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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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

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[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.

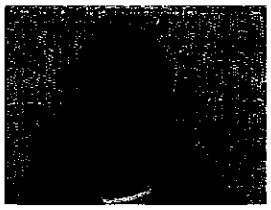
Annexes

PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS OF JUVENILES SENTENCED TO LIFE WITHOUT PAROLE IN THE UNITED STATES OF AMERICA

Steven Macpherson Watt
Ann Beeson
Human Rights Working Group
American Civil Liberties Union

Deborah LaBelle
Kary Moss
American Civil Liberties Union of Michigan

Matthew Bentley was 14 years old in 1998 when the prosecutor charged him as an adult. He was automatically waived to adult court without consideration of his special status as a child. Despite reservations the circuit court judge had no choice but to impose a mandatory life sentence, without the possibility of parole, on Matthew. Matthew was sent to an adult prison. He is incarcerated at the Earnest C. Brooks Correctional Facility, 2500 S. Sheridan Drive, Muskegon, MI, 49444.



Maurice Black was charged and tried as an adult, with felony murder, in 2000. Upon his conviction he was given the mandatory sentence of life without possibility of parole, on February 12, 2001, for acts that were committed when he was 16. Maurice is going into his 5th year in prison and is at the Macomb Correctional Facility, 34625 26 Mile Road, New Haven, MI, 48048.

Larketa Collier was 16 when she was tried and sentenced as an adult in 2004. She was given the mandatory sentence of life without possibility of parole when was found guilty of first degree murder. Larketa was sent to general population in the adult women's prison, Robert Scott Correctional Facility, 47500 W. Five Mile Road, Plymouth, MI, 48170, where she remains until the end of her natural life.

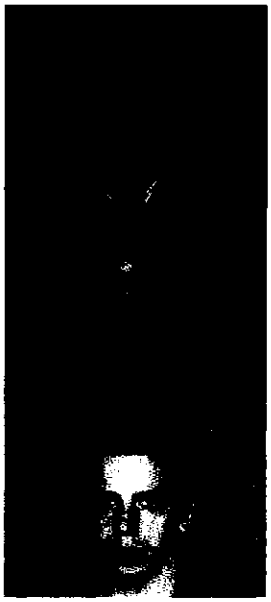
Cornelius Copeland was convicted of felony murder in 2000 for acts that occurred in 1998 when he was 16. He was sentenced to mandatory life without possibility of parole. Cornelius had no previous juvenile record and maintains his innocence. Cornelius is at men's prison known as the Richard A. Handlon Correctional Facility, 1728 Bluewater Highway, Ionia, MI, 48846.

John Espie was 16 in 1998 when he was charged with first degree murder. John had been diagnosed with "Frontal Lobe Syndrome" (little impulse control), ADD, depression and anxiety and was on anti depressant medication. John was tried and convicted as an adult without consideration of his age, mental health, or assertion of self defense On September 10, 1999, John received a mandatory sentence of life without possibility of parole. John has currently served 6 years in a high custody men's prison- Standish Maximum Correctional Facility, 4713 W. M-61, Standish, MI, 48658.

Maurice Ferrell was born August 17, 1985 and was convicted of Felony Murder in connection with a robbery when he was sixteen. Maurice was tried and sentenced as an adult on June 4, 2002. Maurice has currently served 31/2 years of his mandatory natural life sentence at the Richard A. Handlon Correctional Facility, 1728 Bluewater Highway, Ionia, MI, 48846.

Mark Gonzalez was tried as an adult and sentenced on July 19, 2000 to mandatory life without parole for his part in a homicide when he was fifteen. Mark has currently served 6 years in adult prison and is at the Oaks Correctional Facility, 1500 Caberfae Highway, Manistee, Mi, 49660.

Chavez Hall was 15 and in the 8th grade when he charged with Felony Murder for his involvement in homicides commitment by two adult co-defendants. He was tried and sentenced as an adult on October 8, 1999 and received a mandatory life without parole sentence. This is also the maximum sentence his adult co-defendants who committed the murder could receive. Chavez has currently served 6 years in prison and is at the Chippewa Correctional Facility, 4269 W. M-80, Kincheloe, MI, 49784.



Lamar Haywood was automatically charged and tried as an adult for a crime of premeditated murder when he was 15. He received a mandatory life without possibility of parole sentence on August 10, 1999. Lamar has currently served 6 years in prison and is at the Earnest C. Brooks Correctional Facility, 2500 S. Sheridan Drive, Muskegon, MI, 49444.

Lonnell Haywood on was automatically charged and tried as an adult for a crime of premeditated murder when he was 16. He received the mandatory sentence for an adult in Michigan- life without possibility of parole-on August 24, 1998. Lonnell has currently served 7 years in prison and is at the Ryan Correctional Facility, 17600 Ryan Road, Detroit, MI, 48212.

Christopher Hynes had just turned 16 when he was charged with first degree murder. He was tried and sentenced as an adult on September 13, 1999 and received the mandatory sentence of life without possibility of parole. Christopher has currently served 6 years in prison and is at the Alger Maximum Correctional Facility, Industrial Park Drive, P.O. Box 600, Munising, MI, 49862.

Ryan Kendrick was tried as an adult and sentenced on July 19, 2000 to mandatory life without parole for his part in a homicide when he was sixteen. Ryan has currently served 5 1/2 years in prison and is at the Earnest C. Brooks Correctional Facility, 2500 S. Sheridan Drive, Muskegon, MI, 49444..

Cedric King was fourteen when he was charged with conspiracy to commit murder. Cedric is learning disabled and can not read or write. He had completed the 6th grade and was 15 when he was tried, sentenced to life without parole and sent to prison as an adult on November 24, 1998. Cedric has currently served 7 years in prison and is at the Marquette Branch Prison in the Upper Peninsula of Michigan.

On July 24, 2000, Eric Latimer was sixteen and killed his adoptive father. Months before the murder he was hospitalized for emotional problems related to problems with his father but discharged because he lacked funds to pay for treatment. Eric was sentenced without consideration of his age or emotional problems to mandatory life in prison without possibility of parole and has spent most of his time in prison in a mental health unit and on suicide watch. He is at the Bellamy Creek Correctional Facility, 1727 W. Bluewater Highway, Ionia, MI, 48846.

Juan Nunez was 16 when he committed an armed robbery with three other teenagers that resulted in a homicide. He was tried as an adult, convicted of Homicide – Felony Murder and sentenced to mandatory life without parole on April 20, 1998. Juan has served 8 years in prison and is at the Richard A. Handlon Correctional Facility, 1728 Bluewater Highway, Ionia, MI, 48846.

Sharon Patterson was sixteen and had no prior criminal or juvenile record when she tried and convicted as an adult for was convicted of first degree murder. She was given the mandatory sentence of life without parole on April 13, 2004 and incarcerated in the adult women's prison, Robert Scott Correctional Facility, 47500 W. Five Mile Road, Plymouth, MI, 48170, where she remains.

Gregory Petty was 15 when he and a friend tried to rob a person on their bicycles. His friend shot the man and Gregory was tried as an adult for felony murder and given the adult sentence of mandatory life without parole on March 12, 1999. Gregory has spent 7½ years in prison and is at the Baraga Maximum Correctional Facility, 301 Wadaga Road, Baraga, MI, 49908.

Tyrone Reyes was 16 and under the influence of both alcohol and marijuana when he and his older brother and four friends attacked another group of teenagers and killed one of them. Tyrone was on suicide watch until his trial where he was tried and convicted as an adult and given the mandatory life without parole sentence on May 14, 1998. Tyrone has currently served 7½9 years in prison and is at the Alger Maximum Correctional Facility, Industrial Park Drive, P.O. Box 600, Munising, MI, 49862.

Kevin Robinson was15 when he went with four older friends who committed a robbery and a murder. Kevin, who never touched a gun nor shot anyone, received the same mandatory adult sentence as the person who committed the murder, life in prison without parole. Kevin was in foster care most of his childhood and has been diagnosed as mentally impaired. Since his sentence and incarceration on June 7, 2001 Kevin has spent much of his time in prison on suicide watch. Kevin has served 4½ years in prison and is at the Marquette Branch Prison, 1960 U.S. Highway 41, South, Marquette, MI, 49855.

T.J. Tremble was 14 when he was arrested and confessed without counsel or parents present to first degree murder. He was tried as an adult, convicted and received the adult mandatory life without parole sentence on December 5, 1997. The appellate courts rejected his challenge to his confession as being involuntary as he was questioned for 5 hours beginning at 3:00 am., stating he did not ask for an attorney. The court also rejected his challenge to being automatically tried and sentenced as an adult, stating that the courts had previously held this to be constitutional. T.J. has served 8 years in prisons and is at the Southern Michigan Correctional Facility, 4002 Cooper Street, Jackson, MI, 49201.

Marlon Walker was 16 when he committed a robbery and homicide. Despite learning disabilities, a dysfunctional family history, drug use since the age of 11 and mental immaturity, Marlon was tried and sentenced the same as an adult , receiving the mandatory adult sentence of life without possibility of parole on August 15, 2001. Marlon is at the Ojibway Correctional Facility, N5705 Ojibway Road, Marenisco, MI, 49947.

Oliver Webb was 16 when he shot and killed during a fight over Oliver's girlfriend. Oliver was in the ninth grade and had been diagnosed as emotionally impaired and attended special education classes. He had a troubled childhood after being kidnapped by his father and then by his mother, being sexually assaulted by a neighbor at the age of 8 and had attempted suicide at age 14. None of this was considered when he was tried and sentenced as an adult and given the mandatory adult sentence on May 6, 1999. Oliver has served 7½ years in prison and is at the Earnest C. Brooks Correctional Facility, 2500 S. Sheridan Drive, Muskegon, MI, 49444.

Elliott Whittington was sixteen when he killed his father. His borderline IQ , mental impairment and history of abuse and hospitalization for emotional problems was ignored when he was charged and tried as an adult. He received the mandatory adult sentence of life without parole on November 10, 1998. Elliott has currently served 7 years in prison and is at the Carson City Correctional Facility, 10522 Boyer Road, Carson City, MI, 48811.

Shytour Williams was 15 when he was tried as an adult for his involvement in a carjacking and murder by his older cousin. He received the same sentence as his adult cousin who committed the murder and was the main actor in the crime, the adult sentence of mandatory life without parole on November 5, 1997. Shytour has currently served 8 years in prison and is at the Mound Correctional Facility, 17601 Mound Road, Detroit, MI, 48212.

Ahmad Williams was 15 when he killed another teenager during a fight. The trial judge refused to sentence Ahmad to life without parole but was overturned by the appellate court which sentenced Ahmad to the mandatory adult sentence for first degree murder on July 28, 2002. Ahmad has currently served 3 ½ years in prison and is at the Bellamy Creek Correctional Facility, 1727 W. Bluewater Highway, Ionia, MI, 48846.

On November 16, 2000 Leon Williams was 16 years old and was charged and convicted as an adult for armed robbery and murder. Leon was sentenced to mandatory life without parole and his challenges to the automatic treatment of him as an adult were rejected by the appellate courts. Leon has currently served 4 years in prison and is at the Ojibway Correctional Facility, N5705 Ojibway Road, Marenisco, MI, 49947.

Johnny Williams was 16 and was convicted of shooting and killing a man in a drug house. Johnny was charged, tried and convicted as an adult and was sentenced on April 4, 2005 to mandatory life without parole. Robert has currently served ½ year in prison and is at the Bellamy Creek Correctional Facility, 1727 W. Bluewater Highway, Ionia, MI, 48846.

AFFIDAVIT OF HENRY HILL, JR.

I Henry Hill, Jr., do affirm and declare as follows:

I would first like to state that I have been extremely sympathetic to Anthony Thomas' family and friends from the moment they lost their loved one to an act of senseless violence committed by immature teenage boys. When Anthony Thomas was killed in 1980 I was 16 years old, a young scared boy trying to belong someplace simply to feel loved. I often felt that no one in this world could understand my pain or anger. When myself and two of my cousins got into an argument with Anthony at "Wick Park" all of us had guns in our possession, including Anthony. I think about this tragedy daily and can find no justification for Anthony's death. I even recall a time when Anthony Thomas and I were friends and never thought, for one moment, about hurting one another. Dennis Johnson (co-defendant) and myself had already left the park before Larnell Johnson (co-defendant) shot and killed Anthony.

When I was arrested in connection with Anthony's death I had no knowledge nor understanding of the significance of an education. I could neither read nor write and an evaluation by a court-appointed psychologist determined that I was functioning at an academic level of that equal to a third grader and had the maturity of a nine year old child who didn't truly understand "right from wrong". Of course, this is in no way justification for Anthony's death, but I truly did not understand what was happening. I hadn't shot anyone and didn't understand the trial.

My mother and my uncle, Charles McClaine, drove me and my co-defendants to

Saginaw Police Station where I and my co-defendants turned ourselves in. I was read my Miranda Rights, which I didn't know nor understand what this meant, however, my uncle has always been more than a father to me than an uncle, he informed me that I shouldn't say anything until I was appointed an attorney, to remain silent. It was my belief that I would be allowed to go home being that I didn't shoot nor kill Anthony Thomas, however, I was appointed a counselor and a bond hearing was scheduled. My attorney never explained to me the seriousness of the charge and when bond was denied I sat in the courtroom in tears, not understanding why I couldn't go home.

I didn't understand the significance of a waiver hearing, my attorney never explained to me if the court decided to waive me over I would be charged as an adult and if I was convicted I would receive a mandatory life sentence in prison. I was never "offered" a "plea agreement." During my trial, I had no knowledge nor understanding what a plea agreement meant, my attorney never said anything to me nor my mother or uncle about a plea agreement. It has always been my understanding that I didn't shoot nor kill Anthony, therefore, I would only be held accountable for my own actions in having a gun I wasn't suppose to have. I totally depended on my attorney during my trial, he would always say to me, "Henry, everything is going great you will be going home soon don't worry I've your best interests at heart."

When the jury found me guilty of first degree murder, I still didn't understand the seriousness of this charge nor did I understand the ramifications of my behavior. I recall

saying to my attorney, "How can the jury find me guilty for a crime I didn't commit, I didn't shoot nor kill Anthony, how can it be said that I'm guilty of this?" At my sentencing hearing the judge advised me that being that I was found guilty of first degree murder and by law he had no choice but to sentence me to a mandatory sentence of life without the possibility of parole, however by law he must ask me do I wish to say anything before being sentenced? I stood there lost and speechless and in tears I stated to the judge I don't understand how twelve jurors in their right mind could find me guilty, I didn't kill anyone. My attorney did advise me that I would be sentenced to a mandatory life sentence. I asked my mother and uncle not to attend the sentencing hearing. I didn't want my family to hear me being sentenced to life imprisonment.

After sentencing, I was sent to Riverside Correctional Facility for two weeks and transferred to Michigan Reformatory in Ionia, Michigan. My first day there I witnessed an inmate stab another inmate in the ear while eating at food service. I started asking other inmates questions, "why did this happen?" and I was told to mind my own business and I won't have anything to worry about. This incident had me terrified, simply because I was placed in an environment around older inmates that I really didn't know and I was trying to adjust to being in prison. However, a month after my arrival I was placed in GED school. I remember like it was yesterday, when I first arrived at Michigan Reformatory and the officer closed my cell door, I sat on the bed lost and asking myself, "How am I going to spend the rest of my life in this small cell?" The thought kept

entering my mind, "I've been sentenced to life for a crime I did not commit." In fact, after being in prison for 15 years, I finally started to realize that if I don't obtain some education and learn the law I would die of old age in prison. With this in mind, I started taking law classes and working hard to better my education.

I can't begin to say or express the struggles I've endured being in prison at such a young age, not knowing how to read nor write, I felt that the system had failed me and thrown me in prison for life, and thrown away the key. I've always knew that I would receive some type of punishment for my involvement in connection with Anthony's death but I never understood how I could be sentenced to life and I didn't kill anyone.

When I was arrested I didn't understand that simply because I had taken part in an argument I would also ultimately be considered responsible for Anthony's death. Neither did I understand what aiding and abetting meant. I simply believed that I would be accountable for my own actions in connection with Anthony's death. Which as I have stated was merely being involved in an argument with him. I am now 42 years old and through all the accomplishments I have made I still struggle to understand how I could have been sentenced to "life without parole" when I never killed anyone. More importantly, how could an individual that was determined, by a court psychologist, to have the mental capacity of a nine year old be held to the same criminal standard as an adult?

Since being incarcerated I have taken advantage of all the programs available to

me through the Michigan Department of Corrections and I have been working as a third shift lead cook in the kitchen here at the Saginaw Correctional Facility and this is simply one job of many that I have been able to maintain throughout my incarceration.

I struggle each and every day to be a better person than I was the day before. I never again want to be that young, scared, child that was sentenced to life in prison so many years ago. I know that nothing I can do will replace the loss of Anthony but through the changes I have made I can ensure that I will never be responsible, directly or indirectly, for such a senseless act ever again. I was convicted of aiding and abetting first-degree murder and was sentenced to a term of mandatory life imprisonment. This was the identical sentence that Larnell Johnson received for committing this meaningless murder.

How can sentencing a 16 year old child, who has the understanding of a nine year old child, to life without parole be considered justice in any aspect? Because I did not shoot and kill Anthony I believe that I deserve a second chance at life outside of prison. I am not the same child that was condemned to die in prison so many years ago and my biggest fear is to never have the chance again to be that productive member of society that I know I can be. I have no desire to minimize the severity of Anthony's death to minimize my involvement in the initial argument with Anthony, however, I do not believe that involvement requires me spending the rest of my life in prison. I have struggled for 25 years to be someone other than that young boy and I have succeeded.

Respectfully submitted,

Henry Hill, Jr.

DATED: February 2, 2006

AFFIDAVIT OF BARBARA HERNANDEZ

I Barbara Hernandez, do affirm and declare as follows:

It is very disturbing for me to think about what it was like for me at trial. So confusing – so scared, so shocked. I felt so very small. I felt so betrayed by those FBI men and the police – they tricked me into signing that statement. I was afraid of the prosecutor lady – I could tell that she hated me. I could tell that she judged me and didn't even know me. I felt so hated and ugly. I was also sad because I felt that it was my fault all my life any time something bad happened. I was sick inside and lost . . . I wanted to die. During my trial, I would sometimes think – if only he could have overpowered James Hyde. . . I would have been free of him too. I did not understand any of the court stuff. It was mostly a blur – I was in my own world. . . I was sixteen years old.

When I was being sentenced and the judge told me that I was going to be in prison for the rest of my natural life – in my mind I could hear James Hyde laughing, he got exactly what he wanted: me locked up with him forever. He had told me if he was going to be in prison, there was no way I was going to be free without him. Today, I consider myself still somewhat his prisoner. Death sentence is what the judge gave me. A long slow death. A living death. I would have rather been taken out and shot. I did not understand why I could not go to a place for kids my age. They said that there were more programs to rehabilitate me in the adult prison and not enough in juvenile facilities and then sentenced me to life without any chance of parole. I was being sent to prison!! FOREVER!! TO DIE!! That's what it meant.

Natural life now means to me that kids don't matter. It's ok to abuse, torment, exploit and then dispose of children at whim. They are not people, hearts, souls; worthy of defending. They truly are not the hope of the future. The future will take care of itself. Natural life for a juvenile (even after they've/I've become adults) is the same as capital punishment. . . my mind/thought process doesn't differentiate the two.

When I first came to prison in 1991 I was put in with adults – I was immediately of interest to two groups of people: the sexual predators and the women that wanted to play mommy (I guess they felt bad for being away from their own children). I was groped and cornered a couple of times not long after arrival on grounds. I witnessed a lot of inmate sexual contact between male guards and women prisoners in the first months I was in population – like two women going into a staff closet/room with a male guard who left the officer's station unattended; an officer (male) going into another inmates cell and closing the door was common also. Again leaving the officer's station unattended. Taking a shower was always stressful because the bathroom was always a hang-out spot for lovers and predators "peeping toms" – what could you do? Tell? Yeah, right. If you rock the boat, so to speak – you are the one to get punished.

There is/was no, across the board, professionalism. Most officers swear and yell as common practice. Intimidation comes first, than maybe reason. Backwards, if at all necessary. Rogue guards rampant. Sexual innuendo.

When I first came to prison – I was not afforded any programming that benefitted a

juvenile offender. No housing or counseling was available for a juvenile offender when I came to prison. I have never received juvenile services as long as I have been incarcerated.

Being a juvenile in prison is very hard – there are no positive rehabilitative role models: other inmates prey upon the juveniles, the staff is morally corrupt. There is not adequate programming – the environment negates any chance for morality to thrive – gambling, stealing, fighting, sexual promiscuity, rape, officer relations, favoritism from officers, influence from other inmates (peer pressure) drugs and assaults.

I have been cursed at, by officers told how ugly I am and how I will be in prison until I die – all by officers. Surely this is not an officer's duty. Neither is asking to see intimate parts of my body or being told to wear my hear a certain way.

I have had my head split open by another inmate and was afraid to report it because she had favoritism with staff and I believed I would have been the one to suffer further consequences.

I have been in prison almost fifteen years and have completed a vocational class in culinary arts. I took college courses when they were available and I also attend a poetry workshop once a week. I maintain regular employment. I am currently a recreation aide.

I believe myself to be very talented and teachable. I like to complete things that I start. My passion is for helping others. By being of service to others, I learn more about myself. I understand children very much – sometimes all they need is to know someone

cares. I would like to be that person. But, I know not to turn a blind eye to a wrong. I do not wish for the children of tomorrow to come to a place like this. I would love to be part of a deterrence, an end to children coming to this point.

Who am I? I am remorse and pain for what needlessly happened to Mr. James Cotaling. Everyday I wish I could bring him back. Sometimes, even that I could trade my life to bring him back. Beyond remorse, I cry for his family and friends. Truly, I am sorry for my part in the crime. Today, I am not someone that can be told to do something so terribly wrong – even in the face of my own fear of harm. Today, I am a woman, not perfect – but having learned some things very valuable. I have a good heart, supportive people, worthy goals and aspirations. I have an affinity for seemingly forgotten people: abused children, troubled kids, the handicapped/physically-emotionally impaired, elderly...

I don't simply want to be a productive member of society, I know I have a purpose!. . . Responsibilities that I am ready to take on, and fulfill.

I've taken as my motto: Life isn't only about self – we're not here for ourselves.

Respectfully submitted,

Barbara Hernandez

Barbara Hernandez

DATED: February 9, 2006

AFFIDAVIT OF KEVIN M. BOYD

I Kevin M. Boyd, do affirm and declare as follows:

I was sixteen when this whole thing started. This life that has become a night mare in many ways, and it seems never-ending. To share the more embarrassing moments of my time of the past eleven years is not only hard, but even to think of some of the hardships that has fallen on me, is a battle of mind and spirit. I will share this with you, with the hopes that you will come to understand the simple truth of my life, which is one word: hopeless.

My first step through the doors of Oakland County Jail was frightful to say the least. I wasn't sure what to expect. All of the tales of rape and abuse scored through me as I was stripped of all my clothes and placed in an observation cell. I was given a paper gown to wear. When I was taken past the 20 man cell in that, well I had a new found respect for women who got calls crossing the street. You can't understand the fear that you would have to go into one of those cells with men, I was still a kid. Luckily, I didn't have to go in there, I was placed in a single man cell before the court decided that it was best if I was placed in a juvenile detention center, which was only the start of this long trail.

After I was placed in a place called Children's Village, I tried to hang myself, the only thing that stopped me was a man named Shawn Warner. He saved my life, for what it is worth. I was then watched every night for almost a year, this time I was provided a cloth gown, also known as a Bam Bam suit. Every day I was forced to take my clothes

off and put this thing on, and every night I had to endure the heckles of my "fellow inmates" there. I was forced onto drugs that the doctor put me on, the names are kind of a blur, but Maloril was one. I remember the name because I remember wanting more and more after I felt the effects of the addiction they said would never come. After my dosage was upped I don't remember too much of that year, I just remember that there was a point where I gained 50 pounds and told them to take me off of them. They did and I resurfaced into the real world. I think a lot of times I was still in that stupor of sleepy conscience even after the drugs wore off. I still sometimes wonder if that wouldn't be a better life than what I have now, but that only lasts through whatever trying time I am having at the moment.

Through the actual judicial process, I didn't know what was going on, nor did I know my impending doom. The more time went by the more I had it set in my mind that I wasn't going to be sentenced as a juvenile. Through trial I just kind of sat there, I didn't pay attention, it was too hard to relive all of it, so I would try to focus on a table or a thought. It was a scary experience to go into that court room.

After a long trial, and a four day wait for the jury, I was convicted of murder. The prosecutor moved to send me to the jail, the judge agreed. I set foot in a cage with bars for the first time. I sat on my bunk and I just remember not understanding, I had changed, why didn't anyone see that? It was too late.

I remember when I was convicted, and placed back into the jail, into another

juvenile holding spot. When the officer came by my cell, I was hurt that I had been convicted, he just offered me a chuckle of mockery when I asked to make a phone call. The bars were on that cell, for the first time, I was in a real cage, like an animal, and there was nowhere to run to, no where to seek help or someone to talk to, just the swarm of other lost souls begging for food. They had the same drugs I had gotten off of and they would steal from you if they could to eat. The meals at the jail were horrible. But you have to eat, or starve, and nothing hits the spot when you are hungry then a lump of butter and stale bread served in hot dog flavored water. But they would steal your tray if you didn't get it fast enough or you were on walk when they passed it out. I had to learn the hard way on my first day to get your food fast, or go hungry. I mean you could always tell the guard, but then you had to go to the recreation area with the same person you had just ratted on, so you were better off going hungry for the day.

A few months after I was convicted, I was sentenced to life without parole. I tried not to cry as a child would, I stood and held my head up, I took my punishment and nodded understanding eyes to my judge after I apologized to everyone. What more could I do? What more can I do now? There is no words that can express what I felt, or still feel, there is no condolences or reprieves for what I was involved in. I walked out of the court room and tried to look everyone in the eyes as I left, as a man would.

Prison was even more cold hearted when I first entered Riverside Reception Center, nice name huh? Looks good on paper. That's what I thought too, I was told that

prison was so much better than jail. But the porter in the jail had meant for an adult. I was still a teenager. I remember my first bad encounter with a guard, I tried to ask him for something simple, like toilet paper, he mocked being afraid and threw the paper at me and begged that I didn't kill him. That was pain. I had so many of those "looks" in the court room, that said I was nothing more than a piece of trash, now I had to continue to put up with it. What other option did I have? There isn't a home to go to, a place to get away, you have to deal with these people everyday. So your best bet is to get along.

At Riverside you had what is called a gang shower.. There are no curtains and you just "get wet, get dry and say good-bye". There was a lot of fights and chaos there. It was out of control, the officers didn't care, they just want to do their 8 hours and get home. A gang beating here, a cigarette caper there, they didn't care. I was used to Children's Village, new rules to live by, or die by. I was slowly being able to see that this wasn't going to be a juvenile experience anymore, this was an adult world of all the deadly sins wrapped into one.

I used to go to church in Children's Village, where Ms. Ward would do bible study, or my friend Gerry Post would do motivational speaking and some were there just to bullshit, but for the most part all of us went to try and find something, that same thing all of us look for I think. Redemption. In prison, church is a preying field for sexual predators. I stopped going after my third service.

Then I arrived at my first real prison maximum security. I walked in totally afraid,

I saw men in there, I thought I would go to a prison with people my age, but that wasn't the case. I was thrown to the wolves. I entered the compound, when I saw grown men, out and about doing their job details or just walking the yard. Razor wire reminded me at every single turn exactly where I was at. That was when things started to get hard for me.

My first cell mate was probably the best I could have gotten. He only worked me out of my money. I was, at first step through the door, a target. My young age, blonde hair and I guess half way decent looks was like throwing a pig in with wolves. After five minutes I had three offers for cigarettes, two offers for food and drugs and if I would have held out I think I could have gotten a marriage proposal from Bubba. I had a few of the guys kind of take me in and keep me away from trouble, but mind you, you can't have some one here fight for you, you have to fight for yourself and they will be sure you don't get jumped. Anything else is frowned upon and made you a bigger target, you had to fight. My first encounter was two hard built men that had already raped another guy in the shower. I almost went to the officers and let them know, but they didn't care, and that's the truth of it. These were men doing life, they had a reputation of stabbing and raping. Just like in the wild, they found the old and sick to rob, the young and weaker to rape. Fight. And a fight I gave them. I was lucky to win. Lucky to not have to deal with them anymore, I still know that one of my friends told them they would get hurt if they pursued me. I think they wanted to see if I would fight for myself or would I be holding on to a belt loop the next day of one of the men who tried to attack me.

Among many other experiences , I would have to say that the most difficult were never the fights. It is the officers. I have been beat up, stolen from, picked on by inmates, gangs and officers. I have been a reasonably decent inmate I suppose, I have never had a lot of trouble, just being caught in cells getting a tattoo or two. I stole some food from the chow hall for a new year cook up my bunkie and I were going to try and have. I went and got a basketball that was going too close to the fence, I wasn't even paying attention. I disobeyed a direct order to enter a cell that had a 280 pound homosexual predator in it. I guess you could say I haven't been that bad. But in all of that, it still isn't the hard part of prison.

When the best part of your day is when you are sleeping; when you life is nothing more than a daily routine that turns to a monthly or even yearly routine; when you prayed for death to find you so you didn't have to look into your own face watch it age with nothing to be proud of or show for those frown lines; when you know that society looks at you as a piece of garbage and you start to believe it when you see your eyes in that same mirror. That is the bad part of prison.

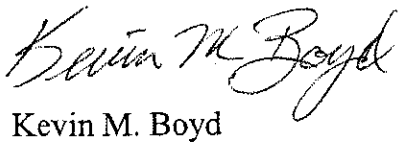
The most humiliating thing I have to go through is telling the world my hardships to try and save my life. To try and show you all that I am a man. I am judged for my actions when I was sixteen, and when I say that I am cast out as heartless. I am the one person who has grieved and beat myself up over this more than anyone, and still do, I am responsible for my father's death, you can't understand what it is to have to endure that,

but I want to live. I want so much to live, I have shared things that any one person would have held. Every person is entitled to have their thoughts, hopes and personal ghost, every person does, mine are put on display to show that there is validity to the studies done by these people I don't really know. It isn't easy to tell how I was treated as a child, how I was hit, molested by my mother's friends and I was afraid to use the bathroom in my own home! I have it all out there to be ridiculed and analyzed by people whom I've never met. The bottom line is that people make mistakes, and some are of the gravest nature, I am putting my soul out in the open to show the world, that people are people. The young man forced to put a bullet in the enemy on the battle field at eighteen years old, has his ghost to face. I am responsible for my father's life. I ran away from home, I tried to ask for help in school, I begged my grandparents to let me live with them, I ran away again, I tried to get away, I tried so hard you don't even understand the half of it. I have had a gun to my head by my own hand, because I never understood why the people I loved treated me the way they did. The courts would have you believe that it is all just a great life to have money and nothing like that happens when you have money, it is all just a scam by some rich greedy 16 criminal mastermind. When you have two abusive parents, it changes the whole equation of things. Am I sorry? Am I remorseful? You could never understand how remorseful I am, but I have managed after 11 years, to find a sense of peace. I can't change the past, what is, simply is; if I could change it all, I would. The truth will always be that I was a troubled and hurting young man, with a lot

of issues. At 28 years old, I look back on that kid, and I know that it isn't me, not anymore. I fought to educate myself, I fought and clawed to try and find some redeeming quality in my eyes, and I did. It took a long time, a lot of soul searching, but I can stand in front of anyone today and look them clean in the eyes and know that I have overcome all that I have had to. I am not that scared kid that was always nervous around my parents, I am not the kid who finally lost it and just didn't care anymore, I am not even the kid that had to fight to take a shower. I am Kevin Boyd, a man who has had a lot to make up for in life, a guy that in many senses still feels he has a lot to prove, but my time in prison has come to a stand still. There is nothing more I can do from this place, except continue to put up with the new ones coming in, trying to make a name for themselves, I am still the guy that just kind of ducks in the cell to get away from it, I read my books and watch my animal shows. I work hard just like anyone else does, eight hours a day for 32 cents an hour. I provide for myself and ask nothing from anyone, I take pride in the little hobby projects I do. And the final humiliation is that I still get the looks of disgust from officers and staff, as if they had a clue of what I have been through. Maybe I deserved it? May be I deserved to go through what I did, I don't know. But this is my life folks, this is my hard aches for everyone to look down upon, at least now I can look back up at you all and smile and say, "I did my best with what life has given me, I have made a lot of poor choices, some that can't be changed but as sure as I am sorry for what I have done, I am

proud to be who I am now." I am still putting my life out there, I am still fighting to be free, as I think anyone should, in many ways it is about me forgiving myself, I fight, because I have forgiven myself, so no matter what the law decides to do, I have gained more from this than you can understand, cause I can walk with my head high, realizing that I went through a lot, and even after I fell as far as I could fall, after the lonely nights with no one to cry to or place to call home, after a million tears I can still stand on my own two feet, provide for myself and see my flaws turned around into a much better light than I ever would have had.

Respectfully submitted,



Kevin M. Boyd

DATED: January 27, 2006

AFFIDAVIT OF DAMION TODD

I Damion Todd, do affirm and declare as follows:

It gives me a great deal of honor to have this opportunity to express myself to you regarding this cruel, unjust, inhumane, demeaning treatment that I (and many other juveniles) have had to suffer for the past 20 years of my life – to be convicted and sentenced to a life without parole sentence as juveniles.

Prior to the incident for which I was convicted, I had no juvenile nor "so called" adult record. That is I was never in trouble with the law. While my friends and high school classmates were getting ready for our senior class trip and graduation from high school, I was representing myself in a court of law. I was seventeen. I was a senior at Detroit Henry Ford High School in the City of Detroit, State of Michigan, United States of America, and one of the captains of our high school football team. I was also an active member of the Mt. Zion Baptist Church where I was a member of the youth choir pastored by Rev. Sterling L. Jones. I also participated in summer youth jobs through my church in which we used to assist elderly senior citizens to the store, malls, walks, etc. I played a number of sports during my childhood years (baseball, ice hockey, football and basketball). I had a good reputation throughout my neighborhood as being a very respectful and easy going person.

What happened to me in 1986 was a shock to me and to everyone that has known me throughout my life. I was in a car driving away from a school party, when a car with another group of teenagers sped up behind us flashing their bright lights at our vehicle

and started shooting with guns at the car I was in. We then sped away and made a childish/impulsive decision to get a gun to defend ourselves. At no time did anyone in our vehicle discuss killing anyone. Truthfully speaking we were upset but more scared than anything else. I went in the car with everyone to one of the guy's houses a few blocks away where his father kept a shotgun. A few minutes later we were back at the school party and as we turned down the street the guys who had just shot at us yelled from a crowd of people, "There they go". Then a gun shot came from the crowd at us again. I was sitting next to the window and one of my friends pushed the gun to me and said "shoot back". I had never shot a gun before but I did that night. I shot into the air toward where we had been shot at from. I didn't aim at anyone or intend to hurt anyone. The next day we found out an innocent female bystander had been shot and later died.

I cannot tell you how many times I have wished that things had turned out differently that night. I have always wanted to express my sincerest remorse and apology to everyone involved for my whole role and actions that night. I am just about 37 years old now and have grown as a man over these 20 years, cherishing the value of life and good judgment.

The scariest moments in my life up to that time was when I stepped into the court room after my arrest. I was placed in front of a judge who's demeanor and unfair representations were openly expressed in front of my jury everyday of my trial. My trial attorney neglected his duty and I did not know or understand enough to make things stop.

