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STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

ROBIN RICK MANNING,

Defendant-Appellant.
______________________________________/

Supreme Court No.

Court of Appeals No. 345268

Circuit Court No. 84-000570-FC

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Robin Rick Manning appeals from the June 7, 2019 Court of Appeals decision (Borello (dissenting), Krause, Swartzle, JJ.) denying his application for leave to appeal the circuit court's denial of his motion for relief from judgment. This application for leave to appeal is being filed within 56 days of the Court of Appeals' decision denying Mr. Manning's timely filed motion for reconsideration as required by MCR 7.305(C)(2)(c).

Mr. Manning seeks review because the issues raised involve legal principles of major significance to the state's jurisprudence. MCR 7.305(B)(3). The Court of Appeals' decision also is clearly erroneous and will cause material injustice. MCR 7.305(B)(5)(a).

Accordingly, Mr. Manning asks this Court to grant this application for leave to appeal or order other appropriate relief.

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QUESTIONS PRESENTED

1. Should Mr. Manning be permitted to file his successive motion for relief from judgment under MCR 6.502(G)(2), where he challenges the constitutionality of the mandatory life-without-parole sentence he received for a crime he committed when he was 18 years and 3 months old based on the U.S. Supreme Court's recent decision in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), held retroactive by *Montgomery v Louisiana*, 136 S Ct 718; 193 L Ed 2d 599 (2016)?

Trial court answered: No.

Court of Appeals answered: No.

Defendant-Appellant answers: Yes.

2. Has Mr. Manning established entitlement to relief under MCR 6.508(D), where the retroactive change in law announced in *Miller* undermines the circuit court's prior denial of his motion for resentencing and, regardless, the recent decisions in *Miller* and *Montgomery* provide "good cause" for any prior failure to challenge his mandatory life-without-parole sentence and "actual prejudice" resulting in an invalid sentence?

Trial court answered: No.

Defendant-Appellant answers: Yes.

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INTRODUCTION

In 1985, Robin Rick Manning received a mandatory sentence of life without parole for a crime he committed when he was three months past his eighteenth birthday. He has been in prison for nearly 35 years. During that time, the U.S. Supreme Court has made clear that youth matters for purposes of sentencing. Children cannot receive the death penalty, *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005); they cannot receive a life-without-parole sentence for a non-homicide offense, *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010); and they cannot receive a mandatory life-without-parole sentence, *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012); *see also Montgomery v Louisiana*, 136 S Ct 718; 193 L Ed 2d 599 (2016) (holding that *Miller* announced a retroactive change in law). The growing scientific consensus now confirms that the mitigating qualities of youth that formed the basis for *Roper*, *Graham*, and *Miller* do not magically disappear when a person turns 18.

Against this backdrop, Mr. Manning filed his *pro se* motion for relief from judgment challenging the constitutionality of his mandatory life-without-parole sentence under *Miller*. The circuit court determined that his successive motion was procedurally barred by MCR 6.502(G) and that he could not establish entitlement to relief under MCR 6.508(D). The Court of Appeals (Borello (dissenting), Krause, Swartzle, JJ.) denied leave to appeal, reasoning that Mr. Manning had not established an exception to the general rule that a movant may not appeal the denial of a successive motion for relief from judgment under MCR 6.502(G).

Both the circuit court and the Court of Appeals erred. Mr. Manning should have been permitted to file—and at the very least appeal the denial of—his successive motion because it is "based on" *Miller*, "a retroactive change in law that occurred after [his] first motion for relief from judgment." MCR 6.502(G)(2). Mr. Manning also established entitlement to relief under MCR 6.508(D). *Miller* announced a retroactive change in law that undermines the circuit court's denial

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of his prior challenge to his mandatory life-without-parole sentence. MCR 6.508(D)(2). And even if his motion raises new grounds for relief, he has established the requisite good cause for any prior failure to raise them as well as actual prejudice. MCR 6.508(D)(3).

The legal principles at issue here of are of major significance to this state's jurisprudence. Life without parole is the harshest sentence *anyone* can receive in this state. The constitutionality of imposing that harshest sentence on an 18-year-old youth—given all the U.S. Supreme Court has said about the mitigating qualities of youth and all the science now tells us about how 18-year-olds are virtually indistinguishable from younger children—is an issue that deserves review and consideration by this state's highest court. Moreover, the errors committed by the circuit court and the Court of Appeals will cause material injustice to Mr. Manning, who is now entitled to an individualized sentencing hearing under *Miller*. At the very least, he should have the opportunity to fully present his constitutional arguments to the courts. Yet the circuit court and the Court of Appeals have effectively closed the courthouse door, refusing to even consider Mr. Manning's arguments despite the fact that his motion is "based on" the retroactive change in law announced in *Miller*. Accordingly, this Court should grant Mr. Manning's application for leave to appeal and vacate the circuit court's decision or issue other appropriate relief, including but not limited to remanding to the Court of Appeals to consider Mr. Manning's case on the merits.

STATEMENT OF FACTS

On August 6, 1984, Gilbert Morales and Thomas Newvine got into a fight at a house party in Saginaw, Michigan.[1] Morales left the party but returned a few hours later, shooting and killing Newvine from inside a car. William Luna and Mr. Manning, who had both been drinking that

[1] The facts of the offense and trial are generally taken from this Court's prior opinion in *People v Manning*, 434 Mich 1; 450 NW2d 534 (1990).

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night, went along with Morales in the car as backup and were present when the shooting took place. Mr. Manning was 18 years and 3 months old. *See* Register of Actions at 1.

Luna and Mr. Manning were charged and tried jointly for the murder. On the fifth day of trial, Luna pled guilty to second degree murder and agreed to testify against Mr. Manning. Mr. Manning rejected a similar plea offer. At trial, Luna testified that Mr. Manning never fired a shot at Newvine. Nonetheless, the jury found Mr. Manning guilty of first degree murder, felony firearm, and carrying a weapon with unlawful intent. The court therefore had no choice but to sentence him to an automatic prison term of life without the possibility of parole under MCL 750.316. Luna, on the other hand, received a sentence of ten to twenty years. *Manning*, 434 Mich at 24 n 2.

After exhausting his direct appeals, Mr. Manning filed a delayed motion for a new trial on August 7, 1991, which the circuit court denied. *See* Register of Actions at 3. He subsequently filed a motion for relief from judgment on August 4, 1997, and has filed a number of post-conviction motions since then. *See id.* In April 2012—before the U.S. Supreme Court decided *Miller*—Mr. Manning filed a motion for resentencing, arguing that his life-without-parole sentence violated both the Michigan and United States Constitutions. *See* Mot for Resentencing (Exhibit A). The circuit court denied the motion, and both the Court of Appeals and this Court denied leave to appeal. *See* Register of Actions at 9–10; *see also People v Manning*, 495 Mich 867; 843 NW2d 144 (2013).

In 2012, the U.S. Supreme Court issued its landmark decision in *Miller*, holding that mandatory life-without-parole sentences for those under the age of 18 at the time of their crimes violate the Eighth Amendment to the U.S. Constitution. 567 US at 465. Four years later, the Court confirmed that *Miller* announced a substantive rule that applies retroactively on post-conviction review. *Montgomery*, 136 S Ct at 736.

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After *Miller* and *Montgomery*, on April 25, 2018, Mr. Manning filed a *pro se* motion for relief from judgment in the circuit court under MCR 6.500 *et seq. See* Mot for Relief from Judgment (Exhibit B). He argued (again) that his mandatory life-without-parole sentence was unconstitutional under both the Michigan and United States Constitutions because the rationale announced in *Miller* also applies to defendants, like him, who were 18 years old at the time of their offenses. Mr. Manning argued that he had good cause for not raising these arguments in prior motions based upon new scientific evidence—which was not available during his original court proceedings or any prior appeals—establishing that 18-year-olds possess many of the same qualities of youth as younger children. *Id.* at 3–4. He also argued that he had established actual prejudice because he was deprived of an individual consideration of mitigating factors at his sentencing as required by *Miller*. *Id.* at 5.

The circuit court denied Mr. Manning's motion. *See* June 7, 2018 Order (Exhibit C). The circuit court determined that all of Mr. Manning's arguments "could have been raised in [his] original appeal" and that "he does not even attempt to put forward good cause for his failure to do so." *Id.* at 2. The court concluded that he had not established entitlement to relief by showing a retroactive change in law under MCR 6.508(D)(2) or good cause and actual prejudice under MCR 6.508(D)(3). *Id.* The court further found that Mr. Manning's successive motion was "procedurally barred" because he did not establish a retroactive change in law or newly-discovered evidence as required by MCR 6.502(G). *Id.* at 3.

On August 30, 2018, Mr. Manning filed a delayed application for leave to appeal under MCR 7.205(G). The Court of Appeals denied leave to appeal, noting that "Defendant has failed to demonstrate the entitlement to an application of any of the exceptions to the general rule that a movant may not appeal the denial of a successive motion for relief from judgment. MCR

6.502(G).” *See* February 21, 2019 Order (Exhibit D). Judge Borrello dissented. He would have granted leave to appeal on the issue of whether the analysis set forth in *Cruz v United States*, unpublished opinion of the United States District Court for the District of Connecticut, issued March 29, 2018 (Case No. 11-CV-787 (JCH))—which held that *Miller* applies to 18-year-olds—applies here. *Id.* Mr. Manning filed a motion for reconsideration on March 11, 2019, and *pro bono* counsel filed a supplemental brief in support of the motion. On June 7, 2019, the Court of Appeals denied the motion for reconsideration. *See* June 7, 2019 Order (Exhibit E). Judge Borrello, dissenting again, would have granted the motion. *Id.*

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ARGUMENT

Without once referring to *Miller* or *Montgomery*, the circuit court summarily denied Mr. Manning’s motion for relief from judgment and the Court of Appeals denied leave to appeal. A decision on a motion for relief from judgment is reviewed for abuse of discretion. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). A court abuses its discretion “when its decision falls outside the range of reasonable and principled outcomes, or makes an error of law.” *Id.* (citations omitted). The interpretation of court rules are questions of law that are subject to *de novo* review. *Id.*, citing *People v Hawkins*, 468 Mich 488, 497; 668 NW2d 602 (2003).

The Michigan Court Rules, MCR 6.500 *et seq.*, set forth the procedures for post-appeal review of a defendant’s judgment or sentence. MCR 6.501. Although a defendant is generally entitled to file only one motion for relief from judgment, MCR 6.502(G)(1), he may file a “successive” motion when it is “based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion.” MCR 6.502(G)(2).

