STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARBARA P. HERNANDEZ,

Defendant-Appellant.

UNPUBLISHED
December 22, 2020

No. 350565
Oakland Circuit Court
LC No. 1990-100991-FC

Before: METER, P.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Defendant was convicted in 1991, following a jury trial, of first-degree premeditated murder, MCL 750.316(1)(a), and armed robbery, MCL 750.529. Defendant was 16 years old at the time of the underlying offenses. The trial court sentenced her to life without parole (LWOP) for the first-degree murder conviction and life imprisonment with parole eligibility for the armed-robbery conviction. Following the United States Supreme Court's determination that mandatory LWOP sentences for juvenile offenders violated the Eighth Amendment's protection against cruel and unusual punishment, *Miller v Alabama*, 567 US 460, 465; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and enactment of MCL 769.25 and MCL 769.25a by the Michigan Legislature, defendant was resentenced by the successor judge who, at the prosecution's request, again sentenced defendant to LWOP for her first-degree murder conviction. Defendant now appeals by right. We affirm.

I. BACKGROUND

A. THE INITIAL CRIME AND TRIAL

This matter arises from the murder of James Cotaling on May 12, 1990. Defendant was with her boyfriend, 20-year-old James Hyde, when Cotaling was killed. As they were staying in Pontiac, Michigan, defendant and Hyde decided to go to New Mexico to visit defendant's father. On the night of the murder, Hyde instructed defendant to buy a hunting knife from a nearby store, so they could kill someone and take the victim's vehicle. The plan was for defendant to act as a prostitute, lure an individual into the home the two were staying, kill the individual, and then take the victim's vehicle. After purchasing the knife from a nearby store, defendant returned to the

house. Cotaling saw defendant outside the home, solicited sexual services from defendant, and entered the home with defendant. After Cotaling began touching defendant and taking off his pants, defendant excused herself to go to the bathroom. She instead went into the kitchen where Hyde was waiting. Hyde proceeded to attack Cotaling, and a brutal struggle ensued. Ultimately, Cotaling was killed with the knife procured by defendant.

The following morning, Hyde went to a hospital in Ohio to seek treatment for a stab wound on his abdomen and was accompanied by defendant. The local police discovered a stolen license plate in the vehicle defendant and Hyde drove to the hospital and learned that the vehicle was registered to Cotaling's girlfriend. After some questioning, defendant told the police where the house was located that contained Cotaling's body. Police officers found the body in the corner of the living room, covered with a blanket and pieces of carpeting. Cotaling had at least 10 stab wounds and 15 incised wounds scattered over his back, chest, neck, head, arms, and hands. The wounds on Cotaling's neck were especially severe, and the medical examiner was unable to determine how many cuts had actually been inflicted on his neck, as Cotaling was almost decapitated.

The jury convicted defendant of first-degree premeditated murder, felony murder predicated on larceny, felony murder predicated on armed robbery, and armed robbery. Following recommendations from representatives of the Department of Corrections (DOC) and Department of Social Services, the trial court agreed sentenced defendant as an adult to LWOP for each murder conviction and a parolable life sentence for the armed robbery conviction. Defendant's felony murder convictions and sentences were later vacated on double jeopardy grounds.

B. POST-*MILLER* HISTORY

In 2012, the United States Supreme Court determined that mandatory LWOP sentences for juvenile offenders violated the Eighth Amendment's prohibition of cruel and unusual punishment. *Miller*, 567 US at 465. Accordingly, defendant filed a motion for postjudgment relief asking that her LWOP sentence be vacated and a mitigation hearing be held to consider her youth, and attendant characteristics, at the time of the murder. Subsequently, the Michigan Legislature enacted 2014 PA 22, which created procedures for reviewing cases if the United States Supreme Court determined that *Miller* applied retroactively to all defendants who were under the age of 18 at the time of their offenses. See MCL 769.25a. The United States Supreme Court then took the step anticipated by the Legislature and held that *Miller* announced a substantive rule of constitutional law that required retroactive application. See *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016). Shortly thereafter, the prosecution filed a notice identifying defendant as a juvenile offender who would be affected by retroactive application of *Miller*, and filed a motion with the trial court to resentence defendant to LWOP for her first-degree murder conviction. Defendant filed a response to the prosecution's motion and requested that the motion be dismissed. The trial court denied defendant's motion.

A *Miller* hearing was held on April 22, 2019. The prosecution offered numerous exhibits relevant to the *Miller* factors, but did not call any witnesses. In pertinent part, the prosecution's exhibits included transcripts from defendant's trial, pretrial proceedings, and sentencing; transcript excerpts from defendant's 2010 commutation hearing; reports regarding defendant's criminal responsibility, competency, and diminished capacity defense authored in 1991 by psychologist

Carol Holden, Ph.D.; and records regarding 17 major misconduct tickets defendant received while in prison. Defendant called a single witness: Pamela Odum, a retired corrections officer who had known defendant since 1995 and interacted with her on a nearly daily basis between 2012 and 2018. Defendant also submitted several exhibits, including a mitigation report from Julie Smyth, LMSW; psychological evaluations from Karen Noelle Clark, Ph.D., and Michael Abramsky, Ph.D.; several letters of support; and affidavits from Lieutenant Ralph Monday and corrections officer Anne Benion.

At the conclusion of the *Miller* hearing, the trial court indicated that it would issue an opinion after reviewing the exhibits. At the resentencing hearing, the trial court addressed the *Miller* factors and found "that the first and second Miller factors weigh in favor of defendant . . . the third Miller factor does not weigh in favor of defendant," the fourth "factor does not weigh in favor of defendant," and that the fifth factor did not weigh in favor of defendant.[1] Thus, the trial court resentenced defendant to LWOP. This appeal follows.

II. DISCUSSION

On appeal, defendant raises several issues concerning resentencing. Defendant argues that the burden of proof at the *Miller* hearing should have been allocated to the prosecution, and the trial court erred in its assessment of the *Miller* factors. According to defendant, proper consideration of the *Miller* factors demonstrates that the trial court's decision to reimpose a LWOP sentence was an abuse of discretion. Defendant also asks this Court to express disagreement with *People v Skinner*, 502 Mich 89; 917 NW2d 292 (2018) (*Skinner I*), and hold that proper interpretation of *Miller* requires a presumption against LWOP for juvenile offenders. Lastly, defendant asks that her case be remanded to a different judge for resentencing. We disagree.

A. BURDEN OF PROOF

Defendant first argues that the trial court erred by not placing the burden of proof on the prosecution at the *Miller* hearing. We disagree.

The proper allocation of the burden of proof is a question of law reviewed de novo on appeal. *Pickering v Pickering*, 253 Mich App 694, 697; 659 NW2d 649 (2002). See also *People v Robar*, 321 Mich App 106, 134; 910 NW2d 328 (2017) (stating that issues regarding assignment of burden of proof under a statutory scheme involves statutory interpretation—a question of law subject to de novo review).

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.' " Thereafter, the Legislature enacted MCL 769.25a to establish procedures for resentencing a defendant who was entitled to

[1] We note that the trial court mistakenly referred to the fourth factor as the fifth factor. Additionally, the trial court did not explicitly state that the fifth factor weighed against defendant, although the transcript is clear, and the parties do not dispute on appeal, that the trial court found this factor weighed against defendant.

relief under *Miller*, despite his or her case being otherwise final for purposes of appeal. *People v Wiley*, 324 Mich App 130, 137; 919 NW2d 802 (2018). In pertinent part, MCL 769.25a provides:

> (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 [MCL 769.25[2]] shall be imprisonment for life without parole eligibility or a term of years as set forth in [MCL 769.25(9)[3]] shall be made by the sentencing judge or his or her successor as provided in this section. . . .
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> * * *
>
> (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 [MCL 769.25].
>
> (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. [MCL 769.25a(2) and (4)(a) through (c).]

In *Montgomery*, 577 US at ___; 136 S Ct at 732, the United States Supreme Court found that *Miller* announced a new substantive rule of constitutional law that must be given retroactive effect, thereby triggering the foregoing procedures. See MCL 769.25a(2).

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[2] MCL 769.25(2)(b) permits the prosecution to file a motion seeking LWOP for a defendant convicted of first-degree murder under MCL 750.316 for an offense committed when the defendant was less than 18 years of age.

[3] Under MCL 769.25(9), "[i]f 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."

Consistent with the mandates of MCL 769.25a(4)(a) and (b), the prosecution filed a notice identifying defendant as a defendant entitled to resentencing under *Miller* and *Montgomery*, followed by a motion asking the trial court to resentence defendant to LWOP. Thus, under MCL 769.25a(4)(b), the court was required to hold a hearing following the procedures set forth in MCL 769.25. Like MCL 769.25a(4), MCL 769.25(3) permits the prosecution to seek a LWOP sentence by filing a motion. "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." MCL 769.25(3). "If the prosecuting attorney does not file a motion under [MCL 769.25(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)." MCL 769.25(4). On the other hand,

> (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. [MCL 769.25(6) and (7).]

Absent from the foregoing procedure is any language clearly allocating a burden of proof concerning the *Miller* factors or other aggravating and mitigating circumstances. Considering this omission, defendant argues that Michigan's general rule imposing the burden of proof on the moving party should be applied. Because the prosecution must affirmatively seek a LWOP sentence by way of a motion, defendant theorizes that the prosecution must bear the burden of proving that LWOP is an appropriate sentence under *Miller*. The prosecution disagrees, arguing that the statutory procedure does not impose a burden of proof on either party. The prosecution further reasons that this conclusion was implied in *Skinner I* and expressly adopted by this Court on remand in *People v Skinner (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued November 13, 2018 (Docket No. 317892) (*Skinner II*), p 11, lv pending.[4]

In *Skinner I*, 502 Mich at 97-98, the Court considered whether MCL 769.25 violated the Sixth or Eighth Amendments by authorizing a judge to determine whether a juvenile offender should be sentenced to LWOP, rather than requiring that issue to be decided by a jury. After lengthy analysis of Supreme Court precedent regarding a criminal defendant's right to trial by jury and the prohibition against cruel and unusual punishment, as applied to juvenile sentencing, the majority answered this question in the negative. *Id*. at 103-126. With respect to the Sixth Amendment issue, the majority observed that MCL 769.25 did not on its face require a trial court to make any particular finding before sentencing a juvenile to LWOP. *Id*. at 113-114. Moreover,

[4] Unpublished opinions may be considered for their persuasive value, but they are not precedentially binding under MCR 7.215(C)(1). *People v Baham*, 321 Mich App 228, 248 n 8; 909 NW2d 836 (2017).

reading such a requirement into the statute would render it unconstitutional, contrary to the rule of statutory interpretation under which courts must construe a statute in a constitutional manner unless a contrary construction is "clearly apparent." *Id*. at 114.

