.Ed.2d 67] (1986), that this Court, for the first time, coined the term "sentencing factor" to refer to a fact that was not found by a jury but that could affect the sentence imposed by the judge. That case involved a challenge to the State's Mandatory Minimum Sentencing Act, 42 Pa. Cons.Stat. § 9712 (1982). According to its provisions, anyone convicted of certain felonies would be subject to a mandatory minimum penalty of five years' imprisonment if the judge found, by a preponderance of the evidence, that the person "visibly possessed a firearm" in the course of committing one of the specified felonies. 477 U.S. at 81–82 [106 S.Ct. 2411]. Articulating for the first time, and then applying, a multifactor set of criteria for determining whether the *Winship*[8] protections applied to bar such a system, we concluded that the Pennsylvania statute did not run afoul of our previous admonitions against relieving the State of its burden of proving guilt, or tailoring the mere form of a criminal statute solely to avoid *Winship's* strictures. 477 U.S. at 86–88 [106 S.Ct. 2411].
>
> We did not, however, there budge from the position that (1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense, *id.* at 85–88 [106 S.Ct. 2411], and (2) that a state scheme that keeps from the jury facts that "expos[e] [defendants] to greater or additional punishment," *id.* at 88 [106 S.Ct. 2411], may raise serious constitutional concern. As we explained:
>
> > Section 9712 neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. . . . The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense. Petitioners' claim that visible possession under the Pennsylvania statute is "really" an element of the offenses for which they are being punished—that Pennsylvania has in effect defined a new set of upgraded felonies—would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment, cf. 18 U.S.C. § 2113(d) (providing separate and greater punishment for bank robberies accomplished through "use of a dangerous weapon or device"), but it does not. *Id.* at 87–88 [106 S.Ct. 2411].

6. 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

7. 530 U.S. at 485–487, 120 S.Ct. 2348.

8. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

As I will discuss later, the statutory scheme created by our Legislature creates these *McMillan*-like sentencing factors rather than requiring particular facts to be found in order for the trial court to have the authority to impose the greater sentence of life without parole.

The Supreme Court has consistently followed this distinction thereafter. In *Ring v. Arizona*,[9] it rejected Arizona's death-penalty statute because it placed on the sentencing judge the responsibility of determining the existence of an aggravating factor necessary to impose the death penalty. Without such a judicial determination, the jury's verdict alone only authorized the imposition of life imprisonment.[10] After analyzing the effect of *Apprendi*, the *Ring* Court summarized the law as follows: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." [11]

Turning to *Blakely v. Washington*,[12] the Court considered a sentencing scheme that authorized the trial court to depart upward from a standard sentence set by statute. The defendant was convicted of kidnapping. Although the Washington statute authorized a maximum sentence of up to 10 years, it further provided that the "standard range" for the defendant's offense was 49 to 53 months.[13] But the statute further authorized a judge to impose a sentence above the standard range if he found "substantial and compelling reasons justifying an exceptional sentence." [14] The sentencing judge had to make findings of fact and conclusions of law that justified the exceptional sentence and those findings were reviewable under a clearly erroneous standard.[15] In rejecting the Washington sentencing scheme, the Court noted "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" [16] Thus, a judge's sentencing authority is limited to "the maximum he may impose *without* any additional findings." [17] The majority attempts to argue that *Blakely* controls this case because "the trial court in this case acquired authority to enhance defendant's sentence from a term of years to life without parole 'only upon finding some additional fact.' " [18] But this attempt fails because MCL 769.25 does not, in fact, require the finding of an additional fact before it authorizes the imposition of a life-without-parole sentence. Indeed, as *Blakely* points out,[19] the question is not whether the sentencing court engages in judicial fact-finding, but on whether the defendant is entitled to a lesser sentence without those facts being found:

> Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule

9. 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

10. *Id.* at 597, 122 S.Ct. 2428.

11. *Id.* at 602, 122 S.Ct. 2428.

12. 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

13. *Id.* at 299, 124 S.Ct. 2531.

14. *Id.*, quoting Wash. Rev. Code 9.94A.120(2).

15. *Id.* at 299–300, 124 S.Ct. 2531.

16. *Id.* at 303, 124 S.Ct. 2531.

17. *Id.* at 304, 124 S.Ct. 2531.

18. *Ante* at 500–01, quoting *Blakely*, 542 U.S. at 305, 124 S.Ct. 2531.

19. 542 U.S. at 309, 124 S.Ct. 2531.

> on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10–year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10–year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

Nothing in MCL 769.25 established a legal entitlement to defendant to be sentenced to a term of years rather than life in prison. That is, juvenile offenders who commit first-degree murder, even after the adoption of MCL 769.25, know that they are risking being sentenced to life in prison without the possibility of parole simply upon the jury's conviction for first-degree murder without the necessity of the jury finding any additional facts regarding the crime.

This then leads to the Court's decision in *Cunningham v. California.*[20] In *Cunningham,* the defendant was convicted of sexual abuse of a child under the age of 14. Under California's determinate sentencing law, the crime was punishable by a lower term of 6 years in prison, a middle term of 12 years in prison, or an upper term of 16 years in prison.[21] But the statute required the imposition of the middle term unless the judge found, by a preponderance of the evidence, the existence of one or more aggravating factors. The judge so found and sentenced Cunningham to the upper term.[22] After a review of *Apprendi* and its progeny, the *Cunningham* Court again summarized the basic principle that comes out of those cases: "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." [23]

This finally leads to the Supreme Court's decision in *Alleyne v. United States,*[24] wherein the Court took up the *Apprendi* principle in the context of increases in a mandatory minimum sentence. Allen Alleyne was convicted under a federal robbery statute and a related statute that required minimum sentences for the possession or use of a firearm in certain crimes. That statute required a minimum sentence of 5 years unless a firearm was brandished, in which case the mandatory minimum was 7 years, and was further raised to 10 years if the firearm was discharged.[25] The verdict form indicated that Alleyne had used or carried a firearm, which would authorize the mandatory 5–year minimum sentence, but did not indicate whether the firearm was brandished, which would authorize the 7–year mandatory minimum.[26] The trial court found that a preponderance of the evidence supported the finding that Alleyne had brandished the weapon and sentenced him to the

20. 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007).

21. *Id.* at 275, 127 S.Ct. 856.

22. *Id.* at 275–276, 127 S.Ct. 856.

23. *Id.* at 290, 127 S.Ct. 856.

24. 570 U.S. ——, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

25. *Id.* at ——, 133 S.Ct. at 2155–2156; see 18 USC 924(c)(1)(A).

