STATE OF MICHIGAN

IN THE SUPREME COURT

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

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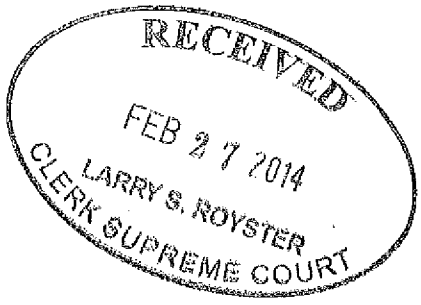
Attorney for Defendant-Appellant

DEFENDANT-APPELLANT'S REPLY BRIEF AND STATEMENT OF SUPPLEMENTAL AUTHORITY

ORAL ARGUMENT REQUESTED



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I. The likely passage of Senate Bill 319.

Senate Bill 319 establishes a sentencing scheme for youth either sentenced to mandatory life without parole for first degree murder or facing future sentencing for first degree murder. (16b-22b). As of this writing, SB 319 has been presented to the Governor, but not yet signed. Per the legislation, if a prosecutor chooses to proceed with a life without parole sentence for first degree murder, then the trial court holds a hearing to evaluate the unique characteristics of youth and determine whether to impose a sentence of life without parole, or to instead impose a minimum sentence of between 25 to 40 years.[1]

As this legislation establishes a remedy for fourteen year-old Dakotah Eliason's unconstitutional sentence, the third question of the leave grant regarding remedy is now moot. *See e.g. Detroit Edison Co. v Michigan Public Service Com'n*, 472 Mich 897 (2005). The legislation can potentially be challenged on a number of grounds, but these are not yet ripe for review until Dakotah has a new sentencing hearing.[2] *See People v Jackson* 487 Mich 783 (2010).

Instead, appellant intends to focus in oral arguments on issues briefed beyond the remedy. In particular, appellant will address whether there should be a categorical ban of life without parole sentences for a fourteen year-old under Article I, Section 16 of the Michigan Constitution, and whether a life without parole sentence is unconstitutional as applied to fourteen year-old Dakotah.

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[1] The legislation also has a provision to implement this scheme in the event this Court or the United States Supreme Court finds *Miller* applies retroactively.

[2] For example, the sentencing scheme might establish an improper mandatory minimum sentence without considering the mitigating factors of youth. *See State v Null*, 836 NW2d 41 (2013) (Iowa Supreme Court finding that *Miller* protections apply to a lengthy mandatory minimum sentence). Legislation allowing resentencing of already sentenced individuals like Dakotah might also violate separation of powers for implicating the Governor's commutation authority. *See People v Preleigh*, 334 Mich 306 (1952). Additionally, as a trial court would impose a maximum sentence following an evidentiary hearing, the legislation might implicate the right to a jury. *See Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000); *Blakely v Washington*, 542 US 296, 303; 124 S Ct 2531; 159 L Ed 2d 403 (2004); *Alleyne v United States*, 570 US__; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

II. The greater protections of the Michigan Constitution compared to the United State Constitution warrant a categorical ban on a life without parole sentence for a fourteen year-old child.

A. The issue is ripe for review.

All parties agree that fourteen year-old Dakotah Eliason is serving an unconstitutional mandatory life without parole sentence, and is entitled to resentencing. This Court should still consider whether there should be a categorical rule against a life without parole sentence for a fourteen year-old youth like Dakotah Eliason.

First, there is no dispute that Dakotah is fourteen years-old and no dispute that the court imposed a sentence of "life in prison without the possibility of parole." (37a). The language of the sentencing order classifying "life without the possibility of parole" as a recommendation does not change the fact that Dakotah, a fourteen year-old youth is serving a life without parole sentence. (21a). The issue of a categorical ban on this sentence per the Michigan Constitution is appropriate for review because there is a live case or controversy. *See Federated Ins. Co. v. Oakland County Road Com'n*, 475 Mich 286, 292 (2006).