The majority reasoned that MCL 769.25(6) simply required the trial court to "consider" the factors listed in *Miller*, all of which are mitigating in nature and "counsel against irrevocably sentencing [juveniles] to a lifetime in prison." *Id*. at 114-115, quoting *Miller*, 567 US at 480 (quotation marks omitted; alteration in original). Because the Sixth Amendment "only prohibits [judicial] fact-finding that *increases* a defendant's sentence," MCL 769.25(6)'s directive for the trial court to consider the *Miller* factors did not violate the Sixth Amendment. *Skinner I*, 502 Mich at 115-116. Under MCL 769.25(7), the trial court must "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." While the majority acknowledged that aggravating circumstances could have the effect of increasing a defendant's sentence, it did not read MCL 769.25(7) as actually requiring the trial court to find an aggravating circumstance before sentencing a juvenile to LWOP. *Skinner I*, 502 Mich at 117. "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." *Id*. In fact, according to the majority, a trial court "court could find that there are no mitigating or aggravating circumstances and *that* is why it is imposing a life-without-parole sentence." *Id*. "[G]iven 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 authorized by the jury's verdict alone." *Id*. at 117-118. "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." *Id*. at 118.

Having concluded that the procedure outlined in MCL 769.25 did not violate the Sixth Amendment, the majority next considered whether the Eighth Amendment requires additional fact-finding before a juvenile may be sentenced to LWOP. *Id*. at 119. The majority agreed with the notion that certain statements in both *Miller* and *Montgomery* could be read as implying that the sentencer must find "irreparable corruption" or "permanent incorrigibility" before sentencing a juvenile offender to LWOP. *Id*. at 119-121. For instance, *Miller*, 567 US at 479-480, opined that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," especially considering the difficulty 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." (Quotation marks and citation omitted.) In the same vein, *Montgomery*, 577 US at ___; 136 S Ct at 734, stated that (1) *Miller*'s discussion of the distinctive attributes of youth debunked penological justifications for LWOP, and (2) "[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." (Quotation marks and citation omitted.)

Despite the potential implications of these passages, the majority in *Skinner I* was unpersuaded that either case mandated additional fact-finding to satisfy the Eighth Amendment. As explained by the majority:

> *Miller* clarified that it was only holding that "*mandatory* life-without-parole sentences for juveniles violate the Eighth Amendment," [*Miller*, 567 US] at 470

> (emphasis added), and that "a sentencer [must] have the ability to consider the mitigating qualities of youth," *id*. at 476 (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. "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. [*Skinner I*, 502 Mich at 120 (second alteration in original).]

Additionally, any implication of additional required fact-finding that could be drawn from *Montgomery* was negated by the Supreme Court's explicit statement that "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility." *Id*. at 121, quoting *Montgomery*, 577 US at ___; 136 S Ct at 735 (quotation marks omitted).

Montgomery further explained:

> Louisiana suggests 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. 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 US 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. [*Montgomery*, 577 US at ___; 136 S Ct at 735 (alterations in original).]

Considering *Montgomery*'s rejection of mandatory findings, the *Skinner I* majority likewise held a trial court did not have to "make a finding of fact regarding a child's incorrigibility." *Skinner I*, 502 Mich at 122.

Finally, the *Skinner I* majority analogized the "irreparable corruption" language in *Montgomery* to the proportionality standard that applies to all criminal sentencing. *Id*. at 123-125, quoting *Montgomery* 577 US 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 citation omitted). As explained by the majority:

> 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. In other words, the Eighth Amendment does not require the finding of any particular fact before imposing a life-without-parole sentence, and therefore the Sixth Amendment is not violated by allowing the trial court to decide whether to impose life without parole. [*Skinner I*, 502 Mich at 125 (footnotes omitted).]

The *Skinner I* Court also considered whether this Court correctly adopted a heightened standard of review for LWOP sentences under MCL 769.25 in a companion case, *People v Hyatt*, 316 Mich App 368; 891 NW2d 549 (2016), aff'd in part, rev'd in part 502 Mich 89 (2018). *Skinner I*, 502 Mich at 97. The majority again answered this question in the negative, finding no reason to deviate from the abuse-of-discretion standard commonly applied to a trial court's sentencing decisions. *Id*. at 131-137.

In *Hyatt*, 316 Mich App at 424, this Court held that "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." While simultaneously refusing to endorse a presumption of unconstitutionality, this Court said it "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. The *Skinner I* majority opined that despite *Hyatt*'s express disclaimer to the contrary, the above quoted statements were "tantamount to a presumption against life-without-parole sentences." *Skinner I*, 502 Mich at 128. Consistent with its earlier analysis of the Sixth and Eighth Amendment issues, the majority reiterated that "the trial court is not obligated to explicitly find that defendant is irreparably corrupt," nor does the trial court "have to explicitly find that defendant is 'rare.' "[5] *Id*.

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[5] The majority explained that the Supreme Court used terms like "uncommon" and "rare" only to predict the infrequency in which juveniles would likely be sentenced to LWOP under the standards set forth in *Miller*. *Skinner I*, 502 Mich at 129-130 ("This is demonstrated by the use of the word 'think' rather than 'hold.' "); see also *Miller*, 567 US at 479 ("But given 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."). *Montgomery*'s repeated references to rare juvenile offenders and circumstances similarly "make the point that juvenile offenders who are deserving of life without parole are rare," a proposition with which the majority did not disagree. *Skinner I*, 502 Mich at 130.

> 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

Moreover, in the majority's view, "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." *Id*. at 131. Rather, the federal precedent "simply require[s] that the trial court consider 'an offender's youth and attendant characteristics' before imposing life without parole." *Id*., quoting *Miller*, 567 US at 483.

Although *Skinner I* did not address the issue of allocating the burden of proof at a resentencing hearing conducted under MCL 769.25, the trial court correctly ruled that the majority's rationale naturally implied that neither party bore the burden of proof with respect to the *Miller* factors or the ultimate question of whether the defendant should be sentenced to LWOP or a term of years. A burden of proof involves two aspects: "The first, the burden of production, requires a party to produce some evidence of that party's propositions of fact. The second, the burden of persuasion, requires a party to convince the trier of fact that those propositions are true." *People v Hartwick*, 498 Mich 192, 216; 870 NW2d 37 (2015) (citations and footnote omitted). According to the *Skinner I* majority, LWOP is authorized by the jury's verdict alone, *Skinner I*, 502 Mich at 117-118, and the statutory scheme requiring the prosecution to file a motion seeking LWOP is nothing more than a "legislative procedural precondition [that] must be satisfied after the jury renders its verdict," *id*. at 113. Assuming the procedural precondition is satisfied and the trial court has considered the *Miller* factors as required by MCL 769.25(6), the trial court could lawfully impose a LWOP sentence if it determined that there were no mitigating or aggravating circumstances at play. *Id*. at 117. *Skinner I* held that MCL 769.25 does not require the trial court to "find an aggravating circumstance in order to sentence a juvenile to life without parole." *Id*. Nor does *Miller* "require trial courts to make a finding of fact regarding a child's incorrigibility" to satisfy the constraints created by the Eighth Amendment. *Id*. at 122. It logically follows that if the requirements of MCL 769.25, *Miller*, and *Montgomery* can be fulfilled without any additional fact-finding concerning the juvenile's incorrigibility, aggravating circumstances, or mitigating circumstances, leaving the trial court free to sentence a juvenile offender to LWOP or a term of years as a matter of discretion, neither party is obligated to provide evidence favorable to its position or otherwise persuade the court of the appropriate sentence. While it would undoubtedly be prudent for the parties to support their respective positions regarding the reasonableness of a LWOP sentence, it would be nonsensical to conclude that either party must shoulder the burden of proving a fact or facts that need not be found.

Defendant's reliance on the fact that Michigan jurisprudence commonly places the burden of proof on the moving party is unpersuasive. Again, the motion requirement is simply a "procedural precondition" to imposing a sentence that is already authorized by the jury's verdict,

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> 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* 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. [*Id*. at 130-131.]

and the trial court has discretion to sentence a juvenile to LWOP even if no mitigating or aggravating circumstances are established. *Id*. at 113-118. Furthermore, there is no rule dictating that the burden "invariably [be] allocated to the pleader of the fact to be proved." *Johnson v Austin*, 406 Mich 420, 432; 280 NW2d 9 (1979). "That burden may be otherwise allocated by the Legislature or judicial decision based, among other factors, on an estimate of the probabilities, fairness and special policy considerations . . . ." *Id*. When a statute fails to allocate a burden of proof, the judiciary is free to assign it as long as the allocation does not "place on the defendant the burden of persuasion to negate an element of the crime." *Robar*, 321 Mich App at 141. That said, while the judiciary has the power to allocate a burden of proof, Michigan precedent suggests that this Court may also decline to do so if exercising that power would thwart a valid statutory scheme.

In re Trejo, 462 Mich 341, 344; 612 NW2d 407 (2000), addressed the statutory framework for termination of parental rights under MCL 712A.19b. A former version of the statute granted the trial court discretion to terminate parental rights, without considering the best interests of the child, once it found clear and convincing evidence of at least one statutory ground for termination. *Id*. at 350-351. In response to concerns that this unfettered discretion risked leaving children in the temporary custody of the court for an indefinite period, the Legislature amended MCL 712A.19b to provide that when the trial court found that one or more grounds for termination had been established, "the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made, unless the court finds that termination of parental rights to the child is clearly not in the child's best interests." *Id*. at 351, quoting MCL 712A.19b(5), as amended by 1994 PA 264. This Court interpreted the amended statute as creating "a mandatory presumption that can only be rebutted by a showing that termination is clearly not in the child's best interests." *In re Hall-Smith*, 222 Mich App 470, 472; 564 NW2d 156 (1997), overruled by *Trejo*, 462 Mich 341 (2000). Thus, according to the *Hall-Smith* Court, the "burden of proof remains with the petitioner to show that a statutory ground for termination has been met by clear and convincing evidence," but "the burden of going forward with evidence that termination is clearly not in a child's best interest rests with the respondent." *Hall-Smith*, 222 Mich App at 472-473.

The Supreme Court disagreed, rejecting "*Hall-Smith*'s characterization of subsection 19b(5) as creating a rebuttable presumption, because the plain language of subsection 19b(5) does not expressly assign any party the burden of producing best interest evidence." *Trejo*, 462 Mich at 353. Because MCL 712A.19b(5) did not specify who had the burden of producing best-interest evidence, evidence introduced by either party could be considered by the trial court. *Id*. Moreover, "even where no best interest evidence is offered after a ground for termination has been established, . . . subsection 19b(5) permits the court to find from evidence on the whole record that termination is clearly not in a child's best interests." *Id*. By construing MCL 712A.19b(5) as permitting the trial court to make a best-interest determination solely on the basis of record evidence, the Court essentially determined that the trial court's decision was not dictated by whether a particular party produced sufficiently persuasive evidence concerning the child's best interests. See *Hartwick*, 498 Mich at 216 (regarding burden of production and burden of persuasion). In other words, *Trejo* demonstrates that there are circumstances in which a burden of proof need not be allocated, particularly when the trial court's decision can be reached on the existing record.