In no way do I sit here today and try to minimize my crime, but at the age of 17, I was involuntarily ignorant about most life decisions in general. It seems my way of thinking at that age was a mixture of fantasy and reality. Only years after I was incarcerated was I able to properly identify with the different emotions that I was experiencing.

I witness the judicial system give "second chances" to adults who have committed far worse crimes than many juveniles have, but because they are seasoned adults who knew how to manipulate the judicial system they are given far less time that we are. Our ignorance or lack of experience in these matters are used against us from the time of our arrest – on to our lack of communication skills with our attorneys. We are railroaded by an adult system that isn't equipped to properly handle juveniles, this current system only cares about getting a conviction at any cost! Although they said at 17 I was an adult and would be treated the same as an adult, the judge kept talking about stopping a crime epidemic by inner city youth. The judge gave me a sentence of life without parole in solitary confinement with hard labor and also said, plus a 100 year sentence.

The setting and circumstances in which I have been incarcerated no longer exist for a man of my age and maturity level. At this point in my life (as well as many other juveniles that have spent most of their lives incarcerated) prison is now beyond punishment. I wasn't raised to hate, cheat, lie, misuse, bully, and mistreat people like this abnormal environment encourages daily from most staff members right down to the prisoners. It works to break you down mentally, to make you become institutionalized

(which is most definitely abnormal). It tries to destroy your self esteem, it tries to make you bitter at the world, and pessimistic about everyone who strives to live a honest and clean life. I live my life resisting all of these stereotypes, and I am so very fortunate to have family and friends who love and support me in every way possible. I yearn/live to be free so that I can give back to my community and those who have shown their love and dedication for me during this period of my life, but more importantly I just want a better life for me than being incarcerated for the rest of my life. A clinical psychologist, Robert Beseda, Ph.D., on January 27, 1987 wrote an assessment of me and said that my crime was more a product of my youth and I, "could have been dealt with just as efficiently and less expensively through probation in the community." He said "it is reasonable to expect that by the time Mr. Todd reaches his early 30's, he would have matured out of a youthful exuberance and indiscretions which resulted in the needless and tragic death of an innocent female bystander," and he believe there was "no intent to kill" anyone. I have but there is no mechanism to give me an opportunity to show that. My sentence is mandatory and permanent.

I have letters of support from lawyers, consultants, school teachers, football coach, policemen, family and friends. I have completed all of the requirements that have been recommended for me since I have been incarcerated and through self examination and self correction I can clearly see today as a grown man the mistakes I made as a youth. But I will never have a chance to show this or be released and be a productive citizen because I have been given a sentence of natural life with no possibility of parole for something

stupid and foolish that turned out awful and tragic one night when I was a teenager. I believe that I should be punished but, forever? I had no other choice but to grow up and become a man while behind bars in prison, and I try to mentally deal with this life without parole sentence. I have served over 20 years in prison – more than I have lived in the free world. This is surely a life time of punishment already that I will carry with me for the rest of my entire life.

Respectfully submitted,

Damion Todd

DATED: January 27, 2006

AFFIDAVIT OF PATRICK McLEMORE

I Patrick McLemore, do affirm and declare as follows:

I greet you all in the state of peace, good spirits, and well defined harmony, for I am addressing you today concerning juveniles serving sentence(s) of life without the possibility of parole. I am one of them, also, I am currently twenty-three (23) years of age, born September 28, 1982, and I have been incarcerated since I was sixteen (16) years old. I was convicted of Felony Murder and as a result of such conviction, I received a natural life sentence. My co-defendant who was an adult, pled guilty to the crime and received a deal. He will be able to go home. Right now, I won't.

In the State of Michigan, you can be present during the commission of a crime and be charged with felony murder and automatically receive a natural life sentence. That within itself is completely harsh, but for a child, you can't even begin to imagine the affliction. In my case there was never a juvenile hearing for consideration of my age, maturity level, nor any conducted test of my mental status. Besides myself, I know of several people who are now adults but were juveniles when convicted of their offense. In most cases their adult co-defendants committed the actual crime, but somehow eventually received less sentences than the juvenile just like me. Under the current Michigan law there is absolutely no chance for me to ever get out of prison. May be they understood the system and what was happening better than we did. During my whole arrest and trial it seems like I was in a different time zone or shock. It's hard to remember what happened. I do remember my lawyer saying something about pleading guilty to

committing a murder and I might get 40 to 50 years. But I wasn't going to say I did something I didn't. I didn't trust the lawyer and my mother and father weren't allowed in the court room as they were potential witnesses. I don't think I understood what the sentence would be. I thought I could be sentenced as a juvenile. Then I was given mandatory life, with no consideration of my age or involvement in the crime.

Furthermore, an overwhelming amount of juveniles have not yet developed decision making abilities as most adults are well equipped with doing. This variation would be the obvious reason as to why I was not allowed to do certain things (i.e. vote, pay taxes, be on a jury, drink, smoke, hold a job or own a car). In applying such analysis of the decision making process, whatever may be obvious to a mature adult, is still a learning experience for juvenile children. In time there comes a point in most everyone's life, a turning point in which they mature. But for me, it is actually too late. I was given a natural life sentence before I even got the opportunity to mature and make adult decisions. In speaking for the youth of the world, it is not our doing to be less responsible or have immature decision making abilities, it is clearly an act of nature to be at such a stage in life.

I am not saying that juveniles or myself should get off with a slap on the wrist, but we should have the chance to successfully demonstrate maturity, responsibility, and the credentials to show that we can be productive members of society, a second chance should be afforded. To be perfectly honest, the time I've been incarcerated, in many ways

has helped me grow up and learn many things about people, myself, life and what it suppose to consist of. I now value and look at things totally different from when I did as a kid. In the regards of such growth, I know personally that I am not the only one who views it that way.

I am currently classified to the lowest allowable security custody level for my crime and conviction. I have successfully received my G.E.D., all court recommended programs such as AA, NA, I received over one-hundred and twenty (120) hours of group counseling. I have completed legal research courses to better understand the system, I have been on board and an active member of the National Lifer's Association. I have been awarded with time in honor units. I am going to study psychology so that I can learn more about people to better understand them, and why we act and do certain things. Hopefully, I would be able to help troubled youth, before it is too late. I would really love that opportunity to do that, I owe that much, for I am one who can relate and identify with those in such a position.

Even though I am incarcerated, still, I am grateful for a lot of things, one such thing to be grateful for would be life within itself, my loving family who I have hurt. As for the victim and the victim's family, I am terribly sorry for the pain I've caused, words cannot express my deepest sympathy for the victim and the victim's family. If I could turn back the hands of time, I would erase their pain and restore their loss. For I know the feeling to lose a close family member due to senseless crimes, so for that matter, I co-

exist with their hurt. This is why I hope to someday help people and save lives within the process of doing such. I pray for that day to come into existence, to make a positive impact upon society, I console that one chance and opportunity to make such a difference, and I hope that I actually get that chance.

I thank you all for listening to these sincere words that I speak from within the corridors of my heart.

Respectfully submitted,

Patrick McLemore

DATED January 26, 2006

M.C.L.A. 712A.2a

C

Michigan Compiled Laws Annotated Currentness

Chapters 701 to 713. Probate Code

The Probate Code of 1939 (Refs & Annos)

Chapter XIIA. Juveniles and Juvenile Division (Refs & Annos)

➡712A.2a. Extension of jurisdiction

Sec. 2a. (1) Except as otherwise provided in subsection (2), if the court has exercised jurisdiction over a juvenile under section 2(a) or (b) of this chapter, jurisdiction shall continue for a period of 2 years beyond the maximum age of jurisdiction conferred under section 2 of this chapter, unless the juvenile is released sooner by court order.

(2) If the court has exercised jurisdiction over a juvenile under section 2(a)(1) of this chapter for an offense that, if committed by an adult, would be a violation or attempted violation of section 72, 83, 84, 86, 88, 89, 91, 110a(2), 186a, 316, 317, 349, 520b, 520c, 520d, 520g, 529, 529a, 530, or 531 of the Michigan penal code, 1931 PA 328, MCL 750.72, 750.83, 750.84, 750.86, 750.88, 750.89, 750.91, 750.110a, 750.186a, 750.316, 750.317, 750.349, 750.520b, 750.520c, 750.520d, 750.520g, 750.529, 750.529a, 750.530, and 750.531, or section 7401(2)(a)(*i*) or 7403(2)(a)(*i*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, jurisdiction may be continued under section 18d of this chapter until the juvenile is 21 years of age.

(3) If the court exercised jurisdiction over a child under section 2(h) of this chapter, jurisdiction of the court continues until the order expires but action regarding the personal protection order after the respondent's eighteenth birthday shall not be subject to this chapter.

(4) This section does not apply if the juvenile is sentenced to the jurisdiction of the department of corrections.

(5) As used in this chapter, "child", "juvenile", "minor", or any other term signifying a person under the age of 18 applies to a person 18 years of age or older concerning whom proceedings are commenced in the court under section 2 of this chapter and over whom the court has continuing jurisdiction pursuant to subsections (1) and (3).

CREDIT(S)

Amended by P.A.1994, No. 192, ß 1, Eff. Oct. 1, 1994; P.A.1996, No. 250, ß 1, Eff. Jan. 1, 1997; P.A.1996, No. 409, ß 1, Eff. Jan. 1, 1998; P.A.1998, No. 474, Eff. March 1, 1999.

HISTORICAL AND STATUTORY NOTES

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Source:

P.A.1939, No. 288, c. XIIA, ß 2a, added by P.A.1953, No. 193, ß 1, Eff. Oct. 2, 1953.
C.L.1948, ß 712A.2a.
P.A.1959, No. 81, ß 1, Eff. March 19, 1960.

P.A.1962, No. 8, ß 1, Imd. Eff. March 19, 1962.
C.L.1970, ß 712A.2a.
P.A.1972, No. 175, ß 1, Imd. Eff. June 16, 1972.

The 1972 amendment inserted the subsection numbering; in subsec. (1), substituted "subdivisions (a) or (b) of

section 2" for "the provisions of section 2 of this chapter by virtue of any of the provisions under subdivision (a) or (b)" and "for a period of 2 years beyond the maximum age of jurisdiction conferred under the applicable subdivisions of section (2)" for "until the child's nineteenth birthday"; and added subsec. (2).

For savings clause provisions of P.A.1972, No. 175, see the Historical and Statutory Notes following ß 712A.2.

The 1988 amendment, in subsec. (1), substituted "except as otherwise provided in subsection (2), if" for "where" and "section 2(a) or (b) of this chapter" for "subdivisions (a) or (b) of section 2", and deleted "other than in criminal complaints occurring subsequent to the child's seventeenth birthday," preceding "unless"; inserted subsec. (2); redesignated former subsec. (2) as subsec. (3); and, in subsec. (3), substituted "18 years of age" for "of age 18".

P.A.1988, No. 54, ß 2, provides:

"This amendatory act shall not take effect unless all of the following bills of the 84th Legislature are enacted into law:

"(a) House Bill No. 4731.

"(b) House Bill No. 4733.

"(c) House Bill No. 4741.

"(d) House Bill No. 4748.

"(e) House Bill No. 5203.

"(f) Senate Bill No. 137.

"(g) Senate Bill No. 601.

"(h) Senate Bill No. 604.

"(i) Senate Bill No. 605.

"(j) Senate Bill No. 607.

"(k) Senate Bill No. 608.

"(l) Senate Bill No. 609."

House Bill Nos. 4731, 4733, 4741, 4748, and 5203, were enacted as P.A.1988, Nos. 51, 52, 53, 67, and 182, respectively; Senate Bill Nos. 137, 601, 604, 605, 607, 608, and 609, were enacted as P.A.1988, Nos. 64, 73, 74, 75, 76, 77, and 78, respectively. P.A.1988, Nos. 51 to 53, were approved March 13, 1988 and filed March 14, 1988; P.A.1988, No. 67, was approved March 24, 1988 and filed March 25, 1988; P.A.1988, No. 182, was approved June 20, 1988 and filed June 21, 1988; P.A.1988, No. 64, was approved and filed March 24, 1988; P.A.1988, Nos. 73 to 78, were approved March 27, 1988 and filed March 28, 1988.

P.A.1988, No. 54, ß 3, as amended by P.A.1988, No. 174, ß 1, Imd. Eff. June 21, 1988, provides:

"This amendatory act shall take effect October 1, 1988."

P.A.1988, No. 54, was ordered to take immediate effect, and was approved March 13, 1988 and filed March 14, 1988.

The 1994 amendment, in subsec. (1), substituted "section 2 of this chapter, unless the child is" for "the applicable

subdivisions of section 2, unless"; in subsec. (2), inserted "529a" and "750.529a"; and, in subsec. (3), substituted "applies" for "shall be construed to apply".

For effective date and contingent effect provisions of P.A.1994, No. 192, see the Historical and Statutory Notes following ß 712A.2.

P.A.1996, No. 250, substituted "juvenile" for "child" throughout the section; in subsec. (1), substituted "court order" for "order of the court"; in subsec. (2), inserted "86," and "110a(2), 186a,", substituted "530, or 531" for "or 530", inserted "750.86," and "750.110a, 750.186a,", and substituted "750.530, and 750.531" for "and 750.530" and "under 18d of this chapter until the juvenile is 21 years of age" for "until the child is 21 years of age under section 18d of this chapter"; inserted subsec. (3); redesignated former subsec. (3) as subsec. (4); and, in subsec. (4), substituted "under" for "pursuant to".

For application, effective date, and contingent effect provisions of P.A.1996, No. 250, see the Historical and Statutory Notes following ß 712A.1.

P.A.1996, No. 409, in subsecs. (1) and (2), deleted "juvenile division of the probate" preceding "court has"; and, in subsec. (4), deleted "juvenile division of the probate" preceding "court under", and substituted "court has" for "juvenile division has".

For effective date and contingent effect provisions of P.A.1996, No. 409, see the Historical and Statutory Notes following ß 710.22.

P.A.1998, No. 474, inserted subsec. (3); redesignated former subsecs. (3) and (4) as subsecs. (4) and (5), respectively; in subsec. (5), substituted "subsections (1) and (3)" for "subsection (1)"; and made nonsubstantive changes in textual citation styles throughout the section.

For effective date and contingent effect provisions of P.A.1998, No. 474, see the Historical and Statutory Notes following ß 712A.2.

CONSTITUTIONAL PROVISIONS

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Article 6, ß 15, provides:

"In each county organized for judicial purposes there shall be a probate court. The legislature may create or alter probate court districts of more than one county if approved in each affected county by a majority of the electors voting on the question. The legislature may provide for the combination of the office of probate judge with any judicial office of limited jurisdiction within a county with supplemental salary as provided by law. The jurisdiction, powers and duties of the probate court and of the judges thereof shall be provided by law. They shall have original jurisdiction in all cases of juvenile delinquents and dependents, except as otherwise provided by law."

CROSS REFERENCES

Appointment of guardian ad litem, meeting with minor or legally incapacitated person, see ß 700.24.

Child custody, divorce, see ß 552.15 et seq.

Children, divorce cases, duties of prosecuting attorney and friend of court, see ß 552.45.

LAW REVIEW AND JOURNAL COMMENTARIES

The worst of all possible worlds: Michigan's juvenile justice system and international standards for the treatment of

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children. Frank E. Vandervort & William E. Ladd, 78 U.Det. Mercy L.Rev. 203 (2001).

LIBRARY REFERENCES

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Infants 152, 230.1.
Westlaw Topic No. 211.
C.J.S. Adoption of Persons ß ß 10 to 12

C.J.S. Infants ß ß 31 to 91.

RESEARCH REFERENCES

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ALR Library

59 ALR 3rd 636, Liability of Parent for Support of Child Institutionalized by Juvenile Court.

Encyclopedias

Mich. Civ. Jur. Minors ß 88, Generally.

Mich. Civ. Jur. Minors ß 95, Continuing Jurisdiction.

Forms

Michigan Legal Forms ß 8:2, Policy Considerations; Age of Majority.

Treatises and Practice Aids

Gillespie MI Crim. Law & Proc. ß 31:4, Juveniles Over 18 Years of Age.

Gillespie MI Crim. Law & Proc. ß 31:8, Extension of Jurisdiction.

Gillespie MI Crim. Law & Proc. ß 31:64, Disposition-Hearing.

5 Michigan Court Rules Practice Text R 3.903, Definitions.

5 Michigan Court Rules Practice Text R 3.993, Appeals.

Michigan Pleading and Practice ß 113A:2, Governing Court Rules.

Michigan Pleading and Practice ß 113A:8, Jurisdiction of Family Division of Circuit Court.

Michigan Pleading and Practice ß 113A:13, Children Attaining Age of 18; Jurisdiction Over Adults.

NOTES OF DECISIONS

M.C.L.A. 712A.2a

1. In general

Probate court may, both before and after juvenile reaches the age of majority, order and collect reimbursement for the costs incurred by the state when out-of-home placement of the juvenile is ordered. In re Reiswitz (1999) 600 N.W.2d 135, 236 Mich.App. 158, appeal denied 610 N.W.2d 927, 461 Mich. 995. Infants 228(1)

Validity vel non of juvenile's confession of guilt regarding alleged larceny did not affect probate court's jurisdiction over him where the jurisdiction was a continuing jurisdiction based on past conduct. Matter of Bennett (1984) 355 N.W.2d 277, 135 Mich.App. 559. Infants 196

Jurisdiction which the Grand Traverse probate court obtained over infant when she was removed from her natural parents continued until infant reached maximum age of jurisdiction unless released sooner by order of the Grand Traverse probate court. Petition of Wehr (1979) 277 N.W.2d 179, 88 Mich.App. 184. Infants 196

Jurisdiction of probate court over children is not inherent but is based upon constitutional and statutory provisions. Petition of Wehr (1979) 277 N.W.2d 179, 88 Mich.App. 184. Infants 18

2. Criminal complaints

Juvenile court's jurisdiction over juvenile convicted of manslaughter expired on juvenile's 19th birthday and thus juvenile court was without authority to require him to serve uncompleted portion of manslaughter sentence. Matter of Summerville (1986) 384 N.W.2d 152, 148 Mich.App. 334. Infants 196

Where, inter alia, 16-year-old defendant was arrested, in connection with murder, at his home between 6:00 p.m. and 6:30 p.m., taken to police station for purposes of preparing admission papers for youth home, transported to youth home at which his mother was present, and subsequently waiver hearing was held in juvenile court to determine whether juvenile court should waive jurisdiction provisions of former JCR 2, 3, 11 relating to taking juvenile into custody without court order, notification of court during hours when court is not open, and holding hearing on petition to determine whether juvenile court jurisdiction should be waived, were complied with. People v. Morris (1975) 226 N.W.2d 565, 57 Mich.App. 573, certiorari denied 96 S.Ct. 90, 423 U.S. 849, 46 L.Ed.2d 72. Infants 68.3

3. Release of jurisdiction

Probate court's authority to compel juvenile's mother to pay reimbursement for the cost of juvenile's out-of-home care during his court-ordered placement with a State agency, as ordered while the court had jurisdiction over the juvenile and the mother, did not cease on the juvenile's nineteenth birthday, even though the court's statutory jurisdiction over the parties ceased at that time. In re Reiswitz (1999) 600 N.W.2d 135, 236 Mich.App. 158, appeal denied 610 N.W.2d 927, 461 Mich. 995. Infants 228(2)

Probate court released jurisdiction over juvenile offender by committing juvenile to Department of Social Services and thus, lacked jurisdiction to specify length of juvenile's commitment. In re Jackson (1987) 414 N.W.2d 156, 163 Mich.App. 105, appeal denied. Infants 223.1

M. C. L. A. 712A.2a, **MI ST 712A.2a**

Current through P.A. 2005, No. 1-340 (End)

END OF DOCUMENT

M.C.L.A. 712A.2a

M.C.L.A. 712A.18d

C

Michigan Compiled Laws Annotated Currentness

Chapters 701 to 713. Probate Code

The Probate Code of 1939 (Refs & Annos)

Chapter XIIA. Juveniles and Juvenile Division (Refs & Annos)

➡712A.18d. Juvenile division of probate court; review hearing; rehabilitation determination, considerations, time, notice, commitment reports

Sec. 18d. (1) If a juvenile is committed under section 18(1)(e) of this chapter [FN1] for an offense that, if committed by an adult, would be a violation or attempted violation of section 72, 83, 84, 86, 88, 89, 91, 110a(2), 186a, 316, 317, 349, 520b, 520c, 520d, 520g, 529, 529a, 530, or 531 of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.72, 750.83, 750.84, 750.86, 750.88, 750.89, 750.91, 750.110a, 750.186a, 750.316, 750.317, 750.349, 750.520b, 750.520c, 750.520d, 750.520g, 750.529, 750.529a, 750.530, and 750.531 of the Michigan Compiled Laws, or section 7401(2)(a)() or 7403(2)(a)(*i*) of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.7401 and 333.7403 of the Michigan Compiled Laws, the court shall conduct a review hearing to determine whether the juvenile has been rehabilitated and whether the juvenile presents a serious risk to public safety. If the court determines that the juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety, jurisdiction over the juvenile shall be continued. In making this determination, the court shall consider all of the following:

(a) The extent and nature of the juvenile's participation in education, counseling, or work programs.

(b) The juvenile's willingness to accept responsibility for prior behavior.

(c) The juvenile's behavior in his or her current placement.

(d) The juvenile's prior record and character and his or her physical and mental maturity.

(e) The juvenile's potential for violent conduct as demonstrated by prior behavior.

(f) The recommendations of the institution, agency, or facility charged with the child's care for the juvenile's release or continued custody.

(g) Other information the prosecuting attorney or juvenile may submit.

(2) The juvenile has the burden of proving by a preponderance of the evidence that he or she has been rehabilitated and does not present a serious risk to public safety.

(3) Unless adjourned for good cause, a review hearing shall be scheduled and held as near as possible to, but before, the juvenile's nineteenth birthday. If the institution, agency, or facility to which the juvenile was committed believes the juvenile has been rehabilitated and does not present a serious risk to public safety, the institution, agency, or facility may petition the court to conduct a review hearing any time before the juvenile becomes 19 years of age or, if the court has continued jurisdiction under subsection (1), any time before the juvenile becomes 21 years of age.

(4) Not less than 14 days before a review hearing is to be conducted, the prosecuting attorney, the juvenile, and, if addresses are known, the juvenile's parent or guardian shall be notified. The notice shall state that the court may extend jurisdiction over the juvenile and shall advise the juvenile and the juvenile's parent or guardian of the right to legal counsel. If legal counsel has not been retained or appointed to represent the juvenile, the court shall appoint legal counsel and may assess the cost of providing counsel as costs against the juvenile or those responsible for the

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juvenile's support, or both, if the persons to be assessed are financially able to comply.

(5) The institution, agency, or facility charged with the care of the juvenile shall prepare commitment reports as provided in section 5 of the juvenile facilities act, Act No. 73 of the Public Acts of 1988, being section 803.225 of the Michigan Compiled Laws, for use by the court at a review hearing held under this section.

(6) This section does not apply to a juvenile convicted under this chapter for committing a crime.

CREDIT(S)

Amended by P.A.1994, No. 192, ß 1, Eff. Oct. 1, 1994; P.A.1996, No. 257, ß 1, Eff. Jan. 1, 1997.

[FN1] M.C.L.A. ß 712A.18(1)(e).

HISTORICAL AND STATUTORY NOTES

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For contingent effect and effective date provisions of P.A.1988, No. 54, see the Historical and Statutory Notes following ß 712A.2a.

The 1994 amendment, in subsec. (1), in the introductory paragraph, in the first sentence inserted "529a" and "750.529a"; in subsec. (1)(d), substituted "child's prior record and character" for "prior record and character of the child"; in subsec. (2), in the first sentence inserted "Unless adjourned for good cause,", and deleted ", unless adjourned for good cause," following "held", and in the second sentence substituted "the child has been rehabilitated and" for "that the child has been rehabilitated and that the child", and deleted "at" preceding "any time" in two places; and, in subsec. (4), inserted "Act No. 73 of the Public Acts of 1988, being section 803.225 of the Michigan Compiled Laws,".

For effective date and contingent effect provisions of P.A.1994, No. 192, see the Historical and Statutory Notes following ß 712A.2.

The 1996 amendment substituted "juvenile" for "child" and "juvenile's" for "child's" throughout the section; in subsec. (1), in the introductory paragraph, in the first sentence inserted "110a(2), 186a,", substituted "530, or 531" for "or 530", inserted "750.110a, 750.186a,", and substituted "750.530, and 750.531" for "and 750.530"; inserted subsec. (2); redesignated former subsecs. (2) to (4) as subsecs. ((3) to (5), respectively; and added subsec. (6).

P.A.1996, No. 257, ß ß 2 to 4, provide:

"Section 2. This amendatory act applies to offenses committed on or after its effective date.

"Section 3. This amendatory act shall take effect January 1, 1997.

"Section 4. This amendatory act shall not take effect unless all of the following bills of the 88th Legislature are enacted into law:

"(a) Senate Bill No. 281.

"(b) Senate Bill No. 283.

"(c) Senate Bill No. 682.

"(d) Senate Bill No. 689.

"(e) Senate Bill No. 699.

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"(f) Senate Bill No. 700.

"(g) Senate Bill No. 724.

"(h) Senate Bill No. 867.

"(i) Senate Bill No. 870.

"(j) House Bill No. 4038.

"(k) House Bill No. 4044.

"(*l*) House Bill No. 4371.

"(m) House Bill No. 4445.

"(n) House Bill No. 4486.

"(o) House Bill No. 4487.

"(p) House Bill No. 4490."

Senate Bill Nos. 281, 283, 682, 689, 699, 700, 724, 867, and 870, were enacted as P.A.1996, Nos. 248, 249, 244, 250, 247, 253, 254, 255, and 256, respectively, and were approved June 11, 1996 and filed June 12, 1996; House Bill Nos. 4038, 4044, 4371, 4445, 4486, 4487, and 4490, and were enacted as P.A.1996, Nos. 258, 245, 246, 259, 260, 261, and 262, respectively, and were approved June 11, 1996 and filed June 12, 1996.

P.A.1996, No. 257, was ordered to take immediate effect, and was approved June 11, 1996 and filed June 12, 1996.

CROSS REFERENCES

Commitment reports due before hearings under this section, see ß 803.225.

Criminal procedure, rules applicable to juveniles charged with life offenses, see MCR 6.901 et seq.

Proceedings involving juveniles, dispositional review, see MCR 3.945.

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Westlaw Topic No. 211.
C.J.S. Adoption of Persons ß ß 10 to 12
C.J.S. Infants ß ß 57, 69 to 85.

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Forms

Michigan SCAO Approved Forms JC 15, 6/03 Motion and Authorization/Denial.

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Michigan SCAO Approved Forms JC 57, 6/03 Supplemental Order of Disposition Following Review Hearing (Delinquency Proceedings).

Treatises and Practice Aids

Gillespie MI Crim. Law & Proc. Practice Deskbook App A, Appendix A. Michigan Court Rules of 1985 (Mcr) Chapter 5.

Gillespie MI Crim. Law & Proc. ß 31:70, Commitment to Placement; Retention of Jurisdiction; Progress Review.

Gillespie MI Crim. Law & Proc. ß 31:71, Review of Commitment.

Gillespie MI Crim. Law & Proc. ß 31:72, Review and Release of Dangerous Juveniles.

5 Michigan Court Rules Practice Text R 3.945, Dispositional Review.

5 Michigan Court Rules Practice Text ß 3945.3, Hearing to Extend Jurisdiction.

5A Michigan Court Rules Practice Text R 6.937, Commitment Review Hearing.

Michigan Pleading and Practice ß 113A:109, Form-Motion and Authorization/Denial.

Michigan Pleading and Practice ß 113A:80.50, Dispositional Review Hearings.

M. C. L. A. 712A.18d, MI ST 712A.18d

Current through P.A. 2005, No. 1-340 (End)

END OF DOCUMENT

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C

Michigan Compiled Laws Annotated Currentness
Chapters 701 to 713. Probate Code
The Probate Code of 1939 (Refs & Annos)
Chapter XIIA. Juveniles and Juvenile Division (Refs & Annos)

→712A.4. Waiver of jurisdiction

Sec. 4. (1) If a juvenile 14 years of age or older is accused of an act that if committed by an adult would be a felony, the judge of the family division of circuit court in the county in which the offense is alleged to have been committed may waive jurisdiction under this section upon motion of the prosecuting attorney. After waiver, the juvenile may be tried in the court having general criminal jurisdiction of the offense.

(2) Before conducting a hearing on the motion to waive jurisdiction, the court shall give notice of the hearing in the manner provided by supreme court rule to the juvenile and the prosecuting attorney and, if addresses are known, to the juvenile's parents or guardians. The notice shall state clearly that a waiver of jurisdiction to a court of general criminal jurisdiction has been requested and that, if granted, the juvenile can be prosecuted for the alleged offense as though he or she were an adult.

(3) Before the court waives jurisdiction, the court shall determine on the record if there is probable cause to believe that an offense has been committed that if committed by an adult would be a felony and if there is probable cause to believe that the juvenile committed the offense. Before a juvenile may waive a probable cause hearing under this subsection, the court shall inform the juvenile that a waiver of this subsection waives the preliminary examination required by chapter VI of the code of criminal procedure, Act No. 175 of the Public Acts of 1927, being sections 766.1 to 766.18 of the Michigan Compiled Laws.

(4) Upon a showing of probable cause under subsection (3), the court shall conduct a hearing to determine if the best interests of the juvenile and the public would be served by granting a waiver of jurisdiction to the court of general criminal jurisdiction. In making its determination, the court shall consider all of the following criteria, giving greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency than to the other criteria:

(a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.

(b) The culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.

(c) The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.

(d) The juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming.

(e) The adequacy of the punishment or programming available in the juvenile justice system.

(f) The dispositional options available for the juvenile.

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(5) If the court determines that there is probable cause to believe that an offense has been committed that if committed by an adult would be a felony and that the juvenile committed the offense, the court shall waive jurisdiction of the juvenile if the court finds that the juvenile has previously been subject to the jurisdiction of the circuit court under this section or section 606 of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, being section 600.606 of the Michigan Compiled Laws, or the recorder's court of the city of Detroit under this section or section 10a(1)(c) of Act No. 369 of the Public Acts of 1919, being section 725.10a of the Michigan Compiled Laws.

(6) If legal counsel has not been retained or appointed to represent the juvenile, the court shall advise the juvenile and his or her parents, guardian, custodian, or guardian ad litem of the juvenile's right to representation and appoint legal counsel. If the court appoints legal counsel, the judge may assess the cost of providing legal counsel as costs against the juvenile or those responsible for his or her support, or both, if the persons to be assessed are financially able to comply.

(7) Legal counsel shall have access to records or reports provided and received by the judge as a basis for decision in proceedings for waiver of jurisdiction. A continuance shall be granted at legal counsel's request if any report, information, or recommendation not previously available is introduced or developed at the hearing and the interests of justice require a continuance.

(8) The court shall enter a written order either granting or denying the motion to waive jurisdiction and the court shall state on the record or in a written opinion the court's findings of fact and conclusions of law forming the basis for entering the order. If a juvenile is waived, a transcript of the court's findings or a copy of the written opinion shall be sent to the court of general criminal jurisdiction.

(9) If the court does not waive jurisdiction, a transcript of the court's findings or, if a written opinion is prepared, a copy of the written opinion shall be sent to the prosecuting attorney, juvenile, or juvenile's attorney upon request.

(10) If the court waives jurisdiction, the juvenile shall be arraigned on an information filed by the prosecutor in the court of general criminal jurisdiction. The probable cause finding under subsection (3) satisfies the requirements of, and is the equivalent of, the preliminary examination required by chapter VI of Act No. 175 of the Public Acts of 1927.

(11) As used in this section, "felony" means an offense punishable by imprisonment for more than 1 year or an offense designated by law as a felony.

CREDIT(S)

Amended by P.A.1996, No. 262, ß 1, Eff. Jan. 1, 1997; P.A.1996, No. 409, ß 1, Eff. Jan. 1, 1998.

HISTORICAL AND STATUTORY NOTES

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Source:

P.A.1939, No. 288, c. XIIA, ß 4, added by P.A.1944, 1st Ex.Sess., No. 54, Imd. Eff. March 6, 1944.
P.A.1946, 1st Ex.Sess., No. 22, Imd. Eff. Feb. 26, 1946.

C.L.1948, ß 712A.4.
P.A.1969, No. 140, ß 1, Eff. March 20, 1970.
C.L.1970, ß 712A.4.
P.A.1972, No. 265, ß 1, Imd. Eff. Oct. 3, 1972.

The 1972 amendment inserted the subsection numbering; in subsec. (1), substituted "Where a child who has attained" for "In any case where a child over" and "may, waive jurisdiction pursuant to this section upon motion of

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the prosecuting attorney" for "may, after investigation and examination, including notice to the prosecuting attorney, and parents or guardians if addresses are known, and upon the court's own motion or motion of the prosecuting attorney, waive jurisdiction"; and added subsecs. (2) to (7).

The 1988 amendment rewrote this section, which prior thereto read:

"(1) Where a child who has attained the age of 15 years is accused of any act the nature of which constitutes a felony, the judge of probate of the county wherein the offense is alleged to have been committed may waive jurisdiction pursuant to this section upon motion of the prosecuting attorney, whereupon it shall be lawful to try such child in the court having general criminal jurisdiction of such offense.

"(2) Before conducting a hearing on the motion to waive jurisdiction, the court shall give notice of the hearing in the manner provided by supreme court rule to the child and the prosecuting attorney and, if addresses are known, to the child's parents or guardians. The notice shall state clearly that a waiver of jurisdiction to a criminal court has been requested and that, if granted, the child can be prosecuted for the alleged offense as though he were an adult.

"(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.

"(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.

"(5) If counsel has not been retained or appointed to represent the child, the court shall advise the child and his parents, guardian, custodian or guardian ad litem of the child's right to representation and appoint counsel. Where the court appoints counsel, the judge may assess the cost of providing such counsel as costs against the child or those responsible for his support, or both, if the persons to be assessed are financially able to comply.

"(6) Counsel shall have access to records or reports provided and received by the judge as a basis for decision in proceedings for waiver of jurisdiction. A continuance shall be granted at counsel's request if any report, information or recommendation, not theretofore available, is introduced or developed at the hearing and the interests of justice require a continuance.

"(7) If the court waives jurisdiction, the order shall include a written statement of the court setting forth findings forming the basis for entry of the order."

P.A.1988, No. 182, ß 2, provides:

"This amendatory act shall not take effect unless all of the following bills of the 84th Legislature are enacted into law:

"(a) House Bill No. 4731.

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"(b) House Bill No. 4733.

"(c) House Bill No. 4741.

"(d) House Bill No. 4748.

"(e) House Bill No. 4750.

"(f) Senate Bill No. 137.

"(g) Senate Bill No. 601.

"(h) Senate Bill No. 604.

"(i) Senate Bill No. 605.

"(j) Senate Bill No. 607.

"(k) Senate Bill No. 608.

"(l) Senate Bill No. 609."

House Bill Nos. 4731, 4733, 4741, 4748, and 4750, were enacted as P.A.1988, Nos. 51, 52, 53, 67, and 54, respectively.

Senate Bill Nos. 137, 601, 604, 605, 607, 608, and 609, were enacted as P.A.1988, Nos. 64, 73, 74, 75, 76, 77, and 78, respectively.

P.A.1988, Nos. 51, 52, 53, and 54, were approved March 13, 1988 and filed March 14, 1988.

