PETITION P-161-06

TO THE HONORABLE MEMBERS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES:

OBSERVATIONS ON THE RESPONSE OF THE UNITED STATES REGARDING JUVENILES SENTENCED TO LIFE IMPRISONMENT WITHOUT PAROLE AND SUPPLEMENTAL SUBMISSION IN SUPPORT OF PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS OF JUVENILES SENTENCED TO LIFE WITHOUT PAROLE IN THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

INTRODUCTION. 1

I. PETITIONERS HAVE EXHAUSTED ALL AVAILABLE, ADEQUATE AND EFFECTIVE DOMESTIC REMEDIES, AND THEIR PETITION SHOULD THUS BE DEEMED ADMISSIBLE. 1

A. Petitioners' Attempts To Obtain Domestic Remedies Would Be Futile. . . . . 8.

1. U.S. Supreme Court and Futility. 8
2. Michigan State Law And Futility. 12
3. The United States: Federal And State Courts. 16

II. THIS PETITION IS TIMELY 17

A. Violation of Petitioners' Rights Are Ongoing and Exacerbated by Cruel or Degrading Treatment Because of Their Age and the Nature of Their Sentences 18

III. ALTERNATIVELY, EXHAUSTION OF REMEDIES AND TIMELINESS SHOULD BE JOINED TO THE MERITS. 23

IV. CONCLUSION. 26

INTRODUCTION:

The United States government's reply to Petition 161.06, addressing sentencing of juveniles to life imprisonment without parole, raised concerns with the admissibility of the petition, based upon an assertion that the Petitioners had failed to exhaust their domestic remedies and/or the petition was untimely. (State's Response, II & III).

The State's reply also addresses the merits of the petition, while asserting that they lack sufficient, specific information regarding certain Petitioners. The State also asserts they did not receive Petitioners' Annex A providing details as to Petitioners. (State's Response, IV, IV(E)).

Petitioners, being advised that the United States is in receipt of Petitioners Annex A, submit these observations to address the admissibility arguments of the State, and provide additional information as to the thirty-two (32) Petitioners' ongoing conditions and treatment during their incarceration for life without opportunity for parole ("JLWOP").

Petitioners have demonstrated the admissibility of this petition and renew their request for a combined admissibility and merits hearing during this Commission's next session. Alternatively, should this Commission require further information before deciding on the merits, Petitioners request that this Commission hold an admissibility hearing during the next session.

I. PETITIONERS HAVE EXHAUSTED ALL AVAILABLE, ADEQUATE AND EFFECTIVE DOMESTIC REMEDIES, AND THEIR PETITION SHOULD THUS BE DEEMED ADMISSIBLE

The United States asserts that petitioners have failed to exhaust domestic remedies. Petitioners in response assert that because they have no reasonable chance of successfully obtaining appropriate redress in domestic courts, they meet one of the exceptions to the exhaustion requirement provided under Article 31(2)(a) of the Commission's Rules of

Procedure. Specifically, this Article provides that domestic remedies need not be exhausted where "the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated." Pursuant to this provision, the Commission has found that domestic remedies "must be (1) adequate, in the sense that they must be suitable to address an infringement of a legal right, and (2) effective, in that they must be capable of producing the result for which they were designed."[1]

The exhaustion requirement "refers to legal remedies that are *available, appropriate, and effective* for solving the presumed violation of human rights."[2] In interpreting these characteristics, the Commission has established that "when, for factual or for legal reason, domestic remedies are unavailable, the petitioners are exempted from the obligation of exhausting the same."[3] Petitioners need not, as the State's reply suggests, exhaust all theoretical avenues of redress. Rather, the Commission has found,

> [i]f the exercise of the domestic remedy is such that, on a *practical* basis, it is unavailable to the victim, there is certainly no obligation to exhaust it, regardless of how effective *in theory* the action may be for remedying the allegedly infringed legal situation.[4]

Likewise, in *Housel v. United States*, the Commission explained that the key question in an exhaustion determination is whether *de facto* remedies exist, not whether *de jure* remedies are theoretically available.[5] In *Housel*, petitioner alleged that his prolonged detention on death row constituted cruel and unusual punishment in violation of Article 26 of the American Declaration on the Rights and Duties of Man ("American Declaration"). The United States claimed that

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[1] *Gary Graham n.k.a Shaka Sankofa v. U.S.*, Case No. 11.193, Report 51/00, para. 55; *Tracey Lee Housel v. U.S.*, Pet. No. 129/02, Report 16/04 (February 27, 2004), para. 31; *Ramon Martinez Villareal v. United States*, Case 11.753, Report No. 108/00, para. 60, I/A Court H.R., *Velásquez Rodríguez*, Judgment of July 29, 1988, Ser. C. No. 4 (1988), paras. 64-66.
[2] *Elias Gattass Sahih*, Report No. 9/05, Inter-Amer. C.H.R., Petition No. 1/03, *at* 30 (2005).
[3] *Id.* (interpreting exhaustion requirements under Art. 46 of the American Convention on Human Rights).
[4] *Id*. (emphasis added). *See also*, European Court of Human Rights, *Akdivar and Others v. Turkey*, 1 BHRC 137, ¶66 (1996), (finding that "[t]he existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness").
[5] *Tracy Lee Housel v. U.S.*, Pet. No. 129/02, Report 16/04 (February 27, 2004).

because he had not raised that issue in domestic courts, he could not raise it before the Commission. The Commission rejected this position, explaining that:

> a petitioner may be excused from exhausting domestic remedies with respect to a claim where it is apparent from the record before it that any proceedings instituted on that claim *would have no reasonable prospect of success in light of prevailing jurisprudence of the state's highest courts*. In these circumstances, the Commission has considered that proceedings in which claims of this nature are raised would not be considered "effective" in accordance with general principles of international law.[6]

The European Court of Human Rights has also underscored the importance of applying the exhaustion requirement with due consideration for the particular facts and context of a case, and without excessive formalism and rigidity. In *Selmouni v. France*, the Court found that the application of the exhaustion requirement

> . . . must make due allowance for the context [and] must be applied with some degree of flexibility and without excessive formalism. . . . [T]he rule [] is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case.

The European Court went on to explain that an appropriate consideration of whether domestic remedies have been exhausted requires that the Court "take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants."[7]

Recently, the Commission has confirmed that it will also find domestic remedies exhausted where further domestic efforts by petitioners would be "futile". In *Isamu Carlos*

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[6] *Ibid*. at ¶. 36 (citing Case 11.193, Report 51/00, Gary Graham v. United States (Admissibility), Annual Report of the IACHR 2000, para. 60, citing Eur. Court H.R., De Wilde, Oomas and Versyp Cases, 10 June 1971, Publ. E.C.H.R. Ser. A, Vol.12, p. 34, paras. 37, 62; Eur. Court H.R., Avan Oosterwijck v. Belgium, Judgment (Preliminary Objections), November 6, 1980, Case Nº 7654/76, para. 37; Case 11.753, Report 108/00, Ramón Martinez Villareal v. United States (Admissibility), Annual Report of the IACHR 2000, para. 70).

[7] European Court of Human Rights, *Selmouni v. France*, (2000) 29 EHRR 403, 435. *See also Baumann v. France*, (2002) 34 EHRR 44, 1055.

Shibayama et al. v. United States,[8] the government claimed that petitioners had not pursued all available domestic remedies at the time of their petition because additional avenues of appeal were available to them before a U.S. federal court. The Commission noted that "[p]etitioners have pursued some, but not all, of the domestic remedies potentially pertinent to the claims raised before the Commission"[9] and that "the information available calls into question the possibility that further proceedings [...] might reasonably be successful." [10] However, the Commission found that "individuals similarly situated to the Petitioners had raised [domestic] claims unsuccessfully" before appellate courts and were denied review by the U.S. Supreme Court.[11] The Commission therefore held that "additional remedies pursued by the Petitioners would not be effective within the meaning of applicable principles of international law and therefore that their claims are not barred from consideration under Article 31.1 of its Rules of Procedure."[12]

In determining whether remedies have been exhausted, this Commission has also given weight to efforts made by petitioners to pursue remedies in domestic forums, and the receptivity of appellate courts to individuals bringing similar claims. In *John Elliott v. United States*,[13] petitioner was sentenced to death in Texas for murder, and claimed that the extended period he spent on death row had resulted in him being subject to "death row syndrome" in violation of article 26 of the American Declaration which prohibits "cruel, infamous or unusual punishment". The Commission noted that the petitioner "pursued numerous domestic avenues of redress since his conviction and sentencing to death,"[14] but found "that any available domestic proceedings

[8] Isamu Carlos Shibayama, et al. v. U.S., Report 26/06, Petition 434-03.
[9] *Ibid.* at para. 49.
[10] Ibid.
[11] *Ibid.* at para. 51.
[12] *Ibid.* at para. 52 (Rules of Procedure of the Inter-American Commission of Human Rights Art. 31(1) requiring exhaustion of domestic remedies).
[13] *John Elliott v. United States*, Report No. 68/04, Petition 28/03 (2004).
[14] *Ibid.* at para. 34.

would provide no reasonable prospect of success"[15] based in part on petitioner's showing that the U.S. Supreme Court had "consistently refused to consider the issue."[16] The Commission found the petition admissible.[17]

Here, Petitioners' claims have no reasonable prospect of success before domestic courts. Petitioners here have pursued multiple avenues of redress before domestic forums[18] and any remaining procedures offer no likelihood of success. Equivalent claims to those raised by Petitioners have been definitively rejected in precedential Michigan state court rulings.[19] Moreover, as discussed in more detail below, the U.S. Supreme Court has given strong indications that it currently considers juvenile life without parole sentences to be constitutional. Clearly, any further efforts by Petitioners to exhaust additional domestic legal remedies would be futile.

In its reply, however, the Government argues that *Roper v. Simmons*, the 2005 Supreme Court decision striking down the death penalty for juveniles, may give Petitioners' claims renewed prospects for success in domestic forums, and that Petitioners should therefore raise their claims before domestic courts rather than the Commission.[20] The State further argues that even if there is no reasonable prospect of success, the likelihood of an adverse ruling is insufficient to demonstrate the futility exception to exhaustion under Article 31.[21] Petitioners

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[15] *Ibid*. at para. 37.
[16] *Ibid*. at para. 35.
[17] *Ibid*. at para. 4. *See also Garifuna Community of "Triunfo De La Cruz" and its Members v. Honduras,* Report 29/06, Pet. 906-03, para. 49 (2006) ("considering the many remedies attempted by the alleged victims in the present case, the Commission finds that the exceptions in Article 46.2, subparagraphs a and b of the Convention are applicable, thereby rendering inapplicable the requirements of the Convention on exhaustion of internal remedies.").
[18] *See* Pet. pp. 46-48.
[19] Once an equivalent claim has been raised and ruled upon in a Michigan appellate court, all subsequent appellant panels are bound by the earlier ruling. MCR 7.215(J)(1) ("a panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court of Appeals as provided in this rule."). As set forth in more detail below, the Michigan Courts had rejected any argument for an effective legal remedy by Petitioners prior to their sentencing and consistently reaffirmed these rulings.
[20] U.S. Government Response Brief (hereinafter, "Response Brief") at 3-4.
[21] Response Brief at 4-5.

disagree with this analysis.

The standard for assessing exhaustion is one of a *realistic assessment*, not, as the Government asserts, a theoretical possibility. Moreover, the onus is on the Government to demonstrate the availability of an adequate remedy by citing to actual success on a claim such as the one raised by Petitioners.[22]

As detailed below, under U.S. law, there was in fact no realistic, adequate, or effective remedy to Petitioners at the time they committed their crimes that would have afforded them substantive review of their status as juveniles. Thus, any claim based on such grounds would have been highly unlikely to succeed.[23]

The Government's suggestion that the Supreme Court may, at some unknown point in the future, grant certiorari (review) on the issue of JLWOP and thereafter hold it unconstitutional, is not an ordinary remedy, and the remote possibility that the Court will exercise review renders it an ineffective remedy for Petitioners. Not only is the granting of certiorari in the Supreme Court discretionary; the exercise of the Court's discretion makes the granting of certiorari highly unlikely. For example, in the 2005 term the Court granted certiorari in only 9% of the petitions made to it.[24]

Moreover, requiring the present Petitioners to file cases in Michigan state courts, or petitions for review before the U.S. Supreme Court, would "not have offered [them] better chances of success" since neither they nor other individuals with similar claims have been

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[22] *See*, for example, the analogous ruling of the European Court of Human Rights in *V v. United Kingdom* (2000) 30 EHRR 121 (1999); *See also Selmouni v. France*, 29 EHRR 403 (2000) (the relevant inquiry is whether there is an available practical remedy, not a procedural hypothetical remedy.).

[23] *Selmouni v. France*, 29 EHRR 403, 437 (2000) ("the remedy available to the applicant was not . . . an ordinary remedy sufficient to afford him redress in respect of the violations he alleged."); *See also, Baumann v.* France, 34 EHRR 44,k para. 45 (2002) (noting that a remedy is exhausted when it is "de facto" ineffective.).

[24] *Harvard Law Review*, Vol 120:372, p. 380, November 2006, Table II(B) Cases Granted Review, *available at* http://www.harvardlawreview.org/issues/120/nov06/statistics06.pdf.

successful to date in challenging their JLWOP sentences.[25]

A. Petitioners' Attempts To Obtain Domestic Remedies Would Be Futile.

1. U.S. Supreme Court and Futility

The sole contention of the Government, supporting their argument that Petitioners have an adequate remedy before domestic courts, is that *Roper v. Simmons*[26] may provide some avenue for relief and that therefore domestic remedies have not been exhausted. As a threshold matter, the *Roper* decision, and the Court's earlier ruling in *Atkins v. Virginia*[27], deal exclusively with the death penalty, not JLWOP sentences. The rationale of *Roper* is premised on the Court's consideration that "the death penalty is the most severe punishment" and that therefore "the Eighth Amendment applies to it with special force."[28] Indeed, the Court explicitly did not limit imposition of other penalties – such as life without parole sentences – on juveniles.[29] In abolishing juvenile death sentences, the Supreme Court actually noted that JLWOP sentences could continue to serve the deterrent effect that the death penalty had served.[30] The Court then vacated the defendant's death sentence and *affirmed* his sentence of life imprisonment without possibility of parole.[31] In no uncertain terms, the U.S. Supreme Court in *Roper* signaled its clear acceptance of the practice of JLWOP.

Moreover, the crucial factual predicate underlying *Roper* is not present in Petitioners'

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[25] *Baumann v. France*, 34 EHRR 44, para. 46 (2002) ("The applicant cannot be criticised for not having had recourse to legal remedies which would have been directed essentially to the same end and would in any case not have offered better chances of success.").
[26] *Roper v. Simmons*, 543 U.S. 551 (2005).
[27] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[28] *Roper*, 543 U.S. at 568.
[29] *Roper*, 543 U.S. at 573-74 ("When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.").
[30] *Id.* at 572 (dismissing the argument that the juvenile death penalty is necessary to deter juveniles from committing crimes, and instead offering that "[t]o the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.").
[31] *Id.* at 560.

claims. The Court in *Roper* recognized, in light of the fact that "30 States prohibit the juvenile death penalty",[32] that an emerging consensus existed among the U.S. states that the execution of juveniles is sufficiently "cruel and unusual" so as to violate the U.S. Constitution's Eighth Amendment prohibition of cruel and unusual punishment.[33] In *Roper*, the fact that 30 states prohibited the use of the juvenile death penalty was essential in finding it unconstitutional, as this indicated a national consensus on the "evolving standards of decency."

Unfortunately, such a consensus among U.S. states does not exist with regard to JLWOP. In contrast with the juvenile death penalty, currently 42 states and the federal government *allow* JLWOP sentencing, making it impossible for Petitioners to satisfy the "unusualness" component of the Eighth Amendment or to demonstrate a national consensus against such sentences. The Government's reliance on *Roper*, therefore, does not demonstrate that Petitioners have an effective domestic remedy that they failed to exhaust.[34]

Subsequent to *Roper*, a number of courts have rejected constitutional challenges to JLWOP sentences. Further, the Supreme Court's recent denials of certiorari in taking up the issue of JLWOP sentencing and the broader legal context both in Michigan and other U.S. states demonstrates that "any proceedings instituted" to challenge the sentence "would have no reasonable prospect of success in light of prevailing jurisprudence" of the highest courts at both state and federal forums.