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Once a successive motion has been filed, the court must examine it and determine whether the defendant is entitled to relief. *See* MCR 6.504(B). The defendant has the burden of establishing entitlement to the relief requested. MCR 6.508(D). The court may not grant relief if the motion:

> (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> > (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
> >
> > (b) actual prejudice from the alleged irregularities that support the claim for relief.

Id. After reviewing the motion, the court must either summarily dismiss it, MCR 6.504(B)(2), or order the prosecutor to respond to it, MCR 6.504(B)(4). The court may also order the parties to expand the record, MCR 6.507(A), or hold an evidentiary hearing, MCR 6.508(C).

Here, the circuit court determined that Mr. Manning's successive motion for relief from judgment was "procedurally barred by MCR 6.5029(G) [sic]" because he "has not established" an exception to the general bar on filing successive motions. Exhibit C at 3. The circuit court also concluded that Mr. Manning's claims "could have been raised on appeal or we [sic] already ruled on by our Court of Appeals" and that he "has not established any good cause and prejudice for failing to raise these issues previously, or in regard to the issues that have already been ruled on, [he] has not established a retroactive change in the law that undermines the prior decision." *Id.* at 2. The Court of Appeals denied leave to appeal, noting that Mr. Manning "has failed to demonstrate the entitlement to an application of any of the exceptions to the general rule that a movant may not appeal the denial of a successive motion for relief from judgment. MCR 6.502(G)." Exhibit D.

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Contrary to the decisions of the lower courts, Mr. Manning's motion for relief from judgment satisfies the procedural requirements of both MCR 6.502(G) and MCR 6.508(D). His successive motion is based on the retroactive change in law announced in *Miller* under MCR 6.502(G)(2). And regardless of whether he did or did not raise this exact issue in a prior motion, he has established that he is entitled to relief under MCR 6.508(D) because the rule announced in *Miller* and held retroactive in *Montgomery* applies equally to defendants, like him, who were 18 at the time of their crimes.

I. Mr. Manning's Successive Motion Is Authorized By MCR 6.502(G) Because It Is "Based On" The Retroactive Change In Law Announced In *Miller*.

Both the Court of Appeals and the circuit court erred when they determined that MCR 6.502(G) barred Mr. Manning's successive motion. There can be no question that Mr. Manning's motion is "based on" the retroactive change in law announced in *Miller*, which was decided over twenty years after he filed his first motion for relief from judgment. MCR 6.502(G)(2). Black's Law Dictionary defines "based on" (albeit in the copyright context) as "[d]erived from, and therefore similar to, an earlier work." *Black's Law Dictionary* (10th ed). Similarly, the Oxford English Dictionary defines the verb "base" as "[t]o place *on* (also *upon*) a foundation, fundamental principle, or underlying basis." *Oxford English Dictionary* (3d ed). Mr. Manning's constitutional challenge to his mandatory life-without-parole sentence is derived from *Miller* and *Montgomery* because those cases provide the foundational and fundamental principles upon which his motion rests. Indeed, Mr. Manning expressly stated in his motion that he was seeking "relief similar to that as ordered in *Miller v Alabama*." Exhibit B at 2. This is enough to authorize the filing of his successive motion under MCR 6.502(G).

Under similar circumstances, a federal district court authorized a federal prisoner's successive habeas petition challenging the mandatory life-without-parole sentence he received for

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a crime he committed at the age of 18. *Cruz*, unpub op at 14. The court held as a threshold matter that the petition was not procedurally barred because it contained "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" as required to file a successive federal habeas petition. *Id.*, citing 28 USC § 2255(h)(2). "Even if Cruz's claim may require a 'non-frivolous extension of [*Miller*'s] qualifying rule' to a set of facts not considered by the *Miller* Court," the court reasoned, "his claim, nonetheless, depends on the rule announced in *Miller*." *Id.* The court went on to note that the "principle underlying the holding [in *Miller*] is more general: '[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.'" *Id.*, quoting *Miller*, 567 US at 479. "Thus, who counts as a 'juvenile' and whether *Miller* applies to Cruz as an 18-year-old are better characterized as questions on the merits, not as preliminary gate-keeping questions under section 2255(h)." *Id.* So too here: Mr. Manning's successive motion for relief from judgment is "based on" the retroactive change in law announced in *Miller* and should not prevent him from filing or appealing his motion for relief from judgment. MCR 6.502(G)(2).

Michigan courts have also confirmed that MCR 6.502(G) serves a gatekeeping function that does not require a full determination on the merits. For example, in *People v. Miller*, unpublished per curiam opinion of the Court of Appeals, issued June 25, 2019 (Docket No. 341425), p. 2 n 4, the Court of Appeals considered the defendant's challenge to his life *with* parole sentence under *Miller*. Even though *Miller* did not squarely apply to invalidate the sentence, the Court of Appeals still determined that it would "have been able to exercise our discretion to review defendant's arguments . . . even if they had been made through a motion for relief from judgment." *Id.*, citing MCR 6.502(G)(2). In other words, regardless of whether the defendant was entitled to

relief on the merits—a question that was premature at that stage—the defendant's reliance on *Miller* provided grounds to authorize the filing of his successive petition. *Id.*; *see also People v Robinson*, unpublished per curiam opinion of the Court of Appeals, issued July 30, 2019 (Docket No. 337865), p. 5 (noting that satisfying the threshold for successive motions "was only the initial qualifying step for defendant to receive a merits review of his motion for post-judgment relief"); *People v Jones*, unpublished opinion of the Kalamazoo County Circuit Court, issued December 21, 2011 (Docket No. 1979-1104-FC) (noting that both parties did not dispute successive motion was permissible where "*Graham* is a retroactive change in the law which occurred after Defendant's first motion for relief from judgment" even though prosecution argued *Graham* did not apply to defendant). The decisions of the circuit court and Court of Appeals in Mr. Manning's case conflict with this understanding of MCR 6.502(G)(2).

