

EXCERPT OF MJI JUVENILE JUSTICE BENCHBOOK

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Juvenile Justice Benchbook

DELINQUENCY AND CRIMINAL
PROCEEDINGS—THIRD EDITION

EXCERPT



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Michigan Supreme Court

- The Honorable Robert P. Young, Jr., *Chief Justice*
- The Honorable David F. Viviano, *MJI Supervising Justice*
- The Honorable Stephen J. Markman, the Honorable Brian K. Zahra, the Honorable Bridget M. McCormack, the Honorable Richard H. Bernstein, the Honorable Joan L. Larsen, *Justices*
- The Honorable Milton L. Mack, Jr., *State Court Administrator*
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rather, a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them[.]” (citations omitted).

“[T]he imposition of a juvenile life-without-parole sentence requires a heightened degree of scrutiny [on appeal] 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.” *Hyatt*, ___ Mich App at ___. “[S]uch sentences should require a searching inquiry into the record and the understanding that, more likely than not, the sentence imposed is disproportionate.” *Id.* at ___ (citations omitted).

See Section 19.4(C)(3)(a) for discussion of sentencing juveniles to life-without-parole sentences under MCL 769.25 and MCL 769.25a.

3. Michigan “Juvenile Lifer” Statutory Sentencing and Resentencing Procedures: Legislative Compliance With *Miller*

Effective March 4, 2014, the Michigan Legislature enacted 2014 PA 22 and 2014 PA 23, which added [MCL 769.25](#) and [MCL 769.25a](#) to Chapter IX of the Code of Criminal Procedure and amended several provisions of the Michigan Penal Code in order to achieve compliance with *Miller*, 567 US ___, by (1) eliminating mandatory life-without-parole sentences for certain offenders under the age of 18 in cases that are not final for purposes of appellate review; (2) establishing, in [MCL 769.25](#), a procedure

¹⁸ ~~In *People v Carp (Carp I)*, 298 Mich App 472, 531 (2012), aff’d on other grounds 496 Mich 440 (2014), rev’d on other grounds ___ Mich ___ (2016), the Court of Appeals held that MCL 791.234(6)(a) (excluding from parole eligibility prisoners convicted of first degree murder), former MCL 750.316(1) (mandating life imprisonment for first degree murder), and MCL 769.1(1)(g) (requiring the imposition of an adult sentence upon a juvenile convicted of first degree murder in an automatic waiver proceeding) “intersect[ed] to create an unconstitutional perfect storm under [*Miller v Alabama*, 567 US ___ (2012)].” The *Carp I* Court further held, however, that *Miller*, 567 US ___, was not retroactively applicable, *Carp I*, 298 Mich App at 537, and the Michigan Supreme Court affirmed, *People v Carp (Carp II)*, 496 Mich 440, 451 (2014), vacated 577 US ___ (2016). However, the United States Supreme Court subsequently held that *Miller*, 567 US ___, “announced a substantive rule that is retroactive in cases on collateral review.” *Montgomery v Louisiana*, 577 US ___, ___ (2016), effectively overruling *Carp I*, 298 Mich App 472, and *Carp II*, 496 Mich 440 (citations omitted). The United States Supreme Court additionally vacated *Carp II*, 496 Mich 440, and remanded the case to the Michigan Supreme Court “for further consideration in light of [*Montgomery*, 577 US ___].” *Carp v Michigan*, 577 US ___ (2016); see also *Davis v Michigan*, 577 US ___ (2016) (remanding defendant Cortez Davis’s case, which was one of three cases considered in *Carp II*, 496 Mich 440, to the Michigan Supreme Court for reconsideration in light of *Montgomery*, 577 US ___). In conformity with *Montgomery*, 577 US ___, and *Miller*, 567 US ___, the Michigan Supreme Court reversed *Carp I*, 298 Mich App 472; vacated the juvenile defendant’s sentence for first degree murder; and remanded for resentencing under MCL 769.25 and MCL 769.25a. *People v Carp (Carp III)*, ___ Mich ___, ___ (2016). See also *People v Davis (Cortez)*, ___ Mich ___, ___ (2016) (remanding to the trial court for resentencing under MCL 769.25 and MCL 769.25a).~~

under which the prosecuting attorney, in a case that is not final for purposes of appellate review, may seek imposition of a life-without-parole sentence for an offender under the age of 18, and providing for the imposition of a term-of-years sentence if a life-without-parole sentence is not imposed; and (3) establishing, in [MCL 769.25a](#), a procedure for the resentencing of defendants in cases that are final for purposes of appellate review, in the event that either the Michigan Supreme Court or the United States Supreme Court determined that *Miller* is to be given retroactive application (and, indeed, the United States Supreme Court held in *Montgomery*, 577 US ___, that *Miller* is to be applied retroactively, thereby triggering application of [MCL 769.25a](#) to cases on collateral review).¹⁹

a. [MCL 769.25](#): Prospective Application of *Miller*²⁰

[MCL 769.25](#)²¹ authorizes a prosecuting attorney to file, in a case that is not final for purposes of appellate review, a motion seeking a sentence of imprisonment for life without the possibility of parole for a conviction of first-degree murder or other enumerated offense that was committed when the defendant was less than 18 years old.²² [MCL 769.25\(1\)-\(3\)](#); [MCL 769.25a\(1\)](#).

