STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

MONTEZ STOVALL

Defendant-Appellant.
_____/

Supreme Court No. _____

Court of Appeals No. 342440

Lower Court No. 92-0334-01, -FC

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellant
_____/

APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

BY: SOFIA NELSON (P 77960)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

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JUDGMENT APPEALED FROM, RELIEF SOUGHT, AND CONCISE ALLEGATIONS OF ERROR

In 1992 Montez Stovall entered into an illusory plea to two counts of second degree murder for crimes he committed as a child. He pled to avoid being convicted as charged and receiving an unconstitutional mandatory life sentence—condemning him to die in prison. Now, 44 years old, Montez is in a worse position than the 363 juvenile lifers convicted as charged because he is being denied a meaningful opportunity at release upon demonstrated maturity and rehabilitation as required by *Miller v Alabama*, and made retroactive by *Montgomery v Louisiana*. Montez' case involves a legal principle of major significance to this state's jurisprudence, and the decision below conflicts with United States Supreme Court precedent. MCR 7.305 (B)(3)&(4).

Montez Stovall appeals the August 23, 2017 denial of his motion from relief from judgement and August 23, 2018 denial of leave by the Court of Appeals. His 1992 plea included a sentencing agreement of life with the possibility of parole. At the time Montez decided to accept this plea offer and sentencing agreement, his attorney counseled him that he would be eligible for release after serving ten years in prison. He was sentenced without any consideration of the mitigating circumstances of youth as is required by *Miller*. The parole board is not required to consider the mitigating circumstances of youth or demonstated rehabilation when reviewing his parole file every five years. The parole board's policies and procedures deny Montez a meaningful opportunity to obtain relase based on demonstrated maturity and rehabilitation. Twenty-six years after his plea and sentence, it is evident that absent relief from this Court, Montez will die in prison having served the functional equivalent of the unconstitutional sentence he bargained to avoid.

By pleading guilty instead of exercising his right to a jury trial, Montez is in a worse position than other juveniles convicted as charged—individuals who are now being afforded the opportunity to demonstrate their capacity for rehabilitation and receive term of years sentences pursuant to MCL

769.25a. Because Montez received no benefit from his plea, and was actually harmed by it, his plea was illusory. Due Process requires he be afforded the opportunity to withdraw his plea. At minimum, he is entitled to a resentencing as his current sentence violates the Eight Amendment.

The trial court ruled on the merits of Montez's claims, writing that he appeared to have "buyer's remorse" and that the sentence he would receive if he benefited from MCL 769.25a is speculative. An illusory plea should engender "buyer's remorse"because there is no benefit to the bargain. Further, Montez does not dispute that the sentence he would receive after careful consideration of the *Miller* factors and his demonstrated capacity for rehabilitation is unknown. He is, however, entitled to Due Process and a meaningful opportunity to obtain release upon demonstrated maturity and rehabilaition, as is currently being afforded other juveniles convicted of murder, and is required by the Eight Amendment. The Court of Appeals did not address the merits of his claims, denyling leave to appeal, although, Judge Cynthia Stephens would have granted leave.

Montez asks this Court to grant leave to appeal to address his situation, and that of similarly situated children convicted of murder who were given and are serving sentences functionally indistinguishable from a life without parole.

STATEMENT OF APPELLATE JURISDICTION

Montez Stovall pled guilty to two counts of second degree murder and two counts of felony firearm for crimes he committed while still achild. He was sentenced on December 15, 1992 to life with the possibility of parole. This is an application for leave to appeal pursuant to Const 1963, art 1, § 20; MCL 600.215(3); MCL 770.3(6); and MCR 7.303(B)(1).

Following the United States Supreme Court's decision in *Montgomery v Louisiana*, 136 S Ct 718, 724 (2016), on February 22, 2016, Mr. Stovall filed a subsequent motion for relief from judgment pursuant to a retroactive change in the law. On March 1, 2016 the trial court appointed the State Appellate Defender Office (SADO) to assist Mr. Stovall in perfecting his post-conviction motion. SADO filed a perfected motion for relief from judgment, and on August 23, 2017 the trial court issued an opinion and order denying the motion. On August 23, 2018 the Court of Appeals denied leave. This application is timely filed and properly before this Court. MCR 7.305(C)(2)(a).

STATEMENT OF QUESTIONS PRESENTED

I. **Was Montez Stovall's plea to second degree murder for the shooting death of Lester Edwards induced by the promise of an illusory benefit—avoiding an unconstitutional sentence of mandatory juvenile life without parole for first degree murder? Does Due Process require that he be allowed to withdraw his plea on all counts as his plea agreement was indivisible?**

Trial Court answers, "No".

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

II. **Does Montez Stovall's sentences of life with the possibility of parole violate the Eighth Amendment because his sentences coupled with the parole board's policies deny him a meaningful opportunity at release and are functionally indistinguishable from life without the possibility of parole? Is he, therefore, entitled to resentencing to a term of years, allowing him a meaningful opportunity at release?**

Trial Court answers, "No".

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Montez Stovall is currently serving life with the possibility of parole[1] for two plea-based convictions for second degree murder stemming from the December 1991 shooting deaths of Terrence Bass and Lester Edwards. PT [2]7-9, ST 3. Montez has served 26 years in connection with these convictions.[3] He was 17 years old at the time of the shootings; he is now 44 years old.

Montez' Background, which must be considered in accordance with the *Miller* Factors

Montez Stovall was born in Detroit in 1974 to Frankie Kelsey. Ms. Kelsey, an African American woman, was 21 at the time of his birth. Montez' biological father, Carl Jackson, was never a part of his life. Montez experienced trauma during gestation, due to a failed abortion attempt by his mother three months into the pregnancy.[4] Montez was delivered with the umbilical cord wrapped around his neck causing an initially slow and inconsistent heartbeat.[5] There are signs he suffered some amount of oxygen loss as a result of his traumatic delivery.[6]

Montez was the second of his mother's four children, all fathered by different men. With no partner to provide support, then loss of her familial support due to the illegitimacy of her children, and depression, Ms. Kelsey failed to provide a safe and nurturing environment for her children. About a year after Montez's birth, Ms. Kelsey attempted suicide.[7]

When Montez was still very young, his mother met and married Grady Kelsey. Mr. Kelsey physically abused Montez. Ms. Kelsey described the abuse as "choking [Montez] at night" and

[1] He is also serving, consecutive to the life sentences, two years for two counts of felony firearm arising from the same instances. ST 3.
[2] PT refers to the November 23, 1992 plea transcript, ST refers to the December 15, 1992 sentencing transcript, attached as appendices A and B for this court's convenience, and MT refers to the April 16, 1993 motion hearing, also attached as appendix C.
[3] JOS, attached as appendix D.
[4] Hawthorn Center Records at 1, attached as appendix E; Methodist Children's center Records at 1, attached as appendix F.
[5] Hawthorn Center Records at 1, attached as appendix E.
[6] Methodist Children's Center Records at 1, attached as appendix F.
[7] *Id*; PSIR at 6, attached as appendix G.

