

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

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

By the undersigned, appearing as petitioners and as counsel for the individual petitioners under the provisions of Article 23 of the Commission's Rules of Procedure:

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I. INTRODUCTION

In the United States each year, children as young as thirteen are sentenced to spend the rest of their lives in prison without any opportunity for release. Despite a global consensus that children cannot be held to the same standards of responsibility as adults and recognition that children are entitled to special protection and treatment, the United States allows children to be treated and punished as adults. In the criminal justice context, children are increasingly excluded from the protection of juvenile courts and tried and sentenced as adults based on the nature of the offense, without any consideration of age, maturity or culpability of the child, and without taking steps to ensure their understanding of the legal system under which they are prosecuted.

Changes in U.S. law over the past fifteen years have increased the mandatory treatment of juvenile offenders as adults based solely on the alleged crime, and resulted in an explosion in the number of children sentenced to life without parole. Over two thousand children have been sentenced to spend life in prison without the possibility of parole (LWOP) which requires a child remain in prison without release until death, irrespective of whether the child poses a threat to society or has, or can be, rehabilitated.

These laws and practices violate well established international standards explicitly prohibiting juvenile life without parole and express provisions of the American Declaration of the Rights and Duties of Man including the right to special protection (Article VII), to be free from cruel infamous or unusual punishment and to humane treatment (Articles I and XXVI) and guarantees to due process (Articles XVIII, XXIV, XXV and XXVI). They also violate other applicable human rights law norms.

This petition is brought against the United States of America and the State of Michigan for violating the rights of Kevin Boyd, Barbara Hernandez, Henry Hill, Patrick McLemore and Damion Todd, and twenty-seven adolescents, identified in Annex A, who were all tried and then sentenced as adults, without consideration of their individual circumstances or juvenile status, to a mandatory sentence of life in an adult prison without possibility of parole.¹ A life without parole sentence is the harshest sentence available for adults in Michigan, which does not have a death penalty. Life without parole means a sentence of imprisonment until death with no review by a parole board or consideration for release.

Petitioners also include the American Civil Liberties Union and the American Civil Liberties Union of Michigan who are preparing this petition in conjunction with and on behalf of the named incarcerated petitioners. The American Civil Liberties Union and its Michigan affiliate are represented by Deborah LaBelle, 221 N. Main St., Ste. 300, Ann Arbor, Michigan, U.S., 48104, deblabelle@aol.com, 734.996.5620 (O), 734.769.2196 (F).

¹ The twenty-seven additional petitioners, were tried and sentenced between 1997-2005 and are Matthew Bentley, Maurice Black, Larketa Collier, Cornelius Copeland, John Espie, Maurice Ferrell, Mark Gonzalez, Chavez Hall, Lamar Haywood, Lonnell Haywood, Christopher Hynes, Ryan Kendrick, Cedric King, Eric Latimer, Juan Nunez, Sharon Patterson, Gregory Petty, Tyrone Reyes, Kevin Robinson, T.J. Tremble, Marlon Walker, Oliver Webb, Elliott Whittington, , Ahmad Williams, Johnny Williams, Leon Williams and Shytour Williams.

The thirty-two individual petitioners are all citizens of the United States, incarcerated in adult prisons throughout the State of Michigan in the United States, and request all information related to this petition be sent to the American Civil Liberties Union of Michigan at the above-mentioned address. The petitioners do not request the IACHR to withhold their identity during the proceedings.

Petitioners intend to seek a hearing and will submit a request at the appropriate time.

II. PETITIONERS

The thirty-two petitioners were all tried as adults and given a mandatory life sentence for crimes committed while they were under the age of 18 without consideration of their individual circumstances or status as children. For purposes of the review by this Commission, petitioners present the detailed facts and circumstances on behalf of five of the petitioners to fully illustrate the impact of the challenged laws and practices, which have been used to violate the rights of all 32 of the individual petitioners.



A. Henry Hill

Henry Hill at age 16.

Henry Hill has been incarcerated in an adult facility in the United States, in the state of Michigan, since 1982 and is serving a life without possibility of parole sentence.

Henry Hill was born on November 16, 1963 and was a sixteen-year-old junior high school student in Saginaw, Michigan, when the incident for which he was sent to prison occurred. One afternoon in 1980, Henry and three other boys got into an argument with an acquaintance at a park. Henry ran away and had already left the park when his 18-year-old friend shot and killed the acquaintance.

Despite evaluations stating that Henry had the mental maturity of a nine year old, psychologists' recommendations that he remain in the juvenile justice system, and the fact that he had never been in trouble before, Henry was tried in an adult court system. In 1982, he was convicted of aiding and abetting a murder based on acts that occurred when he was 16. There is no dispute that Henry did not shoot or kill anyone. Henry was sentenced to mandatory life without parole, the identical sentence given to the actual adult shooter.

Henry Hill has now served over twenty-five years in prison. While in prison, Henry completed his high school education, has earned vocational qualifications, and has exhausted all available programs and resources. He is currently in prison at the Saginaw Correctional Facility, located at 9625 Pierce Rd., Freeland, Michigan 48623, United States of America.



B. Barbara Hernandez

Barbara Hernandez at age 16

Barbara Patricia Hernandez was born on March 16, 1974 and left home at the age of 14 as a result of ongoing physical and sexual abuse first from her father and then from her stepfather. She left school after the 8th grade and moved in with a boyfriend four years her senior. Her boyfriend was involved with drugs and was also physically and sexually abusive of Barbara. In 1990 when Barbara was sixteen, her boyfriend, coerced her into helping him steal a car as part of a plan to leave the state. When Barbara brought a man with a car to the house, her boyfriend attacked and killed the victim while Barbara was in another room. Despite Barbara's age, lack of a prior record and questionable culpability, the prosecutor filed a complaint in the adult criminal system.

Following her conviction, a judge determined that Barbara should be sentenced as an adult even though she would be subject to a mandatory sentence of life in prison without the possibility of parole. This was the same sentence that her adult boyfriend who committed the murder received.

Barbara had never been in trouble with the law before. She has served fifteen years of her life sentence. Barbara is currently serving her sentence in the adult prison system at Robert Scott Correctional Facility located at 47500 West Five Mile Road, Plymouth, Michigan.

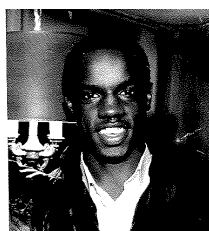


C. Kevin Boyd

Kevin Boyd at age 16

Kevin Boyd was born on September 26, 1977 into a chaotic home environment. He suffered significant emotional and physical abuse from both his parents, who divorced when he was eleven but continued to use him as a pawn in their often-violent disputes. Kevin, along with his mother, was convicted of the murder of his father on August 6, 1994 when Kevin was sixteen. Kevin denies killing his father but admits he gave keys to his father's apartment to his mother and her lover and knew they talked of killing him.

Prosecutors directly filed charges against Kevin in adult criminal court, and following the conviction a judge determined Kevin should be sentenced as an adult subject to the mandatory sentence of life in prison without possibility of parole. Kevin has served eleven years of his mandatory life sentence and is currently at the Richard A. Handlon Correctional Facility, located at 1728 Bluewater Highway, Ionia, MI 48846.



Damion Todd at age 17

D. Damion Todd

Damion Todd was seventeen in 1986 when he and three friends were shot at outside a party in Detroit, Michigan. Damion and his friends drove to a friend's house, retrieved a shotgun, and returned to the party. As they pulled up to the party, someone shot at them. Though Damion had never before used a gun, one of Damion's friends pushed the gun into his hands and told him to shoot. Damion pointed the gun out the window at a 45-degree angle toward the sky and fired three times, hoping to scare the assailants. Damion did not intend to shoot anyone and did not know that the pellets from the shotgun would scatter widely. But one pellet hit an attendee of the party, killing her, and another shot wounded another guest. Although Damion had no prior criminal record, under Michigan law, seventeen year olds are not considered juveniles and are automatically tried in the adult court system.

Damion was convicted of murder and assault. He received a mandatory life without possibility of parole sentence for the murder conviction, and the judge imposed a sentence of 100-200 years for the assault conviction (the assault sentence was deemed excessive and was overturned on appeal). During the trial, the judge refused to give Damion's attorney information suggesting that someone else could have fired the fatal shot and later stated that he wanted to make an example of Damion. Damion has been in prison for 19 years and has been a model prisoner, completing high school and community college courses.

Damion Todd is currently in prison at the Carson City Correctional Facility, in the State of Michigan. The prison is located at 10522 Boyer Road, P.O. Box 5000, Carson City, Michigan 48811-5000.



Patrick McLemore at age 16

E. Patrick McLemore

Patrick McLemore was 16 when he and a 19-year-old acquaintance broke into a home they believed to be unoccupied to commit a robbery. When Patrick entered the home, he found his co-defendant had beaten the occupant to death. Prosecutors charged Patrick with first-degree murder in adult court. Patrick was convicted in 2000, and sentenced to mandatory life without the possibility of parole. His co-defendant, who was not a juvenile, pled guilty to second-degree murder and received a 30-60 year sentence.

Since Patrick's incarceration six years ago, Patrick has completed his GED as well as all of his court recommended programs including AA, NA, and over sixty hours of group counseling. Patrick has a loving, supportive family that is regularly in touch with him and both eager and able to help him should he ever be paroled.

Patrick McLemore is currently in prison at the Bellamy Creek Correctional Facility, located at 1727 W. Bluewater Highway, Ionia, Michigan 48846.

F. Matthew Bentley, Maurice Black, Larketa Collier, Cornelius Copeland, John Espie, Maurice Ferrell, Mark Gonzalez, Chavez Hall, Lamar Haywood, Lonnell Haywood, Christopher Hynes, Ryan Kendrick, Cedric King, Eric Latimer, Juan Nunez, Sharon Patterson, Gregory Petty, Tyrone Reyes, Kevin Robinson, T.J. Tremble, Marlon Walker, Oliver Webb, Elliott Whittington, Ahmad Williams, Johnny Williams, Leon Williams and Shytour Williams

In 1988, Michigan changed its law to eliminate judicial waiver hearings and allow prosecutors to directly file charges for certain crimes against individuals 16 and under in adult criminal court, but required that judges determine whether defendants should be sentenced as juveniles or adults following a conviction. In 1996, Michigan eliminated both judicial waiver hearings (from juvenile to adult court) and post-conviction sentencing hearings for certain crimes, including aiding and abetting a homicide, felony murder and murder. As a result, the juvenile status of the post-1996 Petitioners was never considered in any stage of the proceeding from initial criminal complaint through sentencing and incarceration. In addition, these same crimes carry a mandatory sentence, meaning that the sentencing judge could not consider any individual factors in sentencing and were required to impose a life without possibility of parole sentence.

After 1996, youthful offenders in Michigan could be tried as adults without any consideration of their maturity level or status as a juvenile. Based solely on their alleged crime involving a homicide, prosecutors were allowed to file charges directly in adult criminal court, and offenders were tried and sentenced as adults. Petitioners, detailed in Annex A, were criminally charged and tried following the 1996 change in Michigan law. These petitioners sentenced under the post-1996 laws, were between the ages of 14 and 16 when they committed their crimes. Neither the juries that heard their cases, nor the judges who issued their sentences had any discretion in their treatment and sentencing. Further, once tried as an adult, they received mandatory sentences of life without possibility of parole sentences for aiding and abetting a homicide, felony murder and murder. They were all sent to adult prison where they remain without any chance of parole.

G. American Civil Liberties Union and American Civil Liberties Union of Michigan

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization of more than 300,000 members dedicated to the principles of liberty, equality and human rights embodied in the United States Constitution, treaties and customary international law binding on the United States. The ACLU of Michigan is one of its state affiliates and the

sponsor of the report *Second Chances: Juveniles Serving Life Without Parole Sentences in Michigan*.

III. JUVENILE LIFE WITHOUT PAROLE IN THE UNITED STATES AND THE STATE OF MICHIGAN: DOMESTIC LAW AND FACTS

A. Domestic Law

Currently in the United States, children can be tried as adults and sentenced to life without parole in forty-two states. In twenty-seven of those states, a life without parole sentence is the mandatory sentence for individuals convicted as adults of certain enumerated crimes.² Over 2,000 youth offenders are currently serving life without parole sentences in U.S prison as a result of being tried as an adult for crimes committed while they were under the age of 18.³

Michigan is one of seven states that allow a child of any age to be tried as an adult and subject to a mandatory sentence of life without possibility of parole. In Michigan, youth sentenced as an adult are sent to adult prisons at the age of 14. Once within the adult prisons, children face a much greater risk of physical violence and sexual abuse, are deprived of access to special services designed to educate and rehabilitate youth, and denied age specific medical and mental health treatment.⁴

The harshness and cruelty of the life without parole sentence is compounded by lack of uniformity in application and enforcement. The state in which a child is tried will determine whether he or she may face a life without parole sentence.⁵ Geography also determines whether any hearing is held to consider whether the child should be subject to adult court jurisdiction, whether a prosecutor can unilaterally decide a child will be tried as an adult, whether the law protects children under a certain age from prosecution as an adult or whether a child of any age can be subject to adult prosecution and sentencing without any consideration of their status as a child. Geography also determine whether an adolescent convicted of a homicide crime will automatically receive a mandatory life without parole sentence or whether a court has discretion to sentence the youth as a juvenile.⁶ For petitioners in Michigan, mandatory sentences and laws that have made it increasingly easy to try children as adults mean that a child tried in the state of

² Human Rights Watch & Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, Section IV (table 6), available at: <http://www.hrw.org/reports/2005/us1005/index.htm> (2,225 as of June, 2005).

³ *The Rest of Their Lives*, *supra* note 2, Section I (Introduction).

⁴ Forst, Fagan and Vivona, "Youth in Prisons and State Training Schools," 39 *Juvenile and Family Court Journal* 1-14 (1989); "No Escape: Male Rape in U.S. Prisons" HRW 2001, available at <http://www.hrw.org/reports/2001/prison/report.html>.

⁵ Four states do not have life without parole sentences (Alaska, Maine, New Mexico, and West Virginia); four states and the District of Columbia do not allow juveniles to be sentenced to life without parole (Kansas, Kentucky, Oregon and New York); three states do not allow a life without parole sentence to be imposed on anyone under the age of sixteen (Alabama, California and Indiana). Two states have struck down a life without parole sentence for juveniles that were under 14 (Nevada) or mere lookouts (Illinois). *Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons*, (2004) ACLU Michigan, at <http://www.aclumich.org/pubs/juvenilelifefers.pdf> p. 3.

⁶ *The Rest of Their Lives*, *supra* note2, Section III.

Michigan is seven-and-a-half times more likely to end up with a life without parole than the nationwide average.⁷

The unfettered discretion entrusted to prosecutors in states like Michigan is particularly troubling given the racial disparities that have emerged. African-Americans constitute 60% of the youth offenders serving life without parole, while whites constitute 29%. When the size of the black youth population versus the white population is taken into account, black youth serve life without parole sentences at a rate that is ten times higher than white youth.⁸

In Michigan, the state in which the individual petitioners were tried and convicted, there are currently 307 juvenile offenders serving life without parole sentences.⁹ The majority of juvenile lifers are minorities (221), and 211, or 69%, are African-American, who account for only 15% of Michigan's youth population.¹⁰

The current scheme of disregarding a juvenile's status in the criminal justice system differs widely from the recognized difference and treatment of youth and adults in the civil and political law arena in the United States. Children under the age of eighteen cannot legally use alcohol, serve on juries, vote, sign a contract, or be drafted, because they are presumed not to have the capacity to handle adult responsibilities. Nor can they live away from their parents, drive, make decisions related to their education or medical treatment, or leave school, prior to the age of sixteen.

This disconnect between recognizing and respecting the need for special protection of children in civil and criminal law emerged recently in the United States. In the 1970's, children accused of crimes in the United States were tried, almost exclusively, in juvenile courts.¹¹ A child could be transferred to an adult court only if a judge held a hearing and determined that transfer served the best interests of the child and the public.¹² Fueled by increases in youth violent crime and political and media portrayal of juvenile offenders as "super-predators," many states began to adopt harsher punishments for crimes committed by children.¹³ New laws also restricted the availability of juvenile courts, increasing the likelihood that child offenders would be tried and sentenced as adults.¹⁴

This was accomplished through three types of legislation: (1) the withdrawal of juvenile jurisdiction for certain cases based on age and nature of the offense; (2) granting discretion to prosecutors to file charges involving specified crimes by juveniles directly in adult courts

⁷ *The Rest of Their Lives*, *supra* note 2, Section I (Introduction).

⁸ *The Rest of Their Lives*, *supra* note 2, Section IV.

⁹ *Second Chances*, *supra* note 5 at 4.

¹⁰ *Second Chances*, *supra* note 5 at 6.

¹¹ David Tannenhaus & Steven Drizin, "Owing to the Extreme Youth of the Accused: The Changing Legal Response to Juvenile Homicide," 92 J. Crim L. & Criminology 641 (Spring 2002).

¹² *Kent v. United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).

¹³ Patrick Griffin, Patricia Torbet & Linda Szymanski, *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions*, OJJDP Report: U.S. Department of Justice, December 1998, NCJ 172836. Available online at <http://www.ojjdp.ncjrs.org/pubs/tryingjuvasadult/toc.html>.

¹⁴ Gerard Rainville & Steven Smith. *Juvenile Felony Defendants in Criminal Courts*, Special Report, Bureau of Justice Statistics. U.S. Department of Justice May 2003, NCJ 197961; Bureau of Justice Statistics, National Corrections Reporting Program, 2003. Available online at <http://www.ojp.usdoj.gov/bjs/abstract/jfdcc98.htm>

without judicial waiver proceedings; and (3) lowering the age at which child offenders are subject to adult prosecution. As a result, the proportion of youth receiving the adult sentence of life without parole steadily increased, despite the decrease in youth murder convictions.¹⁵

Michigan, the state in which the individual petitioners were tried and sentenced, passed a combination of all three legislative initiatives to increase punishment for youthful offenders. Prior to 1988, charges against children under 17 would be filed in juvenile court. (Only seventeen year olds were excluded from juvenile court jurisdiction and automatically treated as adults). Fifteen or sixteen year olds could be waived to adult court jurisdiction only through a judicial waiver process, which required a hearing to determine whether waiver would serve the best interests of the child and the public.¹⁶ Life without parole sentences, which could only be imposed if a juvenile was waived by a judge to adult court, were relatively low. However, once it was determined that a child would be tried as an adult, he or she would be subject to adult sentences, including mandatory life without parole sentences for conviction of certain crimes. Petitioner Henry Hill received a mandatory sentence of life without parole under this legislative scheme.

In 1988, Michigan adopted an automatic waiver provision allowing prosecutors to bypass juvenile court by directly filing charges against fifteen and sixteen year olds, for certain offenses, in adult criminal court. Once convicted, a juvenile was still entitled to a hearing to determine whether juvenile or adult sentencing would best serve the interests of the child and the public.¹⁷ In Michigan, a conviction of first-degree murder, which includes premeditated murder, felony murder or murdering a peace or corrections officer, or aiding and abetting first degree murder, carries a mandatory sentence of life without the possibility of parole.¹⁸ Many judges, faced with only two, widely disparate, options in first degree murder cases – commitment to a juvenile facility until the age of nineteen¹⁹ or mandatory life without parole – imposed life without parole sentences. The number of juvenile life sentences for crimes committed from 1988-96 rose to 18% of homicide cases from 7.5% between 1975-87.²⁰ Petitioners Barbara Hernandez and Kevin Boyd were sentenced to life without parole under this legislative scheme.

In 1996, Michigan expanded the direct file of charges against juveniles in adult courts to include fourteen year olds.²¹ The legislature also required that all juveniles tried as adults, be

¹⁵ *The Rest of Their Lives*, *supra* note 2, Section I (Introduction) (The percent of youth sentenced to life without parole rose from 2.9% to 9.1%, while youth murder convictions decreased from 2,234 in 1990 to 1,006 in 2000).

¹⁶ M.C.L.A. § 712A.4 Historical and Statutory Notes concerning statute prior to 1988 amendment.

¹⁷ M.C.L.A. § 764.1f (Historical and Statutory Notes concerning statute prior to 1988 amendment.)

¹⁸ M.C.L.A. § 750.316 (requiring life without parole for willful, deliberated and premeditated killing, murder committed in the perpetration or attempted perpetration of certain felonies and the murder of a peace or corrections officer); M.C.L.A. § 767.39 (requiring that every person who “procures, counsels, aids, or abets in [the commission of a crime] shall be punished as if he had directly committed such offense.”)

¹⁹ Prior to 1972 juvenile court jurisdiction over juveniles convicted of homicide crimes extended only to the age of nineteen, at which time the juvenile would have to be released. In 1972 Michigan created the ability for courts to extend juvenile court jurisdiction until the age of 21 under certain circumstances. M.C.L.A § 712A.2a(1), (2). In 1988, legislation specified that a court could extend juvenile court jurisdiction until the age of 21 for those juveniles who committed their offenses prior to the age of 17 upon a determination that the “juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety” M.C.L.A. § 712A.18(d)(1),(2).

²⁰ *Second Chances*, *supra* note 5, at 10.

²¹ M.C.L.A. § 764.1f.

sentenced as adults, including for crimes that carried a mandatory life without parole sentence.²² Under current Michigan law, a child as young as fourteen can be charged, tried, sentenced and incarcerated in an adult prison for life without any evaluation or assessment of how age or individual circumstances may affect culpability, rehabilitative capacity, cognitive ability or public safety concerns. From 1997-2001, 23.5% of juvenile homicide cases resulted in life without parole sentences.

Patrick McLemore and the twenty-seven petitioners identified in Annex A were all tried and sentenced to mandatory life without parole under this legislative scheme.

Petitioner Damion Todd, who as a seventeen year old was automatically considered an adult, was also sentenced to life without parole without any consideration of his juvenile status or individual circumstances. Michigan is one of eleven states that exclude seventeen year olds from juvenile court jurisdiction.²³

B. Factual Statement of Petitioners' Cases

1. Henry Hill

a. Background

On the evening of July 16, 1980, Henry Hill, along with Larnell Johnson, his younger brother Dennis Lee Johnson and Squeeky Saunders, encountered Anthony Thomas and his brother Louis Thomas, Jr. in Wickes Park, Saginaw, Michigan. There was a history of previous disputes between these boys and all the boys had weapons. Anthony Thomas had been drinking and had a shotgun and ammunition in his pocket. Larnell, who was eighteen, had a carbine, and Dennis and Henry both had handguns.

When Henry, Larnell and Dennis saw Anthony Thomas, they chased him, and started shooting. Henry fired in the air and never hit Anthony. Only Larnell shot directly at Anthony. After Anthony fell on the ground, Dennis and Henry fled. Larnell got nearer, continuing to shoot him. At the time that Larnell administered the fatal shot, Dennis and Henry (both sixteen) were no longer in the park.

Anthony died from a bullet that went into his skull. The autopsy determined that the bullets found in Anthony's body were all from Larnell's carbine. Larnell, Dennis, and Henry were tried for the murder of Anthony Thomas.

b. Judicial Proceedings

On July 22, 1980, a petition was filed in Juvenile Court, charging Henry and Dennis with Open Murder and the Use of a Firearm during the Commission of a Felony. Henry was declared an indigent person, and a public defender was appointed to represent him. Following a

²² M.C.L.A. § 769.1(g).

²³ See M.C.L.A. § 722.822(2)(e) (2005), "Minor" means an individual less than 17 years of age."

preliminary hearing on July 24, 1980, the prosecutor filed a petition requesting that Dennis and Henry be waived to Circuit Court and tried as adults.²⁴

Under the law that existed in 1980, after determining that there was probable cause, the court was required to hold a hearing to determine if waiver was in the best interests of the child and public. At the hearing, the court was required to consider five factors: (1) prior record and character including physical and mental maturity; (2) seriousness of the offense; (3) whether the offense was part of repeat pattern of offenses; (4) the suitability of programs in the juvenile and criminal systems; and (5) whether waiver was in the best interests of public welfare and the protection of public security.²⁵

A psychological evaluation, requested by his attorney, placed Henry in the “mental deficient range” of the I.Q. scale, with academic ability on the 3rd grade level.²⁶ The evaluation established that Henry was significantly impaired in all areas, and had the mental maturation of a nine year old. The report recommended that Henry be treated as a juvenile in the Michigan justice system.

The report further opined that Henry’s I.Q. could improve with appropriate stimulation and environment and recommended psychological counseling for at least five years. Despite the evaluation, on September 22, 1980, the juvenile (probate) court judge waived Henry to an adult court.²⁷

Henry was tried with Dennis, and they were both convicted of aiding and abetting First Degree Murder and a Possession of a Firearm in the Commission of a Felony.

In Michigan, defendants who are convicted of aiding and abetting an offense are sentenced as if they committed the offense themselves²⁸ and the sentence for First Degree Murder is mandatory life without parole.²⁹ On June 3, 1982, Henry was sentenced to life without parole on the First Degree Murder charge, and a two year sentence, consecutive and prior to the murder charge, on the felony firearm charge. The pre-sentence investigation report of May 21, 1982, recommended that Henry be given an opportunity to continue his education while he was in prison.

c. Henry’s life in prison

Henry spent his first year in prison in a juvenile detention center and was transferred to an adult prison when he turned 17. Henry was transferred to the Michigan Reformatory, which

²⁴ In 1988, Michigan law was amended to allow prosecutors to directly file a complaint against juveniles 15 or older in adult criminal court for certain offenses, including First Degree Murder. In 1996, the age was lowered to 14. *See supra* notes 17-22 and accompanying text.

²⁵ M.C.L.A. § 712A.4 Historical and Statutory Notes concerning the statute prior to 1988 amendment.

²⁶ Henry’s verbal I.Q. was 69, performance I.Q. 58 and full scale I.Q. 61, placing Henry in the lowest one percentile of the results, meaning that if he were compared with another one hundred young people of his age, his I.Q. would be the lowest.

²⁷ An appeal of the waiver of jurisdiction to the criminal court was filed on behalf of Henry on October 13, 1980, and it was denied on April 9, 1981.

²⁸ M.C.L.A § 767.39.

²⁹ M.C.L.A § 750.316(1).

inmates called “the gladiator school” because of the level of violence. He spent a year in a cell in isolation except for the one or two times per week he was allowed to go outside for an hour. He feared for his safety since physical and sexual abuse of young prisoners was common. After the Michigan Reformatory, Henry was transferred to various adult prisons where he has been subject to similar conditions.

Despite the psychologist’s recommendations, Henry has not received psychological services since his transfer to adult prison. Requests for services have either gone unanswered, or were denied because he is serving a natural life sentence. Henry has taken and completed all educational courses available to him. He is classified as a low security risk and has remained misconduct free. Henry Hill obtained a High School Certificate on September 29, 1986 and completed skill courses in fire extinguisher training; furniture sander, legal research and food service and hospitality management.

At the Saginaw Correction Facility, Henry works as a third shift cook and his responsibilities include cooking and making sure the food is ready. He is responsible of feeding 25 to 30 officers and the 25 to 30 inmates who work in the kitchen every day.

Henry Hill submits an affidavit detailing the circumstances of his arrest, trial, sentencing and incarceration in an adult prison for his natural life for his involvement in the crime at age sixteen. Annex B.

2. Barbara Hernandez

a. Background

Sexual abuse, domestic violence, and neglect marked Barbara Hernandez’s adolescent home life. Her father was an alcoholic, who abused her mother and two older siblings. After her father and mother divorced when Barbara was 8 years old, her stepfather molested her. By the age of 13, Barbara was in an abusive relationship with James Hyde, who was four years her senior. She dropped out of school and at 15, moved in with Mr. Hyde, who introduced her to drugs and alcohol and coerced her to work as a prostitute. Barbara’s relationship with Mr. Hyde was filled with violence. Barbara learned not to question Mr. Hyde because he often responded by beating her.

In the spring of 1990, Barbara and Mr. Hyde discussed leaving Michigan and traveling to New Mexico. On May 12, 1990, Mr. Hyde instructed Barbara to steal a car. When she returned without a car, Mr. Hyde became angry and violent and told her to buy a knife. Barbara complied without questioning. After returning with the knife, he instructed her to act as a prostitute and lure someone into the house. Barbara believed Mr. Hyde would use the knife to intimidate the victim. Instead, Mr. Hyde stabbed him to death. Barbara remained in another room while the assault occurred.

b. Judicial Proceedings

Barbara was prosecuted as an adult under Michigan's "automatic waiver" provision, which was passed in 1988.³⁰ The prosecutor bypassed juvenile court and directly filed charges against Barbara in the adult criminal court.³¹ As an indigent, she was represented by appointed counsel during a jury trial, from April 2 to April 19, 1991.

At trial, an adolescent psychiatrist testified that because of Barbara's abusive home environment, she suffered from several mental disabilities including personality defects and thought disorders that impaired her judgment and ability to cope with life. He specifically testified that due to her personality disorders, "it would be very difficult for her to . . . make a decision such as contemplating destroying someone else, because she is not capable of making that kind of decision. She never has, nor will she." Despite the psychiatrist's testimony and the judge's questionable admission of an FBI statement, signed by Barbara without any counsel which she testified she signed only so she could go home,³² the jury convicted Barbara of first-degree premeditated murder, two counts of first-degree felony murder (larceny and robbery), and armed robbery on April 19, 1999.

On August 6 and 20, 1991, the court held a hearing to determine whether Barbara should be sentenced as a juvenile or as an adult. In 1991, Michigan law required that a judge sentencing a juvenile who had been waived to adult court must conduct a hearing to determine if the best interests of the juvenile and the public would be served by sentencing the juvenile as a juvenile or as an adult.³³ In making the determination, the judge was required to consider (1) prior record, character, maturity and pattern of living, (2) seriousness of offense, (3) whether the offense was part of a pattern, (4) whether the nature of the juvenile's behavior renders him or her dangerous to the public if released at 21, (5) whether the juvenile is more likely to be rehabilitated by services and facilities in adult or juvenile facilities and (6) the best interests of the public welfare and protection of public security.³⁴

A probation officer and a delinquency services worker recommended that Barbara be sentenced as an adult because of the "gravity of the offense, the serious nature of the offense and the long-term protection of society" and because she showed no remorse that the victim was dead. The probation officer stated he was concerned for society should Barbara be sentenced as a juvenile, which would have meant she would be released at age 21, because "apparently she is very susceptible to the influence of strong characters, particularly male characters. . . . She has very poor impulse control . . . not much stability in her life otherwise." Although testimony established that the juvenile system is more geared toward rehabilitation, other testimony asserted the type of rehabilitation available in the juvenile system would not help Barbara.

The judge had two options under the law, a juvenile facility until Barbara turned 21 or a mandatory life without parole sentence in an adult prison. The judge sentenced Barbara as an

³⁰ See *supra* note 17 and accompanying text.

³¹ M.C.L.A. § 764.1f. In 1996, the age was lowered to fourteen.

³² The FBI statement stated that Barbara and Mr. Hyde planned that she would lure the victim into the house so Mr. Hyde could kill him and steal his car.

³³ M.C.L.A. §769.1(3) (Historical and Statutory Notes). The statute was amended in 1996 to require that juveniles tried as adults be sentenced as an adults for certain crimes, including first degree murder, which has a mandatory life sentence.

³⁴ *Id.*

adult, noting the probation officer's conclusion that Barbara had no remorse about the victim's death and the seriousness of the offense. He also stated that the juvenile detention facility did not offer the type of medical attention and therapy he thought Barbara needed, whereas the new women's facility (Scott Correctional Facility) was supposed to offer the needed services. Barbara received mandatory life without parole sentences for her three murder convictions and an additional life sentence for her armed robbery conviction. Two of her murder convictions were subsequently dismissed on double jeopardy grounds.

c. Barbara's life in prison

At the age of sixteen, Barbara was placed in the women's adult prison system where she was sexually preyed upon by an inmate ten years her senior and eventually assaulted by when she rebuffed the sexual advances. To this day, she has a scar on her head where it was slammed against the bed pole during the assault. Additionally, Barbara has also been sexual assaulted by male prison guards. On numerous occasions, the guards have groped and kissed her. She was subjected to daily body pat downs by male staff that included touching her breasts and genitals and routine sexually degrading comments. Because of her young age and her status as an inmate, she felt she was unable to refuse or report these acts. Barbara is currently housed in the lowest security risk housing available to those serving life and remains misconduct free.

Barbara Hernandez submits an affidavit of the conditions under which she was prosecuted, subject to trial, sentenced and incarcerated in an adult prison for life for her involvement in this crime at the age of 16. Annex C.

3. *Kevin Boyd*

a. Background

Kevin Boyd was the product of a tumultuous home background. Kevin's mother Lynn Louise Boyd was a recovering alcoholic, mentally unstable and often heavily medicated. Kevin's father struggled with alcoholism and had an explosive temper. In 1989, Kevin's mother asked for a divorce and left Kevin, age twelve, and his father.

From 1989-94, Kevin primarily lived with his mother but stayed with his father for short periods of time. During this period, Kevin was bounced from his mother to father and attended ten different middle schools. Kevin's mother continued to abuse drugs, fought frequently with Kevin and began a relationship with another woman, who was mentally and physically abusive. Kevin clashed frequently with his mother's lover. Kevin was often teased and picked on because of his mother's relationship and got into frequent fights.

Kevin's relationship with his father also became estranged. They had frequent heated arguments that often ended with violence. After Kevin's parents divorced, they continued to have an angry, antagonistic relationship. Kevin's mother was particularly destructive of Kevin's relationship with his father, and tried to keep Kevin away from his father, telling Mr. Boyd that Kevin hated him.

Kevin underwent a 1991 psychological evaluation, which concluded that he was immature for his age with few coping mechanisms. He also spent periods in psychiatric facilities following his parents' separation in 1989 and a 1992 suicide attempt.

On the night of August 6th 1994, Mr. Boyd was killed in his apartment. His autopsy revealed twenty-one stab wounds, two cuts and four blunt force injuries, and the police concluded it was the work of two assailants. On December 18th 1994, Ms. Boyd confessed to murdering her ex-husband with her lover Julia Grain.

Following the confession, the police arrested and interrogated Kevin. The only recording of the interview is a tape of proceedings from 8:30-9:20 p.m. and 1:00 a.m. to 1:40 a.m. the next morning. At 8:30 p.m., Kevin denied any involvement in the murder. The tape of the interview ended at 9:20 p.m.. At 1:00 a.m. after several hours of interrogation that were not recorded, and without counsel or any family present, the interview tape came back on, and Kevin stated that he had killed his father with his mother and that he had been armed with a knife and she was armed with a baseball bat. On the tape, Kevin stated that his father had hit him 5 days before the murder, and he told his mother he was tired of the beatings. His confession ended at 1:40 a.m.

Kevin has subsequently stated that his confession was false and that while he gave the keys and information about his father's apartment to his mother and Ms. Grain, he was not present when his father was murdered.

b. Judicial Proceedings

Kevin, at age 16, was prosecuted as an adult under Michigan's "automatic waiver" provision, which was passed in 1988.³⁵ He was charged with conspiracy to commit murder as well as premeditated first-degree murder.

Prior to trial, a hearing was held to determine whether Kevin's taped confession should be admitted at trial. Among other issues, the defense argued that the officers interrogating Kevin had been informed that he had an attorney, but no opportunity was given to Kevin to call his lawyer. Although Kevin's mother's consent had been obtained for all prior interviews, the interview was conducted without parental consent or a responsible adult. The defense also argued that Kevin was subjected to psychological intimidation and coercion during the almost four hours that were missing from the tape. Finally, the defense argued that Kevin was not given a full and proper Miranda warning before the interrogation began. The officers testified that Kevin looked noticeably tired at the time of the confession. Despite all this, the trial court ruled that his confession was voluntary and admitted his statements in evidence at trial.

After a jury trial, Kevin was convicted on of first-degree murder and conspiracy to commit murder on May 28th 1996.

In August 1996, the court conducted a hearing to determine whether Kevin should be sentenced as a juvenile or adult.³⁶

³⁵ See *supra* note 17 and accompanying text.; M.C.L.A. § 764.1f.

Kevin's pre-sentence report noted that Kevin's home life was "chaotic with numerous assaults on his self-esteem." The report suggested that family dynamics played a large role in Kevin's behavior, stating "[a] youngster who is only looking for acceptance and love is met with rejection after rejection from both parents cannot help but be damaged psychologically." It also stated that while Kevin was acting under his own accord when the crime was committed "it was under [his mother's] maternal influence, and [that] he wanted her approval." The report's author testified that Kevin suffered significant emotional abuse from his parents and was easily influenced by his mother.

At the hearing, there was substantial evidence that Kevin could have been rehabilitated. Although Kevin had been failing school prior to his arrest, while incarcerated in a juvenile facility after his arrest, he earned all As and Bs. It was also noted that his offense was not part of a repetitive pattern, that he was amenable to treatment and unlikely to disrupt the rehabilitation of other juveniles. The pre-sentence report and several witnesses testified that he was a model prisoner in the juvenile detention facility prior to, and during, the trial. Despite his potential for rehabilitation, the pre-sentence report recommended adult sentencing because of the violent nature of the offense and the short time available to treat him because he was almost 19 at sentencing. The author of the report testified that if Kevin were younger that she would have recommended juvenile sentencing.

Relying on the pre-sentence report, the judge found that two years, which is as long as Kevin could be kept in a juvenile facility, would be insufficient time to rehabilitate him. The judge stated that he felt genuinely sorry for Kevin but could not risk public safety by sentencing as a juvenile with mandatory release at age 21. Instead, he determined that Kevin should be sentenced as an adult, which required a mandatory life without parole sentence. Kevin was sentenced to life without parole on each of his two convictions.

c. Kevin's Life in Prison

While in prison, Kevin has earned a G.E.D. and has attended a vocational training class, but as a lifer, is not permitted to attend group-counseling sessions.

Kevin Boyd's affidavit relates what occurred when he was arrested and tried in adult court at the age of sixteen, together with the consequences of his conviction for natural life and placement in an adult prison as a juvenile. Annex D.

4. *Damion Todd*

a. Background

³⁶ M.C.L.A. §769.1(3) (Historical and Statutory Notes) In 1996 (prior to the January 1, 1997 effective date of a 1996 amendment which required that juveniles convicted of certain crimes automatically be sentenced as an adult), Michigan law required that a judge sentencing a juvenile conduct a hearing to determine if the best interests of the juvenile and the public would be served by sentencing the juvenile as a juvenile or as an adult. *See supra* note 34 and accompanying text (discussing factors the judge was required to consider).

In the summer of 1986, Damion Todd was a seventeen-year-old former high school football team captain who was preparing to enter his senior year of high school. Damion had never fired a gun and had no record of criminal or juvenile offenses. He was active in his community and was a member of his church youth choir and junior deacon board. Damion had received offers from various universities and planned to go to college after graduating high school.

On Sunday afternoon, August 17, 1986, Damion Todd, Vernard Carter, Derrick McClure and DeWayne Smiley were in a car outside a party in Detroit, Michigan. As they were leaving the party, a car drove past them, pulled to a stop, and people got out and started shooting at the car Damion was in. Damion's friend sped off and proceeded to DeWayne's house, where DeWayne got his family's shotgun, and got back in the car. Damion had never handled a gun before, but he was sitting in the front seat, and, while they were arriving back at the party, one of his friends gave the gun to him. Just as they arrived, they were shot at again. Damion's friends told him to shoot, and he stuck the gun out the window pointing it toward the sky and fired three times. Two girls were struck by shot pellets; one of them later died. Damion and his friends were arrested the next day, and Damion has been imprisoned ever since.

b. Judicial Proceedings

Damion, Vernard, and Derrick were tried for murder in the first degree, assault with intent to murder, and felony firearms charges. The other friend, DeWayne, had an uncle who was the leading officer of the case, and was given immunity in exchange for testifying for the state. Under Michigan law, juvenile court jurisdiction ends at 17 years of age, so Damion was tried directly in adult court.³⁷

Damion's family retained counsel for him, Cornelius Pitts. Damion's attorney, unfortunately, did not meet with Damion until the day before trial.

During the trial, an anonymous letter, allegedly written by eyewitnesses to the events, was sent to the editor of the Detroit Free Press who then sent it to the judge. The letter stated that two known drug dealers were in a fight with each other at the party, and it was not Damion's shot that hit the girls, but rather one of the drug dealer's. The letter stated that people in the neighborhood were too scared of the dealers to publicly testify to this, and the police decided to lay the blame on Damion. The judge did not convey this information to Damion's attorney during the trial, though it could have exculpated him. Nor did the judge allow the jury to consider any lesser charge other than first-degree murder conviction, which carries the mandatory life without parole sentence.³⁸

The judge also told a newspaper that "Todd is from a poor neighborhood and he is fatherless." The media, in covering the story, however, were surprised to learn that Damion's neighborhood was in fact full of middle-income professionals, causing one of the reporters to remark to Damion's mother, "Ms. Todd, your home looks nothing like the judge described it in the newspaper, I wished I lived here."

³⁷ See M.C.L.A. § 722.822(2)(e) (2005), "Minor" means an individual less than 17 years of age."

³⁸ See M.C.L.A. § 750.316(1).

On December 6, 1986, Damion was convicted and sentenced to mandatory life without parole for the murder charge, 100-200 years for the assault with intent to murder charge, and two years for the firearms charge. The Court of Appeals later vacated the assault sentence as excessive. A local newspaper stated, “the sentence virtually unprecedented for a 17 year old was not imposed lightly ‘The case was clean,’ the judge said, ‘you’ve got to start to win the war (against youth violence and murder) someplace.’ Mr. Todd had the monumental misfortune to be the example Judge Talbot wished to set in an effort to help Detroit gain control over youth crime epidemic.”

c. Damion’s life in prison

Damion has been a model prisoner throughout his incarceration. Over eighteen years in prison, he has only received four misconduct tickets. He finished high school and has attended classes at the Montcalm Community College, where he has a 3.5 GPA. He has joined church membership, and participates in group counseling in a positive manner. He has maintained close contact with his family, serving as surrogate father to his niece. He has also married and fathered a child. He has asked his mother to send money anonymously to the family of the girl who was killed and has stated numerous times his regret for the actions he took on August 17. His wish, should he ever be released from prison, is to dedicate his life to ensuring future teenagers do not make mistakes that will put them in a situation similar to his.

Damion Todd’s affidavit sets forth the circumstances that resulted in his arrest, conviction and mandatory sentence to life without possibility of parole for his involvement in the crime that occurred when he was seventeen. Annex E.

5. *Patrick James McLemore*

a. Background

In the summer of 1999, Patrick James McLemore was 16 years old. He was diagnosed with ADHD as boy and had a history of school attendance and academic problems dating back to elementary school. In 1995, his brother committed suicide. Patrick dropped out of school after the 8th grade and used alcohol and marijuana on a frequent basis and experimented with cocaine and acid. Despite some obvious problem with substance abuse and attention deficit disorder little was done to intervene and provide necessary counseling.

On June 14, 1999, 16-year-old Patrick McLemore and 19 year old Nathan Reid spent the afternoon and evening hanging out with friends and drinking beer and whiskey. That night they wandered around Reid’s neighborhood when they noticed that the garage door of Oscar Manning’s house was open. Reid was carrying a wrench he found lying in the grass. Reid entered the house through the garage and then entered the house while Patrick waited outside. A few minutes later, Reid motioned to Patrick to follow him inside the house. According to Patrick, when he entered the bedroom, he saw blood on the mattress and walls and Mr. Manning’s body on the floor between the bed and wall. He immediately ran out of the house.

Patrick was convicted of first-degree felony murder and carjacking and was respectively sentenced to life without parole and 18 to 50 years imprisonment.

b. Judicial Proceedings

On the morning of trial, Nathan Reid entered a no contest plea to Second Degree Murder, Armed Robbery, Carjacking and First Degree Home Invasion. Patrick was not offered a plea and was automatically charged as an adult.

At trial, Patrick testified that he did not think the victim was in the house on the night of he murder and that Reid beat and killed the victim before Patrick entered the house. Patrick was convicted of First Degree Felony Murder, Armed Robbery, First Degree Home Invasion and Carjacking. The court subsequently vacated the armed robbery and home invasion convictions on double jeopardy grounds.

c. Patrick's Life in Prison

Patrick has been in prison for 6 years and during this time he has completed a GED and has 60 hours of group counseling and 120 hours of substance abuse counseling. He has also completed a legal research course. Despite a history of poor grades, when Patrick was in juvenile facilities awaiting sentencing, the supervised setting and required school attendance greatly improved his academic performance, and he received grades in the A and B range. When Patrick did receive appropriate services, he responded positively.

Patrick's affidavit of his involvement in the crime that led to his trial as an adult and mandatory adult sentence for conviction of a crime that occurred when he was sixteen is attached as Annex F.

IV. APPLICATION OF THE AMERICAN DECLARATION TO THE UNITED STATES AND THE COMMISSION'S INTERPRETIVE MANDATE

Because the United States is not a party to the Inter-American Convention on Human Rights, the Charter of the Organization of American States [OAS Charter] and the American Declaration on the Rights and Duties of Man [American Declaration] establish the human rights standards applicable in this case. Signatories to the OAS Charter are bound by its provisions,³⁹ and the OAS General Assembly has repeatedly recognized the American Declaration as a source

³⁹ Charter of the Organization of American States, 119 U.N.T.S. 3, *entered into force* December 13, 1951; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, *entered into force* Feb. 27, 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, *entered into force* Nov. 16, 1988; amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, *entered into force* September 25, 1997; amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, *entered into force* January 29, 1996. *See also* I/A Comm. H.R., *James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, ¶ 46.

of international legal obligation for OAS member states.⁴⁰ This principle has been affirmed by the Inter-American Court of Human Rights [Inter-American Court], which has found that that the “Declaration contains and defines the fundamental human rights referred to in the Charter,”⁴¹ and by the Inter-American Commission on Human Rights [IACHR or the Commission], which has recognized the American Declaration as a “source of international obligations” for OAS member states.⁴² The Commission has consistently asserted its general authority to “supervis[e] member states’ observance of human rights in the Hemisphere,” including those rights prescribed under the American Declaration, and specifically as against the United States.⁴³

Moreover, the Commission’s Statute and Rules of Procedure establish that the Commission is the body empowered to supervise OAS member states’ compliance with the human rights norms contained in the OAS Charter and the American Declaration.⁴⁴

International tribunals, including the Inter-American Court, have repeatedly found that international human rights instruments must be interpreted in light of the evolving norms of human rights law expressed in the domestic, regional, and international contexts.⁴⁵ In considering the relationship between the American Declaration and the American Convention on Human Rights [American Convention], the Inter-American Court found that “to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948.”⁴⁶ Again, in 1999, the Court reasserted the importance of maintaining an “evolutive

⁴⁰ See, e.g., OAS General Assembly Resolution 314 (VII-0/77) (June 22, 1977) (charging the Inter-American Commission with the preparation of a study to “set forth their obligation to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man).

⁴¹ I/A Court H.R., *Advisory Opinion OC-10/89, July 14, 1989, “Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights,”* Ser. A N° 10, ¶43, 45 [hereinafter OC-10/89].

⁴² See e.g., Report No. 74/90, Case 9850, Hector Geronimo Lopez Aurelli (Argentina), Annual Report of the IACHR 1990, ¶. III.6 (quoting I/A Court H.R., *Advisory Opinion OC-10/89*, ¶ 45); see also *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, December 27, 2002, ¶ 163.

⁴³ *Detainees in Guantanamo Bay, Cuba, Request for Precautionary Measures*, Inter-Am. C.H.R. (March 13, 2002) at 2. See also I/A Comm. H.R., *James Terry Roach and Jay Pinkerton v. United States*, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, ¶¶ 46-49 (affirming that, pursuant to the Commission’s statute, the Commission “is the organ of the OAS entrusted with the competence to promote the observance of and respect for human rights”).

⁴⁴ See Statute of the Inter-American Commission on Human Rights, Arts. 18 and 20 (directing the Commission to receive, examine, and make recommendations concerning alleged human rights violations committed by any OAS member state, and “to pay particular attention” to the observance of certain key provisions of the American Declaration by states that are not party to the American Convention); Rules of Procedure of the Inter-American Commission on Human Rights, Art. 23 (“[a]ny person . . . legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission . . . concerning alleged violations of a human right recognized in . . . the American Declaration of the Rights and Duties of Man,”) and Arts. 49 and 50 (confirming that such petitions may contain denunciations of alleged human rights violations by OAS member states that are not parties to the American Convention on Human Rights).

