STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Gleicher, P.J., O'Connell and Murray, JJ.

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v No. 147428

DAKOTAH WOLFGANG ELIASON
Defendant-Appellant.

No. 10-015309-FC
COA No. 302353

BRIEF AMICUS CURIAE OF THE WAYNE COUNTY PROSECUTING ATTORNEY

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I.

A trial judge sentencing a person convicted of first-degree murder must sentence that person to life in prison, and has no authority whatever to direct the Parole Board with regard to whether the person sentenced is or is not eligible for parole. Under *Miller v Alabama*, the denial of *any* parole consideration for those convicted of first-degree murder under MCL § 791.234(6)(a) is unconstitutional as applied to juvenile murderers. Should the unconstitutional application be severed, so that, unless and until the legislature acts, a juvenile first-degree murderer is eligible for parole consideration in 15 calendar years?

Amicus answers: YES

Statement of Facts

Amicus refers the court to the briefs of the parties.

Argument

I.

A trial judge sentencing a person convicted of first-degree murder must sentence that person to life in prison, and has no authority whatever to direct the Parole Board with regard to whether the person sentenced is or is not eligible for parole. Under *Miller v Alabama*, the denial of *any* parole consideration for those convicted of first-degree murder under MCL § 791.234(6)(a) is unconstitutional as applied to juvenile murderers. The unconstitutional application can be severed, so that, unless and until the legislature acts, a juvenile first-degree murderer is eligible for parole consideration in 15 calendar years.

A. Introduction

The Court has invited the Wayne County Prosecutor to address the question of the remedy that is required "for defendants under the age of 18 whose sentences of life without parole for murder have been found invalid under *Miller*[1] of Const 1963, art § 16."[2] The question of the proper understanding of Const 1963, art § 16, and that of the retroactivity of *Miller* to cases where the direct appeal had concluded before its decision, are also of great moment, but are being addressed elsewhere.[3] But as amicus will attempt to show, the premise of the Court's question is mistaken. *No* sentence of life in prison for *any* juvenile murderer is invalid under either *Miller* or the Michigan constitution. There is no question that a juvenile sentenced for first-degree murder after the decision in *Miller*, or one who had an appeal pending on direct appeal at that time, is entitled to some form

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[1] *Miller v Alabama*, US ; 132 S Ct 2455, 183 L Ed 2d 407 (2012).

[2] *People v. Eliason*, __Mich__ , 2013 WL 5943449 (2013).

[3] *People v. Davis*, __Mich__, 2013 WL 5943457 (2013); *People v. Carp*, 2013 WL 5943450 (Mich.,2013).

of relief, but, at least unless and until the legislature promulgates some other scheme, that relief does not include anything other than the imposition of a life sentence by the sentencing judge. Amicus will confine the response here to the question of relief in cases not involving retroactivity.

B. Remedy and Process After *Miller*

(1) The Michigan statutory scheme: A defendant convicted of first-degree murder is not sentenced to life without parole in Michigan; rather, the sentence is to "life," and is mandatory

No one in Michigan—young or old, juvenile or adult—convicted of first-degree murder is sentenced to "mandatory life without parole" or "natural life." While a convenient shorthand for judges and practitioners,[4] "mandatory life without parole" is also a misnomer. The sentence to life in prison *is* mandatory—the court may impose no other—as MCL § 750.316 provides that one so convicted "*shall* be punished by imprisonment for life" [emphasis supplied]. But there is no "without parole" or "with parole" or "natural life" in the statute, or as a "box" to check on the judgment of sentence. The *sentence* is to life imprisonment; whether or not the defendant may be eligible for *parole* is determined not by the judgment of sentence, but by the parole statute, MCL § 791.234. That statute, in paragraph (6)(a), provides that

> A prisoner sentenced to imprisonment for life for any of the following *is not eligible for parole* and is instead subject to the provisions of section 44: (a) First degree murder in violation of section 316 of the Michigan penal code, 1931 PA 328, MCL 750.316 [emphasis supplied].

