STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF MICHIGAN, Plaintiff-Appellee, vs. **RAYMOND CURTIS CARP,** Defendant-Appellant.	Supreme Court No. 146478 Court of Appeals No. 307758 St. Clair Circuit Court LC No. 06-001700-FC;
and	
PEOPLE OF MICHIGAN, Plaintiff-Appellee, vs. **DAKOTAH WOLFGANG ELIASON,** Defendant-Appellant.	Supreme Court No. 147428 Court of Appeals No. 302353 Berrien Circuit Court LC No. 2010-015309-FC;
and	
PEOPLE OF MICHIGAN, Plaintiff-Appellee, vs. **CORTEZ ROLAND DAVIS,** Defendant-Appellant.	Supreme Court No. 146819 Court of Appeals No. 314080 Wayne Circuit Court LC No. 94-002089-FC

AMICUS CURIAE BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF DEFENDANT-APPELLANTS RAYMOND CURTIS CARP, DAKOTAH WOLFGANG ELIASON, AND CORTEZ ROLAND DAVIS

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Dated: February 20, 2014

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STATEMENT OF INTEREST OF AMICUS CURIAE

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is the nation's first civil rights law firm. LDF was founded as an arm of the NAACP in 1940 by Charles Hamilton Houston and Thurgood Marshall to redress injustices caused by racial discrimination and to assist African Americans in securing their constitutional and statutory rights. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent people of color from realizing their basic civil and human rights.

LDF has a longstanding concern with racial discrimination in the administration of criminal justice. LDF has served as counsel of record or amicus curiae in federal and state court litigation challenging such issues as the role of race in juvenile life without parole sentencing, *see Miller v. Alabama* and *Jackson v. Hobbs* (*Miller/Jackson*), 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010), the role of race in capital sentencing, *see McCleskey v. Kemp*, 481 U.S. 279 (1987); *Furman v. Georgia*, 408 U.S. 238 (1972), the influence of race on prosecutorial discretion, *see United States v. Armstrong*, 517 U.S. 456 (1996); *United States v. Bass*, 266 F.3d 532 (6th Cir. 2001), the correlation between felon disenfranchisement and racial bias and disproportionality in the criminal justice system, *see Farrakhan v. Gregoire*, 590 F.3d 989 (9th Cir. 2010), and the discriminatory use of peremptory challenges, *see Miller-El v. Dretke*, 545 U.S. 231 (2005); *Johnson v. California*, 545 U.S. 162 (2005). Given its expertise in matters concerning racial discrimination in the criminal justice system, LDF believes its perspective would be helpful to this Court.

INTRODUCTION

In a series of recent decisions, the United States Supreme Court firmly established that children are less culpable than adults and that youth have distinctive attributes, which should be considered when imposing a punishment as severe as life without parole. Thus, in *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court barred juvenile life without parole sentences for nonhomicide offenses. Two years later, the Supreme Court, in *Miller v. Alabama* and *Jackson v. Hobbs* (*Miller/Jackson*), 132 S. Ct. 2455, 2463 (2012), prohibited mandatory life without parole sentences for children. At the heart of these landmark decisions is the Eighth Amendment principle of "proportionate punishment" and the recognition that children have diminished culpability by virtue of their child status.

The evaluation of a child's culpability has, however, been marred by racial stereotypes and underlying fears of youth violence. From the late-1980s through the mid-1990s, the "super-predator myth" crystallized unfounded perceptions of youth of color as uniquely depraved and violent, beyond rehabilitation or redemption. Despite the fallacy of these stereotypes, the resultant fear of so-called "super-predators" fueled the passage of extreme juvenile sentencing laws that ignored the unique characteristics of youth and, instead, drove children into the adult criminal justice system to face outsized adult punishments.

Michigan was a national leader in the implementation of extreme, adult sentences for children. In 1988, Michigan legislators created automatic waiver provisions that required 15- and 16-year-old children to be tried as adults for certain serious offenses if the prosecutor filed charges in adult court. Upon conviction, these children could receive either an adult or juvenile sentence. Michigan expanded this automatic waiver in 1996 to include 14-year-old children, and also mandated adult sentencing for children tried and convicted as adults for certain serious offenses such as first degree murder. The confluence of these changes in the law, in conjunction

with mandatory life without parole sentencing for children convicted of first degree murder, ultimately led Michigan to have the second highest population of juvenile lifers in the country. Given the influence of the racially-charged super-predator myth on these extreme sentencing laws, it is not surprising that Michigan's juvenile sentencing scheme has a disproportionate effect on children of color: while youth of color comprise only 29% of Michigan's children, they are a shocking 73% of Michigan's children serving life without parole.

In light of the fallacies surrounding the super-predator myth that informed Michigan's current juvenile sentencing laws, the most severe sentence available in Michigan—life without parole—should never be imposed on any child, regardless of the offense or the date of conviction and sentence. Accordingly, amicus curiae urges this Court to grant the relief requested by Defendant-Appellants Raymond Curtis Carp, Dakotah Wolfgang Eliason, and Cortez Roland Davis.

ARGUMENT

I. A WIDESPREAD FEAR OF YOUTH VIOLENCE DURING THE LATE-1980s TO MID-1990s LED TO THE MASSIVE UPHEAVAL OF JUVENILE SENTENCING LAWS.

The late-1980s to the mid-1990s was a period of significant change in juvenile justice systems nationwide. During this time, the prevailing fear of rising youth violence led state legislatures to reject the juvenile justice model that viewed youth offenders as children deserving of opportunities for rehabilitation. Instead, legislators adhered to the mantra of "adult time for adult crime," thereby increasingly subjecting children to be treated, tried, and sentenced as adults. Through legislation passed in 1988 and 1996, Michigan became a leader in this national trend, and currently maintains some of the toughest juvenile justice laws in the country. As a result, Michigan has the second largest population of children in the United States serving life without parole sentences. Deborah LaBelle & Anlyn Addis, *Basic Decency: Protecting the*

Human Rights of Children, Second Chances 4 Youth, ACLU of Michigan (2012), at 1, *available at* http://www.scribd.com/doc/93527377/Basic-Decency.

A. Concerns About the Best Interests of Crime-Involved Children, and a Focus on Rehabilitation, Animated the Modern Juvenile Justice System.

Prior to the advent of the modern juvenile justice system, children "were regarded as miniature adults, small versions of their parents" Barry C. Feld, *The Transformation of the Juvenile Court*, 75 Minn. L. Rev. 691, 694 (1991). Indeed, children were "subjected to arrest, trial, and in theory to punishment like adult offenders." *In re Gault*, 387 U.S. 1, 16 (1967). Youth who broke the law were treated like adult criminals. In the late 19th century, Progressive reform movements fundamentally changed the perception, and treatment, of children.[1]

> The early reformers were appalled . . . by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. . . . The child—essentially good, as they saw it—was to be made "to feel that he is the object of [the state's] care and solicitude," not that he was under arrest or on trial. . . . The idea of crime and punishment was to be abandoned. The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive.