Except as otherwise provided in [MCL 769.25a\(2\)](#) and [MCL 769.25a\(3\)](#) (providing for resentencing in a case that is final for purposes of appellate review in the event that the Michigan Supreme Court or

¹⁹ After the enactment of [MCL 769.25](#) and [MCL 769.25a](#), the Michigan Supreme Court issued a decision holding that *Miller*, 567 US ___, was not retroactively applicable. *People v Carp (Carp II)*, 496 Mich 440, 451 (2014), vacated 577 US ___ (2016). However, the United States Supreme Court subsequently held that *Miller*, 567 US ___, “announced a substantive rule that is retroactive in cases on collateral review.” *Montgomery*, 577 US at ___ (citations omitted). The United States Supreme Court additionally vacated *Carp II*, 496 Mich 440, and remanded the case to the Michigan Supreme Court “for further consideration in light of [*Montgomery*, 577 US ___].” *Carp v Michigan*, 577 US ___ (2016). In conformity with *Montgomery*, 577 US ___, and *Miller*, 567 US ___, the Michigan Supreme Court vacated the juvenile defendant’s sentence for first-degree murder and remanded for resentencing under [MCL 769.25](#) and [MCL 769.25a](#). *People v Carp (Carp III)*, ___ Mich ___, ___ (2016).

²⁰ For additional guidance in sentencing or resentencing a juvenile offender under [MCL 769.25](#) or [MCL 769.25a](#), see [SCAO Memorandum](#), March 4, 2016. For a table summarizing the application of [MCL 769.25](#) and [MCL 769.25a](#), see the Michigan Judicial Institute’s [Juvenile Life-Without-Parole Quick Reference Guide](#).

²¹ [MCL 769.25](#) was added, effective March 4, 2014, by 2014 PA 22.

²² “[A] defendant is a juvenile for the purposes of *Miller*[, 567 US ___.] when he or she is under the age of 18, as determined by his or her anniversary of birth[.]” rather than “by the day preceding the anniversary of birth as at English common law.” *People v Woolfolk*, 497 Mich 23, 26, 27 (2014) (aff’g 304 Mich App 450 (2014) and holding that “[the] defendant remained ‘under the age of 18’ at the time he committed [a] homicide offense [on the night before his 18th birthday] and [was] therefore entitled to be treated in accordance with the United States Supreme Court’s rule in *Miller*[.]”).

the United States Supreme Court determined that *Miller*, 567 US ___, is retroactively applicable, as, indeed, the United States Supreme Court has since held),²³ “the procedures set forth in [MCL 769.25] do not apply to any case that is final^[24] for purposes of appeal on or before June 24, 2012.” MCL 769.25a(1)-(3). Specifically, MCL 769.25 “applies to a criminal defendant who was less than 18 years of age at the time he or she committed an offense described in [MCL 769.25(2)] if either of the following circumstances exists:”

“(a) The defendant is convicted of the offense on or after [March 4, 2014,] the effective date of the amendatory act that added [MCL 769.25].

(b) The defendant was convicted of the offense before [March 4, 2014,] and either of the following applies:

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

(ii) On June 25, 2012[,] the case was pending in the trial court or the applicable time periods for direct appellate review by state or federal courts had not expired.” MCL 769.25(1)(a)-(b).

²³ After the enactment of MCL 769.25 and MCL 769.25a, the Michigan Supreme Court issued a decision holding that *Miller*, 567 US ___, was not retroactively applicable. *People v Carp (Carp II)*, 496 Mich 440, 451 (2014), vacated 577 US ___ (2016). However, the United States Supreme Court subsequently held that *Miller*, 567 US ___, “announced a substantive rule that is retroactive in cases on collateral review.” *Montgomery*, 577 US at ___ (citations omitted). The United States Supreme Court additionally vacated *Carp II*, 496 Mich 440, and remanded the case to the Michigan Supreme Court “for further consideration in light of [*Montgomery*, 577 US ___].” *Carp v Michigan*, 577 US ___ (2016). In conformity with *Montgomery*, 577 US ___, and *Miller*, 567 US ___, the Michigan Supreme Court vacated the juvenile defendant’s sentence for first-degree murder and remanded for resentencing under MCL 769.25 and MCL 769.25a. *People v Carp (Carp III)*, ___ Mich ___, ___ (2016). See Section 19.4(C)(3)(b) for discussion of MCL 769.25a.

