STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: Gleicher, P.J. and O'Connell and Murray, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

DAKOTAH WOLFGANG ELIASON

Defendant-Appellant.
_____/

Supreme Court No. 147428

Court of Appeals No. 302353

Lower Court No.10-015309FC

BERRIEN COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

JONATHAN SACKS (P67389)
Attorney for Defendant-Appellant

DEFENDANT-APPELLANT'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.

STATE APPELLATE DEFENDER OFFICE

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STATEMENT OF JURISDICTION

This court granted leave to appeal on November 6, 2013. This Court has jurisdiction pursuant to MCL 770.3(6); MCR 7.301 (A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. Does *Miller v Alabama*, 567 US __ (2012) invalidate Michigan's entire sentencing scheme for youth convicted of first degree murder?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

II. Does a mandatory sentence of life without the possibility of parole for a youthful offender amount to cruel or unusual punishment under article 1, section 16 of the Michigan Constitution?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

Do the greater protections of the Michigan Constitution warrant a categorical ban on life without parole sentences for youth, especially with respect to a fourteen year-old child?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

III. Is the remedy for a youth's unconstitutional sentence of life without parole an individualized sentencing to life or any term of years per MCL 750.317?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

For Dakotah in particular, should a different judge should be required to sentence him to life with parole or a term of years?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS AND PROCEEDINGS

Early in the morning of March 7, 2010, fourteen year-old Dakotah Eliason shot and killed Jesse Miles, his grandmother's husband of 35 years, whom he considered his grandfather. (90a, 101a, 107a). He is now serving a mandatory sentence of life without parole. (299a).

Shooting of Jesse Miles

Jean Miles lived on Buchanan Road with her husband of 35 years, Jesse. Dakotah, who was her grandson and his step-grandson, visited frequently on weekends. Dakotah lived with his father, sister, and step-mother, but his grandparents' house was a getaway where he played videogames and watched movies. (89a-92a, 120a-121a).

On Friday, March 5, 2010, Dakotah and his eight year-old sister Lelanai came to stay with their grandparents for the weekend. Lelanai returned home on Saturday, while Dakotah stayed with his grandparents. At about 7:30 PM on Saturday, Ms. Miles went to her room to watch television. Dakotah came by to talk when he came downstairs to use the restroom. They had a brief and ordinary conversation, during which Dakotah seemed neither upset nor angry. After that, Ms. Miles fell asleep. (92a-93a, 99a-100a).

At 3:00 AM on March 7, 2010, Ms. Miles heard a sudden pop. She then heard Dakotah's voice saying something like, "I shot Papa." She next remembered getting out of bed, and she had the gun in her hands. Ms. Miles did not remember how she acquired the gun. Ms. Miles walked into the living room, and saw blood and her husband lying down. She instructed Dakotah to call 911, which he immediately did. Ms. Miles put the gun down in the dining room chair. Dakotah and Ms. Miles walked outside and police arrived. (101a-103a).

Trooper Brenda Keifer arrived at the home at 3:00 AM. She handcuffed and interviewed Dakotah. As Mr. Miles' family members arrived, Dakotah was placed in the back of Deputy Eugene Casto's car. Trooper Shoemaker and Deputy Casto transferred Dakotah to the Niles

Enforcement Center for a follow-up interview with Detective Fabian Suarez. (123a-127a, 132a-133a, 138a; 165a-166a, 209a).

Ms. Miles told police the location of the gun and gave permission for them to search the house. Police recovered two steak knives from the kitchen in a chair at the edge of the living room. There were no signs of a struggle in the house. Police Officer Michael Troup recovered the gun from a chair in the house. He noticed the hammer was cocked and the gun loaded. (104a-105a, 116a, 131a, 134a-137a, 162a-164a, 171a-172a, 223a).

EMT specialist Richard James Hotary arrived at the scene to find Mr. Miles on the couch, making some movements, with a large bullet wound to his head. An ambulance took Mr. Miles to Lakeland Niles then South Bend Memorial Hospitals. Mr. Miles died the next afternoon at Memorial Hospital from a gunshot wound to the head. (107a, 153a-155a, 186a).

Dakotah explained to Trooper Keifer that around midnight he walked downstairs and grabbed his grandfather's gun from a hook on a hat rack in the hallway. He took the gun upstairs to his room and sat in a chair for two to three hours, holding the gun. Dakotah stated, "he was thinking about life and death … contemplating homicide or suicide. Trooper Keifer asked Dakotah's motivation, and he said "first sadness," and then "pent up anger." (128a-129a).

When Dakotah waited in Deputy Casto's police car, the video equipment and interior microphone were running. Dakotah said his life had turned into a "Law and Order" episode, without commercials. He stated he wished he could take it back, but he "now understood the feeling people get when they do that." Dakotah finally said, "you know when you hit that point of realization, for a split second, you feel like nothing could ever hurt you, just for that split second, once you realize what you've done." People's Exhibit 5, (210a-213a).

Detective Fabian Suarez interviewed Dakotah, with his father, Steve Eliason present. The police recorded the interview. Dakotah explained to Detective Suarez that, "I don't know," what happened tonight. Dakotah went downstairs to use the bathroom, grabbed the loaded gun from underneath a hat, and fired one time at his sleeping grandfather. Dakotah could not supply an explanation for the shooting. His grandfather had never hurt him physically or mentally. Dakotah, who was contemplating suicide at one point, could not find a way to vent his emotions. He would build up to a point where he just did not know what he was doing. Dakotah stated that school was fine, and he denied a specific suicide attempt, explaining only that he had thoughts of suicide. Dakotah noted though that a friend recently hanged himself. Dakotah said that before that night, it never occurred to him to harm his grandfather, but "something snapped." He admitted to pent up anger over certain things, including the fact that his mom dated a new guy every two years, and he could hardly see his brother, Bradley. Dakotah said his situation was not exactly like somebody hearing voices. It was more multiple personalities, a good guy and a bad guy, and good does not always win over evil. He sat near his grandfather, trying to convince himself not to do anything. He then blacked out for a couple of minutes, with the hammer already cocked. Dakotah had an argument with himself about whether it should be suicide or homicide, and he was not ready to go, so it was homicide. He placed two knives on the stairs in case he wanted it to be quieter than a gun. Dakotah shot the gun and started shaking. For five seconds, he felt like nothing could hurt you after killing someone. He denied wanting to also hurt his grandmother. People's Exhibit 11, (229a-231a).

Trial and sentencing

On August 19, 2010, before Judge Scott Schofield, a Berrien County trial court jury convicted Dakotah Eliason of one count of first degree premeditated murder, MCL 750.316(a)

and one count of felony firearm, MCL 750.227b-a. On October 25, 2010, Judge Schofield sentenced Dakotah to the mandatory sentence of life without parole for first degree murder, consecutive to two years for felony firearm. Judge Schofield denied a constitutional challenge to the sentence of life without parole for a juvenile. (266a-278a, 299a).

Appellant appealed as of right, challenging his conviction and the constitutionality of a life without parole sentence for a fourteen year-old. On October 25, 2011, the Michigan Court of Appeals remanded to the trial court for an evidentiary hearing on ineffective assistance of counsel for failing to call an expert witness to explain the context of Dakotah's supposed lack of remorse and to determine whether jurors saw leg iron restraints worn by Dakotah during the trial.

Evidentiary Hearing on Remand

The Berrien County Circuit Court held a two day hearing on December 8, 2011 and February 2, 2012. At the hearing, appellant first withdrew the issue involving leg iron restraints. Two witnesses then testified – trial attorney Lanny Fisher[1] and Dr. James Henry, the Director of the Southwest Michigan Children's Trauma Assessment Center. The parties also stipulated that Steve Eliason would have testified to the following:

When Dakotah was one year-old and Steve Eliason first split up with Dakotah's mother, he had custody of Dakotah. Dakotah's mother visited him periodically until the age of twelve, when she initiated a formal agreement that included two weeks uninterrupted visitation. Following one of these extended visits, on July 31, 2008, his mother formally terminated her parental rights in exchange for forfeiting child support obligations. (303a-304a).

In 2010, Steve Eliason filed for bankruptcy after the loss of his job in late 2009. In March, 2010, days before the shooting, Steve Eliason informed Dakotah that they would lose

[1] Since the case no longer involves ineffective assistance of counsel at this stage, testimony of trial counsel is omitted from this summary.

their house and move into their grandparents' house. His wife, daughter, and Dakotah would all move into the Miles residence. (303a).

Dr. James Henry is a Professor at the School of Social Work and Director of the Southwest Michigan Children's Trauma Assessment Center at Western Michigan University. The Center conducts neurodevelopmental assessments of children who have experienced maltreatment. The Center has examined 2,800 children, who have suffered trauma ranging from sexual abuse to neglect to emotional abuse to parental substance abuse. Dr. Henry has conducted workshops on trial trauma issues for juvenile referees, social workers, foster parents, CPS staffers, probation officers, judges, and prosecutors. Dr. Henry has testified as an expert witness on child trauma, child development, or child sexual abuse over a hundred times. In about 99% of these cases, he has testified as a prosecution expert, and only twice for the defense prior to the instant hearing. The trial court ruled per MRE 702 that Dr. Henry had the requisite training, education, and experience to provide the court with an opinion in his specialized area of knowledge. (305a-313a).

Dr. Henry visited Dakotah Eliason with Dr. Sloane, a behavioral pediatrician at a detention facility on August 10, 2011. They spent two and a half to three hours with Dakotah, interviewing him and administering several of tests for neurodevelopmental testing. (313a-315a).

Dr. Henry described a series of events in Dakotah's life before the shooting that he classified as traumatic when taken as a whole. First, Dakotah's mother abandoned him as a caregiver in infancy, then subsequently in the year before the shooting when she changed her mind about the visitation agreement and terminated her parental rights. Dr. Henry found that the decision of Dakotah's mother to terminate her parental rights would be a "striking" emotional

loss with a significant impact on emotional development. These events would impact both a child's perception of himself and the ability to regulate emotions. Second, Dr. Henry described the death of Dakotah's dog five months before the shooting as the sort of event retriggering the loss of key people. Third, Dr. Henry described the recent suicide of Dakotah's friend as an event that would further increase Dakotah's thoughts of isolations and worthlessness. Fourth, the death of Dakotah's cousin in an accident during the same time frame would reenact Dakotah's string of loss and abandonment. Fifth, Dakotah's father lost his job, which had the financial impact of the need to move into his grandparent's home. To Dr. Henry, this event meant that Dakotah would lose his safe place, his grandparent's house, where he took refuge from a conflicted relationship with his father. For Dr. Henry, "the desperation as to I have nowhere that's going to be safe just exacerbated all these traumatic experiences of loss and an inability to manage these and further distancing in this racing set of intrusive thoughts that were related to the trauma that he became overwhelmed by, believing that there was no place that was going to be safe for him." (321a-331a).

