No. 20-6626

IN THE
Supreme Court of the United States

IHAB MASALMANI,

Petitioner,

v.

STATE OF MICHIGAN,

Respondent.

On Petition for Writ of Certiorari
to the Michigan Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION I

1. Should this Court grant certiorari to decide whether the prosecution should bear the burden of proof at a *Miller* hearing when *Miller*, *Montgomery*, and the relevant state statute all dictate that neither party bears the burden of proof at such a hearing, and when the trial court conducted an entirely constitutional *Miller* hearing?

QUESTION II

2. Should this Court grant certiorari to decide whether a presumption against life-without-parole sentences exists when the Petitioner failed to raise this claim in the state courts?

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OPINIONS & ORDERS BELOW

The Michigan Supreme Court's Order denying the Petitioner's application for leave to appeal, signed on May 29, 2020, is published at 943 NW2d 359 (Mich. 2020) (Pet. App. A, 1a-7a). The Michigan Supreme Court's Order denying reconsideration, dated July 15, 2020, is published at 944 NW2d 92 (Mich. 2020) (Pet. App. B, 8a).

The Michigan Court of Appeals' opinion affirming the Petitioner's convictions, vacating his mandatory life sentence for First-Degree Felony Murder, and remanding for resentencing, signed on March 19, 2013, is unpublished. (Pet. App. C, 9a-15a). The Michigan Supreme Court's Order denying the Petitioner's application for leave to appeal, dated September 3, 2013, is published at 495 Mich 853; 835 NW2d 592 (Mich. 2013). On January 6, 2015, the Macomb County Circuit Court subsequently sentenced the Petitioner to life imprisonment without the possibility of parole ("LWOP"). (Pet. App. D, 16a-24a). On direct appeal, the Michigan Court of Appeals affirmed in an unpublished opinion signed on September 22, 2016. (Pet. App. E, 25a-32a). The Michigan Supreme Court granted leave to appeal this ruling on April 5, 2019, and this order is published at 924 NW2d 585 (Mich. 2019) (Pet. App. F, 33a).

STATEMENT OF JURISDICTION

The State of Michigan agrees that this Court has jurisdiction to consider the Petition as to the Question I, but for the reasons stated more fully herein, the Court lacks jurisdiction to consider Question II in the Petition for Writ of Certiorari.

CONSTITUTIONAL & STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Pursuant to the Fourteenth Amendment to the United States Constitution, "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

Michigan Compiled Law ("MCL") § 769.25 applies to criminal defendants who were less than 18 years of age at the time he or she committed an offense punishable by life imprisonment without the possibility of parole before the act's effective date and "[o]n 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 have not expired." See MCL § 769.25(1)(b)(ii). The statute provides that "[i]f 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 statute indicates that if the assistant prosecuting attorney files such a motion: "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 460; 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." MCL § 769.25(6). Finally, "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." MCL § 769.25(7).

STATEMENT OF THE CASE

The Petitioner's convictions stem from a series of violent crimes he committed in Macomb County, Michigan, in August of 2009. The Michigan Court of Appeals accurately summarized the facts adduced at trial as follows:

> Defendant's convictions arise from three criminal episodes that occurred during a three-day crime spree from August 9, 2009, until defendant's arrest on August 11, 2009. The prosecutor's theory was that on the afternoon of August 9, 2009, defendant, acting in concert with codefendant Robert Taylor, both of whom were juveniles, carjacked and abducted Matt Landry from outside an Eastpointe restaurant [Quizno's], held Landry captive for several hours, stole his money using his ATM card, and later murdered him by shooting him in the head and leaving his body at an abandoned burnt-out house in a drug-infested neighborhood. The next day, defendant, using Landry's vehicle and now acting alone, robbed a Flagstar Bank, during which he pointed a gun and threatened several people inside the bank, temporarily abducted customer Sarah Maynard, and stole money from both the bank and a customer before fleeing in Landry's vehicle. Defendant continued his crime spree on August 11, 2009, by carjacking David Hassroune at gunpoint in a Walmart parking lot before being arrested. Surveillance videotape from several locations depicted defendant committing many of the offenses. (Pet. App. C, 10a).

