STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBIN RICK MANNING,

Defendant-Appellant.
_____/

Supreme Court
No. 160034

Court of Appeals
No. 345268

Circuit Court
No. 84-005570-FC

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

(ORAL ARGUMENT REQUESTED)

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Table of Contents

Index of Authorities

Cases: **Page:**

United States Supreme Court

Michigan

Other Jurisdictions

Constitutional Provisions: **Page:**

Statutes and Court Rules: **Page:**

Other Sources: **Page:**

Statement of Jurisdiction

The People incorporate defendant's statement of jurisdiction.

Statement of Questions Involved

I. Is defendant's successive motion for relief from judgment "based on a retroactive change in law" under MCR 6.502(G)(2) when the motion relies on the reasoning from *Miller v Alabama*, 567 US 460 (2012), but not the Supreme Court's announced holding or the *ratio decidendi* of the case?

Plaintiff says no.
Defendant says yes.
The trial court said no.
The Court of Appeals said no.

II. Does a mandatory sentence of life without the possibility of parole for a person who was 18 years old at the time of his or her crime violate the Eighth Amendment of the United States Constitution, Const 1963, art 1, § 16, or both?

Plaintiff says no.
Defendant says yes.
The trial court did not answer this question.
The Court of Appeals did not answer this question.

Counterstatement of Facts

On March 21, 1985, a jury found defendant guilty of first-degree murder, MCL 750.316, carrying a weapon with unlawful intent, MCL 750.226, and carrying a firearm during the commission of a felony (felony-firearm), MCL 750.227b, related to the shooting death of Thomas Newvine. (App 1a.) The shooting occurred on August 6, 1984, when defendant—born April 27, 1966—was 18 years old. (App 1a.)

Newvine was shot after he and Gilbert Morales got into an argument and physical fight during a neighborhood house party in Saginaw, Michigan. (App 5-6b, 15-16b.) During the argument, Morales was forcefully ejected from the party, at which time he threatened to return and kill Newvine. (App 5-6b, 15-16b.) After leaving the party, Morales called William Luna's house, seeking backup in the fight he intended to continue with Newvine. (App 77-78b.) Luna, joined by defendant, drove to Morales's home, where Morales, armed with long-barreled and short-barreled weapons, joined them in the car. (App 78-79b.) The three men then drove back to the house party. Newvine was standing in the street just outside of the house. Shots were fired from the vehicle and Newvine was killed. (App 83-86b.)

Morales was charged individually and was convicted by a jury of first-degree murder and felony-firearm. Defendant and Luna were tried jointly for Newvine's murder. During trial, Luna accepted a plea offer of second-degree murder, while defendant rejected a similar offer against the advice of his trial counsel. (App 70-72b.) Thereafter, Luna testified that defendant answered the phone call from Morales asking for backup. (App 77-78b.) Luna said he and defendant drove to Morales's

home, where Morales brought guns out to the vehicle and said he was going to "blow [Newvine] away." (App 80b.) Luna testified that defendant drove the group to the house party, got out of the car, took the .22 caliber weapon from the back seat where Morales had placed it, entered the front passenger side of the car, passed the weapon to Morales, and himself took ahold of the shotgun. (App 83b.) According to Luna and others, Morales asked defendant, "You ready?" and defendant responded, "Yeah." (App 83b, 150b, 152b.) With Luna now driving, the three men proceeded to drive slowly down the street, looking for Newvine. (App 83-84b.)

Luna testified at trial that defendant never fired the shotgun he was holding (App 103b), but other testimony presented at trial suggested that guns protruded and were fired from both the front and rear passenger-side windows of the vehicle. (App 44-45b, 52-53b, 58b, 122-125b, 133-134b.) Accordingly, although Luna testified that defendant did not fire the fatal shots, at a minimum his testimony implicated defendant as an aider and abettor of first-degree murder.

The jury found defendant guilty of first-degree murder, carrying a weapon with unlawful intent, and felony-firearm. (App 1a.) On June 17, 1985, the trial court sentenced defendant to life imprisonment without the possibility of parole for his conviction of first-degree murder.[1] (App 171b.) The Michigan Court of Appeals affirmed defendant's convictions in an unpublished per curiam opinion. *People v Manning*, unpublished per curiam opinion of the Court of Appeals, issued September

[1] The trial court also sentenced defendant to three to five years' imprisonment for carrying a firearm with unlawful intent and two years' imprisonment for felony-firearm, to be served consecutively and preceding the other sentences. (App 171b.)

