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JUNE 23, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Barry C. Garcia,

Petitioner - Appellant,

vs.

Supreme Court No. 20170030
District Court No. 09-2016-CV-00309

State of North Dakota,

Respondent - Appellee.

APPELLEE'S BRIEF w/addendum

APPEAL FROM JUDGMENT DENYING APPLICATION
FOR POST-CONVICTION RELIEF
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE WADE L. WEBB, PRESIDING

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[¶2] **TABLE OF AUTHORITIES**

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[¶3] **ISSUES PRESENTED**

[¶4] I. Whether the District Court erred by denying Garcia's post-conviction request for a sentencing reduction or parole eligibility.

[¶5] II. Whether recently enacted House Bill No. 1195 allows Garcia to move for a reduction in his sentence.

[¶6] **STATEMENT OF THE CASE**

[¶7] Appellant Barry Garcia is hereafter referred to as "Garcia". Appellee State of North Dakota is hereafter referred to as "State".

[¶8] In 1995 Garcia was charged with murder (Count 1), attempted robbery (Count 2), aggravated assault (Count 3) and criminal street gang crime (Count 4). He was convicted on July 2, 1996 and sentenced to life in prison without the possibility of parole (Count 1) and five years (Count 3), to run concurrently. The district court granted the State's motion to dismiss Count 2 and Garcia's motion for judgment of acquittal on Count 4. The North Dakota Supreme Court affirmed Garcia's conviction. State v. Garcia, 1997 ND 60, 561 N.W.2d 599. Garcia petitioned for writ of certiorari with the United States Supreme Court, which was denied. Garcia v. North Dakota, 522 U.S. 874 (1997).

[¶9] In 1998 Garcia applied for post-conviction relief, which the district court denied. While on appeal, Garcia filed for post-conviction relief a second time. The North Dakota Supreme Court remanded the matter to the district court, which denied the second post-conviction application. Both post-conviction cases were combined into Court File No. 09-98-CV-00894. The Supreme Court affirmed both denials. Garcia v. State, 2004 ND 81, 678 N.W.2d 568.

[¶10] In 2004 Garcia filed a habeas corpus petition, federal Court File No. 3:04-cv-075. After the federal district court denied Garcia relief, he appealed to the 8th Circuit Court of Appeals, which affirmed the district court. Garcia v. Bertsch, 470 F.3d 748 (8th Cir. 2006). Garcia again petitioned for a writ of

certiorari, which was denied. Garcia v. Bertsch, 551 U.S. 1116, 127 S.Ct. 2937 (2007).

[¶11] In 2013 Garcia filed yet another federal habeas corpus case, federal Court File No. 1:13-cv-02, which the district court dismissed without prejudice for lack of subject matter jurisdiction.

[¶12] In 2016 Garcia filed for post-conviction relief. Court File No. 09-2016-CV-00309. He claimed that because he was a juvenile at the time he committed the crime, the 8th Amendment's prohibition against cruel and unusual punishment, together with a line of U.S. Supreme Court cases starting in 2005, entitled him to a lighter sentence. The district court granted the State's Motion for Summary Disposition and denied Garcia's post-conviction claim after a hearing on January 13, 2017. (Appellant's App. 62-64). This appeal followed.

[¶13] **STATEMENT OF THE FACTS**

[¶14] The State understands Garcia is the only person in North Dakota to have been sentenced to life without parole for a crime he committed while a juvenile. He has been incarcerated on this crime for over 20 years.

[¶15] The State understands Garcia was a few weeks shy of his 17th birthday when he murdered Cherryl Tendeland, and five months shy of his 18th birthday when he was sentenced on July 2, 1996. The State does not list Garcia's actual birthday here for privacy purposes.

[¶16] In the 2017 session the North Dakota Legislature enacted House Bill No. 1195. That bill becomes effective on August 1, 2017. House Bill No. 1195 amends, among other things, N.D.C.C. Ch. 12.1-32 to create a new section. That section allows a court to reduce a criminal sentence imposed upon a defendant for an offense committed while the defendant was still a juvenile, under certain conditions. Those conditions include, among other things, the defendant has served at least twenty years in custody for the offense and the court considers various factors. (State's App. 1-3)

[¶17] The trial court's imposition of a life-without-parole sentence was a discretionary determination. The law allowed the court to sentence Garcia up to life imprisonment without parole, or anything less than that. N.D.C.C. §12.1-32-01 (1995). (State's App. 74-75)

[¶18] The post-conviction hearing on January 13, 2017 was not scheduled as an evidentiary hearing. It was scheduled only for legal arguments because the

issues were legal and not factual in nature. (Doc. ID#35); (Tr. 4:18-24.) Garcia appeared by telephone. Notwithstanding the non-evidentiary nature of the hearing, during the hearing Garcia's counsel asked that Garcia be allowed to present a statement. The judge allowed that statement subject to limitations:

> THE COURT: Okay. Mr. Gereszek, any statement the Court would allow from Mr. Garcia would not be evidence for the purposes of this hearing, but simply an allowance for him to make a brief statement. Is that what's being requested here?
> MR. GERESZEK: Yes, Your Honor.
> …
> THE COURT: Mr. Garcia … I will give you a minute or two here just to make a brief statement. It's not evidence, but the Court will, in its discretion, allow such a brief statement. (Tr. 43:19–44:18)

Notwithstanding that, Garcia's entire Statement of Facts is rooted in the verbal statement Garcia made to the district court at that hearing. (Garcia Brief, ¶¶25-33) To the extent Garcia's argument in this appeal relies upon his statement, it was not considered "evidence" by the district court and should not be considered evidence by this Court.

[¶19] Other relevant facts are woven into the following arguments.

[¶20] STANDARD OF REVIEW

[¶21] The State concurs with Garcia's standard of review.

[¶22] ARGUMENT

[¶23] I. The District Court did not err in denying Garcia's post-conviction claim for a sentencing reduction.

[¶24] Garcia refers to a quartet of United States Supreme Court cases relating to juvenile sentencing, briefly summarized below:

a) Roper v. Simmons, 543 U.S. 551 (2005): The 8th Amendment's prohibition against cruel and unusual punishment prohibits juvenile offenders from being sentenced to death.

b) Graham v. Florida, 560 U.S. 48 (2010): The 8th Amendment prohibits juvenile offenders convicted of non-homicide offenses from being sentenced to life imprisonment without parole.

c) Miller v. Alabama, 567 U.S. 460 (2012): The 8th Amendment prohibits mandatory life without parole sentences for juvenile offenders because a juvenile is different than an adult in their diminished culpability and greater prospects for reform. A sentencing court must consider the juvenile's youth and attendant characteristics before determining that life without parole is a proportionate sentence.

d) Montgomery v. Louisiana, 577 U.S. ___, 136 S.Ct. 718 (2016): Miller's prohibition on mandatory life without parole sentences for juveniles is retroactively applicable in collateral review in state courts.

Of those four cases, Garcia relies primarily upon Miller and Montgomery for his argument that he should be resentenced or otherwise offered parole.

[¶25] A. Miller and Montgomery Do Not Require Garcia be Resentenced

[¶26] The U.S. Supreme Court precedents do not require granting Garcia sentencing relief. Certainly in Roper, Graham and Miller, the Supreme Court drew a distinction between how a court should address juveniles and adults in criminal

sentences. Roper, 543 U.S. at 570-571 ("diminished culpability of youth"; a juvenile's irresponsible behavior "is not as morally reprehensible as that of an adult"); Graham, 560 U.S. at 68 (juveniles are more capable of change and their actions less likely to be evidence of irretrievably depraved character); Miller, 567 U.S. 477 ("[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences"). In Montgomery, the Supreme Court echoed those same distinctions. However, none of these four cases directly relates to Garcia's situation. Contrary to Roper, Garcia was not sentenced to death. Contrary to Graham, Garcia was sentenced for committing homicide, not armed burglary. Contrary to Miller and Montgomery, the trial court was not mandated to sentence Garcia to life without parole for his crime, but rather did so in its discretion. In Miller, the petitioners made an alternative argument that the 8th Amendment categorically bars life without parole sentences for juveniles, at least those aged 14 or younger. The Supreme Court declined to adopt that argument. Miller, 567 U.S. at 479. However, relying upon its reasoning in Roper, Graham and Miller about a juvenile's "diminished culpability and heightened capacity for change", the Supreme Court stated "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon". Id. After noting the difficulty of distinguishing between transient immaturity and the rare juvenile whose crime reflects irreparable corruption, Miller said: "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we

require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison". Id. Montgomery made Miller's decision retroactively applicable, but did not expand the court's holding.

[¶27] Montgomery was a Louisiana case. In 2013, post-Miller but before the retroactivity announced in Montgomery, the Louisiana Legislature promulgated a procedural mechanism for reviewing the Miller direction for new cases. However, during the 2016 legislative session the Louisiana Legislature was unsuccessful in its attempt to address the situation for cases decided pre-Miller. State v. Montgomery, 194 So.3d 606, 608-609 (La. 2016). Accordingly, the Louisiana Supreme Court offered guidance on older cases. The Louisiana Supreme Court directed the trial court to be mindful of the directives in Miller in considering whether Montgomery should become eligible for parole. It suggested the trial court allow the prosecution and defense to introduce aggravating and mitigating evidence of the offense or character of the offender, including the circumstances of the crime, criminal history of the offender, the offender's level of family support, social history, and other factors considered relevant by the trial court. Id. Describing that as a non-exclusive list, the Louisiana Supreme Court also suggested consideration of factors which Florida had enumerated in its statute considering sentencing a juvenile offender to life imprisonment including: (a) nature and circumstances of the offense, (b) effect of the crime on the victim's family, (c) defendant's age, maturity, intellectual capacity, and mental/emotional health at the

time of the offense, (d) defendant's background, including his family, home, and community environment, (e) effect, if any, of immaturity, impetuosity, or failure to appreciate the risks and consequences on the defendant's participation in the offense, (f) extent of the defendant's participation in the offense, (g) effect, if any, of familial pressure or peer pressure in the defendant's actions, (h) nature and extent of the defendant's prior criminal history, (i) effect, if any, of characteristics attributable to the defendant's youth on defendant's judgment, and (j) the possibility of rehabilitating the defendant. Id. Of course, North Dakota enacted House Bill No. 1195 in the recent legislative session. However, as addressed later in this Brief, it is not retroactively applicable.

[¶28] The question posed by Garcia's post-conviction claim is whether the Miller commentary about non-mandatory life without parole cases (which it declined to actually rule upon), together with the guidance provided by other courts, for example Florida and Louisiana, required the district court to hold a hearing to resentence Garcia. The State asserts the answer is "no". In support of that assertion the State relies upon the ground already trod in Garcia's case by the trial court in its sentencing hearing, a transcript of which was filed as Doc ID#25 ("Sentencing Tr."). Although Garcia's sentencing judge did not have the benefit of the Roper, Graham and Miller decisions in 1996, his sentencing analysis addressed the same kinds of issues raised in those cases and in the guidance later outlined by the Louisiana Supreme Court and Florida Legislature. At the time of Garcia's sentence, the judge noted he had reviewed and intended to rely upon the

presentence investigation report (PSI), documents in the court file including the charging document, police reports including a statement by Garcia, a report from the North Dakota State Hospital and a variety of victim impact statements. (Sentencing Tr. 1:15-25) He also listened to the sentencing arguments of counsel. For example, the State argued Garcia had an extensive record for his age including, among other things, beating a kid (who was riding by on his bicycle after a Boy Scout meeting, according to the PSI) with a pool ball wrapped inside a bandana and requiring 45-50 stitches, terroristic threats and multiple probation violations. (Sentencing Tr. 7-8) The State acknowledged Garcia had a "very unstable, chaotic family history", including that his mother had been murdered and his father in prison. (Sentencing Tr. 8:6-7) The State referred to input by the State Hospital that Garcia was minimally amenable to rehabilitation. (Sentencing Tr. 8:24–9:1) The State also noted that according to the testimony the apparent reason for Garcia's action was that the murder victim "shouldn't have looked at me that way, she won't look at me again that way." (Sentencing Tr. 9:6-7) Defense counsel understandably struck a different tone, noting that everyone makes poor decisions when young. "[A]ll of us were unpredictable, exercised extremely poor judgment and we didn't think before things happened". (Sentencing Tr. 13-14) His counsel highlighted that Garcia's evaluation did not say he was not amenable to treatment (or rehabilitation) but was minimally amenable. (Sentencing Tr. 14:20-22) Defense counsel recommended Garcia be sentenced to 30 years, and that such a sentence would give him incentive to complete programs in order to earn good time

and show the Parole Board how he had changed. (Sentencing Tr. 16) Counsel noted that Garcia's family was also hurting, the innocent people in the Hispanic community would suffer as a result of the case and that life without parole would send a subliminal message to other kids involved in gang-related activities that there is no hope for redemption or change. (Sentencing Tr. 18) He explained that Garcia's family was present and had been throughout trial. Counsel spent hours with Garcia's grandmother, brother and friends whom he described as decent people. He stated Garcia's grandmother's view of Garcia was diametrically opposed to the State's and that she would tell the court Garcia was great with his younger brothers, almost assuming the responsibility of a parent to them in some situations, that he watched out for them and took care of them, that he had potential. (Sentencing Tr. 19:2-9, 16-17) Counsel concluded by asking the judge to guarantee Garcia the opportunity to change. (Sentencing Tr. 20:10-14)

[¶29] The sentencing judge's remarks about his approach to sentencing Garcia reflect the kind of considerations Miller seeks. He said, among other things:

a) "I came to this case with a personal philosophy … My personal philosophy is that young people are never beyond redemption." (Sentencing Tr. 25:16-20)

b) "My personal philosophy is that particularly young people are capable of changing, they are capable of reforming their lives, that they are capable of starting anew." (Sentencing Tr. 25:21-23)

c) "I came to this case, looking for some reason, some justification, some excuse, to hand down a sentence less than the maximum. Mr. Garcia has given me no alternative, he has given me no opportunity." (Sentencing Tr. 25:24–26:2)

d) The judge reviewed his perspective on the relevant sentencing factors in N.D.C.C. §12.1-32-04. (Sentencing Tr. 21:13–25:15) Within that discussion he noted, among other things, that it was "hard to imagine a more serious harm than willfully causing the death of another … without any justification"; that Garcia shot the victim at "point blank range" with a shotgun; that the evidence for Garcia's action, as best it could be determined, was because the victim "looked at him the wrong way"; Garcia had a serious history of serious assaults and that his problems are most likely the result of an unresolved anger problem; within Garcia's criminal/juvenile history there were 16 "convictions" over the previous two years, including five assaults or terroristic threats, evidencing a "criminal pattern of increasing violence and consistent violence"; he described Garcia's history as a "one-person judicial wrecking crew"; and Garcia had been involved in the judicial for years and has failed to respond to treatment. In the "other factors" sentencing category, the judge returned to the issue of Garcia's youth. He said one of the "inalienable attributes" of a human being is the "possibility of redemption or rehabilitation", as a result of "a life-

changing circumstance, youth, spiritual, and personal change". That such a change is more likely in young people because their personalities were "still in formation". (Sentencing Tr. 25:1-7) The judge also noted that Garcia had not demonstrated he understood the seriousness of his crime or that he had changed as a result of that experience. (Sentencing Tr. 25:14-15)

e) The judge noted that a life sentence without parole did not mean Garcia would have to sit in prison for the rest of his life, but that the pardon process provided at least some opportunity to get out of prison if he changed sufficiently. (Sentencing Tr. 26:11-22) The judge concluded that he hoped Garcia could one day give the Governor some evidence of the significant changes necessary to support a pardon. (Sentencing Tr. 27:1-4) (Some courts have commented that the opportunity for executive clemency may not be equivalent to the opportunity for parole. For example, the court in Graham described it this way: "executive clemency - the remote possibility of which does not mitigate the harshness of the sentence". 560 U.S. at 70.)

[¶30] Garcia argued in multiple venues that his counsel should have handled sentencing differently and provided evidence of mitigating circumstances. However, the courts have not found fault. In Garcia's direct criminal appeal he claimed cruel and unusual punishment because the sentencing judge did not inquire into mitigating factors which were not articulated by his counsel. Noting the

absence of such evidence this Court denied his argument stating the trial court had no affirmative duty to so inquire. Garcia, 1997 ND 60, ¶¶55-58, 561 N.W.2d 599. Although the trial court gave Garcia a chance to speak at sentencing, he declined. (Sentencing Tr. 21:7-12) Garcia made a post-conviction claim for ineffective assistance of counsel because his lawyer did not present evidence of his troubled childhood. There was an extensive evidentiary hearing in 2003 on those claims. This Court denied him relief, noting the trial court discussed the statutory sentencing factors and that the most relevant portions of Garcia's life history, which he presented in his post-conviction hearing as mitigating evidence, were in fact presented to the trial court through the PSI. The post-conviction witnesses he presented indicated he had a troubled childhood, his mother had been murdered, has father was in prison, he was a good friend and family member and was capable of being repentant and of reform. This Court found Garcia was not prejudiced by the absence of the remaining purported testimony because the trial court was looking for evidence Garcia had accepted responsibility or changed as a result of his experiences and, given the unprovoked and brutal nature of his crimes and history of violent crimes and probation violations, "there was no reasonable probability the purported witness testimony would have changed the sentence imposed". Garcia, 2004 ND 81, ¶20, 678 N.W.2d 568. In Garcia's federal habeas case the 8th Circuit agreed with this Court, finding the testimony of Garcia's friends and family in his post-conviction case, which was his mitigating evidence, would not have resulted in a more lenient sentence than he received given all the circumstances of both

Garcia and the case. Garcia, 470 F.3d 748, 756-757 (8th Cir. 2006), cert. denied, 551 U.S. 1116 (2007) (noting Garcia's counsel's "impassioned argument" for a sentence less than life without parole, Garcia's youth and the possibility of change in young people and that Garcia's family could testify to his positive characteristics).

