Statement by David D. O'Brien to the
House Criminal Justice and Senate Judiciary Committees
in Support of House Bill No. 4806

August 27, 2013

Distinguished members of the House Criminal Justice and Senate Judiciary Committees, good morning. My name is David O'Brien, and I am an attorney at Miller, Canfield, Paddock and Stone, where I practice primarily in the field of criminal defense. I'm here today to speak in favor of House Bill No. 4806, which is before you for consideration.

In July of last year, I agreed to undertake on a pro bono basis one of the child lifer cases pending in Washtenaw County to pursue a new sentencing hearing following the United States Supreme Court's decision in *Miller*. My client, Bosie Smith, was convicted of first degree murder back in 1992 for the stabbing death of a man who lived in his neighborhood in Ypsilanti. Bosie was 16 years old at the time of the offense. He's now 37 and currently incarcerated at the Kinross Correctional Facility in the Upper Peninsula.

Like any criminal case, there were many facts in dispute at Bosie's trial. However, when the Michigan Court of Appeals heard his case on direct review seventeen years ago, it acknowledged that certain facts were undeniable:

> The decedent was older, bigger, and stronger than Bosie.
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> The decedent started the confrontation that led to the stabbing by hitting Bosie in the head with a milk crate.
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> The decedent had beaten Bosie down to his knees, pulled his jacket over his head, and was repeatedly hitting and kicking Bosie at the moment that Bosie stabbed him.

The judge who presided over Bosie's trial was the Honorable William F. Ager of the Washtenaw County Circuit Court. He sentenced Bosie to life without parole, as was required by Michigan statute before the Supreme Court's decision in *Miller*. But Judge Ager explicitly stated on the record at the time of sentencing that it was an "extremely difficult" case, and that he wished he had the option to sentence Bosie to a term of years instead. The legislation before you is going to provide the judiciary with the option that Judge Agers, and many other trial judges in his position, wished they had.

But with that background, I want the Committees to know that I'm not here today as an attorney. I'm not here today as a representative of the criminal defense bar. And I'm not here as an advocate for Bosie. I'm here for the same reason I agreed to volunteer my time to represent Bosie in the first place: because I'm a human being with a basic sense of what is right and what is wrong, and I want to ensure that our legal system is guided by principles that are fundamentally fair.

There has been a lot of debate around the scope of the *Miller* decision, what it does and doesn't say, and how it should be applied. Despite the controversy, I think there are at least three broad points that everyone who is familiar with the case can agree upon no matter what their position or perspective:

> First, that the Supreme Court ruled that mandatory life sentences without the possibility of parole for children are unconstitutional under the Eight Amendment;
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> Second, that the Miller Court held that children are different when it comes to sentencing because their youth can give rise to diminished culpability and provide for greater prospects of reform;
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> And third, that judges must have the opportunity to consider these mitigating factors and be given the flexibility to sentence children to something other than mandatory life without parole.

With that backdrop, I want to speak briefly about one of the issues that has occupied the focal point of the *Miller* debate: retroactivity. The controversy surrounding retroactivity essentially boils down to a single question: does the right to resentencing announced in *Miller* apply only to convictions that have not yet become final through the direct appeal process, or does it extend to all juveniles serving unconstitutional sentences, no matter when they were convicted?

House Bill No. 4806 provides for full retroactivity by taking the latter approach, and I would respectfully submit that is the only option that comports with any sense of justice. If a sentence is declared unconstitutional by the U.S. Supreme Court, it shouldn't matter when it was imposed. The practical reality is that the unjust punishment continues forward each day into the future that it remains in effect.

Regardless of whether the sentence is two days or two decades old, it is an ongoing violation which will endure until the day that the person serving it dies in prison. That is not justice. Anyone who is being punished in a cruel and unusual manner should have the opportunity for a judge to review that penalty and impose a punishment that is consistent with the U.S. Constitution. That is the basic meaning and promise of retroactivity.

Think about the concept of retroactivity in other areas of the law. The Thirteenth Amendment, which was adopted on December 6, 1865, declared that slavery was unconstitutional. Would it have been acceptable to apply that principle only prospectively? Would it have been ok to say that from that point forward, no one new could be enslaved, but all existing slaves had to remain in involuntary servitude for the rest of their lives? It's inconceivable.

Retroactivity is just as important in the context of remedying unconstitutional life sentences. As I indicated earlier, one of the key rationales underlying the *Miller* decision is that mandatory life without parole sentences are unconstitutional for children because they have the greatest prospect of reform. But reform does not happen overnight. It is often a slow and time consuming process. Of all the youthful offenders in the state prison system, it those defendants with the oldest convictions, those defendants who have been serving an unconstitutional sentence the

longest, who are most likely to have demonstrated the type of true personal transformation required to show that they are deserving of release.

I have seen this firsthand with Bosie. He has taken advantage of every opportunity made available to him in the prison system to enrich himself and others over the nearly 22 years that he has been incarcerated, whether it be obtaining his GED, working with abused dogs, or teaching his fellow inmates nonviolent methods of dispute resolution. The very guards who are responsible for protecting society from Bosie have written letters of support stating that he is no danger to anyone and would be a productive member of the community if released.

But Bosie's conviction is more than two decades old. His direct appeal ended long ago. Without retroactivity, it is Bosie and the other adolescent defendants like him – the people who exemplify the most basic premise of the *Miller* decision – that will be required to continue to serve unconstitutional sentences and spend the rest of their lives in prison.

It is my understanding that many involved in the debate over House Bill No. 4806 want to use the concept of full retroactivity as a bargaining tool to pass a piece of legislation that provides for high mandatory minimums for child offenders. There are a lot of different numbers that apparently have been advanced or considered as part of that compromise. I've heard terms of 60 to 80 years, 45 to 60, and 25 to 40. Here's the problem with all of them. In some cases, any of these ranges may very well be appropriate. But in other cases, they will not be. The entire premise of *Miller* is that child offenders are unique, and judges need the discretion to consider the circumstances of each individual youthful defendant in fashioning an appropriate punishment.

Trading off one mandatory sentence for another simply doesn't serve that goal. All it does is constrain the discretion of judges who deal with crime and punishment on a daily basis and have the most experience in sentencing. And keep in mind that the sentencing decision isn't going to be made in a vacuum. It will occur only after the conduct of a full evidentiary hearing in which both sides – the prosecution and victims included – will have the opportunity to present the aggravating and mitigating factors related to the crime and the child who committed it.

The bottom line is that a one-size-fits-all approach defies the principle of judicial discretion at the core of *Miller*. The judiciary must have the ability to tailor the punishment to the facts of each case. In fact, U.S. Attorney General Eric Holder just gave a speech to the American Bar Association's House of Delegates two weeks ago in which he described mandatory minimums for federal drug offenses as "draconian" and noted that they "breed disrespect" for the criminal justice system. They are no more attractive when it comes to sentencing children. Mandatory minimums should not be used as a negotiating point to pass a remedial piece of legislation that applies *Miller* retroactively.

I want to close my comments this morning with a quote from the Honorable John Corbett O'Meara. As many of you probably know, Judge O'Meara is the federal district court judge who sits in Ann Arbor and has served on the bench for nearly twenty years. When he was given the opportunity to express his view on the retroactivity of *Miller* in an opinion that he released in January of this year, he said the following: