STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION April 4, 2013
v	No. 302353 Berrien Circuit Court
DAKOTAH WOLFGANG ELIASON, Defendant-Appellant.	LC No. 2010-015309-FC

Before: GLEICHER, P.J., and O'CONNELL and MURRAY, JJ.

GLEICHER, P.J., (*concurring in part and dissenting in part*).

I concur with the result reached by the majority regarding defendant Dakotah Eliason's challenges to his first-degree murder conviction. I write separately to respectfully express my belief that the Michigan Constitution forbids the trial court from resentencing Dakotah to imprisonment for life without the possibility of parole. Furthermore, because Michigan's parole guidelines do not take into account Dakotah's youth at the time he committed the crime, I believe that both the United States and Michigan Constitutions mandate that the trial court consider sentencing Dakotah to a term of years that affords him a realistic opportunity for release.

I. THE EIGHTH AMENDMENT, PROPORTIONALITY, AND JUVENILE OFFENDERS

The Eighth Amendment to the United States Constitution embodies the basic precept that punishment for crime should be proportioned to both the offender and the offense. *Miller v Alabama*, __ US __; 132 S Ct 2455, 2463; 183 L Ed 2d 407 (2012). "The concept of proportionality is central to the Eighth Amendment." *Graham v Florida*, 560 US __; 130 S Ct 2011, 2021; 176 L Ed 2d 825 (2010). Applying proportionality principles, the Supreme Court held in *Miller* that a mandatory sentence of life imprisonment without the possibility of parole violates the Eighth Amendment's prohibition of "cruel and unusual punishments" when imposed on an offender who had not reached the age of 18 at the time of his crime. *Miller*, 132 S Ct at 2469.

Miller's holding flows from two precedential strands of Eighth Amendment jurisprudence: "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty," *Miller*, 132 S Ct at 2463, and the requirement "that sentencing authorities consider the characteristics of a defendant and the

details of his offense before sentencing him to death." *Id.* at 2463-2464. "[T]he confluence of these two lines of precedent," the Supreme Court explained, "leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Id.* at 2464.

The "categorical ban" authorities cited by the Supreme Court, *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005), and *Graham*, 130 S Ct 2011, "establish that children are constitutionally different from adults for the purposes of sentencing." *Miller*, 132 S Ct at 2464. Recklessness, impulsivity, and thoughtlessly engaging in risk-taking behaviors are but three unpleasant hallmarks of adolescent behavior. These characteristics of youth render children "less culpable than adults." *Graham*, 130 S Ct at 2028 (quotation marks and citation omitted). Accordingly, a convicted defendant's age figures prominently in the Eighth Amendment's proportionality analysis. *Miller*, 132 S Ct at 2465-2466.

Because "youth matters" in determining whether lifetime incarceration without the possibility of parole is warranted, "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Id.* (quotation marks and citation omitted). Thus, mandatory penalty provisions contravene the fundamental constitutional principle "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id.* at 2466. Likening life-without-parole sentences to the death penalty, the Supreme Court reasoned that juveniles convicted of homicide must be sentenced individually and in a manner that recognizes "the mitigating qualities of youth." *Id.* at 2467 (quotation marks and citation omitted). The Supreme Court elaborated:

> [M]andatory penalties, by their nature, preclude a sentence from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other – the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile . . . will receive the same sentence as the vast majority of adults committing similar homicide offense – but really, as *Graham* noted, a *greater* sentence that those adults will serve. [*Id.* at 2467-2468 (emphasis in original).]

Juveniles convicted of even the most serious offenses may redeem themselves in prison and thereby demonstrate an ability to rejoin society as productive members. For this reason, the Eighth Amendment requires that states provide "'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Id.* at 2469, quoting *Graham*, 130 S Ct at 2030. And although the Supreme Court refused to "foreclose a sentencer's ability" to impose on a juvenile a punishment of life without parole, the Court emphasized that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller*, 132 S Ct at 2469.

The majority recognizes that *Miller* sets forth a new constitutional rule governing the process of sentencing juveniles convicted of first-degree murder in Michigan. Citing this Court's opinion in *People v Carp*, __ Mich App __; __ NW2d __ (Docket No. 307758, issued November 15, 2012), the majority holds that Dakotah is entitled to resentencing following a hearing after

which the trial court must impose a sentence of either life without the possibility of parole, or life imprisonment with the possibility of parole. According to dicta contained in *Carp* and adopted by the majority, *Miller* "does not [] imply that a sentencing court has unfettered discretion in sentencing a juvenile. Rather the focus is on the discretion of the sentencer to determine whether to impose the harshest possible penalty of life without possibility of parole on a juvenile convicted of a homicide offense." *Carp*, slip op at 15.