"beating [Montez] with an extension cord."[8] Montez recalled that Mr. Kelsey would punish him by hitting his thumbs with a hammer or by tying him to the refrigerator and beating him with a belt.[9]

When Montez was nine he was removed from his mother's home due to physical abuse and neglect.[10] Montez had numerous loop-shaped scars on his thighs and back from being beat.[11] While he was receiving treatment at Methodist Children's Home Society (MCHS), his mother was brought in for an interview. Ms. Kelsey advised that Montez "deliberately hurt himself" since toddlerhood using such methods as squeezing his fingers in doors.[12] She stated he did not show any response to pain until later in life, around the time his abusive stepfather left the home.[13] When asked by MCHS staff what she might be able to do differently in parenting Montez, she was unable to think of anything.[14] The MCHS' psychiatrist's final impression was:

> Child born to depressed, rejected mother, who was ambivalent about delivering him (had attempted abortion, then changed mind). Delivery possibly traumatic. During infancy clearly rejected by mother's family, mother depressed and, one can speculate, only partially met his needs. In process of her ambivalent parenting, it appears that he did not develop a sense of his and his body's importance, as evidenced by his lack of response to pain and self-infliction of pain. Appears he subjected to marked abuse by stepfather and had feeling of non-protection by mother.[15]

After treatment at MCHS, Montez was placed in foster care.

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[8] Methodist Children's Center Records at 1-2, attached as appendix F.
[9] PSIR at 5, attached as appendix G.
[10] *Id.*
[11] Methodist Children's Center Records at 1, attached as appendix F.
[12] *Id.* at 2.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 3.

Montez spent the rest of his childhood, until his incarceration for the instant offenses, in and out of residential facilities and foster placements.[16] After he was removed from his home, his mother failed to visit him or meaningfully engage in his treatment.[17]

Once Montez entered school he was placed into emotionally impaired courses and consistently received low academic scores.[18] As a child Montez was described as having an IQ in the low range.[19] Montez was exposed to drug and alcohol at a very young age. He began drinking at 11, and using marijuana at 13.[20]

Montez attempted suicide numerous times.[21] He first attempted to kill himself at age nine by running into traffic on the freeway.[22] At 12 he attempted to hang himself.[23] At the time his Presentence Investigation Report was completed in 1992, it was estimated that he had attempted suicide on six or seven occasions.[24]

Procedural History

Montez was advised at the time of his plea that his sentencing agreement would make him eligible for "probation" after he had served ten years in prison. PT 3. Based on this understanding, he pled guilty to two counts of second degree murder and two counts of felony firearm in order to avoid a mandatory sentence of life without parole if convicted as charged. PT 10. His guidelines for his minimum sentence were scored at 144 (12 years) to 300 months (25 years).[25]

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[16] PSIR at 5, attached as appendix G.
[17] Hawthorn Center Records at 3, attached as appendix E.
[18] Methodist Children's Center Records at 1, attached as appendix F; Hawthorn Center Records at 1, attached as appendix E.
[19] PSIR at 5, attached as appendix G; Hawthorn Center Records at 4, attached as appendix E.
[20] MDOC Evaluation of Suicide Risk, attached as appendix H.
[21] Hawthorn Center Records at 3, attached as appendix E.
[22] MDOC Evaluation of Suicide Risk, attached as appendix H.
[23] *Id.*
[24] PSIR at 6, attached as appendix G.
[25] SIR, attached as appendix I.

A common understanding of the criminal bar and trial court judges at the time of Montez' plea was that a sentence of life with parole would result in a defendant seeing the parole board after 10 years and serving an average of approximately 15 years in prison prior to release.[26] Therefore, a sentence to a term of years exceeding 15 years on the minimum was thought to be a harsher punishment than a life with parole sentence.[27]

Montez was ultimately sentenced, without any consideration of the mitigating circumstances of his youth, pursuant to the sentencing agreement to two life terms for second degree murder to run concurrently to each other, but consecutively to a two-year term for the two counts of felony firearm. S 3. Had Montez declined the plea deal, and instead been convicted as charged and sentenced to life without parole, he may already have been resentenced to a term of years pursuant to MCL 769.25a. At minimum he would be indisputably entitled to a *Miller* hearing and resentencing as required by MCL 769.25a, *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 136 S Ct 718, 724 (2016).

During plea and sentencing Montez was represented by court appointed attorney Jay Nolan. PT. Following his sentencing on December 15, 1992, Montez requested appellate counsel, and was appointed Donald Cook, who subsequently filed a Motion for Plea Withdrawal on the grounds that Montez' plea was not knowing and voluntary. MT 7. That motion was denied. MT 10. The Court of Appeals affirmed, and the Michigan Supreme Court denied leave.[28]

Since he lost his direct appeal, Montez has filed several Motions for Relief from Judgment—in 1995, 2006, 2008, and 2012—all denied.[29] Following the United States Supreme Court's decision in *Montgomery*, on February 22, 2016 Montez filed a subsequent 6.500 pursuant to a retroactive

[26] *What Should "Parolable Life" Mean? Judges Respond to the Controversy* at 15, attached as appendix J; Letter from Judge John O'Brien, attached as appendix K.
[27] Appendix J at 16; Affidavit of Judge Samuel Gardner, attached as appendix L.
[28] Register of Actions, attached as appendix M.
[29] *Id.*

change in the law.[30] On March 1, 2016 the trial court appointed the State Appellate Defender Office to perfect his post-conviction motion.[31]

Undersigned counsel perfected that pro per filing, arguing that Montez was entitled to plea withdrawal and/or resentencing pursuant to a retroactive change in law. On August 23, 2017 the trial denied the motion on the grounds that the *Miller* and *Montgomery* decisions are not applicable to sentences of life with the possibility of parole.[32] On August 23, 2018 the Court of Appeals denied leave, with Judge Cnythia Stephens dissenting.[33]

Montez' Demonstrated Maturity and Capacity for Rehabilitation

Montez was a child when he shot and killed Terrence Bass and Lester Edwards. He is now a 44 year old adult housed at the lowest possible security classification authorized for those serving a life sentence—level II.[34] At the time of this filing he has served over 26 years of his sentence.

Due to severe abuse and neglect, instability, emotional impairment, and chronic depression Montez struggled throughout his childhood, and continued to struggle in the beginning of his prison sentence. Developmental neuroscience has established that adolescents and young adults (under age 25) have poor impulse control and a lessened ability to resist negative influences. This is in part because the portions of the brain that control executive functioning such as decision making in complex situations are still developing into young adulthood, and do so independently of puberty.

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[30] *Id.*
[31] Order of Appointment, attached as appendix N.
[32] TC Order, attached as appendix O.
[33] COA Order, attached as Appendix P.
[34] *See* https://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=228511; Security Classification Screen, attached as appendix Q. Note that item seven under confinement level (serving a life sentence) requires placement in at least security level II.

