

**LEGAL AND  
PRACTICAL  
CONSIDERATIONS  
RELATING TO MCL  
769.25A**

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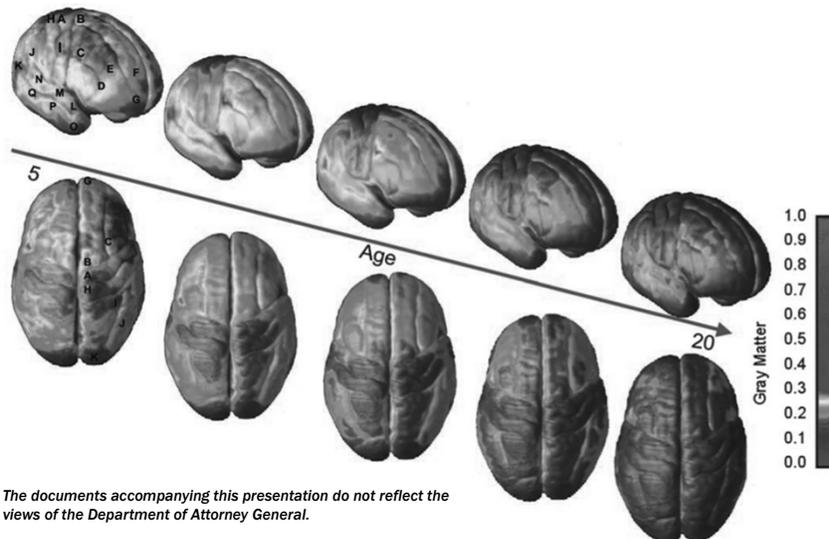
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## BACKGROUND: MILLER V. ALABAMA (2012)

- MCL 769.25(6) -requires consideration of *Miller* factors and allows consideration of other relevant factor.
- *Miller* - Mandatory LWOP precludes consideration:
  - of his chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences.
  - It prevents taking into account the family and home environment that surrounds him — and from which he cannot usually extricate himself — no matter how brutal or dysfunctional.
  - It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.
  - Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth — for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.
  - And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

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## MILLER LOOKED TO CURRENT SCIENCE/RESEARCH ON ADOLESCENT DEVELOPMENT



- Readings if interested:
- American Psychological Association *Miller* amicus brief: <http://www.apa.org/about/offices/ogc/amicus/miller-hobbs.aspx>
- Elizabeth Cauffman & Laurence Steinberg, *Emerging Findings from Research on Adolescent Development and Juvenile Justice*, Vol. 7(issue 4) *Victims and Offenders*, p.428-449 (2012).

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## MONTGOMERY & MCL 769.25A

- MCL 769.25a - implicated when U.S.S.C. found *Miller* retroactive.
- Montgomery describes substantive Eighth Amendment right:
  - “*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. **The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.**”
  - “*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 ‘unfortunately yet transient immaturity.’*”
  - “[L]ife without parole is excessive for all but ‘the rare juvenile offender whose crime reflects irreparable corruption.’” *Montgomery*, 136 S Ct at 734.

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## MCL 769.25A(5) – RESENTENCING HEARINGS SHALL BE HELD IN THE FOLLOWING ORDER OF PRIORITY:

- **(a) Cases involving defendants who have served 20 or more years of imprisonment shall be held first.**
  - Term of years sentence - MCL 769.24a(4).
  - Status conference, if desired, pretrial, and/or resentencing hearing can be scheduled now.
  - At present, no specific sentencing guidelines.
  - Must be proportionate.

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## MDOC AFTER A 769.25A TOY RESENTENCING

- **Why requests about MDOC & MDOC programming?**
  - May see requests or stipulations to consider for parole, order to immediately place in programming needed to be considered for parole; other requests on record.
  - “ERD” – earliest release date – important for access MDOC programming. No “ERD” until resentencing.
- **What is the parole process at MDOC once a defendant is given a TOY sentence?**

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## MCL 769.25A(5): ORDER OF PRIORITY

- **(b) “Cases in which the prosecuting attorney has filed a motion requesting a sentence of imprisonment for life without the possibility of parole shall” then be held.**
- **Juvenile Justice Benchbook, MJI, esp. Chapter 19.**

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## CASES IN WHICH LWOP BEING SOUGHT...

