Office of the Prosecuting Attorney
County of Oakland

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August 27, 2013

TESTIMONY OF JESSICA R. COOPER, OAKLAND COUNTY PROSECUTOR, BEFORE THE MICHIGAN LEGISLATURE JOINT COMMITTEE HEARINGS

My name is Jessica Cooper and I am here at the invitation of Ken Samborski, who is the father of now deceased Mason Samborski, an Oak Park Safety Officer whose act of kindness of driving a 16 year old allegedly to his sister, instead of arresting him for driving without a license, was repaid by a bullet to his head at close range.

I speak to you not only as the Prosecutor of Oakland County, but as a former Judge who in the 1990s, when the juvenile statutes were different, sentenced two juveniles in separate, but equally heinous, First Degree Murder cases to life without parole.

I don't come to speak to you as a theorist, I come to speak to you as someone who has the experience to know the difference between theory and cold stark reality.

While you will be discussing many aspects of the U.S. Supreme Court's case in *Miller vs Alabama*, what we need to understand, first and foremost, is that we are talking about individuals who have been convicted by a jury of the most serious crime on Michigan's books, the crime of First Degree Murder. We are not talking about other lesser crimes. We are not talking about innocent defendants; we are talking about killers who happen to be under the age of 18.

There are, however, two major issues that must be addressed. The first is in HB 4806, and provides that judges be given the option to sentence a juvenile who has

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been convicted of Murder in the First Degree to a sentence limited to a set term of years. Jurors sat through a trial, heard the evidence and determined that the defendant was guilty beyond a reasonable doubt of First Degree Murder, not Second Degree Murder, not one of the two Manslaughter options, but Murder in the First Degree. Permitting courts to sentence such convicted murderers to a term of years would literally set aside the verdict of the jury. It is contrary to the holding in *Miller vs Alabama* and contrary to the finding of our Court of Appeals in *Eliason* interpreting *Miller*, which definitively found that there was no option in sentencing for First Degree Murder other than life with, or life without, parole. Simple math will tell you that a 20 year, or even a 40 year, sentence will release the defendant back into the community when they are 36 or even 56 years old. Think they still won't be dangerous?

The second issue concerns ensuring that the judges who make the sentencing decisions on juveniles convicted of First Degree Murder are provided with objective material to make the determination of life with or without parole. As of now there is no mechanism to provide for anything other than a presentence report giving the juvenile defendant's limited presentence scrutiny. Minimally, there should be a requirement of an extensive familial history and a psychological evaluation, preferably at the forensic center where they are trained to evaluate the mental culpability of criminal defendants. Such a report would require a waiver of privileged juvenile evaluations and judicial findings. We have placed this decision of life with or without parole in the hands of a member of the judiciary. We have to give that judge all of the tools and background information available to make an informed decision.

I told you at the outset, that as a Circuit Judge I sentenced two juveniles to life without parole. One of the cases involved a co-defendant who was 14 years of age at the time of the brutal rape and murder of a woman, picked at random, by these two defendants. At that time, the statutes required that the 14 year old be sentenced as a juvenile and, so, he was given all of the benefits of the juvenile system and released when he became an adult. But when he was released back into the community, he killed again and is now serving a life sentence along with his co-defendant.

I have prepared and attached to my written statement a list of bullet points that list many of the inconsistencies and logistical problems in some of the bills. There are gaps in the coverage of the bills, omissions in coverage for certain crimes and other problematic issues that are addressed in this summary.

Once a jury has seen and heard all the evidence, and made the difficult determination that the defendant has committed the ultimate crime, First Degree Murder, we should be very circumspect before we allow such murderers to be released back into the community. Even with juvenile offenders and, in fact especially with juvenile offenders, experience has taught us that the danger these convicted killers pose to the community is too great to take this issue lightly.

Respectfully Submitted,

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Oakland County Prosecutor

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To: Michigan Legislature Joint Committee Hearings

From: Jessica R. Cooper, Oakland County Prosecutor's Office

Re: SB 318, 319
HB 4806, 4807, 4808, 4809

Date: August 27, 2013

The purpose of this Memorandum is to provide a summary of the potential inconsistencies and logistical problems of House and Senate Bills that were introduced to effectuate the ruling in *Miller v Alabama*, 132 S Ct 2455 (2012), where the Supreme Court ruled that the trial courts may not be required to *automatically* sentence a juvenile to nonparolable life, but may still impose a nonparolable life sentence after considering factors outlined in *Miller*. In *People v. Eliason*, ___Mich. App___ (April 04, 2013 No. 302353), the Michigan Court of Appeals held that the ***only*** available sentences after a *Miller* hearing are (1) life with the possibility of parole; or (2) life without the possibility of parole.