[¶31] B. District Court's Denial of Post-conviction Relief

[¶32] In denying Garcia post-conviction relief on the basis of Miller and Montgomery, the district court outlined its reasoning in depth. (Tr. 48:22–63:1) It identified both the legal and factual framework for its decision. In sum, it found the sentencing judge "did comply with and satisfy Miller and Montgomery, and at a minimum satisfactorily or substantially complied with the requirements of Miller and Montgomery. The record would reflect that Judge Erickson did not use the words 'permanent incorrigibility' and did not use the words 'irreparable corruption'…I don't believe, although they are terms of art clearly used by certain justices of the United States Supreme Court, that it requires, in hindsight, even retroactively applied, for Judge Erickson, back in the mid-90's, to have somehow figured out the correct exact words to use. What is important is to take a look at the context, what we have learned from Miller, Montgomery, and apply it back in time retroactively to what Judge Erickson did and what did he say he did and why he did it at the time of his sentencing." (Tr. 53:16–54:8) It further stated: "… the language, his discussion, his statements, that I do believe, taken as a whole, put in the proper context, then do comply with Miller, Montgomery … and that Judge

Erickson's findings, conclusion, and order, his reasons, rationale for sentencing, substantially comply, frankly, satisfy, Miller and Montgomery." (Tr. 57:11-18) The district court concluded: "I do believe [Judge Erickson] considered permanent incorrigibility, irreparable corruption, and concluded that Mr. Garcia, unfortunately, was one of those folks." (Tr. 62:9-11)

[¶33] C. Distinguishing Miscellaneous Cases

[¶34] Garcia cites to several cases in proposing this Court remand the matter to the district court for resentencing, including Valencia, Landrum and Veal. (Garcia Brief, ¶90) Each is a post-Montgomery case and from another state, hence not binding on this Court. Valencia was a consolidated appeal involving two different defendants (ages 16 and 17) and two different crimes. State v. Valencia, 386 P.3d 392 (Az. 2106). The defendants were each convicted of first degree murder in the 1990's. They were each sentenced to the equivalent of life without parole. Each filed for post-conviction relief under Miller, but were denied relief. The Arizona Supreme Court reversed and remanded for further consideration of their claims. The outcomes of appellate cases are frequently dependent upon the facts. Unfortunately the Valencia opinion is woefully devoid of facts, making any meaningful comparison to Garcia's situation impossible. Landrum is distinguishable in that it did not involve individualized sentencing. Landrum v. Florida, 192 So.3d 459, 467-469 (Fl. 2016). To the 16-year old defendant the sentencing judge said simply; "it's the judgment, order and sentence of the Court that you be adjudicated guilty of the offense of murder in the second degree and

confined in state prison for the remainder of your natural life therefore." Id. That was not the case for Garcia. In Veal, a 17-1/2 year old defendant was convicted of murder and several other crimes. Veal v. State, 784 S.E.2d 403 (Ga. 2016). When the court sentenced him to life without parole it made no mention of his age and said simply: "based upon the evidence … it's the intent of the court that the defendant be sentenced to the maximum." Id. at 409. In subsequent proceedings the trial court mentioned something about the defendant's age and the Georgia Supreme Court stated that the trial court "appeared generally" to have considered the defendant's age and perhaps "some of its associated characteristics". Id. at 412. The Georgia Supreme Court remanded the case because the trial court had not mentioned on the record that the defendant was "irreparably corrupt" or "permanently incorrigible" which it considered necessary. Id. Having said that, sentencing in Veal occurred several months after Miller was decided and hence the sentencing court would have had access to those particular terms of art at the time. Id. at 408. Again, that was not the case for Garcia. Garcia also cites to Adams v. Alabama, 136 S.Ct. 1796 (2016) and Tatum v. Arizona, 137 S.Ct. 11 (2016) elsewhere in his Brief for similar propositions. Again, it is difficult to draw a correlation to Garcia's sentencing situation based upon the limited facts provided in the decisions.

[¶35] The trial court had all the information it needed to make an informed decision on Garcia's sentence. It approached the decision with the kind of perspective Miller advocates, namely individualized sentencing that recognizes

juveniles are different than adults, they are capable of change and rehabilitation and a life without parole sentence for a juvenile should be a rare thing. If Roper, Graham and Miller had been decided before Garcia's sentence had been imposed, the State asserts the sentencing result would have been the same.

[¶36] **II. Recently enacted House Bill No. 1995 does not allow Garcia to move for a reduction of sentence.**

[¶37] Garcia's initial argument is the Supreme Court should remand this case to the district court to "permit Garcia to supplement his pleadings and the record to conform to the requirements of the new law." (Garcia Brief ¶43) The State asserts the new law does not apply to Garcia.

[¶38] Normally during an appeal the parties are limited to the record before the district court. Neither House Bill No. 1995, nor the related legislative history, existed at the time the district court rendered its decision in this matter. However, because Garcia has advanced this argument, and to the extent this Court may consider the argument, the State provides a copy of House Bill No. 1195 for the Court's convenience. (State's App. 1-3) If this Court considers the bill, then it may be beneficial to have the related legislative history for context. That history is not yet available at the Legislature's web site, so the State obtained it from Legislative Council and provides a copy for the Court's convenience. (State's App. 4-73)

[¶39] House Bill No. 1195, while approved by the Legislature, is not currently the law in North Dakota. It does not become effective until August 1,

2017. In other circumstances it may seem premature for Garcia to argue the application of a law that is not yet effective. However, by the time this Court considers this matter, presumably in September 2017 or thereafter, it will be the law.

[¶40] The district court noted during the post-conviction hearing that courts show deference to legislatures on questions of public policy. (Tr. 54:15–56:2); State v. Vandermeer, 2014 ND 46, ¶19, 843 N.W.2d 686 ("This Court has acknowledged the legislature is better suited than the courts for setting public policy in North Dakota.") The district court further noted the North Dakota Legislature had not, as of that time, addressed the topics raised in Miller. However, the Legislature did so in the 2017 session and specifically considered whether to retroactively apply House Bill No. 1195. The State raised the retroactivity issue to the House Judiciary Committee at its initial hearing on the bill on January 18, 2017, specifically referring to Garcia as the one existing case in North Dakota. (State's App. 7, 57-58) Representative Lawrence Klemin expressly addressed the non-retroactivity of the revised bill in his testimony before the Senate Judiciary Committee on March 13, 2017. (State's App. 61-63) Furthermore, N.D.C.C. §1-02-10 provides: "No part of this code is retroactive unless it is expressly declared to be so." Section 1-02-10, N.D.C.C., is only a statutory rule of construction to aid in interpreting statutes to ascertain legislative intent and is subject to a narrow exception carved out by this Court. State v. Cummings, 386 N.W.2d 468, 471 (N.D. 1986). Unless otherwise indicated by the Legislature, an ameliorating amendment to a criminal statute is reflective of the Legislature's determination that

a lesser penalty is appropriate, unless the defendant has been "finally convicted" of the offense. Id. at 472. Here Garcia has been "finally convicted" and, as noted above, the Legislature expressed its intent the new law not apply retroactively. See also, State v. Flatt, 2007 ND 98, ¶¶8-10, 733 N.W.2d 608.

[¶41] For these reasons the State asserts the Legislature did not intend the new law to apply to Garcia. Accordingly, Garcia is not entitled to move for a sentence reduction under the law at this time, or at any future time.

[¶42] CONCLUSION

[¶43] For all the reasons provided above, the State respectfully requests this Honorable Court affirm the district court's denial of post-conviction relief.

[¶44] Respectfully submitted this 23rd day of June, 2017.

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[¶45] CERTIFICATE OF SERVICE

[¶46] A true and correct copy of the foregoing document was sent by e-mail on June 23, 2017 to: Samuel A Gereszek (sam@egflawyer.com) and John R. Mills (j.mills@phillipsblack.org).

Birch P. Burdick

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Barry C. Garcia,

Petitioner - Appellant,

vs.

Supreme Court No. 20170030
District Court No. 09-2016-CV-00309

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STATE'S ~~APPENDIX~~ addendum

APPEAL FROM JUDGMENT DENYING APPLICATION FOR POST-CONVICTION RELIEF
EAST CENTRAL JUDICIAL DISTRICT
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Sixty-fifth Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 3, 2017

HOUSE BILL NO. 1195
(Representatives Klemin, Maragos, Schneider)
(Senators Hogue, D. Larson, Mathern)

AN ACT to create and enact a new section to chapter 12.1-32 of the North Dakota Century Code, relating to imprisonment of minors; to amend and reenact subsection 4 of section 12.1-20-03 of the North Dakota Century Code, relating to gross sexual imposition; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 4 of section 12.1-20-03 of the North Dakota Century Code is amended and reenacted as follows:

4. If, as a result of injuries sustained during the course of an offense under this section, the victim dies, the offense is a class AA felony, for which the maximum penalty of life imprisonment without parole must be imposed unless the defendant was a juvenile at the time of the offense.

SECTION 2. A new section to chapter 12.1-32 of the North Dakota Century Code is created and enacted as follows:

Juveniles - Sentencing - Reduction.

1. Notwithstanding any other provision of law, a court may reduce a term of imprisonment imposed upon a defendant convicted as an adult for an offense committed and completed before the defendant was eighteen years of age if:

   a. The defendant has served at least twenty years in custody for the offense;

   b. The defendant filed a motion for reduction in sentence; and

   c. The court has considered the factors provided in this section and determined the defendant is not a danger to the safety of any other individual, and the interests of justice warrant a sentence modification.

2. A defendant whose sentence is reduced under this section must be ordered to serve a period of supervised release of at least five years upon release from imprisonment. The conditions of supervised release and any modification or revocation of the term of supervised release must be in accordance with this chapter.

3. When determining whether to reduce a term of imprisonment under this section, the court shall consider:

   a. The factors provided in section 12.1-32-04, including the nature of the offense;

   b. The age of the defendant at the time of the offense;

   c. A report and recommendation from the department of corrections and rehabilitation, including information relating to the defendant's ability to comply with the rules of the institution and whether the defendant completed any educational, vocational, or other prison programming;

   d. A report and recommendation from the state's attorney for any county in which the defendant was prosecuted;

e. Whether the defendant has demonstrated maturity, rehabilitation, and a fitness to re-enter society sufficient to justify a sentence reduction;

f. A statement by a victim or a family member of a victim who was impacted by the actions of the defendant;

g. A report of a physical, mental, or psychiatric examination of the defendant conducted by a licensed health care professional;

h. The defendant's family and community circumstances at the time of the offense, including any history of abuse, trauma, or involvement in the child welfare system;

i. The role of the defendant in the offense and whether an adult also was involved in the offense;

j. The diminished culpability of juveniles compared to adults and the level of maturity and failure to appreciate the risks and consequences; and

k. Any additional information the court determines relevant.

4. A defendant may make a second motion for a reduction in sentence under this section no earlier than five years after the initial motion for reduction.

5. A defendant may make a final motion for a reduction in sentence no earlier than five years after the order for a second motion was filed.

Speaker of the House

President of the Senate

Chief Clerk of the House

Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Sixty-fifth Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1195.

House Vote:	Yeas 87	Nays 0	Absent 7
Senate Vote:	Yeas 46	Nays 0	Absent 1

Chief Clerk of the House

Received by the Governor at _____M. on _____, 2017.

Approved at _____M. on _____, 2017.

Governor

Filed in this office this _____day of _____, 2017,

at _____ o'clock _____M.

Secretary of State

2017 HOUSE JUDICIARY

HB 1195

2017 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1195
1/18/2017
27053

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Relating to life imprisonment of minors; and to provide a penalty.

Minutes: 1,2,3,4,5

Chairman K. Koppelman: Opened the hearing on HB 1195.

Representative Klemin: (1,2) Handed of testimony and went over the testimony. (2:00-12:14) #2 is a copy of the Campaign for the Fair Sentencing of Youth which provides more detailed information and I provided a complete copy of that publication to the clerk for inclusion in the record.

Chairman K. Koppelman: Does Minnesota have anything on this?

Representative Klemin: I don't know the answer to that, but they would probably allow this at this time.

Chairman K. Koppelman: Some states that have the death penalty; but I assume that some states that have the death penalty also have provisions that allow a minor to be charged as an adult and sentenced as an adult like we do in certain circumstances. Has the court ruled the violates the 8th amendment as well as life without patrol for a minor?

Representative Klemin: Yes it has. There are a number of other states like ND where we don't have mandatory life without patrol sentences for minors except for that one. In a number of other states, the courts have applied the ruling of the Supreme Court to also apply life those other states.

Leann Bertsch, Director of ND DOCR: See Testimony. (#3) (14:45-16:20)

Representative Satrom: Do you have statistics on how many people fit into this category presently?

Leann Bertsch: There is only one in our system right now. People in the system age quicker than and anywhere else. If they have a major stroke that disables them they can't even take

care of themselves. Is there really a need to continue to have them in a maximum security prison. When you take that opportunity of no patrol then you take any opportunity away from them to ever get out.

Representative Satrom: I assume this is really an incentive for these people to try and make their lives better and behave if you will?

Leann Bertsch: Life without patrol are for the most violent offenders. That incentive is only if their good behavior to get them something. This gives individuals hope and it makes the prison safer.

Chairman K. Koppelman: With respect to this one individual; would this help them?

Leann Bertsch: I don't think this would be retroactive so it would not affect that one individual.

Representative Nelson: When a juvenile is sentenced as an adult do they serve their entire sentence in with the adult population.

Leann Bertsch: Under the Prison Rape Elimination Act you cannot house juveniles with adults. If they are convicted when they are 16 we house them at the Youth Correction Center until they turn 18 then we can house them as an adult at the State Pen.

Chairman K. Koppelman: Have you found as director as doing that housing people that have these long sentences at that location changes the environment of that location? Does it make it a scarier place for other kids who are there?

Leann Bertsch: No not really.

Jackson Lofgren, President of the ND Association of Criminal Defense Lawyers: In support of this bill. This is a bill that may not effect a lot of people, but what were we like at 18 than it is now. That person goes to the petitionary at 17 or 16 is not the person that is going to be setting there are 61. I we give them some incentive to turn their life around and make something of their life they may grab onto that.

Opposition:

Aaron Birst, Legal Counsel, ND Assoc. of Counties: (4) (25:34-29:27) The patrol board is not elected; there is no accountability to voters; which may or may not be a good thing; a local judge who sentences people is accountable to the voters. Every victim will be notified of the hearing and they will have to come and they will be re victimized.

Representative Vetter: Do you know anything about that one person.

Aaron Birst: Cass County States Attorney Birch Berdick is here and he will talk about that individual case.

Representative Johnston: Currently the judge has to make a decision to issue like without or with patrol?

Aaron Birst: Course you need to violate that statue that has that possibility, but murder and rape could be one of those.

Representative Klemin: You might be aware of a juvenile was sentenced to 4 consecutive life sentences with the opportunity for patrol. Do you know how that works?

Aaron Birst: I am not the expert on that. We have 2 people in the state penitentiary. The second one is where a young man killed and he was a juvenile at the time; killed 4 and he did not receive a life without patrol so that is why he doesn't get counted in that; however, he received 40 years for each homicide so you could say he received like without patrol, but technically he is not qualified for that.

Representative Simons: You said the judges have been somewhat leant with giving patrol with a life sentence?

Aaron Birst: The system has been more than willing to give that individual a break. There is no doubt we should look at juveniles in a different way.

Representative Simons: In the prison system I came across a 14 year old youth. The judge gave a life sentence without patrol and the young 14-year-old got life; not within patrol. The judges have been kind on this.

Aaron Birst: Yes. Very seldom to judges want to impose that kind of penalty on a juvenile.

Birch Burdick, Cass County States Attorney: Testimony #5(35:00-42:00) I don't think we should get rid of it all together. The Supreme Court has suggested the pardon process
If you decide to pass it, I would encourage that you would be clear in your language of it's retroactive. Set out criteria that the judges could use to think about such a sentence of life without patrol and leave it in the hands of a judge. I agree this should be the rarest of circumstances, but I don't think we should get rid of it altogether. I am opposed to you passing this bill. If you decide to pass this will I would encourage you to be abundantly clear in your language as to it retroactivity.

Representative Paur: How long have you been in the states attorney office?

Birch Burdick: January 1999.

Representative Paur: Do you have any estimate as to how many juveniles have receives a life sentence?

Birch Burdick: One that I know of with life without patrol.

Chairman K. Koppelman: Do you remember when this statue being passed; when was that statue passed with life without patrol and particularly how it might apply to juveniles?

Birch Burdick: It was in the early 90s.

Chairman K. Koppelman: Prosecutors make the request. Do you have any sentence how many of them are requested by prosecutors in our state?