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[4] See e.g. *People v. Carter*, 462 Mich. 206, 208 (2000): "Defendant was sentenced to imprisonment for natural life without the possibility of parole for the felony-murder conviction"; *People v. Grant*, 445 Mich. 535, 537 (1994): "The trial court sentenced defendant to mandatory life without parole for the murder conviction." This shorthand expression is used, and understandably so, widely, by both the bench and bar.

There is no exception in the statute allowing parole for those convicted of first-degree murder committed when they were under the age of 18.[5]

(2) The effect of *Miller v Alabama* on the Michigan statutory scheme

Miller did *not* hold that a defendant convicted of 1st-degree murder who is 17-years old or younger at the time of the commission of the crime cannot be sentenced to life in prison; indeed, the Court did not hold that refusing parole consideration to such an individual is *necessarily* unconstitutional. The case held only that:

- The Eighth Amendment forbids a sentencing scheme that *mandates* life in prison *without possibility of parole* for juvenile offenders.[6]

- Instead, a judge or jury must have the opportunity to consider individualized aggravating and mitigating circumstances before imposing the "harshest possible" penalty for juveniles. Requiring that all those under the age of 18 who are convicted of homicide receive lifetime incarceration *without possibility of parole*, regardless of their age and age-related characteristics and the nature of their crimes, violates the Eighth Amendment's ban on cruel and unusual punishment.[7]

Miller in fact permits a sentence of life *and* the denial of any opportunity for parole, so long the decision disallowing parole consideration is made on an individualized basis. And the case in no way casts doubt on any sentence—including a life sentence—that is subject to the possibility of parole. A state may thus impose a mandatory life sentence on a juvenile for a homicide, but may *not*

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[5] Previously, those who committed murder when they were under the age of 18 were tried as adults, but a sentencing hearing was held, with specific factors delineated in the statute to be considered by the trial judge, but the judge had only two options: sentence the juvenile as an adult, the sentence being, then, life, and the parole statute precluding parole, or sentence as a juvenile, under the sentencing scheme for juveniles.

[6] *Miller*, 132 S Ct at 2459.(emphasis supplied).

[7] *Miller*, 132 S Ct at 2475 (emphasis supplied).

deny even the *possibility* of parole—though parole itself is not required—without an individualized determination considering aggravating and mitigating circumstances. But *with* such a procedure, even the possibility of parole may be denied: "Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, *it mandates only that a sentencer follow a certain process*—considering an offender's youth and attendant characteristics—before imposing a particular penalty."[8]

The penalty provision—the mandatory sentence to life—then, of MCL § 750.316 is perfectly constitutional. While some have argued that "*Miller*-applicable" defendants must be sentenced under a procedure that places discretion in the trial judge to consider a sentence to a term of years, the claim fundamentally misapprehends the holding of *Miller*, which, as has been pointed out, does not in any way suggest that paroleable life sentences are unconstitutional, and so, the premise being faulty, the conclusion does not follow. But while the penalty provision of MCL § 750.316 is constitutional on its face *and* as applied to juvenile murderers, that portion of the parole scheme, MCL § 791.234(6)(a), that categorically precludes parole consideration for all first-degree murderers cannot, under *Miller*, constitutionally be applied to juvenile murderers. The question that must be answered thus arises—what remedy is to be given for "*Miller*-applicable" defendants; that is, those whose sentences were on direct appeal when *Miller* was decided, those who were sentenced after *Miller*, and those who *will* be sentenced in the future.

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[8] 132 S Ct at 2471.

(3) *Carp* and *Eliason* on remedy and process

Everything in *People v Carp*[9] concerning remedy and process is dicta, the precedential portion of the opinion concluding with the holding that *Miller* is not retroactive to cases on postconviction review. But after so holding, the panel went on to discuss what *Miller* means in those cases where it *does* apply, in situations that were not, then, before the court.