Id. at 15-16 (citations omitted) (alteration in original).[2] Children were then viewed as "vulnerable, innocent, passive, and dependent beings who needed extended preparation for life." Feld, *Transformation*, *supra*, at 694.

Recognized as immature and possessing unformed personalities, youth were removed from the adult system for treatment through intervention strategies to serve their best interests

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[1] Shay Bilchik, *Juvenile Justice: A Century of Change*, Off. of Juv. Just. & Delinq. Prevention, U.S. Dep't of Just., 1999 Nat'l Rep. Series 2, (Dec. 1999), https://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf.

[2] *See also Kent v. United States*, 383 U.S. 541, 554 (1966) (describing juvenile court as "engaged in determining the needs of the child and of society rather than adjudicating criminal conduct"); *McKeiver v. Pennsylvania*, 403 U.S. 528, 551-52 (1971) (White, J., concurring) (highlighting the difference between the adult criminal system, which punishes adults based on their culpability, and the juvenile system, which recognizes their diminished culpability and focuses on rehabilitation).

and prevent further criminality. Barry C. Feld, *The Honest Politician's Guide to Juvenile Justice in the Twenty-First Century*, 564 Annals Am. Acad. Pol. & Soc. Sci. 10, 12 (1999). These concepts culminated in the creation of the first juvenile court in Chicago (Cook County), Illinois in 1899. Robin Walker Sterling, *Fundamental Unfairness: In Re Gault and the Road Not Taken*, 72 Md. L. Rev. 607, 617 (2013). In juvenile court, the state acted as *parens patriae* to ensure a youth's well-being. Different language was used "to reduce the stigma attached to juvenile court adjudications." Michele Benedetto Neitz, *A Unique Bench, a Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 Geo. J. Legal Ethics 97, 110 (2011).[3] Eventually, constitutional protections were furnished to court-involved youth.[4] Thus, a system distinct from the adult criminal justice system, and designed to meet the needs of criminally engaged children, was formed. *See* C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 Kan. L. Rev. 659, 662-73 (2005) (describing the evolution of juvenile court).

"Reforms that began in Cook County made their way into Michigan shortly thereafter." Eugene Arthur Moore, *Juvenile Justice: The Nathaniel Abraham Murder Case*, 41 U. Mich. J.L. Reform 215, 217 (2007). In 1907, the Michigan legislature passed the Juvenile Court Act, which "created a juvenile division of the probate court" with "exclusive jurisdiction over 'delinquency' . . . defined as a violation of the law by a boy or girl under the age of seventeen."

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[3]Specifically, "[c]harges are brought as 'petitions' instead of 'complaints' or 'indictments,' and 'trials' are called 'jurisdictional hearings.' Young offenders are referred to as 'minors' or 'delinquents,' not 'defendants' or 'criminals,' and convicted juvenile offenders receive 'dispositions,' rather than 'sentences.'" *Id.* at 110 (citations omitted).

[4]*See, e.g.*, *In re Winship*, 397 U.S. 358, 368 (1970) (holding that children are constitutionally entitled to proof beyond a reasonable doubt standard in criminal proceedings); *In re Gault*, 387 U.S. at 33-37, 55-56 (imposing constitutional requirements of notice of charges, right to counsel, privilege against self-incrimination, and the right to confrontation); *Kent*, 383 U.S. at 557 (entitling youth facing waiver of juvenile court jurisdiction to a "hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision" to waive jurisdiction").

Frank E. Vandervort & William E. Ladd, *The Worst of All Possible Worlds: Michigan's Juvenile Justice System and International Standards for the Treatment of Children*, 78 U. Det. Mercy L. Rev. 203, 217 (2001). "[T]he juvenile court was meant to be non-criminal and informal in nature, with a focus on saving children from both a brand of criminality and from a life of crime." *Id.* "Each child was to receive the individualized treatment necessary to change his or her behavior so the child could grow into a successful adult." Moore, *supra*, at 218. Indeed, "[r]ehabiliation became the byword of the Juvenile Court" in Michigan. *Id.*

B. The National Legislative Responses to the Purported Rise in Youth Violence Led to the Proliferation of Severe Adult Punishments in the Juvenile Justice System.

The late-1980s and early-to-mid-1990s precipitated a dramatic shift in the nature of the juvenile justice system across the country. A spike in violent juvenile crime between 1985 and 1993 triggered broad fears over an impending storm of youth violence. Franklin E. Zimring & Stephen Rushin, *Did Changes in Juvenile Sanctions Reduce Juvenile Crime Rates? A Natural Experiment*, 11 Ohio St. J. Crim. L. 57 (2013). The legislative reaction was unprecedented. "[A]ll but three states[5] passed new legislation designed to make the juvenile justice system more punitive." Zimring & Rushin, *Changes*, *supra*, at 58. These laws "facilitated an increase in the flow of youth into the adult justice system," leaving them to face adult punishments like life without parole. Charles Puzzanchera & Benjamin Adams, *Juvenile Arrests 2009*, U.S. Dep't of Just., Off. of Juv. Just. & Delinq. Prev. 8, (Dec. 2011), http://www.ojjdp.gov/pubs/236477.pdf. "Inherent in many of the changes [was] the belief that serious and violent juvenile offenders must be held more accountable for their actions. Accountability [was] . . . defined as punishment or a period of incarceration . . . ." Patricia Torbet, et al., *State Responses to Serious*

[5]Nebraska, New York, and Vermont were the only states during this time period that did not enact laws to make their juvenile justice systems more punitive. *See* Zimring & Rushin, *Changes*, *supra*, at 60.

and Violent Juvenile Crime, U.S. Dep't of Just., Off. of Juv. Just. & Delinq. Prev. xi, (July 1996), http://www.ncjrs.gov/pdffiles/statresp.pdf. Law reforms in almost every state facilitated adult prosecution and adult punishment of juveniles, often through automatic transfer statutes that categorically classified youths charged with particular serious crimes as adults. A "[t]ougher, more punitive treatment of youth, including adult handling," became the norm. Sarah Alice Brown, *Trends in Juvenile Justice State Legislation: 2001-2011*, Nat'l Conf. of State Legislatures 3, (June 2012), http://www.ncsl.org/documents/cj/TrendsInJuvenileJustice.pdf. The rehabilitative aims of the juvenile justice system were largely discarded by sweeping changes that prescribed adult treatment, severe punishment, and incapacitation as a remedy for serious juvenile crime.

C. Michigan Followed National Trends and Enacted Some of the Nation's Most Extreme Juvenile Sentencing Laws.

Consistent with national trends, in 1988 and 1996, "lawmakers in Michigan adopted one of the toughest juvenile justice laws in the nation . . . ." Keith Bradsher, *Murder Trial of 13-Year-Old Puts Focus on Michigan Law*, N.Y. Times, Oct. 31, 1999, at 1-22; *see also* Keith Bradsher, *Michigan Boy Who Killed at 11 Is Convicted of Murder as Adult*, N.Y. Times, Nov. 17, 1999, at A21 ("At least 44 states have adopted new juvenile justice laws since 1992 that allow more children to be tried as adults, with Michigan adopting one of the toughest statutes of all in 1996.") These laws transformed juvenile sentencing in Michigan from a regime focused on rehabilitation and individualized sentencing to one where children as young as 14 are automatically subject to adult sentences for serious violent offenses, including mandatory life without parole for first degree murder.