All of these events of loss retriggered trauma in Dakotah's brain creating intense loneliness and separation, which leads to a dissociation. (330a). To Dr. Henry:

> And so his dog had died within five months or something. And this tremendous loss retriggers the loss of key people, especially given abandoned by his mother. So the loss of his dog, the suicide of a friend, the accidental death of a cousin, the loss of his father's job which was going to then require – was going to result in foreclosure of the house and the parents moving in with the grandparents.
>
> Those were key events that had happened within a relatively short period of time that exacerbated his experiences of loss, his experiences of feeling like the world was falling apart and that he had no way to stop that. (327a).

Dakotah suffered from a "toxic stress," due to continued overwhelming events without a buffer, or someone to mitigate the emotional pain. The result for a traumatized child is racing

thoughts, as he tries to make sense of his world. The racing thoughts, the sleeplessness, and hyper arousal were all responses to stress in Dakotah's head at the time of the shooting. (332a). Significant loss was the dominant organizer in Dakotah's life. (331a-332a).

Dr. Henry found it significant that Dakotah spontaneously talked about events like he was watching a movie. This description is consistent with a dissociative process, where an individual is watching events as if they are not really happening. These thoughts meant that Dakotah did not experience emotions tied to the shooting – it was like watching something happening to somebody else. Dakotah suffered from two processes, depersonalization, a feeling of not being real, and derealization, a separation from outside events. Dakotah's disengaged and numb feeling was a self-protective mechanism, consistent with trauma. (335a-337a).

Dakotah's description of thinking about either suicide or homicide on the night of the shooting reflected that he could no longer cope. Similarly, Dakotah's description of blacking out is typical of the dissociation associated with trauma. Ultimately, then when Dakotah described a sudden rush of power after the shooting, he referred to a release of his racing thoughts, and some idea of maintaining control. This idea was not indicative of any sort of sociopathy, but rather an isolated act, explained by trauma. Dakotah never had a prior history of violence or warning signs such as cruelty to animals or other children. (338a-340a, 345a-346a).

Dr. Henry diagnosed Dakotah with dissociation and Post-Traumatic-Stress-Disorder. The PTSD symptoms were intrusive thoughts, emotional numbing, and hyper arousal, all evident in Dakotah. Dakotah's youthfulness at the time of the shooting exacerbated these processes because a fourteen year-old lacks the cognition, resources, and relationships of adults to better cope. (355a-356a, 485a).

Dr. Henry acknowledged that his observations were based in part on an interview and testing one year after the shooting. He understood that Dakotah now took certain antidepressants and had been influenced by his time in prison. However, he also made observations and conclusions based on video, audio, and police reports completed just after the shooting. (480a-481a). The video in particular contained significant evidence of trauma and disassociation. (480a-481a). Dr. Henry did not feel either the time difference or Dakotah's medication impacted his diagnosis and evaluation. (363a-373a, 481a).

Dr. Henry also acknowledged that Dakotah had some good relationships, especially with his step-mother, and grandparents, but that did not change his opinion that Dakotah was a victim of child trauma. Dr. Henry also provided his opinion on premeditation or lack thereof in the shooting, but he acknowledged that he was not a lawyer and not testifying to make legal conclusions. Several actions taken during the killing, such as getting knives or cocking a gun could still be part of a disassociated state. (393a-403a, 463a-466a, 474a-476a, 484a).

Dr. Henry discussed the other three mental health evaluations of Dakotah. He considered them outside the scope of his evaluation because they were limited to criminal responsibility and did not examine Dakotah's circumstances and actions through a trial trauma lens. Dr. Henry noted though that another evaluator concluded:

> What is known is that Mr. Eliason experienced a significant amount of loss in a relatively short period of time, namely the deaths of his cousin, dog and friend to suicide, not to mention the back drop of the very significant and repeated loss of his mother via abandonment. These losses would be difficult for any adolescent to cope with, but Mr. Eliason seems to have lacked the supports and guidance many others receive from their parents / family and even friends. (476a).

For Dr. Henry, these observations perfectly matched his conclusions. (387a-388a, 477a-480a).

On April 30, 2012, Judge Scott Schofield denied the motion for new trial after the evidentiary hearing and filing of supplemental pleadings. (37a – 56a).

Direct Appeal

On April 4, 2013, the Court of Appeals affirmed Dakotah's convictions, but remanded for resentencing to either life with or without parole based on the unconstitutional sentence of mandatory life without parole for a juvenile offender per *Miller v Alabama*, 567 US __; 132 S Ct 2455 (2012). *People v Eliason*, 300 Mich App 293 (2013). The dissenting judge would also have affirmed Dakotah's convictions, but found (1) that the trial court should have the option to sentence Dakotah to a term of years; (2) that the sentence of life without parole for a juvenile violates Michigan Constitution's provision against the infliction of cruel or unusual punishment, Const 1963 art 1, §16; and (3) resentencing should be held before a different judge. *Eliason*, 300 Mich App at 318-338 (J. Gleicher, dissent).

Dakotah applied for leave to appeal. This Court granted leave to consider:

> (1) whether the Court of Appeals correctly applied *Miller v. Alabama*, —— U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), to Michigan's sentencing scheme for first-degree murder;
>
> (2) whether that sentencing scheme amounts to cruel or unusual punishment under Const. 1963, art. 1, § 16 as applied to defendants under the age of 18; and
>
> (3) what remedy is required for defendants whose sentences have been found invalid under Miller or Const. 1963, art. 1, § 16. *People v Eliason*, 839 NW2d 193 (2013).

SUMMARY OF ARGUMENT

Youth matters in the decision to sentence children like fourteen year-old Dakotah Eliason. In *Miller v Alabama*, 132 S Ct 2469 (2013), the United States Supreme Court observed that youth were constitutionally different from adults for sentencing purposes. Mandatory life

without parole for youthful offenders violated the Eight Amendment's prohibition on cruel and unusual punishment. Instead a sentencing court needed to consider the mitigating factors of youth at an individualized hearing. *Miller* held unconstitutional Michigan's entire mandatory scheme that sentenced youth to life without parole – the first degree murder statute, the parole statute, and the statutes allowing children to be tried in adult court.

This sentencing scheme necessarily violates the Michigan Constitution's ban on "cruel or unusual punishment." Const. 1963, art. 1, § 16. This textual difference between "*cruel and unusual*" and "*cruel or unusual*" combined with the historical context, and longstanding precedent shows that the Michigan Constitution carries greater protection.

In fact, the disproportionate and excessive nature of a life without parole sentence for a child means that this Court should ban this harshest possible sentence for a youthful offender. Neurological, psychological, and sociological studies show that a youthful offender is not as culpable as an adult and not deserving of the most severe punishment. The sentence of life without parole for a youth is disproportionate compared to sentences in both Michigan and other states for homicide offenders. Finally, where most children "age out" of criminal behavior and a life without parole sentence completely obviates the rehabilitative ideal, this penalty has no compelling penological justification. At the very least, this Court should ban a life without parole sentence for a fourteen year-old youth like Dakotah.

The remedy for Dakotah's unconstitutional life without parole sentence is an individualized sentencing hearing where a court can impose the sentence of life or any term of years permitted for MCL 750.317. *Miller* requires an individualized sentencing hearing that takes into account the unique characteristics of youth. Both other states and Michigan allow for sentencing to the most severe lesser included offense.

The alternative Court of Appeals remedy of a hearing where a court imposes either life with or without parole is not permissible. First, this scheme forecloses the proportional review required by *Miller*. Second, it creates a brand new sentencing scheme and statute out of whole cloth, violating foundational principles of separation of powers and severance of an unconstitutional provision. The remedy of a life with parole sentence also implicates *Miller* because it is the functional equivalent of a life without parole sentence.

This Court should categorically ban the sentence of life without parole for a youth and instead require an individualized sentence to life or any term of years. Dakotah in particular is a fourteen year-old child suffering from dissociation and post-traumatic stress disorder who could not appreciate the risks and consequences of his offence. In spite of the trauma in his home and family life, he has a real chance of rehabilitation. A different judge should impose an individualized sentence, where life without parole is not permitted.

ISSUE PRESERVATION AND STANDARD OF REVIEW

Appellant challenged the constitutionality of his sentence prior to sentencing. (266a-278a). The constitutionality of a statute is a question of law to be reviewed *de novo*. *People v Drohan*, 475 Mich 140,146 (2006).

I. *Miller v Alabama*, 567 US __ (2012) invalidates Michigan's entire sentencing scheme for youth convicted of first degree murder.

A. *Miller* invalidated mandatory life without parole for youthful offenders.

In *Miller v Alabama*, the United States Supreme Court held that mandatory life imprisonment without parole for youth violated the Eighth Amendment's prohibition on cruel

and unusual punishment[2] because the punishment is not proportional to the youthful offender. *Miller v Alabama*, 567 US __; 132 S Ct at 2469. "[Y]outh matters" in a decision to sentence children to life without parole. *Miller*, 132 S Ct at 2465. *Miller* stemmed first from *Roper v Simmons*, 543 US 551 (2003), where the Court ended the death penalty for youthful offenders and *Graham v Florida*, 560 US 48 (2010), where the Court prohibited life without parole for non-homicide youthful offenders.

These categorical ban cases stood for the proposition that youth were constitutionally different from adults for sentencing purposes and youth did not deserve the most severe punishments. The Court cited three reasons supported by a strong consensus in psychology and neuroscience. *Miller*, 132 S Ct at 2464. First, youth exhibited "a lack of maturity and an underdeveloped sense of responsibility leading to recklessness, impulsivity, and heedless risk-taking." *Id*. (quotations omitted). 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." *Id*. (quotations omitted). 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*. (quotations omitted).

The Court then evaluated these dynamics about children through the prism of the mandatory death penalty cases which required consideration of the characteristics of a defendant and the details of the offense before imposition of the death sentence. *Woodson v North Carolina*, 428 US 280 (1976); *Lockett v Ohio*, 438 US 586 (1978). These cases require an individualized hearing at which the sentencer can consider relevant mitigating evidence prior to

[2] The Eighth Amendment of the United States Constitution provides that "Excessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted." US Const., Am. VIII.

the imposition of the state's harshest punishment. These holdings coupled with the Court's findings about the differences between adults and youth for sentencing purposes resulted in the rule that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 132 S Ct at 2469. A state's sentencing scheme is unconstitutional if it makes "youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, [because] such a scheme poses too great a risk of disproportionate punishment." *Id*.