Birch Burdick: As far as I know it is uncommon. We are different at 50 or 60 as when we are 16. The people who fit this criterion; they are not you or me and there is something different that lead them to this gruesome crime.

Representative Vetter: How often is patrol granted?

Birch Burdick: I don't know the answer to that question.

Neutral:

Hearing closed.

2017 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1195
2/13/2017
28249

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Minutes: 1

Chairman K. Koppelman: Opened the meeting on HB 1195.

Representative Klemin: (#1) Pass out a proposed amendment. (2:10-11:10) Went through the amendment. I sent this to Aaron Birst and they reviewed it. They don't oppose this. This is the same language that was put in the SD bill last year.

Motion made to move the amendment by Rep. Klemin; Seconded by Representative Maragos:

Discussion:

Representative Roers Jones: Would this be retroactive?

***Rep*resentative Klemin:** That was the testimony given at the hearing. It could be made retroactive but we would have to add a provision in here in another section that says so.

Representative Roers Jones: I just wanted to make sure of that. I think it is one thing to make these sort of changes and apply them prospectively to a victim's family who at least knows from the outset that this would be the case. I would have a hard time voting in favor of something like this if we are going back and taking away that security from the Tenderlon family after what they have already been through.

Representative Klemin: Top of page 2 is in there and the court must consider that.

Representative Paur: I have trouble with the defendant serving 20 years in custody when the rest of the other instances when they are not a minor is 30 years. This that correct?

Chairman K. Koppelman: On the original bill Leann Bertsch testified in favor of that bill. I have struggled with this bill. The reason was the case Representative Roers Jones mentioned. The Tenderlon murder occurred in 1995 in Fargo and it was one of the most

brutal murders we have seen in ND. In 1995 the law was changed that dealt with this. The judge was the only case where he has sentenced the juvenile to life without the possibility of patrol was Judge Ralph Erickson, who is a federal judge. I had an amendment I prepared, but I think Rep. Klemin did a good job with his. I am going to support the amendment if it passes and the bill.

Representative Klemin: This puts it back into the sentencing court to review what has happened to this juvenile rather than putting it up to the parole board.

Voice vote carried.

Do Pass as Amended Motion Made by Representative Maragos: Seconded by Rep. Johnston

Discussion:

Representative Hanson: I agree with the premise and so I feel like this amendment is a nice compromise.

Roll Call Vote: 14 Yes 0 No 1 Absent Carrier: Representative Roers Jones

Closed.

2/13/17 DA
1 of 2

17.0583.02001
Title.03000

Prepared by the Legislative Council staff for
Representative Klemin
February 13, 2017

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1195

Page 1, line 1, replace "subsection to section 12.1-32-02" with "section to chapter 12.1-32"

Page 1, line 2, remove "life"

Page 1, replace lines 4 through 9 with:

"**SECTION 1.** A new section to chapter 12.1-32 of the North Dakota Century Code is created and enacted as follows:

Juveniles - Sentencing - Reduction.

1. Notwithstanding any other provision of law, a court may reduce a term of imprisonment imposed upon a defendant convicted as an adult for an offense committed and completed before the defendant was eighteen years of age if:

   a. The defendant has served at least twenty years in custody for the offense;

   b. The defendant filed a motion for reduction in sentence; and

   c. The court has considered the factors provided in this section and determined the defendant is not a danger to the safety of any other individual, and the interests of justice warrant a sentence modification.

2. A defendant whose sentence is reduced under this section must be ordered to serve a period of supervised release of at least five years upon release from imprisonment. The conditions of supervised release and any modification or revocation of the term of supervised release must be in accordance with this chapter.

3. When determining whether to reduce a term of imprisonment under this section, the court shall consider:

   a. The factors provided in section 12.1-32-04, including the nature of the offense;

   b. The age of the defendant at the time of the offense;

   c. A report and recommendation from the department of corrections and rehabilitation, including information relating to the defendant's ability to comply with the rules of the institution and whether the defendant completed any educational, vocational, or other prison programming;

   d. A report and recommendation from the state's attorney for any county in which the defendant was prosecuted;

   e. Whether the defendant has demonstrated maturity, rehabilitation, and a fitness to re-enter society sufficient to justify a sentence reduction;

2/13/17 DP

2 of 2

f. A statement by a victim or a family member of a victim who was impacted by the actions of the defendant;

g. A report of a physical, mental, or psychiatric examination of the defendant conducted by a licensed health care professional;

h. The defendant's family and community circumstances at the time of the offense, including any history of abuse, trauma, or involvement in the child welfare system;

i. The role of the defendant in the offense and whether an adult also was involved in the offense;

j. The diminished culpability of juveniles compared to adults and the level of maturity and failure to appreciate the risks and consequences; and

k. Any additional information the court determines relevant.

4. A defendant may make a second motion for a reduction in sentence under this section no earlier than five years after the initial motion for reduction.

5. A defendant may make a final motion for a reduction in sentence no earlier than five years after the order for a second motion was filed."

Renumber accordingly

Date: 2-13-17
Roll Call Vote 1

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO 1195

House **Judiciary** Committee

☐ Subcommittee

Amendment LC# or Description: 17.0583.02001

Recommendation: ☒ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Rep Klemin Seconded By Rep Maragos

Representatives	Yes	No	Representatives	Yes	No
Chairman K. Koppelman			Rep. Hanson		
Vice Chairman Karls			Rep. Nelson		
Rep. Blum					
Rep. Johnston					
Rep. Jones					
Rep. Klemin					
Rep. Magrum					
Rep. Maragos					
Rep. Paur					
Rep. Roers-Jones					
Rep. Satrom					
Rep. Simons					
Rep. Vetter					

Total (Yes) _____ No _____

Absent _____

Floor Assignment : _____

If the vote is on an amendment, briefly indicate intent:

Date: 2-13-17
Roll Call Vote 2

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO 1195

House **Judiciary** Committee

☐ Subcommittee

Amendment LC# or Description: 17.0583.02001

Recommendation: ☐ Adopt Amendment
☑ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☑ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Rep Maragos Seconded By Rep. Johnston

Representatives	Yes	No	Representatives	Yes	No
Chairman K. Koppelman	✓		Rep. Hanson	✓	
Vice Chairman Karls	✓		Rep. Nelson	✓	
Rep. Blum	✓				
Rep. Johnston	✓				
Rep. Jones	✓				
Rep. Klemin	✓				
Rep. Magrum	✓				
Rep. Maragos	✓				
Rep. Paur	✓				
Rep. Roers-Jones	✓				
Rep. Satrom	✓				
Rep. Simons	✓				
Rep. Vetter	✓				

Total (Yes) 14 No 0

Absent 1

Floor Assignment : Rep. Roers Jones

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1195: Judiciary Committee (Rep. K. Koppelman, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (14 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1195 was placed on the Sixth order on the calendar.

Page 1, line 1, replace "subsection to section 12.1-32-02" with "section to chapter 12.1-32"

Page 1, line 2, remove "life"

Page 1, replace lines 4 through 9 with:

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   c. The court has considered the factors provided in this section and determined the defendant is not a danger to the safety of any other individual, and the interests of justice warrant a sentence modification.

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   b. The age of the defendant at the time of the offense;

   c. A report and recommendation from the department of corrections and rehabilitation, including information relating to the defendant's ability to comply with the rules of the institution and whether the defendant completed any educational, vocational, or other prison programming;

   d. A report and recommendation from the state's attorney for any county in which the defendant was prosecuted;

   e. Whether the defendant has demonstrated maturity, rehabilitation, and a fitness to re-enter society sufficient to justify a sentence reduction;

   f. A statement by a victim or a family member of a victim who was impacted by the actions of the defendant;

g. A report of a physical, mental, or psychiatric examination of the defendant conducted by a licensed health care professional;

h. The defendant's family and community circumstances at the time of the offense, including any history of abuse, trauma, or involvement in the child welfare system;

i. The role of the defendant in the offense and whether an adult also was involved in the offense;

j. The diminished culpability of juveniles compared to adults and the level of maturity and failure to appreciate the risks and consequences; and

k. Any additional information the court determines relevant.

4. A defendant may make a second motion for a reduction in sentence under this section no earlier than five years after the initial motion for reduction.

5. A defendant may make a final motion for a reduction in sentence no earlier than five years after the order for a second motion was filed."

Renumber accordingly

2017 SENATE JUDICIARY

HB 1195

2017 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1195
3/13/2017
29076

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Relating to imprisonment of minors; and to provide a penalty.

Minutes: **Testimony attached #** 1,2,3

Chairman Armstrong called the committee to order on HB 1195. All committee members were present.

Lawrence K. Klemin, North Dakota State Representative District 47 (:05 – 10:35), introduced and testified in support of the bill. (see attachment 1)

Chairman Armstrong (6:30): "Given Marsy's Law in the constitution, do we need F in there at all?

Representative Klemin: "I think the court will take a statement from the victim or victim's family into consideration regardless of Marsy's law."

Chairman Armstrong: "Does the court have to consider A-K under section 3?"

Representative Klemin: "Yes, the court has to consider those things."

Chairman Armstrong (10:30): "What are your thoughts on retroactivity?"

Representative Klemin: "I think there are some policies that mitigate against that. I think support of this bill from others, like state's attorneys, perhaps, is going to be based on the fact that there is no retroactivity."

Leann Bertsch, Director of the North Dakota Department of Correction and Rehabilitation (DOCR) (11:30 – 13:40), testified in support of the bill. (see attachment 2)

Chairman Armstrong (13:40): "How many in the state have a sentence of life without parole?"

Leann Bertsch: "Two in the state. Three have life with parole."

Senator Luick (14:40): "Would you go into more detail about the 5-year time between being evaluated and re-evaluated?"

Leann Bertsch: "This bill takes it away from the parole board. This puts it back with the sentencing court. Typically, what happens with the parole board is when they see a horrendous crime they will often times say we are denying you parole and we don't want to see you for a number of time. Five years is a reasonable time; I've seen people get put off for 15 years which I think is too long. People do a lot of changing over that time period. I think they do say five years because every time you have a review with someone like this, you do open up all the issues that deal with victim notification and stuff like that. So they don't want to do it that often because its putting the victims and the families of the victims through all of this again."

Senator Luick: "Are they getting some education and counseling during those five years?"

Leann Bertsch: "Yes, there are programs for them to partake in. We monitor all of that. I think the court will also take into consideration their institutional behavior, and that goes a long way. Some people continue be criminals whereas some people really do change for the better."

Senator Luick (18:40): "What is the percent of those who cause problems inside?"

Leann Bertsch: "About 5-10% in the institution."

Senator Luick (19:45): "Do you notice in the age, if they are younger do they try harder to change their ways?"

Leann Bertsch: "Age is certainly a predictor for behavior. Under age 25 you get more points added on because you tend to do more things that get you into more trouble than when you are older. When you are younger you are more impulsive and more likely to do things that will get you into trouble."

James Dold, Advocacy Director & Chief Strategy Officer of the Campaign for the Fair Sentencing of Youth (20:45 – 29:10), testified in support of the bill. (see attachment 3)

Jackson Lofgren, President of North Dakota Association of Criminal Defense Lawyers, testified in support of the bill. No written testimony.

"We do support this bill. This bill is different than what it was in the House, but the changes that were made were good and we do now support this bill."

Senator Nelson (31:20): "Do you think this should be retroactive?

Jackson Lofgren: "I do."

Senator Luick: "Is that in here?"

Jackson Lofgren: "No."

Aaron Birst, Association of Counties (32:25), testified in support of the bill. No written testimony.

"We support this bill, and just so you know, we prosecutors don't like to give life sentences out to juveniles; it should be a very rare occasion to do that. We do not support making this bill retroactive."

Aaron Birst told a story of a case where a woman was shot in a random car shooting by a shotgun. An individual walked up, shot her, tried to kill the others but only succeeded killing her.

"That is the only sentence I'm aware of that is a life without parole sentence. That was just litigated again and the judge agreed that is a good sentence. I'd like to point out that the Supreme Court has said that minimum mandatory sentences of life without parole for a juvenile are unconstitutional, but they have never said that a juvenile life sentence is unconstitutional. I'd like to committee to look at section 12.1-20-03 subsection 4 of the Century Code which is the gross sexual imposition.

Under that law, anybody who does a gross sexual imposition or rape, and kills somebody in the process is subjected to a Class AA Felony with the maximum penalty of life without parole that must be imposed. So we do have a life without parole minimum mandatory sentence right now, and the way that is written that could be used against a juvenile or an adult. I think you should consider inserting that a juvenile would not apply in that section because that is unconstitutional."

James Dole called back to the podium.

Senator Myrdal (36:25): "Should it be retroactive, Mr. Dole?

James Dole: "We do believe it should be retroactive. We do have legislation in Arkansas that retroactivity would be applied to 110 cases there."

Chairman Armstrong closed the hearing on HB 1195.

No motions were made.

2017 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1195 Committee Work
3/13/2017
29083

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature	

Explanation or reason for introduction of bill/resolution:

Relating to imprisonment of minors; and to provide a penalty.

Minutes: **Attachments** 1

Chairman Armstrong began the discussion on HB 1195. All committee members were present.

Proposed Amendment was handed out and discussed. (see attachment 1)

Senator Larson motioned to Adopt the Amendment. **Senator Luick** seconded.

Discussion followed:

Senator Larson: "This does seem to make areas of the code consistent. This makes sense to me."

A Roll Call Vote was taken. Yea: 6 Nay: 0 Absent: 0.
The motion carried.

Senator Larson motioned for a Do Pass as Amended. **Senator Myrdal** seconded.

Discussion followed:

Senator Osland: "Is retroactivity a bad thing?"

Chairman Armstrong: "In this case you would be affecting two people. I would tell you that those two people may use this law as a reason for post-conviction relief. If they get any relief there then you will see this coming forward. Aaron, the one case we were talking about when did that occur?"

Aaron Birst, Association of Counties, came to the podium to answer a question.
"In the mid-90's."

Chairman Armstrong: "This seems to be a global policy moving forward and I think it's a good idea."

Senator Nelson: "I think most of us remember when Mr. Dold was here the first time. He had a young man with him who was convicted of murder and was out and had redeemed himself. But we just asked Leann out the door about the Carlson case, and she said he still has many, many problems. He's just not adjusting well at all, and that was like 10 years ago."

A Roll Call Vote was taken. Yea: 6 Nay: 0 Absent: 0.
The motion carried.

Senator Larson carried the bill.

Chairman Armstrong ended the discussion on HB 1195.

CR
3/13/17

17.0583.03001
Title.04000

Adopted by the Senate Judiciary Committee

March 13, 2017

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1195

Page 1, line 2, after the semicolon insert "to amend and reenact subsection 4 of section 12.1-20-03, relating to gross sexual imposition;"

Page 1, after line 3, insert:

"**SECTION 1. AMENDMENT.** Subsection 4 of section 12.1-20-03 of the North Dakota Century Code is amended and reenacted as follows:

4. If, as a result of injuries sustained during the course of an offense under this section, the victim dies, the offense is a class AA felony, for which the maximum penalty of life imprisonment without parole must be imposed unless the defendant was a juvenile at the time of the offense."

Renumber accordingly

Date:3/13/17
Roll Call Vote # 1

2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1195

Senate Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: 17.0583.03001

Recommendation: ☒ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Senator Larson Seconded By Senator Luick

Senators	Yes	No	Senators	Yes	No
Chairman Armstrong	X		Senator Nelson	X	
Vice-Chair Larson	X				
Senator Luick	X				
Senator Myrdal	X				
Senator Osland	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date:3/13/17
Roll Call Vote # 2

2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1195

Senate Judiciary Committee

☐ Subcommittee

Amendment LC# or Description: 17.0583.03001

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☒ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Senator Larson Seconded By Senator Myrdal

Senators	Yes	No	Senators	Yes	No
Chairman Armstrong	X		Senator Nelson	X	
Vice-Chair Larson	X				
Senator Luick	X				
Senator Myrdal	X				
Senator Osland	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Larson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1195, as engrossed: Judiciary Committee (Sen. Armstrong, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1195 was placed on the Sixth order on the calendar.

Page 1, line 2, after the semicolon insert "to amend and reenact subsection 4 of section 12.1-20-03, relating to gross sexual imposition;"

Page 1, after line 3, insert:

"**SECTION 1. AMENDMENT.** Subsection 4 of section 12.1-20-03 of the North Dakota Century Code is amended and reenacted as follows:

4. If, as a result of injuries sustained during the course of an offense under this section, the victim dies, the offense is a class AA felony, for which the maximum penalty of life imprisonment without parole must be imposed unless the defendant was a juvenile at the time of the offense."

Renumber accordingly

2017 TESTIMONY

HB 1195

#1
1195
1-18-17

TESTIMONY OF REP. LAWRENCE R. KLEMIN
HOUSE JUDICIARY COMMITTEE
HOUSE BILL NO. 1195
JANUARY 18, 2017

Mr. Chairman and Members of the Committee. I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I am here to testify in support of House Bill 1195.