Underdevelopment of these portions of the brain explain why adolescents and young adults are more susceptible to peer pressure and more likely to engage in risky behavior.[35]

Due to the developing nature of their brains, behavioral regulation can be difficult for all adolescents and young adults, but behavioral regulation is further complicated for those who have suffered adverse childhood experiences. Childhood maltreatment negatively affects brain development and neurobiological responses to stress, leading to an increased risk of various negative behaviors for those who have suffered adverse childhood experiences.[36] This can mean that children who are exposed to multiple types of adverse childhood experiences can be more impulsive, and have less ability to rationally problem-solve than their more fortunate peers.[37]

As the chart on the next page shows, prior to age 25, the age at which one's brain is fully developed, Montez received 199 misconducts or tickets in prison, and spent long periods of time in solitary confinement. The chart also demonstrates that with age Montez matured and demonstrated his ability to conform his behavior to the rules. Montez has not received a misconduct for violence or threatening behavior in over nine years. Due to his improved conduct, he has been housed at the lowest possible security classification since 2014.

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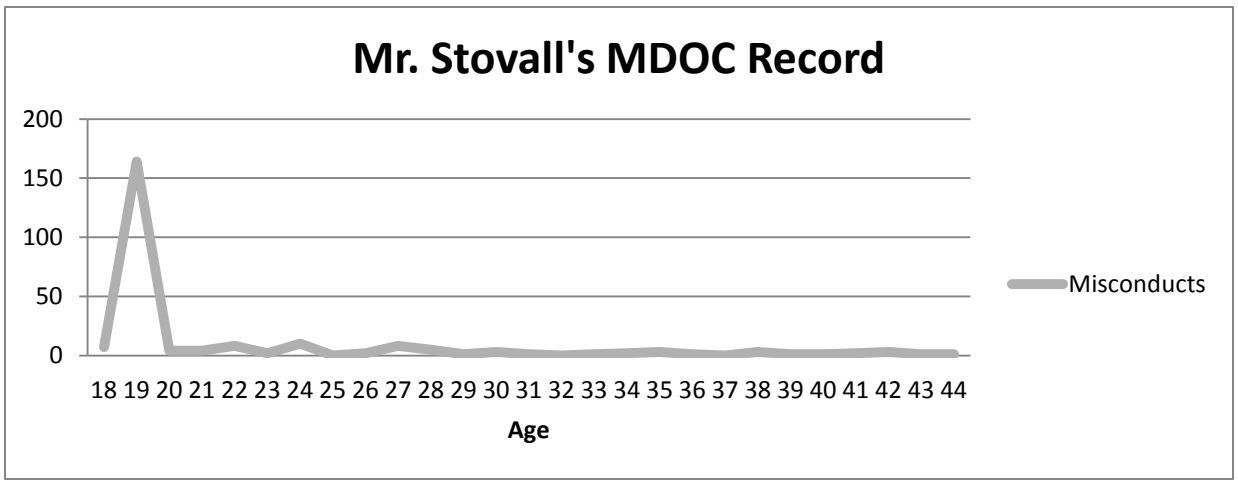
[35] This science underpins the United States Supreme Court's juvenile sentencing precedent. "'[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds'—for example, in 'parts of the brain involved in behavior control.'" *Miller v Alabama*, 567 US 460; 132 S Ct 2455, 2464 (2012) (quoting *Graham v Florida*, 560 US 48, 68; 130 S Ct 2011, 2026 (2010); *See also See* Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives From Brain and Behavioral Science*, Current Directions in Psychological Science, Vol 16, No 2 (Apr., 2007).

[36] *See e.g.* Robert Anda et al, *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood*, European Archives of Psychiatry and Clinical Neuroscience, Vol 256 , Issue 2 (April 2006).

[37] See e.g. Nadine Burke et al, *The Impact of Adverse Childhood Experiences on Urban Pediatric Population*, Childhood Abuse and Neglect ,Vol 35 Issue 6 (June 2011); Vanessa Sacks and David Murphey, *The Prevalence of Adverse Childhood Experiences, Nationally, by State, and by Race and Ethnicity*, Child Trends (Feb 12, 2018), available at <https://www.childtrends.org/publications/prevalence-adverse-childhood-experiences-nationally-state-race-ethnicity>; Pamela Clarkson Freeman, *Prevalence and Relationship Between Adverse Childhood Experiences and Child Behavior Among Young Children, Infant Mental Health Journal*, Vol 35 Issue 6 (Nov/Dec 2014) .



In 1999 Montez earned his GED.[38] In 2003 he completed a career education program in custodial maintenance. He recently successfully completed a self-help program called Family Focus designed to address thought and behavior issues resulting from dysfunctional family upbringings.[39] Following completion of Family Focus, Montez received scores of excellent in Substance Abuse Phase I.[40] Montez currently works as a unit porter and receives positive work evaluations.[41]

De facto Life

Since the time of Montez' plea the parole process for lifers has changed significantly resulting in Montez serving a sentence that is functionally indistinguishable from a life without parole sentence. In Michigan, whether a life sentence is parolable is dictated by the corrections code. Specifically, MCL 791.234(7) & (8) define when those serving sentences of life for an offense other than first degree murder[42] and other specified offenses[43] come under the jurisdiction of the Parole Board.

[38] GED Certificate, attached as appendix R.
[39] Family Focus Certificate, attached as appendix R.
[40] Phase I Substance Abuse Completion, attached as appendix S.
[41] Work Evaluations, attached as appendix T.
[42] All non-juveniles convicted for first degree murder must be sentenced to life and are not eligible for parole. MCL 750.316. Juveniles convicted of first degree murder fall under MCL 769.25a.
[43] MCL 791.234(6).

In 1992 the time a lifer must serve prior to reaching parole eligibility was increased from ten to 15 years.[44] At that time the law was also amended to increase the interval at which lifers cases would be reviewed by the Board, increasing the period from every two years to every five years.[45] And again that year, the Board composition was changed from civil service members to political appointees.[46]

In 1999 further amendments were passed to MCL 791.234, eliminating a prisoner's right to appeal a parole denial by leave to the Circuit Court; however, a parole grant is still appealable by a victim or prosecutor.[47] That same year the chairperson of the Board testified before the Legislature definitively stating the Board's policy toward lifers: "It has been a long standing philosophy of the Michigan Parole Board that a life sentence means just that --- life in prison."[48] The next year two more changes were made to reinforce the "life means life" policy of the parole board. First, after the initial interview, the Board would no longer be required to interview a lifer in person; instead, a single Board member could decline an interview based simply on a file review.[49] Second, the decision to deny a lifer parole was redefined as only occurring after a public hearing.[50] MDOC Policy Directive 06.05.104, para. M. now provides, "the Parole Board's decision not to interview a prisoner serving a life sentence, or not to proceed with a public hearing, is not a denial of parole."[51] This change allowed the Board to circumvent the requirement of MCL 791.235(12) that prisoners receive a written explanation detailing the reason for denying parole. Instead, the Board can now inform the prisoner, without even conducting an interview, that the Board has no interest in taking action at

