Michigan Law
University of Michigan Law School

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Testimony of Professor Kimberly Thomas,
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Dear Members of the Senate Judiciary and House Criminal Justice Committees:

I am Kimberly Thomas, a professor at the University of Michigan Law School and co-director of the school's Juvenile Justice Clinic. I will focus my testimony today on 1) giving you a brief overview and history of the Michigan laws that result in mandatory life without parole for juveniles, and 2) placing Michigan within the context of the national trends on juvenile life without parole.

By now, you know that neuroscientists, psychologists, and parents see distinct behaviors in adolescents, especially regarding youths' increased likelihood of engaging in risky behavior, their inability to foresee and appreciate the consequences of their actions, and their susceptibility to the influences of others. These differences are biologically-based and, research shows that, even for youth who commit crimes during their teens, nearly all of these adolescents mature into law-abiding adults.

These differences in adolescent behavior are the basis for a range of laws, such as restrictions on when youth can be emancipated from their parents, drinking of alcohol, and the establishment and use a separate of the juvenile court system for nearly all adolescents.

These differences have also influenced the U.S. Supreme Court's understanding of adolescent crime and potential for rehabilitation; most recently in the Court's decision in *Miller v. Alabama* in June 2012, which held that juveniles could not be mandatorily sentenced to life without parole. To reach this holding, the Court looked at two prior strands of caselaw – first, the Court examined categorical bans on sentencing practices, based on a mismatch between the culpability of a class of offenders and the severity of the penalty. Second was the Court's ban on the mandatory imposition of the most severe punishment and insistence that the sentencing authority consider the characteristics of the defendant and the details of the offense before imposing sentence. Instead, the Court required an individualized determination that examined mitigating information regarding the youth's chronological age and its features such as "immaturity, impetuosity, and failure to appreciate risks and consequences," as well as family and home environment, the circumstances of the offense, and the possibility that the youth would have been charged and convicted of a lesser crime if not for the "incompetencies associated with youth."

We are here today because Michigan's current legislative scheme violates the Court's decision in *Miller v. Alabama* and, as currently written, imposes an unconstitutional sentence on offenders under 18.

I. Michigan's "perfect storm" of laws that create mandatory life without parole for juveniles.

There is no one law that creates mandatory life without parole for juveniles in Michigan. In fact, there are a series of laws, in completely different sections of the Michigan Compiled Laws, passed at different points in time by, given term limits, completely different elected officials, that combine to create a sentence of mandatory life without parole. I will first address how juveniles 16 and under are sentenced to life without parole, then address the treatment of 17 year olds under Michigan law.

A. Mandatory life without parole for first-degree murder for adults: Two laws combine to result in mandatory life without parole for adults.

1) Michigan's first-degree murder law includes both willful or premeditated murder and "felony murder," a killing that occurs during the perpetration of a felony. Mich. Comp. Laws 750.316. This law defines the punishment for first-degree murder as "life." To be convicted of felony murder, the person need not have intended that a life be taken – the law requires that the person create a high risk of harm and be perceived to have an understanding that death or great harm would likely result.

If an individual "aids and abets," – in other words, where the juvenile is not the person who commits the killing, but was a lookout, getaway driver, or other assistant in the crime – he or she is, by law, equally culpable to the actual perpetrator.

2). A second law, contained within the Code's parole provisions, provides that the state Parole Board does not have jurisdiction over individuals sentenced to life on first-degree murder convictions. MCL 791.234(6)(a).

B. Separate and apart from the criminal charging, sentencing, and parole provisions, how juveniles are charged in adult court has changed over time, so that by the mid to late 1990s, juveniles changed with first-degree murder were automatically tried in adult court and were automatically given the same mandatory life without parole sentence as adults.

Individuals who are 16 and under who are alleged to have committed a crime are normally under the jurisdiction of the juvenile court system.

However, in Michigan, 14, 15 and 16 year olds charged with these offenses are automatically charged in adult court. Mich. Comp. Laws 764.1f. (juvenile code).

Additionally, once convicted, they are automatically sentenced to mandatory life without parole, the same as adult defendants. Mich. Comp. Laws 769.1(1).

There is no opportunity for a judge to review whether charging in juvenile court is in the best interest of the public and there is no ability to distinguish between, as the U.S. Supreme Court has put it, the vast majority of juvenile offenders and the "rare" offender for whom life without parole is justified.

This was not always the case.

Before 1988, Michigan had a system in place where prosecutors could request that certain juveniles be waived into adult court. The juvenile court judge would then have a hearing, at which the judge

would consider facts about both the offense and the offender and would decide that prosecution in adult court was in the best interest of the juvenile and the public.

From 1988 – 1996, the law eliminated judicial hearings and 15 and 16 year olds charged with first-degree murder could automatically be charged in adult court. No hearings on whether prosecution in adult court was appropriate and no criteria, beyond age and charged offense, for evaluating which cases should go to adult court.