House Bill 1195 provides that the maximum sentence that can be imposed upon a child convicted of a Class AA felony is life in prison with the opportunity for parole. Under current law in North Dakota, a child14 years of age or older but under the age of 18 who is charged with a Class AA felony, such as murder or gross sexual imposition, can be transferred from Juvenile Court to the District Court and tried as an adult. If convicted of a crime punishable by life in prison, that child can then be sentenced to die in prison at the end of his natural life without the opportunity for parole review. Section 12.1-32-01(1) of the North Dakota Century Code provides as follows:

> 12.1-32-01. Classification of offenses — Penalties.
>
> Offenses are divided into seven classes, which are denominated and subject to maximum penalties, as follows:
>
> 1. Class AA felony, for which a maximum penalty of life imprisonment without parole may be imposed. The court must designate whether the life imprisonment sentence imposed is with or without an opportunity for parole. Notwithstanding the provisions of section 12-59-05, a person found guilty of a class AA felony and who receives a sentence of life imprisonment with parole, shall not be eligible to have that person's sentence considered by the parole board for thirty years, less sentence reduction earned for good conduct, after that person's admission to the penitentiary.

For violent offenders, I understand that the 85% rule also applies. Section 12.1-32-09.1 provides:

> 12.1-32-09.1. Sentencing of violent offenders.
>
> 1. Except as provided under section 12-48.1-02 [conditions of eligibility for release programs] and pursuant to rules adopted by the department of corrections and rehabilitation, an offender who is convicted of a crime in violation of section 12.1-16-01 [murder], 12.1-16-02 [manslaughter], subsection 2 of section 12.1-17-02 [aggravated assault], section 12.1-18-01 [kidnapping], subdivision a of subsection

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1 or subdivision b of subsection 2 of section 12.1-20-03 [gross sexual imposition], section 12.1-22-01 [robbery], subdivision b of subsection 2 of section 12.1-22-02 [burglary], or an attempt to commit the offenses, and who receives a sentence of imprisonment is not eligible for release from confinement on any basis until eighty-five percent of the sentence imposed by the court has been served or the sentence is commuted. [Note that not all of these crimes are punishable as Class AA felonies.]

2. In the case of an offender who is sentenced to a term of life imprisonment with opportunity for parole under subsection 1 of section 12.1-32-01 [Class AA felonies], the term "sentence imposed" means the remaining life expectancy of the offender on the date of sentencing. The remaining life expectancy of the offender must be calculated on the date of sentencing, computed by reference to a recognized mortality table as established by rule by the supreme court.

3. Notwithstanding this section, an offender sentenced under subsection 1 of section 12.1-32-01 may not be eligible for parole until the requirements of that subsection have been met.

Section 12-59-05 referred to in Section 12.1-32-01, relates to the Parole Board and provides:

12-59-05. Consideration by board.

Every inmate's eligibility for parole must be reviewed in accordance with the rules adopted by the parole board. The board shall consider all pertinent information regarding each inmate, including the circumstances of the offense, the presentence report, the inmate's family, educational, and social history and criminal record, the inmate's conduct, employment, participation in education and treatment programs while in the custody of the department of corrections and rehabilitation, and the inmate's medical and psychological records.

This bill will eliminate sentences of life without the opportunity for parole for child offenders. It does not guarantee the release of anyone, but rather ensures that a child who commits a serious crime and who is charged as an adult has the opportunity for parole review some day. Parole is not automatic. The child who is sentenced to life in prison with an opportunity for parole will have to serve a very long time in prison before becoming eligible for parole. Parole will then not be granted unless the Parole Board finds that the person also meets the factors set out in Section 12-59-05.

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Studies have shown that children's brains are not fully developed until they become adults. Children are less capable than adults to consider the long-term impact of their actions, control their emotions and impulses, or evaluate risks and reward. They also are more vulnerable and susceptible to peer pressure.

This change in the law is consistent with several recent U.S. Supreme Court cases and will encourage child offenders to work toward rehabilitation and forgiveness, in order to earn a second chance after they have spent a significant amount of time in prison.

The United States Supreme Court, in a series of decisions during the last decade, has said that children are constitutionally different from adults and should not be subject to the nation's harshest punishments.

In *Roper v. Simmons* (2005) the Court struck down the death penalty for children, finding it to be a violation of the 8th Amendment's prohibition on cruel and unusual punishment.

In *Graham v. Florida* (2010) the Court struck down life without parole sentences for non-homicide offenses, holding that states must give children a "realistic opportunity to obtain release.

In *Miller v. Alabama* (2012) the Court struck down mandatory life without parole sentences for homicide offenses committed by juveniles, finding that sentencing courts must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."

Finally, last year in *Montgomery v. Louisiana* (2016) the Court affirmed that its 2012 *Miller* decision was to be applied retroactively. The Court further clarified its previous decision, finding that Miller's conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile [homicide] offenders raises a grave risk that many are being held in violation of the Constitution.

This bill will ensure that North Dakota is in compliance with the letter and spirit of all of these decisions, and will bring the state's juvenile sentencing policies in line with the juvenile brain and behavioral development science underlying these decisions. More than 17 states, including neighboring Montana, Wyoming, and South Dakota have recently passed similar legislation.

I am attaching to my testimony excerpts from a publication by the Campaign for the Fair Sentencing of Youth (2016), which provides more detailed information. A complete copy of this publication has been provided to the Clerk of this committee for inclusion in the record. I will email a complete copy of this publication to you on request.

Mr. Chairman and Members of the committee, I urge your support of House Bill 1195.

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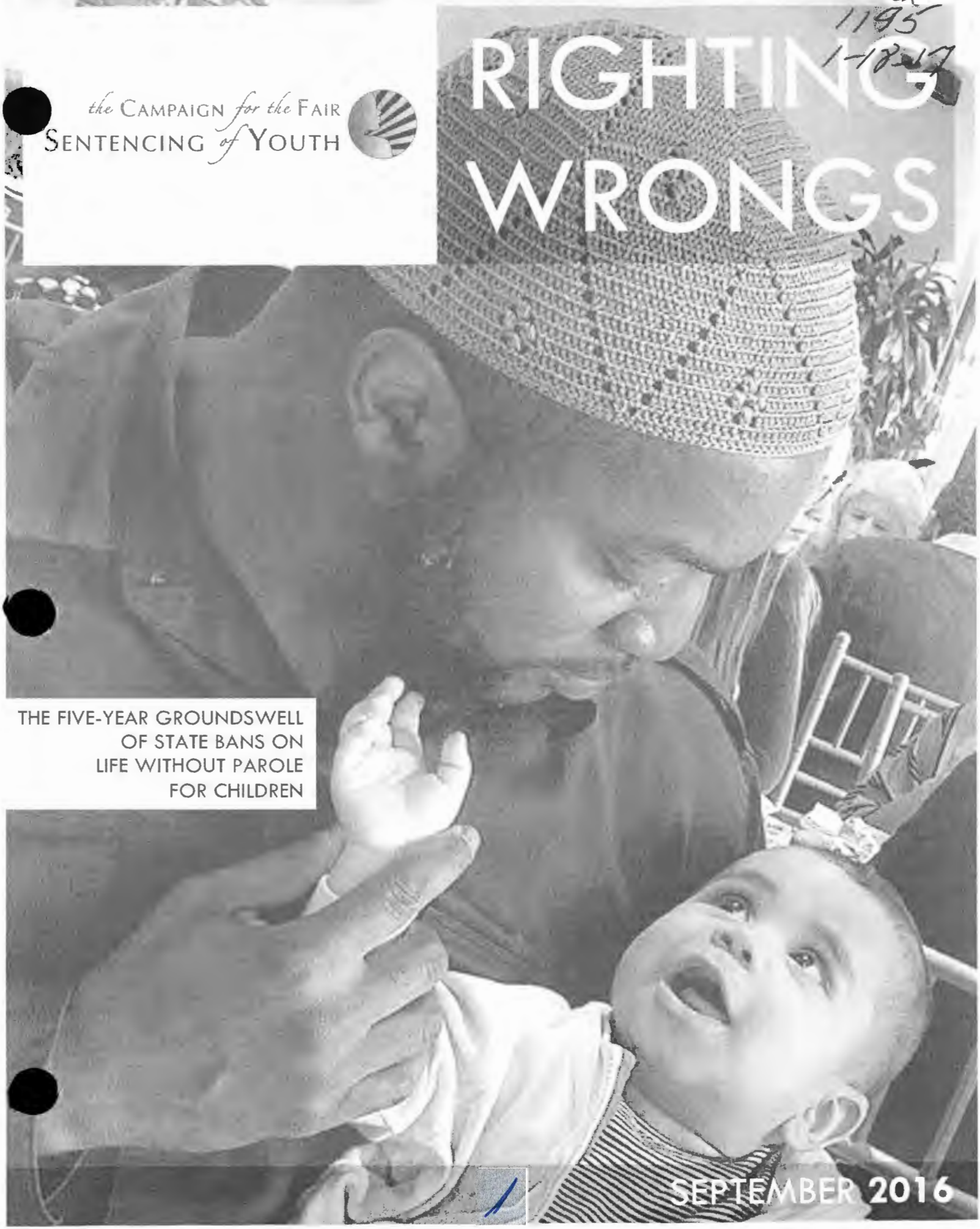
the CAMPAIGN for the FAIR SENTENCING of YOUTH

RIGHTING WRONGS



THE FIVE-YEAR GROUNDSWELL OF STATE BANS ON LIFE WITHOUT PAROLE FOR CHILDREN

SEPTEMBER 2016

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A Publication by the Campaign for the Fair Sentencing of Youth

the CAMPAIGN for the FAIR SENTENCING of YOUTH

The Campaign for the Fair Sentencing of Youth is a national coalition and clearinghouse that leads, coordinates, develops, and supports efforts to implement fair and age-appropriate sentences for youth, with a focus on abolishing life without parole sentences for youth.

Cover image: Ralph Brazel, pictured with his son in 2016. Ralph was given three life-without-parole sentences at 17 for his role in a drug ring operated by an adult. He became eligible for relief following 2010's U.S. Supreme Court decision in *Graham v. Florida*. He served nearly 22 years in prison, and was released in 2013, shortly before his 40th birthday. His son was born last year.

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RIGHTING WRONGS

THE FIVE-YEAR GROUNDSWELL OF STATE BANS ON LIFE WITHOUT PAROLE FOR CHILDREN

A MESSAGE OF HOPE

The Campaign for the Fair Sentencing of Youth was launched in 2009 to coordinate, bolster, and build new strategies to end the practice of sentencing children to life in prison without parole—the most punitive sentence imposed on our children. It is a sentence to die in prison, imposed only in the United States.

Sentencing children to die in prison declares them irredeemable, defining their lives based on their worst mistakes. All children—even those convicted of the most serious crimes—are different from adults and should be held accountable for harm they have caused in age-appropriate ways. In addition, children who receive the harshest treatment are frequently the most vulnerable children in our society: children from poor communities, children of color, and children who have endured extensive trauma.

Our vision is to help create a society that respects the dignity and human rights of children through a justice system that operates with consideration of the child's age, provides youth with opportunities to return to the community, and bars the imposition of life without parole for children under age eighteen. This vision is turning into reality as states change their policies and individuals previously sentenced to life without parole as children begin to return home as productive members of society.

We are privileged to lead and work alongside a robust national alliance committed to banning life-without-parole sentences for children. Our partners include conservative and liberal policymakers alike, faith leaders from every major world religion, medical professionals, defense attorneys, prosecutors, judges, formerly incarcerated youth, victims' families, and child advocates. Together, we utilize advocacy, public education, and legal strategies to end the practice of sentencing our children to die in prison. The multi-faceted movement to ban life without parole for children has resulted in a culture shift, visible in the recent momentum to scale back these extreme sentences.

As a result, the United States is on course to replace life-without-parole sentences for children with less punitive and more age-appropriate accountability measures, informed by individuals and communities directly impacted by youth violence. This publication provides a glimpse of our recent progress in state legislatures, the widespread support for ending life without parole for children, and most importantly, the lives touched by this crucial work.

I invite you to join this growing movement of giving hope of a second chance to *all* of our children.

Onward,

Jody Kent Lavy
Executive Director
Campaign for the Fair Sentencing of Youth

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AN EVOLVING STANDARD OF DECENCY

FIVE YEARS OF POSITIVE SENTENCING REFORM FOR CHILDREN

EXECUTIVE SUMMARY

In just five years—from 2011 to 2016—the number of states that ban death-in-prison sentences for children has more than tripled. In 2011, only five states did not permit children to be sentenced to life without parole. Remarkably, between 2013 and 2016, three states per year have eliminated life-without-parole as a sentencing option for children. Seventeen states now ban the sentence.

This rapid rate of change, with twelve states prohibiting the penalty in the last four years alone, represents a dramatic policy shift, and has been propelled in part by a growing understanding of children's unique capacity for positive change. Several decades of scientific research into the adolescent brain and behavioral development have explained what every parent and grandparent already know—that a child's neurological and decision-making capacity is not the same as those of an adult.[1] Adolescents have a neurological proclivity for risk-taking, making them more susceptible to peer pressure and contributing to their failure to appreciate long-term consequences.[2] At the same time, these developmental deficiencies mean that children's personalities are not as fixed as adults, making them predisposed to maturation and rehabilitation.[3] In other words, children can and do change. In fact, research has found that most children grow out of their criminal behaviors by the time they reach adulthood.[4]

Drawing in part from the scientific research, as well as several recent U.S. Supreme Court cases ruling that life-without-parole sentences violate the U.S. Constitution for the overwhelming majority of children,[5] there is growing momentum across state legislatures to reform criminal sentencing laws to prohibit children from being sentenced to life without parole and to ensure that children are given meaningful opportunities to be released based on demonstrated growth and positive change. This momentum has also been fueled by the examples set by formerly incarcerated individuals who were once convicted of serious crimes as children, but who are now free, contribute positively to their communities, and do not pose a risk to public safety.

In addition to the rapid rate of change, legislation banning life without parole for children is notable for the geographic, political, and cultural diversity of states passing these reforms, as well as the bipartisan nature in which bills have passed, and the overwhelming support within state legislatures.

Currently, Nevada, Utah, Montana, Wyoming, Colorado, South Dakota, Kansas, Kentucky, Iowa, Texas, West Virginia, Vermont, Alaska, Hawaii, Delaware, Connecticut, and Massachusetts all ban life without parole sentences for children. Additionally California, Florida, New York, New Jersey, and the District of Columbia ban life without parole for children in nearly all cases.

It is also important to note that three additional states—Maine, New Mexico, and Rhode Island—have never imposed a life-without-parole sentence on a child. Several other states have not imposed the sentence on a child in the past five years, as states have moved away from this inappropriate sentence both in law and in practice.

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[1] Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 ANN. REV. CLINICAL PSYCHOL. 459 (2009).

[2] *Id*; Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 DEVELOPMENTAL REV. 78 (2008).

[3] Jay N. Giedd, The Teen Brain: Insights from Neuroimaging, 42 J. OF ADOLESCENT HEALTH 335 (2008); Mark Lipsey et al., Effective Intervention for Serious Juvenile Offenders, JUV. JUST. BULL. 4-6 (2000).

[4] Terrie E. Moffitt, Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, 100 PSYCHOL. REV. 674, 675 (1993).

[5] See *Miller v. Alabama*, 132 S. Ct. 2455 (2012); and *Montgomery v. Louisiana* 136 S. Ct. 718 (2016).

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STATE LEGISLATIVE CHAMPIONS

"I believe that children, even children who commit terrible crimes, can and do change. And I believe they deserve a chance to demonstrate that change and become productive citizens. In the end, I gathered a very diverse set of legislators from across the political spectrum and passed the bill with solid margins."

Senator Craig Tieszen
South Dakota State Senator (R), Chair of the South Dakota Senate Judiciary Committee and former Police Chief of Rapid City, South Dakota

"In many aspects of our culture and society, we recognize the recklessness and impulsivity in children, which is why we don't allow them to make adult-decisions relating to voting, buying alcohol or tobacco products, entering into contracts, marrying, or joining the military. HB 2116 creates parity in our laws by recognizing that children are different from adults when it comes to criminal sentencing and that they should not be subject to our state's toughest penalties.

Representative Karen Awana
Former Hawaii State Representative (D)

"Utah's criminal justice system has long recognized the fundamental difference between children and adult offenders. Passage of HB 405 is an expression of that important recognition and it provides a clear statement of Utah's policy regarding the treatment of children placed in custody for serious offenses."

Representative V. Lowry Snow
Utah State Representative (R)

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BANS **TRIPLE** IN 5 YEARS

2011

Ban LWOP for children

Do not use or ban LWOP for children in most cases

5 states BANNED LWOP for children

2016

Ban life without parole (LWOP) for children

Ban LWOP for children in most cases

17 states BAN LWOP for children

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BROAD SUPPORT FOR REFORM

LEGISLATIVE MOMENTUM TOWARD AGE-APPROPRIATE ACCOUNTABILITY

REFORM IN EVERY REGION

Legislative reform has passed in every region in the country, including New England, the Mid-Atlantic, the South, the Midwest, the West, and the Pacific.

Legislation to prohibit life without parole for children has passed in states that historically have been Republican-led, including Utah and Wyoming, and states that historically have been Democratic-led, including Connecticut and Delaware.

BIPARTISAN SUPPORT FOR REFORM

Sentencing reform to end life-without-parole sentences for children has gained the support and co-sponsorship of Republicans and Democrats, resulting in robust passage rates. In Delaware, Wyoming, Hawaii, West Virginia, and Utah legislation passed in one chamber unanimously, and in Nevada, legislation passed both chambers unanimously. In many states, legislation has passed with retroactive application.