Defendant argues that most jurisdictions to consider the issue have allocated the burden of proof to the prosecution and directs this Court's attention to opinions from seven state courts to support this contention. This Court is not bound by decisions reached by courts in other states. *K & K Const, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559 n 38; 705 NW2d 365 (2005). Moreover, each of the cases cited by defendant is distinguishable because the burden of proof was allocated, whether explicitly or implicitly, on the basis of a sentencing statute with no analogous Michigan counterpart or for reasons that are incompatible with *Skinner I*. See *Stevens v Oklahoma*, 422 P3d 741, 750; 2018 OK CR 11 (Okla Crim App, 2018) (reasoning that finding of irreparable corruption or permanent incorrigibility increases maximum punishment authorized by verdict and, thus, must be proved by prosecution beyond a reasonable doubt); *Davis v Wyoming*, 415 P3d 666, 681; 2018 WY 40 (2018) (opining that *Miller* and *Montgomery* require the sentencing court to begin with a presumption against LWOP that may be rebutted by the prosecution); *Pennsylvania v Batts*, 640 Pa 401, 471-472; 163 A3d 410 (2017) (concluding that "faithful application of the holding in *Miller*, as clarified in *Montgomery*," requires presumption against LWOP for juvenile offenders); *Iowa v Seats*, 865 NW2d 545, 555 (Iowa, 2015) (construing *Miller* as creating a presumption that juvenile offender should be eligible for parole); *Utah v Houston*, 353 P3d 55, 69-70; 2015 UT 40 (2015) (explaining that Utah's legislature "determined that a jury may sentence a defendant to life without parole if it determines that that the State has satisfied its burden to demonstrate that this is the 'appropriate' sentence to impose"); *Missouri v Hart*, 404 SW3d 232, 241 (Mo, 2013) (allocating burden to prosecution without appreciable analysis, supported only by citation to caselaw regarding constitutional implications of increasing available sentence on the basis of judge-found facts); *Conley v Indiana*, 972 NE2d 864, 871 (Ind, 2012) (citing state statute, Ind Code § 35-50-2-9 (2008), placing burden on prosecution).

Finally, defendant also argues that the burden of proof should be allocated to the prosecution on the basis of due-process principles, as articulated in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976). This issue is unpreserved because defendant raised the issue for the first time on appeal. *People v Zitka*, 325 Mich App 38, 48; 922 NW2d 696 (2018). Further, defendant has not presented an argument applying the controlling legal framework. Because this Court is not obligated to rationalize the basis for an appellant's claim of error, we decline to address defendant's unpreserved claim of error. *People v Henry*, 315 Mich App 130, 148; 889 NW2d 1 (2016) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.").

In conclusion, the trial court did not err by declining to assign the prosecution the burden of proof at the *Miller* hearing. Although *Skinner I* did not address allocating the burden of proof, its rejection of a presumption against LWOP sentences and conclusion that the trial court is not required to find additional facts at a *Miller* hearing establishes that a burden of proof should not be imposed on either party.

B. *MILLER* FACTORS

Defendant next argues that the trial court erred in its consideration of the *Miller* factors during resentencing. We disagree.

"Any questions of law are to be reviewed de novo, and the trial court's decision about the sentence imposed is reviewed for an abuse of discretion." *Wiley*, 324 Mich App at 165. See also *Skinner I*, 502 Mich at 131-132 (approving the traditional abuse-of-discretion standard of review for LWOP sentences imposed under MCL 769.25). An abuse of discretion occurs when the trial court makes a decision that "falls outside the range of reasonable and principled outcomes," *Wiley*, 324 Mich App at 165 (quotation marks and citation omitted), or imposes a sentence that "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," *Skinner I*, 502 Mich at 131-132, quoting *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990) (quotation marks omitted). In addition, an error of law necessarily constitutes an abuse of discretion. *Wiley*, 324 Mich App at 165. To the extent that the trial court made factual findings, those findings are reviewed for clear error. *Skinner I*, 502 Mich at 137 n 27. "A trial court's factual finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *Wiley*, 324 Mich App at 165 (quotation marks and citation omitted).

Pursuant to MCL 769.25(6), the trial court was required to consider the following factors identified in *Miller*: (1) the defendant's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the defendant's "family and home environment that surrounds [her]—and from which [she] cannot usually extricate [herself]—no matter how brutal or dysfunctional"; (3) "the circumstances of the homicide offense, including the extent of [her] participation in the conduct and the way familial and peer pressures may have affected [her]"; (4) whether the defendant "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, [her] inability to deal with police officers or prosecutors (including on a plea agreement) or [her] incapacity to assist [her] own attorneys"; and (5) "the possibility of rehabilitation[.]" *Miller*, 567 US at 477-478. The court may also consider "any other criteria relevant to its decision, including the individual's record while incarcerated." MCL 769.25(6). Although the trial court is not required to make any specific factual findings, *Skinner I*, 502 Mich at 119, 125, it 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).

The trial court found that the first two *Miller* factors weighed in defendant's favor "given the evidence that is before this Court," and the prosecution's failure to rebut the psychological evaluations provided by defendant. Defendant argues that the trial court gave insufficient weight to these factors. It is difficult to assess the weight the court attributed to defendant's age and background, but as a general matter, appellate courts refrain from interfering with a factfinder's role of assessing the weight and credibility of evidence. *People v Kosik*, 303 Mich App 146, 150; 841 NW2d 906 (2013).

Regarding the first factor, defendant was 16 years old when she participated in Cotaling's murder in 1990. The trial court's reference to the absence of a psychological evaluation proffered by the prosecution is telling because the prosecution *did* produce several reports that addressed defendant's mental functioning—Dr. Holden's 1991 reports addressing defendant's criminal responsibility, competency to stand trial, and diminished capacity defense. Thus, this Court can infer that the trial court found the more current reports proffered by defendant more persuasive in evaluating the role defendant's age and upbringing played in her crime.

Defendant produced two updated psychological evaluations; the first was prepared by Dr. Abramsky in 2007 and the second was prepared by Dr. Clark in 2019. Dr. Abramsky attached great significance to the fact that defendant had been abused and sexually molested as a child, explaining that "[s]uch children grow up not only frightened of the world, but extremely needy of affection and attention to compensate for their feelings of abandonment and low self[-]worth." This leaves the previously victimized child vulnerable to the influences of "any individual who comes along and promises them love." In Dr. Abramsky's opinion, defendant's history and age made her overwhelmingly dependent upon Hyde to the point of being a "psychological captive." Dr. Abramsky also cited literature showing "that adolescents, even if they can reason about what is right and wrong, do not have the emotional maturity to act upon that reasoning." Accounting for defendant's "history and the situational pressures she was under, her vulnerability, the battering she took, the fact that she was a teenager and involved with a much older man," Dr. Abramsky believed that duress, as opposed to "an autonomous, informed and conscious choice," was a "major motivation" for defendant's participation in the murder.

Dr. Clark also commented on the impact of defendant's youth, stating that at the age of 16, defendant was naïve, immature, and suffering from extreme emotional distress. The effects of defendant's brutal life circumstances "were pervasive, long-lasting, and permeated every aspect of her life." "She was a broken young person who felt hopeless, helpless, and worthless." Dr. Clark believed that defendant's "behavior in the events leading to the murder were [sic] within the parameters of adolescent behavior." Defendant "lacked the maturity and self-sufficiency to be able to extricate herself from these hostile and exploitive surroundings," and Dr. Clark opined that defendant's "lack of impulse control and impaired ability to consider alternative courses of actions" was a mitigating factor under *Miller*. Both psychological reports are consistent with *Miller*'s recognition that the hallmark features of youth, including immaturity, impulsivity, and failing to appreciate risks and consequences, mitigate against imposing LWOP for an offense committed by a juvenile defendant. *Miller*, 567 US at 471, 477.

The prosecution argues that the trial court should not have construed this factor in defendant's favor because she had a history of premeditated criminal behavior before the murder and postincarceration misconduct demonstrating that her actions were not strictly attributable to youthful recklessness. We disagree. Although defendant did not have a record of formal juvenile adjudications before the convictions at issue in this case, she admitted engaging in other criminal activity, namely, prostitution and theft. However, defendant was 16 years old or younger when she participated in those uncharged crimes, and it can be reasonably inferred that her immaturity, vulnerability to exploitation, and dependent personality diminished her culpability for those offenses to some extent, just as those factors played a role in Cotaling's murder. See *id*. at 471-472 (reasoning that characteristics of youth lessen moral culpability). That defendant developed or agreed to preplanned criminal activity, both before and in connection with Cotaling's murder, admittedly demonstrates that her behavior was not a simple matter of reckless impulsivity. But as Dr. Abramsky observed, defendant's emotional immaturity likely impaired her ability to act pursuant to logic or morality.

Defendant's postincarceration misconduct is more telling. Between the ages of 23 and 33, defendant received a total of 17 major misconduct tickets, ranging from relatively technical or minor infractions, like insolence or being out of place, to more severe offenses like smuggling drugs. Of these incidents, defendant was cited for assaultive or violent misconduct four times—

three times in 2011 between the ages of 26 and 27, and once in 2004 when she was 30 years old. According to the prosecution, defendant's continued misconduct as an adult suggests that her crimes at the age of 16 may have been influenced by a more deeply rooted proclivity for deviant behavior. While this view of the evidence is not unreasonable, the trial court apparently found the psychological evaluations more persuasive with respect to the first *Miller* factor and determined that defendant's chronological age and associated characteristics favored defendant or, in other words, mitigated against sentencing defendant to LWOP. This Court is not left with a definite and firm conviction that the trial court erred in its assessment of the first factor.

Concerning the second factor, defendant's family and home environment, *id*. at 477, defendant's childhood was riddled with traumatizing experiences and circumstances by any standard. When defendant's initial presentence investigation reports (PSIR) were prepared, she disclosed a turbulent childhood. From a young age, defendant was exposed to regular domestic violence perpetrated by her alcoholic father against her mother. Defendant also saw her father rape her mentally disabled aunt, resulting in his arrest and incarceration. Defendant's mother remarried, and defendant was sexually abused by her stepfather. Defendant's mother did not believe defendant's allegations of sexual abuse and did not confront defendant's stepfather about the matter until defendant ran away from home. The stepfather's sexual abuse continued after defendant returned to the family home, though it was directed at her younger sister, rather than defendant. Defendant eventually moved in with her older sister. When defendant was 13 years old, she met Hyde, who introduced her to illicit drugs. At some point thereafter, Hyde became physically abusive toward her and used drugs as a means of getting defendant to submit to him sexually. Hyde eventually convinced defendant to move in with him, and they resided with defendant's mother until shortly before Cotaling's murder.