After a trial before Macomb County Circuit Court Judge Diane M. Druzinski ("Judge Druzinski") in September of 2010 in three consolidated cases, a jury convicted the Petitioner of Bank Robbery (MCL § 750.531), two counts of Armed Robbery (MCL § 750.529), two counts of Kidnapping (Maynard) (MCL § 750.349), two counts of Carjacking (MCL § 750.529a), five counts of Felony Firearm (MCL § 750.227b), Receiving and Concealing a Stolen Firearm (MCL § 750.535b), Larceny from the Person (MCL § 750.357), Conspiracy to Commit Carjacking (MCL § 750.157a),

Conspiracy to Commit Kidnapping, and First-Degree Felony Murder (MCL § 750.316). (Pet. App. C, 10a).

On November 4, 2010, Judge Druzinski sentenced the Petitioner to LWOP on his First-Degree Felony Murder conviction, terms of 15 to 50 years' imprisonment on his Bank Robbery, Armed Robbery, Kidnapping convictions in the Flagstar case and his Carjacking conviction in the Walmart case, terms of 25 to 50 years' imprisonment on his Carjacking, Kidnapping, and Conspiracy convictions in the Quizno's case, terms of five to 10 years' imprisonment on his Receiving and Concealing a Stolen Firearm and Larceny from the Person convictions, and two years' imprisonment on the five Felony Firearm convictions. (Pet. App. C, 9a-10a).

The Petitioner appealed as of right. The Michigan Court of Appeals ("Court of Appeals") affirmed his convictions, but vacated Judge Druzinski's sentence on the Petitioner's conviction for First-Degree Felony Murder and remanded for resentencing consistent with the intervening decisions in *Miller* and *People v. Carp*, 298 Mich App 472; 828 NW2d 685 (2012) (affirmed at 496 Mich 440; 852 NW2d 801 (2014). (Pet. App. C, 10a, 15a). On September 3, 2013, the Michigan Supreme Court ("Supreme Court") denied the Petitioner's application for leave to appeal.

In early 2014, the Michigan Legislature passed MCL § 769.25, which took effect on March 4, 2014. In April of 2014, the prosecution filed a motion under MCL § 769.25(2) requesting imposition of LWOP on the defendant's First-Degree Felony Murder conviction. Pursuant to *Miller* and the new statute, Judge Druzinski conducted a two-day hearing in October of 2014. (Pet. App. D, 16a). At that hearing,

the defense called five witnesses. On the first day of testimony, Dr. Daniel P. Keating, a psychology professor at the University of Michigan and an expert in adolescent brain development, testified regarding the scientific underpinnings of this Court's ruling in *Miller*. (Pet. App. D and E, 18a, 22a, 28a-30a). Jennifer Keller, a social worker and one of the Petitioner's case managers, testified about her interaction with the Petitioner from 2001 until approximately 2005 (ages nine to 13) and his three foster care placements during that period. (Pet. App. D, 20a). William Ladd, an attorney specializing in representing children in the Wayne County juvenile courts and the Petitioner's attorney in various capacities from 2001 to 2009, testified regarding his representation of the Petitioner in the juvenile justice system. (Pet. App. D and E, 19a-20a, 29a).

On the second day of testimony, Dr. Frank Vandervort, a law professor at the University of Michigan and an expert in the field of child welfare and juvenile delinquency proceedings, testified about the juvenile justice system in Michigan and the Petitioner's experience within that system. (Pet. App. D, 20a). Dr. Lyle Danuloff, a licensed psychologist, testified regarding his evaluation of the Petitioner. (Pet. App. D and E, 22a-23a, 30a-31a). In addition to this testimony, the parties stipulated to the admission of numerous exhibits during this hearing, including the Petitioner's disciplinary records from the Michigan Department of Corrections. (Pet. App. E, 31a).