> - We recognize that the ultimate authority to determine penalties for criminal offenses is constitutionally vested in the Legislature, while the authority to impose sentences and to administer statutory law governing sentencing that the Legislature enacts lies with the judiciary. We also readily acknowledge that "a court's constitutional obligation is to interpret, not rewrite, the law" and that "[a]ny responsibility to rewrite the statutes lies with the Legislature."
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> - While cognizant of our role, we also recognize our duty to the trial courts that will face sentencing issues in pending cases and which can be anticipated on remand. We must, we believe, provide guidance to these trial courts to ensure a consistency of approach until the Legislature can respond by reworking the sentencing scheme for juveniles in Michigan to be in accord with *Miller*. We urge the Legislature to take up its task quickly in this matter.
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> - But we find it unacceptable in the interim to simply remand cases to the trial courts for resentencing. Without such guidance, *the trial courts will be caught between the Miller Court's ruling that a mandatory life sentence without parole for a juvenile convicted of homicide is constitutionally defective while simultaneously required by the current statutory scheme in Michigan to impose such a sentence.*[10]

But the court's premise is mistaken, for, as amicus has pointed out above, judges in Michigan will *not*, post-*Miller*, be "required by the current statutory scheme" to impose a "mandatory life sentence without parole for a juvenile convicted homicide [that] is constitutionally defective." Judges will

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[9] *People v Carp*, 298 Mich 472 (2012).

[10] *Carp*, at 523-524.

be required, after *Miller,* as they were before *Miller*, to impose a sentence of life in prison. They can do no less, for the statute requires a sentence of life,[11] and that sentence is constitutional, *nor any more*, for they have no authority from the legislature beyond imposition of the statutorily mandated sentence, which again, is not unconstitutional.

Based on this mistaken premise, *Carp*, in dicta, said that the parole provision, MCL § 791.234(6)(a), "fails to acknowledge a sentencing court's discretion to determine that a convicted juvenile homicide offender may be eligible for parole." But under MCL § 750.316 the sentencing court has no such discretion. The court went on to take note of factors delineated in *Miller* that a sentencing court considering whether a sentence for juvenile murderer should be parolable life or nonparolable life must take into account:

> (a) "the character and record of the individual offender [and] the circumstances of the offense,"
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> (b) "the chronological age of the minor,"
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> (c) "the background and mental and emotional development of a youthful defendant,"

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[11] The court in *Carp* recognized that it is the categorical exclusion from parole consideration, rather than the mandatory nature of the life sentence, that is unconstitutional as applied to juveniles: "the current statutory provision, MCL 791.234(6)(a), which provides that a prisoner sentenced to life imprisonment for first-degree murder 'is not eligible for parole' [is] unconstitutional as written and as applied to juvenile offenders convicted of homicide." *Carp*, 298 Mich.App. at 531. Amicus is puzzled, however, at the "as written" statement, for the statute is not unconstitutional on its face, but only as applied to juvenile defendants. See e.g. *Commonwealth v. Cunningham*, __A3d__, 2013 WL 5814388, 1 (PA.,2013) ("The United States Supreme Court issued the *Miller* decision in June 2012, rendering Pennsylvania's mandatory scheme of life imprisonment for first- and second-degree murder *unconstitutional, as applied* to offenders under the age of eighteen at the time of their crimes")(emphasis supplied); *Commonwealth. v. Walczak*, 463 979 N.E.2d 732, 750 (Mass.,2012) ("the United States Supreme Court has in recent decisions declared the harshest of penalties *unconstitutional as applied* to juvenile defendants") (emphasis supplied).