3, 1987 (Docket No. 86145). In 1990, this Court granted defendant's application for leave to appeal, but then affirmed his convictions in an opinion. *People v Manning*, 434 Mich 1, 7; 450 NW2d 534 (1990).[2]

Back in the circuit court, defendant filed delayed motions for a new trial in 1991 and 1993, both of which were denied.[3] Defendant filed his first motion labeled as a motion for relief from judgment in August 1997, which the trial court denied. In 1998, the Michigan Court of Appeals denied leave to appeal, and in 1999, this Court followed suit. See *People v Manning*, unpublished order of the Court of Appeals, entered July 29, 1998 (Docket No. 206906); *People v Manning*, 459 Mich 966, 966; 591 NW2d 36 (1999). Defendant filed several additional successive motions for relief from judgment, all of which the trial court denied. The Michigan Court of Appeals and this Court also consistently denied defendant's applications for leave to appeal.[4]

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[2] Defendant then filed a habeas action in federal court; the district court denied his petition, the Sixth Circuit Court of Appeals affirmed, and the United States Supreme Court denied defendant's petition seeking a writ of certiorari. See *Manning v Jabe*, 985 F2d 560, 560 (CA 6, 1993); *Manning v Jabe*, 509 US 910, 910; 113 S Ct 3011; 125 L Ed 2d 701 (1993).

[3] The Michigan Court of Appeals and this Court denied defendant's subsequent applications for leave to appeal from both denial orders. See *People v Manning*, unpublished order of the Court of Appeals, entered March 31, 1992 (Docket No. 145240) and *People v Manning*, 441 Mich 870, 870; 494 NW2d 749 (1992) (denying leave to appeal because "defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)"); *People v Manning*, unpublished order of the Court of Appeals, entered March 24, 1994 (Docket No. 169922) and *People v Manning*, 446 Mich 880, 880; 522 NW2d 637 (1994) (same).

[4] See *People v Manning*, unpublished order of the Court of Appeals, entered October 1, 2002 (Docket No. 243271); *People v Manning*, 468 Mich 894, 894; 661 NW2d 240 (2003) ("Defendant's motion for relief from judgment is prohibited by MCR 6.502(G)(1), and he has failed to demonstrate an exception to that rule."); *People v Manning*, unpublished order of the Court of Appeals, entered February 7, 2007 (Docket No. 275762); *People v Manning*, 478 Mich 930, 930; 732 NW2d 903 (2007)

In 2012, the United States Supreme Court held in *Miller v Alabama*, 567 US 460, 465; 132 S Ct 2455; 183 L Ed 2d 407 (2012), that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " Four years later, in *Montgomery v Louisiana*, ___ US ___, ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), the Supreme Court held that *Miller*'s prohibition on mandatory life without parole for juvenile offenders constituted a new substantive rule of constitutional law that applied retroactively to cases on collateral review.

On April 25, 2018, defendant filed the instant successive motion for relief from judgment.[5] On June 7, 2018, the trial court denied defendant's successive motion, concluding that defendant had satisfied neither of the threshold procedural

("[D]efendant's motion for relief from judgment is prohibited by MCR 6.502(G)."); *People v Manning*, unpublished order of the Court of Appeals, entered May 30, 2013 (Docket No. 312992); *People v Manning*, 495 Mich 867, 867; 843 NW2d 144 (2013) ("[D]efendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).").

[5] Defendant requested the following relief in his motion:

> (1) Find that the NEW RULE and PRINCIPLE announced in Miller made retroactive can be applied to Defendant who was 18 years old at the time of his crime;
>
> (2) Find that Defendant has presented NEWLY DISCOVERED EVIDENCE with the recent developments in Scientific Evidence on Brain Development as presented by Scientist Dr. Steinberg, who established that this science applies to 18 year olds, such as Defendant, who was 18 years old at the time of his crime, establishing that Defendant was less culpable and less deserving of societies [sic] harshest Penalty Life without parole;
>
> (3) Find that MCL 750[.316] was UN-constitutional in this case based on it did not allow the sentencing judge any discretion to evaluate the mitigating factors of Defendants Age, level of culpability and Prospect for Rehabilitation . . . . [App 29a.]

requirements in MCR 6.502(G). (App 31-32a.) The court further explained that defendant did not demonstrate good cause for failing to raise the issues identified in his motion on direct appeal, and regarding any issues already ruled upon, defendant did not establish that a retroactive change in law undermined any of the earlier decisions affirming his convictions and sentences. (App 31a.)