In accordance with *Carp*, the majority circumscribes Dakotah's sentence alternatives to life imprisonment without parole or life imprisonment with parole. The majority predicates this rule on "the Michigan Legislature's judgment that a life sentence is the appropriate punishment for a juvenile who is lawfully convicted of first degree murder." Contrary to *Carp* and the majority, *Miller* mandates that a sentencing court retain discretion to fashion an individualized sentence that takes into account an offender's youth, his "distinctive (and transitory) mental traits and environmental vulnerabilities," and affords him a "meaningful opportunity to obtain release." *Miller*, 132 S Ct at 2465, 2469 (quotation marks and citation omitted). The sentencing calculus crafted by *Carp* violates *Miller* because it eliminates individualized sentencing and (as *Carp* concedes) it forecloses any meaningful opportunity for a reformed juvenile to obtain his or her freedom.

Furthermore, while professing fidelity to legislative sentencing judgments, the majority (and *Carp*) fail to identify any statutory provision permitting a trial court to sentence a defendant convicted of first-degree murder to life imprisonment with the possibility of parole. Our Legislature has defined only one sentence for first-degree murder, and that sentence simply does not contemplate life with parole.

The majority insists that *Miller* requires that when resentencing juveniles, judges must apply the legislative "policy choice" most consistent with life without parole. I find nothing in *Miller* even remotely consistent with this view. To the contrary, *Miller* holds that proportionality principles must guide juvenile sentencing, and that laws that disregard the characteristics of youth are flawed. *Miller*, 132 S Ct at 2465-2466. Moreover, the majority's newly-created life-sentence option is no more tethered to Michigan's legislative sentencing scheme than a term-of-years sentence. Absent any legislatively-approved sentence for first-degree murder other than life without parole, the real question is whether affording a sentencing court the ability to impose a term-of-years sentence is required to fulfill *Miller's* mandate. In my view, only this option permits an individualized sentence and offers a juvenile "some *meaningful* opportunity to obtain release." *Miller*, 132 S Ct at 2469 (emphasis added).

Furthermore, article 1, § 16 of the Michigan Constitution (Const 1963, art 1, § 16) precludes sentencing Dakotah to life imprisonment. Michigan's constitutional prohibition of cruel or unusual punishment incorporates a proportionality analysis emphasizing evolving sentencing standards "enlightened by a humane justice," and focusing on rehabilitation rather than retribution. *People v Lorentzen*, 387 Mich 167, 178 (quotation marks and citation omitted), 179-181; 194 NW2d 827 (1972). Measured against this framework, a life sentence with or without the possibility of parole exceeds constitutional bounds.

II. THE EIGHTH AMENDMENT, JUVENILE OFFENDERS, AND MICHIGAN'S SENTENCING SCHEME

In *Carp*, this Court elected to "provide guidance" to courts that would in the future sentence juveniles convicted of first-degree murder, despite that the sole issue presented was whether *Miller* applied retroactively. *Carp*, slip op at 31. In dicta adopted uncritically by the majority, *Carp* limited sentencing courts' range of options to life imprisonment with parole, or life without parole. *Id.* at 34. *Carp* based this commandment on its own determination that "[i]t would . . . be inconsistent to sentence juveniles who commit murder to a sentence that is not proportional to the severity of the crime." *Id.*

This new rule is incorrect for two reasons. First, it ignores the United States Supreme Court's admonition in *Miller*, *Graham* and *Roper* that a youthful offender's sentence must be proportioned *to the offender* as well as the offense. While an automatic life sentence may be proportionate to the crime of murder, a life sentence may not be imposed on a juvenile absent meaningful consideration of whether such punishment fits the *juvenile criminal*. *Carp*'s prescription – life with or without parole – nullifies the "foundational principle[] that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[1] *Miller*, 132 S Ct at 2466.