- Experts
- Mitigation specialists
- Investigators
- U.S. Supreme Court has compared LWOP for juvenile to the death penalty for an adult; & used death penalty case law.
  - American Bar Association – Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases  
[http://www.americanbar.org/groups/committees/death\\_penalty\\_representation/resources/aba\\_guidelines.html](http://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines.html)
- Range of defense counsel

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## CASELAW ON MCL 769.25A: *PEOPLE V. HYATT (CONFLICT PANEL) JULY 21, 2016*

- “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.”
- Trial court must decide “**whether this individual is the truly rare juvenile mentioned in Miller who is incorrigible and incapable of reform.**”
  - Slip op. *People v. Hyatt*, No. 325971 (July 21, 2016).

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## **CASELAW ON MCL 769.25A: *PEOPLE V. HYATT* (CONFLICT PANEL) JULY 21, 2016**

- The Court reversed the *Hyatt* panel decision on the Sixth Amendment, requiring jury factual findings in order to be exposed to LWOP.
- A “judge, not a jury, is to determine whether to sentence a juvenile to life without parole under MCL 769.25.” *Hyatt* slip op. at 29.
- Both *Skinner* & *Hyatt* cases have pending leave apps. before Michigan Supreme Court.
- Government has been filing motions to stay in LWOP cases.

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## **CHALLENGES TO MCL 769.25 & 25A.**

- *Hill v. Snyder* – federal civil rights suit challenges statute. E.D. Michigan.
- Expect challenges in individual cases related to different aspects of these two laws.

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**SUMMARY OF THE SUPREME COURT’S CURRENT APPROACH TO THE  
EIGHTH AMENDMENT’S CRUEL AND UNUSUAL PUNISHMENT CLAUSE IN  
THE CONTEXT OF JUVENILE OFFENDERS:**

1. Juveniles are constitutionally different than adults for purposes of sentencing. *Miller*, 567 U.S. at 68, 132 S. Ct. at 2464, 183 L. Ed. 2d at 418; *Graham*, 560 U.S. at 68, 130 S. Ct. at 2026, 176 L. Ed. 2d at 841; *Roper*, 543 U.S. at 569-71, 125 S. Ct. at 1195-96, 161 L. Ed. 2d at 21-22.
2. Because of these differences, ordinary criminal culpability is diminished when the offender is a youth, and the penological objectives behind harsh sentences are diminished. *Miller*, 567 U.S. at \_\_\_\_, 132 S. Ct. at 2465, 183 L. Ed. 2d at 419; *Graham*, 560 U.S. at 74, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845; *Roper*, 543 U.S. at 571, 125 S. Ct. at 1196, 161 L. Ed. 2d at 22; *cf. Atkins*, 536 U.S. at 316, 122 S. Ct. at 2250, 153 L. Ed. 2d at 348.
3. The traits of youth that diminish ordinary criminal culpability are not crime specific and are present even in juveniles who commit heinous crimes. *Montgomery*, 577 U.S. at \_\_\_\_, 136 S. Ct. at 735-36, 193 L. Ed. 2d at 621-22; *Miller*, 567 U.S. at \_\_\_\_, 132 S. Ct. at 2465, 183 L. Ed. 2d at 420.
4. Imposition of life in prison without parole shares some of the characteristics with death sentences that are shared by no other sentences. Life without the possibility of parole is “a forfeiture that is irrevocable,” depriving the convict of the most basic liberties without hope of restoration except in the remote possibility of executive clemency. Life in prison is especially harsh for juveniles who will almost inevitably serve more years and a greater percentage of life in prison than adult offenders. *Miller*, 567 U.S. at \_\_\_\_, 130 S. Ct. at 2466, 183 L. Ed. 2d at 421; *Graham*, 560 U.S. at 69-70, 130 S. Ct. at 2027, 176 L. Ed. 2d at 842.