⁴⁵ See ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971 (“an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation.”)

⁴⁶ OC 10/89, *supra* note 41, ¶ 37.

interpretation” of international human rights instruments under the general rules of treaty interpretation established in the 1969 Vienna Convention.⁴⁷ Following this reasoning, the Court subsequently found that the U.N. Convention on the Rights of the Child [CRC], having been ratified by almost all OAS member states, reflects a broad international consensus (*opinio juris*) on the principles contained therein, and thus could be used to interpret not only the American Convention but also other treaties relevant to human rights in the Americas.⁴⁸

The Commission has also consistently embraced this principle and specifically in relation to its interpretation of the American Declaration. For example, in the *Villareal* case, the Commission recently noted that “in interpreting and applying the American Declaration, it is necessary to consider its provisions in the context of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged. Developments in the corpus of international human rights law relevant in interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments.”⁴⁹ Adopting this approach the Commission has looked to numerous international and regional treaties as well as decisions of international bodies and customary international law to interpret rights under the American Declaration.⁵⁰

V. HUMAN RIGHTS VIOLATIONS AND LEGAL ANALYSIS

Juvenile Life Without Parole [JLWOP] violates Articles I (right to humane treatment), VII (right to special protection), XVIII, XXIV, XXV and XXVI (right to due process), XXVI

⁴⁷ I/A Court H.R., *Advisory Opinion OC-16/99, October 1, 1999, “The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,”* Ser. A No. 16, ¶¶ 114-15 (citing, *inter alia*, the decisions of the European Court of Human Rights in *Tryer v. United Kingdom* (1978), *Marckx v. Belgium* (1979), and *Louizidou v. Turkey* (1995)); see also I/A Court H.R., *Advisory Opinion OC-18/03, September 17, 2003, “Juridical Condition and Rights of the Undocumented Migrants,”* Ser. A No. 18, ¶ 120 (citing *Advisory Opinion OC-16/99*).

⁴⁸ I/A Court H.R., *Advisory Opinion OC-17/2002, August 28, 2002, “Juridical Status and Human Rights of the Child,”* Ser. A No. 17, ¶¶ 29-30.

⁴⁹ *Ramón Martínez Villareal v. United States*, Case 11.753, Report No. 52/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 821 (2002) ¶ 60 (citing *Garza v. United States*, Case N° 12.243, Annual Report of the IACHR 2000, ¶¶ 88-89); see also *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004), ¶¶ 86-88; *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860 (2002), ¶¶ 96-97.

⁵⁰ See, e.g., IACHR, *Report On The Situation Of Human Rights Of Asylum Seekers Within The Canadian Refugee Determination System*, Country Report, OEA/Ser.L/V/II.106, Doc. 40 rev., Feb. 28, 2000, ¶¶ 28, 159, 165 (referencing the U. N. Convention on the Rights of the Child to interpret Canada’s responsibilities to asylum seekers under the American Declaration and the OAS Charter); *Maya Indigenous Community*, *supra* note 49, ¶¶ 112-120, 163, 174 (referencing the American Convention, jurisprudence of the Inter-American Court, and the United Nations Convention on the Elimination of Racial Discrimination (CERD) to interpret the rights to property, equality before the law, and judicial protection for indigenous peoples contained in the American Declaration); *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Report No. 54/01, Inter-Am. C.H.R., OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2001) (referring to the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará) in determining Brazil’s obligations under the American Declaration to effectively prosecute domestic violence-related crimes); *Michael Domingues v. United States*, Case 12.285 (Report No. 62/02) (October 22, 2002), ¶ 45.

(right to protection against cruel, infamous or unusual punishment) of the American Declaration. JLWOP also violates the explicit prohibition on life sentences for juveniles in the CRC.⁵¹ Further, the trying and sentencing of the individual petitioners, as adults, to natural life sentences violates international norms recognizing the right to special protection⁵² and the principle of the “best interests of the child.”⁵³ These norms and privileges are reflected in the American Declaration as well as other international instruments establishing the need for criminal procedures that take into account the status and special needs of juveniles,⁵⁴ preference for imprisonment of the shortest duration,⁵⁵ and a rehabilitative goal for juvenile offenders.⁵⁶

The child’s right to special protection embodied in Art. VII prohibits the treatment of juveniles as adults for trial and mandatory LWOP sentences without consideration of the child’s age, mental capacity and culpability.

JLWOP is a cruel, infamous, or unusual punishment under Art. XXVI and violates the right to humane treatment under Art. I because of the unique mental anguish experienced by children who are placed in adult prisons for the rest of their natural lives. These children, because of their young age, face longer sentences than adults given a life sentence, higher rates of abuse by guards and fellow inmates and a suicide rate that is eight times that of children in juvenile detention facilities. Further, the punishment in the context of international norms is highly unusual. Especially as taken in context of a child’s right to special protection, life without parole is a cruel, infamous or unusual punishment to inflict on children.

Michigan’s system of creating age categories and categories of offenses under which there is no opportunity for courts or juries to take the juvenile status and interests of juvenile offenders into consideration and mandatory JLWOP sentences for those convicted of certain crimes, also violate the right to due process under Arts. XVIII, XXIV, XXV and XXVI. Moreover, the right to special protection guarantees, “in the case of children the highest standard must be applied” in determining whether other articles of the American Declaration have been violated.⁵⁷ Thus, when considering if JLWOP is inhumane or cruel, infamous, or unusual punishment in violation of Arts. I and XXVI, or a violation of due process rights, the Inter-

⁵¹Convention on the Rights of the Child [hereinafter CRC], G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990., Art. 37.

⁵²International Covenant on Civil and Political Rights [hereinafter ICCPR], Art. 24, CRC, Art. 20(1), American Convention on Human Rights [hereinafter American Convention], O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), Art. 19.

⁵³CRC, Art. 3.

⁵⁴CRC, Art. 37(c)(“[e]very child deprived of liberty shall be treated . . . in a manner which takes into account the needs of persons his or her age.”); ICCPR, Art. 14(4); American Convention, Art. 5(5); United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted by the United Nations General Assembly Resolution 40/33 of November 29, 1985 [hereinafter Beijing Rules], Rule 5.

⁵⁵CRC, Art. 37(b)(“[t]he arrest, detention or imprisonment of a child . . . shall only be used as a measure of last resort and for the shortest appropriate time.”), Beijing Rules, *supra* note 54, Rules 17(b) & 28; United Nations Guidelines for the Prevention of Juvenile Delinquency, adopted by the United Nations General Assembly Resolution 45/112 of December 14, 1990 *available at* <http://www.un.org/documents/ga/res/45/a45r112.htm> [hereinafter Riyadh Guidelines], Rule 46.

⁵⁶CRC, Art. 40, ICCPR, Arts. 10(3), 14(4), Beijing Rules, *supra* note 54, Rules 19, 23, 26 .

⁵⁷Case No. 11.634, Jailton Neri Da Fonseca v. Brazil, Report No. 33/04, at para. 64.

American Commission on Human Rights (hereinafter the Commission or IACHR) must consider the child's special status and needs.

A. The Treatment of the Petitioners Violates the U.S.'s Obligations Under the American Declaration.

1. Imposition of a Life Sentence Without Possibility of Parole on the Individual Petitioners Violates their Right to Special Protection Under (Art. VII)

Article VII of the American Declaration establishes that "all children have the right to special protection, care and aid." The IACHR has recognized that the obligation to provide special protection for children "includes ensuring the well-being of juvenile offenders and endeavor[ing] their rehabilitation." The Commission has held that Art. VII of the American Declaration, requires that "when the State apparatus has to intervene in offenses committed by minors, it should make substantial efforts to guarantee their rehabilitation in order to 'allow them to play a constructive and productive role in society.'"⁵⁸

In accordance with its interpretative mandate, the IACHR should interpret Art. VII in the light of other international treaties and instruments as well as customary international law relative to the rights of the child, including most significantly the CRC. The Inter-American Court has specifically stated that in its interpretation of the American Convention, the Commission should take into account the provisions of the CRC:⁵⁹

Both the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of the child that should help this Court establish the content and scope of the general provision established in Article 19 of the American Convention.⁶⁰

The same principles hold true for the Commission's interpretation of Art. VII of the American Declaration.

The child's right to special protection is a well-established principle of international law and is reflected in all major human rights treaties concerning the rights of the child. For instance, Article 19 of the American Convention establishes that "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state." According to the Inter-American Court, the special protection of children derives "from the specific situation of children, taking into account their weakness, immaturity or inexperience."⁶¹ Other treaties and international instruments also recognize a child's rights to

⁵⁸ Case 12.285, *Domingues v. United States* [hereinafter *Domingues*], Report No. 62/02, at para. 83 (citing I/A Court H.R., *Villagran Morales and others* ("Street Children") Case [hereinafter *Street Children Case*], Judgment of November 19, 1999, Annual Report 1999, para. 197).

⁵⁹ See *Jailton*, *supra* note 58, at para. 81.

⁶⁰ *Street Children Case*, *supra* note 59, para. 194.

⁶¹ Inter-American Court Of Human Rights, Advisory Opinion Oc-17/2002 [hereinafter *Oc-17/2002*], Of August 28, 2002, Requested By The Inter-American Commission On Human Rights *Juridical Condition and Human Rights of the Child*, para. 60, available at http://www.corteidh.or.cr/seriea_ing/index.html.

special measures of protection. The International Covenant on Civil and Political Rights [hereinafter ICCPR], Art. 24, for example, provides that “[e]very child shall have . . . the right to such measures of special protection as are required by his status as a minor.” And Article 3 of the CRC provides that “[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration.”

Like the American Declaration, international law also recognizes that the right to special protection applies to children who come into conflict with the law. For example, Art. 37(c) of the CRC requires that “[e]very child deprived of liberty shall be treated . . . in a manner which takes into account the needs of persons his or her age.” International standards also require that juvenile justice systems emphasize the well being of the juvenile and that the treatment of the juvenile should balance the circumstances of the offender and the offense.⁶² Regard for the special needs of the child is also reflected in numerous provisions requiring separate facilities and different procedures for children.⁶³ Two of the most fundamental rights inherent in the right of children to special protection are the right to be incarcerated for the shortest possible duration and to reintegration and rehabilitation. Both are violated by Michigan’s application of JLWOP against the petitioners.

a. Incarceration for the Shortest Duration

The right to special protection under Art. VII, recognizes that children should be incarcerated for the shortest possible duration. Article 37 of the CRC, for instance, absolutely prohibits a life without parole sentence for anyone who commits a crime under the age of 18 and establishes that imprisonment of persons under 18 years old must be for the shortest appropriate period of time.⁶⁴ Similarly, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice [“Beijing Rules”] provide that “Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible

⁶² Beijing Rules, *supra* note 54, 5.1 concerning the “Aims of Juvenile Justice” provides “The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.” Rule 14.2 requires that court and other proceedings concerning a juvenile offender “be conducive to the best interests of the juvenile,” and Rule 17 provides that any disposition by a competent authority shall be guided by the principle of proportion – consideration of “the needs of the juvenile as well as [] the needs of society” (Rule 17.1(a)) and that “the well-being of the juvenile shall be the guiding factor in the consideration of her or his case” (Rule 17.1(d)). *See also* Oc-17/2002, *supra* note 62, para. 61 (“it is necessary to weigh not only the requirement of special measures, but also the specific characteristics of the situation of the child.”)

⁶³ ICCPR, Art. 10(2)(b) (“[a]ccused juvenile persons shall be separated from adults”), Art. 10(3) (“Juvenile offenders shall be segregated from adults and accorded treatment appropriate to their age and legal status.”); Art. 14(4) (juvenile criminal procedure shall “take account of their age”); CRC, Art. 37(c) (“e]very child deprived of liberty shall be treated . . . in a manner which takes into account the needs of persons of his or her age.”), Art. 40(3) (requiring States Parties to establish “laws, procedures, authorities and institutions specifically applicable to children” accused or recognized as violating the penal law); American Convention, Art. 5(5) (requiring that minors be separated from adults and “brought before specialized tribunals . . . so that they may be treated in accordance with their status as minors.”)

⁶⁴ Article 37(b) (“The arrest, detention or imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate period of time); *see* Rights of the Child, Commission on Human Rights Resolution 2000/85, E/CN.4/RES/2000/85, para. 36(b) (calling upon States “[t]o take appropriate steps to ensure compliance with the principle that depriving children of their liberty should be used only as a measure of last resort and for the shortest appropriate period of time. . .”)

minimum.”⁶⁵ The commentary to Rule 17 states that the rule “implies that strictly punitive approaches are not appropriate.” Rule 28 emphasizes the need to grant conditional release “to the greatest possible extent” and “at the earliest possible time” to juveniles that are imprisoned.⁶⁶ The United Nations Guidelines for the Prevention of Juvenile Delinquency [hereinafter The Riyadh Guidelines]⁶⁷ also emphasizes alternatives to incarceration for children such as petitioners here.⁶⁸ The U.N. Human Rights Commission’s most recent resolution on the Rights of the Child re-affirms that international standards prohibit JLWOP and require that incarceration be for the shortest appropriate time.⁶⁹

b. Right to Rehabilitation

The right to special protection under Art. VII also includes an obligation to “ensur[e] the well-being of juvenile offenders and endeavor their rehabilitation.”⁷⁰ Citing the Beijing Rules, the Inter-American Court has held that, “When the State apparatus has to intervene in offenses committed by minors, it should make substantial efforts to guarantee their rehabilitation in order to “allow them to play a constructive and productive role in society.”⁷¹ The right to rehabilitation is also reflected in international law. Article 10 of the ICCPR establishes that incarcerated juveniles must receive special treatment aimed at their reintegration in society.⁷² Article 14(4) of the ICCPR requires that procedures “take account of [juveniles’] age and the desirability of promoting their rehabilitation.”⁷³ In the United States context, the U.S. Supreme Court has also

⁶⁵ Beijing Rules, *supra* note 54, Rule 17.1(b).

⁶⁶ Beijing Rules, *supra* note 54, Rule 28: “Frequent and early recourse to conditional release. 28.1 Conditional release from an institution shall be used by the appropriate authority to the greatest possible extent, and shall be granted at the earliest possible time.” The commentary explains that “Circumstances permitting, conditional release shall be preferred to serving a full sentence.”

⁶⁷ Riyadh Guidelines, *supra* note 56.

⁶⁸ The Riyadh Guidelines, *supra* note 56, Rule 58 suggests that law enforcement and other relevant personnel should be familiar with and use “to the maximum extent possible, programmes and referral possibilities for the diversion of young persons from the justice system.”

⁶⁹ The Committee’s 2005 Resolution on the Rights of the Child calls upon States to “ensure compliance with the principle that depriving children of their liberty should be used only as a measure of last resort and for the shortest appropriate time, in particular before trial, recalling the prohibition of life imprisonment without possibility of release.” U.N. Human Rights Commission, 61st Sess., Supp. 3, U.N. Doc. E/CN.4/2005/135 (2005), Res. 2005/44, at para. 27., available at http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-44.doc.

⁷⁰ *Domingues*, *supra* note 59, para. 83.

⁷¹ *Street Children Case*, *supra* note 59, para. 197. Article 5 of the American Convention holds that, “Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.” The Beijing Rules state that the objectives of institutional treatment must be to “provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society.” Rule 26.1, Beijing Rules *supra* note 54.

⁷² Article 10, ICCPR: “1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. [2](b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.” General Comment No. 21 on article 10 echoes the rehabilitative goal stating that juveniles should be separated and treated differently from adults “with the aim of furthering their reformation and rehabilitation.”

⁷³ Although the U.S. issued a reservation to Article 10 and 14(4), the reservation is limited, stating that the U.S. only “reserves the right *in exceptional circumstances* to treat juveniles as adults.” See discussion on the reservation *infra* note 85 and accompanying text.

noted the potential to rehabilitate children stating, “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.”⁷⁴

The sentence of life without parole for children contradicts the right to rehabilitation and the ICCPR’s explicit requirement that imprisonment should promote rehabilitation.⁷⁵ It reflects a determination that there is nothing that can be done to render the child a fit member of society. It is an unforgiving sentence of permanent banishment – which rejects any concept of redemption or faith that time, treatment or hard work can promote positive change. The sentence denies youth any hope that they may atone for their crimes and improve their lives. Indeed, as discussed in Barbara Hernandez’s affidavit, petitioners were routinely denied existing rehabilitation programming because their life sentences precludes the option of rehabilitation and parole. Many rehabilitative programs are unavailable by policy to petitioners due to their natural life sentence, which is viewed as non-rehabilitative. For those programs petitioners are allowed to take they are routinely placed at the bottom of the waiting list.

