STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

ROBERT TAYLOR,

Defendant-Appellant.
_____/

Supreme Court No. 154994

Court of Appeals No. 325834

Macomb CC No. 09-005243-FC

Brief of Criminal Defense Attorneys of Michigan as Amici Curiae

Oral Argument Requested

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Statement of Questions Presented

Should this Court find juvenile life without parole unconstitutional under Michigan's constitution, art. 1, § 16, as it has been a failed experiment resulting in disproportionate, racially disparate, and arbitrary sentences?

Court of Appeals answers, "No."

Robert Taylor answers, "Yes."

This Court should find juvenile life without parole unconstitutional under Michigan's constitution, art. 1, § 16, as it has been a failed experiment resulting in disproportionate, racially disparate, and arbitrary sentences.

Introduction.

Since the United States Supreme Court abolished mandatory life without parole for juveniles, Michigan has grappled with implementation of the Court's mandate that "…appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller v Alabama*, 567 US 460, 479 (2012). A review of sentences across the state reveal that MCL 769.25, 769.25a, *Miller,* and its progeny do not provide the guidance needed to ensure constitutional and proportionate sentences for all "juvenile lifers" in Michigan. The very nature of sentencing children to long sentences which will continue well into their adulthood will always be hampered by the readily and frequently acknowledged fact that there is no crystal ball with which to predict whether a child is that rare individual who is permanently incorrigible. This Court should take to heart the Supreme Court's invitation to the states[1] in *Jones v Mississippi,* 141 S Ct 1307 (2021)*,* and prohibit juvenile life without parole as cruel or unusual punishment under the Michigan Constitution, art. 1, § 16.

[1] "Importantly, like *Miller* and *Montgomery*, our holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder. States may categorically prohibit life without parole for all offenders under 18." *Jones v Mississippi*, 141 S Ct 1307, 1323 (2021).

Argument.

The Michigan Constitution, art. 1, § 16, includes the principle of proportionality and affords more protection than the Eighth Amendment. *People v Bullock,* 440 Mich 15 (1992). While a punishment that is cruel but not unusual is permitted under the federal constitution, *Harmelin v Michigan,* 501 US 957, 994-995 (1991), it is forbidden by Michigan's prohibition of cruel *or* unusual punishment. *Bullock,* 440 Mich at 30.

Michigan's proportionality test evaluates four factors: (1) the severity of the sentence imposed compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed on other offenders in the same jurisdiction, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the penological goal of rehabilitation. *Id.* at 33-34 (citation omitted). Life without parole sentences for child fail the test necessary for them to be deemed proportionate under the Michigan Constitution. Mr. Taylor's brief discusses this test in detail, and the following points illustrate and supplement Argument II of his brief, particularly II(D): "The Michigan Constitution Categorically Bars LWOP Sentences for Juveniles."[2]

[2] Brief of Mr. Taylor, pp. 29-32.

1. JLWOP sentences in Michigan have been at the mercy of "geographic justice."

Since discretionary sentencing under MCL 769.25 began in 2016, whether an individual received a term-of-years sentence or whether the prosecution continued to seek life without parole has been much more a matter of geography and election results rather than consideration of the individualized characteristics of the individual in question. For example, in 2016, Oakland County had 48 people awaiting resentencing. The former Oakland County prosecutor sought life without parole in all but five cases. After a different prosecutor was elected and reviewed the individualized facts of each case, all but a few of those resentencing hearings have been resolved for a term-of-years sentence, without proceeding to a *Miller* hearing. In Ingham County, there were two JLWOP cases and both were designated for life without parole. After a different prosecutor was elected, both of those people were resentenced to a term of years.[3]

Most trial courts in Michigan have limited exposure to sentencing under MCL 769.25, whether in a term-of-years sentencing or a *Miller* hearing. In many counties, there were but one or two such cases in the wake of *Montgomery v Louisiana,* 577 US 190 (2016). In such counties (Bay, Cass, Clinton, Eaton, etc.) prosecutors overwhelmingly sought to reimpose life without parole. [4]

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[3] Nearly 200 Michigan juvenile lifers still wait for resentencing (freep.com); Prosecutor Karen McDonald Reviews Cases for Juvenile Lifers • Oakland County Times (oaklandcounty115.com) (last accessed 12/13/2021).