The Michigan Court Rules permit Mr. Manning to make his case on the merits that *Miller* applies to his circumstances. Accordingly, the circuit court should have permitted the filing of Mr. Manning's successive motion and the Court of Appeals should have granted Mr. Manning's application for leave to appeal, as Judge Borello would have done.

II. Mr. Manning Established Entitlement To Relief Under MCR 6.508(D).

The circuit court's conclusion that Mr. Manning did not establish entitlement to relief under MCR 6.508(D) was also error. Because *Miller* applies equally to defendants who were 18 at the time of their crimes, Mr. Manning established that a retroactive change in law has undermined the circuit's court's prior denial of his motion for resentencing under MCR 6.508(D)(2). Even if Mr. Manning did not previously raise these exact grounds for relief in a prior motion, he has established "good cause" and "actual prejudice" under MCR 6.508(D)(3).

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A. *Miller* Seriously Undermines The Mandatory Life-Without-Parole Sentence Mr. Manning Received For A Crime He Committed At Age 18.

The United States Supreme Court has made clear time and again that children are "constitutionally different from adults for purposes of sentencing" and are categorically "less deserving of the most severe punishments." *Miller*, 567 US at 471. In *Roper v Simmons*, the Court held that imposing the death penalty on children violates the Eighth Amendment's prohibition on cruel and unusual punishments. 543 US at 568. A few years later, in *Graham v Florida*, it held that the Eighth Amendment categorically "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 US at 82. And in *Miller*, it held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 US at 479.

The Court grounded its conclusions in each of these cases on scientific research establishing "three significant gaps between juveniles and adults." *Id.* at 471; *see also Graham*, 560 US at 68 (noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"). First, children lack maturity and have an "underdeveloped sense of responsibility," which leads to "recklessness, impulsivity, and heedless risk-taking." *Miller*, 567 US at 471. Second, they are "more vulnerable . . . to negative influences and outside pressures," including from their family and peers, and "lack the ability to extricate themselves from horrific, crime-producing settings." *Id.* Finally, they are "less fixed" in their character and more capable of change than adults. *Id.* These "distinctive attributes of youth" make youth less culpable, more capable of reform, and "diminish the penological justifications for imposing the harshest sentences" on them. *Id.* at 472.

In invalidating mandatory life-without-parole sentences for children, *Miller* reaffirmed that "youth matters" for purposes of sentencing. *Id.* at 473. Specifically, these sentences "preclude a

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sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it," including the following "mitigating qualities of youth":

> 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. And finally, this mandatory punishment disregards the **possibility of rehabilitation** even when the circumstances most suggest it.

Id. at 476–77 (emphasis added; citations omitted). "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence," the Court explained, mandatory life-without-parole sentences for children "pose[ ] too great a risk of disproportionate punishment" and violate the Eighth Amendment. *Id.* at 479. *Miller* announced a substantive rule barring life without parole "for all but the rarest juvenile offenders, those whose crimes reflect permanent incorrigibility," which must be applied retroactively. *Montgomery*, 136 S Ct at 734.

Nearly fifteen years ago, *Roper* drew the line between children and adults at the age of 18, and it has not been reevaluated since then. It is now undeniable that this line is no longer consistent with the current state of scientific research, the rationale underlying the holding in *Miller*, or how youth are considered and treated under the law.

1. The Growing Scientific Consensus Establishes That 18-Year-Olds Share The Same Qualities Of Youth That The Court Found Critical In *Miller*.

The *Miller* Court rested its decision not only on "common sense—on what 'any parent knows'—but on science and social science as well." *Miller*, 567 US at 471, quoting *Roper*, 543

US at 569. There is now a growing scientific consensus confirming what any parent also knows: youth does not magically end at 18.

In the years since *Roper*, empirical research in neurobiology and developmental psychology has shown that the "distinctive attributes of youth" identified by the U.S. Supreme Court continue beyond the age of 18 and into a person's mid-twenties. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Ford L Rev 641, 653 (2016) ("It is clear that the psychological and neurobiological development that characterizes adolescence continues into the midtwenties."); *see also* Beaulieu & Lebel, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 27 J Neuroscience 31 (2011). One widely-cited study tracked the brain development of 5,000 children and found that their brains were not fully mature until they were at least 25 years old. Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 Sci 1358, 1358–59 (2010). In particular, the development of the prefrontal cortex—which plays a key role in "higher-order cognitive functions" such as "planning ahead, weighing risks and rewards, and making complicated decisions"—continues into a person's early twenties. Monahan et al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 Crime J 557, 582 (2015).