5. The qualities that distinguish juveniles from adults do not disappear when an individual turns eighteen, but society has generally drawn the line at eighteen for the purposes of distinguishing juveniles from adults. *Graham*, 560 U.S. at 74-75, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845; *Roper*, 543 U.S. at 574, 125 S. Ct. at 1197, 161 L. Ed. 2d at 24.

6. Because the signature qualities of youth are transient, incorrigibility is inconsistent with youth. *Miller*, 567 U.S. at \_\_\_\_, 132 S. Ct. at 2465, 183 L. Ed. 2d at 419; *Graham*, 560 U.S. at 73, 130 S. Ct. at 2029, 176 L. Ed. 2d at 844; *Roper*, 543 U.S. at 570, 125 S. Ct. at 1195, 161 L. Ed. 2d at 22.

7. While juveniles who prove irredeemably corrupt may be subject to life in prison, “appropriate occasions” for sentencing juveniles to this harshest possible penalty will be “uncommon” or “rare.” *Montgomery*, 577 U.S. at \_\_\_\_, 136 S. Ct. at 733-34, 193 L. Ed. 2d at 619; *Miller*, 567 U.S. at \_\_\_\_, 132 S. Ct. at 2469, 183 L. Ed. at 424.

8. Even trained and experienced professionals find it very difficult to predict which youthful offenders might ultimately fit into this small group of incorrigible offenders. *Graham*, 560 U.S. at 72-73, 130 S. Ct. at 2029, 176 L. Ed. 2d at 844; *Roper*, 543 U.S. at 573, 125 S. Ct. at 1197, 161 L. Ed. 2d at 24. As in *Roper*, the *Graham* court doubted “that courts taking a case-by-case . . . approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.” *Id.* at 77, 130 S. Ct. at 2032, 176 L. Ed. 2d at 847. Courts have recognized the APA’s holding that: “[t]he positive predictive power of juvenile psychotherapy assessments . . . remains poor.” A research study that found only sixteen percent of the youth adolescents who scored in the top fifth on a juvenile psychopathy measurement tool would eventually be assessed as psychopathic at age twenty-four. Another study that attempted to use psychological testing to predict future homicide offenders yielded a

very high false positive rate of eighty-seven percent. APA and Rolf Loeber et al., *Violence and Serious Theft: Development and Prediction from Childhood to Adulthood* 333 (2008)).

9. An unacceptable likelihood exists that the brutality or cold-blooded nature of a particular crime will overcome mitigation arguments based on youth when the objective immaturity, vulnerability, and lack of true depravity should require a lesser sentence. *Graham*, 560 U.S. at 77-78, 130 S. Ct. at 2032, 176 L. Ed. 2d at 847; *Roper*, 543 U.S. at 573, 125 S. Ct. at 1197, 161 L. Ed. 2d at 24.

10. Juveniles are less able to provide meaningful assistance to their lawyers than adults, a factor that can impact the development of the defense and gives rise to a risk of erroneous conclusions regarding juvenile culpability. *Graham*, 560 U.S. at 78, 130 S. Ct. at 2033, 176 L. Ed. 2d at 847-48; *cf. Atkins*, 536 U.S. at 320, 122 S. Ct. at 2252, 153 L. Ed. 2d at 350.

11. Because of the transient characteristics of youth that diminish criminal culpability, life-without-the-possibility-of-parole sentences “pose[] too great a risk” of disproportionate punishment. *Miller*, 567 U.S. at \_\_\_\_, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424.

12. Accurate assessment of whether a youth is incorrigible is particularly important when a sentence of life in prison is involved, because such sentences share some of the characteristics of death sentences—characteristics that are shared by no other sentences. *Miller*, 567 U.S. at \_\_\_\_, 132 S. Ct. at 2466-67, 183 L. Ed. 2d at 421-22; *Graham*, 560 U.S. at 69-70, 130 S. Ct. at 2027, 176 L. Ed. 2d at 844-45.