Consistent with international norms, requiring that any incarceration of children be for the shortest period possible and be consistent with a rehabilitative goal, sentencing juveniles to life without the possibility of parole clearly violates the right of all 32 individual petitioners to special protection under Art. VII and international law.

2. JLWOP Constitutes Cruel, Infamous or Unusual Punishment (Art. XXVI) and Violates the Right to Humane Treatment (Art. I)

Article of XXVI of the American Declaration provides that every person accused of an offense has the right “not to receive cruel, infamous or unusual punishment [hereinafter CIUP].”⁷⁶ Further, the right to life under Article I includes the right to humane treatment.⁷⁷ Given the greater vulnerability, lesser maturity and consequent lesser moral and legal culpability of persons under 18 years of age, the imposition of life sentence without the possibility of parole constitutes cruel, infamous and unusual punishment and also violates their right to be free from inhumane treatment..

⁷⁴ United States Supreme Court, *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 1195 (2005).

⁷⁵ The Michigan Supreme Court has stated that “[t]he rehabilitative function of sentences, with an eye towards returning the offender to society at a future time, is not present in nonparolable life sentences.” *People v. Fernandez*, 427 Mich. 321, 339 (1986).

⁷⁶ American Declaration of the Rights and Duties of Man, American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), available at <http://www.cidh.org/Basicos/basic2.htm>.

⁷⁷ Although, this right is not explicitly recognized under Article I, the Commission has interpreted this Article to include similar protections to those rights protected under Article 5 of the American Convention. *See Report on Terrorism and Human Rights*, Inter-American C.H.R. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, ¶ 155 (noting that while the American Declaration lacks a general provision on the right to humane treatment, the Commission has interpreted Article I as containing a prohibition similar to that of Article 5 of the American Convention) (citing Case 9437, Report N° 5/85, Juan Antonio Aguirre Ballesteros (Chile), Annual Report of the IACHR 1984-1985).

Other international instruments confirm an international consensus on the right to humane treatment. Article 5 of the American Convention⁷⁸ states that, “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.” Article 7 of the ICCPR establishes that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The ICCPR also recognizes that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.⁷⁹ Article 16 of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment requires that States Parties undertake to prevent “acts of cruel, inhuman or degrading treatment or punishment.” Similarly, Article 3 of the European Convention on Human Rights and Fundamental Freedoms (“European Convention”) prohibits inhuman or degrading treatment or punishment.

The Commission here should look to international standards concerning the right to humane treatment in interpreting Articles XXVI and I of the American Declaration.

a. Non-Physical Harm and Abusive Forms of Detention Violate Articles I and XXVI

In interpreting the right to humane treatment, both the Commission and the Inter-American Court have found that proscribed conduct is not limited to physical abuse and may include conduct that causes psychological or moral suffering and abusive forms of detention.⁸⁰ Similarly, in *Soering v. United Kingdom*, the European Court found that “the very long time spent on death row [in extreme conditions], with the ever present and mounting anguish of awaiting execution” taken with the age and mental state of the defendant violated Art. 3 of the European Convention.

The Commission has found that detention of a child can under certain circumstances constitute torture or CIUP. In *Jailton Neri Da Fonseca*, the Commission examined the case of a fourteen year-old child abducted and executed by the Brazilian police and found that Jailton “experienced extreme fear and terror in finding himself in the hands of the military police, not knowing where they were taking him,” and that this constitutes torture.⁸¹

In making its determination, the Commission used the definition from Article 2 of the Inter-American Convention to Prevent and Punish Torture, which includes “the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.”⁸² The U.N. Human

⁷⁸ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), available at <http://www.cidh.org/Basicos/basic3.htm>

⁷⁹ ICCPR, at art. 10(1).

⁸⁰ See Annual Report of the IACHR 1997, ¶ 85-87 regarding, *Luis Lizardo Cabrera v. Dominican Republic*, Case 10.832 9 (prolonged arbitrary detention and solitary confinement) citing Eur. Comm. H.R., *The Greek Case*, 1969, 12 Y. B. Eur. Conv. on H.R. 12; I/A Court H.R., *Loayza Tamayo Case*, September 19, 1997, Ser. C. No 33 at ¶57; Inter-Am. Ct. H.R., *Castillo Paez Case*, Judgment of Nov. 3, 1997 (Ser. C) No. 35, ¶¶ 63, 66.

⁸¹ *Jailton*, *supra* note 58, at para. 65.

⁸² *Ibid.*

Rights Committee has also found that forms of detention that cause mental anguish can constitute cruel, inhuman or degrading treatment on numerous occasions.⁸³

b. The American Declaration and International Standards Require that Age Be Taken into Account in Determining What Constitutes Cruel, Inhumane, Infamous and Unusual Punishment.

Because a child's moral and mental maturity is different from an adult, severe forms of punishment such as LWOP are not appropriate. The right to humane treatment recognized under Article 5 of the American Convention specifically requires that minors subject to criminal proceedings be "treated in accordance with their status as minors." The Commission has stated that age must be taken into account when determining whether acts constitute torture or CIDT. In *Jailton Neri Da Fonseca*,⁸⁴ the Commission found a violation of Art. 5 of the American Convention, reasoning,

... although this article leaves some room for interpretation in defining whether a specific act constitutes torture, *in the case of children the highest standard must be applied* in determining the degree of suffering, taking into account factors such as age, sex, the effect of the tension and fear experienced, the status of the victim's health, and his maturity, for instance.⁸⁵ (emphasis added)

International standards also require that a child's status be taken into account when determining whether punishment is inhumane. For example, the CRC treats LWOP as a form of cruel, inhuman and degrading treatment. The CRC's prohibition on life without parole appears in Art. 37(a) and generally prohibits torture and other cruel, inhuman or degrading treatment. Art. 37 reads:

States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

c. Application to Facts

While an LWOP sentence would be difficult for any person, juveniles in particular have heightened vulnerability. Applying the highest standard to determine the degree of suffering of children,⁸⁶ the petitioners' sentences of life without the possibility of parole clearly constitute cruel, infamous and unusual punishment and also violates their right to humane treatment. Punishments "prescribed by law and applied in fact should be humane and proportionate to the gravity of the offense."⁸⁷ Life without parole sentences for child offenders are per se

⁸³ See, e.g., *Tshishimbi v. Zaire*, Communication No. 542/1993, U.N. Doc. CCPR/C/53/D/542/1993 (1996) (abducting petitioner and incommunicado detention constitutes cruel and inhuman treatment).

⁸⁴ See *Jailton*, *supra* note 58.

⁸⁵ *Id.*, at para. 64.

⁸⁶ *Id.*, at para. 63.

⁸⁷ "Report on the 1960 Seminar on the Role of Substantive Criminal Law in the Protection of Human Rights and the Purpose and Legitimate Limits of Penal Sanctions," organized by the United Nations in Tokyo, Japan, 1960.

disproportionate. Indeed, giving an adult sentence of natural life to a minor is disproportionate even compared to the same sentence given to a forty-five year old adult. The years juveniles miss are the most formative, during which they would otherwise finish their education, form relationships, start families, gain employment, and through those experiences learn to become adults.

Moreover, adult prisons are especially harsh for juveniles. Juveniles held in adult prisons and jails are at a much greater risk of harm than their peers in juvenile facilities. Sexual assault of juveniles is five times more likely in adult facilities and beatings by staff are almost twice as likely. Because of their young age and smaller size, juveniles are often the prey for sexual predators and are over-represented as victims of custodial sexual misconduct.⁸⁸ Petitioners Kevin Boyd, Henry Hill and Barbara Hernandez recount, in their affidavits the attempted sexual assaults as well as the physical violence that was prevalent upon their placement in adult prisons as a juvenile.

The mental anguish faced by juveniles who receive LWOP is reflected in the fact that the suicide rate for juveniles in adult prisons is *eight times* that of juveniles in detention facilities.⁸⁹ Kevin Boyd attempted suicide on more than one occasion and other petitioners have been on suicide watch on multiple occasions. In his affidavit, Kevin states “the best part of your day is when you are sleeping; [] your life is nothing more than a daily routine that turns to a monthly or even yearly routine; [] 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; [] you know that society looks at you as a piece of garbage and you start to believe it”

As a JLWOP prisoner who has been incarcerated since the age of sixteen put it, “When I went to prison, I was around . . . all the violence. I was like, ‘man I gotta get out of this—how am I gonna get out of this prison?’ I can’t do no life sentence here at that age. And so I thought of that [killing himself]. Gotta end it, gotta end it. . . . I’ve got so many cuts on me”⁹⁰ Psychological experiments have found that the negative mental effects of imprisonment increase the longer one is imprisoned, but decrease as time of release nears.⁹¹ JLWOP prisoners know they will never be released, thus providing no brake for a downward spiraling emotional state. A treatment director at Mitchellville prison in Iowa says JLWOP prisoners “tend to go through the

⁸⁸ *Second Chances*, *supra* note 5, at 18, citing Forst, Fagan, and Vivona, “Youth in Prisons and State Training Schools,” 39 *Juvenile and Family Court Journal* 1-14 (1989); Forst, Fagan, and Vivona, “Youth in Prisons and State Training Schools,” 39 *Juvenile and Family Court Journal* 1-14 (1989). “No Escape: Male Rape in US Prisons.” Human Rights Watch. April 2001, *available at*: http://www.org.reports/2001/prison/report4.html_1_24

⁸⁹ *See id*, citing James Austin, Kelly Johnson, & Maria Gregoriou, “Juveniles in adult prisons and jails: A National Assessment.” U.S. Department of Justice, Bureau of Justice Assistance. October 2000., citing Community Research Center, “Juvenile Suicides in Adult Jails. Juvenile Transfer Series. Washington, DC: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention.” (1980).

⁹⁰ Human Rights Watch interview with Richard I., East Arkansas Regional Unit, Brickeys, Arkansas, June 21, 2004 (pseudonym), in *The Rest of their Lives*, *supra* note 2, at 64.

⁹¹ For documentation of increased effects, *see, e.g.*, Stanton Wheeler, “Socialization in Correctional Communities,” *American Sociological Review*, vol. 26 (1961), p. 697; Peter Garabedian, “Social Role and Processes of Socialization in the Prison Community,” *Social Problems*, vol. 11 (1963), p. 140. For documentation of decreased effects, *see, e.g.*, Robert Johnson and Hans Toch, “The First Cut is the Deepest: Psychological Breakdown and Survival in the Detention Setting,” *The Pains of Imprisonment* (Thousand Oaks: SAGE Publications, 1982); “Psychology and the Limits to Prison Pain,” p. 499, in *The Rest of their Lives*, *supra* note 2, at 53.

grief cycle twice. The first time it has to do with the simple fact of entering adult prison, so they pass through shock, anger, depression, and then acceptance. But for the lifers, they go through all four stages again—often several years later or whenever the reality of their sentence finally sinks in.”⁹²

Beyond the normally harsh conditions of prison life, JLWOPs are often sent to the harshest of environments: supermaximum security confinement (supermax). In Colorado, over fifty percent of JLWOPs had spent time in supermax. Supermaxes themselves may constitute CIUP, with total isolation over 23 hours per day leading to devastating psychological effects including depression and difficulty relating to others once released from solitary. While most of the individual petitioners are not at the maximum-security levels, they have all been subject to isolation either as a mechanism for protecting themselves from harm or as a punitive detention. The Human Rights Committee in General Comment 20 notes that ““prolonged solitary confinement of the detained or imprisoned person may amount to” torture or CIDT.”⁹³

Although juveniles sentenced to a lifetime in prison do not face death or corporal punishment on a certain date, they are faced with a prison term that will end only with their death. Psychological studies of long-term prisoners show “protracted depression, apathy, and the development of a profound state of hopelessness.”⁹⁴ Children, naturally more dependent on their family relationships for support, are especially vulnerable to depression when they are cut off from family contact in prison. Here the anguish is caused not by the imminence of death, but with the fear and dread of physical harm and the prospect of continued incarceration until the end of their days.

The juvenile’s age and status as a child makes JLWOP particularly cruel, inhumane, infamous and unusual. *Jailton Neri Da Fonseca’s* holding that the mental trauma of a fourteen year-old child abducted by the Brazilian military police was CIUP emphasized “the highest standard must be applied in determining the degree of suffering” in children. Just as Jailton feared his abduction by the military police would mean torture and possible death for him, children sentenced to JLWOP face physical abuse, sexual predation, and the suicidal depression that accompanies lifetime in prison. The individual petitioners faced, and continue to face, adult prison life, with all the attendant traumas to which children are especially vulnerable, without the hope of ever being released. In her affidavit, Barbara Hernandez states: “[d]eath sentence is what the judge gave me. A long slow 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.”

Under “the highest standard” to determine the degree of suffering for children, the Commission should find that the sentence of life in prison without possibility of parole violates the rights of all the individual petitioners to humane treatment and to be free from cruel infamous

⁹² Human Rights Watch interview with Treatment Director at Iowa Correctional Institute for Women, Mitchellville, Iowa, April 5, 2004, in *The Rest of their Lives*, *supra* note 2, at 58.

⁹³ Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), para. 6

⁹⁴ “Psychology and the Limits to Prison Pain,” p. 499 (citing Judith Herman, “Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma,” *Journal of Traumatic Stress*, vol. 5 (1992), p. 377), in *The Rest of their Lives*, *supra* note 2, at 61.

or unusual punishment under Arts. I and XXVI of the American Declaration read in conjunction with Art. VII.

3. *The Mandatory System of Moving Juveniles into the Adult Justice System and Imposing Mandatory LWOP Violates Art. XVIII, XXIV, XXV and XXVI's Guarantee of Due Process in Conjunction with Art. VII's Requirement of Special Protection for Children*

A fair trial in the context of juvenile criminal justice must include safeguards to protect the special needs and interests of those persons under 18 years old that are accused of having committed a crime. At a minimum level, these safeguards must include different courts and justice systems to judge persons under 18 years old and adults, independently of the crime committed and an opportunity for judges to make meaningful individualized determinations prior to imposing life without parole sentences. Michigan's criminal system and laws do not provide adequate safeguards for these rights. Juvenile courts do not have jurisdiction over 17 year olds, and they are automatically tried as adults. Children 16 and under, accused of certain crimes, can be directly prosecuted as adults, without any individual judicial determination of the propriety of treating them as adults.⁹⁵ Once it has been determined that children will be tried and sentenced as adults, life without parole sentences are mandatory for certain crimes, and judges have no discretion to determine whether they are appropriate for the child being sentenced.

The United States indicated general support for special criminal procedures for children when it ratified the ICCPR. ICCPR Article 14 requires, "in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of their rehabilitation."⁹⁶ When the United States ratified the ICCPR, it attached a limiting reservation that stipulates:

That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, *in exceptional circumstances*, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14.⁹⁷

The circumstances surrounding this reservation indicates that it was intended to permit – on an exceptional basis – the trial of children as adults and the incarceration of children and adults in the same prison facilities. As discussed below, instead of being limited to exceptional circumstances, in Michigan adult criminal procedures and sentences are being applied in a routine and automatic fashion. Further, while the reservation discusses criminal procedures, there is nothing in the reservation to suggest that the United States reserved the right to sentence children as harshly or harsher than adults who commit similar crimes.

⁹⁵ These cases are called "direct files" or "automatic waiver" cases since the juvenile status of the accused is never raised nor considered by the Court. The decision is taken by the prosecutor.

⁹⁶ ICCPR, *at art.* 14(4).

⁹⁷ United Nations Treaty Collections, International Covenant on Civil and Political Rights, U.S. Reservations, Declarations and Understandings: Reservations, para. 5 (emphasis added); 138 Cong. Rec. 54781-01 (Daily Ed. April 2, 1992).