The research also confirms that 18-year-olds are more similar to children than they are to fully mature adults. They "are more likely than somewhat older adults to be impulsive, sensation seeking, and sensitive to peer influence in ways that influence their criminal conduct." Icenogle et al., *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample*, 43 L & Hum Beh 69, 83 (2019); *see also, e.g.*, Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death Penalty*, 40 NYU Rev L & Soc Change 139, 163 (2016) (noting that "peer pressure

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towards antisocial behaviors continue[s] to have an important influence" in emerging adults ages 18 to 25). They show "diminished cognitive capacity, similar to that of adolescents, under brief and prolonged negative emotional arousal." Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 Temple L Rev 769, 786 (2016). And the period of "emerging adulthood" is a time of peak risk behavior. Arnett, *Emerging Adulthood: A Theory of Development From the Late Teens Through the Twenties*, 55 Am Psychol 469, 475 (2000); *see also, e.g.*, Gardner & Steinberg, *Peer Influence and Risk Taking, Risk Preference, and Risky Decision Making*, 41 Dev Psychol 625, 631–32 (2005) (finding that adolescents (ages 13–16) and youths (ages 18–22) "were more oriented toward risk than were adults" and that "peer pressure had a greater impact on risk orientation" among both groups as compared to adults).

Thus, the very same scientific research that led the *Miller* Court to conclude that mandatory life without parole for children is unconstitutional likewise applies to 18-year-olds like Mr. Manning. *See, e.g.*, *Young Adulthood as a Transitional Legal Category*, 85 Ford L Rev at 662 (noting that developmental scientific research supports "a presumption that mandatory minimum adult sentencing regimes should exclude young adult offenders"); *Adolescents' Cognitive Capacity*, 43 L & Hum Beh at 83 (noting that "teens—and young adults—are relatively less likely to have the self-restraint necessary to deserve the privileges and penalties we reserve for people we judge to be fully responsible for their behavior"). Indeed, the American Bar Association has already recognized in the death penalty context that "the line drawn by the U.S. Supreme Court no longer fully reflects the state of the science on adolescent development." American Bar Association, *ABA Resolution 111: Death Penalty Due Process Review Project Section of Civil Rights and Social Justice Report to the House of Delegates* (February 2018), p. 6.

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2. For The Same Reasons As In *Miller*, The Eighth Amendment Categorically Prohibits Mandatory Life-Without-Parole Sentences For 18-Year-Olds.

Just as there is no meaningful scientific difference between an 18-year-old youth and one under 18, there is no meaningful constitutional difference between the two. *Miller*'s rationale applies equally to 18-year-olds like Mr. Manning.

The *Miller* Court grounded its holding on the Court's past holdings in *Graham* and *Roper*, which adopted "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." 567 US at 470. The Court reasoned that the fundamental differences between children and adults—"transient rashness, proclivity for risk, and inability to assess consequences"—both lessen a child's "moral culpability" and enhance the prospect that, "as the years go by and neurological development occurs, his deficiencies will be reformed." *Miller*, 567 US at 472 (quotation marks omitted). Because 18-year-olds share the same mitigating qualities of youth as those under 18, they also share the same "diminished culpability and greater prospects for reform." *Id.* at 471.

A mandatory life-without-parole sentence is also no less harsh when applied to an 18-year-old. As the *Miller* Court observed, "[i]mprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.'" *Miller*, 567 US at 475, quoting *Graham*, 560 US at 69. Life without parole is an "especially harsh punishment" for an 18-year-old just as it is for someone younger. *Id.* In both cases, the sentence necessarily requires the defendant to serve "more years and a greater percentage of his life in prison than an adult offender." *Id.*, quoting *Graham*, 560 US at 70. "The penalty when imposed on a teenager, as compared with an older person, is therefore 'the same . . . in name only.'" *Id.*, quoting *Graham*, 560 US at 70.

Moreover, as in *Miller*, "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences" on 18-year-olds. *Id.* at 472. "Because [t]he heart

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of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult." *Id.*, quoting *Graham*, 560 US at 71 (quotation marks omitted; alterations in original). 18-year-olds, who share the same qualities of youth as younger children, likewise have diminished culpability. Nor does deterrence justify a mandatory life-without-parole sentence for an 18-year-old, because "the same characteristics that render [them] less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." *Id.*, quoting *Graham*, 560 US at 72 (quotation marks omitted). Similarly, incapacitation requires a determination of incorrigibility, which "is inconsistent with youth." *Id.* at 473, quoting *Graham*, 560 US at 72–73. And a life-without-parole sentence "forswears altogether the rehabilitative ideal." *Id.*, quoting *Graham*, 550 US at 74; *see also People v Carp*, 496 Mich 440, 520–21; 852 NW2d 801 (2014) (concurring with the U.S. Supreme Court that life without parole "does not serve the penological goal of rehabilitation"), vacated on other grounds by *Davis v Michigan*, 136 S Ct 1356; 194 L Ed 2d 339 (2016).

Finally, because life-without-parole sentences "share some characteristics with death sentences that are shared by no other sentences," *Graham*, 560 US at 69, individualized consideration of a defendant's "age and the wealth of characteristics and circumstances attendant to it," *Miller*, 567 US at 476, is just as important here as it was in *Miller*. The same rule should apply when an 18-year-old "confronts a sentence of life (and death) in prison." *Id.* at 477. Ultimately, if youth matters in sentencing—as the U.S. Supreme Court has made clear it does—"then the youthfulness of a marginally older offender for whom the sentence would be equally harsh must also be considered." Shust, *Extending Sentencing Mitigation for Deserving Young Adults*, 104 J Crim Law & Criminology 667, 692 (2014).

