

CURRENT ISSUES IN JUVENILE JUSTICE

November 14, 2014 Tracey Braine, Assistant Dean and Professor and Tonya Krause-Pfeifer Professor
Western Michigan University-Thomas M. Cooley Law School

COMPETENCY

COMPETENCY MCL §712A.18n (effective March 28, 2013)

- **Statutory presumption of competence**
 - Although a juvenile **10** years of age or older is still presumed competent for purposes of a delinquency petition, statutory provisions have been added that either require or permit an evaluation regarding a juvenile's competency to proceed in juvenile court. MCL §712A.18n(1) and (2)
- **Incompetence.** A juvenile is incompetent if, based on age-appropriate norms, lacks a reasonable degree of rational and factual understanding of the proceeding or is unable to do one or more of the following:
 - Consult with and assist his or her attorney in preparing his or her defense in a meaningful manner, or
 - Sufficiently understand the charges against him or her. MCL §712A.1(g)(i) and (ii).

Raising Competency

- The court may order on its own motion, or at the request of the juvenile, the juvenile's lawyer, or the prosecuting attorney, a competency evaluation to determine whether the juvenile is incompetent to proceed. MCL §712A.18n(2).
- The issue of competency may be raised at any time during the proceedings. MCL §712A.18n(1).

Stay of Proceedings

- Once a juvenile's competency is raised, the delinquency proceeding must be temporarily put on hold until a determination is made about the juvenile's competency. MCL §712A.18n(3); (MCL §712A.180(1)).
- This provision is referred to as a "procedural defense." That simply means that it would be unfair to continue prosecuting the child *until* a determination is made regarding the statutory criteria for competence.
 - This provision parallels the adult system.

Qualified Juvenile Forensic Mental Health Examiner

- A qualified juvenile forensic mental health examiner (QJFMHE) must perform the exam. The court makes the final determination of an expert witness serving as a qualified juvenile forensic mental health examiner. MCL §712A.180(1).
 - The QJFMHE person is entitled to reasonable fees for services rendered. MCL §712A.18q(3).
- **Second Opinions**
 - A party may retain its own qualified juvenile forensic mental health examiner to conduct *additional* evaluations at the party's own expense. MCL

The Evaluation

- The competency evaluation shall be conducted in the least restrictive environment.
 - A presumption favors conducting a competency evaluation while the juvenile remains in the custody of a parent or legal guardian, unless:
 - removal from the home is necessary for the best interests of the juvenile
 - for reasons of public safety, or
 - because the parent or guardian has refused to cooperate in the competency evaluation process. MCL §712A.18o(3).

Relevant Material

- The court is required to order the prosecuting attorney to provide the juvenile's attorney all information related to competency.
- The court is also required to order the prosecuting attorney and juvenile's lawyer to submit to the QJFMHE, within ten days any information considered relevant to competency.
- **Additional Material**
 - **The Prosecutor and Juvenile's Lawyer must provide:**
 - The lawyers' names and addresses, information about the alleged offense, and any information about the juvenile's background that the prosecutor possesses. MCL §712A.18p(1)(a)-(c).
 - **The Juvenile's Lawyer must provide:**
 - Psychiatric records, school records, medical records, and child protective services records. MCL §712A.18p (2)(a)-(d).
 - **Privilege.** Work product and attorney-client privileged information is not abrogated or waived. MCL §712A.18p(3).

Examiner's Findings and Report

- The examiner must submit a written report within 30 days of the court order containing factual findings and conclusions. MCL §712A.18p(5) and (6).
 - But on good cause shown, the forensic examiner is entitled to a 30-day extension. MCL §712A.18p(7).
- **Contents of Report**

A description of the nature, content, and extent of the examination, including, but not limited to, all of the following:

 - A description of assessment procedures, techniques, and tests used.
 - Available medical, educational, and court records reviewed.

A **clinical assessment** that includes, but is not limited to, the following:

- A mental status examination.
- The diagnosis and functional impact of mental illness, developmental disability, or cognitive impairment. If the juvenile is taking medication, the impact of the medication on the juvenile's mental state and behavior.
- An assessment of the juvenile's intelligence.
- The juvenile's age, maturity level, developmental stage, and decision-making abilities.
- Whether the juvenile has any other factor that

A **description of abilities and deficits** in the following mental competency functions related to the juvenile's competence to proceed:

- The ability to factually as well as rationally understand and appreciate the nature and object of the proceedings, including, but not limited to, all of the following:
 - An ability to understand the role of the participants in the court process, including, the roles of the judge, the juvenile's attorney, the prosecuting attorney, the probation officer, witnesses, and the jury, and to understand the adversarial nature of the process.
 - An ability to appreciate the charges and understand the seriousness of the charges.
 - An ability to understand and realistically appraise the likely outcomes.
 - An ability to extend thinking into the future.

Ability to render meaningful assistance

- The ability to render meaningful assistance to the juvenile's attorney in the preparation of the case, including, but not limited to, all of the following:
 - An ability to disclose to an attorney a reasonably coherent description of facts and events pertaining to the charge, as perceived by the juvenile.
 - An ability to consider the impact of his or her action on others.
 - Verbal articulation abilities or the ability to express himself or herself in a reasonable and coherent manner.
 - Logical decision-making abilities, particularly multi-factored problem-solving or the ability to take several factors into consideration in making a decision.
 - An ability to reason about available options by weighing the consequences, including weighing pleas, waivers, and strategies.

Disclosure of Report

- The court must provide the juvenile's attorney, the prosecutor, and any guardian ad litem for the juvenile the written report within **five** working days of receiving the report. MCL §712A.18p(8).

Hearing

- The court must hold a hearing to determine if the juvenile is competent to proceed within 30 days after the examiner's report is filed. Other evidence (or stipulations thereto) may be introduced at the hearing. MCL §712A.18q(1).
- **Incompetent.** If the court finds the juvenile incompetent to proceed and there is a substantial probability that the juvenile will remain incompetent to proceed for the foreseeable future or within the period of the restoration order, the court shall dismiss **with prejudice** the charges against the juvenile and may determine custody of the juvenile. MCL §712A.18q(2).