In later years, defendant disclosed further traumatic aspects of her childhood. In 2007, she told Dr. Abramsky that her father sexually molested her older sister. Defendant indicated that her stepfather was also her father's nephew (and thus defendant's cousin). The family lived in a trailer with no heat or running water, and defendant was often left alone with her younger sister "to fend for themselves." Concerning her relationship with Hyde, defendant explained that he was initially kind and attentive, only to become increasingly possessive and controlling as time passed. Defendant indicated that Hyde pressured her to drop out of school and pushed her to "work the streets, not by actually having sex with customers, but by luring them in, taking their money and running, which she did." Defendant began engaging in true prostitution after Hyde determined that it would be more profitable. Defendant also told Dr. Abramsky that Hyde beat her, enjoyed violent sex, and was verbally demeaning.

Defendant's 2010 commutation application indicated that defendant's mother "beat her and subjected her to a chaotic, violent, sexually abusive home life; exposure to alcoholism, beatings and rapes by her father and stepfather were in the norm." Defendant confirmed the accuracy of this statement at the commutation hearing. The application also indicated that after defendant began living with her sister, Hyde "broke into her house and took [defendant] away." Defendant clarified that Hyde coerced her to leave her sister's home by threatening to "do things" to defendant's sister and her sister's children. She also confirmed that she learned to be obedient to Hyde because he was physically and verbally abusive to her when she did not comply with his instructions. Defendant explained that she never reported Hyde's abuse to anyone because she feared punishment and, above all other concerns, she did not want to return to her family.

Dr. Clark's 2019 psychological evaluation indicated that defendant reported her stepfather as being not only sexually abusive, but also physically abusive. Defendant's stepfather would brandish guns and knives at defendant and her siblings and once threw a knife at defendant. The handle-end of the knife struck defendant's arm. He would also throw bullets near defendant's feet, and she feared that the bullets would explode. Although defendant's description of her childhood previously suggested that she did not meet Hyde until she was living with her sister, defendant told Dr. Clark that her growing relationship with Hyde and absence from home angered her mother and stepfather, which was prompted her to move to her sister's house.

Considering the foregoing history, the trial court did not clearly err by finding that the second *Miller* factor favored defendant. The prosecution does not seem to seriously dispute that defendant's childhood was terrible, though it questions the veracity of defendant's "ever shifting claims" regarding the nature of the abuse she endured and notes that other evidence is seemingly at odds with defendant's allegations. The prosecution contends that these inconsistencies demonstrate that defendant was exaggerating the severity of her home environment as time passed, presumably to make herself appear more sympathetic. Although the trial court did not make specific findings regarding this matter, it observed that defendant's past was not fairly characterized as a merely "bad childhood." Rather, "the system" failed defendant, leaving her to experience trauma beyond what any child should have to endure. Thus, it seems that the trial court largely credited defendant's reports regarding her family and home environment. Even if the trial court had accepted the prosecution's criticism of defendant's more expansive allegations over the years, the court's determination that the second *Miller* factor favored defendant would still be well founded in light of the disclosures defendant made from the outset.

The third *Miller* factor contemplates "the circumstances of the homicide offense," including the defendant's degree of participation and the impact of any familial or peer pressure. *Miller*, 567 US at 477. The trial court found that this factor did not favor leniency, reasoning that defendant's involvement in the crime was suspect in light of "the evidence presented at trial, statements made following the crime[,] and defendant's repeated inconsistent statements," as well as what the court deemed to be "self-serving" behavior. This Court construes the trial court's explanation as implying that it did not believe defendant's insistence that her involvement in the murder was limited to purchasing a knife for Hyde and luring Cotaling into the abandoned house. Defendant takes issue with the trial court's assessment of this factor for several reasons.

Defendant argues that the trial court's reliance on inconsistent statements was misplaced because any such statements were not "of consequence." According to defendant, the main "inconsistency" concerned whether she did anything to assist in the murder after luring Cotaling into the house. At trial, Lieutenant Monday testified that defendant told him she "might" have held Cotaling down during the attack, but explained that defendant was "unclear" when she made that statement. Defendant acknowledges that this testimony is inconsistent with her own assertions that she was completely uninvolved in the physical attack, but emphasizes that Lieutenant Monday signed an affidavit in 2017 in which he denies knowledge of any evidence that defendant "held Mr. Cotaling down or participated in the physical attack or stabbing of Mr. Cotaling."

But this was not the only inconsistent statement that was relevant to the trial court's consideration of the circumstances of defendant's offense. Defendant signed a statement admitting that, on the day of the murder, Hyde "came up with a plan to use me to pose as a prostitute . . .

with the intent of luring someone into the house where [Hyde] would kill someone and steal his car to drive us to New Mexico." When Dr. Holden interviewed defendant several months later, she denied knowing that Hyde intended to commit murder and robbery. At trial, defendant testified that Hyde did not tell her, nor did she ask, why he wanted her to purchase a knife and bring a stranger back to the house under the pretense of prostitution. Confronted with her signed statement, defendant denied telling FBI agents that she attempted to "lure" a victim to the house or that Hyde intended to kill that person. Defendant testified that when she gave her statement, the agents "mostly just asked me some questions, and they acted like they already knew everything, and I just agreed with them." Defendant could not recall if she agreed with the agents' suggestions that she knew of Hyde's plan and reiterated that she did not, in fact, know Hyde's intentions. Years later, defendant changed tack again and admitted at her commutation hearing that Hyde told her in advance that he wanted to kill somebody as a means of acquiring money and a car.

Defendant's various assertions regarding her knowledge of Hyde's intent were clearly inconsistent and cannot be fairly characterized as "inconsequential." If defendant was unaware of Hyde's intentions when she purchased the knife and brought Cotaling to the house, it could reasonably be argued that her moral responsibility for Cotaling's death stemmed primarily from following Hyde's orders without thought or question. But if defendant carried out Hyde's orders with full knowledge of the intended outcome, her actions were far more egregious. The distinction between unintentional, or perhaps negligent, participation at the behest of a controlling boyfriend and willing participation in a premeditated murder fall on opposite ends of the culpability scale. Even accounting for defendant's susceptibility to peer pressure at the age of 16, exacerbated by her dependent relationship with Hyde, her knowingly compliance with Hyde's scheme drastically increased her level of culpability. Thus, defendant's acknowledged lies regarding this matter were extremely relevant to the third *Miller* factor.

Defendant also argues that the trial court should have focused on the "main facts" of the offense, rather than focusing on insignificant details. Defendant maintains that the third *Miller* factor clearly weighed against a LWOP sentence because the evidence demonstrated that Hyde concocted the plan, made defendant purchase the murder weapon, insisted that defendant act as bait, and then brutally killed Cotaling. Defendant's argument lacks merit because, as the trial court indicated, other evidence presented at trial rendered defendant's claim of limited involvement "suspect."

Several hairs were collected from and around Cotaling's body. When those hairs were analyzed, it was determined that two hairs found in Cotaling's hand were consistent with a known sample from defendant. One of the hairs bore evidence of having been forcibly removed during an active growth stage. A clump of hair found near Cotaling's right foot and additional hairs removed from his back were also consistent with defendant's hair sample. Additionally, the medical examiner testified that Cotaling was a fairly large man—he stood just over 6 feet tall and weighed 177 pounds. Hyde, in contrast, was at least 4 inches shorter and approximately 30 pounds lighter. Blood spatter at the scene and the defensive wounds Cotaling sustained suggested that a significant struggle occurred before Cotaling succumbed to his injuries, and defendant has consistently confirmed that a lengthy fight took place. Hyde was stabbed in the abdomen at some point during the altercation. Given the size disparity between the two men, the fact that Hyde was wounded, and the discovery of defendant's hair on Cotaling's body, the trial court could have

reasonably inferred that defendant's role in the murder scheme did not end when she successfully lured Cotaling into the house.

The trial court also considered statements made after the crime to support its disbelief of defendant's claim that she did not actively participate in the physical attack. The trial court was presumably referring to Hyde's statements implicating defendant in the murder. Hyde claimed that he entered the abandoned house to find defendant and Cotaling in a compromising position and heard defendant say, "[H]e raped me." Hyde indicated that he went after Cotaling, stabbing Cotaling in the back once and in the side twice. According to Hyde, Cotaling knocked the knife from his hand. As they wrestled on the floor, Hyde was able to restrain Cotaling's head and arms. Hyde stated that defendant grabbed the knife and stabbed Cotaling as Hyde held him still. Hyde said that he then took the knife from defendant and stabbed Cotaling a few more times. When he stopped, defendant shouted that Cotaling was still moving, so Hyde cut Cotaling's throat. Hyde reported that defendant held Cotaling's head and arms down while Hyde stabbed him and repeatedly yelled, " 'Kill' or 'get him, Jim.' " Hyde's statements further bolstered the trial court's belief that defendant had not been truthful when she denied participating in the physical attack.

Next, defendant suggests that the trial court's citation of self-serving behavior referred to defendant's rehabilitation efforts while in prison, which is not relevant to the third *Miller* factor. The prosecution disagrees and contends that its arguments at the *Miller* hearing gives context to the trial court's statement, demonstrating that the court agreed defendant's failure to fully acknowledge her culpability for Cotaling's death was self-serving. Both views of the trial court's statement have limited merit. The prosecution cites portions of the *Miller* hearing during which it urged the court to find that defendant had yet to fully accept responsibility because she blamed her actions and situation on others and never expressed sincere remorse. But the prosecution's arguments were made in the context of the fifth *Miller* factor (possibility of rehabilitation), so they provide little context for the trial court's assessment of the third factor, the circumstances of the offense. Defendant's interpretation is somewhat more persuasive. The prosecution argued below that the sudden improvement in defendant's behavior in 2008 was triggered by the Clemency Project's interest in her case, which led her to believe that she might someday be released from prison. The prosecution urged the court to infer that defendant's good behavior thereafter was motivated only by a desire for release and, thus, would not continue if she was paroled. If the trial court was persuaded by the prosecution's theory, it would certainly support the conclusion that defendant had acted in a self-serving manner. But as defendant correctly argues, that sort of behavior has no bearing on the circumstances of defendant's crime.