26. *Id.* at ——, 133 S.Ct. at 2156.

mandatory minimum of 7 years in prison.[27] While the *Alleyne* Court concluded that the fact of whether the defendant brandished a firearm must be found by the jury in order to increase the mandatory minimum sentence that he faced,[28] the Court also took pains to note that facts that merely influence judicial discretion in sentencing do not have to be found by a jury, stating as follows: [29]

> In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. See, *e.g., Dillon v. United States,* 560 U.S. [817, 828–829, 130 S.Ct. 2683, 177 L.Ed.2d 271] (2010) ("[W]ithin established limits[,] . . . the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts" (emphasis deleted and internal quotation marks omitted)); *Apprendi,* 530 U.S. at 481 [120 S.Ct. 2348] ("[N]othing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute"). This position has firm historical roots as well. As Bishop explained:
>
> > [W]ithin the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment. [1] Bishop [Criminal Procedure (2d ed., 1872)] § 85, at 54.
>
> "[E]stablishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." *Apprendi,* [530 U.S.] at 519, 120 S.Ct. 2348, 147 L.Ed.2d 435 (THOMAS, J., concurring). Our decision today is wholly consistent with the broad discretion of judges to select a sentence within the range authorized by law.

The Michigan Supreme Court recently considered the application of *Alleyne* to the Michigan sentencing guidelines in *People v. Lockridge.*[30] While not directly applicable to this case, I do find its analysis relevant. Particularly, the Court makes the following observation in finding the legislative sentencing guidelines to be constitutionally deficient in light of *Alleyne*: "That deficiency is the extent to which the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range, i.e., the 'mandatory minimum' sentence under *Alleyne.*" [31] Applying this same principle to the statute before us, the

27. *Id.* at ——, 133 S.Ct. at 2156.

28. In doing so, the Court explicitly found that its earlier decision in *Harris v. United States,* 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), could not be reconciled with *Apprendi* and also questioned the continued validity of *McMillan* as it applied to mandatory minimum sentences. *Id.* at ——, 133 S.Ct. at 2157–2158.

29. *Id.* at ——, 133 S.Ct. at 2163 (alterations other than those related to citations in original).

30. 498 Mich. 358, 870 N.W.2d 502 (2015).

31. *Id.* at 364, 870 N.W.2d 502.

juvenile lifer law does not require any particular judicial fact-finding to increase the potential sentence from a term of years to life without parole. Indeed, as the Court observed, the "inquiry is whether the pertinent facts that must be found are an element of the offense or a mere sentencing factor." [32]

I would submit that, regardless of whether we look to *Apprendi* or *Alleyne*, or any of the other decisions of the United States Supreme Court, the principle to be applied is simple: Does the statutory scheme enacted by the Legislature authorize the sentencing court to impose a particular sentence without any additional fact-finding or, to impose the particular sentence, must an additional fact beyond that which supports the conviction itself be found? If it is the former, the sentencing court is free to impose the sentence that his or her discretion concludes is appropriate. If the latter, then the defendant has the right to have that additional fact found by a jury beyond a reasonable doubt.

Turning to the statute at issue in this case, I believe that it fits within the former category—i.e., that no additional fact-finding is necessary to justify a sentence of life without parole. MCL 769.25 deals with the sentencing of defendants who were under the age of 18 at the time that they committed a crime punishable by a sentence of life without parole and provides in pertinent part as follows:

> (3) If the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described in subsection (1)(a), the prosecuting attorney shall file the motion within 21 days after the defendant is convicted of that violation. If the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described under subsection (1)(b), the prosecuting attorney shall file the motion within 90 days after the effective date of the amendatory act that added this section. The motion shall specify the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole.
>
> (4) If the prosecuting attorney does not file a motion under subsection (3) within the time periods provided for in that subsection, the court shall sentence the defendant to a term of years as provided in subsection (9).
>
> (5) If the prosecuting attorney files a motion under subsection (2) requesting that the individual be sentenced to imprisonment for life without parole eligibility, the individual shall file a response to the prosecution's motion within 14 days after receiving notice of the motion.
>
> (6) 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[sic] U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.
>
> (7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.
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> * * *

32. *Id.* at 368–369, 870 N.W.2d 502.

(9) If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years.

The majority fundamentally misreads this statute. First, the majority looks to *People v. Carp*[33] and its reference to MCL 769.25 establishing a "default sentencing range" for defendants convicted of first-degree murder committed while a juvenile. But the majority downplays the fact that this statement is made in the context of the fact that this "default sentencing range" is only applicable "absent a motion by the prosecutor seeking a sentence of life without parole" and that the trial court may impose a sentence of life without parole after such a motion is filed and conducting a hearing.[34] The majority then performs an act of legalistic legerdemain and reinterprets *Carp* as follows: "Stated differently, at the point of conviction, absent a motion by the prosecution and *without additional findings* on the *Miller*[35] factors, the maximum punishment that a trial court may impose on a juvenile convicted of first-degree murder is a term-of-years prison sentence."[36] If this statement were true, then I would agree with the majority that the question of life without parole must be submitted to the jury. But the statement is simply untrue. There are no additional findings that must be made in order for a defendant to be subjected to a sentence of life without parole.[37]

MCL 769.25(6) does require the trial court to conduct a hearing before it may impose a sentence of life without parole on a juvenile offender. And it further requires that the trial court "consider" the factors listed in *Miller*, as well as any other criteria the trial court deems relevant to its decision. MCL 769.25(7) then requires that "the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." But nowhere does the statute require the trial court to make any particular finding of fact before it is authorized to impose a sentence of life without parole. Rather, after conducting the hearing and considering the evidence presented at the hearing as well as the evidence presented at trial, the trial court makes its decision and must state on the record the reasons for that decision. As our Supreme Court noted in *Carp*, this process allows for the "individualized sentencing" procedures established by *Miller*.[38] This procedure also presumably allows for more meaningful appellate review of the sentence.

As for *Miller* itself, while MCL 769.25(6) directs the trial court to "consider the factors listed in *Miller v. Alabama*," the opinion itself hardly establishes a list of factors that must be met before a sentence of life without parole may be imposed.

33. 496 Mich. 440, 458, 852 N.W.2d 801 (2014).

34. *Id.*

35. *Miller v. Alabama*, 567 U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

36. *Ante* at 496–98 (emphasis added).

37. Arguably, the trial court must "find" that the prosecutor filed a motion within 21 days after conviction, as required by MCL 769.25(3). But I doubt that this is the type of "fact" that the Supreme Court had in mind in determining a defendant's Sixth Amendment rights in *Apprendi* and its progeny.

38. *Carp*, 496 Mich. at 458–459, 852 N.W.2d 801.

Rather, the opinion speaks in general terms about why mandatory life without parole for a juvenile offender violates the Eighth Amendment and what must be considered before imposing a sentence of life without parole. For example, with respect to the former point, the Court [39] states that a mandatory life-without-parole sentence for a juvenile

> precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.

As for the latter point, the Court directs the sentencing court to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." [40] But neither *Miller* nor the statute sets forth any particular facts that must be found before a sentence of life without parole may be imposed. Rather, both merely require the sentencing court to take into account the individual circumstances of the juvenile offender before determining whether a sentence of life without parole is appropriate in each particular case. But this hardly establishes an "element of the crime" that must be determined by a jury beyond a reasonable doubt.[41]

Moreover, I note that an underlying issue in this case—the trial court's failure to adopt any particular burden of proof because none is set forth in the statute—further supports the conclusion that the statute does not require any particular finding of fact. Rather, I would suggest that the Legislature did not include a burden of proof out of oversight or a desire to leave it to the courts to fashion one, but because it was unnecessary because the statute does not require anything to be proved. Rather, it only requires consideration of the relevant criteria to guide the trial court in determining the appropriate individualized sentence for the defendant before it.