Evidentiary Issues

- The constitutional protections against self-incrimination apply to all competency evaluations.
 - Any evidence or statement obtained during a competency evaluation is inadmissible in any proceeding to determine the juvenile's responsibility (or for any other charges based on those events or transactions. MCL §712A.18r(1)-(3).
 - But, the juvenile or the juvenile's guardian may consent to use of statements after being given opportunity to consult with lawyer. MCL §712A.18r(4).

Sealing Records

- After adjudication or the juvenile is found to be unable to regain competence the court must order all of the reports submitted to be sealed.
 - The reports can only be opened for further competency or criminal responsibility evaluations, statistical analysis, reports necessary for mental health treatment, data gathering, scientific study or other legitimate research. MCL §712A.18r(5)(a)-(e).
 - The records remain confidential, even if opened. MCL §712A.18r(6).
- Juvenile's statements made during a competency evaluation are not subject to disclosure. MCL

Judicial Action if Juvenile Found Incompetent, but may be Restored to Competency in the Foreseeable Future

- **If the offense is:**
 - Traffic offense or a non—serious misdemeanor, the court must dismiss the matter. MCL §712A.18s(1)(a).
 - Serious misdemeanor, the court may dismiss the case or suspend the proceedings against the juvenile. MCL §712A.18s(1)(b).
 - Felony, the proceedings against the juvenile must be suspended. MCL §712A.18s(1)(c).

Possible restoration of competency

- If proceedings are suspended because the juvenile is incompetent to proceed but the court finds that the juvenile may be restored to competency in the foreseeable future, **all** of the following apply:
 - Before issuing a restoration order, the court shall hold a hearing to determine the least restrictive environment for completion of the restoration.

Restoration Order

□ The court may issue a restoration order that is valid for 60 days from the date of the initial finding of incompetency or until one of the following occurs, whichever occurs first:

- The QJFMHE, based on information provided by the qualified restoration provider, submits a report that the juvenile has regained competency or that there is no substantial probability that the juvenile will regain competency within the period of the order;
- The charges are dismissed; or
- The juvenile reaches 18 years of age. MCL §712A.18s(2)(a) and (b).

Report regarding restoration efforts

□ Following issuance of the restoration order, the qualified restoration provider shall submit a report to the court and the qualified juvenile forensic mental health examiner. The report shall be submitted to the court and the qualified juvenile forensic mental health examiner every 30 days, or sooner if and at the time either of the following occurs:

- 1. The qualified restoration provider determines that the juvenile is no longer incompetent to proceed.
- 2. The qualified restoration provider determines that there is no substantial probability that the juvenile will be competent to proceed within the period of the order. MCL §712A.18s(1)(c).

Extension of Restoration Order

□ Not later than 14 days before the expiration of the initial 60-day order, the qualified restoration provider may recommend to the court and the qualified juvenile forensic mental health examiner that the restoration order be renewed by the court for another 60 days

- if there is a substantial probability that the juvenile will not be incompetent to proceed within the period of that renewed restoration order.
- The restoration order and any renewed restoration order shall not exceed a total of 120 days. MCL §712A.18s(3).

Long-term or Permanent Incompetency

- Except as otherwise provided in this section, upon receipt of a report that there is a substantial probability that the juvenile will remain incompetent to proceed for the foreseeable future or within the period of the restoration order, the court shall do both of the following:
 - Determine custody of the juvenile as follows:
 - The court may direct that civil commitment proceedings be initiated, as allowed under the mental health code,
 - If the court determines that commitment proceedings are inappropriate, the juvenile shall be released to the juvenile's parent, legal guardian, or legal custodian under conditions considered appropriate to the court.

Mental Health Services

- Upon receipt of a report from a qualified juvenile forensic mental health examiner that there is a substantial probability that the juvenile is unable to be restored due to serious emotional disturbance,
 - The court may in its discretion, except as otherwise provided, order that mental health services be provided to the juvenile by the department of community health, subject to the availability of inpatient care, a community mental health services program, the department of human services, a county department of human services, or another appropriate mental health services provider for a period not to exceed 60 days.
 - The court shall retain jurisdiction over the juvenile throughout the duration of the order. The entity ordered to provide services under this subsection shall continue to provide services for the duration of the period of treatment ordered by the court. MCL 5712A.18s(5)

Mental Health Treatment Report

- Not later than 14 days before the expiration of an order for treatment under this subsection or subsection (5), the entity providing mental health services under that order shall submit a report to the court and the qualified juvenile forensic mental health examiner regarding the juvenile.
 - Upon receipt of the report, the court shall review the report and do either of the following:

- Renew the order for another period of treatment not to exceed 60 days. The order for treatment and any renewed order shall not exceed a total of 120 days.
- Determine custody of the juvenile and dismiss the charges against the juvenile. MCL §712A.18s(6)(a) and (b)

- Statistical records**
- The department of community health shall maintain a record of the number of juveniles for whom the court ordered that mental health services be provided under subsection (5) or (6). MCL §712A.18s(7).

**JURISDICTIONAL
WAIVER:
RECENT SENTENCING
AND LEGISLATIVE
ISSUES**

WAIVER

- In Michigan, there are three ways a juvenile's case may be removed from juvenile court and referred to circuit (adult criminal) court. This process is referred to as "waiver." There are three different types juvenile waiver:
 - traditional (discretionary) waiver,
 - mandatory waiver, and
 - automatic waiver.

Traditional Waiver: MCL 712A(1)-(4)

- This form of waiver provides the juvenile court some discretion in the waiver determination.
 - If a juvenile 14 years of age or older is accused of an act that if committed by an adult would be a felony, the judge of the family division of circuit court in the county in which the offense is alleged to have been committed may waive jurisdiction.
 - If the juvenile court waives jurisdiction, the juvenile's case is transferred to circuit (adult criminal) court.