Pursuant to *Miller*'s core proportionality principles, an offender's age possesses special relevance that necessarily factors prominently in a sentencing calculation. *Id.* at 2469. *Miller* instructs that because "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole," sentencing courts must consider "the background and mental and emotional development" of each individual youthful offender before passing sentence. *Id.* at 2465, 2467 (quotation marks and citation omitted). In other words, *Miller* compels a sentencing court to tailor punishment to an offender's *personal* responsibility and *singular* moral guilt. To comply with *Miller*, a judge must bear in mind that children under age 18 are "categorically less culpable," *Roper*, 543 US at 567 (quotation marks and citation omitted), and more amenable to rehabilitation than adults who commit the same crimes. A sentencing scheme that forecloses sentencing proportionate to a child's culpability violates *Graham***,** *Roper* and *Miller*.

For this reason, *Carp*'s circumscription of sentence options to either of two life terms cannot be reconciled with *Miller*'s central teaching: children are constitutionally unique. Judges sentencing children must consider the mitigating effects of youth and the specific circumstances

[1] *Carp*'s conclusion that juveniles who commit murder deserve a life sentence because only a life sentence is proportionate to that crime disregards that just as all juveniles are not alike, neither are all murders. Kuntrell Jackson, one of the *Miller* defendants, had not fired the bullet that killed the victim and did not intend her death. He was convicted solely as an aider and abettor. *Miller*, 132 S Ct at 2468. These mitigating circumstances "go to Jackson's culpability for the offense." *Id.* Thus, sentencing a juvenile convicted of first-degree murder to life imprisonment without parole may sometimes qualify as inconsistent with substantial justice. Ultimately, that question is for a sentencing court to decide, not the Michigan Court of Appeals.

of their crimes. These factors may counsel strongly against a life term, either with or without the possibility of parole. A sentencing rubric that fails to permit proportional and individualized mitigation does not pass constitutional muster.

In light of the "diminish[ed] . . . penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes," *Miller*, 132 S Ct at 2465, different sentencing principles apply. Despite that Michigan law demands that an adult murderer serve a mandatory life sentence, *Miller* obligates sentencing courts to exercise meaningful discretion when sentencing a child who committed that same crime. Exercising discretion involves thoughtfully considering "the wealth of characteristics and circumstances attendant to" a defendant's youth, *id.* at 2467, which in turn means that a court must be permitted to reject that a child deserves to serve a life term. In my view, the exercise of discretion contemplated in *Miller* is simply inconsistent with a rule allowing only for life imprisonment with or without parole. The "two-sizes-fit-all" approach embraced by *Carp* offends the Eighth Amendment because it forecloses proportionality.[2]

I respectfully take issue with *Carp* for a second reason. In *Carp*, this Court acknowledged that a parolable life sentence likely results in lifetime imprisonment. *Carp*, slip op at 37-38.[3] This reality compels the conclusion that a sentence of life with parole is just as final as one that denies the possibility of parole at the outset. Although *Carp* urges that the Parole Board provide "a meaningful determination and review when parole eligibility arises," *id.* at 39, *Miller* instructs that removing youth from the balance *at the time of sentencing* contravenes the Eighth Amendment by prohibiting a judge "from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Miller*, 132 S Ct at 2466.

Postponing proportionality analysis until parole eligibility is simply inconsistent with *Miller*. This is particularly true in Michigan, as the statutory and administrative standards governing our parole board's decision-making bear no resemblance to the most relevant mitigating factors identified in *Miller*: a juvenile's diminished moral culpability, the "wealth of characteristics and circumstances attendant to" an offender's youth at the time he committed the crime, and the harshness of a life sentence imposed on, for example, a 14-year-old child. *Miller*, 132 S Ct at 2467. Instead, Michigan's parole system focuses on "the prisoner's mental and social attitude" *at the time parole is considered*. MCL 791.233(1)(a). Although the parole

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[2] Like the California Court of Appeals, I believe that a "presumptive penalty" of life imprisonment cannot be "constitutionally square[d]" with *Miller*. *People v Siackasorn*, 211 Cal App 4th 909, 912; 149 Cal Rptr 3d 918 (2012). In *Siackasorn*, the court held that a sentencing judge has "equal discretion to impose" either life without parole or the 25-year-to-life penalty permitted by a California statute. *Id.* Michigan lacks a complementary statutory provision. But that hardly means that a sentencing court has "unfettered" discretion to sentence a juvenile convicted of first-degree murder. A sentence of life or a term of years is well known in this state. See MCL 750.317; *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989). A disproportionately light sentence is as objectionable as a disproportionately onerous one.