[4] Nearly 200 Michigan juvenile lifers still wait for resentencing (freep.com)

This Court has said, "Just as courts are not allowed to impose disproportionate sentences, courts are not allowed to sentence juveniles who are not irreparably corrupt to life without parole." *People v Skinner*, 502 Mich 89, 125 (2018). This maxim could not be clearer. Yet courts throughout Michigan ignore this unequivocal instruction. See, for examples,

- *People v Granger,* unpublished decision of the 42nd Circuit Court, entered May 5, 2020 (Docket No. 83-4565-FY) (The trial court noted that it could not find Mr. Granger irreparably corrupt or incapable of reform, and yet sentenced Mr. Granger to LWOP.)
- *People v Bennett,* 335 Mich App 409 (2021) (Following his Wayne County *Miller* hearing, Mr. Bennett was resentenced LWOP and in reversing that LWOP sentence, the Court of Appeals noted, "The evidence supported that Bennett had achieved rehabilitation. The prosecution presented no evidence whatsoever to the contrary.")
- *People v Hernandez,* 965 NW2d 554 (2021) (Ms. Hernandez was resentenced to LWOP, on what could be characterized as improper "speculation" about her rehabilitation by the trial court judge, in violation of her due process rights.)
- *People v Musselmen,* unpublished opinion per curiam of the Court of Appeals, issued May 20, 2021 (Docket No. 351700) (Mr. Musselman was resentenced to LWOP, despite the prosecution presenting no witnesses,

and the defense presenting testimony of good potential for rehabilitation and successful reintegration into society.)

- *People v Wheeler,* unpublished decision of the 35th Circuit Court, entered July 7, 2020 (Docket No. 70-3957MJS-FC) (Where the prosecution presented no evidence or witnesses, and the defense presented three experts and 20 exhibits demonstrating Mr. Wheeler should be resentenced to a term of years, the trial court granted the motion to reimpose LWOP. Mr. Wheeler, who will turn 70 in May of 2022, is at Level II in the Michigan Department of Corrections, the lowest security level a lifer can achieve.[5]).

This sampling of cases demonstrates that there is no consistency in sentencing and that courts and prosecutors are not applying this Court's admonition from *Skinner*. When it comes to JLWOP sentencing, Michigan fails the proportionality test, *supra*—there is no rhyme or reason to those who receive LWOP and those who do not.

There is no parity with adult offenders sentenced for the same offense. An adolescent sentenced to LWOP will "on average serve more years and a greater percentage of his life in prison than an adult offender." *Graham v Florida,* 560 US 48, 70 (2010). And in evaluating the penalty imposed for the offense of homicide committed by children, compared to the penalty imposed for the same offense in other

5 Offender Tracking Information System (OTIS) - Offender Profile (state.mi.us)

states, Michigan again fails the test for proportionality. Twenty-five states and DC have abolished JLWOP. Seven more have no-one serving JLWOP. States that Ban Life without Parole for Children - Campaign for the Fair Sentencing of Youth | CFSY. Michigan is in the steadily shrinking minority of states that utilizes this draconian penalty.

2. JLWOP sentences have been applied in a racially disproportionate and unjust manner in Michigan and nationally.[6]

Race should have no place in the imposition of a criminal sentence. "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v Mitchell,* 443 US 545, 555 (1979). This concept is vitally important when the sentence under consideration is sentencing a child to die in prison.

According to data from the *Hill v Whitmer*[7] litigation, 361 people in Michigan were eligible for resentencing following *Montgomery*. Of those, 76 percent were children of color. Of the approximately 93 people still waiting for resentencing under *Montgomery,* 77 percent are people of color. The national data is just as bad. In the years before *Miller,* Black children were sentenced to LWOP ten times more often

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[6] The grotesque history of the "super-predator" myth as a basis for harsh sentencing of children, particularly children of color, has been set forth for this Court in the past, and will not be reiterated here. See, for example, Amicus Curiae Brief of the NAACP Legal Defense Fund, *People v Carp, et al,* Supreme Court No. 146478.