Prosecutorial Request for Removal

- Prosecuting attorney must move to have jurisdiction waived.
 - If the prosecutor files such a motion, before conducting a hearing on the motion to waive jurisdiction, the court must give notice of the hearing to the juvenile and the prosecuting attorney and, if addresses are known, to the juvenile's parents or guardians.
 - The notice shall state clearly that a waiver of jurisdiction to a court of general criminal jurisdiction has been requested and that, if granted, the juvenile can be prosecuted for the alleged offense as though he or she were an adult.

Two-part Hearing

- First, the court shall determine on the record if there is probable cause to believe that an offense has been committed that if committed by an adult would be a felony and if there is probable cause to believe that the juvenile committed the offense.
- If the prosecutor establishes probable cause, the court must conduct the second part of the hearing.
 - Here, the court must determine:
 - if the waiver of jurisdiction is in the **child's best interests**, AND

- In making its determination, the court shall consider all of the following criteria, giving **greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency than to the other criteria**:
 - The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.
 - The culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.

- The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.
- The juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming.
- The adequacy of the punishment or programming available in the juvenile justice

Mandatory Waiver, MCL 712A.4(5)

- If the court determines that there is probable cause to believe that the juvenile committed an offense, that if committed by an adult would be a felony, the court **shall** waive jurisdiction if the court determines the juvenile has been previously subject to the jurisdiction of circuit court.
- Due to the mandatory nature of this method of waiver, the juvenile court judge need only to conduct phase I of the bifurcated hearing involved in the traditional waiver process.

Automatic Waiver, MCL 764.1f

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

- First-degree arson, assault with intent to commit murder, assault with intent to maim, assault with intent to rob and steal (armed), attempted murder, first-degree murder, second-degree murder, kidnapping, criminal sexual conduct-first degree, armed robbery, carjacking, and stealing from bank, safe, vault, or other depository.
- Assault with intent to do great bodily harm less than murder; assault by strangulation or suffocation and home invasion if the juvenile is

- Escape or attempted escape from a juvenile facility, but only if the juvenile facility from which the individual escaped or attempted to escape was 1 of the following:
 - (i) A high-security or medium-security facility operated by the family independence agency or a county juvenile agency.
 - (ii) A high-security facility operated by a private agency under contract with the family independence agency or a county juvenile agency.

- Certain drug offenses; MCL 333.7401 and 333.7403.
- An attempt to commit a violation described in subdivisions (a) to (d).
- Conspiracy to commit a violation described in subdivisions (a) to (d).
- Solicitation to commit a violation described in subdivisions (a) to (d).
- Any lesser-included offense of a violation described in subdivisions (a) to (g) if the individual is charged with a violation described

Sentencing the Juvenile in Juvenile Court

- Sentencing a juvenile that has been waived to circuit court has been the subject of change and controversy.
 - In some cases, the court retains discretion to sentence the offender as either a juvenile or as an adult in discretionary designation cases.
 - A discretionary designation case or a court designated case occurs when the prosecutor files a petition alleging the juvenile committed an offense other than the specified juvenile violation and requests the court to designate the case as one in which the juvenile is tried the same as an adult.

Blended Sentencing

- **Blended.** The court may delay a sentence of imprisonment by entering a juvenile order of disposition of the sentence and placing the juvenile on probation on terms and conditions it considers appropriate.
 - This is called a **delayed sentence** as the court reserves the right to impose an adult sentence later. This occurrence is usually saved for the party who commits a new serious crime while on probation.
 - For example, if an armed robber gets a blended sentence and then gets caught smoking marijuana, this usually would not trigger adult sentencing.

Sentencing as an Adult

- **Adult Sentencing.** The court has the right to impose a purely adult sentence. MCL 712A.18(1)(m). The sentence may include the Department of Corrections or adult probation.
 - The only exception is that Juveniles may not be sent to prison (unlike jail) unless they are convicted of a crime specified under MCL712A.18h.

Revocation

- **Revocation.** If a juvenile is placed on probation, the court must revoke probation and impose sentence if the Juvenile is convicted of a felony or a misdemeanor punishable by more than a year.

Sentencing on Specified Felonies

Prior to 1996, a juvenile who was waived into circuit court was entitled to a mandatory hearing, post-conviction, "to determine whether to sentence the juvenile as a juvenile or as an adult." This protection was abolished by M.C.L. § 769.1(1) to require that juveniles convicted of one of twelve out of the nineteen "specified juvenile violations" be sentenced in the same manner as adults.

- See Bell, Matthew William, *Prosecutorial Waiver in Michigan and Nationwide*, 2004 Mich. St. L. Rev. 1071 (2004), citing Mich. Comp. Laws § 769.1(1) (2004). The violations for which an adult sentence must be imposed are: arson of a dwelling, assault with intent to commit murder, assault with intent to maim, attempted murder, conspiracy to commit murder, solicitation to commit murder, first degree murder, second degree murder, kidnapping, first

United States Supreme Court

- **Roper v. Simmons**, 543 U.S. 551, 125 S.Ct. 1183 (2005)
 - The United States Supreme Court held The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The Court noted that scientific and sociological studies confirm, youth tend to demonstrate "[a] lack of maturity and an underdeveloped sense of responsibility . . . These qualities often result in impetuous and ill-considered actions and decisions." 543 U.S. at 569.
- **Graham v. Florida**, 560 US 48: 130 S.Ct. 2011 (May 17, 2010)
 - The Supreme Court held that the Eighth Amendment prohibits imposition of life without parole sentence on juvenile offender for a non-homicide. Further, States must give juvenile non-homicide offenders sentenced to life without parole a meaningful opportunity to obtain release.
- **Miller v. Alabama**, 567 U.S. . . . 132 S.Ct. 2455 (2012)
 - The United States Supreme Court ruled that the Eighth Amendment prohibits a sentencing scheme that mandates life in prison without parole for juvenile offenders. The Court found these sentencing schemes flawed because they failed to give courts the opportunity to consider mitigating circumstances before