Second, this Court routinely rules when, as with Dakotah's case, the issue could present itself again in trial court. *In re Midland Publishing Co, Inc.*, 420 Mich 148, 151 n 2 (1984) ("Although the issues presented in this appeal thus appear moot, this Court will consider them because they are of public significance and are likely to recur, yet may evade judicial review"); *see also People v Kaczmarek*, 464 Mich 478, 481 (2001) (same). Here, upon resentencing, SB 319 again permits the court to sentence Dakotah to life without parole, and the Michigan statutory scheme continues to allow fourteen year-olds to receive life without parole sentences. *See also People v Clary*, 494 Mich 260 (2013) (granting new trial based on prosecutor's misuse

of post-arrest, post-*Miranda* silence, but also reaching additional issue for trial court and holding that defendant was permissibly impeached at retrial with his silence from the first trial).

Although eventual resentencing means this Court need not reach the question of a categorical rule prohibiting a sentence of life without parole for Dakotah, his case presents an opportunity to consider this critical question for Dakotah and other fourteen year-olds sentenced or facing sentencing for first degree murder.

B. The fact that trial counsel only challenged the life without parole sentence on federal constitutional grounds does not impact consideration of this issue.

Appellee is correct that trial counsel challenged Dakotah's life without parole sentence based on the United States Constitution rather than the Michigan Constitution. This dynamic changes nothing.

First, Michigan Courts have applied a *de novo* standard of review to challenges of a statute's constitutionality when an issue is raised for the first time on appeal. *People v Drohan*, 475 Mich. 140, 145-146 (2006); *People v Noble,* 238 Mich App 647, 651 (1999). *See also People v Bullock*, 440 Mich 15, 23, fn 5 (1992) (considering constitutionality of life without parole mandatory sentence for a drug offense in spite of failure to preserve the issue).

Second, as described at length in appellant's brief, the unconstitutional sentence of life without parole is an obvious example of plain, obvious error affecting Dakotah's constitutional rights. *People v Carines*, 460 Mich 750 (1999). If the Michigan Constitution does indeed establish a categorical rule against sentencing a fourteen year-old to life without parole, Dakotah is entitled to relief, regardless of whether trial counsel properly preserved the issue.

C. The Michigan Constitution requires a categorical ban on life without parole for a fourteen year-old offender.

Appellant first suggests that this Court should reconsider the greater protections of the Michigan constitution established in *People v Lorentzen*, 387 Mich 167 (1972) and *People v Bullock*, 440 Mich 15 (1992). Such a response to *Miller* is ill advised.[3] First, this Court would overrule more than forty years of precedent. Second, this Court would ignore the clear textual difference between the Michigan Constitution's ban on "cruel *or* unusual punishment," and the Eighth Amendment ban on "cruel *and* unusual" punishment. Compare Const. 1963, art. 1, § 16 to US Const., Am. VIII. Third, the Michigan Constitutional assembly adopted this language in 1850, ignoring a proposal for more permissive language. See Const 1850, art. 6, §31; *Report of the Proceedings and Debate of the Convention to Revise the Constitution of the State of Michigan. 1850.* (Lansing, 1850), at 45.

Appellant points out the seriousness of first degree murder, the realities of brain development in the first years of life, and the fact that Dakotah has shown some maturity. This focus completely ignores the scientific and legal consensus regarding the diminished culpability of youth, especially an offender as young as fourteen.[4] Appellant also discusses life without parole for less serious offenses, a flawed argument since a categorical ban on the sentence of life without parole for a fourteen year-old would necessarily apply to these sentences.

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[3] Appellant refers the Court to the analysis of Brief of Amicus Curiae, Criminal Defense Attorneys of Michigan, in the companion case of *People v Cortez Davis*, MSC#146819, at 8-10.
[4] Appellant's brief at 17-21. *See also* Brief of Ad Hoc Committee Comprised of Former Officials of the Michigan Department of Corrections and Correctional, Penological, Public Safety and Mental Health Organizations Together with Individual Experts as *Amicus Curiae* in Support of Appellant.

Appellant analyzes other states that do allow life without parole sentences,[5] but misses three key points. First, Michigan sentencing of life without parole for a fourteen year-old is disproportionate compared to *both* other states and the number of overall homicide arrests in Michigan. Appellant's brief at 26-27. Second, this dynamic does not change the fact that the "consistency of change" is certainly a movement towards greater scrutiny of life without parole sentences for youth. *See Atkins v Virginia*, 536 US 304, 315 (2002). Third, Michigan is clearly an anomaly when considering the trend of sentencing fourteen year-olds to life without parole sentences – four of the six fourteen year-olds serving life without parole sentences in Michigan were sentenced in 2007 or later. Appellant's brief at 26.