The majority perpetuates its mistaken reading of the statute when it states that the "Legislature conditioned defendant's life-without-parole sentence on two things: (1) the prosecution's filing of a motion to impose the sentence and (2) the trial court's findings with respect to the *Miller* factors and 'any other criteria relevant to its decision. . . .' " [42] While the first point is correct—the prosecution must file a motion—the second point, of course, is erroneous. The statute does not require findings, but only that the trial court "consider" the *Miller* "factors" and other relevant criteria. And "consider" does not mean to make findings, but, rather, "to think about carefully" and "to think about in order to arrive at a judgment or decision" and "may suggest giving thought to in order to reach a suitable conclusion, opinion, or decision[.]" *Merriam–Webster's Collegiate Dictionary* (11th ed.), pp. 265–266.

The majority rejects the argument in the Attorney General's amicus curiae brief

39. *Miller,* 567 U.S. at ——, 132 S.Ct. at 2468.

40. *Id.* at ——, 132 S.Ct. at 2469.

41. *Apprendi,* 530 U.S. at 477, 120 S.Ct. 2348.

42. *Ante* at 497–98, quoting MCL 769.25(6).

such requirement is established under the statute.

In conclusion, there is no need to empanel a jury to make any additional factual findings to authorize the trial court to impose a sentence of life without parole. Under MCL 769.25, the only factual finding necessary to authorize the trial court to impose a sentence of life without parole was that defendant's involvement in the killing of her father constituted first-degree murder. The jury concluded that it did. Thus, *Apprendi* and the Sixth Amendment are satisfied and the trial court possessed the statutory authority to impose a sentence of life without parole, which it did. In fact, the trial court has done so three times: first, when it was mandatory, then a second time on remand after the decision in *Miller*, and then a third time on remand after the decision in *Carp* and the passage of MCL 769.25. Perhaps the *Lockridge* majority says it best in observing that "unrestrained judicial discretion within a broad range is in; legislative constraints on that discretion that increase a sentence (whether minimum or maximum) beyond that authorized by the jury's verdict are out." [50] The majority attempts to find a legislative restraint on the trial court's sentencing discretion where none exists.

For these reasons, I would affirm.

50. *Lockridge,* 498 Mich. at 375, 870 N.W.2d 502.

that no additional facts are needed to authorize a life-without-parole sentence as follows: [43]

> However, if as the prosecution and the Attorney General contend, the "maximum allowable punishment" at the point of defendant's conviction is life without parole, then that sentence would offend the Constitution. Under *Miller*, a mandatory *default sentence* for juveniles *cannot* be life imprisonment without the possibility of parole. Such a sentence would not be an individualized sentence taking into account the factors enumerated in *Miller*.

But, of course, the statute does not provide for a *mandatory* default sentence of life without parole. And it is the mandatory nature of the life-without-parole statutes that offended the Court in *Miller*, resulting in a holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." [44] And MCL 769.25 commits no such offense. The majority also latches onto a statement in a law review article by Professor Sarah Russell that "*Miller* concludes that life without parole is an inappropriate sentence for most juveniles, and may be given only in rare circumstances where certain facts are established. Thus, the factual finding of 'irreparable corruption' aggravates—not mitigates—the penalty." [45] But, with all due respect to Professor Russell and the majority, *Miller* hardly establishes "irreparable corruption" as an aggravating factor. Rather, *Miller* uses that term in a quotation from *Roper v. Simmons*, 543 U.S. 551, 573, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), which noted the difficulty in distinguishing between "transient immaturity" and "irreparable corruption." [46] It uses that point to support its statement that "[a]lthough we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." [47] This hardly establishes "irreparable corruption" as an aggravating factor that must be found in order for the Eighth Amendment to allow the imposition of a life-without-parole sentence on a juvenile offender.

Finally, the majority conflates the observation made in *Carp*[48] that MCL 769.25 creates a "default sentence" of a term of years if the prosecutor fails to move for a sentence of life without parole with a requirement that there be additional findings in order to impose a life-without-parole sentence. Indeed, the majority describes the Attorney General's argument that a term-of-years sentence is not the "default sentence" as a "Herculean attempt at linguistic gymnastics." [49] But the only linguistic gymnastics here, Herculean or otherwise, are those of the majority. It attempts to create a "default sentence" under the statute when none exists once the prosecutor has moved for a life sentence. And the majority repeatedly states that the statute requires "additional findings" in order to authorize a sentence of life without parole when no

43. *Ante* at 499–500.

44. *Miller*, 567 U.S. at ——, 132 S.Ct. at 2469.

45. Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 BC L. Rev. 553, 582 (2015).

46. See *Miller*, 567 U.S. at ——, 132 S.Ct. at 2469.

47. *Id.* at ——, 132 S.Ct. at 2469.

48. *Carp*, 496 Mich. at 458, 852 N.W.2d 801.

49. *Ante* at 503–04.

APPENDIX C

Approved, SCAO

Original - Court file
1st copy - Assignment Clerk/Extra
2nd copy - Friend of the Court/Extra
3rd copy - Opposing party
4th copy - Moving party

STATE OF MICHIGAN JUDICIAL CIRCUIT JUDICIAL DISTRICT COUNTY	ORDER	CASE NO. 10-002136-FC

Court address | Court telephone no.

Plaintiff name(s)		Defendant name(s)
People.		Tia Marie Mitchell Skinner
Plaintiff's attorney, bar no., address, and telephone no.	v	Defendant's attorney, bar no., address, and telephone no.
Hilary Georgia P66226 St. Clair County Prosecutor's Office 201 McMorran Blvd, Suite 5800, Port Huron 48060 (810) 985-2400		Kimberly Thomas P66643 Juvenile Justice Clinic 701 S State Street, Ann Arbor, MI 48109 734-763-5000

1. Motion title: Motion That Tia Skinner Be Provided a Jury Determination of Any/All Facts Exposing Her to a Life Without Parole Sente
2. Moving party: Tia Skinner, Defendant
3. This matter has been placed on the motion calendar for:

Judge	Bar no.	Date	Time
Hon. Kelly	P24338	9/2/14	3pm
Hearing location ☐ Court address above ☐			

IT IS ORDERED: The above named motion is

- ☐ granted.
- ☐ granted in part, denied in part.
- ☒ denied.

9-2-14
Date

David J. Kelly
Judge

MC 327 (6/05) **ORDER**

2018 WL 5929052
Only the Westlaw citation is currently available.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v.
TIA MARIE-MITCHELL SKINNER,
Defendant-Appellant.

No. 317892
|
November 13, 2018

St Clair Circuit Court

LC No. 10-002936-FC

Before: SAWYER, P.J., and MURPHY and BORRELLO, JJ.

