Office of the Ohio Public Defender

Timothy Young, State Public Defender

Testimony in Support of SB256
Parole Eligibility for Juveniles Sentenced as Adults
Sponsors Senators Lehner and Manning

Chair Lang, Vice Chair Plummer, Ranking Member Leland and members of the House Criminal Justice Committee, thank you for the opportunity to testify on behalf of the Office of the Ohio Public Defender (OPD) in support of Senate Bill 256 (SB256).

SB256 establishes timelines for parole eligibility for juvenile offenders serving extended prison sentences, it abolishes the sentence of juvenile life without the possibility of parole, and it requires the sentencing court and parole board to consider youth and its characteristics as mitigating factors. OPD strongly encourages this committee to support SB256. Passage of SB256 will ensure that most children given adult sentences have the opportunity for parole review. Under the bill, children incarcerated for a non-homicide offense will have a parole hearing after serving 18 years in prison, and children serving prison time for homicide offenses will have a parole hearing after serving 25 years. The bill creates an exception for children convicted of an "aggravated homicide offense," defined in the bill as the killing of three or more victims as the principal offender or an act of terrorism when the underlying offense is murder or aggravated murder. Individuals convicted of this offense will not receive parole eligibility.

Since 2005, the U.S. Supreme Court held certain sentences for children are unconstitutional. Those sentences include death, life in prison without parole for non-homicide offenses, and, in homicide cases, sentencing children to mandatory life without parole.[1]

[1] *Roper v. Simmons*, 543 U.S. 551, (2005); *Graham v. Florida*, 560 U.S. 48, 82, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, ¶ 48 (2016); and *Miller v. Alabama*, 567 U.S. 460, 489, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

Federal caselaw requires states to offer all but "those rare children whose crime reflect irreparable corruption" a "meaningful opportunity for release."[2] Furthermore, in 2016, the Ohio Supreme Court, in a decision written by Justice Pfeiffer, held in *State v. Moore*[3] that de facto life sentences for juveniles, sentences that exceed the juvenile's life expectancy, are unconstitutional for non-homicide offenses.

A "meaningful opportunity for release" can either be through a new sentencing hearing or a parole review hearing.[4] Without legislation to bring Ohio's law into compliance with state and federal caselaw, Ohio will be encumbered by long and expensive litigation to address the resentencing of juveniles who received life without parole or lifelong sentences, and to further define vague terms like what "exceeds a child's lifetime." If these children are not provided relief under the bill, they will be forced to litigate their unconstitutional sentences. Providing parole hearings and allowing these children a "meaningful opportunity for release,"[5] as is proposed in SB256, will save Ohio from the heavy burden of a plethora of litigation.

Allowing children sentenced as adults the opportunity for release is not only a decision of economics and efficiency, it is also a moral imperative. That is why bills like SB256 are passing nationwide. Twenty-three states and the District of Columbia have eliminated life without parole as a sentencing option for children. These states represent the diversity of our country – they are red states and blue states, in the Midwest, Northeast, South, and Pacific Coast. They include our neighbors like Kentucky and West Virginia. Ohio should join these states by passing SB256 which recognizes that children, even those convicted of serious crimes, have the potential for rehabilitation.

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[2] *Montgomery v. Louisiana*, 577 U.S. __, 136 S.Ct. 718, 734, 193 L.Ed.2d 599 (2016).
[3] *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288.
[4] *See id.* at 735-736.
[5] *Miller v. Alabama*, 567 U.S. 460, 489, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

Not all crimes are created equal, especially when the perpetrator is a minor. Ohio Supreme Court Chief Justice O'Connor wrote that, "minors are less mature and responsible than adults…they are lacking in experience, perspective, and judgment, and…they are more vulnerable and susceptible to the pressures of peers than are adults."[6] Many children accused of crimes have developmental disabilities or mental health issues. Additionally, it is not unusual to have instances where a child was manipulated by an adult in the course of a serious offense.