HIGHLIGHTS OF REFORM

Several states have led the movement for age-appropriate accountability for children. In addition to banning life without parole for children, these states have enacted legislation that ensures all children receive an opportunity for review and the possibility of release. For example, laws enacted in Delaware, West Virginia, Connecticut, and Nevada have allowed hundreds of individuals who were sentenced to lengthy prison terms distinct from life without parole for crimes committed as children a chance to demonstrate how they have matured and changed. Each law prioritizes giving individuals opportunities to lead meaningful lives where they can finish school, establish careers, and start families. As a result of these laws, individuals who were once told as children that they would die in prison have returned home and now are contributing members of their communities.

Legislation from states has included:

- consideration of factors related to a child's age, maturity, life circumstances, and capacity for rehabilitation at the time of sentencing for all children tried in adult court
- judicial discretion to depart from mandatory minimums, sentencing enhancements, and lengthy terms of years for children being sentenced in adult court
- meaningful and periodic reviews for all children sentenced in adult court
- due process protections, including legal representation during parole and resentencing proceedings

West Virginia and Nevada are geographically and politically diverse states which can serve as examples for other states to follow.

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SNAPSHOT: WEST VIRGINIA

HB 4210 (2014)

VOTE MARGIN

House: 89 yeas, 9 nays

Senate: 34 yeas, 0 nays

SENTENCING PROVISIONS

In 2014, West Virginia passed HB 4210 which, among other things, banned the use of life without parole as a sentencing option for children. On the "sentencing front-end," the bill also specified that anytime a child is being sentenced for a felony offense as an adult in criminal court, a judge must consider the following mitigating circumstances:

"We all fall short at times, and, as a person of faith, I believe we all can be redeemed, particularly our children. Young people, often exposed to violence, poverty, and neglect in home environments they cannot escape, sometimes make tragic mistakes. We should and can still hold them accountable for the harm they have caused but in an age-appropriate way that motivates them to learn from their mistakes and work toward the possibility of release. As minority chair on the Judiciary Committee, I can report that we passed this bill with widespread bipartisan support. I hope it will serve as a model for other state legislatures."
Former Delegate John Ellem (R)

(1) *Age at the time of the offense;*
(2) *Impetuosity;*
(3) *Family and community environment;*
(4) *Ability to appreciate the risks and consequences of the conduct;*
(5) *Intellectual capacity;*
(6) *The outcomes of a comprehensive mental health evaluation conducted by an mental health professional licensed to treat adolescents in the State of West Virginia;*
(7) *Peer or familial pressure;*
(8) *Level of participation in the offense;*
(9) *Ability to participate meaningfully in his or her defense;*
(10) *Capacity for rehabilitation;*
(11) *School records and special education evaluations;*
(12) *Trauma history;*
(13) *Faith and community involvement;*
(14) *Involvement in the child welfare system; and*
(15) *Any other mitigating factor or circumstances.*

REVIEW PROVISIONS

West Virginia established parole eligibility for all children convicted of any offense or offenses after no more than 15 years. Additionally, the parole board is required to take into consideration *"the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner during incarceration."* The parole board also must consider the following mitigating factors when determining whether or not to grant parole to an individual who was a child at the time of their offense(s):

(1) *A review of educational and court documents;*
(2) *Participation in available rehabilitative and educational programs while in prison;*
(3) *Age at the time of the offense;*
(4) *Immaturity at the time of the offense;*
(5) *Home and community environment at the time of the offense;*
(6) *Efforts made toward rehabilitation;*
(7) *Evidence of remorse; and*
(8) *Any other factors or circumstances the board considers relevant.*

Under existing law, individuals who are eligible for parole in West Virginia must be reviewed no later than every three years. This, coupled with the provisions outlined in HB 4210, make West Virginia's laws one of the national models that states should seek to imitate when holding children accountable for committing serious crimes.

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SNAPSHOT: NEVADA

AB 267 (2015)

VOTE MARGIN

Assembly: 42 yeas, 0 nays

Senate: 21 yeas, 0 nays

"When we sentence a child to die in prison, we forestall the possibility that he or she can change and find redemption. In doing so, we ignore Jesus' fundamental teachings of love, mercy, and forgiveness."

Nevada Assembly Speaker John Hambrick (R)

SENTENCING PROVISIONS

In 2015 Nevada unanimously passed AB 267 with the support of the Nevada District Attorneys Association. The new law bans the use of life-without-parole sentences for children and requires judges to consider *"the differences between juvenile and adult offenders, including, without limitation, the diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth"* any time a child under the age of 18 is being sentenced as an adult in criminal court.

REVIEW PROVISIONS

AB 267 also specifies parole eligibility guidelines for individuals who committed their crimes under the age of 18, as follows:

(a) For a prisoner who is serving a period of incarceration for having been convicted of an offense or offenses that did not result in the death of a victim, after the prisoner has served 15 calendar years of incarceration, including any time served in a county jail.

(b) For a prisoner who is serving a period of incarceration for having been convicted of an offense or offenses that resulted in the death of only one victim, after the prisoner has served 20 calendar years of incarceration, including any time served in a county jail.

As a result of AB 267, nearly every child who had been given a sentence that would have made them ineligible for release on parole for more than 20 years will now be eligible for parole after either 15 or 20 years. More than 100 people serving life or other life-equivalent sentences were directly impacted by the passage of this law.

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A CONSERVATIVE PERSPECTIVE

by Nevada Assembly Speaker John Hambrick (R) and former West Virginia Delegate John Ellem (R)

It is time to ban life-without-parole sentences for children.

As conservative Republican legislators, we helped lead the efforts in our states to end these sentences and replace them with age-appropriate sentences that consider children's capacity to change and become rehabilitated. In West Virginia and Nevada, the states we represent, the legislatures overwhelmingly passed these measures.

The impact of serious crimes is no less tragic because a child is involved and youth must be held accountable for their conduct. However, as a modern society we must balance protecting public safety and justice for victims with the psychological and developmental differences between children and adults. In fact, many victims' families, who have come to know the child offenders in their cases, have found healing when the child was given the possibility of a second chance. Not everyone should be released from prison, but those children who change and become rehabilitated should be given that hope, and we should support healing for the victims' families and their communities.

Adolescent development research has shown children do not possess the same capacity as adults to think through the consequences of their behaviors, control their responses, or avoid peer pressure. Often times the children who commit serious offenses have suffered abuse, neglect, and trauma, which affects their development and plays a role in their involvement in the justice system. Drawing in part on this research, the U.S. Supreme Court has said children are "constitutionally different" and should not be subject to our harshest penalties.

But our motivation goes beyond what the Court said. Redemption is a basic tenet of nearly every religion. When we sentence a child to die in prison, we forestall the possibility that he or she can change and find redemption. In doing so, we ignore Jesus' fundamental teachings of love, mercy, and forgiveness. As Father Bernard Healey recently pointed out—Moses, David, and the Apostle Paul were all guilty of killing, but found redemption and purpose through the grace of God. Shouldn't we show this same mercy to our nation's children, allowing them a chance at redemption?

Seventeen states have banned life-without-parole sentences for children. The time has come for all states to do so. As Congress looks to criminal justice reform, they would do well to make banning these sentences a priority.

(This article first appeared in CQ *Researcher*).

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PROSECUTORS FOR REFORM

PROTECTING PUBLIC SAFETY AND PROMOTING AGE-APPROPRIATE ACCOUNTABILITY

by Salt Lake County District Attorney Sim Gill

For the fourth time in just over ten years, the U.S. Supreme Court has weighed in on the constitutional sentencing parameters for juveniles who commit serious violent offenses. These four cases represent a major paradigm shift in how the state can and will pursue just outcomes in cases involving juveniles who commit serious crimes.

In *Roper v. Simmons,* 543 U.S. 551 (2005), the Court said that sentencing a juvenile to death violates the Eighth Amendment. In *Graham v. Florida*, 560 U.S. 48 (2010), the Court said that sentencing a juvenile to life without parole for a nonhomicide offense—even a serious, violent nonhomicide—violates the Eighth Amendment. In *Miller v. Alabama*, 132 S.Ct. 2455 (2012), the Court said that a mandatory life-without-parole sentence imposed on a juvenile for a homicide offense violates the Eighth Amendment, because the sentencer must take into account the unique factors of youth before sentencing a juvenile to life in prison. And on January 25, 2016 in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), the Court said that the *Miller* decision applies retroactively and that life without parole is unconstitutional for the vast majority of juveniles who commit homicide. In its 2016 General Session, the Utah Legislature overwhelmingly passed H.B. 405, which eliminated life without the possibility of parole in cases where the offender was under the age of 18 at the time of the offense and where the offender is sentenced after May 10, 2016. I supported that bill because it was based on sound policy.

Juveniles and adults are treated differently under the law in the United States in any number of ways: juveniles can't vote, serve in the military, buy cigarettes or alcohol, or enter into contracts. And now the Supreme Court has made clear that juveniles and adults must be treated differently for sentencing purposes as well, at least as regards the use of extreme sentences, like the death penalty and life imprisonment without the possibility of parole. It's worth noting that with the exception of *Graham* (which involved an armed burglary with assault or battery), all of these cases involved juveniles convicted of serious homicide offenses. So when the Court assessed the constitutional uniqueness of juveniles at sentencing, the Court did so in the context of some of the most violent and terrible crimes that come through our courts.

In *Roper*, *Graham*, *Miller*, and *Montgomery*, the Supreme Court looked to the underlying research for why juveniles and adults are treated differently under the law—namely, that juveniles are physiologically impulsive, impressionable, and engage in risky behavior, but that given time, juveniles can outgrow antisocial adolescent behavior. According to the Court, brain science shows that "ordinary adolescent development diminishes the likelihood that a juvenile offender [who commits a serious homicide] forever will be a danger to society." *Montgomery*, 136 S.Ct. at 733. The Court also emphasized that the "relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside. . . For most teens, risky or antisocial behaviors are fleeting; they cease with maturity as individual identity becomes settled." *Roper*, 543 U.S. at 570.

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The constitutional uniqueness of juveniles for sentencing purposes highlights new and challenging responsibilities for prosecutors, and *Miller* and *Montgomery* in particular have created a complex landscape for prosecutors to navigate. Whereas *Roper* and *Graham* instituted a categorical bar on a particular punishment, *Miller* did not. However, *Montgomery* clarified that "*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. . . . Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole. After *Miller*, it will be the rare juvenile offender who can receive that same sentence. The only difference between *Roper* and *Graham*, on the one hand, and *Miller*, on the other hand, is that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right." *Montgomery*, 136 S. Ct. at 734.

The state must uphold the laws and Constitution on behalf of all its citizenry—and that includes criminal defendants. Following *Roper*, the state no longer pursued death for juveniles who committed homicide. Doing so would have undermined the very law we as prosecutors strive to uphold. The same is now true for pursuing life without parole for juveniles. To seek life without parole in the vast majority of cases in which we are statutorily permitted is not justice under the Constitution.

In jurisdictions where life without the possibility of parole is still a sentencing option for juvenile offenders, *Miller* and *Montgomery* present significant practical challenges for prosecutors in addition to ethical ones. Not only must prosecutors divine which crimes reflect irreparable corruption and which do not, the burden now rests on the state to prove irreparable corruption in order to secure a constitutional life-without-parole sentence. This is a high, if not impossible, burden to meet, given what we know about juveniles' biological capacity for positive change.

Therefore, instead of wasting resources prosecuting the thorny issue of which juveniles who commit homicide are irreparably corrupt and which are not, prosecutors should come out in support of ending the practice of life without parole for juveniles altogether. I supported the legislative effort in Utah because I believe our law must demand accountability and rehabilitation from juveniles who commit terrible crimes. Public safety will be served best when the law empowers parole boards (or judges in states without a parole system) to make release determinations based on a juvenile offender's actual—rather than future hypothetical—maturation and rehabilitation. As prosecutors, it is our responsibility to uphold the Constitution and to seek just outcomes. It is time for us to seek just and age-appropriate outcomes for the juveniles we prosecute.

"I am proud of our legislators for acknowledging that the minds of children are different from those of adults in very specific ways. Certainly, when children commit serious crimes, we in law enforcement must respond and protect the community; however, putting a child in prison and throwing away the key is not a humane or cost-effective solution to this problem."

Kauai County Prosecuting Attorney Justin Kollar

"I supported the legislative effort in Utah because I believe our law must demand accountability and rehabilitation from juveniles who commit terrible crimes. Public safety will be served best when the law empowers parole boards (or judges in states without a parole system) to make release determinations based on a juvenile offender's actual—rather than future hypothetical—maturation and rehabilitation."

Sim Gill, Salt Lake County District Attorney

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CHILDREN CAN CHANGE

INCARCERATED CHILDREN'S ADVOCACY NETWORK (ICAN)

As an initiative of the Campaign for the Fair Sentencing of Youth, the Incarcerated Children's Advocacy Network (ICAN), is a national network of leaders who were formerly incarcerated as youth and who are living proof of the unique capacity for change that resides within every child. Members humbly recognize their responsibility to humanity and serve as a source of motivation to others that it is never too late to become a positive force in the community. Every ICAN member was previously convicted or pled guilty to a homicide-related offense and/or was sentenced to life without parole for a crime committed as a child. ICAN members champion the cause for age-appropriate and trauma-informed alternatives to the extreme sentencing of America's youth.

ICAN has played a central role in advocating for and informing recent youth sentencing policy reforms. Featured below are profiles of current ICAN members who have been involved in advocacy efforts to end the practice of sentencing children to life without parole.

PROFILES OF ICAN MEMBERS

XAVIER At the age of 13, Xavier McElrath-Bey was sent to prison for murder, but, through faith and maturation, turned his life around.

While he was incarcerated, Xavier earned both his Associates and Bachelor's degrees from Roosevelt University. Upon his release, he worked as a barista at Starbucks, earned a Master's Degree, and worked in various youth intervention and juvenile justice research positions.

Much of Xavier's advocacy efforts have been highlighted by various media sources and news outlets, such as the *New York Times*, *Chicago Tribune*, PBS NewsHour, The Steve Wilkos Show, the *Huffington Post*, Al Jazeera America, the podcast *Undisclosed*, and many others. He also delivered a powerful TEDx Talk at Northwestern University, titled "No Child is Born Bad," in which he shared about his childhood experiences of abuse, neglect, incarceration, and the unique capacity for change that exists within every child, demonstrating that children should never be defined by their worse act. He currently serves as Youth Justice Advocate and ICAN Coordinator at the Campaign, and is a founding member of ICAN.

DOLPHY Dolphy Jordan's early life was challenging. Born in San Diego, Dolphy grew up in Seattle in an impoverished and abusive home environment. His father was addicted to drugs, and Dolphy's mother relied on public benefits to raise him and his sister.

By the 9th grade, Dolphy had attended 15 or 16 different schools. He acted out and was kicked out of some schools for truancy and bad behavior. At one point, his mother also kicked him out of the house. For a while, Dolphy bounced between the streets and various foster homes.

At 16, Dolphy was convicted of murder in Washington State. After serving 21 years he received a second chance. Upon release, he enrolled in college and graduated with honors, earning the Presidential Award at commencement. He currently works full time with King County Drug Diversion Court as a Resource Specialist connecting people

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dealing with substance use disorders and mental health issues to community resources. He also works with another nonprofit and talks with youth at truancy workshops.

He is very active in the community, loves the outdoors, and is an avid Seahawks fan.

"Through my experiences, I have learned to truly appreciate the value of life and know that people have the capacity to change despite whatever circumstances they may face."

SEAN Sean Ahshee Taylor's formative years in Denver were filled with challenges: his mother battled crack addiction, and his father, who was not a major presence in his life, was incarcerated.

When he was about 14, Sean joined the Bloods street gang. To adolescent Sean, the gang offered the potential of financial stability. In 1990, at 17, a jury convicted Sean of first-degree homicide.

While in prison, Sean taught fellow incarcerated people adult basic education. Sean, who speaks some Spanish, also taught English as a Second Language. In 2011, a juvenile clemency board created by Colorado Gov. Bill Ritter (D) granted clemency to Sean and three other people who were minors at the time of their crimes. Sean was released at age 38.

Shortly after he gained his freedom, Sean found work as a case worker by the Second Chance Center in Aurora. The center aspires to reduce the recidivism rates of men and women who have been incarcerated by helping them transition into successful lives in society. Sean is a role model for the people he works with and has worked his way up and is now the organization's deputy director. He is also a gang intervention specialist.

"Those of us who are formerly incarcerated are modeling what is possible. The ones we left behind are saying, if we can get out and be successful so can they. That's priceless seed planting."

FRANCESCA Francesca Duran learned from her abusive, alcoholic mother to respond to problems not with dialogue, but with violence.

At 13, during a fight with several other teenagers, Francesca's cousin pulled a knife and stabbed one of the girls, killing her. New Mexico authorities charged Francesca with accessory to commit first-degree murder, conspiracy, and harboring a felon.

At 16, Francesca eventually pled to lesser charges, including battery resulting in great bodily harm, and was sentenced to two years in juvenile detention. She gave birth to her son, Joedamien, while incarcerated. Francesca's mother, who had received treatment for alcoholism, took care of the baby while Francesca served her time. She was released in 2003, when Joedamien was a year old.