ON REMAND

PER CURIAM.

***1** This case has been remanded to this Court to determine whether the trial court abused its discretion in sentencing defendant, Tia Marie Mitchell Skinner, a juvenile offender, to life without the possibility of parole pursuant to MCL 769.25 following defendant's conviction of first-degree murder, conspiracy to commit murder, and attempted murder. *People v Skinner*, 502 Mich 89, 97; ___ NW2d ___ (2018). For the reasons set forth in this opinion, we affirm defendant's sentence.

I PROCEDURAL BACKGROUND

Our Supreme Court set forth the procedural history of this case as follows:

> Following a jury trial, defendant was convicted of first-degree premeditated murder, conspiracy to commit murder, and attempted murder for acts committed when defendant was 17 years old. Defendant was sentenced to life in prison without the possibility of parole. The Court of Appeals remanded for resentencing under [*Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012)], which held that mandatory life-without-parole sentences for offenders under 18 years old violate the Eighth Amendment.[1] This Court denied leave to appeal .... On remand, the trial court reimposed a life-without-parole sentence. After defendant was resentenced, MCL 769.25 took effect, setting forth a new framework for sentencing juveniles convicted of first-degree murder. The Court of Appeals remanded for resentencing under MCL 769.25.[2] On remand, the trial court again sentenced defendant to life without parole.

In a split, published decision, the Court of Appeals again remanded for resentencing, holding that a jury must decide whether defendant should be sentenced to life without parole and that, to the extent that MCL 769.25 requires the trial court to make this determination, it is unconstitutional. [*People v Skinner (Skinner II)*, 312 Mich App 15, 877 NW2d 482 (2015)]. This Court granted the prosecutor's application for leave to appeal and directed the parties to address "whether the decision to sentence a person under the age of 18 to a prison term of life without parole under MCL 769.25 must be made by a jury beyond a reasonable doubt[.]"[3] [*Skinner*, 502 Mich at 98-99.]

Following this Court's decision in *Skinner II*, 312 Mich App at 15, but before the Michigan Supreme Court granted leave, in *People v Hyatt*, 314 Mich App 140; 885 NW2d 900 (2016), this Court addressed another case involving a juvenile offender sentenced to life without the possibility of parole. In *Hyatt*, this Court affirmed the defendant's conviction of first-degree, felony murder, among others, and would have affirmed his [life-without-parole] sentence but for [*Skinner II*], which held that a jury must decide whether to impose a life-without-parole sentence on a juvenile. The *Hyatt*

Court called a conflict panel, and, in a published decision,[4] "disagreed with [*Skinner II*] and held that a judge may decide whether to impose a nonparolable life sentence on a juvenile." *Skinner*, 502 Mich at 99. However, the *Hyatt* Court vacated the defendant's life-without-parole sentence and remanded the case for resentencing with instruction for the trial court to "not only consider the *Miller* factors, but decide whether defendant Hyatt is the truly rare juvenile mentioned in *Miller* who is incorrigible and incapable of reform." *Hyatt*, 316 Mich App at 429.

***2** The Michigan Supreme Court ultimately granted leave to appeal in both *Skinner II* and *Hyatt*. The Court held as follows:

> [W]e reverse the judgment of the Court of Appeals in [*Skinner II*] and affirm the part of *Hyatt* that held that "[a] judge, not a jury, must determine whether to impose a life-without-parole sentence or a term-of-years sentence under MCL 769.25." [*Hyatt*, 316 Mich App at 415]. However, we reverse the part of *Hyatt* that adopted a heightened standard of review for life-without-parole sentences imposed under MCL 769.25 and that remanded this case to the trial court for it to "decide whether defendant Hyatt is the truly rare juvenile mentioned in [*Miller*, 567 US at 460] who is incorrigible and incapable of reform." [*Hyatt*, 316 Mich App at 429]. No such explicit finding is required. Finally, we remand both of these cases to the Court of Appeals for it to review defendants' sentences under the traditional abuse-of-discretion standard of review. [*Skinner*, 502 Mich at 97.]

We now examine whether the trial court abused its discretion when it sentenced defendant to life-without-parole.

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews a trial court's sentencing decision under MCL 769.25 for an abuse of discretion. *Skinner*, 502 Mich at 131, (noting that "neither *Miller* nor *Montgomery* requires this Court to deviate from its traditional abuse-of-discretion standard in reviewing a trial court's decision to impose life without parole."). " '[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' " *Id*. at 131-132, quoting *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). See also *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017) ("[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion."). A trial court also abuses its discretion when it errs as a matter of law. *People v Jackson*, 498 Mich 246, 257; 869 NW2d 253 (2015). A trial court's findings of fact at a sentencing hearing are reviewed for clear error while issues of law are reviewed de novo. *Skinner*, 502 Mich at 137, n 27. "A finding is clearly erroneous if this Court is left with the definite and firm conviction that a mistake has been made." *People v Allen*, 295 Mich App 277, 281; 813 NW2d 806 (2011).

In *Miller*, 567 US at 465, the United States Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments" (quotation marks omitted). However, the *Miller* Court did not categorically bar life-without-parole sentences for juvenile offenders, explaining that such sentences may be imposed in certain circumstances, noting that it would be the "rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified." *Id*. at 479. In doing so, "*Miller* made clear that 'appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.' " *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718, 733-734; 193 L Ed 2d 599 (2016), quoting *Miller*, 567 US at 479.

***3** The *Miller* Court held that certain factors should be considered when sentencing a juvenile to life imprisonment without the possibility of parole. *Miller*, 567 US at 477-478. Those factors include:

> [Defendant's] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences; the family and home

> environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional; the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him; whether he might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys; and the possibility of rehabilitation [*Skinner*, 502 Mich at 104-105 (quotation marks and citation omitted).]

Following *Miller*, the Legislature enacted MCL 769.25 to provide a framework for sentencing juvenile offenders to life without the possibility of parole. Under the statute, following the conviction of a juvenile for first-degree murder, pursuant to MCL 769.25(2) and (3), a prosecuting attorney may move to sentence the juvenile defendant to life imprisonment without the possibility of parole. If the prosecuting attorney moves to impose this sentence, MCL 769.25(6) and (7) govern the sentencing procedure and provide as follows:

> (6) 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*, 567 US at 477-478], and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.
>
> (7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.

In *Skinner*, 502 Mich at 138, our Supreme Court explained that in reversing *Hyatt's* requirement that a precondition for a life sentence for a juvenile is that the State prove the juvenile defendant incorrigible and incapable of reform, held that "[n]o such explicit finding is required." Similarly, the trial court "does not have to explicitly find that defendant is 'rare.' " *Id.* at 130. Moreover,

> [N]either *Miller* nor *Montgomery* imposes a presumption *against* life without parole for those juveniles who have been convicted of first-degree murder on either the trial court or the appellate court. *Miller* and *Montgomery* simply require that the trial court consider an offender's youth and attendant characteristics before imposing life without parole. [*Id.* at 131 (quotation marks and citation omitted).]