On February 21, 2019, the Michigan Court of Appeals denied defendant's application for leave to appeal, and June 7, 2019, the court denied defendant's motion for reconsideration. (App 33-34a.)[6] Defendant then filed an application for leave to appeal in this Court. On December 11, 2019, this Court ordered oral argument on defendant's application, framing the issues as follows:

> (1) whether the defendant's successive motion for relief from judgment is "based on a retroactive change in law," MCR 6.502(G)(2), where the law relied upon does not automatically entitle him to relief; and (2) if so, whether the United States Supreme Court's decisions in *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 136 S Ct 718 (2016), should be applied to 18 year old defendants convicted of murder and sentenced to mandatory life without parole, under the Eighth Amendment to the United States Constitution or Const 1963, art 1, § 16, or both. [App 35a.]

Argument

I. This Court should deny leave to appeal on procedural grounds.

Appellate courts review for an abuse of discretion a trial court's ruling on a motion for relief from judgment. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92, lv den 488 Mich 992 (2010). A trial court abuses its discretion when its decision

[6] The Court of Appeals' panel was comprised of Judges BORRELLO, RONAYNE KRAUSE, and SWARTZLE. Judge BORRELLO dissented from the denial of both defendant's application for leave to appeal and his motion for reconsideration.

falls outside the range of reasonable and principled outcomes or when it makes an error of law. *Id*. The proper interpretation of a court rule is a question of law reviewed de novo. *People v Hawkins*, 468 Mich 488, 497; 668 NW2d 602 (2003).

A. This is not the best vehicle to address the merits of whether mandatory life without parole for those who were 18 at the time of their crimes violates the state and/or federal Constitutions.

This case comes before the Court on collateral review.[7] So, there are lofty procedural barriers before the Court may reach the merits of defendant's constitutional claims. These barriers exist because the state has a substantial interest in promoting the finality of judgments, an interest long recognized and respected by this Court. See *People v Carpentier*, 446 Mich 19, 37; 521 NW2d 195 (1994) ("[T]his state has a legitimate interest in promoting the finality of judgments. . . . Because collateral attacks threaten such finality, it is appropriate to impose the burden of proof on that party making the challenge[.]"), citing *Parke v Raley*, 506 US 20; 113 S Ct 517; 121 L Ed 2d 391 (1992). See also *People v Ward*, 459 Mich 602, 611; 594 NW2d 47 (1999) ("[I]t is entirely appropriate that a much higher standard be applied to a defendant who seeks relief from a judgment long after the conviction.").

To reach the important constitutional issues implicated here, this Court must first conclude that defendant satisfies the lofty procedural threshold of MCR 6.502(G)(2). A ruling that defendant satisfies the retroactive-change-in-law exception

[7] Collateral attacks encompass any challenges raised other than by initial appeal of the judgment in question. *People v Ingram*, 439 Mich 288, 291 n 1; 484 NW2d 241 (1992); *People v Roseberry*, 465 Mich 713, 716; 641 NW2d 558 (2002). See also *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995) ("[A] collateral attack occurs whenever a challenge is made to a judgment in any manner other than through a direct appeal.").

would be the first (binding decision[8]) of its kind in Michigan. But such a ruling may also stretch the scope of the court rule beyond what its language can bear, jeopardizing the countervailing interest in protecting the finality of judgments.

If this Court is concerned about the procedural implications of reaching the merits here, it is not without alternatives. The constitutional issues identified by defendant have come before this Court in the past,[9] and in all likelihood will come before this Court in the future, in cases on direct review. If this Court were to hold in a case on direct review that a sentence of mandatory life without parole for those 18 (or older) at the time of their crimes violates the Eighth Amendment, Const 1963, art 1, § 16, or both, such a holding would represent a change in law that applies retroactively to cases on collateral review (assuming, of course, the Court adopted the retroactivity rationale from *Montgomery*). Defendant could thereafter file a new successive motion for relief from judgment, citing such a precedent, to satisfy the procedural threshold of MCR 6.502(G)(2). By waiting for a case on direct review, this Court could avoid the tricky procedural issue without foreclosing the possibility of a future ruling on the merits or relief for defendant.

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[8] See *People v Miller*, unpublished per curiam opinion of the Court of Appeals, issued June 25, 2019 (Docket No. 341425), p 2 n 4 (stating in dicta that a defendant challenging a life-*with*-parole sentence by citing *Miller* arguably satisfies MCR 6.502(G)(2)); *People v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued June 18, 2019 (Docket No. 344322), p 2 (similar).

