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**STATE OF MICHIGAN  
IN THE SUPREME COURT**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff – Appellee,

Supreme Court No. 146478

v.

Court of Appeals No. 307758

RAYMOND CURTIS CARP,

St. Clair County Circuit Court  
No. 06-001700-FC

Defendant – Appellant.

AND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff – Appellee,

Supreme Court No. 146819

v.

Court of Appeals No. 314080

CORTEZ ROLAND DAVIS,

Wayne County Circuit Court  
No. 94-002089-01-FC

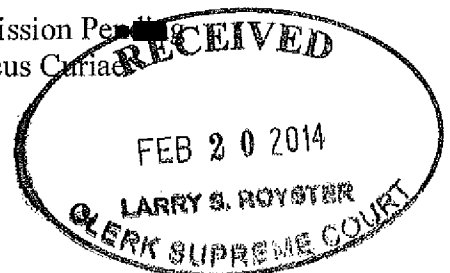
Defendant – Appellant.

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**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**

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**STATEMENT OF INTEREST OF AMICUS CURIAE**

*Amicus curiae* is an ad hoc committee comprised of former officials of the Michigan Department of Corrections, correctional, penological, mental health, community and justice organizations, together with individual experts, who are intimately familiar with criminal justice goals and objectives. *Amicus curiae* has been involved in developing, implementing, and/or contributing to correctional and criminal justice policies in Michigan and nationally; it has been engaged in balancing concerns with public safety and rehabilitation for youthful offenders. *Amicus curiae* supports the retroactive application of *Miller* to allow youth offenders who were sentenced under a mandatory sentencing scheme to life without parole an opportunity to demonstrate growth, rehabilitation, and capacity to rejoin society without undue risk to public safety. *Amicus curiae* also supports the cessation of imposing the punishment of life without parole upon youthful offenders and supports proportional sentencing that takes into consideration their child status and its attendant circumstances. The *amicus curiae* ad hoc committee constituents are set forth in the attached appendix.

STATEMENT OF QUESTIONS PRESENTED

**Defendant-Appellant Carp**

I. Where *Miller v. Alabama/Jackson v. Hobbs* categorically bans mandatory life without parole for juveniles convicted of homicide, and where the decision meets other criteria to be found substantive, does *Miller* apply retroactively under the first exception in *Teague v. Lane*?

Defendant-Appellant answers: Yes

Plaintiff-Appellee answers: No

Amicus Curiae answers: Yes

Court of Appeals answers: No

St. Clair County Circuit Court answers: No answer

II. Do the principles of “even-handed justice” (*Teague*) and “Logical Relationship” (*Tyler v. Cain*) require that *Miller* apply retroactively, in view of the relief the court provided Kuntrell Jackson, whose case was on collateral review in *Jackson v. Hobbs*?

Defendant-Appellant answers: Yes

Plaintiff-Appellee answers: No

Amicus Curiae answers: Yes

Court of Appeals answers: No

St. Clair County Circuit Court answers: No answer

III. Does *Miller, supra*, apply retroactively under *People v. Maxson*, as the purpose of its new rule relates to the very integrity of the fact-finding process, defendant-appellant suffered actual harm in reliance on the old rule, and the effect on the administration of justice is minimal?



Defendant-Appellant answers: Yes

Plaintiff-Appellee answers: No

Amicus Curiae answers: Yes

Court of Appeals answers: No

St. Clair County Circuit Court answers: No answer

- IV. Does *Miller's* prohibition on mandatory life without parole for juveniles convicted of homicide require defendant-appellant be resentenced with individualized consideration and an opportunity for a sentence less than life without parole?

Defendant-Appellant answers: Yes

Plaintiff-Appellee answers: No

Amicus Curiae answers: Yes

Court of Appeals answers: No

St. Clair County Circuit Court answers: No answer

#### **Defendant-Appellant Davis**

- I. Whether the United States Supreme Court's ruling, that a mandatory sentencing scheme that imposes life without parole without consideration of child status of Defendant, is an unconstitutional cruel and unusual punishment, should be applied to allow the resentencing of youth punished under that scheme and whose time for direct review has expired.