> (d) "the family and home environment,"
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> (e) "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 [the juvenile],"
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> (f) whether the juvenile "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth,"and
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> (g) the potential for rehabilitation.[12]

Unless and until legislation implementing *Miller* is enacted, said the court, judges sentencing juveniles convicted of first-degree murder must hold a hearing, evaluate the factors listed in *Miller*, and reach a conclusion as to whether the particular defendant should be eligible for parole; further, the Parole Board is *bound* by the choice made by the sentencing judge, which presumably will be entered on the judgment of sentence.[13]

Because the Court of Appeals in the *Carp* opinion concluded that *Miller* does not apply retroactively to cases on postconviction review, the directions in *Carp* as to how sentencing judges should proceed with *Miller*-applicable defendants was dicta, and not binding on circuit courts. Not so with *People v Eliason*,[14] the present case. Here, the panel majority concurred with the procedure that should occur in *Miller*-applicable cases as set out in *Carp*. The panel in addition observed that "under MCR 6.425(E)(1), a trial court is already required to hold a sentencing hearing, and so this

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[12] *Carp*, at 532.

[13] *Carp*, at 538.

[14] *People v Eliason*, 300 Mich App 292 (2012).

. . . is expressly permitted by court rule and is not an unconstitutional trip by the judiciary into the legislative realm."[15] But it is.

(4) As to juveniles, MCL § 791.234(6)(a) is unconstitutional as categorically applied, but is severable from the statutory scheme, so that the sentence of life remains, but subject to parole

"Question Authority"[16]

MCL § 750.316 provides that defendants—any and all defendants—*"shall* be punished by imprisonment for life." MCR 6.425(E)(1) prescribes the procedure that occurs in all sentencing proceedings. The court rule in no way authorizes a judge sentencing a juvenile for first-degree murder to hold a hearing to determine whether that juvenile should ever be eligible for parole, and to issue an order binding on the Parole Board, over which the sentencing circuit judge has no authority. The panels in *Carp* and *Eliason*, despite their disclaimers,[17] have crossed the line between adjudicating and legislating.

The Court of Appeals opinions in *Carp* and *Eliason* are absolutely correct that after *Miller* MCL §791.34(6)(a) is unconstitutional as applied to juvenile murderers, and that the procedure the Court of Appeals imposes on trial judges in those opinions is a "fix" that satisfies *Miller*. But that fix is not the only possible fix, and the fix chosen by the Court of Appeals is outside of its authority.

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[15] *Eliason*, at 310-311.

[16] Sometimes attributed to Timothy Leary, but Socrates was sentenced to death for the crime of "corrupting the youth of Athens," in part by teaching that they should question authority.

[17] *Carp*, at 523: "We also readily acknowledge that 'a court's constitutional obligation is to interpret, not rewrite, the law' and that '[a]ny responsibility to rewrite the statutes lies with the Legislature.'" *Eliason*, at 293: stating that its directions to circuit judges do not constitute "an unconstitutional trip by the judiciary into the legislative realm."

No statute gives a sentencing judge the authority to enter an order binding on the Parole Board after conducting a hearing at sentencing. That authority must come from the legislature.

All agree that MCL § 791.234(6)(a) is unconstitutional as applied. But when a statute is unconstitutional as applied in a particular situation, or, as here, to a particular group, the judiciary is not free to *rewrite* the statute so as to cure the defect. Rather, the reviewing court must sever, if possible, the unconstitutional application from the statutory scheme. Here, that may readily be accomplished by holding MCL § 791.234(6)(a) inapplicable to juvenile murderers, severing it from the statutory scheme as applied to juveniles, leaving MCL § 769.234(7) applicable to juveniles.[18] As this Court has said, "'[i]t is the law of this State that if invalid or unconstitutional language can be deleted from an ordinance and still leave it complete and operative then such remainder of the ordinance be permitted to stand.'"[19] This is also the mandate of the legislature, which has provided in MCL § 8.5 that "If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or