Prior to the 1988 legislation, 15- and 16-year-old children were charged with criminal offenses in juvenile court, but could be transferred to adult court if a judge granted a prosecutor's

request for a waiver after considering a number of factors. *See* Jeffrey J. Shook & Rosemary C. Sarri, *Trends in the Commitment of Juveniles to Adult Prisons: Toward an Increased Willingness to Treat Juveniles as Adults?*, 54 Wayne L. Rev. 1725, 1735 (2008) (detailing Michigan's transfer provisions). In 1988, the Michigan legislature revised the waiver law and established concurrent jurisdiction—in both juvenile and adult courts—over 15- and 16-year-old children charged with one of a specified list of serious and violent offenses, including first degree murder. 1988 Mich. Legis. Serv. 53 (West). Thus, the prosecutor's charging decision alone determined whether a 15- or 16-year-old child would remain in juvenile court or be tried as an adult for first degree murder. *Id.* This automatic waiver provision "eliminated all opportunity for individual assessment before transfer to adult court." LaBelle & Addis, *Basic Decency*, *supra*, at 5, 9 (footnotes omitted). Once convicted in adult court, however, "a hearing was held to determine whether a juvenile or adult sentence would best serve the interests of the child and the public." Deborah LaBelle et al., *Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons*, ACLU of Michigan 10, (2004), http://www.aclumich.org/sites/default/files/file/Publications/Juv%20Lifers%20V8.pdf.

In 1996, the Michigan legislature expanded the automatic waiver to include 14-year-old children. Mich. Comp. Laws Ann. § 600.606; *see also* Mich. Comp. Laws Ann. § 712A.2(a)(1). The 1996 legislation further mandated that children, who are tried as adults in circuit court for first degree murder and other enumerated offenses, automatically receive adult sentences upon conviction. Mich. Comp. Laws Ann. § 769.1. Under Michigan law, a person convicted of first degree murder must be sentenced to life, Mich. Comp. Laws Ann. § 750.316 (West 2013), and is not eligible for parole, Mich. Comp. Laws Ann. § 791.234(34)(6)(a) (West 2013). Accordingly, since 1996, "[t]his 'perfect storm' of statutes results in many juveniles accused of serious crimes

being tried as adults in circuit court and those charged with first-degree murder automatically receiving sentences of life without the possibility of parole." Kimberly Thomas, *Juvenile Life Without Parole: Unconstitutional in Michigan?*, Mich. B. J. 90, no. 2 (2011): 34-6.

In addition, "Michigan is among a minority of states that make life without parole mandatory for a juvenile accomplice who did not commit an intended homicide." LaBelle & Addis, *Basic Decency*, *supra*, at 5 (footnote omitted); *see also* Mich. Comp. Laws Ann. § 767.39. As a consequence, "[o]ne-third of youth currently serving life without parole sentences in Michigan did not themselves commit a homicide but instead were convicted for their lesser involvement as tag-alongs, lookouts, or for following the orders of adult co-defendants." LaBelle & Addis, *Basic Decency*, *supra*, at 5.

The 1988 and 1996 legislative changes have had a dramatic effect on juvenile life without parole sentences in Michigan. "The number of juvenile lifers sentenced for offenses between 1975 and 1987 was less than ten percent (7.5%) of the number of homicides committed by juveniles during that time." LaBelle et al., *Second Chances*, *supra*, at 10. Between 1988 and 1996, that percentage rose to 18%, and, from 1997 to 2001, "23.5% of homicides committed by juveniles under seventeen resulted in an LWOP sentence." *Id.* At present, approximately 360 youth offenders in Michigan are serving life without parole sentences. *See* Press Release, Off. of the Mich. Att'y Gen., *Schuette Announces He Will Appeal Federal Court Ruling Opening Door for Parole for Teenage Murderers*, (Dec. 2, 2013), http://www.michigan.gov/ag/0,4534,7-164-46849-317347--,00.html; *but see* LaBelle & Addis, *Basic Decency*, *supra*, at 1 (indicating that "376 young people have been sentenced to life without the possibility of parole in Michigan"). Michigan has the second highest juvenile life without parole population in the United States. *Id.*

II. THE RACIALIZED CRIMINALIZATION OF YOUTH, EMBODIED IN THE SUPER-PREDATOR MYTH, FUELED THE PASSAGE OF EXTREME JUVENILE SENTENCING LAWS AND CONTRIBUTED TO THE STARK RACIAL DISPARITIES OF YOUTH IN THE CRIMINAL JUSTICE SYSTEM.

The seismic shift in juvenile justice in Michigan and nationwide was fueled, in large part, by public fear of a purported new class of youth offenders who were blamed for the spike in juvenile crime. This fear was rooted in pernicious stereotypes that equated children of color—and particularly African-American children—with criminality, and propelled laws that punished children convicted of homicide offenses with mandatory life without parole sentences. Both nationally and in Michigan specifically, public officials propagated imagery of "super-predators"—an especially depraved and immoral assortment of child offenders who were responsible for the most heinous crimes. The concept of the super-predator has long been discredited, as the predicted rise of youth violence never materialized. However, the harm from the racial stereotypes underlying the super-predator myth has had an indelible impact on the extreme juvenile sentencing laws produced by that era and the resultant racial disparities of adult-sentenced youth.

A. The Racial Underpinnings of the Now-Discredited Super-Predator Myth Instigated the Proliferation of Extreme Juvenile Sentencing Laws.

1. Race and the Super-Predator Myth.

Around the time when extreme juvenile sentencing laws were enacted in Michigan and across the country, sociologists, criminologists, politicians, and pundits raised the specter of a new breed of hyper-violent, morally-depraved, and criminally-involved children as the most significant, imminent threat to society.[6] Then-Princeton University professor and criminologist John J.DiIulio, Jr., who in the mid-1990s coined the term "super-predator," warned of a coming

[6] *See, e.g.*, Peter Annin, *'Superpredators' Arrive*, Newsweek, Jan. 22, 1996, at 57; David Gergen, Editorial, *Taming Teenage Wolf Packs*, U.S. News & World Rep., Mar. 17, 1996, at 68; Richard Zoglin, *Now For the Bad News: A Teenage Time Bomb*, Time Magazine, Jan. 15, 1996, at 52.

population of "super crime-prone young males" with impending doom:

> On the horizon . . . are tens of thousands of severely morally impoverished juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons . . . . [A]s long as their youthful energies hold out, they will do what comes "naturally": murder, rape, rob, assault, burglarize, deal deadly drugs, and get high.