Defendant-Appellant answers: Yes

Plaintiff-Appellee answers: No

*Amicus Curiae* answers: Yes

Court of Appeals answers: No

Wayne County Circuit Court answers: Yes

- II. Whether the prohibition against cruel and unusual punishments found in the Eighth Amendment to the United States Constitution, or the prohibition against cruel or unusual punishment found in the Michigan Constitution of 1963, article 1, § 16, categorically bars the imposition of a life without parole sentence for youth under the age of 18 who have been convicted of first-degree homicide under an aiding and abetting theory or based upon the commission of a felony in the course of which a homicide was committed by another individual.

Defendant-Appellant answers: Yes

Plaintiff-Appellee answers: No

*Amicus Curiae* answers: Yes

Court of Appeals answers: No

Wayne County Circuit Court answers: Yes

## INTRODUCTION

Uncontested research in developmental psychology and neuroscience continues to validate and confirm the conclusion that youth are different and less culpable than adults for their actions. Compared to adults, children are less able to restrain their impulses and exercise self-control; less capable of considering alternative courses of action and avoiding unduly risky behaviors; and simply less capable than adults of mature judgment and decision-making, especially in the social contexts in which criminal behavior is most likely to arise. It is these signature qualities of adolescence that reduce these young people's culpability and increase their capacity for change.

The research confirms what those working in corrections and on criminal justice issues have long observed and documented – that youth are still in the process of forming coherent identities, and adolescent crime often reflects the signature and transient qualities of youth itself, rather than an entrenched bad character. *Roper v Simmons*, 543 US 551, 570; 125 S Ct 1183 (2005). Although some youthful offenders may commit criminal acts as adults, it is more likely that those children will mature and grow out of the behavior and characteristics that contributed to their criminal actions, becoming capable of rejoining society as productive citizens.

These profound differences between a child and an adult undermine any possible penological justification for punishing a child with a sentence that “guarantees he will die in prison without any meaningful opportunity to obtain release.” *Graham v Florida*, 560 US 48, 79; 130 S Ct 2011, 2033 (2010). Moreover, it remains essentially impossible “even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption,” rendering the sentence of life without parole for a child inconsistent with the goals of corrections.

*Miller v Alabama*, 132 S Ct 2455, 2469 (2012) (quoting *Roper*, 543 US at 573). This is true even of youth offenders who have committed the most serious crimes.

*Amicus curiae* believes that condemning an immature, vulnerable, and not-yet-fully-formed adolescent to live every remaining day of his life in prison does not serve legitimate penological objectives and is a constitutionally disproportionate punishment. *Amicus curiae*, relying on the particular experience, knowledge, and expertise of its members, urge this Court to consider the fact that many of those individuals currently serving this sentence can objectively demonstrate maturation, growth, and rehabilitation. It serves no penological purpose to continue to imprison these youth until death. *Amicus curiae* urges that retroactive application of *Miller* is consistent with the purposes of our criminal justice system and penological objectives by allowing rehabilitated youth the opportunity for release.

## ARGUMENT

### **I. THERE IS NO PENOLOGICAL JUSTIFICATION FOR CONTINUING TO PUNISH YOUTH SENTENCED BEFORE *MILLER* TO LIFE WITHOUT PAROLE SENTENCES.**

The *Miller* Court recognized that a sentence lacking any legitimate penological justification is by its nature disproportionate to the offense, and that disproportionate punishment fails to comport with the Eighth Amendment. The Court explained that the unique characteristics of youth mean that the imposition of life without parole on children cannot easily be justified by any of the traditional penological justifications – retribution, deterrence, incapacitation or rehabilitation.

Retribution rationales for harsh sentences apply with diminished force to children, because children are inherently less blameworthy than adults. *Miller*, 132 S Ct at 2465 (citing *Graham*, 1305 S Ct at 2028) (“The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.”). To continue to imprison youth until their death, after recognizing that they are less culpable and yet, that they had no opportunity to present mitigating circumstances prior to sentencing, does not serve any valid retribution goal but rather imposes a punishment deemed to be cruel and unusual. *Roper*, 543 US at 571 (“[R]etribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”). Here, both appellants received this State’s most severe penalty.

Deterrence rationales similarly have little force when applied to children, because “the same characteristics that render juveniles less culpable than adults – their immaturity, recklessness, and impetuosity – make them less likely to consider potential punishment.” *Miller*,

132 S Ct at 2465 (quoting *Graham*, 560 US at 72; 130 S Ct at 2028 (quoting *Roper*, 543 US at 571)).

The certainty of harsh punishments for serious crimes has been shown to have little to no deterrent effect on youth because they lack the foresight, discipline, intentionality, and appreciation of consequences that are necessary for deterrence to be effective. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, *The Future of Children*, Vol. 18, No. 2 (Fall 2008), at 26 (“[L]ittle evidence supports the claim that youth are deterred from criminal activity by the threat of harsh sanctions, either generally or because their experience in prison ‘taught them a lesson.’”).