On the contrary, the reservation's plain language and drafting history show that the United States sought to reserve the ability in "exceptional circumstance" to try children in adult courts and to require some of them to serve their sentences in adult prison. According to the United States Senate Committee on Foreign Relations, the reservation was included because, at times, juveniles were not separated from adults in prison due to their criminal backgrounds or the nature of their offenses.⁹⁸ The reservation is not about the length or severity of sentences for juveniles and it cannot be read to condone the automatic sentencing of juveniles involved in serious crimes as adults.

a. Different Criminal Procedures are Required in Light of the Special Needs and Interests of Juveniles

Art. XXVI of the American Declaration states, "Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws."⁹⁹ In order to comply with due process guarantees, at a minimum, Michigan courts should consider children's juvenile status and potential for rehabilitation and special needs in some meaningful way. Indeed, the American Convention not only requires consideration of juvenile status but also mandates special tribunals for juveniles subject to criminal proceedings. For example, Art. 5 of the American Convention states that "[m]inors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors."

According to the Inter-American Court, the special protection that must be afforded to children should be reflected in the creation of special courts and the "characteristics of State intervention in the case of minors who are offenders must be reflected in the composition and functioning of these courts, as well as in the nature of the measures they can adopt."¹⁰⁰ Adults and persons under 18 years of age must be treated differently in order to maintain substantive equality given that they are different and have different needs. The Inter-American Court held, "[t]here are certain factual inequalities that may be legitimately translated into inequalities of juridical treatment, without this being contrary to justice. Furthermore, said distinctions may be an instrument for the protection of those who must be protected, taking into consideration the situation of greater or lesser weakness or helplessness in which they find themselves."¹⁰¹

⁹⁸ United States, *Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, 31 I.L.M. 645, 651 (1992) ("Although current domestic practice is generally in compliance with these provisions, there are instances in which juveniles are not separated from adults, for example because of the juvenile's criminal history or the nature of the offense. In addition, the military justice system in the United States does not guarantee special treatment for those under 18.").

⁹⁹ Art. XVIII provides the right to "resort to the courts to ensure and respect [] legal rights" and requires a procedure for court protection "from acts of authority that [] violated any fundamental constitutional right." Art. XXIV provides "the right to submit respectful petitions to any competent authority . . . and the right to obtain a prompt decision thereon." Art. XXV provides "[n]o person may be deprived of his liberty except in the cases and according to the procedures established by preexisting law" and [e]very person [deprived of liberty] has the right to have the legality of the detention ascertained without delay . . . the right to be to be tried without undue delay , , , [and] the right to humane treatment during his time in custody."

¹⁰⁰ Oc-17/2002, *supra* note 62, para. 137(10).

¹⁰¹ *Id.*, at para. 46.

The Beijing Rules specifically address the need for special procedures for juvenile justice systems in its Rule 6 on scope of discretion:

6.1 In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions. 6.2 Efforts shall be made, however, to ensure sufficient accountability at all stages and levels in the exercise of any such discretion. 6.3 Those who exercise discretion shall be specially qualified or trained to exercise it judiciously and in accordance with their functions and mandates.

According to the commentary to Rule 6,

Rules 6.1, 6.2 and 6.3 combine several important features of effective, fair and humane juvenile justice administration: the need to permit the exercise of discretionary power at all significant levels of processing so that those who make determinations can take the actions deemed to be most appropriate in each individual case; and the need to provide checks and balances in order to curb any abuses of discretionary power and to safeguard the rights of the young offender. Accountability and professionalism are instruments best apt to curb broad discretion.

Taking a youth's age into consideration is consistent with universal recognition that children have lesser culpability than adults. The Inter-American Court has stated that "[i]t is generally accepted that children under a certain age lack [the legal] capacity [of adults]. This is a generic legal assessment, one that does not examine the specific conditions of the minors on a case by case basis, but rather excludes them completely from the sphere of criminal justice."¹⁰² The IACHR has also recognized the difference between the culpability of children and adults.¹⁰³

State practice too recognizes that children are less culpable than adults. Indeed a recent decision of the U.S. Supreme Court took this very factor into consideration in striking down the death penalty for all youth who committed their crime under the age of 18. The Supreme Court held that:

Juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows, and as the scientific and sociological studies (...) tend to confirm, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults. (...) The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. (...) The third broad difference is that

¹⁰² *Id.*, at para. 105..

¹⁰³ See *Domingues*, *supra* note 59, at para. 67, noting prohibitions on the execution of children are "based on the idea that a person who has not reached the age of eighteen years is not fully capable of sound judgment, does not always realize the significance of his actions and often acts under the influence of others, if not under constraint," citing International Committee of the Red Cross, *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (J.S. Pictet ed., 1958), at 346-347.

the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult.¹⁰⁴

The Supreme Court also acknowledged the persuasiveness of recent adolescent brain research that scientifically affirms that children’s brains are physiologically different from adult brains, with children reacting more in their impulse area to stress, and adults reacting more in their cognitive area.¹⁰⁵

In addition to raising questions about relative culpability, differences between children and adults raise serious questions about the ability of children to understand and participate in adult criminal proceedings. The affidavits of the individual petitioners illustrate that they did not understand what was happening during their trials.¹⁰⁶ Nor were they competent to make key trial decisions. Noting that adults familiar with the criminal justice system often received far lighter sentences for more serious crimes, Damion Todd states “[o]ur 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.” The individual petitioners inability to understand and participate often was compounded by poor representation. Henry Hill states, “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 in prison sentence. I was never ‘offered’ a ‘plea agreement.’ During my trial, I had no knowledge nor understanding of what a plea agreement meant, my attorney never said anything to me nor my mother or uncle about a plea agreement.”

b. Mandatory Life Sentences Are Inappropriate for Juveniles

Once it was determined that the individual petitioners would be tried and sentenced as adults, they were subject to a mandatory sentence of life without parole. Imposing such a severe mandatory sentence on children violates due process because the individual petitioners were not given an opportunity to make submissions or present evidence that the sentence was inappropriate given the particular circumstances of their cases. They were also denied the opportunity for effective review or appeal of the life without parole sentence.

¹⁰⁴ *Roper v. Simmons*, *supra* note 75, at 1195.

¹⁰⁵ See e.g. Jay N. Giedd, et al., “Brain Development During Childhood and Adolescence: A Longitudinal MRI Study,” *Nature Neuroscience*, vol. 2 (1999), at 861, *cited in The Rest of their Lives*, *supra* note 2, at 47.

¹⁰⁶ Barbara Hernandez states “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.” Henry Hill who could neither read nor write and was evaluated to have the maturity of a nine year old states “I truly did not understand what was happening.” Damion Todd states “my way of thinking at that age was a mixture of fantasy and reality.” Patrick McLemore states “[d]uring my whole arrest and trial it seems like I was in a different time zone or shock.” Kevin Boyd states “I didn’t know what was going on Through the 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.”

In the death penalty context, the Commission has determined that mandatory sentences violate the American Declaration because they deny the individual a right to due process of law. For example, in the *Michael Edwards* case, the Commission held that mandatory death sentences for murder crimes in the Bahamas violated due process.¹⁰⁷ Specifically, it found that, given the wide range of mitigating and aggravating circumstances and varying degrees of culpability that may exist when a murder is committed, the automatic sentence resulted in the arbitrary imposition of the death penalty.¹⁰⁸ The Commission noted that in death penalty cases, due process requires “an effective mechanism by which a defendant may present representations and evidence to the sentencing court as to whether the death penalty is permissible or an appropriate form of punishment in the circumstances their case.”¹⁰⁹ The Commission also expressed concern that the mandatory nature of the sentence prevented effective review or appeal of the sentence.¹¹⁰

Although the Commission stated that the finality of the death penalty required the state to exercise a higher standard in reviewing a case for due process and CIUP violations, it can likewise be argued here that the severe nature of the life without parole sentence coupled with the right of the child to special protection requires a similar level of scrutiny. In *Edwards*, the Commission found the broad definition of murder in the Bahamas and the wide-ranging circumstances under which the automatic sentence could be triggered problematic. Michigan law also imposes mandatory life sentences on children in a wide range of circumstances. In like fashion, once it has been determined that a child will be sentenced as an adult, Michigan law requires life without parole for all first degree murder crimes, which includes premeditated murder, felony murder and murder of a peace or corrections officer. Further, no distinction is made between the actual perpetrator and someone who “aids or abets” the crime.

Irrespective of how it was determined that the individual petitioners would be tried and sentenced as adults, once the decision was made by the legislature, prosecutor or court, all of the individual petitioners were subject to the mandatory sentence of life without parole. At sentencing, they were deprived of the ability to demonstrate personal circumstances that might support a lesser adult sentence¹¹¹ and instead were given automatic sentences solely based on the general category of the crime committed.

c. Application to Facts

¹⁰⁷ See Cases No. 12.067, 12.068, 12.086, Michael Edwards, Omar Hall, Brian Schoreter, and Jeronimo Bowleg v. The Bahamas, Report No. 48/01. See also Case No. 11.765, Paul Lallion, Report No. 55/02; Case No. 12/158, Benedict Jacob, Report No. 56/02; Cases No. 11.826, 11.843, 11.846, 11.847, Leroy Lamey, Kevin Mykoo, Milton Montique, Dalton Daley, Report No. 49/01; Cases No. 12.023, 12.044, 12.107, 12.126, 12.146, Desmond McKenzie, Andrew Downer and Alphonso Tracey, Carl Baker, Dwight Fletcher, Anthony Rose, Report No. 41/00; Case No. 12/028, Donnason Knights, Report No. 47/01;; Case 11.743, Rudolph Baptiste, Report No. 38/.

¹⁰⁸ *Edwards id.* at paras. 136, 138, 145.

¹⁰⁹ *Id.* at para. 151.

¹¹⁰ *Id.* at paras. 137, 150

¹¹¹ Although under the law from 1988-1996, Barbara and Kevin were given post-conviction hearings to determine whether they should be sentenced as adults or juveniles, once the judge determined that an adult sentence was appropriate, the judge had to sentence them to life without parole and had no discretion to impose a lesser adult sentence.

Where juveniles are involved, the American Declaration, as well as other international law, requires a higher standard of review of due process guarantees. Current and former Michigan law falls far short of the due process required. First, Michigan law categorically requires that all juveniles aged 17 be tried as adults. Where first-degree murder charges with mandatory life without parole sentences are involved, there is no opportunity during the trial or sentencing for consideration of individual circumstances, past history or likelihood of rehabilitation.

Second, Michigan law currently allows juveniles as young as fourteen accused of certain crimes, including felony murder and aiding and abetting, to be automatically waived to adult court, convicted, and receive a mandatory sentence of life without parole. The waiver decision is made by prosecutors with no requirement that he or she consider how age may affect cognitive capacity, competency, or culpability for the offense. By excluding 17 year olds from juvenile court jurisdiction and allowing prosecutors to directly file criminal charges against children 16 years old or younger who are accused of certain crimes and then making JLWOP sentences mandatory, Michigan denies juveniles any individual consideration of their circumstances that they are due as juveniles.

Further, while Michigan did provide for sentencing hearings to determine whether juveniles tried as adults should be sentenced as adults from 1988-1996, such hearings were inadequate to protect the juveniles' right to special protection and due process. Based on the decision of prosecutors, juveniles such as Barbara and Kevin were forced to participate in adult criminal trials without any required consideration of their culpability and whether they were capable of understanding and participating in the trial. Although post-conviction, judges did have the discretion to sentence them as juveniles, the range of sentencing options, either juvenile disposition or the mandatory life without parole adult sentence, were insufficient to satisfy their interest in rehabilitation, and post-conviction public pressure to sentence convicted juveniles as adults is often too great to allow a fair balancing of individual and public interests. The sentencing judges themselves complained about the lack of sentencing and rehabilitation options.¹¹²

Finally, although Michigan required judicial waiver hearings prior to 1988, that system still raises serious due process concerns because any waiver of children into the adult criminal system is inconsistent with the right to special protection and due process. And, given the severe nature of life without parole sentences and the right of the child to special protection, mandatory sentencing of juveniles is arbitrary and thus in itself violates their right to due process.

Thus, even if the Commission finds that JLWOP is not per se a violation of the American Declaration, it should find that the Michigan's current system, which requires that all 17 year olds be tried as adults and allows 14-16 year olds to be tried as adults at the discretion of prosecutors and then imposes mandatory life sentences for first degree murder crimes, or aiding and abetting such crimes, with no consideration of juvenile status or individual circumstances, violates the rights of Damion Todd, Patrick McLemore and the individual petitioners in Annex A to due process under Arts. XVIII, XXIV, XXV and XXVI taken together with Art. VII. The Commission should also find that the system from 1988-96 improperly allowed 14-16 year old to

¹¹² See *supra* III.B.2(b) and III.B.3(b).

be tried as adult at the discretion of prosecutors and inadequately considered individual circumstances and juvenile status at sentencing in violation of the due process rights of Barbara Hernandez and Kevin Boyd under Arts. XVIII, XXIV, XXV and XXVI taken together with Art. VII. Finally, the Commission should find that the system prior to 1988, which allowed Henry Hill to be tried as an adult and subjected him to a mandatory sentence of life without parole for acts committed at age 16 violated his due process rights under Arts. XVIII, XXIV, XXV and XXVI taken together with Art. VII.

B. Juvenile Life Without Parole Violates Customary International Law

As discussed, *infra*, the Commission's interpretive mandate requires that it consider the American Declaration in the context of developments in the field of international human rights law, including customary international law. In order to establish a norm of customary international law, there must be a concordant practice by a number of states with respect to a situation that falls within the domain of international relations, a continuation of the practice over a considerable period of time, a conception that the practice is required by or consistent with prevailing international law, and general acquiescence by other states.¹¹³ As discussed below, the near universal acceptance of the CRC, including provisions concerning the treatment of juvenile offenders and its absolute prohibition on JWLOP support a finding of a violation of the American Declaration.

The CRC explicitly addresses the contradiction between the particular rights and needs of children and life without parole sentences.¹¹⁴ Underpinning several of the treaty's provisions is the fundamental recognition of the child's potential for rehabilitation. Recognizing the unacceptability of sentences that negate the potential for children to make changes for the better over time, the CRC flatly prohibits sentencing children to life sentences without parole or to the death penalty.¹¹⁵ Article 37(a) states:

Neither capital punishment *nor life imprisonment without possibility of release* shall be imposed for offenses committed by persons below eighteen years of age.¹¹⁶

The CRC also requires that a state's decision to incarcerate a child "shall be used only as a measure of last resort and for the shortest appropriate period of time."¹¹⁷ A child who has committed a crime is to be treated in a manner that takes into account "the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."¹¹⁸ States are to use a variety of measures to address the situation of children in conflict with the law, including "care, guidance and supervision orders; counseling; probation; foster

¹¹³ *Domingues, supra* note 59, at para. 36.

¹¹⁴ CRC, art. 37(a), G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. no. 49, at 167, U.N. Doc. A/44/736 (1989) (entered into force Sept. 2, 1980), reprinted in 28 I.L.M. 1448, 1470 (emphasis added).

¹¹⁵ The juvenile death penalty is now prohibited in the United States. *Roper, supra* note 75, at 1199 (finding the juvenile death penalty unconstitutional and citing to international standards).

¹¹⁶ CRC, at art. 37(a) (emphasis added).

¹¹⁷ CRC, at art. 37(b).

¹¹⁸ CRC, at art.40.1.

care; education and vocational training programs and other alternatives to institutional care.”¹¹⁹ The treaty also anticipates the need for regular and accessible procedures in which a child can “challenge the legality of the deprivation of his or her liberty.”¹²⁰ Punishing a youth offender with the longest prison sentence possible, offering no hope of rejoining society, little motivation of rehabilitation, and scant opportunities for learning, violates each of these provisions.

The CRC has been accepted nearly universally, with 192 out of a total of 194 countries joining as parties. None of the state parties to the treaty has registered a reservation to the CRC’s prohibition on life imprisonment without release for children.¹²¹ The United States and Somalia¹²² are the only two countries in the world that have not ratified the CRC, although both have signed it.¹²³ As a signatory to the CRC, the United States may not take actions that would defeat the convention’s object and purpose.¹²⁴

The U.S. government has proclaimed commitment to the CRC’s principles. When Ambassador Madeline Albright, as the U.S. Permanent Representative to the U.N., signed the CRC on behalf of the United States in 1995, she declared:

The convention is a comprehensive statement of international concern about the importance of improving the lives of the most vulnerable among

¹¹⁹ CRC, *at* art. 40.4.