Both before and after Petitioners were sentenced, the U.S. Supreme Court had repeatedly

[32] *Roper*, 543 U.S. at 564.
[33] *Id.* at 568.
[34]The exhaustion requirement certainly does not require waiting for the Eighth Amendment's "evolving standards of decency" to catch up with international law regarding the appropriate standards for the punishment of juveniles. Government Response at 4, quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

declined to review JLWOP cases from both state[35] and federal courts,[36] and held that life without parole sentences for adults are constitutional.[37] And, in December 2007, the Supreme Court, again, denied certiorari to consider the constitutionality of JLWOP sentences in *Craig v. Louisiana*, reaffirming Petitioners' argument that attempts to exhaust would be futile.[38]

In his petition, Craig sought review of his life without parole sentence, arguing that "[t]he principles underlying the decision in *Roper v. Simmons,* bolstered by continuing scientific research and the great weight of international law, point to the illegality of the juvenile life without parole sentence under the Eighth Amendment."[39] Craig also argued that the sentence violated the Supremacy Clause of the Constitution because the United States is a party to the ICCPR, and under the ICCPR, criminal trials of juveniles should take into account their age and the desirability of promoting their rehabilitation.[40]

The Louisiana appellate court rejected both arguments, and specifically noted that the U.S. Supreme Court considered the ICCPR in *Roper* and nevertheless reached a decision upholding a JLWOP sentence.[41] The state court also emphasized that the ICCPR is a "non-self-executing" treaty, meaning that it does not give individuals a right to sue the government in U.S. courts for violations of the treaty's provisions, and noted that in any event, the United States specifically reserved on its right to impose capital punishment on juveniles when it ratified the treaty.[42] Thus, the Louisiana appellate court held that the JLWOP sentence imposed was not constitutionally excessive and was not grossly disproportionate to the severity of the offense.

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[35] *State v. Massey*, 60 Wash.App. 131 (1990), review denied by 115 Wash.2d 1021 (1990), cert denied by 499 U.S. 960 (1991); *State v. Lee*, 148 N.C.App. 518 (2002), appeal dismissed by 335 N.C. 498, cert. denied sub nom *Lee v. North Carolina*, 537 U.S. 955 (2002); *State v. Standard*, 351 S.C. 199 (2002), cert. denied by 537 U.S. 1195 (2003).
[36] *Rice v. Cooper*, 148 F.3d 747 (7th Cir. 1998), cert. denied 526 U.S. 1160 (1999).
[37] *Harmelin v. Michigan*, 501 U.S. 957 (1991).
[38] *Craig v. Louisiana*, 944 So. 2d 660 (La. Ct. App. 2006), cert. denied 128 S. Ct. 714 (2007). The Louisiana Supreme Court also denied cert to hear the case (*State v. Craig*, 959 So. 2d 518 (2007)).
[39] *Craig v. Louisiana*, 944 So. 2d 660 (La. Ct. App. 2006), cert. denied 128 S. Ct. 714 (2007).
[40] Id.
[41] Id.
[42] Id. at 663.

The U.S. Supreme Court's subsequent denial of certiorari in *Craig v. Louisiana* to address the scope of *Roper* and the application of international standards to juvenile sentencing practices demonstrates a *de facto* unavailability of domestic remedies from the highest court in the United States, and confirms the futility of attempts to exhaust domestic remedies at this time.

The unavailability of remedies was more recently confirmed in 2008 when the U.S. Supreme Court denied certiorari to hear *Pittman v. South Carolina,* a case involving the conviction of boy who was 12 years old at the time of the incident.[43] Pittman was sentenced to the shortest sentence possible under the mandatory minimum sentencing guidelines in South Carolina: two concurrent terms of thirty years imprisonment.[44] On appeal, Pittman argued that the trial court erred in not taking into consideration his youth in terms of the admissibility of his confession and sentence. Pittman's arguments that his child status should have been considered were rejected by the highest state court in South Carolina, given "the nature of the criminal acts of which Appellant was convicted."[45] The state court also held that "we do not believe that evolving standards of decency in our society dictate that it is cruel and unusual to sentence a twelve-year-old convicted of double murder to a thirty-year prison term."[46]

In denying certiorari, the Supreme Court demonstrated that it will not consider the severity of JLWOP sentencing as it relates to emerging evidence concerning the cognitive capacity and physiology of children in relation to the crimes and continues to refuse recognition of a child's right to special protection. Prior to this, the Supreme Court declined to hear any cases challenging automatic waiver statutes that permit automatic transfers from juvenile to adult court, based on age, offense, or prior record without consideration of child status at any stage of

[43] 128 S. Ct. 1872 (April 14, 2008).
[44] *State v. Pittman*, 373 S.C. 527, 544 (2007).
[45] *Id.* at 563.
[46] *Id.* at 564.

the proceedings.[47]

Therefore, the government's contention that the "evolving standards of decency" test and the *Roper* decision preclude exemption from the exhaustion obligation is clearly erroneous. Petitioners are barred from obtaining an effective and appropriate remedy in domestic courts and thus fall within the exception from the exhaustion requirement of Art. 31(2)(a).

2. Michigan State Law And Futility

Michigan state courts also do not provide an effective remedy for any of the Petitioners. Any efforts Petitioners could theoretically make to pursue state judicial challenges would therefore be futile.[48] The five Petitioners, whose facts are set forth in detail in the petition, represent the range of circumstances under which juveniles have been sentenced to life without possibility of parole in Michigan. Damion Todd was 17 in 1986 when he committed the offense for which he was convicted. At 17, he was considered an adult and charged, tried, sentenced and incarcerated without consideration of his child status.

Henry Hill was 16 in 1980 and his I.Q. showed his capacity at a third grade/9 year old level.[49] He was ordered to be tried in adult court, under the law which required a judge to rule on whether he was an adult or juvenile, and sentenced as an adult to a mandatory life sentence.

Barbara Hernandez and Kevin Boyd were 16 years old in 1990 and 1994 when they were tried as adults under the new automatic waiver law, which went into effect in 1988. The law allowed the judge at sentencing to choose between the adult sentence of life without parole or juvenile detention until 21. Both were sentenced and incarcerated as adults. Patrick McLemore and all twenty-seven Petitioners listed in the Annex were tried, sentenced and incarcerated under

[47] *U.S. v. Bland*, 412 U.S. 909 (1973); *Quinones v. U.S.*, 516 F.2d 1309 (1st Cir. 1975), *cert. denied*, 423 U.S. 852 (1975); *Cox v. U.S.*, 473 F.2d 334, 336 (4th Cir. 1973), *cert. denied*, 414 U.S. 869 (1973).
[48] *See Sergio Schiavini & Maria Teresa Schnack de Schiavini v. Argentina*, Report 5/02, Petition 12.080, para. 45 (2002) ("Convention provides that this provision will not apply when there are no local remedies to be exhausted, whether because of factual circumstances or points of law.").
[49] Petition, p. 11-12

the current law passed in 1996. There is no consideration of their child status at any time. They were charged, tried, sentenced and incarcerated as adults. There are now 321 individuals in Michigan prisons serving the sentence of life without possibility of parole for crimes committed under the age of eighteen. All of the challenges to the laws under which Petitioners are incarcerated have been rejected.

In 1976, prior to **any** of the Petitioners receiving their mandatory life without possibility of parole sentences, the Michigan Supreme Court determined, in a case challenging a mandatory life without parole sentence for an adult convicted of felony murder, that "[a] mandatory life sentence without possibility of parole for this crime does not shock the conscience."[50] This reasoning was extended to the JLWOP context in 1996, where the Michigan Court of Appeals considered the constitutionality of the imposition of a life without parole sentence for a juvenile and concluded, following *Hall*, that "it is not cruel or unusual punishment to sentence a juvenile to life imprisonment without the possibility of parole".[51] Subsequently, Michigan state courts have repeatedly rejected appeals that characterize mandatory life sentences for juveniles as cruel or unusual punishment and have refused to recognize a child's legal right to special protection, thus making any future challenges on these issues futile.[52] Petitioners' and other individuals' attempts to challenge *Hall's* application to children have all been rejected,[53] and the Michigan Supreme Court has consistently denied review.

Petitioner Matthew Bentley, age 14 at the time of his crime, attempted to appeal his life sentence after Michigan passed the statute. He argued that the imposition of a mandatory life

[50] *People v. Hall*, 396 Mich. 650; 24 N.W.2d 377 (1976).
[51] *People v. Launsburry*, 217 Mich. App. 358, 464 (Mich. App. 1996), appeal and rehearing denied, 454 Mich. 883 (1997).
[52] *People v. Jarrett*, 1996 WL 33360697 (Mich. App.), appeal denied 454 Mich. 921 (1997); *People v. Bentley*, 2000 WL 33519653 (Mich. App. 2000), appeal denied 463 Mich. 993 (2001).
[53] See *People v. Launsberry*, 217 Mich.App. 358, 551 N.W.2d 460 (Mich.App. 1996), appeal and rehearing denied 454 Mich. 883 (1997) (extending the rationale of *People v. Hall* to juveniles and sanctioning the imposition of life without possibility of parole sentencing).

sentence without the possibility of parole constituted cruel or unusual punishment and that the mandatory sentence – as applied to minors – violates due process. However, the Michigan Court of Appeals rejected all of his arguments, noting these issues had been previously decided. The Michigan Supreme Court refused to review the decision.[54] Michigan state courts also do not recognize a child's right to special protection, thereby rendering a due process claim in state court futile. The lack of such a right means that states have complete discretion in formulating their procedures and standards for waiving juveniles into adult courts. Consequently, in the face of due process challenges, Michigan courts have repeatedly upheld Michigan automatic waiver laws without consideration of child status at any stage of the proceedings.[55] In light of these precedents, further challenges to Michigan's automatic waiver scheme by the individual Petitioners would be futile.

Michigan state courts have consistently rejected challenges to the constitutionality of JLWOP sentences. As recently as six months before the Petition in this case was filed, in *People v. Crossley*,[56] the Michigan Supreme Court denied an appeal of an appellate court decision rejecting such a challenge by one of the Petitioners, Vincent Crossley. Crossley had argued on appeal that his life sentence constituted cruel or unusual punishment under the state Constitution and, in addition, that his sentence was disproportionate to the severity of the crime committed. This ruling by the state's highest court and others noted herein are precedential in nature and thus render similar challenges by any other Petitioners futile.

The government's argument that this Commission should find Petitioners' claims inadmissible because of the possibility that U.S. law may change at some future date, has previously been explicitly rejected by this Commission. In *Ramón Martínez Villareal v. United*

[54] *People v. Bentley*, 2000 WL 33519653 (Mich. App. 2000), appeal denied 463 Mich. 993 (2001).
[55] *Conat*, 238 Mich.App. 134 (1999); *Bentley* 2000 WL 33519653 1, appeal denied 463 Mich. 993 (2001); *People v. Espie*, 2002 WL 875163 (Mich. App., 2002), appeal denied 467 Mich. 881 (2002); 672 N.W.2d 857 (Mich. 2002).
[56] 2006 Mich. App. LEXIS 562 (Mich. App. 2006), appeal denied 2006 Mich. LEXIS 1755 (Mich., Aug. 29, 2006).

States, the petitioner was sentenced to death by a court in Florida after his conviction on two counts of murder and one count of burglary.[57] The government argued that the petitioner had failed to exhaust his domestic remedies because motions were pending in the Florida Supreme Court to re-open petitioner's case. In finding the case admissible, the Commission focused on the likelihood of success, finding that the potential additional avenues of redress were "of an exceptional nature".[58] Significantly, the Commission found that the fact that such avenues of redress, "even if successful, will not provide [petitioner] with the relief [he] seek[s]," because that potential redress would not repair the harm done to the petitioner in the process.[59] The European Court of Human Rights has likewise held that a petitioner need not await the outcome of a case pending before domestic courts that could potentially provide an avenue of redress for the petitioner, if it is unlikely the petitioner will be able to obtain redress based on the case law *at the time he or she files his or her petition.*

As in *Villareal*, the government argues here that not all Petitioners have exhausted their opportunities to pursue habeas relief.[60] While many Petitioners have in fact filed habeas petitions, for those who have not filed or who are currently involved in the process, even in the rare circumstance where review might be granted, the relief afforded will not provide Petitioners with the redress they seek in this petition.

In addition, even theoretical avenues of domestic redress for the current Petitioners will not remedy the harm they have already experienced in the intervening years where they were denied the protections, services, and sentencing considerations they deserved as a consequence

[57] *Ramón Martínez Villareal v. United States*, Report 108/00, Case 11.753, (2000) ("the State has confirmed . . . that arguments that a condemned prisoner has suffered unduly from delays in his or her case cannot be grounded in U.S. law . . . the Commission finds that any proceedings raising these claims before domestic courts would appear to have no reasonable prospect of success, would not be effective in accordance with general principles of international law, and accordingly need not be exhausted in accordance with Article 37 of the Commission's Regulations.").
[58] *Id.* at para. 65.
[59] *Id.* ("they will not repair the prejudice caused during [petitioner's] trial and sentencing proceedings").
[60] Kevin Boyd, Henry Hill and Damion Todd have exhausted all of their collateral habeas corpus remedies.

of their child status. Ironically, in support of this argument, the United States cites *Velásquez Rodríguez*[61], a case in which the Inter-American Court noted in relation to the exhaustion issue that "senseless formalit[ies]" need not be pursued.[62]

3. The United States: Federal And State Courts

Outside of Michigan, rulings by other state courts and lower federal courts reveal a general legal and political context in which domestic remedies for challenges to JLWOP sentences are unavailable. These courts' decisions demonstrate that there is presently no reasonable prospect of success for Petitioners in any domestic forum:

- *Culpepper v. McDonough* (Florida, 2007)[63]: *Roper* does not extend to a 14-year old child who received a mandatory life without parole sentence, and *Roper* does not create a "new constitutional right" as the *Roper* decision is to be narrowly construed to include capital cases involving death sentences for minors;

- *State v. Bunch* (Ohio, 2008)[64]: Upholding an 89-year sentence of a juvenile, since *Roper* does not support the conclusion that for a juvenile, a term of life in prison without the possibility of parole was unconstitutional;

- *State v. Goins* (Ohio, 2008)[65]: An 84-year sentence of a juvenile did not violate the prohibition of cruel and unusual punishment contained in the Eighth Amendment or in Article 1, Section 9 of the Ohio Constitution;

- *State v. Williams* (South Carolina, 2008):[66] Upholding a life sentence without parole for a juvenile who could not prove that evolving standards of decency precluded his punishment, or that the sentence was disproportionate to the crime;

- *Graham v. State* (Florida, 2008)[67]: Neither state nor federal courts have ever considered the imposition of a life sentence on a juvenile to be unlawful or "unusual," as defined by the Eighth Amendment;

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[61] *Velasquez Rodriguez* case, Judgment of July 29, 1988 (Inter-American Court).
[62] *Ibid.* at para. 68. The court in *Velasquez Rodriguez* noted that "If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable." *Ibid.* at para. 64. It is manifestly unreasonable to require petitioners to remain in custody erroneously and in violation of their rights for an unknown period of time while they pursue remedies foreclosed to them.
[63] 2007 U.S. Dist. LEXIS 50866 (M.D. Fla.) (2007).
[64] 2008 Ohio 2340 (Ohio Ct. App. 2008).
[65] 2008 Ohio 3369 (Ohio Ct. App. 2008).
[66] 2008 S.C. App. LEXIS 172 (Ct. App. S.C. 2008)
[67] 982 So. 2d 43 (Fl. Ct. App. 2008), rehearing denied, *Graham v. State*, 2008 Fla. App. LEXIS 8917 (Fla. Dist. Ct. App. 1st Dist., May 16, 2008).

- *People v. Demirdjian* (California, 2006)[68]: Life sentence was not excessive punishment under the Eighth Amendment and Article 1, Section 17 of the California Constitution, because there is no categorical prohibition against imposition of a life term on juveniles who commit special circumstance murder.

The above case law shows that the relevant facts considered under the "evolving standards of decency" test have not altered since *Roper* and that there is currently no national trend toward abolition of JLWOP sentences. The Government's assertion that the "evolving standards of decency" test and *Roper* preclude Petitioners from being exempted from the exhaustion of domestic remedies requirement is clearly erroneous. Here, Petitioners have been and continue to be unable to attain an effective and appropriate remedy in domestic courts and thus fall within the Art. 31(2)(a) exception to the exhaustion requirement.

II. THIS PETITION IS TIMELY

According to Article 32(1) of the Commission's Rules of Procedure, a petition must ordinarily be filed within six months of "the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies." However, Article 32(2) provides that where "exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case."

The Commission long has recognized that continued violations of rights make petitions

[68] 44 Cal. App. 4th 10 (Cal. Ct. App, 2d App. Dist., Div. Four 2006), hearing denied, *People v. Demirdjian*, 2006 Cal. App. LEXIS 1995 (Cal. App. 2d Dist., Nov. 13, 2006), review denied, *People v. Demirdjian*, 2007 Cal. LEXIS 601 (Cal., Jan. 24, 2007).

timely even beyond six months from the initial violation.[69] In *Christian Daniel Dominguez Domenichetti v. Argentina*, for example, the Commission found that the six-month rule does not apply "where the allegations concern a continuing situation -- where the rights of the victim are allegedly affected on an ongoing basis."[70]

Where, as here, exhaustion of domestic remedies would be futile and/or the violation of rights under the American Declaration is ongoing, Article 32(2) is applicable, and the petition need not comply with the six-month rule for filing of petitions.[71] Rather Petitioners need only bring their Petition "within a reasonable period of time" under the circumstances.[72] The government erroneously asserts that supposed prior awareness by petitioners' counsel, the ACLU, of "the Commission and its work" has a bearing on the timeliness determination under Article 32. Not surprisingly, the government fails to cite any authority for this inapposite proposition.