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[18] MCL 791.234(7): A prisoner sentenced to imprisonment for life, other than a prisoner described in subsection (6), is subject to the jurisdiction of the parole board and may be placed on parole according to the conditions prescribed in subsection (8) if he or she meets any of the following criteria:
(a) Except as provided in subdivision (b) or (c), the prisoner has served 10 calendar years of the sentence for a crime committed before October 1, 1992 or 15 calendar years of the sentence for a crime committed on or after October 1, 1992.
(b) Except as provided in subsection (12), the prisoner has served 20 calendar years of a sentence for violating, or attempting or conspiring to violate, section 7401(2)(a)(*i*) of the public health code, 1978 PA 368, MCL 333.7401, and has another conviction for a serious crime.
(c) Except as provided in subsection (12), the prisoner has served 17- 1/2 calendar years of the sentence for violating, or attempting or conspiring to violate, section 7401(2)(a)(*i*) of the public health code, 1978 PA 368, MCL 333.7401, and does not have another conviction for a serious crime.

[19] *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich. 295, 345 (2011).

applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, *and to this end acts are declared to be severable*" (emphasis supplied).

Indeed, after *Graham v Florida*[20] held, as a *categorical* matter, that a sentence of life with no possibility of parole is impermissible for a juvenile offender convicted of a *nonhomicide* offense, the question arose as to the remedy in those jurisdictions imposing such a sentence. Because, as with *Miller*, the concern of the Court was with the lack of the *possibility* of parole, the remedy has been to make the sentence of life subject to parole; that is, the "life" sentence is permissible under *Graham* for a juvenile convicted of a nonhomicide offense, but the denial of any consideration for parole is not, not even with an individualized hearing as is possible with homicide offenses under *Miller*. And so in *State v. Shaffer*[21] the Louisiana Supreme Court applied *Graham* to reform a sentence of life with no possibility of parole to allow for parole consideration. The court noted that *Graham* had specifically said that "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants ... some *meaningful opportunity to obtain release* based on demonstrated maturity and rehabilitation."[22] The remedy, then, said the Louisiana Supreme Court, was to provide a meaningful opportunity to obtain release to juvenile offenders convicted of nonhomicide offenses; that is, to amend the sentence "to delete the restriction on parole eligibility."[23] Obviously, if what is required

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[20] *Graham v Florida*, 560 U.S. ——, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

[21] *State v. Shaffer*, 77 So. 3d 989 (La, 2011).

[22] 130 S Ct at 2016.

[23] 77 So.3d at 942-943.

to remedy a life without parole sentence for a *less* serious offense—a nonhomicide—is not a "guarantee of eventual freedom," but a "meaningful *opportunity*" to gain parole, no *more* is required in homicide cases, where, in fact, even the possibility of parole *can* be denied, so long as done on an individualized basis.

The Iowa Supreme Court reached the same result in *Bonilla v. State*.[24] State statute provided that for "class A" felonies the court was required to sentence the defendant to the department of corrects for the "rest of the defendant's life," and the statute further provided that "a person convicted of a class 'A' felony shall not be released on parole unless the governor commutes the sentence to a term of years." For essentially the same reasons advanced by the Louisiana Supreme Court, the court held that "Severance is appropriate here. The last clause of the last sentence of section 902.1, stating 'a person convicted of a class 'A' felony shall not be released on parole unless the governor commutes the sentence to a term of years,' is unconstitutional as applied to Bonilla. This last clause can be severed from the remainder of section 902.1," so that the defendant could be considered for parole in the ordinary course.[25] So also in Michigan.

When a statute is declared unconstitutional as applied to a particular situation, the ordinary remedy is to sever that situation from the statute, if that is possible; the declaration of

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[24] *Bonilla v. State*, 791 N.W.2d 697, 702 (Iowa, 2010).