The sentence of life without parole for a fourteen year-old constitutes "unusually excessive imprisonment" per the standards of the Michigan Constitution. *Lorentzen*, 387 Mich at 172. This Court should categorically ban the practice.

III. If SB 319 does not become law, this Court cannot impose the remedy of a sentencing hearing where a court may impose life without parole.

Appellee has failed to locate any statutory authority for trial courts to enact the remedy for Michigan's unconstitutional juvenile life without parole sentencing scheme proposed by the Court of Appeals in *Carp* and adopted by the Court of Appeals in this case. Plaintiff's argument that *Miller* itself provides this authority conflates the ideas of what is *prohibited* by the federal and Michigan constitutions, and what is *authorized* by Michigan statute. In a nutshell, plaintiff has argued Michigan courts are free to enact any juvenile life without parole sentencing scheme not prohibited by the federal and Michigan constitutions. Of course, this argument ignores the bedrock principle that enacting *any* sentencing scheme is beyond the power of the judiciary.

[5] Some of this analysis is incomplete, for instance Delaware might technically have youth who serve life without parole sentences, but a sentencing court is permitted to modify the sentence after 35 years. Del Code Ann tit 11, § 4217(f).

Further, plaintiff has not cited any case law applying MCL 8.5 to effect selective application of a statute. Even if this court did elect to selectively apply MCL 791.234(6)(a) as Plaintiff urges, the result would not be creation of special new hearings, but application of MCL 791.234(6)(a) only to adult offenders, creating parolable life sentences for juveniles.

A. Lack of a constitutional prohibition does not amount to statutory authorization.

Appellant maintains that resentencing under MCL 750.317 is the correct remedy because no part of the juvenile life without parole scheme can be severed. Plaintiff offers a new theory of how MCL 8.5 might operate. However, Plaintiff does not address how that theory would avoid separation of powers issues, nor does Plaintiff cite even a single case which applies MCL 8.5 in the way Plaintiff proposes.

The essence of the prosecution's argument is that "if the sentencing judge instead makes individualized findings (as prescribed by *Miller*) and concluded that life without parole is appropriate for a particular juvenile, then there is no constitutional bar to the parole board's application of MCL 791.234(6)(a) to that juvenile." This is true,[6] but ignores that *there is no statutory authority for a judge to make these findings.* The absence of a constitutional prohibition does not amount to statutory authorization.

Appellee has argued that application of MCL 8.5, the severance statute, creates the authority for these hearings. But MCL 8.5 only *removes* text from statutes, it does not *insert* text into statutes. Plaintiff notes that MCL 8.5 contains the phrase "application thereof" and argues this language means that severance can be something other than striking language from a statute. However, Plaintiff does not offer a single instance of MCL 8.5 being applied as Plaintiff proposes, or address this Court's repeated use of MCL 8.5 to delete statutory text. Indeed, a

[6] More precisely, this would be true if the sentencing judge had the discretion to sentence to something besides life without parole or its functional equivalent. As described in Defendant's brief on appeal, parolable life in Michigan is a fiction which would not satisfy *Miller.*

review of recent severance cases such as *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich. 295 (2011) shows that this Court used MCL 8.5 exclusively to delete statutory text.

The best authority Plaintiff can muster is MCR 6.425(E)(1) which requires a sentencing court to give the "defendant, the defendant's lawyer . . . an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence . . ." This is nothing more than a guarantee that the defendant and defense counsel will have an opportunity to address the sentencing court. There is no requirement that a defendant be allowed to present additional evidence or call witnesses. There is no standard by which the sentencing judge should make a decision between life and life without parole and analyze the mitigating factors of youth. This simply does not authorize the special new hearings described by the Court of Appeals.

B. If this Court applies MCL 791.234(6)(a) selectively, it must follow *Bullock*.

If this Court elects to find MCL 791.234(6)(a) unconstitutional as applied to juveniles, and apply MCL 8.5 selectively as Plaintiff urges, the result should be application of MCL 791.234(6)(a) only to adult offenders rather than creation of special new hearings. This is the position taken by the Wayne County Prosecutor's Office.