²⁴ A case is final . . . if any of the following apply:

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

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

(c) If the state supreme court has granted leave to appeal, after the court renders its decision or after a timely filed motion for rehearing is denied.” MCL 769.25a(1).

Enumerated Offenses. MCL 769.25(2) provides that “[t]he prosecuting attorney may file a motion . . . to sentence a defendant described in [MCL 769.25(1)] to imprisonment for life without the possibility of parole if the individual is or was convicted of any of the following violations:”

- first-degree murder, MCL 750.316;
- certain offenses involving the alteration, adulteration, misbranding, or mislabeling of a drug, medicine, or device with the intent to kill or to cause serious impairment of a body function of two or more individuals, resulting in death, MCL 333.17764(7); MCL 750.16(5); MCL 750.18(7);
- a violation of Chapter XXXIII of the Michigan Penal Code (“Explosives, Bombs, and Harmful Devices”), MCL 750.200—MCL 750.212a;
- willfully mingling a poison or harmful substance with a food, drink, nonprescription medicine, or pharmaceutical product, or willfully placing a poison or harmful substance in a spring, well, reservoir, or public water supply, knowing or having reason to know that it may be ingested or used by a person to his or her injury, causing the death of another individual, MCL 750.436(2)(e);
- terrorism causing death, MCL 750.543f; or
- a violation of law involving the death of another person for which parole eligibility is expressly denied under state law.

Motion and Response Requirements. If a prosecuting attorney intends to seek a sentence of imprisonment for life without parole for a defendant who was convicted on or after March 4, 2014 (the effective date of the amendatory legislation), the motion must be filed within 21 days after the defendant was convicted. MCL 769.25(3). If the defendant was convicted before March 4, 2014, but the conviction was not final as set out in MCL 769.25(1)(b), a motion for a sentence of life imprisonment without parole must be filed within 90 days after March 4, 2014. MCL 769.25(3). The motion must “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.” *Id.* The defendant must file a response within 14 days after receiving notice of the prosecutor’s motion. [MCL 769.25\(5\)](#).

Victims’ Rights. “Each victim shall be afforded the right under section 15 of the [Crime Victim’s Rights Act], [MCL 780.765](#), to appear before the court and make an oral impact statement at any sentencing or resentencing of the defendant under [[MCL 769.25](#)].” [MCL 769.25\(8\)](#).

Hearing Process. [MCL 769.25\(6\)](#) requires the trial court to “conduct a hearing on the motion as part of the sentencing process[.]” and to consider the factors listed in *Miller*, 567 US at ___,²⁵ and [MCL 769.25\(7\)](#) requires the court to specify on the record the aggravating and mitigating circumstances considered by the court and the court’s reasons supporting the sentence imposed.

“A judge, not a jury, is to make the determination of whether to impose a life-without-parole sentence or a term-of-years sentence under MCL 769.25.” *Hyatt*, ___ Mich App at ___, abrogating in part *People v Skinner*, 312 Mich App 15, 59-61 (2015), and superseding in part *People v Perkins (Floyd)*, ___ Mich App ___, ___ (2016). “Neither *Miller*[, 567 US ___,] nor MCL 769.25 implicates the right to a jury trial under *Apprendi*[, 530 US 466,] and its progeny[²⁶; r]ather, our Legislature’s implementation of *Miller*’s Eighth Amendment protections through MCL 769.25 simply establishes a procedural framework for protecting a juvenile’s Eighth Amendment rights at sentencing.” *Hyatt*, ___ Mich App at ___. “*Miller* simply holds that a framework of protections required by the Eighth Amendment must be implemented in order to ensure that the imposition of the maximum available penalty—life without parole—is proportionate to the particular offender and the particular offense.” *Hyatt*, ___ Mich App at ___ (citation omitted). “The considerations required by *Miller*’s individualized sentencing guarantee

²⁵The *Miller* Court identified, as relevant considerations, the juvenile offender’s “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences[.]” the offender’s “family and home environment[.]” “the circumstances of the homicide offense, including the extent of [the offender’s] participation in the conduct and the way familial and peer pressures may have affected him [or her:]” the “incompetencies associated with youth[.]” in dealing with police officers, prosecutors, and defense attorneys; and “the possibility of rehabilitation[.]” See *Miller*, 567 US at ___.

²⁶See the Michigan Judicial Institute’s *Criminal Proceedings Benchbook*, Vol. 2, Chapter 3, for discussion of *Apprendi*, 530 US 466, and its progeny.

are sentencing factors, not elements that must be found [by a jury] before a more severe punishment is authorized[.]” and “a juvenile offender’s age is a mitigating factor that is to be considered in rendering a proportionate sentence for a juvenile who is convicted of first-degree murder.” Hyatt, ___ Mich App at ___ (citations omitted; emphasis added). Furthermore, the Legislature did not, by enacting MCL 769.25, “alter the statutory maximum sentence that may be imposed based solely on the jury’s verdict, nor did [it] make the imposition of the statutory maximum dependent on any particular finding of fact[.]” rather, “[u]nder MCL 769.25, the statutory maximum for juvenile offenders—assuming the requisite motion has been filed[by the prosecution]—is a life-without-parole sentence, and the sentencing authority, in imposing that rare sentence, is not tasked with finding any particular fact before arriving at such a sentence.” Hyatt, ___ Mich App at ___.