[3] See also *Alexander v Birkett*, 228 Fed Appx 534 (CA 6, 2007).

guidelines examine the severity of the crime, they omit regard for a youthful offender's unique characteristics. See *In re Parole of Elias*, 294 Mich App 507, 512-517; 811 NW2d 541 (2011). Uncertain, unpredictable and unlikely parole does not substitute for factoring in on the "front-end" a juvenile's lessened culpability. *Miller* does not contemplate that a parole board may substitute for a sentencing judge.

Because the alternative sentencing options set forth in *Carp* are materially indistinguishable and discretionary in name only, they do not satisfy *Miller*. In practice, they are but two sides of the same life-imprisonment coin. Confining a sentencing court's ability to commit a juvenile to life without parole or to life with but the barest possible prospect of parole defies *Miller*'s mandate that when passing sentence, judges must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S Ct at 2469. Accordingly, implementing *Miller* entails more than mechanically applying adult sentencing practices to child offenders.

Carp declares that *Miller* "does not require Michigan or other states with similar mandatory sentencing schemes to abrogate or abandon a hierarchical methodology of sentencing for those convicted of first-degree murder or to necessitate a term-of-years sentence consistent with a lesser offense, such as second-degree murder." *Carp*, slip op at 33-34. I respectfully submit that this statement reflects a misunderstanding of *Miller*. *Miller* does not "abrogate or abandon" any state's sentencing methodology. It simply requires that every state adjust that methodology in a manner that recognizes that "youth matters," allowing judges to implement that recognition by tailoring a sentence to fit the offender as well as the offense. Because a parolable life sentence in Michigan actually amounts to the imposition of a life-without-parole sentence, *Carp* has simply written mitigation out of the equation. Regardless whether a "term of years" sentence would correspond with a conviction of second-degree murder, it must remain an option for a sentencing court.

III. THE MICHIGAN CONSTITUTION

Const 1963, art 1, § 16 prohibits the infliction of cruel or unusual punishment. In *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992), our Supreme Court held that this provision should be interpreted more expansively than the United States Supreme Court interprets the Eighth Amendment. Three "compelling reasons" guided the *Bullock* Court's decision to construe the provisions differently. First, Michigan's Constitution bars "cruel *or* unusual" punishments, while the federal constitution addresses "cruel *and* unusual" punishments. *Id.* (emphases in original). This textual variance "does not appear to be accidental or inadvertent." *Id.* at 30. The Supreme Court observed in *Bullock* that "this difference in phraseology . . . might well lead to different results with regard to allegedly disproportionate prison terms." *Id.* at 31. Citing *Lorentzen*, 387 Mich at 172, the Court explained that "[t]he prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition." *Bullock*, 440 Mich at 31 (quotation marks omitted).

Next, *Bullock* drew on "historical factors" suggesting that the framers of Michigan's Constitution understood the meaning of the clause differently than did the United States Supreme Court. In contrast with the United States Supreme Court, by 1963 the Michigan Supreme Court determined that the cruel and unusual punishment ban "include[d] a prohibition on grossly

disproportionate sentences." *Id.* at 32. "Longstanding Michigan precedent" guided the *Bullock* Court's conclusion that the Michigan Supreme Court has historically interpreted the operative words through the prism of proportionality. *Id.* at 33-34.

After establishing the interpretive independence of the Michigan Supreme Court concerning our Constitution's "cruel or unusual punishment" provision, the Court struck down as unconstitutionally disproportionate a mandatory sentence of life without possibility of parole for conviction of knowing possession of 650 grams or more of cocaine. *Id.* at 40. Notably, the United States Supreme Court had rebuffed an Eighth Amendment challenge to precisely the same sentence less than one year earlier in *Harmelin v Michigan*, 501 US 957; 111 S Ct 2680; 115 L Ed 2d 836 (1991). The Michigan Supreme Court specifically embraced Justice Byron White's dissenting opinion in *Harmelin*, ruling that "[t]o be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt." *Bullock*, 440 Mich at 39 (alteration in original), quoting *Harmelin*, 501 US at 1023 (WHITE, J., dissenting).