B. Michigan's entire mandatory sentencing scheme is unconstitutional.

Several interwoven statutes work in conjunction to impose a regime of mandatory life without parole for youth convicted of first degree murder in Michigan. MCL 712A.2 and MCL 600.606 allow youth to be automatically tried as adults in circuit court, instead of adjudicated in the family division of circuit court, for some offenses including first degree murder. MCL 750.316 establishes that first degree murder "[S]hall be punished by imprisonment for life." Under MCL 791.234, the statute governing parole eligibility, those sentenced to life imprisonment for first degree murder are not eligible for parole:

> (6) 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.

Finally, youth convicted of first degree murder must be sentenced within this adult framework:

> A judge of a court having jurisdiction may pronounce judgment against and pass sentence upon a person convicted of an offense in that court. The sentence shall not exceed the sentence prescribed by law. The court shall sentence a juvenile convicted of any of the following crimes in the same manner as an adult:
> . . .
> (g) First degree murder in violation of section 316 of the Michigan penal code, 1931 PA 328, MCL 750.316. [MCL 769.1].

One commentator called this framework a "'perfect storm of statutes" and observed it has left Michigan with the country's second-highest number of persons serving sentences of life without parole for offenses committed when they were 17 years old or younger.[3]

The Court of Appeals properly observed that *Miller* invalidated "sentencing schemes" that mandate life without parole for youthful offenders. *People v Eliason*, 300 Mich App 293, 308 (2013). The Court also correctly held that "defendant's case was pending on direct review at the time *Miller* was decided; therefore, *Miller* applies and defendant's mandatory sentence of life imprisonment without the possibility of parole constitutes cruel and unusual punishment under the Eighth Amendment." *Id*. at 309, *citing People v Carp*, 298 Mich App 472 (2012), emphasis in original. Finally, the Court of Appeals correctly specified that a combination of separate Michigan statutes – MCL 750.316(a), MCL 769.1(1)(g), and MCL 791.234(6)(a) – were implicated in the resentencing process. *Eliason*, 300 Mich App at 313.[4] The Court of Appeals thus acknowledged that an entire statutory scheme and not just the parole statute produced Dakotah's unconstitutional sentence.

As the Court of Appeals recognized, *Miller* invalidated Dakotah's mandatory life sentence, which stemmed from the interplay of an entire statutory scheme. The Court of Appeals erred though in fashioning a remedy to this unconstitutional statutory scheme for sentencing youth convicted of first degree murder. *See Section III, infra*. Fourteen year-old Dakotah is serving an unconstitutional mandatory sentence of life without parole. An analysis of the *Miller*

[3] Kimberly Thomas, "Juvenile Life Without Parole / Unconstitutional in Michigan?," Michigan Bar Journal, February, 2011, p 35, available at http://www.michbar.org/journal/pdf/pdf4article1811.pdf.

[4] This parallels the United States Supreme Court analysis of the Alabama statute *Miller*. The Court noted that Evan Miller served a sentence of life without parole due to the interplay of juvenile transfer statutes and the murder statute. *Miller*, 132 S Ct at 2462-2463. The Court did not analyze the Arkansas scheme, noting only that the state waived any argument against the mandatory nature of the sentence. *Id*. at 2462, Fn 2.

decision, the Michigan constitution, and separation of powers and severability principles requires the remedy of a term of years sentence that must exclude life without parole.

II. A mandatory sentence of life without the possibility of parole for a youthful offender amounts to cruel or unusual punishment under article 1, section 16 of the Michigan Constitution. The greater protections of the Michigan Constitution warrant a categorical ban, especially with respect to a fourteen year-old child.

A. Michigan's mandatory sentencing scheme violates the state constitution because the state constitutional prohibition on cruel *or* unusual punishment offers more protection than the United States Constitution.

The statutory framework used to sentence Dakotah to life without parole plainly violates the Michigan Constitution.[5] The Michigan Supreme Court has found the Michigan Constitution's protection from "cruel *or* unusual punishment" to be broader than the United States Constitution's protection from "cruel *and* unusual punishment." *People v Bullock*, 440 Mich 15, 30 (1992). This textual difference is not merely inadvertent, and this Court has traced the language of Michigan's constitution to the 1787 Northwest Ordinance. *People v Lorentzen,* 387 Mich 167, 172 n.3 (1972). Because *Miller* held that *any* statutory scheme of mandatory life without parole for offenses committed by juveniles violates the Eighth Amendment, Michigan's scheme must also violate Michigan's broader constitutional protection. Consequently, the Michigan constitution also prohibits the application of a "perfect storm" of Michigan's sentencing, transfer, and parole statutes to Michigan youth.

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[5] The Michigan Constitution provides:

> Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonable detained. [Const. 1963, art. 1, § 16.]

The textual difference, the historical context that calls for a prohibition on disproportionate sentences, and longstanding Michigan precedent all mean that the Michigan constitution provides greater protection. *Bullock*, 440 Mich at 30-35. The Michigan Supreme Court noted in 1972 that "the prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition." *Lorentzen*, 387 Mich at 172 (1972). This has continued to be true despite contrary United States Supreme Court decisions on the Eighth Amendment question. For example, the U.S. Supreme Court ruled in *Harmelin v Michigan*, 501 US 957, 994 (1991), that a mandatory sentence of life imprisonment without the possibility of parole for possessing more than 650 grams of cocaine, did not violate the "cruel and unusual punishment" provision of the Eighth Amendment. The Michigan Supreme Court declined to follow, holding less than a year later that the same sentence under the same statute for the same crime violated the Michigan constitutional provision. *Bullock*, 440 Mich at 30. This Court noted that the weight of caselaw within Michigan provided a "compelling reason not to reflexively follow the . . . United States Supreme Court's Eighth Amendment analysis." *Id*. at 35.

The statutory scheme resulting in Dakotah's mandatory sentence of life without parole without consideration of the mitigating factors of youth resulted in a disproportionate sentence under the Michigan Constitution.

B. Under the Michigan Constitution's expanded protections, this Court should categorically ban a sentence of life without the possibility of parole for a youth, or at a minimum, with respect to a fourteen year-old.

Michigan has developed a four-prong test to determine if a sentence is "cruel or unusual." The first prong weighs the gravity of the offense against the severity of the penalty, taking into account relevant facts about the culpability of the offender. The second and third prongs

examine evolving standards by comparing the sentence to those imposed for the same crime in both Michigan and other jurisdictions. Finally, the fourth prong examines whether the purpose of punishment is served, with particular emphasis on rehabilitation. *See, e.g., People v Lorentzen*, 387 Mich 167, 171-181 (1972) (finding twenty years imprisonment for sale of by "a first offender high school student" unconstitutional); *People v Fernandez*, 427 Mich 321, 335 (1986) (permitting life without parole sentence for conspiracy to commit murder).

Under this test, a sentence of life without the possibility of parole imposed on a youthful offender, especially a fourteen year-old youth violates the Michigan Constitution.[6] *See e.g. Diatchenko v District Attorney for Dist*, 466 Mass 655 (2013) (holding that even the discretionary imposition of life without parole sentence upon a youthful offender violated the Massachusetts constitutional prohibition against "*cruel or unusual*" punishment).

1. This Court should establish a categorical ban against life without parole sentences for youthful offenders.

(a) Life without parole is an excessively harsh penalty for a youth.

The first prong of Michigan's test for cruel or unusual punishment weighs the gravity of the offense against the severity of the penalty, taking into account relevant facts about the culpability of the offender. Under this test, life without parole for youth is excessively harsh given their diminished culpability relative to adult offenders.

The Supreme Court in *Miller* observed that "the science and social science supporting *Roper's* and *Graham's* conclusions [regarding the diminished culpability of youth] have become even stronger. *Miller*, 132 S Ct at 2464, fn 5. Indeed, contemporary neurological,

[6] This Court is of course specifically considering the categorical ban argument as to youth serving life without parole for aiding and abetting felony murder. *People v Davis*, 838 NW2d 876 (2013). Appellant believes there should be such a ban, but here makes the argument for all youthful offenders and fourteen year-olds because his is not a case of aiding and abetting felony murder.

psychological, and sociological studies converge to find numerous characteristics of adolescents that differentiate them from adults – changeability, immature judgment, an underdeveloped capacity for self-regulation and responsibility, and a lack of control over their own impulses and their environment.[7]

The brains of youth are less fully developed in regions related to judgment, self-control, and decision-making. *See Graham*, 560 US at 68. The parts of the brain that control executive functioning and process risk do not finish biological development until late adolescence or early adulthood.[8] Recent findings on the development of the prefrontal cortex, a part of the brain active during long-term planning, judgment, and decision making, suggest that these higher-order cognitive capacities may be immature well into late adolescence.[9]

At the same time, a "rapid and dramatic increase in dopaminergic activity within the socioemotional system around the time of puberty" fuels increased sensation-seeking and risk-taking, without the benefit of fully developed executive function and cognitive control that will develop later in adolescence.[10]

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[7] For a comprehensive review of the modern science and social science research, *see* Brief for Am Psychol Assn et al. as Amici Curiae and Brief for J. Lawrence Aber et al. as Amici Curiae Supporting Pet'r, *Miller v Alabama*, 132 S Ct 2455 (2012) (No. 10-9646), accessed at *http://www.scotusblog.com/miller-v-alabama/*

[8] *See, e.g.*, Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neurosci 861, 862 (1999); Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neurosci 859, 860 (1999) (in longitudinal study of brain development, finding prefrontal cortex loses gray matter only at end of adolescence); Luna & Sweeney, *The Emergence of Collaborative Brain Function*, 1021 Annals NY Acad Sci 296, 301 (2004).

[9] *See, e.g.*, Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am Psychologist 1009, 1013 (2003); Whitford et al., *Brain Maturation in Adolescence*, 28 Hum Brain Mapping 228, 228 (2007) (adolescence is "peak period of neural reorganization").

[10] See Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report*, 44 Dev Psychol 1764, 1764 (2008); Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann Rev Clinical Psychol 459, 466 (2009).