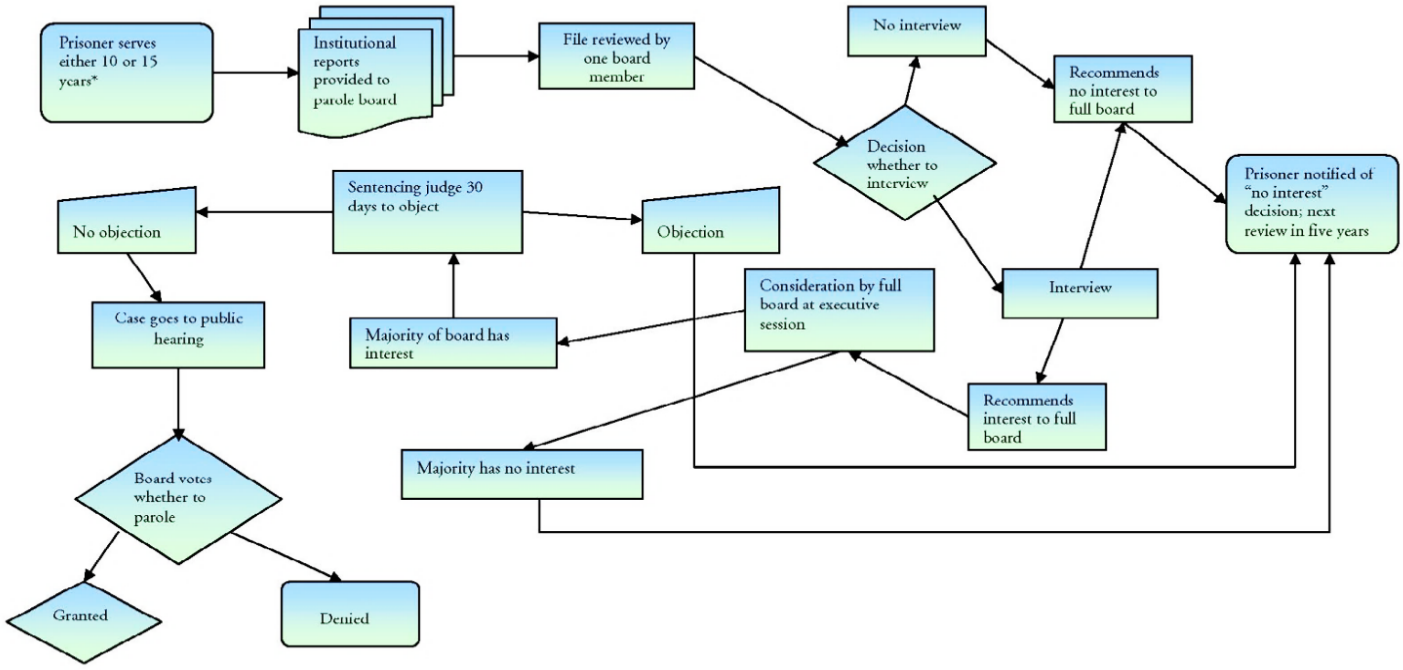
[44] MCL 791.234(7)(a).
[45] MCL 791.234(8)(b).
[46] MCL 791231a(1).
[47] MCL 791.234(11).
[48] Michigan Department of Corrections, Office of the Michigan Parole Board, Testimony in support of Proposed Legislation (Lansing, September 28, 1999).
[49] MCL 791.234(8).
[50] MCL 791.234(8)(c).
[51] MDOC Policy Directive 06.05.104, attached as appendix U.

this time, and not look at the prisoner's file again for another five years. Montez last received such a notice on September 27, 2018, meaning his case will not be considered by the board again till December 18, 2023.[52]

MCL 791.233[53] is the only guidance to the Parole Board on what to consider in granting or denying parole. Nothing in that statute requires the Board to consider a defendant's age at the time of the offense, family and home environment, how peer influences may have affected the defendant, subsequent maturity, or capacity for rehabilitation. On its own, the Parole Board has declined to score the parole guidelines for parolable lifers, although the applicable statute MCL 791.233e contains no such exception. Montez' parole guidelines have never been scored. The parole process for lifers is markedly different and more complex than the process for those serving term of years sentences. A chart summarizing the process lifers must go through appears on the next page.[54]

[52] Parole Board Notice, attached as appendix V.
[53] The statute reads, "A prisoner shall not be given liberty on parole until the board has reasonable assurance, after consideration of all the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to public safety."
[54] This chart is an updated version of a chart originally created by Citizens Alliance on Prisons & Public Spending available at http://www.capps-mi.org/wp-content/uploads/2013/03/5.4-Michigan-parole-process-for-lifers.pdf. The chart was updated to reflect current law.

The Michigan parole process: lifers



*Years of service required by Lifer Law for parole eligibility depends on whether offense was committed before or after Oct. 1, 1992.

A recent study found that the average life expectancy for African American males, like Montez, sentenced as juveniles to life in the Michigan Department of Corrections is 50 ½ years. *Kelly v Brown*, 851 F3d 686, 688 (CA 7 2017) (Posner, R. dissenting). Montez is 44. Given the Parole Board's policy that life means life, the changes in the law made after Montez' plea and sentence that reinforce that policy, and the lack of a process that requires the board to consider the *Miller* [55] factors and Montez' demonstrated maturity and rehabilitation, Montez expects to die in prison absent action by this Court.

[55] The *Miller* factors include (1) "chronological age," (2) "hallmark features" of youth such as "immaturity, impetuosity, and failure to appreciate risks and consequences," (3) "family and home environment," (4) "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," (5) whether a juvenile "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth," and, (6) the possibility of rehabilitation. *Miller*, 567 US at 477-478.

ARGUMENT

I. Montez Stovall's plea to second degree murder for the shooting death of Lester Edwards was induced by the promise of an illusory benefit—avoiding an unconstitutional sentence of mandatory juvenile life without parole for first degree murder. Due process requires that he be allowed to withdraw his plea on all counts as his plea agreement was indivisible.

In recent years 0.15 percent of parole eligible lifers have received parole. *Foster v Booker*, 595 F 3d 353, 366 (CA 6 2010). Montez' sentences are death in prison. The Eighth Amendment prohibits sentencing a child to remain in prison "until he dies…" in all but the most extreme of circumstances. *Miller v Alabama*, 567 US 460; 474 (2012). Montez was told he could avoid death in prison by pleading guilty to a lesser offense so he did just that. Now, he is being denied a "meaningful opportunity to obtain release…" upon demonstrated maturity and rehabilitation and is serving a sentence functionally indistinguishable from the one he bargained to avoid. *Miller*, 576 US at 479; *Montgomery v Louisiana*, 136 S Ct 718, 726 (2016); US Const, Am VIII. The prohibition of death in prison sentences for children was deemed a substantive rule of constitutional law in *Montgomery* that must be applied retroactively. *Montgomery*, 136 S Ct at 734; see also *Teague v Lane*, 489 US 288, 31(1989).

In forbidding sentences that deny a meaningful opportunity for release for children convicted of homicide, the Court extended precedent relating to bans on punishment where there is a disconnect between culpability and the severity of the punishment. The Court reasoned that children are categorically "less culpable than adults," due to:

> chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences[,]…the family and home environment that surrounds [them]—and from which [they] cannot usually extricate [themselves]—no matter how brutal or dysfunctional…the circumstance of the homicide offense, including the extent of [their] participation in the conduct and the way familiar and peer pressures may have affected [them][,]…[and the] incompetencies associated with youth—for example [] inability to deal with police

> officers or prosecutors (including on a plea agreement) or [their] incapacity to assist his own attorneys."
> *Miller v Alabama*, 567 US 460, 477 (2012).