Bullock thereby invalidated the life without parole sentences for the two defendants in that case, as well as all others "currently incarcerated under the same penalty, and for committing the same offense[.]" *Bullock*, 440 Mich at 42. The "most appropriate remedy" for the disproportionate life sentences imposed on those offenders, the Court concluded, was to "ameliorate the no-parole feature of the penalty" and to require that "such defendants [receive] the parole consideration otherwise available upon completion of ten calendar years of the sentence[,]" in accordance with MCL 791.234(4) [now MCL 791.234(7)(a)]. *Bullock*, 440 Mich at 42.

In *Bullock*, 440 Mich at 34, the Court acknowledged that its proportionality analysis derived from *Lorentzen*. The 23-year-old defendant in *Lorentzen* was convicted of "the unlicensed sale, dispensation or otherwise giving away of any quantity of marijuana," and was sentenced to the mandatory minimum for that offense: 20 years' imprisonment. *Lorentzen*, 387 Mich at 170-171. The defendant lived with his parents, worked at General Motors, and had no other criminal convictions. *Id.* at 170. The Supreme Court held the defendant's sentence unconstitutional under the Michigan Constitution, explaining that "[a] compulsory prison sentence of 20 years for a nonviolent crime imposed without consideration for defendant's individual personality and history is so excessive that it 'shocks the conscience.'" *Id.* at 181.

Lorentzen fashioned a three-factor test for evaluating proportionality under the Michigan Constitution. First, a court must weigh the gravity of the offense against the severity of the punishment, bearing in mind relevant facts regarding the offender's personal culpability. *Id.* at 176. Next, a court applies "[t]he decency test," which compares the sentences for other similar and different crimes, in Michigan and in other states. *Id.* at 179. Finally, a court looks to "rehabilitative considerations in criminal punishment," recognizing that Michigan's sentencing scheme is designed "'to reform criminals and to convert bad citizens into good citizens, and thus protect society.'" *Id.* at 179-180, quoting *People v Cook*, 147 Mich 127, 132; 110 NW 514 (1907). Specifically,

> "[t]his test looks to a consideration of the modern policy factors underlying criminal penalties – rehabilitation of the individual offender, society's need to

> deter similar proscribed behavior in others, and the need to prevent the individual offender from causing further injury to society." [*Lorentzen*, 387 Mich at 180, quoting *In re Southard*, 298 Mich 75, 82; 298 NW 457 (1941).]

This final criterion, the *Bullock* Court explained, is "rooted in Michigan's legal traditions." *Bullock*, 440 Mich at 34.

Bullock and *Lorentzen* stand for the proposition that Const 1963, art 1, § 16 prohibits both an unusually excessive period of imprisonment when compared with the seriousness of the crime, and a punishment that qualifies as disproportionately cruel considering the characteristics of the offender. In my view, sentencing a juvenile to life imprisonment with or without parole effectively trumps *Lorentzen*'s "decency test" and casts aside the mainstay rehabilitative ideals encompassed within article 1, § 16.[4]

III. MICHIGAN'S CONSTITUTION AND JUVENILE HOMICIDE OFFENDERS

The Michigan Supreme Court explicitly recognized in *Lorentzen* and *Bullock* that "moral guilt" and "the moral sense of the people" inform proportionality. *Bullock*, 440 Mich at 35 n 18, 39 (quotation marks and citations omitted). This acknowledgment corresponds with the United States Supreme Court's portrayal of the evolving nature of Eighth Amendment jurisprudence: "The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Furman v Georgia*, 408 US 238, 382; 92 S Ct 2726; 33 L Ed 2d 346 (1972) (BURGER, J., dissenting). *Roper*, *Graham* and *Miller* underscore that the need to sentence children differently than adults has achieved acceptance as a moral imperative.

In *Lorentzen* and *Bullock*, as in *Graham* and *Miller*, the Courts exercised "independent judgment requir[ing] consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Graham*, 130 S Ct at 2026. In these cases, the United States Supreme Court struck down sentences deemed excessive in light of contemporary norms and discordant with the penological goals sentencing should fulfill. All four cases agreed that as a matter of constitutional law, mandatory punishments insufficiently corresponding with a defendant's individual blameworthiness and the legitimate purposes of punishment do not pass muster. In this regard, as *Bullock* explicitly recognized, Michigan's proportionality jurisprudence foreshadowed the development of federal Eighth Amendment law. While the United States Supreme Court in *Miller* declined to categorically ban lifetime imprisonment for juveniles who have committed murder, I believe that pursuant to *Bullock* and *Lorentzen*, Const 1963, art 1, § 16 commands this result in Michigan.