Considering the obvious shortcomings of both parties' positions on this matter, there is an alternative interpretation of the trial court's reference to self-serving behavior. According to a criminal responsibility report prepared by Dr. Holden, defendant was admitted to the Center for Forensic Psychiatry for evaluation and custody pending trial. Dr. Holden observed defendant interacting appropriately with other patients and staff. She frequently played cards and smiled. Dr. Holden noted that defendant's behavior outside the formal clinical setting was "in contrast to [her] general presentation in the interviews, where she was extremely subdued, made little eye contact, smiled only infrequently, spoke in a very soft voice, and presented herself as preoccupied with death as a means of escape." When defendant was questioned about topics she did not want to discuss, primarily the legal proceedings, she became vague, expressed suicidal preoccupation, or struggled to concentrate. Defendant performed poorly when Dr. Holden asked questions

designed to evaluate defendant's intellectual functioning, which was at odds with defendant's vocabulary and manner in the interview, as well as her writing and reading skills. Additionally, Dr. Holden was unable to interpret the results of defendant's psychological test because defendant endorsed a high number of unusual items. According to Dr. Holden, "individuals responding to the test in a similar fashion may be malingering or may be exaggerating symptoms and problems as a plea for help or sympathy."

The take away from Dr. Holden's report was that defendant may have been attempting to present herself in a more sympathetic light, which could certainly be construed as self-serving behavior. It would also support the trial court's negative view of defendant's credibility and related belief that defendant helped Hyde stab Cotaling to death. It is beyond dispute that Cotaling's murder was carried out in an especially brutal manner. He was stabbed 10 times and had at least 15 additional cuts on his body. The medical examiner could not accurately determine how many cuts had been inflicted on Cotaling's neck, but the end result was just short of decapitation. The trial court's belief that defendant participated in this vicious attack was not clearly erroneous. Accordingly, this Court is not left with a definite and firm conviction that the trial court erred by finding that the circumstances of the offense did not mitigate against sentencing defendant to LWOP.

Defendant does not challenge the trial court's finding regarding the fourth *Miller* factor, whether defendant might have been "charged and convicted of a lesser offense if not for the incompetencies of youth . . . ." *Miller*, 567 US at 477. Accordingly, we will not address this factor.

The fifth and final *Miller* factor considers the possibility of rehabilitation. *Id*. at 478. Without explicitly stating that this factor weighed against defendant, the court expressed concern regarding defendant's rehabilitation prospects. Defendant argues that the trial court's reasoning was critically flawed because it ignored unrebutted evidence that defendant had achieved remarkable self-growth and instead relied on speculation that defendant would be unable to maintain her self-improvement outside of a structured prison environment. Defendant also argues that the trial court erroneously treated defendant's improvement and rehabilitation as an aggravating circumstance, rather than a mitigating factor. Defendant's concerns regarding this factor present a close question, but the trial court's overall assessment was not clearly erroneous.

Defendant presented extensive evidence that after a rocky start to her incarceration, she developed an overwhelmingly positive prison record. Although defendant received 17 major misconduct tickets, many were for minor or technical offenses and none were incurred after 2007. Defendant obtained her GED, acquired at least 55 college credits, and completed a variety of voluntary programs involving substance abuse, stress and anger management, and religious topics. Defendant has been a mentor in the residential substance abuse treatment (RSAT) program since approximately 2010, and two program supervisors reported defendant's impressive success in that role. Odum, in particular, was impressed by defendant's skillful and intellectual resolution of prisoner grievances. Defendant was waived into a Level I security classification, even though she should have had a Level II classification because of the nature of her conviction. She was also assessed by the DOC as presenting a low risk for recidivism or violence. The evidence generally suggested that, for at least 10 years, defendant has been an ideal prisoner.

Despite recognizing that defendant was thriving in the highly structured environment of prison, the court was skeptical that defendant would be able to maintain her improvement if she was ever released. The court reasoned that defendant would be unable to create the requisite structure on her own behalf and cited a passage from Dr. Clark's psychological evaluation in support of this belief. Specifically, Dr. Clark said:

> [Defendant's] MCMI profile suggests that she identifies with a depressive dependency, a tendency to sabotage her occasional good fortune, self-pity, an anxious seeking of reassurance from others, and behavior that often serves to undo the support of those who have provided it in the past. Significant relationships in her life may have become increasingly insecure and unreliable, in part a consequence of possibly permitting others to be exploitive and mistreating. In response, she may have become erratically moody and withdrawn, and she may now experience prolonged periods of futility and dejection.

Defendant takes issue with the trial court's reliance on this portion of Dr. Clark's report because Dr. Clark's ultimate opinion, taking all defendant's circumstances into account, was that defendant had been rehabilitated. Dr. Clark said that defendant "learned healthier and more appropriate strategies for resolution of her problems," and "learned how to cope with the normal vicissitudes of her life." She described defendant as "reflective, introspective, resilient, compassionate and responsible," and "a vastly different person from the adolescent who entered the prison system 28 years ago at the age of 16." Dr. Clark opined that defendant "understands and appreciates the gravity of her actions, and has demonstrated that she is capable of rehabilitation, in even the adverse conditions of prison." Dr. Clark also believed that defendant's long-term role as an RSAT mentor reinforced the "depth and breadth of rehabilitation."

While this Court agrees that Dr. Clark's full opinion was very supportive of defendant's potential for rehabilitation, the trial court still had good reason to be concerned about defendant's recent MCMI results. Defendant's psychiatric expert, Dr. James W. Johnson, testified at trial that defendant had an avoidant personality disorder. He explained that a person's personality is made up of two aspects: temperament and character. Temperament involved hereditary or genetic factors, like passiveness or a hot temper, while character was a product of environment. Dr. Johnson indicated that "characterological defects are permanent," and do not respond to treatments generally used in psychiatry. According to Dr. Johnson, people with avoidant personality disorder often seek "someone or some environment that will achieve for them a feeling of security, even if it sacrifices their own personal integrity," and they might be prone to self-destructive behavior. Dr. Johnson also explained:

> I think the difficulty in understanding the real pathology in a personality disorder is that the individual looks different at different times.
>
> If the individual is in a structured environment; by that I mean their welfare is being looked after, their security is maintained, food and drink are provided; that individual will function much better than when they are stressed.

> Now, when they are under a lot of stress, their thinking is disorganized, their judgment is poor, frequently their memory has gaps in it, and the individual does not function as you might expect they would at other times.

Defendant's 2019 MCMI results mirrored Dr. Johnson's 1991 opinion in terms of being motivated by a need for reassurance from others, being at risk of exploitation and manipulation, and a tendency for self-destructive behavior. While these attributes could be attributed, at least in part, to defendant's age in 1991, the fact that they still presented nearly 30 years later was worrying. It suggested that the susceptibility to peer pressure that prompted defendant's participation in Cotaling's murder was more than a transient quality of youth. Without discounting the laudable improvements defendant has made in the last decade, the trial court's belief that the prison setting was a significant factor in defendant's self-improvement was consistent with Dr. Johnson's opinion and the MCMI results reported by Dr. Clark. Since defendant joined the RSAT program in 2009 or 2010, she has been in an environment entirely focused on substance abuse treatment and therapy. She participates in extensive group therapy for eight hours each day and often has additional tasks to perform afterward because of her role as a mentor. Defendant "quickly became a leader and a role model in the RSAT program and was well respected within the larger prison community." This praise and recognition may have catered to defendant's anxious need for reassurance and approval. The absence of that approval outside the prison setting—replaced instead by the suspicion often faced by convicted felons—could substantially increase defendant's risk of turning to self-destructive or criminal behavior.

Defendant also argues that the trial court's speculation about her inability to create the necessary structure on her own was "a reentry observation, not a rehabilitation factor," while simultaneously arguing that the trial court's criticism of her reentry plan was improper. As an initial matter, defendant waived any claim of error arising from the trial court's consideration of her reentry plan. Smyth's report detailing defendant's plans for reintegrating into the community was introduced by defendant, with defense counsel arguing that defendant's reentry plan was "obviously important." An appellant may not claim error on the basis of an issue he or she deemed proper before the trial court. *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010).

However, this Court agrees that the trial court's particular concerns about defendant's reentry plans were improper. The trial court observed that defendant did not call any witnesses to testify about "specific living conditions, employment opportunities and other specific plans for rehabilitation and how defendant would live safely within the community." "Instead, the Court was provided with vague and unsworn letters of support that individuals would be there to . . . 'emotionally support' . . . defendant upon her release." Defendant contends that the trial court should not have faulted her for relying on letters of support in lieu of sworn statements because a prehearing order indicated that the rules of evidence would not apply at the *Miller* hearing. Defendant places too much significance on the trial court's use of the word "unsworn," as it appears the court's primary concern was the vague nature of the support promised by defendant's friends and family.

But even if defendant's plans for future housing, employment, and other considerations that would arise outside of prison were not yet set in stone, the vagueness of those plans was not relevant to her potential for rehabilitation. Whether defendant took the time to develop a realistic plan for reentry could shed light on her increased maturity, responsibility, and appreciation for the

value of foresight. The mitigation report authored by Smyth described defendant's desire to live in Washtenaw County, where she would be close to a significant portion of her community support system. The report discussed defendant's financial resources, how she planned to obtain suitable housing, the support programs that would be available to her in Washtenaw, and the educational and volunteering opportunities that she hoped to pursue. Smyth's report was bolstered by several letters from members of the community who, as the trial court noted, generally promised varying levels of support without clear details regarding what that support would entail. Nonetheless, defendant's proofs reflected the fact that she had put substantial thought into how to become a valuable member of society upon release.

Considering the procedural posture of the case, a concrete reentry plan would have little practical value, nor would it bolster the value of defendant's plan as evidence of rehabilitation. After all, the trial court was not tasked with considering when and under what circumstances defendant ought to be released from prison. The trial court's only duty at the *Miller* hearing was to determine whether LWOP was a proportionate sentence, giving due consideration to defendant's youth and attendant circumstances at the time of her offense. If the court decided not to sentence defendant to LWOP, it had to impose a minimum sentence of "not less than 25 years or more than 40 years." MCL 769.25(9). Defendant has been incarcerated since 1991, so the court could have chosen a sentence that would make her immediately eligible for parole. But parole eligibility is not the same as entitlement to parole, and the ultimate decision of whether and when to grant parole is held by the Michigan Parole Board, not the trial court. *In re Spears*, 325 Mich App 54, 60; 922 NW2d 688 (2018). Thus, even if defendant had received a term-of-years sentence at the low end of the range authorized by MCL 769.25(9), defendant was far from guaranteed to be released in the foreseeable future. It could still be years, if not decades, before defendant secured release from prison, during which time her plans would necessarily have to evolve to accommodate her own increasing age and changes in the community support on which she could rely. Accordingly, the trial court's concern about the imprecise nature of defendant's plan was not relevant to defendant's rehabilitation.[6]

Notwithstanding the foregoing, this Court disagrees with defendant's contention that she is entitled to yet another resentencing. "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 individualized sentencing schemes." *Skinner I*, 502 Mich at 135-136, citing *Miller*, 567 US at 465. See also *Montgomery*, 577 US at ___; 136 S Ct at 733 (explaining that *Miller* requires the sentencing judge to consider "how children are different, and how those differences counsel against irrevocably sentencing them to lifetime in prison"), quoting *Miller*, 567 US at 480 (quotation marks omitted). The trial court reviewed extensive evidence concerning defendant's background, Cotaling's murder, and defendant's record and progress while incarcerated. It is clear from the record that the trial court took each of the factors outlined in *Miller* into consideration, and the court explained the reasons underlying its decision to resentence defendant to LWOP, thereby satisfying the requirements of MCL 769.25(6) and (7) and *Miller*'s

[6] Of course, MCL 769.25(6) instructs that a trial court "may consider any other criteria relevant to its decision . . . ." But the same relevance deficiencies arise outside the context of the rehabilitation factor.

demand for individualized sentencing. And despite the trial court's misplaced criticism of defendant's reentry plan, the balance of its rationale sufficiently demonstrated why it believed LWOP was the most appropriate sentence. On this record, the trial court's decision to sentence defendant to LWOP did not violate the principle of proportionality and did not fall outside the range of reasonable outcomes.