On January 6, 2015, Judge Druzinski resentenced the Petitioner to life imprisonment without the possibility of parole. (Pet. App. E, 24a). The Petitioner subsequently appealed as of right, and the Court of Appeals ultimately affirmed that

sentence. (Pet. App. E, 26a, 31a-32a). On April 5, 2019, the Michigan Supreme Court granted the Petitioner's application for leave to appeal, (Pet. App. F, 33a), but after receiving briefs and hearing oral arguments, it eventually denied the request for leave to appeal. (Pet. App. A, 1a). The Petitioner has since filed the instant Petition for Writ of Certiorari.

ARGUMENT

Introduction

In late 2014, the trial court, as demonstrated in more detail at the end of this pleading, conducted a thoroughly constitutional *Miller* hearing, at which the Petitioner called numerous witnesses on his behalf and the trial court properly applied the holdings in *Miller* and *Montgomery v. Louisiana*, 136 S Ct 718; 193 LEd2d 599 (2016). At the conclusion of this hearing, in January of 2015, the trial court concluded that the Petitioner "present[ed] precisely what the Supreme Court characterized as the 'rare juvenile offender whose crime reflects irreparable corruption.'" (Pet. App. D, 24a). Subsequently, the trial court resentenced the Petitioner to "life without the possibility of parole." (Pet. App. D, 24a).

The Michigan appellate courts did not disturb the trial court's ruling. The Court of Appeals found that "the trial court accurately analyzed each of the *Miller* factors and correctly concluded that defendant is the rare juvenile offender whose crime reflects irreparable corruption" and that the trial court "did not abuse its discretion in determining that defendant should be sentenced to life imprisonment without parole." (Pet. App. E, 31a). The Michigan Supreme Court, ultimately, after ordering briefing and holding argument, denied the Petitioner's application for leave to appeal. (Pet. App. A, 1a).

In his Petition for Writ of Certiorari, the Petitioner asks this Court to review a claim of error not yet ruled upon by the Michigan Supreme Court, either previously or in the case bar—which party bears the burden of proof at a *Miller* hearing. The prosecution submits that this Court's opinions in *Miller* and *Montgomery*, as well as

the language in the applicable Michigan statute, dictate that neither party bears the burden of showing that a *Miller* factor suggests, or does not suggest, a sentence of LWOP. Rather, a trial court must simply consider "an offender's youth and attendant characteristics" in determining whether to impose a sentence of LWOP. See *Miller*, 132 S Ct at 2468. Here, the state trial court did not place a burden of proof on either party at the *Miller* hearing, and thus, no constitutional error occurred requiring reversal. (Pet. App. D, 16a-24a). Moreover, the Petitioner's reliance on cases from a handful of other jurisdictions is misplaced in that each is distinguishable because: (1) the burden of proof was allocated, either explicitly or implicitly, based on the specific state's sentencing statute; (2) the court misread *Miller* and *Montgomery*; or (3) an entirely different constitutional analysis was applied. For these reasons, as set forth in more detail below, this Court should deny the Petitioner for Writ of Certiorari.

Question I

This Court should deny the Petition for Writ of Certiorari on the issue of whether the prosecution bears the burden of proof at a *Miller* hearing where the Court's decisions in *Miller* and *Montgomery*, as well as the applicable state statute, plainly establish that neither party bears such a burden, where no constitutional basis exists for this Court to impose that burden upon the prosecution, and where the state trial court conducted an entirely constitutional *Miller* hearing.

A. Both *Miller* and *Montgomery*, and also the applicable state statute, plainly establish that neither the prosecution, nor the defendant, bears the burden of proving that a *Miller* factor supports, or does not support, a life-without-parole sentence, and there is no constitutional basis for this Court to impose such a burden on the prosecution.

