

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARBARA P. HERNANDEZ,

Defendant-Appellant.

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UNPUBLISHED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 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.<sup>1</sup> After a hearing, the trial court determined that defendant should be sentenced as an adult. In August 1991, the court imposed a 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

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<sup>1</sup> 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.

(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.<sup>2</sup>

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

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<sup>2</sup> “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”<sup>3</sup> 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

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<sup>3</sup> 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.<sup>4</sup>

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 un rebutted 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

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<sup>4</sup> 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.<sup>5</sup>

/s/ Douglas B. Shapiro

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<sup>5</sup> 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.