[25] The statute has since been amended to provide that "Notwithstanding subsection 1, a person convicted of a class 'A' felony, and who was under the age of eighteen at the time the offense was committed shall be eligible for parole after serving a minimum term of confinement of twenty-five years," so as to bring the statute into compliance with *Graham*. I.C.A. § 902.1. The Michigan legislature could do something similar with regard to juveniles sentenced for first-degree murder, including creating a sentencing process that allows the denial of all parole consideration after a hearing considering mitigating and aggravating factors, but has not done so to date.

unconstitutionality as applied does *not* permit the rewriting of the statute. The appropriate judicial response in this situation has been well delineated by the United States Supreme Court:

- Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, *to enjoin only the unconstitutional applications of a statute while leaving other applications in force, . . ., or to sever its problematic portions while leaving the remainder intact* . . .

- Three interrelated principles inform our approach to remedies.

  > *First*, we try not to nullify more of a legislature's work than is necessary, for we know that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.". . .It is axiomatic that a "statute may be invalid as applied to one state of facts and yet valid as applied to another.". . .
  >
  > *Second*, mindful that our constitutional mandate and institutional competence are limited, *we restrain ourselves from "rewrit[ing] [the] law to conform it to constitutional requirements*" even as we strive to salvage it. . . .Our ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly we have already articulated the background constitutional rules at issue and how easily we can articulate the remedy. . . .But making distinctions in a murky constitutional context, or where line-drawing is inherently complex, *may call for a "far more serious invasion of the legislative domain" than we ought to undertake*. . . .
  >
  > *Third*, the touchstone for any decision about remedy is legislative intent, for a court cannot "use its remedial powers to circumvent the intent of the legislature.". . .After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?. . . All the while, we are wary of legislatures who would rely on our intervention, for "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside" to

> announce to whom the statute may be applied. . . ."This would, to some extent, substitute the judicial for the legislative department of the government."[26]

Here, the Court of Appeals, acting in all good faith in attempting to find a constitutional remedy for *Miller*-applicable cases, in a situation where the legislature's response to *Miller* has been one of "all deliberate speed," with the emphasis on the "deliberate," has rewritten a portion of the statute "to conform it to constitutional requirements," and by so doing has made a "far more serious invasion of the legislative domain than [it] ought to [have] undertake[n]."

Severance is easily accomplished here. MCL § 791.234(6)(a) is simply severed from the statutory scheme when applied to juveniles, given that *Miller* creates an as-applied problem, so that MCL § 791.234(7) is applicable. Instead, the Court of Appeals has effectively amended MCL § 750.316 and MCL § 791.234(6)(a). The former must be taken now to read

> A person who commits . . . first degree murder . . . shall be punished by imprisonment for life. *If the person convicted is under the age of 18, the sentencing court shall hold a hearing to determine whether the sentence imposed is subject to the possibility of parole. The court shall consider:*
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> *(a) the character and record of the individual offender [and] the circumstances of the offense,*
>
> *(b) the chronological age of the minor,*
>
> *(c) the background and mental and emotional development of a youthful defendant,*
>
> *(d) the family and home environment,*

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[26] *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-330, 126 S.Ct. 961, 967 - 969 (2006)(emphasis supplied; internal citations omitted).

> *(e) 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 [the juvenile],*
>
> *(f) whether the juvenile might have been charged and convicted of a lesser offense if not for incompetencies associated with youth, and*
>
> *(g) the potential for rehabilitation.*
>
> *The decision with respect to parole shall be noted on the judgment of sentence. The Parole Board is required to implement the decision of the trial court.*

The latter must now be taken to read:

> A prisoner sentenced to imprisonment for life for any of the following is not eligible for parole and is instead subject to the provisions of section 44:
>
> (a) First degree murder in violation of section 316 of the Michigan penal code, 1931 PA 328, MCL 750.316. *This section is inapplicable if the prisoner sentenced to life is under the age of 18, and the trial judge has included on the judgment of sentence a finding that the prisoner shall be subject to consideration for parole.*