C. OTHER ISSUES

Defendant's remaining two issues, that this Court should disagree with *Skinner I* and hold that proper interpretation of *Miller* requires a presumption against LWOP for juvenile offenders, and that the case should be remanded to a different judge for resentencing, can be summarily dealt with. Concerning defendant's first issue, this Court does not have the authority to overrule decisions of our Supreme Court. *People v Armisted*, 295 Mich App 32, 53; 811 NW2d 47 (2011). Next, "[h]aving found that there is no need for remand, there is no need to explore whether a new judge is necessary." *Cassidy v Cassidy*, 318 Mich App 463, 510; 899 NW2d 65 (2017).

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Riordan

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARBARA P. HERNANDEZ,

Defendant-Appellant.

UNPUBLISHED
December 22, 2020

No. 350565
Oakland Circuit Court
LC No. 1990-100991-FC

Before: METER, P.J., and SHAPIRO and RIORDAN, JJ.

SHAPIRO, J (*dissenting*).

I respectfully dissent. Defendant Barbara P. Hernandez was convicted in 1991 of first-degree premeditated murder, MCL 750.316(1)(a), and armed robbery, MCL 750.529, and sentenced to life without parole (LWOP). Following a remand pursuant to *Miller v Alabama*, 567 US 460, 465; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and MCL 769.25 and MCL 769.25a, defendant was again sentenced to LWOP for her first-degree murder conviction.

Defendant was 16 years old at the time of the underlying offenses, yet her abusive relationship with her older codefendant—the one who planned the murder and killed the victim—began when she was 13 years old and followed a childhood of abuse and trauma. Since 2007, defendant has been a model prisoner and she produced ample evidence demonstrating her capacity for rehabilitation.

The trial court failed to apply and weigh the *Miller* factors in the manner required by *Miller* and *People v Skinner*, 502 Mich 89; 917 NW2d 292 (2018). The court disregarded the substantial progress defendant made in prison on the basis of one finding in a psychological report that was otherwise favorable to defendant. The court also failed to consider what was the most compelling set of facts—that defendant was a child under the influence of a controlling sadistic man. I would remand for resentencing because the mitigating circumstances overwhelming favored a term-of-years sentence.

I.

A. BACKGROUND OF OFFENDER AND OFFENSE

Testifying in 1991 at a hearing to determine whether defendant would be sentenced as an adult, social services worker Linda Tansil agreed that the early years of defendant's life were "horrifying." The prosecution does not disagree. From a young age, defendant was regularly exposed to domestic violence perpetrated by her alcoholic father against her mother and her older brother. Both defendant and her older sister later disclosed that they were sexually molested by their father. Defendant's mother was emotionally neglectful of defendant and her siblings. When defendant was around eight years old, her father was arrested and incarcerated for sexually assaulting defendant's mentally disabled maternal aunt, which defendant witnessed. Defendant's paternal cousin then became romantically involved with and married defendant's mother. Defendant's new stepfather also had substance abuse issues and was physically abusive toward her mother. Her stepfather also sexually abused defendant and her two sisters and regularly displayed guns and knives while threatening the children. Defendant recalled that for a period of time the sexual abuse occurred daily. Defendant's mother worked nights and so defendant and her younger sister were frequently left in the care of the stepfather. Defendant's older brother and sister moved out of the home when they were able to. Defendant's mother and stepfather would sometimes leave defendant and her younger sister at home at nights while they were out partying.

Defendant met her codefendant in this case, James Hyde, when she was in the seventh grade; Hyde was repeating the twelfth grade in the same school building as defendant. Hyde took an interest in defendant and initially was kind to her. Despite the fact that she was far below the age of sexual consent, Hyde began having sex with her and they drank and smoked marijuana together. Around this time, defendant left her family home to begin living with her older sister.

As time went on, Hyde became increasingly possessive and controlling of defendant. He insisted that defendant come live with him and his mother and when defendant initially resisted Hyde threatened to harm defendant's sister and her sister's children. At this point, Hyde introduced defendant to hard drugs such as cocaine and heroin and hallucinogens such as mescaline and LSD. The two took drugs and drank daily. Defendant dropped out of school after the eighth grade at the age of 14.

To support their drug habits, Hyde began having defendant pose as a prostitute and steal money from potential customers. Eventually, Hyde directed defendant to actually work as a prostitute. He required defendant to give him all the money she received. On one occasion when defendant did try to leave Hyde, he took her clothes and locked her in a room naked. In the spring of 1990, Hyde's mother kicked him out of the home for stealing from her. Defendant, then 16 years old, began living with Hyde in an abandoned house in Pontiac. They decided to leave Michigan but needed transportation. Defendant testified at trial that the original plan was for her to steal a vehicle from one of her customers. When she failed to do so, Hyde yelled at her, pulled her hair and struck her in the face. According to defendant, Hyde then hatched a new plan for defendant to lure a customer back to the abandoned home so that Hyde could kill him and take his vehicle.

The offense occurred on May 12, 1990. At Hyde's direction, defendant, knowing of Hyde's plan to murder, purchased a hunting knife from a local store and brought it back to Hyde. Then she went outside and attracted the attention of James Cotaling, the victim in this case. According to defendant, Cotaling waved at her and then parked in the driveway and followed her into the abandoned house. Once inside, Cotaling began touching defendant's legs and hair. Defendant then said she was going to the bathroom and Cotaling began removing his pants. Defendant did not go to the bathroom, but instead went to the kitchen where was Hyde was waiting. Hyde then entered the living room and attacked Cotaling with the knife. According to defendant, what ensued was a brutal struggle between Hyde and Cotaling and the physical evidence was consistent with that description. Cotaling was stabbed and cut numerous times and his throat was slit. Defendant has consistently denied wielding the knife at any point but admits to seeing the struggle and doing nothing to assist Cotaling.

Hyde and defendant took Cotaling's vehicle to Ohio where they went to a hospital because during the struggle Hyde had been stabbed in the abdomen. The hospital called the local police and Hyde and defendant were both arrested on suspicion of receiving stolen property. When defendant met with law enforcement on May 15, 1990, she readily confessed to her role in the murder, and drew a map for law enforcement explaining where to find Cotaling's body.

Following a jury trial, defendant was convicted of first-degree murder and armed robbery.[1] After a hearing, the trial court determined that defendant should be sentenced as an adult. In August 1991, the court imposed n LWOP sentence for the murder conviction and a parolable life sentence for the armed-robbery conviction.

B. DEFENDANT'S CONDUCT DURING INCARCERATION

Defendant was arrested at age 16 and was 45 years old when resentenced. Defendant admits that during her early years of incarceration she did little to rehabilitate herself and used drugs inside the prison. From 1997 to 2007, she received 17 "major" misconduct tickets, some of which were actually minor infractions

From 2007 forward, however, defendant received zero misconduct tickets and made substantial advances in her education and other prison programs. Most significantly, in 2010, defendant began the Residential Substance Abuse Treatment (RSAT) program at the Huron Valley Correctional Facility. Although defendant had been sober for some years at that point, the record shows that defendant benefitted greatly from the intensive six-month treatment, which is also aimed at helping inmates with mental illness and involves extensive group therapy sessions. After completing the program, defendant became a mentor for other inmates in the program and still participates in some services herself. Due to her exceptional prison record over the past decade and her participation in the RSAT program, defendant is currently classified as level I security (the

[1] Defendant was also convicted of felony murder predicated on larceny, felony murder predicated on armed robbery, and armed robbery. Defendant's felony murder convictions and sentences were later vacated on double jeopardy grounds. According to the Michigan's Offender Tracking and Information System (OTIS), Hyde was convicted of first-degree murder, armed robbery and two counts of felony murder.

lowest security classification), having been granted a waiver from the mandatory-minimum level II classification for prisoners convicted of murder.

C. DEFENDANT'S *MILLER* HEARING

What is known as a *Miller* hearing was held on April 22, 2019, the purpose of which is to determine whether a LWOP sentence is justified for a juvenile offender considering the mitigating factors. The prosecution offered numerous exhibits but did not call any witnesses. In pertinent part, the prosecution's exhibits included transcripts from defendant's trial, pretrial proceedings, and sentencing; transcript excerpts from defendant's 2010 commutation hearing; 1991 reports regarding defendant's criminal responsibility, competency, and diminished capacity authored by psychologist Carol Holden, Ph.D.; and records regarding the major misconduct tickets defendant received while in prison.

Defendant called one witness: Pamela Odum, a retired corrections officer who had known defendant since 1995. Odum's interactions with defendant significantly increased in 2012 when Odum began supervising the RSAT program. At that time, defendant had already completed the program and was serving as 1 of 12 prisoner-mentors. Odum observed that defendant was always very respectful to staff and dedicated to personal growth, as well as her role in the RSAT program. Defendant was skilled at resolving grievances from RSAT prisoners because she responded intellectually, rather than emotionally. Odum explained that defendant was an exemplary, trustworthy prisoner who made the staff's job easier. Odum opined that defendant would be a productive member of society if given the opportunity to be released from prison. She said that "some people can fake it, but you can't fake this."

Defendant also submitted several exhibits, including a mitigation report from Julie Smyth, LMSW, psychological evaluations from Karen Noelle Clark, Ph.D., and Michael Abramsky, Ph.D., multiple letters of support, and affidavits from Lieutenant Ralph Monday and corrections officer Anne Benion. Smyth's lengthy mitigation report was prepared for purposes of defendant's resentencing. Smyth reviewed a variety of records and interviewed defendant, DOC staff members, and defendant's family and friends. Smyth's report included numerous letters of support, primarily from members of the community who had come into contact with defendant over the years and witnessed her personal growth. Many of the writers expressed their willingness to assist defendant with her reentry to the community in the event of her release. In addition to the letters of support attached to Smyth's report, defendant also presented letters of support from her University of Michigan-Dearborn writing professor and the leader of Northridge Church's Prison Outreach Ministry.