P.A.1988, No. 67, was approved March 24, 1988 and filed March 25, 1988.

P.A.1988, No. 64, was approved and filed March 24, 1988.

P.A.1988, Nos. 73, 74, 75, 76, 77, and 78, were approved March 27, 1988 and filed March 28, 1988.

P.A.1988, No. 182, ß 3, provides:

"This amendatory act shall take effect October 1, 1988."

P.A.1988, No. 182, was ordered to take immediate effect, and was approved June 20, 1988 and filed June 21, 1988.

P.A.1996, No. 262, rewrote this section, which prior thereto read:

"(1) If a child who has attained the age of 15 years is accused of an act which, if committed by an adult, would be a felony, the judge of probate of the county where the offense is alleged to have been committed may waive jurisdiction pursuant to this section upon motion of the prosecuting attorney. After waiver, it shall be lawful to try the child in the court having general criminal jurisdiction of the offense.

"(2) Before conducting a hearing on the motion to waive jurisdiction, the court shall give notice of the hearing in the manner provided by supreme court rule to the child and the prosecuting attorney and, if addresses are known, to the child's parents or guardians. The notice shall state clearly that a waiver of jurisdiction to a court of general criminal jurisdiction has been requested and that, if granted, the child can be prosecuted for the alleged offense as though he or she were an adult.

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"(3) Before the court waives jurisdiction, the court shall determine on the record if there is probable cause to believe that an offense has been committed which if committed by an adult would be a felony and if there is probable cause to believe that the child committed the offense. Before a child may waive a probable cause hearing under this subsection, the court shall inform the child that a waiver of this subsection waives the preliminary examination required by chapter VI of the code of criminal procedure, Act No. 175 of the Public Acts of 1927, being sections 766.1 to 766.22 of the Michigan Compiled Laws.

"(4) Upon a showing of probable cause pursuant to subsection (3), the court shall conduct a hearing to determine if the best interests of the child and the public would be served by granting a waiver of jurisdiction to the court of general criminal jurisdiction. In making the determination, the court shall consider the following criteria giving each weight as appropriate to the circumstances:

"(a) The prior record and character of the child, his or her physical and mental maturity, and his or her pattern of living.

"(b) The seriousness of the offense.

"(c) Whether the offense is part of a repetitive pattern of offenses which would lead to 1 of the following determinations:

"(*i*) The child is not amenable to treatment.

"(*ii*) That despite the child's potential for treatment, the nature of the child's delinquent behavior is likely to disrupt the rehabilitation of other children in the treatment program.

"(d) Whether, despite the child's potential for treatment, the nature of the child's delinquent behavior is likely to render the child dangerous to the public if released at the age of 19 or 21.

"(e) Whether the child is more likely to be rehabilitated by the services and facilities available in adult programs and procedures than in juvenile programs and procedures.

"(f) 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.

"(5) If legal counsel has not been retained or appointed to represent the child, the court shall advise the child and his or her parents, guardian, custodian, or guardian ad litem of the child's right to representation and appoint legal counsel. If the court appoints legal counsel, the judge may assess the cost of providing legal counsel as costs against the child or those responsible for his or her support, or both, if the persons to be assessed are financially able to comply.

"(6) Legal counsel shall have access to records or reports provided and received by the judge as a basis for decision in proceedings for waiver of jurisdiction. A continuance shall be granted at legal counsel's request if any report, information or recommendation, not previously available, is introduced or developed at the hearing and the interests of justice require a continuance.

"(7) The court shall enter a written order either granting or denying the motion to waive jurisdiction, and the court shall state on the record or in a written opinion the court's findings of fact and conclusions of law forming the basis for entry of the order. If a child is waived, a transcript of the court's findings or a copy of the written opinion shall be sent to the court of general criminal jurisdiction.

"(8) If the court does not waive jurisdiction, a transcript of the court's findings or, if a written opinion is prepared, a copy of the written opinion shall be sent to the prosecutor, child, or child's attorney upon request.

"(9) If the court waives jurisdiction, the child shall be arraigned on an information filed by the prosecutor in the court of general criminal jurisdiction. The probable cause finding under subsection (3) shall satisfy the requirements

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of and be considered the equivalent of the preliminary examination required by chapter VI of Act No. 175 of the Public Acts of 1927."

P.A.1996, No. 262, ß ß 2 to 4, provide:

"Section 2. This amendatory act applies to offenses committed on or after its effective date.

"Section 3. This amendatory act shall take effect January 1, 1997.

"Section 4. This amendatory act shall not take effect unless all of the following bills of the 88th Legislature are enacted into law:

"(a) Senate Bill No. 281.

"(b) Senate Bill No. 283.

"(c) Senate Bill No. 682.

"(d) Senate Bill No. 689.

"(e) Senate Bill No. 699.

"(f) Senate Bill No. 700.

"(g) Senate Bill No. 724.

"(h) Senate Bill No. 867.

"(i) Senate Bill No. 870.

"(j) House Bill No. 4037.

"(k) House Bill No. 4038.

"(*l*) House Bill No. 4044.

"(m) House Bill No. 4371.

"(n) House Bill No. 4445.

"(o) House Bill No. 4486.

"(p) House Bill No. 4487."

Senate Bill Nos. 281, 283, 682, 689, 699, 700, 724, 867, and 870, were enacted as P.A.1996, Nos. 248, 249, 244, 250, 247, 253, 254, 255, and 256, respectively, and were approved June 11, 1996 and filed June 12, 1996; House Bill Nos. 4037, 4038, 4044, 4371, 4445, 4486, and 4487, and were enacted as P.A.1996, Nos. 257, 258, 245, 246, 259, 260, and 261, respectively, and were approved June 11, 1996 and filed June 12, 1996.

P.A.1996, No. 262, was ordered to take immediate effect, and was approved June 11, 1996 and filed June 12, 1996.

P.A.1996, No. 409, in subsec. (1), in the first sentence substituted "judge of the family division of circuit court in the" for "probate judge".

For effective date and contingent effect provisions of P.A.1996, No. 409, see the Historical and Statutory Notes

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following ß 710.22.

Prior Laws:

P.A.1905, No. 312.

P.A.1907, No. 325.
P.A.1907, Ex.Sess., No. 6, ß 6.
P.A.1915, No. 308.
C.L.1915, ß 2016.
P.A.1923, No. 105.
C.L.1929, ß 12839.
P.A.1939, No. 288, c. XII, ß 26.

CONSTITUTIONAL PROVISIONS

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Article 6, ß 13, provides:

"The circuit court shall have original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court; and jurisdiction of other cases and matters as provided by rules of the supreme court."

Article 6, ß 15, provides:

"In each county organized for judicial purposes there shall be a probate court. The legislature may create or alter probate court districts of more than one county if approved in each affected county by a majority of the electors voting on the question. The legislature may provide for the combination of the office of probate judge with any judicial office of limited jurisdiction within a county with supplemental salary as provided by law. The jurisdiction, powers and duties of the probate court and of the judges thereof shall be provided by law. They shall have original jurisdiction in all cases of juvenile delinquents and dependents, except as otherwise provided by law."

CROSS REFERENCES

Criminal procedure, rules applicable to juveniles charged with life offenses, see MCR 6.901 et seq.

Discharge or binding defendant over for trial, see ß 766.13.

Felony defined, see ß 750.7.

Jurisdiction, prosecutions upon information, see ß 767.1 et seq.

Juveniles under 17 years of age, arrest and transfer procedures, see ß 764.27.

Juveniles, transfer of nonfelony case to family division of circuit court, waiver, see ß 766.14.

Proceedings involving juveniles, waiver of jurisdiction, see MCR 3.950.

Youth correctional facility, housing of prisoners within court's jurisdiction under this section, see ß 791.220g.

LAW REVIEW AND JOURNAL COMMENTARIES

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Attorney in the juvenile court. 44 Mich.St.B.J. 11 (1965).

Attorney's role in delinquency proceedings. Samuel L. Simpson, 57 Mich.St.B.J. 839 (1977).

Criminal law and procedure: Annual survey of Michigan law 1973. Edward M. Wise, 20 Wayne L.Rev. 365 (1974).

Criminal procedure: Annual survey of Michigan law 1977. Elizabeth Jacobs, 24 Wayne L.Rev. 435 (1978).

Duties of the prosecutor. John T. Hammond, 51 Mich.St.B.J. 40 (1972).

Family law: Annual survey of Michigan law 1973. William T. Downs, 20 Wayne L.Rev. 449 (1974).

House of Judah: The problem of child abuse and neglect in communes and cults. Note, 18 U.Mich.J.L.Ref. 1089 (1985).

The juvenile homicide offender. Mary Anne Quinn, 71 Mich.B.J. 532 (1992).

Operative relationships among various courts, law enforcement and welfare agencies in the city of Detroit. Maxine Boord Virtue, 49 Mich.L.Rev. 1 (1950).

Probate court: Waiver of jurisdiction over juvenile; constitutional limitations on procedure and evidence. 43 Mich.St.B.J. 30 (1964).

Right to counsel in juvenile court. 54 Mich.L.Rev. 1000 (1956).

Statutory rhetoric: Reality behind juvenile justice policies in America. 5 J.L. & Pol'y 223 (1996).

Waiver proceedings in Michigan juvenile courts. Hon. Eugene Arthur Moore and William P. Bartlam. 65 Mich.B.J. 36 (1986).

Waiver to adult court after adjudication of delinquency. 21 Wayne L.Rev. 1324 (1975).

When minors face major consequences. Frank E. Vandevort, 80 Mich.B.J. 36 (2001).

The worst of all possible worlds: Michigan's juvenile justice system and international standards for the treatment of children. Frank E. Vandervort & William E. Ladd, 78 U.Det. Mercy L.Rev. 203 (2001).

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74 ALR 5th 453, Juvenile's Guilty or No Contest Plea in Adult Court as Waiver of Defects in Transfer or Certification Proceedings.

22 ALR 4th 1162, Possibility of Rehabilitation as Affecting Whether Juvenile Offender Should be Tried as Adult.

Encyclopedias

Mich. Civ. Jur. Minors ß 97, Waiver of Jurisdiction.

Mich. Civ. Jur. Minors ß 98, Hearing and Disposition.

Mich. Civ. Jur. Minors ß 99, Right to Counsel.

Mich. Civ. Jur. Minors ß 100, Order and Findings.

Mich. Civ. Jur. Minors ß 121, Minors Subject to Department of Corrections.

Forms

Michigan SCAO Approved Forms JC 18, 6/03 Motion to Waive Jurisdiction and Notice.

Treatises and Practice Aids

Gillespie MI Crim. Law & Proc. Practice Deskbook App A, Appendix A. Michigan Court Rules of 1985 (Mcr) Chapter 5.

Gillespie MI Crim. Law & Proc. Practice Deskbook App B, Appendix B. Michigan Court Rules of 1985 (Mcr) Chapter 6.

Gillespie MI Crim. Law & Proc. Practice Deskbook ß 16:07, Age.

Gillespie MI Crim. Law & Proc. Practice Deskbook ß 16:08, Standard.

Gillespie MI Crim. Law & Proc. Practice Deskbook ß 16:11, Jurisdiction in Circuit Court.

Gillespie MI Crim. Law & Proc. ß 17:2, Preliminary Proceedings Upon Which Based.

Gillespie MI Crim. Law & Proc. ß 20:69, In General.

Gillespie MI Crim. Law & Proc. ß 20:70, Waiver Hearings-Phase One.

Gillespie MI Crim. Law & Proc. ß 20:72, Automatic Waiver.

Gillespie MI Crim. Law & Proc. ß 20:73, Form-Order of Family Division Waiving Jurisdiction.

Gillespie MI Crim. Law & Proc. ß 31:52, Discretionary Waiver of Jurisdiction-In General.

Gillespie MI Crim. Law & Proc. ß 31:53, Grant or Denial of Waiver.

Gillespie MI Crim. Law & Proc. ß 31:58, Statute.

Gillespie MI Crim. Law & Proc. ß 53:10, Commitment and Trial of Minors.

Gillespie MI Crim. Law & Proc. ß 31:136, Preliminary Examination; Lack of Probable Cause on Specified Juvenile Violation.

5 Michigan Court Rules Practice Text R 3.950, Waiver of Jurisdiction.

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5 Michigan Court Rules Practice Text R 3.993, Appeals.

5 Michigan Court Rules Practice Text ß 3950.3, Right to Assistance of Attorney.

5 Michigan Court Rules Practice Text ß 3950.4, Hearing Procedure.

5 Michigan Court Rules Practice Text ß 3950.7, Access to Information.

5 Michigan Court Rules Practice Text R 3.950 DEC., Michigan Decisions.

5A Michigan Court Rules Practice Text R 6.901, Applicability.

5A Michigan Court Rules Practice Text R 6.937, Commitment Review Hearing.

5A Michigan Court Rules Practice Text ß 6931.1, Requirement that Hearing be Held.

5A Michigan Court Rules Practice Text R 6.901 SCOPE, Purpose and Scope.

Michigan Pleading and Practice ß 113A:17, Juvenile Over 14 Years of Age Accused of Felony; Waiver of Jurisdiction.

UNITED STATES SUPREME COURT

Juvenile delinquents, maximum sentence authorized for conviction as an adult, sentencing guidelines, see U.S. v. R.L.C., U.S.Minn.1992, 112 S.Ct. 1329, 503 U.S. 291, 117 L.Ed.2d 559.

NOTES OF DECISIONS

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1. Validity

Procedure used to waive juvenile jurisdiction did not place defendant in jeopardy twice. People v. Saxton (1982) 325 N.W.2d 795, 118 Mich.App. 681. Double Jeopardy 33

No need existed to declare statute on waiver of juvenile jurisdiction unconstitutional, since Supreme Court had power, through its decisions and rules, to provide adequate constitutional safeguards to guide judges in reaching their decisions pertaining to waiver of jurisdiction over juveniles to courts of general jurisdiction; unjustified discrimination in exercise of waiver power can be protected against by courts on appeal from orders waiving jurisdiction. Overruling People v. Fields, 388 Mich. 66, 199 N.W.2d 217, on rehearing 391 Mich. 206, 216 N.W.2d 51. People v. Peters (1976) 244 N.W.2d 898, 397 Mich. 360, certiorari denied 97 S.Ct. 365, 429 U.S. 944, 50 L.Ed.2d 315. Infants 68.2

Provision of this section for waiver of probate court jurisdiction over certain juveniles charged with crime was unconstitutional for lack of sufficient standards; objection was overcome by enactment of new statute. People v. Fields (1974) 216 N.W.2d 51, 391 Mich. 206. Constitutional Law 61; Infants 68.2

2. Constitutional rights

State trial court's failure to transfer a murder, assault, and firearm prosecution to juvenile division of state probate court for a waiver hearing, as required by state law after the trial court was informed of defendant's juvenile status at the time of the crime, violated defendant's due process rights. Dickens v. Jones, E.D.Mich.2002, 203 F.Supp.2d 354, amended 2002 WL 1480805. Constitutional Law 255(4); Infants 68.7(3)

The likelihood that state court juvenile defendant might have been waived to Recorder's Court to be tried as an adult or whether such an adjudication would have benefitted him was not germane to determining whether his due process rights were violated when the trial court failed to transfer his criminal prosecution to juvenile division of state probate court for a waiver hearing, as required by state law after the trial court was informed of his juvenile status at the time of the crime. Dickens v. Jones, E.D.Mich.2002, 203 F.Supp.2d 354, amended 2002 WL 1480805. Constitutional Law 255(4); Infants 68.7(1)

There is no constitutional right to be treated as juvenile; rather, in derogation of common law, juvenile justice procedures are governed by statutes and court rules that probate courts are required to follow in absence of

constitutional infirmity. People v. Hana (1993) 504 N.W.2d 166, 443 Mich. 202, certiorari denied 114 S.Ct. 1074, 510 U.S. 1120, 127 L.Ed.2d 392, on remand 1997 WL 33353817. Constitutional Law 82(6.1)

Full panoply of constitutional rights applicable in adult criminal proceedings and extended to adjudicative phase of juvenile waiver hearing, at which probable cause determination is made, does not apply to dispositional phase, at which determination as to whether juvenile should be treated as adult is made; dispositional phase focuses on balancing interests of both juvenile and public and requires full investigation of those interests, probate court has historically been afforded discretion in juvenile proceedings, extending rights to dispositional phase would seriously curtail individualization of disposition favored by Probate Code and court rules, and waiver proceeding is not tantamount to sentence enhancement as it precedes any determination of guilt. People v. Hana (1993) 504 N.W.2d 166, 443 Mich. 202, certiorari denied 114 S.Ct. 1074, 510 U.S. 1120, 127 L.Ed.2d 392, on remand 1997 WL 33353817. Constitutional Law 255(4); Infants 68.7(3)

Constitutional protections extended to juvenile proceedings apply with full force to adjudicative phase of juvenile waiver hearing, at which probable cause determination is made. People v. Hana (1993) 504 N.W.2d 166, 443 Mich. 202, certiorari denied 114 S.Ct. 1074, 510 U.S. 1120, 127 L.Ed.2d 392, on remand 1997 WL 33353817. Constitutional Law 255(4); Infants 68.7(3)

Statutes and court rules governing adjudicative, or probable cause, phase of juvenile waiver hearing, when properly applied, afford appropriate protection for juvenile's constitutional rights. People v. Hana (1993) 504 N.W.2d 166, 443 Mich. 202, certiorari denied 114 S.Ct. 1074, 510 U.S. 1120, 127 L.Ed.2d 392, on remand 1997 WL 33353817. Infants 68.7(3)

Use of juvenile's alleged incriminating statements to police and court psychologist at dispositional phase of juvenile waiver hearing did not violate juvenile's right to counsel or privilege against self-incrimination, full panoply of constitutional rights applicable to criminal proceedings and extended to adjudicative or "probable cause" phase of juvenile waiver hearing does not apply to dispositional phase. People v. Hana (1993) 504 N.W.2d 166, 443 Mich. 202, certiorari denied 114 S.Ct. 1074, 510 U.S. 1120, 127 L.Ed.2d 392, on remand 1997 WL 33353817. Infants 68.7(3); Witnesses 293.5

3. In general

Juvenile court's failure to make specific findings at the transfer hearing on 15-year-old juvenile petitioner's home life, educational level, and the relative suitability of available juvenile programs and facilities, as required by Michigan law in effect at time of juvenile petitioner's offenses, in connection with the juvenile court's waiver of jurisdiction in a murder prosecution, did not violate due process, barring habeas relief, where petitioner was represented by counsel at the transfer hearing, the hearing was held on the record, and transfer was determined to be valid by Michigan state courts. Spytma v. Howes, C.A.6 (Mich.)2002, 313 F.3d 363, rehearing and suggestion for rehearing en banc denied. Constitutional Law 255(4); Habeas Corpus 535; Infants 68.7(4)

Any due process error in juvenile court's failure to make specific findings at the transfer hearing on 15-year-old juvenile defendant's home life, educational level, and the relative suitability of available juvenile programs and facilities, as required by Michigan law in effect at time of juvenile defendant's offenses, in connection with the juvenile court's waiver of jurisdiction in a murder prosecution, was harmless, and thus did not warrant habeas relief; it was likely that any reasonable juvenile judge would have transferred defendant to adult court, in light to the brutality of the offense. Spytma v. Howes, C.A.6 (Mich.)2002, 313 F.3d 363, rehearing and suggestion for rehearing en banc denied. Habeas Corpus 535

Juvenile defendant could not show that he was prejudiced by defense counsel's alleged deficient performance in failing to object to juvenile court's lack of specific statutory findings at transfer hearing in determining that defendant was required to be transferred to adult court, in murder prosecution, barring ineffective assistance claim on that basis; if court had ordered another transfer hearing on appeal, and specific findings were made, it was likely that defendant would have been transferred to adult court, in light of nature of offense. Spytma v. Howes, C.A.6

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(Mich.)2002, 313 F.3d 363, rehearing and suggestion for rehearing en banc denied. Infants 68.7(3)

Where minor is over age 14 when charged with conduct which would amount to a felony had the minor been an adult, the prosecutor has the discretion to ask Family Division of Circuit Court to waive its jurisdiction over the juvenile. People v. Thenghkam (2000) 610 N.W.2d 571, 240 Mich.App. 29. Infants 68.7(1)

A minor who is alleged to have engaged in conduct which would constitute a crime if minor were an adult can be (1) tried and sentenced as a juvenile, (2) tried as an adult and sentenced as a juvenile, or (3) tried and sentenced as an adult. People v. Thenghkam (2000) 610 N.W.2d 571, 240 Mich.App. 29. Infants 68.7(1); Infants 69(1)

Court was not required to investigate juvenile services outside the county before waiving jurisdiction over juvenile to the circuit court. People v. Fowler (1992) 483 N.W.2d 626, 193 Mich.App. 358. Infants 68.7(2)

Where case is transferred to probate court, probate court shall have jurisdiction without regard to defendant's age at time of transfer; however, such jurisdiction shall be for limited purpose of holding a waiver hearing and pursuant to procedures set forth in this section, probate court may waive jurisdiction to court having general criminal jurisdiction over charged offense and if probate court declines to waive jurisdiction, case shall be dismissed. People v. Schneider (1982) 326 N.W.2d 416, 119 Mich.App. 480. Infants 68.5; Infants 68.7(1)

With exception of right to public trial, usual protections accorded adult in criminal prosecutions govern delinquency proceedings. Matter of Wilson (1982) 317 N.W.2d 309, 113 Mich.App. 113. Infants 191

Where defendant timely asserted his right to preliminary examination in circuit court and was not fugitive from justice, juvenile defendant was entitled to preliminary examination when he was subject to trial in circuit court on felony charges even though, for purpose of determining whether waiver of jurisdiction should be granted, juvenile court was required to find that felony had been committed and there was probable cause to believe that juvenile had committed the crime, since criminal justice required system to proceed with utmost caution when juveniles are to be treated as adults. People v. Dunigan (1980) 298 N.W.2d 430, 409 Mich. 765. Criminal Law 224

Record established that jurisdiction of probate court over juvenile charged with homicide had not been improvidently waived in proceedings on prosecutor's petition to have juvenile prosecuted as an adult. People v. Peters (1976) 244 N.W.2d 898, 397 Mich. 360, certiorari denied 97 S.Ct. 365, 429 U.S. 944, 50 L.Ed.2d 315. Infants 68.7(3)

Supreme Court could by court rule constitutionally insure procedural due process in the handling of juvenile waiver proceedings. People v. Peters (1976) 244 N.W.2d 898, 397 Mich. 360, certiorari denied 97 S.Ct. 365, 429 U.S. 944, 50 L.Ed.2d 315. Constitutional Law 61; Infants 68.7(1)

If legislature is to treat some persons under age of 17 different from entire class of such persons, excluding them from beneficent processes and purposes of juvenile courts, the legislature must establish suitable and ascertainable standards whereby such persons are to be deemed adults and treated as such subject to processes and penalties of the criminal law. People v. Fields (1972) 199 N.W.2d 217, 388 Mich. 66, rehearing denied 216 N.W.2d 51, 391 Mich. 206. Constitutional Law 208(3)

Where defendant was 16 at time he was arrested and charged with having committed a felony, namely homicide, where prosecuting attorney petitioned probate court for waiver of jurisdiction, and where, after notice of hearing, defendant's parents waived further notice and consented to grant of prosecuting attorney's petition, requirements of this section were met and jurisdiction of probate court over defendant was properly waived. People v. Terpening (1969) 167 N.W.2d 899, 16 Mich.App. 104. Infants 68.7(1)

Juvenile court must determine that offense of which child over age of 15 years is accused is felony and waive its jurisdiction before court of general criminal jurisdiction may lawfully try child for the particular offense charged. People v. Hoerle (1966) 143 N.W.2d 593, 3 Mich.App. 693. Infants 68.5

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Under this article, the time which should be determinative of authority of probate court to waive jurisdiction is the time when first proceedings are initiated against him regardless of whether they consist of formal charge of felony in court of criminal jurisdiction or the filing of petition accusing him of any act, the nature of which constitutes a felony. People v. Carlson (1960) 104 N.W.2d 753, 360 Mich. 651. Infants 68.5

Under this article, when a child over 15 is accused of a felony, before waiving jurisdiction to a court of criminal jurisdiction, probate judge must conduct an investigation and examination. Op.Atty.Gen.1945-46, No. O-2562, p. 67.

4. Age of child

Recaptured 19-year-old escapee could properly be interrogated as adult in regard to crimes he had committed at age 16, where probate court with original jurisdiction over matter had waived its jurisdiction to recorder's court. People v. Kincaid (1984) 356 N.W.2d 4, 136 Mich.App. 209, appeal denied. Infants 68.7(5)

Where minor accused of murder was fourteen years of age at time there was filed in probate court a petition for waiver of jurisdiction by such court, and petition accused the minor of an act the nature of which constituted a felony, subsequent waiver of jurisdiction by probate court after minor had become 15 years of age was unauthorized and statutes conferring exclusive jurisdiction on probate court obtained. People v. Carlson (1960) 104 N.W.2d 753, 360 Mich. 651. Infants 68.5

P.A.1944, 1st Ex.Sess., No. 54, as amended by P.A.1946, 1st Ex.Sess., No. 22, providing for transfer of case to juvenile division of probate court if during pendency of criminal charge it should be ascertained that person charged is under age of 17, contemplated age at time when child was charged with felony, rather than his age at time of alleged commission of the felony. People v. Tillard (1947) 29 N.W.2d 111, 318 Mich. 619. Infants 68.7(2)

Where defendant was over age of 17 years when charged with a felony in recorder's court, such court had jurisdiction without a waiver from, or transferring case to, juvenile division of probate court, even though defendant was but 16 years of age, when offense was allegedly committed. People v. Tillard (1947) 29 N.W.2d 111, 318 Mich. 619. Infants 68.5

5. Notice to parents

Conviction of first-degree murder on plea of guilty by 15 year old boy without notice to his father could not be set aside, where in accord with lawful action, though procedure might well have been less speedy considering age of boy. People v. Crandell (1935) 258 N.W. 224, 270 Mich. 124. Infants 68.4

Under this article, when a child over 15 is accused of a felony, before waiving jurisdiction to a court of criminal jurisdiction, probate judge must, prior to examination, give notice to parents in manner required for probate notices by applicable statute. Op.Atty.Gen.1945-46, No. O-2562, p. 67.

6. Hearings--In general

Family court was warranted in not conducting a phase-two waiver hearing to transfer juvenile proceedings from family court's jurisdiction to circuit court's jurisdiction under traditional waiver process, where juvenile had been previously subject to jurisdiction of circuit court as result of criminal conduct, which made best interests determination conducted in phase-two hearing irrelevant to decision to waive jurisdiction to the circuit court. People v. Williams (2001) 628 N.W.2d 80, 245 Mich.App. 427. Infants 68.7(3)

Public policy underlying dispositional phase of juvenile waiver hearing, at which determination as to whether juvenile should be treated as adult is made, requires relaxed evidentiary standards so as to ensure full investigation into whether interests of juvenile and public would best be served by granting waiver. People v. Hana (1993) 504

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N.W.2d 166, 443 Mich. 202, certiorari denied 114 S.Ct. 1074, 510 U.S. 1120, 127 L.Ed.2d 392, on remand 1997 WL 33353817. Infants 68.7(3)

First phase-waiver hearing need only be held within 28 days from the date that petition for waiver of jurisdiction over juvenile is filed, and need not be held within 28 days of the date that the petition is authorized. People v. Fowler (1992) 483 N.W.2d 626, 193 Mich.App. 358. Infants 68.7(3)

Motion to adjourn phase I of waiver of juvenile jurisdiction hearing must generally be brought within 28 days of preliminary hearing. People v. Sweet (1983) 335 N.W.2d 110, 124 Mich.App. 626. Infants 68.7(1)

7. ---- Timeliness of hearings

Reversal of defendant's conviction based on plea of guilty was not required for failure to comply with former JCR 1969, 11.1 that phase I of waiver of juvenile jurisdiction hearing be held within 28 days after preliminary hearing where phase I hearing was adjourned for good cause which existed at all times prior to adjournment and at an adjudication hearing which would have been timely but for petition to waive jurisdiction, and where defendant had actual notice of hearing on petition to waive jurisdiction and neither party moved to reschedule hearing within time period called for by rule. People v. Sweet (1983) 335 N.W.2d 110, 124 Mich.App. 626. Criminal Law 1166(1)

Violation of former JCR 1969, 11.1 requiring that phase I of waiver of juvenile jurisdiction hearing be held within 28 days after preliminary hearing does not necessarily entitle defendant to discharge, but rather nature of noncompliance dictates nature of remedy. People v. Sweet (1983) 335 N.W.2d 110, 124 Mich.App. 626. Infants 68.7(1)

8. ---- Probable cause determination, hearings

Recognized rules of evidence apply at hearing to determine whether there is probable cause to believe that child committed crime for purposes of deciding whether probate court should grant waiver of jurisdiction to court of criminal jurisdiction and at preliminary examination. People v. Williams (1981) 314 N.W.2d 769, 111 Mich.App. 818. Infants 68.7(3)

9. ---- Burden of proof, hearings

Due process does not require application of the beyond a reasonable doubt standard at a probate court hearing to waive juvenile jurisdiction since the "probable cause" determination of phase I of a waiver hearing is similar to a preliminary examination and phase II is designed to determine the best interests of the minor and the public and, unlike the determination of delinquency hearings, guilt or innocence is not determined at a waiver hearing and such hearing does not subject the child to loss of liberty. People v. Allen (1979) 282 N.W.2d 255, 90 Mich.App. 128. Constitutional Law 255(4)

10. ---- Admissibility of evidence, hearings

Sixteen-year-old defendant's confession, which was made after defendant was given Miranda warnings and in presence of his mother at youth home where he was taken after arrest, was admissible in juvenile court hearing to determine if juvenile court's jurisdiction should be waived. People v. Morris (1975) 226 N.W.2d 565, 57 Mich.App. 573, certiorari denied 96 S.Ct. 90, 423 U.S. 849, 46 L.Ed.2d 72. Criminal Law 527

Only legally admissible evidence can be adduced at waiver hearing held to determine whether there is necessary probable cause to waive juvenile court's jurisdiction over juvenile. People v. Morris (1975) 226 N.W.2d 565, 57 Mich.App. 573, certiorari denied 96 S.Ct. 90, 423 U.S. 849, 46 L.Ed.2d 72. Infants 68.7(3)

Assuming that 16-year-old defendant's confession was illegally obtained and therefore inadmissible in juvenile court

hearing to determine whether there was probable cause to waive juvenile court jurisdiction, defendant's subsequent plea of guilty to reduced charge of manslaughter when defendant was 17 years old constituted waiver of infirmity. People v. Morris (1975) 226 N.W.2d 565, 57 Mich.App. 573, certiorari denied 96 S.Ct. 90, 423 U.S. 849, 46 L.Ed.2d 72. Infants 68.7(5)

Basic consideration in determining whether confession of 16-year-old defendant was admissible to establish necessary probable cause for waiver of juvenile court's jurisdiction on basis that there was probable cause to believe that defendant committed offense which if committed by adult would be a felony was totality of the circumstances. People v. Morris (1975) 226 N.W.2d 565, 57 Mich.App. 573, certiorari denied 96 S.Ct. 90, 423 U.S. 849, 46 L.Ed.2d 72. Criminal Law 527; Infants 68.7(3)

11. Discretion of court

Family court retains discretion to make ultimate decision on whether to waive jurisdiction over a juvenile and transfer proceedings to circuit court's jurisdiction even though legislature prescribed six criteria family court must consider when making such best interests determination during second phase of the traditional waiver process. People v. Williams (2001) 628 N.W.2d 80, 245 Mich.App. 427. Infants 68.7(1)

12. Criteria for waiver--In general

Where prosecutor seeks to have Family Division of Circuit Court waive its jurisdiction over juvenile who was over age 14 when charged with conduct that would have amounted to a felony had the juvenile been an adult, Family Division must determine if there is probable cause to believe that the juvenile committed a felony, and whether the facts pertinent to each statutory factor weigh in favor of a juvenile adjudication or an adult trial. People v. Thenghkam (2000) 610 N.W.2d 571, 240 Mich.App. 29. Infants 68.7(3)

Order waiving jurisdiction over juvenile defendant will be affirmed whenever the probate court'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 19 or to disrupt the rehabilitation of other children in the program prior to his release. Matter of Le Blanc (1988) 430 N.W.2d 780, 171 Mich.App. 405. Infants 68.8

Probate court did not base its decision to waive jurisdiction over juvenile only on seriousness of offense, but, rather, carefully considered juvenile's amenity to treatment and treatment he required, and its findings were based upon substantial evidence in record, so that waiver was proper; five assault charges arose from three separate shooting incidents involving children and one elderly woman. People v. Rader (1988) 425 N.W.2d 787, 169 Mich.App. 293, appeal denied. Infants 68.7(2)

In order for juvenile division of probate court to properly waive jurisdiction of juvenile under ß 712A.4, it must be determined, on basis of substantial evidence and thorough investigation, that the juvenile is not amenable to treatment or that, despite potential for treatment, nature of the difficulty is likely to render the juvenile dangerous to the public if released at age 19 or to disrupt the rehabilitation of other juveniles in the treatment program prior to release; in addition, there must be evidence on the record, to which probate court must refer, regarding relative suitability of programs and facilities available in the juvenile and adult correctional systems. People v. Dunbar (1985) 377 N.W.2d 262, 423 Mich. 380. Infants 68.7(2)

Probate court erred in waiving jurisdiction so that 16-year old defendant could be tried as an adult for murder, where waiver was based on court's belief that adult correctional facilities provided better vocational training than juvenile facilities, and record indicated that defendant would have been amenable to treatment available in juvenile facilities, did not pose a danger to the public and would not have disrupted the rehabilitation of other juveniles. People v. Dunbar (1985) 377 N.W.2d 262, 423 Mich. 380. Infants 68.7(2)

At juvenile jurisdiction waiver hearing, the juvenile court's failure to consider defendant's prior record or whether

his actions were part of a repetitive pattern was harmless error, in view of the evidence presented at trial which demonstrated that defendant had a violent personality. People v. Saxton (1982) 325 N.W.2d 795, 118 Mich.App. 681. Infants 68.8

In deciding whether to grant waiver of jurisdiction over 16-year-old defendant to court of criminal jurisdiction, it was not error for probate court to consider reports containing hearsay information. People v. Williams (1981) 314 N.W.2d 769, 111 Mich.App. 818. Infants 68.7(2)

In deciding whether probate court should grant waiver of jurisdiction to court of criminal jurisdiction, probate court may consider out-of-court information on record relative to criteria used in this section in determining whether interest of child and of public would be best served by granting waiver. People v. Williams (1981) 314 N.W.2d 769, 111 Mich.App. 818. Infants 68.7(2)

Order waiving jurisdiction over juvenile 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 19 or to disrupt the rehabilitation of other children in the program prior to his release. People v. Schumacher (1977) 256 N.W.2d 39, 75 Mich.App. 505. Infants 68.8

13. ---- Prior criminal acts, criteria for waiver

In deciding whether to grant waiver of jurisdiction to court of criminal jurisdiction, probate court did not err by considering alleged prior criminal acts which did not result in conviction. People v. Williams (1981) 314 N.W.2d 769, 111 Mich.App. 818. Infants 68.7(2)