As a society we have long recognized that kids are not little adults. They require laws aimed at protecting them from certain people and activities. It is these same vulnerabilities that necessitate that children receive special recognition in our criminal justice system. Children are less culpable than adults; they have less control over their environments; they are more susceptible to peer pressure; and their brains, specifically the frontal lobe which is responsible for executive functioning, are not fully developed to weigh long-term consequences.[7] The U.S. Supreme Court has acknowledged that juveniles' personalities are not as "well formed" as adults[8], and they have greater capacity for change.[9] They are therefore, constitutionally different from adults. Even children that commit a crime can grow, change, and benefit from education, treatment, and rehabilitation.[10] That is why this bill is supported by a broad coalition of groups and individuals. As you can see from the individuals that submitted proponent testimony, this bill is supported by legal experts, formerly incarcerated individuals, the friends and family members of incarcerated individuals, friends and family members and victims of

[6] *State v. Aalim*, 2017-Ohio-2956, ¶109 (O'Connor, dissenting), quoting *State v. Long*, 138 Ohio St.3d 478, ¶33 (O'Connor, concurring).
[7] *Roper v. Simmons*, 543 U.S. 551, 569-570, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).
[8] *Roper v. Simmons*, 543 U.S. 551, 570, 125 S.Ct. 1183 (2005).
[9] *Graham v. Florida*, 560 U.S. 48, 77, 130 S.Ct. 2011 (2010).
[10] *Montgomery* at 726, 736-737.

juvenile offenders, and judges who have expertise in this area. SB256 is supported by the people who best understand the impact of incarcerating juveniles for life.

It is extremely important to note that a parole hearing does not guarantee release. From 2014-2016, the Ohio Department of Rehabilitation and Correction Parole Board release rate was only 7.57%.[11] A Senator Manning discussed during sponsor testimony, the rate of release between 2014 – 2018 at the first parole hearing was .4%, 1 out of 237. A parole hearing is simply an opportunity for that individual to present to the Parole Board the ways in which he or she has grown, changed, and been rehabilitated since they were a juvenile.

Ohio law has permitted, or mandated, certain children be tried as adults for over 50 years. As result, we recently determined, in collaboration with the Ohio Parole Board, that as many as 17% of individuals reviewed for parole every month was under 18 at the time of their offense. That is why SB256 includes guidance from the Supreme Court to the Parole Board, including the meaningful opportunity for release standard and mitigating factors of youth.

As Senate President Obhof said from the floor of the Senate while speaking in support of this bill, “We are a nation that believes in redemption.” Passage of SB256 will ensure that juveniles are given individual consideration at the time they are sentenced in the adult court system and access to a parole hearing where their growth, maturity, and rehabilitation can be considered.

Thank you for the opportunity to testify in support of SB256. I am happy to answer any questions.

[11] Department of Rehabilitation and Corrections 2014 – 2016 Calendar Year Reports, Links available at http://drc.ohio.gov/reports/parole (accessed February 1, 2018).

SENATE BILL 256: KIDS SENTENCED AS ADULTS – PAROLE ELIGIBILITY

Sponsors Senators Lehner and Manning

"We are a nation that believes in redemption."

- President Larry Obhof speaking in support of the bill on the Senate floor

BILL SUMMARY

- **United States Supreme Court and Supreme Court of Ohio have ruled:**
  - For non-homicide offenses, kids cannot receive life without parole sentences[1] or sentences that exceed their lifetime.[2]
  - For homicide offenses, kids cannot receive mandatory life without parole because kids have "diminished culpability and heightened capacity for change."[3]
- **SB256 is the next step–it abolishes discretionary life without parole (LWOP) for kids and provides parole eligibility for kids serving extended sentences in adult prison:**
  - After serving 25 years for homicide offenses;
  - After serving 18 years for all other offenses.
- **SB256 does not grant parole eligibility for "Aggravated Homicide Offenses," defined as the purposeful killing of three or more persons, or an act of terrorism that involves murder or aggravated murder.**
- **The bill provides juvenile offenders with an opportunity to show the parole board that they have been rehabilitated and pose no threat to the community.**
- **This issue has been vetted by the Ohio General Assembly for 4.5 years over four bills and 16 hearings.**[4]
  - In 2016, HB521 (Manning) passed the House 92–4.

[1] *Graham v. Florida*, 560 U.S. 48 (2011).
[2] *State v. Moore*, 149 Ohio St.3d 557 (2016).
[3] *Miller v. Alabama*, 567 U.S. 460 (2012).
[4] The General Assembly heard from more than 40 proponents, including judges, victims, religious leaders, released juvenile offenders, families of incarcerated juvenile offenders, former prosecutors, juvenile development experts, and legal experts.

PROPONENT TESTIMONY

Justice-involved children deserve love, mercy, forgiveness, and the support they need to change their future. That's why the Ohio Conservative Juvenile Justice Network, policy leaders, and judicial experts like me are advocating for this bill and for these youth to have a 'meaningful opportunity' to turn their lives around.