In his pleadings, the Petitioner asks this Court to impose the burden of proof at *Miller* hearings on the prosecution. In doing so, the Petitioner conducts very little analysis of this Court's holding in *Miller*, the applicable Michigan statute, or this Court's decision in *Montgomery*. In *Miller*, 132 S Ct at 2467-2475, this Court held that mandatory LWOP sentences for individuals under the age of 18 were "cruel and unusual" and violated the Eighth Amendment of the United States Constitution. The Court observed that:

> 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. *Id.* at 2471.

The Court, however, rejected arguments for a categorical bar to sentencing juveniles to life in prison without parole, observing that it did not "foreclose a sentencer's ability to make that judgment in homicide cases." *Id.* at 2469. Instead, *Miller* emphasizes that its holding serves to "mandate[] only that a sentence follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* at 2471.

In *Miller*, this Court did not discuss a burden of proof at such sentencings. Rather, this Court simply stated that mandatory LWOP for a juvenile precludes the trial court's "consideration" of these factors. See *id.* at 477. In that regard, *Miller* holds that "*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." See *Miller*, 567 US at 488.

Similarly, the applicable Michigan statute, MCL § 769.25 does not reference a burden of proof at these sentencings. The relevant statute, MCL § 769.25(6), merely instructs the trial court to conduct a hearing on the prosecuting attorney's motion "as part of the sentencing process" and "consider the factors listed in [*Miller*], and may consider any other criteria relevant to its decision, including the individual's record while incarcerated." Further, MCL § 769.25(7) provides that the trial court "shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." Finally, the trial court "may consider evidence presented at trial together with any evidence presented at the sentencing hearing." MCL § 769.25(7).

Only in *Montgomery* did this Court allude to a burden of proof at a *Miller* hearing. See *Montgomery*, 136 S Ct at 736. At the end of the opinion, Justice Kennedy observed that "[i]n light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, however, 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 736-737. Indeed, the Michigan Supreme Court, in *People v Skinner*, 502 Mich 89, 131; 917 NW2d 292 (2018), made this observation, noting that "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."

Given the overarching thrust of the language in *Miller* and *Montgomery* and the Michigan statute, the prosecution submits that neither party bears the burden of showing that a *Miller* factor does or does not suggest a sentence of LWOP. Traditionally, in the State of Michigan, neither party carries a burden of proof regarding the trial court's imposition of sentence. This interpretation is buoyed by the discussion of *Miller* and *Montgomery* in *Skinner*, in which the Michigan Supreme Court stated:

> 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. *Skinner*, 502 Mich at 131 (quoting *Miller*, 567 US at 483).

Moreover, the Michigan Supreme Court's holding in *Skinner* 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" further buttresses the view that a *Miller* hearing is a sentencing hearing just like any other in the State of Michigan and does not carry with it an applicable burden of proof. *Id.*

On remand in *Skinner III* (*People v. Skinner*, COA No. 317892), the Michigan Court of Appeals seized on this language in addressing the defendant's contention that the prosecution carried the burden of proof at a *Miller* hearing:

> 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 out Supreme Court's holding in [*Skinner*]. 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 sentencing.

Under the circumstances, the prosecution maintains that neither party carries a burden of proof at a *Miller* hearing. Given that Judge Druzinski did not impose a burden of proof on either party at the *Miller* hearing in 2014, no constitutional error occurred requiring reversal. (Pet. App. D, 16a-24a).

As indicated, the Petitioner does not root his argument in a discussion of *Miller*, *Montgomery*, or even the applicable Michigan statute. Instead, he relies wholly on case law from a small number of other States. Notably, each of the cases cited by the Petitioner is distinguishable because the burden of proof (or presumption) was assigned, either explicitly or implicitly, based on a specific state sentencing statute, a misreading of *Miller* and *Montgomery*, or an entirely different constitutional analysis. See *Stevens v. Oklahoma*, 422 P3d 741, 750; 2018 OK CR 11 (Okla Crim App, 2018) (explaining that finding of irreparable corruption increases maximum punishment authorized by verdict, and, as a result, must be proved by