If a 15 or 16 year old was found guilty of first-degree murder, the court was still required to hold a sentencing hearing to determine if the individual should be sentenced as a juvenile or an adult. This was a limited choice, however, because if sentenced as a juvenile, the juvenile court's authority of the offender ends at, at most, 21 years old.

After 1996, the legislature reduced the age to 14 at which juveniles could be directly prosecuted in adult court.

More significantly, the law was also changed to require that juveniles be sentenced to the exact same sentence as an adult. This eliminated the limited option to sentence to adult or juvenile court for cases in which the individual was charged in adult court.

C. Mandatory life without parole for 17 year-old juveniles

In Michigan, 17 year olds are not subject to the jurisdiction of the juvenile court. Instead, Michigan, unlike the vast majority of states, treats all 17 year olds as adults under the law. At the end of 2012, 39 states gave juvenile court original jurisdiction over 17 year olds. If anything, there is a trend nationally toward increasing the jurisdiction of the juvenile court to older youth. The U.S. Supreme Court, in *Miller* as well as its other recent cases, has drawn a clear line at 18 years old.

Michigan summary

Michigan has approximately 360 individuals serving life without parole for an offense committed while a juvenile. This is the second highest number in the country, after Pennsylvania, and is not accounted for by the number of youth in Michigan's population or youth arrest rate.

Instead, the large number of juveniles serving mandatory life without parole in Michigan has resulted from a series of laws, in different sections of the Code, passed at different times. These laws combine to result in youth, age 14 to 17 years old being charged directly in adult court and automatically sentenced as adults to mandatory life without parole; a combination that the U.S. Supreme Court forbids.

II. National perspective

There are a handful of states – including Michigan (Pennsylvania, Louisiana and Florida) – that have imposed particularly robust systems of mandatory life without parole for juveniles. These four states account for over half of the juveniles serving life without parole nationwide. There are approximately 2600 juveniles serving life without parole nationwide; these four states account for approximately 1400 of these individuals.

The U.S. Supreme Court also noted this disparity. The Court was troubled that a small proportion of the juveniles serving LWOP came from the jurisdictions which allowed judges and juries to distinguish between the majority of juvenile offenders and the most severe offenders, while the vast majority of juveniles serving LWOP came from jurisdictions which automatically imposed this penalty regardless of the circumstances of the offense or the offender. In other words, in jurisdictions that allow a nuanced, individualized sentencing decision, courts determine that many of these individuals do not merit the complete denial of an opportunity for release.

In creating a series of laws that resulted in the imposition of life without parole for some juveniles, Michigan was not alone. In the early 1990s, there was a national trend toward increased punishment for juveniles. In this timeframe, many other states in addition to Michigan adopted laws that, in one way or another, increased the penalty for juvenile offenders or subjected more juveniles to the jurisdiction of the adult court.

Twenty years later, the pendulum is swinging back from the extreme, based in part on the understanding of adolescents, and the likelihood that juveniles will stop engaging in criminal behavior, and in part on the recent U.S. Supreme Court decisions recognizing differences in culpability between juveniles and adults. Additionally, states have realized the financial cost of mandatory permanent incarceration.

These broader trends in juvenile sentencing include expanding juvenile court jurisdiction (to cover, for example, 17 year old offenders), changing transfer laws so that youth are more likely to be kept within the juvenile system, and changing sentencing laws to account for the differences between juvenile and adult culpability.

More specific to juvenile life without parole, states, before and after *Miller v. Alabama*, have eliminated juvenile life without parole entirely or have constrained the circumstances under which the sentence of life without parole can be given, as well as eliminating mandatory life without parole.

For example, a number of states, including jurisdictions that we do not think of as "soft on crime" – Texas, Wyoming, Colorado, have completely eliminated life without parole for juveniles. Other jurisdictions eliminated LWOP for some juvenile offenders and have rewritten their sentencing systems for other juvenile offenders; for example, legislation in Pennsylvania and North Carolina eliminated the possibility of LWOP for felony murder offenses.

California instituted a system in which juveniles sentenced to life without parole have an opportunity for meaningful review and sentence modification. Delaware, which was previously a mandatory JLWOP state, also recently implemented, for all youth serving life without parole, legislative changes to comply with *Miller*.

Conclusion

In sum, a series of unrelated laws combine to impose mandatory life without parole on juveniles in Michigan; an outcome that is unconstitutional under *Miller*. HB 4806 and related bills are necessary. These bills will remedy our sentencing system to provide that all juveniles sentenced under this unconstitutional system have an opportunity for an individualized hearing at which the fact-finder can hear mitigating evidence of the nature and circumstances of the youth, the role in the offense, the effect of peers, family, and other influences, and the other considerations laid out in *Miller* and impose a proportionate sentence.