In 2006, Francesca began work at PB & J Family services, which provides social

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services to families in the Albuquerque area. Francesca started as a home visitor, conducting home visits to ensure that children were in healthy environments. Today she supervises six workers in that unit.

"All families matter, all parents are human beings who deserve respect, people are greater than their circumstances people can change. It's strong leaders like ICAN and the Campaign that exemplify these values."

ELLIS Ellis Curry was convicted of murder in Florida at 16 years old. He is currently an entrepreneur and small business owner in Jacksonville and volunteers with Compassionate Families, where he travels around the state with Glen Mitchell, the father of the victim, talking to at-risk youth about the perils of bad choices. He is also a loving husband.

"I believe that every child should get a second chance because, if you would have met me at the age of 16, you would have thought I was a monster, but now I'm a business owner and a law-abiding citizen."

ERIC Eric Alexander was sent to prison at 17 for aggravated robbery and murder in Tennessee. Since his release he has a become a mentor to other at-risk youth and currently serves as the Program Director for the YMCA Community Project in Nashville, Tennessee. He is happily married and recently became a father to a baby girl. He and his wife have also adopted a teenage boy.

"There is not a greater gift than to be given a second chance and then use that opportunity to give back to youth who are in desperate need of someone who they can relate to while helping them to navigate through brokenness."

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A PATH FORWARD

JOIN THE MOVEMENT

As a nation built on second chances, the United States shines as a beacon of hope to people all around the world. But that hope has been stripped from children in this country told they were worth nothing more than dying in prison. Fortunately, with the leadership of courageous policymakers from diverse geographic, political, and ideological backgrounds, that message is being replaced by an affirmation that there is no such thing as a throwaway child. The extraordinary rate of legislative change banning life-without-parole sentences for children across the U.S. in the past five years reflects an emerging consensus that no child should be sentenced to die in prison. The momentum demonstrates a shift from draconian punishment toward approaches that hold our children accountable for harm they have caused in age-appropriate ways.

Now is the time to join the movement to end life sentences for children and ensure all children have an opportunity to demonstrate positive growth and a second chance at life.

LIVES TOUCHED

Assembly Speaker John Hambrick (R) watches as Governor Sandoval (R) signs AB 267 into law

"The work that the Campaign for the Fair Sentencing of Youth is doing is changing the lives, the hopes and aspirations of men, women and families across America. I have witnessed first-hand how families rejoice and celebrate when their loved ones have benefitted from their work."

-Assembly Speaker John Hambrick (R)

Donald Lee with his attorney Maggie Lumbrose after being released as a result of AB 267

"I wish more than anything I could say that would adequately express how grateful I am, but there simply are no words to describe the feeling that comes from breathing fresh air as a free man or hugging your aunt in your grandmother's kitchen. I grew up in prison. I spent 31 years incarcerated, to be exact, and I still cannot believe you [the Campaign] have made it possible for me to have kids, get married, and help others. We cannot stop until every child sentenced to life without has the chance to one day sit in their grandmother's kitchen and hear their aunt say, 'I love you.'"

- Donald Lee

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Christopher Williams, pictured with his sister LeAnna Williams, was given hope of a second chance because of AB 267

"AB 267 has enabled me to truly see hope; hope in what was an impossibly hopeless set of circumstances that I had realized as my life; hope that even though I spent three years on Death Row and the last 20 years serving life without parole, that all was not lost, as I now have the hope of a future life outside of prison."

-Christopher Williams, sentenced to life without parole

"Instead of counting days he is there, now we are counting days till his next parole hearing. I want to thank everyone at the Campaign for the Fair Sentencing of Youth, Speaker John Hambrick, and everyone involved with AB 267 not only for changing the future of Christopher's life, but for also changing the quality of my own life as well. I will be forever grateful."

-LeAnna Williams

Jon Hawkins was recently granted parole under AB 267

"AB 267 is a big deal. Never did I expect to see a Parole Board, let alone anticipate the full scale of what being in the "free world" means. This bill has allowed many incarcerated persons to have an opportunity to be heard by the Parole Board, a feat that was never to be accomplished by those of us who had juvenile life without the possibility of parole, such as myself. All of my adult life has been in prison, until about a month and a half ago. Now, I have a job, I am learning to drive a car, and I can choose what I would like to eat for my meals. These things are taken for granted by John Q. Public, but to be without them is no way to exist."

– Jon Hawkins

Defense Attorney, Kristina Wildeveld, with her client Richard Gaston.

"In one fell swoop, this piece of legislation literally saved so many men and women and gave them new life. I have been proud to be a part of it and honored to watch as these individuals who lived without hope in the law, but filled with hope in their hearts, get released and become contributing members of society. Working with the professionals at the Campaign for the Fair Sentencing of Youth has been a great experience. They are always available and ready to step into any state at any time to help. The professionalism, experience, and knowledge they offer navigating the legislative system is invaluable and impressive."

-Kristina Wildeveld

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Senator Craig Tieszen with members of CFSY and Coalition partners Libby Skarin and Lindsey Rivet-Rapp

"The Campaign for the Fair Sentencing of Youth provided important testimony and support. As important as the sentencing reform is, I think it is equally valuable that legislators had the opportunity to think differently about how and why we incarcerate children."

-South Dakota State Senator Craig Tieszen (R)

Dr. Linda White, whose daughter Cathy was murdered by two teenagers

"I'm incredibly grateful to the Campaign for all the work they've done to change the dialogue regarding youthful offenders. In spite of being the mother of a young woman who was killed by two 15-year-olds, I see only waste - wasted lives and wasted funds better spent on prevention - in keeping children locked up until they die behind bars. It also seems really cruel to their families who become one more set of victims."

-Dr. Linda White

Representative Barbara Rachelson (D) watches as Governor Shumlin (D) signs H. 62 into law.

"Working with the Campaign for the Fair Sentencing of Youth to pass legislation to ban life-without-parole sentences for children in Vermont was so very helpful. Their knowledge, availability and rapport with legislators made all the difference. I can honestly say that without CFSY's help, this never would have happened."

-Vermont State Representative Barbara Rachelson (D)

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Sara Kruzan with her daughter

"The Campaign for the Fair Sentencing of Youth has been a tremendous pillar of support. It's with great admiration to say from the very core of my being I am not an Exception but a Reflection! It is an honor to be a pro-social advocate alongside the Campaign as well as ICAN. They are the Epitome of HOPE!"

-Sara Kruzan. At 16, Sara was sentenced to life without parole for first degree murder, and has been home for nearly three years and is a loving mother and advocate.

Ralph Brazel, Jr., with his son

"'Invaluable' and 'heaven sent' are words that come to mind when I think about the tremendous blessing the Campaign for the Fair Sentencing of Youth has been in my life. What better description is there for a people who pick up the shovel to uncover children who have been buried alive?"

-Ralph Brazel, Jr. At 17 was sentenced to life without parole for a non-violent drug offense, and has been home for more than 3 years now and is married with children.

Billy Harris with his sister Lisa

"The Campaign for the Fair Sentencing of Youth's support and guidance with regards to juvenile sentencing reform in the Missouri Legislature has been instrumental in my personal growth as an advocate for others like me, who deserve a second chance at a normal life."

-Billy Harris. At 16 Billy was sent to prison for second degree murder, and has been home for more than a decade now advocating for his sister, Lisa, who at the age of 17 was sentenced to life without parole.

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STATEMENT OF PRINCIPLES

We believe that young people convicted of serious crimes should be held accountable for the harm they have caused in a way that reflects their capacity to grow and change. We believe in fair sentencing for youth that reflects our human rights, values and moral beliefs, and as such, the fundamental difference between youth and adults. Research has proven that youth are still developing both physically and emotionally and their brains, not just their bodies, are not yet fully mature. Because of these differences, youth have greater potential to become rehabilitated. Therefore, we believe that youth under the age of 18 should never be sentenced to prison for the rest of their lives without hope of release.

We believe that a just alternative to life in prison without parole is to provide careful reviews to determine whether, years later, individuals convicted of crimes as youth continue to pose a threat to the community. There would be no guarantee of release—only the opportunity to demonstrate that they are capable of making responsible decisions and do not pose a threat to society. This alternative to life without parole sentencing appropriately reflects the harm that has been done, as well as the special needs and rights of youth, and focuses on rehabilitation and reintegration into society.

We know that victims and survivors of serious crimes committed by youth endure significant hardship and trauma. They deserve to be provided with supportive services, and should be notified about sentencing reviews related to their cases. We believe in restorative practices that promote healing for the crime victims as well as the young people who have been convicted of crimes.

Sentencing minors to life terms sends an unequivocal message to young people that they are beyond redemption. We believe that society should not be in the practice of discarding young people convicted of crimes for life, but instead, should provide motivations and opportunities for healing, rehabilitation, and the potential for them to one day return to our communities as productive members of society.

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OFFICIAL SUPPORTERS

American Civil Liberties Union • American Correctional Association • American Correctional Chaplains Association • American Humanist Association • American Probation and Parole Association • American Psychological Association • Amnesty International • Association of Paroling Authorities International (APAI) • Association of Women Executives in Corrections • Baha'is of the United States • Baltimore Ethical Society • Boys Scouts of America • Buddhist Peace Fellowship • Campaign for Youth Justice • Catholic Mobilizing Network • Center for Children's Law and Policy • Central Juvenile Defender Center • Centro Pedro Claver, Inc. • Child Rights International Network (CRIN) • Child Welfare League of America • Children & Family Justice Center • Children's Action Alliance • Children's Defense Fund • Children's Law Center of Massachusetts, Inc. • Christ & St. Ambrose Episcopal Church, Philadelphia, PA • Church of the Brethren, Global Partnerships • Coalition for Juvenile Justice • Coalition on Human Needs • Colorado Juvenile Defender Coalition • Conference of Major Superiors of Men • Council for Educators of At-Risk and Delinquent Youth • Council of Juvenile Correctional Administrators • The Defender Association of Philadelphia • Doctors for Global Health • Engaged Zen Foundation • Equal Justice Initiative • Evangelical Lutheran Church in America • Every Child Matters • Faith Communities for Families and Children • Families & Allies of Virginia's Youth • First Focus • Friends & Families of Inmates, Omaha, Nebraska • From Death to Life • The General Synod of the United Church of Christ • Georgetown Center for Juvenile Justice Reform • Hispanic Clergy of Philadelphia and Vicinity • Human Rights Watch • International Association of Forensic Nurses • International Community Corrections Association • Jesuit Conference • Jewish Council on Urban Affairs • Journey of Hope • Just Detention International • JustFaith Ministries • Justice Policy Institute • Juvenile Justice Coalition of Ohio • Juvenile Justice Initiative of Illinois • Juvenile Justice Project of Louisiana • Juvenile Justice Trainers Association • Juvenile Law Center • Mental Health America • Michigan Council on Crime and Delinquency • Mid-Atlantic Juvenile Defender Center • Midwest Juvenile Defender Center • Mississippi Youth Justice Project • Mothers Against Murderers Association • Muslim Public Affairs Council • Muslims for Progressive Values • NAACP • NAACP Legal Defense and Educational Fund, Inc. • NAMI Colorado • National Advocacy Center of the Sisters of the Good Shepherd • National African American Drug Policy Coalition, Inc. • National Alliance of Faith and Justice • National Alliance of Sentencing Advocates and Mitigation Specialists • National Association for Children of Incarcerated Parents • National Association of Counsel for Children • National Association of Criminal Defense Lawyers • National Association of Juvenile Correctional Agencies • National Association of School Psychologists • National Association of Social Workers • National Black Police Association • National Center for Youth Law • National Disability Rights Network • National Juvenile Defender Center • National Juvenile Detention Association • National Juvenile Justice Network • National Legal Aid and Defender Association • National Partnership for Juvenile Services (NPJS) • National PTA • Office of Restorative Justice, Archdiocese of Los Angeles • Pacific Juvenile Defender Center • Partnership for Safety & Justice • PeacePathways • Penal Reform International • The Pendulum Foundation • Pennsylvania Prison Society • Prison Mindfulness Institute • Save the Kids • The Sentencing Project Southern Juvenile Defenders Center • Southern Poverty Law Center • TheyThinkAloud • UDC David A. Clarke School of Law, Took Crowell Institute for At-Risk Youth • Union for Reform Judaism • Unitarian Universalist Association of Congregations • United Methodist Church, General Board of Church and Society • United States Conference of Catholic Bishops • United States Psychiatric Rehabilitation Association • University of Iowa Students for Human Rights • University of Oregon Prison Justice • Voices for America's Children • Voices for Children in Nebraska • The W. Haywood Burns Institute • Western Juvenile Defender Center • The William Kellibrew Foundation • Wisconsin Council on Children and Families • The Youth Advocacy Project, Roxbury, MA • Youth Advocate Programs, Inc. • Youth Justice Coalition • Youth Law Center • Youth Sentencing & Reentry Project

To become an official supporter, please contact the Campaign at info@fairsentencingofyouth.org

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Dedicated to those still serving life-without-parole sentences for crimes they committed as children.

Campaign staff and ICAN members. 2016.

A special thanks to our official supporters, donors, and partners that make our work possible.

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House Judiciary Committee
Representative Kim Koppelman, Chairman
January 18, 2017

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Leann Bertsch, Director, North Dakota Department of Corrections and Rehabilitation
Presenting testimony on HB 1195

My name is Leann Bertsch and I am the Director of the North Dakota Department of Corrections and Rehabilitation (DOCR). I am here to testify in support of House Bill 1195.

This bill proposes to eliminate the sentence of life imprisonment without the possibility of parole for individuals who committed the crime when under the age of 18. Limiting the use of life without parole does not guarantee such individuals will be released; it guarantees them a "meaningful opportunity" for release. Evidence that people age out of crime is compelling. Researches have persistently found that age is one of the most important predictors of criminality. Criminal activity tends to peak in late adolescence or early adulthood and then declines as a person ages. In 2012, in *Miller v. Alabama,* and *Jackson v. Hobbs,* the U.S. Supreme Court held that, for juveniles, mandatory life without parole sentences violate the Eighth Amendment. Writing for the majority, Justice Kagan emphasized that judges must be able to consider the characteristics of juvenile defendants in order to issue a fair and individualized sentence. Adolescence is marked by "transient rashness, proclivity for risk and inability to assess the consequences". Every day within the DOCR we see people who turn their lives around in prison, in spite of the obstacle of incarceration. Kids can and do grow up; and as they develop they change. None of us are the same at 50 as we were at 16. Providing the possibility for parole review decreases the likelihood of continued violent behavior behind bars and provides incentives to engage in meaningful rehabilitative programs so as to be considered more favorably by the parole board.
The DOCR supports the passing of House Bill 1195.

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Testimony to the
House Judiciary Committee
Prepared January 18, 2017
by Aaron Birst, Legal Counsel
North Dakota Association of Counties

Regarding: HB 1195

Thank you Chairman Koppelman and Committee Members, for the opportunity to provide feedback on HB 1195. I would also like to personally thank the bill sponsor for reaching out to the prosecuting community and advancing a bill that certainly deserves public policy discussion.

My name is Aaron Birst and I represent the North Dakota Association of Counties. In particular, our State's Attorney members have concerns with 1195. It is our understanding this bill seeks to remove the possibility of a juvenile ever receiving a life without parole sentence. The State's Attorneys are hesitant to see the creation of a blanket prohibition on such sentences as there may be situations where such a sentence is appropriate for both punishment/deterrent purposes and future protection to the general public.

Here is where prosecutors do agree. There should NEVER be any statute that would require MANDATORY life without parole for juveniles. Currently, NDCC 12.1-20-03(4) requires such a penalty. (regardless of the defendant's age) That statute should be amended to reflect juveniles should not be subjected to such a minimum mandatory sentence.

We also agree life without parole sentences for juveniles should be the rarest of the rare. National trends along with sound scientific research indicates juvenile development would argue for a case by case analysis to determine the possibility of rehabilitation. Not only do prosecutors and the judges who handle these cases philosophically agree with this principal but they have clearly demonstrated their commitment to it. Currently, in North Dakota, only one juvenile has received such a sentence. The State's Attorney from Cass County, Birch Burdick, is also here today to discuss that particular case.

As an alternative to this blanket prohibition, the State's Attorneys would welcome developing additional statutory criteria to ensure life without parole sentences for juveniles remain a seldom seen sentence. This could be accomplished by either additional legislative guidance or by requiring additional elements a jury would have to find before such a sentence could be imposed.

Thank you

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North Dakota 65rd Legislative Assembly
HOUSE JUDICIARY COMMITTEE
Hon. Rep. Kim Koppelman, Chair
Hearing on January 18, 2017

Re: Testimony in Opposition to House Bill 1195

Chairman Koppelman and members of the Committee, I am Birch Burdick, Cass County State's Attorney. I oppose House Bill No. 1195.

First, an overview of recent U.S. Supreme Court opinions on the topic of juvenile sentencing. In 2005, the Court ruled the 8th Amendment's prohibition against cruel and unusual punishment prohibited sentencing juvenile offenders to death (Roper v. Simmons). In 2010, the Court ruled the 8th Amendment prohibited sentencing juvenile offenders to life-without-parole for a non-homicide offense (Graham v. Florida). In 2012, the Court ruled the 8th Amendment prohibited mandatory life-without-parole sentences for juveniles (Miller v. Alabama). In 2016, the Court applied the Miller ruling retroactively (Montgomery v. Louisiana).