Michigan's Response

- **People v. Carp**, 298 Mich. App. 472 (Nov. 15, 2012)
 - The court addressed retroactive application of *Miller v. Alabama*. The Michigan Court of Appeals recognized the *Miller* announced a new rule because it was not dictated by precedent existing at the time of the defendant's conviction became final. But, the court concluded that *Miller* was a procedural rule, not a watershed rule. As a result, the court found *Miller* inapplicable to Michigan cases on collateral review.
 - However, according to *Carp*, MCL 791.234 (6)(a) providing that a prisoner sentenced to life imprisonment for first-degree murder is ineligible for parole is unconstitutional as applied to juveniles. As a result, sentencing courts must consider, at the time of sentencing, characteristics associated with youth as well as circumstances of offense in order to decide whether to sentence a juvenile to life with or without parole. For purposes of sentencing, a juvenile is a person under 18. The court ruled that *Miller* is only applicable to cases pending on direct appeal.
 - Finally, in rare language, the Court of Appeals urged the legislature to address "with all possible expedience" revising current statutory sentencing scheme for juveniles. The court also urged the parole board to respect a sentencing

Federal Response: Eastern District of Michigan

- **Hill v. Snyder**, 14568, 2013 WL 364198 (E. D. Mich., Jan. 30 2103).
 - District Judge John Corbett O'Meara ruled that *Miller* applies retroactively, not just on cases going forward (prospectively). This means that all individuals currently servicing the sentence must be eligible and considered for parole.

Subsequent Michigan Cases

- **People v. Skinner**, 306903, 2013 WL 951265 (February 21, 2013)
 - The Court of Appeals ruled that defendant was entitled to a resentencing at which time the trial court must consider the "characteristics of youth and the circumstances of the offense" before sentencing the defendant for the first-degree murder conviction
 - The court noted that the trial court was still permitted to sentence the defendant a life without parole, but that it must engage in the proper analysis first.
- **People v. Skinner**, 494 Mich. 872, 832 NW2d 237 (June 25, 2013).
The Michigan Supreme Court denied review.

- **People v. Ellason**, 302353, 300 Mich. App. 293, ____ N W 2d (April 4, 2013)
- The Michigan Court of Appeals ruled that after *Miller*, the only discretion afforded to trial courts when sentencing a juvenile for first-degree murder is whether to impose life imprisonment without parole or life imprisonment with the possibility of parole. In making such a decision, the court should consider the following non-exclusive list of factors:
 - -the character and record of the individual offender [and] the circumstances of the offense,
 - -the chronological age of the minor,
 - -the background and mental and emotional development of a youthful defendant, the family and home environment,
 - -the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected [the juvenile],
 - -whether the juvenile might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with youth, and

People v. Masalmani, 301376, 2013 WL 1137181 (March 19, 2013).
 The Michigan Court of Appeals vacated the defendant's mandatory life sentence for first-degree murder and remanded for sentencing consistent with *Miller v. Alabama* and *People v. Carp*.
 People v. Taylor, 303208, 2013 WL 1165239 (March 21, 2013).
 The Michigan Court of Appeals vacated the defendant's mandatory life sentence for first-degree murder and remanded for sentencing consistent with *Miller v. Alabama* and *People v. Carp*.
 People v. McCloud, 296256, 2013 WL 2360122 (May 30, 2013).
 The Michigan Court of Appeals vacated the defendant's mandatory life sentence for first-degree murder and remanded for sentencing consistent with *Miller v. Alabama* and *People v. Carp*.
 People v. McDade, 307597, 2013 WL 3020686 (June 18, 2013).
 The Michigan Court of Appeals vacated the defendant's mandatory life sentence for first-degree murder and remanded for sentencing consistent with *Miller v. Alabama* and *People v. Carp*.

People V Woolfolk, 304 Mich 450 (2014)

Determining youth's age for purposes of *Miller*
 Defendant was born on January 29, 1989. Defendant shot and killed the victim on the evening of January 28, 2009.
 Under the birthday rule of age calculation, which we conclude applies, he was not yet eighteen years of age when the shooting occurred.

- *Miller* makes it clear that violation of the prohibition against cruel and unusual punishment occurs when individuals "under the age of 18 at the time of their crimes" are sentenced to mandatory life without the possibility of parole.
- Defendant was under the age of 18 at the time he shot and killed Little. We therefore hold that *Miller* applies to this case, and that resentencing is required.

The Michigan Supreme Court hears *Carp*

People v. Carp, 496 Mich. 440, 852 N.W.2d 801 (2014) reh'g denied sub nom. *People v. Davis*, No. 146819, 2014 WL 5370846 (Mich. Oct. 22, 2014).
 Ruled that *Miller v. Alabama* did not apply retroactively.
 Life without parole sentence on juvenile homicide offenders did not automatically violate principles of cruel and unusual punishment.
 Life without parole sentence on juvenile homicide offender convicted on aiding and abetting theory did not automatically violate principles of cruel and unusual punishment.

Legislative Updates

- Effective March 4, 2014
 - Senate Bill 319 (Rick Jones); Governor Snyder signed
 - Changes Michigan law for all pending and future cases involving juvenile defendant convicted of 1st degree murder, felony murder or certain repeat assault offenses
 - Judges can consider a term between 25-60 years instead of automatically handing down a mandatory life sentence
 - House Bill 4808 (Margaret O'Brien)
 - Related provision amended Michigan penal code to reflect the law as set forth in *Miller*.

PETITIONING FOR REMOVAL FROM THE MICHIGAN SEX OFFENDER REGISTRY

Presentation provided by the Access to Justice Clinic at Thomas M. Cooley Law School

Who is eligible to petition for removal?

- Offenders who engaged in consensual sexual activity with a teenaged victim less than four years younger than them.
 - (AKA Romeo & Juliet Offenders)
- Juvenile offenders under the age of 14 who are not tried as an adult.
- Juveniles in the 14-16 year old age group who were not tried as an adult AND did not commit a Tier III Offense.

Who is eligible to petition for a shorter registration?

- **Juveniles** aged 14-16 who committed a **TIER III offense** and who **have not re-offended** are required to register for life on the non-public registry, but may petition for removal after **25 years**.
- **All TIER I offenses** are required to register for 15 years, but may petition for removal after **10 years** if they have **have not re-offended** and the court determines that removal would be just.