John J. DiIulio, Jr., *The Coming of the Super-Predators*, The Weekly Standard 3, (Nov. 27, 1995), *available at* http://www.weeklystandard.com/Content/Protected/Articles/000/000/007/011vsbrv.asp#.

The super-predator myth defined the national sentiment about juvenile crime. The term super-predator was infused with "racist imagery and stereotypes" and was rooted in "historic representations of African Americans [and other people of color] as violence-prone, criminal and savage." Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L. Rev. 679, 712 (2002). Indeed, connections between race, youth, and criminality were central to the super-predator myth, and the "racial connotations were unmistakable." Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. Gender Race & Just. 281, 281 (2012). The ultimate message conveyed by the super-predator rhetoric was that "[t]he most violent, the most adult-like, and the most amoral of adolescents were young black males." *Id.*

Professor DiIulio targeted "black inner-city neighborhoods" as the source of the coming violence, and cast population growth and crime in racial terms. DiIulio, *Super-Predators*, *supra*, at 1. He steeped crime data in race, emphasizing the racial demographics of the predicted wave of juvenile criminals:

> The surge in violent youth crime has been most acute among black inner-city males. . . . Moreover, the violent crimes experienced by young black males tended to be more serious than those experienced by young white males . . . . In Los Angeles, there are

> now some 400 youth street gangs organized mainly along racial and ethnic lines: 200 Latino, 150 black, the rest white or Asian. In 1994, their known members alone committed 370 murders and over 3,300 felony assaults.

Id. at 2. He further concluded that the mere surge in the population of youth of color would ensure greater numbers of so-called super-predators. According to Professor DiIulio, an increase in the number of young males in the U.S. population would "put an estimated 270,000 more young predators on the streets" by 2010, resulting in what he called a probable surge in the "number of young black criminals" as the "black crime rate, both black-on-black and black-on-white, is increasing." John J. DiIulio, Jr., *My Black Crime Problem, and Ours: Why Are So Many Blacks In Prison? Is the Criminal Justice System Racist? The Answer is Disquieting*, City Journal 1, (Spring 1996), *available at* http://www.city-journal.org/printable.php?id =62. [hereinafter Dilulio, *My Black Crime Problem*]. He claimed that "as many as half of these juvenile super-predators could be young black males." *Id.*

Professor DiIulio also argued that alleged moral failings of inner city communities of color were the root cause of America's "black crime problem:"

> My black crime problem, and ours, is that for most Americans, especially for average white Americans, the distance is not merely great but almost unfathomable, the fear is enormous and largely justifiable, and the black kids who inspire the fear seem not merely unrecognizable but alien. . . . [T]hink how many inner-city black children are without parents, relatives, neighbors, teachers, coaches, or clergymen to teach them right from wrong, give them loving and consistent discipline, show them the moral and material value of hard work and study, and bring them to cherish the self-respect that comes only from respecting the life, liberty, and property of others. Think how many black children grow up where parents neglect and abuse them, where other adults and teenagers harass and harm them, where drug dealers exploit them. Not surprisingly, in return for the favor, some of these children kill, rape, maim, and steal without remorse.

Id. at 4.[7] In turn, he predicted that "the trouble will be greatest in black inner-city neighborhoods," *id.* at 1, where "the demographic bulge of the next 10 years will unleash an army of young male predatory street criminals who will make even the leaders of the Bloods and Crips . . . look tame by comparison," DiIulio, *Super-Predators*, *supra*, at 3.

Other academics made similar predictions conflating race, youth, and criminality. Dean James Alan Fox of Northeastern University's College of Criminal Justice cautioned of a "future wave of youth violence" due to a population increase in the number of 14- to 17-year-old African-American males that would begin in 2005 and "continue to expand well into the next century, easily surpassing the population levels of twenty years ago." James Alan Fox, U.S. Dep't of Just., Bureau of Just. Stat., *Trends In Juvenile Violence: A Report to the United States Attorney General on Current and Future Rates of Juvenile Offending*, Exec. Summary 3 (Mar. 1996), http://www.bjs.gov/content/pub/pdf/tjvfox.pdf. According to Fox, sheer demographics ensured a growth in the number of "teen killers."[8] *Id.*

Television and print media played a central role in constructing and reinforcing the

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[7]Professor DiIulio theorized that crime was cause by moral poverty, which he defined as the "poverty of being without loving, capable, responsible adult who teach you right from wrong" as role models and "growing up surrounded by deviant, delinquent, and criminal adults in abusive, violence-ridden, fatherless, Godless, and jobless settings where drug abuse and child abuse are twins, and self-respecting young men literally aspire to get away with murder." James Traub, *The Criminals of Tomorrow*, The New Yorker, Nov. 4, 1996, at 53-54 (internal quotation marks omitted). Professor DiIulio and his co-authors opined that moral poverty creates super-predators, who are more likely to be African-American children and other children of color, who have grown up in what they term "criminogenic communities." *See generally* William Bennett et al., *Body Count* 22, 28 (1996).

[8]Others also openly fed the racial criminalization of youth and the public perception of a forthcoming spike in juvenile crime rates. For example, in 1992, Dr. Frederick Goodwin, the Director of the Alcohol, Drug Abuse and Mental Health Administration, called for a study of violence in inner city neighborhoods:

> In choosing to focus on children of the inner city, Dr. Goodwin suggested . . . that violence had a genetic component [that] some individuals were more vulnerable to violent impulses; [that] these individuals could be identified at a young age; and [that] such vulnerability might be traced to inferior social structures, so that "maybe it isn't just careless use of the word when people call certain areas of certain cities jungles. He also referred to male monkeys who were both hyper-aggressive and hypersexual.

Jane Rutherford, *Juvenile Justice Caught Between the Exorcist and a Clockwork Orange*, 51 DePaul L. Rev. 715, 723 (2002).

perceived link between race, youth, and crime. Media coverage exaggerated the prevalence of juvenile crime and consistently portrayed "some groups, such as juveniles and minorities, as more criminally dangerous than others."[9] Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 Wm. & Mary L. Rev. 397, 458 (2006); *see also* Ernestine S. Gray, *The Media-Don't Believe the Hype*, 14 Stan. L. & Pol'y Rev. 45, 45-47 (2003) (detailing how over-representation of African-American youth as perpetrators "reinforce[es] public fears and perceptions of rising crime rates committed by 'super-predators' and ultimately influenc[es] public policy"). The onset of "twenty-four-hour cable news . . . [meant] the American public was literally saturated throughout the 1990's with images of juveniles of color taking the ubiquitous 'perp walk.'" Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 Md. L. Rev. 849, 851-52 (2010).