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[4] The majority implies a preference that the current Supreme Court overrule *Bullock* and *Lorentzen*. I find this preference quite ironic in light of the majority's paean to precedent from *Allegheny Gen Hosp v NLRB*, 608 F2d 965, 969-970 (CA 3, 1979). I remind the majority that despite the Legislature's power to fashion sentences for crimes, the people of this State limited that authority by ratifying article 1, § 16 of Michigan's Constitution. To hold otherwise denigrates our Constitution and disregards the judiciary's role in Constitutional enforcement.

Mandatory life imprisonment constitutes the single harshest sentence that can be imposed by a Michigan judge. Lifetime incarceration of a juvenile, imposed without regard to his or her individual background and emotional development, is morally insupportable for the host of reasons discussed in *Roper*, *Graham* and *Miller*. "From a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 US at 570. To protect the community, it may be rational to deprive an adult murderer of any hope of freedom. The morality of such a severe sentence rests on the need to incapacitate a dangerous person, to exact retribution, and to deter others from committing the same heinous crime. Those ethical considerations ring hollow when applied to a youth such as Dakotah.

Dakotah is not a hardened criminal; when he killed his grandfather, he was an extremely troubled young man. As the forensic report addressing his criminal responsibility elucidated, Dakotah

> experienced a significant amount of loss in a relatively short period of time, namely the deaths of his cousin, dog and friend to suicide, not to mention the back drop of the very significant and repeated loss of his mother via abandonment. These losses would be difficult for any adolescent to cope with, but Mr. Eliason seems to have lacked the supports and guidance many others receive from their parents/family and even friends. As a result he appears to have been left to his own devices and he appears to have lacked the capabilities to gradually come to terms with these losses. Rather, they were forces which overwhelmed him.

Additionally, the examiner pointed out, Dakotah preferred his "fantasy life" to the wrenching task of confronting his real life. "This movement from a focus upon fantasies to coming to terms with one's external reality is a maturational step that all adolescents must pass through. It would appear that Mr. Eliason was delayed with regard to this maturation."

Given Dakotah's emotional limitations at age 14, officially pronouncing that he is and forever will be irretrievably depraved flies in the face of common sense. Dakotah's maturational shortcomings mirror those of the youthful offenders described in *Roper*, *Graham* and *Miller*. These defendants lacked the ability to regulate negative and destructive behavior – a defining feature of adolescence. It is simply impossible to predict whether Dakotah will someday develop the ability to grasp the full horror of his crime and to employ that knowledge in his emotional growth. "Maturity can lead to that considered reflection which is the foundation for remorse, renewal and rehabilitation." *Graham*, 130 S Ct at 2032. Because youthful offenders may grow and change, "irrevocable judgments about" their characters offend our Constitution's proportionality guarantee.

Furthermore, mandatory lifetime incarceration of a teenager serves no valid penological purpose. "A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Id.* at 2028. In *Lorentzen*, our Supreme Court described three primary "policy factors underlying criminal penalties[:]" rehabilitation, deterrence, and

incapacitation. *Lorentzen*, 387 Mich at 180.[5] A mandatory lifetime sentence "does not even purport to serve a rehabilitative function." *Harmelin*, 501 US at 1028 (STEVENS, J., dissenting). As *Graham* explained, juvenile offenders are generally not susceptible to being deterred based on their propensity for making "impetuous and ill-considered" decisions. *Graham*, 130 US at 2028-2029 (quotation marks and citation omitted). And while incapacitating a juvenile for his lifetime likely eliminates the possibility that he will commit another homicide, this is an extraordinarily drastic measure given the very real possibility that age would accomplish the same result. "*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 132 S Ct at 2465.

Lorentzen and *Bullock* support that mandatory lifetime prison sentences may not be imposed on homicide offenders under age 18. By forbidding cruel punishment regardless of its commonality, Michigan's Constitution prohibits imposing a severe, mandatory sentence that ignores both an offender's circumstances and lacks applicability to the goals of punishment recognized in this state. The evolving standards of decency elegantly articulated in *Graham* and *Miller* represent "the moral sense of the people" that imprisoning children for life is a disproportionate penalty regardless of the crime. Furthermore, lifetime imprisonment of a child serves no rational purpose. Accordingly, I would hold that lifetime imprisonment of a juvenile offender violates Const 1963, art 1, § 16.