Social scientists have also confirmed that adolescents are extraordinarily vulnerable to peer pressure relative to adults. "Research has shown that susceptibility to peer influence, particularly in situations involving pressure to engage in antisocial behavior, increases between childhood and early adolescence, peaks at around age 14, and then declines slowly during the late adolescent years, with relatively little change after age 18."[11]

These characteristics of adolescence taken together show that a youthful offender is not as culpable as an adult. The United States Supreme Court explained that children have a "lack of maturity and an underdeveloped sense of responsibility leading to recklessness, impulsivity, and heedless risk-taking." *Miller*, 132 S Ct at 2464 (quotations omitted). The Court also explained these neurological differences make children "more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited control over their environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Id.* (quotations omitted). Finally, "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*. (quotations omitted). The conclusion of the social science research is that "juveniles achieve the ability to use adult reasoning by mid-adolescence, but lack the ability to properly assess risks and engage in adult-style self-control." *State v Null*, 836 NW2d 41, 55 (2013) (citing Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 34 (2008)).

Consideration of a youth's lesser culpability has long been recognized in Michigan as

[11] Br for Am Psychol Assn et al. as Amici Curiae Supporting Pet'r, *Graham v Florida*, 560 US 48; (2010) (No. 08-7412) (citing Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 Developmental Psychol 608, 612, 615-616 (1979); Steinberg & Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 Child Dev 841, 848 (1986); Scott & Steinberg, *Rethinking Juvenile Justice* 38 (2008)); *see also* Kristan Erickson et al., *A Social Process Model of Adolescent Deviance: Combining Social Control and Differential Association Perspectives*, 29 J. Youth & Adolescence 395, 420-421 (2000) (discussing peer influence on delinquency); Fagan, *Contexts of Choice by Adolescents in Criminal Events, in Youth on Trial* 371-394 (Thomas Grisso & Robert G. Schwartz eds., 2000)., at 382-84 (discussing coercive effect of social context on adolescents).

important to a constitutional analysis of the severity of a punishment. *See People v Lorentzen*, 387 Mich 167 (1972) (finding a twenty year sentence unconstitutional for a first-offender high school student convicted of selling marijuana); *People v DiPiazza*, 286 Mich App 137 (2009) (finding a continuing sex offender registration requirement to be "cruel or unusual" as applied to an 18-year old first offender for consensual sexual activity with another teenager); *compare People v Launsburry*, 217 Mich App 358 (1996) (holding life without parole for sixteen year-old did not violate the Michigan constitutional ban on cruel and unusual punishment prior to advancements in neuroscience and social science and Supreme Court decisions in *Graham*, *Roper*, and *Miller*, and prior to statutory scheme that imposed the same punishment to children as adults).

Further, the Michigan legislature recognizes that youth are different from adults. At the time of this offense, fourteen year-old Dakotah was not permitted to vote or serve on a jury.[12] He could not drink, drive or smoke cigarettes. Someone his age needs a special permit to be employed and, by law, must be enrolled in school.[13] He would need both parental and probate court permission to marry.[14] These laws recognize that youth lack the reasoning and maturity to be responsible enough to warrant these civil privileges. This recognition of their underdeveloped judgment and temporary immaturity should extend to their lesser accountability and culpability, as compared to adults, for criminal offenses. *Roper v Simmons*, 543 US 551, 569 (2005).

Together these differences in brain, personality, and identity development between youth and adults "render suspect any conclusion that a juvenile falls among the worst offenders"

[12] MCL 168.492; MCL 600.1307a.

[13] MCL 409.104; MCL 380.1561.

[14] MCL 551.51, MCL 551.201.

because the "susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult." *Roper*, 543 US at 570 (quotations omitted). In Michigan, where life without parole is the most severe sentence that a court may impose due to the lack of a death penalty,[15] the differences between youth and adults mandate that it is an "unusually excessive" and therefore unconstitutional penalty. *Lorentzen*, 387 Mich at 172.

(b) Life without parole for youth is a disproportionate sentence in Michigan.

The second prong of the test for unconstitutional "cruel or unusual" punishment in Michigan compares the sentence with the sentences imposed on other offenders in the same jurisdiction.

Due to the lack of a death penalty, life without the possibility of parole is the most severe sentence any Michigan offender, regardless of age, can receive. A life without parole sentence is even more severe than the same sentence for an adult – a juvenile who receives this sentence will spend more years and a greater percentage his or her life in prison than an adult who receives nominally the same penalty. *See Graham*, 130 S Ct at 2027-2028.

Less culpable youth are frequently sentenced on a par with adult criminals who committed equivalent or more severe offenses, or with a more culpable adult offender. In Michigan, almost half of youth sentenced to life without parole who were under seventeen at the time of the offense report that they were either convicted under an aiding and abetting theory, or that they were not the person who committed the murder; and nearly half of those so reporting had adult co-defendants. *Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons* (Detroit: ACLU of Michigan, 2004), p 4. Adults who are better able to navigate the

[15] Const 1963, art 4, §46 (banning the death penalty).

criminal justice system are more likely to take plea agreements and avoid the harshest sentences.[16] *See Graham*, 560 US at 78 (finding that youth are less likely than adults to work effectively with their lawyers to aid in their defense).

(c) Life without parole for youth is a disproportionate sentence in comparison to other jurisdictions.

The third prong of the test for unconstitutional "cruel or unusual" punishment in Michigan compares the sentence with the sentences imposed for the same crime in other jurisdictions. Michigan continues to impose an unconstitutionally unusual sentence.

For the period 1990-2001, Michigan, rivaled only by Florida, led the nation in the percentage of homicides by youth, 22 percent, that resulted in a life without parole sentence. According to Human Rights Watch, Michigan had over three and a half times the national rate of individuals serving life without parole for crimes committed while 17 or under. Amnesty International/Human Rights Watch, *Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (New York: Human Rights Watch/Amnesty International, 2005), pp 35-36, figure 6. Out of the forty states for which Human Rights Watch could locate data, Michigan was second only to Louisiana in the number of youth serving life without parole sentences relative to its current population of 14 to 17 year-olds. *Id*. As of 2005, Michigan was one of only nine states where a child of any age could be tried as an adult and receive life without parole. *Rest of Their Lives* (2005), p 18. Michigan has the second highest number of youth after Pennsylvania serving a life without parole sentence. *See* Human Rights Watch, *State Distribution of Youth Offenders Serving Juvenile Life Without Parole* (2009).[17]

[16] In Michigan, 62% of adults initially charged with first-degree murder pled guilty to a conviction with either a lesser term of years or a parolable life sentence. The average prison term served by an adult originally charged with first-degree murder but offered a plea by the prosecutor is 12.2 years. *See Basic Decency: Protecting the Human Rights of Children* (Detroit: ACLU of Michigan, 2012), p 8.

This trend continues to shift away from life without parole for youth in jurisdictions other than Michigan. From 2006 to 2010, 39 states imposed zero or one life without parole sentence a year for a youthful offender, while Michigan imposed 35 such sentences. From 2008 to 2010, 27 states did not sentence a single youth to life without parole, while Michigan and three others sentenced 174 youthful offenders. *Basic Decency*, p. 25.

Other states, including some of those with a formerly large population of youth serving life without parole have recently limited or eliminated the sentence for youth. California passed the Fair Sentencing for Youth Act, which retroactively provided youthful offenders sentenced to life without parole periodic review with the possibility for parole or resentencing. *See* Cal. Penal Code § 1170(d)(2)(A)(i) (2013). Texas eliminated all life without parole for youth. Tex. Penal Code § 12.31(a)(1) (2013). Nebraska also passed a law retroactively giving all offenders who were juveniles when committing the offense parole. *See* Neb. St. § 83-1,110.04 (2013). Delaware legislatively eliminated life without parole for youth. *See* Del. Code. Tit. 11, § 4209A (2013). In 2013 Wyoming passed a bill eliminating life without parole for youth. Wyo. Stat. § 6-2-101 (2013). Just recently, the Massachusetts Supreme Judicial Court declared all juvenile LWOP sentences unconstitutional. See *Diatchenko v. Dist. Attorney for Dist.*, 466 Mass. 655 (2013).

"It is not so much the number of these States [enacting reforming legislation] that is significant, but the consistency of the direction of change." *Atkins v Virginia*, 536 US 304, 315 (2002). In *Roper*, the United States Supreme Court found similarly relevant a trend even though only five states had eliminated the death penalty for youth in the previous fifteen years. *Roper* 543 US at 565. Michigan's sentencing of youthful offenders to life without parole is excessive and unusual.

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[17] Accessed at http://www.hrw.org/sites/default/files/related_material/updatedJLWOP10.09.pdf

(d) Life without parole for youth does not serve any penological goal, and particularly not that of rehabilitation.

The fourth factor in a Michigan "cruel or unusual punishment" analysis is the relationship to the penological goals of punishment, with a focus on the goal of rehabilitation. *Lorentzen*, 387 Mich at 179; *Bullock*, 440 Mich at 34. It is self-evident that a sentence of life without the possibility of parole imposed on a youth completely obviates any goal of rehabilitation as "the penalty forswears altogether the rehabilitative ideal." *Graham*, 560 US at 74. Unlike certain adults though, youth have a significant chance of rehabilitation and success. "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 US at 570.

Most children who commit crimes as teenagers do "age out" of such behavior – over 50 percent by the early 20s, and 85 percent by age 28. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychol Rev 674, 675 (1993). The United States Supreme Court observed that these distinctions between children and adults impact the likelihood of recidivism noting that studies confirm "only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patters of problem behavior." *Miller*, 132 S Ct at 2464 (quotations omitted).

Developing youth are uniquely capable of reform, but at the time of their offense, it is impossible to determine who will later succeed. Studies have consistently concluded that behavior can be identical in adolescents who will continue as criminal offenders through adulthood and those who will reform.[18] For example, researchers were not able to predict with a

[18] Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychol Rev 674, 678 (1993); see also Mulvey & Cauffman, *The*

frequency greater than chance, based on adolescent history, which fifteen-year-old juvenile offenders would become career criminals and which ones would abandon criminal activity after adolescence. Moreover, their predictions did not improve after taking into account type of offense. Moffitt, p. 678. Nevertheless, regardless of whether a youth sentenced to life without parole is one of the many who will reform or the few who will not, the sentence removes any hope of such a possibility.

The other goals of incarceration – retribution, deterrence, and incapacitation – also do not justify sentencing youth to life without the possibility of parole. "The case for retribution is not as strong with a minor as with an adult" due to the minor's lesser culpability stemming from lack of maturity. *Roper*, 543 US at 571. The deterrent effect of life without the possibility of parole is minimal, as "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence," *id*., and "they are less likely to take a possible punishment into account when making decisions." *Graham*, 560 US at 72. "Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a juvenile offender forever will be a danger to society would require mak[ing] a judgment that [he] is incorrigible – but incorrigibility is inconsistent with youth." *Miller*, 132 S Ct at 2465, (quotations omitted).