A. Violation of Petitioners' Rights Are Ongoing and Exacerbated by Cruel or Degrading Treatment Because of Their Age and the Nature of Their Sentences

As described *infra*, in the instant case, Petitioners' rights are violated on a daily basis.[73] Petitioners are challenging a Michigan statutory scheme that (1) continues to confine them in prison, (2) denies them the opportunity for parole, and (3) denies them any opportunity to have

[69] *See, e.g.*, *María Emilia González, et al v. Argentina*, Pet. No. 618/01, Report 15/06 (March 2, 2006) (finding petition timely where proceedings were on-going, but government had failed to clarify facts that would allow effective prosecution of open proceedings); *Sergio Schiavini and Maria Teresa Schnack de Shiavini*, Report 5/02, Petition 12.080 (2002) (noting continuing violation alleged and finding petition timely); *Ricardo Manuel Semoza Di Carlo v. Peru*, Report 84/01, Case 12.078, para. 25 (2001) (finding failure to enforce a final judgment to be an on-going violation and that therefore petition was timely filed); *Eugenio Sandoval v. Argentina*, Report No. 16/06, Petition 619-01, para. 72 (2006) (finding petition timely where petitioner alleged a continuing violation because had not received sufficiently specific information as to whether her father's death was an accident or homicide); *Guatemala Case*, Report 28/98, Case 11.625, para. 29 (1998) ("[g]iven the nature of the claims raised, which concern the ongoing effects of legislation which remains in force, the six-months rule creates no bar to the admissibility of this case under the circumstances.").

[70] Pet. No. 11.819, Rep. No. 51/03 ¶48.

[71] *See* Petitioners' argument concerning futility, *supra*, and Petitioners' argument concerning ongoing violations, *infra*.

[72] IACHR Rules of Procedure Art. 32(2).

[73] Pet. at 46.

their child status at the time they committed their crimes taken into consideration. Moreover, the twin deprivations – of being a child incarcerated in an adult prison serving a non-parolable life sentence– have been exacerbated by the consequential failure to provide rehabilitation opportunities, education, or adequate health services.

One of the most prevalent problems for Petitioners serving life without parole sentences is that they are being denied education and rehabilitative programming opportunities because of their non-parolable status. Due to their age at the time of their arrest the majority of Petitioners had completed only an eighth grade education at the time of their incarceration.[74] Many of the Petitioners also had learning disabilities which interfered with their prior education.[75] Petitioners clearly stand to benefit from additional education (and oftentimes, special education). Yet as described below, Petitioners consistently report that their requests for educational services fall on deaf ears or are explicitly rejected because they are "lifers."

Education is not only important for the Petitioners' cognitive development. A GED (General Educational Development test) is a prerequisite for inmates in Michigan prisons who seek employment or other vocational programming in prison. Yet many petitioners have been denied access to GED educational programs. As a result, Petitioners are unable to earn money through prison employment or gain skills through vocational programming. They become cognitively, financially, educationally, and socially disempowered.

Several anecdotes from Petitioners illustrate the pervasiveness of the denial of essential educational and vocational programs. Ahmad Williams laughed as he told us that he took [Alcoholics and Narcotics Anonymous] class even though he didn't need it, just to have

[74]More than half of the petitioners were arrested prior to completing the ninth grade. Lamarr Haywood, Cedric King, Patrick McLemore, Juan Nunez and Ahmad Williams had not finished eighth grade before they were arrested and sentenced to a life of imprisonment without the possibility of parole.

[75] Matthew Bentley, Kevin Boyd, Cornelius Copeland, John Espie, Lonnell Haywood, Cedric King, Eric Latimer, Patrick McLemore, Tyrone Reyes, Kevin Robinson, Marlon Walker, Oliver Webb and Johnny Williams were either diagnosed with learning disabilities or enrolled in Special Education classes prior to their arrest and subsequent to incarceration.

something to keep his mind active.[76] When asked about the most difficult challenge in prison, Juan says, "Being able to adapt to an element where there are no counselors to guide you or programs in order for you to get therapy, you have to be within 2 years of your release. They don't try to reform us with any help in here."[77]

Petitioner Oliver Webb has consistently been denied educational or rehabilitative services by prison officials at Brooks Correctional Facility. When asked about the counseling and programs he has attended, Petitioner Webb says, "I sent a kite for all of these [rehabilitative programs] and I was told I had too much time for them."[78]

- Petitioners Cedric King, and Eric Latimer were denied access to any G.E.D. classes due to the length of their sentence. They are continually placed at the back of the list behind other inmates who are within 2 years of their first "out date." Chavez Hall, who has been incarcerated for nine years is now taking GED classes, but has not been given the opportunity to take the test, was told "prisons don't like paying for us [LWOP inmates] to take tests."
- Petitioners Matthew Bentley, Maurice Black, Kevin Boyd, Maurice Ferrell, Mark Gonzalez, Lonnell Haywood, Barbara Hernandez, Christopher Hynes, Juan Nunez, Sharon Patterson, Damion Todd, TJ Tremble, Marlon Walker, Oliver Webb, and Ahmad Williams have been able to obtain their GEDs by self-study, but have been denied all further educational opportunities.
- Petitioners Matthew Bentley, Maurice Black, Kevin Boyd, Larketa Collier, Cornelius Copeland, Maurice Ferrell, Mark Gonzalez, Lamar Haywood, Cedric King, Patrick McLemore, Tyrone Reyes, Kevin Robinson, Damion Todd, Marlon Walker, Oliver

[76] From interview with Ahmad Williams in 11/14/2008.
[77] "Life Offense and Conviction Detail Questionnaire" completed by Juan Nunez.
[78] A "kite" is prison slang for any type of written correspondence. Inmates will send "kites" to prison officials to request programs or services. Webb's reference to "too much time" refers to his life without parole sentence.

Webb, Elliott Whittington, Ahmad Williams, Leon Williams, Johnny Williams, have been denied rehabilitative programs since their incarceration because of their LWOP sentence.

In addition to the frustrations they encounter from being deprived of educational and rehabilitative opportunities, many Petitioners have described the general inhumanity they feel because of their life sentences. Petitioner Ahmad Williams describes a common feeling in his words: "We are all just animals in Michigan."[79] Petitioner Matthew Bentley describes his life since his incarceration at 14 in 1997: "Everyday a guy [in prison] feels emasculated; you have to hold onto the little bit of pride that you have. You feel like they try to emasculate you . . . I'm in prison, but I'm still a man."[80]

Moreover, Petitioners report strong racial tensions in the Michigan prisons, among both guards and inmates. Many report being called racial slurs by corrections officers, and feel that inmates are treated differently on the basis of their race. Extreme racial tension divides the inmates from one another, and causes violence and fear within the facilities. Petitioner Kevin Boyd says: "It does not matter whether you like it or not. If you want to survive, you pick a side."[81]

Mental health services to address these juveniles' complex issues are scarce. The Petitioners have gone through adolescence in prison with little, if any, counseling, support or health services. "I feel like the only thing [mental health treatment in] prison is concerned about with a person like myself is whether or not I am going to kill myself, because of the time I have,"

[79] Interview with Ahmad Williams on November 13, 2008.
[80] Interview with Matthew Bentley on November 13, 2008.
[81] Interview with Kevin Boyd on November 14, 2008

says Chavez Hall.[82] Seeking help for psychological issues can also come with severe costs. "Having emotional problems [mental health issues], you get ostracized by staff and inmates alike. I am in a prison within a prison," says Petitioner Barbara Hernandez.

Physical illness and health problems are neglected for long periods of time within the prison system. In general, it was reported that inmates receive no response to medical "kites," and that there is no preventative treatment. Inmates also wait long periods of time for treatment and medication, often to the point where conditions become life threatening. One of many examples is Petitioner Marlon Walker, who came down with the flu. His illness lasted over three weeks, and he lost 15 pounds. He was coughing up fluids and made frequent requests to see a doctor. Still, his request was not honored. He received no medication and no medical attention.[83]

The Commission has indicated that it will be especially receptive to petitions where full exhaustion of theoretical remedies would decrease the Commission's ability to provide redress. In the instant petition, Petitioners' ability to obtain redress for the harm they have suffered decreases in inverse proportion to their time incarcerated. Petitioners by now may be incarcerated beyond the time that would be justified had their juvenile status been considered.[84]

The Commission has also excused petitioners from exhausting domestic remedies when exhaustion would require pursuing lengthy domestic procedures that result in undue delays in the provision of justice at both the domestic and international levels. In *Valbuena v. Colombia*,[85] petitioners were family members of two men who had been abducted by paramilitary forces in Colombia. The government had failed to diligently pursue investigations into the abductions, but claimed that domestic remedies had not been exhausted because an investigation had recently

[82] From 'Life Offense and Conviction Detail Questionnaire' completed by Chavez Hall.
[83] Interview with Marlon Walker on November 13, 2008.
[84] Pet. at 25 "Incarceration for the Shortest Duration".
[85] Carlos Alberto Valbuena and Luis Alfonso Hamburger Diaz Granados v. Colombia, Report 87/06, Petition 668-05 (2006).

been opened by another unit of the prosecutor's office. The court noted that such investigations are time-sensitive, and that the probability of justice being served diminishes over time.[86] It therefore reiterated its position that "the rule on prior exhaustion of domestic remedies must not stop or delay international remedies to help the victims, so that such remedies become useless."[87]

Here, Petitioners' pursuit of theoretical domestic remedies that have an extremely low likelihood of success would only result in prolonging the denial of justice. Moreover, as in *Valbuena,* the utility of potential international remedies that this Commission could provide decreases as time passes. Petitioners continue to be denied essential rehabilitative services, such as mental health care, counseling, and education; in part, because of the combination of their child status and non-parolable life sentences. Petitioners are further harmed the longer they are denied rehabilitative services.[88] With each passing day, Petitioners' potential to start down a path of rehabilitation decreases.[89] Requiring additional years of futile domestic procedures would further harm Petitioners, and limit the Commission's ability to redress the continuing violations of their rights.

III. ALTERNATIVELY, EXHAUSTION OF REMEDIES AND TIMELINESS SHOULD BE JOINED TO THE MERITS

In certain cases, where there is substantial interplay between the effective availability to of domestic remedies and the substantive human rights violations alleged in the merits of a case, the Commission may choose to join the issue of exhaustion with its consideration on the merits. The Commission has found that where "there is a close connection between the question of

[86] *Ibid.* at para. 25 ("The IACHR notes that, as a general rule, a criminal investigation must be conducted promptly, so as to protect the interests of the victims, preserve the evidence and even safeguard the rights of any person regarded as a suspect in the investigation.").
[87] *See also Christian Daniel Dominguez Domenichetti v. Argentina*, Report No. 51/03, Inter-Amer. C.H.R., Petition 11.819 (2003) ("The rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless [alleged] victim ineffective.").
[88] Pet. at 26 "Right to Rehabilitation".
[89] Pet. at 27.

exhaustion of domestic remedies; the timeliness of the petition's submission; and the violations alleged on the merits of the petition pertaining to the non-availability of processes to the victims to assert their claims," it will join its consideration of exhaustion of domestic remedies and the timeliness of the petition to the merits of the case, and determine the petition admissible.[90]

In *John Doe et al. v. Canada*,[91] a petition was brought on behalf of three immigrants, nationals of Malaysia, Pakistan and Albania, claiming that a Canadian immigration policy violated their fair trial rights under the American Declaration. The policy required that refugee claimants arriving in Canada via the U.S. be immediately returned to the U.S. and given a date to return for their asylum interview, without any assurances from the U.S. that they would be able to return to Canada for the interview. The Commission found that the questions of whether Canada provided a domestic forum for immigrants to claim a violation of their fair trial rights and whether there was an adequate process for these individuals to assert their status as refugees were closely bound with the question of whether the men had exhausted remedies. With this set of guiding questions, the Commission admitted the petition and joined the question of exhaustion of remedies to the merits of the complaint.

Likewise, in *Da Silva v. Brazil*,[92] petitioners alleged violations of the American Declaration on behalf of an individual killed by the Brazilian military police. Petitioners alleged that the Brazilian government had failed to conduct an adequate investigation into the death. Because this claim cast into doubt the effectiveness of domestic remedies, the Commission joined exhaustion to the merits, stating:

> [W]hen some exceptions to the rule of non-exhaustion of domestic remedies are evoked, such as the ineffectiveness of such remedies, or the non-existence of due process, it is alleged that the petitioner is not required to pursue such remedies and the State is indirectly implicated in another violation of obligations assumed

[90] *John Doe et al v. Canada*, Pet. No. 554/04, Report No. 121/06, para. 62-63 (2006).
[91] *Id*.
[92] *Diniz Bento Da Silva v. Brazil*, Report 23/02, Case 11.517 (2002).

> under the Convention. In such circumstances, the question of domestic remedies can be equated with the substance of the case. . . . [T]he relationship between the judgment on applicability of the rule and the need for timely international action in the absence of effective domestic remedies may frequently advise consideration of questions regarding that rule together with the substance of the claim, to prevent preliminary objection procedures from delaying the process unnecessarily.[93]

Similarly, in *Roberto Romeno Ramos v. United States*,[94] petitioner was sentenced to death for murder by a court in Texas. Petitioner claimed, in part, that State-appointed counsel for him at the trial and appellate level was inadequate and that he was denied due process. The Commission found the petition admissible because:

> [g]iven the interplay between the effective availability to Mr. Moreno Ramos of domestic procedures and one of the substantive human rights violations alleged in the merits of the case, namely the competence of Mr. Moreno Ramos' trial representation, the Commission considers that the question of the prior exhaustion of these remedies must be taken up with the merits of the case. Accordingly, the Commission will join this aspect of the exhaustion of domestic remedies question to the merits of the case.[95]

Here, Petitioners allege a failure in Michigan's laws and procedures to consider their child status in imposing a mandatory life without possibility of parole sentence in adult prisons.[96] As a result, Petitioners suffer ongoing harm, including lack of rehabilitative assistance and exposure to adult inmates as children, which interferes with effective remedies. Petitioners' rights are violated in part because the process by which they were tried did not sufficiently consider their child status.

Thus, there is substantial interplay between Petitioners' access to due process in domestic

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[93] *Id.* at para. 26, fn. 3 (quoting *Velásquez Rodríguez Case*, Preliminary Objections, IACtHR, Judgment of June 26, 1987, paras. 91, 93); *See also 120 Cuban Nationals and 8 Haitian Nationals Detained in the Bahamas*, Report 6/02, Petition 12.071 (2002) (joining exhaustion with merits where question of no process for immigrants to assert claims); *Rafael Ferrer-Mazorra et al. v. United States*, Report 51/01, Case 9903 (joining where claim that review plan did not constitute adequate mechanism for reviewing detentions)..

[94] *Roberto Romeno Ramos v. United States*, Report No. 61/03, Petition P4446/02 (2003).

[95] *Ibid*. at para. 63. *See also Prinz v. Austria*, (2001) 31 EHRR 12, para. 29-30 (joining exhaustion of remedies question to merits where petitioner claimed failure to be present at his hearing violated his rights and government claimed non-exhaustion of remedies because petitioner could have requested to be present.)

[96] Pet. at 9-11.

forums, and the violations of their substantive rights, especially since they are not provided the opportunity to have their child status taken into account. Thus, the Commission may, if it so chooses, join the issues of exhaustion of remedies and timeliness to its consideration of the merits of the case.

IV. CONCLUSION

In its review of the United States report to the U.N. Human Rights Committee on U.S. compliance with the International Covenant on Civil and Political Rights (ICCPR) (*see* Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, 2006), the Committee expressed concern that 2,225 youth offenders were currently serving life without parole sentences. Michigan now leads the states in t he number of children serving this sentence. In its Concluding Observations, the committee noted that while the U.S. reservation to the ICCPR asserts only the right to "treat juveniles as adults in exceptional circumstances," it remained concerned by information that the "treatment of children as adults I not only applied in exceptional circumstances." As detailed in the Petition and observations in response to the State's reply, this sentence is being regularly, routinely and mandatorily applied in Michigan.

The U.N. Committee Against Torture expressed concern about "the large number of children sentenced to life imprisonment" in the United States in its Conclusions and Recommendations of the Committee Against Torture, United States of America U.N. Doc. CAT/C/USA/CO/2, ¶34 (2006).

The Human Rights Committee stated that in its view "sentencing children to life sentence without parole is of itself not in compliance with article 24(1) of the Covenant." The

Committee's instructions to the United States required that the United States "ensure that no such child offender is sentenced to life imprisonment without parole, and should adopt all appropriate measures to review the situation of persons already serving such sentence." (HRC Concluding Observations ¶34).

The Committee Against Torture similarly instructed the U.S. to "address the question of sentences of life imprisonment of children, as these could constitute cruel, inhuman or degrading treatment or punishment." (CAT Conclusions and Recommendations ¶34).

The United Nations General Assembly recognized the importance of eliminating life without parole sentences for juveniles in ensuring a child protection perspective across the human rights agenda and called upon all States to abolish life imprisonment without possibility of release for those below the age of 18 years at the time of the commission of the offense. (G.A. Res., ¶31, U.N. Doc. A/C.3/61/L.6/Rev.1 (Nov. 17, 2006)). This issue also played prominently in advocates submissions on U.S. compliance with the CERD treaty. The resolution passed by 185 to 1 with the only opposing vote cast by the United States.[97]

In February of 2008, the United States Human Rights Network Working Group on Juvenile Justice published a report titled, "Children in Conflict with the Law: Juvenile Justice & The U.S. Failure to Comply with Obligations Under the Convention for the Elimination of All Forms of Racial Discrimination" (CERD).