“MCL 769.25 does not make the imposition of [life without parole] contingent on any particular fact[.]” rather, “all that is mandated by MCL 769.25 is the individualized sentencing required, as stated in Miller, by the Eighth Amendment[.]” and “a juvenile offender’s age is a mitigating factor that is to be considered in rendering a proportionate sentence for a juvenile who is convicted of first-degree murder.” Hyatt, ___ Mich App at ___ (noting that “[t]he analysis on the Miller factors does not aggravate punishment; instead, the analysis acts as a means of mitigating punishment because it acts to caution the sentencing judge against imposing the maximum punishment authorized by the jury’s verdict, a sentence which Montgomery[, 577 US at ___], cautioned is disproportionate for ‘the vast majority of juvenile offenders[.]’”).

Life-Without-Parole Sentence: Proportionality and Rarity. In applying MCL 769.25, “the sentencing judge must honor the mandate that was made abundantly clear in Miller[, 567 US ___], and other recent Eighth Amendment caselaw: life without parole is to be reserved for only the rarest of juvenile offenders so as to avoid imposing an unconstitutionally disproportionate life-without-parole sentence on a transiently immature offender.” Hyatt, ___ Mich App at ___ (holding that “the trial court committed an error of law by failing to adhere to [the directives of] Miller and [Montgomery, 577 US ___], . . . about the rarity with which a life-without-parole

sentence should be imposed[.]”). “[W]hen sentencing a juvenile offender, a trial court must begin with the understanding that, in all but the rarest of circumstances, a life-without-parole sentence will be disproportionate for the juvenile offender at issue[.]” and that such a sentence is appropriate only for “the truly rare individual who is incapable of reform.” *Hyatt*, ___ Mich App at ___ (citations omitted). “The court must undertake a searching inquiry into the particular juvenile, as well as the particular offense, and make the admittedly difficult decision of determining whether this is the truly rare juvenile for whom life without parole is constitutionally proportionate as compared to the more common and constitutionally protected juvenile whose conduct was due to transient immaturity for the reasons addressed by our United States Supreme Court[in *Miller and Montgomery*].” *Hyatt*, ___ Mich App at ___. ~~However, in *People v Skinner*, 312 Mich App 15, 59-61 (2015), the Michigan Court of Appeals partially severed these provisions and held that a jury must determine whether a juvenile homicide offender should be sentenced to life imprisonment without parole under MCL 769.25. The *Skinner* Court held that MCL 769.25 “offends the Sixth Amendment as articulated in [*Apprendi v New Jersey*, 530 US 466 (2000),] and its progeny[.]” because it “authorizes a trial court to enhance [the default term of years sentence prescribed in MCL 769.25(9)] to life without parole on the basis of factual findings that were not made by a jury but rather were found by the court.”²⁷ *Skinner*, 312 Mich App at 58. However, “apart from the provision in [MCL 769.25(6)] directing the trial court to consider the *Miller* factors and the provision in [MCL 769.25(7)] directing the court to articulate aggravating and mitigating circumstances on the record, MCL 769.25 remains operable in the event that the findings on the *Miller* factors are made by a jury beyond a reasonable doubt.” *Skinner*, 312 Mich App at 59-60.~~

~~The *Skinner* Court set out the following procedure for hearings under MCL 769.25:~~

~~“[F]ollowing a conviction of first-degree murder and a motion by the prosecuting attorney for a sentence of life without parole, absent [the] defendant’s waiver, the court~~

²⁷ See the Michigan Judicial Institute’s *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3, for discussion of *Apprendi*, 530 US 466, and its progeny.

~~should empanel a jury^[28] and hold a sentencing hearing at which the prosecution is tasked with proving that the factors in *Miller* support that the juvenile's offense reflects irreparable corruption beyond a reasonable doubt. During this hearing, both sides must be afforded the opportunity to present relevant evidence, and each victim must be afforded the opportunity to offer testimony in accordance with MCL 769.25(8). Following the close of proofs, the trial court should instruct the jury that it must consider whether in light of the factors set forth in *Miller* and any other relevant evidence, the defendant's offense reflects irreparable corruption beyond a reasonable doubt sufficient to impose a sentence of life without parole. Alternatively, if the jury decides this question in the negative, then the court should use its discretion to sentence the juvenile to a term of years in accordance with MCL 769.25(9)."~~ *Skinner*, 312 Mich App at 60-61.