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3. The Arbitrary Line Drawn In *Roper* Is Outdated And Must Be Reconsidered.

The *Roper* Court's observation that "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," 543 US at 574, is outdated and should be reconsidered. Faced with new scientific evidence that 18-year-olds are not as fully mature as adults, state and federal legislators are increasingly recognizing that the unique characteristics of youth extend beyond age 18. Among other things:

- All fifty states require a person to be 21 years old to purchase alcohol. *See* 23 U.S.C. § 158 (National Minimum Drinking Age Act); *see also* MCL 436.1109(6) (defining "minor" for purposes of Michigan Liquor Control Code as "an individual less than 21 years of age").

- Eighteen states have raised the legal age to purchase tobacco to 21.[2]

- Federal law prohibits the sale of any firearm or ammunition, other than a shotgun or rifle, to anyone who is under 21. 18 U.S.C. § 922(b)(1). Michigan law prohibits a person under 21 from obtaining a concealed carry permit. *See* MCL 28.425b(7)(a).

- For purposes of federal student aid, the federal government considers those under age 23 to be legal dependents of their parents. Federal Student Aid, <https://studentaid.ed.gov/sa/fafsa/filling-out/dependency> (accessed August 2, 2019).

- The Affordable Care Act allows dependent children to remain on their parents' health insurance until age 26. 42 U.S.C. § 300gg-14.

- Approximately 25 states, including Michigan, have extended foster care beyond the age of 18. *See* National Conference of State Legislatures, *Extending Foster Care Beyond 18*, <http://www.ncsl.org/research/human-services/extending-foster-care-to-18.aspx> (accessed August 2, 2019); *see also* MCL 400.647 (providing that "[a]

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[2] *See* Campaign for Tobacco Free Kids, *States and Localities That Have Raised the Minimum Legal Sale Age for Tobacco Products to 21*, <https://www.tobaccofreekids.org/assets/content/what_we_do/state_local_issues/sales_21/states_localities_MLSA_21.pdf> (accessed August 2, 2019). These states are: Hawaii, California, New Jersey, Oregon, Maine, Massachusetts, Illinois, Virginia, Delaware, Arkansas, Texas, Vermont, Connecticut, Maryland, New York, Washington, and Utah. *Id.* In addition, at least 475 localities—including the City of Ann Arbor and Genesee County in Michigan—have raised the minimum age to 21. *Id.*

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> youth who exited foster care after reaching 18 years of age but before reaching 21 years of age may reenter foster care and receive extended foster care services").

Significantly, the Michigan legislature recently relied upon scientific research to amend the Holmes Youthful Trainee Act—which allows young adults convicted of certain offenses to avoid a criminal record—to include 21-, 22-, and 23-year-olds. *See* MCL 762.11. This change was made specifically "to recognize recent research indicating that the human brain doesn't fully mature until closer to the mid-20s." House Legislative Analysis, HB 4069 (July 20, 2016).

Put simply, the line drawn in *Roper* nearly fifteen years ago no longer reflects the state of the scientific consensus on adolescent development or the legal treatment of young adults. Drawing a new line in light of these developments would not be unprecedented. In fact, *Roper* itself reconsidered the definition of childhood. In 1988, the U.S. Supreme Court held that the death penalty was unconstitutional for children under the age of 16 at the time of their crimes. *Thompson v Oklahoma*, 487 US 815, 838; 108 S Ct 2687; 101 L Ed 702 (1988) (plurality opinion). The Court reasoned that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Id.* at 835. Seventeen years later, the *Roper* Court concluded that "[t]he logic of *Thompson* extends to those who are under 18." 543 US at 574. There is nothing in *Roper*, *Graham*, or *Miller* that prohibits this Court from doing the same here and holding mandatory life-without-parole unconstitutional for 18-year-olds.

A separate line of Eighth Amendment cases further supports the use of current scientific research to draw a new line between children and adults. In *Hall v Florida*, 572 US 701; 134 S Ct 1986; 188 L Ed 2d 1007 (2014), the U.S. Supreme invalidated a Florida statute requiring an IQ score of 70 or lower before permitting a capital defendant to present evidence of an intellectual disability to avoid the death penalty. The Court noted that the Florida statute was inconsistent with

“established medical practice” because it took an IQ score as conclusive evidence of intellectual disability “when experts in the field would consider other evidence.” *Id.* at 712. The Court further noted that “[i]n determining who qualifies as intellectually disabled, it is proper to consult the medical community’s opinions.” *Id.* at 710; *see also Moore v Texas*, 137 S Ct 1039, 1050, 1053; 197 L Ed 2d 416 (2017) (holding that in determining whether an offender has an intellectual disability for purposes of the Eighth Amendment, states must defer to the “medical community’s current standards” that reflect “improved understanding over time” and that the Texas court’s consideration of the issue “deviated from prevailing clinical standards”). Similarly, here, the law must follow the science and recognize that 18-year-olds are entitled to the constitutional protections afforded to youth. Just as “[i]ntellectual disability is a condition, not a number,” *Hall*, 572 US at 723, “youth is more than a chronological fact,” *Miller*, 567 US at 476, quoting *Eddings v Oklahoma*, 455 US 104, 115; 102 S Ct 869; 71 L Ed 2d 1 (1982).