B. FACTUAL FINDINGS AND LEGAL CONCLUSIONS OF THE TRIAL COURT

Relative to the underlying facts leading to the conviction in this case, in this Court's first opinion we stated:

> ***4** The victims, defendant's parents, were viciously attacked in their bed in November 2010. Defendant's father was killed in the attack and defendant's mother suffered roughly 25 stab wounds. An investigation led to Jonathan Kurtz, defendant's boyfriend, and James Preston. The investigation also led to the discovery of a map of the neighborhood and a note containing tips on how to break into defendant's house and commit the murders. Cell phone records revealed text messages between defendant, Kurtz, and Preston that indicated that the crime had been planned by all three. During an interview with police, defendant implicated Preston, then implicated Kurtz and Preston, and then admitted that she had talked to

> Kurtz about killing her parents. Defendant said that Kurtz was going to seek Preston's help. [*People v Skinner*, unpublished opinion per curiam of the Court of Appeals, issued February 21, 2013 (Docket No. 306903), p 1.]

Following our initial opinion in this matter, the matter went before the trial court again, for a resentencing hearing. At the September 2014 resentencing hearing, several witnesses testified. Mara Skinner, defendant's adoptive mother, victim, and spouse of deceased victim Paul Skinner, testified at the hearing. Mara testified that she and Paul raised two biological children and two adoptive children, including defendant; all four children were raised as siblings. Defendant was the biological child of Mara's sister Valerie Borja; Valerie was incarcerated at the time of defendant's birth and could not care for defendant. Defendant lived the first 10 months of her life with her biological father in Detroit; she then spent a couple of weeks in foster care before moving to Charlevoix to live with her great grandmother. Defendant began living with Mara and Paul when she was about two years old. Jeffery Skinner was defendant's biological brother and he also lived in the Skinner household.

Mara testified that all of the children in her home were loved; Paul was actively involved in the family and he and defendant had a close relationship. During the time before the murder, Paul was concerned that defendant would move away to attend college and he wanted her to attend a college that was close to the Skinner home in Yale, Michigan. All four of the children had close relationships and spent time together. Mara described holidays, vacations, sporting events, and other occasions that the family spent together. Defendant's three older siblings all attended college and defendant planned to attend Western Michigan University upon graduating from high school.

Mara also testified that defendant was a healthy child; she did not have any developmental issues and she was very happy. Defendant and her three siblings were involved in school sports and defendant was involved in band, and she progressed normally in school and had many friends. Mara testified that she taught school for many years in the Yale elementary and junior high schools; she and Paul made academic success their primary goal for all the children, made sure the children attended and succeeded in school, participated in extracurricular activities, and encouraged and supported all the children in these areas. Defendant was actively involved in her school and was often a leader among her peers and was said to have good relationships with her family and friends.

Mara testified that in 2009 and 2010, defendant was involved with two friends whom were not a good influence. These were the only two occasions when Mara questioned defendant's judgment in choosing her friends. Mara spoke with defendant and asked her not to have contact with one of her male friends. Defendant became upset with Mara. Mara also stated that on one occasion, defendant had "scratch marks" on her arm.

Mara's brother Marcel Borja testified that he met defendant when she was an infant. He explained that the entire family accepted defendant and included her in family activities and vacations. Marcel never had concerns about defendant; she was always happy and well-adjusted. Defendant did not have any problems with her family, friends, or neighbors. Similar testimony, that defendant was loved and well cared for, was given to the trial court by another of Mara's brothers, Jeff Borja.

***5** Jeffrey Skinner, defendant's biological brother, testified that he grew up in the Skinner household with defendant. He described his family as very close and a family that spent a lot of time together. Jeffrey testified that the Skinner family ensured that the children were protected and happy.

Dr. Carol Holden, Ph.D., a forensic psychologist and the director of the Michigan Forensic Center, testified that she met with and assessed defendant on two occasions and reviewed the April 2011 criminal responsibility evaluation of defendant. She reviewed defendant's criminal responsibility evaluation in light of *Miller*, and explained:

> There was a lot that was absolutely unremarkable. [Defendant] presented at the time with no evidence of mental illness as defined by statute. She was clearly a bright, is and was a bright woman. She spoke of no particular traumatic experiences recently in her home, for example. There were a couple of things ... that stood out to me as I mentioned about self-centered approach, and a

> striking lack of appreciation of what this crime could mean for her and those around her.

Dr. Holden testified that it was apparent that defendant grew up in a warm and loving family; however, her very early childhood was "very different" and likely contributed to some difficulties with attachment. Defendant's biological father was involved with drugs and weapons and it was likely that he was a "less than excellent caregiver." Dr. Holden testified that defendant had issues with attachment, having likely had disruptions in her early attachments with caregivers; however defendant was not diagnosed with an attachment disorder. Defendant lived with her biological father for 10 months; she was then in foster care for a short time before moving to Charlevoix to live with grandparents for two years. Defendant then moved to the Skinner home, an "excellent" environment, where she resided for her childhood. Dr. Holden explained that she was not attempting to draw a direct link between defendant's very early childhood disruptions and the crime, however, the disruptions could have impacted defendant's internal view of the world and could provide context for the sentencing court to consider.

Dr. Holden testified that defendant was in middle adolescence at the time of the crime. Adolescence is the period of time when children become comfortable with abstract reasoning. By about age 16, children are able to think and reason in a cognitive way that is similar to that of an adult. However, adolescents are far more "tuned into reward then they are to potential difficulties," and would be more willing to engage in behavior that adults consider risky. Dr. Holden explained that cognitive development occurs during adolescence, but the slowest part of the brain to develop is the pre-frontal cortex, which controls planning, thinking through problems, and inhibiting impulses. She explained that teenagers do things that are ill considered because of lack of brain development. Overall, Dr. Holden concluded by stating that she did not diagnose defendant with any mental illness or having suffered from any traumatic experiences which may have brought on serious psychological difficulties.

Dr. James Garbarino, Ph.D, testified as an expert in developmental psychology with an emphasis in adolescence. He met with defendant in September 2014 for 90 minutes, reviewed court filings, and other case-related documents. Dr. Garbarino summarized a report that he prepared, explaining that defendant "was a very damaged child early in her life" when "the formation of secure attachments ... is essential," her "developmental damage carried through into adolescence," the "good quality of her care in later childhood and adolescence" masked much of her damage. According to Dr. Garbarino, defendant also had difficulty or issues with respect to her identity, was vulnerable to peer pressure, experienced serious problems with depression, and had serious issues with social emotional maturity.

***6** Dr. Garbarino testified that defendant employed dissociation to disconnect from her emotions until she reached 15 or 16 years of age; defendant reported crying more, cutting herself, and feeling depressed, at times acting out violently toward the Skinners. His opinion was that defendant's self-harm was indicative of a serious psychological issue, for which defendant did not receive therapeutic help. Dr. Garbarino presumed that defendant's biological father sexually abused her given that she reported sleeping in the same bed with her biological father. He opined that defendant was capable of benefitting from mental health services and other prison services testifying that: "it would be very likely that with mental health intervention and the passage of time she would fully recover from the crisis that has led her to the terrible crime that she committed."