Senate Bill 319 (adding MCL 769.32 and MCL 769.33 to Code of Criminal Procedure)

- The proposed new section 32 provides that beginning January 1, 2014, if a person under 18 is convicted of First-Degree Murder the prosecutor may file a motion within 14 days of conviction requesting that the defendant be sentenced to nonparolable life.
    - The bill provides a non-exhaustive list of 17 aggravating factors and 8 mitigating factors for the court to consider in imposing sentence.
- If the prosecutor does not file a motion seeking a nonparolable life sentence for the defendant within 14 days of conviction, the bill will <u>require</u> the court to sentence the defendant to life with the possibility for parole.

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- If the court does not sentence the defendant to life without parole, the court must sentence the defendant to life with the possibility for parole which may be granted only after the defendant has served 45 years. (It should be noted that the House Bill would not alter the current state of the law which generally allows for parole eligibility after only 15 years).

- The bill puts the burden on the prosecutor and only gives the prosecutor 14 days after conviction to file a motion to request that the defendant be sentenced to nonparolable life. This is an unreasonable time requirement.

  - MDOC's Presentence Investigation Report (PSI) for the defendant would not be completed before the prosecution's motion would have to be filed;

  - This short timeframe would not allow for a forensic or psychological evaluation of the defendant to be completed and reviewed by the parties;

  - This short timeframe would not allow for a home study (as required by the *Miller* decision) to be conducted by pretrial services to evaluate defendant's home environment;

  - This short timeframe would not allow the prosecutor to secure the school records, DHS records and any juvenile adjudicative records, all of which should be reviewed to allow an accurate assessment of the factors detailed in the *Miller* case.

- Some of the "aggravating factors" listed in the bill are found in *Miller* and, while admittedly non-exclusive, appear to have been assembled somewhat arbitrarily. For example, "lying in wait" is included as an aggravating factor, however, a situation where a defendant used poison or otherwise premeditated the killing, is not included.

- All of the "mitigating factors" from the *Miller* decision are not included in this bill, particularly (1) the defendant's potential for rehabilitation; (2) whether the defendant might have been convicted of a lesser offense if not for incompetency associated with youth; and (3) the defendant's background (apart from his

family life).

  - The bill includes no specific mechanisms such as a home study by pretrial services (as required by the *Miller* decision) or a referral to the forensic center or other psychiatric evaluation to address the background and mental capacity issues detailed in *Miller*.

- The bill does not address whether the parties can call experts at a sentencing hearing.

  - The bill needs to clarify who bears the expense if experts are called at a hearing. This will be especially important in cases of indigent defendants;

  - There should be an automatic judicial referral for a post-conviction forensic evaluation. Either or both parties should also have the opportunity to retain their own experts after receipt of the court ordered referral.

- The bill does not address cases where the defendant was convicted after *Miller*, but before 2014. Caselaw will have to be the guide for these cases.

- The bill's definition of when a case is "final" for purposes of applying section 32 is confusing and could be worded more clearly.

House Bill 4806 (adding MCL 769.33 to Code of Criminal Procedure)

- The proposed new section 33 provides that if a juvenile was sentenced (for any offense) to nonparolable life *before* January 1, 2014, the prosecutor or prisoner may file a motion for resentencing at any time after 1/1/14.

- The bill allows the defendant to file a motion for resentencing *any time* after 1/1/14.

  - There should be a time limit placed upon a defendant's ability to file a motion for resentencing. As the years go by, it becomes increasingly difficult to obtain objective evidence to present at the

hearing or to contact the witnesses and family members of the victims in these cases.

- If the prisoner files a motion for resentencing and the prosecutor does not file a response within 28 days of a defendant's filing of a motion for resentencing, the court will be required to resentence the defendant to life with parole or a term of years, with a 'term of years' sentencing being contrary to the First-Degree Murder statute, *People v Carp*, 298 Mich App 472 (2012), and *People v Eliason*, ___ Mich App ___ (2013). See also *Miller*. It would also set aside the jury's determination of murder in the first degree.