The penological goal of incapacitation is satisfied by incarcerating people until they can demonstrate their rehabilitation and return to their community as participating citizens without posing a risk to public safety. The failure to consider a child’s greater capacity for rehabilitation was a central underpinning of the *Miller* Court’s holding that incarcerating children for their natural life, without consideration of their child status and its attendant characteristics, constitutes disproportionate punishment without a valid penological purpose, in violation of the Eighth Amendment. Recognizing that sentencing a child to life without possibility of parole is contrary to a child’s unique capacity to reform upon maturity, the Court noted, “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Graham*, 560 US at 73; 130 S Ct at 2029 (quoting *Roper*, 543 US at 572). In rejecting both incapacitation and rehabilitation as rationales that support imposing life without parole sentences on children, the Court reasoned:

Deciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible – but incorrigibility is inconsistent with youth. And for the same reason, rehabilitation could not justify that sentence. Life without parole foreswears altogether the rehabilitative ideal. It reflects an irrevocable judgment about an offender’s value and place in society, at odds with a child’s capacity for change.

*Miller*, 132 S Ct at 2465 (internal citations and quotations omitted).

The legitimate goals of penal sanctions – retribution, deterrence, incapacitation, and rehabilitation – are simply not sufficient to justify natural life sentences imposed on youth in the same manner as adults. It is the lack of any compelling penological justification for imposing the harshest available punishment on children, combined with the limited culpability of children, that led the Supreme Court in *Miller* to categorically ban the imposition of mandatory life without parole on children. *Id.* at 2469. *Amicus curiae* urges this Court to apply this holding equally to those individuals at issue, because continued incarceration without an opportunity for resentencing under the *Miller* and *Graham* holdings serve no penological purpose.

**II. THE INTEREST OF THE PUBLIC IS NOT SERVED BY DENYING THE OPPORTUNITY FOR RESENTENCING TO THOSE SERVING MANDATORY LIFE WITHOUT PAROLE FOR OFFENSES COMMITTED AS A CHILD.**

The public interest is served by the fair and just administration of our criminal justice system. For the class of individuals at issue in this appeal, who received the harshest sentence that can be imposed in this State without regard to the fact that they were children at the time of their offense, the Eighth Amendment requires, and the public interest is served, by a retroactive application of *Miller*. *Amicus curiae* believes that we cannot continue violating the Eighth Amendment by maintaining a sentencing scheme that has been deemed unconstitutional, as if the U.S. Supreme Court ruling in *Miller* never happened. Nor does the mere resentencing of these individuals pose any risk to public safety. The individuals at issue here could only be released

upon a determination by a parole board or the judge that they do not pose a risk to public safety. The only barrier to this determination is the failure to require a *Miller*-compliant hearing that allows mitigating evidence to be presented and consideration of the growth and rehabilitation of those individuals previously punished as if they were the same as adults. Additionally, such hearings would remove the burden of incarcerating rehabilitated individuals whose continued imprisonment serves no valid penological purpose. *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992) (Rehabilitation, as the goal of punishment, is “rooted in Michigan’s legal traditions.”).

As a mandatory life sentence is constitutionally appropriate only for the “rare” child whose crime reflects “irreparable corruption,” the inescapable conclusion is that the majority of the 363 individuals currently serving life without parole sentences are serving sentences that are disproportionate to their offenses. The Supreme Court explained, when it comes to children, these sentences will rarely comport with the Eighth Amendment’s proscription against disproportionate punishment, stating that:

[G]iven all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest penalty will be uncommon. 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. Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

*Miller*, 132 S Ct at 2469 (internal citations and quotations omitted).