The most obvious authority to look to in this situation is the only case where this Court has found a mandatory life without parole sentence unconstitutional—*People v Bullock*, 440 Mich 15 (1991). In *Bullock*, this Court held that mandatory life without parole for possession of 650 grams or more of a mixture containing cocaine constituted cruel or unusual punishment under the Michigan Constitution. *Bullock*, 440 Mich at 27. There, rather than judicially crafting some sort of new trial court hearings, this Court struck down the "no-parole feature of the penalty," and held that effected defendants would come under the jurisdiction of the parole board

at the appropriate time. *Id.* at 42-43. Defendant argues that the *Bullock* remedy is unavailable only because severance means striking statutory text, not selective application. However, if this Court elects to apply MCL 791.234(6)(a) selectively, then *Bullock* controls how that application operates. Because there is now no statutory scheme for a juvenile life without parole hearing, the result of applying MCL 8.5 would be that MCL 791.234(6)(a) simply cannot be applied to juvenile offenders.

Plaintiff offers *People v Bricker*, 389 Mich 524 (1973) for authority that this Court can create special new trial court hearings for juvenile offenders facing possible life without parole sentences. *Bricker* does not support this argument.

In *Bricker*, the defendant was charged with conspiracy to commit abortion in violation of MCL 750.14. However, the United States Supreme Court had recently held criminalization of abortion unconstitutional relating to abortions in the first trimester of a pregnancy as authorized by the pregnant woman's attending physician in exercise of his medical judgment. *Roe v Wade*, 410 US 113 (1973). The *Bricker* court simply held that *Roe* did not impact that defendant, because he was not a licensed physician. *Bricker*, 389 Mich at 528-529. The *Bricker* Court quoted extensively from Justice Cooley's Constitutional Limitations. Plaintiff has quoted just five words from Justice Cooley's passage, but the entire passage the *Bricker* Court quoted makes the Justice's meaning clear:

> A legislative act may be entirely valid as to some classes of cases, and clearly void as to others. A general law for the punishment of offences, which should endeavor to reach, by its retroactive operation, acts before committed, as well as to prescribe a rule of conduct for the citizen in the future, would be void so far as it was retrospective; but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control. A law might be void as violating the obligation of existing contracts, but valid as to all contracts which should be entered into subsequent to its passage, and which therefore would have no legal

> force except such as the law itself would allow. In any such case the unconstitutional law must operate as far as it can, and it will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the constitution forbids. If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others. [*Bricker*, 389 Mich at 530 (quoting Cooley, Constitutional Limitations (5th ed), pp 215-216).]

While Justice Cooley and the *Bricker* Court said that a statute might apply to "some classes of cases, and [be] clearly void as to others," neither said courts had authority to themselves *create new classes of cases.* The *Bricker* Court applied a statute in a case where no superseding authority prohibited application. The *Bricker* Court did not exceed its statutory authority and *create* the condition for constitutional application.

Arguably, *Bricker* stands for the proposition that MCL 791.234(6)(a) can be applied to adult offenders sentenced to mandatory life without parole, a class of cases which *Miller* does not affect, without applying it to juvenile offenders sentenced to mandatory life without parole, a class of cases which *Miller* renders unconstitutional. Thus, *Bricker* offers additional support for the Wayne County Prosecutor's position. But, nothing in *Bricker* stands for the proposition that appellate courts can invent new trial court procedures without any statutory basis to cure constitutional defects in an unconstitutional class of cases.

CONCLUSION

Appellant requests this Honorable Court categorically ban the sentence of life without parole for fourteen year-old offenders under the Michigan Constitution, and remand for resentencing pursuant to SB 319 if it becomes law or for an individualized sentencing remedy if it does not.

Respectfully submitted,

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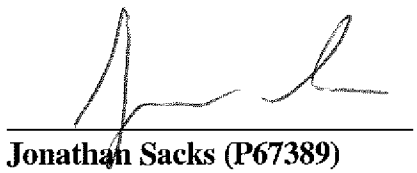
BY: 

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