The CERD committee in its "Concluding Observations" found the current practice of JLWOP as it is practiced in the United States to be a clear violation of the Convention on the

[97] General Assembly Resolution 61/146, "Promotion and protection of the rights of children," Para. 31(a), (19 Dec. 2006).

Elimination of All Forms of Racial Discrimination.[98] Echoing the concerns of previous human rights bodies, the Committee said:

> "In light of the disproportionate imposition of life imprisonment without parole on young offenders – including children – belonging to racial, ethnic and national minorities, the Committee considers that the persistence of such sentencing is incompatible with article 5 (a) of the Convention. The Committee therefore recommends that the State party discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences."[99]

This finding is equally applicable to Petitioners, 72% of whom are children of color reflective of the ratio of children of color serving this sentence in Michigan.

The practice of sentencing children to die in prison is considered unacceptable across the world. The international community has reached a consensus (as the previous brief has noted). Nevertheless, the United States continues the practice and human rights committees and assemblies continue to decry the practice and call for its end. The Inter American Commission should call for the same thing.

[98] CERD Committee Report on the U.S. CERD/C/USA/CO/6; *See also* USHRN Working Group on Juvenile Justice, "Children in Conflict with the Law: Juvenile Justice & The U.S. Failure to Comply with Obligations Under the Convention for the Elimination of All Forms of Racial Discrimination," (Feb, 2008); Human Rights Watch, "The Rest of their Lives: Life Without Parole for Youth Offenders in the United States in 2008." (May 2008), at 7, http://www.hrw.org/backgrounder/2008/us1005/us1005execsum.pdf (Last visited on, Nov. 11, 2008).
[99] *Id.*, at para 21.

n52 Our review of the case law reveals that only two jurisdictions have adopted the constitutional argument proffered by defendant. In *R H v State, 777 P2d 204* (Alas App, 1989), an appellate court concluded that the compulsion to submit to a psychiatric examination without proper Fifth Amendment warnings violated the juvenile's constitutional right against self-incrimination. *Id. at 211.* According to that court, the psychiatric testimony "involved in furthering the interests of the child's formal adversary" and exposed the juvenile "to potential punishment far more severe than could otherwise have been visited upon him." *Id. at 210.* In *Commonwealth v Wayne W, 414 Mass 218; 606 NE2d 1323 (1993),* the Supreme Judicial Court of Massachusetts concluded that the Fifth Amendment precludes compelled self-incrimination at a psychological examination ordered for the dispositional phase of a juvenile transfer proceeding unless the juvenile first offers psychiatric evidence. We believe that this position fails to adequately consider the history of juvenile proceedings and that the legislative intent behind the Michigan statutes does not permit a similar interpretation. For these reasons, we decline to follow the holdings in *R H* and *Wayne W.*

[***29] Defendant argues that waiver is the harshest [*220] penalty that could be imposed on him. We disagree. In cases where a juvenile is waived to an adult criminal court, the juvenile is still afforded a right to jury trial and the presumption of innocence, and he is therefore not truly subjected to a harsher penalty *because guilt is* [*221] [**175] *not yet established.* Moreover, we are unaware of a constitutional right to be treated as a juvenile. n53 Rather, and in derogation of the common law, juvenile justice procedures are governed by statutes and court rules that the probate courts are required to follow in the absence of constitutional infirmity. It is to these provisions that we now turn.

n53 See *Wayne W*, n 52 *supra* (juveniles charged with murder do not have a constitutional right to be retained in the juvenile justice system).

The statute n54 and the court rule n55 involved here [*222] both mandate a bifurcated waiver hearing to determine in separate proceedings whether probable cause to suspect a defendant exists, phase I, and [***30] whether waiver to an adult criminal court is appropriate, phase II. The evidentiary requirements for admissibility differ at each phase of a juvenile waiver hearing. Although the statute is silent on the matter, the court rule provides that only "legally admissible evidence" may be used to establish probable cause in phase I of a waiver hearing while "[t]he Michigan Rules of Evidence do not apply to . . . [phase II] of the waiver hearing." n56

n54 [HN9] Former *MCL 712A.4*; MSA 27.3178(598.4) provided:

> (3) Before the court waives jurisdiction, it shall determine if there is probable cause to believe that the child committed an offense which if committed by an adult would be a felony.
>
> (4) Upon a showing of probable cause, the court shall conduct a hearing to determine whether or not the interests of the child and the public would be served best by granting a waiver of jurisdiction to the criminal court. In making the determination, the court shall consider the following criteria:
>
> (a) The prior record and character of the child, his physical and mental maturity and his pattern of living.
>
> (b) The seriousness of the offense.
>
> (c) Whether the offense, even if less serious, is part of a repetitive pattern of offenses which would lead to a determination that the child may be beyond rehabilitation under existing juvenile programs and statutory procedures.
>
> ([HN10] d) The relative suitability of programs and facilities available to the juvenile and criminal courts for the child.
>
> (e) Whether it is in the best interests of the public welfare and the protection of the public security that the child stand trial as an adult offender.

n55 [HN11] *MCR 5.950(B)* provides:

> (1) First Phase. The first-phase hearing is to determine whether there is probable cause

that an offense has been committed which if committed by an adult would be a felony, and that there is probable cause that the juvenile who is 15 years of age or older committed the offense.

* * *

(b) At the hearing, *the prosecuting attorney has the burden to present legally admissible evidence* to establish each element of the offense and to establish probable cause that the juvenile committed the offense.

* * *

(2) Second Phase. If the court finds the requisite probable cause at the first-phase hearing . . . the second-phase hearing shall be held to determine whether the interests of the juvenile and the public would best be served by granting the motion.

* * *

(b) The prosecuting attorney has the burden of establishing by a preponderance of the evidence that the best interests of the juvenile and the public would be served by waiver. *The Michigan Rules of Evidence do not apply to the second phase of the waiver hearing.*

[HN12] (c) The court, in determining whether to waive the juvenile to the court having general criminal jurisdiction, shall consider and make findings on the following criteria, giving each weight as appropriate to the circumstances:

(i) the juvenile's prior record and character, physical and mental maturity, and pattern of living;

(ii) the seriousness of the offense;

(iii) whether the offense is part of a repetitive pattern of offenses which would lead to the determination either that the juvenile is not amenable to treatment, or that, owing to the nature of the delinquent behavior, the juvenile is likely to disrupt the rehabilitation of others in the treatment program, despite the juvenile's potential for treatment;

(iv) whether, despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to render the juvenile dangerous to the public when released at age 19 or 21;

[HN13] (v) whether the juvenile is more likely to be rehabilitated by the services and facilities available in adult programs and procedures than in juvenile programs and procedures;

(vi) whether the best interest of the public welfare and the protection of the public security require that the juvenile stand trial as an adult offender. [Emphasis added.]

n56 See [HN14] 1985 *MCR 5.911(A)(1)* which, prior to amendment, provided:

> Phase I: Showing of Probable Cause. The court shall first determine if a crime has been committed . . . . *The determination must be based on legally admissible evidence.* [Emphasis added.]

See also *People v Williams, 111 Mich App 818; 314 NW2d 769 (1981)* (noting that [HN15] phase I of a waiver hearing, which is analogous to a preliminary examination, requires proof of probable cause only through use of legally admissible evidence while phase II, which is more like the sentencing phase of a criminal trial, is not similarly restricted).

[***31] [***32] [**176] In the recent past, this Court has adopted a number of significant revisions to the court rules for the purpose of clarifying juvenile court procedures. n57 To aid the bench and bar, we have declared that these [HN16] rules "are to be construed to secure fairness, flexibility, and simplicity" so that the rights and proper interests of *all* parties concerned are protected. See *MCR 5.902(A)*. The appropriate [*223]

standard for purposes of a phase [***33] II hearing is "whether the interests of the juvenile *and the public* would best be served by granting the motion [for waiver]." *MCR 5.950(B)(2)* (emphasis added). Former *MCR 5.911(A)(2)* required a "full investigation" into these interests and provided a five-factor test that has been carried over to *MCR 5.950(B)(2)(c)* without substantial change. n58 (See also former JCR 1969, 11.) In short, we believe that the public policy underlying phase II hearings requires relaxed evidentiary standards so as to ensure a "full investigation." n59

n57 See n 2. Prior to 1988, the Probate Code contained fourteen provisions regarding proceedings in the juvenile division of probate court. Today, there are forty-one provisions under the same subchapter.

n58 The proper standard for appellate review is found in *People v Dunbar, 423 Mich 380, 387; 377 NW2d 262 (1985),* in which this Court held:

> [[HN17] A]n order waiving jurisdiction will be affirmed whenever the judge's findings, based upon substantial evidence and upon thorough investigation, show either that the juvenile is not amenable to treatment, or, that despite his potential for treatment, "the nature of his difficulty is likely to render him dangerous to the public if released at age [nineteen], or to disrupt the rehabilitation of other children in the program prior to his release." [Quoting *People v Schumacher, 75 Mich App 505, 511-512; 256 NW2d 39 (1977).* Citations omitted.]

See also *People v Fowler, 193 Mich App 358, 363; 483 NW2d 626 (1992).*

n59 Moreover, we draw attention to the fact that the Michigan Legislature (effective October 1, 1988) went one step further by providing for *automatic waiver* from probate court, *without any investigation*, for juveniles over the age of fifteen, charged with any of nine serious felonies. See *MCL 712A.2(a)(2)*; MSA 27.3178(598.2)(a)(2) and *MCL 600.606*; MSA 27A.606. The automatic waiver felonies are *MCL 750.83*; MSA 28.278 (assault with intent to commit murder); *MCL 750.89*; MSA 28.284 (armed assault with intent to rob); *MCL 750.91*; MSA 28.286 (attempted murder by nonassaultive means, e.g., poisoning); *MCL 750.316*; MSA 28.548 (first-degree murder); *MCL 750.317*; MSA 28.549 (second-degree murder); *MCL 750.520b*; MSA 28.788(2) (first-degree criminal sexual conduct); *MCL 750.529*; MSA 28.797 (armed robbery); *MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i) (manufacture or possession of 650 grams or more of a controlled substance with intent to deliver); MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i) (possession of 650 grams or more of a controlled substance).*

[***34] The special role played by the phase [***35] II hearing [*224] is further illustrated by *MCL 769.1(3)*; MSA 28.1072(3) n60 and *MCR 6.931*, which provides for a juvenile sentencing hearing in *automatic waiver* cases where juveniles have been convicted of a life offense following an adult criminal trial. This "waiver-back" procedure requires the equivalent of a phase II hearing whose criteria correspond point for point to the criteria found in *MCL 712A.4(4)*; MSA 27.3178(598.4)(4) and *MCR 5.950(B)(2)*, see *MCR 6.931(E)(3)*, in cases of automatic waiver. See *MCR 6.901(B)*. Although the burden of proving that a juvenile should be sentenced as an adult is on the prosecutor, *MCR 6.931(E)(2)*, "all relevant and material evidence may be received by the court and relied upon to the extent of its probative value, *even though such evidence may not be admissible at trial.*" *MCR 6.931(E)(1)* (emphasis added). Thus, the waiver-back hearing mandates the use of the same flexible evidentiary standard found in phase II hearings even though guilt has been established.

n60 This subsection was added by *1988 PA 78.*

[***36] On the basis of the foregoing, we are persuaded that the Court of Appeals misconstrued [**177] the purpose of phase II of a waiver hearing and the underpinnings of the Juvenile Code. The requirements of a full investigation, protection of juveniles as well as the public, and the historic discretion afforded our probate courts in these matters convince us that the full panoply of constitutional rights was never intended to apply to the dispositional phase of a waiver hearing. n61

n61 Moreover, our review of the probate court record persuades us that defendant's phase I hearing was properly sanitized to prevent the possibility of taint from the allegedly involuntary

confessions. The prosecution offered the testimony of a witness arrested in the same transaction as defendant and two officers who were involved in the controlled purchase operation. Although the testimony of Officer Brooks was offered, it was limited to establishing probable cause for the bribery charge and did not implicate any admissions or confessions allegedly made by defendant at the police station.

[*225] [***37] IV

CONCLUSION

We conclude that the constitutional protections extended to juvenile proceedings in cases such as *Kent* and *Gault* apply in full force to the adjudicative phase of a juvenile waiver hearing. n62 We also find that the statutes and court rules concerning phase I hearings, when properly applied, afford the appropriate protection. Thus, because none of the alleged confessions or admissions were introduced at the phase I adjudicative phase of the waiver hearing, there was no constitutional violation. n63 We conclude further that the full panoply of constitutional rights asserted by defendant does not [*226] apply to the dispositional phase of a waiver hearing. The United States Supreme Court has confined its extension of Fifth and Sixth Amendment rights to the adjudicative and not the dispositional phase of waiver proceedings. Use of defendant's alleged statements to the police and the court psychologist at the phase II dispositional hearing, therefore, did not violate any constitutional provisions.

n62 The courts of this state have already recognized these rights applicable to the adjudicative phase of a waiver hearing. See, e.g., *Williams*, n 56 *supra* (only legally admissible evidence is admissible at the adjudicative phase of a waiver hearing); *People v Good, 186 Mich App 180; 463 NW2d 213 (1990)* (voluntariness of a confession must be established before it may be considered at the adjudicative phase of a waiver hearing); *People v McGilmer, 95 Mich App 577; 291 NW2d 128 (1980)* (Michigan courts apply the *Kent* right to counsel at juvenile proceedings prospectively).

MCL 712A.4(9); MSA 27.3178(598.4)(9), added by *1988 PA 182*, now provides that "[t]he probable cause finding [phase I] shall satisfy the requirements of and be considered the equivalent of the preliminary examination required by [*MCL 766.4*; MSA 28.922]." Accordingly, juveniles must be afforded the same constitutional protections as adults at the phase I stage of a waiver hearing, including the right to a pretrial hearing regarding the voluntariness of alleged admissions or confessions, see, e.g., *People v Walker (On Rehearing), 374 Mich 331; 132 NW2d 87 (1965)*, and the right to counsel at any critical stage of the criminal proceedings. See *People v Martin #2, 21 Mich App 667; 176 NW2d 470 (1970)* (denial of effective cross-examination of witnesses at the preliminary examination, which is presumed when the defendant is without counsel, would make any testimony elicited at the preliminary examination inadmissible at a subsequent trial).

n63 [HN18] This jurisdiction has adopted the "totality of the circumstances" test to determine the voluntariness of confessions sought to be admitted at a phase I hearing. See *Good*, n 62 *supra* at 188-189. See also *Fare v Michael C, 442 U.S. 707; 99 S Ct 2560; 61 L Ed 2d 197 (1979); Gallegos v Colorado, 370 U.S. 49; 82 S Ct 1209; 8 L Ed 2d 325 (1962); State v Benoit, 126 NH 6; 490 A2d 295 (1985)*. We do not reach the issue whether statements made to psychologists or psychiatrists at court-ordered examinations are to be treated like admissions or confessions made to police officers during custodial interrogation.

[***38] The historical and legislative directives are clear. n64 We therefore interpret the [**178] purpose behind [*227] the Probate Code and the court rules to favor individualized tailoring of a juvenile's sentence with emphasis on both the child's and society's welfare. [***39] Such individualization would be seriously curtailed if the dispositional phase was restricted as defendant urges.

n64 We disagree with the dissent's conclusion that our interpretation of the statutes and court rules does not comport with the "'rehabilitative ideal.'" *Post*, p 227.

First, the dissent never addresses the concept of "protection of the public" as required by *MCR 5.950(B)(2)*, nor does it reconcile its position with the historic "full investigation" required by court rule and case law.

Second, a clear purpose of the disposition hearing is to determine whether a juvenile is amenable to treatment in the juvenile justice system. If not, it is determined that the adult system is better equipped to rehabilitate; the determination is *not* to inflict a more severe punishment. In cases in which an appellate court is faced with

facts that indicate a desire to punish, it is proper to search for error in the application of the waiver factors and not for error based on constitutional grounds. Moreover, there is no certainty of punishment where the juvenile is afforded the right to a jury trial. The possibility of acquittal or even probation in a criminal trial (contrasted to an indefinite term in a juvenile home, in some cases) is not properly characterized as "punishment."

Third, the authority cited in the dissent does not make the same clear distinction between the adjudicative and dispositional phases of a waiver hearing as we find in the relevant Michigan statutes and court rules. We would have to agree with the dissent's position were it the case that Michigan probate practice did not recognize rights afforded adult criminal defendants at some phase of a juvenile waiver hearing. However, these protections are recognized at the adjudicative or "probable cause" phase.

Moreover, the cases are distinguishable on their facts. For example, in *Christopher P v State, 112 NM 416; 816 P2d 485 (1991),* the juvenile was ordered to discuss the delinquent acts themselves with a psychologist, and opposing counsel was permitted to watch the examination through a one-way mirror. Its applicability in this case is therefore tenuous where the inquiry was limited to the amenability question without a specific order to discuss the alleged crime. In fact, the holding in *Christopher P* made clear that the authority of the children's court to order a psychological examination was not challenged. *816 P2d 486.*

[***40] The decision of the Court of Appeals is reversed and the case is remanded for consideration of defendant's other appellate issues. n65

n65 On remand, the Court of Appeals is to consider defendant's other appellate issues, including whether the circuit court erred in affirming the decision of the probate court for failure of the prosecution to offer sufficient evidence that defendant was not amenable to treatment and rehabilitation, whether defendant was denied any constitutional right for failure of the circuit court to grant severance of his trial from that of his brother, and whether the circuit court erred for failing to instruct the jury about possession of more than 225 but less than 650 grams of a controlled substance. While we offer no opinion on the matter, defendant may also pursue the voluntariness of the alleged statements used at the trial in circuit court following the court's denial of a motion to suppress. The issue was not addressed by the Court of Appeals for its decision on the constitutionality issue.