Indeed, the social science research shows that most youth crime is the result of children’s tendencies to experiment with risky behavior in the process of discovering their identities, and is



not indicative of morally deficient character.<sup>1</sup> Drs. Steinberg and Scott concluded that “[m]ost adolescents literally grow out of their antisocial tendencies as individual identity becomes settled.”<sup>2</sup> The scientists based that conclusion on statistics showing that although crime rates peak at age seventeen, they drop off significantly after that.<sup>3</sup> A more recent study on the development of psychosocial maturity<sup>4</sup> among serious child offenders showed that “individual differences in the rate of development of self-regulation” shed light on the variability in antisocial behavior from child to child.<sup>5</sup> Another finding of that study – that the majority of youth who had committed serious crimes demonstrated increased psychosocial maturity over time – supports the general consensus that the “vast majority of adolescents who commit serious crimes eventually mature out of antisocial behavior.”<sup>6</sup>

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<sup>1</sup> Scott & Steinberg, *Adolescent Development and the Regulation of Youth Crime*, at 24. Psychologist Alison Gopnik explains that new studies suggest that risky behavior in teens is not so much linked to teens’ underestimation of risks, but rather to their overvaluation of rewards, particularly social rewards. Alison Gopnik, *What’s Wrong with the Teenage Mind?*, Wall St J, Jan. 28, 2012, available at <http://online.wsj.com/article/SB10001424052970203806504577181351486558984.html>.

<sup>2</sup> Scott & Steinberg, *Adolescent Development and the Regulation of Youth Crime*, at 24.

<sup>3</sup> *Id.*

<sup>4</sup> The three aspects of psychosocial maturity the study examined were “temperance (impulse control and suppression of aggression), perspective (consideration of others and future orientation), and responsibility (the ability to take responsibility for one’s behavior and resist peer influences.” Kathryn C. Monahan, Laurence Steinberg, Elizabeth Cauffman & Edward P. Mulvey, *Psychosocial (im)maturity from adolescence to early adulthood: Distinguishing between adolescence-limited and persisting antisocial behavior*, 25 *Development and Psychopathology* 1093, 1094 (2013).

<sup>5</sup> Monahan, et al., at 1103.

<sup>6</sup> *Id.* at 1103–04. This first longitudinal study of a population of serious juvenile offenders found that 92.5% of these individuals engaged in low levels of antisocial behavior by age 25. *Id.* at 1099.

Over 250 of those individuals serving the life without parole sentence in Michigan have served more than 15 years and have already reached physical and cognitive maturity. Over 50 have served more than 30 years for crimes committed as a child and have yet to be assessed for rehabilitation and possible release.<sup>7</sup> To continue to punish these individuals without consideration of their rehabilitative status is especially harsh given their status as children when they were first imprisoned. The *Miller* Court recognized the severity of this punishment, stating:

[T]his lengthiest possible incarceration is an “especially harsh punishment for a juvenile,” because he will almost inevitably serve “more years and a greater percentage of his life in prison than an adult offender.” The penalty when imposed on a teenager, as compared with an older person, is therefore “the same . . . in name only.”

*Miller*, 132 S Ct at 2466 (quoting *Graham*, 130 S. Ct at 2028).

The consideration of whether these individuals have been sufficiently rehabilitated to warrant release is significantly different in light of their child status when they were sentenced. There is scientific consensus that children continue to develop cognitively, and in terms of maturity, throughout adolescence.<sup>8</sup> Dr. Steinberg, whose research on child neurological development was cited by the *Roper* Court, has noted that “[a]dolescents’ neurobiological immaturity, relative to adults, is a fact, and within the neuroscience community, an

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<sup>7</sup> Because no one – not even trained psychiatrists and psychologists – can predict whether a child will outgrow antisocial tendencies as his or her individual identity and psychosocial maturity develops, a sentence that denies a child the opportunity to later demonstrate personal growth at an individualized hearing wholly ignores that capacity for rehabilitation. See *Roper*, 543 US at 573; 125 S Ct at 1197.

<sup>8</sup> See Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 *Pharmacology, Biochemistry & Behav.* 212, 216 (2009) (noting adolescence is commonly characterized as the developmental period between childhood and adulthood from ages twelve to seventeen); see also B.J. Casey, Sara Getz & Adriana Galvan, *The Adolescent Brain*, 28 *Dev Rev* 62, 72 (2008) (defining adolescence as a transitional time marked by puberty).

uncontroversial one at that.”<sup>9</sup> Psychologists attribute the differences between children and adults to both cognitive factors (children think differently than adults) and psychosocial factors (children lack developed social and emotional capabilities).<sup>10</sup> Research shows that adolescent thinking is oriented to the present and largely overlooks consequences or implications,<sup>11</sup> and that children tend to make decisions based on emotions, such as anger or fear, to a much greater extent than do adults.<sup>12</sup> Behaviors that seem likely to increase positive emotions tend to become more desirable to the adolescent mind, even if they carry risk. When combined, these cognitive characteristics result in a lack of maturity that leaves children incapable of fully considering, or appreciating, the future impact of their actions.<sup>13</sup> This is particularly true in stressful situations,

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<sup>9</sup> Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 *Am Psychologist* 739, 742–45 (2009).