Inherent Limits of Predicting School Violence, 56 Am Psychologist 797, 799 (2001) ("Assessing adolescents … presents the formidable challenge of trying to capture a rapidly changing process with few trustworthy markers."); Grisso, *Double Jeopardy: Adolescent Offenders with Mental Disorders* 64-65 (2005) (discontinuity of disorders in adolescence creates "moving targets" for identification of mental disorders); Edens et al., *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review*, 19 Behav Sci & L 53, 59 (2001) (citing studies and noting difficulty of predicting juveniles' future behavior, such as antisocial conduct or psychopathy, because juveniles' social and emotional abilities are not fully developed).

"A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham*, 560 US at 71. Life without parole for a youthful offender is a disproportionate and unconstitutional sentence based on Michigan requirements.

2. At a minimum, this Court should establish a categorical ban against the extreme practice of a fourteen year-old serving a life without parole sentence.

The disproportionate sentence of life without parole for youth is even more extreme in relationship to youth like Dakotah who are just fourteen years old. Despite the fact that Michigan allows children as young as fourteen to be tried as adults for first-degree murder, there are only six individuals, including Dakotah, who are serving life without parole in Michigan for offenses committed as fourteen year-olds. Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison* (Montgomery, Ala: Equal Justice Initiative, 2007), p 20 (listing the number as two).[19] As 107 children under fifteen were arrested in Michigan from 1990 through 2005 for murder or non-negligent manslaughter, it is clear that, even for young teens suspected of a homicide crime, the outcome of life without parole crime is extremely rare in Michigan. FBI Uniform Crime Reporting Program, 1990-2005 Arrest by State and Drug Arrest by State Data Sets and Coding Guidelines (December 5, 2007).

Michigan's disproportionate imprisonment of fourteen year-olds for life without parole is even starker in comparison to other jurisdictions. At last count, only sixty-nine youths were serving life without parole for crimes committed while under age fifteen. *See Cruel and Unusual*, p 20 (listing the number as seventy-three, including six convicted of non-homicides). Six of these sixty-nine young teens, over nine percent, are in Michigan. Even of the states that do allow life without parole by statute for youth, only a minority impose it on young teens in

[19] The third is fourteen year-old is Deante Hawkins, sentenced in Wayne County on October 25, 2007. The fourth and fifth are Dontez Tillman and Thomas McCloud, sentenced in Oakland County on December 2, 2009, and the sixth is Dakotah.

practice. In 2007, only nineteen states had individuals serving life without parole sentences for offenses committed while under age 15. *Cruel and Unusual*, p 11. And of these nineteen states, California, Nebraska, and Delaware have recently allowed parole for youth. *Section IIB3, supra*.

Life without parole sentences are appropriate for only the "rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 132 S Ct at 2469 (quotations omitted). A fourteen year-old, who still may be capable of rehabilitation does not meet this criteria.

C. Conclusion

The mandatory and arbitrary statutory scheme allowing a life without parole sentence without any consideration of an offender's youth violates the Michigan Constitution's greater protections against "cruel *or* unusual punishment" than those offered by the United States Constitution. *Lorentzen*, 387 Mich at 172; *Bullock*, 440 Mich at 30. This Court must also apply these greater protections of the Michigan Constitution to evaluate a categorical ban on life without parole sentencing for youth. "Prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition." *Lorentzen*, 387 Mich at 172. The diminished culpability of youth, Michigan's unusual implementation of this sentence compared to other jurisdictions, the fact that life without parole is the *most* severe sentence in Michigan, and the lack of a penological justification all describe a disproportionate and excessive sentencing scheme. A sentence of life without the possibility of parole for a youth categorically violates the Michigan constitution, *at the very least* with respect to a fourteen year-old.

III. The remedy for a youth's unconstitutional sentence of life without parole is an individualized sentencing to life or any term of years per MCL 750.317. For Dakotah in particular, a different judge should be required to sentence him to life with parole or a term of years.

A. The remedy for an unconstitutional life without parole sentence is an individualized sentence to either life with parole or a term of years after a consideration of the special characteristics of youth.

Miller's requirement of individualized sentencing should result in courts sentencing children convicted of first degree murder to parolable life or any term of years. Michigan's complicated statutory scheme, which mandates that juveniles convicted of first degree murder must be sentenced to life without parole, is unconstitutional under *Miller* and cannot be applied. When a statutory scheme of punishment cannot be applied, courts in Michigan and in other states generally sentence defendants under the most severe lesser included offense. *See infra.* In this case, the most severe lesser included offense is second degree murder. *People v Clark*, 274 Mich App 248, 257 (2007). Second degree murder carries a penalty of "imprisonment in the state prison for life, or any term of years." MCL 750.317. Application of severance and separation of powers principles prohibit the imposition of another remedy that would require legislative action.

This Court has the authority to order entry of a judgment under MCL 750.317 for youth who face unconstitutional sentences under MCL 750.316. To be clear, the youth is still guilty of first degree murder, but the sentence is to life or any term of years under the statute for second degree murder. *Miller* does not render the elements of Michigan's first-degree murder law unconstitutional as applied to juveniles. But it does make MCL 750.316 unenforceable against juveniles inasmuch as the statute mandates, without exception, a sentence of life that carries no possibility of parole.

The United States Supreme Court has held that appellate courts have the "power to substitute a conviction on a lesser offense" when a defect affects only a greater offense. *Rutledge v United States*, 517 US 292, 306 (1996). The unconstitutionality of the mandatory life without parole sentencing scheme for youth does not affect the sentencing scheme for second degree murder. Consequently, defendants whose sentences are unconstitutional under *Miller* may be resentenced under this most severe lesser included offense.

1. *Miller* requires individualized sentencing.

The calculus of sentencing is different with children, and when society's harshest penalties are implicated, individualized sentencing is required. In *Miller*, the United States Supreme Court explained that the qualities of youth lessen a child's "moral culpability." *Miller*, 132 S Ct at 2465. The Court also explained that as children pass into adulthood "neurological development occurs" and qualities of youth which led to criminal behavior "will be reformed." *Id*. As Noted in Issue II, the Court based this reasoning on scientific evidence gleaned from across several disciplines. Given these facts, the rationales of sentencing fail to justify mandatory imposition of our harshest penalties on children.

Miller required an evaluation of these dynamics through the rule of mandatory death penalty cases which required individualized consideration of the characteristics of the offender and the details of the offense before imposition of the sentence. *Woodson v North Carolina*, 428 US 280 (1976); *Lockett v Ohio*, 438 US 586 (1978). These holdings create the need for an individualized hearing where the court considers all relevant mitigating evidence prior to imposition of the state's harshest punishment. As the dissent in *Eliason* observed:

> Exercising discretion involves thoughtfully considering the wealth of characteristics and circumstances attendant to a defendant's youth, which in turn means that a court must be permitted to reject that a child deserves to serve a life term. In my view, the exercise of

> discretion contemplated in *Miller* is simply inconsistent with a rule allowing only for life imprisonment with or without parole. The "two-sizes-fit-all" approach embraced by *Carp* offends the Eighth Amendment because it forecloses proportionality. [*Eliason*, 300 Mich App at 326 (J. Gleicher, dissent) (quotations omitted).]

A sentence for a youthful offender needed to take into account the unique characteristics of youth for sentencing purposes. The Court listed (1) chronological age; (2) immaturity, impetuosity, and the failure to appreciate risks and consequences; (3) the youth's family and home environment; (4) the extent of participation in the criminal conduct; (5) the impact of familial and peer pressures; (6) effect of offender's youth on the criminal justice process, such as inability to comprehend a plea bargain; and the (7) the possibility of rehabilitation. *Miller*, 132 S Ct at 2468.

Miller stands first and foremost for the proposition that youthful offenders require individualized sentencing in which the judge considers the particular, individual, and unique characteristics of youth. *Id*. at 2467-2468, 2471.

2. Other states have recognized that when a sentencing scheme is unconstitutional, sentencing per the next lesser offense is appropriate.

Miller is not the first decision from the United States Supreme Court to render a sentencing scheme unconstitutional. In *Gregg v Georgia* and its companion cases, the Court remade the landscape of death penalty jurisprudence. *Gregg v Georgia*, 428 US 153 (1976). Thirty-five states had death penalty schemes at the time. *Id*. at 179-180. Many of these were not impacted by *Gregg*.[20] Some statutory schemes had unconstitutional death penalty provisions, but

[20] *See Proffitt v Florida*, 428 US 242 (1976); *Jurek v Texas*, 428 US 262, 276 (1976); *Harris v State*, 352 So2d 479, 482 (Ala 1977); *State v Murphy*, 113 Ariz 416, 418; 555 P2d 1110, 1112 (1976*); Collins v State*, 261 Ark 195, 203 (1977); *State v White*, 395 A2d 1082, 1084 (Del 1978); *State v Osborn*, 102 Idaho 405, 407; 631 P2d 187, 189 (1981); *State v McKenzie*, 186 Mont 481, 519 (1980); *State v Simants*, 197 Neb 549, 552 (1977); *State v Addison*, 159 NH 87, 94 (2009); *State v Shaw*, 273 SC 194, 203; 255 SE2d 799, 804 (1979); *Smith v Commonwealth*, 219 Va 455, 483 (1978). *But see Jackson v State*, 337 So2d 1242, 1253 (Miss. 1976) (mandating bifurcated

had optional lower penalties for the charged offense.[21] Neither New York, Louisiana, nor Kentucky had a statutory framework which allowed sentencing under the charged offense. They all resentenced under lesser included offenses.

In *People v Davis*, the Court of Appeals of New York noted that, according to *Gregg*, New York's death penalty statute was unconstitutional. *People v Davis*, 43 NY2d 17, 29-36 (1977). New York's high court simply noted that "based on our review of the records, as to the respective indictment counts charging murder in the first degree, we determine that in each case there has been a showing beyond a reasonable doubt of defendant's guilt of murder in the second degree," and remanded for resentencing under the lesser included offense. *Id*. at 37.

Louisiana had a mandatory death sentence for both first degree murder and aggravated rape. *See Roberts v Louisiana*, 428 US 325, 329 (1976); *State v Selman*, 300 So2d 467, 471 (1974), *vacated in part sub nom. Selman v Louisiana*, 428 US 906 (1976). Much like *Miller* found life without parole sentences unconstitutional for youth if mandatory, *Roberts* and *Selman* found Louisiana's death penalties unconstitutional because of their mandatory nature. The Louisiana Supreme Court subsequently ordered resentencing under lesser included offenses. *State v Lee*, 340 So2d 180, 184 (1976) (remanding for entry of judgment and sentencing of attempted aggravated rape); *State v Jenkins*, 340 So2d 157, 179 (1976) (remanding for entry of judgment and sentencing of second degree murder).