[9] See, e.g., *People v Stanton-Lipscomb*, unpublished per curiam opinion of the Court of Appeals, issued September 20, 2018 (Docket No. 337433), lv den 503 Mich 1019 (2019); *People v Jordan*, unpublished per curiam opinion of the Court of Appeals, issued March 7, 2017 (Docket No. 328474), lv den 501 Mich 864 (2017); *People v Adamowicz*, unpublished per curiam opinion of the Court of Appeals, issued June 22, 2017 (Docket No. 330612), rev'd in part and lv den in rel part 503 Mich 880 (2018).

B. Defendant's motion is not "based on a retroactive change *in law*."

MCR 6.502(G)(2) allows a defendant to file a successive motion for relief from judgment when the motion is "based on a retroactive change in law that occurred after the first motion for relief from judgment . . . ." Defendant contends that "*Miller* constitutes a 'retroactive change in law,' " defendant's supp brief, p 9, and because he seeks to extend *Miller*'s *reasoning* to a new class of defendants, his motion is therefore "based on" a retroactive change in law, satisfying the procedural threshold of MCR 6.502(G)(2).[10] But discussing the scope of the phrase "based on"[11] before addressing the scope of the term "law" in MCR 6.502(G)(2) puts the cart before the horse.

The development of "law" in the context of a constitutional judicial opinion like *Miller* refers to law established by precedent. See Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 Tex L Rev 1843, 1844 (2013) ("Text is what starts the engine of constitutional law, but precedent is what really makes it hum."). "It is under stare decisis, or the doctrine of precedent, that legal cases make law."[12] Varsava, *How to Realize the Value of Stare Decisis: Options for*

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[10] "Mr. Manning argues that—given the *rationale* of *Miller* and the overwhelming scientific evidence showing that 18-year-olds possess the same mitigating qualities of youth as younger children—a mandatory life-without-parole sentence for an 18-year-old like him is unconstitutional under both the Michigan and U.S. Constitutions." Defendant's supp brief, p 10 (emphasis added).

[11] The People don't express any particular qualms about defendant's definitions of "based on," but would add to the mix *Merriam-Webster*'s take, defining "base" as "**1 :** to make, form, or serve as a base for **2 :** to find a base or basis for" and defining "basis" as "**1 :** the bottom of something considered as its foundation **2 :** the principal or component of something **3 a :** something on which something else is established or based . . . **4 :** the basic principle." *Merriam-Webster's Collegiate Dictionary* (11th ed).

[12] "Pursuant to stare decisis, judicial decisions constitute legal norms that people are bound to follow and that courts are bound to interpret and enforce." *Id.*

Following Precedent, 30 Yale J L & Human 62, 67 (2018). In the context of constitutional law, scholars often debate the role or operation of precedent when the precedent arguably deviates from the original meaning of the Constitution's text.[13] To the extent judicial opinions carry weight or authority in this area, however, it is under the doctrine of precedent.[14] But not all parts of a judicial opinion are necessarily precedential, carrying the force of law.[15]

Scholars have developed various theories regarding how to identify precedent.

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[13] See, e.g., McGinnis & Rappaport, *Originalism and the Good Constitution* (Cambridge: Harvard University Press, 2013), p 154 ("Originalism is often thought, by both its advocates and its critics, to be inconsistent with precedent."); Mitchell, *Stare Decisis and Constitutional Text*, 110 Mich L Rev 1, 3 (2011) ("[T]he justices may—in limited situations—use wrongly decided constitutional precedents as rules of decision without betraying their allegiance to the enacted constitutional text.").

[14] Serkin & Tebbe, *Is the Constitution Special?* 101 Cornell L Rev 701, 739 (2016) ("There can be no real dispute that constitutional and statutory interpretation evolve analogously to the common law, through the ongoing process of judicial interpretation. The law is thought to be like a kind of palimpsest, where the underlying text is painted over with layer upon layer of subsequent interpretation, each of which must be examined to see the complete picture.").

[15] See Gray, *The Nature and Sources of the Law* (New York: McMillan, 1921), p 261:

> [N]ot every opinion expressed by a judge forms a Judicial Precedent. In order that an opinion may have the weight of a precedent, two things must occur: it must be, in the first place, an opinion given by a judge, and, in the second place, it must be an opinion the formation of which is necessary for the decision of a particular case; in other words, it must not be *obiter dictum*.