14. ---- Seriousness of offense, criteria for waiver

Seriousness of charged offense alone will not justify waiver of probate court's jurisdiction over juvenile and seriousness of offense should not gain preeminence over other factors to be assessed. People v. Whitfield (1995) 543 N.W.2d 347, 214 Mich.App. 348, opinion after remand 579 N.W.2d 465, 228 Mich.App. 659, appeal denied 590 N.W.2d 63, 459 Mich. 939. Infants 68.7(2)

Breaking and entering, felony-firearm, felonious assault, and possession of a short-barreled rifle were offenses of a serious nature and court did not give undue weight to them in determining to waive jurisdiction to the circuit court. People v. Fowler (1992) 483 N.W.2d 626, 193 Mich.App. 358. Infants 68.7(2)

Probate court dealing with intelligent first-time offender who commits premeditated murder is not required to keep him within the juvenile system. Matter of Le Blanc (1988) 430 N.W.2d 780, 171 Mich.App. 405. Infants 68.7(2)

Seriousness of the offense allegedly committed by juvenile may not alone be used to determine likelihood that a potentially amenable juvenile will endanger the public or other children in the rehabilitation program. People v. Schumacher (1977) 256 N.W.2d 39, 75 Mich.App. 505. Infants 68.1

15. ---- Repetitive pattern of offenses, criteria for waiver

Even though five incidents occurred within short period of time, probate court could consider that such charged incidents constituted "repetitive pattern of behavior," for purposes of waiver of jurisdiction over juvenile; various assault charges arose out of incidents in which defendant chased two children with rifle and shot at them, arose out of similar incident less than two weeks later, and third incident in which juvenile allegedly shot 75-year-old woman in stomach and ran away. People v. Rader (1988) 425 N.W.2d 787, 169 Mich.App. 293, appeal denied. Infants 68.7(2)

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Evidence that juvenile had long prior record with juvenile court and that the various prior offenses demonstrated a serious and repetitive pattern sustained determination of probate court to waive jurisdiction over juvenile who was charged with armed robbery and other felonies. People v. White (1973) 214 N.W.2d 326, 51 Mich.App. 1. Infants 68.7(3)

16. ---- Potential for rehabilitation, criteria for waiver

Probate court's finding that juvenile was not amenable to treatment in juvenile facilities was not improperly based on crimes of which juvenile was never found guilty but, rather, was properly based on numerous offenses which were increasing in severity over time despite the fact that the juvenile was involved in treatment programs. People v. Fowler (1992) 483 N.W.2d 626, 193 Mich.App. 358. Infants 68.7(2)

Probate court order waiving jurisdiction will be affirmed whenever court's findings, based on substantial evidence and through investigation, show either that juvenile was not amenable to treatment or that, despite his potential for treatment, nature of his difficulty is likely to render him dangerous to the public if released at age 19 or 21 or to disrupt the rehabilitation of other children. People v. Fowler (1992) 483 N.W.2d 626, 193 Mich.App. 358. Infants 68.8

Evidence supported probate court's decision to waive juvenile jurisdiction over defendant charged with committing armed robbery and assault, although defendant did not have prior criminal record; evidence indicated that defendant's potential for rehabilitation was extremely limited and that nature of defendant's emotional and intellectual difficulties were likely to render him dangerous to public if he were released at age 19. People v. Nelson (1988) 425 N.W.2d 225, 168 Mich.App. 781, appeal denied. Infants 68.7(3)

Fact that witness who testified that juvenile could be rehabilitated at hearing to determine whether jurisdiction over juvenile who was charged with armed robbery and other felonies should be waived to circuit court was not familiar with programs and facilities available to criminal courts did not prevent probate court from properly waiving jurisdiction as probate judge could take judicial notice of available rehabilitative facilities. People v. White (1973) 214 N.W.2d 326, 51 Mich.App. 1. Evidence 50; Infants 68.7(3)

17. ---- Danger to public, criteria for waiver

Order by juvenile division of probate court waiving jurisdiction of juvenile will be affirmed where probate court, on basis of substantial evidence and thorough investigation, determines that juvenile is not amenable to treatment or that, despite potential for treatment, nature of difficulty is likely to render juvenile dangerous to public if released at age 19 or to disrupt rehabilitation of other juveniles in treatment program prior to release; in addition, there must be evidence on record, to which probate court refers, regarding relative suitability of programs available in juvenile and adult correctional systems. People v. Rader (1988) 425 N.W.2d 787, 169 Mich.App. 293, appeal denied. Infants 68.8

Substantial evidence supported probate court's conclusion that juvenile, if released too early, would pose serious danger to society, for purpose of waiver of jurisdiction, even though juvenile cooperated in detention unit; several witnesses testified that juvenile may comply with rules of facility and still not undergo actual change in behavior or character, and juvenile was charged with assaults with intent to commit murder and other offenses. People v. Rader (1988) 425 N.W.2d 787, 169 Mich.App. 293, appeal denied. Infants 68.7(3)

Evidence that juvenile's planning of assaultive crimes had escalated beyond the discussion stage and that, even after the near-fatal attack on clerk in store which he tried to rob he was considering robbing another store sustained determination of the probate court that juvenile would pose a threat to society if released at age 19 and that jurisdiction over him should be waived by the probate court. People v. Schumacher (1977) 256 N.W.2d 39, 75 Mich.App. 505. Infants 68.7(3)

18. ---- Witness testimony, criteria for waiver

Expert witnesses testifying at hearing on waiver of juvenile to the circuit court were competent to testify, even though none of them attempted to compare juvenile and adult systems, where they drew on their knowledge of the individual systems to express an opinion as to whether juvenile would benefit within that system. People v. Fowler (1992) 483 N.W.2d 626, 193 Mich.App. 358. Evidence 536

19. Right to counsel

Fact that accused juvenile pleaded guilty in adult court with all constitutional safeguards present amounted to waiver of failure of state to provide counsel at time of juvenile waiver hearing. Trombley v. Anderson, E.D.Mich.1977, 439 F.Supp. 1250, affirmed 584 F.2d 807. Infants 68.7(3)

Supreme court decisions providing that juveniles have right to counsel in all adjudicatory hearings were not applicable retroactively to right of juvenile to have appointed counsel at juvenile waiver hearings. Trombley v. Anderson, E.D.Mich.1977, 439 F.Supp. 1250, affirmed 584 F.2d 807. Courts 100(1)

Right to counsel at juvenile waiver or transfer proceeding, announced by United States Supreme Court in 1966 Kent decision [383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966)], does not apply retroactively. People v. Bradley (1982) 324 N.W.2d 499, 117 Mich.App. 776. Courts 100(1)

20. Waiver order

In order to support waiver of jurisdiction over juvenile by probate court, there must be evidence on the record, to which the probate judge must specifically refer, regarding the relative suitability of programs and facilities available to the juvenile and criminal courts for the child. People v. Schumacher (1977) 256 N.W.2d 39, 75 Mich.App. 505. Infants 68.7(3)

Where petition charging defendant in juvenile court alleged both the requisite value of goods taken and damage to motor vehicle, either of which was sufficient to classify larceny charged as a felony, fact that waiver order itself did not allege value or damage was not material and where defendant was 16 and accused of a felony, waiver of jurisdiction to circuit court was proper. People v. Fuzi (1973) 208 N.W.2d 47, 46 Mich.App. 204. Infants 68.7(4)

Probate court's waiver of jurisdiction over 16-year-old defendant was not defective by virtue of having failed to specify crime with which defendant was charged, where probate court made reference to felony with which "he (defendant) is now charged" and such reference must be read in context with record which established that the only felony with which defendant was then charged was murder. People v. Terpening (1969) 167 N.W.2d 899, 16 Mich.App. 104. Infants 68.7(4)

Language of probate court order which waived jurisdiction over 16-year-old defendant and which stated that it appeared such an order should issue was indicative of an investigation and examination by probate judge, as required by this section, and since no attack was made on waiver proceedings before an appeal some 20 years later, it could not be said that probate judge failed to do what his oath and this section required of him. People v. Terpening (1969) 167 N.W.2d 899, 16 Mich.App. 104. Infants 68.7(4)

21. Scope of waiver

A waiver to permit prosecution for one offense is not a waiver to permit prosecution for a greater one. People v. Hoerle (1966) 143 N.W.2d 593, 3 Mich.App. 693. Infants 68.7(1)

Waiver by juvenile division of probate court under this article waives only the felony, and, after waiver, the juvenile may not be charged with a lesser included offense, and he may not plead guilty to the lesser included offense before the circuit court. Op.Atty.Gen.1965, No. 4502.

Defendant accused of unlawfully driving away a motor vehicle could not be charged with, or plead guilty to, a second count charging unlawful use of a motor vehicle, and, after waiver by juvenile division of probate court, defendant could be charged with or plead guilty to the felony only. Op.Atty.Gen.1965, No. 4502.

22. Dismissal of motion

Where probate court, juvenile division, made no substantive ruling on issue of waiver of jurisdiction but rather "dismissed" motion requesting waiver, terminated phase two proceedings and accepted juvenile defendant's plea in confession, cause on appeal was remanded for full investigation and determination of waiver issue during which prosecutor would be entitled to present any relevant evidence he might have bearing on criteria set forth in former JCR 11 and this section governing written statements setting forth findings which form basis for waiver should waiver of jurisdiction be granted. Matter of Wilson (1982) 317 N.W.2d 309, 113 Mich.App. 113. Infants 68.8

23. Appeal of waiver decision

Where defendant had two chances to appeal probate court's waiver of jurisdiction, when he was tried and subsequently retried in circuit court, defendant waived any challenge to infirmity of probate court's waiver decision. People v. Billington (1982) 323 N.W.2d 343, 116 Mich.App. 220. Infants 68.7(4)

24. Double jeopardy

Where first proceeding against defendant on felony charge came to an end upon granting of defendant's motion to quash proceedings against him on ground that recorder's court had no jurisdiction to try him without waiver of jurisdiction of juvenile court, defendant had not, as result thereof, been placed in "jeopardy" so as to bar subsequent proceeding. People v. Tillard (1947) 29 N.W.2d 111, 318 Mich. 619. Double Jeopardy 52

25. Findings

No statement of findings is required where waiver of juvenile court jurisdiction is denied, but court is bound to conduct full investigation and to hear all relevant and available evidence bearing on criteria set forth in former JCR 11 and this section governing written statement setting forth findings which form basis for waiver should waiver of jurisdiction be granted. Matter of Wilson (1982) 317 N.W.2d 309, 113 Mich.App. 113. Infants 68.7(4)

Trial court did not err in upholding probate court's waiver of jurisdiction over 15-year-old charged with assault with intent to rob and assault with intent to commit murder since probate court's findings were as detailed, succinct and cogent as could reasonably be expected, statutory criteria were rigidly adhered to and probate court's findings were more than adequate to support waiver. People v. Allen (1979) 282 N.W.2d 255, 90 Mich.App. 128. Infants 68.7(4)

Since waiver of jurisdiction over juvenile is critically important action determining vitally important statutory rights of such juvenile, probate and juvenile court judges would be urged to provide findings which clearly illuminate reasons motivating such waiver. People v. Mahone (1977) 254 N.W.2d 907, 75 Mich.App. 407. Infants 68.7(4)

26. Statement of reasons

Where hearing for waiver of juvenile court was held, defendant, his mother and counsel were present, defendant's case history was fully reviewed by probate judge, counsel for defendant was given access to all social records and probate judge made order waiving jurisdiction and stated on record his reasons therefor, failure to file statement of reasons until approximately six months later did not prejudice defendant or deprive him of equal protection of law. People v. Coleman (1969) 172 N.W.2d 512, 19 Mich.App. 250. Constitutional Law 250.2(1); Infants 68.7(4)

M.C.L.A. 712A.4

27. Preliminary examination

When jurisdiction of juvenile offender was waived to circuit court, he was entitled to preliminary examination upon timely demand. People v. Phillips (1982) 330 N.W.2d 366, 416 Mich. 63. Criminal Law 224

Decision holding that when jurisdiction of juvenile offender is waived to circuit court, defendant is entitled to preliminary examination before he may be charged in criminal information unless examination is waived by defendant or he is fugitive from justice was not a new rule of law, as would raise question of retroactive application of decision, where no matter how widespread practice of denying examination to juvenile defendants may have been, it was an illegal practice and was not the sort of "clear precedent" which should have triggered "new rule" retrospective analysis, and no new rule was announced by decision. People v. Phillips (1982) 330 N.W.2d 366, 416 Mich. 63. Courts 100(1)

After juvenile court waived jurisdiction over defendant and information was filed in circuit court against juvenile on felony charges, defendant was entitled to preliminary examination even if he made no affirmative demonstration of prejudice resulting from failure to hold such examination. People v. Dunigan (1980) 298 N.W.2d 430, 409 Mich. 765. Criminal Law 224

28. Review--In general

Upon finding that state trial court violated petitioner's due process rights by failing to transfer his murder, assault, and firearm prosecution to juvenile division of state probate court for a waiver hearing, as required by state law after trial court was informed of petitioner's juvenile status at the time of the crime, habeas court would issue the writ conditioned upon state affording petitioner a juvenile waiver hearing within 120 days; if probate court determined after hearing that it would not be in best interests to have tried petitioner as an adult, petitioner's conviction would have to be vacated and the charges against him dropped, but if probate court determined it was proper to waive petitioner to Recorder's Court and try him as an adult, petitioner's conviction could stand. Dickens v. Jones, E.D.Mich.2002, 203 F.Supp.2d 354, amended 2002 WL 1480805. Habeas Corpus 798

Court of Appeals will affirm a probate court's waiver decision whenever the court's findings, based on substantial evidence and on 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 he were to be released at the age of nineteen or twenty-one, or to disrupt rehabilitation of other children in program prior to his release. People v. Whitfield (1998) 579 N.W.2d 465, 228 Mich.App. 659, appeal denied 590 N.W.2d 63, 459 Mich. 939. Infants 68.8

Probate court's determination that statutory factor regarding juvenile defendant's prior record, maturity, and pattern of living militated in favor of waiving jurisdiction in murder prosecution was supported by substantial evidence; although juvenile defendant had only one prior informal contact with the juvenile system, his school record contained numerous instances of misconduct evidencing a highly combative, assaultive character, defendant exhibited a poor pattern of living, and he committed a significant instance of misconduct at juvenile home during his pretrial incarceration. People v. Whitfield (1998) 579 N.W.2d 465, 228 Mich.App. 659, appeal denied 590 N.W.2d 63, 459 Mich. 939. Infants 68.7(3)

Probate court did not engage in an improper weighing of statutory criteria in determining to waive jurisdiction in murder prosecution of juvenile defendant; fact that probate court may have accorded significant weight to the seriousness of defendant's heinous offenses was not grounds for reversal. People v. Whitfield (1998) 579 N.W.2d 465, 228 Mich.App. 659, appeal denied 590 N.W.2d 63, 459 Mich. 939. Infants 68.7(3); Infants 68.8

Substantial record evidence supported probate court's finding that despite juvenile defendant's amenability to treatment, nature of his delinquent behavior was likely to render him a danger to the public if he were released from juvenile detention at the ages of nineteen or twenty-one; three witnesses associated with the juvenile justice system

opined that, in light of his marked behavioral difficulties, defendant would not receive adequate treatment in a juvenile facility by time of his inevitable departure and would therefore pose a threat to public safety on his release. People v. Whitfield (1998) 579 N.W.2d 465, 228 Mich.App. 659, appeal denied 590 N.W.2d 63, 459 Mich. 939. Infants 68.7(3)

Substantial evidence supported probate court's findings that statutory factor, which considered whether juvenile would more likely be rehabilitated by services and facilities available in adult programs than in juvenile programs, weighed in favor of waiver of jurisdiction in murder prosecution; supervisor of county social services testified that a juvenile of defendant's age and behavioral disposition was not likely to be redeemed by the treatment method used in the juvenile system, especially because defendant would spend relatively little time in juvenile incarceration. People v. Whitfield (1998) 579 N.W.2d 465, 228 Mich.App. 659, appeal denied 590 N.W.2d 63, 459 Mich. 939. Infants 68.7(3)

Where infant, represented by counsel, did not invoke circuit court's review of probate court's decision to waive jurisdiction over him before pleading guilty to information filed in circuit court, his failure to do so waived any infirmity in the proceeding in the probate court. People v. Figlus (1978) 272 N.W.2d 722, 86 Mich.App. 552. Infants 68.7(1)

Where probate court waives jurisdiction over juvenile in order that he be tried as adult, juvenile must first seek review of that decision in circuit court before Court of Appeals will consider the question. People v. Mahone (1977) 254 N.W.2d 907, 75 Mich.App. 407. Infants 68.8

Juvenile defendant who invokes circuit court review of waiver order may, upon his later conviction, raise anew the propriety of waiver in his appeal of right before Court of Appeals. People v. Mahone (1977) 254 N.W.2d 907, 75 Mich.App. 407. Infants 68.8

Findings made by probate court to support its waiver of jurisdiction over juvenile were insufficient for such purpose; remand for supplementation of such findings was not permissible, however, in view of juvenile's failure to appeal waiver to circuit court. People v. Mahone (1977) 254 N.W.2d 907, 75 Mich.App. 407. Infants 68.8

Whenever sufficiency of proceedings for waiving juvenile court is questioned, record before reviewing court should contain formal waiver order and transcript of waiver hearing. People v. Coleman (1969) 172 N.W.2d 512, 19 Mich.App. 250. Infants 68.8

29. ---- Plea of guilty, review

Juvenile's bargained plea of guilty did not foreclose review on appeal of alleged error of probate court in waiving jurisdiction. People v. Schumacher (1977) 256 N.W.2d 39, 75 Mich.App. 505. Infants 68.8

M. C. L. A. 712A.4, **MI ST 712A.4**

Current through P.A. 2005, No. 1-340 (End)

END OF DOCUMENT

M.C.L.A. 722.822

C

Michigan Compiled Laws Annotated Currentness

Chapter 722. Children

Juvenile Diversion Act (Refs & Annos)

→722.822. Definitions

Sec. 2. As used in this act:

(a) "Assaultive crime" means an offense that, if committed by an adult, would constitute an offense against a person described in section 82, 83, 84, 86, 87, 88, 89, 316, 317, 321, 349, 349a, 350, 397, 520b, 520c, 520d, 520e, 520g, 529, 529a, or 530 of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.82, 750.83, 750.84, 750.86, 750.87, 750.88, 750.89, 750.316, 750.317, 750.321, 750.349, 750.349a, 750.350, 750.397, 750.520b, 750.520c, 750.520d, 750.520e, 750.520g, 750.529, 750.529a, and 750.530 of the Michigan Compiled Laws.

(b) "Court" means the family division of circuit court.

(c) "Divert" or "diversion" means the placement that occurs when a formally recorded apprehension is made by a law enforcement agency for an act by a minor that if a petition were filed with the court would bring that minor within section 2(a) of chapter XIIA of Act No. 288 of the Public Acts of 1939, being section 712A.2 of the Michigan Compiled Laws, and instead of petitioning the court or authorizing a petition, either of the following occurs:

(*i*) The minor is released into the custody of his or her parent, guardian, or custodian and the investigation is discontinued.

(*ii*) The minor and the minor's parent, guardian, or custodian agree to work with a person or public or private organization or agency that will assist the minor and the minor's family in resolving the problem that initiated the investigation.

(d) "Law enforcement agency" means a police department of a city, village, or township, a sheriff's department, the department of state police, or any other governmental law enforcement agency in this state.

(e) "Minor" means an individual less than 17 years of age.

CREDIT(S)

P.A.1988, No. 13, ß 2, Eff. April 1, 1988. Amended by P.A.1994, No. 197, ß 1, Eff. Oct. 1, 1994; P.A.1996, No. 415, ß 1, Eff. Jan. 1, 1998.

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The 1994 amendment rewrote subd. (a), which prior thereto read:

" 'Assaultive crime' means an offense which if committed by an adult would constitute an offense against a person described in any of the following sections: 82 to 89, 316, 317, 321, 349 to 350, 397, 520a to 520g, 529, and 530 of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.82 to 750.89, 750.316, 750.317, 750.321, 750.349 to 750.350, 750.397, 750.520a to 750.520g, 750.529, and 750.530 of the Michigan

M.C.L.A. 722.822

Compiled Laws."

The 1994 amendment, also, in subd. (e), substituted "an individual" for "a person".

P.A.1994, No. 197, ß ß 2 and 3, provide:

"Section 2. This amendatory act shall take effect October 1, 1994.

"Section 3. This amendatory act shall not take effect unless Senate Bill No. 773 of the 87th Legislature is enacted into law."

Senate Bill No. 773, was enacted as P.A.1994, No. 191, and was approved June 19, 1994 and filed June 21, 1994.

P.A.1994, No. 197, was ordered to take immediate effect, and was approved June 19, 1994 and filed June 21, 1994.

The 1996 amendment, in subd. (b), substituted "family division of circuit court" for "juvenile division of the probate court".

P.A.1996, No. 415, ß ß 2 and 3, provide:

"Section 2. This amendatory act shall take effect January 1, 1998.

"Section 3. This amendatory act shall not take effect unless Senate Bill No. 1052 of the 88th Legislature is enacted into law."

Senate Bill No. 1052, was enacted as P.A.1996, No. 388, and was approved and filed September 30, 1996.

P.A.1996, No. 415, was not ordered to take immediate effect, and was approved October 30, 1996 and filed October 31, 1996.

The general effective date for 1996 legislation is March 31, 1997.

M. C. L. A. 722.822, **MI ST 722.822**

Current through P.A. 2005, No. 1-340 (End)

END OF DOCUMENT

M.C.L.A. 750.316

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 750. **MICHIGAN PENAL CODE**
THE MICHIGAN PENAL CODE
CHAPTER XLV. HOMICIDE

➡750.316. First degree murder; definitions

Sec. 316. (1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:

(a) Murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing.

(b) Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, or vulnerable adult abuse in the first and second degree under section 145n. [FN1]

(c) A murder of a peace officer or a corrections officer committed while the peace officer or corrections officer is lawfully engaged in the performance of any of his or her duties as a peace officer or corrections officer, knowing that the peace officer or corrections officer is a peace officer or corrections officer engaged in the performance of his or her duty as a peace officer or corrections officer.

(2) As used in this section:

(a) "Arson" means a felony violation of chapter X. [FN2]

(b) "Corrections officer" means any of the following:

(*i*) A prison or jail guard or other prison or jail personnel.

(*ii*) Any of the personnel of a boot camp, special alternative incarceration unit, or other minimum security correctional facility.

(*iii*) A parole or probation officer.

(c) "Major controlled substance offense" means any of the following:

(*i*) A violation of section 7401(2)(a)(*i*) to (*iii*) of the public health code, 1978 PA 368, MCL 333.7401.

(*ii*) A violation of section 7403(2)(a)(*i*) to (*iii*) of the public health code, 1978 PA 368, MCL 333.7403.

(*iii*) A conspiracy to commit an offense listed in subparagraph (*i*) or (*ii*).

(d) "Peace officer" means any of the following:

(*i*) A police or conservation officer of this state or a political subdivision of this state.

(*ii*) A police or conservation officer of the United States.

(*iii*) A police or conservation officer of another state or a political subdivision of another state.

M.C.L.A. 750.316

[FN1] M.C.L.A. ß 750.145n.

[FN2] M.C.L.A. ß 750.71 et seq.

Current through P.A. 2005, No. 1-340 (End)

END OF DOCUMENT

M.C.L.A. 764.1f

C

Michigan Compiled Laws Annotated Currentness
Code of Criminal Procedure Chapters 760 to 777 (Refs & Annos)
Chapter 764. Code of Criminal Procedure--Arrest (Refs & Annos)
Chapter IV. Arrest (Refs & Annos)

➡764.1f. Complaints and warrants, filing; specified juvenile violation, defined

Sec. 1f. (1) If the prosecuting attorney has reason to believe that a juvenile 14 years of age or older but less than 17 years of age has committed a specified juvenile violation, the prosecuting attorney may authorize the filing of a complaint and warrant on the charge with a magistrate concerning the juvenile.

(2) As used in this section, "specified juvenile violation" means any of the following:

(a) A violation of section 72, 83, 86, 89, 91, 316, 317, 349, 520b, 529, 529a, or 531 of the Michigan penal code, 1931 PA 328, MCL 750.72, 750.83, 750.86, 750.89, 750.91, 750.316, 750.317, 750.349, 750.520b, 750.529, 750.529a, and 750.531.

(b) A violation of section 84 or 110a(2) of the Michigan penal code, 1931 PA 328, MCL 750.84 and 750.110a, if the juvenile is armed with a dangerous weapon. As used in this subdivision, "dangerous weapon" means 1 or more of the following:

(*i*) A loaded or unloaded firearm, whether operable or inoperable.

(*ii*) A knife, stabbing instrument, brass knuckles, blackjack, club, or other object specifically designed or customarily carried or possessed for use as a weapon.

(*iii*) An object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon or carried or possessed for use as a weapon.

(*iv*) An object or device that is used or fashioned in a manner to lead a person to believe the object or device is an object or device described in subparagraphs (*i*) to (*iii*).

(c) A violation of section 186a of the Michigan penal code, 1931 PA 328, MCL 750.186a, regarding escape or attempted escape from a juvenile facility, but only if the juvenile facility from which the individual escaped or attempted to escape was 1 of the following:

(*i*) A high-security or medium-security facility operated by the family independence agency or a county juvenile agency.

(*ii*) A high-security facility operated by a private agency under contract with the family independence agency or a county juvenile agency.

(d) A violation of section 7401(2)(a)(*i*) or 7403(2)(a)(*i*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403.

(e) An attempt to commit a violation described in subdivisions (a) to (d).

(f) Conspiracy to commit a violation described in subdivisions (a) to (d).

(g) Solicitation to commit a violation described in subdivisions (a) to (d).

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(h) Any lesser included offense of a violation described in subdivisions (a) to (g) if the individual is charged with a violation described in subdivisions (a) to (g).

(i) Any other violation arising out of the same transaction as a violation described in subdivisions (a) to (g) if the individual is charged with a violation described in subdivisions (a) to (g).

CREDIT(S)

P.A.1927, No. 175, c. IV, ß 1f, added by P.A.1988, No. 67, ß 1, Eff. Oct. 1, 1988. Amended by P.A.1994, No. 195, ß 1, Eff. Oct. 1, 1994; P.A.1996, No. 255, ß 1, Eff. Jan. 1, 1997; P.A.1998, No. 520, Imd. Eff. Jan. 12, 1999.

HISTORICAL AND STATUTORY NOTES

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For effective date and contingent effect provisions of P.A.1988, No. 67, see the note following ß 761.1.

The 1994 amendment substituted "or older but" for "and", "529, or 529a" for "or 529", and "750.529, and 750.529a" for "and 750.529".

P.A.1994, No. 195, ß ß 2 and 3, provide:

"Section 2. This amendatory act shall take effect October 1, 1994.

"Section 3. This amendatory act shall not take effect unless Senate Bill No. 773 of the 87th Legislature is enacted into law."

Senate Bill No. 773, was enacted as P.A.1994, No. 191, and was approved June 19, 1994 and filed June 21, 1994.

P.A.1994, No. 195, was ordered to take immediate effect, and was approved June 19, 1994 and filed June 21, 1994.

The 1996 amendment rewrote this section, which prior thereto read:

"If the prosecuting attorney has reason to believe that a juvenile 15 years of age or older but less than 17 years of age has violated section 83, 89, 91, 316, 317, 520b, 529, or 529a of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.83, 750.89, 750.91, 750.316, 750.317, 750.520b, 750.529, and 750.529a of the Michigan Compiled Laws, or section 7401(2)(a)(*i*) or 7403(2)(a)(*i*) of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.7401 and 333.7403 of the Michigan Compiled Laws, the prosecuting attorney may authorize the filing of a complaint and warrant on the charge with a magistrate concerning the juvenile."

For applicability, effective date, and contingent effect provisions of P.A.1996, No. 255, see the Historical and Statutory Notes following ß 762.15.

P.A.1998, No. 520, rewrote this section, which prior thereto read:

"Sec. 1f. (1) If the prosecuting attorney has reason to believe that a juvenile 14 years of age or older but less than 17 years of age has committed a specified juvenile violation, the prosecuting attorney may authorize the filing of a complaint and warrant on the charge with a magistrate concerning the juvenile.

"(2) As used in this section, 'specified juvenile violation' means any of the following:

"(a) A violation of section 72, 83, 86, 89, 91, 316, 317, 349, 520b, 529, 529a, or 531 of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.72, 750.83, 750.86, 750.89, 750.91, 750.316, 750.317,

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750.349, 750.520b, 750.529, 750.529a, and 750.531 of the Michigan Compiled Laws.

"(b) A violation of section 84 or 110a(2) of Act No. 328 of the Public Acts of 1931, being sections 750.84 and 750.110a of the Michigan Compiled Laws, if the juvenile is armed with a dangerous weapon. As used in this subdivision, 'dangerous weapon' means 1 or more of the following:

"(*i*) A loaded or unloaded firearm, whether operable or inoperable.

"(*ii*) A knife, stabbing instrument, brass knuckles, blackjack, club, or other object specifically designed or customarily carried or possessed for use as a weapon.

"(*iii*) An object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon or carried or possessed for use as a weapon.

"(*iv*) An object or device that is used or fashioned in a manner to lead a person to believe the object or device is an object or device described in subparagraphs (*i*) to (*iii*).

"(c) A violation of section 186a of Act No. 328 of the Public Acts of 1931, being section 750.186a of the Michigan Compiled Laws, regarding escape or attempted escape from a juvenile facility, but only if the juvenile facility from which the individual escaped or attempted to escape was 1 of the following:

"(*i*) A high-security or medium-security facility operated by the family independence agency.

"(*ii*) A high-security facility operated by a private agency under contract with the family independence agency.

"(d) A violation of section 7401(2)(a)(*i*) or 7403(2)(a)(*i*) of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.7401 and 333.7403 of the Michigan Compiled Laws.

"(e) An attempt to commit a violation described in subdivisions (a) to (d).

"(f) Conspiracy to commit a violation described in subdivisions (a) to (d).

"(g) Solicitation to commit a violation described in subdivisions (a) to (d).

"(h) Any lesser included offense of a violation described in subdivisions (a) to (g) if the individual is charged with a violation described in subdivisions (a) to (g).

"(i) Any other violation arising out of the same transaction as a violation described in subdivisions (a) to (g) if the individual is charged with a violation described in subdivisions (a) to (g)."

For contingent effect provisions of P.A.1998, No. 520, see the Historical and Statutory Notes following ß 761.1.

CROSS REFERENCES

Construction of references to family independence agency and department of social services as references to department of human services, see ß 400.226

Criminal procedure, rules governing, see MCR 6.001.

Proceedings involving juveniles, acquiring physical control of juvenile, see MCR 3.933.

Proceedings involving juveniles, arranging court appearance, detention of juvenile, see MCR 3.934.

Proceedings involving juveniles, preliminary hearing, see MCR 3.935.

M.C.L.A. 764.1f

LAW REVIEW AND JOURNAL COMMENTARIES

The worst of all possible worlds: Michigan's juvenile justice system and international standards for the treatment of children. Frank E. Vandervort & William E. Ladd, 78 U.Det. Mercy L.Rev. 203 (2001).

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Infants 68.5.
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Treatises and Practice Aids

Gillespie MI Crim. Law & Proc. Practice Deskbook App A, Appendix A. Michigan Court Rules of 1985 (Mcr) Chapter 5.

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Gillespie MI Crim. Law & Proc. ß 31:33, Taking Minor Into Custody.

Gillespie MI Crim. Law & Proc. ß 31:132, in General; Specified Juvenile Violations.

Gillespie MI Crim. Law & Proc. ß 31:137, Juvenile Sentencing Hearing-Procedure.

5 Michigan Court Rules Practice Text R 3.933, Acquiring Physical Control of Juvenile.

5 Michigan Court Rules Practice Text R 3.934, Arranging Court Appearance; Detained Juvenile.

5 Michigan Court Rules Practice Text R 3.935, Preliminary Hearing.

5 Michigan Court Rules Practice Text R 3.939, Case Transferred from District Court Pursuant to Subchapter 6.900.

5 Michigan Court Rules Practice Text ß 3933.1, Scope.

5 Michigan Court Rules Practice Text ß 3934.2, Duties of Apprehending Officer.

5A Michigan Court Rules Practice Text R 6.001, Scope; Applicability of Civil Rules; Superceded Rules and Statutes.

5A Michigan Court Rules Practice Text R 6.901, Applicability.

5A Michigan Court Rules Practice Text R 6.937, Commitment Review Hearing.

5A Michigan Court Rules Practice Text ß 6001.4, Juvenile Cases.

M.C.L.A. 764.1f

5A Michigan Court Rules Practice Text ß 6110.1, Right to Preliminary Examination.

5A Michigan Court Rules Practice Text ß 6903.2, Definition of Juvenile.

5A Michigan Court Rules Practice Text ß 6903.4, Definition of Specified Juvenile Violation (Retitled).

5A Michigan Court Rules Practice Text ß 6911.1, Right of Automatically Waived Juvenile to Preliminary Examination.

5A Michigan Court Rules Practice Text R 6.901 SCOPE, Purpose and Scope.

5A Michigan Court Rules Practice Text R 6.911 SCOPE, Purpose and Scope.

Michigan Pleading and Practice ß 113A:17.50, Automatic Waiver; Juvenile Over 14 Accused of Serious Felony.

NOTES OF DECISIONS

1. Validity

Sentence of life imprisonment without possibility of parole for defendant who committed murder one week before his seventeenth birthday was not grossly disproportionate to his crime, as would violate the Eighth Amendment. Foster v. Withrow, E.D.Mich.2001, 159 F.Supp.2d 629, affirmed 42 Fed.Appx. 701, 2002 WL 1766415. Homicide 1572; Sentencing And Punishment 1495

Statute giving prosecutors discretion to charge juveniles as adults for certain enumerated crimes, and to seek imposition of adult sentences with respect thereto, did not violate constitutional principle of separation of powers; statute was permissible legislative limitation on sentencing discretion of courts, and prosecutorial charging discretion thereunder did not have effect of allowing prosecutor to impose sentence. People v. Conat (1999) 605 N.W.2d 49, 238 Mich.App. 134, leave to appeal denied 622 N.W.2d 521, 461 Mich. 1013. Constitutional Law 80(1); Infants 68.7(2)

Statute giving prosecutors discretion to charge juveniles as adults for certain enumerated crimes, and to seek imposition of adult sentences with respect thereto, did not violate equal protection, in absence of any showing of intentional discrimination against particular group of juveniles, despite fact that exercise of prosecutorial discretion resulted in some juveniles being charged and sentenced differently from others. People v. Conat (1999) 605 N.W.2d 49, 238 Mich.App. 134, leave to appeal denied 622 N.W.2d 521, 461 Mich. 1013. Constitutional Law 242.1(4); Infants 68.7(2)

In order to hold that exercise of prosecutorial charging discretion through statute giving prosecutors discretion to charge juveniles as adults for certain enumerated crimes, and to seek imposition of adult sentences with respect thereto, violates equal protection, it must be demonstrated that prosecutor, on basis of impermissible factors, decided to charge as adults certain juveniles who committed certain crimes and to charge as juveniles other juveniles who committed same crimes. People v. Conat (1999) 605 N.W.2d 49, 238 Mich.App. 134, leave to appeal denied 622 N.W.2d 521, 461 Mich. 1013. Constitutional Law 242.1(4); Infants 68.7(2)

M.C.L.A. 764.1f

Statute giving prosecutors discretion to charge juveniles at least fourteen years of age as adults for certain enumerated crimes, and to seek imposition of adult sentences with respect thereto, did not deny juveniles constitutional right to due process, as juveniles engaging in criminal conduct had no constitutional right to be treated differently from adults, entire juvenile justice system was legislatively created and subject to legislative amendment, and without juvenile justice system all juveniles would be subject to adult criminal penalties. People v. Conat (1999) 605 N.W.2d 49, 238 Mich.App. 134, leave to appeal denied 622 N.W.2d 521, 461 Mich. 1013. Constitutional Law 255(4); Infants 68.2

Statute giving prosecutors discretion to seek imposition of adult sentences upon certain juveniles at least fourteen years of age without sentencing hearing prevailed over court rule requiring sentencing hearing before sentencing juvenile as adult, to extent statute and rule were in direct conflict, as statute was matter of substantive law. People v. Conat (1999) 605 N.W.2d 49, 238 Mich.App. 134, leave to appeal denied 622 N.W.2d 521, 461 Mich. 1013. Infants 68.2

Automatic waiver law and related court rules applicable to juveniles charged with life offenses subject to jurisdiction of district, circuit and recorder's court did not violate separation of powers doctrine set forth in State Constitution since waiver statutes and rules did not give prosecutors authority to exercise judicial power; rather, automatic waiver provisions simply vested circuit courts with jurisdiction to hear certain cases that previously came within exclusive jurisdiction of probate courts and consequently, while prosecutors had choice of proceeding in either probate court or circuit court, all judicial power continued to be exercised by judiciary. People v. Black (1994) 513 N.W.2d 152, 203 Mich.App. 428. Constitutional Law 80(1); Infants 68.2; Infants 68.5

2. In general

A minor who is alleged to have engaged in conduct which would constitute a crime if minor were an adult can be (1) tried and sentenced as a juvenile, (2) tried as an adult and sentenced as a juvenile, or (3) tried and sentenced as an adult. People v. Thenghkam (2000) 610 N.W.2d 571, 240 Mich.App. 29.