prosecutor beyond a reasonable doubt); *Davis v. Wyoming*, 415 P3d 666, 681; 2018 WY (2018) (holding that *Miller* and *Montgomery* require trial court to start with presumption against LWOP that may be rebutted by prosecutor); *Pennsylvania v. Batts*, 640 Pa 401, 471-472; 163 A3d 410 (2017) (find that *Miller* and *Montgomery* require presumption against LWOP for juvenile defendants); *Iowa v. Seats*, 865 NW2d 545, 555 (Iowa, 2015) (interpreting *Miller* as creating presumption that juvenile defendants should be parole eligible); *Utah v. Houston*, 353 P3d 55, 69-70; 2015 UT 40 (2015) (stating that Utah Legislature "determined that a jury may sentence a defendant to life without parole if it determines that the State has satisfied its burden to demonstrate that this is the 'appropriate' sentence to impose"); *Missouri v. Hayes*, 404 SW3d 232, 241 (Mo, 2013) (allocating burden of proof to prosecution with only reference to case law regarding constitutional implications of increasing sentence on basis of judge-found facts); *Conley v. Indiana*, 972 NE2d 864, 871 (Ind, 2012) (placing burden on prosecutor based on state statute).

Based upon the foregoing then, this Court should deny the Petitioner's request for a Writ of Certiorari.

B. The trial court wholly complied with this Court's holding in *Miller* by conducting the appropriate resentencing hearing mandated by *Miller*, and by adequately weighing and considering all of the mitigating factors outlined in *Miller* before it ultimately resentenced the Petitioner to life in prison without parole.

In addition to the arguments already set forth herein, the State of Michigan submits that the Petition for Writ of Certiorari should also be denied based upon the fact that the trial court: (1) conducted an entirely thorough, and wholly constitutional, *Miller* hearing in this case; (2) adequately weighed, and properly considered, each of

the mitigating factors discussed in *Miller* in light of the evidence presented at that hearing; and (3) only re-imposed the Petitioner's life-without-parole sentence after it first provided those constitutional safeguards. The trial court's analysis of the evidence presented at the *Miller* hearing as to each the mitigating factors is more specifically addressed below.

Chronological Age and Hallmark Features

In its seminal decision in *Miller*, 132 S Ct at 2468, this Court decided that state criminal sentencing schemes that mandate sentences of LWOP amount to unconstitutional cruel and unusual punishment, noting, in part, that such statutes "preclude[] consideration of chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller* provided a bright-line in considering the Petitioner's chronological age and his juvenile psychological disposition—18 years old.

Here, Judge Druzinski, in her written opinion, specifically acknowledged the "hallmark features" of youth and brain science that underpin the decision in *Miller*:

> The Court must also consider the "hallmark features" of the defendant's age, including immaturity, impetuosity, and failure to appreciate risks. Dr. Keating testified that the limbic system—which serves as "arousal system, . . . an incentive system, and a reward system"—is much more active during one's teenage years than as an adult. *Id.* at 20-21 (Keating). Dr. Keating further testified that the prefrontal cortex governs "executive function" and "is designed as a brake on the [limbic] system but it develops much more slowly than the limbic system." *Id.* at 23 (Keating). He explained that there is a "developmental maturity mismatch" between the limbic system and the prefrontal cortex. *Id.* at 24-25 (Keating). He explained that "[t]he prefrontal cortex . . . doesn't reach full maturity under the mid-20s." *Id.* at 23 (Keating). As a

> result, teenagers tend to engage in "generally reckless behavior." *Id.* at 28 (Keating). (Pet. App. D, 18a).

Given the foregoing, Judge Druzinski "carefully consider[ed]" the "hallmark features" of chronological age at the *Miller* hearing. (Pet. App. D, 18a-19a).