[7] Docket No. 10-cv-14568 in the Unites States District Court, Eastern District of Michigan, Southern District.

than white children. Ltr. From United States & Int'l Human Rights Orgs. To the U.N. Comm on the Elimination of Racial Discrimination 2 (June 4, 2009).[8]

Since the *Miller* decision, trial courts in Michigan have sentenced fifteen children to LWOP, some for offenses committed after *Miller* and some who were on direct appeal at the time of *Miller*. All of them are people of color; thirteen of them are Black.[9] Michigan prosecutors and courts continue to apply JLWOP in a racially discriminatory fashion, and nothing in our statutory scheme or prior decisions of this Court has changed that.

Children of color are disproportionately sentenced to the most severe punishment available in Michigan, compared to others convicted of the same crimes, either in Michigan or nationally. It is not a proportionate sentence.

3. Reimposed JLWOP sentences have been reversed and relitigated. There is no closure in a JLWOP sentence.

According to data retained by counsel in the *Hill v Whitmer* litigation and the State Appellate Defender Office, about seventeen people have had LWOP reimposed in the wake of *Montgomery*. Of those, four have been vacated in post-conviction

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8 Letter from Human Rights Organizations to CERD regarding Juvenile Life Without Parole in the US | Human Rights Watch (hrw.org) (last accessed 12/7/2021).

9 It should be noted that at least two of the Black children suffered severe mental illness, and those two individuals (Christopher Howard and Delilah Evans) have already received relief in post-conviction proceedings handled by the State Appellate Defender Office. While it is fortunate that the criminal legal system eventually afforded appropriate relief, in the interim these mentally ill young Black people were held in the custody of the MDOC for several years before receiving appropriate treatment.

proceedings, with another nearing disposition for a term-of-years sentence. The rest remain pending in the Court of Appeals and this Court.

In each LWOP case that is vacated on appeal, the state, the defense, the family of the deceased, and the trial court must all once again go through the grueling, time and labor-intensive, emotional process of another resentencing hearing. This is not a system that provides finality. There is and has always been too much complexity, uncertainty, and lack of adherence to the law for these cases to survive scrutiny on appeal.

4. There is no rehabilitative purpose in a JLWOP sentence.

There is no question that LWOP is "an especially harsh punishment" for children. An adolescent sentenced to LWOP will "on average serve more years and a greater percentage of his life in prison than an adult offender." *Graham,* 560 US at 70.

In instructing that JLWOP sentences should be uncommon, the Supreme Court noted, "That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' *Roper*, 543 U.S., at 573; Graham, 560 U.S., at 68." *Miller,* 567 US at 479–80 (cleaned up). LWOP is premised on the idea that an individual is "incorrigible" and "forever will be a danger to society." *Graham,* 560 US at 72-73. But, a conclusion of "incorrigibility is inconsistent with youth." *Id.*

At 73. It cannot be a proportionate sentence when its applicability cannot be reasonably and consistently identified and correctly imposed.

Term-of-years sentences allow children the time needed to mature, to learn, and to grow. This Court is well-aware of the neuroscience underlying *Graham, Roper,*[10] and *Miller*, and that science will not be repeated here. The scientific conclusions that the youthful brain does mature, is resilient, and can overcome past trauma, have not been controverted in any "juvenile lifer" case, including Mr. Taylor's. The only purpose to a JLWOP sentence is retribution against children who commit murder.—Disproportionately, children convicted of murder are people of color who have experienced unspeakable trauma and chaos in their young lives. JLWOP is not a proportionate sentence under the Michigan Constitution.

5. This Court can sever the LWOP portions of MCL 769.25 and 769.25a.

Courts have the authority to sever unconstitutional portions of a statute from the whole.

> 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.

MCL 769.25 and 769.25a could be severed, leaving in place the sentencing range of not less than 25 or more than 40 years as the minimum sentence and not

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10 *Roper v Simmons,* 543 US 551 (2005).

more than 60 years as the maximum sentence. Such a scheme would comport with the Michigan Constitution, bring Michigan in harmony with the majority of states, and leave in place a sentencing range that places decision-making in the hands of the Michigan Parole Board.

Conclusion.

Imposition of juvenile life without parole has proven to be an unworkable and failed experiment. It is arbitrary, racially discriminatory, and achieves no societal purpose regarding rehabilitation. This Court should declare it an unconstitutional sentence under art. 1, § 16.

Respectfully submitted,

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