IV. RESENTENCING DAKOTAH

When the trial court sentenced Dakotah to life imprisonment without possibility of parole, it rejected his counsel's argument that this sentence constituted a cruel or unusual punishment. "Other than his juvenile status," the trial court opined, "there's really nothing about Mr. Eliason that makes him less culpable than any other person who has murdered another human being in cold blood." The trial court spoke these words before the Supreme Court issued its decision in *Miller*. Accordingly, the majority correctly recognizes that Dakotah must be resentenced.

Despite that the trial court lacked the benefit of *Miller*'s reasoning when it imposed sentence, I believe that the trial court has clearly and unequivocally expressed its opposition to any sentence less than mandatory life. I quote the court's sentencing rationale at length here because I believe it demonstrates that the trial court has made up its mind about Dakotah, regardless of *Miller*:

> In this case the defendant was examined by two mental health profession[al]s, including one selected by the defense. There's been no showing that the defendant suffered from any mental health or intellectual deficiency. To the contrary, all the evidence has been that Mr. Eliason is an intelligent and

[5] Retribution constitutes a fourth. The arguments supporting purely retributive justice lose their power when applied to offenders who lack the ability to regulate their behavior. See *Roper*, 543 US at 571.

articulate young man. There was some testimony that Mr. Eliason was going through some personal problems. But other than the recent suicide of a close friend, which the court concedes is a major event in the life of any young person, any one, but otherwise he was attempting to work through problems common to many 14 year old boys.

His parents separated when he was young. He didn't get to spend enough time with his mother or his half-brother. He had some difficulty in meeting his father's expectations. His pet died. These are problems that certainly are – I'm not saying they're insubstanial, but they're certainly common to many 14 year old boys.

* * *

There are factors which in the court's view might make, and do make the defendant more culpable than perhaps other defendants who have committed first degree murder. He enjoyed a close relationship with his victim, and enjoyed – and had the benefit of his grandfather's frequent hospitality. Mr. Eliason was welcomed almost every weekend into the victim's home and treated as a weekend refuge from his own – life with his own family.

There has been no mitigating explanation provided for the murder. And the reason for the killing apparently remains a mystery to this day.

Mr. Eliason's testimony showed he spent several hours quietly contemplating whether or not to kill his grandfather. And then after that period of contemplation was over, shot his grandfather in the head while his grandfather slept. When the murder weapon was found the hammer on the revolver was cocked, and there were five live rounds in the chamber.

And the court, along with the jury, listened carefully to the recorded statements given by Mr. Eliason at the scene, later at the law enforcement complex, and remarks that he made to Deputy Casto while he was seated in the back of Deputy Casto's patrol car. Mr. Eliason showed a remarkable lack of emotion or remorse after the shooting and talked about the situation in a very calm and matter of fact way.[6]

[6] Lack of demonstrated remorse is yet another feature of a child's immaturity. For a full discussion of this subject, see Duncan, *"So Young and So Untender": Remorseless Children and the Expectations of the Law*, 102 Colum L Rev 1469 (2002). Judge Richard Posner has also written, quite persuasively, that an apparent absence of remorse ("a mitigating factor") does not automatically translate for sentencing purposes to the presence of an aggravating factor. *United States v Mikos*, 539 F3d 706, 721-724 (CA 7, 2008) (POSNER, J., dissenting).

> There – the court has been presented with nothing to convince [sic] that a life without parole sentence is particularly cruel and unusual when imposed upon Mr. Eliason in particular. *And as I said, certain aspects of the case show that such a sentence is particularly appropriate when applied to Mr. Eliason.* So the court does not find that a life without parole sentence for Mr. Eliason, convicted of first degree murder is in violation of the constitution as cruel and unusual. [Emphasis added.]

It is unreasonable to expect that the trial court will simply discard these sincerely-held views in light of *Miller*. The trial court's words make abundantly clear its rejection that the mitigating factors of youth described in *Miller*, *Graham* and *Roper* should be applied to Dakotah. To preserve the appearance of fairness and justice, a different judge should resentence Dakotah. See *People v Evans*, 156 Mich App 68, 71-72; 401 NW2d 312 (1986).

/s/ Elizabeth L. Gleicher