In writing these opinions, the U.S. Supreme Court stated juveniles are different than adults. Throughout the decisions they used phrases like: "diminished culpability of youth"; "not as morally reprehensible as … an adult"; their actions are less likely evidence of an irretrievably depraved character; a court should consider a juvenile's "chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences". That said, when the appellants in Miller expressly invited the Supreme Court to ban all life-without-parole sentences for juveniles, at least for those aged 14 or younger, the Court declined. Instead it said "appropriate occasions for sentencing juveniles to the harshest possible penalty (life-without-parole) will be uncommon". After noting the difficulty of distinguishing between "transient immaturity" and "irreparable corruption", it stated a sentencing judge should take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

In Miller and Montgomery, the sentencing judges were **required** to impose life-without-parole given the nature of the crime. North Dakota's law is different – that option is **discretionary** with the judge. The U.S. Supreme Court, which has led this change in the law, has not ventured where House Bill No. 1995 would take you – a complete ban on life-without-parole for a juvenile. I don't believe it is necessary for you to go there. Given the ruling in Miller, under North Dakota's existing law judges will analyze the appropriateness of such a sentence considering the juvenile's unique characteristics. It will undoubtedly be a very rare sentence.

To my knowledge there is only one such case in North Dakota. That juvenile was Barry Garcia, convicted of murdering Cherryl Tendeland, a middle-aged wife and mother, in West Fargo in 1995. He left the sidewalk, strolled across the boulevard, put a shotgun up to the passenger window of the Tendeland car and pulled the trigger. Cherryl was

sitting in that seat. He later said: "she shouldn't have looked at me that way; she won't look at me again that way". In 2016, Mr. Garcia brought a petition for re-sentencing using Miller. The hearing was last Friday. The Court denied his petition, ruling the law did not require re-sentencing. Furthermore the court noted the sentencing judge in 1996 discussed his belief in the power of redemption, especially for juveniles, but then analyzed Mr. Garcia's history of increasing violence, the brutal and cold-blooded nature of the murder, and the State Hospital's determination that he was minimally amenable to rehabilitation, before imposing the sentence.

I was born and raised in North Dakota. It is a wonderful and special place to live. However, I realize we are not so special as to be immune to potentially gruesome crimes. The things that happen elsewhere, can and do happen here. If you let your mind wander into dark places, you can imagine circumstances where the balance of "transient immaturity" and "permanent incorrigibility" may support a life-without-parole sentence. Do not remove the ability of our judges to at least consider it in rare circumstances.

For these reasons I ask you to oppose House Bill No. 1195. Thank you.

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Prepared by the Legislative Council staff for
Representative Klemin
January 31, 2017

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1195

Page 1, line 1, replace "subsection to section 12.1-32-02" with "section to chapter 12.1-32"

Page 1, line 2, remove "life"

Page 1, replace lines 4 through 9 with:

"**SECTION 1.** A new section to chapter 12.1-32 of the North Dakota Century Code is created and enacted as follows:

Juveniles - Sentencing - Reduction.

1. Notwithstanding any other provision of law, a court may reduce a term of imprisonment imposed upon a defendant convicted as an adult for an offense committed and completed before the defendant was eighteen years of age if:

   a. The defendant has served at least twenty years in custody for the offense;

   b. The defendant filed a motion for reduction in sentence; and

   c. The court has considered the factors provided in this section and determined the defendant is not a danger to the safety of any other individual, and the interests of justice warrant a sentence modification.

2. A defendant whose sentence is reduced under this section must be ordered to serve a period of supervised release of at least five years upon release from imprisonment. The conditions of supervised release and any modification or revocation of the term of supervised release must be in accordance with this chapter.

3. When determining whether to reduce a term of imprisonment under this section, the court shall consider:

   a. The factors provided in section 12.1-32-04, including the nature of the offense;

   b. The age of the defendant at the time of the offense;

   c. A report and recommendation from the department of corrections and rehabilitation, including information relating to the defendant's ability to comply with the rules of the institution and whether the defendant completed any educational, vocational, or other prison programming;

   d. A report and recommendation from the state's attorney for any county in which the defendant was prosecuted;

   e. Whether the defendant has demonstrated maturity, rehabilitation, and a fitness to re-enter society sufficient to justify a sentence reduction;

f. A statement by a victim or a family member of a victim who was impacted by the actions of the defendant;

g. A report of a physical, mental, or psychiatric examination of the defendant conducted by a licensed health care professional;

h. The defendant's family and community circumstances at the time of the offense, including any history of abuse, trauma, or involvement in the child welfare system;

i. The role of the defendant in the offense and whether an adult also was involved in the offense;

j. The diminished culpability of juveniles compared to adults and the level of maturity and failure to appreciate the risks and consequences; and

k. Any additional information the court determines relevant.

4. A defendant may make a second motion for a reduction in sentence under this section no earlier than five years after the initial motion for reduction.

5. A defendant may make a final motion for a reduction in sentence no earlier than five years after the order for a second motion was filed."

Renumber accordingly

(1) HB 1195 3/13/17

TESTIMONY OF REP. LAWRENCE R. KLEMIN
SENATE JUDICIARY COMMITTEE
HOUSE BILL NO. 1195
MARCH 13, 2017

Mr. Chairman and Members of the Committee. I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I am here to testify in support of House Bill 1195. This bill relates to the sentencing of juveniles to prison, particularly those juveniles sentenced to life in prison, and allows a court to order the reduction of the sentence of a juvenile after 20 years in prison under certain circumstances.

The United States Supreme Court, in a series of decisions, has held that children are constitutionally different from adults and should not be subjected to the nation's harshest punishments.

In *Roper v. Simmons* (2005) the Court struck down the death penalty for children, finding it to be a violation of the 8th Amendment's prohibition on cruel and unusual punishment.

In *Graham v. Florida* (2010) the Court struck down life without parole sentences for non-homicide offenses, holding that states must give children a "realistic opportunity" to obtain release.

In *Miller v. Alabama* (2012) the Court struck down mandatory life without parole sentences for homicide offenses committed by juveniles, finding that sentencing courts must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."

In *Montgomery v. Louisiana* (2016) the Court affirmed its 2012 *Miller* decision and clarified that *Miller's* conclusion that a sentence of life without parole is disproportionate for the vast majority of juvenile [homicide] offenders and raises a grave risk that many are being held in violation of the Constitution.

HB 1195 is consistent with the spirit of these U.S. Supreme Court decisions and will encourage child offenders to work toward rehabilitation and forgiveness in order to earn a second chance after they have spent a minimum of 20 years in prison. HB 1195 is modeled after Section 209 of the proposed federal Sentencing Reform and Corrections Act of 2015, S.2123, 114th Congress (2015-2016). This Act was approved in committee but was not acted upon before adjournment.

Under current law in North Dakota as set out in Section 27-20-34(1) of the North Dakota Century Code **[see attachment for statutes referred to in this testimony],** a child14 years of age or older, but under the age of 18, who is charged with a Class AA felony, such as murder or gross sexual imposition, can be transferred from Juvenile Court to

the District Court and tried as an adult. If convicted of a crime punishable by life in prison, that child can then either be sentenced to die in prison at the end of his natural life without the opportunity for parole review, or be sentenced to life in prison with the opportunity for parole, pursuant to Section 12.1-32-01(1) of the North Dakota Century Code.

Section 12-59-05 referred to in Section 12.1-32-01, relates to the Parole Board and sets out the factors that the Parole Board must consider in determining an inmate's eligibility for parole.

For violent offenses, including those committed by juveniles, the 85% rule set out in Section 12.1-32-09.1 also applies to life sentences. This means that the offender must serve 85% of the offender's remaining life expectancy determined on the date of sentencing, before the offender is eligible to be considered for parole.

Therefore, under these sections, an adult offender can be sentenced to life in prison with or without the opportunity for parole. If sentenced to life with parole, the adult offender must serve a minimum of **30 years** in prison, or 85% of his remaining life expectancy, whichever is greater. However, for a juvenile offender, the minimum sentence is almost double. For example, a 16 year old offender with a life expectancy of 76 on the date of sentencing, must serve a minimum sentence of ***51 years*** because of the 85% rule. [76 –16 = 60 X 85% = 51 years]

HB 1195 passed the House unanimously [a remarkable event] and creates a new section of law relating to the reduction of sentences of juveniles. Subsection 1 of the bill provides that a court may reduce the sentence of a defendant convicted as an adult for an offense committed before the defendant was 18 years of age under certain conditions. The defendant must have served a minimum of 20 years in prison and must file a motion for reduction of sentence. The court must consider the factors set out in subsection 3 and must determine that the defendant is not a danger to society or to the safety of any individual and the interests of justice warrant a sentence modification.

Subsection 2 provides that a defendant whose sentence is reduced must then serve at least 5 years of supervision after release from prison.

Subsection 3 sets out the factors that the court must consider, including the factors currently set out in Section 12.1-32-04 [attached]. The new factors are consistent with the decisions of the U.S. Supreme Court and include:

- Nature of the offense
- Age at the time of the offense
- Report and recommendation of DOCR

- Report and recommendation of the State's Attorney for the county in which the defendant was prosecuted
- Whether the defendant has demonstrated maturity, rehabilitation, and fitness to re-enter society
- Statement by the victim or the victim's family
- Report of a physical, mental, or psychiatric examination
- Circumstances of the defendant's family at the time of the offense, including any history of abuse, trauma, or involvement in the child welfare system
- Role of the defendant in the commission of the offense and whether an adult was involved
- Diminished culpability of juveniles compared to adults and the level of maturity and failure to appreciate the risks and consequences
- Any additional information the court determines relevant

If the court denies the motion for sentence reduction, subsections 4 and 5 allow a defendant to make a second motion 5 years after the initial motion and a third motion 5 years later. The third denial of sentence reduction is final.

The bill is not expressly stated to be retroactive and therefore should not be retroactive. *See* Section 1-02-10 of the North Dakota Century Code [attached].

This bill does not guarantee the release of anyone, but rather provides that a child who commits a serious crime and who is charged as an adult has the opportunity for sentence reduction and parole review someday. Studies have shown that children's brains are not fully developed until they become adults. Children are less capable than adults to consider the long-term impact of their actions, control their emotions and impulses, or evaluate risks and reward. They are also more vulnerable and susceptible to peer pressure.

This bill will bring the state's juvenile sentencing policies in line with current science involving juvenile brain and behavioral development. In the past 5 years, more than 17 states, including neighboring Montana, Wyoming, and South Dakota have passed legislation modifying sentencing procedures for juveniles and banning sentences of life without parole for juveniles. *See* attached chart.

Mr. Chairman and Members of the committee, I urge your support of House Bill 1195.

Attachment to Klemin Testimony on HB 1195 – Statutory References

1-02-10. Code not retroactive unless so declared.

No part of this code is retroactive unless it is expressly declared to be so.

12-59-05. Consideration by [parole] board.

Every inmate's eligibility for parole must be reviewed in accordance with the rules adopted by the parole board. The board shall consider all pertinent information regarding each inmate, including the circumstances of the offense, the presentence report, the inmate's family, educational, and social history and criminal record, the inmate's conduct, employment, participation in education and treatment programs while in the custody of the department of corrections and rehabilitation, and the inmate's medical and psychological records.

12.1-32-01. Classification of offenses — Penalties.

Offenses are divided into seven classes, which are denominated and subject to maximum penalties, as follows:

1. Class AA felony, for which a maximum penalty of life imprisonment without parole may be imposed. The court must designate whether the life imprisonment sentence imposed is with or without an opportunity for parole. Notwithstanding the provisions of section 12-59-05, a person found guilty of a class AA felony and who receives a sentence of life imprisonment with parole, shall not be eligible to have that person's sentence considered by the parole board for thirty years, less sentence reduction earned for good conduct, after that person's admission to the penitentiary.

12.1-32-04. Factors to be considered in sentencing decision.

The following factors, or the converse thereof where appropriate, while not controlling the discretion of the court, shall be accorded weight in making determinations regarding the desirability of sentencing an offender to imprisonment:

1. The defendant's criminal conduct neither caused nor threatened serious harm to another person or his property.

2. The defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person or his property.

3. The defendant acted under strong provocation.

4. There were substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the defendant's conduct.

5. The victim of the defendant's conduct induced or facilitated its commission.

6. The defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained.

7. The defendant has no history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial period of time before the commission of the present offense.

8. The defendant's conduct was the result of circumstances unlikely to recur.

9. The character, history, and attitudes of the defendant indicate that he is unlikely to commit another crime.

10. The defendant is particularly likely to respond affirmatively to probationary treatment.

11. The imprisonment of the defendant would entail undue hardship to himself or his dependents.

12. The defendant is elderly or in poor health.

13. The defendant did not abuse a public position of responsibility or trust.

14. The defendant cooperated with law enforcement authorities by bringing other offenders to justice, or otherwise cooperated.

Nothing herein shall be deemed to require explicit reference to these factors in a presentence report or by the court at sentencing.

12.1-32-09.1. Sentencing of violent offenders.

1. Except as provided under section 12-48.1-02 [conditions of eligibility for release programs] and pursuant to rules adopted by the department of corrections and rehabilitation, an offender who is convicted of a crime in violation of section 12.1-16-01 [murder], 12.1-16-02 [manslaughter], subsection 2 of section 12.1-17-02 [aggravated assault], section 12.1-18-01 [kidnapping], subdivision a of subsection 1 or subdivision b of subsection 2 of section 12.1-20-03 [gross sexual imposition], section 12.1-22-01 [robbery], subdivision b of subsection 2 of section 12.1-22-02 [burglary], or an attempt to commit the offenses, and who receives a sentence of imprisonment is not eligible for release from confinement on any basis until eighty-five percent of the sentence imposed by the court has been served or the sentence is commuted. [Note that not all of these crimes are punishable as Class AA felonies.]

2. In the case of an offender who is sentenced to a term of life imprisonment with opportunity for parole under subsection 1 of section 12.1-32-01 [Class AA felonies], the term "sentence imposed" means the remaining life expectancy of the offender on the date of sentencing. The remaining life expectancy of the offender must be calculated on the date of sentencing, computed by reference to a recognized mortality table as established by rule by the supreme court.

3. Notwithstanding this section, an offender sentenced under subsection 1 of section 12.1-32-01 may not be eligible for parole until the requirements of that subsection have been met.

27-20-34. Transfer to other courts.

1. After a petition has been filed alleging delinquency based on conduct which is designated a crime or public offense under the laws, including local ordinances or resolutions of this state, the court before hearing the petition on its merits shall transfer the offense for prosecution to the appropriate court having jurisdiction of the offense if:

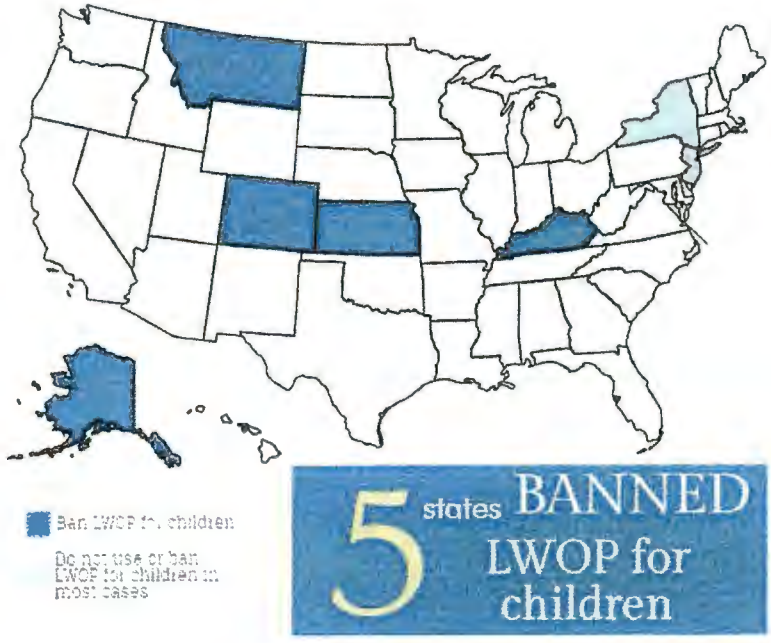
a. The child is over sixteen or more years of age and requests the transfer;

b. The child was fourteen years of age or more at the time of the alleged conduct and the court determines that there is probable cause to believe the child committed the alleged delinquent act and the delinquent act involves the offense of murder or attempted murder; gross sexual imposition or the attempted gross sexual imposition of a victim by force or by threat of imminent death, serious bodily injury, or kidnapping; or

c. (1) The child was fourteen or more years of age at the time of the alleged conduct; . . .