3. Construction with other law

Conflict between statute giving prosecutors discretion to seek imposition of adult sentences upon certain juveniles at least fourteen years of age without sentencing hearing, and court rule requiring sentencing hearing before sentencing juvenile as adult, did not amount to unconstitutional infringement on Supreme Court's rulemaking authority, as statute was substantive rather than procedural and court's exclusive rulemaking authority extended to matters of practice and procedure; statute reflected substantive policy choice by legislature to require more severe punishment for juveniles who commit serious crimes. People v. Conat (1999) 605 N.W.2d 49, 238 Mich.App. 134, leave to appeal denied 622 N.W.2d 521, 461 Mich. 1013. Constitutional Law 80(1); Infants 68.7(2)

4. Jurisdiction, generally

By filing a complaint in a Circuit Court against a juvenile for one of the enumerated offenses, prosecutor "automatically" waives the jurisdiction of the Family Division of Circuit Court, and vests jurisdiction of the case in the Circuit Court. People v. Thenghkam (2000) 610 N.W.2d 571, 240 Mich.App. 29.

5. Prosecutor's discretion

Prosecutor alone has discretion to decide to charge and try a juvenile, age 14 or older, as an adult for a select group of 17 specified offenses, along with any lesser included offenses, or the crimes of attempt, conspiracy, or solicitation to commit those enumerated offense. People v. Thenghkam (2000) 610 N.W.2d 571, 240 Mich.App. 29.

6. Felony-firearm charges

M.C.L.A. 764.1f

Automatic waiver statute, which grants recorder's court and circuit court jurisdiction as to certain enumerated life felonies, did not grant recorder's court ancillary jurisdiction with respect to juvenile's felony-firearm charge; therefore, recorder's court did not have jurisdiction to accept juvenile's plea of guilty to that charge. People v. Miller (1993) 503 N.W.2d 89, 199 Mich.App. 609, appeal denied 519 N.W.2d 842, 445 Mich. 855, reconsideration denied 521 N.W.2d 610. Infants 68.5

7. Adult sentence

If juvenile is convicted as an adult of an enumerated offense, which is actually a subset of the 17 offenses that fall under the automatic waiver provision, circuit court must impose an adult sentence on the juvenile, as determined by statute and sentencing guidelines, and retains authority within statutory limits to sentence the juvenile to an adult or juvenile sentence for the remaining offenses. People v. Thenghkam (2000) 610 N.W.2d 571, 240 Mich.App. 29.

8. Review

Juveniles' motions to dismiss charges brought against them as adults presented actual controversy involving constitutionality of statute under which they were charged, despite fact that two of the four juveniles had not yet been convicted; one juvenile had entered plea of no contest based on trial court's indication that it would sentence him as juvenile, and all four juveniles faced real and immediate threat of adult sentences upon conviction. People v. Conat (1999) 605 N.W.2d 49, 238 Mich.App. 134, leave to appeal denied 622 N.W.2d 521, 461 Mich. 1013. Infants 68.7(2)

M. C. L. A. 764.1f, **MI ST 764.1f**

Current through P.A. 2005, No. 1-340 (End)

END OF DOCUMENT

M.C.L.A. 767.39

C
MICHIGAN COMPILED LAWS ANNOTATED
CODE OF CRIMINAL PROCEDURE CHAPTERS 760 TO 777
CHAPTER 767. **CODE OF CRIMINAL PROCEDURE--GRAND JURIES, INDICTMENTS, INFORMATIONS AND PROCEEDINGS BEFORE TRIAL**
CHAPTER VII. GRAND JURIES, INDICTMENTS, INFORMATIONS AND PROCEEDINGS BEFORE TRIAL

➡767.39. Abolition of distinction between accessory and principal

Sec. 39. Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

Current through P.A. 2005, No. 1-340 (End)

END OF DOCUMENT

M.C.L.A. 769.1

Michigan Compiled Laws Annotated Currentness
Code of Criminal Procedure Chapters 760 to 777
Chapter 769. Code of Criminal Procedure--Judgment and Sentence (Refs & Annos)
Chapter IX. Judgment and Sentence (Refs & Annos)

→769.1. Sentencing; juveniles sentenced in same manner as adults; fingerprints; juveniles, hearing and determination; waiver; transcripts; reimbursement, collection, intercept orders; attorney fees; annual review of services; report to department of commerce

Sec. 1. (1) A judge of a court having jurisdiction may pronounce judgment against and pass sentence upon a person convicted of an offense in that court. The sentence shall not exceed the sentence prescribed by law. The court shall sentence a juvenile convicted of any of the following crimes in the same manner as an adult:

(a) Arson of a dwelling in violation of section 72 of the Michigan penal code, 1931 PA 328, MCL 750.72.

(b) Assault with intent to commit murder in violation of section 83 of the Michigan penal code, 1931 PA 328, MCL 750.83.

(c) Assault with intent to maim in violation of section 86 of the Michigan penal code, 1931 PA 328, MCL 750.86.

(d) Attempted murder in violation of section 91 of the Michigan penal code, 1931 PA 328, MCL 750.91.

(e) Conspiracy to commit murder in violation of section 157a of the Michigan penal code, 1931 PA 328, MCL 750.157a.

(f) Solicitation to commit murder in violation of section 157b of the Michigan penal code, 1931 PA 328, MCL 750.157b.

(g) First degree murder in violation of section 316 of the Michigan penal code, 1931 PA 328, MCL 750.316.

(h) Second degree murder in violation of section 317 of the Michigan penal code, 1931 PA 328, MCL 750.317.

(i) Kidnapping in violation of section 349 of the Michigan penal code, 1931 PA 328, MCL 750.349.

(j) First degree criminal sexual conduct in violation of section 520b of the Michigan penal code, 1931 PA 328, MCL 750.520b.

(k) Armed robbery in violation of section 529 of the Michigan penal code, 1931 PA 328, MCL 750.529.

(*l*) Carjacking in violation of section 529a of the Michigan penal code, 1931 PA 328, MCL 750.529a.

(2) A person convicted of a felony or of a misdemeanor punishable by imprisonment for more than 92 days shall not be sentenced until the court has examined the court file and has determined that the person's fingerprints have been taken.

(3) Unless a juvenile is required to be sentenced in the same manner as an adult under subsection (1), a judge of a court having jurisdiction over a juvenile shall conduct a hearing at the juvenile's sentencing to determine if the best interests of the public would be served by placing the juvenile on probation and committing the juvenile to an institution or agency described in the youth rehabilitation services act, 1974 PA 150, MCL 803.301 to 803.309, or by imposing any other sentence provided by law for an adult offender. Except as provided in subsection (5), the

court shall sentence the juvenile in the same manner as an adult unless the court determines by a preponderance of the evidence that the interests of the public would be best served by placing the juvenile on probation and committing the juvenile to an institution or agency described in the youth rehabilitation services act, 1974 PA 150, MCL 803.301 to 803.309. The rules of evidence do not apply to a hearing under this subsection. In making the determination required under this subsection, the judge shall consider all of the following, giving greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency:

(a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.

(b) The juvenile's culpability in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.

(c) The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.

(d) The juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming.

(e) The adequacy of the punishment or programming available in the juvenile justice system.

(f) The dispositional options available for the juvenile.

(4) With the consent of the prosecutor and the defendant, the court may waive the hearing required under subsection (3). If the court waives the hearing required under subsection (3), the court may place the juvenile on probation and commit the juvenile to an institution or agency described in the youth rehabilitation services act, 1974 PA 150, MCL 803.301 to 803.309, but shall not impose any other sentence provided by law for an adult offender.

(5) If a juvenile is convicted of a violation or conspiracy to commit a violation of section 7403(2)(a)(*i*) of the public health code, 1978 PA 368, MCL 333.7403, the court shall determine whether the best interests of the public would be served by imposing the sentence provided by law for an adult offender, by placing the individual on probation and committing the individual to an institution or agency under subsection (3), or by imposing a sentence of imprisonment for any term of years but not less than 25 years. If the court determines by clear and convincing evidence that the best interests of the public would be served by imposing a sentence of imprisonment for any term of years but not less than 25 years, the court may impose that sentence. In making its determination, the court shall use the criteria specified in subsection (3).

(6) The court shall state on the record the court's findings of fact and conclusions of law for the probation and commitment decision or sentencing decision made under subsection (3). If a juvenile is committed under subsection (3) to an institution or agency described in the youth rehabilitation services act, 1974 PA 150, MCL 803.301 to 803.309, a transcript of the court's findings shall be sent to the family independence agency or county juvenile agency, as applicable.

(7) If a juvenile is committed under subsection (3) or (4) to an institution or agency described in the youth rehabilitation services act, 1974 PA 150, MCL 803.301 to 803.309, the written order of commitment shall contain a provision for the reimbursement to the court by the juvenile or those responsible for the juvenile's support, or both, for the cost of care or service. The amount of reimbursement ordered shall be reasonable, taking into account both the income and resources of the juvenile and those responsible for the juvenile's support. The amount may be based upon the guidelines and model schedule prepared under section 18(6) of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.18. The reimbursement provision applies during the entire period the juvenile remains in care outside the juvenile's own home and under court supervision. The court shall provide for the collection of all amounts ordered to be reimbursed, and the money collected shall be accounted for and reported to the county board of commissioners. Collections to cover delinquent accounts or to pay the balance due on reimbursement orders may

be made after a juvenile is released or discharged from care outside the juvenile's own home and under court supervision. Twenty-five percent of all amounts collected pursuant to an order entered under this subsection shall be credited to the appropriate fund of the county to offset the administrative cost of collections. The balance of all amounts collected pursuant to an order entered under this subsection shall be divided in the same ratio in which the county, state, and federal government participate in the cost of care outside the juvenile's own home and under county, state, or court supervision. The court may also collect benefits paid by the government of the United States for the cost of care of the juvenile. Money collected for juveniles placed with or committed to the family independence agency or a county juvenile agency shall be accounted for and reported on an individual basis. In cases of delinquent accounts, the court may also enter an order to intercept state tax refunds or the federal income tax refund of a child, parent, guardian, or custodian and initiate the necessary offset proceedings in order to recover the cost of care or service. The court shall send to the person who is the subject of the intercept order advance written notice of the proposed offset. The notice shall include notice of the opportunity to contest the offset on the grounds that the intercept is not proper because of a mistake of fact concerning the amount of the delinquency or the identity of the person subject to the order. The court shall provide for the prompt reimbursement of an amount withheld in error or an amount found to exceed the delinquent amount.

(8) If the court appoints an attorney to represent a juvenile, an order entered under this section may require the juvenile or person responsible for the juvenile's support, or both, to reimburse the court for attorney fees.

(9) An order directed to a person responsible for the juvenile's support under this section is not binding on the person unless an opportunity for a hearing has been given and until a copy of the order is served on the person, personally or by first-class mail to the person's last known address.

(10) If a juvenile is placed on probation and committed under subsection (3) or (4) to an institution or agency described in the youth rehabilitation services act, 1974 PA 150, MCL 803.301 to 803.309, the court shall retain jurisdiction over the juvenile while the juvenile is on probation and committed to that institution or agency.

(11) If the court has retained jurisdiction over a juvenile under subsection (10), the court shall conduct an annual review of the services being provided to the juvenile, the juvenile's placement, and the juvenile's progress in that placement. In conducting this review, the court shall examine the juvenile's annual report prepared under section 3 of the juvenile facilities act, 1988 PA 73, MCL 803.223. The court may order changes in the juvenile's placement or treatment plan including, but not limited to, committing the juvenile to the jurisdiction of the department of corrections, based on the review.

(12) If an individual who is under the court's jurisdiction under section 4 of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.4, is convicted of a violation or conspiracy to commit a violation of section 7403(2)(a)(*i*) of the public health code, 1978 PA 368, MCL 333.7403, the court shall determine whether the best interests of the public would be served by imposing the sentence provided by law for an adult offender or by imposing a sentence of imprisonment for any term of years but not less than 25 years. If the court determines by clear and convincing evidence that the best interests of the public would be served by imposing a sentence of imprisonment for any term of years but not less than 25 years, the court may impose that sentence. In making its determination, the court shall use the criteria specified in subsection (3) to the extent they apply.

(13) If the defendant is sentenced for an offense other than a listed offense as defined in section 2(d)(*i*) to (*ix*) and (*xi*) to (*xiii*) of the sex offenders registration act, 1994 PA 295, MCL 28.722, the court shall determine if the offense is a violation of a law of this state or a local ordinance of a municipality of this state that by its nature constitutes a sexual offense against an individual who is less than 18 years of age. If so, the conviction is for a listed offense as defined in section 2(d)(*x*) of the sex offenders registration act, 1994 PA 295, MCL 28.722, and the court shall include the basis for that determination on the record and include the determination in the judgment of sentence.

(14) When sentencing a person convicted of a misdemeanor involving the illegal delivery, possession, or use of alcohol or a controlled substance or a felony, the court shall examine the presentence investigation report and determine if the person being sentenced is licensed or registered under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838. The court shall also examine the court file and determine if a report of the conviction upon which the person is being sentenced has been forwarded to the department of consumer and

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industry services as provided in section 16a. If the report has not been forwarded to the department of consumer and industry services, the court shall order the clerk of the court to immediately prepare and forward the report as provided in section 16a.

CREDIT(S)

Amended by P.A.1986, No. 232, ß 1, Eff. June 1, 1987; P.A.1988, No. 78, ß 1, Eff. Oct. 1; P.A.1989, No. 113, ß 1, Imd. Eff. June 23; P.A.1993, No. 85, ß 1, Eff. April 1, 1994; P.A.1996, No. 247, ß 1, Eff. Jan. 1, 1997; P.A.1996, No. 248, ß 1, Eff. Jan. 1, 1997; P.A.1998, No. 520, Imd. Eff. Jan. 12, 1999; P.A.1999, No. 87, Eff. Sept. 1, 1999.

HISTORICAL AND STATUTORY NOTES

2000 Main Volume

Source:
P.A.1927, No. 175, c. IX, § 1, Eff. Sept. 5.
C.L.1929, § 17329.
C.L.1948, § 769.1.
C.L.1970, § 769.1.

The 1980 amendment rewrote the section, which prior thereto read:

"The justices of the supreme court, or any of them, or any of the several circuit judges in the respective circuits, or any judge of a court of record having jurisdiction of criminal cases, in this state, are hereby authorized and empowered to pronounce judgment against and pass sentence upon all persons heretofore convicted, or that may hereafter be convicted in any court held by said justices, or judges, or any of them, for any offense heretofore committed or that may hereafter be committed against the laws of this state: Provided, That such sentence shall in no case or respect be greater than the penalty now or that may be prescribed hereafter by law."

The 1986 amendment inserted the subsection numbering; and added subsec. (2).

For contingent effect and effective date provisions of P.A.1986, No. 232, see the note following § 764.29.

The 1988 amendment, in subsec. (1), in the first sentence, substituted "that court" for "a court held by that judge"; and added subsecs. (3) to (10).

P.A.1988, No. 78, § 2, provides:

"This amendatory act shall not take effect unless all of the following bills of the 84th Legislature are enacted into law:

"(a) House Bill No. 4731.

"(b) House Bill No. 4733.

"(c) House Bill No. 4741.

"(d) House Bill No. 4748.

"(e) House Bill No. 4750.

"(f) House Bill No. 5203.

"(g) Senate Bill No. 137.

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"(h) Senate Bill No. 601.

"(i) Senate Bill No. 604.

"(j) Senate Bill No. 605.

"(k) Senate Bill No. 607.

"(l) Senate Bill No. 608."

House Bill Nos. 4731, 4733, 4741, 4748, 4750, and 5203, were enacted as P.A.1988, Nos. 51, 52, 53, 67, 54, and 182 respectively; P.A.1988, Nos. 51 to 54, were approved March 13, 1988 and filed March 14, 1988; P.A.1988, No. 67, was approved March 24, 1988 and filed March 25, 1988; P.A.1988, No. 182, was approved June 20, 1988 and filed June 21, 1988.

Senate Bill Nos. 137, 601, 604, 605, 607 and 608, were enacted as P.A.1988, Nos. 64 and 73, 74, 75, 76, and 77, respectively; P.A.1988, No. 64, was approved and filed March 24, 1988; P.A.1988, Nos. 73 to 77, were approved March 27, 1988 and filed March 28, 1988.

P.A.1988, No. 78, § 3, as amended by P.A.1988, No. 181, § 1, Imd. Eff. June 21, 1988, provides:

"This amendatory act shall take effect October 1, 1988."

P.A.1988, No. 78, was ordered to take immediate effect, and was approved March 27, 1988 and filed March 28, 1988.

The 1989 amendment, in subsec. (6), added the eleventh to fourteenth sentences; and in subsec. (10), in the second sentence added ", Act No. 73 of the Public Acts of 1988, being section 803.223 of the Michigan Compiled Laws".

P.A.1989, No. 113, § 2, provides:

"This amendatory act shall not take effect unless Senate Bill No. 137 of the 85th Legislature is enacted into law."

Senate Bill No. 137, was enacted as P.A.1989, No. 112, and was approved June 22, 1989 and filed June 23, 1989.

P.A.1989, No. 113, was ordered to take immediate effect, and was approved June 22, 1989 and was filed June 23, 1989.

The 1993 amendment, in subsec. (4), in the second sentence substituted "shall not impose" for "may not impose"; and added subsec. (11).

P.A.1993, No. 85, § 2, provides:

"This amendatory act shall not take effect unless all of the following bills of the 87th Legislature are enacted into law:

"(a) House Bill No. 4076.

"(b) House Bill No. 4295."

House Bill Nos. 4076 and 4295, were enacted as P.A.1993, Nos. 80 and 79, respectively, and were approved July 8, 1993 and filed July 9, 1993.

P.A.1993, No. 85, was not ordered to take immediate effect, and was approved July 8, 1993 and filed July 9, 1993.

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P.A.1996, No. 247 rewrote subsecs. (1) to (3), which prior thereto read:

"(1) A judge of a court having jurisdiction is authorized and empowered to pronounce judgment against and pass sentence upon a person convicted of an offense in that court. The sentence shall not be in excess of the sentence prescribed by law.

"(2) The sentencing of a person convicted of a felony or a misdemeanor punishable by imprisonment for more than 92 days shall not occur until the court has examined the court file and has determined that the fingerprints of the person have been taken.

"(3) A judge of a court having jurisdiction over a juvenile shall conduct a hearing at the juvenile's sentencing to determine if the best interests of the juvenile and the public would be served by placing the juvenile on probation and committing the juvenile to a state institution or agency described in the youth rehabilitation services act, Act No. 150 of the Public Acts of 1974, being sections 803.301 to 803.309 of the Michigan Compiled Laws, or by imposing any other sentence provided by law for an adult offender. The rules of evidence do not apply to a hearing under this subsection. In making this determination, the judge shall consider the following criteria giving each weight as appropriate to the circumstances:

"(a) The prior record and character of the juvenile, his or her physical and mental maturity, and his or her pattern of living.

"(b) The seriousness and the circumstances of the offense.

"(c) Whether the offense is part of a repetitive pattern of offenses which would lead to 1 of the following determinations:

"(i) The juvenile is not amenable to treatment.

"(ii) That despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to disrupt the rehabilitation of other juveniles in the treatment program.

"(d) 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 if released at the age of 21.

"(e) 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.

"(f) What is in the best interests of the public welfare and the protection of the public security."

P.A.1996, No. 247, also, in subsec. (5), in the second sentence substituted "family independence agency" for "department of social services"; in subsec. (6), in the tenth sentence substituted "family independence agency" for "state department of social services"; in subsec. (10), in the third sentence inserted "including, but not limited to, committing the juvenile to the jurisdiction of the department of corrections,"; and, in subsec. (11), in the first sentence substituted "When" for "At the time of", and in the second and third sentences substituted "consumer and industry services" for "commerce".

P.A.1996 No. 247, §§ 2 to 4, provide:

"Section 2. This amendatory act applies to offenses committed on or after its effective date.

"Section 3. This amendatory act shall take effect January 1, 1997.

"Section 4. This amendatory act shall not take effect unless all of the following bills of the 88th Legislature are enacted into law:

"(a) Senate Bill No. 281.

"(b) Senate Bill No. 283.

"(c) Senate Bill No. 682.

"(d) Senate Bill No. 689.

"(e) Senate Bill No. 700.

"(f) Senate Bill No. 724.

"(g) Senate Bill No. 867.

"(h) Senate Bill No. 870.

"(i) House Bill No. 4037.

"(j) House Bill No. 4038.

"(k) House Bill No. 4044.

"(l) House Bill No. 4371.

"(m) House Bill No. 4445.

"(n) House Bill No. 4486.

"(o) House Bill No. 4487.

"(p) House Bill No. 4490."

Senate Bill Nos. 281, 283, 682, 689, 700, 724, 867, and 870, were enacted as P.A.1996, Nos. 248, 249, 244, 250, 253, 254, 255, and 256, respectively, and were approved June 11, 1996 and filed June 12, 1996; House Bill Nos. 4037, 4038, 4044, 4371, 4445, 4486, 4487, and 4490, were enacted as P.A.1996, Nos. 257, 258, 245, 246, 259, 260, 261, and 262, respectively, and were approved June 11, 1996 and filed June 12, 1996.

P.A.1996, No. 247, was ordered to take immediate effect, and was approved June 11, 1996 and filed June 12, 1996.

P.A.1996, No. 248, in subsec. (3), in the second sentence inserted "Except as provided in subsection (5),"; inserted subsec. (5); redesignated former subsecs. (5) to (10) as subsecs. (6) to (11), respectively; in subsec. (9), substituted "is not binding" for "shall not be effectual and binding"; in subsec. (11), in the first sentence substituted "(10)" for "(9)"; inserted subsec. (12); and redesignated former subsec. (11) as subsec. (13).

P.A.1996, No. 248, §§ 2 to 4, provide:

"Section 2. This amendatory act applies to offenses committed on or after its effective date.

"Section 3. This amendatory act shall take effect January 1, 1997.

"Section 4. This amendatory act shall not take effect unless all of the following bills of the 88th Legislature are enacted into law:

"(a) Senate Bill No. 283.

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"(b) Senate Bill No. 682.

"(c) Senate Bill No. 689.

"(d) Senate Bill No. 699.

"(e) Senate Bill No. 700.

"(f) Senate Bill No. 724.

"(g) Senate Bill No. 867.

"(h) Senate Bill No. 870.

"(i) House Bill No. 4037.

"(j) House Bill No. 4038.

"(k) House Bill No. 4044.

"(l) House Bill No. 4371.

"(m) House Bill No. 4445.

"(n) House Bill No. 4486.

"(o) House Bill No. 4487.

"(p) House Bill No. 4490."

Senate Bill Nos. 283, 682, 689, 699, 700, 724, 867, and 870, were enacted as P.A.1996, Nos. 249, 244, 250, 247, 253, 254, 255, and 256, respectively, and were approved June 11, 1996 and filed June 12, 1996; House Bill Nos. 4037, 4038, 4044, 4371, 4445, 4486, 4487, and 4490, were enacted as P.A.1996, Nos. 257, 258, 245, 246, 259, 260, 261, and 262, respectively, and were approved June 11, 1996 and filed June 12, 1996.

P.A.1996, No. 248, was ordered to take immediate effect, and was approved June 11, 1996 and filed June 12, 1996.

P.A.1998, No. 520, rewrote this section, which prior thereto read:

"Sec. 1. (1) A judge of a court having jurisdiction may pronounce judgment against and pass sentence upon a person convicted of an offense in that court. The sentence shall not exceed the sentence prescribed by law. The court shall sentence a juvenile convicted of any of the following crimes in the same manner as an adult:

"(a) Arson of a dwelling in violation of section 72 of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being section 750.72 of the Michigan Compiled Laws.

"(b) Assault with intent to commit murder in violation of section 83 of Act No. 328 of the Public Acts of 1931, being section 750.83 of the Michigan Compiled Laws.

"(c) Assault with intent to main in violation of section 86 of Act No. 328 of the Public Acts of 1931, being section 750.86 of the Michigan Compiled Laws.

"(d) Attempted murder in violation of section 91 of Act No. 328 of the Public Acts of 1931, being section 750.91 of the Michigan Compiled Laws.

"(e) Conspiracy to commit murder in violation of section 157a of Act No. 328 of the Public Acts of 1931, being section 750.157a of the Michigan Compiled Laws.

"(f) Solicitation to commit murder in violation of section 157b of Act No. 328 of the Public Acts of 1931, being section 750.157b of the Michigan Compiled Laws.

"(g) First degree murder in violation of section 316 of Act No. 328 of the Public Acts of 1931, being section 750.316 of the Michigan Compiled Laws.

"(h) Second degree murder in violation of section 317 of Act No. 328 of the Public Acts of 1931, being section 750.317 of the Michigan Compiled Laws.

"(i) Kidnapping in violation of section 349 of Act No. 328 of the Public Acts of 1931, being section 750.349 of the Michigan Compiled Laws.

"(j) First degree criminal sexual conduct in violation of section 520b of Act No. 328 of the Public Acts of 1931, being section 750.520b of the Michigan Compiled Laws.

"(k) Armed robbery in violation of section 529 of Act No. 328 of the Public Acts of 1931, being section 750.529 of the Michigan Compiled Laws.

"(l) Carjacking in violation of section 529a of Act No. 328 of the Public Acts of 1931, being section 750.529a of the Michigan Compiled Laws.

"(2) A person convicted of a felony or of a misdemeanor punishable by imprisonment for more than 92 days shall not be sentenced until the court has examined the court file and has determined that the fingerprints of the person have been taken.

"(3) Unless a juvenile is required to be sentenced in the same manner as an adult under subsection (1), a judge of a court having jurisdiction over a juvenile shall conduct a hearing at the juvenile's sentencing to determine if the best interests of the public would be served by placing the juvenile on probation and committing the juvenile to a state institution or agency described in the youth rehabilitation services act, Act No. 150 of the Public Acts of 1974, being sections 803.301 to 803.309 of the Michigan Compiled Laws, or by imposing any other sentence provided by law for an adult offender. Except as provided in subsection (5), the court shall sentence the juvenile in the same manner as an adult unless the court determines by a preponderance of the evidence that the interests of the public would be best served by placing the juvenile on probation and committing the juvenile to a state institution or agency described in Act No. 150 of the Public Acts of 1974. The rules of evidence do not apply to a hearing under this subsection. In making the determination required under this subsection, the judge shall consider all of the following, giving greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency:

"(a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.

"(b) The culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.

"(c) The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.

"(d) The juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming.

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"(e) The adequacy of the punishment or programming available in the juvenile justice system.

"(f) The dispositional options available for the juvenile.

"(4) With the consent of the prosecutor and the defendant, the court may waive the hearing required under subsection (3). If the court waives the hearing required under subsection (3), the court may place the juvenile on probation and commit the juvenile to a state institution or agency described in Act No. 150 of the Public Acts of 1974, but shall not impose any other sentence provided by law for an adult offender.

"(5) If a juvenile is convicted of a violation or conspiracy to commit a violation of section 7401(2)(a)(i) or 7403(2)(a)(i) of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.7401 and 333.7403 of the Michigan Compiled Laws, the court shall determine whether the best interests of the public would be served by imposing the sentence provided by law for an adult offender, by placing the individual on probation and committing the individual to a state institution or agency under subsection (3), or by imposing a sentence of imprisonment for any term of years but not less than 25 years. If the court determines by clear and convincing evidence that the best interests of the public would be served by imposing a sentence of imprisonment for any term of years but not less than 25 years, the court may impose that sentence. In making its determination, the court shall use the criteria specified in subsection (3).

"(6) The court shall state on the record the court's findings of fact and conclusions of law for the probation and commitment decision or sentencing decision made under subsection (3). If a juvenile is committed under subsection (3) to a state institution or agency described in Act No. 150 of the Public Acts of 1974, a transcript of the court's findings shall be sent to the family independence agency.

"(7) If a juvenile is committed under subsection (3) or (4) to a state institution or agency described in Act No. 150 of the Public Acts of 1974, the written order of commitment shall contain a provision for the reimbursement to the court by the juvenile or those responsible for the juvenile's support, or both, for the cost of care or service. The amount of reimbursement ordered shall be reasonable, taking into account both the income and resources of the juvenile and those responsible for the juvenile's support. The amount may be based upon the guidelines and model schedule prepared under section 18(6) of chapter XIIA of Act No. 288 of the Public Acts of 1939, being section 712A.18 of the Michigan Compiled Laws. The reimbursement provision shall apply during the entire period the juvenile remains in care outside the juvenile's own home and under court supervision. The court shall provide for the collection of all amounts ordered to be reimbursed, and the money collected shall be accounted for and reported to the county board of commissioners. Collections to cover delinquent accounts or to pay the balance due on reimbursement orders may be made after a juvenile is released or discharged from care outside the juvenile's own home and under court supervision. Twenty-five percent of all amounts collected pursuant to an order entered under this subsection shall be credited to the appropriate fund of the county to offset the administrative cost of collections. The balance of all amounts collected pursuant to an order entered under this subsection shall be divided in the same ratio in which the county, state, and federal government participate in the cost of care outside the juvenile's own home and under state or court supervision. The court may also collect benefits paid by the government of the United States for the cost of care of the juvenile. Money collected for juveniles placed with or committed to the family independence agency shall be accounted for and reported on an individual basis. In cases of delinquent accounts, the court may also enter an order to intercept state tax refunds or the federal income tax refund of a child, parent, guardian, or custodian and initiate the necessary offset proceedings in order to recover the cost of care or service. The court shall send to the person who is the subject of the intercept order advance written notice of the proposed offset. The notice shall include notice of the opportunity to contest the offset on the grounds that the intercept is not proper because of a mistake of fact concerning the amount of the delinquency or the identity of the person subject to the order. The court shall provide for the prompt reimbursement of an amount withheld in error or an amount found to exceed the delinquent amount.

"(8) If the court appoints an attorney to represent a juvenile, an order entered under this section may require the juvenile or person responsible for the juvenile's support, or both, to reimburse the court for attorney fees.

M.C.L.A. 769.1

"(9) An order directed to a person responsible for the juvenile's support under this section is not binding on the person unless an opportunity for a hearing has been given and until a copy of the order is served on the person, personally or by first-class mail to the person's last known address.

"(10) If a juvenile is placed on probation and committed under subsection (3) or (4) to a state institution or agency described in Act No. 150 of the Public Acts of 1974, the court shall retain jurisdiction over the juvenile while the juvenile is on probation and committed to that state institution or agency.

"(11) If the court has retained jurisdiction over a juvenile under subsection (10), the court shall conduct an annual review of the services being provided to the juvenile, the juvenile's placement, and the juvenile's progress in that placement. In conducting this review, the court shall examine the juvenile's annual report prepared pursuant to section 3 of the juvenile facilities act, Act No. 73 of the Public Acts of 1988, being section 803.223 of the Michigan Compiled Laws. The court may order changes in the juvenile's placement or treatment plan including, but not limited to, committing the juvenile to the jurisdiction of the department of corrections, based on the review.

"(12) If an individual who is under the court's jurisdiction under section 4 of chapter XIIA of Act No. 288 of the Public Acts of 1939, being section 712A.4 of the Michigan Compiled Laws, is convicted of a violation or conspiracy to commit a violation of section 7401(2)(a)(i) or section 7403(2)(a)(i) of Act No. 368 of the Public Acts of 1978, the court shall determine whether the best interests of the public would be served by imposing the sentence provided by law for an adult offender or by imposing a sentence of imprisonment for any term of years but not less than 25 years. If the court determines by clear and convincing evidence that the best interests of the public would be served by imposing a sentence of imprisonment for any term of years but not less than 25 years, the court may impose that sentence. In making its determination, the court shall use the criteria specified in subsection (3).

"(13) When sentencing a person convicted of a misdemeanor involving the illegal delivery, possession, or use of alcohol or a controlled substance or a felony, the court shall examine the presentence investigation report and determine if the person being sentenced is licensed or registered under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.18838 of the Michigan Compiled Laws. The court shall also examine the court file and determine if a report of the conviction upon which the person is being sentenced has been forwarded to the department of consumer and industry services as provided in section 16a. If the report has not been forwarded to the department of consumer and industry services, the court shall order the clerk of the court to immediately prepare and forward the report as provided in section 16a."

For contingent effect provisions of P.A.1998, No. 520, see the Historical and Statutory Notes following § 761.1.

P.A.1999, No. 87, in subsec. (5), in the first sentence deleted "7401(2)(a)(i) or" following "of section" and "333.7401 and" following "MCL"; in subsec. (12), in the first sentence deleted "section 7401(2)(a)(i) or" following "violation of" and "333.7401 and" following "MCL"; inserted subsec. (13); redesignated former subsec. (13) as subsec. (14); and made nonsubstantive changes in textual citation styles throughout the section.

P.A.1999, No. 87, enacting §§ 1 and 2, provide:

"Enacting section 1. This amendatory act takes effect September 1, 1999.

"Enacting section 2. This amendatory act does not take effect unless Senate Bill No. 566 of the 90th Legislature is enacted into law."

Senate Bill No. 566, was enacted as P.A.1999, No. 85, and was approved and filed June 28, 1999.

P.A.1999, No. 87, was ordered to take immediate effect, and was approved and filed June 28, 1999.

Prior Laws:
P.A.1850, No. 162, § 3.
P.A.1851, No. 166.
C.L.1857, § 6113.

M.C.L.A. 769.1

C.L.1871, § 7997.
How. § 9613.
C.L.1897, § 11983.
C.L.1915, § 15856.