Defendant testified at the sentencing hearing, stating that she did not have any independent memory of living with her father; she recalled living with her great grandmother in Charlevoix, and wanting to stay with her great grandmother. She also testified that she was involved in extracurricular activities in high school. She was involved in a youth group at her church and she babysat for people. Defendant testified that she became "very depressed" when she was 16 and 17 years old. She did not talk to people about her problems. She cut herself with a razor, but she did not obtain counseling for her depression. She continued her cutting behavior where no one could see. In prison, she continued this behavior. Defendant testified that she attended counseling in prison once per month and she was taking medication for anxiety, depression, and OCD.

Defendant acknowledged that she committed the offense for which she was convicted. She testified that she did not know why she committed "a horrendous crime" against a "wonderful family." She stated that she did not have an excuse for her crime. She stated that neither Paul nor Mara ever harmed her or did anything wrong to her. She agreed that the Skinner family never treated her "less than

wonderful." Defendant testified that she understood the consequences of her actions before the crime was completed.

After hearing this testimony, the trial court noted its mindfulness of the *Miller* factors, and its difficulty imagining "a case more factually opposite of those concerns than this case." The trial court opined that the defense effort to depict defendant's childhood "from court records alone and ... portray her background to fit classical psychological profiles distorts the truth and is a cruel disservice to a family that has suffered not only through the trauma of this horrific murder but three separate trials," and three sentencing hearings.

According to the trial court, although defendant "did not personally inflict the stab wounds," she did not play a passive role in the attack. The trial court specified that it was defendant who instigated "the idea of killing her parents and [was] the architect of the plan"; that defendant "promised her new boyfriend and his buddy money to kill them"; that defendant "drew a map of the neighborhood," the layout of her house, and "even included notes how best to avoid early detection"; that defendant "left her bedroom window open," cut the window screen, and placed "a step ladder outside to allow them to quietly enter the house"; that defendant "left kitchen knives on her bed for [the codefendants] to use in case they were unable to find knives themselves"; that defendant communicated with the codefendants by text messages "almost non-stop that evening to keep everyone posted as events were unfolding"; and that defendant actively prevented her brother from helping the victims.

The trial court rejected that defendant had grown up as "the victim of an abusive or dysfunctional family." In support of the trial court's view that defendant lived in "a l[o]ving and caring home," the trial court observed that the victims and their children had attended "college and held professional positions," Mara Skinner "was a highly respected teacher," the victims, their children, and members of the extended family "treated [defendant] with love and respect and included her in all activities," "attended all of her school and athletic activities," "vacationed together and showered her with attention," frequently hosted defendant's friends in the Skinner house; and defendant performed "well in school and learned after this crime that she had been accepted to Western Michigan University"; and a video presented at the resentencing hearing that documented defendant's life with the Skinner family, including "holiday celebrations, ... school events, ... vacations together," and showed the life "she had destroyed and the life that she had given up for herself."

***7** The trial court noted that defendant had exhibited no prior "signs of any emotional or psychological problems," "no prior contacts with the authorities," and had been "very involved in school and church activities." In so finding, the trial court also rejected the defense suggestion that defendant had moved "from one home setting to another early in her life," which "prevent[ed] her from developing appropriate attachment to one adult." Rather, the trial court found that although defendant's biological mother "was a heroin addict when [defendant] was conceived" and gave birth to defendant in prison, defendant's biological father kept her after her birth because the biological mother faced 10 more months of incarceration, the biological mother retrieved defendant "from her biological father's custody because he was [a] drug ... dealer" and she felt concerned for defendant's safety, the biological mother gave defendant to Mara Skinner, defendant then spent a few weeks in foster care because the biological mother had advised Mara Skinner of her belief that the biological father was dangerous, and Mara Skinner and the biological mother "agreed that ... the best and safest place for [defendant] was with their grandparents in Charlevoix." The trial court recounted that the victims had "established a relationship with [defendant] even while she was living in Charlevoix," before reaching 2-1/2-years of age defendant "began living full time with the Skinners," and when defendant was between 2-1/2 and 8 years of age, the Skinners facilitated interactions between defendant and her biological father, who "was a loving and caring man who wanted a relationship with his daughter."

The trial court went on to discredit the opinions of two psychological experts that defendant had experienced circumstances adversely affecting her emotional development by noting that the April 2011 psychiatric and psychological evaluations had reported "no history of depression and nothing in [defendant's] demeanor which suggested a debilitating depression or mania," "no sleep or appetite problems and ... no symptoms of disorders of th[ ]ough[t] or mood."

The trial court described Dr. Garbarino's findings as premised on "flawed and inaccurate data." Based, in part on this finding, the trial court went on to conclude that Dr. Garbarino had opined on the basis of inaccurate facts and failed "to adequately account for the positive influence from the Skinners and the lack of any anti-social or emotional issues."

The trial court also considered defendant's potential for rehabilitation, explaining as follows:

> Both defense psychologists suggested that she is a bright individual and could benefit from mental health treatment. That with time and maturity she could gain insight into the gravity of her behavior. A clinician associated with ... where [defendant] resides, ... testified that she has been outstanding as a peer educator for incoming prisoners to the facility.
>
> None of us have a crystal ball. For some, services provided within the prison system truly benefit an individual and they return to society and never reoffend. Others come out worse than before. However, given the legislative restriction now in effect, this factor has less relevance in this state. Even if I were to impose the minimum possible sentence she would still be required to serve at least 25 years before even being given a hearing before the parole board. Given the wide variety of life experiences that she will be exposed to during that time period, no one can make an accurate assessment of who she will be at that point. As a result, I cannot weigh her potential for rehabilitation within any range of predictable outcomes.

C. DEFENDANT'S SENTENCE IS NOT AN ABUSE OF DISCRETION

Our review of the record leads us to conclude that the trial court did not abuse its discretion in sentencing defendant to life imprisonment without the possibility of parole under MCL 769.25. In this case, the trial court's sentencing decision was "proportionate to the seriousness of the circumstances surrounding the offense and the offender"; therefore, the trial court did not abuse its discretion in sentencing defendant to life imprisonment without the possibility of parole. *Milbourn*, 435 Mich at 636. The trial court properly applied MCL 769.25 and adequately considered the *Miller* factors in rendering its sentencing decision. Specifically, the trial court considered defendant's age, noting that she was 27 days from her 18th birthday at the time of the offenses. The trial court considered the other features of defendant's youthfulness. The trial court noted that there was no evidence that defendant previously exhibited emotional or psychological issues. Defendant was not previously involved in criminal behavior and there were no signs of peer pressure. Defendant agreed that she formulated the plan to kill her parents. Further, we cannot conclude that the trial court clearly erred when it found that defendant's experts were not credible. In so finding, the trial court stated that defendant's prior psychological evaluation showed no signs of prior mental health issues; however defendant's experts did make those findings, the basis of which were greatly undermined during cross examination.