- If the prosecutor does not file a response to a defendant's motion within 28 days the bill will <u>require</u> the court to sentence the defendant to life with the possibility of parole or for any term of years.

    - To secure and thoroughly review the records necessary to evaluate the factors detailed in the *Miller* decision would require a far longer time period than the 28 days provided in this bill, particularly as witnesses need to be located and victims' families need to be notified.

- This bill does not specifically state that the court may sentence a juvenile to nonparolable life.

- The bill allows the court to sentence a defendant convicted of First-Degree Murder to a term of years which is contrary to the law cited above.

- The bill does not address whether the parties can call experts at a hearing.

- Like SB 319, HB 4806 contains no specific mechanism such as a home study by pretrial services and a referral to the forensic center to gather this necessary information to assist the sentencing court as to the defendant's mental state and emotional development. These are some of the core concerns in the *Miller* decision.

- The bill also does not state that its enactment is contingent on the enactment of any other bill. This is problematic because the bill specifically refers to "section 32," which is created by Senate Bill 319. Thus, enactment of Bill 4806 must be

contingent on the enactment of Bill 319.

House Bill 4808 (amending multiple sections of the Michigan Penal Code)

- HB 4808 would amend the sections of the penal code that provide as punishment imprisonment for life without the possibility of parole. The bill adds language to those sections that states, "except as provided in . . . MCL 769.32 and 769.33," which would presumably mean that juveniles convicted of those offenses may not be sentenced to nonparolable life without following special procedures and rules.

- House-proposed MCL 769.33 applies only to sentences imposed before 2014. Therefore, this "exception" language in Bill 4808 does not seem to mean much except where it amends MCL 750.316 (the First-Degree Murder statute) or when the defendant was convicted before 2014.

- The enactment of Bill 4808 is contingent on the enactment of Senate Bill 319 *and* House Bill 4806. This does not make sense because Bill 319 and Bill 4806 conflict.

House Bill 4809 (amending multiple sections of the Corrections Code)

- HB 4809 adds section (7)(D) to MCL 791.234, which states that if a juvenile was sentenced to life with the possibility of parole under MCL 769.33, the parole board has jurisdiction after he has served 15 years.

- The bill also provides that the parole board must *interview* the prisoner when he becomes eligible for parole and every 2 years thereafter (rather than at the discretion of the parole board as the statute currently states).

- The bill also deletes the language stating that the parole board must *review* the prisoner's file at the end of 15 years and every 5 years thereafter.

- Additionally, the bill changes the effect of a judge's objection to the parole board's grant of parole - although a sentencing judge's written objections to the granting of parole still stops the grant of parole, a *successor* judge's objections would no longer prevent the granting of parole.

- The bill does not fix the unconstitutional language in MCL 791.234(6)(a), as the bill states that a prisoner sentenced to life with the possibility of parole *under* MCL 769.33 is eligible for parole after 15 years, but the House-proposed MCL 769.33 applies only when the defendant is sentenced before 2014.

    - Thus, even for sentences after 2014, when MCL 769.33 no longer applies, the statute will continue to state that a defendant (not excluding juveniles) sentenced for life for First- Degree Murder will not be eligible for parole;

    - This is contrary to current Michigan case law, including the *Carp* decision. It also is contrary to Senate-proposed MCL 769.32, which provides that a juvenile convicted of First- Degree Murder may be sentenced to life with parole.

- The bill also proposes an amendment to MCL 791.235, which governs the release of a prisoner on parole.

    - The bill adds subsection (4), which would require the parole board to consider 7 of the *Miller* factors in deciding whether to grant parole to a person who was a juvenile when he committed the offense. *Miller* does not require this, as the *Miller* factors were designed for consideration of the defendant's sentence at the time of sentencing;

    - By making these revisions, HB 4809 directs the parole board to ignore the usual factors related to parole eligibility, such as the prisoner's criminal history, prison behavior, program performance, age, parole guidelines score and information from crime victims at the expense of focusing instead upon the defendant's mental state at the time of the offense. This improperly shifts the focus of the defendant's potential parole away from whether these defendants have been rehabilitated and no longer poses a risk to public safety.