The overarching result of these media misrepresentations was that youthful offenders, and in particular youth of color, were thought to be morally deficient and, thus, pose a higher threat of violent criminal activity. Moriearty & Carson, *Cognitive Warfare*, *supra*, at 296-97. In effect, media coverage "put a black face on young criminals. . . ." Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 Minn. L. Rev. 1447, 1507 (2003). The proposed remedy, therefore, was to control and incapacitate African-American youth through harsh punishment.[10]

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[9] The infamous "Central Park Jogger" case, and the media firestorm surrounding it, exemplified portrayals of violent crime as a phenomenon naturally associated with youth of color and requiring harsh punishment. In 1989, seven African-American and Latino teenagerss were wrongfully arrested for the brutal beating and rape of a young, white female jogger in Manhattan's Central Park. Moriearty & Carson, *Cognitive Warfare*, *supra*, at 294-95. The term "wilding" was coined to describe their behavior. *Id.* at 295. Local politicians, like New York City Mayor Edward Koch, "called for the death penalty for 'wilding,' deemed the seven suspects 'monsters,' and complained that the juvenile justice system was too lenient." *Id.* (citations omitted). Then-mayoral candidate David Dinkins called for a "new antiwilding law." *Id.* (citations and internal quotations omitted).

[10] Racial typification, which is "the media's stereotypical portrayal of crime as a minority phenomenon," provokes punitive attitudes. Beale, *News Media's Influence*, *supra*, at 458-61 (citations omitted). Thus, "[w]hen minority offenders are stereotyped as particularly predatory or disposed to chronic criminal offending, they 'are seen

Beyond saturating the public consciousness with racialized images of juvenile crime, the media coverage masked the empirical truth. A 2001 study found that the depictions of crime were "not reflective of either the rate of crime generally, the proportion of crime which is violent, the proportion of crime committed by people of color, or the proportion of crime committed by youth." Lori Dorfman & Vincent Schiraldi, *Off Balance: Youth Race & Crime in the News* 7 (2001), http://www.bmsg.org/sites/default/files/bmsg_other_publication_off_balance.pdf. Media coverage of violent juvenile crime continued to increase despite the fact that youth crime rates "began to fall precipitously in the mid-1990's." Moriearty, *Framing Justice*, *supra*, at 852. Indeed, in the face of unprecedented declines in juvenile crime in the mid-1990s, media coverage of juvenile delinquency grew substantially. *Id.* at 868.

The super-predator narrative and faulty predictions of a juvenile crime wave drove the national political discourse as well. "Racial imagery and racially biased political appeals played an important role in creating the climate that led to the enactment of harsh punitive measures for youth. Sara Sun Beale, *You've Come A Long Way, Baby: Two Waves of Juvenile Justice Reforms As Seen from Jena, Louisiana*, 44 Harv. C.R.-C.L. L. Rev. 511, 514 (2009). Politicians employed super-predator rhetoric to demonize children and insist on a swift legislative response to the impending threat posed by youth violence. Barry C. Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* 208 (1999). For example, at the end of 1995, President Bill Clinton named "juvenile violence" as "the number one crime problem in America." William J. Clinton, Statement on the Report on Juvenile Crime (Nov. 11, 1995), http://www.presidency.ucsb.edu/ws/?pid=50761. Presidential candidate Bob Dole proclaimed in a 1996 radio address that "[u]nless something is done soon, some of today's newborns will

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as more villainous and therefore more deserving of severe penalties.'" George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments in Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, Am. Soc. Rev. Vol. 63, Iss. 4 (1998), at 555 (citations omitted).

become tomorrow's super-predators—merciless criminals capable of committing the most vicious acts for the most trivial of reasons." Associated Press, *Dole Seeds to Get Tough on Young Criminals,* L.A. Times, July 7, 1996, at A16. Congressman Bill McCollum of Florida warned that "[t]oday no population poses a larger threat to public safety than young adult criminals. . . . [B]race yourself for the coming generation of 'super-predators.'" Juvenile Justice and Delinquency Prevention Act: Hearing Before the House Subcomm. on Early Childhood, Youth and Families, 104th Cong. 90 (1996) (statement of Bill McCollum, Chairman, S. Comm. on Crime, H. Judiciary Comm.). Others joined the chorus:

> Paul McNulty, a senior Republican staffer in Congress, warned that "America has been heavily victimized by recidivistic teenage thugs who were quickly returned to the streets by idealistic judges," and that it must brace itself to respond to a new breed of "natural born killers." In California, Representative Chuck Quackenbush, a key promoter of state legislation to lower the age at which children could be tried as adults for murder, warned of the "Little Monsters we have today who murder in cold blood" who must be "punished and walled off from society for a very long period of time, if not forever."

Beale, *Two Waves*, *supra*, at 535 (citations omitted).

2. Discrediting the Super-predator Myth.

Despite the hysteria around violent juvenile crime and racialized criminalization of youth, the predictions of a new wave of super-predators were wrong. By 1994, youth violent crime arrest rates had already begun to drop, and through 2009 had fallen by "nearly 50% to [their] lowest level[s] since at least 1980." Puzzanchera & Adams, *supra*, at 8. Rather than increasing as predicted, the juvenile crime rate "dropped by more than half," thereby discrediting the super-predator theory and causing Professor DiIulio to concede that "he wished he had never become the 1990's intellectual pillar for putting violent juveniles in prison and condemning them as 'superpredators.'" Elizabeth Becker, *As Ex-Theorist on Young "Superpredators," Bush Aide*

Has Regrets, N.Y. Times, Feb. 9, 2001, at A19. By 2004, the number of juvenile arrests was 22 percent lower than it had been in 1995, and the arrest rate for juvenile crimes of violence was at its lowest level in over two decades.[11] Mark Soler et al., *Juvenile Justice: Lessons for a New Era*, 16 Geo. J. Poverty L. & Pol'y 483, 486-87 (2009). In 2012, Professor DiIulio joined an amicus curiae brief filed with United States Supreme Court in *Miller/Jackson*, repudiating the super-predator myth and admitting that it never came to pass. Brief for Jeffrey Fagan et al. as Amicus Curiae in Support of Petitioners, *Jackson v. Hobbs* and *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9646, 10-9647), 2012 WL 174240, at *18-19.

In light of these declines, United States Surgeon General David Satcher issued a report in 2001 that explicitly rejected the super-predator myth: "[t]here is no evidence that young people involved in violence during the peak years of the early 1990s were more frequent or more vicious offenders than youths in earlier years. The increased lethality resulted from gun use, which has since decreased dramatically. There is no scientific evidence to document the claim of increased seriousness or callousness." Off. of the Surgeon Gen., *Youth Violence: A Report of the Surgeon General* (2001), *available at* http://www.surgeongeneral.gov/library/youthviolence/chapter1/sec2.html#myths; *see also id.* at ch. 3 (describing inaccuracies that wholly undermined the super-predator myth). The Surgeon General also repudiated the racial mythology that youth of color, and African-American and Latino youth in particular, were more likely to become involved in youth violence. *Id.*

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[11] In retrospect, "there was never a general pattern of increasing adolescent violence in the 1980's and 1990's." Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality*, 33 Wake Forest L. Rev. 727, 728 (1998). Instead, "[t]he important variations concerned narrower bands of behavior and shorter periods of time," specifically "a thin band of highly lethal gun attacks . . . and garden variety assaults. . . ." *Id*; *see also* David Westphal, *Predicted Teenage Crime Wave Failed to Occur, Numbers Show*, Fresno Bee, Dec. 13, 1999, at A12 (detailing fact that predicted crime youth crime wave never happened); Editorial, *Children's Court: Back to the Future*, Chi. Trib., July 25, 1999, at 16 (same). Moreover, the moral panic over juvenile crime overlooked the fact that juveniles were not responsible for most violent crime. For example, "fewer than one-half of 1 percent of juveniles in the United States were arrested for a violent offense in 1994. That represents fewer than 1 in 200 juveniles, yet these juveniles [drove] national juvenile justice policy concerns." Patricia Torbet, et al., *supra*, at 1.