Who is a Romeo & Juliet Offender?

- ii If the offense was the result of a **consensual sexual activity**; and **EITHER**
 - All of the following are true:
 - The victim was **at least 13 years old, but less than 16 years old**,
 - The **offender was not more than 4 years older than the victim**.
 - OR
 - All of the following are true:
 - The offender was convicted of:
 - 750.15b, crime against nature or sodomy against victim under 18, OR
 - 750.33b, 750.33b(a) or b, Gross indecency victim 13-17 years old, OR
 - 750.520c(1)(ii), 2nd Degree CSC and "that other person is under the jurisdiction of the Dept. of Corrections and the actor is an employee of a contractual employee of, or a volunteer with, the Dept. of corrections who knows that the other person is under the jurisdiction of the Dept. of Corrections."
 - The victim was **16 years or older** at the time of the offense
 - The victim was **not under the custodial authority of the offender** at the time of the offense.

Tier 1 & III Offenses Defined

<ul style="list-style-type: none"> ii Tier 1 OFFENSES □ 750.145c(4), Person who knowingly possesses any child sexually abusive material □ 750.335a(2)(b), Indecent exposure with fondling of self, if the victim is a minor □ 750.349b, Unlawful imprisonment/restraint if the victim is a minor □ 750.520e, 4th Degree CSC if the victim is 18 or older □ 750.520g(2), Assault with attempt to commit touch if the victim is 18 or older □ 750.528k, Surveillance of or distribution, dissemination, or transmission of recording, photograph, or visual image of individual having reasonable expectation of privacy, if victim is minor □ 750.104, Anyone who was at the time of the offense, a sexually delinquent person □ 28.722(B)(k)(w), Catch all provision 	<ul style="list-style-type: none"> ii TIER III OFFENSES □ 750.33b, Gross indecency between males, victim under 13 □ 750.33b(a), Gross indecency between females, victim under 13 □ 750.33b(b), Gross indecency between male and female, victim under 13 □ 750.349, Kidnapping committed against a minor □ 750.350, Kidnapping victim under 14 □ 750.520b, 1st Degree CSC □ 750.520c, 2nd Degree CSC □ 750.520d, 3rd Degree CSC □ 750.520e, 4th Degree CSC if victim is under 18 □ 750.520g(1), Assault with attempt to commit penetration □ 750.520g(2), Assault with attempt to commit touch, OR attempt or conspiracy for any of the above
---	---

What to do if you believe your are eligible to Petition for Removal or a Reduction

- If you can afford an attorney, contact a defense attorney to investigate your case and, if you are eligible, begin the process on your behalf. If you cannot afford an attorney, contact your local legal services office.
- **Be aware:** Individuals who are currently on the Michigan Sex Offender Registry may only submit a petition for removal ONCE; make sure you are receiving the help you need to submit a successful petition. Don't risk losing the opportunity.

EXPUNGEMENT

Presentation provided by the Access to Justice Clinic at Thomas M. Cooley Law School

What is Expungement?

- A lawsuit against the state to set aside a conviction.
 - Setting aside a conviction has the effect of removing it from a criminal record.
 - This does NOT mean that it never existed.
- Expungement has the effect of setting aside a criminal conviction, which permits the person to honestly tell potential employers and others that he or she has not been convicted of a crime.
 - However, even an expunged criminal record can be used for some purposes.

Understanding Expungement

- In general, once a conviction is set aside under the expungement statute, the person whose record has been expunged is legally considered not to have been convicted of a crime.
- For example, the person may honestly answer "no" if a potential employer asks, "Have you ever been convicted of a crime?"

Important Notes on Expungement

- The expungement process does not erase the arrest or the court proceedings.
- Expunged convictions are still considered convictions for purposes of
 - immigration deportation,
 - will not alter registration as a sexual offender, and
 - may be considered in sentencing if the person is ever convicted of another offense
- Regardless of the law governing what may be asked about criminal history, anyone with \$10 can obtain a person's criminal history from the state police website, which may still reveal the arrest.
 - (<http://apps.michigan.gov/CHAT/Home.aspx>)
- Expungement is not available if the multiple convictions arose from the same criminal transaction, and they occurred on the same date.

Employers and Expungement

- May an employer ask about a **criminal conviction** in connection with an application for employment?
 - No. (See MCL 37.2205a.)
 - But there are exceptions that may cause a criminal history to haunt a person after expungement
 - Many employers are specifically authorized by statute to conduct criminal history checks, and certain government or law enforcement agencies are not bound by whether a conviction was obtained.
- A person whose conviction is expunged may only answer "no" to the question "Have you ever been convicted of a crime?"
- If an application inquires into the fact of arrest or regarding criminal dispositions taking place before expungement, you may need to obtain separate legal advice as to whether the question may legally be asked and how to answer it.

How to get an Expungement

- 1) Determine whether a conviction may be expunged
- 2) Obtain a copy of the forms you need to expunge the conviction
- 3) Order a certified copy of the conviction record
- 4) Complete the application to set aside conviction
- 5) File the completed application with the court clerk
- 6) Obtain copies of the applicant's fingerprints
- 7) Assemble everything you need to mail the application to the appropriate agencies
- 8) Mail the application materials to the required agencies
- 9) Complete a proof of service
- 10) Prepare the order on application to set aside conviction
- 11) Prepare for the hearing
- 12) If the judge grants the expungement, provide the appropriate follow-up

JUVENILE EXPUNGMENTS

- SAME AS ADULT IN MANY WAYS
- Crime(s) CANNOT BE SPECIFICALLY PRECLUDED BY STATUTE
- LIFE IMPRISONMENT AND TRAFFIC OFFENSES EXCLUDED
- PLUS ANY CONVICTIONS WHERE THE JUVENILE WAS TRIED AS AN ADULT

Step 1: Determine whether a conviction may be expunged

- | | |
|--|--|
| <ol style="list-style-type: none"> 1. Is it a felony for which the maximum punishment is life in prison?
If YES, you may NOT expunge the conviction. 2. Is it a violation or attempted violation of Michigan's Criminal Sexual Conduct (CSC) Laws?
If YES, you may NOT expunge the conviction. | <ol style="list-style-type: none"> 1. Is it a misdemeanor traffic offense, such as drunk driving, driving without a license, or any other criminal misdemeanor under the Michigan Vehicle Code?
If YES, you may NOT expunge the conviction. |
|--|--|

Step 1: Determine whether a conviction may be expunged

- 1. Is the adjudication for an offense that if committed by an adult would be a felony for which the maximum penalty is life imprisonment? If yes, no expungement. MCL 712A.18e(2)(a).
- 2. Is the adjudication for a traffic offense, such as drunk driving, driving without a license or any other criminal traffic code criminal offense? If yes, no expungement.