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sentencing procedure); *State v Rondeau*, 89 NM 408, 412 (1976) (reviving pre-death penalty statute).

[21] *See Rockwell v Superior Court*, 18 Cal 3d 420, 424-428 (1976) (rejecting the people's invitation to prescribe constitutional procedures); *People v Dist Court*, 196 Colo 401, 403; 586 P.2d 31, 32 (1978); *French v State*, 266 Ind 276, 277 (1977); *Blackwell v State*, 278 Md 466, 468 (1976); *Smith v State*, 93 Nev. 82, 85 (1977); *State v Thompson*, 290 NC 431, 442 (1976); *Commonwealth v Moody*, 476 Pa 223, 228 (1977); *Miller v State*, 584 SW2d 758, 765 (Tenn 1979); *Kennedy v State*, 559 P2d 1014, 1019 (Wy 1977); *State v Green*, 91 Wash 2d 431, 447 (1979).

Kentucky's death penalty was also struck down by *Gregg*. Although imposition of the death penalty was still constitutional under the proper procedures, the Kentucky Supreme Court declined to judicially prescribe procedures for its imposition in *Boyd v Commonwealth*. There, the defendant was convicted of two "intentional multiple murders," which was a capital offense carrying a mandatory death penalty. *Boyd v Commonwealth*, 550 SW2d 507, 508 (1977). The court noted that this verdict depended on proof of the lesser included offenses of two "intentional simple murders," class A felonies. *Id.* The court then sentenced the defendant to the top penalty under the lesser included offenses. *Id*.

In the absence of a legislative remedy, Michigan can and must impose the life or any term of years sentence of the lesser offense, MCL 750.317, for a first degree murder conviction.[22]

3. Michigan Courts have the authority to sentence youth convicted of first degree murder to "life or any term of years."

The power to order resentencing under a lesser included offense is well established in Michigan through caselaw adopting the less serious conviction when there is a defect in the lead charge. This Court has noted the broad authority of appellate courts to use this power, and Michigan courts have used the power in a variety of contexts. The limit to this power – that a factfinder must have found the elements of the lesser offense to have been proven beyond a reasonable doubt – does not preclude its use in this context.

In *People v Williams*, this Court considered a defendant who committed a larceny and a concurrent, single homicide who was charged with and convicted of first degree premeditated

[22] In the *Miller* life without parole context, the Colorado Court of Appeals imposed a similar remedy of the most serious statutorily authorized penalty that was constitutionally permissible, life with the possibility of parole after forty years. *People v Banks*, 2012 WL 4459101, __ P3d __ (Colo.App.), paras. 127-129 (Appendix 494A). The Supreme Court of Colorado is reviewing this question. *Banks v People*, 2013 WL 3168752 (Colo. Jun 24, 2013).

murder, first degree felony murder, and the larceny as the felony underlying the felony murder charge. *People v Williams*, 475 Mich 101, 103 (2006). The Court noted that such a result had potential double-jeopardy implications, and that the current practice was for such a defendant to receive one conviction of first degree murder, supported by two theories, and the conviction of the predicate felony underlying the felony murder to be vacated. *Id*. citing *People v Wilder*, 411 Mich 328 (1981); *People v Bigelow*, 229 Mich App 218 (1998). Still, prosecutors worried that if the "defendant's conviction of murder is overturned *for some reason* unrelated to his conviction of larceny," the defendant might go free and his larceny would go unpunished despite the fact that he had unquestionably committed the larceny. *Id*. (emphasis added). This Court affirmed the practice of vacating the underlying felony, and leaving the defendant with one murder conviction supported by two theories. *Id*. The Court reasoned there was no danger of the larceny going unpunished because "if defendant's murder conviction is reversed on grounds only affecting the murder element, entry of a judgment of conviction of larceny may be directed by the appellate court." *Id*. at 104-105. There, even where the prosecutor had not advanced any particular reason the murder conviction could be vacated, the worry that the larceny would go unpunished was unfounded because the appellate courts would have the broad power to order entry of a judgment of larceny *in any event*.

Indeed, Michigan courts have used this power with regularity when the sentence from the greater offense may not constitutionally be imposed for any of a number of reasons. In *People v Randolph* this Court applied the remedy in a context particular to the law of robbery. There, the conviction for unarmed robbery could not be sustained nor its sentence imposed because the force defendant exerted was not contemporaneous with the larceny. *People v Randolph*, 466 Mich 532, 552 (2002) (abrogated on other grounds by legislative action). Consequently, the

appropriate remedy was entry of judgment of larceny in a building as "the jury's decision necessarily included a finding that defendant committed every element of the crime of larceny in a building." *Id*. at 552, n. 5.

In *People v Hutcherson* this Court applied the remedy when the jury was not instructed correctly on the greater offense. The Court held the conviction of first degree murder could not be sustained nor its sentence imposed because the jury instructions "failed to provide the jury with any understandable explanation of the premeditation element of first degree murder." *People v Hutcherson*, 415 Mich 854 (1982). However, because the instructions sufficiently explained the element of second degree murder, the court ordered entry of judgment on this lesser included offense.

4. The *Carp / Eliason* remedy of a hearing to select either life with or without parole violates the foundational principles of severance of an unconstitutional statute and separation of powers.

First through *dicta* in *People v Carp*, and then through the majority opinion in this case, our Court of Appeals imposed a remedy to an unconstitutional mandatory life without parole sentence for a youth, whereby after a hearing, the trial court would impose either life with or without parole. *Eliason*, 300 Mich App at 310; *Carp*, 298 Mich App at 527. While the prosecution may argue that a theoretical hearing with a sentencing judge deciding between parolable life and life without parole could satisfy *Miller*, that possibility cannot be imposed as a remedy in Michigan. There simply is no statutory framework for such a hearing in Michigan. Such a hearing cannot be created by severing or deleting text from the statutory framework, so writing text *into* the statutory framework would be required. However, this would amount to legislating, and would violate Michigan's separation of powers.

(a) The Carp/Eliason remedy violates fundamental separation of power principles.

To be sure, there are hypothetical penalties and procedures besides sentencing under MCL 750.317 which would fall above the constitutional floor set by *Miller*. However, there is not currently a statutory authority for some other kind of sentencing scheme, and the *Carp/Eliason* remedy, or any other sentencing scheme crafted from whole cloth, is beyond the authority of the judiciary.

The Michigan Constitution divides the powers of government into three separate and coequal branches. Const 1963, art III, § 2. The power to enact statutes is vested in the Legislature. Const 1963, art IV, § 1. The Constitution specifically states that "No person exercising powers of one branch shall exercise powers properly belonging to another branch . . ." Const 1963, art III, § 2. The judiciary may sever unconstitutional language from a statute. MCL 8.5; *In re Request for Advisory Opinion*, 490 Mich at 347. But writing language *into* a statute is beyond the judiciary's authority. Michigan courts have often repeated the mantra that courts may not write language into a statute. *See Joseph v A.C.I.A.*¸ 491 Mich 200, 214 (2011) ("Indeed, *Regents* impermissibly interpreted the phrase 'bring the action' in MCL 600.5851(1) as conferring on a claimant the right to 'bring the action and recover an unlimited amount of damages,' an interpretation which cannot be extracted from the plain and unambiguous statutory text."); *Robinson v City of Lansing*, 486 Mich 1, 15 (2010) ("[I]t is well established that we may not read into the statute what is not within the Legislature's intent as derived from the language of the statute.") (internal quotation omitted); *Am Fedn of State, Co & Muni Employees v City of Detroit*, 468 Mich 388, 400 (2003) ("Additionally, we may not read into the statute what is not within the Legislature's intent as derived from the language of the statute."); *Omne Fin, Inc v*

Shacks, Inc, 460 Mich 305, 311 (1999) ("Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself.").

However, writing language into a statute is exactly what the remedy imposed by *Carp/Eliason* does. MCL 750.316 provides "A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life." MCL 791.234(6) provides "A prisoner sentenced to imprisonment for life for any of the following is not eligible for parole . . . (a) First degree murder in violation of section 316 of the Michigan penal code." Nothing in this statutory language can conceivably be interpreted to provide for hearings as described in *Carp/Eliason*. The dissent in *Eliason* made exactly this point:

> Furthermore, while professing fidelity to legislative sentencing judgments, the majority (and *Carp*) fail to identify any statutory provision permitting a trial court to sentence a defendant convicted of first-degree murder to life imprisonment with the possibility of parole. Our Legislature has defined only one sentence for first-degree murder, and that sentence simply does not contemplate life with parole. [*Eliason*, 300 Mich App at 333 (J. Gleicher, dissent).]

Rather, the procedures discussed in *Carp/Eliason* and the enumerated factors have all been effectively created from whole cloth and written *into* the statute.[23] Despite statements to

[23] *See also Brief Amicus Curiae of the Wayne County Prosecuting Attorney* at 14-15 ("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:*
(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 amid menial and emotional development of a youthful defendant,
(d) the family and home environment,
(e) the circumstances of the homicide offense, including the extent of his participation in tile conduct and the way familial and peer pressures may have affected [the juvenile],
(j) whether the juvenile might have been charged am-id 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 contrary from the *Carp* and *Eliason* panels, this remedy exceeded the authority of the Judiciary and into that of the Legislature.

(b) The process of severance of an unconstitutional statute prohibits the Carp/Eliason remedy.

Neither the remedy applied in *Carp/Eliason* nor any other construction or severance of the statutory scheme that allows life without parole for youth can save it. Courts may sever unconstitutional language from a statute under MCL 8.5.[24] The process of severance, where courts strike unconstitutional language from a statute and leave constitutional language intact, is well known to Michigan courts as described by Justice Cooley:

> In any such case the portion which conflicted with the constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. . . . A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in form of law, may contain other useful and salutory provisions, not obnoxious to any just constitutional exception. . . . The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. [Cooley, Constitutional Limitations (8th Ed.) vol. 1, pp. 359-363].

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*.").