The central principle and mandate of *Miler* and *Montgomery* is that sentencing courts must consider a "juvenile's special circumstances" because "children who commit even heinous crimes are capable of change and, in all but the very rarest of circumstances must be afforded "hope for some years of life outside of prison walls." *Montgomery*, 136 S. Ct. at 725, 736–37. Montez is being denied a process through which he can demonstrate his capacity for change. He is being denied all hope for a life outside of prison's walls.

Montez was a traumatized, neglected, abused, and mentally ill child trying to survive on his own in 1991 when he was involved in the shooting deaths of Lester Edwards and Terrence Bass.[56] He was charged with first degree murder for the death of Lester Edwards, which at the time carried a mandatory sentence of life without the possibility of parole upon conviction. MCL 750.316; PT 2. In 1992 Montez plead guilty to two counts of second degree murder pursuant to a sentencing agreement of life with the possibility of parole, plus a consecutive two years for two counts of felony firearm. PT 2-3.

The purported benefit of this plea agreement was avoiding a mandatory life without parole sentence for first degree murder, thereby gaining a meaningful opportunity at release. Montez also believed, based on his attorney's representation, that a life sentence would lead to his release sooner than a sentence to a term of years. PT 3. This plea was a package deal encompassing Case Nos. 92-000334-01-FC and 92-000335-01-FC, which is evidenced by both pleas being tendered and accepted in the same proceeding and sentencing on all counts also taking place in one proceeding. PT; ST. Montez' plea and sentencing agreement is an indivisible package deal. *People v Blanton*, 317 Mich App

[56] PSIR at 2, 5, attached as appendix G.

107 (2016). If Montez is entitled to withdraw his plea as to one count, he necessarily is entitled to withdraw his plea on all counts. *Id.*

Absent relief from this court Montez will almost certainly die in prison, serving a sentence that is functionally indistinguishable to the one he bargained to avoid. *See*, e.g., *Kelly v Brown*, 851 F3d 686, 688 (CA 7 2017) (Posner, R. dissenting) (life expectancy for African American males sentenced as juveniles to life in prison is 50 ½ years); *Foster*, 595 F 3d at 366.

The Parole Board has made clear in public testimony that a life sentence means life in prison.[57] The trial court offers no evidence or explanation for its assertion that Montez "has an opportunity to be released under his current sentence."[58] A mere "opportunity" is not the same as a meaningful or realistic opportunity. *Graham v. Florida*, 560 US 48, 75, 82 (2010). There is no reason for Montez, under his current sentence, to expect anything other than a notice from the parole board every five years stating, "[t]he majority of the Parole Board has no interest in taking action at this time. Your case will be reviewed as required by law."[59]

Montez pled guilty because he was told that was how he could avoid having to spend the rest of his life in prison. Now 44 years old, having served 26 years, his sentence strips him of all hope for a life outside of prison. Had he not pled, and instead been convicted as charged following a trial, he, like all other juveniles lifers, would either have already been resentenced to a term of years, or at least, have the opportunity of demonstrating his maturity and capacity for rehabilitation at a *Miller* hearing. MCL 769.25a.

Montez is not one of the juveniles for whom a life without parole sentence would be constitutional and proportionate, yet he is being denied a meaningful opportunity at a release.

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[57] Michigan Department of Corrections, Office of the Michigan Parole Board, Testimony in support of Proposed Legislation (Lansing, September 28, 1999).
[58] Trial Court Opinion at 2, attached as appendix O.
[59] Parole Board Notice, attached as appendix V.

Montez' plea put him in a worse position than he would be in had he gone to trial and been convicted and sentenced as charged. A plea bargain is illusory when a defendant is lead to believe it has a benefit, but in actuality it has no benefit. *People v Mrozek*, 147 Mich App 304, 307 (1985). For these reasons Montez's plea and sentencing agreement is illusory and he is entitled to plea withdrawal. Because his plea was a package deal, he is entitled to withdraw his plea on all counts. *People v Blanton*, 317 Mich App 107 (2016).

A. His claim for relief is not precluded by MCR 6.502(g) as a successive petition because it rests on the holding and rationale in *Montgomery v Louisiana*, which is a retroactive change in the law.

Montez has filed several previous motions for relief from judgment, all denied, pursuant to MCR 6.500 *et seq*.[60] None of these prior motions claimed that his plea was illusory based on a retroactive change in Eighth Amendment law—that is, the United States Supreme Court's 2016 decision in *Montgomery*. On February 22, 2016 Montez filed a subsequent motion for relief from judgment on these grounds and requested appointment of counsel.[61] On March 1, 2016 the State Appellate Defender Office was appointed to perfect Montez' motion for relief from judgment based on a retroactive change in law.[62] The State Appellate Defender Office perfected the February 22, 2016 pro per filing, and on August 23, 2017 the trial court issued a brief opinion and order denying relief.[63] Importantly, the trial court did not rule that the motion was barred pursuant to MCR 6.500 *et seq,* rather the trial court denied relief on substantive grounds.[64] The Court of Appeals denied leave on August 23, 2018, with Judge Stephens dissenting.[65]

[60] Register of Actions, attached as appendix M.
[61] *Id.*
[62] Order of Appointment, attached as appendix N.
[63] Trial Court Order, attached as appendix O.
[64] *Id.*
[65] Court of Appeals Order, attached as appendix P.

MCR 6.502(G)(2) provides that Montez may file a "subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment." Montez' first motion for relief from judgement was filed on May 9, 1995, prior to the United States Supreme Court's rulings in *Miller* and *Montgomery*. This motion for relief from judgment rests on a retroactive change in the law and is properly before this court under MCR 6.502(G)(2).

B. A sentence of life without parole, as applied to Montez, is cruel and unusual punishment.

Montez was a mentally ill, emotionally impaired, intellectually low performing, and abused child when he shot Lester Edwards and Terrance Bass.[66] During his 26 years imprisonment Montez has demonstrated his capacity for positive growth and rehabilitation. Pursuant to *Miller* and *Montgomery*, a sentence that denies Montez a meaningful opportunity at release is unconstitutional.

Montez was 17 and involved with a dangerous peer group when the two shootings occurred.[67] He was a traumatized ward of the state that due to decades of abuse and neglect lacked a sense of the importance of his own life or the life of others.[68] He was estimated to have a low IQ.[69] In addition to shooting at others in the instant offenses, he repeatedly attempted to kill himself.[70] Severe childhood abuse and neglect, his toxic family and home environment, peer influences, and the impetuousness of youth were major contributing factors in the crimes Montez committed, and his early struggle to adjust to prison. Montez' culpability was lessened by his youth, severe childhood trauma, and intellectual deficiencies. *Miller* 132 S Ct at 2458; *Atkins v Virginia*, 536 US 304, 306 (2002).

[66] PSIR at 2, 5-6, attached as appendix G.
[67] *Id.* at 5.
[68] Methodist Children's Center Records at 3, attached as appendix F.
[69] PSIR at 2-3, attached as appendix G.
[70] *Id* at 6.