Step 1: Continued

- 3. Is the adjudication for an offense for which the juvenile was tried as an adult and it resulted in a conviction under MCL 712A.2d? If yes, no expungement under the Juvenile expungement procedure BUT may be set aside under the adult expungement statute, MCL 780.621)
- 4. Does the client have more than one juvenile offense that would be a felony committed by an adult and more than three juvenile offenses (of which not more than one could be an offense considered a felony if convicted as an adult.) If yes, no expungement.

Step 1: Continued

- Multiple adjudications arising out of the same incident could be set aside if they occurred within 12 hours as long as none were assaultive crimes including weapons possession or a crime with a 10 year maximum.
- 5. Does the client have any adult convictions for felonies in addition to the adjudication the client wants to have expunged?

Step 1: continued

***6. Has it been less than one year (reduced from 5 years as of 12/28/2012)?

If yes, you may not expunge.

7. Is it a violation or attempted violation of Michigan's Criminal Sexual Conduct (CSC) Laws? If YES, you may NOT expunge the conviction.

Step 1: Continued

8. In addition to the conviction the person wants to have expunged, are there any other convictions that have already been set aside due to a deferred sentence, plea under advisement, or Holmes Youthful Training Act (HYTA)?

It does not matter how many other convictions the applicant has had set aside by other means, such as HYTA; as long as the applicant has only one conviction *presently* on his or her record, you may proceed with expungement.

However, in deciding whether to grant the expungement petition, the court **may** negatively consider any previous convictions that have already been set aside.

If previous convictions have already been set aside by other means, and the person still has just one conviction (not counting up to two minor offenses), proceed to the next question.

Step 2: Obtain a copy of the forms you need to expunge the conviction

Application to Set Aside Conviction, and

SCAO form MC 227

Order on Application to Set Aside Conviction

SCAO form MC 228

Note that these forms do not mention the term *expungement*.

The forms do include an "application checklist" that includes the information needed for the application

Step 3: Order a certified copy of the conviction record

- Contact the court where the conviction occurred and order a certified copy of the conviction record.
 - Be patient, as records more than five years old are often in storage, converted to microfiche, or otherwise difficult to access.
 - There may be a small charge for this process (\$10 base fee, plus \$1 per page).
 - The exact format of the conviction record is not critical. You may obtain a certified copy of the judgment of sentence, probation order, or register of actions. Just be sure there is something from the court that sufficiently describes both the charge and the exact date of conviction (the date of sentence, or the date any term of imprisonment was completed).
 - In addition, you will need to make four copies of the record of conviction for use during the application process.

Steps 4 and 5

Once you obtain a certified copy of the correction record, complete the application to set aside the conviction. Use MC 227. You will also need to make five copies of the application.

File the following items with the court clerk where the original conviction was entered:

- the original signed and notarized application,
- the original certified copy of the prior conviction, and
- five copies of the application and four copies of the certified record of the prior conviction.

The clerk will set a hearing date and return the five copies with the hearing date filled in under the "Notice of Hearing" section of the application form. The State Police have requested that hearings be set at least 90-120 days from filing to ensure that they will have time to respond to the application.

Step 6: Obtain copies of the applicant's fingerprints

- Before proceeding further with the application you must obtain two copies of the applicant's fingerprints.
- Go to the local police departments and get fingerprinted.
 - The police department may schedule an appointment or may advise you to simply walk in during designated times.
- These fingerprints will be taken on an applicant card (RI-8). Fill out the card completely. You may have to pay an application fee to the police agency.

Step 7: Assemble everything

You will need to have the following items ready:

- Five copies of the completed application to set aside the conviction, with the hearing date filled in,
- Four copies of the certified copy of the conviction,
- Two sets of fingerprints, and
- A \$50 fee payable to the state of Michigan.

Step 8: Mail the application materials to the required agencies

The following materials must be mailed to these agencies:

- To the Michigan State Police:
 - a copy of the application
 - a copy of the certified record of conviction
 - both fingerprint cards
 - the \$50 fee payable to the State of Michigan
- Michigan State Police
Criminal Justice Information Center
P.O. Box 30634
Lansing, MI 48909
- To the Attorney General:
 - a copy of the application
 - a copy of the certified record of conviction
- Attorney General's Office
Convictions Division
P.O. Box 30213
Lansing, MI 48909
- To the Prosecutor's office for the county in which the applicant was convicted:
 - a copy of the application
 - a copy of the certified record of conviction
- Obtain this address from the Internet, or ask the court clerk.
- Keep for yourself:
 - the remaining two copies of the application
 - a copy of the certified record of conviction

Steps 9 and 10



- On one of the remaining two copies of the application, complete the section at the bottom entitled "Proof of Service." Simply check the appropriate boxes, fill in the dates, and sign and date at the bottom.
 - Make a copy of this form with the completed proof of service for your records, and mail to or personally file the original with the court clerk.
- Use SCAO form MC 228.
 - Fill out the heading with your case information and print the form, leaving the body of the order to be completed by the judge.
 - Make four copies and take it to the hearing with you.

Step 11: Prepare for the hearing

All judges handle expungement hearings differently. Some will grant the expungement automatically if the applicant is eligible; others will want strong evidence of good character. Be ready for the latter.