Justice Evelyn Stratton, Retired, OCJJN

To be clear, S.B. 256 would not automatically grant a juvenile offender release after 18 or 25 years. It merely allows a parole board hearing to determine whether the offender has been sufficiently rehabilitated to be considered for release. This meaningful hearing is what the Constitution requires.

Justice Paul Pfeiffer, Retired, Ohio Judicial Conference

My story is not unique. I am one of many people who went to prison as children after they were convicted of serious crimes who are now dedicating their lives to strengthen our communities, our states and our country.

Xavier McElrath-Bey, The Campaign for the Fair Sentencing of Youth

The changes proposed in Senate Bill 256 are not radical, have been passed in other jurisdictions, and are meant to harmonize Ohio law with recent court rulings.

Jeff Dillon, Americans for Prosperity Ohio

"I saw those boys in court. When I saw them, I thought I was going to see men. They were babies, and I knew I had to look deeper, so I did, and that's why I'm here."

- Rukiye Abdul-Mutakallim, speaking, during proponent testimony, of the juveniles who killed her son

CORRECTING THE MYTHS

Parole review ≠ release from prison	• The bill grants parole review to juvenile offenders; it does not guarantee release. • DRC estimates that the number of individuals released pursuant to this bill will be 5–10 annually.[5]
The bill will not make Ohio less safe	• Kids are different, and even those who commit crime are less culpable and uniquely hardwired for successful rehabilitation.[6] • Research shows that incarcerating youths for longer than 15 to 20 years has diminished returns for public safety.[7] • A study of juvenile offenders released in Pennsylvania found a recidivism rate of approximately 1%.[8]
The bill will not make Ohio an outlier	• Twenty-three states and the District of Columbia have abolished LWOP for kids. • The bill will bring Ohio in line with those other states, including, Arkansas, West Virginia, and Virginia.
The bill does not put an additional burden on victims	• The parole process in the bill is the exact same process as current law that allows victims to participate if they wish. • The U.S. Supreme Court held that kids must have a "meaningful opportunity to obtain release"[9] either through parole or a resentencing hearing.[10]
The bill does not limit judicial discretion	• Other than prohibiting the sentence of LWOP for kids, the bill does not limit available sentences. • Judges can sentence more serious cases to longer sentences while giving less serious cases shorter sentences. • If the juvenile offender is never granted parole, juveniles sentenced to harsher sentences will serve more time in prison, perhaps their entire life.
Mass shooters will not be released from prison because of this bill	• Individuals convicted of the killing of three or more victims do not get parole eligibility under the bill. • A future mass shooter could get a consecutive sentence much longer than their life span, for example 99 years to life (30 to life per victim + gun specifications).

[5] Fiscal Note & Local Impact Statement for SB256, Legislative Service Commission
[6] *Graham v. Florida*, 560 U.S. 48 (2011); *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, 577 U.S. __ (2016); *State v. Moore*, 149 Ohio St.3d (2016).
[7] *Still Life America's Increasing Use of Life and Long-Term Sentences*, The Sentencing Project Research and Advocacy for Reform, 2017, www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf
[8] Tarika Daftary-Kapur and Tina M. Zottoli, *Resentencing of Juvenile Lifers: The Philadelphia Experience*, Montclair State University, www.msudecisionmakinglab.com/philadelphia-juvenile-lifers
[9] *Miller v. Alabama*, 567 U.S. 460,479 (2012).
[10] *Montgomery v. Louisiana*, 577 U.S. __, 1436 S.Ct. 718, 736 (2016).

Published by the Office of the Ohio Public Defender, 2020

"The bill you are considering today is telling our young people in prison that they are more than the worst mistake they ever made. You're telling them that you won't give up on them. They need a path to redemption and you are creating it."

Tyra Patterson, Ohio Justice and Police Center

Response to the OPAA's Requests Regarding SB256

Senate Bill 256 - Sponsors Senators Lehner and Manning

Background: On Sep. 23, 2020, the Senate passed Senate Bill 256 by a vote of 29–4.[1] Prior to the vote, all the Ohio Prosecuting Attorneys Association's requested changes were rejected by the Senate. Further, OPAA's suggestions are adamantly opposed by the bill's proponents.

Cognitive development and social science have rejected the notion that young people are static: What a child does at the age of fourteen—or seventeen—does not define who or what that child will become. Given what we know about brain development and a child's capacity to change, it is imprudent to spend up to $4 million to incarcerate a changed and rehabilitated person for the rest of their life.[2] Common sense, the courts, and science tell us that kids are different than adults and deserve special consideration.