Trial courts applying the *Miller* factors are confined by the 18-year age limit and the brain science is, in effect, baked into the holdings in *Miller*/*Montgomery*. As a result, expert testimony like Dr. Keating is of limited utility at a *Miller* hearing where every defendant's limbic system will be overly active and every defendant's prefrontal cortex will be developing. Instead, at a *Miller* hearing, trial courts must examine the evidence adduced regarding the defendant's own chronological age/maturity and determine whether the "hallmark features" of adolescence discussed in *Miller*, including immaturity, impetuosity, and a failure to appreciate risks and consequences, played any role in the defendant's crimes.

Here, the Petitioner was 17 years and eight months old when he ruthlessly executed Matthew Landry in a secluded Detroit drug den several hours after abducting him after he had methodically used his victim to obtain cash and a vehicle. (Pet. App. C and D, 10a, 18a). By contrast, as Judge Druzinski observed, *Miller* itself "dealt with juvenile defendants who were a mere 14-years old at the time of their offenses, a far cry from this case." (Pet. App. D, 19a). The defense introduced no testimony or evidence at the *Miller* hearing demonstrating that the Petitioner was unusually immature or impetuous for a nearly-18 year old. Instead, the defendant's guardian ad litem testified that, maturity-wise, the Petitioner "was probably in the middle out of the 5,000 to 8,000 children he had represented over the years." (Pet.

App. D, 19a). Finally, at the resentencing hearing, Judge Druzinski found that the Petitioner "did exhibit some level of maturity."

In this regard, this Court expressly indicated in *Miller* that it was appropriate to take into account the differences between juveniles of different ages. More specifically, in explaining the defects of a scheme mandating LWOP for juveniles, this Court stated: "Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the children from a stable household and the child from a chaotic and abusive one." *Miller*, 132 S Ct at 2467-2468. In fact, Justice Kennedy criticized the dissents in *Miller* for continually referring to 17-year-olds who have committed brutal crimes and comparing those defendants to the 14-year-old defendants in *Miller*, explaining: "Our holding requires factfinders to attend to exactly such circumstances—to take into account the differences among defendants and crimes. By contrast, the sentencing schemes that the dissents find permissible altogether preclude considering these factors." *Id.* at 2469 n 8. In other words, treating 14-year-olds the same as 17-year-olds is exactly what the ruling in *Miller* sought to end and, thus, Judge Druzinski properly focused on the Petitioner's individual age/maturity in analyzing the *Miller* factors.

The most significant aspect of this factor, however, lies in the line that *Miller* "drew . . . between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery*, 136 S Ct at 718. Judge Druzinski, who sat through the Petitioner's entire trial and conducted the

Miller hearing, observed at the resentencing hearing, "there was no impulsiveness or failure to appreciate the risks when he kidnapped and kept Mr. Landry alive for at least eight hours before killing him." Moreover, the Michigan Court of Appeals stated:

> The record refutes any claim that the hallmark features of adolescence identified in *Miller*, 132 S Ct at 2468, including immaturity, impetuosity, and a failure to appreciate risks and consequences, played any role in defendant's crimes. This was not, as in *Miller*, 132 S Ct at 2465, a mere botched robbery that turned into a killing. Defendant engaged in an unusually horrific, disturbing, and violent crime spree that extended over a three-day period. Defendant, aided by codefendant Robert Taylor, brazenly and forcibly kidnapped and carjacked Matt Landry in broad daylight outside a restaurant, punched and dragged him by the neck, drove his car, held him captive for at least seven hours, used his ATM card to steal his money and buy numerous items. He then took Landry to a drug house where defendant bought and consumed crack cocaine. Finally, defendant took Landry to a nearby vacant house where he killed him in a brutal execution style by shooting him in the back of the head. Defendant then committed additional violent crimes over the next two days, including robbing a bank and its customers, kidnapping a bank customer, and another carjacking. Landry's significantly decomposed body was found two days later inside the vacant burned out house where he had been shot in the back of the head. From the position of the body, it appeared that Landry had been kneeling at the time of his murder. Defendant's criminal actions over an extended period of time are not reflective of a merely immature or impetuous adolescent who fails to appreciate risks and consequences. (Pet. App. E, 18a).