¹²⁰ CRC, *at* art. 37(d).

¹²¹ United Nations Treaty Collection Database, available online at <http://untreaty.un.org/>, accessed on July 16, 2004. Malaysia registered a reservation to art. 37(a) as follows: “The Government of Malaysia. . . declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.” *Ibid.* The government of Myanmar made a broad objection to Article 37, which it later withdrew after other states protected. *Ibid.* The government of Singapore has maintained a declaration regarding Article 37. However, the declaration does not address the prohibition on life imprisonment without parole. Singapore’s declaration reads: “The Republic of Singapore considers that articles 19 and 37 of the Convention do not prohibit – (a) the application of any prevailing measures prescribed by law for maintaining law and order in the Republic of Singapore; (b) measures and restrictions which are prescribed by law and which are necessary in the interests of national security, public safety, public order, the protection of public health or the protection of the rights and freedom of others; or (c) the judicious application of corporal punishment in the best interest of the child.” A number of states have interpreted the declaration as a reservation and objected to it as contrary to the object and purpose of the Convention. See UN Treaty Collection Database (Germany: Sept. 4, 1996; Belgium: Sept. 26, 1996; Italy: Oct. 4, 1996; The Netherlands: Nov. 6, 1996; Norway: Nov. 29, 1996; Finland: Nov. 25, 1996; Portugal: Dec. 3, 1996; Sweden: Aug. 1997). In the *Roper* decision, the United States Supreme Court took special note of the fact that no state party to the CRC made a reservation to the prohibition against the juvenile death penalty contained in Article 37. *Roper, supra* note 75, *at* 1199.

¹²² According to the United Nations’ agency for children, UNICEF, Somalia is currently unable to ratify the CRC because it lacks a recognized government. See UNICEF, “Frequently Asked Questions,” available online at: <http://www.unicef.org/crc/faq.htm#009>, accessed on July 19, 2004.

¹²³ The United States signed the CRC on February 16, 1995, and the Somalia signed on May 2, 2002.

¹²⁴ See Vienna Convention on the Law of Treaties, art. 18, concluded May 23, 1969, 1155 U.N.T.S. 331 (entered into force on Jan. 27, 1980). Although the United States has signed but not ratified the Vienna Convention on the Law of Treaties, it regards this convention as “the authoritative guide to current treaty law and practice.” S. Exec. Doc. L., 92d Cong., 1st sess. (1971), p. 1; Theodor Meron, “The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination,” *American Journal of International Law*, vol. 79 (1985), p. 283. The U.S. government has also accepted that it is bound by customary international law not to defeat a treaty’s object and purpose. See e.g., “Albright Says U.S. Bound by Nuke Pact; Sends Letters to Nations Despite Senate Vote,” *Washington Times*, (November 2, 1999), p. A1 (describing the Clinton administration’s acceptance of obligations under the Comprehensive Test Ban Treaty despite the Senate’s failure to ratify).

us, our children. Its purpose is to increase awareness with the intention of ending the many abuses committed against children around the world. . . . United States' participation in the Convention reflects the deep and long-standing commitment of the American people.¹²⁵

The United States has reaffirmed this commitment on subsequent occasions. For example, in 1999 Ambassador Betty King, U.S. Representative on the U.N. Economic and Social Council stated:

Although the United States has not ratified the Convention on the Rights of the Child, our actions to protect and defend children both at home and abroad clearly demonstrate our commitment to the welfare of children. The international community can remain assured that we, as a nation, stand ready to assist in any way we can to enhance and protect the human rights of children wherever they may be.¹²⁶

The widespread ratification of the CRC demonstrates the almost absolute consensus in the international community against JLWOP. Only three countries appear to have prisoners serving LWOP sentences for crimes committed as children, and those states have about a dozen prisoners *combined*.¹²⁷ Further, the practice is inconsistent with international juvenile justice norms emphasizing the importance of taking into account the status and special of the child and a goal of rehabilitation.

In *Domingues*, the IACHR found that the prohibition against the juvenile death penalty to be a *jus cogens* norm. The Commission looked at the near-universal ratification of the CRC without reservation to article 37(a) and found that “the extent of ratification of this instrument alone constitutes compelling evidence of a broad consensus on the part of the international community” against the juvenile death penalty.¹²⁸ The IACHR examined a widespread trend against the death penalty generally, and the juvenile death penalty in particular. With the juvenile death penalty, the Commission found that eight states still allowed the practice, and five were currently using it; with JLWOP fourteen states (at most) allow the practice, and only three are currently using it. The prohibition against JLWOP is part of the same sentence in the CRC that prohibits the juvenile death penalty, and state practice is almost equivalent to that against the juvenile death penalty, thus the Commission’s reasoning in *Domingues* strongly supports a finding that the prohibition on JLWOP constitutes customary international law.

¹²⁵ “Remarks by Ambassador Madeline K. Albright, United States Permanent Representative to the United Nations on the Occasion of the Signing of the U.N. Convention on the Rights of the Child,” U.S. Press Release, (February 16, 1995).

¹²⁶ “Statement by Ambassador Betty King, United States Representative on the Economic and Social Council, to the Plenary of the 54th Session of the General Assembly on the Tenth Anniversary of the Convention on the Rights of the Child,” November 11, 1999, available online at: http://www.un.int/usa/99_112.htm, accessed on July 22, 2005.

¹²⁷ *The Rest of their Lives*, *supra* note 2, at 105-7. The CRC Committee recently urged Liberia, the Netherlands and Aruba to amend legislation to prohibit JLWOP. CRC/C/15/Add/236, para. 68; CRC/C/15/Add.227, para. 59.

¹²⁸ *Domingues*, *supra* note 59, at para. 57.

VI. PROCEDURAL REQUIREMENTS

A. Exhaustion of Domestic Requirements

In order for a petition to be admissible, domestic remedies must be pursued and exhausted (IACHR Rules of Procedure, Art. 31), and the petition be brought within six months following the date the victim has been notified of the decision that exhausted the domestic remedies (IACHR Rules of Procedure, Art. 32(2)).

Exhaustion is not required where domestic legislation “does not afford due process of law for protection of the right or rights that have allegedly been violated.” Art. 31(2)(1). Domestic remedies “must be both adequate, in the sense that they must be suitable to address an infringement of a legal right, and effective, in that they must be capable of producing the result for which they were designed.”¹²⁹

The requirement of exhaustion of domestic remedies “refers to legal remedies that are *available, appropriate, and effective* for solving the presumed violation of human rights.”¹³⁰ In interpreting these characteristics, the Commission has established that “when, for factual or for legal reasons, domestic remedies are unavailable, the petitioners are exempted from the obligation of exhausting same.”¹³¹ The IACHR also emphasized “if 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.”¹³²

Where an exception to the exhaustion requirement applies, the petition must be “presented within a reasonable period of time.” IACHR Rules of Procedure, Art. 32(2). For the following reasons Petitioners claims are not procedurally barred.

1. *The United States and the State of Michigan Do Not Provide Effective Remedies for the Rights Violated.*

Petitioners Henry Hill, Barbara Hernandez, Kevin Boyd, Damion Todd and Patrick McLemore together with the twenty-seven petitioners set forth in Annex A, were all convicted of crimes committed when they were adolescents. As adolescents they were particularly lacking in the knowledge and resources necessary to challenge their convictions and seek an effective remedy to the continued violation of their human rights.

¹²⁹ *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., *Velasquez Rodriguez*, Judgment of July 29, 1988, Ser. C. No. 4 (1988), paras. 64-66.

¹³⁰ *Elias Gattass Sahih*, Report No. 9/05, Inter-Amer. C.H.R., Petition No. 1/03, at 30 (2005).

¹³¹ *Ibid.* (interpreting exhaustion requirements under Art. 46 of the American Convention on Human Rights).

¹³² *Ibid.* (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”).

The likely domestic basis for a challenge to petitioners' treatment "as adults" lies in the constitutional prohibition against cruel or unusual punishment. As forty-two states and the federal government allow for the sentencing of juveniles to life without parole and nineteen states allow for some form of automatic transfer of children to adult court and mandatory sentences, individual petitioners' sentences are not "unusual." All direct attempts by petitioners to raise a challenge to their sentences as "cruel" were rejected or rendered futile by legal rulings on this issue.¹³³ In light of the existing law, any attempts to fully exhaust their domestic remedies would have been futile.

Prevailing jurisprudence in the U.S. and the state of Michigan has resulted in petitioners' reasonable belief that proceedings, (1) challenging the practice of sentencing petitioners to life without the possibility of parole as a violation of the right to special protection or as inhumane treatment and cruel, infamous or unusual punishment, or (2) asserting that the right to special protection and due process prohibit trying and sentencing juveniles as adults without little or no consideration of their individual circumstances, do not have a reasonable prospect of success, rendering the exhaustion requirement inapplicable.¹³⁴

a. U.S. Courts Reject Challenges to JLWOP Sentences

The Michigan state courts have consistently rejected challenges to the validity and constitutionality of children being sentenced as adults. The courts have also rejected a challenge under the prohibition against cruel and unusual punishment to the constitutionality of Michigan's laws that allow juveniles to be sentenced to mandatory life without possibility of parole.

In 1997, in *People v. Launsberry*,¹³⁵ a Michigan juvenile challenged his sentence to mandatory life without possibility of parole arguing that it violated the state's constitutional prohibition on cruel or unusual punishment. The appellate court rejected the argument stating that the Michigan Supreme Court had upheld this sentence for adults and there was "no constitutional right to be treated as a juvenile." The Supreme Court of Michigan denied two requests to review and reverse the court's ruling.

In 2000, a Michigan appellate court again rejected a claim by petitioner, Matthew Bentley, that a non-discretionary life without parole sentence, imposed under the post-1996 laws,

¹³³ Decisions in one case are binding on subsequent claims by other juveniles, and the filing of frivolous cases are punishable by sanctions, including loss of right of access to judicial remedies and financial penalties.

¹³⁴ See *Graham*, *supra* note 130, at para. 60 (holding that claims concerning application of the death penalty to juveniles and the delay in execution had no reasonable prospect for success based on prevailing jurisprudence in the U.S.); *Housel*, *supra* note 130, at para. 34-38 (holding that any proceedings on claims challenging protracted time on death row would be ineffective); *Villareal*, *supra* note 130, at paras. 69-70 (holding that that there were no effective remedies for claim alleging delay in criminal death penalty proceedings based on U.S jurisprudence and violation of consular rights based on the State's position that the Vienna Convention does not create individual rights and the state's failure to contest or demonstrate effective domestic remedies.)

¹³⁵ 217 Mich App, 358, 551 N.W.2d 460, 463 (Mich.App. 1996), appeal and rehearing denied 454 Mich. 883 (1997). Launsberry was sentenced prior to the amendment to M.C.L. 769.1 and was given a sentencing hearing to determine whether he should be sentenced as a minor or adult. See *People v. Jarrett*, 1996 WL 33360697 (Mich. App.) at *3, appeal denied 454 Mich 921 (1997) (rejecting argument that applying mandatory life without parole sentence to juvenile sentenced as an adult following a sentencing hearing that determined he should be sentenced as an adult constituted cruel and unusual punishment).

constituted cruel and unusual punishment. *People v. Bentley*.¹³⁶ An appellate court reached the same conclusion in *People v. Espie*.¹³⁷ The Michigan Supreme Court denied appeals in both cases. In light of the fact that Michigan appellate courts have rejected every challenge to the legality and constitutionality of the treatment of juveniles as adults and the trial and sentencing of juveniles to a life without parole sentence under each of the statutory frameworks, and the Michigan Supreme Court has repeatedly refused to hear or overturn these rulings, petitioners reasonably believed any challenged to these sentences would be futile.

Other state supreme courts have also rejected claims that juvenile life without parole sentences constitute cruel and unusual punishment.¹³⁸ Where review from the United States Supreme Court has been sought, the Court has declined to review these cases.¹³⁹

The U.S. Supreme Court has held in general that life without parole sentences are Constitutional.¹⁴⁰ As forty-two states allow life without parole sentences for juveniles, a constitutional challenge that the punishment is cruel and unusual, under the precepts of the Eighth Amendment, would be futile at this time. Federal appellate courts have held that mandatory sentences of life without parole without the possibility of parole imposed on juveniles for murder convictions do not violate the Eighth Amendment and where review has been sought

¹³⁶ 2000 WL 33519653 (Mich.App. 2000), appeal denied 463 Mich. 993 (2001).

¹³⁷ 2002 WL 87516(Mich. App. 2002), appeal denied 467 Mich. 881, 672 N.W.2d 857 (Mich. Sep 30, 2002) (TABLE, NO. 121182), at *4.

¹³⁸ *State v. Jensen*, 579 N.W.2d 613 (S.D. 1998) (South Dakota Supreme Court holding life without parole sentence for fifteen year old does not constitute cruel and unusual punishment), *State v. Lee*, 148 N.C.App. 518 (2002), appeal dismissed by 335 N.C. 498 (2002) (North Carolina Supreme Court dismissing appeal of appellate holding that life without parole sentence for fourteen year old convicted of first degree murder does not violate the 8th Amendment), *State v. Chambers*, 589 N.W.2d 466 (1999) (Minnesota Supreme Court holding that mandatory life without parole sentence for a 17 year old convicted of first degree murder of a police officer is not cruel and unusual punishment); *State v. Standard*, 351 S.C. 199 (2002) (South Carolina Supreme Court holding that life without parole sentence for 15 year old convicted of burglary does not constitute cruel and unusual punishment); *White v. State*, 374 So.2d 843 (1979) (Mississippi Supreme Court holding life without eligibility for parole sentence for 16 year old convicted of armed robbery does not constitute cruel and unusual punishment); *State v. Massey*, 60 Wash.App. 131 (1990), review denied by 115 Wash.2d 1021 (1990) (Washington Supreme Court denying review of appellate case holding that life without parole sentence for 13 year old convicted of aggravated murder does not constitute cruel and unusual punishment); *State v. Garcia*, 561 N.W.2d 599 (1997) (North Dakota Supreme Court holding that a life sentence without the possibility of parole for a 16 year old convicted of murder did not violate the Eighth Amendment); *State v. Foley*, 456 So.2d 979 (1984) (Louisiana Supreme Court holding that life without parole sentence for 15 year old convicted of aggravated rape does not constitute cruel and unusual punishment). The Louisiana Supreme Court also denied writ to review two appellate cases holding that life without parole sentences for juveniles did not violate the 8th amendment. *State v. Pilcher*, 655 So.2d 636 (La.App. 2 Cir. 1995), writ denied by 662 So.2d 466 (La. 1995) (fifteen year old convicted of two counts of second degree murder); *State v. Payne*, 482 So.2d 178 (La.App. 1986), writ denied by 487 So.2d 178 (1986) (fifteen year old convicted of second degree murder). See *People v. Fernandez*, 883 P.2d 491 (Colorado Court of Appeals holding that a life without parole sentence for a 16 year old convicted of armed robbery did not constitute cruel and unusual punishment.

¹³⁹ *Rice v. Cooper*, 148 F.3d 747 (7th Cir. 1998), cert. denied 526 U.S. 1160 (1999), *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. Massey*, 60 Wash.App. 131 (1990), review denied by 115 Wash.2d 1021 (1990), cert. denied by 499 U.S. 960 (1991), *State v. Standard*, 351 S.C. 199 (2002), cert. denied by 537 U.S. 1195 (2003).

¹⁴⁰ *Harmelin v. Michigan*, 501 U.S. 957 (1991).

by the United States Supreme Court, it has been declined.¹⁴¹ These courts have also rejected arguments that the lack of consideration of the defendants' youth posed Constitutional problems.¹⁴² Although two state supreme courts have held that juvenile life without parole sentences were improper, the cases involved a 13 year old convicted of murder and a 14 year old convicted of rape, which are neither the facts of the individual petitioners' cases nor the states in which they were sentenced.¹⁴³

2. U.S. Courts Do Not Recognize a Right to Special Protection

The United States does not recognize a child's right to special protection as provided by Article VII in the criminal justice context. Thus, any attempt to bring petitioners' claims of violation of the right to special protection or as a form of due process in U.S. courts would be futile. The Supreme Court of Michigan has specifically held that juveniles do not have a fundamental or constitutional right to special protection.¹⁴⁴

The lack of a right to special protection means that there is no fundamental right to certain procedures and standards for determining when children can be treated as adults. And even, the minimal standards Michigan had in place (and subsequently discarded), gave the judge the ability to disregard significant evidence favoring rehabilitation by applying an abuse of discretion standard on review. For instance, Petitioner Kevin Boyd attempted to challenge the decision to sentence him as an adult. Initially, an appellate court held:

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.¹⁴⁵

The court of appeals reversed its own decision four months later, finding it not to be an abuse of discretion and the Michigan Supreme Court denied leave to appeal.