DISSENTBY:

CAVANAGH

DISSENT:

Cavanagh, C.J.

I respectfully dissent. The majority holds that "the legislative purpose and the underpinnings of the Probate Code mandate the conclusion that a probate court's discretion at the dispositional phase of a waiver hearing remains unfettered by certain evidentiary requirements recognized in criminal proceedings and already extended to the adjudicative phase of a waiver hearing." *Ante*, p 204. The decision to waive jurisdiction over a juvenile is not, however, consistent with the "rehabilitative ideal," underlying the [*228] creation of the juvenile courts. n1 As one commentator noted:

> To those committed to rehabilitation as a goal of the justice system, waiver of juvenile court jurisdiction over any offender seems nonsensical. As a matter of logic, waiver could only be appropriate when a better means of rehabilitation -- that is, a better process for removing the juvenile's desire to misbehave -- exists in the criminal court. As a practical matter, the criminal courts will never provide a better rehabilitative process than the juvenile court. [***42] If nothing else, the conditions of criminal incarceration guarantee that. So a waiver theory based on the concept of rehabilitation has but one premise -- there should be no waiver. [Whitebread & Batey, *The role of waiver in the juvenile court: Questions of philosophy and function*, printed in Major Issues in Juvenile Justice Information and Training: Readings in Public Policy 207, 218 (1981).]

While there are no doubt instances where it is necessary to waive jurisdiction over certain juvenile offenders, the decision to waive cannot be characterized as being consistent with the philosophy underlying the [**179] juvenile court system. In reality, the decision to waive juvenile court jurisdiction is not a decision to *rehabili-*

tate, but, rather, a decision to *punish* the juvenile upon conviction. Thus, the juvenile should be afforded the traditional due process protections in judicial waiver proceedings enjoyed by adults accused of crime.

n1 Feld, *Criminalizing juvenile justice: Rules of procedure for the juvenile court, 69 Minn L R 141, 146-147 (1984).*

[***43] I

The majority holds that adult constitutional protections are unnecessary in phase II juvenile [*229] waiver hearings because it is a dispositional proceeding and "*precedes* any determination of guilt." *Ante*, p 219. (Emphasis in original.) In so holding, the majority makes clear that it views phase II as a nonadversarial proceeding that is concerned only with the determination of the forum within which the juvenile will be tried. As is evident from this discussion, however, there is much more at stake in phase II of the juvenile waiver proceeding than the mere determination of which court will adjudicate the juvenile's guilt or innocence.

Since the United States Supreme Court decided *Kent v United States, 383 U.S. 541; 86 S Ct 1045; 16 L Ed 2d 84 (1966)*, and *In re Gault, 387 U.S. 1; 87 S Ct 1428; 18 L Ed 2d 527 (1967)*, various jurisdictions have rejected the view espoused by the majority, including the United States Court of Appeals for the Fourth Circuit, n2 Alaska, n3 [*230] Kansas, n4 Massachusetts, n5 New Mexico, n6 [***44] and Oklahoma. n7 Either by analogizing the transfer hearing to the sentencing phase of adult criminal proceedings, n8 or by characterizing the rights affected by the decision to waive jurisdiction as equally, if not more important, than the rights affected in juvenile proceedings to determine delinquency, n9 [**180] each of [*231] these jurisdictions has held that constitutional protections afforded adult criminal defendants apply to juvenile waiver proceedings.

n2 *Kemplen v Maryland, 428 F2d 169, 174* (CA 4, 1970). In *Kemplen*, the court stated:

> [I]t seems to us nothing can be more critical to the accused than determining *whether there will be a guilt determining process in an adult-type criminal trial.* The waiver proceeding can result in dire consequences indeed for the guilty accused. If the juvenile court decides to keep jurisdiction, he can be detained only until he reaches majority. . . . But, if jurisdiction is waived to the adult court, the accused may be incarcerated for much longer, depending upon the gravity of the offense, and, if the offense be a felony, lose certain of his rights of citizenship. [Emphasis in original.]

n3 *R H v State, 777 P2d 204, 210* (Alas App, 1989). The court stated:

> [J]uvenile waiver hearings are hardly "neutral proceedings." Rather, they are fully adversary proceedings in which the burden of establishing a child's probable unamenability to treatment is formally allocated to the state. . . .
>
> Nor can juvenile waiver proceedings realistically be said to affect "only the forum where the issue of guilt will be adjudicated." A juvenile waiver proceeding is the only available avenue by which the state may seek to prosecute a child as an adult. Consequently, the stakes involved in such proceedings are high:
>
> "The result of a fitness hearing is not a final adjudication of guilt; but the certification of a juvenile offender to an adult court has been accurately characterized as 'the worst punishment the juvenile system is empowered to inflict.'" [Quoting *Ramona R v Superior Court, 37 Cal 3d 802, 810; 210 Cal Rptr 204; 693 P2d 789 (1985).]*

n4 *Edwards v State, 227 Kan 723, 725; 608 P2d 1006 (1980)* (stating that "proceedings to certify a minor to stand trial as an adult [as] 'comparable in seriousness to a criminal prosecution'").

n5 *Commonwealth v Wayne W, 414 Mass 218, 230; 606 NE2d 1323 (1993).* The court stated:

> It minimizes the importance, and the potential impact, of transfer hearings to characterize them as civil proceedings that merely

> determine the proper forum for an adjudication of guilt. Part B hearings are *fully adversary* -- the Commonwealth seeks transfer; the juvenile seeks to remain in the juvenile justice system. In a murder case, the outcome of these proceedings will, in the event of conviction, usually mean the difference between a limited period of confinement in a treatment setting and a lengthy term of imprisonment. [Emphasis added.]

n6 *Christopher P v State, 112 NM 416, ; 816 P2d 485, 486 (1991)* (stating that majority's characterization of juvenile waiver proceedings "diminishes the impact of the proceedings on the child").

n7 *JTP v State, 544 P2d 1270, 1276* (Okla Crim App, 1975) (characterizing the nature of the rights affected by a waiver decision as "critical").

n8 See *Kemplen*, n 2 *supra; R H*, n 3 *supra;* and *Wayne W*, n 5 *supra.*

n9 See *Edwards*, n 4 *supra*, p 725 (holding that "[t]he exclusionary rules, pertaining to illegally obtained confessions, [are] equally applicable to waiver proceedings in juvenile courts, as to juvenile proceedings or criminal trials").

In *JTP*, n 7 *supra*, p 1276, the Oklahoma Court of Criminal Appeals held:

> [W]e are compelled to conclude that there is no rational basis for a rule which would permit an illegally obtained confession to be introduced into evidence at a certification hearing when the same confession would be clearly excluded at a delinquency hearing or a criminal trial. In addition we believe it to be contrary to the fundamental policy of the juvenile court system to permit a child within its jurisdiction to stand trial as an adult with no consideration of whether an admission or confession obtained from him was taken under circumstances which make its trustworthiness suspect. We hold it is the duty of the judge of the juvenile court to deny admission into evidence at a certification hearing those statements of a child, obtained in violation of constitutional or statutory rights, which are inadmissible in delinquency or criminal proceedings.

See also *Christopher P*, n 6 *supra, 816 P2d 487* (stating that "[c]onsidering the consequences that evolve from transfer, the distinction between adjudicatory and transfer proceedings blurs in the context of the fifth amendment").

[***45] [***46] [***47] [***48] Those jurisdictions that view the decision to waive juvenile court jurisdiction as being analogous to adult sentencing, generally rely on *Estelle v Smith, 451 U.S. 454; 101 S Ct 1866; 68 L Ed 2d 359 (1981),* in finding that the privilege against compelled self-incrimination applies to juvenile waiver proceedings. In *Estelle*, the Supreme Court held that the Fifth Amendment protects against the use of testimonial disclosures that might subject a person to harsher punishment upon conviction. *Id.*, pp 462-463. The Court stated:

> The essence of this basic constitutional principle is "the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." . . .
>
> The Court has held that "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." [*Id.*, p 462, quoting *Gault, supra, p 49.* [***49] Emphasis in original.]

[*232] The Court distinguished between the "limited, neutral purpose of determining his competency to stand trial," and the "plainly adverse" use of testimonial disclosures to enhance a defendant's punishment. *Id.*, p 465.

Characterizing the waiver proceeding as adversarial and the decision to waive jurisdiction as punishment, both the court in *R H v State, 777 P2d 204, 208* (Alas App, 1989), and the court in *Commonwealth v Wayne W, 414 Mass 218, 236; 606 NE2d 1323 (1993),* held that *Estelle* "foreclosed" the use of confessions and admissions taken in violation of a juvenile's right against com-

pelled self-incrimination in juvenile waiver proceedings. I agree.

The majority's reasoning to the contrary ignores reality. The waiver of juvenile court jurisdiction is "a *sentencing* decision that represents a choice between the punitive disposition of adult criminal court and the 'rehabilitative' disposition of the juvenile court." Feld, *Criminalizing juvenile justice: Rules of procedure for the juvenile court, 69 Minn L R 141, 269 (1984).* [***50] (Emphasis in original.) n10 Given the substantial interests at stake, there can be no question that waiver proceedings are adversarial. Indeed, this case demonstrates the adversarial nature of phase II waiver proceedings. The prosecution filed a petition for waiver of jurisdiction to the circuit court and presented evidence against the defendant, attempting to prove, as it [*233] [**181] must, n11 that Kafan Hana, who had no prior juvenile record, was "beyond rehabilitation under existing juvenile programs and statutory procedures." See former *MCR 5.950(B)(2)(c).* Kafan presented substantial testimonial evidence, attempting to convince the court to retain jurisdiction.

> n10 The waiver decision is a choice to allocate an alleged offender to one of two courts which differ markedly in basic philosophy; in other words, the waiver decision is a choice of philosophies . . . . In aspiration, at least, the juvenile court is committed to rehabilitation of the offender, while the primary commitment of the criminal justice process lies elsewhere, in the theoretical realms of retribution and deterrence. [Whitebread & Batey, *supra*, p 213.]

n11 See former *MCR 5.950(B)(2)(b).*

[***51] There can also be no question regarding the punitive nature of the decision to waive juvenile jurisdiction over Kafan. Had Kafan been prosecuted as a juvenile, he would have faced a maximum of two and one-half years (he was 16 1/2) of confinement (until 19) in a juvenile reformatory. The decision to waive jurisdiction over Kafan, however, paved the way for the state to secure not only a conviction but also a life sentence in an adult prison. n12 In my view, this case clearly demonstrates both the adversarial and punitive nature of juvenile waiver proceedings and compels the conclusion that *Estelle* requires the recognition of Fifth Amendment protections in such proceedings.

> n12 Because the crime charged carried a mandatory sentence, the decision to waive jurisdiction, for all practical purposes, established the sentence that he would receive upon conviction.

I also agree with the courts that [***52] find the rationale underlying the United States Supreme Court decision in *Gault* to compel the conclusion that the constitutional rights recognized in that case must apply in phase II proceedings. n13 In my view, the rights affected by the decision to waive jurisdiction are equally, if not more important, than the rights affected in juvenile proceedings to determine delinquency, requiring equal, if not more protection. Further, as mentioned in part III, waiver of juvenile court jurisdiction deprives the juvenile of his [*234] statutory rights to the traditional benefits of the juvenile justice system. As recognized in both *Kent* and *Gault*, the justification for denying juveniles traditional due process rights is the benefits that juveniles purportedly derive from the juvenile justice system. See part II. Therefore, it seems to follow that traditional due process protections should be afforded to juveniles in any proceeding in which the state seeks to deprive a juvenile of those rights. n14 In filing a petition for waiver of juvenile court jurisdiction, the state is not acting as parens patriae to determine whose "custody" is in the best interest of the juvenile accused of crime. [***53] To the contrary, the state is deliberately initiating, via the only available avenue, *criminal proceedings* against the juvenile. Accordingly, such proceedings should be "subject to the requirements which restrict the state when it seeks to deprive a person of his liberty." *Gault, supra, p 17.*

> n13 See n 9; see also *In re Doe, 61 Hawaii 48, 58; 594 P2d 1084 (1979)* (stating that "full application of the broad principles announced in *Gault* would lead to the conclusion that the privilege [against compelled self-incrimination] should apply in such proceedings").
>
> n14 If the United States Constitution requires the extension of adult criminal protections to juveniles retained in the juvenile system, because the underlying rationale for denying such benefits has, for the most part, little basis in reality, then surely the Constitution must also require the extension of such protections to juvenile waiver proceedings where the juvenile faces the possibility of losing those benefits entirely.

[***54] II

At common law, children over the age of seven who committed crimes were subject to punishment as adults and entitled to the same procedural protections. *Gault, supra, p 16.* As the majority recognizes, however, punishment was foreign to the philosophy underlying the progressive movement that sparked the creation of juvenile courts. *Ante*, p 210. The progressives envisioned a system that focused "on reforming the offender rather than on punishing the offense." Feld, *supra*, pp 146-147.

[*235] The early reformers sought to develop a juvenile justice system that would "use the techniques of the then-developing behavioral sciences -- psychiatry, psychology, and sociology -- to treat and cure antisocial behavior in children." Whitebread & Batey, *supra*, p 208. "The child -- essentially good, as they saw it -- was to be made 'to [**182] feel that he is the object of [the state's] care and solicitude,' not that he was under arrest or on trial." *Gault, supra, p 15.* To avoid the stigma associated with adult criminal prosecutions, "hearings were confidential and private, access to court records was limited, and youths were found to be 'delinquent' [***55] rather than guilty of an offense." Feld, *supra*, p 151. Further, a juvenile found to be delinquent was "never to be incarcerated with adult offenders . . . ." Whitebread & Batey, *supra*, p 208.

"As corollaries to these propositions, the reformers . . . proposed that the courts operate informally and without legal process." n15 *Id.* As a result, until the United States Supreme Court decided *Kent* and *Gault* "[c]hildren had none of the traditional rights of the criminal defendant because juvenile courts were considered 'civil' courts." Whitebread & Batey, *supra*, p 209. Traditional due process rights were considered unnecessary because "the state was proceeding as parens [*236] patriae," n16 and, consequently, the proceedings were viewed as nonadversarial. *Gault, supra, p 16.*

> The right of the state, as parens patriae, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty but to custody." . . . If the parents default in effectively performing their custodial functions -- that is, if the child is "delinquent" -- the state may intervene. In doing so, [***56] it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled. On this basis, proceedings involving juveniles were described as "civil" not "criminal" and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty. [*Id., p 17.*]

In short, "[t]he traditional due process rights had, in theory, been traded for the benefits of the juvenile court philosophy." Whitebread & Batey, *supra*, p 209.

> n15 "Because the reformers' aims were benevolent, their solicitude individualized, and their intervention guided by science, [the early reformers] saw no reason to narrowly circumscribe the power of the state." Feld, *supra*, p 150. Consequently, the reformers sought a system that "maximized discretion to provide flexibility in diagnosis and treatment and focused on the child and the child's character and lifestyle rather than on the crime." *Id.* "Discretion was necessary because identifying the causes and prescribing the cures for delinquency required an individualized approach that precluded uniformity of treatment or standardization of criteria." *Id.*, p 147, n 22. "Because the important issues involved the child's background and welfare rather than the commission of a specific crime, courts dispensed with juries, lawyers, rules of evidence, and formal procedures." *Id.*, p 151.
>
> > n16 The parens patriae doctrine drew no distinction between criminal and noncriminal youth conduct, a view that supported the Progressive position that juvenile court proceedings were civil rather than criminal in nature. [Feld, *supra*, pp 148-149.]

[***57] III

The Supreme Court has recognized that the waiver of juvenile court jurisdiction "is a 'critically important' action determining vitally important statutory rights of the juvenile." *Kent, supra, p 556.* Aptly referred to as "the most important dispositional decision in the juvenile court," n17 the decision to waive jurisdiction is, in reality, a decision to forgo any rehabilitative effort and to *punish* the juvenile as an adult upon conviction. Indeed, [*237] some courts have characterized the waiver of juvenile court jurisdiction as "the worst *punishment* the juvenile system is empowered to inflict." *Ramona R v Superior Court, 37 Cal 3d 802, 810; 210 Cal Rptr 204; 693 P2d 789 (1985).* n18 (Emphasis added.)

n17 Feld, *supra*, p 272.

n18 One commentator has even analogized the waiver decision to the imposition of the death penalty in adult court:

> To transfer a young offender from juvenile to criminal court is clearly not the same thing as executing a convicted murderer. However, considering waiver of serious juvenile offenders as "the capital punishment of juvenile justice" reveals a number of disturbing similarities. Capital punishment in criminal justice and waiver in juvenile justice share four related characteristics: (1) low incidence, (2) prosecutorial and judicial discretion, (3) ultimacy, and (4) inconsistency with the premises that underlie the system's other interventions. [Zimring, *Notes toward a jurisprudence of waiver*, printed in Major Issues in Juvenile Justice Information and Training: Readings in Public Policy, p 193.]