Working within *Miller*'s framework, Judge Druzinski appropriately concluded that the defendant's chronological age and its hallmark features did not weigh in favor of mitigation.

Family and Home Environment

Also in *Miller*, 132 S Ct at 2468, this Court observed that such mandatory sentencing schemes for juveniles "prevent[] taking into account the family and home

environment that surrounds him—and from he cannot usually extricate himself—no matter how brutal or dysfunctional."

Here, Judge Druzinski noted that the evidence at the *Miller* hearing was "essentially uncontroverted" that the Petitioner's "family and home environment were terrible." (Pet. App. D, 19a). As the Petitioner was "moved from one foster care placement to another, he lost the ability to form attachments with parental figures and became more oriented toward being out on the streets." (Pet. App. E, 29a). The Petitioner "had delinquency cases for assault and drug offenses; he pleaded guilty to misdemeanors and became a delinquent court ward." (Pet. App. E, 29a). Given the testimony and evidence adduced at the *Miller* hearing, the trial court properly found that "this factor likely weighs in defendant's favor" against a sentence of LWOP. (Pet. App. D, 21a).

Circumstances of the Homicide Offense

This Court, in holding that mandatorily sentencing a juvenile to LWOP violated the Eighth Amendment, observed that such a scheme "neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and way familial and peer pressures may have affected him." *Miller*, 132 S Ct at 2468. The Petitioner, along with his co-defendant, brazenly kidnapped and carjacked Matthew Landry in broad daylight in Eastpointe, Michigan, and, many hours later, brutally executed him inside a burnt-out drug house in Detroit. (Pet. App. C, 10a). The Petitioner committed two more violent crimes over the next few days, using Matthew Landry's green Honda as a getaway vehicle. (Pet. App. C, 10a).

Nothing in the testimony or evidence from the *Miller* hearing suggested that the Petitioner's crime spree was the result of familial or peer pressure. (Pet. App. D, 21a).

Judge Druzinski observed at the resentencing hearing that the Petitioner "had numerous opportunities to abandon his plan, and instead d[r]ove with his co-defendant and Matthew Landry around town for hours before killing Landry in cold blood execution style in a vacant home." In other words, the circumstances surrounding this murder were not a mitigating factor under *Miller*: "There is nothing in the facts and circumstances of the crime which would warrant anything less than life in prison without the possibility of parole." As the Michigan Court of Appeals observed: "Given the defendant's extensive participation in these disturbing criminal acts and the absence of any family or peer pressure on defendant, the trial court did not err in heavily weighing this factor against the defendant and concluding that it did not favor mitigation." (Pet. App. E, 29a).

Incapacities of Youth

In *Miller*, 132 S Ct at 2468, this Court, in striking down sentencing schemes that mandate LWOP for juvenile offenders, observed that such systems "ignore[] that [the defendant] might have been charged and convicted of a lesser offense if not for the 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." Here, at the *Miller* hearing, the defense did not even contest that the Petitioner may have been charged with a lesser crime if not for his age. As Judge Druzinski wrote, "[t]here is no evidence that the incapacities of youth caused

defendant to be unable to participate in his defense . . . [n]or is there any evidence that he implicated himself due to youthful incapacities." (Pet. App. D, 22a). As a result, this *Miller* factor did weigh in favor of mitigation.

Possibility of Rehabilitation

Finally, this Court, in ruling that a juvenile offender may not be automatically sentenced to LWOP without offending the Eighth Amendment, stated that "this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." *Miller*, 132 S Ct at 2468.