The purpose of SB256 is to give kids a second chance. OPAA's suggestions below extinguish the purpose of the bill; accordingly, they were rejected by the Senate and should be rejected by the House.

OPAA SUGGESTION #1: "Maintain discretionary LWOP sentences as permitted by *Miller*."

REASON FOR REJECTION

While it is accurate that *Miller v. Alabama*[3] addressed mandatory life without parole (LWOP), that fact did not stop 23 other states and the District of Columbia from eliminating all juvenile life without parole (JLWOP) sentences. Further, it incorrectly suggests that the Supreme Court has not given states guidance regarding discretionary JLWOP. In fact, the Court has remanded five discretionary JLWOP cases to the lower courts instructing the courts to apply *Miller*.[4]

Virginia is the most recent state to eliminate discretionary JLWOP and allow parole eligibility to juvenile offenders after serving 20 years. Virginia passed its law knowing that the juvenile codefendant of the D.C. sniper, who was responsible for the death of ten people, would receive parole review after serving 20 years. Despite the horrible facts of that case, Virginia acted on its the legal, economic, and moral imperative to pass legislation. Even the Virginia Association of Commonwealth Attorneys supported the legislation because they recognized that it is consistent with how the majority of states now sentence children.

[1] www.legislature.ohio.gov/legislation/legislation-votes?id=GA133-SB-256
[2] Kevin Werner, SB256 Proponent Testimony, Ohio Justice and Policy Center, Feb. 19, 2020.
[3] *Miller v. Alabama*, 567 U.S. 460 (2012).
[4] see *Tatum v. Arizona*, 580 U.S. __, No. 15-8850, (2016).

Published by the Office of the Ohio Public Defender, 2020

OPAA SUGGESTION #2: "Address *Miller* by requiring parole eligibility after 40 years for any person sentenced as a juvenile to mandatory LWOP. Prohibit juvenile mandatory life without parole sentences going forward."

REASON FOR REJECTION

This suggestion does not fit with Ohio law and Supreme Court precedent. First, a mandatory LWOP sentence for juveniles is unconstitutional.[5] Further, Ohio does not currently have anyone serving mandatory JLWOP. OPAA's proposal adds significant years before parole eligibility despite evidence that this extension is not needed for either public safety or rehabilitation, and, therefore, places an unnecessary financial burden on taxpayers.[6]

The Supreme Court has said that kids should have a "meaningful opportunity for release."[7] While that term is still being litigated, and this bill would save Ohio from that litigation, it is undisputed that every year of incarceration takes 2 years off an individual's life expectancy.[8] It is not a "meaningful opportunity for release" to deny parole eligibility until an individual is between 54–57 years old. Some juvenile offenders will die before they see the parole board. Furthermore, we know the parole board's release rate between 2014–2016 was only 7.57%.[9] OPAA's suggestion would unconstitutionally destroy any chance for some individuals to become contributing members of society.

SB256's current language allowing parole eligibility after 25 years for homicide cases is consistent with other states that have statutorily granted parole eligibility for kids sentenced as adults.[10]

OPAA SUGGESTION #3: "Address *Moore* by requiring parole eligibility after a person sentenced as a juvenile has served 80% of a sentence or 40 years, whichever comes first, in a non-homicide case.

Otherwise there is no distinction based on the seriousness of the crime. Someone like Moore, who was convicted of 12 very serious offenses with 11 specifications, would be treated the same as someone convicted of some lesser series of crimes who was still subjected to an extended sentence."

REASON FOR REJECTION

These suggestions, if implemented, would result in Ohio passing the most extreme, punitive bill on youth sentencing of any state since *Miller v. Alabama* was decided by the U.S. Supreme Court in 2012. It would make Ohio a national outlier for nonhomicide cases. To suggest this bill results in no distinction in sentences is patently false. Senate President Obhof spoke to this fact on the Senate floor before the vote. Perhaps even more telling, the largest proponent of judicial discretion in the state, the Ohio Judicial Conference, supports the bill.

Other than prohibiting the sentence of JLWOP, which is already not available to kids convicted of nonhomicide offenses[11], SB256 does not limit sentences available to the court. Despite the bad facts in Moore's case, the Supreme Court of Ohio found it unconstitutional to sentence kids to a defacto life sentence for nonhomicide offenses.[12] Under SB256 and current case law, courts can sentence a case that involves "12 very serious offenses with 11 specifications" to a longer sentence, short of defacto life, while giving less serious cases shorter sentences. SB256 will allow both individuals parole eligibility after 18 years. However, as discussed above, parole eligibility is a far cry from mandatory release. If an individual is never granted parole, someone convicted of "12 very serious offenses with 11 specifications" will serve a longer time in prison than someone convicted of a less serious offense.