[***58] In addition to the possibility of a substantial increase in the loss of liberty upon [**183] conviction in adult court, the waiver decision also deprives the juvenile of the protections purportedly afforded juveniles under the Probate Code. For instance, incarceration with adults pending trial and, if convicted of a felony, loss of certain rights of citizenship. [***59] All of these are benefits that the early reformers relied upon to justify denying the juvenile traditional due process protections. See part II.

As the majority notes, the United States Supreme Court, although faced with the issue in *Kent*, n19 has never explicitly held that, in a juvenile waiver proceeding, a juvenile is entitled to the full panoply of constitutional protections afforded adults accused of crime. The Court did, however, find the denial of such protections particularly [*238] disturbing, "where . . . there is an absence of any indication that the denial of rights available to adults was offset, mitigated or explained by action of the Government, as parens patriae, evidencing the special solicitude for juveniles commanded by the Juvenile Court Act." *Kent, supra, pp 551-552.* It was precisely this concern -- that "children had traded away their traditional due process rights for benefits they were not receiving," Whitebread & Batey, *supra*, p 209 -- that prompted the Court in *Gault* to hold that in proceedings involving the potential loss of liberty, children are entitled to constitutionally adequate notice of the charges against them, *Gault, supra, p 41,* [***60] the right to counsel, *id.*, the right to confrontation and cross-examination, *id., pp 56-57,* and the Fifth Amendment right against compelled self-incrimination. *Id., pp 47-48.*

n19 The Court was not required to reach this issue because it remanded the case because of procedural error with respect to waiver of jurisdiction. *Kent, supra, p 552.*

IV

For the foregoing reasons, I would remand this case to the juvenile court for a hearing to determine whether the statements and confessions introduced and considered at phase II of Kafan's juvenile waiver hearing were obtained in violation of his Fifth Amendment right to remain silent or his Sixth Amendment right to counsel. If the juvenile court determines that the statements and confessions were constitutionally obtained, then I would affirm Kafan's adult convictions and sentences. If, however, the juvenile court determines that the statements and confessions were obtained in violation [***61] of Kafan's constitutional rights, then the juvenile court should conduct another waiver hearing. In the event another waiver hearing is necessary, and, absent any tainted statements and confessions, the juvenile court again determines [*239] that the waiver of juvenile court jurisdiction is appropriate, then I would affirm Kafan's adult convictions and sentences. If, absent any tainted statements and confessions, however, the juvenile court determines that the waiver of juvenile court jurisdiction was inappropriate, then I would vacate Kafan's adult convictions and sentences, try Kafan as a juvenile, and enter the appropriate dispositional order consistent with the Probate Code.

LEXSEE 551 N.W.2D 460

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v STEPHEN LAUNSBURRY, Defendant-Appellant.

No. 178536

COURT OF APPEALS OF MICHIGAN

217 Mich. App. 358; 551 N.W.2d 460; 1996 Mich. App. LEXIS 194

April 16, 1996, Submitted
June 25, 1996, Decided

PRIOR HISTORY: [***1]

LC No. 93-64278.

DISPOSITION:

Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant appealed from a judgment of a trial court (Michigan), which convicted him of first-degree felony murder, in violation of *Mich. Comp. Laws § 750.316*, and possession of a firearm during the commission of a felony, in violation of *Mich. Comp. Laws § 750.227b*, and sentenced him to consecutive terms of two years and life without parole.

OVERVIEW: Defendant was a minor who, with a codefendant, carjacked and murdered an expectant mother. Defendant claimed he agreed to take the blame for the murder because he was a juvenile and would not be subject to as harsh a penalty as the codefendant. Affirming the conviction and sentences, the court held that because evidence of defendant's guilt was overwhelming, defendant could not meet his burden of proof on claims that the prosecutor's calling defendant a moron, idiot, and coward was reversible error or that his counsel's failure to object to the comments constituted a deprivation of his right to the effective assistance of counsel. The court found that defendant was properly sentenced as an adult as the trial court considered defendant's record, age, mental and physical maturity, potential for rehabilitation, availability of treatment in an adult prison, and the circumstances surrounding the offense. The court held that life imprisonment without parole was not cruel and unusual punishment for a juvenile who committed first-degree murder.

OUTCOME: The court affirmed defendant's convictions for first-degree murder and felony-firearm and his sentences therefor.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

[HN1] Absent an objection or a request for a curative instruction, the court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct.

Evidence > Criminal Evidence > Inferences
Criminal Law & Procedure > Trials > Closing Arguments > Fair Comment & Fair Response

[HN2] A prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief, and is not required to state inferences and conclusions in the blandest possible terms.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
[HN3] To show ineffective assistance of counsel, a defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.

Criminal Law & Procedure > Juvenile Offenders > Confinement Practices
Criminal Law & Procedure > Sentencing > Appeals
[HN4] Review of a trial court's decision to sentence a minor as a juvenile or as an adult is a bifurcated one. First, the trial court's factual findings supporting its determination regarding each factor enumerated in *Mich. Comp. Laws § 769.1(3)* are reviewed under the clearly erroneous standard. The trial court's factual findings are clearly erroneous if, after review of the record, the court is left with a definite and firm conviction that a mistake has been made. Second, the ultimate decision whether to sentence the minor as a juvenile or as an adult is reviewed for an abuse of discretion.

Governments > Legislation > Interpretation
[HN5] Statutes are presumed to be constitutional, and the court must construe them as being constitutional absent a clear showing of unconstitutionality.

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment
[HN6] A mandatory life sentence without the possibility of parole for an adult is not cruel or unusual punishment. In determining whether a punishment is cruel or unusual, one must look to the gravity of the offense and the harshness of the penalty, compare the penalty to those imposed for other crimes in this state as well as the penalty imposed for the instant offense by other states, and consider the goal of rehabilitation.

Criminal Law & Procedure > Juvenile Offenders > Confinement Practices
Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment
Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN7] It is not cruel or unusual punishment to sentence a juvenile to life imprisonment without the possibility of parole. The crime of first-degree murder is the most serious offense possible to commit and should be dealt with harshly.

Criminal Law & Procedure > Juvenile Offenders > Confinement Practices
Criminal Law & Procedure > Criminal Offenses > Homicide > Murder
Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN8] There is no constitutional right to be treated as a juvenile. *Mich. Comp. Laws § 712A.4* allows a probate court to waive jurisdiction over cases involving children who have obtained the age of 15 years and are accused of committing crimes that if committed by an adult would be felonies. *Mich. Comp. Laws § 600.606* provides for automatic waiver of individuals between the ages of 15 and 17 from the probate court to the circuit court if they are charged with committing first-degree murder. The trial court's imposition of a life sentence without the possibility of parole on a 16-year-old does not necessarily constitute cruel or unusual punishment.

COUNSEL:

Frank J. Kelley, Attorney General, Thomas L. Casey, Solicitor General, William A. Forsyth, Prosecuting Attorney, and Timothy K. McMorrow, Chief Appellate Attorney, for the people.

State Appellate Defender (by Debra A. Gutierrez), for the defendant on appeal. Detroit.

JUDGES: Before: McDonald, P.J., and Markman and C.W. Johnson, * JJ.

* Circuit judge, sitting on the Court of Appeals by assignment.

OPINIONBY: Gary R. McDonald

OPINION: [**462] [*359]

McDONALD, P.J.

Following a jury trial, defendant was convicted of two counts of first-degree felony murder, *MCL 750.316*; MSA 28.548, armed robbery, *MCL 750.529*; MSA 28.797, kidnapping, *MCL 750.349*; MSA 28.581, and possession of a firearm during the commission of a felony, *MCL 750.227b*; MSA 28.424(2). All the convictions except for one count of first-degree felony murder and for felony-firearm were vacated, and defendant was sentenced to a two-year term of imprisonment for the felony-firearm conviction, [*360] which is to be served consecutively to and before the nonparolable life sentence for the murder conviction. Defendant now appeals as of right from both his convictions and sentences. We affirm.

On November [***2] 26, 1993, defendant and codefendant, Gregory Wines, intending to steal a vehicle in order to leave town, flagged down the victim's car. The victim was an expectant mother who was the lone occupant of the vehicle. After the victim stopped, defendant got into the passenger side of the vehicle. Wines sat directly behind the victim. Defendant pulled a .22 caliber revolver from his waistband and told the victim to follow his directions. After traveling for a time, defendant told the victim to pull over and stop the vehicle. Defendant ordered the victim out of the car. While Wines remained in the vehicle, defendant walked the victim toward a factory building. In defendant's first two statements to the police defendant admitted that when he and the victim came to a wall of the building, he shot the victim twice in the back of the head. However, at trial, defendant testified it was codefendant Wines who shot the victim after defendant made the victim get down on her hands and knees. Defendant claims he agreed to take the blame for the shooting because he was a juvenile and would not be subject to as harsh a penalty as codefendant. Defendant stated he was willing to take the "rap" even though [***3] his codefendant was the person that turned him in. Defendant does not dispute that he and Wines planned the robbery in advance and that defendant acquired the gun and ammunition used in the murder.

On appeal, defendant first claims the trial court erred in instructing the jury with regard to the elements [*361] of felony murder. We find no error. Defendant failed to object to the instructions below, and the instructions given fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Pollick, 448 Mich. 376; 531 N.W.2d 159 (1995); People v Caulley, 197 Mich. App. 177; 494 N.W.2d 853 (1992).*

We also find no merit in defendant's claim certain conduct by the prosecutor denied him his right to a fair trial. Once again defendant's failure to object below limits our review of his claim on appeal. [HN1] Absent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct. [**463] *People v Allen, 201 Mich.* [***4] *App. 98; 505 N.W.2d 869 (1993); People v Gonzalez, 178 Mich. App. 526; 444 N.W.2d 228 (1989).* Neither situation is present here. [HN2] A prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief, *People v Viaene, 119 Mich. App. 690; 326 N.W.2d 607 (1982),* and is not required to state inferences and conclusions in the blandest possible terms. *People v Marji, 180 Mich. App. 525; 447 N.W.2d 835 (1989).* Although the prosecutor went beyond proper comment regarding the evidence when he called the defendant a "moron," an "idiot," and a "coward," given the overwhelming evidence of defendant's guilt and the isolated nature of the comments, we do not believe the comments rise to the level of error requiring reversal. *People v Bahoda, 448 Mich. 261; 531 N.W.2d 659 (1995).* Finally, defendant's [*362] claim that his counsel's failure to object to the contested prosecutorial comments constituted a deprivation of his right to the effective assistance of counsel must also fail. [HN3] To show ineffective assistance of counsel, a defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been [***5] different. *People v Stanaway, 446 Mich. 643; 521 N.W.2d 557 (1994).* Because the evidence of defendant's guilt was overwhelming, defendant cannot meet this burden.

Defendant next claims the trial court erred in sentencing him as an adult rather than as a juvenile. We disagree. [HN4] Review of a trial court's decision to sentence a minor as a juvenile or as an adult is a bifurcated one. First, the trial court's factual findings supporting its determination regarding each factor enumerated in *MCL 769.1(3)*; MSA 28.1072(3) are reviewed under the clearly erroneous standard. *People v Lyons (On Remand), 203 Mich. App. 465; 513 N.W.2d 170 (1994).* The trial court's factual findings are clearly erroneous if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *Id.* Second, the ultimate decision whether to sentence the minor as a juvenile or as an adult is reviewed for an abuse of discretion. *Id.*

A review of the record reveals the trial court carefully considered defendant's prior criminal record, his age, mental and physical maturity, potential for rehabili-

tation, the availability of treatment in the adult prison, and the [***6] circumstances surrounding the offense. The court's findings were not clearly erroneous and, given the severity of the offense and the inability to predict whether defendant would still be dangerous at the age of twenty-one, we find no abuse [*363] of discretion in the court's decision to sentence him as an adult. *MCL 769.1(3)*; MSA 28.1072(3); *Lyons, supra; People v Black, 203 Mich. App. 428; 513 N.W.2d 152 (1994); People v Cheeks, 216 Mich. App. 470;* N.W.2d (1996). Contrary to defendant's unsupported assertions on appeal, the trial court's failure to conduct educational and psychological testing on defendant did not deprive him of an accurate hearing. The court had all the statutorily required evidence before it and rendered its decision in accordance with applicable law and procedures.

Finally defendant claims his status as a juvenile renders the mandatory sentence of life imprisonment without the possibility of parole cruel or unusual punishment. We disagree. [HN5] Statutes are presumed to be constitutional, and this Court must construe them as being constitutional absent a clear showing of unconstitutionality. *People v Thomas, 201 Mich. App. 111; 505 N.W.2d* [***7] *873 (1993).* Our Supreme Court has already ruled [HN6] a mandatory life sentence without the possibility of parole for an adult is not cruel or unusual punishment. *People v Hall, 396 Mich. 650; 242 N.W.2d 377 (1976).* In determining whether a punishment is cruel or unusual, one must look to the gravity of the offense and the harshness of the penalty, compare the penalty to those imposed for other crimes in this state as well as the penalty imposed for the instant offense by other states, and consider the goal of rehabilitation. *People v Bullock, 440 Mich. 15; 485 N.W.2d 866 (1992); People v Lorentzen, 387 Mich. 167; 194 N.W.2d 827 (1972).*

Applying these factors to the instant case, defendant concedes murder is a serious offense and that the punishment imposed in [**464] this case has been held to be [*364] proportionate to the offense. *Hall, supra.* Other crimes in this state that carry the same sentence include the manufacture, delivery, or possession with intent to deliver or manufacture more than 650 grams of a controlled substance, *MCL 333.7401(2)(a)(i)*; MSA 14.15(7401)(2)(a)(i); premeditated murder, *MCL 750.316*; MSA 28.548; treason, *MCL 750.544*; MSA 28.812, and placing explosives with [***8] intent to destroy and causing injury to a person, *MCL 750.207*; MSA 28.404. A sample of the other states that permit sentences of life imprisonment without the possibility of parole for minors include Washington, Massachusetts, Pennsylvania, Illinois, and Delaware. *State v Massey, 60 Wash. App. 131; 803 P.2d 340 (1990); Commonwealth v Diatchenko 387 Mass. 718; 443 N.E.2d 397 (1982); Commonwealth v Sourbeer, 492 Pa. 17; 422 A.2d 116 (1980); People v Rodriguez, 134 Ill. App. 3d 582; 480 N.E.2d 1147, 89 Ill. Dec. 404 (1985); People v Spence, 367 A.2d 983* (Del, 1976). The fourth factor, the need for rehabilitation, is taken into consideration by Michigan courts when they determine whether juvenile defendants should be sentenced as adults rather than as juveniles. *MCL 769.1(3)(a)*-(f); MSA 28.1072(3)(a)-(f); *Lyons, supra at 468-469.* We conclude [HN7] it is not cruel or unusual punishment to sentence a juvenile to life imprisonment without the possibility of parole. The crime of first-degree murder is the most serious offense possible to commit and should be dealt with harshly. See *Hall, supra; People v Hamp, 110 Mich. App. 92; 312 N.W.2d 175 (1981).* Michigan imposes the [***9] same sentence for crimes other than murder, and other states have imposed the same sentence for the crime of murder. Finally, the need to consider rehabilitation is already set forth as a factor to be considered [*365] in sentencing. We also note Michigan case law and statutes have treated juveniles as adults. In *People v Hana, 443 Mich. 202; 504 N.W.2d 166 (1993),* our Supreme Court stated [HN8] there is no constitutional right to be treated as a juvenile. In addition, our Legislature has enacted *MCL 712A.4*; MSA 27.3178(598.4), which allows a probate court to waive jurisdiction over cases involving children who have obtained the age of fifteen years and are accused of committing crimes that if committed by an adult would be felonies, as well as *MCL 600.606*; MSA 27A.606, which provides for automatic waiver of individuals between the ages of fifteen and seventeen from the probate court to the circuit court if they are charged with committing first-degree murder. The trial court's imposition of a life sentence without the possibility of parole on a sixteen-year-old does not constitute cruel or unusual punishment.

Affirmed.

/s/ Gary R. McDonald

/s/ Stephen J. Markman

/s/ Charles [***10] W. Johnson

H
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v.
Michael JARRETT, Defendant-Appellant.
No. 173921.

Aug. 9, 1996.

Before: GRIFFIN, P.J., and BANDSTRA and M. WARSHAWSKY, [FN*] JJ.

FN* Circuit judge, sitting on the Court of Appeals by assignment.

UNPUBLISHED

PER CURIAM.