Judge Druzinski determined that this *Miller* factor did not weigh in favor of mitigation. (Pet. App. D, 22a-23a). The utter depravity of the Petitioner's vicious crime spree suggests that he is wholly incapable of rehabilitation. Moreover, the relevant statute, MCL § 769.25(6), provides that, at such a hearing, the trial court must consider the *Miller* factors, as well as "any other criteria relevant to its decision, including the individual's record while incarcerated." Incredibly, the Petitioner amassed "23 major misconduct violations" in the short time after his incarceration in the Michigan Department of Corrections. (Pet. App. E, 31a). As the Michigan Court of Appeals observed:

> Defendant continued engaging in assaultive behavior after being incarcerated for the present offenses. He assaulted or attempted to assault staff personnel at the Macomb County Jail several times. After being transferred to prison, defendant incurred 23 misconduct tickets. Four of the tickets were for fighting, two were for possessing a weapon, one was for assault and battery of another prisoner, and another one was for assault resulting in serious physical injury to another prisoner. (Pet. App. E, 31a).

Given the foregoing, the appellate record fully supports Judge Druzinski's determination that the "defendant's prospects for rehabilitation are negligible." (Pet. App. D, 23a).

Significantly, the defense at the *Miller* hearing was entirely unable to introduce any testimony or evidence tending to show that the Petitioner had any real prospects for rehabilitation. Dr. Keating declined to make any prediction for the Petitioner regarding his rehabilitation. (Pet. App. D, 22a). Even so, as Judge Druzinski noted in her ruling, Dr. Keating "acknowledged that the rehabilitation challenges are certainly higher in the case of a juvenile who is capable of pulling a trigger" and that "the worse the circumstances, the more likely it is for non-resilience, no rehabilitation to be the case." (Pet. App. D, 22a).

Notably, Dr. Danuloff, the licensed psychologist who evaluated the Petitioner for the defense just prior to the *Miller* hearing and approximately five years after the Petitioner murdered Matthew Landry, testified that the defendant told him that his crimes were "both" righteous and evil. (Pet. App. D, 23a). Further, the Petitioner told Dr. Danuloff that "he didn't have any choice" but to commit these crimes. (Pet. App. D, 23a). Dr. Danuloff, like Dr. Keating, testified that he could not predict the Petitioner's future outcome. (Pet. App. D, 22a-23a). The Petitioner told Dr. Danuloff that "[e]ven a Godly person can punish people who bring harm to them. Even God did this." (Pet. App. D, 23a). Despite all this, as well as the Petitioner's statement to Dr. Danuloff regarding the "righteous[ness]" of his crimes, Dr. Danuloff testified that the Petitioner was "lucky" because, as a result of this Court's decision in *Miller*,

"something was happening inside of" the Petitioner that Dr. Danuloff was unable to define that was "very primitive" and "embryonic." (Pet. App. D, 22a-23a). At the same time, Dr. Danuloff conceded that the Petitioner, given his diagnosis of antisocial personality disorder, was manipulative. (Pet. App. D, 22a-23a). Surely such testimony does not constitute evidence that the Petitioner has any real prospects for rehabilitation.

Given the trial court's proper application of this Court's decision in *Miller* to the instant case, coupled with the other arguments outlined herein, the State of Michigan respectfully submits that the Petition for Writ of Certiorari should be denied by this Honorable Court.

Question II

This Court should also deny the Petition for Writ of Certiorari on the issue of whether there is a presumption against life-without-parole sentences since the Petitioner failed to raise such a claim in the state courts.

Simply stated, the Petitioner has failed to preserve any claim that this Court's precedent creates a legal presumption against LWOP sentences. Although the Petitioner has asserted that this Court should decide whether such a presumption exists for juvenile offenders, that issue has never once been raised in the Michigan state courts, nor has the issue been passed on, or otherwise preserved, in the Michigan state courts. This Court "has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 89 S Ct 1161, 1163 (1969). Accordingly, under these

circumstances, the State of Michigan respectfully submits that this Court must decline to review this claim of error for want of jurisdiction.

RELIEF REQUESTED

For the reasons set forth herein, Respondent respectfully urges this Honorable Court to **DENY** the Petition for Writ of Certiorari.

Respectfully Submitted,

By: Joshua D. Abbott

JOSHUA D. ABBOTT
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