LEXSEE 186 MICH APP 625

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v. DAMION LAVOIAL TODD, Defendant-Appellant. PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v. VERNARD CARTER, Defendant-Appellant. PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v. DERRICK TYRONE McCLURE, Defendant-Appellant

Docket Nos. 98203, 98575, 99632

Court of Appeals of Michigan

186 Mich. App. 625; 465 N.W.2d 380; 1990 Mich. App. LEXIS 499

October 4, 1990, Submitted December 17, 1990, Decided

DISPOSITION: [***1]

Todd, affirmed but remanded for a resentencing.
McClure, affirmed but remanded for a resentencing.
Carter, reversed and remanded for a new trial.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants appealed from their convictions in the trial court on charges stemming from a fatal drive-by shooting.

OVERVIEW: Defendants were convicted of various charges arising from a fatal drive-by shooting. Defendants sought review, and their cases were consolidated for review. On appeal, the court held that as to the first defendant, the trial court erred in sentencing defendant to 100 to 200 years in prison because it was not reasonably possible for defendant to serve the sentence. As to the second defendant, the court ruled that his attorney did not provide effective assistance of counsel because the attorney failed to convey a plea bargain offer. The court reversed the second defendant's conviction and remanded for a new trial. As to the third defendant, the court reversed a sentence of 40 to 80 years for second-degree murder and remanded for sentencing.

OUTCOME: The court reversed the sentences of two defendants, reversed the conviction of the third defendant, and remanded each case for further proceedings.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review
Criminal Law & Procedure > Interrogation > Miranda Rights > Voluntary Waiver
[HN1] Because the Miranda rule is only a procedural safeguard to protect constitutional rights, a Miranda argument does not implicate the important constitutional question exception to the preservation requirement.

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review
[HN2] Where defense counsel does not object to a witness' statement, this issue is waived absent manifest injustice. *Mich. Comp. Laws § 769.26* (Mich. Stat. Ann. § 28.1096).

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review
Criminal Law & Procedure > Jury Instructions > Requests to Charge
Criminal Law & Procedure > Jury Instructions > Particular Instructions > Lesser Included Offenses
[HN3] The trial court is generally required to give instructions that comport with the theories of the parties if they are requested and are supported by some evidence. Regarding lesser included offenses, unless a party informs the trial court of the exact lesser included offenses for which instructions are being requested, the issue is not preserved for review.

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review
Criminal Law & Procedure > Jury Instructions > Objections
[HN4] Where the defendant did not object to jury instructions, a reviewing court will not upset the verdict unless the instructions caused a miscarriage of justice.

Criminal Law & Procedure > Appeals > Standards of Review > Standards Generally
Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review
Criminal Law & Procedure > Verdicts > Polling of Jury
[HN5] A challenge to the court's method of polling the jury is waived absent an objection below or proof of manifest injustice.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Counsel > Effective Assistance
Criminal Law & Procedure > Counsel > Effective Assistance > Tests
[HN6] To establish a meritorious claim of ineffective assistance of counsel, the defendant must first show that counsel's performance was deficient, i.e., that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Second, the deficiency must have been prejudicial to the defendant.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Counsel > Effective Assistance
Criminal Law & Procedure > Counsel > Effective Assistance > Pleas
Criminal Law & Procedure > Counsel > Effective Assistance > Tests
[HN7] An attorney's failure to advise his client of a plea bargain offer may be ineffective assistance of counsel. Defendant has the burden of proving by a preponderance of the evidence that a plea offer was made and that his counsel failed to communicate it to him.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations
[HN8] Where there are two juries, and defendant's jury had learned of the other jury's verdict before beginning deliberations, then there would be serious error. However, a judge is presumed to be able to decide a case solely on the basis of the evidence properly admitted during trial. Defendant does not rebut this presumption with evidence that the court's knowledge of the jury verdict affected its verdict against defendant.

COUNSEL:

Frank J. Kelley, Attorney General, *Gay Secor Hardy*, Solicitor General, *John E. O'Hair*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of the Criminal Division, Research, Training, and Appeals, and *Jan J. Raven* and *John P. Puleo*, Assistant Prosecuting Attorneys, for the people.

Kenneth A. Webb, for defendant Todd on appeal.

Neil H. Fink and *Mark J. Kriger*, for defendant Carter.

Daniel J. Rust, for defendant McClure.

JUDGES:

Danhof, C.J., and Cavanagh and W. R. Beasley, * JJ.

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

OPINIONBY:

PER CURIAM

OPINION:

[*627] [**382] Defendants Damion Lavoial Todd, Vernard Carter, and Derrick Tyrone McClure were tried jointly in December of 1986 on [**383] charges stemming from an August 17, 1986, drive-by shooting in which Melody Rucker, age sixteen, was killed and Vinita Smith, age fifteen, was seriously injured. Rucker and Smith were among at least a dozen teenagers who were standing in front of a house in Detroit when Todd fired [***2] several shotgun blasts from the passenger seat of a car being driven by Carter. Todd was apparently firing toward another male teenager who was standing close to Rucker. The shotgun belonged to McClure, who was sitting in the back seat of the car. A fourth young man, Dwayne Smiley, who was also in the back seat, testified for the prosecution.

Todd was tried before a jury and was convicted of first-degree murder, *MCL 750.316*; MSA 28.548, assault with intent to murder, *MCL 750.83*; MSA 28.278, and possession of a firearm during the commission of a felony, *MCL 750.227b*; MSA 28.424(2). He received prison sentences of natural life, one hundred to two hundred years, and two years, respectively. Carter and McClure waived jury trials. Carter was convicted of aiding and abetting Todd, and he received the same sentences [*628] as Todd. McClure was convicted of second-degree murder, *MCL 750.317*; MSA 28.549, assault with intent to commit great bodily harm, *MCL 750.84*; MSA 28.279, and felony-firearm. He received sentences of forty to eighty years, six to ten years, and two years. Defendants appeal as of right, raising several issues. We have consolidated their cases for appeal. We [***3] affirm Todd's and McClure's convictions, but remand for resentencing in those cases. We reverse Carter's convictions and remand for a new trial.

People v Todd

Defendant Todd first argues that in obtaining a statement from him, the police failed to scrupulously honor his right to remain silent as required by *Miranda v Arizona, 384 U.S. 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)*, and *Michigan v Mosley, 423 U.S. 96; 96 S Ct 321; 46 L Ed 2d 313 (1975)*. We disagree. We note initially that defendant did not raise this argument at the *Walker* n1 hearing on his motion to suppress. Rather, he argued that his statement was not voluntary and understanding. Thus, this issue was not preserved. Further, we have held that, [HN1] because the *Miranda* rule is only a procedural safeguard to protect constitutional rights, a *Miranda* argument does not implicate the "important constitutional question" exception to the preservation requirement. *People v Calloway, 169 Mich App 810, 818; 427 NW2d 194 (1988)*. [***4] Therefore, this issue is waived.

n1 *People v Walker (On Rehearing), 374 Mich 331; 132 NW2d 87 (1965)*.

Regardless, we are convinced that defendant's statement was admissible. Defendant did indicate, while en route to the police station with his aunt and Officer Smith, that he did not wish to speak to [*629] Officer Smith at that time. However, it is not clear from his statement that he wished to cut off all questioning, or whether he simply did not wish to give a statement to Officer Smith at that time. Defendant's parents arrived at the police station sometime after defendant. Another officer spoke with defendant's parents and his aunt, after which the officer again advised defendant of his rights. Defendant then agreed to give a statement. Since it is not clear that defendant had unequivocally invoked his right to remain silent, we do not believe that the police failed to scrupulously honor defendant's right to cut off questioning. See and compare [***5] *People v Catey, 135 Mich App 714, 719-726; 356 NW2d 241 (1984)*. Therefore, there was no *Miranda* or *Mosley* violation.

Defendant next argues that during his jury trial an officer made a comment which resulted in a violation of *Bruton v United States, 391 U.S. 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968)*. In response to a question by defense counsel regarding how the police investigation focused on defendant Todd, the officer stated, "I had Vernard Carter's statement stating that Damion Todd had pulled the trigger."

[HN2] Defense counsel did not object to the officer's statement, so this issue is waived [**384] absent manifest injustice. *MCL 769.26*; MSA 28.1096; *People v Rau, 174 Mich App 339, 341; 436 NW2d 409 (1989)*. Since we find that defendant clearly was not prejudiced by the officer's statement, we need not decide whether the officer's statement resulted in a *Bruton* violation. Defendant took the stand and admitted that he shot the gun from the passenger seat of the moving [***6] car. The dispute centered on defendant's intent, not whether he "pulled the trigger." In light of defendant's own testimony, he clearly was not prejudiced by the officer's comment, and [*630] any error that may have occurred did not rise to the level of manifest injustice.

As his next issue, defendant claims that the trial court erred by refusing to permit defense counsel to verbally describe, for the record, a witness' nonverbal indication of the angle at which defendant was holding the gun when he shot toward the people congregated in front of the house. Our examination of the record reveals that defense counsel actually described the witness' actions quite fully. The trial court then declined to confirm that counsel's description was accurate, saying that the angle

of the gun was for the jury to decide. We are aware of no authority that would require the trial court to ratify a party's verbal description of nonverbal evidence. The record was not so incomplete as to jeopardize defendant's appeal. *People v Wilson (On Rehearing), 96 Mich App 792, 797; 293 NW2d 710 (1980).* Defendant's argument is without merit.

Next, [***7] defendant claims that the court committed error requiring reversal by refusing defense counsel's request for an instruction regarding the charge of involuntary manslaughter and by failing to instruct sua sponte regarding the charge of reckless discharge of a firearm. We disagree.

[HN3] The trial court is generally required to give instructions that comport with the theories of the parties if they are requested and are supported by some evidence. *People v Benson, 180 Mich App 433, 439; 447 NW2d 755 (1989).* Regarding lesser included offenses, unless a party informs the trial court of the exact lesser included offenses for which instructions are being requested, the issue is not preserved for review. *People v Beach, 429 Mich 450, 482; 418 NW2d 861 (1988); People v Herbert Smith, 396 Mich 362; 240 NW2d 245 (1976).*

[*631] Our review of the record reveals that defense counsel expressly requested, in writing and verbally, an instruction regarding voluntary manslaughter. The trial court refused to give the instruction. [***8] On appeal, defendant does not argue that the trial court erred in failing to instruct regarding voluntary manslaughter. Instead, he argues that the court should have instructed the jury regarding involuntary manslaughter. Since defendant did not request this exact instruction, this issue is waived. *Beach, supra; Herbert Smith, supra.*

In any event, we believe that an instruction regarding involuntary manslaughter was inappropriate here. The only form of involuntary manslaughter that was arguably applicable here was the one that defines the offense as an unintentional killing of another without malice in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm. See *People v Beach, supra, p 477; People v Daniels, 172 Mich App 374, 379; 431 NW2d 846 (1988).* Defendant admitted that he repeatedly fired the shotgun from a moving car in the direction of the people in the front yard of the house. We believe that this was an unlawful act that naturally tended to cause death [***9] or great bodily harm. Therefore, an involuntary manslaughter instruction was inappropriate. This conclusion is not affected by defendant's claims that he did not aim at anyone and that he did not intend to kill anyone, or by one witness' ambiguous testimony that defendant may have been shooting high. It was the act of shooting the gun from a moving car toward a group of people which precluded an involuntary manslaughter instruction. Compare *People v Beach,* [**385] *supra, pp 475-480.* Since the instruction was not appropriate, there [*632] would have been no error even if the instruction had been requested and refused. We also disagree that an instruction regarding reckless discharge of a firearm was appropriate here.

Defendant next raises two more jury instruction issues. He first claims that reversal is required because the trial court erred in making the following statement before instructing the jury on second-degree murder: "The law in Michigan also requires that in every case where first-degree murder is charged, I must also instruct you on second-degree murder." Defendant argues that by this statement the court indicated to the [***10] jury its belief that the law, but not the evidence, required the charge of second-degree murder. Defendant also claims that the court erred in instructing the jury regarding the element of malice of first-degree murder. Neither claim is meritorious.

[HN4] Since defendant did not object to either instruction, we will not upset the verdict unless the instructions caused a miscarriage of justice. *People v Watkins, 178 Mich 439, 450; 444 NW2d 201 (1989).* Jury instructions must be reviewed in their entirety; they are not to be extracted piecemeal in an effort to establish error requiring reversal. *Id.*

Regarding the court's preface to its jury charge regarding second-degree murder, we disagree that the court's statement necessarily indicated its opinion on the case. But in any event, the court further instructed the jurors that, if they had come to believe during the course of the trial that the court was telling them how to decide the case, they must disregard that opinion, in that they are the sole and exclusive judges of the facts. The court also instructed that to convict defendant of a crime, they must be satisfied that [***11] every element was proven beyond a reasonable doubt. Therefore, when viewed in conjunction with the other instructions, [*633] the statement did not result in a miscarriage of justice.

With respect to the court's instruction regarding the intent element of first-degree murder, it is true that at one point the court's charge was somewhat ambiguous with regard to whether the element could be satisfied by something less than the intent to kill. However, on at least four other occasions the court clearly indicated that first-degree murder requires the intent to kill, and twice the court contrasted the intent elements of first- and second-degree murder. There was no miscarriage of justice.

As defendant's next issue, he claims that the manner in which the jury was polled resulted in error requiring reversal. [HN5] A challenge to the court's method of

polling the jury is waived absent an objection below or proof of manifest injustice. *People v Clarence Williams, 37 Mich App 219, 220; 194 NW2d 527 (1971).* Here, the trial court's explanation to the jury of why it was being polled did not result in manifest injustice.

As defendant's [***12] final issue, he claims that his sentence of one hundred to two hundred years for his assault conviction was impermissibly excessive. We find that defendant's sentence for this conviction must be vacated and the case remanded on the basis that it is not reasonably possible for defendant to serve the sentence. *People v Moore, 432 Mich 311; 439 NW2d 684 (1989).*

People v Carter

Defendant Carter first argues that he was denied the effective assistance of counsel. We agree and therefore reverse defendant's convictions and remand for a new trial.

Effective assistance of counsel is presumed, and [*634] the defendant bears the burden of proving otherwise. *People v Harris, 185 Mich App 100, 104; 460 NW2d 239 (1990).* [HN6] To establish a meritorious claim of ineffective assistance of counsel, the defendant must first show that counsel's performance was deficient, i.e., that counsel made errors so serious that counsel was not functioning as the "counsel" [**386] guaranteed by the Sixth Amendment. *People v Stammer, 179 Mich App 432, 438; 446 NW2d 312 (1989).* [***13] Second, the deficiency must have been prejudicial to the defendant. *Id.*

At the *Ginther* n2 hearing regarding defendant's motion for a new trial, defendant claimed that his trial counsel failed to convey to him a plea bargain offer which would have permitted him to plead guilty of second-degree murder and felony-firearm, with a minimum sentence of twenty-five years in prison for the murder conviction and two years for the felony-firearm. Recently, in *People v Williams, 171 Mich App 234, 241-242; 429 NW2d 649 (1988),* cert den *110 S Ct 369 (1989),* a panel of this Court stated its position with regard to this issue:

> Although the issue has never been decided in Michigan, we agree with the many courts which have held that [HN7] an attorney's failure to advise his client of a plea bargain offer may be ineffective assistance of counsel. *Williams v Arn, 654 F Supp 226* (ND Ohio, 1987), app dis *820 F2d 1226 (1987); People v Alexander, 136 Misc 2d 573; 518 NYS2d 872 (1987); Ex Parte Wilson, 724 SW2d 72* [***14] (Tex Crim App, 1987); *Hanzelka v State, 682 SW2d 385* (Tex App, 1984); *Young v State, 470 NE2d 70* (Ind, 1984); *State v Simmons, 65 NC App 294; 309 SE2d 493 (1983); Lyles v State, 178 Ind App 398; 382 NE2d 991 (1978).* We further agree that defendant has the burden of proving by a preponderance of the evidence that a plea offer was made and that [*635] his counsel failed to communicate it to him. *Alexander, supra; State v Martin, 318 NC 648; 350 SE2d 63 (1986); Young, supra.*

n2 *People v Ginther, 390 Mich 436; 212 NW2d 922 (1973).*

In *Williams*, the plea offer was made during the course of the trial, and the prosecutor told the defense counsel that he would have to [***15] get his superior's approval of the terms of the offer. The Court held that, in order to establish that a "plea offer was made" in that situation, the defendant had to prove by a preponderance of the evidence that he would have accepted the plea and that the prosecutor's superior would have approved the plea. The Court found that the defendant had failed to prove that the prosecutor's superior would have accepted the terms of the offer, and the Court therefore affirmed the defendant's convictions.

We agree with the *Williams* Court that a failure to convey a plea bargain offer may constitute ineffective assistance of counsel, and we hold that, on the facts of this case, defendant was denied the effective assistance of counsel. There is no evidence that the prosecutor's plea offer in this case was conditioned on any further approval. There is also no dispute that a plea offer was made and that the defendant's counsel failed to communicate the offer to defendant. At the *Ginther* hearing, defendant's appellate counsel questioned defendant's trial counsel on the issue:

> *Q.* One last theory in this case. Are you aware whether or not a plea was offered to Mr. Carter?
>
> *A* [***16] . Yes.
>
> *Q.* And that plea offer was 25 years plus two on the firearm; is that correct?
>
> *A.* That is correct.
>
> *Q.* And did you ever see Mr. Carter or speak with Mr. Carter in regard to that plea offer?
>
> [*636] *A.* I don't believe so.

> *Q.* And could you tell the court why you decided to make the unilateral decision not to discuss this plea bargain with Mr. Carter?
>
> *A.* Well, I didn't think that that was a good plea offer, and I still feel that the defense was strong in the case.
>
> *Q.* So in other words, you felt that there was just really no chance of him being convicted under the facts because of [*People v Burrell, 253 Mich 321; 235 NW 170 (1931)]?*
>
> *A.* Well, I wouldn't like to say no chance, but I felt that I could have persuaded the court to adopt the authority of *People v Burrell* in this case. I think [**387] there's always a chance whenever you come to court that you're going to lose.

In light of this testimony, we hold that defendant has carried his burden of proving that a plea offer was made and that counsel failed to communicate the offer. *Williams, supra.* Since defendant received a conviction [***17] and sentence that was substantially greater than the plea offer, he was prejudiced by the error. There is some indication in the record that defendant attended a final pretrial conference at which the plea offer was mentioned. n3 If the record were clear that defendant was actually informed of the offer at the conference, then our decision on this issue might be different. However, this point was discussed at the *Ginther* hearing, and we are not satisfied from the record that defendant was informed of the plea offer. Therefore, on the basis of the uncontroverted evidence that defense counsel failed to convey an authorized plea offer to defendant, we reverse defendant's convictions and remand for a new [*637] trial. In light of our resolution of this issue, we need not discuss defendant's other claims of error.

> n3 Defense counsel failed to attend both the conference and a hearing regarding defendant's motion to quash which was held on the same date as the pretrial conference.

People v McClure

Defendant [***18] McClure first argues that there was insufficient evidence of the intent element to support the trial court's findings on that element. We have examined the record and we disagree. Defendant provided the shotgun that was used in the murder and assault. He rode in the back seat of the car, and, just before the shooting, he instructed Todd with regard to how to operate the gun. Viewed in the light most favorable to the prosecution, *People v Jackson, 178 Mich App 62, 64; 443 NW2d 423 (1989),* there was sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that defendant acted in reckless disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. *People v Aaron, 409 Mich 672, 728; 299 NW2d 304 (1980); People v Hopson, 178 Mich App 406, 410; 444 NW2d 167 (1989).*

Defendant next argues that his convictions should be reversed because the court heard the jury's verdict regarding the charges against Todd while the bench trial against [***19] defendant and Carter was ongoing. The trial court in this case served as the trier of fact for defendants Carter and McClure, while a jury served as the trier of fact for defendant Todd. Following the completion of evidence in the Todd case, the jury was dismissed to deliberate. The court then heard additional evidence against defendants Carter and McClure. Before the prosecutor finished presenting his proofs against Carter and McClure, the jury was brought in and its guilty verdicts against Todd [*638] were received. No objection was made to the procedure.

Defendant is correct that had this been a situation [HN8] where there were two juries, and defendant's jury had learned of the other jury's verdict before beginning deliberations, then there would be serious error. See *People v Lytal, 415 Mich 603, 612; 329 NW2d 738 (1982)* (the conviction of another involved in a criminal enterprise is not admissible at the defendant's separate trial). However, a judge is presumed to be able to decide a case solely on the basis of the evidence properly admitted during trial. *People v Jones, 168 Mich App 191, 194;* [***20] *423 NW2d 614 (1988).* Defendant has not rebutted this presumption with evidence that the court's knowledge of the jury verdict affected its verdict against defendant. We do not believe that the error complained of resulted in a miscarriage of justice. *MCL 769.26*; MSA 28.1096. For the same reasons, we disagree with defendant's argument that error requiring reversal resulted when the court heard the prosecutor's closing argument in the Todd case before finishing the bench trial against defendant.

Finally, defendant argues that his sentence was excessive. Defendant's sentence of forty to eighty years represented a significant departure from the sentencing guidelines. We therefore remand for resentencing [**388] to permit the court to sentence defendant in accordance with the principle of proportionality announced in *People v Milbourn, 435 Mich 630; 461 NW2d 1 (1990).*

Todd's and McClure's convictions are affirmed, and their cases are remanded for resentencing in accordance with this opinion. Carter's convictions are reversed, and the case remanded for a new trial. We retain no jurisdiction.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v MICHAEL CONAT, Defendant-Appellee. PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v SARAH PLUMB, Defendant-Appellee. PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v DEREK F. SCHROEDER, Defendant-Appellee. PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v STEPHEN RAINES, a/k/a STEPHEN RAINS, Defendant-Appellee.

Nos. 218204, 219258, 219259, 219958

COURT OF APPEALS OF MICHIGAN

238 Mich. App. 134; 605 N.W.2d 49; 1999 Mich. App. LEXIS 284

August 10, 1999, Submitted
October 19, 1999, Decided

PRIOR HISTORY: [***1] Oakland Circuit Court. LC No. 99-164272 FC. Oakland Circuit Court. LC No. 98-158033 FC. Oakland Circuit Court. LC No. 98-160279 FC. Wayne Circuit Court. LC No. 00-000310.

DISPOSITION: Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

CASE SUMMARY:

PROCEDURAL POSTURE: In consolidated appeals of four criminal cases, appellant prosecutors challenged the orders of the Oakland Circuit Court and Wayne Circuit Court (Michigan), which declared that *Mich. Comp. Laws § 769.1(1)* (Mich. Stat. Ann. § 28.1072(1)), requiring the circuit court to sentence certain juvenile offenders as adults, was unconstitutional.

OVERVIEW: Appellees were juveniles charged as adults. One pled guilty, the other three were awaiting trial. All filed motions for determinations that *Mich. Comp. Laws § 769.1(1)* (Mich. Stat. Ann. § 28.1072(1)) was unconstitutional. The circuit courts granted the motions, appellant prosecutors challenged, the cases were consolidated, and the court reversed. The cases were ripe because appellees faced real and immediate threats. The statute did not violate separation of powers because, although a prosecutor's decision to charge a juvenile as an adult would result in an adult sentence upon conviction, the court still had discretion over the sentence. The statute did not violate equal protection or due process protections because no intentional discrimination was demonstrated, and adults had no right to a pre-charge hearing. The statute reflected substantive policy, so, although it conflicted with *Mich. Ct. R. 6.931*, it did not infringe on the state supreme court's procedural rulemaking authority.

OUTCOME: Orders were reversed and remanded for further proceedings; the statute permitting juveniles to be charged as adults was constitutional because it did not violate the separation of powers doctrine, appellees' equal protection or due process rights, and it did not infringe on the state supreme court's rulemaking authority.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN1] An "automatic waiver" process exists whereby prosecutors may choose to waive certain juvenile offenders into the circuit court to be tried as adults. *Mich. Comp. Laws § 764.1f(1)* (Mich. Stat. Ann. § 28.860(6)(1)).

Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN2] See *Mich. Comp. Laws § 764.1f(1)* (Mich. Stat. Ann. § 28.860(6)(1)).

Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN3] The effect of the automatic waiver provisions is that the prosecutor has discretion whether to charge a juvenile at least fourteen years of age who commits specified serious felonies as an adult or as a juvenile. Under the automatic waiver provisions, no hearing is held to determine whether the juvenile should be tried as an adult.

Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN4] See *Mich. Comp. Laws § 769.1(1)* (Mich. Stat. Ann. § 28.1072(1)).

Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN5] Although every crime that requires an adult sentence is one of the "specified juvenile violations" for which a juvenile may be automatically waived into the circuit court by the prosecutor under Mich. Comp. Laws. § 764.1f (Mich. Stat. Ann. § 28.860(6)), not every "specified juvenile violation" requires an adult sentence under *Mich. Comp. Laws § 769.1(1)* (Mich. Stat. Ann. § 28.1072(1)). If an adult sentence is not required, the circuit court must conduct a hearing to determine whether to sentence the juvenile as a juvenile or as an adult. Mich. Comp. Laws. § 769.1(3) (Mich. Stat. Ann. § 28.1072(3)).

Criminal Law & Procedure > Appeals > Standards of Review > Standards Generally
[HN6] When cases present constitutional questions, the appellate court's standard of review is de novo.

Constitutional Law > The Judiciary > Case or Controversy > Ripeness
[HN7] Judicial power includes the authority to hear and decide controversies. Courts ordinarily will not decide a case or question, in or on which there is no real controversy. Thus, an issue generally will not be reviewed if it does not reflect an actual, existing controversy, but merely a potential one. An actual controversy exists if a party faces a real and immediate threat to the party's interests, as opposed to a hypothetical one.

Governments > Legislation > Enactment
[HN8] The separation of powers doctrine is set forth in Mich. Const. art. 3, § 2.

Governments > Legislation > Enactment
[HN9] See Mich. Const. art. 3, § 2.

Criminal Law & Procedure > Sentencing > Sentencing Guidelines Generally
Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury
[HN10] The judicial power to hear and determine controversies includes the power to exercise discretion in imposing sentences. However, this sentencing discretion is limited by the legislature, which has the power to establish sentences. In other words, the legislature has the exclusive power to determine the sentence prescribed by law for a crime, and the function of the court is only to impose a sentence under and in accord with the statute.

Criminal Law & Procedure > Appeals > Standards of Review > Standards Generally
Criminal Law & Procedure > Accusatory Instruments > Informations
[HN11] Prosecutorial charging decisions always affect the sentence that a court may impose; this does not violate the separation of powers doctrine. It is well settled that the decision whether to bring a charge and what charge to bring lies

in the discretion of the prosecutor. Indeed, the prosecutor is a constitutional officer entrusted with performing the executive function of bringing criminal charges against defendants. The prosecutor is given broad charging discretion, and judicial review of the exercise of that discretion is limited to whether an abuse of power occurred, i.e., whether the charging decision was made for reasons that are unconstitutional, illegal, or ultra vires.

Criminal Law & Procedure > Accusatory Instruments > Informations
Constitutional Law > Separation of Powers
[HN12] The doctrine of separation of powers is not violated where prosecutors are given the authority to decide which crimes to charge a defendant with and where this decision affects the severity of punishment imposed if the defendant is convicted. Any power delegated to the executive branch to choose which statute to charge a defendant with is no broader than the authority prosecutors routinely exercise in enforcing the criminal laws.

Criminal Law & Procedure > Accusatory Instruments > Informations
Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN13] Under the amended automatic waiver statutes, the exercise of prosecutorial charging discretion requires the prosecutor to decide what crime to charge a juvenile with and whether to charge the juvenile as an adult. Although the exercise of that discretion will, in some instances, determine whether the juvenile will receive an adult sentence if convicted, the doctrine of separation of powers is not violated.

Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN14] *Mich. Comp. Laws § 764.1f* (Mich. Stat. Ann. § 28.860(6)), the automatic waiver provision allowing the prosecutor to charge certain juvenile offenders as adults, does not give prosecutors judicial power. While the statute allows prosecutors to choose whether to proceed against a defendant as an adult in the circuit court or as a juvenile in the family court, all judicial power continues to be exercised by the judiciary.

Constitutional Law > Equal Protection
[HN15] Equal protection of the law is guaranteed by both the United States and Michigan Constitutions. U.S. Const. amend. XIV, § 1; Mich. Const. art. 1, § 2. The state constitutional guarantee provides no greater protection than does its federal counterpart.

Constitutional Law > Equal Protection > Level of Review
Constitutional Law > Equal Protection > Scope of Protection
[HN16] The constitutional guarantee of equal protection requires that the government treat similarly situated persons alike. The party challenging the statute must demonstrate that it evidences intentional discrimination against a particular group of persons. Where the different treatment is not based on a suspect classification, such as race or ethnicity, and does not impinge on the exercise of a fundamental right, rational basis scrutiny applies.

Constitutional Law > Equal Protection > Level of Review
[HN17] Under rational basis scrutiny, the challenged statute will be upheld if it furthers a legitimate governmental interest and if the classification is rationally related to achieving the interest. This is a deferential standard, for the court presumes the statute to be constitutional, and the party challenging the statute has the burden of demonstrating that the classification is arbitrary and irrational.

Governments > Legislation > Interpretation
Constitutional Law > Substantive Due Process
[HN18] In order to find that a statute is not only unconstitutional as applied, but is facially unconstitutional, the party challenging the statute must establish that no set of circumstances exists under which the statute would be valid. The fact that the statute might operate unconstitutionally under some conceivable set of circumstances is insufficient.

Constitutional Law > Equal Protection > Scope of Protection
Criminal Law & Procedure > Accusatory Instruments > Informations
Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN19] In order to successfully claim that the exercise of prosecutorial charging discretion constitutes a violation of equal protection guarantees, a defendant must demonstrate that the prosecutor singled out certain defendants for prosecution while not charging others similarly situated who committed the same crime and that this decision was based on impermissible factors such as race, sex, religion, or the exercise of a fundamental right. Therefore, in order to hold that the exercise of prosecutorial charging discretion through the automatic waiver process violates equal protection, it must be demonstrated that the prosecutor, on the basis of impermissible factors, decided to charge as adults certain juveniles who committed certain crimes and to charge as juveniles other juveniles who committed the same crimes.

Constitutional Law > Equal Protection
Criminal Law & Procedure > Accusatory Instruments > Informations
[HN20] Without a showing of intentional discrimination based on impermissible factors, the mere fact that some persons are charged differently from others for the same conduct does not violate equal protection.

Constitutional Law > Substantive Due Process > Scope of Protection
[HN21] Both the United States and Michigan Constitutions provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; Mich. Const., art. 1, § 17. Michigan's due process guarantee provides no greater protection than does the federal due process guarantee.

Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN22] There is no constitutional right to be treated as a juvenile.

Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN23] Because juveniles have no constitutional right to be treated differently from adults when they engage in criminal conduct, and because without the legislatively created juvenile justice system all juveniles at least 14 years of age would be subject to adult criminal penalties, the amended automatic waiver system does not deny juveniles the constitutional right to due process.

Criminal Law & Procedure > Accusatory Instruments > Informations
Constitutional Law > Substantive Due Process
[HN24] A lack of standards to govern the exercise of prosecutorial charging discretion does not, in itself, violate the right to due process.

Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN25] *Mich. Ct. R. 6.931* provides that, when a juvenile is convicted in the circuit court, a hearing is required to determine whether to sentence the offender as an adult or as a juvenile.

Governments > Courts > Authority to Adjudicate
Governments > Legislation > Interpretation
[HN26] Under Mich. Const. art. 6, § 5, the Michigan Supreme Court is given the exclusive rulemaking authority in matters of practice and procedure. However, the Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law. Accordingly, in resolving a conflict between a statute and a court rule, the court rule prevails if it governs practice and procedure. However, if the statute does not address purely procedural matters, but substantive law, the statute prevails.

Governments > Legislation > Interpretation
[HN27] Arguments that a statute is unwise or results in bad policy should be addressed to the legislature.

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JUDGES: Before: Hoekstra, P.J., and O'Connell and R.J. Danhof *, JJ. HOEKSTRA, P.J., (concurring).

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

OPINIONBY: Peter D. O'Connell

OPINION: [*138] [**53] O'CONNELL, J.

In these consolidated appeals, the prosecutors appeal from four lower court orders declaring that *MCL 769.1*; MSA 28.1072 (hereinafter § 1), as amended by *1996 PA 247,* is unconstitutional. The amended statute requires the circuit court to sentence certain juvenile offenders as adults. We hold that the statute is constitutional, and we accordingly [*139] reverse the orders of the trial courts and remand for trial. [***3]

I. Legislative Background

Generally, the family division of the circuit court (family court) has exclusive jurisdiction over juveniles under seventeen years of age who commit criminal offenses. *MCL 712A.1(1)(c)*; MSA 27.3178(598.1)(1)(c), *MCL 712A.2(a)(1)*; MSA 27.3178(598.2)(a)(1). n1 The "traditional-waiver" process allows the judge of the family court, on motion of the prosecutor, to waive jurisdiction over a juvenile at least fourteen years of age who "is accused of an act that if committed by an adult would be a felony . . . ." *MCL 712A.4(1)*; MSA 27.3178(598.4)(1). In determining whether to waive jurisdiction so that the juvenile may be tried in the circuit court as an adult, the court must conduct a hearing to determine whether the best interests of the juvenile and the public would be served by granting a waiver of jurisdiction. *MCL 712A.4(3)* and (4); MSA 27.3178(598.4)(3) and (4). The judge must consider the following statutory factors: the seriousness of the alleged offense, the culpability of the juvenile, the prior record of the juvenile, the history of the juvenile in participating in available programs, the adequacy of both punishment and programs available in [***4] the juvenile system, and the dispositional options available for the juvenile. *MCL 712A.4(4)(a)* - (f); MSA 27.3178(598.4)(4)(a) - (f).

n1 Formerly, such matters were heard in the probate court, but in 1996, the Legislature created the family division of the circuit court to hear all family-related matters, including juvenile delinquency proceedings. See *1996 PA 409,* Senate Fiscal Agency Bill Analysis, SB 1036 et al., November 1, 1996.

[*140] Alternatively, [HN1] an "automatic waiver" process exists whereby prosecutors may choose to "waive" certainjuvenile offenders into the circuit court to be tried as adults. [HN2] *MCL 764.1f(1)*; MSA 28.860(6)(1) provides:

If the prosecuting attorney has reason to believe that a juvenile 14 years of age or older but less than 17 years of age has committed a specified juvenile violation, the prosecuting attorney may authorize the filing of a com-

plaint and [**54] warrant on the charge with a magistrate concerning the juvenile.

A "specified juvenile violation" [***5] is defined as any of the following offenses:

(1) arson of a dwelling, *MCL 750.72*; MSA 28.267;

(2) assault with intent to commit murder, *MCL 750.83*; MSA 28.278;

(3) assault with intent to maim, *MCL 750.86*; MSA 28.281;

(4) assault with intent to rob and steal while armed, *MCL 750.89*; MSA 28.284;

(5) attempted murder, *MCL 750.91*; MSA 28.286;

(6) first-degree murder, *MCL 750.316*; MSA 28.548;

(7) second-degree murder, *MCL 750.317*; MSA 28.549;

(8) kidnapping, *MCL 750.349*; MSA 28.581;

(9) first-degree criminal sexual conduct, *MCL 750.520b*; MSA 28.788(2);

(10) armed robbery, *MCL 750.529*; MSA 28.797;

(11) carjacking, *MCL 750.529a*; MSA 28.797(a);

(12) bank, safe, or vault robbery, *MCL 750.531*; MSA 28.799;

(13) assault with intent to do great bodily harm less than murder, *MCL 750.84*; MSA 28.279, if armed [***6] with a dangerous weapon;

[*141] (14) home invasion, *MCL 750.110a*; MSA 28.305(a), if armed with a dangerous weapon;

(15) escape from certain higher-security juvenile facilities, *MCL 750.186a*; MSA 28.383a;

(16) manufacture, delivery, or possession with intent to deliver over 650 grams of a controlled substance, *MCL 333.7401(2)(a)(i)*; MSA 14.15(7401)(2)(a)(i);

(17) possession of over 650 grams of a controlled substance, *MCL 333.7403(2)(a)(i)*; MSA 14.15(7403)(2)(a)(i);

(18) an attempt to commit, conspiracy to commit, or solicitation to commit any of the above offenses; and

(19) any lesser-included offenses or other offenses arising out of the same transaction, if the juvenile is charged with one of the above offenses. See *MCL 764.1f(2)*; MSA 28.860(6)(2).