Life-Without-Parole Sentence: Standard of Review. "[T]he appropriate standard of review in cases where a judge imposes a sentence of life without parole on a juvenile defendant is a common three-fold standard[:]. . . [a]ny factfinding by the trial court is to be reviewed for clear error, any questions of law are to be reviewed de novo, and the court's ultimate determination as to the sentence imposed is for an abuse of discretion." *Hyatt*, ___ Mich App at ___ (citations omitted). However, "the imposition of a juvenile life-without-parole sentence requires a heightened degree of scrutiny regarding whether a life-without-parole sentence is proportionate to a particular juvenile offender, and even under this deferential standard, an appellate court should view such a sentence as inherently suspect." *Id.* at ___. "[S]uch sentences should require a searching inquiry into the record and the understanding that, more likely than not,

²⁸ The Court noted that "this hearing may be conducted before the jury that determined the defendant's guilt in the event that the prosecution moves to impose a life without parole sentence after the jury verdict but before the jury is dismissed[:]. . . [a]lternatively, the court may empanel a new jury for the purpose of the sentencing hearing in accordance with the court rules governing empaneling a jury for the guilt phase of the proceeding." *Skinner*, 312 Mich App at 60 n 20, citing MCR 6.410; MCR 6.412.

the sentence imposed is disproportionate.” *Id.* at ___ (citations omitted). A sentence imposed under MCL 769.25 may constitute an abuse of discretion “if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.” *Hyatt*, ___ Mich App at ___ (concluding that the trial court erred by failing to give “credence to . . . [the] repeated warnings [in *Miller*, 567 US ___,] that a life-without-parole sentence should only be imposed on the rare or uncommon juvenile offender[] . . . who is incapable of reform[]” and in focusing on an expert opinion that the defendant’s “prognosis for change *in [only] the next five years was poor[]*”) (citations omitted).

Term-of-Years Sentence. If a nonparolable life sentence is not imposed, either following a sentencing hearing under MCL 769.25 or because the prosecutor does not file a timely motion, the court must impose a “term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years.” MCL 769.25(9); see also MCL 769.25(4). The defendant must be given credit for time already served, “but shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant’s minimum or maximum sentence.” MCL 769.25(10).

b. MCL 769.25a: Retroactive Application of *Miller*

MCL 769.25a²⁹ sets out procedures for resentencing certain eligible offenders whose convictions are final for purposes of appellate review. These procedures were to become applicable only in the event, and to the extent, that the Michigan Supreme Court or the United States Supreme Court determined that *Miller*, 567 US ___, is retroactively applicable.³⁰ Indeed, after the enactment of MCL 769.25 and MCL 769.25a, the United States Supreme Court held that *Miller* is to be applied retroactively, thereby triggering application of MCL 769.25a to cases on collateral review. *Montgomery v Louisiana*, 577 US ___ (2016).

²⁹ MCL 769.25a was added, effective March 4, 2014, by 2014 PA 22.

[MCL 769.25a\(2\)](#) provides:

“(2) If the state supreme court or the United States supreme court finds that [*Miller*, 567 US ___], 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\(9\)](#)] shall be made by the sentencing judge or his or her successor as provided in [[MCL 769.25a](#)]. For purposes of [[MCL 769.25a\(2\)](#)], a decision of the state supreme court is final when either the United States supreme court denies a petition for certiorari challenging the decision or the time for filing that petition passes without a petition being filed.”³¹

Because a decision requiring *Miller*'s retroactive application has been issued as contemplated in [MCL 769.25a\(2\)](#), the following procedures apply:

“(a) Within 30 days after the date the supreme court’s decision becomes final,^[32] 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

³⁰ After the enactment of [MCL 769.25](#) and [MCL 769.25a](#), the Michigan Supreme Court issued a decision holding that *Miller*, 567 US ___, was not retroactively applicable. *People v Carp (Carp II)*, 496 Mich 440, 451 (2014), vacated 577 US ___ (2016). However, the United States Supreme Court subsequently held that *Miller*, 567 US ___, “announced a substantive rule that is retroactive in cases on collateral review.” *Montgomery*, 577 US at ___ (citations omitted). The United States Supreme Court additionally vacated *Carp II*, 496 Mich 440, and remanded the case to the Michigan Supreme Court “for further consideration in light of [*Montgomery*, 577 US ___].” *Carp v Michigan*, 577 US ___ (2016). In conformity with *Montgomery*, 577 US ___, and *Miller*, 567 US ___, the Michigan Supreme Court vacated the juvenile defendant’s sentence for first-degree murder and remanded for resentencing under [MCL 769.25](#) and [MCL 769.25a](#). *People v Carp (Carp III)*, ___ Mich ___, ___ (2016).