This is a perfectly acceptable—*Miller* compliant—sentencing scheme. But it is not one the Court of Appeals has authority to promulgate.[27] A sentencing judge has no option but to sentence a juvenile first-degree murderer to life in prison, but has no statutory authority over the Parole Board;[28] the Court of Appeals scheme gives the sentencing judge that authority. Again, this may be

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[27] As Justice Markman has noted, "This Court does not have the authority to rewrite a statute, even if it does so wisely." *Fleischfresser V Peterson Towing, Inc.*, 480 Mich. 918 (2004), Markman, J., concurring in denial of leave. And see also *People v. Cohen*, 487 Mich 874 (2002): "even if the statute were unconstitutional, neither the courts nor the drafters of the standard jury instructions would have authority to rewrite it. That task is a legislative one allocated to the elected representatives of the people under our system of government." Corrigan, J., concurring in the denial of leave.

[28] The trial judge's jurisdiction ends when a valid sentence is pronounced. *People v. Miles*, 454 Mich. 90, 96 (1997). Authority over a defendant sentence to prison then passes to the

a fine way to proceed, but it is a legislative, not a judicial, response to *Miller*. And as the Supreme Court said in *Ayotte*, the judiciary should be "wary of legislatures who would rely on our intervention, . . . and 'leave it to the courts to step inside to announce to whom the statute may be applied. . . [as] 'this would, to some extent, substitute the judicial for the legislative department of the government.'" It is the legislature's responsibility to respond to *Miller* if and as it wishes; the judicial branch can only disable that portion of the statutory scheme that is unconstitutional.

C. Conclusion

There is, then, *nothing* that a sentencing judge may do when sentencing a juvenile convicted of first-degree murder other than sentence the defendant to life in prison, as statute requires. And there is nothing an appellate court should do when an appeal is brought by a juvenile convicted of first-degree murder and sentenced to life in prison. As the matter currently stands, unless and until the legislature acts, all *Miller*-applicable juvenile murders must be sentenced to life in prison, and are eligible for parole in 15 calendar years; this comports with *Miller*. If the legislature does nothing, there is no basis for an appellate court to intervene in any way unless and until a juvenile murderer is denied parole consideration in 15 calendar years. It is to be hoped that long before the first case could become ripe for adjudication caused by any denial of parole consideration, the legislature will have enacted some amendment to the current scheme as it now exists after *Miller*.

To be sure, the result of severing MCL § 791.234(6)(a) for juveniles sentenced to life in prison for first-degree murder—that MCL § 791.234(7) applies, and so these prisoners are eligible for parole in 15 calendar years—is not good public policy, and is not a system with which amicus

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Parole Board. *In re Jenkins*, 438 Mich. 364, 368 (1991).

is sanguine. It makes no sense that one who has been convicted of first-degree murder is parole-eligible in 15 calendar years while that same juvenile would not be eligible for parole for 20 calendar years for violating, or attempting or conspiring to violate, section 7401(2)(a)(*i*) of the public health code if he or she has another conviction for a serious crime, and for 17 1/2 years if he or she does *not* have another conviction for a serious crime. And, as *Miller* recognizes, it is constitutionally appropriate that some juvenile murderers be denied *any* parole consideration. But the public policy considerations that go into a different scheme than the State is left with after MCL § 791.234(6)(a) is severed in the case of juvenile murderers is quintessentially legislative, and surely the legislature will eventually act so as to remedy the matter;[29] the Court should, in the meantime, be "wary of legislatures who would rely on [its] intervention."

[29] See Senate Bills 318 and 319.

Relief

WHEREFORE, amicus submits that the portion of the decision of the Court of Appeals remanding for a sentencing hearing at which the trial court is to apply the "*Miller* factors" and then enter an order as to whether the defendant is parole eligible that is binding on the Parole Board should be vacated.

Respectfully submitted,

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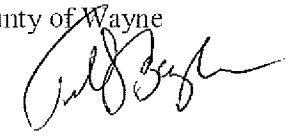

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