<sup>10</sup> See Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 *J Res Adolescence* 211, 215 (2011); Elizabeth Cauffman and Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults*, 18 *Behav Sci & L* 742 (2000).

<sup>11</sup> See, e.g., Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 *J Adolescent Health* 216, 218 (2009); see also Samantha Schad, *Adolescent Decision Making: Reduced Culpability in the Criminal Justice System and Recognition of Capability in Other Legal Contexts*, 14 *J. Health Care L & Pol’y* 375, 382 (2011) (noting impulsivity and sensation seeking are psychosocial factors that can affect risk-taking); Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 *Developmental Psychol* 1764, 1764 (2008); Marty Beyer, *Recognizing the Child in the Delinquent*, 7 *Kentucky Ch Rts J* 16 (Summer 1999); Catherine C. Lewis, *How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications*, 52 *Child Development* 538, 541–42 (1981).

<sup>12</sup> See Thomas Grisso, *What We Know About Youth’s Capacities*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* 267 (Thomas Grisso and Robert G. Schwartz, eds., 2000).

<sup>13</sup> See Elizabeth Locker, *Grow Up Georgia . . . It’s Time to Treat Our Children as Children*, 4 *J Marshall LJ* 85, 96 (2011) (citing *Johnson v. Texas*, 509 US 350, 367 (1993)).

which have a greater effect on children than on adults and frequently create an intense drop in judgment during the stressful event.<sup>14</sup>

Many of these differences between children and adults are simply physical: there are dramatic differences between the brains of children and those of adults.<sup>15</sup> Studies show that the brain continues to develop into the twenties, and this is particularly true of physiological developmental processes relating to judgment and impulse-control.<sup>16</sup> Researchers have found that the parts of the brain in the frontal lobe associated with regulating aggression, long-range planning, abstract thinking, and perhaps even moral judgment are not sufficiently developed in children to support these functions. These parts of the brain are not fully developed until

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<sup>14</sup> See Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L Rev 1055, 1110 (2010) (quoting Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 *Dev Psych* 625, 625 (2005)); Kim Taylor-Thompson, *States of Mind/States of Development*, 14 *Stan L & Pol'y Rev* 153, 155 nn 107–108 (2003); Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, in 15 *Summary of Criminal Justice* 27 (2000).

<sup>15</sup> See Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Rev* 339 (1992); Jay N. Giedd, et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 *Nature Neuroscience* 681(1999); Kenneth W. Kwong, et al., *Dynamic Magnetic Resonance Imaging of Human Brain Activity During Primary Sensory Stimulation*, 89 *Proceedings of the National Academy of Science* 5675 (1992).

<sup>16</sup> Gur RC, Ragland JD, Moberg PJ, Bilker WB, Kohler C, Siegel SJ, Gur RE, *Computerized Neurocognitive Scanning II: The Profile of Schizophrenia*, in *Neuropsychopharmacology* (2001) pp 25, 777–788; Sharma, T., & Harvey, P. (Eds.), *Cognition in Schizophrenia* (Oxford University Press: Oxford, G.B., 1999) ; Yakovlev PL, Lecours AR, *The myelogenetic cycles of regional maturation of the brain.*, in *Regional development of the brain in early life 3-70* (Minkowski A, ed.) (Oxford: Blackwell 1967); Matsuzawa J, Matsui M, Konishi T, Noguchi N, Gur RC, Bilker W, Miyawaki T, *Age-related volumetric changes of brain gray and white matter in healthy infants and children*, in *Cerebral Cortex*, 11, 335-342 (2001).

adulthood.<sup>17</sup> Because they lack frontal lobe functions, children tend to make decisions using the amygdala, a part of the brain associated with impulsive and aggressive behavior.<sup>18</sup>

Children are also subject to more negative influences and outside pressures than adults,<sup>19</sup> a fact that again stems from inherent – and transient – differences between adolescent and adult neurological conditions.<sup>20</sup> Because they are less self-reliant and have a less robust sense of self