13. Even if the state’s judgment that a juvenile offender is incorrigible is later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate

because that judgment was made at the outset. *Graham*, 560 U.S. at 73, 130 S. Ct. at 2029, 176 L. Ed. 2d at 844-45.

14. Even if life in prison without the possibility of parole at the time of sentence is no longer available, nothing guarantees that a juvenile offender will be entitled to release. *Graham*, 560 U.S. at 75, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845-46.

## INDIVIDUALIZED SENTENCING OF YOUTH FACING LIFE WITHOUT PAROLE A JUDICIAL BENCH CARD

This bench card is a resource for trial judges with jurisdiction over criminal cases in which a defendant is eligible for life without parole for a crime committed when the defendant was under the age of 18. The bench card provides a brief synopsis of relevant U.S. Supreme Court decisions and related considerations for sentencing and resentencing.

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### CASE LAW SYNOPSIS

#### YOUTH ARE CONSTITUTIONALLY DIFFERENT FROM ADULTS

- In four cases—*Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), *Miller v. Alabama*, 132 S.Ct. 2455 (2012), *Graham v. Florida*, 560 U.S. 48 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005)—the Supreme Court of the United States has established that “children [under 18] are constitutionally different from adults for purposes of sentencing.” *Miller*, 132 S.Ct. at 2464.
- The U.S. Supreme Court “emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.” *Id.* at 2465.
- Youthful mitigating attributes identified by the U.S. Supreme Court include lack of maturity and underdeveloped sense of responsibility, vulnerability to negative influences and outside pressures, limited control over their environment, and capacity for change. *See id.* at 2464.

#### LIFE WITHOUT PAROLE IS UNCONSTITUTIONAL FOR THE VAST MAJORITY OF YOUTH

- **Life without parole is unconstitutional for youth who commit nonhomicide offenses.** The Court in *Graham* held “that for a juvenile offender who did not commit homicide, the Eighth Amendment forbids the sentence of life without parole.” *Graham*, 56 U.S. at 74.
- **Life without parole is unconstitutional for the vast majority of youth who commit homicide offenses.** The Court in *Miller* and *Montgomery* held that life without parole “is disproportionate under the Eighth Amendment” when imposed on “a child whose [homicide] crime reflects transient immaturity.” *Montgomery*, 136 S.Ct. at 736. “*Miller*’s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution.” *Id.*

#### YOUTH FACING LIFE WITHOUT PAROLE MUST HAVE AN INDIVIDUALIZED SENTENCING HEARING

- “A hearing where ‘youth and its attendant characteristics’ are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not.” *Montgomery*, 136 S.Ct. at 735.
- However, the Court in *Miller* and *Montgomery* did more than require the sentencing court to conduct an individualized sentencing hearing. “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 [homicide] crime reflects unfortunate yet transient immaturity.” *Id.* at 734.

#### THE SUPREME COURT ESTABLISHED A PRESUMPTION AGAINST LIFE WITHOUT PAROLE FOR YOUTH

- “Although *Miller* did not foreclose a sentencer’s ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children [who commit homicide], those whose crimes reflect ‘irreparable corruption.’” *Id.* at 726.

## SENTENCING/RESENTENCING CHECKLIST

### QUESTIONS TO CONSIDER AT SENTENCING AND RESENTENCING

- Has the defense had the time and resources to conduct a mitigation investigation commensurate with a capital sentencing mitigation investigation? Resources include funds to retain a qualified investigator, mitigation specialist, and expert witnesses.
- Has the defense had the opportunity to present mitigating evidence for purposes of sentencing, consistent with *Miller*'s mandate that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles"?<sup>1</sup>
- Has the sentencer at minimum considered the mitigating factors outlined in *Miller*? Mitigating factors at the time of the offense include, but are not limited to:
  - chronological age and its hallmark features, including immaturity, impetuosity, and failure to appreciate risks and consequences;
  - family and home environment;
  - the circumstances of the offense, including susceptibility to familial and peer pressures;
  - incompetencies associated with youth, including inability to deal with police officers, prosecutors, or defense counsel;
  - reduced culpability due to age and capacity for change; and
  - other relevant life history identified during the mitigation investigation.