[24] "In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
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 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." [MCL 8.5]

It is well settled 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." *Eastwood Park Amusement Co v East Detroit Mayor*, 325 Mich 60, 72 (1949). Courts sever language when "what remains is complete in and of itself, logical in its formulation and organization, and clearly in furtherance of the Legislature's stated goal . . . ." *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 347 (2011). When severing language from a statute courts must always consider "whether the remainder of the act is otherwise complete in itself and capable of being carried out without reference to the unconstitutional section," and whether "the unconstitutional portions are so entangled with the others that they cannot be removed without adversely affecting the operation of the act." *Blank v Dept of Corr*, 462 Mich 103, 123 (2000) (internal quotation omitted). No portion of the life without parole scheme for youth can be deleted without impacting Michigan's broader sentencing scheme, or leaving the juvenile sentencing scheme in shambles.

No part of MCL 769.1 can be severed

MCL 769.1 enumerates the crimes for which courts must sentence juvenile offenders in the same manner as adults. Among them is first degree murder. MCL 769.1(1)(g). If MCL 769.1(1)(g) were severed, juveniles convicted of first degree murder would be subject to MCL 769.1(3). Under this provision, a judge determines at sentencing whether an offender will be sentenced as a juvenile or as an adult. This approach fails for two reasons.

First, the sentencing scheme which would result from severing MCL 769.1(1)(g) would in no way be "complete in and of itself, logical in its formulation and organization, and clearly in furtherance of the Legislature's stated goal." *In re Request for Advisory Opinion*, 490 Mich at 347. While youth convicted of first degree murder would no longer be subject to automatic adult

sentencing, youth convicted of second degree murder, armed robbery, and nine other violations would be. MCL 769.1(a – f); MCL 769.1(h – l). A scheme where juveniles convicted of first degree murder must be evaluated for sentencing as juveniles, and where according *Miller* the adult sentence of life without parole would be "uncommon," but where juveniles convicted of second degree murder and armed robbery are automatically sentenced as adults is not "logical in its formulation and organization."

Second, such proceedings would not satisfy *Miller*. Under MCL 769.1(3), a judge determines at sentencing whether an offender will be sentenced as a juvenile or as an adult depending on "the best interests of the public." The judge considers six statutory factors in this decision.[25] But *Miller* requires the decision to sentence a juvenile to life without parole to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S Ct at 2469. Additionally, *Miller* provides its own list of factors for consideration which do not comport with MCL 769.1(3). Although *Miller* did not speak to whether "public interest" considerations found in MCL 769.1(3) such as "adequacy of the punishment or programming available in the juvenile justice system," and "dispositional options available for the juvenile," could counterbalance factors it did enumerate, that proposition is dubious at best. Consider if they could. In that case, as programming

[25] "(a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.
(b) The juvenile's culpability in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.
(c) The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.
(d) The juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming.
(e) The adequacy of the punishment or programming available in the juvenile justice system.
(f) The dispositional options available for the juvenile." [MCL 769.1(3)].

available to juvenile prisoners decreased, the Eighth Amendment protection of *Miller* would decrease along with it. The proposition that a juvenile's Eighth Amendment rights shrink along with state funding of correctional facilities seems doubtful.

Even if such a hearing considered the appropriate factors, the disparity between the possible outcomes of life without parole or treatment as a juvenile, could run afoul of *Miller*. The Court cautioned against forcing judges into "a choice between extremes: light punishment as a child or standard sentencing as an adult (here, life without parole)." *Id*. at 2474. Because hearings under the factors enumerated in MCL 769.1(3) do not satisfy *Miller*, severance which results in only these hearings standing between defendants and life without parole does not render the scheme constitutional.

No part of MCL 750.316 can be severed.

The first degree murder statute is straightforward enough. It provides that a person who commits murder in any of an enumerated ways is "guilty of first degree murder and shall be punished by imprisonment for life." MCL 750.316(1). The remainder of the statute enumerates the circumstances which constitute first degree murder, MCL 750.316(1)(a – c), and defines terms used in the statute, MCL 750.316(2)(a – d).

Severing any of the enumerated circumstances which constitute first degree murder would obviously leave other circumstances which could subject juveniles to mandatory life imprisonment without parole. Severing any of the definitions would only serve to make the statute unclear. The only part left to try and sever is the penalty of imprisonment for life itself, leaving the offense without a penalty. Felonies with no prescribed penalty are punishable by "imprisonment for not more than 4 years or a fine of not more than $5,000.00, or both." MCL

750.503. This result would obviously be contrary to the intent of the Legislature to severely punish first degree murder.

No part of MCL 791.234 can be severed.

MCL 791.234 controls many aspects of parole operation. Among its provisions is MCL 791.234(6)'s list of violations for which a violator is ineligible for parole. MCL 791.234(6)(a) lists "First degree murder in violation of section 316 of the Michigan penal code" among them. MCL 791.234(6)(a)'s operation together with MCL 750.316 creates the penalty of life without parole for first degree murder in Michigan. In *People v Bullock*, 440 Mich 15 (1991), the remedy for a cruel and unusual punishment of life without parole for possession of more than 650 grams of a mixture containing cocaine was to sever the applicable portion of this statute. However, applying this remedy to sever MCL 791.234(6)(a) would strike life without parole for adult as well as youthful offenders, and would leave other crimes punished more harshly than first degree murder.

Severing MCL 791.234(6)(a) would result in parole eligibility for those sentenced to life without parole for murders committed before they turned 18 years of age. But, because all offenders sentenced under MCL 750.316 are rendered parole ineligible by MCL 791.234(6)(a), severing this provision would render parole eligible not just those who committed crimes before turning 18, but all others sentenced under MCL 750.316 as well. This remedy is clearly overbroad as *Miller* has not called into question the constitutionality of life without parole sentences for those convicted of committing first degree murder as an adult.

Further, merely severing MCL 791.234(6)(a) would leave the sentence of life without parole in effect for the other violations enumerated in MCL 791.234(6).[26] Some of these additional crimes require intent to kill, and MCL 750.520b does not even require that a death result from the crime. While all of these additional crimes are undoubtedly heinous, the judgments of our Legislature and the United States Supreme Court via its sentencing decisions have been that first degree murder carries equal or greater culpability than other offenses. *See Kennedy v Louisiana*, 554 US 407, 437 *opinion mod on denial of reh* (2008) (holding the death penalty unconstitutional for the rape of a child where the crime did not result, and was not intended to result, in death of the victim); *Coker v Georgia*, 433 US 584, 597 (1977) ("*Short of homicide*, [rape] is the ultimate violation of self.") (emphasis added). Removing the sentence of life without parole for first degree murder, but leaving it in place for the other crimes, does not result in a scheme "logical in its formulation and organization." *In re Request for Advisory Opinion*, 490 Mich at 347.

5. Both the *Carp/Eliason* remedy of life with or without parole and a mandatory life with parole remedy violate the *Miller* requirement of individualized sentencing.

Given the realities of how paroleable life is administered in Michigan, neither the life with or without parole remedy of *Carp/Eliason* nor the mandatory life with parole remedy imposed in other circumstances by *Bullock*, 440 Mich at 42-43, and suggested by the Wayne

[26] Adulteration of a drug with the intent to kill or cause serious impairment of a body function to 2 or more individuals which results in death, MCL 750.16(5); Mixing, coloring or staining a drug or medicine with the intent to kill or cause serious impairment of a body function to 2 or more individuals which results in death, MCL 750.18(7); Chapter XXXIII of the Michigan Penal Code dealing with explosives, bombs, and harmful devices; offering for sale, possess for sale, or manufacture for sale a drug or device bearing or accompanied by a label that is misleading as to the contents, uses, or purposes of the drug or device with the intent to kill or cause serious impairment of a body function to 2 or more individuals which results in death, MCL 333.17764; Criminal sexual conduct in the first degree committed by an individual 17 or older against a victim 13 or younger under certain circumstances, MCL 750.520b.

County Prosecuting Attorney[27] would satisfy *Miller*. Parolable life in Michigan is a fiction. *See infra*. Consequently, a choice between life without parole and Michigan's version of parolable life amounts to a choice between life without parole and its functional equivalent. This does not satisfy *Miller's* requirement of individualized sentencing.

Other jurisdictions have recognized that there is no constitutional difference between a sentence titled "life without parole" and a functional equivalent. Some jurisdictions have imposed prison terms beyond or approaching a child's life expectancy, others have theoretical possibilities for release which fail to amount to a "meaningful opportunity for release" as specified in *Graham*. Either way, the result is the same – *Miller's* protections are triggered.

In several states, courts have found lengthy term of years sentences to be the functional equivalent to life without parole. In *People v Caballero* the juvenile defendant was convicted of several non-homicide offenses in connection with a gang shooting and sentenced to consecutive terms which amounted to a total term of 110 years to life. *People v Caballero*, 55 Cal 4th 262, 265 (2012). Because the defendant was convicted of non-homicide offenses, a sentence of life without parole would have violated *Graham's* categorical ban on such sentences for juvenile non-homicide offenders. *Graham*, 130 S.Ct. at 2030. The California Supreme Court recognized that, although not technically a sentence of life without parole, a minimum term of 110 years is quite obviously the functional equivalent of life without parole saying "he would have no opportunity to 'demonstrate growth and maturity' to try to secure his release, in contravention of

[27] *Brief Amicus Curiae of the Wayne County Prosecuting Attorney*

Graham's dictate," and ordered resentencing. *Caballero*, 55 Cal 4th at 268. Courts in other states are similarly recognizing that lengthy sentences amount to life without parole.[28]

In Iowa, courts have recognized that a theoretical opportunity for release does not save a sentence from being the functional equivalent of life without parole. After *Miller* was decided, Iowa's Governor commuted the sentences of 38 prisoners who received mandatory life without parole as children to life with no possibility of parole for 60 years with no credit for earned time. *State v Ragland*, 836 NW2d 107, 110-111 (2013). The amended sentences were challenged on the ground that the Governor's commutation failed to follow *Miller's* mandate for individualized sentencing. *Id*. at 112. The Iowa Supreme Court held the sentence was the functional equivalent of life without parole notwithstanding the hypothetical opportunity for release, and that its blanket imposition violated *Miller's* requirement of individualized sentencing. *Id*. at 122-123. *See also Jackson v Norris*, 2013 Ark 175 (2013) (rejecting a remedy of severing "without parole" language and imposing mandatory parolable life as not allowing for consideration of *Miller* evidence.). Other courts are reaching similar conclusions that, notwithstanding a hypothetical possibility of release, other sentences amount to the functional equivalent of life without parole.[29]

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[28] *See State v Null* 836 NW2d 41 (2013) (minimum term of 52.5 years functional equivalent to life without parole); *State v Riley*, 140 Conn App 1 (2013) (minimum term of 100 years functional equivalent to life without parole); *Floyd v State*, 87 So 3d 45 (Fla Dist Ct App 2012) ("common sense dictates that Appellant's eighty-year sentence, which, according to the statistics cited by Appellant, is longer than his life expectancy, is the functional equivalent of a life without parole sentence and will not provide him with a meaningful or realistic opportunity to obtain release."); *United States v. Mathurin* order of the United States District Court for the Southern District of Florida, issued June 29, 2011 (Docket No. 09-21075-Cr) (minimum term of 307 years functional equivalent to life without parole).