Because no fundamental right to special protection is recognized, states are free to formulate their own procedures and standards for waiving juveniles into adult court¹⁴⁶ or decide

¹⁴¹ *Harris v. Wright*, 93 F.3d 581 (9th Cir. 1996), *Rice v. Cooper*, 148 F.3d 747 (7th Cir. 1998), cert. denied 526 U.S. 1160 (1999), *Rodriguez v. Peters*, 63 F.3d 546 (7th Cir. 1995). See *Foster v. Withrow*, 159 F. Supp.2d 629 (S.D. Mich. 2001), aff'd 42 Fed.Appx. 701 (6th Cir.(Mich.) Jul 30, 2002).

¹⁴² *Harris*, 93 F.3d at 585 ("Youth has no obvious bearing on this problem."); *Rice*, 148 F.3d at 752 (rejecting argument that the lack of consideration of mitigating factors rendered the statute cruel and unusual); *Rodriguez*, 63 F.3d at 568 (mandatory sentence of life without parole "can be rationally applied to juvenile offenders who are tried as adults without offending the Eighth Amendment's prohibition against cruel and unusual punishment.").

¹⁴³ *Naovarath v. State*, 779 P.2d 944 (Nev. S. Ct. 1989); *Workman v. Kentucky*, 429 S.W.2d 374 (Ky. S.Ct. 1968).

¹⁴⁴ *People v. Hana*, 443 Mich. 202, 221 (1993); *People v. Conat*, 238 Mich.App. 134, 158 (1999), appeal denied 461 Mich. 1013 (2000).

¹⁴⁵ *People v. Boyd*, _____ Mich App _____, 1998 WL 1991584 (1998).

¹⁴⁶ *State v. Angel C.*, 245 Conn. 93, 104 (1998); *State v. Cain*, 381 So.2d 1361, 1363 (Fla. 1980)(Florida Supreme Court holding there is no "inherent or constitutional right to preferred treatment as a juvenile delinquent"); *State v.*

to exclude children from juvenile court altogether based on age or crime charged. Further, although U.S. courts have held that once a right has been granted by the legislature, the legislature may not rescind that right in other contexts,¹⁴⁷ courts have consistently refused to apply this principle to the juvenile justice cases¹⁴⁸ and have found that any special treatment or consideration of juvenile status can be withdrawn.¹⁴⁹

In 1999, a Michigan appellate court reversed trial court decisions in four consolidated cases and held that Michigan's current automatic waiver scheme – the scheme which allowed Patrick McLemore and the twenty-seven petitioners identified in Annex A, to be waived to adult criminal court by the prosecutor and automatically sentenced as an adult subject to a mandatory life without parole sentence – is permissible even though a juvenile's status as a child is not considered in any stage of the proceedings.¹⁵⁰ Specifically, the court held that because there is “no constitutional right to be treated as a juvenile,” the legislature could eliminate post-sentencing hearings without violating due process.¹⁵¹ Due process arguments continue to be rejected by Michigan courts, in automatic waiver cases where juveniles are given mandatory life without parole sentences, and the Michigan Supreme Court has refused to review these cases.¹⁵² A similar statutory scheme to Michigan, in which the prosecutor is given unchecked discretion to waive a child into adult court, was approved by the D.C. Circuit Court of Appeals. Again, the government relied on the fact that the child did not have a “right to juvenile treatment.”¹⁵³ The Supreme Court declined to hear the case¹⁵⁴ and has consistently refused to hear any case challenging automatic waiver statutes.¹⁵⁵ In light of clear domestic precedent establishing that automatic waiver provisions precluding any judicial consideration of a defendant's juvenile status are permissible, challenges to Michigan's current automatic waiver scheme would be futile.

3. *Statutory Exclusion*

Bell, 785 P.2d 390, 399 (Utah 1989) (Utah Supreme Court holding that “[a] juvenile has no right to treatment in the juvenile system or ‘to be specially treated as a juvenile delinquent instead of a criminal offender.’”); *People v. Drayton*, 39 N.Y.2d 580, 584 (N.Y. 1976) (New York highest court holding that “[t]here is no constitutional right to youthful offender status”); *Woodard v. Wainwright*, 556 F.2d 781, 785 (5th Cir. 1977) (“treatment as a juvenile is not an inherent right”); *Commonwealth v. Clint C.*, 430 Mass. 219 (Aug. 31, 1999) (noting that “[t]here is no federal constitutional right to any preferred treatment as a juvenile offender. The Massachusetts Legislature, if it chose to do so, could lawfully abolish Juvenile Court jurisdiction”); *Conat*, 238 Mich. App. 134;

¹⁴⁷ See e.g. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that once a federal or state legislature has created a right to receive welfare benefits, that right could not be rescinded without a due process hearing).

¹⁴⁸ See *Woodard*, 556 F.2d at 785 (finding that “[i]n the first place, we do not believe that petitioners have ever been ‘given’ the right to juvenile treatment in any realistic sense”).

¹⁴⁹ *State v. Coleman*, 271 Kan. 733, 736 (Kan. 2001) (“The special treatment of juvenile offenders on account of age is not an inherent or constitutional right but rather results from statutory authority, *which can be withdrawn.*”) (emphasis added).

¹⁵⁰ *Conat*, 238 Mich. App. 134 (1999).

¹⁵¹ *Id.* at 158-61, citing *People v. Hana*, 443 Mich. 202 (1993).

¹⁵² *Bentley* 2000 WL 33519653 at *1 and footnote 1, *appeal denied* 463 Mich. 993 (Apr. 3, 2001); *Espie*, 2002 WL 87516* 3, *appeal denied* 467 Mich. 881 (Sept. 30, 2002).

¹⁵³ *United States v. Bland*, 472 F.2d 1329, 1343 (D.C. Cir. 1972) (Wright, J., dissenting).

¹⁵⁴ *Bland*, 412 U.S. at 909.

¹⁵⁵ See *Quinones v. United States*, 516 F.2d 1309, 1311 (1st Cir. 1975), *cert. denied*, 423 U.S. 852 (1975); *Cox v. United States*, 473 F.2d 334, 336 (4th Cir. 1973), *cert. denied*, 414 U.S. 869 (1973).

Under Michigan law, juvenile court jurisdiction only extends up to age 16. Irrespective of the crime charge, prior record or individual maturity, seventeen year olds must be tried in adult criminal court. Like the prosecutorial waiver statutes, the U.S. does not recognize the child's right to special protection. Damion Todd had no reasonable basis in domestic law to challenge his treatment as an adult and attempting to exhaust his domestic remedies by challenging the statutory exclusion would be futile in Michigan and United States courts.

Such rulings are binding rules of law on the petitioners, and there is not a reasonable belief that a challenge would be successful at this time.

B. Timeliness

All of the individual petitioners are serving the sentence of life without possibility of parole sentences. The violation of their rights, as set forth in their petition, occurs on a daily basis. While the petitioners have been tried and sentenced to mandatory life sentences on different dates, the nature of the human rights violations are similar for each of the individual petitioners and occur on an ongoing basis as they continue to serve a mandatory natural life sentence for offenses occurring while they were juveniles. These petitioners brought this petition at the first opportunity after learning of the existence of their rights under the American Declaration, learning of the jurisdiction of this Commission, and obtaining the support of the ACLU to bring this petition. Petitioners believe that the circumstances render their petition timely. Petitioners further set forth their prior efforts to address their underlying convictions below. While there are collateral attacks on their conviction, not involving the issues and rights presented to this commission that are unavailable in the domestic setting, petitioners' filings demonstrate their good faith efforts to challenge their conditions of convictions.

1. Henry Hill

Henry has diligently and timely sought appropriate domestic remedies to challenge his conviction. However, he did not raise the issues in this petition in domestic proceedings due to futility.

Henry's conviction was affirmed by an Appellate Court on March 23, 1984 and leave to appeal was denied by the Michigan Supreme Court.¹⁵⁶ Over the years, Henry presented various collateral state motions, which were taken all the way to the Michigan Supreme Court and denied.¹⁵⁷ In the spring of 2004, Henry filed a petition for Writ of Habeas Corpus to the Federal District Court for the Eastern District of Michigan, Southern Division, which was denied on statute of limitations grounds.¹⁵⁸ Henry's petition for rehearing is pending.

¹⁵⁶ People v. Hill, Mich. Ct. App. No. 66264 (March 23, 1984), People v. Hill, Mich. Sup. Ct. No. 74176 (S 939 (1984)).

¹⁵⁷ Henry filed a Motion to Remand for a New Trial on November 23, 1984, which was denied on May 24, 1985. On September 24, 1985, the Michigan Court of Appeals denied a Delayed Application for Leave to Appeal, and in 1986, the Michigan Supreme Court denied Henry's Application for Leave to Appeal. People v. Hill, Mich. Ct. App. No. 85848 (September 24, 1985), People v. Hill, Mich. Sup. Ct. No. 77417 (March 24, 1986).

¹⁵⁸ Hill v. Lafler, Civ. No. 04-71278 (September 28, 2005).

2. Barbara Hernandez

Barbara has diligently and timely sought appropriate domestic remedies to challenge her conviction. However, she did not raise the issues in this petition in domestic proceedings due to futility.

The Michigan Court of Appeals affirmed Barbara's conviction on February 4, 1994, and the Michigan Supreme Court denied her leave to appeal on December 6, 1994.

Barbara then sought collateral relief. On September 30, 1996, the Michigan Court of Appeals denied her motion for relief from judgment.¹⁵⁹ She then filed an application for leave to appeal to the Michigan Court of Appeals on October 3, 1996, raising several claims including a double jeopardy issue regarding her multiple life sentences for her four-count conviction. In response, the Michigan Court of Appeals remanded Barbara's application for leave to appeal to the trial court for a ruling setting forth findings of fact and conclusions of law. To address these issues on appeal, the Court of Appeals issued an order appointing counsel on November 3, 1998, but the order was mistakenly not sent to the appointed counsel, and as of October 23, 2002, nothing had happened regarding this appeal because of the appointed counsel miscommunication.¹⁶⁰ On October 23, 2002, the Michigan Appellate Assigned Counsel System requested the appointment of appellate counsel, which was granted. On January 31, 2006 the trial court dismissed two convictions as violating petitioner's double jeopardy, however, the life without possibility of parole sentence remains for conviction of 1st degree felony murder. Petitioner's counsel is pursuing a challenge to statements introduced at trial. However, no challenge based on her status as a juvenile is contemplated for the reasons stated previously.

3. Kevin Boyd

Kevin has diligently and timely sought appropriate domestic remedies to challenge his conviction. However, he did not raise the issues in this petition in domestic proceedings due to futility.

The Michigan Court of Appeal affirmed his convictions and sentences in orders on June 5, 1998 and October 6, 1998. On October 26, 1999, the Michigan Supreme Court denied Kevin leave to appeal.

Kevin then filed a motion for relief from judgment, rehearing and an evidentiary hearing and a petition for DNA testing, which were denied on October 27, 2003. On March 22, 2004, the Michigan Court of Appeals denied Kevin's application for leave to appeal. Kevin filed an application for leave to appeal with the Michigan Supreme Court that was denied on October 25, 2004.

4. Damion Todd

¹⁵⁹ Michigan Appellate Assigned Counsel System, letter to Oakland Circuit Court, Pontiac, Michigan, Oct. 23, 2002.

¹⁶⁰ Letter by Michigan Appellate Assigned Counsel System, dated Oct. 23, 2002.

Damion Todd was seventeen when he committed his offense and therefore considered an adult under Michigan's criminal law.¹⁶¹

Damion challenged the several errors in his trial, conviction and sentencing. The appellate court rejected all but one. The court found the additional sentence of 100-200 years to be excessive as it was "not reasonably possible for [Damion] to serve the sentence."¹⁶² Requests to appeal the rulings on his life without parole sentence were denied.

5. Patrick McLemore

Patrick filed a notice of appeal on February 23, 2000. On Feb. 27, 2002, the Court of Appeals granted the second of two motions to remand for an evidentiary hearing based on newly discovered evidence of statements made by Reid, indicating that he had killed the victim. Following the evidentiary hearing, the trial court denied a motion for a new trial. The Court of Appeals affirmed the trial court's decision on December 20, 2002. Patrick filed a delayed application for leave to appeal to the Michigan Supreme Court in Feb. 14, 2003. Leave to appeal was denied.

6. Post 1996 Petitioners: Matthew Bentley, Maurice Black, Larketa Collier, Cornelius Copeland, John Espie, Maurice Ferrell, Mark Gonzalez, Chavez Hall, Lamar Haywood, Lonnell Haywood, Christopher Hynes, Ryan Kendrick, Cedric King, Eric Latimer, Juan Nunez, Sharon Patterson, Gregory Petty, Tyrone Reyes, Kevin Robinson, T.J. Tremble, Marlon Walker, Oliver Webb, Elliott Whittington, Ahmad Williams, Johnny Williams, Leon Williams and Shytour Williams

Any challenge to the treatment of petitioners as juveniles, the lack of consideration of their child status or the mandatory nature of their sentence would not have been reasonable in light of prior rulings. Petitioner Matthew Bentley's attempted challenges were rejected based on prior rulings on these matters and his request for Michigan Supreme Court review denied. These petitioners have made various collateral challenges to their convictions, some of which are pending, none of which have been successful in obtaining their release or re-sentencing to date.

C. Duplication of proceedings

This petition has not been presented to any other international tribunal.

VII. CONCLUSION AND PETITION

Kevin Boyd, Barbara Hernandez, Henry Hill, Damion Todd, Patrick McLemore and the petitioners in Annex A, respectfully request the Inter-American Commission on Human Rights to:

1. Declare this petition admissible;

¹⁶¹ Michigan is one of eleven states to set the adult age at seventeen for criminal prosecution. The remaining thirty-nine states acknowledge 18 as the age of majority.

¹⁶² *People v. Todd*, 186 Mich App 625, 465 N.W.2d 380 (1991).

2. Investigate, with hearings and witnesses as necessary, the facts alleged in this petition;

3. Declare that United States of America and the State of Michigan are responsible for the violation of the individual petitioners' rights under the American Declaration of Human Rights, and under international human rights law generally. In particular, as juveniles sentenced to life without parole, their right to special protection under Art. VII and their right to humane treatment and to be free from cruel, infamous or unusual punishment under Arts. I and XXVI have been violated. Furthermore, their trial in adult court subject to mandatory sentences of life without parole with no, or inadequate consideration of their juvenile status, interests or personal circumstances violates the right to special protection under Art. VII and due process under Arts. XVIII, XXIV, XXV and XXVI;

4. Declare that continued incarceration without opportunity for parole constitutes a violation of the individual petitioners' rights under the American Declaration;

5. Declare that any future applications of the juvenile life without parole sentence under the current scheme, constitutes a violation of Article VII, XVIII, XXIV, XXV and Article XXVI; and

6. Recommend such remedies as the Commission considers adequate and effective for the violation of the individual petitioners' fundamental human rights, including *inter alia*:

(a) Monetary compensation;

(b) A full and prompt opportunity for review and consideration of parole for the individual petitioners;

(c) Adoption by the United States of measures designed to reform laws in the State of Michigan and throughout the United States that allow juveniles to be tried as adults, including through judicial waiver, the withdrawal of juvenile jurisdiction and the lowering of the age at which juveniles are subject to adult prosecution;

(d) Adoption by the United States of measures designed to reform laws in the States of Michigan and throughout the United States that allow juveniles to be sentenced to life without parole, including through mandatory sentencing requirements.

Dated: February 21, 2006

Respectfully submitted by the undersigned, as counsel for the individual petitioners under the provisions of Article 23 of the Commission's Rules of Procedure:

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