Defendant also met with Dr. Clark, who authored a psychological evaluation report dated April 8, 2019. Like Smyth, Dr. Clark summarized defendant's traumatic childhood, submissive relationship with Hyde, her recollection of the murder, her stated remorse, her prison adjustment, and her rehabilitation achievements. Dr. Clark opined that defendant's behavior in connection with Cotaling's murder was "within the parameters of adolescent behavior." Dr. Clark reasoned that the effects of defendant's traumatic childhood were "cumulative, pervasive, long-term, and affected every aspect of her life." Defendant was particularly susceptible to Hyde's negative influences because she was "young, immature, desperate, and naïve to the potential risks that this older man represented." However, given defendant's successful growth in prison, Dr. Clark also

opined that defendant "demonstrated maturity in understanding and reconciling her confusing and chaotic background." Dr. Clark continued, "Older and more confident and mature now, she has learned healthier and more appropriate strategies for resolution of problems. She has learned how to cope with the normal vicissitudes of her life."

At the conclusion of the *Miller* hearing, the trial court indicated that it would issue an opinion after reviewing the exhibits. Several months later, the trial court instead entered an order scheduling defendant's resentencing hearing for August 8, 2019.

After hearing victim impact statements from Cotaling's siblings, and testimony from defendant apologizing for her actions and participation in Cotaling's murder, the trial court took a recess and then returned to address the *Miller* factors. The trial court found that the first two factors weighed in favor of defendant receiving a term-of-years sentence, but that the other three factors did not. The court sentenced defendant to LWOP without any explanation as to why that was an appropriate sentence given the mitigating circumstances.

II.

A. CONTROLLING LAW

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.' " The Court relied on its precedent establishing that the "distinctive attributes of youth" render juvenile offenders "constitutionally different" from adults for purposes of sentencing:

> Because juveniles have diminished culpability and greater prospects for reform, we explained, they are less deserving of the most severe punishments. Those cases relied on three significant gaps between juveniles and adults. First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievabl[e] deprav[ity]. [*Id*. at 471 (quotation marks and citations omitted).]

Miller did not foreclose LWOP sentences for juvenile offenders, but it required a sentencing judge or jury "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at 480. The Court believed that LWOP sentences for juvenile offenders "will be uncommon," especially considering "the great difficulty . . . 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 479-480 (quotation marks and citations omitted).

In Montgomery v Louisiana, 577 US ___; 136 S Ct 718, 736; 193 L Ed 2d 599 (2016), the United States Supreme Court held that *Miller* announced a substantive rule of constitutional law

that required retroactive application. In reaching that conclusion, *Montgomery* reiterated that LWOP sentences for juvenile offenders would be rare. *Id*. at ___; 136 S Ct at 734. The Court also explained that *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. 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—i.e., juvenile offenders whose crimes reflect the transient immaturity of youth*. [*Id. at* ___; 136 S Ct at 734 (quotation marks and citations omitted; emphasis added).]

Because *Miller* was held to apply retroactively, MCL 769.25a entitled defendant to resentencing. The hearing on the prosecution's motion to resentence defendant to LWOP was governed by MCL 769.25, which provides in relevant part:

> (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.
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> (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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> (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. [MCL 769.25(6), (7) and (9).]

In *Skinner*, 502 Mich 89, the Michigan Supreme Court resolved a number of procedural questions regarding *Miller* hearings. First, the Court held that the statutory procedure calling for a judge to consider the *Miller* factors at resentencing did not violate a defendant's constitutional right to trial by jury because neither MCL 769.25, *Miller* nor *Montgomery* require a particular finding of fact before a trial court to impose a LWOP sentence. *Id*. at 110-119. Specifically, the Court held that trial courts are not required to make a factual finding whether a juvenile offender is irreparably corrupt. *Id* at 120. The Court reasoned that although *Montgomery* held that "the substantive rule is that juveniles who are not 'irreparably corrupt' cannot be sentenced to life

without parole," it allowed the states "to develop their own procedures to enforce this substantive rule." *Id*. at 124. Viewed in that light, the Court likened the irreparable-corruption standard to the principle of proportionality that applies to all sentences but does not require a factual finding:

> 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. In other words, the Eighth Amendment does not require the finding of any particular fact before imposing a life-without-parole sentence, and therefore the Sixth Amendment is not violated by allowing the trial court to decide whether to impose life without parole. [*Id*. at 125.]

Skinner also clarified that there is no presumption against LWOP for juvenile offenders and that an abuse-of-discretion review applies to such sentences. *Id*. at 128-131.

B. APPLICATION OF THE *MILLER* FACTORS

Defendant claims numerous errors regarding the trial court's consideration of the *Miller* factors. I agree with defendant that the court made errors in evaluating certain factors and that viewing the totality of the mitigating circumstances the trial court's decision to sentence defendant to LWOP was an abuse of discretion.[2]

The principle of proportionality "requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Walden*, 319 Mich App 344, 351-352; 901 NW2d 142 (2017) (quotation marks and citation omitted). Although a trial court is not required to find whether a juvenile offender is irreparably corrupted, *Miller* and *Montgomery* nonetheless established that "courts are not allowed to sentence juveniles who are not irreparably corrupt to life without parole." *Skinner*, 502 Mich at 125. Thus, although an explicit finding on the record is not required, the sentencing judge may not impose LWOP unless she is convinced that the defendant is irreparably corrupt.

Pursuant to MCL 769.25(6), the trial court was required to consider the following factors identified in *Miller*: (1) the defendant's chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the defendant's family and home environment; (3) the circumstances of the homicide offense, including the extent

[2] "Any questions of law are to be reviewed de novo, and the trial court's decision about the sentence imposed is reviewed for an abuse of discretion." *People v Wiley*, 324 Mich App 130, 165; 919 NW2d 802 (2018). An abuse of discretion occurs when the trial court makes a decision that "falls outside the range of reasonable and principled outcomes." *Id*. (quotation marks and citation omitted). Any factual findings made by the trial court are reviewed for clear error. *Skinner*, 502 Mich at 137 n 27. "A trial court's factual finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *Wiley*, 324 Mich App at 165 (quotation marks and citation omitted). Because I conclude that the trial court erred by resentencing defendant to LWOP even if the prosecution did not have the burden of proof at the *Miller* hearing, I do not address that issue.

of the defendant's participation in the conduct and the way familial and peer pressures may have affected her; (4) whether the defendant might have been charged and convicted of a lesser offense had she been more able to deal with the police, the prosecutor, and her attorney; (5) the possibility of rehabilitation. *Miller*, 567 US at 477-478; *Skinner*, 502 Mich at 104-105.

The majority correctly affirms the trial court's finding that the first *Miller* factor weighs in favor of sentencing leniency as there is no question that defendant's participation in the crime reflected immaturity. The majority also makes passing reference to the control Hyde had over defendant, but does not discuss that defendant's relationship with Hyde was itself a product of her youth. However, to fully understand how defendant's participation in the murder was a product of her age, we must consider not only defendant's age at the time of the murder, but also how her youth led to her to that point. Dr. Clark explained this point as follows:

> Ms. Hernandez' behavior in the events leading to the murder were within the parameters of adolescent behavior. In retrospect, Ms. Hernandez was angry, sexually exploited, defenseless, young and immature and unable to cope with the dire circumstances of her life, but most particularly in her adolescent years.

Dr. Clark opined that defendant was particularly susceptible to Hyde's negative influences because she was "young, immature, desperate, and naïve to the potential risks that this older man represented." While defendant was 16 at the time of the murder, she was 13 when she met Hyde. One of the attributes of youth is that children "are more vulnerable . . . to negative influences and outside pressures, including from their family and peers . . . ." *Miller*, 567 US at 471 (quotation marks and citation omitted). Hyde was more than a "negative" influence; it is undisputed that he was predatory, manipulative, possessive, and abusive toward defendant and that his control over her progressed incrementally. As explained by Dr. Clark:

> Mr. Hyde was like a vulture, sucking the life out of Ms. Hernandez. He was diabolical, totally oppressive, and increasingly violent toward her. She was susceptible to his influence because of her youth and vulnerability. She was depressed, desperate and dependent on him. She used drugs, including crack cocaine, crack, heroin and mescaline to escape the anguished reality of her life. She became resigned to living a life devoid of dignity and respect. She admits to self-mutilation and having thoughts of suicide. She had no viable recourse. There was no escape. There was no place to go.

Through Hyde, defendant engaged in increasing levels of criminality, including stealing and working as a prostitute. Thus, viewed in context, defendant's decision to participate in the murder of Cotaling was the tragic next step in her abusive relationship with Hyde, which began when she was in the seventh grade and was undoubtedly a product of her youth.

The trial court also found that the second *Miller* factor, defendant's family and home environment, weighed in favor of a term-of-years sentence. The majority accurately sets forth the history of defendant's disclosures and correctly rejects the prosecution's argument that this factor does not present a mitigating circumstance. The abuse defendant suffered and was exposed to as a child clearly made her vulnerable to further exploitation by Hyde. Dr. Abramsky explained that abused children "grow up not only frightened of the world, but extremely needy of affection and

attention to compensate for their feelings of abandonment and low self[-]worth." This leaves the previously victimized child vulnerable to the influences of "any individual who comes along and promises them love." In Dr. Abramsky's opinion, defendant's history and age made her overwhelming dependent upon Hyde to the point of being a "psychological captive."

Next, the trial court found that the third *Miller* factor, concerning the circumstances of the homicide offense, did not favor leniency. The court reasoned that defendant's involvement in the crime was suspect in light of "the evidence presented at trial, statements made following the crime[,] and defendant's repeated inconsistent statements," as well as what the court deemed to be "self-serving"[3] behavior. It can be implied from the record that the court did not believe defendant's insistence that her involvement in the murder was limited to purchasing a knife for Hyde and luring Cotaling into the abandoned house. Defendant argues that the trial court erred by not concluding that this factor contained mitigating circumstances. She disputes the implication that she participated in the stabbing but also argues that a finding to the contrary does not change the fact that Hyde was primarily responsible for the crime.

It is unclear from the record if the jury found that defendant participated in the stabbing or whether it found her guilty essentially based on an aiding-and-abetting theory. Accordingly, the precise degree of defendant's involvement in the fatal assault remains undetermined. It bears repeating that when defendant met with the police she readily confessed to her involvement in the murder, provided them with the location of Cotaling's body and has consistently denied that she participated in the actual stabbing. It is also important to note that at trial the prosecution largely discredited Hyde's statement to the police, including that he returned to the abandoned home and unexpectedly found defendant with Cotaling. The prosecutor's theory was consistent with defendant's statement that the killing was premediated by Hyde and involved a plan for defendant to bring a customer into the abandoned home. And, as the majority notes, Lieutenant Ron Monday—an officer present during the FBI's interrogation of defendant who also testified at defendant's trial—submitted an affidavit stating, "I am not aware of any evidence that [defendant] held Mr. Cotaling down or participated in the physical attack or stabbing of Mr. Cotaling."