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<sup>17</sup> See Bruce Bower, *Teen Brains On Trial: The Science Of Neural Development tangles With The Juvenile Death Penalty*, Science News Online, vol. 165, no. 19 (May 8, 2004); Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* 434 (New York: Oxford University Press, 2001), p 434; Allan L. Reiss, et al., *Brain Development, Gender and IQ in Children: A Volumetric Imaging Study*, in 119 *Brain* 1768 (1996); Elizabeth R. Sowell, et al., *Mapping Continued Brain growth and Gray matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 *J. of Neuroscience* 8821 (2001).

<sup>18</sup> See Jan Glascher and Ralph Adolphs, *Processing of the Arousal of Subliminal Emotional Stimuli by the Human Amygdala*, 23 *J of Neuroscience* 10274 (2003); Nat'l Juvenile Defender Ctr, *Adolescent Brain Development and Legal Culpability* (2003). The recommendation does not depend on brain research for its viability, nor is it an argument for an age even higher than 18; rather, it emphasizes that teens at 16 and 17 are nowhere near full maturity. The brain research merely reinforces the powerful body of knowledge about adolescent development cited by the Supreme Court in *Roper*.

<sup>19</sup> See Jeffrey Fagan, *The Contradictions of Juvenile Crime & Punishment*, *J of the Am Acad of Arts and Scis*, at 44 (Summer 2010).

<sup>20</sup> Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21(22) *J Neuroscience* 8819, 8819 (2001); B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 *Biological Psychol* 241 (2000); Eveline A. Crone et al., *Neurocognitive Development of Relational Reasoning*, 12 *Developmental Sci* 55 (2009); Jay N. Giedd et al., *Anatomical Brain Magnetic Resonance Imaging Typically Developing Children and Adolescents*, 48 *J Am Acad Child & Adolescent Psychiatry* 465 (2009); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 *Nature Neuroscience* 861 (1999).

than adults,<sup>21</sup> children are more vulnerable to negative peer pressure.<sup>22</sup> To make matters worse, the tendency of children to be vulnerable to peer pressure is strongest when antisocial behavior and delinquency are involved.<sup>23</sup> As a result, children are more inclined than adults to choose an antisocial activity suggested by their peers rather than a more positive choice of their own.<sup>24</sup> Research has shown that susceptibility to peer pressure to engage in antisocial behavior increases between childhood and early adolescence, peaks around age 14, and then declines slowly during the late childhood years.<sup>25</sup> One major study found that exposure to peers during a risk-taking task doubled the amount of risky behavior among mid-adolescents (with a mean age of 14) but had no impact at all among young adults.<sup>26</sup> Recent studies using magnetic resonance imaging that examine how children's brains activate have established that there is a profound,

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<sup>21</sup> Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am Psychologist* 1009, 1012 (2003).

<sup>22</sup> See Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 *Developmental Psychol* 1531 (2007) (“[T]here is little doubt that peers actually influence each other and that the effects of peer influence are stronger during adolescence than in adulthood.”).

<sup>23</sup> *Id.* at 1532.

<sup>24</sup> Thomas Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 *Developmental Psychol* 608, 614 (1979).

<sup>25</sup> Elizabeth Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 38 (2008); Berndt, *supra* note 24, at 612, 615–16; Laurence Steinberg & Susan Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 *Child Dev* 841, 848 (1986); Fagan, *supra* note 19, at 382–84 (discussing coercive effect of social context on adolescents).

<sup>26</sup> Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood*, 41 *Developmental Psychol* 625, 626–634 (2005).

neurological foundation for children's susceptibility to outside pressures.<sup>27</sup> Thus, children's choices are very different from the affirmative choices of cognitively mature adults that form the basis of criminal culpability.

The problems that this tendency can create for children who grow up in homes or neighborhoods marked by negative peer influences are only exacerbated by children's lack of control over their immediate environments. Unlike adults, children cannot decide where they live, who lives with or cares for them, or where they go to school.<sup>28</sup> Children have no practical means of escaping from a toxic home or school environment. In addition to the immediate and negative social pressures that these situations can impose on children, they can also delay or even prevent healthy adolescent development and cognitive growth.<sup>29</sup>

The established science permits only one conclusion: children, for reasons beyond their control, sometimes commit crimes as children that they would *not* commit as adults. The Eighth Amendment – and fundamental justice – require that these individuals be given an opportunity to demonstrate that their criminal actions were a function of their child status and that, upon maturity, their continued incarceration serves no legitimate penological or public interest purpose.