Since being extracted from his dangerous childhood environment and having matured into an adult, Montez has demonstrated that he can conform his behavior to expectations. As a result, he is housed at the lowest possible security level for prisoners with his sentence.[71] The evolution of Montez' prisoner record alone demonstrates his capacity for change. Only those juveniles incapable of change may be condemned to die in prison. *Montgomery*, 136 S Ct at 733; *People v Skinner*, 502 Mich 89, slip opinion at 27.

Montez has spent the last 26 years in prison without access to much rehabilitative programming because of his status as a lifer[72], and yet he has grown and matured into an adult who seeks out education and what little programming is available to him.[73] He has proven he can be a responsible worker.[74] He has grown from an abused mentally unstable child unable to regulate his behavior to an adult capable of contributing via work, learning via programming, and abiding by the rules. Montez is not one of the rarest of juveniles who is incapable of rehabilitation or is irreparably corrupt, and therefore, a sentence of life without the possibility of parole would have been and is still cruel and unusual punishment as applied to him. *Miller,* US 576 at 479; *Montgomery*, 136 S Ct 7 at 724; Us Cont, amend VIII; *Skinner*, 502 Mich, slip opinion at 27.

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[71] Security Classification Screen, attached as appendix Q.

[72] There are more prisoners in need of rehabilitative and educational programming than there are available spots in programs. Prisoners closest to or past their earliest release dates are given priority for programming. Due to Montez' life sentence he lacks an earliest release date and is therefore at the bottom of the waiting lists for programming. *See* House Fiscal Agency, FY 2016-17: Department of Corrections Summary, available at <http://www.house.mi.gov/hfa/PDF/Summaries/16h5294h1_Corrections_Summary_Article_V_passed_HAC.pdf> (includes budget increases due to programming shortages resulting in many prisoners being denied parole simply because they have not been able to access required programming). *See also* "[D]efendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates. For juvenile offenders, who are most in need of and receptive to rehabilitation, the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident." *Graham v Florida*, 560 US 48, 74 (2010) (internal citations omitted).

[73] GED Certificate, attached as appendix X; Family Focus Certificate, attached as appendix R; Substance Abuse Phase I, attached as appendix S.

[74] Work Evaluations, attached as appendix T.

C. The proper remedy for a guilty plea induced by an illusory promise is plea withdrawal, and because plea agreements are indivisible, Montez Stovall is entitled to withdraw his plea on all counts.

Montez was charged with first degree murder for the shooting death of Lester Edwards. At the time of this offense, conviction at trial would have resulted in a mandatory sentence of life without the possibility of parole. MCL 750.316. The "Eighth Amendment of the Constitution forbids a sentencing scheme that mandates life in prison without the possibility of parole for youth offenders." *Miller,* 576 US at 479. The purported benefit of Montez' plea was to avoid what is now known to be an unconstitutional mandatory sentencing regime. That benefit was illusory because such a sentence could not be constitutionally imposed upon Montez absent consideration of the mitigating circumstances of his childhood and his capacity for rehabiliation. *Skinner*, 502 Mich, slip opinion at 9-10.

"[A]n illusory plea bargain is one in which the defendant is led to believe that the plea bargain has one value when, in fact, it has another lesser value." *People v Williams,* 153 Mich App 346, 350-351 (1986); *See also People v Bollinger*, 224 Mich App 491, 493 (1997) (plea bargain deemed illusory where plea was induced by prosecutor's promise to forego opportunity to prosecute defendant as a repeat offender, an opportunity the prosecutor had already lost; plea and conviction therefore vacated); *People v Graves*, 207 Mich App 217, 220 (1994) (defendant entitled to withdraw his plea because it was based on an erroneous assumption that he could be charged with two counts of robbery, rendering the plea illusory).

The illusory assumption at play here was that if Montez were convicted of first degree murder he would be required to serve a natural life sentence. However, had Montez gone to trial and been convicted of first degree murder, he would now be a candidate for resentencing to a term of years under MCL 769.25a pursuant to *Miller* and *Montgomery*. In a perverse twist, Montez is in a worse position as the result of his plea and sentencing agreement than he would be if he had been

convicted as charged following trial. The fact that his plea and sentencing agreement was actually to his detriment demonstrates that his plea was illusory.

Plea withdrawal is the proper remedy where the bargain is illusory. *See People v Falkenberg*, 124 Mich App 173 (1983) (finding plea withdrawal the proper remedy if the prosecuting attorney made an illusory promise for a concurrent sentence where consecutive sentencing would have been prohibited). Because the benefit of the plea and sentencing agreement was illusory, Montez is entitled to plea withdrawal. *Id.* Because the plea and sentencing agreement was an indivisible package deal, he is entitled to withdraw his plea on all counts. *People v Blanton*, 317 Mich App 107, *9 (2016). Montez asks this court to grant his motion for relief from judgement, allow him the opportunity to withdraw his plea, and thereby vacate his conviction and sentence.

II. Montez Stovall's sentences of life with the possibility of parole violate the Eighth Amendment because his sentences coupled with the parole board's policies deny him a meaningful opportunity at release and are functionally indistinguishable from life without the possibility of parole. He is, therefore, entitled to resentencing to a term of years, allowing him a meaningful opportunity at release.

In *Graham v. Florida*, 560 US 48 (2010), *Miller*, 576 US 460 (2012), and *Montgomery v. Louisiana*, 136 S Ct 718 (2016), the United States Supreme Court placed constitutional limits on the sentences that may be imposed on children. *Graham* barred sentences of life without parole for children convicted of nonhomicide offenses, and held that such offenders must have a "realistic" and "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 US at 75, 82. *Miller* and *Montgomery* established that children convicted of murder must have this same meaningful opportunity for release—except in the very rarest of cases where it is determined that the particular child "exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S Ct at 733; *See also Tatum v Arizona,* 137 S Ct 11, 12 (2016) (Sotomayor concurring) (clarifying that only "the very rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility" and "such irretrievable depravity that rehabilitation is impossible" can constitutionally be condemned to die in prison.)

Twelve state supreme courts have concluded that sentences not technically labeled "life without parole" are cruel and unusual punishment as applied to children if those sentences do not provide a realistic opportunity to obtain release at a meaningful point in an individual's life as required by *Graham, Miller* and *Montgomery*.

- *State v Ramos*, No 92454-6, 2017 WL121541 (Wash Jan 12, 2017) (applying *Miller* to defendant's aggregate 85-year sentence, concluding that the case "clearly" applies to "any juvenile homicide offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation.")