[29] *See Parker v State*, 119 So 3d 987, 997 (2013) (conditional release at 65 amounts to functional equivalent of life without parole); *Bear Cloud v State*, 294 P 3d 36, 45 (Wyo 2013) (life sentence that provides an opportunity for parole only upon commutation of the sentence to a term of years by the governor is functional equivalent of life without parole).

Parolable life in Michigan triggers *Miller's* protections both because of the Parole Board's "life means life" policy and because of unchecked judicial vetoes. The Michigan Parole Board has been candid about its current and longstanding policy not to consider parole for prisoners with parolable life terms pursuant to its "life means life" policy. As the Sixth Circuit observed, the chairman of the Parole Board testified in 1999 that "a life sentence means just that-life in prison," and a spokesman publicly reiterated that policy in 2001. *Alexander v Birkett*, 228 Fed. Appx. 534, 535 (CA 6 2007). More recently, the Sixth Circuit observed that the percentage of prisoners with parolable life terms who were released was only 0.15% on average. *Foster-Bey v Booker*, 595 F.3d 353, 366 (CA 6 2010).[30]

Setting aside the Parole Board's refusal to equitably consider parole for those sentenced to life terms, even if parole from a life sentence could be obtained it would be subject to an unreviewable judicial veto from the sentencing judge or his successor. MCL 791.234 (8)(c) ("[P]arole shall not be granted if the sentencing judge, or the judge's successor in office, files written objections to the granting of the parole within 30 days of receipt of the notice of hearing"). No standards are provided to guide sentencing judges in wielding this judicial veto, nor is the decision subject to appeal. This means that each prisoner hoping for parole from a life

[30] *Foster-Bey v. Rubitschun*, No. 05-71318, 2007 WL 7705668 (ED Mich. October 23, 2007) ("The testimony shows that the new Board's approach to nonmandatory lifers indeed became 'life means life.'"), *rev'd and remanded sub nom. Foster v Booker*, 595 F 3d 353 (2010); *People v Dowtin-El*, 481 Mich 909 (Kelly, J., dissenting) ("would grant leave to appeal to consider whether the Parole Board's policy of 'life means life' improperly converted the defendant's sentence into a nonparolable life term"); *People v Hill*, 267 Mich App 345, 352 (2005) ("Further, it appears to have been well-known that most lifers were never granted parole [as early as 1976]."); *People v Bazzetta*, unpublished opinion per curiam of the Court of Appeals issued January 3, 2003 (Docket No. 237756) (quoting the trial court saying "[T]o [the parole board], life means life and that there is nothing to talk about. And that is not what I understood at the time I sentenced . . .).

sentence must not only beat seemingly insurmountable odds of clearing the Parole Board's "life-means-life" policy, he must *also* get what amounts to clemency from the sentencing judge who has unlimited and unreviewable discretion to deny parole. The Court of Appeals in *Carp* even acknowledged the problems with the parolable life process. 298 Mich App at 533-535.

As the dissent in *Eliason* observed:

> In *Carp*, this Court acknowledged that a parolable life sentence likely results in lifetime imprisonment. This reality compels the conclusion that a sentence of life with parole is just as final as one that denies the possibility of parole at the outset. Although *Carp* urges that the Parole Board provide a meaningful determination and review when parole eligibility arises, *Miller* instructs that removing youth from the balance *at the time of sentencing* contravenes the Eighth Amendment by prohibiting a judge from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. [*Eliason*, 300 Mich App at 333 (J. Gleicher, dissent) (quotations omitted).]

This Court should recognize, as other jurisdictions have, that a sentence which is the functional equivalent of life without parole does not satisfy *Miller*. Consequently, mandatory imposition of ostensibly parolable life, either as an alternative to life without parole as dictated by *Carp/Eliason*, or mandatory life with parole as suggested by the Wayne County Prosecutor's Office does not satisfy *Miller*.

B. At Dakotah's new sentencing hearing, life without parole should be prohibited and a different judge should impose the sentence.

1. A sentence of life without parole is unconstitutional as applied to fourteen year-old Dakotah.

As presented in Issue II, this Court should categorically ban a sentence of life without parole for fourteen year-old Dakotah. However, even if life without parole is permitted as an "uncommon" sentence it should not apply to Dakotah. *Miller*, 132 S Ct at 2469.

Several of the mitigating factors of youth that must be considered per *Miller*, 132 S Ct at 2468 are directly implicated by Dakotah's offense. First, his chronological age of fourteen is

certainly at the extreme margin for a first degree murder sentencing, both nationally and in Michigan. *Issue II, supra*.

Second, the testimony at the evidentiary hearing on remand established Dakotah's failure to appreciate the risks and consequences and properly understand his actions. Dr. James Henry, a Professor from the School of Social Work and Director of the Children's Trauma Assessment Center at Western Michigan University detailed a series of traumatic events in Dakotah's life prior to the shooting – (1) the abandonment of his mother, both in infancy and in the year before the shooting; (2) the death of his dog; (3) the suicide of his best friend; (4) the death of his cousin in an accident; and (5) the loss of his father's job forcing a move into Dakotah's safe haven, his grandparent's house[31]. These events accounted for a process of dissociation whereby Dakotah was completely separated from both himself and the outside world. Dr. Henry diagnosed Dakotah with dissociation and Post-Traumatic-Stress Disorder. For Dr. Henry, loss was the dominant organizer in Dakotah's life. The result was an appearance of inhumanity and aloofness after the shooting, when he was instead disconnected from events due to trauma[32]. (321a-337a, 347a-355a, 462a).

Third, the testimony at the evidentiary hearing described the trauma to Dakotah from the events in his family and home environment at the time of the offense. The abandonment of his

[31] Dakotah had other psychological evaluations prior to trial, but as Dr. Henry observed, they were limited to criminal responsibility and an analysis of potential child abuse. They did not examine Dakotah through a child trauma lens. (387a-388a, 479a-480a).

[32] The prosecution made much at both trial and sentencing of Dakotah's supposed lack of remorse. The trial judge also made this observation at sentencing. However, as explained at length during the evidentiary hearing on remand by Dr. Henry, a series of traumatic events created the depersonalization and derealization that appeared to police officers, Steve Eliason, and the jurors to be a lack of remorse. (335a-350a). Children may often fail to grasp the concept of death or utilize defense mechanisms like denial, evasiveness, or stoicism that can affect outward expressions. *See* Martha Grace Duncan, *"So Young and So Untender": Remorseless Children and the Expectations of the Law*, 102 Colum. L. Rev. 1469, 1478-79 (2002).

mother, suicide of his friend, death of a cousin, and impending move to his grandparent's house, his safe haven, all pointed to Dakotah's unusually stressful family and home environment.

Finally, as described at length in Issue II, although it is impossible to predict with certainty, a youth such as Dakotah has a strong possibility of rehabilitation.

Dakotah is not the "rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 132 S Ct at 2469 (quotations omitted). At his resentencing hearing, this Court should prohibit the imposition of life without parole.

2. A different judge should resentence Dakotah.

Three factors should determine whether the new sentencing hearing should be before a different judge: "(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *People v Evans*, 156 Mich App 68, 71-72 (1986) (internal citations omitted).

The conclusions of Judge Schofield regarding the necessity for a life without parole sentence for fourteen year-old Dakotah demonstrate that he would have substantial difficulty in putting aside his previous views and findings despite the Supreme Court decision in *Miller*.

In particular, the court noted that "[o]ther than his juvenile status there's really nothing about Mr. Eliason that makes him less culpable than any other person who has murdered another human being in cold blood." (273a). This viewpoint belies the entire underlying thesis of *Miller*, that children *are* different than adults, and need to be sentenced accordingly for first degree murder.

In describing the goals of sentencing, the trial court seemed to signal that for the crime of premeditated murder, only a life without parole sentence is ever appropriate, regardless of the offender's age:

> Incapacitation is also a legitimate goal of a juvenile life without parole sentence. The state has an obligation to protect its citizens. And perhaps that's the most fundamental and important obligation that a government owes its citizens. When a juvenile commits premeditated murder, making the decision to take another persons life after engaging in reflection about the plusses and minuses of a killing, the State can legitimately seek to incapacitate the juvenile and to separate him from society for society's own protection.
>
> In addition to deterrence and incapacitation, retribution, punishment are also appropriate sentencing goals.
>
> The justice system has to have the confidence of the people whom it serves. If the people whom the justice system serves begin to believe that the system is not adequately punishing those who violate the covenant which form the foundation of our civilized society, the conveyance that allows us to peacefully co-exist, then the justice system will be unable to do its job. Chaos and anarchy will ensue because people will take the law into their own hands. That's how we get vigilantes. People have to believe, the people whom the justice system serves have to believe that the punishment fits the crime. And so the State can legitimately seek to require an offender to spend life in prison when that offender has taken a life, even if the offender was only 14 years old at the time he took that life. (272a).

Indeed, the trial court concluded that a life without parole sentence is "particularly appropriate" for Dakotah. (275a). The trial court's sincere statements regarding life without parole sentences for youthful offenders, many now repudiated by *Miller*, demonstrate a "substantial difficulty" in resentencing Dakotah without these views and findings infecting the hearing. Under these circumstances reassignment to a different judge is necessary for the appearance of justice. As the relief is for resentencing, rather than a new trial, there would not be any risk of disproportionate waste or duplication. A different judge should conduct Dakotah's resentencing hearing.

SUMMARY AND RELIEF

Appellant requests this Honorable Court:

(1) Hold that Michigan's sentencing scheme violates both the United States Constitution under *Miller v Alabama*, and the "cruel or unusual punishment" clause of the Michigan Constitution.

(2) Categorically ban the sentence of life without parole for youthful offenders under the Michigan Constitution, at a minimum with respect to a fourteen year-old child.

(3) Impose the remedy of an individualized sentence to life or any term of years.

(4) Find any life without parole sentence impermissible as applied to fourteen year-old Dakotah Eliason and order his resentencing in front of a different judge.

Respectfully submitted,

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