4. Several Other State And Federal Courts Have Applied *Miller* To 18-Year-Olds Like Mr. Manning.

A number of state and federal courts have already applied *Miller* to 18-year-olds like Mr. Manning, including in the post-conviction context. In *Cruz v United States*, unpub op at 14, a federal district court granted habeas relief and held that *Miller* renders life-without-parole sentences for 18-year-olds unconstitutional. The court relied upon testimony from Dr. Laurence Steinberg, a prominent expert in adolescence and the lead scientist on the *amicus curiae* briefs filed by the American Psychological Association in *Roper*, *Graham*, and *Miller*. Dr. Steinberg testified that “we didn’t know a great deal about brain development during late adolescence until much more recently.” Steinberg Tr., *Cruz v United States* (September 13, 2017) (Exhibit F) at 14:20–25. He testified that those in late adolescence “still show problems with impulse control and self-regulation and heightened sensation seeking which would make them in those respects more

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similar to somewhat younger people than to older people." *Id.* at 19:20–25. In addition, "[s]usceptibility to peers is higher during late adolescence than it is in adulthood." *Id.* at 20:24–25. Late adolescents also are "more capable of change" than adults. *Id.* at 21:7–9. Finally, Dr. Steinberg testified that he was "[a]bsolutely certain" that the science underpinning the U.S. Supreme Court's decisions applies equally to 18-year-olds. *Id.* at 71:5–6. After considering this scientific evidence and the "emerging trend that 18-year-olds should be treated differently from fully mature adults," the *Cruz* court held that the Eighth Amendment prohibits mandatory life-without-parole sentences for 18-year-olds. *Cruz*, unpub op at 22, 25.

A Kentucky court considering similar scientific evidence held that the death penalty is unconstitutional for 18- to 21-year olds. *Commonwealth v Bredhold*, unpublished opinion of the Circuit Court of Kentucky, issued August 1, 2017 (Case No. 14-CR-161). The court noted that "[f]urther study of brain development conducted in the past ten (10) years has shown that these key brain systems and structures actually continue to mature well into the mid-twenties (20s); this notion is now widely accepted among neuroscientists." *Id.* at 4.

Other courts have applied the principles announced in *Miller* to young adults and considered youth as a mitigating factor in sentencing. *See, e.g.*, *State v Norris*, unpublished opinion of the Superior Court of New Jersey, Appellate Division, issued May 15, 2017 (Case No. A-3008-15T4), p. 5 (remanding for resentencing in light of *Miller* where 21-year-old was sentenced to *de facto* life in prison); *United States v Walters*, unpublished opinion of the United States District Court for the Eastern District of Wisconsin, issued May 30, 2017 (Case No. 16-CF-198), p. 3 (imposing sentence of time served on 19-year-old in part because "[c]ourts and researchers have recognized that given their immaturity and undeveloped sense of responsibility, teens are prone to doing foolish and impetuous things"); *State v O'Dell*, 183 Wash 2d 680, 696; 358 P3d 359 (2015)

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(holding that "a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender . . . who committed his offense just a few days after he turned 18"); *Sharp v State*, 16 NE3d 470 (Ind Ct App 2014), vacated on other grounds by *Sharp v State*, 42 NE3d 512 (Ind 2015) (finding 55-year sentence for felony murder inappropriate where defendant was "just three months past turning eighteen years of age at the time of the crime").

To be sure, the caselaw is not entirely one-sided. In two unpublished opinions, the Court of Appeals has declined to extend *Miller* to 18-year-olds. *See People v Stanton-Lipscomb*, unpublished per curiam opinion of the Court of Appeals, issued September 20, 2018 (Docket No. 337433), p. 4; *People v Jordan*, unpublished per curiam opinion of the Court of Appeals, issued March 7, 2017 (Docket No. 328474), p. 3. Of course, these unpublished opinions have no precedential effect and are not binding on this Court. *See* MCR 7.215(C)(1). The *Stanton-Lipscomb* panel also cited *Roper*'s language that "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Roper*, 543 US at 574. But, as discussed above, *Roper* was decided nearly 15 years ago, and new scientific evidence (among other things) supports a new line—one that is not at all foreclosed by *Roper*, *Graham*, or *Miller*. Given the conflicting caselaw and the need for clarity on this key constitutional issue, Mr. Manning should be granted leave to appeal to fully present his arguments to this Court.

5. At A Minimum, *Miller* Calls Into Question The Validity Of Mr. Manning's Sentence Under The Michigan Constitution.

Mr. Manning's sentence also violates the Michigan Constitution, which is broader than its federal counterpart. Whereas the Eighth Amendment proscribes the use of "cruel *and* unusual punishments," Michigan's constitution provides that "cruel *or* unusual punishment shall not be inflicted." *People v Bullock*, 485 NW2d 866, 872; 485 NW2d 866 (1992), citing Const 1963, art 1, § 16. This textual difference "provides greater protection" and has led this Court to adopt a

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"broader test for proportionality than that employed in *Graham*." *Carp*, 496 Mich at 519. Specifically, the test considers (1) the severity of the sentence imposed compared to the gravity of the offense; (2) the penalty imposed for the offense compared to penalties imposed on other offenders in the same jurisdiction; (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states; and (4) whether the penalty imposed advances the penological goal of rehabilitiation. *Id.* at 520. For the same reasons discussed above, a mandatory life-without-parole sentence imposed on an 18-year-old is disproportionate under Michigan's Constitution.