Moreover, the legislative changes resulting from the racialized criminalization of youth did not cause the dramatic reductions in serious juvenile crime or serve as a deterrent. As one study concluded, "[e]vidence is scarce that 'deliberate and focused' strategies to increase the harshness of the juvenile justice system actually exerted a unique and independent influence in lowering juvenile homicide rates . . . . [D]eeper statistical analysis suggests that changes in juvenile homicide rates were highly similar to changes in young adult homicide rates, despite the national wave of legislation targeted at juvenile offenders." Zimring & Rushin, *Changes*, *supra*, at 69.

B. The Racially-Charged and Now-Discredited Super-Predator Myth Influenced the Passage of Michigan's Extreme Juvenile Sentencing Laws, to the Detriment of Michigan's African-American Youth.

1. Prevalence of the Super-Predator Myth in Michigan.

The super-predator myth and the racially tinged moral panic over juvenile crime that swept through the nation had a tremendous effect on legislators and public officials in Michigan. The misguided hysteria about an anticipated wave of merciless youth offenders in Michigan fueled the passage of the 1988 and 1996 legislation, which was undergirded by a view of children who commit serious violent offenses as depraved, immoral, and beyond redemption. In Michigan, the vast majority of children who have borne the brunt of these legislative reforms are African-American.

As was true of perceptions about juvenile crime across the country, supporters of the 1988 legislation "believe[d] that while juvenile crime may be down overall, the numbers of hardened juvenile offenders are higher than ever." H. Legis. Analysis Section, *Juvenile Waiver Package, H.B. 4731 et al, Third Analysis* (Mich. 1988), at 1 [hereinafter *Juvenile Waiver Package*]. Senator John Kelly, a supporter of automatic waiver, referred to the children targeted by the waiver provision as "thugs." *Bill in Michigan Seeks Adult Trials for Some Youths*, Toledo

Blade, May 23, 1985, at 3, *available at* http://news.google.com/newspapers?nid=1350&dat=19850523&id=LygxAAAAIBAJ&sjid=1gIEAAAAIBAJ&pg=4466,8069793. Notably, the legislation's supporters felt that reform was needed to quell the threat of youth violence in Wayne County, the county with the highest concentration of African Americans in Michigan.[12] Indeed, the legislative analysis that accompanied the bill explained that the "need to deal with such hardened young criminals is perceived to be the greatest in Wayne County, where juvenile crime is the highest, but the percentage of waiver petitions granted has been, incongruously, substantially lower than elsewhere in the state." *Juvenile Waiver Package, supra,* at 2. Fear of Wayne County—and the threat of juvenile violent crime committed by its disproportionate African-American population—inspired these legislative changes. *See* Shook & Sarri, *supra,* at 1737 ("Although the legislature did not provide a coherent rationale to guide decision making, one clear intention of these reforms was to increase the number of juveniles transferred to the adult court and sentenced to adult prisons, specifically youth from Wayne County.").

Michigan lawmakers in 1996 believed there was "a dire need to respond to the threat provided by the increasing number of dangerously violent juvenile offenders . . . ." H. Legis. Analysis Sec., *Juvenile Justice Reform Package, Senate Bills 281 et al., Second Analysis* (Mich. 1996), at 13 [hereinafter *Juvenile Justice Reform Package*]. Consistent with the growing super-predator myth, supporters of the 1996 legislation pointed to a "widespread public perception that there exists a growing population of juvenile offenders who are without remorse or compassion, and pose an increasing threat to average citizens." *Id.* at 2. Thus, in a "society . . . confronted with an increasing number of serious juvenile offenders," a way "to deal with serious juvenile

[12] African Americans make up 14.3% of Michigan's population, *see* U.S. Census Bureau, *State and County QuickFacts, Michigan,* http://quickfacts.census.gov/qfd/states/26000.html, compared to 40.1% of Wayne County's population, *see* U.S. Census Bureau, *State and County QuickFacts, Wayne County, Michigan,* http://quickfacts.census.gov/qfd/states/26/26163.html.

offenders is to have them tried and sentenced as adults." *Id.*

Michigan State Senator William Van Regenmorter, Chair of the Senate Judiciary Committee during the passage of the 1996 legislation, stated of the new law:

> [It] recognizes we have some juveniles dangerous enough that we need to protect the public from them. It is time we recognize the influence of gangs; the influence of a lack of conscience with no sense of right or wrong on the part of some juveniles must be addressed. This is a package of bills designed to give the system the tools to deal with these remorseless renegades.

SBT, Juvenile Justice Reform Passes Senate With Few Amendments, Capitol Capsule (Mich. Info. & Research Serv., Inc.), Vol. XIII, Iss. 218, Dec. 7, 1995, at 2. Senator Van Regenmorter described some 14-year-old children as "violent animals," John Flesher, *Years of Family Trauma End with Killing, Relatives Say*, The Argus Press, Aug. 3, 1997, at A7, and commented that "[l]aw enforcement officers tell me quite regularly that they find that juveniles are much more cold-blooded, much more conscienceless than adults," Sharon Cohen, *Michigan Boy Who Killed at Age 11 Will Stand Trial as Adult*, St. Louis Post-Dispatch, Sept. 19, 1999, at A5.

Executive officials in Michigan similarly embraced the false perception that a new breed of youthful offenders warranted harsh adult criminal sanctions, regardless of their status as children—a reflection of the rationale that informed the super-predator myth and the national sentiment about the changing nature of juvenile crime. Michigan Governor John Engler, a staunch proponent of tougher juvenile sentencing laws, asserted:

> Crimes perpetrated by teenagers that were unthinkable in the past have become today's tragic reality as juvenile offenders terrorize communities with random acts of violence, including murder, armed robberies, arsons and assaults. . . . No more excuses, no more slaps on the wrist—young violent offenders will be held accountable for their crimes.