The circuit court is given jurisdiction over juveniles at least fourteen years of age who commit any of the "specified juvenile violations," so that it may hear the automatic waiver cases where the prosecutor charges the juvenile as an adult. *MCL 600.606*; MSA 27A.606. Correspondingly, [***7] the normally exclusive jurisdiction of the family court over juveniles is limited in cases where a juvenile at least fourteen years of age is charged with any of the "specified juvenile violations," so that the family court only has jurisdiction if the prosecutor chooses to file a petition in the family court instead of authorizing a complaint and warrant to proceed against the juvenile as an adult. *MCL 712A.2(a)(1)*; MSA 27.3178(598.2)(a)(1). [HN3] The effect of these automatic waiver provisions is that the prosecutor has discretion whether to charge a juvenile at [*142] least fourteen years of age who commits specified serious felonies as an adult or as a juvenile. Underthe automatic waiver provisions, no hearing is held to determine whether the juvenile should be tried as an adult.

Before 1996, *MCL 769.1*; MSA 28.1072 provided in part as follows:

(3) A judge of a court having jurisdiction over a juvenile shall conduct a hearing at the juvenile's sentencing to determine if the best interests of the juvenile and the public would be served by placing the juvenile on probation and committing the juvenile to a state institution or agency . . . or by imposing any other sentence [***8] provided by law for an adult offender.

[**55]

Thus, if the prosecutor charged a juvenile as an adult under the automatic waiver provisions and the juvenile was convicted, the circuit court was required to conduct a hearing to determine whether to sentence the juvenile as a juvenile or as an adult. The court was to consider various factors, set forth by § 1, such as the prior record and character of the juvenile, the seriousness of the offense, the juvenile's potential for rehabilitation, and the dangerousness of the juvenile to the public.

In 1996, the Legislature amended § 1 to require the circuit court to sentence juveniles convicted of certain offenses as adults. Subsection 1(1), [HN4] *MCL 769.1(1)*; MSA 28.1072(1), now provides in part as follows:

A judge of a court having jurisdiction may pronounce judgment against and pass sentence upon a person convicted of an offense in that court. The sentence shall not exceed the sentence prescribed by law. The court shall sentence a juvenile convicted of any of the following crimes in the same manner as an adult:

[*143] (a) Arson of a dwelling [*MCL 750.72*; MSA 28.267].

(b) Assault with intent to commit [***9] murder [*MCL 750.83*; MSA 28.278].

(c) Assault with intent to maim [*MCL 750.86*; MSA 28.281].

(d) Attempted murder [*MCL 750.91*; MSA 28.286].

(e) Conspiracy to commit murder [*MCL 750.157a*; MSA 28.354(1)].

(f) Solicitation to commit murder [*MCL 750.157b(2)*; MSA 28.354(2)(2)].

(g) First degree murder [*MCL 750.316*; MSA 28.548].

(h) Second degree murder [*MCL 750.317*; MSA 28.549].

(i) Kidnapping [*MCL 750.349*; MSA 28.581].

(J) First degree criminal sexual conduct [*MCL 750.520b*; MSA 28.788(2)].

(k) Armed robbery [*MCL 750.529*; MSA 28.797].

(l) Carjacking [*MCL 750.529a*; MSA 28.797(a)].

[HN5] Although every crime that requires an adult sentence is one of the "specified juvenile violations" for which a juvenile may be automatically waived into the circuit court by the prosecutor under *MCL 764.1f*; MSA 28.860(6), not every "specified juvenile violation" requires [***10] an adult sentence under § 1. If an adult sentence is not required, the circuit court must conduct a hearing to determine whether to sentence the juvenile as a juvenile or as an adult. *MCL 769.1(3)*; MSA 28.1072(3). The effect of the 1996 amendment is that, if the prosecutor charges a juvenile as an adult with one of the offenses for which an adult sentence is required, the prosecutor's charging decision determines that the juvenile will face an adult sentence if convicted. Previously, the statute gave the circuit court discretion to determine whether the convicted juvenile would be sentenced as an adult.

[*144] II. Consolidated Cases

Defendants in these cases are all juveniles over fourteen years of age who have been charged as adults by the prosecutors under *MCL 764.1f*; MSA 28.860(6). All four defendants have been charged with crimes that would require the circuit court to impose an adult sentence upon conviction under the amended version of § 1. Defendants Michael Conat and Stephen Raines are accused of murder, and defendants Sarah Plumb and Derek Schroeder are accused of armed robbery. Defendants' motions for a determination that [***11] § 1 was unconstitutional were granted by the lower courts. The charge against defendant Raines was dismissed by the trial court on the basis of its determination that § 1 was unconstitutional. The prosecutor appealed as of right. This Court also granted leave to appeal in the other three cases. The cases have been consolidated for appeal. [HN6] Because these cases present constitutional questions, our standard of review is de novo. [**56] *People v Pitts, 222 Mich. App. 260, 263; 564 N.W.2d 93 (1997).*

III. Ripeness

In *People v Conat* and *People v Plumb*, the prosecutors argue that the lower courts should not have held that § 1 is unconstitutional because the issue was not ripe. The prosecutors argue that the issue was not ripe because defendants had not yet been convicted and therefore were not yet subject to the adult sentences mandated by § 1.

[HN7] Judicial power includes the authority to hear and decide controversies. *Johnson v Kramer Bros Freight Lines, Inc, 357 Mich. 254, 258; 98 N.W.2d 586 (1959),* [*145] quoting *Risser v Hoyt, 53 Mich. 185, 193; 18 N.W. 611 (1884).* "Courts ordinarily will not decide a [***12] case or question, in or on which there is no real controversy." *Johnson v Muskegon Heights, 330 Mich. 631, 633; 48 N.W.2d 194 (1951).* Thus, an issue generally will not be reviewed if it does not reflect an actual, existing controversy, but merely a potential one. *United Public Workers of America v Mitchell, 330 U.S. 75, 89-90; 67 S. Ct. 556; 91 L. Ed. 754 (1947).* See also *Kelvinator, Inc v Dep't of Treasury, 136 Mich. App. 218, 234; 355 N.W.2d 889 (1984)* (holding that, where the petitioners' claim was based on the stated policy position of the respondent, the issue was not subject to review until that policy was implemented in a concrete case). An actual controversy exists if a party faces a real and immediate threat to the party's interests, as opposed to a hypothetical one. *Los Angeles v Lyons, 461 U.S. 95, 101-102; 103 S. Ct. 1660; 75 L. Ed. 2d 675 (1983); Dep't of Social Services v Emmanuel Baptist Preschool, 434 Mich. 380, 410; 455 N.W.2d 1 (1990)* (Cavanagh, J.).

These cases present an actual controversy involving whether [***13] § 1 is unconstitutional. The prosecutors acknowledge that this issue is ripe with respect to defendant Schroeder, who entered a plea of no contest pursuant to *People v Cobbs, 443 Mich. 276; 505 N.W.2d 208 (1993),* in reliance on the trial court's indication that it would sentence him as a juvenile. Additionally, an actual controversy exists with respect to all three other defendants because they have been charged as adults by the prosecutors and face adult sentences upon conviction.

Defendants face a real and immediate threat, not merely a hypothetical or speculative one, and the lower courts were correct to [*146] reach the merits of defendants' claims that § 1 is unconstitutional.

IV. Separation of Powers

The prosecutors argue that the lower courts erred in finding that § 1 violates the doctrine of separation of powers. We agree.

[HN8] The separation of powers doctrine is set forth in Const 1963, art 3, § 2 as follows:

[HN9] The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. [***14]

This does not mean, however, that all three branches must be kept completely separate, with no overlap of functions or powers. *Judicial Attorneys Ass'n v Michigan, 459 Mich. 291, 296; 586 N.W.2d 894 (1998); Soap & Detergent Ass'n v Natural Resources Comm, 415 Mich. 728, 751-752; 330 N.W.2d 346 (1982).* Rather, the evil to be avoided is the accumulation in one branch of the powers belonging to another. Thus, the impetus behind the separation of powers doctrine is that "'where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.'" *Soap & Detergent, supra at 752,* quoting The Federalist No. 47 (J. Madison) (emphasis in original). [**57]

The trial courts held, and defendants argue, that § 1 violates the separation of powers doctrine because it gives prosecutors the power to determine whether a juvenile or an adult sentence is imposed on certain [*147] juvenile offenders, thus impermissibly giving prosecutors sentencing discretion that properly belongs to the judiciary. However, this argument ignores [***15] the commonplace interaction between all three branches of government in determining what punishment is given to criminal offenders; namely, that the Legislature defines the sentences, the court fashions and imposes individual sentences within the legislatively defined parameters, and the prosecutor brings charges against defendants that inevitably affect which sentences are available for the court to impose.

[HN10] The judicial power to hear and determine controversies includes the power to exercise discretion in imposing sentences. *People v Raihala, 199 Mich. App. 577, 579; 502 N.W.2d 755 (1993),* quoting *In re Southard, 298 Mich. 75, 81; 298 N.W. 457 (1941).* However, this sentencing discretion is limited by the Legislature, which has the power to establish sentences. *People v Hall, 396 Mich. 650, 658; 242 N.W.2d 377 (1976).* For example, the Legislature may set a minimum and a maximum sentence for a particular offense. Courts have no sentencing discretion "unless it be conferred upon them by law." *People v Palm, 245 Mich. 396, 404; 223 N.W. 67 (1929).* In other words, the Legislature [***16] has the exclusive power to determine the sentence prescribed by law for a crime, and the function of the court is "only to impose [a] sentence under and in accord with the statute." *In re Callahan, 348 Mich. 77, 80; 81 N.W.2d 669 (1957).* See also *In re Doelle, 323 Mich. 241, 245; 35 N.W.2d 251 (1948)* ("The length of imprisonment for a specific felony is a matter for legislative determination . . . ."). "While the power to set the range of punishment for a given offense is legislative, bringing that statutory range of [*148] discretion to bear upon an individual defendant in the form of a sentence has been confided to the judiciary." *People v Pulley, 411 Mich. 523, 528; 309 N.W.2d 170 (1981).* For example, no violation of the separation of powers doctrine results from the Legislature's requiring a mandatory life sentence without the possibility of parole for first-degree murder. *Hall, 396 Mich. at 657-658.* Such a sentence clearly limits the sentencing discretion of the court. Likewise, § 1 is a permissible legislative limitation on the sentencing discretion of courts, requiring that if a juvenile defendant [***17] is convicted in the circuit court of certain offenses, the court must impose an adult sentence. The court is still vested with the discretion to fashion an appropriate sentence as prescribed by law for the specific offense.

Defendants argue, however, that § 1 does more than limit judicial sentencing discretion. They argue that, in effect, § 1 impermissibly gives that discretion to prosecutors because the prosecutor, alone, under *MCL 764.1f;* MSA 28.860(6), chooses whether to charge the offender as a juvenile or as an adult, thus determining whether the offender will receive an adult sentence if convicted. However, § 1 does not give sentencing discretion to prosecutors, but instead provides that "the *court* shall sentence a juvenile . . . ." (Emphasis added.) The court still retains its judicial function of imposing a sentence as prescribed by law; the prosecutor does not impose the sentence.

Furthermore, the argument that § 1 gives prosecutors sentencing discretion ignores the inevitable sentencing effect that results from the everyday exercise of prosecutorial charging discretion. [HN11] Prosecutorial charging decisions always affect the sentence that a [*149] court [***18] may impose; this does not violate the separation of powers doctrine. It is well settled that "the decision whether to bring a charge and what charge

to bring lies in the discretion of the prosecutor." *People v Venticinque, 459 Mich. 90, 100; 586 N.W.2d 732 (1998).* [**58] Prosecutors must often choose among various applicable criminal statutes in deciding which charges to bring against a defendant. Indeed, the prosecutor is a constitutional officer entrusted with performing the executive function of bringing criminal charges against defendants. See *Genesee Prosecutor v Genesee Circuit Judge, 386 Mich. 672, 683-684; 194 N.W.2d 693 (1972); People v Siebert, 450 Mich. 500, 510; 537 N.W.2d 891 (1995)* (Boyle, J.) (noting that the prosecutor "is constitutionally entrusted with authority to charge defendants"). This is grounded in the responsibility of the executive branch to enforce the laws. See US Const, art II, § 3 (requiring the President to "take Care that the Laws be faithfully executed"). The prosecutor is given broad charging discretion, *Genesee Prosecutor, supra at 683,* and judicial review of the exercise [***19] of that discretion is limited to whether an abuse of power occurred, i.e., whether the charging decision was made for reasons that are unconstitutional, illegal, or ultra vires. *People v Barksdale, 219 Mich. App. 484, 488; 556 N.W.2d 521 (1996).*

The exercise of the prosecutor's charging discretion routinely affects the sentence that the court may impose upon conviction. For example, if the prosecutor charges a defendant with first-degree murder, the court must impose a sentence of life imprisonment without the possibility of parole if the defendant is convicted. However, the prosecutor could choose to charge that same defendant with a lesser offense, in [*150] which case the court could impose a lower sentence upon conviction. The prosecutor could even choose not to charge the defendant with any crime whatsoever. These decisions do not offend notions of separation of powers, but are merely instances of the executive branch, through the office of the prosecutor, exercising its power to enforce the laws by bringing criminal charges against offenders. This power is not without checks and balances, for the magistrate must determine at the preliminary examination that [***20] probable cause exists to believe that the defendant committed the charged offense, and the trier of fact must determine at trial whether the defendant is guilty beyond a reasonable doubt of the charged offense.

[HN12] The doctrine of separation of powers is not violated where prosecutors are given the authority to decide which crimes to charge a defendant with and where this decision affects the severity of punishment imposed if the defendant is convicted. The United States Supreme Court held in *United States v Batchelder, 442 U.S. 114; 99 S. Ct. 2198; 60 L. Ed. 2d 755 (1979),* that by choosing to charge a defendant under a statute that provided a greater penalty than did another applicable statute, the prosecutor did not "predetermine ultimate criminal sanctions." *Id.* at 125. Rather, that decision "merely enabled the sentencing judge to impose a longer prison sentence . . . ." *Id.* The Court was faced with two criminal statutes with identical elements that provided for different penalties, and it rejected the argument that this violated the separation of powers doctrine by impermissibly delegating legislative responsibility to set penalties to [***21] the executive branch. *442 U.S. at 125-126.* The Court held that any power delegated to the executive branch to [*151] choose which statute to charge a defendant with was "no broader than the authority [prosecutors] routinely exercise in enforcing the criminal laws." *Id. at 126.* Likewise, although the prosecutor's decision to charge a juvenile who commits certain crimes as an adult will result in the imposition of an adult sentence upon conviction, the prosecutor does not thereby predetermine the criminal sanction imposed. Rather, the prosecutor's decision merely affects the sentencing options available to the court if the defendant is convicted. Furthermore, although the prosecutor's decision regarding which crime to charge the juvenile with will also affect the sentencing options available to the court, defendants do not claim that this violates the separation of [**59] powers doctrine. [HN13] Under the amended automatic waiver statutes, the exercise of prosecutorial charging discretion requires the prosecutor to decide what crime to charge a juvenile with and whether to charge the juvenile as an adult. Although the exercise of that discretion will, in some instances, determine whether the juvenile [***22] will receive an adult sentence if convicted, the doctrine of separation of powers is not violated.

This Court has previously upheld *MCL 764.1f*; MSA 28.860(6), the automatic waiver provision allowing the prosecutor to charge certain juvenile offenders as adults, against a separation of powers challenge. In *People v Black, 203 Mich. App. 428; 513 N.W.2d 152 (1994),* this Court held that [HN14] this provision did not give prosecutors judicial power. The panel held that, while the statute allowed prosecutors to choose whether to proceed against a defendant as an adult in the circuit court or as a juvenile in the probate court (now the family court), "all judicial power continues [*152] to be exercised by the judiciary." *Id.* at 430. Although *Black* was decided when § 1 required the circuit court to hold a hearing to determine whether to sentence the juvenile as an adult, the separation of powers analysis remains the same. Under the amended version of § 1, the prosecutor's options are no different. The only difference effected by the amendment is that the Legislature has limited the sentencing discretion of the court so that, for certain serious [***23] felonies, the court must impose an adult sentence. All judicial power to hear and determine controversies and impose a sentence within the bounds of the sentencing

discretion given by the Legislature continues to be exercised by the court, not the prosecutor.

Therefore, we hold that § 1 does not violate Const 1963, art 3, § 2, because it does not offend the doctrine of separation of powers. Under the amended automatic waiver process, the roles of the three branches of government remain the same as before the amendment. The prosecutor has the same discretion as before--whether to charge a particular juvenile at all, what crime to charge the juvenile with, and whether to charge the juvenile as an adult. Under the amended § 1, as before, the court is authorized to impose a sentence on the juvenile upon conviction. The Legislature exercised its power to set sentences when it amended § 1 to require the court to sentence juveniles as adults when convicted of certain felonies. That the prosecutor's charging decision has an effect on the sentence that the court may impose is undeniable; this is an inevitable effect of the exercise of prosecutorial discretion and does not offend the separation [***24] of powers doctrine. The roles of all three branches of government remain intact: the executive [*153] branch still makes the charging decision, the legislative branch still sets the available sentences, and the judiciary still fashions an individual sentence within the sentencing discretion given it by the legislative branch.

V. Equal Protection

The prosecutors also argue that the lower courts erred in finding that § 1 violates federal and state guarantees of equal protection. We agree.

[HN15] Equal protection of the law is guaranteed by both the United States and Michigan Constitutions. US Const, Am XIV, § 1; Const 1963, art 1, § 2. The state constitutional guarantee provides no greater protection than does its federal counterpart. *Moore v Spangler, 401 Mich. 360, 370; 258 N.W.2d 34 (1977); Doe v Dep't of Social Services, 439 Mich. 650, 670-674; 487 N.W.2d 166 (1992); Harville v State Plumbing & Heating, Inc, 218 Mich. App. 302, 310; 553 N.W.2d 377 (1996).* [HN16] The constitutional guarantee of equal protection requires that the government treat similarly situated persons alike. *El Souri v Dep't of Social Services, 429 Mich. 203, 207;* [***25] *414 N.W.2d 679 (1987),* quoting *F S Royster Guano Co v Virginia, 253 U.S. 412, 415; 40 S. Ct. 560; 64 L. Ed. 989 (1920).* The party challenging the statute must demonstrate that it evidences intentional [**60] discrimination against a particular group of persons. *Harville, 218 Mich. App. at 306-309.* Where, as in the instant case, the different treatment is not based on a suspect classification, such as race or ethnicity, and does not impinge on the exercise of a fundamental right, rational basis scrutiny applies. *Doe, supra at 662; Yaldo v North Pointe Ins Co, 457 Mich. 341, 349; 578 N.W.2d 274 (1998).* [HN17] Under rational basis scrutiny, [*154] "the challenged statute will be upheld if it furthers a legitimate governmental interest and if the classification is rationally related to achieving the interest." *Id. at 349.* This is a deferential standard, for we presume the statute to be constitutional, *Doe, supra at 662,* and the party challenging the statute has the burden of demonstrating that the classification is arbitrary and irrational. *Yaldo, supra at 349.*

The challenged statutory system [***26] provides that juveniles at least fourteen years of age who commit enumerated serious felonies may be subjected to prosecution as adults in the circuit court and, if convicted, face sentencing as adults. Defendants do not argue that the statutory system intentionally discriminates against a particular group of juveniles, but only that the prosecutors' charging decisions will result in some juveniles being charged and sentenced differently from others. Therefore, because no intentional discrimination has been demonstrated, we cannot conclude that the statutory system violates equal protection. *Harville, supra at 311.* Moreover, the lower courts' rulings that § 1 is unconstitutional were not limited to the application of § 1 to the present defendants. We note that [HN18] in order to find that a statute is not only unconstitutional as applied, but is facially unconstitutional, the party challenging the statute "'must establish that no set of circumstances exists under which the [statute] would be valid. The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient . . . .'" *Council of Organizations and Others for Ed About Parochiaid, Inc v Governor, 455 Mich. 557, 568;* [***27] *566 N.W.2d 208 (1997),* quoting *United States v Salerno, 481 U.S. 739, 745; 107 S. Ct. 2095; 95 L. Ed. 2d* [*155] *697 (1987).* In this case, defendants failed to demonstrate that the statutory system will always result in purposeful discrimination. We conclude that defendants did not meet this heavy burden of overcoming the presumption of constitutionality, and the lower courts therefore erred in finding that § 1 violated the constitutional guarantees of equal protection.

Furthermore, defendants' challenge to § 1 is essentially a challenge to prosecutorial charging discretion. Defendants do not complain of the classification created by the statutory automatic waiver process itself--juveniles at least fourteen years of age who commit enumerated crimes as opposed to juveniles in the same age group who commit different crimes or juveniles under fourteen years of age who commit the same crimes--but rather of the classification that results from the exercise of prosecutorial discretion regarding whether to charge as adults certain juveniles at least fourteen years of age who commit enumerated crimes. Both the lower courts and defendants note the [***28] two classes cre-

ated by the statutory system as follows: (1) juveniles at least fourteen years of age accused of enumerated serious felonies who are charged and sentenced as juveniles on the basis of the decision of the prosecutor, and (2) juveniles at least fourteen years of age accused of the same crimes who are charged and sentenced as adults on the basis of the decision of the prosecutor. Therefore, the alleged equal protection violation results from the exercise of prosecutorial charging discretion.

However, [HN19] in order to successfully claim that the exercise of prosecutorial charging discretion constitutes a violation of equal protection guarantees, a [*156] defendant must demonstrate that the [**61] prosecutor singled out certain defendants for prosecution while not charging others similarly situated who committed the same crime and that this decision was based on impermissible factors such as race, sex, religion, or the exercise of a fundamental right. *People v Maxson, 181 Mich. App. 133, 135; 449 N.W.2d 422 (1989)*, quoting *People v Ford, 417 Mich. 66, 102; 331 N.W.2d 878 (1982)*. Therefore, in order to hold that the exercise of prosecutorial [***29] charging discretion through the automatic waiver process violates equal protection, it must be demonstrated that the prosecutor, on the basis of impermissible factors, decided to charge as adults certain juveniles who committed certain crimes and to charge as juveniles other juveniles who committed the same crimes. Defendants have made no such showing, but merely assert that because the prosecutor may arbitrarily exercise charging discretion in this area, the statutory system granting the prosecutor that discretion violates equal protection. In order to accept defendants' argument, we would be required to abandon the notion of prosecutorial charging discretion entirely. If we accepted defendants' argument, presumably an equal protection violation would result from a prosecutor's charging one thirty-year-old person with felonious assault, *MCL 750.82(1)*; MSA 28.277(1), a felony prosecuted in the circuit court, while charging another thirty-year-old person who committed a similar act with simple assault, *MCL 750.81(1)*; MSA 28.276(1), a misdemeanor prosecuted in the district court. [HN20] Without a showing of intentional discrimination based on [***30] impermissible factors, the mere fact that some persons are charged differently from others for the same conduct [*157] does not violate equal protection. *Maxson, 181 Mich. App. at 134-135*. Furthermore, to the extent that defendants' argument is based on the effect the prosecutor's decision has on the sentencing options available to the court, we again note that prosecutorial charging decisions always affect sentencing options without offending the constitutional doctrine of separation of powers.

We therefore hold that the statutory system for automatic waiver does not violate federal and state guarantees of equal protection.

VI. Due Process

In *People v Schroeder*, the trial court held that § 1 violated the constitutional right to due process. The prosecutor argues that this was error. Again, we agree.

[HN21] Both the United States and Michigan Constitutions provide that no person shall be deprived of life, liberty, or property without due process of law. US Const, Am XIV, § 1; Const 1963, art 1, § 17. Michigan's due process guarantee provides no greater protection than does the federal due process guarantee. *Syntex Laboratories v Dep't of Treasury, 233 Mich. App. 286, 292;* [***31] *590 N.W.2d 612 (1998)*.

Defendants argue that § 1 violates the right to due process because juveniles at least fourteen years of age convicted of certain crimes after being charged as an adult face adult sentences without the benefit of a hearing to determine whether they should be sentenced as an adult or as a juvenile. Before § 1 was amended, a juvenile sentencing hearing was always held; after the amendment, the circuit court is [*158] required to sentence juveniles as adults if they are convicted of any of the enumerated serious felonies. However, defendants failed to demonstrate that the procedures afforded before § 1 was amended were constitutionally required. We conclude that, because the entire juvenile justice system is a legislatively created system, the mere fact that legislatively mandated procedures are legislatively altered does not necessarily result in a violation of the right to due process.

[HN22] There is no constitutional right to be treated as a juvenile. *People v Hana, 443 Mich. 202, 220; 504 N.W.2d 166 (1993)*. Our Supreme Court recently discussed [**62] the history of juvenile justice in the United States and in Michigan, noting that, at [***32] common law, juveniles at least fourteen years of age were presumed to be capable of forming criminal intent and were subject to the same criminal penalties as adults. *443 Mich. at 209-210*. In 1905, Michigan first provided for a separate process, in the probate court, for juvenile offenders. *Id. at 213*. However, by 1939, a process was implemented to waive jurisdiction over juveniles who committed felonies punishable by more than five years' imprisonment. *Id. at 214*. Legislation granting the prosecutor the discretion to automatically waive certain juvenile offenders into the circuit court was passed in 1988. *Id.* The legislative intent behind the automatic waiver process was "to treat juvenile offenders who engage in serious criminal activity more harshly by providing adult penalties for certain crimes." *People v Veling,*

443 Mich. 23, 27; 504 N.W.2d 456 (1993). See also *People v Valentin, 457 Mich. 1, 6; 577 N.W.2d 73 (1998).* The 1996 amendment of the automatic waiver system was designed to more effectively accomplish this intent. See, generally, House Legislative Analysis, HB [*159] 4037 et [***33] al., July 22, 1996. [HN23] Because juveniles have no constitutional right to be treated differently from adults when they engage in criminal conduct, and because without the legislatively created juvenile justice system all juveniles at least fourteen years of age would be subject to adult criminal penalties, we conclude that the amended automatic waiver system does not deny juveniles the constitutional right to due process.

Defendants argue that, according to the United States Supreme Court in *Kent v United States, 383 U.S. 541; 86 S. Ct. 1045; 16 L. Ed. 2d 84 (1966),* due process requires a hearing before trying and sentencing a juvenile as an adult. Therefore, defendants argue that the amended automatic waiver system is unconstitutional because it places the decision whether to try and sentence juveniles as adults solely within the discretion of the prosecutor, without any hearing or any standards. However, the Court in *Kent* did not hold that a hearing was required under an automatic waiver system; rather, it held that, where the federal statute allowed the juvenile court to waive its exclusive jurisdiction over a juvenile offender after the court [***34] made a full investigation, due process required that the court hold a hearing before waiving jurisdiction. *383 U.S. at 547-548, 553, 561-562.* The Court was not faced with the question whether such a hearing would be required under an automatic waiver system, where the prosecutor decides whether to charge the juvenile as an adult. Therefore, defendants' reliance on *Kent* is inapposite.

Defendants also argue that, in rejecting a due process challenge to the automatic waiver system before the 1996 amendment of § 1, this Court upheld the [*160] automatic waiver system because a juvenile sentencing hearing was required, which satisfied the requirements of due process. *People v Parrish, 216 Mich. App. 178; 549 N.W.2d 32 (1996).* However, the panel in *Parrish* was addressing a claim that the automatic waiver system then existing violated the right to due process because it did not afford the same procedural protections as did the traditional waiver system. The panel concluded that, because a sentencing hearing was held to decide whether to sentence the juvenile as an adult, the automatic waiver system afforded procedures similar to those under the traditional waiver [***35] system, which required a hearing to decide whether the juvenile should be tried as an adult. *216 Mich. App. at 182-183.* Therefore, because both systems provided substantially the same procedural protections, the panel rejected the defendant's claim that the automatic waiver system was unconstitutional because it did not provide the same procedural protections as did the traditional waiver system. *Id. at 184.* Importantly, the panel did not hold that such procedures were constitutionally required, and even noted [**63] that there is no constitutional right to be treated as a juvenile. *216 Mich. App. at 182.* Rather, the panel held only that because both systems provided similar procedures, the defendant's due process challenge based on the allegedly different procedures of the two systems was without merit. Thus, defendants' reliance on *Parrish* is also misplaced.

Defendants essentially argue that, because the amended automatic waiver system removes in some cases the prior procedural requirement of a juvenile sentencing hearing, due process is denied to juveniles who commit the enumerated serious felonies that [*161] now require adult sentences if the juvenile is charged and convicted as an adult. However, [***36] that the Legislature previously required certain procedures before sentencing a juvenile as an adult does not necessarily elevate those procedures to constitutional rights. The juvenile justice system is legislatively created, and the alteration of statutory procedures in this case does not constitute a denial of the right to due process. As noted above, the Legislature has exercised its power to limit the sentencing discretion of the circuit court in sentencing juveniles who are convicted of serious felonies. The removal of this sentencing discretion by requiring the court to sentence such juveniles as adults does not deny those juveniles due process. Juveniles are afforded the same due process protections during trial as adults, such as the presumption of innocence and the right to a jury trial. Furthermore, the exercise of prosecutorial charging discretion does not require a hearing. No defendant has the right to a hearing before the prosecutor decides what charges to bring against the defendant. We therefore conclude that the trial court erred in holding that § 1 violates the constitutional right to due process.

To the extent that defendants' argument is based on the lack of [***37] standards to govern the prosecutor's decision whether to charge a particular juvenile as an adult, we note that our Supreme Court has held that [HN24] a lack of standards to govern the exercise of prosecutorial charging discretion does not, in itself, violate the right to due process. *Ford, supra at 97, 99.* Also, this argument is essentially defendants' equal protection argument in another guise.

[*162] VII. Conflict with *MCR 6.931*

We also conclude that the lower courts erred in finding that § 1 is unconstitutional because it directly conflicts with a court rule governing matters of practice and procedure.

[HN25] *MCR 6.931* provides that, when a juvenile is convicted in the circuit court, a hearing is required to determine whether to sentence the offender as an adult or as a juvenile. Defendants correctly note that § 1, mandating that the circuit court sentence a juvenile convicted of any of the enumerated serious felonies as an adult, without a hearing, directly conflicts with *MCR 6.931*. However, the prosecutors also correctly note that the court rules governing juvenile proceedings in the circuit court found in MCR subchapter 6.900 were promulgated by the Supreme Court in response [***38] to legislation allowing for automatic waiver into the circuit court for certain crimes. See staff comment on MCR subchapter 6.900, R 6.9-9. *MCR 6.931*, then, was promulgated to conform with legislation requiring that the circuit court hold a juvenile sentencing hearing upon conviction to determine whether to sentence the juvenile offender as an adult. *Id.* With this in mind, we turn to the task of resolving this conflict between the statute and the court rule.

We conclude that, although *MCR 6.931* and § 1 are in direct conflict, § 1 is not an unconstitutional infringement on the Supreme Court's rulemaking authority because § 1 is substantive rather than procedural. [HN26] Under Const 1963, art 6, § 5, the Supreme Court is given the exclusive rulemaking authority in matters [**64] of practice and procedure. *McDougall v Schanz, 461 Mich. 15, 26; 597 N.W.2d 148 (1999).* However, the Court "is not authorized to enact court rules [*163] that establish, abrogate, or modify the substantive law." *Id.* at 27. Accordingly, "in resolving a conflict between a statute and a court rule, the court rule prevails if it governs practice and procedure." *People v Strong, 213 Mich. App. 107, 112;* [***39] *539 N.W.2d 736 (1995).* However, if the statute does not address purely procedural matters, but substantive law, the statute prevails. *McDougall, supra at 37.*

In *McDougall*, the Supreme Court held that a statutory evidentiary rule restricting the admissibility of expert opinions in certain medical malpractice cases did not impermissibly infringe on the Supreme Court's constitutional rulemaking authority over practice and procedure, even though the statute directly conflicted with a court rule of evidence. *Id.* The Court concluded that the statute was an enactment of substantive law, reflecting "wide-ranging and substantial policy considerations relating to medical malpractice actions against specialists." *461 Mich. at 35.* Therefore, the statute, not the court rule, governed. Likewise, § 1 in the instant case involves substantive policy considerations regarding juvenile crime and how to punish juveniles who commit serious crimes. The legislative intent behind the automatic waiver system was to require more severe punishment for juveniles who commit serious crimes, and § 1 was designed to further this legislative intent. See, e.g., *Veling, supra at 27;* [***40] *Valentin, supra at 6;* House Legislative Analysis, HB 4037 et al., July 22, 1996. Thus, § 1 reflects a substantive policy choice by the Legislature and, although directly conflicting with *MCR 6.931*, does not infringe on the Supreme Court's procedural rulemaking authority.

[*164] Although *MCR 6.001* specifically notes that the court rules contained in subchapter 6.900 govern matters of procedure and supersede any statutory procedure inconsistent with those rules, this alone does not render the question whether a juvenile sentencing hearing should be conducted to determine whether to sentence a juvenile as an adult a procedural issue. As noted above, the staff comment to those court rules indicates that they were enacted in response to legislation. We conclude that the court rules contained in MCR subchapter 6.900 were intended to govern procedures designed to implement legislative policy choices regarding juvenile crime. The Legislature was clearly concerned about substantive issues regarding juvenile crime, and § 1 reflects a legislative policy decision. Accordingly, we hold that § 1 does not unconstitutionally infringe on the Supreme Court's rulemaking authority and that where [***41] § 1 and *MCR 6.931* directly conflict regarding whether a juvenile sentencing hearing is required, § 1 prevails because it is a matter of substantive law.

VIII. Conclusion

In summary, we conclude that the constitutional questions presented are ripe for review and that the lower courts erred in holding that § 1 was unconstitutional. The Legislature's decision to require adult sentences for certain juvenile offenders was one of policy. We may not substitute our judgment for that of the Legislature in this matter. *Ecorse v Peoples Community Hosp Authority, 336 Mich. 490, 500; 58 N.W.2d 159 (1953).* "Arguments [HN27] that a statute is unwise or results in bad policy should be addressed to the Legislature." *People v Kirby, 440 Mich. 485, 493-494; 487* [*165] *N.W.2d 404 (1992).* The issue before this Court is not whether the amended automatic waiver system is wise or results in good policy; rather, our inquiry is strictly limited to whether it is unconstitutional. We conclude that it is not. Accordingly, we reverse the lower courts' orders finding § 1 unconstitutional, and we remand these cases for trial. We again [**65] note that defendant Schroeder [***42] entered a *Cobbs* plea of no contest in reliance on the trial court's indication that he would be sentenced as a juvenile. In light of our holding, under which the trial court would be required to sentence him as an adult if convicted, we direct the trial court to allow defendant Schroeder to withdraw his plea of no contest.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

R.J. Danhof, J., concurred.