However, although the trial court did not make an affirmative finding under a preponderance of the evidence standard as to the extent of defendant's involvement, it strongly implied that it did not believe her version of events. While it is difficult to evaluate this non-specific finding, I agree with the majority that the trial court's credibility determination regarding plaintiff's involvement in the killing was not clear error. Nonetheless, I agree with defendant that the circumstances of the crime are a mitigating factor in this case.

The third *Miller* factor includes consideration of "peer pressures." *Miller*, 567 US at 477. Given the age difference between defendant and Hyde and the level of abuse involved in their relationship, the term "peer pressure" does not do justice to Hyde's influence over defendant. In a psychiatric report completed in 1991, Dr. James Johnson concluded that defendant "was

[3] Regardless of what self-serving behavior the trial court was referring, I conclude—as the majority ultimately does—that the court merely cited it as a reason supporting its credibility determination as to defendant's involvement in the crime. Any speculation regarding defendant's behavior at the Center for Forensic Psychiatry pending trial has no relevance to the third *Miller* factor.

essentially a slave" to Hyde. Although there is no suggestion that defendant was threatened or physically coerced into participating in the murder, Hyde had placed defendant in a subservient role through such methods. Indeed, Hyde beat defendant when she failed to steal a car on her own, the clear implication being that any refusal to participate in the murder plot would result in further abuse. Further, there is no dispute that the crime was Hyde's idea and that defendant was following his instructions. That does not excuse defendant's actions, but these are plainly mitigating circumstances. Accordingly, the trial court clearly erred by concluding that the third *Miller* factor did not support a term-of-years sentence.[4]

The fourth *Miller* factor considers whether the defendant might have been "charged and convicted of a lesser offense if not for the incompetencies of youth . . . ." *Id*. at 477. Defendant does not challenge the trial court's finding that this factor did not favor her.

The fifth and final *Miller* factor considers the possibility of rehabilitation. Without explicitly stating that this factor weighed against defendant, the court expressed concern regarding defendant's rehabilitation prospects. Defendant argues that the trial court's reasoning was critically flawed because it ignored voluminous unrebutted evidence that defendant had achieved remarkable self-growth and instead relied on speculation that defendant would be unable to maintain her self-improvement outside of a structured prison environment. I agree.

As explained by *Miller*, one of the reasons that a LWOP sentence for juvenile offenders is particularly harsh is that LWOP "reflects 'an irrevocable judgment about [an offender's] value and place in society,' " which is "at odds with a child's [heightened] capacity for change." *Id*. at 472. Indeed, the defendant's potential for rehabilitation is arguably the overriding factor considering that it is the "the rare juvenile offender who exhibits such irretrievable depravity *that rehabilitation is impossible* and life without parole is justified." *Montgomery*, 577 US at ___; 136 S Ct at 733 (emphasis added).

In this case, no speculation is needed about defendant's capacity for rehabilitation. Defendant presented extensive evidence that after a rocky start to her incarceration, she developed an overwhelmingly positive, if not exemplar prison record. Defendant has received no misconduct tickets since 2007, she obtained her GED, acquired at least 55 college credits, and completed a variety of voluntary programs addressing issues such as substance abuse, stress and anger management, and religious topics. Defendant has been a mentor in the RSAT program since approximately 2010, and two program supervisors reported defendant's impressive success in that role. Odum, in particular, was impressed by defendant's skillful and intellectual resolution of prisoner grievances. She was also assessed by the DOC as presenting a low risk for recidivism or violence and consistent with that conclusion, she had been placed in the lowest security risk

[4] The trial court stated that it could not fathom why defendant would not run away and find the police while Hyde was fighting Cotaling. No one, including defendant, suggests that defendant's actions were in any way justified. She was convicted of first-degree murder and has served almost 30 years in prison. But, in the context of evaluating the mitigating circumstances, the court's failure to even consider Hyde's abuse of and control over defendant, and how that affected her decision making, is in and of itself reversible error.

population. The evidence strongly supported the conclusion that since 2007, defendant has been an ideal prisoner: disciplined, motivated, helpful to others and focused on her rehabilitation.

Despite recognizing that defendant had demonstrated a high degree of rehabilitation during her decades in prison, the court was skeptical that defendant would be able to maintain her improvement if she was ever released. The court reasoned that defendant would be unable to create the requisite structure on her own behalf and cited a passage from Dr. Clark's psychological evaluation in support of this belief, reading:

> [Defendant's Millon Clinical Multiaxial Inventory III] profile suggests that she identifies with a depressive dependency, a tendency to sabotage her occasional good fortune, self-pity, an anxious seeking of reassurance from others, and behavior that often serves to undo the support of those who have provided it in the past. Significant relationships in her life may have become increasingly insecure and unreliable, in part a consequence of possibly permitting others to be exploitive and mistreating. In response, she may have become erratically moody and withdrawn, and she may now experience prolonged periods of futility and dejection.

The trial court's focus on this single finding was erroneous. First, as defendant argues, this paragraph does not reflect Dr. Clark's full evaluation nor her ultimate opinion which was that defendant had been rehabilitated. Dr. Clark said that defendant had "learned healthier and more appropriate strategies for resolution of her problems," and "learned how to cope with the normal vicissitudes of her life." She described defendant as "reflective, introspective, resilient, compassionate and responsible," and "a vastly different person from the adolescent who entered the prison system 28 years ago at the age of 16." Dr. Clark opined that defendant "understands and appreciates the gravity of her actions, and has demonstrated that she is capable of rehabilitation, in even the adverse conditions of prison." Dr. Clark also believed that defendant's long-term role as an RSAT mentor reinforced the "depth and breadth of rehabilitation."

Second, defendant's rehabilitation concerns whether she will refrain from committing crime if released at some point. See *Black's Law Dictionary* (11th ed) (defining "rehabilitation" as "[t]he process of seeking to improve a criminal's character and outlook so that he or *she can function in society without committing other crimes* . . . .") (emphasis added). Dr. Clark concluded that the circumstances that led to defendant's prior criminal behavior were largely the product of her youth and immaturity. For similar reasons, Dr. Ambrasky found that defendant was a low recidivism risk:

> First, [defendant] is now 33 years old, not 16. Her brain has matured and her ability to understand and her ability to control actions are correlated and in sync with each other. . . . [T]he vulnerability that [defendant] had as an adolescent are no longer there in a mature woman. Her ability to not become involved with pathological types is much more in place and she is a healthy more mature person today. . . . [T]he likelihood of a similar situation occurring for all of the reasons I have outlined is slim.

Defendant concedes that, if and when she is released, she will face challenges in adjusting to society after decades of incarceration. But the substantial progress that she has made in the prison

programs, as well as the fact that she had not had a prison misconduct ticket since 2007, strongly indicates that she can function in society without committing crime.

In evaluating the fifth *Miller* factor, the trial court repeatedly noted its concerns with defendant's proposed reentry plan. The majority correctly concludes, and I agree, that defendant's reentry plan was not relevant to her capacity for rehabilitation. The trial court was not tasked with considering when and under what circumstances defendant ought to be released from prison. The trial court's only duty at the *Miller* hearing was to determine whether LWOP was a proper sentence, giving due consideration to defendant's youth and the attendant circumstances at the time of her offense. If the court decided not to sentence defendant to LWOP, it had to impose a maximum term "not less than 60 years" and a minimum term "not less than 25 years or more than 40 years." MCL 769.25(9). Defendant has been incarcerated since 1991, so the court could have chosen a sentence that would make her immediately eligible for parole or one that would assure her continued imprisonment for years to come. Defendant's reentry plan, though relevant to the parole board's determinations after she completes her minimum term, does not bear on whether she should ever be allowed parole consideration. Accordingly, the trial court erred by considering the reentry plan in evaluating this factor, and given that defendant has plainly established her capacity for rehabilitation, the trial court clearly erred by not finding that this factor weighed in her favor.

In sum, there is no dispute that defendant faced horrible circumstances in her upbringing that left her especially susceptible to manipulation. At the age of 13, she met the much older Hyde, who was initially kind to her but became abusive and led her down a path of increasingly severe drug use and criminal activity. Hyde obtained a progressive amount of control over defendant, and would beat or threaten her if she did not do as he said. These circumstances directly led to defendant's decision to follow Hyde's plan to murder someone for the purposes of stealing vehicle. These compelling mitigating factors strongly suggest that defendant is not irreparably corrupt but rather that she be given the opportunity to rehabilitate. And defendant's prison record shows, beyond any question, that she has the capacity for rehabilitation and has indeed made substantial progress toward that goal, if she has not obtained it already.

Even though the trial court found that two *Miller* factors presented mitigating circumstances, the court made no effort to explain why LWOP was nonetheless justified. Indeed, the court expressed confusion as to how it was to evaluate the *Miller* factors, stating that "it is unclear when discussing *Miller* and looking at the totality if the Court should be determining *Miller* on the totality of the factors as a whole or the totality within each factor." Although not entirely clear, the court's statement indicates that it simply weighed the two *Miller* factors it found in defendant's favor against the three that the court found did not, and concluded that LWOP was justified. In any event, the trial court clearly failed to appreciate that *all* the *Miller* factors concern mitigating circumstances. *Skinner*, 502 Mich at 116 ("It is undisputed that all of these factors are mitigating factors."). Accordingly, even if only one *Miller* factor presented mitigating circumstances, a judge would still have to consider whether those circumstances require a term-of-years sentence. Cf. *id*. at 117 ("If the trial court simply finds that there are no mitigating circumstances, it can sentence a juvenile to life without parole.") As discussed, I conclude that the trial court clearly erred by finding that the third and fifth *Miller* factors do not favor leniency. But the first two *Miller* factors that the trial court weighed in defendant's favor should have given the trial court great pause before imposing a LWOP sentence. The court was required 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). Instead, the court gave no explanation for why it sentenced defendant to LWOP in light of the mitigating circumstances.

The court's failure to understand the purpose of the *Miller* factors and to follow MCL 769.25 at the very least requires remand so that the court could explain why a LWOP sentence is required. However, considering the substantial mitigating circumstances, I conclude that a LWOP sentence is not a reasonable outcome. Accordingly, I would reverse and remand for defendant to be sentenced to a term of years.[5]

/s/ Douglas B. Shapiro

[5] I disagree with defendant that remand to a different judge is required. The record does not support defendant's contention that the sentencing judge was unduly swayed by the statements from Cotaling's siblings or will have trouble setting aside any previously expressed views. And while the judge's criticism of the Clemency Project for a statement it released regarding this case would have been better left unsaid, the judge explicitly stated that she was not holding the statement against defendant, and so there is not a substantial probability that her criticisms of the Clemency Project would affect the sentence on remand.