Letter from Gov. John Engler to the Citizens of Michigan, *Juvenile Justice Reform: Governor Engler's Action Plan for Michigan*, (July 27, 1995). Thomas Ginster, Governor Engler's aide on

his juvenile justice reform package, referred to a "new and rapidly growing category of violent young offenders, many of whom have no respect for property or human life" and are "not amenable to rehabilitation. The governor doesn't think we should spend rehabilitation dollars on violent criminals." *Juvenile Justice Bills Stir Prevention vs. Punishment Debate*, Mich. Rep. (Gongwer News Service, Inc.), Rep. 37, Vol. 35, Feb. 23, 1996, at 2 [hereinafter *Juvenile Justice Bills*]. Former Detroit Police Chief Isaiah McKinnon commented, "It's tragic that we have to legislate things this way, to make it possible for 14-year-olds to spend the rest of their lives in prison. . . . But the fact is younger people are committing more violent, more heinous crimes, and we have to do what's best for society." Jack Kresnak, *New Laws Get Tough on Young Felons Age No Longer Limits Who's Sent to Prison*, Detroit Free Press, Dec. 30, 1996, at 1A.

Governor Engler even called for the creation of a "punk prison" to deal with the anticipated wave of juvenile offenders:

> In 1999, Michigan braced for a predicted increase in "super predators," teenage criminals so dangerous, they'd need to be locked in their own high-security prison. To save taxpayer money, Gov. John Engler signed a contract with GEO to build and operate what he called the "punk prison" in Baldwin. It was "time to stop pampering punks who rape, murder and assault law-abiding citizens," Engler said at the groundbreaking.

Pat Shellenbarger, *Are Private Prisons Mich.'s Cost Savior?*, Bridge Magazine, Mar. 1, 2012, http://bridgemi.com/2012/03/are-private-prisons-mich-s-cost-savior/.

2. Failed Predictions of the Super-predator in Michigan.

The 1988 and 1996 legislation were criticized from their inception. With respect to the 1988 law, critics charged that "automatic trial and sentencing as adults is a simplistic solution to a complex problem. Although the adult system may provide for better due process of law, automatic waiver for certain offenses would fail to accommodate mitigating circumstances and could lead to a salvageable young person being imprisoned for life." *Juvenile Waiver Package*,

supra, at 2. Richard Duranczyk, Associate Director of the Michigan Council on Crime and Delinquency, did not "see the need to change the waiver system at all" because the "facts don't bear out the claims that there is a juvenile crime wave." *Juvenile Crime Decreasing Statewide*, Ludington Daily News, Mar. 7, 1988, at 3, *available at* http://news.google.com/newspapers?nid=110&dat=19880307&id=og5QAAAAIBAJ&sjid=QlUDAAAAIBAJ&pg=4325,4591709.

Critics of the 1996 legislation found the changes to be "almost entirely punitive in nature and offer[] no real solutions to the problem. . . . The best way to reduce juvenile crime is to intervene in the lives of at-risk youth early enough to prevent it." *Juvenile Justice Reform Package*, *supra*, at 13. State Representative Laura Baird described it as "very shortsighted. . . . If there's an influx of juvenile crime, we need to know the issues before we enact a law, or else it's a band-aid effort." *Juvenile Justice Bills*, *supra*, at 3. Other opponents described the 1996 legislation as "a breathtakingly ignorant attempt to curb youth violence" that "swept away the fundamental differences between how children and adults charged with certain crimes are to be treated." Editorial, *Getting Tough on Kids, Not Crime*, Chi. Trib., Nov. 22, 1999, at 14.

History has proven the early critics correct. "[T]he long-feared generation of super-predators never materialized. In 1994, a total of 1,968 Wayne County youth were arrested for violent crimes, including murder and forcible rape, compared to 413 arrests in 2004, according to the FBI. The numbers followed a national downward trend." Desiree Cooper, *Judge Says Violent Kids Need Second Chances*, Detroit Free Press, Oct. 19, 2006, at 1. From 2005 to 2009, juvenile arrests for violent crime dropped by 22%. *See* Public Policy Associates, Inc., *Michigan's Statewide Juvenile Arrest Analysis Report, Volume One: Report*, Mich. Dep't of Hum. Serv. & Mich. Comm. on Juv. Just. 3 (2012), http://michigancommitteeonjuvenilejustice.com/site-files/files/Documents/2012JuvenileArrestAnalysisReportVol1.pdf. At

present, "juvenile violent and property arrest rates are lower in Michigan than the national average." *Id.* at 1. Moreover, "[h]igher-population and urban counties," like Wayne County, "do not necessarily have the highest rates of juvenile criminal activity." *Id.*

One stark example of the failed predictions of growing youth violence is the wasted resources spent on the so-called "punk prison" during Governor Engler's administration. It "closed under Gov. Jennifer Granholm in 2005. . . . Baldwin's prison cost more because it was built for violent adolescents needing highly secure cells, then had to be converted to a lower-level adult unit when the number of youthful felons fell substantially short of projections." Gary Heinlein, *State Looks Beyond Food Service for Cost Savings*, Detroit News, Aug. 23, 2013, at A1.

3. Severe Racial Disparities for Youth in Michigan's Criminal Justice System.

While the super-predator myth that fueled the sweeping changes to Michigan's juvenile justice system was thoroughly discredited, the laws requiring children to be tried and sentenced as adults remain in full force with devastating consequences for youth of color. From 1985 to 1994, African-American juvenile offenders in the United States were involved in between 41% to 52% of all juvenile cases waived to criminal court. Carol J. De Frances & Kevin J. Strom, *Juveniles Prosecuted in State Criminal Courts*, U.S. Dep't of Just., Off. of Juv. Just. & Delinq. Prev. 5 (1997), http://www.bjs.gov/content/pub/pdf/JPSCC.PDF. Similarly, a study of automatic waivers in Michigan after the 1988 legislation found that, while 82% of juvenile defendants eligible to be sentenced as adults were African American, they represented 94% of those receiving adult sentences. John D. Burrow, *Punishing Serious Juvenile Offenders: A Case Study of Michigan's Prosecutorial Waiver Statute,* 9 U.C. Davis J. Juv. L. & Pol'y 1, 53, tbl. 6 (2005). In Wayne County in 2004, African-American youth comprised only 49% of the youth population, but accounted for 58.1% of juvenile arrests and 77.3% of criminal court filings.

Jolanta Juszkiewicz, *To Punish a Few: Too Many Youth Caught in the Net of Adult* Prosecution, 16, tbl. 4 (2007), http://www.campaignforyouthjustice.org/documents/to_punish_a_few_final.pdf.