[5] *Miller v. Alabama*, 567 U.S. 460 (2012).
[6] *Research and Advocacy for Reform*, The Sentencing Project, 2017, www.sentencingproject.org/wpcontent/uploads/2017/05/Still-Life.pdf; and Tarika Daftary-Kapur and Tina M. Zottoli, *Resentencing of Juvenile Lifers: The Philadelphia Experience*, Montclair State University, www.msudecisionmakinglab.com/philadelphiajuvenile-lifers.
[7] *Id.*, at 479.
[8] Emily Widra, *Incarceration shortens life expectance*, Prison Policy Initiative, June 26, 2017, www.prisonpolicy.org/blog/2017/06/26/life_expectancy/.
[9] Department of Rehabilitation and Corrections 2014 – 2016 Calendar Years Report
[10] *A State-by-State Look at Juvenile Life Without Parole*, The Associated Press, The Seattle Times, July 31, 2017, https://www.seattletimes.com/nation-world/a-state-by-state-look-at-juvenile-life-without-parole/.
[11] *Graham v. Florida*, 560 U.S. 48 (2011)
[12] *State v. Moore*, 149 Ohio St.3d 557 (2016).

OPAA SUGGESTION #4: "Remove the sentencing factor in lines 1748–1753.

We don't know what this provision means and it is troubling to us to suggest that prosecutors are charging and convicting youth offenders with more serious offenses, or somehow dealing with them unfairly, just because they are youth."

REASON FOR REJECTION

The language that is causing OPAA confusion comes from *Miller*'s discussion of the unconstitutionality of JLWOP because of the difference between juveniles and adults.

> To recap: Mandatory 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. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that *he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.*[13]

Further clarification is provided in *Montgomery*, where the Supreme Court found that the factors discussed above regarding "'youth and its attendant characteristics' are considered as sentencing factors [that are] necessary to separate those juveniles who may be sentenced to life without parole from those who may not."[14] SB256 requires the sentencing court to consider the *Miller* factors at sentencing in order to craft a sentence that reflects the true nature of crime and culpability of the offender. Currently pending before the U.S. Supreme Court is a case that addresses whether sentencing courts are required to make factual findings on the record for each of the *Miller* factors.[15] SB256 could save Ohio from having to become compliant with the decision after the fact.

OPAA SUGGESTION #5: "Remove the requirement in lines 2180–2204 that require the parole board to reconsider the same factors of youth as the sentencing court.

If the court considers these factors as required by the bill, it may already lead to a mitigated sentence. The parole board should not be required to use the exact same factors to further mitigate an already mitigated sentence. This is essentially empowering the parole board to say the judge got it wrong. "

REASON FOR REJECTION

First, SB256 is retroactive, and the *Miller* factors could not have been considered at sentencing for individuals currently incarcerated. The purpose of SB256 is to determine if a kid's offense "reflects transient immaturity" associated with youth and give rehabilitated youth a "meaningful opportunity for release."[16] To the extent it is known, this information should be considered by the sentencing court in order to craft the proper sentence. However, the extent to which the child may change and grow is unknown at the time of sentencing. Given what we know about a child's greater capacity for change, it is important that the parole board also consider the *Miller* factors when determining if a child has been rehabilitated. "The opportunity for release will be afforded to those who demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change."[17]

Finally, OPAA's assertion that that the parole board will "mitigate" the sentence is factually and legally inaccurate. It is not the parole board's job to enhance or mitigate a sentence, but to consider whether an individual is ready for release. SB256 provides the parole board a constitutional framework to clarify information they already have or should have.

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[13] *Miller*, at 477–478, (Emphasis added), citing see, e.g., *Graham*, 560 U.S., at 78, 130 S.Ct., at 2032 ('[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings'); *J.D.B. v. North Carolina*, 564 U.S. 261, 269, 131 S.Ct. 2394, 2400–2401, 180 L.Ed.2d 310 (2011) (discussing children's responses to interrogation).

[14] *Montgomery v. Louisiana*, 136 S.Ct. 718, 735 (2016)

[15] *Jones v. Mississippi*, www.scotusblog.com/case-files/cases/jones-v-mississippi/.

[16] See *Graham*, 560 U.S. 48 (2010)

[17] *Montgomery*, 136 S.Ct. at 736.