/s/ Peter D. O'Connell

/s/ Robert J. Danhof

CONCURBY: Joel P. Hoekstra

CONCUR: HOEKSTRA, P.J., (*concurring*).

I agree with the majority's analysis, but write separately to explain why I reject defendants' argument that *MCL 769.1*; MSA 28.1072 violates Const 1963, art 3, § 2, the provision providing for separation of powers among the three branches of Michigan's government.

The majority frames the argument in terms of the balance of power between the prosecutor, a member of the executive branch, and the judiciary. Fundamentally, however, this is a jurisdictional question and should be analyzed in terms of the Legislature's power to bestow and withhold jurisdiction. The Michigan Constitution [***43] provides for a probate court with original jurisdiction over juvenile cases, "except as otherwise provided by law." Const 1963, art 6, § 15. [*166] The convention comment following this provision states, in pertinent part:

The probate court continues to have original jurisdiction in all cases involving juvenile delinquents and dependent juveniles, unless otherwise provided by law. This will permit the legislature greater flexibility in the future in determining the best method within our court system for the handling of juvenile matters, including the possibility of creating a family court.

According to the Michigan Constitution, therefore, the Legislature determines which courts have jurisdiction over juvenile defendants. See *In re Wirsing, 456 Mich. 467, 472; 573 N.W.2d 51 (1998)* (the jurisdiction of the probate court is defined entirely by statute). Nothing in art 6, § 15 prevents the Legislature from granting jurisdiction over juveniles who commit certain enumerated crimes to other courts, nor does it prohibit the creation of concurrent jurisdiction over certain offenses. Indeed, the Legislature recently withdrew jurisdiction from the juvenile division [***44] of the probate court and gave it to the newly created family division of the circuit court. *MCL 712A.1*; MSA 27.3178(598.1) (as amended by *1996 PA 409).*

For policy reasons properly left to the Legislature, the circuit courts and family courts have concurrent jurisdiction over certain juvenile defendants. The statute in question, *MCL 769.1*; MSA 28.1072, provides that, for certain crimes, the circuit court must sentence its juvenile defendants as adults. As noted by the majority, however, the Legislature has the power to prescribe sentencing options for various offenses, and the power to sentence any given juvenile defendant, within those legislatively prescribed limits, remains with the trial court. This statutory scheme [*167] provides the prosecutor a choice of jurisdictions, but that is all. Although that choice can have de facto sentencing consequences, it is fundamentally a jurisdictional decision.

Absent some showing that this constitutionally permissible exercise of power has yielded an unconstitutional result, I can find no fault with the Legislature's decision to create courts of concurrent jurisdiction. To the extent that the de facto sentencing [***45] consequences turn this issue into one concerning the proper allocation of sentencing power, I agree with the majority's conclusion that the prosecutor's choice to proceed in the circuit court more closely resembles the decision regarding how the defendant will be charged; therefore, it does not invade the trial court's constitutional role in fashioning a defendant's sentence. However, with regard to the issue [**66] whether *MCL 769.1*; MSA 28.1072 violates art 3, § 2, I maintain that it is enough that we simply recognize that the Legislature has the power to create concurrent jurisdictions and that the prosecutor's discretion is limited to discussions involving jurisdiction, not sentencing.

/s/ Joel P. Hoekstra

LEXSEE 443 MICH. 202

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v. KAFAN BAHJAT HANA, Defendant-Appellee.

Docket No. 94268

Supreme Court of Michigan

443 Mich. 202; 504 N.W.2d 166; 1993 Mich. LEXIS 1943

April 1, 1993, Argued August 3, 1993, Decided
August 3, 1993, Filed

SUBSEQUENT HISTORY:

Certiorari Denied by the Supreme Court of the United States on February 22, 1994, 510 U.S. (1994).

DISPOSITION:

[***1] Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: The prosecution appealed orders of the state appellate court (Michigan) which reversed the probate court's waiver of jurisdiction over juvenile defendant on charges for possession of more than 650 grams of a substance containing cocaine, delivery of more than 225 but less than 650 grams of a substance containing cocaine, conspiracy to induce a minor to commit a felony, and bribery of a public official.

OVERVIEW: After defendant was charged, the prosecution filed a motion with the probate court to waive jurisdiction over defendant. At defendant's phase II dispositional hearing, the court determined the best interest of the public and defendant would be served by its jurisdictional waiver over defendant to an adult court. Defendant appealed. The circuit court affirmed and the appellate court reversed. On appeal, the court reversed the appellate court, holding that the waiver was not akin to a criminal disposition, because there was no determination of guilt, and the asserted constitutional protections had not yet become relevant. The court held that legislative purpose mandated the conclusion that the probate court's discretion and full investigation requirement at the disposition phase of a waiver hearing remained unfettered by evidentiary and constitutional requirements necessary for later phase criminal proceedings. The court distinguished the case law asserted by defendant as either not applicable to the dispositional hearing phase of the proceedings, or that the necessary protections had already been afforded to defendant.

OUTCOME: The court reversed and remanded the appellate court's reversal of the probate court's jurisdictional waiver over defendant. The court remanded other issues asserted by defendant to the appellate court.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN1] The procedures for waiver of jurisdiction over a juvenile defendant for trial as an adult are set forth in *Mich. Comp. Laws § 712A.4* (Mich. Stat. Ann. § 27.3178(598.4)) and *Mich. Ct. R 5.950*.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings
[HN2] The criminal standard of proof beyond a reasonable doubt extends to juvenile proceedings. However, only "accurate factfinding" is required, which can be satisfied by a judge or jury.

Governments > Courts > Authority to Adjudicate
[HN3] The responsibility of defining probate court jurisdiction is the responsibility of the Legislature. Probate courts derive no power from the common law but must find warrant for all of their doings in the statutes.

Criminal Law & Procedure > Juvenile Offenders > Confinement Practices
[HN4] In Michigan, a probate court retains jurisdiction over juveniles who are committed to a state institution until the age of 19. Mich. Pub. Acts 288, ch. XII, § 19 (1939). This section was amended effective October 1, 1988, Mich. Pub. Acts 54, ch. XIIA, § 18c (1988). *Mich. Comp. Laws § 712A.18c(4)* (Mich. Stat. Ann § 27.3178(598.18c)(4)). The amendment retains the automatic release provision for juveniles reaching the age of 19, but it also permits extension of jurisdiction until age 21 for certain offenses. 1988 Mich. Pub. Acts 54, ch. XIIA, § 18d(1) (1988), now found at *Mich. Comp. Laws § 712A.18d(1)* (Mich. Stat. Ann. 27.3178(598.18d)(1)).

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings
Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN5] Juvenile waiver procedures are a "critical phase" of the judicial process, so that certain rights, such as the right to counsel and the right against self-incrimination, must be recognized.

Criminal Law & Procedure > Juvenile Offenders > Confinement Practices
[HN6] The Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings
[HN7] The Kent holding requires a degree of procedural regularity in juvenile waiver hearings that comports with the basic requirements of due process and fairness and full investigation. Accordingly, juvenile courts are required to establish hearing procedures, afford the right to counsel, and set forth their findings to avoid arbitrariness and the inability to review waiver dispositions for lack of clear findings.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings
[HN8] The Gault holding assured a juvenile the right to counsel at waiver proceedings, including the right to proper notification of this right and the right to appointment of counsel in appropriate circumstances.

Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN9] Former *Mich. Comp. Laws § 712A.4* (Mich. Stat. Ann § 27.3178(598.4)) provided: 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. 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. (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.

Criminal Law & Procedure > Juvenile Offenders > Trial as Adult

[HN10] Former *Mich. Comp. Laws § 712A.4* (Mich. Stat. Ann. § 27.3178(598.4)) provided: (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.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings
Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN11] *Mich. Ct. R. 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 Mich. R. Evid.do not apply to the second phase of the waiver hearing.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings
Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN12] *Mich. Ct. R. 5.950(B)* also provides: (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.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings
Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN13] *Mich. Ct. R. 5.950(B)* also provides: (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.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings
[HN14] *Mich. Ct. R. 5.911(A)(1)* (1985) 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.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings
Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN15] Phase I of a waiver hearing on juvenile jurisdiction is analogous to a preliminary examination, and 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.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings
Criminal Law & Procedure > Juvenile Offenders > Trial as Adult
[HN16] Juvenile Court procedure rules are to be construed to secure fairness, flexibility, and simplicity so that the rights and proper interests of all parties concerned are protected. *Mich. Ct. R. 5.902(A)*. The appropriate standard for purposes

of a phase II hearing is whether the interests of the juvenile and the public would best be served by granting the motion for waiver. *Mich. Ct. R. 5.950(B)(2)*. Former *Mich. Ct. R. 5.911(A)(2)* required a full investigation into these interests and provided a five-factor test that has been carried over to *Mich. Ct. R. 5.950(B)(2)(c)* without substantial change. The public policy underlying phase II hearings requires relaxed evidentiary standards so as to ensure a full investigation.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence
[HN17] An order waiving jurisdiction over a juvenile defendant 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 19, or to disrupt the rehabilitation of other children in the program prior to his release.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings
[HN18] Michigan has adopted the "totality of the circumstances" test to determine the voluntariness of confessions sought to be admitted at a phase I hearing.

COUNSEL:

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *Carl J. Marlinga*, Prosecuting Attorney, *Robert J. Berlin*, Chief Appellate Lawyer, and *Linda Davis*, Assistant Prosecuting Attorney, for the people.

Neil H. Fink and *Mark A. Kriger* (*Carole M. Stanyar*, of counsel), for the defendant.

JUDGES:

Riley, J. Brickley, Boyle, Griffin, and Mallett, JJ., concurred with Riley, J. Cavanagh, C.J., dissenting. Levin, J., concurred with Cavanagh, C.J.

OPINIONBY:

RILEY

OPINION:

[*204] [**167] This case requires us to consider an intricate mix of factual and constitutional issues surrounding waiver procedures for juveniles pursuant to the provisions of the Probate Code n1 and related Michigan Court Rules. n2 The primary question is whether the full panoply of protections provided by the Fifth and Sixth Amendments of the United States Constitution apply to the dispositional phase, as well as to the adjudicative phase, of a juvenile waiver hearing. [***2] We hold 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. Accordingly, we reverse the decision of the Court of Appeals and remand the case for consideration of the remaining issues raised by defendant.

n1 *1939 PA 288*, ch XII, as amended, now found at *MCL 712A.1 et seq.*; MSA 27.3178(598.1) *et seq.*

n2 *MCR 5.901 et seq.*

[*205] I

FACTS AND PROCEEDINGS

On January 6, 1988, defendant was arrested n3 in a drug raid conducted by the City of Sterling Heights Police Department and charged with possession of more than 650 grams of a substance containing cocaine, n4 delivery of more than 225 but less than 650 grams of a substance containing cocaine, n5 conspiracy to induce a minor to commit a felony, n6 and [***3] bribery of a public official. n7 We turn first to the facts at issue beginning with the period immediately following defendant's arrest.

n3 Also arrested were defendant's brother and two others who had arranged with Officer Putnam to purchase twelve ounces of cocaine.

n4 *MCL 333.7403(2)(a)(i)*; MSA 14.15(7403)(2)(a)(i).

n5 *MCL 333.7401(2)(a)(ii)*; MSA 14.15(7401)(2)(a)(ii).

n6 *MCL 750.157c*; MSA 28.354(3).

n7 *MCL 750.117*; MSA 28.312.

On the way to the police station, Officer Blasky testified that he informed defendant and his brother of their *Miranda* n8 rights. He also testified that he told defendant and his brother to refrain from talking to the officers because "it wasn't our job to interview them," and he warned them to be quiet when the brothers began talking to each other. According to Officer Blasky, defendant and his brother, who are of Arabic [**168] descent, seemed proficient in English, were not under the influence of any intoxicants, and appeared to understand their *Miranda* rights.

n8 *Miranda v Arizona, 384 U.S. 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).*

[***4] Shortly before arriving at the police station, the officers discovered that defendant was a juvenile. n9 Therefore, defendant was taken to the juvenile [*206] bureau area of the station to await transfer to the youth home by a juvenile court officer. n10

n9 On the date of his arrest, defendant was 16 1/2 years old.

n10 According to Officer Blasky, this was the policy of the Sterling Heights Police Department.

Officer Blasky testified that while waiting for the juvenile court officer, defendant boasted about his involvement in other drug deals, stated that he had been selling drugs for a few years, and claimed to have been selling up to twenty kilograms of cocaine per month. Officer O'Connor entered [***5] the room and told Officer Blasky and defendant that they had discovered a safe in defendant's bedroom. Officer Blasky asked defendant for the combination to the safe to make things easier because the police were already in the process of securing a search warrant and would gain access to the safe one way or another. Defendant began to cry, stated, "I'm dead," but ultimately gave police the combination to the safe. n11

n11 Defendant also allegedly stated that the police would have found approximately $ 300,000 in the safe had they searched it a day earlier.

Shortly thereafter, Officer Brooks, the youth officer, arrived, and Officer Blasky left. Officer Brooks testified that he advised defendant of his *Miranda* rights, advised him not to discuss the evening's events until a parent or attorney was present, and asked if he understood his rights. Defendant acknowledged that he did, but nevertheless continued to make incriminating statements and was again warned not to speak without a parent or attorney present.

While [***6] in Officer Brooks' custody, defendant was permitted to make a phone call to his parents. n12 Officer Brooks testified that following the phone call defendant began asking if Brooks was the person who would decide whether defendant would [*207] be detained overnight or released. Defendant then allegedly offered Officer Brooks a new pager, followed by offers of increasing amounts of money. n13

n12 The record indicates that defendant was unable to contact his parents because they had left his uncle's house, but that they would be contacted as soon as they arrived home.

n13 These alleged offers formed the basis for the bribery of a public official charge.

Officer Dodt, who was assigned to drive defendant to the youth home, testified that defendant's conversation regarding the events of the evening included whether defendant would "flip himself over" and make a deal with the detectives to incriminate defendant's supplier, how much defendant made each month together with any commissions for selling cocaine over a certain [***7] price, the fact that defendant ordinarily sold to blacks in the City of Detroit, and that defendant went through with the sale that led to his arrest against his better judgment because he had incurred a gambling debt of approximately $ 11,000 the day before and was in need of money. Officer Dodt also testified that defendant expressed a desire to make $ 200,000 or $ 300,000, then "get out and live." n14

n14 While transporting defendant to the youth home, Officer Dodt was requested via radio dispatch to ask defendant if there was any more money hidden in the home at which time defendant allegedly stated that there was $ 6,000 in a closet near the safe.

Pursuant to the prosecutor's motion to waive jurisdiction over defendant for trial as an adult, n15 the probate court conducted bifurcated hearings early in February and March of 1988. At the probable cause [**169] phase of the waiver hearing (phase I), the prosecution offered the testimony of Officer Putnam, his supervisor,

Officer Cleland, and another witness, all of whom [***8] had been involved in the drug raid. The prosecution also offered the testimony of Officer Brooks relating to the bribery charge. None of Officer Brooks' testimony involved [*208] any admissions or confessions allegedly made by defendant. At the close of the phase I segment of the waiver hearing, the probate court concluded that there was probable cause to believe that defendant committed the crimes charged as required by *MCL 712A.4(3)*; MSA 27.3178(598.4)(3) and *MCR 5.950(B)(1)*.

n15 [HN1] The procedures for waiver are set forth in *MCL 712A.4*; MSA 27.3178(598.4) and *MCR 5.950*. *MCL 712A.4*; MSA 27.3178(598.4) was amended effective October 1, 1988. *1988 PA 182*. The provisions relevant to this proceeding remain substantially unchanged.

Several weeks later, the court conducted a hearing on the issue whether defendant should be treated as a juvenile or as an adult under the criteria set forth in *MCL 712A.4(4)*; MSA 27.3178(598.4)(4) and *MCR 5.950(B)(2)* (phase II). At the phase II hearing, the probate court permitted [***9] testimony of the probate court psychologist n16 and Officers Blasky, Brooks, and Dodt concerning statements allegedly made by defendant after his arrest. The court's basis for admissibility was "that we're in phase II here, to determine . . . [respondent's] pattern of living, his character, and that sort of thing" rather than in the phase I probable cause stage. The court also listened to testimony of several witnesses who were alleged to have purchased narcotics from defendant in the past and from Lieutenant Tuttle of the Michigan State Police regarding the likely prior involvement in the drug world of someone entrusted to sell three kilograms of cocaine.

n16 The record indicates that while defense counsel objected to the testimony of the police officers, defense counsel failed to object to testimony by the court psychologist that defendant admitted "to the offenses that he's being charged with . . . [and] that his involvement was a little more extensive and there were other things going on, he wasn't sure if he wanted to tell everything."

[***10] Defendant offered testimony of a character witness as well as the findings of his own psychologist. Following the phase II hearing, jurisdiction over defendant was waived.

Defendant appealed the waiver decision in the [*209] Macomb Circuit Court. n17 The circuit court concluded that there was ample evidence to support the waiver. However, the Court of Appeals, relying on *In re Gault, 387 U.S. 1; 87 S Ct 1428; 18 L Ed 2d 527 (1967)*, reversed, holding that the constitutional rights applicable in criminal proceedings extended to phase II, the dispositional phase of a waiver hearing. n18 Moreover, the Court, drawing upon a trilogy of United States Supreme Court cases, n19 concluded that a waiver of this nature is tantamount to an enhancement of defendant's sentence, and thus required application to a phase II waiver hearing of the same constitutional protections found in criminal trials.

n17 See *MCL 600.863(1)*; MSA 27A.863(1) (authorizing a right of appeal directly to the appropriate circuit court of any order, sentence, or judgment of a probate court) and *MCL 600.867*; MSA 27A.867 (permitting suspension of further proceedings of the probate court pending an appeal to a circuit court).

n18 Unpublished opinion per curiam of the Court of Appeals, decided March 20, 1992 (Docket No. 119792).

n19 *Gault, supra; Kent v United States, 383 U.S. 541; 86 S Ct 1045; 16 L Ed 2d 84 (1966); Estelle v Smith, 451 U.S. 454; 101 S Ct 1866; 68 L Ed 2d 359 (1981).*

[***11] On November 17, 1992, this Court granted leave to appeal. n20

n20 *441 Mich 883.*

II

HISTORICAL OVERVIEW

A

At common law, a child over the age of fourteen was presumed to have the mental capacity to form the mens rea required for specific intent crimes. n21 [*210] As a result, juveniles [**170] from the age of fourteen could receive the same penalties as adult criminals. n22 This criminal accountability of juveniles extended to the highest level of punishment possible, capital punishment. n23

n21 1 Wharton, Criminal Law (14th ed), § 96, pp 426-427. See also Feld, *The juvenile court meets the principle of the offense: Legislative changes in juvenile waiver statutes, 78 J Crim L & Criminology 471, 521 (1987),* and authorities cited therein; McCarthy, *The role of the concept of responsibility in juvenile delinquency proceedings, 10 U Mich J L Ref 181, 184-185 (1977).*

n22 Feld, n 21 *supra* at 524; McCarthy, n 21 *supra* at 185. See also *Gault, supra at 16-17.*

n23 See Feld, n 21 *supra* at 522, ns 177 and 178; *Thompson v Oklahoma, 487 U.S. 815, 832-833; 108 S Ct 2687; 101 L Ed 2d 702 (1988)* (opinion of Stevens, J.).

[***12] Near the end of the nineteenth century, this country experienced a radical change in attitude regarding the treatment of children generally and in particular those caught up in the juvenile justice [***13] system. The exponents of what was called the Progressive Movement n24 began focusing on rehabilitation rather than on retribution, pursuant to the doctrine of parens patriae. n25

n24 See, generally, Feld, n 21 *supra* at 474-475; Feld, *Criminalizing juvenile justice: Rules of procedure for the juvenile court, 69 Minn L R 141, 142-151 (1984),* and authorities cited therein.

n25 See Shears, *Legal problems peculiar to children's courts, 48 ABA J 719, 720 (1962)* ("The basic right of a juvenile is not to liberty but to custody. He has the right to have someone take care of him, and if his parents do not afford him this custodial privilege, the law must do so"), quoted in *Gault, supra at 17, n 21.* See, generally, *47 Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children, § 1* to *§ 8*, pp 986-990.

The first true juvenile court was established by the Illinois Legislature in 1899. n26 The enabling legislation provided [***14] that the act "be liberally construed to the end that its purpose may be carried out, to wit: That, the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents . . . ." n27 [*211] Several states quickly followed Illinois' lead by enacting similar legislation, and by 1928, all but two states had adopted a juvenile court system. n28

n26 McCarthy, n 21 *supra* at 189.

n27 *Id.* at 189, quoting the Act of April 21, 1899, Ill Laws, Juvenile Courts, § 21. *MCL 712A.1(2)*; MSA 27.3178(598.1)(2), which mirrors this philosophy, provides:

> This chapter shall be liberally construed to the end that each child coming within the jurisdiction of the [probate] court shall receive the care, guidance, and control, preferably in his or her own home, as will be conducive to the child's welfare and the best interest of the state. If a child is removed from the control of his or her parents, the child shall be placed in care as nearly as possible equivalent to the care which should have been given to the child by his or her parents.

n28 *Id.* at 189, ns 41 and 42 and accompanying text.

[***15] For nearly three quarters of a century, the laws and procedures surrounding juvenile courts remained virtually unchallenged and unchanged. However, in 1966, the United States Supreme Court in *Kent v United States, 383 U.S. 541, 556; 86 S Ct 1045; 16 L Ed 2d 84 (1966),* concluded that waiver procedures for juveniles to criminal courts were "a 'critically important' action determining vitally important statutory rights of the juvenile." The *Kent* Court n29 extended to juveniles several constitutional rights recognized in adult criminal trials. A year later in *Gault*, n30 the Court stated that Fifth and Sixth Amendment rights recognized in adult criminal proceedings applied to juvenile proceedings. n31

n29 Discussed *infra*, pp 215-216.

n30 Discussed *infra*, pp 216-217.

n31 In *In re Winship, 397 U.S. 358, 365-367; 90 S Ct 1068; 25 L Ed 2d 368 (1970),* the Supreme Court [HN2] extended the criminal standard of proof beyond a reasonable doubt to juvenile proceedings. However, the Supreme Court declined an invitation to require a jury trial in juvenile proceedings, requiring instead only "accurate factfinding," which could be satisfied by a judge or jury. See *McKeiver v Pennsylvania, 403 U.S. 528, 543; 91 S Ct 1976; 29 L Ed 2d 647 (1971)* (opinion of Blackmun, J.).

Careful review of both *Kent* and *Gault* reveals a reluctance on the part of the United States Supreme Court to establish a clear link between the Fifth and Sixth Amendments, or even the *Miranda* case, to juvenile proceedings. Rather, both cases focus on general concepts of due process extended to juveniles pursuant to the Fourteenth Amendment. See *Kent, supra at 562* ("[w]e do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but *we do hold that the hearing must measure up to the essentials of due process and fair treatment*") (emphasis added); *Gault, supra at 13* ("neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"). We interpret this reluctance as recognition of the prevailing philosophy that sought to treat juveniles differently than adults and would require by its very nature a type of discretion alien to the adult criminal justice system.

A popular legislative resolution of this dilemma, in which Michigan participates, is the bifurcated waiver hearing that recognizes adult criminal protections in the adjudicative phase while retaining historical discretion in the dispositional phase. See Feld, *Legislative changes in juvenile waiver statutes*, n 21 *supra* at 487-491.

[*212] [***16] [**171] This body of case law led to a significant increase in judicial and legislative action regarding juvenile justice procedures. n32 Particularly noteworthy is the fact that judicial extension of constitutional protections in juvenile proceedings led to legislative restriction of the sentencing discretion of the probate courts. n33 In short, the "constitutional domestication" n34 of the juvenile justice system prompted sentencing uniformity for more serious crimes via legislative enactment at the expense of sentencing flexibility.

n32 See, e.g., Feld, *Criminalizing juvenile justice*, n 24 *supra* at 161-164.

n33 Professor Feld states:

> Beginning in 1970, and in direct response to the Supreme Court's *Kent* decision, Congress excluded a catalogue of offenses from the jurisdiction of the juvenile courts of the District of Columbia. By 1975, four other states followed suit, and, by 1980, nine states excluded serious present offenses from juvenile court jurisdiction. The remaining states have acted similarly since 1980. Thus, *there is a very strong trend to legislatively excise the most serious young offenders from juvenile court jurisdiction* solely on the basis of their offense.
>
> Regardless of the statutory details, *the thrust of these laws is to remove sentencing discretion from judges with respect to the juvenile or adult disposition* . . . . [Feld, *Legislative changes in juvenile waiver statutes*, n 21 *supra* at 517. Emphasis added.]

n34 This term appears to have been coined by Justice Roberts of the Supreme Court of Pennsylvania in state proceedings held in *McKeiver*. See *In re Terry* and *In re McKeiver, 438 Pa 339, 346; 265 A2d 350 (1970).*

[*213] [***17] B

Michigan's history regarding juvenile justice procedures parallels the national trend. The first provision for the establishment of probate courts in Michigan is found in the Constitution of 1835. n35 By 1850, the Michigan Constitution included a provision for the probate courts jurisdiction, to wit: "The jurisdiction, powers and duties of such courts shall be prescribed by law." n36 This constitutional empowerment has remained virtually unchanged. n37 Thereafter, the powers and duties of the probate courts were defined by the Legislature. n38

n35 Const 1835, art 6, § 3 provided, in toto, "A Court of probate shall be established in each of the organized counties." Section 4 of art 6 provided that probate judges were to be elected to four-year terms by qualified voters within the several counties. Before the Constitution of 1835, matters that are ordinarily considered to be the subject of probate court jurisdiction were within the province of a three-member court empowered to pass judgments in accord with the extant common law. Northwest Ordinance of 1787, § 4.

n36 Const 1850, art 6, § 13.

n37 See Const 1963, art 6, § 15.

n38 See *Buback v Governor, 380 Mich 209, 226; 156 NW2d 549 (1968)* ([HN3] the responsi-

bility of defining probate court jurisdiction is the responsibility of the Legislature); *In re Chamberlain Estate, 298 Mich 278, 283-284; 299 NW 82 (1941)* (probate courts derive no power from the common law but must find warrant for all of their doings in the statutes).

[***18] The Michigan Legislature first authorized probate court jurisdiction over juveniles in 1905. n39 What would be considered Michigan's first waiver statute was passed in 1907. n40 In 1915, the Legislature passed [**172] a law requiring that juveniles who [*214] were arrested be taken immediately before the probate court. n41 In 1939, the Legislature made specific provision for waiver of jurisdiction over any child above the age of fifteen "charged with a felony which involves a maximum penalty of imprisonment for life or a term of more than 5 years" upon full investigation into [***19] the circumstances following a motion for waiver filed by the prosecutor. n42 By late 1988, legislation was passed creating a class of cases of a violent or drugrelated nature for which waiver to an adult criminal court was automatic. n43

n39 *1905 PA 312,* § 1. A "delinquent child" subject to probate court jurisdiction was defined as any boy under sixteen years of age and any girl under the age of seventeen who, inter alia, violated a state law.

n40 *1907 PA 325,* § 2, provided, in pertinent part:

> Proceedings under this act shall not be deemed to be criminal proceedings and this act shall not prevent the trial by criminal procedure in the proper courts of children under fourteen years of age charged with the commission of a felony.

1907 PA 325, § 1, also raised the age of delinquency for boys to seventeen years of age.

n41 *1915 PA 308,* § 6. A similar provision is now found at *MCL 764.27*; MSA 28.886.

n42 *1939 PA 288,* ch XII, § 26.

n43 *1988 PA 52,* found at *MCL 600.606*; MSA 27A.606. Because the effective date of this act was October 1, 1988, it does not apply to defendant, although he was charged with one of the felonies listed in the automatic waiver statute, namely, *MCL 333.7403(2)(a)(i)*; MSA 14.15(7403)(2)(a)(i) (possession of more than 650 grams of a controlled substance).

[***20] III

ANALYSIS

It is against the foregoing historical backdrop that we consider defendant's argument that the waiver procedures provided in *MCL 712A.4(3)*, (4); MSA 27.3178(598.4)(3), (4) and *MCR 5.950(B)* are unconstitutional. According to defendant, waiving probate jurisdiction over a minor is the harshest penalty that could be imposed on a juvenile, who could otherwise expect to be released at age nineteen, but for the waiver. n44

n44 [HN4] In Michigan, a probate court retains jurisdiction over juveniles who are committed to a state institution until the age of nineteen. See *1939 PA 288,* ch XII, § 19. This section was amended effective *October 1, 1988, by 1988 PA 54,* ch XIIA, § 18c. See *MCL 712A.18c(4)*; MSA 27.3178(598.18c)(4). The amendment retained the automatic release provision for juveniles reaching the age of nineteen, but it also permitted extension of jurisdiction until age twenty-one for certain offenses. See *1988 PA 54,* ch XIIA, § 18d(1), now found at *MCL 712A.18d(1)*; MSA 27.3178(598.18d)(1).

[*215] [***21] Defendant also notes that [HN5] juvenile waiver procedures are a "critical phase" of the judicial process, so that certain rights, such as the right to counsel and the right against self-incrimination, must be recognized. See *Kent, supra at 553; Gault, supra at 30-31.* Defendant then directs our attention to *Estelle v Smith, 451 U.S. 454, 462-463, 469-471; 101 S Ct 1866; 68 L Ed 2d 359 (1981),* wherein the United States Supreme Court ruled that all Fifth and Sixth Amendment rights recognized in criminal trials applied to the sentencing phase of Texas' bifurcated trial procedure in capital punishment cases. n45

n45 The *Estelle* rationale was adopted in the adult criminal context by this Court in *People v Wright, 431 Mich 282; 430 NW2d 133 (1988).*

The Court of Appeals treated *Kent, Gault* and *Estelle* as [***22] dispositive. However, we conclude that the Court's analysis of these cases is flawed, and thus it erred in reversing the probate court's decision to waive

jurisdiction over defendant. A careful review of the proceedings in these cases is instructive.

In *Kent*, jurisdiction over a sixteen year old who was charged with housebreaking, robbery, and rape was waived by the District of Columbia Juvenile Court. The defendant was arrested and questioned for approximately seven hours, during which time he apparently admitted involvement in the offense and volunteered information concerning similar offenses. After overnight detention in a juvenile home, the defendant was released to police for another full day of interrogation and then returned to the juvenile home where he remained for a week without arraignment or determination of probable cause.

[*216] No hearing was held on the defendant's motions to retain jurisdiction over him, and the court's waiver order was made without any findings or recitation of reasons for [**173] the waiver decision. After failing to secure a reversal through the District of Columbia's appellate process, the United States Supreme Court granted certiorari. n46 A five-justice [***23] majority held:

> [The District of Columbia waiver statute] assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a "*full investigation.*"
>
> * * *
>
> We do not consider whether, on the merits, [the defendant] should have been transferred; but there is no place in our system of law for reaching a result of such tremendous consequences without ceremony -- without hearing, without effective assistance of counsel, without a statement of reasons. *[383 U.S. 553-554.* Emphasis added; citation omitted.] n[47]

n46 *381 U.S. 902 (1965).*

n47 The majority also recognized the "considerable latitude" that the juvenile courts had when determining whether to waive or retain jurisdiction over a juvenile and held:

> This concern [lack of procedural safeguards and of solicitous care], however, does not induce us in this case to accept the invitation to rule that constitutional guaranties which would be applicable to adults charged with the serious offenses for which [the defendant] was tried must be applied in juvenile proceedings concerned with allegations of law violation. *[383 U.S. 556.]*

[***24] In *Gault*, a fifteen-year-old boy was adjudicated a delinquent for making lewd or indecent remarks to a female neighbor by telephone. The boy was arrested and taken to a detention home. His detention pending a hearing had been imposed entirely [*217] as a result of statements made by him to the juvenile court judge during proceedings at which the complainant was absent, no testimony was given, and no record was made. After a hearing that shared many of the same infirmities as the detention hearing, the defendant was committed to the State Industrial School until the age of majority. n48 *Id.* at 4-8.

n48 Then twenty-one years of age in Arizona.

The United States Supreme Court noted that the Arizona Supreme Court had already recognized that due process of law was a constitutional prerequisite to a finding of delinquency that entailed commitment to an institution. *Id.* at 12. The majority stated:

> We conclude that [HN6] the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency [***25] which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child. [*Id.* at 41.] n[49]

n49 The *Gault* majority did, however, add the following caveat:

> We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not

> even consider the entire process relating to juvenile "delinquents." For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process. [*Id.* at 13.]

Finally, in *Estelle*, the United States Supreme Court was asked to review the constitutionality of using psychiatric testimony at the sentencing phase of a bifurcated, [***26] capital murder trial where [*218] the defendant and his counsel were not warned beforehand that his statements could be used in the prosecution's case in the death penalty phase. The prosecution asserted that the evidence was admissible because it was not offered to establish guilt, which had already been decided against the defendant. Finding for the defendant, the Supreme Court concluded:

> We agree with the Court of Appeals that respondent's Fifth Amendment rights were violated by the admission of [**174] Dr. Grigson's testimony at the penalty phase.
>
> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. [*Estelle, supra at 468* (opinion of Burger, C.J.).] n[50]

n50 In addition, the Court held:

> Because "[a] layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege," the assertion of that right "often depends upon legal advice from someone who is trained and skilled in the subject matter." *Maness v Meyers, 419 U.S. 449, 466 [95 S Ct 584; 42 L Ed 2d 574]* (1975).

* * *

> Therefore, in addition to the Fifth Amendment considerations, the death penalty was improperly imposed on respondent because the psychiatric examination on which Dr. Grigson testified at the penalty phase proceeded in violation of respondent's Sixth Amendment right to the assistance of counsel. [*Estelle, supra at 471.]*

[***27] On the basis of the foregoing, it is clear that *Kent, Gault*, and *Estelle* are significantly distinguishable from the instant case and do not support the conclusion reached by the Court of Appeals in reversing the probate court's waiver decision. [HN7] The [*219] *Kent* holding requires a degree of procedural regularity in juvenile waiver hearings that comports with "the basic requirements of due process and fairness" and "full investigation." *Kent, supra at 553.* Accordingly, juvenile courts are required to establish hearing procedures, afford the right to counsel, and set forth their findings to avoid arbitrariness and the inability to review waiver dispositions for lack of clear findings. [HN8] *Gault* assured a juvenile the right to counsel at waiver proceedings, including the right to proper notification of this right and the right to appointment of counsel in appropriate circumstances. Neither *Kent* nor *Gault* extended these constitutional protections to the dispositional phase of the waiver hearing n51 that focuses on balancing the interests of both the juvenile and the public.

n51 See ns 47 and 49.

[***28] In *Estelle*, the United States Supreme Court extended Fifth and Sixth Amendment rights to psychiatric examinations used at the penalty phase of a capital murder case to enhance the sentence *after* guilt had been established. In contrast, a juvenile waiver decision is distinguishable because it is a hearing to determine probable cause (phase I) and to determine whether the best interests of the public and the juvenile would be served by waiving jurisdiction of the juvenile to an adult court (phase II). Thus, the waiver hearing *precedes* any determination of guilt. Therefore, neither the *Estelle* holding nor the holdings of *Kent* and *Gault* mandate extending protections presently applicable to phase I hearings to phase II hearings. n52

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).

*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

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

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.

Not Reported in N.W.2d, 1996 WL 33360697 (Mich.App.)

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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

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.

Not Reported in N.W.2d, 1998 WL 1991584 (Mich.App.)

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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,

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

> 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.

Not Reported in N.W.2d, 2000 WL 33519653 (Mich.App.)

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