***8** Additionally, we observe that the trial court considered the relevant evidence and it was free to weigh the credibility of defendant's expert witnesses. Moreover, given our Supreme Court's holding in *Skinner*, it is apparent that the trial court was not required to make an explicit finding with respect to each and every *Miller* factor. Instead, the trial court was required to consider the *Miller* factors and articulate rationale for its decision as required by statute. See MCL 769.25(7). The trial court thoroughly explained the reasoning for its sentencing decision and the court did not abuse its discretion in imposing that sentence. Hence to the extent defendant also argues on appeal that the trial court erred and violated her constitutional rights when it failed to adequately consider her potential for rehabilitation by ignoring relevant mitigation evidence including evidence of attachment issues, we observe that the trial court specifically made findings relevant to defendant's claims of mitigating issues. The fact that the trial court rejected the testimony offered by defendant as to mitigation does not translate into this Court holding that the trial court failed to consider the issue. Accordingly, defendant has failed to show that the trial court erred with respect to its consideration of her potential for rehabilitation.

In addition, the trial court considered the circumstances of the offense and noted that defendant was involved in planning the attack. The evidence showed that defendant was intricately involved in the plot to kill her parents. She formulated the idea and took steps to facilitate the killings. She drew a map to help direct her codefendants to her parents and she took action to prevent her brother Jeffrey, a trauma nurse, from rendering aid. She sent text messages to the codefendants leading up to the attack. Defendant agreed that she had an opportunity to stop the attacks before they happened, but she did not do so.

The trial court also considered defendant's home environment. The trial court rejected the theory that defendant's very early childhood was unstable, noting that defendant testified that she grew up in a loving and

supportive home, with her family actively involved in her schooling and every aspect of her life.

The trial court also considered defendant's testimony. Defendant acknowledged that she understood the consequences of her plan to kill her parents. She admitted that she wanted her parents dead, and she agreed that there was no way to justify what she did. Defendant admitted that she attempted to manipulate a psychiatric and psychological assessment and that she hoped to alter her life-without-parole sentence. Defendant agreed that she did not feel depressed or have significant difficulty in school. She felt welcome in the Skinner home, and her uncle attended most of her extracurricular activities. Defendant agreed that her codefendant did not formulate the plan to kill her parents and she agreed that she chose to proceed with the plot. Defendant stated that she thought that she would escape detection for the attacks and would continue living her life. She agreed that she had an opportunity to stop the attacks, but she did not do so and that she planned to pay her codefendants from funds leftover from her college scholarship. The trial court concluded that this testimony "reputed the allegations that were the basis for [defendant's] claims." Finally, the trial court considered defendant's potential for rehabilitation and concluded that it could not "weigh her potential for rehabilitation within any range of predictable outcomes."

On this record, it is apparent that the trial court did what was requested on remand when it considered defendant's "youth and attendant characteristics" before sentencing defendant to life without the possibility of parole as required by *Miller*. See *Skinner*, 502 Mich at 131 (quotation marks and citation omitted). The trial court considered the factors articulated in *Miller* and set forth the aggravating circumstances that it considered while allowing defendant the opportunity to present evidence, after which the trial court articulated rationale in support of its sentencing decision. See MCL 769.25(6) and (7). Our review of the trial court's considerations and the factors employed, lead us to conclude that the trial court adequately considered the relevant evidence and the sentence it imposed did not violate the principle of proportionality. *Milbourn*, 435 Mich at 636; *Steanhouse*, 500 Mich at 471.

***9** Defendant also argues on appeal that the trial court violated her due process rights when it declined to impose a burden of proof on the prosecution. However, this argument is governed by our Supreme Court's holding in *Skinner*, 502 Mich at 131. Specifically, our Supreme Court explained that, in sentencing a juvenile defendant under MCL 769.25, a trial court is not required to make any explicit findings. *Id*. The trial court need not find that a defendant is irreparably corrupt or that a defendant is a rare juvenile offender. *Id*. Rather, a trial court must simply consider "an offender's youth and attendant characteristics ...." *Id*. at 131 (quotation marks and citation omitted). Moreover, MCL 769.25 does not require the prosecution to meet a burden of proof. Accordingly, the trial court did not err in declining to impose a burden of proof at resentencing.

Defendant also argues on appeal that the trial court erred in (1) considering victim-impact statements offered by Mara's brothers Jeff and Marcel, (2) erred in considering a video depicting the life of victim Paul Skinner, (3) erred in considering transcripts from a prior sentencing hearing, and (4) erred in considering opinions of defendant's parole officers contained in the PSIR wherein the officers recommended a life-without-parole sentence.

Although Jeff and Marcel did not fall within the definition of "victim" for purposes of the Crime Victim's Rights Act, MCL 780.752(1)(*i*), this Court has recognized a trial court's broad discretion in considering statements by victims who do not technically satisfy MCL 780.752(1)(*i*). See *People v Albert*, 207 Mich App 73, 74-75; 523 NW2d 825 (1995) (noting that "a sentencing court is afforded broad discretion in the sources and types of information to be considered when imposing a sentence, including relevant information regarding the defendant's life and characteristics"). Moreover, at a *Miller* sentencing hearing, a trial court may consider "evidence presented at trial together with *any evidence* presented at the sentencing hearing." MCL 769.25(7) (emphasis added). Accordingly, MCL 769.25(7) allows the trial court to consider all of the evidence complained of by defendant. We accordingly assign no error to the trial court's consideration of this evidence.

In conclusion, the trial court's sentence did not violate the principle of proportionality and the trial court did not commit legal error in conducting the resentencing hearing. Accordingly, the trial court did not abuse its discretion in sentencing defendant to life imprisonment without the possibility of parole.

Affirmed.

David H. Sawyer

William B. Murphy

Stephen L. Borrello Not Reported in N.W. Rptr., 2018 WL 5929052

All Citations

Footnotes

1 *People v Skinner (Skinner I)*, unpublished per curiam opinion of the Court of Appeals, issued February 21, 2013 (Docket No. 306903).

2 *People v Skinner*, unpublished order of the Court of Appeals, entered July 30, 2014 (Docket No. 317892).

3 *People v Skinner*, 500 Mich 929; 889 NW2d 487 (2017).

4 *People v Hyatt*, 316 Mich App 368; 891 NW2d 549 (2016).

APPENDIX E

1

PEOPLE of the State of Michigan, Plaintiff-Appellant,

v.

Tia Marie-Mitchell SKINNER, Defendant-Appellee.

SC: 152448
COA: 317892

Supreme Court of Michigan.

August 24, 2018

St. Clair CC: 10-002936-FC

Order

Rehearing No. 619

On order of the Court, the motion for rehearing of the Court's June 20, 2018 opinion is considered, and it is DENIED.

2

PEOPLE of the State of Michigan, Plaintiff-Appellant,

v.

Kenya Ali HYATT, Defendant-Appellee.