Severe racial disparities are also prevalent in the detention and confinement of Michigan youth. Between 1991 and 1994, Michigan's African-American youth made up 61.5% of commitments to juvenile facilities, far exceeding their 17.6% share of the youth population during that time. Vandervort & Ladd, *supra*, at 238 (footnotes omitted). A statistical evaluation of police intake decisions in five Michigan counties in 1990 revealed that, even when controlling for other statistically significant factors such as weapons possession, drug charges, or prior offenses, "race continued to exert an independent and significant influence on detention." Madeline Wordes et al., *Locking Up Youth: The Impact of Race on Detention Decisions*, 31 J. Research in Crime & Delinq. 149, 156 (1994); *see also* Carl E. Pope et al., *Disproportionate Minority Confinement: A Review of the Research Literature from 1989 Through 2001*, U.S. Dep't of Just., Off. of Juv. Just. & Delinq. Prev., 15 (2002), http://www.ojjdp.gov/dmc/pdf/dmc89_01.pdf (indicating *Locking Up Youth* study examined five Michigan counties). While "youth of color were more likely to be charged with more serious offenses, they were also more likely to be detained independent of offense seriousness." Wordes et al., *supra*, at 156. Similar disparities were found in detention decisions by juvenile courts at preliminary hearings. *Id.* at 159-60. Moreover, "although social factors (i.e., low socioeconomic status, having person problems) are . . . important in the detention decision, race continues to have a significant and independent effect on detention." *Id.* at 163. From their findings, the study's authors surmised:

> [I]t was apparent that being African American was related to being charged with more serious offenses. Hence it may be that African American and Latino youth were perceived to be more dangerous or dangerous offenders. This perception may lead police and court

> decision makers to base their actions on stereotypes and not on the specifics of each case.

Id.

African-American youth's overrepresentation in Michigan's criminal justice system is perhaps most acute when it comes to the most severe punishment available in the state, life without parole. Although African-Americans make up 15% Michigan's population, African-American youth they represent 69% of those serving juvenile life without parole. LaBelle et al., *Second Chances*, *supra* at 6. This percentage of African-American youth in Michigan serving life without parole is far greater than the national percentage, which is 60% of the total juvenile lifer population. Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Youth Offenders in the United States in 2008,* Executive Summary 2 (May 2008), http://www.hrw.org/sites/default/files/reports/us1005execsum.pdf. While youth of color comprise only 29% of Michigan's youth population, they represent 73% of those serving juvenile life without parole. LaBelle & Addis, *Basic Decency*, *supra*, at 15.

III. THE TAINT OF RACIAL DISCRIMINATION IN MICHIGAN'S JUVENILE SENTENCING LAWS RENDERS LIFE WITHOUT PAROLE SENTENCES ILLEGITIMATE FOR ALL CHILDREN IN MICHIGAN.

A proper evaluation of culpability is a fundamental component of a constitutional sentence. Therefore, the Eighth Amendment's "concern with proportionate punishment" demands a full and fair appraisal of one's culpability to arrive at an appropriate criminal sanction. *Miller/Jackson*, 132 S. Ct. at 2463. This culpability assessment is critical, particularly in the sentencing of children who—because of the distinctive attributes of youth—are less culpable than adults, regardless of their crime. *Id.* at 2464.[13]

[13] The United States Supreme Court's holdings in *Graham v. Florida*, 560 U.S. 48 (2010) and *Roper v. Simmons*, 543 U.S. 551 (2005), state unequivocally that children are less culpable than adults, regardless of their offense. In *Miller/Jackson*, the Court again recounted the stark range of differences between children and adults

In *Miller/Jackson*, the United States Supreme Court barred mandatory life without parole sentences for juveniles precisely because mandatory penalty schemes prevented the constitutionally required evaluation of culpability. *Id.* at 2466. Consistent with the Eighth Amendment, a sentencer considering the imposition of the State's harshest penalties on a child must take account of that child's "age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467. As the *Miller/Jackson* Court explained, "by removing youth from the balance [mandatory life without parole sentencing laws] prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.* at 2466. Making youth and its related features irrelevant to sentencing "poses too great a risk of disproportionate punishment." *Id.* at 2469. *Miller/Jackson* reaffirmed the constitutional principle that a youth's diminished culpability warranted less severe punishment than adults. *Id.* at 2464. As this amicus brief explains, racial stereotypes about youth and criminality threaten to undermine that principle.

Race, of course, has no place in the imposition of a criminal sentence. Indeed, "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). The United States Supreme Court has engaged in "unceasing efforts to eradicate racial discrimination" throughout the criminal justice system. *See Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (race discrimination in use of peremptory strikes); *Turner v. Murray*, 476 U.S. 28 (1986) (juror's racial bias); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (race discrimination in grand jury selection); *Whitus v. Georgia*, 385 U.S. 545 (1967) (race discrimination in grand and petit jury selection); *Hernandez v. Texas*, 347 U.S. 475 (1954) (race discrimination against Mexican-Americans in petit jury

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reflected in the lesser culpability of youth. 132 S. Ct. at 2464-66; *see also J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403-05 (2011) (discussing well-established deficiencies of youth).

selection); *Hill v. Texas*, 316 U.S. 400, 406 (1942) (race discrimination in grand jury selection). This Court has taken on similar efforts to eliminate the taint of racial bias in the administration of justice.[14]

Yet, in practice, race has tainted the sentencing of Michigan youth convicted of homicide offenses. As detailed in this submission, laws—in Michigan and states across the country—that eased the transfer of children into adult court and mandated adult punishments like life without parole, suffer from two interrelated and constitutionally fatal defects. First, they were propelled by widespread fears and stereotypes—embodied in the super-predator myth—that conflate youth, race, and criminality. Second, they "remov[e] youth from the balance" and mandate the imposition of the state's most severe penalties on juvenile offenders without consideration of their child status. *Miller/Jackson*, 132 S.Ct. at 2466. The result is a juvenile sentencing scheme that ignores the mitigating value of youth and is, instead, premised on pernicious stereotypes, as evidenced by the stark racial disparities of Michigan's juvenile life without parole population. Such a result is in direct contravention of the Eighth Amendment, the United States Supreme Court's command in *Miller/Jackson*, and the fundamental constitutional principle that race play no part in the administration of justice. Accordingly, life without parole sentences should never be imposed on any of Michigan's children, regardless of their offense or their date of conviction and sentence.

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[14] On September 15, 1987, this Court issued Administrative Order No. 1987-6, which created the Task Force on Racial and Ethnic Issues in the Courts and the Task Force on Gender Issues in the Courts. Lorraine H. Weber, *The History of Gender, Racial, and Ethnic Initiatives in Michigan—Where Have We Been, Where We Hope to Go, and Why It Is Important*, 25 T.M. Cooley L. Rev. 139, 144 (2008). These Task Forces produced reports in 1989, which "made hundreds of specific findings and 167 detailed recommendations urging individuals, agencies, organizations, and the courts to address the problems identified." *Id.* This Court took steps in response to the Task Force Reports, including the issuance of "Administrative Order 1990-3 on June 12, 1990, which directed that 'judges, employees of the judicial system, attorneys and other court offices commit themselves to the elimination of racial, ethnic and gender discrimination in the Michigan judicial system.'" Hon. Harold Hood, *The Race/Ethnic Bias Task Force Four Years Later—Looking Back*, 73 Mich. B.J. 267, 268 (1994).

CONCLUSION

For the foregoing reasons, this Court should grant the relief requested by Defendant-Appellants Raymond Curtis Carp, Dakotah Wolfgang Eliason, and Cortez Roland Davis.

Respectfully submitted,

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