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<sup>27</sup> Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14 *Developmental Sci* F1, F5–F8 (2011).

<sup>28</sup> See Gary W. Evans, *The Environment of Childhood Poverty*, 59 *Am Psychologist* 77, 88 (2004) (noting children who come from low-income environments and who face risk factors are “more likely to rely on peers than adults” and are particularly vulnerable to aggressive peers).

<sup>29</sup> See *id.* at 88; Brian J. Bigelow, *There's an Elephant in the Room: The Impact of Early Poverty and Neglect on Intelligence and Common Learning Disorders in Children, Adolescents and Their Parents*, 23 *Developmental Disabilities Bulletin* 177, 185 (2006); see also Arnold J. Sameroff et al., *Stability of Intelligence from Preschool to Adolescence: The Influence of Social and Family Risk Factors*, 64 *Child Dev* 80, 80–97 (1993).

### III. IMPOSING MICHIGAN'S HARSHEST PUNISHMENT, LIFE WITHOUT POSSIBILITY OF PAROLE, ON CHILDREN IS A VIOLATION OF THE FEDERAL CONSTITUTION'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND THE MICHIGAN CONSTITUTION'S PROHIBITION AGAINST CRUEL OR UNUSUAL PUNISHMENT.

Children are different than adults, something *amicus curiae*, as well as parents, teachers, and others in their communities, have always known. When taking any action they know how to step on the gas pedal, but often lack the maturity to find and apply the brake. They want to belong and want to be accepted, leading many times to poor choices of role models and peers. They see the reward, but are frequently blind to the consequences. They are adolescents, by definition – children becoming, but not yet, adults. Yet, compared to adults, they have a greater ability to develop, to change, to mature and be productive members of society. That is why it is constitutionally and fundamentally wrong to subject them to the harshest penalty that an adult could receive in this State – life without the possibility of parole, or death in prison.

In a series of groundbreaking decisions, the Supreme Court recognized that “children cannot be viewed simply as miniature adults.” *J.D.B. v North Carolina*, 131 S Ct 2394, 2404 (2011). In the Eighth Amendment context in particular, the “evolving standards of decency that mark the progress of a maturing society,”<sup>30</sup> have led the Court to strike down state laws that impose society’s harshest punishments on children who break the law.

In *Roper*, citing developments in neuroscience and psychology, the Court observed that children in the criminal justice context are fundamentally different from adults. The Court concluded that young offenders are less culpable for their criminal acts than adults, and are therefore less deserving of society’s harshest punishments. *Roper*, 543 US at 571. Applying and

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<sup>30</sup> *Roper*, 543 US at 561 (quoting *Trop v Dulles*, 356 US 86, 100–101 (1958)).



relying on the same principles, *Graham* held that children under the age of 18 who did not kill or intend to kill cannot be given life sentences with no meaningful opportunity for release because such harsh punishment is not appropriate for children given their diminished culpability and unique capacity for change and rehabilitation. *Graham*, 130 S Ct at 2030.

The *Roper* Court's reasoning for prohibiting the death penalty for youth – then applied in *Graham* to strike down life without parole sentences imposed on children who commit non-homicide crimes – applies with equal force here. In the only post-*Graham* Michigan case involving the resentencing of a youth convicted of a first-degree homicide, the court in vacating the life without parole sentence held:

While this court recognizes the *Graham* Court considered these factors in a non-homicide context, the *Roper* Court considered and, in fact, found persuasive, those same factors while considering the culpability of a juvenile murderer. Thus the differences that exist between juveniles and adults neither change nor become less persuasive whether the underlying conviction is for a homicide or otherwise.

*People v Jones*, unpublished opinion of the Ninth Circuit Court, issued Dec. 21, 2011 (No. 1979-1104-FC), 2011 WL 7404445, at \*6, (granting Defendant's Motion for Relief from Judgment) (internal citation omitted).