*1 Following a jury trial, defendant was convicted of first-degree murder, M.C.L. ß 750.316; MSA 28.548, and the possession of a firearm during the commission of a felony, M.C.L. ß 750.227b; MSA 28.424(2). Defendant, a juvenile, was sentenced as an adult to life in prison without the possibility of parole on the first-degree murder conviction, consecutive to a two-year sentence for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

On appeal, defendant first contends that there was insufficient evidence of premeditation and deliberation to support his conviction for first-degree murder. We disagree. In reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v. Wolfe,* 440 Mich. 508, 515; 489 NW2d 748 (1992), amended 441 Mich. 1201 (1992). In order to prove first-degree murder, the prosecutor must show that defendant intentionally killed the victim and that the killing was premeditated and deliberate. MCL 750.316; MSA 28.548; *People v. Anderson,* 209 Mich.App 527, 537; 531 NW2d 780 (1995); *People v. Haywood,* 209 Mich.App 217, 229; 530 NW2d 497 (1995). Premeditation and deliberation require sufficient time to allow the defendant to take a "second look." *Anderson, supra.* "The elements of premeditation and deliberation may be inferred from all the facts and circumstances surrounding the incident ... including the parties' prior relationship, the actions of the accused both before and after the crime, and the circumstances of the killing itself." *Haywood, supra* at 229; see also *Anderson, supra* at 537.

In the present case, after a witness observed defendant circling the area where the victim was talking among friends, several witnesses observed defendant approach the victim from across the street while carrying a gun in his hand, get the victim's attention, aim the gun at the victim, and shoot the victim in the face from close range. As the victim slumped to the ground, defendant shot the victim once again. The second bullet entered through the victim's back and lodged in his chest. Defendant then approached the fallen victim, observed his status, and fled the scene. The victim died of multiple gunshot wounds. There is no evidence that defendant and the victim engaged in any argument or struggle prior to the shooting. Moreover, contrary to defendant's claim that his actions were inspired by "hot blood," defendant had time to contemplate his actions as he circled the area in his car and approached the victim from across the street with a loaded gun in his hand. Viewed in a light most favorable to the prosecution, we conclude that this presents sufficient evidence to justify the submission of the first-degree murder charge to the jury.

II

Next, defendant claims that he was denied a fair trial because the prosecutor vouched for the credibility of a witness. However, defendant failed to object to the conduct that he now claims to have been improper. Accordingly, appellate review of this unpreserved issue is foreclosed unless the failure to review the issue would result in a miscarriage of justice. *People v. Stanaway,* 446 Mich. 643; 521 NW2d 557 (1994); *People v. Hoffman,* 205 Mich.App 1, 21; 518 NW2d 817 (1994); *People v. Vaughn,* 186 Mich.App 376, 384; 465 NW2d 365 (1990); *People v. Gonzalez,* 178 Mich.App 526, 534-535; 444 NW2d 228 (1989).

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*2 After reviewing the prosecutor's comments in context, we find no miscarriage of justice. *Gonzalez, supra* at 535. Even assuming arguendo that the prosecutor's comments were improper, but see *People v. Bahoda,* 448 Mich. 261, 276-277; 531 NW2d 659 (1995) (no error if prosecutor does not insinuate possession of some special knowledge not heard by the jury), the evidence against defendant was so overwhelming that the error, if any, is harmless. MCR 2.613; MCL 769.26; MSA 28.1096; *People v. Mosko,* 441 Mich. 496, 502-503; 495 NW2d 534 (1992); *People v. Hubbard,* 209 Mich.App 234, 243; 530 NW2d 130 (1995).

III

Defendant further contends that his conviction should be reversed because a juror that had previously been dismissed was allowed to replace a juror who became ill. We disagree. The day after jury deliberation commenced, one of the jurors became ill and was taken to the hospital. When the trial court learned that the ill juror could not continue deliberating, it recalled a juror who sat through the entire trial, but was dismissed after jury instructions to attend a funeral. Each party questioned the recalled juror, who said that he could deliberate impartially and that he had not spoken with anyone about the case. Defense counsel indicated that he did not want to proceed with only eleven jurors and stated that defendant had no objection to replacing the excused juror with the recalled juror. The trial court instructed the jury to begin their deliberations anew.

Defendant makes no claim that this procedure prejudiced him in any way. Therefore, in accordance with this Court's holding in *People v. Dry Land Marina,* 175 Mich.App 322; 437 NW2d 391 (1975), we conclude that defendant is not entitled a new trial. See also *United States v. Hillard,* 701 F.2d 1052 (CA 2, 1983). Although defendant suggests that we reject the holding in *Dry Land Marina* in light of the Ninth Circuit's holding in *People v. Lamb,* 529 F.2d 1153 (CA 9, 1975), this Court rejected *Lamb* in *Dry Land Marina* and we are not persuaded that that *Dry Land Marina* was wrongly decided. Furthermore, defendant agreed to the trial court's method of handling the problem created by the sick juror and we will not allow a party to harbor error to use as an appellate parachute. *People v. Shuler,* 188 Mich.App 548, 552; 470 NW2d 492 (1991).

IV

Finally, defendant claims that sentencing a minor to life without parole constitutes cruel or unusual punishment. We disagree. After the jury convicted defendant of first-degree murder, the trial court conducted a dispositional hearing pursuant to M.C.L. ß 769.1(3); MSA 28.1072(3) and MCR 6.931(A) determined that the best interests of defendant and the public would be better served by sentencing defendant as an adult. After making this determination, the trial court was bound by M.C.L. ß 750.316(1); MSA 28.548(1) to sentence defendant to life imprisonment without the possibility of parole.

*3 Defendant does not contend that the sentencing court abused its discretion in deciding to sentence defendant as an adult. Nor does defendant claim that M.C.L. ß 750.316(1); MSA 28.548(1) is unconstitutional as it applies to adults. Instead, defendant advances the limited proposition that applying M.C.L. ß 750.316(1); MSA 28.548(1) to a minor who is sentenced as an adult constitutes cruel or unusual punishment. However, in *People v. Launsburry,* ___ Mich.App ___; ___ NW2d ___ (Docket No. 178536, issued 6/25/96, slip op at 3-4), this Court held that it is not cruel or unusual punishment to sentence a juvenile to mandatory life imprisonment. In fact, defendant cites no authority for the proposition that minors, or minors sentenced as adults, enjoy some special constitutional status that would make M.C.L. ß 750.316(1); MSA 28 .548(1) unconstitutional when applied to a minor where it is not unconstitutional when applied to adults. See *People v. Hall,* 396 Mich. 650; 242 NW2d 377 (1976); *People v. Saxton,* 118 Mich.App 681; 325 NW2d 795 (1982). Nor does any such authority exist. See *Washington v. Massey,* 803 P.2d 340, 348 (Wash App, 1990). Indeed, "there is no constitutional right to be treated as a juvenile," *Launsburry, supra* at 4, citing *People v. Hanna,* 443 Mich. 202; 504 NW2d 166 (1994), and defendant was clearly afforded the protections for juveniles the Legislature has chosen to provide. See *Woodard v. Wainwright,* 556 F.2d 781, 785 (CA 5, 1977) ("treatment as a juvenile is not an inherent right but one granted by the state legislature ..."). Furthermore, contrary to defendant's position that his sentence is cruel or unusual because the sentencing court was unable to look at mitigating factors before applying M.C.L. ß 750.316(1); MSA 28.548(1), the trial court held a thorough dispositional hearing before determining that defendant should be sentenced as an adult. Indeed, this dispositional hearing provided the sentencing court the ability to consider mitigating factors and defendant's potential for rehabilitation. In this respect, a juvenile first-degree murderer is better situated than an adult first-degree murderer because, unlike the adult, the sentencing court must consider several factors before sentencing a juvenile as an

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adult and, hence, imposing the life sentence required by M.C.L. ß 750.316(1); MSA 28.548(1). Accordingly, we reject defendant's claim that M.C.L. ß 750.316(1); MSA 28.548(1) is per se unconstitutional when applied to a minor sentenced as an adult. *Launsburry, supra* at 3.

We proceed, however, to determine whether the sentence is "cruel or unusual" as it applies to defendant. In determining whether a sentence violates the "cruel or unusual" clause of the Michigan Constitution, we must consider (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, (3) the sentences imposed for the commission of the same crime in other jurisdictions, and (4) the goal of rehabilitation. *People v. Bullock,* 440 Mich. 15, 33-34; 485 NW2d 866 (1992), citing *People v. Lorentzen,* 387 Mich. 167; 194 NW2d 827 (1972); *People v. Loy-Rafuls,* 198 Mich.App 594, 604; 500 NW2d 480 (1993), rev'd on other grounds 442 Mich. 915; 503 NW2d 453 (1993).

***4** Here, while he was an escaped fugitive from a juvenile detention facility, defendant gratuitously shot a man--ambush style--on a public street corner, in broad daylight, in front of several witnesses and a young child. Defendant's grave, predatory crime warrants the severest penalty constitutionally permitted in Michigan. See M.C.L. ß 750.316(1); MSA 28.548(1); *Hall, supra; Launsburry, supra* at 3; *People v. Hamp,* 110 Mich.App 92; 312 NW2d 175 (1981). Moreover, even when focusing our attention on juveniles who are sentenced as adults, we find that defendant's sentence is neither unusual in this state, see, e.g., *People v. Lyons,* 203 Mich.App 465; 513 NW2d 170 (1994) (remanding for resentencing when a juvenile convicted of first-degree murder was not sentenced as an adult); *People v. Black,* 203 Mich.App 428; 513 NW2d 152 (1994) (same); *People v. Miller,* 199 Mich.App 609; 503 NW2d 89 (1993); *People v. Haynes,* 199 Mich.App 593; 502 NW2d 758 (1993) (same), nor unique to this state. See, e.g., *Massey, supra* (holding that sentencing a minor to mandatory life imprisonment is not cruel and unusual punishment); *Illinios v. Clark,* 544 N.E.2d 100 (Ill App, 1989) (same); *Illinios v. Rodriguez,* 480 N.E.2d 1147 (Ill App, 1985) (same); *Eddings v. State,* 688 P.2d 342 (Okla Crim App, 1984); see also *Stanford v. Kentucky,* 492 U.S. 361; 109 S Ct 2969; 106 L.Ed.2d 306 (1989) (holding that imposing capital punishment on persons who murder at age sixteen or seventeen does not constitute cruel and unusual punishment). Further, with regard to the goal of rehabilitation, we note that several efforts have been made to rehabilitate defendant and that those efforts have proven futile. Indeed, defendant has rebuked past rehabilitative efforts with two escapes from juvenile detention facilities, an escalating pattern of predatory criminal behavior, repeated fighting while in jail on the present charges, and defendant's professed pride with his criminal lifestyle. Under these circumstances, defendant's sentence of life in prison is proportionate to the offense and the offender, see *People v. Milbourn,* 435 Mich. 630; 461 NW2d 1 (1990), neither cruel nor unusual, see *People v. Williams (After Remand),* 198 Mich.App 537, 543; 499 NW2d 404 (1993), and necessary to accomplish the objective of protecting society and to achieve the related goals of deterrence, rehabilitation, and restitution.

Affirmed.

BANDSTRA, J. (concurring).

I concur in the majority opinion but write separately to acknowledge the significance of the issue defendant raises regarding the constitutionality of imposing a mandatory life imprisonment sentence upon a juvenile. Defendant is not, of course, arguing that the constitution requires that, notwithstanding his horrendous crime, he must someday be allowed to be freed from incarceration. Instead, defendant argues that the constitution requires much less, i.e., that he be allowed at some point in his life, probably after decades of imprisonment, to present an argument to a parole board that he has changed since he committed this terrible crime, that he is no longer a threat to the community, and that justice will best be served by allowing him to participate in society again. The question is not, then, whether defendant has a constitutional right to ever be free again but, instead, whether he must be allowed the chance to argue at some point that he has undergone such a basic change of personality that relief from further incarceration is justified.

***5** The majority opinion correctly follows *People v. Launsburry,* ____ Mich.App ___; ____ NW2d ___ (Docket No. 178536, issued 6/25/96), a precedent binding upon us under Administrative Order 1996-4. *Launsburry* presents a fair interpretation and application of the principles for determining whether a sentence is "cruel or unusual" under the Michigan Constitution, see *People v. Bullock,* 440 Mich. 15, 33-34; 485 NW2d 866 (1992), with respect to the issue presented.

However, the *Launsburry* interpretation and

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application of the *Bullock* principles, with the resulting determination that a mandatory life sentence in this context is not cruel or unusual, is not without its problems and, accordingly, not the only possible result. For example, *Bullock* requires that we consider the goal of rehabilitation, "a criterion rooted in Michigan's legal traditions, and reflected in the provision for 'indeterminate sentences" ' of Michigan's constitution. *Bullock, supra* at 34. *Launsburry* concludes that this goal is taken into consideration by trial courts when they determine whether juveniles should be sentenced as adults. *Launsburry,* slip op at p 3; see M.C.L. ß 769.1(3)(a)-(f); MSA 28.1072(3)(a)-(f). However, with respect to major crimes such as the one at issue in the present case, this statute presents a trial court with only "bad alternatives: sentence defendant as a juvenile and thereby endanger society, or sentence defendant as an adult and condemn a potentially salvageable child to spend...life in prison," without the possibility of parole. *People v. Black,* 203 Mich.App 428, 431; 513 NW2d 152 (1994). As pointed out by Judge Michael J. Kelly, "[t]he juvenile sentencing alternative of incarceration until the age of twenty-one is not a sufficient societal response to the viciousness of the crimes committed" in this type of case. *People v. Lyons,* 195 Mich.App 248, 257-258; 489 NW2d 218 (1992)(Michael J. Kelly, P.J., dissenting), vacated 442 Mich. 895; 502 NW2d 41 (1993). It is not implausible to argue that the trial court has, therefore, no real discretion and is forced to sentence juveniles who have committed major crimes as adults because of the limited penalties or rehabilitation prospects afforded by our necessarily short-term juvenile system. Neither is it implausible to argue that this consideration overrides all others; judges who decide not to sentence juveniles as adults in major criminal cases are routinely reversed. See, e.g., *People v. Bosie Smith,* 451 Mich. 901; ___ NW2d ___ (1996); *People v. Miller,* 199 Mich.App 609, 616; 503 NW2d 89 (1993); *People v. Haynes,* 199 Mich.App 593, 603; 502 NW2d 758 (1993); *Lyons, supra at 257.*

Bullock also directs that we consider sentences imposed in other jurisdictions. *Id.* at 33-34. A number of other states permit sentences of life imprisonment without the possibility of parole for minors, see *Launsburry,* slip op at p 3; other states apparently do not allow this harsh punishment to be imposed against juvenile offenders. What this mixed review of other states' approaches means for the *Bullock* analysis is arguable.

***6** Finally, courts in some jurisdictions have concluded that imposing a sentence of life without parole against a juvenile is unconstitutional. See, e.g., *Naovarath v. Nevada,* 779 P.2d 944 (Nev, 1989); *Workman v. Kentucky,* 429 S.W.2d 374 (Ky App, 1968). The Nevada and Kentucky courts came to this conclusion in applying constitutional language that prohibits "cruel *and* unusual" punishment and our Supreme Court has determined that the "cruel *or* unusual" language of the Michigan Constitution proscribes a broader category of sanctions. *Bullock, supra* at 27-36. Arguably, therefore, the Michigan prohibition might reasonably be interpreted as preventing mandatory life sentences for juveniles, even for the worst offenses.

Defendant presents an important constitutional issue with obvious far-reaching consequences for all juveniles similarly situated. *Launsberry* resolved the issue in a fashion arguably consistent with *Bullock.* Nonetheless, considering the importance of the question raised and the possibility of a different interpretation of *Bullock* as discussed above, I encourage our Supreme Court to grant leave to consider this issue so that definitive guidance may be provided to the lower courts.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
Kevin BOYD, Defendant-Appellant.
No. 197876.

June 5, 1998.

Before: KELLY, P.J., and CAVANAGH and N.J. LAMBROS, [FN*] JJ.

FN* Circuit judge, sitting on the Court of Appeals by assignment.

PER CURIAM.

***1** Following a jury trial, defendant was convicted of first-degree murder, M.C.L. ß 750.316; MSA 28.548, and conspiracy to commit first-degree murder, M.C.L. ß 750.157(a); MSA 28.354(1). He was sentenced to life imprisonment without parole on both counts. Defendant now appeals as of right. We affirm defendant's conviction but remand for resentencing.

Defendant first argues that the trial court erred by admitting his confession because it was taken in violation of his right against self-incrimination. Specifically, defendant argues that the confession was obtained in violation of his Fifth Amendment right to counsel and that it was involuntary. We disagree.

The confession was not obtained in violation of defendant's right to counsel during custodial interrogation under *Miranda*. [FN1] Defendant's retained attorney sent a letter to the sheriff's department indicating that he represented defendant and his mother and requesting that all communication between the department and his clients be directed to him. Defendant contends that the police violated his right to counsel when they engaged in the functional equivalent of express questioning by showing defendant a gun taken from the victim's home. We agree with the prosecution that defendant did not invoke his right to counsel by the letter because *Miranda* rights can not be invoked anticipatorily. See *McNeil v. Wisconsin*, 501 U.S. 171, 182 n 3; 111 S Ct 2204; 115 L Ed2 2d 158 (1991). We need not address whether presenting the gun would have been improper had the right to counsel been invoked.

FN1. *Miranda v. Arizona*, 384 U.S. 436; 86 S Ct 1602; 16 L.Ed.2d 694 (1966).