*See Miller*, 132 S.Ct. at 2468.

- Have any of the mitigating factors outlined above been presented as aggravating evidence at sentencing or resentencing, contrary to *Miller* and *Montgomery*? For example, was youth at the time of the offense presented as aggravating rather than mitigating evidence?
- Has the defense had the opportunity to present mitigating evidence through lay and expert witness testimony, demonstrative evidence, affidavits, records, and/or reports?
- Has the state proven that the juvenile defendant is "the rare juvenile offender whose crime reflects irreparable corruption," sufficient to justify a sentence of life without parole under the Eighth Amendment, consistent with *Miller* and *Montgomery*?

### ADDITIONAL CONSIDERATIONS FOR RESENTENCING

- In addition to the mitigating evidence outlined in *Miller* relating to the circumstances of the offense, has the sentencer had the opportunity to consider evidence of maturity and rehabilitation for purposes of resentencing? Examples include:
  - the availability and completion of prison programming;
  - academic or vocational achievements;
  - prison record;
  - positive relationships with correctional staff and other inmates;
  - other positive personal relationships; and
  - a reentry plan.

<sup>1</sup> *Miller*, 132 S.Ct. at 2475.

## ADOLESCENT DEVELOPMENT RESOURCES

### ADOLESCENT DEVELOPMENT RESEARCH CITED IN *ROPER, GRAHAM, MILLER, AND MONTGOMERY*

Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Review* 339 (1992).

- “[A]dolescents are overrepresented statistically in virtually every category of reckless behavior.” *Roper*, 543 U.S. at 569.

Brief for the American Medical Association et al. as Amici Curiae in Support of Neither Party, *Graham v. Florida*, 560 U.S. 48 (2010)(Nos. 08-7412, 08-7621); Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioners, *Graham v. Florida*, 560 U.S. 48 (2010)(Nos. 08-7412, 08-7621).

- “[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.” *Graham*, 560 U.S. at 68; *Miller*, 132 S.Ct. at 2464-5.

Erikson, *Identity: Youth and Crisis* (1968).

- “[T]he character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.” *Roper*, 543 U.S. at 570; *see Graham*, 560 U.S. at 89; *see Miller*, 132 S.Ct. at 2464; *see Montgomery*, 136 S.Ct. at 732.

Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009 (2003).

- “The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside. . . . For most teens, risky or antisocial behaviors are fleeting; they cease with maturity as individual identity becomes settled.” *Roper*, 543 U.S. at 570 (internal citations, quotations, and brackets omitted); *see Miller*, 132 S.Ct. at 2464.
- “[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.” *Roper*, 543 U.S. at 569 (internal citations omitted); *see Graham*, 560 U.S. at 68; *see Miller*, 132 S.Ct. at 2475; *see Montgomery*, 136 S.Ct. at 732.
- “[J]uveniles lack the freedom that adults have to extricate themselves from a criminogenic setting.” *Roper*, 543 U.S. at 569 (internal brackets omitted); *see Miller* 132 S.Ct. at 2464.
- “It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Roper*, 543 U.S., at 573; *see Graham*, 560 U.S. at 68; *see Miller*, 132 S.Ct. at 2469; *see Montgomery*, 136 S.Ct. at 734.

### ADDITIONAL ADOLESCENT DEVELOPMENT RESOURCES

The Campaign for the Fair Sentencing of Youth, Psychological Research, *available at* [fairsentencingofyouth.org/psychological-research](http://fairsentencingofyouth.org/psychological-research).

Elizabeth Scott, Thomas Grisso, Marsha Levick & Laurence Steinberg, *The Supreme Court and the Transformation of Juvenile Sentencing* (2015), *available at* [modelsforchange.net](http://modelsforchange.net).