- *State v Zuber*, No 076806, 2017 WL 105004 (NJ Jan 11, 2017) (The court held that *Miller* applies "to sentences that are the practical equivalent of life without parole, like the ones in these appeals. The proper focus belongs on the amount of real time a juvenile will spend in jail and not on the formal label attached to his sentence." *Id.* at 201.)
- *State v Moore*, No 2014-0120, 2016 WL 7448751 (Ohio Dec 22, 2016) ("We agree with these other state high courts that have held that for purposes of applying the Eighth Amendment protections discussed in *Graham* and *Miller*, there is no distinction between life-without-parole sentences for juveniles and term-of-years sentences that leave a juvenile offender without a meaningful opportunity to demonstrate rehabilitation and growth leading to possible early release within the juvenile offender's expected lifespan." *Id.* at 1146.)
- *People v Reyes*, 63 NE3d 884 (Ill 2016) (The Illinois Supreme Court concluded that a mandatory aggregate sentence of 97 years imprisonment for several homicide offenses violated *Miller*.)
- *Casiano v Comm'r of Corrections*, 115 A3d 1031, 1033-34 (Conn 2015), *cert. denied*, 136 S. Ct. 1364 (2016) (The Connecticut Supreme Court held that *Miller* applies to the imposition of a sentence of 50 years without parole on a juvenile homicide offender. "We, too, reject the notion that, in order for a sentence to be deemed 'life imprisonment,' it must continue until the literal end of one's life." *Id.* at 1045)
- *Henry v State*, 175 So3d 675, 680 (Fla 2015) (The Florida Supreme Court remanded a 90-year aggregate sentence for multiple nonhomicide offenses because *Graham* is not

limited to the "exclusive term of 'life in prison'" and a juvenile offender must have a meaningful opportunity to obtain release during his or her natural life.)

- *State v Boston*, 363 P3d 453 (Nev 2015) (The Nevada Supreme Court concluded that an aggregate sentence requiring 100 years in prison before parole violates *Graham*. "[T]he *Graham* rule applies to aggregate sentences that are the functional equivalent of a sentence of life without the possibility of parole." *Id.* at 457.)
- *Bear Cloud v State*, 334 P3d 132, 136 (Wyo. 2014) (The Wyoming Supreme Court held "that the teachings of the *Roper/Graham/Miller* trilogy require sentencing courts to provide an individualized sentencing hearing to weigh the factors for determining a juvenile's 'diminished culpability and greater prospects for reform' when, as here, the aggregate sentences result in the functional equivalent of life without parole." *Id.* at 141-42 (quoting Miller, 567 US at 471). The court explained: "To do otherwise would be to ignore the reality that lengthy aggregate sentences have the effect of mandating that a juvenile die in prison." *Id.* at 142). *Davis v Wyoming*, 415 P3d 666, 666-7 (Wyo. 2018)(The Wyoming Supreme Court affirmed *Bear Cloud* holding that individuals with sentences that are functionally equivalent to life without parole are enitlted to *Miller* hearings.)
- *Brown v State*, 10 NE3d 1 (Ind 2014) (The Indiana Supreme Court held that defendant's aggregate sentence of 150 years imprisonment "forswears altogether the rehabilitative ideal" and exercised state constitutional authority to impose a lesser sentence.)
- *State v Ragland*, 836 NW2d 107, 110-11 (Iowa 2013) (The Iowa Supreme Court hold that a sentence of 60 years for a juvenile convicted of homicide must be modified in

light of *Miller* because "the rationale of *Miller*, as well as *Graham*, reveals that the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole." *Id.* at 121).

- *Commonwealth v Brown*, 1 NE3d 259, 261 (Mass 2013) (In remanding for resentencing the Supreme Judicial Court of Massachusetts instructed the lower court that under *Miller* they must "avoid imposing on juvenile defendants any term so lengthy that it could be seen as a functional equivalent of a life-without-parole sentence." *Id.* at 270 n 11.)
- *People v Caballero*, 282 P3d 291 (Cal 2012) (The California Supreme court held that a total effective term of 110 years-to-life for nonhomicide offense is prohibited under *Graham*.)

In addition, three federal courts of appeals, applying the more stringent AEDPA standard on habeas review, have also held that sentences functionally equivalent to life without parole are unconstitutional as applied to children.[75]

- Mckinley v Butler, 8-9 F3d 908, 909 (7th Cir 2016) (The Seventh Circuit held that *Miller* applies to "a *de facto* life sentence…")
- *Budder v Addison*, 851 F3d 1047, 1049 (10th Cir 2017) (The Tenth Circuit held that "the sentencing practice that was the Court's focus in Graham was any sentence that

[75] While not a grant of habeas relief, recently the Sixth Circuit authorized a filing of a second successive habeas petition filed by a juvenile offender pursuant to *Miller* and *Montgomery*. The petitioner was convicted of first degree murder at 17 and under Tennessee law must serve at least 51 years before he becomes eligible for parole. The Court held that because the petitioner's sentence was crafted without consideration of his special circumstances as a juvenile and is the "functional equivalent of a mandatory sentence of life without parole" that he had made prima facie showing for relief. *In Re: Edward Pinchon*, unpublished order of the 6th Circuit Court, issued August 18, 2017 (Docket No. 17-5104), attached as appendix Y.

denies a juvenile nonhomicide offender a realistic opportunity to obtain release in his or her lifetime, whether or not that sentence bears the specific label 'life without parole.'" *Id.* at 1057.)

- *Moore v Biter*, 725 F3d 1184, 1186 (9th Cir 2013) (The Ninth Circuit applied Graham to a 254 year sentence stating that it "is materially indistinguishable from a life sentence…" *Id.* at 1192.)

Most analogous to Montez' case, the Western District of Missouri ruled that the Eighth Amendment prohibits juveniles from being subjected to life with the possibility of parole sentences where the parole board's policies, procedures, and customs deny those juveniles a "meaningful and realistic opportunity for release based on demonstrated maturity and rehabilitation." *Norman Brown, et al, Plaintiffs, v Anne Precythe, et al, Defendants*, No. 2:17-CV-04082-NKL, 2018 WL 4956519, at *10 (WD Mo, October 12, 2018). Missouri's parole process for juvenile offenders serving life with parole sentences is even more robust than Michigan's, allowing for hearings and providing reasons for the denial—two thing Montez has never been provided. *Id.* at *9. Similar to Michigan, however, and key to showing an Eighth Amendment violation, is that Missouri's parole process does not garuntee defendants the opportunity to present evidence relevant to the *Miller* factors and meaningfully advocate for release based on demonstrated maturity and rehabilitation . *Id.* Like Missouri's unconstiational process, Michiagan's parole procedure for lifers has denied Montez a process that allows him to meaningfully advocate for his release based on the diminished culpability of youth and demonstrated rehabilation.

The Eighth Amendment is not triggered by the magic words "life without parole," but rather by any sentence that does not allow a person convicted as a child a realistic opportunity to obtain

release upon demonstrating maturity and rehabilation. *Montgomery*, 136 S Ct at 736. Montez' sentences deny him that opportunity.