We next address defendant's claim that the statement was involuntary. This Court reviews a trial court's determination of voluntariness and the decision to admit a defendant's confession by examining the entire *Walker* [FN2] hearing record and making an independent determination as to the admissibility of the evidence. However, this Court should not disturb the lower court's factual findings regarding the validity of the waiver of *Miranda* rights unless that ruling is found to be clearly erroneous. *People v. Cheatham*, 453 Mich. 1, 29-30; 551 NW2d 355 (1996).

FN2. *People v. Walker (On Rehearing)*, 374 Mich. 331; 132 NW2d 87 (1965).

Where a defendant challenges the admissibility of a confession on the grounds that his *Miranda* rights had not been validly waived, the court must consider the totality of circumstances surrounding the interrogation. *Cheatham, supra* at 27. A voluntary relinquishment of his rights means that the decision must be the " 'product of a free and deliberate choice rather than intimidation, coercion, or deception." ' *People v. Garwood*, 205 Mich.App 553, 556; 517 NW2d 843 (1994), quoting *Colorado v. Spring*, 479 U.S. 564; 107 S Ct 851; 93 L.Ed.2d 954 (1987). When evaluating the admissibility of a juvenile's confession, appropriate considerations include:

(1) whether the requirements of *Miranda v. Arizona*, 384 U.S. 436;86 S Ct 1602, 16 L.Ed.2d 694 (1966), have been met and the defendant clearly understands and waives those rights, (2) the degree of police compliance with M.C.L. ß 764.27; MSA 28.866 and the juvenile court rules, (3) the presence of an adult parent, custodian or guardian, and (4) the juvenile defendant's personal background.

***2** In addition, the court must consider (1) the

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accused's age, educational and intelligence level, and the extent of the accused's prior experience with the police, (2) the length of detention before the statement was made, (3) the repeated and prolonged nature of the questioning, and (4) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep or medical attention. [*People v. Good*, 186 Mich.App 180, 189; 463 NW2d 213 (1990). Citations omitted.]

Although defendant complains that the *Miranda* rights were read together, we are nevertheless satisfied that the requirements of *Miranda* were met and that defendant understood and waived those rights. Although he was seventeen at the time he gave the statement, he had one prior contact with the juvenile court when he was thirteen and had been interviewed by the police on other occasions before he gave the statement. Furthermore, because he chose not to testify at the *Walker* hearing, the accounts of the police officers were uncontested. These accounts do not suggest that the confession was the product of police coercion, which is a prerequisite to a finding that the waiver of rights was involuntary. *Garwood, supra* at 555.

Defendant next argues that he was denied a fair trial because the trial court refused to instruct the jury on the offense of accessory after the fact. Accessory after the fact is not a cognate lesser offense of murder. *People v. Perry*, 218 Mich.App 520, 532; 554 NW2d 362 (1996). It is a separate and distinct offense that can occur only after the substantive crime has been committed. *People v. Bargy*, 71 Mich.App 609, 614-615 n 5, 61-617; 248 NW2d 636 (1976). Therefore, the court did not err by refusing to give the requested instruction.

Defendant contends that the trial court abused its discretion by excluding evidence about his mother contacting the police in November about "some difficulties" with a third person. The court sustained the prosecutor's hearsay objection. Defense counsel did not make an offer of proof nor was the substance of the evidence apparent from the context of the question. MRE 103(a)(2). Accordingly, defendant is not entitled to relief on this basis.

Defendant also argues that it was error for the court to exclude Lynn Boyd's testimony that her trial strategy was to blame her son for the murder. However, it was defense counsel that objected to the prosecutor's question about her trial strategy. Defendant cannot request a certain action in the trial court and then, after the court grants the request, argue on appeal that the action was error. *People v. Murry*, 106 Mich.App 257, 262; 307 NW2d 464 (1981). Therefore, defendant may not now contend that the court erred when it sustained defense counsel's objection at trial.

Defendant next contends that the trial court abused its discretion by admitting the opinion testimony of a police officer concerning blood spatter evidence. At trial, defendant objected to the court's qualifying the witness as an expert because he had not been previously qualified as an expert in the field in any circuit court. Inasmuch as the officer had been trained in the field by attending several seminars and had experience as shown by the fact that he had previously testified as an expert in district court, the trial court did not abuse its discretion in qualifying the officer as an expert witness in blood spatter evidence. MRE 702; *People v. Whitfield*, 425 Mich. 116; 388 NW2d 206 (1986).

***3** Finally, defendant argues that the trial court abused its discretion in sentencing him as an adult. We agree.

A trial court's findings of fact at a juvenile sentencing hearing are reviewed for clear error, while the ultimate decision whether to sentence a minor as an juvenile or as an adult is reviewed for an abuse of discretion, using the principle of proportionality. *People v. Brown*, 205 Mich.App 503; 517 NW2d 806 (1994); *People v. Lyons (On Remand)*, 203 Mich.App 465, 468; 513 NW2d 170 (1994).

We believe the trial court abused its discretion in sentencing defendant as an adult. Although defendant committed a very serious offense, experts testified at the sentencing hearing that defendant was a model prisoner, an excellent student, amenable to treatment, unlikely to disrupt the rehabilitation of other juveniles, not a danger to the public and remorseful for his actions. Under these circumstances, it was an abuse of discretion for the trial court to sentence defendant as an adult. *Brown, supra; Lyons, supra.*

Defendant's convictions are affirmed but this matter is remanded to the trial court for resentencing in conformity with the dictates of this opinion. We do not retain jurisdiction.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v.
Matthew Scott BENTLEY, Defendant-Appellant.
No. 214170.

April 11, 2000.

Before: METER, P.J., and GRIFFIN and OWENS, JJ.

PER CURIAM.

*1 Defendant, a juvenile tried as an adult under M.C.L. ß 764.1f(1); MSA 28.860(6)(1), appeals by right from his convictions by a jury of first-degree felony-murder, M.C.L. ß 750.316(1)(b); MSA 28.548(1)(b), first-degree home invasion, M.C.L. ß 750.110a(2); MSA 28.305(a)(2), and possession of a firearm during the commission of a felony, M.C.L. ß 750.227b(1); MSA 28.424(2)(1). The trial court sentenced defendant to a mandatory two years' imprisonment for the felony-firearm conviction, followed by twelve to twenty years' imprisonment for the home invasion conviction. For the felony-murder conviction, the court, following the mandatory sentencing provisions of M.C.L. ß 769.1(1)(g); MSA 28.1072(1)(g) and M.C.L. ß 750.316; MSA 28.548, sentenced defendant to life imprisonment without the possibility of parole. We affirm.

Defendant first argues that the statute authorizing his sentence as an adult, M.C.L. ß 769.1; MSA 28.1072, as amended by 1996 PA 247, is unconstitutional because it violates state and federal rights to due process, state and federal rights to equal protection, and the separation of powers doctrine. Essentially, defendant argues that because prosecutors have discretion under M.C.L. ß 764.1f(1); MSA 28.860(6)(1) to determine which juveniles accused of felony-murder will be tried as adults, and because M.C.L. ß 769.1; MSA 28.1072 mandates that juveniles convicted of felony-murder be sentenced as adults, M.C.L. ß 769.1; MSA 28.1072 impermissibly denies juveniles a hearing on the appropriateness of adult treatment, irrationally treats some juveniles differently than other, similarly-situated juveniles, and impermissibly deprives the judiciary of sentencing discretion. These claims involve constitutional issues that we review de novo. *People v. Conat*, 238 Mich.App 134, 144; 605 NW2d 49 (1999).

Constitutional claims analogous to those now raised by defendant were recently addressed and rejected by this Court in *Conat, supra* at 146-164. Defendant raises no new arguments not already considered and rejected in *Conat*. Therefore, defendant's claim that the statute is unconstitutional on the aforementioned grounds is without merit.

Next, defendant argues that M.C.L. ß 769.1(1)(g); MSA 28.1072(1)(g), by requiring the imposition of a sentence of life imprisonment without the possibility of parole upon a juvenile tried as an adult and convicted of first-degree murder, violates the Michigan constitution's prohibition against cruel or unusual punishment. See Const 1963, art 1, ß 16. Defendant contends that a *mandatory*, nonparolable life sentence should not apply to a fourteen-year-old, since age and maturity are significant mitigating factors with regard to crimes committed by juveniles.

We review constitutional questions de novo. *People v. Pitts*, 222 Mich.App 260, 263; 564 NW2d 93 (1997). Moreover, statutes are presumed constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *People v. Hubbard (After Remand)*, 217 Mich.App 459, 483-484; 552 NW2d 493 (1996). The party challenging a statute has the burden of proving its invalidity. *People v. Thomas*, 201 Mich.App 111, 117; 505 NW2d 873 (1993).

*2 In deciding if punishment is cruel or unusual under Michigan law, we employ a four-part test where we (1) look to the gravity of the offense and the harshness of the penalty, (2) compare the punishment to the penalty imposed for other crimes in this state, (3) compare the penalty imposed for the same crime in other states, and (4) consider the goal of rehabilitation. *In re Ayres*, ___ Mich.App ___; ___ NW2d ___ (Docket No. 216523, issued 12/7/99), slip op, p 2; *People v. Launsburry*, 217 Mich.App 358,

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363; 551 NW2d 460 (1996).

Here, an analysis of the four aforementioned factors leads us to conclude that the mandatory life sentence contained in M.C.L. ß 769.1(1)(g); MSA 28.1072(1)(g) does not constitute cruel or unusual punishment. First, our courts have held that a mandatory life sentence without the possibility of parole is not an unduly harsh sentence for felony-murder, given the seriousness of the offense, even when applied to a minor. See *People v. Hall*, 396 Mich. 650, 657-658; 242 NW2d 377 (1976), and *Launsburry, supra* at 363-364. Second, defendant, in discussing *Launsburry,* essentially concedes that our state imposes mandatory, nonparolable life sentences for other offenses. Third, defendant acknowledges that thirteen other states allow the imposition of mandatory, nonparolable life sentences on minors. Finally, in the context of a mandatory life sentence, our Supreme Court has noted that rehabilitation and release are still possible because a defendant has available the possibility of (1) commutation of his or her sentence by the Governor to a parolable offense, or (2) outright pardon. *Hall, supra* at 658. Accordingly, defendant's sentence does not constitute cruel or unusual punishment in contravention of our state's constitution, and defendant has not met his burden of overcoming the presumption of constitutionality. [FN1] See *Thomas, supra* at 117

> FN1. Defendant suggests that because prosecutors have discretion regarding whether to try a juvenile as an adult for first-degree murder, and because a minor convicted of first-degree murder now faces a mandatory, nonparolable life sentence under the amended version of M.C.L. ß 769.1; MSA 28.1072, the mandatory sentence now constitutes cruel or unusual punishment. In other words, defendant argues that whereas a mandatory life sentence for a minor might have been appropriate prior to the amendment of M.C.L. ß 769.1; MSA 28.1072, when a hearing was held to determine if a juvenile should be sentenced as an adult or a minor, such a sentence is now cruel or unusual because of the absence of this hearing. We disagree, however, that the mere absence of this hearing somehow elevates an otherwise appropriate sentence to the level of cruel or unusual punishment, when a minor accused of first-degree murder and tried as an adult has been validly convicted of this most serious of offenses. As stated in *Conat, supra* at 159, "juveniles have no constitutional right to be treated differently from adults when they engage in criminal conduct."

Next, defendant argues that M.C.L. ß 769.1(1)(g); MSA 28.1072(1)(g), by setting forth a mandatory, nonparolable life sentence for certain minors, violates the federal constitutional prohibition against cruel and unusual punishment. See U.S. Const, Am VIII, as applied to the states by Am XIV. Again, we review constitutional questions de novo, *Pitts, supra* at 263, and a statute is presumed constitutional unless the party challenging it proves otherwise or unless an unconstitutional defect is clearly apparent. *Hubbard, supra* at 483-484; *Thomas, supra* at 117.

The Michigan Supreme Court has held that the federal constitutional protection against "cruel and unusual punishment" is less broad than the protections against "cruel or unusual punishment" afforded under our state constitution. *People v. Bullock*, 440 Mich. 15, 30; 485 NW2d 866 (1992). Our analysis of alleged cruel and unusual punishment under the federal constitution involves a two-step process. First, we determine whether the sentence is grossly disproportionate to the offense. If the sentence is indeed grossly disproportionate, we compare sentences imposed for other crimes within Michigan and sentences imposed for the same crime (here, first-degree murder) in other jurisdictions to assess whether the sentence is excessive. See *Smallwood v. Johnson*, 73 F3d 1343, 1347 (CA 5, 1996), and *McGruder v. Puckett*, 954 F.2d 313, 315-316 (CA 5, 1992) (both discussing *Harmelin v. Michigan*, 501 U.S. 957, 1005; 111 S Ct 2680; 115 L.Ed.2d 836 (1991), and *Solem v. Helm*, 463 U.S. 277, 290-292; 103 S Ct 3001; 77 L.Ed.2d 637 (1983), partial overruling recognized by *Smallwood, supra* at 1347, and *McGruder, supra* at 315-316). [FN2]

> FN2. In *Solem,* the Court adopted three factors to assess in determining whether a sentence is cruel and unusual under federal law: (1) the gravity of the offense relative to the harshness of the penalty (i.e., the proportionality of the sentence), (2) the sentences imposed for other crimes in the jurisdiction, and (3) the sentences imposed for the same crime in other jurisdictions. See *Solem, supra* at 292. In *Harmelin,* which was a plurality opinion, five justices rejected this full three-part test. See *Harmelin, supra* at 964-990, 997-1005. However, seven justices in *Harmelin* supported a continued "proportionality analysis" for alleged cruel

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> and unusual punishment. *Id.* at 997-1005, 1018-1028. Accordingly, federal courts have interpreted *Solem* and *Harmelin,* read together, to mean that a threshold inquiry must be made to determine if a sentence is grossly disproportionate to an offense, and only if this threshold question is answered in the affirmative do the remaining two *Solem* factors need to be considered. See *McGruder, supra* at 315-316, and *Smallwood, supra* at 1347.

***3** It cannot seriously be contended that life imprisonment for the taking of another life is *grossly* disproportionate. Consequently, we need not conduct the second step--intra- and inter-jurisdictional comparisons--as discussed in *Smallwood, supra* at 1347, and *McGruder, supra* at 315-316. Defendant's argument that M.C.L. ß 769.1(1)(g); MSA 28.1072(1)(g) facilitates cruel and unusual punishment under the federal constitution is without merit. [FN3]

> FN3. Because the statute at issue here does not violate the state constitution against cruel or unusual punishment, as discussed *supra,* and because the federal constitution provides less protection in this area than the state constitution, *Bullock, supra* at 30, it would be a strange result indeed to hold that the statute violates the federal prohibition against cruel and unusual punishment.

Finally, defendant argues that the trial court erred by admitting into evidence two photographs of the victim's body--one depicting her entire, bloody body, and the other depicting her bruised left hand. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v. Lukity,* 460 Mich. 484, 488; 596 NW2d 607 (1999); *People v. Starr,* 457 Mich. 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found when an unprejudiced person, considering the facts on which the trial court acted, could find no justification for the ruling made. *People v. Ullah,* 216 Mich.App 669, 673; 550 NW2d 568 (1996). Any error in the admission of evidence does not require reversal unless a substantial right of the party is affected. MRE 103(a); *People v. Travis,* 443 Mich. 668, 686; 505 NW2d 563 (1993).

Defendant contends that because he admitted killing the victim, the photographs were irrelevant. He further contends that even if the photographs *had* been relevant, any probative value was outweighed by their potential to prejudice defendant.

With regard to the photograph of defendant's bruised hand, the transcript of the relevant motion hearing reveals no basis for admissibility. Indeed, the prosecutor made no argument that defendant caused the victim to bruise her hand. However, under M.C.L. ß 769.26; MSA 28.1096, error in the admission of evidence does not warrant reversal unless it affirmatively appears that the error resulted in a miscarriage of justice. "In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Lukity, supra* at 495. Here, the admission of the photograph depicting the victim's hand could not possibly have affected the jury's verdict, given the overwhelming evidence that defendant killed the victim and given the other, properly admitted photographs depicting the victim's dead body and the victim's autopsy.

With regard to the photograph wholly depicting the victim's dead body, we conclude that the court did not abuse its discretion in admitting this photograph. First, the blood loss shown in the photographs was relevant toward defendant's intent, an important element of the felony-murder charge. See *People v. Mills,* 450 Mich. 61, 71; 537 NW2d 909, modified and remanded on other grounds 450 Mich. 1212 (1995) ("The severity and the vastness of the victim's injuries were of consequence to the determination whether the defendants' acts were intentional"). The photograph was also relevant to establish the position of the body and to corroborate the prosecution's witnesses' version of the events that took place on the day of the killing. See *People v. Eddington,* 387 Mich. 551, 562; 198 NW2d 297 (1972) (photographs showing the corpus delecti of the crime admissible even though witnesses were available to testify regarding the subject matter of the photographs). Furthermore, the Court carefully considered a number of photographs and admitted only those it considered probative and not particularly inflammatory. See *Mills, supra* at 78. As in *Mills,* we are satisfied in the instant case that the court "admitted only those photographs that were necessary in furthering the probative force, and omitted those that were repetitive or too gruesome and unfairly prejudicial." *Id.* at 78. Accordingly, we conclude that the trial court did not abuse its discretion by admitting the photograph of the victim's body.

***4** Affirmed.

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