³¹ See also [MCL 769.25a\(3\)](#), which is similar to [MCL 769.25a\(2\)](#) and provides for resentencing in the event that the Michigan Supreme Court or United States Supreme Court concludes that *Miller*, 567 US ___, “applies retroactively to all defendants who were convicted of *felony murder* under [[MCL 750.316\(1\)\(b\)](#)], and who were under the age of 18 at the time of their crimes[.]” (Emphasis added.) *Montgomery*, 577 US ___, did not limit retroactive application of *Miller* to juveniles convicted of felony murder; accordingly, [MCL 769.25a\(2\)](#) applies, rather than [MCL 769.25a\(3\)](#).

³² A mandate was issued in *Montgomery*, 577 US ___, on February 26, 2016 (see [Docket No. 14-280](#)), rendering the decision final as of that date. See [Sup Ct R 45](#).

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].^[33]

(c) If the prosecuting attorney does not file a motion under [MCL 769.25a(4)(b)], the court shall sentence the individual to a term of imprisonment for which the maximum term shall be 60 years^[34] and the minimum term shall be not less than 25 years or more than 40 years. Each victim shall be afforded the right under section 15 of the [Crime Victim's Rights Act], MCL 780.765, to appear before the court and make an oral impact statement at any resentencing of the defendant under [MCL 769.25a(4)(c)]." MCL 769.25a(4).

MCL 769.25a(5) sets out the following order of priority for conducting resentencing hearings under MCL 769.25a(4):

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

(b) Cases in which the prosecuting attorney has filed a motion requesting a sentence of imprisonment for life without the possibility of parole shall be held after cases described in [MCL 769.25a(5)(a)] are held.

(c) Cases other than those described in [MCL 769.25a(5)(a)-(b)] shall be held after the cases described in [MCL 769.25a(5)(a)-(b)] are held."

³³ See Section 19.4(C)(3)(a) for discussion of the hearing requirements.

³⁴ Note that, contrary to a term-of-years sentence imposed in a prospective case under MCL 769.25(9) (providing for a maximum term of "not less than 60 years"), the maximum term imposed collaterally under MCL 769.25a(4)(c) "shall be 60 years[.]" (Emphasis added.)

A defendant who is resentenced under [MCL 769.25a\(4\)](#) must be given credit for time already served, “but shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant’s minimum or maximum sentence.” [MCL 769.25a\(6\)](#).

For additional guidance in sentencing or resentencing a juvenile offender under [MCL 769.25](#) or [MCL 769.25a](#), see [SCAO Memorandum](#), March 4, 2016. For a table summarizing the application of [MCL 769.25](#) and [MCL 769.25a](#), see the Michigan Judicial Institute’s [Juvenile Life-Without-Parole Quick Reference Guide](#).

D. Mandatory Minimum 25-Year Sentence for Certain CSC-I Offenders

“[T]he 25-year mandatory minimum [sentence] prescribed by [MCL 750.520b\(2\)\(b\)](#) [for first-degree criminal sexual conduct committed by a defendant who is 17 years of age or older against a victim who is less than 13 years of age] is [not] cruel or unusual when applied to a [17-year-old] juvenile offender[,]” because the mandatory sentence “provides ‘some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation’ for juvenile offenders.” *People v Payne (Jarrud)*, 304 Mich App 667, 675-676 (2014)³⁵ (quoting [Graham v Florida](#), 560 US 48, 75 (2010), and noting that “[a]lthough a minimum sentence of 25 years is unquestionably substantial, it is simply not comparable to the sentences of death and life without parole found unconstitutional when applied to juveniles in *Miller v Alabama*, 567 US ___ (2012),] *Graham*, [560 US 48,] and *Roper v Simmons*, 543 US 551 (2005)[]”).³⁶

E. Extradition of Juvenile

“[A] detainee awaiting extradition[] has not incurred a punishment under [either] the Eighth Amendment[]” or [Const 1963, art 1, § 16](#). *In re Boynton*, 302 Mich App 632, 635, 652, 654-655 (2013) (holding that

³⁵ The *Payne (Jarrud)* Court additionally rejected as irrelevant the defendant’s assertion that “although his chronological age was 17½ years at the time of the offense, he lacked the mental maturity of a 17½-year-old because of his developmental delays, intellectual difficulties, and premature birth.” *Payne (Jarrud)*, 304 Mich App at 676 n 3 (quoting *United States v Marshall*, 736 F3d 492, 498 (CA 6, 2013), and noting that “[u]nder the [United States] Supreme Court’s jurisprudence concerning juveniles and the Eighth Amendment, the only type of ‘age’ that matters is chronological age[]”).

³⁶ Note that [MCL 750.520b\(2\)\(c\)](#), which previously prescribed a mandatory sentence of life imprisonment without the possibility of parole for certain repeat CSC offenders 17 years of age or older against a victim less than 13 years of age, has been amended by 2014 PA 23, effective March 4, 2014, to apply only to offenders 18 years of age or older. [MCL 750.520b\(2\)\(b\)](#), which does not impose a life-without-parole sentence, has not been amended.