- If the applicant has been in school, bring copies of transcripts.
- If the applicant has been working, bring a copy of their resume and letters of reference from employers.
- If the applicant has done volunteer work or community service, bring evidence of what they has done and letters if available.
- If the applicant has been rehabilitated, bring proof.
 - This could include drug or alcohol intervention, psychological treatment, and/or religious or spiritual guidance from a personal place of worship.
- Have letters of support from friends, family members, or others who know the applicant well and can vouch for his or her good character.
 - Consider bringing some of these key people to the hearing.

Step 11: Continued

- If the crime to be expunged was assaultive in nature or a serious misdemeanor, the prosecutor will give the victim written notice of the request for expungement, including a copy of the application to set aside the expungement. Therefore, you should be prepared for the possibility that the victim will contact the judge concerning the expungement or even appear at the hearing.

Step 12: Follow-up

- If the judge grants the expungement, complete the process. Check with the court clerk to make sure that they send copies of the order to the State Police Central Records Division.
 - You may want to send copies yourself to the Attorney General and the Prosecutor.
- After a couple of months, double check the your record to make sure that the conviction was expunged.

Disclaimer

□ *Using these materials is not a substitute for the attorney's independent judgment, drafting, and research. The content of this presentation must not be considered legal advice. This presentation was designed for informational purposes only.*

Sources

- ICLE How-To Kit: How to Expunge an Adult Conviction
 - <https://www.icle.org/modules/howtokits/how-to-kit.aspx?kit=2004tk2019&lib=criminal&q=expungement>
- ICLE How-To Kit: How to Expunge a Juvenile Conviction
 - https://www.icle.org/modules/howtokits/how-to-kit_print.aspx?kit=2006TK2018&lib=criminal
- MCL 712A.18e
- MCL 780.621
- SCAO Forms MC 227 and MC 228

TEEN COURT

**WMU-COOLEY'S HISTORICAL
Connection to the Kent County**

Teen Court

- The mission of the Kent County Teen Court is to engage youth through restorative justice principles, parental and community collaboration, addressing juvenile justice and community challenges, and personal responsibility.
- *The Kent County Teen Court is supported by the Kent County Family Court, the Kent County Prosecutor's Office, and the juvenile probation system.*

**The Teen Court Focused on Three
Goals:**

- *Prevention.*
 - The Teen Court takes a proactive approach in preventing first time offenders from pursuing a life of crime and redirects the youth's energy to become a productive member of the community.
 - The youth participant is exposed to a model court system that parallels the state criminal court process.

□ *Education.*

- The Teen Court educates both youth participants and youth volunteers regarding the negative effect of crime on society and their personal lives.
- The Teen Court educates both youth participants and youth volunteers regarding the negative effect of crime on society and their personal lives.

□ *Personal Responsibility.*

- The Teen Court holds youth participants accountable for their actions. All young people participating and volunteering in Teen Court are provided insight on the need for and effect of being responsible for their own actions.
- Youth volunteers are provided leadership opportunities preparing them for the greater responsibilities of life.

Program Structure

The youth participants are referred by the Kent County probation department.

Youth participants and their parents are given a choice between going through the traditional criminal justice system and the Teen Court program.

If they choose Teen Court

- If they choose Teen Court, they must
 - 1) admit responsibility for the crime;
 - 2) participate in a community service activity;
 - 3) attend school consistently;
 - 4) attend street law workshop hosted by Teen Court; and
 - 5) check in by phone each week with Teen Court officials. The experience culminates with a hearing at which the youth participant must appear before a jury of his peers.

The Teen Court Jury

- The jury is comprised of high school students from a broad range of local high school.
 - Teen Court officials are intentional about drawing from a diverse pool of jurors that includes students from inner-city, suburban, public and private schools.
- A teen court official meets with the students and their teacher(s) the week before the hearing to explain how the jury system works and what their role will be at the hearing.
 - The class chooses a clerk and a bailiff, and everyone else serves as jurors.

- At the hearing, the jurors listen to statements made by the youth participant and his parent or guardian, the victim, if present, and Teen Court officials.
- The Teen Court officials give a report on the youth participant's progress to date in the program.
 - Jurors then have the opportunity to ask questions.
 - The goal of the questioning is glean information that will help the jurors with their disposition decision, and to hold the youth participant accountable by answering questions about why the crime occurred, how it

- Once the questioning concludes, the jurors retire to deliberate. They are reminded that the youth participant already admitted responsibility and directed to decide on a disposition that will hold the youth participant accountable and restore the victim and community.
 - Disposition orders often include additional community service, tutoring, an apology letter the victim, and service as a juror in a future teen court hearing.

□ Once the youth participant completes all programming – that imposed by Teen Court officials and by the jury – his case is dismissed and his record cleared.

□ At the conclusion of this process, the youth participant has hopefully learned from the second chance and will not repeat the behavior.

- The high school jurors learn about the law and jury service.
- The facilitators help the community explore new paradigms of juvenile justice.

WMU-Cooley and the Future of Teen Court

□ Cooley students have been an integral part of the process from the beginning.

□ Despite best efforts, the law school's connection to the Kent County Teen Court was tabled.

□ With the WMU-Cooley affiliation and newly-designed combined graduate studies, the relationship with this project may be reinstated.

JUVENILE INTERROGATIONS AND CONFESSIONS

**Miranda v Arizona:
A Quick Review**

- Historically, and prior to judicial reform, law enforcement routinely extracted confessions with force, violence, and coercion.
 - Confessions were suppressed only if the police activity rose to the level of a due process violation
- To avoid suppression on due process and/or police brutality grounds, police turned to non-violent and psychological tactics.

- The *Miranda* opinion did not declare the psychological interrogation techniques illegal, *per se*.
- But recognizing the psychological techniques utilized by police, in part, led to the Supreme Court creating a presumption that all **custodial interrogations** are inherently coercive.
- So to combat the inherently coercive nature of custodial interrogations, the *Miranda* warnings were designed to ensure people know they have the right to not self-incriminate and that they have a right to the presence of counsel during questioning.