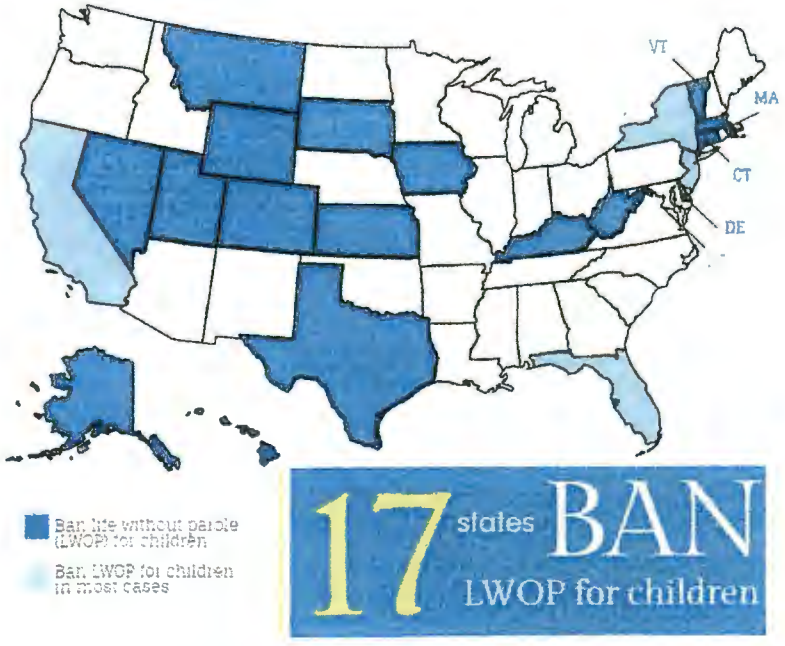
BANS **TRIPLE** IN 5 YEARS

2011



5 states BANNED LWOP for children

2016



17 states BAN LWOP for children

(2)

Senate Judiciary Committee
Senator Kelly Armstrong, Chairman
March 13, 2017

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Leann Bertsch, Director, North Dakota Department of Corrections and Rehabilitation
Presenting testimony on HB 1195

My name is Leann Bertsch and I am the Director of the North Dakota Department of Corrections and Rehabilitation (DOCR). I am here to testify in support of House Bill 1195.

This bill proposes to provide a method for the sentencing court to reduce a sentence of life imprisonment without the possibility of parole for individuals who committed the crime when under the age of 18. House Bill 1195 as introduced would have eliminated the sentence of life imprisonment without the possibility of parole for individuals who committed the crime when under the age of 18. The bill, as engrossed, places the authority for any sentence reduction with the court rather than the parole board. It also outlines in great detail the factors the court shall consider when determining whether to reduce a term of imprisonment. This new section to chapter 12.1-32 of the North Dakota Century Code does not guarantee such individuals will be released or have their sentence reduced; it guarantees them a "meaningful opportunity" for review. Evidence that people age out of crime is compelling. Researchers have persistently found that age is one of the most important predictors of criminality. Criminal activity tends to peak in late adolescence or early adulthood and then declines as a person ages. In 2012, in *Miller v. Alabama,* and *Jackson v. Hobbs,* the U.S. Supreme Court held that, for juveniles, mandatory life without parole sentences violate the Eighth Amendment. Writing for the majority, Justice Kagan emphasized that judges must be able to consider the characteristics of juvenile defendants in order to issue a fair and individualized sentence. Adolescence is marked by "transient rashness, proclivity for risk and inability to assess the consequences". Every day within the DOCR we see people who turn their lives around in prison, in spite of the obstacle of incarceration. Kids can and do grow up; and as they develop they change. None of us are the same at 50 as we were at 16. Providing the possibility for judicial review decreases the likelihood of continued

violent behavior behind bars and provides incentives to engage in meaningful rehabilitative programs so as to be considered more favorably by the sentencing court. The DOCR supports the passing of House Bill 1195.

3/13/17 (3) HB 1195

the CAMPAIGN for the FAIR SENTENCING of YOUTH

TESTIMONY IN SUPPORT OF HB 1195
PRESENTED TO THE NORTH DAKOTA SENATE JUDICIARY COMMITTEE
MARCH 13, 2017

Mr. Chairman and members of the Committee:

The Campaign for the Fair Sentencing of Youth respectfully submits this testimony for the official record to express our support for HB 1195. We are grateful to Representative Klemin for his leadership in introducing this bill and appreciate the North Dakota Legislature's willingness to address this important constitutional and human rights issue concerning the extreme sentencing of North Dakota's children.

The Campaign is a national coalition and clearinghouse that coordinates, develops and supports efforts to implement age-appropriate alternatives to the extreme sentencing of America's youth with a focus on abolishing life without parole sentences for all youth. We work closely with formerly incarcerated youth, family members of victims, and family members of incarcerated youth to help develop sentencing alternatives for children that focus on their rehabilitation and capacity for reintegration into society. We work with policymakers across the political spectrum as well as a variety of national organizations to develop policy solutions that will keep our communities safe and hold children accountable when they are convicted of serious crimes.

The Campaign supports HB 1195 because, if signed into law, it will ensure that North Dakota fulfills the spirit of recent U.S. Supreme Court rulings that children, because they are constitutionally different from adults, should not be subject to our nation's harshest punishments. This bill would allow child offenders convicted of serious crimes to petition the court for sentencing review after serving a mandatory minimum of 20 years.

Life Sentences Without the Possibility of Parole
Today, approximately 2,500 individuals have been sentenced to life without parole for crimes committed as children.

This sentence is a final judgment that disregards children's unique capacity to grow and change as they mature into adulthood. Studies have shown that children's brains are not fully developed. As a result, children are less capable than adults to consider the long-term impact of their actions, control their emotions and impulses, or evaluate risks and reward. They also are more vulnerable and susceptible to peer pressure.

We also know from experience and from behavioral and brain development experts that children possess a unique capacity for change. The vast majority of children who commit crimes age out

of criminal behavior and no longer pose a threat to society in adulthood. This highlights the need for sentencing policies that reflect the scientific and developmental realities of children, and allow judges to review sentences imposed upon children after they have matured into adulthood.

Our country's recognition that children are still developing and have lessened culpability is reflected in the limitations we place on them. We don't allow children to enter into contracts, purchase or consume tobacco and alcohol, vote, or engage in other adult activities. We should also look at children who commit crimes through this same lens.

The practice of sentencing children to die in prison stands in direct contradiction to what we know about children. These sentences also are most frequently imposed upon the most vulnerable members of our society. Nearly 80 percent of juvenile lifers reported witnessing violence in their homes: more than half (54.1%) witnessed weekly violence in their neighborhoods. In addition, 50 percent of all children sentenced to life in prison without the possibility of parole have been physically abused and 20 percent have been sexually abused during their life. For girls serving life without parole sentences, more than 80 percent have been sexually assaulted.[1]

The United States is the ONLY country in the world that uses life without the possibility of release as a sentencing option for children. [2] Most recently, Utah, South Dakota, Texas, Wyoming, Kentucky, Kansas, Colorado, Montana, Alaska, Hawaii, Delaware, Massachusetts, and West Virginia have all passed legislation allowing for some form of review (parole or judicial), later in life, to children convicted of serious offenses. These states represent geographic and political diversity which highlights the widespread support for these policies on both sides of the aisle.

In light of the U.S. Supreme Court trends, adolescent development research and growing support from policymakers and opinion leaders, several additional states are considering abolition measures during this legislative cycle as well.

Fiscal Burden

Aside from the human rights and constitutional reasons for North Dakota to pass HB 1195, there is also a strong fiscal argument to be made in support of this legislation. In the U.S. it costs approximately $2.5 million to incarcerate a child for the duration of his or her life. Collectively the 2,500 individuals sentenced to life without parole will cost taxpayers an estimated $6.2 billion over their lifetimes.[3] In contrast, a child with a high school education who is paroled after serving 10 years could potentially contribute $218,560 in tax revenue.[4] A formerly incarcerated child who obtains a college degree can potentially contribute $706,560 in tax revenue over their

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[1] *The Lives of Juvenile Lifers*, The Sentencing Project, March 2012, http://sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf

[2] *Here Are All the Countries Where Children Are Sentenced to Die in Prison*, Huffington Post, Saki Knafo, September 20, 2013, http://www.huffingtonpost.com/2013/09/20/juvenile-life-without-parole_n_3962983.html

[3] *The Mass Incarceration of the Elderly*, ACLU, June 2012. Available at: https://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf

[4] *The Fiscal Consequences of Adult Educational Attainment*, National Commission on Adult Literacy. Retrieved from: http://www.nationalcommissiononadultliteracy.org/content/fiscalimpact.pdf

lifetime.[5] These figures do not include their contributions to the local economy, job productivity, or the intangible impact of being positive role models for other at-risk youth.

The U.S. Supreme Court

The United States Supreme Court, in a series of decisions during the last decade, has said that children are constitutionally different from adults and should not be subject to the nation's harshest punishments. In *Roper v. Simmons* (2005) the Court struck down the death penalty for children, finding it to be a violation of the 8th Amendment's prohibition on cruel and unusual punishment.[6] In that opinion, the Court emphasized the brain and behavioral development science showing that children are fundamentally different than adults in their development and that they have a unique capacity to grow and change as they mature.[7] In *Graham v. Florida* (2010) the Court struck down life without parole sentences for non-homicide offenses, holding that states must give children a "realistic opportunity to obtain release."[8] Finally, in *Miller v. Alabama* (2012) the Court struck down mandatory life without parole sentences for homicide offenses, finding that sentencing courts must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[9]

In the wake of these decisions, 13 states have eliminated life without the possibility of release as a sentencing option for children by providing review through either the parole board or judiciary. In addition, the American Bar Association recently adopted Resolution 107C, which was voted for and supported by the U.S. Department of Justice, calling on all states and the federal government to "eliminate life without the possibility of release or parole for youthful offenders [under 18 years of age] both prospectively and retroactively."

HB 1195 will bring North Dakota in line with the letter and spirit of these Supreme Court decisions by allowing judges to review and modify sentences for children in appropriate cases. This bill is the right policy to ensure public safety, fiscal responsibility, and fair and age-appropriate sentencing standards for North Dakota's children. It is also an example of common sense, practical solutions for holding children accountable when they come into conflict with the law.

Children can and do commit serious crimes. While they must be held responsible, our response must not be focused on retribution. Instead, it must be measured and assure age-appropriate accountability that focuses on the unique capacity of children to grow, change and be rehabilitated. Therefore, we strongly urge this committee to vote favorably upon HB 1195. Thank you for your consideration.

James L. Dold, J.D.
Advocacy Director & Chief Strategy Officer,
The Campaign for the Fair Sentencing of Youth

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[5] *Id.*

[6] *Roper v. Simmons*, 543 U.S. 551 (2005).

[7] *Id.*

[8] *Graham v. Florida*, 130 S. Ct. 2011 (2010).

[9] *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

① 3/13/17

17.0583.03000

Sixty-fifth
Legislative Assembly
of North Dakota

INTERN DRAFT AMENDMENT ENGROSSED HOUSE BILL NO. 1195

update title

SECTION1. AMENDMENT. Subsection 4 of section 12.1-20-03 of the North Dakota Century Code is amended and reenacted as follows:

Gross sexual imposition - Penalty.

4. If, as a result of injuries sustained during the course of an offense under this section, the victim dies, the offense is a class AA felony, for which the maximum penalty of life imprisonment without parole must be imposed unless the defendant was a juvenile at the time of the offense.

Renumber accordingly

North Dakota
CENTURY CODE

REPLACEMENT

VOLUME 2B

1995 Pocket Supplement

Containing
New Statutes and Amendments to Statutes of a General and Permanent Nature Enacted by the Legislative Assembly Since Publication of Replacement Volume 2B of the Century Code

PUBLISHED BY AUTHORITY OF THE LEGISLATIVE ASSEMBLY
UNDER THE SUPERVISION AND WITH THE ASSISTANCE OF THE
LEGISLATIVE COUNCIL AND THE SECRETARY OF STATE

MICHIE BUTTERWORTH
Law Publishers
CHARLOTTESVILLE, VIRGINIA

Source: S.L. 1993, ch. 125, § 2; 1995, ch. 133, §§ 1, 2.

Effective Date.

The 1995 amendment of this section by sections 1 and 2 of chapter 133, S.L. 1995 became effective July 1, 1995, pursuant to N.D. Const., Art. IV, § 13.

Construction.

—Reasonable Grounds.

"Reasonable grounds" is synonymous with the term "probable cause." Svedberg v. Stamness, 525 N.W.2d 678 (N.D. 1994).

Fighting Words.

To determine what constitutes fighting words, a court must consider both the content and the context of the expression, including the age of the participants. Svedberg v. Stamness, 525 N.W.2d 678 (N.D. 1994).

Taunts, threats including a threat to kill, and the public display of snow effigies which were constructed to harass victim, when delivered to a 14-year-old, were sufficient when taken as a whole to constitute fighting words, and were therefore unprotected by the First Amendment. Svedberg v. Stamness, 525 N.W.2d 678 (N.D. 1994).

Reasonable Grounds.

Reasonable grounds exist for purposes of this section when facts and circumstances presented to the judge are sufficient to warrant a person of reasonable caution to believe that acts constituting the offense of disorderly conduct have been committed. Svedberg v. Stamness, 525 N.W.2d 678 (N.D. 1994).

CHAPTER 12.1-32

PENALTIES AND SENTENCING

12.1-32-01. Classification of offenses — Penalties. Offenses are divided into seven classes, which are denominated and subject to maximum penalties, as follows:

1. Class AA felony, for which a maximum penalty of life imprisonment without parole may be imposed. The court must designate whether the life imprisonment sentence imposed is with or without an opportunity for parole. Notwithstanding the provisions of section 12-59-05, a person found guilty of a class AA felony and who receives a sentence of life imprisonment with parole, shall not be eligible to have that person's sentence considered by the parole board for thirty years, less sentence reduction earned for good conduct, after that person's admission to the penitentiary.
2. Class A felony, for which a maximum penalty of twenty years' imprisonment, a fine of ten thousand dollars, or both, may be imposed.
3. Class B felony, for which a maximum penalty of ten years' imprisonment, a fine of ten thousand dollars, or both, may be imposed.
4. Class C felony, for which a maximum penalty of five years' imprisonment, a fine of five thousand dollars, or both, may be imposed.
5. Class A misdemeanor, for which a maximum penalty of one year's imprisonment, a fine of one thousand dollars, or both, may be imposed.
6. Class B misdemeanor, for which a maximum penalty of thirty days' imprisonment, a fine of five hundred dollars, or both, may be imposed.
7. Infraction, for which a maximum fine of five hundred dollars may be imposed. Any person convicted of an infraction who has, within one year prior to commission of the infraction of which the person was convicted, been previously convicted of an offense classified as an infraction may be sentenced as though convicted of a class B misdemeanor. If the prosecution contends that the infraction is punishable as a class B misdemeanor, the complaint shall specify that the offense is a misdemeanor.

This section shall not be construed to forbid sentencing under section 12.1-32-09, relating to extended sentences.

Source: S.L. 1973, ch. 116, § 31; 1975, ch. 116, § 23; 1979, ch. 177, § 2; 1995, ch. 134, § 1.

Effective Date.

The 1995 amendment of this section by section 1 of chapter 134, S.L. 1995 became effective August 1, 1995.

Class B Misdemeanor.

The punishments set forth in section 39-08-01(4)(a) are mandatory minimum penalties and because a first-time offender is guilty of a Class B misdemeanor under section 39-08-01(2), he may be punished in accordance with the punishments specified for a Class B misdemeanor in subsection 6, — up to a $500 fine, 30 days' imprisonment, or both; thus, the trial court was not limited to sentencing the defendant to pay a fine of $250 and to undergo an addiction evaluation. State v. Nelson, 417 N.W.2d 814 (N.D. 1987).

Class C Felony.

Sentence of three years imprisonment and three years suspension of probation for a class C felony exceeded in duration the maximum sentence of imprisonment for the offense, which is five years. State v. Nace, 371 N.W.2d 129 (N.D. 1985), decided prior to the enactment of NDCC section 12.1-32-06.1.

Maximum Sentences.

Provision of section 12.1-32-02(1) that sentences imposed thereunder shall not exceed in duration the maximum sentences of imprisonment provided by this section plainly applies to "combination" sentences, as well as sentences of imprisonment. State v. Nace, 371 N.W.2d 129 (N.D. 1985), decided prior to the enactment of NDCC section 12.1-32-06.1.

Where there was no indication in the record that the trial court considered an impermissible factor in sentencing defendant accused of breaking into a vehicle, imposition of maximum penalty of five years' imprisonment was not error. State v. Manhattan, 453 N.W.2d 758 (N.D. 1990).

Parole Eligibility.

Failure of the sentencing judge to advise defendant of the parole eligibility provision of this section was not a violation of Rule 11, N.D.R.Crim.P., nor did it affect the voluntariness of defendant's guilty plea. Houle v. State, 482 N.W.2d 24 (N.D. 1992) (urging judges however, to inform defendants of parole ineligibility features of the North Dakota Century Code).

Parole Ineligibility.

There is no mandatory minimum punishment which must be imposed for a class AA

STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF CASS — EAST CENTRAL JUDICIAL DISTRICT

Barry Caesar Garcia,

Petitioner - Appellant,

vs.

State of North Dakota,

Respondent – Appellee.

CERTIFICATE OF ELECTRONIC SERVICE

Supreme Court No. 201700030
SA No. 17-AP-00005

[¶1] I, Birch P. Burdick, hereby certify that on July12, 2017, the following document:

2017 HB 1195 Minutes and Testimony

was served by e-mail on the following:

Sam Gereszek
sam@egflawyer.com

John Mills
j.mills@phillipsblack.org

Dated this 14th day of July, 2017.

Birch P. Burdick

Subscribed and sworn to before me this dated this 14th day of July, 2017.

KATHERINE ANN JONES
Notary Public
State of North Dakota
My Commission Expires Dec. 29, 2020

Notary Public