Procedures for Handling Juvenile Life-Without-Parole (“LWOP”) Sentencings and Resentencings Under *Miller v Alabama*,¹ *People v Hyatt*,² and MCL 769.25/MCL 769.25a³

I. Resentencings in Pending Cases and Sentencings in New Cases: MCL 769.25

This table applies to pending cases that were not final for purposes of direct review at the time that *Miller* was decided. See MCL 769.25(1). MCL 769.25a provides further guidance for applying MCL 769.25 retroactively.

<u>Prosecutor Seeks LWOP</u>	<u>Prosecutor Does Not Seek LWOP</u>
The prosecutor may file a motion seeking imposition of LWOP if defendant was under age 18 at the time of a LWOP offense. The motion must specify the grounds on which LWOP is sought.	If the prosecutor does not timely file a motion seeking LWOP (see MCL 769.25(3)), the court must impose a term-of-years sentence as directed below.
The defendant must file a response to the prosecution's motion within 14 days after receiving notice of the motion.	No action on the part of the defendant is required if the prosecutor does not seek a LWOP sentence.
The court must conduct a hearing on the motion as part of the sentencing process.	MCL 769.25 does not address whether a hearing is required if the prosecutor does not file a motion seeking LWOP; however, it can be assumed that a normal sentencing hearing is required.
Any victim must be afforded the right, under the Crime Victim’s Rights Act, to appear before the court and make an oral impact statement at any sentencing or resentencing.	Any victim must be afforded the right, under the Crime Victim’s Rights Act, to appear before the court and make an oral impact statement at any sentencing or resentencing.

¹ *Miller v Alabama*, 567 US ___ (2012). Under *Miller*, a juvenile who was under the age of 18 at the time of the commission of an offense cannot be sentenced to mandatory life imprisonment without parole. A life-without-parole sentence may be imposed, but only after consideration of whether the circumstances reflect “irreparable corruption.”

² *People v Hyatt*, ___ Mich App ___ (2016), abrogating in part *People v Skinner*, 312 Mich App 15 (2015). The *Hyatt* Court, resolving a conflict between *Skinner* (which had held that the Sixth Amendment requires that a jury must make the findings required by MCL 769.25(6) before a juvenile may be sentenced to life without parole) and *People v Perkins (Floyd)*, ___ Mich App ___, ___ (2016) (opining that *Skinner* was wrongly decided), concluded that “a judge, not a jury, is to make [the] determination[.]” whether to sentence a juvenile to life without parole under MCL 769.25. *Hyatt*, ___ Mich App at ___.

³ MCL 769.25 establishes procedures for sentencing or resentencing a juvenile who was under the age of 18 at the time of the commission of an offense calling for the mandatory imposition of a life-without-parole sentence. The prosecution may file a motion seeking a life-without-parole sentence for such juveniles. If a motion is filed, a hearing must be conducted and the *Miller* factors must be considered to determine whether the circumstances reflect “irreparable corruption.” If no motion is filed, or if it is determined after a hearing that a life-without-parole sentence is not justified, the defendant must be given a term-of-years sentence with a minimum term of between 25 and 40 years and a maximum term of at least 60 years. MCL 769.25a provides further guidance for applying MCL 769.25 collaterally, in the event that *Miller* applies retroactively. *Miller* was, indeed, given retroactive effect in *Montgomery v Louisiana*, 577 US ___ (2016).

<p><u>Prosecutor Seeks LWOP</u></p>	<p><u>Prosecutor Does Not Seek LWOP</u></p>
<p>At the hearing, the trial court must consider the factors listed in <i>Miller v Alabama</i>, 567 US ___ (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated. The court must specify on the record the aggravating and mitigating circumstances it considered and the reasons supporting the sentence imposed. Evidence presented at trial may be considered together with any evidence presented at the sentencing hearing. A life-without-parole sentence will very rarely be proportionate; such a sentence is appropriate only for "the truly rare individual who is incapable of reform." <i>Hyatt</i>, ___ Mich App at ___ (citations omitted).</p>	<p>MCL 769.25 does not provide guidance for conducting a hearing or fashioning a sentence when LWOP is not sought. In the absence of guidance, normal sentencing procedures should be followed, with the caveat that there does not appear to be any basis for attempting to apply the sentencing guidelines.</p>
<p>If the court rejects LWOP, the court must exercise its discretion and sentence the defendant to a term of imprisonment for which the maximum term cannot be less than 60 years and the minimum term cannot be less than 25 years or more than 40 years.</p>	<p>The court must exercise its discretion and sentence the defendant to a term of imprisonment for which the maximum term cannot be less than 60 years and the minimum term cannot be less than 25 years or more than 40 years.</p>
<p>Defendant must be given credit for time already served but must not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the minimum or maximum sentence.</p>	<p>Defendant must be given credit for time already served but must not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the minimum or maximum sentence.</p>

II. Collateral Resentencings: [MCL 769.25](#) and [MCL 769.25a](#)

This table applies to resentencings in cases that were final for purposes of direct review at the time that *Miller* was decided. See [MCL 769.25a\(1\)](#). [MCL 769.25a](#) provides guidance for applying [MCL 769.25](#) retroactively to these cases.