Recently the Washington Supreme Court applied *Graham* and *Miller's* essential holding, that "children are different," to all sentences imposed on children in adult court that "fail to take defendants' youthfulness into account..." *State v Houston-Sconiers*, 391 P3d 409, 413 (Wash 2017), quoting *Miller*, 567 US at 2470; *Graham*, 560 US at 76. Ultimately the Washington Supreme Court concluded that the Eighth Amendment requires a sentencing court to consider the mitigating circumstances of youth, and that the ability to petition for early release, even after 20 years, does not cure the constitutional error of imposing a sentence on a child without considering the mitigating effects of the hallmark features of youth. *Houston-Sconiers*, 391 P3d at 418-421.[76]

Montez' sentence, denies him a meaningful opportunity for release and was crafted without any consideration of his childhood environment and family circumstances, his mental health, intellectual impairments, the way he was influenced by family and peers, his youth's impact on his ability to meaningfully participate in his own defense, his immaturity and inability to appreciate the risks and consequences of his actions, or his potential for rehabilitation. Therefore, Montez' sentence is unconstitutional and he is entitled to a resentencing at which the relevant mitigating circumstances and his capacity for rehabiliation can be properly weighed.

Our Court of Appeals has acknowledged that when it comes to imposing the harshest available penalty on youth, not only must the *Miller* factors be considered as mitigation, but the weighing of traditional sentencing goals such as deterrence, retribution, and punishment is an error of law. *People v Garay*, 320 Mich App 29, 47-48 (2017). The two-page sentencing transcript in

[76] Resentencing was not deemed the proper remedy for cases that were already final, rather parole consideration in a system that offers far more protections than Michigan's was deemed adequate. *State v Scott*, 190 Wash 2d 586, 600 (2018).

Montez' case makes clear that no consideration was given to the mitigating circumstances of youth in crafting his sentence, and the trial court was not yet aware that consideration of traditional aims of punishment was in error. ST.

A. This claim for relief is not precluded by MCR 6.502(g) as a successive petition because it rests on the holding and rationale in *Montgomery v Louisiana*, which is a retroactive change in the law.

Montez has filed several previous motions for relief from judgement, all denied, pursuant to MCR 6.500 *et seq*.[77] None of these prior motions claimed that his plea was illusory based on a retroactive change in Eighth Amendment law—that is, the United States Supreme Court's 2016 decision in *Montgomery*. On February 22, 2016 Montez filed a subsequent motion for relief from judgment on these grounds and requested appointment of counsel.[78] On March 1, 2016 the State Appellate Defender Office was appointed to perfect Montez' motion for relief from judgment based on a retroactive change in law.[79] The State Appellate Defender Office perfected the February 22, 2016 pro per filing, and on August 23, 2017 the trial court issued a brief opinion and order denying relief.[80] Importantly, the trial court did not rule that the motion was barred pursuant to MCR 6.500 *et seq,* rather the trial court denied relief on substantive grounds.[81] The Court of Appeals denied leave on August 23, 2018, with Judge Stephens dissenting.[82]

MCR 6.502(G)(2) provides that Montez may file a "subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment." Montez' first motion for relief from judgement was filed on May 9, 1995, prior to the United States Supreme

[77] Register of Actions, attached as appendix M.
[78] *Id.*
[79] Order of Appointment, attached as appendix N.
[80] Trial Court Order, attached as appendix O.
[81] *Id.*
[82] Court of Appeals Order, attached as appendix P.

Court's rulings in *Miller* and *Montgomery*. This motion for relief from judgement rests on a retroactive change in the law and is properly before this court under MCR 6.502(G)(2).

B. Michigan's parole process does not provide Montez Stovall with a meaningful, realistic opportunity for release based on demonstrated maturity and rehabilitation as is required by the United States Supreme Court in *Miller* and *Montgomery*.

While one does not typically have a protected liberty interest in a grant of parole, "the parole process takes on a constitutional dimension that does not exist for other offenders" when applied to juvenile offenders, because denying that class of people a meaningful opportunity at release violates the Eighth Amendment. *Diatchenko v Dist Attorney for Suffolk Dist*, 471 Mass 12, 19 (2015). The Eighth Amendment prohibits a sentence that denies Montez a meaningful opportunity at release. Montez is a member of a class of people, juveniles offenders, who must be afforded an opportunity to demonstrate their rehabilitation in order to earn their release. *Graham*, 560 US at 75, 82; *Montgomery*, 136 S Ct at 736. Michigan's parole process denies Montez that opportunity.

In *Montgomery* the Supreme Court suggested it could be possible for states to remedy the constitutional violation at issue by "permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Montgomery* at 736. This is not the remedy Michigan chose. MCL 769.25a. Moreover, the Court went on to explain that, "[a]llowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Id.* When determining if a constitutional violation has taken place, courts must look at more than the words at issue, in this case what Montez' sentence is called. Courts must also analyze the law's application. *See, e.g., Turner v Fouche*, 396 US 346, 353 (1970) . While technically eligble for parole, in practice Montez is not being afforded a meaningful opportunity at release upon

demonstrated maturity and rehabilitation, and therefore, his sentence violates the Eight Amendment.

Nothing in the process afforded Montez guarantees him the opportunity to even speak to a member of the Parole Board, let alone requires the Board to consider his demonstrated rehabilitation or the mitigating factors of youth. MCL 791.233; MCL 791.234(8). The maze that is the parole process for those serving life sentences was detailed in the Statement of Facts, but in sum, numerous changes in the laws governing the Board and its policies since Montez' plea and sentence have resulted in hardly anyone, including those convicted of non-violent drug crimes, being paroled from life sentences. *Foster*, 595 F 3d at 366 (finding that the percentage of parole-eligible lifers who were released was only 0.15% on average in recent years). The parole process for lifers is an ad hoc exercise comparable to commutation—providing such a "bare possibility" of release that it does not cure the Eighth Amendment violation. *Solem v Helm*, 463 US 277, 303 (1983).

Due to the Parole Board's policy that "life means life" and the harsh reality of the short life expectancy for juveniles sentenced to life in prison, Montez' sentence functionally condemns him to die in prison. Michigan Department of Corrections, Office of the Michigan Parole Board, Testimony in support of Proposed Legislation (Lansing, September 28, 1999); *Kelly*, 851 F3d at 688. His sentences therefore violate the Eighth Amendment. The proper remedy for an unconstitutional sentence is resentencing. *People v Eliason*, 300 Mich App 293, 311 (2013) (finding a juvenile defendant's sentence unconstitutional, vacating sentence, and remanding for an individualized sentence within the strictures of *Miller*).

C. Montez Stovall is entitled to resentencing to a term of years with a minimum term of years within his guidelines range of 130 months to 300 months.

Montez' sentencing guidelines were calculated at the time of his sentence to be 144 months (12 years) to 300 months (25 years) or life.[83] The maximum penalty by statute for second degree murder is "life, or any term of years, in the discretion of the court trying the same." MCL 750.317. MCL 769.9(2) prescribes that for sentences where the court may impose a sentence of life or a term of years, that if the court imposes a minimum of a term of years, the maximum or tail of that sentence must also be a fixed number of years. Because Montez' current sentence violates the Eighth Amendment, he is entitled to resentencing. He asks this court grant his motion from relief from judgment, vacate his sentence, and resentence him within his originally calculated guidelines.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Montez Stovall asks that this Honorable Court to grant leave to appeal, or in the alternative, grant any other relief to which he may be entitled.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Sofia V. Nelson

BY: _____

Sofia V. Nelson (P77960)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, MI 48226
(313) 256-9833
snelson@sado.org

Dated: October 18, 2018

[83] SIR, attached as appendix I.