The *Miller* Court also recognized that “none of what is said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime specific.” *Miller*, 132 S Ct at 2465.<sup>31</sup> It is because they are children with children's characteristics “lack of maturity and an underdeveloped sense of responsibility [that] often result in impetuous and ill-considered actions and decisions” that as a class they are “less deserving of the most serious

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<sup>31</sup> The *Miller* Court stated that because of its decision to strike down all mandatory life without parole punishments for children, “we do not consider Jackson and Miller's alternate argument that the Eighth Amendment requires a categorical ban on life without parole for juveniles.” *Miller*, 132 S Ct at 2469.

punishments.” *Graham*, 130 S Ct at 2026; *Roper*, 543 US at 569–70; *see also J.D.B.*, 131 S Ct at 2404.

These traits are not peculiar to certain children or subsets of children but rather describe youth as a class. *See J.D.B.*, 131 S Ct at 2404–05. Accordingly, when evaluating any child offender’s culpability, youth is a significant mitigating factor in every case. Its universal relevance ““deriv[es] from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in *younger* years can subside,”” and indeed they usually do. *Roper*, 543 US at 570 (quoting *Johnson v Texas*, 509 US 350, 368 (1993)).<sup>32</sup> Delivering the harshest punishment that the State can impose on a child is therefore disproportionate no matter the nature of a child’s offense.

Michigan abolished the death penalty in 1846 for crimes involving homicides. The harshest penalty the State can impose on an adult convicted of any such crime, or series of crimes, is a life sentence without the possibility of parole. In order to effectuate the recognition of the diminished culpability of youth as a class, children cannot receive the harshest sentence available and must, at a minimum, be afforded some meaningful opportunity for release. The combination of the complete absence of any penological justification, the diminished culpability of children who commit crimes, and “the severity of life without parole sentences” necessarily lead to the conclusion that sentencing persons to life without parole for any crime committed

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<sup>32</sup> In its December opinion holding that imposing life without parole sentences on children was unconstitutional, the Massachusetts Supreme Judicial Court reasoned that because a child’s brain and personality are not fully developed at the time of the offense, the state can never make “a conclusive showing of traits such as an ‘irretrievable depraved character,’” at an individualized sentencing hearing. *Diatchenko v. Dist. Att’y for Suffolk Dist.*, 466 Mass 655, 667 (Mass 2013) (quoting *Roper*, 543 US at 570, 125 S Ct 1183). Without such a showing, the Massachusetts’ court concluded that it would be impossible for a sentencing judge to find that life imprisonment without parole, the harshest punishment in Massachusetts, was warranted. *Id.*

before they were 18 years old is a cruel and unusual punishment prohibited by the Eighth Amendment and Michigan's Constitution which prohibits punishment that is cruel or unusual.

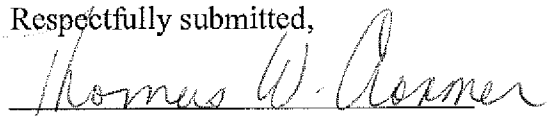
*See Graham*, 130 S Ct at 2030.

## CONCLUSION

There is no penological or public interest justification to continue to impose the harshest possible sentence upon child offenders whose decision-making capacities had not fully matured at the time of their offenses. For this reason, *amicus curiae* urges the Court to give child offenders serving life without parole sentences a meaningful opportunity to show that they are capable of rehabilitation, and to hold that imposing life without parole sentences upon children violates the United States and Michigan Constitutions as a disproportionate punishment.

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# **APPENDIX A**

**LIST OF AMICUS CURIAE MEMBERS**

American Probation and Parole Association

Association of Women Executives in Corrections

Citizens for Prison Reform

Citizen's Alliance on Prisons and Public Spending

Council of Juvenile Corrections Administrators

International Community Corrections Association

Mental Health Association in Michigan

Michigan Association for Children with Emotional Disorders

Michigan Association of Community Mental Health Boards

Michigan Council on Crime and Delinquency

Michigan County Social Services Association

Michigan Protection and Advocacy Service, Inc.

Michigan Women's Justice & Clemency Project

National Association of Social Workers – Michigan

National Partnership for Juvenile Services

Patricia Caruso, Former Director, Michigan Department of Corrections

Perry Johnson, Former Director, Michigan Department of Corrections

Dr. Barry Krisberg, Distinguished Senior Fellow, University of California, Berkeley School of Law

Daniel Nagin, PhD., Teresa and H. John Heinz III Professor of Public Policy and Statistics, and Associate Dean of Faculty, Carnegie Mellon University, Heinz College.

Pamela Withrow, Former Warden, Michigan Department of Corrections