<p>Within 30 days after <i>Montgomery</i> became final—i.e., by the end of March 2016—the prosecuting attorney should have provided a list of defendants who must be resentenced.</p>
<p>Cases must be handled by the judge who originally imposed sentence, or the successor judge. A different judge may not be assigned unless the sentencing judge’s judgeship was eliminated.</p>
<p>Within 180 days after <i>Montgomery</i> became final—i.e., by approximately August 24, 2016—the prosecuting attorney should have filed motions for resentencing in all cases in which LWOP will be sought.</p>
<p>SCAO recommends that the court should not require a defendant to initiate resentencing proceedings under <i>Montgomery</i>. (See SCAO Memorandum, March 4, 2016.)</p>
<p>SCAO recommends that the court provide notice to each defendant that under Montgomery:</p> <ol style="list-style-type: none"> 1. defendant must be resentenced and defendant need not file for relief from judgment; 2. the prosecutor may file a motion seeking to sentence defendant to LWOP; 3. if a timely motion is not filed, MCL 769.25a(4)(c) requires that the court sentence the defendant to a term of years for which the maximum shall be 60 years and the minimum shall be not less than 25 years or more than 40 years; and 4. the defendant’s case will be scheduled according to the priority established by statute. <p>If notice is sent, it should be recorded on the register of actions and placed in the court file.</p>
<p>Along with the notice described above, SCAO recommends that the court provide defendants with documentation for requesting court-appointed counsel.</p>
<p>The court should immediately begin to block out dates for conducting the necessary resentencing hearings. Resentencing hearings must be held in the following order of priority:</p> <ol style="list-style-type: none"> 1. Cases involving defendants who have served 20 or more years of imprisonment 2. Cases in which the prosecuting attorney has filed a motion requesting a LWOP sentence 3. All other cases
<p>A defendant is entitled to a reasonably updated PSIR. Therefore, the court should communicate with the probation supervisor regarding the identity of defendants that will be resentenced.</p>
<p>Any victim must be afforded the right, under the Crime Victim’s Rights Act, to appear before the court and make an oral impact statement at any sentencing or resentencing.</p>

<u>Prosecutor Seeks LWOP</u>	<u>Prosecutor Does Not Seek LWOP</u>
<p>The court must conduct a hearing on the motion as part of the sentencing process.</p>	<p>MCL 769.25 does not address whether a hearing is required in a case in which the prosecutor does not file a motion seeking LWOP; however, it can be assumed that a normal sentencing hearing is required.</p>
<p>At the hearing, the trial court must consider the factors listed in Miller v Alabama, 567 US ___ (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated. The court must specify on the record the aggravating and mitigating circumstances it considered and the reasons supporting the sentence imposed. Evidence presented at trial may be considered together with any evidence presented at the sentencing hearing. A life-without-parole sentence will very rarely be proportionate; such a sentence is appropriate only for "the truly rare individual who is incapable of reform." People v Hyatt, ___ Mich App ___ (2016) (citations omitted).</p>	<p>MCL 769.25 does not provide guidance for conducting a hearing or fashioning a sentence when LWOP is not sought. In the absence of guidance, normal sentencing procedures should be followed, with the caveat that there does not appear to be any basis for attempting to apply the sentencing guidelines.</p>
<p>If the court rejects LWOP, it must exercise its discretion and sentence the defendant to a term of imprisonment for which the maximum term must be 60 years¹ and the minimum term cannot be less than 25 years or more than 40 years.</p>	<p>The court must exercise its discretion and sentence the defendant to a term of imprisonment for which the maximum term must be 60 years² and the minimum term cannot be less than 25 years or more than 40 years.</p>
<p>Defendant must be given credit for time served but must not receive any credits that reduce the minimum or maximum sentence.</p>	<p>Defendant must be given credit for time served but must not receive any credits that reduce the minimum or maximum sentence.</p>

1. Note that although [MCL 769.25\(9\)](#) provides that the maximum sentence "shall be **not less than** 60 years[.]" [MCL 769.25a\(4\)\(c\)](#) provides that "the maximum term shall be 60 years[.]" (Emphasis added.)

2. Note that although [MCL 769.25\(9\)](#) provides that the maximum sentence "shall be **not less than** 60 years[.]" [MCL 769.25a\(4\)\(c\)](#) provides that "the maximum term shall be 60 years[.]" (Emphasis added.)