People of the State of Michigan, Plaintiff-Appellee,

v.

Kenya Ali Hyatt, Defendant-Appellant.

SC: 153081, SC: 153345
COA: 325741

Supreme Court of Michigan.

August 24, 2018

Wayne CC: 13-032654-FC

Order

Rehearing No. 620

On order of the Court, the motion for rehearing of the Court's June 20, 2018 opinion is considered, and it is DENIED.

3

NORTH AMERICAN BROKERS, LLC, and Mark Ratliff, Plaintiffs-Appellees,

v.

HOWELL PUBLIC SCHOOLS, Defendant-Appellant,

and

St. John Providence, Defendant.

SC: 155498
COA: 330126

Supreme Court of Michigan.

August 24, 2018

Livingston CC: 15-028669-CH

Order

On order of the Court, the motion for reconsideration of this Court's June 29,

APPENDIX F

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

769.25 Criminal defendant less than 18 years; circumstances; imprisonment for life without possibility of parole; violations; motion; response; hearing; record; sentence.

Sec. 25. (1) This section applies to a criminal defendant who was less than 18 years of age at the time he or she committed an offense described in subsection (2) if either of the following circumstances exists:

(a) The defendant is convicted of the offense on or after the effective date of the amendatory act that added this section.

(b) The defendant was convicted of the offense before the effective date of the amendatory act that added this section and either of the following applies:

(*i*) The case is still pending in the trial court or the applicable time periods for direct appellate review by state or federal courts have not expired.

(*ii*) On June 25, 2012 the case was pending in the trial court or the applicable time periods for direct appellate review by state or federal courts had not expired.

(2) The prosecuting attorney may file a motion under this section to sentence a defendant described in subsection (1) to imprisonment for life without the possibility of parole if the individual is or was convicted of any of the following violations:

(a) A violation of section 17764(7) of the public health code, 1978 PA 368, MCL 333.17764.

(b) A violation of section 16(5), 18(7), 316, 436(2)(e), or 543f of the Michigan penal code, 1931 PA 328, MCL 750.16, 750.18, 750.316, 750.436, and 750.543f.

(c) A violation of chapter XXXIII of the Michigan penal code, 1931 PA 328, MCL 750.200 to 750.212a.

(d) Any violation of law involving the death of another person for which parole eligibility is expressly denied under state law.

(3) If the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described in subsection (1)(a), the prosecuting attorney shall file the motion within 21 days after the defendant is convicted of that violation. If the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described under subsection (1)(b), the prosecuting attorney shall file the motion within 90 days after the effective date of the amendatory act that added this section. The motion shall specify the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole.

(4) If the prosecuting attorney does not file a motion under subsection (3) within the time periods provided for in that subsection, the court shall sentence the defendant to a term of years as provided in subsection (9).

(5) If the prosecuting attorney files a motion under subsection (2) requesting that the individual be sentenced to imprisonment for life without parole eligibility, the individual shall file a response to the prosecution's motion within 14 days after receiving notice of the motion.

(6) 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.

(7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.

(8) 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 sentencing or resentencing of the defendant under this section.

(9) If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years.

(10) A defendant who is sentenced under this section shall be given credit for time already served but shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence.

History: Add. 2014, Act 22, Imd. Eff. Mar. 4, 2014.

Compiler's note: Former MCL 769.25, which pertained to authorized imprisonment in reformatory at Ionia or Detroit house of correction instead of state prison of any male person convicted for first time of any offense other than rape, murder, or treason, was repealed by Act 256 of 1964, Eff. Aug. 28, 1964.

APPENDIX G

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

769.25a Case as final on or before June 24, 2012; effect of state supreme court or United States supreme court decision; procedures; resentencing hearings; priority; credit for time served.

Sec. 25a. (1) Except as otherwise provided in subsections (2) and (3), the procedures set forth in section 25 of this chapter do not apply to any case that is final for purposes of appeal on or before June 24, 2012. A case is final for purposes of appeal under this section if any of the following apply:

(a) The time for filing an appeal in the state court of appeals has expired.

(b) The application for leave to appeal is filed in the state supreme court and is denied or a timely filed motion for rehearing is denied.

(c) If the state supreme court has granted leave to appeal, after the court renders its decision or after a timely filed motion for rehearing is denied.

(2) If the state supreme court or the United States supreme court finds that the decision of the United States supreme court in Miller v Alabama, 576 US ___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), applies retroactively to all defendants who were under the age of 18 at the time of their crimes, and that decision is final for appellate purposes, the determination of whether a sentence of imprisonment for a violation set forth in section 25(2) of this chapter shall be imprisonment for life without parole eligibility or a term of years as set forth in section 25(9) of this chapter shall be made by the sentencing judge or his or her successor as provided in this section. For purposes of this subsection, a decision of the state supreme court is final when either the United States supreme court denies a petition for certiorari challenging the decision or the time for filing that petition passes without a petition being filed.

(3) If the state supreme court or the United States supreme court finds that the decision of the United States supreme court in Miller v Alabama, 576 US ___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), applies retroactively to all defendants who were convicted of felony murder under section 316(1)(b) of the Michigan penal code, 1931 PA 328, MCL 750.316, and who were under the age of 18 at the time of their crimes, and that the decision is final for appellate purposes, the determination of whether a sentence of imprisonment shall be imprisonment for life without parole eligibility or a term of years as set forth in section 25(9) of this chapter shall be made by the sentencing judge or his or her successor as provided in this section. For purposes of this subsection, a decision of the state supreme court is final when either the United States supreme court denies a petition for certiorari challenging the decision with regard to the retroactive application of Miller v Alabama, 576 US___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), to defendants who committed felony murder and who were under the age of 18 at the time of their crimes, or when the time for filing that petition passes without a petition being filed.

(4) The following procedures apply to cases described in subsections (2) and (3):

(a) Within 30 days after the date the supreme court's decision becomes final, the prosecuting attorney shall provide a list of names to the chief circuit judge of that county of all defendants who are subject to the jurisdiction of that court and who must be resentenced under that decision.

(b) Within 180 days after the date the supreme court's decision becomes final, the prosecuting attorney shall file motions for resentencing in all cases in which the prosecuting attorney will be requesting the court to impose a sentence of imprisonment for life without the possibility of parole. A hearing on the motion shall be conducted as provided in section 25 of this chapter.

(c) If the prosecuting attorney does not file a motion under subdivision (b), 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.

(5) Resentencing hearings under subsection (4) shall be held in the following order of priority:

(a) Cases involving defendants who have served 20 or more years of imprisonment shall be held first.

(b) Cases in which the prosecuting attorney has filed a motion requesting a sentence of imprisonment for life without the possibility of parole shall be held after cases described in subdivision (a) are held.

(c) Cases other than those described in subdivisions (a) and (b) shall be held after the cases described in subdivisions (a) and (b) are held.

(6) A defendant who is resentenced under subsection (4) shall be given credit for time already served, but shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence.

History: Add. 2014, Act 22, Imd. Eff. Mar. 4, 2014.