Miranda: a very basic primer

- As a result, prior to the commencement of custodial interrogation law enforcement must advise the individual of their rights.
 - The warnings are:
 - You have the right to remain silent.
 - Anything you say can, and will, be used against you in a court of law
 - You have the right to the presence of an attorney now and during questioning.
 - If you cannot afford an attorney, one will be appointed for you at public expense

What Do Custody and Interrogation Mean?

- For *Miranda* purposes, custody has been determined to be those situations where:
 - Application of physical force
 - Defendant's freedom of movement restricted
- For *Miranda* purposes, interrogation has been determined to be those situations where:
 - Police express questioning
 - or
 - It's functional equivalent
 - Functional equivalent means words or actions designed to elicit an incrimination response.

What can one do with his or her *Miranda* rights?

- INVOKE
 - To invoke (exercise) your right to remain silent or your right to counsel, a suspect must *clearly and unambiguously* assert these rights.
- WAIVE
 - A suspect may waive his or her *Miranda* rights
 - Government must prove that a suspect's waiver was:
 - knowing
 - intelligent, and
 - voluntary

J.D.B.
V.
NORTH CAROLINA

131 S.Ct. 2394
(2011)

Another Juvenile Justice Landmark Case

J.D.B. v. North Carolina

- The Supreme Court recognized the increased risk of false confessions from youth due to:
 - Their vulnerability and susceptibility to outside pressures
 - Their difficulty in weighing long-term consequences
 - Their limited understanding of the criminal justice system and the roles of the institutional players within the system

J.D.B.—the facts

- J.D.B. was a 13-year old seventh grader
- One day while he was sitting in his social studies class, a detective showed up at his school.
 - The detective told school administrators—including the assistant principal and a uniformed school officer that he needed to question J.D.B. about a burglary.
- The uniformed school officer took the boy out of class to a closed room where he was met by the assistant principal and the detective.

What happened in that closed room?

- First, the adults engaged J.D.B. in small talk.
- The investigator questioned J.D.B. about the burglary—for 30 minutes.
 - With the help of the assistant principal
- Not surprisingly, J.D.B. confessed.
- During this school interrogation, the detective did not read J.D.B. *Miranda* warnings.
- Further, J.D.B. was not given the right to call his grandmother.
- He was not told he was free to leave until after he had made incriminating statements

North Carolina courts rule against J.D.B.

- Every single court in North Carolina upheld the admissibility of J.D.B.'s confession.
- Specifically, the lower courts ruled there was no *Miranda* violation.
 - Why?
 - These courts determined J.D.B. was *not* in custody.

SCOTUS ruled differently

- In a 5-4 decision, (Sotomayor) ruled that age was an appropriate factor in deciding whether a juvenile was in custody for purposes of the *Miranda* rule.
 - "It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis."
- The Court remanded J.D.B.'s case to determine whether he was in custody at the time of the interrogation.
- The Court instructed the lower court to address the custody question by taking into account all of the relevant circumstances of the interrogation, including J.D.B.'s age at the time.

Michigan and J.D.B.

- *People v White*, 493 Mich187 (2012)
 - A 17-year old armed robbery suspect was taken into custody and given *Miranda* warnings.
 - He invoked his right to remain silent.
 - The officer's response was, "Okay. The only thing I can tell you is this, and I'm not asking you any questions, I'm just telling you. I hope that the gun is into a place where nobody can get a hold of it and nobody else can get hurt by it, okay. All right."
 - The defendant responded with a brief admission.

□ The Michigan Supreme Court upheld the admission of White's statement.

□ Why?

- Because the officer's "statement" was not express questioning or its functional equivalent.

□ Vigorous dissent by Justices Kavanagh and Kelly

- Stated the detective should have recognized that made him especially susceptible to such psychological techniques. As such, the detective's "statement" was designed to elicit an incriminating response.

Superintendent of Indian River v. Sturm

□ 6th Circuit, 514 Fed. Appx. 618

□ Defendant was 12 years old. He was suspected of killing his grandmother and his aunt.

□ Police went to the juvenile's home. With his father's permission and his presence, police interrogated the juvenile in the back of an unmarked police car.

- Police told the child he was not under arrest, that he did not have to speak to the police, and that he could leave at any time.
 - No *Miranda* warnings were given.

Sturm, continued

□ When the detective thought the child was being dishonest, he asked the father's permission to continue questioning outside his presence.

- Alone and accused of lying, the child confessed to killing his grandmother and aunt.

□ Sturm's lawyer sought to suppress his confession.

□ The court denied his motion determining he was not in custody.

- Sturm sought habeas relief alleging the lower courts did not take his age into consideration when analyzing the admissibility of his statement (*J.D.B.*)
 - Denied because lower courts applied correct law at time.

□ Query: Should Sturm's age have played a factor in deciding whether his confession was voluntary?

Legal Parallels

Is there a parallel between the way we analyze a child's competency and the manner in which law enforcement is permitted to interrogate the child?

Most likely, yes.

- In addition to determining whether a juvenile suspect was in custody or was interrogated, there are several other important legal concepts imbedded in the *Miranda* rules that invite a fresh look.
 - Waiver
 - Invoking right to silence or counsel
 - Voluntariness of the confession
- Trial
 - Creating reasonable doubt based on youth's particular vulnerabilities
- Sentencing
 - Advocating alternatives as well as fair sentences

Sources Cited


Resources for the Interrogation and Confession Section:

Tepler, Joshua A., *Defending Juvenile Confessions After J.D.B. v. North Carolina*, *Champion*, March 2014, p. 20.
<http://www.nacul.org/Champion.aspx?id=32655>

TRIALS IN JUVENILE COURT

Trends in trying juvenile cases?

- With the issues of competency (and related issues) at the forefront juvenile criminal cases, how are family court judges responding?
- Embracing or push-back?
- What is happening in your jurisdiction?


Copyright © 2014
Tracey Brame, Assistant Dean and Professor
Tonya Krause-Phelan, Professor
Licensed to:
2014 Juvenile Justice Legal Issues Seminar attendees
Unauthorized use prohibited.
No claim to included works.