6. The Facts Of Mr. Manning's Case Illustrate The Need For An Individualized Consideration Of The Mitigating Factors Of His Youth.

The Court does not have to look far to see the "distinctive attributes of youth" at play in Mr. Manning's case. The prosecutor did not introduce evidence at trial that Mr. Manning killed or intended to kill anyone. Rather, Mr. Manning went along with his friend as backup in a fight. These facts involve the very qualities of immaturity, impulse control, risk-taking, and peer pressure that led the U.S. Supreme Court to decide *Miller*. We also know that Mr. Manning rejected a plea offer—one that resulted in his co-defendant receiving a sentence of 10 to 20 years. Plea bargaining is a particularly problematic stage for young defendants: *Miller* specifically requires sentencers to consider the possibility that the juvenile might have been "charged and convicted of a lesser offense, if not for the incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement)." *Miller*, 567 US at 478.

The trial court was expressly prohibited from taking any of these relevant facts into account in sentencing Mr. Manning. Yet a defendant who was just *three months younger* would now be entitled to a resentencing hearing where the court would be required to consider the defendant's individual circumstances and the mitigating factors of youth.

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B. Mr. Manning Has Established The Requisite Retroactive Change In Law Or Cause And Prejudice Under MCR 6.508(D).

Mr. Manning's motion for relief from judgment fulfills the requirements of MCR 6.508(D). As an initial matter, Mr. Manning's current motion for relief from judgment "alleges grounds for relief which were decided against [him] in a prior appeal or proceeding" and falls within the scope of MCR 6.508(D)(2). Mr. Manning challenged his mandatory life-without-parole sentence in a prior motion for resentencing in 2012, before *Miller* was decided and years before *Montgomery* held it was retroactive. *See* Exhibit A. Thus, for the reasons explained above, Mr. Manning has established that the retroactive change in law announced in *Miller* undermines the trial court's prior decision on his motion for resentencing under MCR 6.508(D)(2).

Even if his motion raises a new claim that could have been raised earlier, Mr. Manning has established the requisite "good cause" and "actual prejudice" under MCR 6.508(D)(3). Good cause can be established by showing that some external factor prevented counsel from previously raising the issue. *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995). External factors include "showing that the factual or legal basis for a claim was not reasonably available to counsel." *Id.* at 385 n 8, quoting *Murray v Carrier*, 477 US 478, 488; 106 S Ct 2639; 91 L Ed 2d 397 (1986). Thus, Mr. Manning has established good cause because the legal basis for his challenge to his mandatory life-without-parole sentence was not available before *Miller* and *Montgomery*. *See People v Harrell*, unpublished per curiam opinion of the Court of Appeals, issued February 26, 2019 (Docket No. 339800), p. 5 (concluding that good cause existed for defendant's failure to challenge his parolable life sentence before *Miller* and *Montgomery*). Moreover, as discussed above, the circuit court had already denied Mr. Manning's challenge to his life-without-parole sentence once before. Thus, Mr. Manning "would have reasonably believed that he need not and in fact could not raise such sentencing arguments prior to *Miller* and *Montgomery*." *Id.* at 5; *see also Jones*, unpub

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op (noting that "[t]he new rule in *Graham* is also good cause as to why Defendant's current arguments could not have been made previously").

Finally, in the case of a challenge to the sentence, "actual prejudice" means that the sentence is invalid. MCR 6.508(D)(3)(b)(iv). Because *Miller* applies equally to 18-year-olds like Mr. Manning, his mandatory life-without-parole sentence is invalid. *See Jones*, unpub op (concluding that "[b]ecause *Graham* is applicable to this case, Defendant's life without parole sentence is invalid, which demonstrates actual prejudice").

CONCLUSION AND RELIEF SOUGHT

After *Miller* and *Montgomery*, Mr. Manning should be given the opportunity to explain why sentencers must take into account how 18-year-olds like him "are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 US at 480. The Court should grant Mr. Manning's application for leave to appeal, vacate the decision of the circuit court, and remand for further proceedings in the circuit court regarding the merits of Mr. Manning's constitutional challenge to his mandatory life-without-parole sentence. Alternatively, the Court should reverse the Court of Appeals decision and remand for further consideration by the Court of Appeals.

Dated: August 2, 2019

Respectfully submitted,

JONES DAY

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PROOF OF SERVICE

I hereby certify that on August 2, 2019, I served a copy of the foregoing application on the following counsel of record, by depositing the same in the United States mail with first class postage fully prepaid:

Saginaw County Prosecutor
Saginaw County Courthouse
111 South Michigan Avenue
Saginaw, MI 48602

I further certify that a notice of the filing of the foregoing application was served on the clerks of the Court of Appeals and the Saginaw County Circuit Court.

I declare that the statements above are true to the best of my knowledge, information, and belief.

/s/ Brittany D. Parling
Brittany D. Parling (P78870)

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