Tiersma, *The Textualization of Precedent*, 82 Notre Dame L Rev 1187, 1214 (2007):

> Even if . . . a previous case should serve as a precedent . . . it does not follow that everything the judge said in the earlier judgment, or even every legal principle that he or she articulated, is binding on the later court. Judicial decisions are very different from statutes in this regard. A general rule for interpreting statutes is that every word has meaning and that nothing should be treated as surplusage. This cannon does not apply to judicial opinions[.]

One theory is that precedent is found by determining the *ratio decidendi* of the case:

> A precedent . . . is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi*. The concrete decision is binding between the parties to it, *but it is the abstract ratio decidendi which alone has the force of law as regards the world at large.* [Salmond, Jurisprudence, § 56, p 176 (emphasis added).][16]

Identifying the *ratio decidendi* of a case is not without its difficulties.[17] In 1930, Arthur L. Goodhart, Professor of Jurisprudence at Oxford, explained:

> The initial difficulty with which we are faced is the phrase "*ratio decidendi*" itself. With the possible exception of the legal term "malice," it is the most misleading expression in English law, ***for the reason which the judge gives for his decision is never the binding part of the precedent.*** The logic of the argument, the analysis of prior cases, the statement of the historical background may all be demonstrably incorrect, but the case remain a precedent nevertheless. It would not be difficult to cite a large number of cases, both ancient and modern, in which one or more of the reasons given for the decision can be proved to be wrong; but in spite of this these cases contain valid and definite principles which are as binding as if the reasoning on which they are based were correct. [Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L J 161, 162 (1930) (emphasis added).][18]

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[16] See also Hall, American Law and Procedure, § 43, p 48 ("[O]ne may say, roughly, that a case becomes a precedent only for such a general rule as is necessary to the actual decision reached, when shorn of unessential circumstances."); Allen, Law in the Making (2d ed), p 155 ("Any judgment of any Court is authoritative only as to that part of it, called the *ratio decidendi*, which is considered to have been necessary to the decision of the actual issue between the litigants.").

[17] See *The Textualization of Precedent*, 82 Notre Dame L Rev at 1214 ("[F]inding the ratio, though it is one of the most basic skills of a lawyer, can be an uncertain enterprise fraught with difficulty.").

[18] See also Eisenberg, *The Nature of the Common Law* (Cambridge: Harvard University Press, 1988), p 52 ("The rule so established is characterized as the ratio decidendi or holding of the precedent, and is deemed binding. Anything else said in the opinion is characterized as dicta and is deemed not binding.").

Goodhart opined the *ratio decidendi* is found by applying the following principles:[19]

> (1) The principle of a case is not found in the reasons given in the opinion. (2) The principle is not found in the rule of law set forth in the opinion. (3) The principle is not necessarily found by a consideration of all the ascertainable facts of the case and the judge's decision. (4) The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them. (5) In finding the principle it is also necessary to establish what facts were held to be immaterial by the judge, for the principle may depend as much on exclusion as it does on inclusion. [*Id.* at 182.]

A second theory is that precedent is determined by considering the outcome in light of the material facts of the case. This view of precedent, too, "ignores or discounts the articulated rationale in favor of binding future courts based on the outcome in light of the material facts." Ross, *An Advocate's Toolbox*, 81 Mich B J 24, 26 (Aug 2002). "What is important under this approach is what the precedent court *did*, not what it *said*." Eisenberg, *The Nature of the Common Law* (Cambridge: Harvard University Press, 1988), pp 52-53 (emphasis added). Both the *ratio decidendi* and results-oriented theories of identifying precedent are largely grounded in the premise

[19] Other early American legal scholars agreed that the *ratio decidendi* of a case alone carries the force of law, but framed the relevant identifying factors differently. See Wambaugh, *The Study of Cases* (Boston: Little, Brown, & Co, 1892), pp 3-8 (the four "keys" to determine the *ratio decidendi* are: (1) the deciding court's authority is limited to the very case before it; (2) the court must decide the case in accordance with a general rule; (3) the words used by the court are not necessarily the doctrine of the case ("So far as the opinion goes beyond a statement of the proposition of law necessarily involved in the case, the words contained in the opinion are not authority of the highest order, but are merely words spoken, *dicta*."); and (4) the doctrine of the case must be a doctrine that is in the mind of the court ("[A] case is not a precedent for any proposition that was neither consciously nor unconsciously in the mind of the court.")). Still others have opined that it is "impossible to devise formulae for determining the ratio decidendi of a case[.]" Cross & Harris, *Precedent in English Law* (Oxford: Clarendon Press, 1991), p 72.

that precedent is established only as a byproduct of the court's resolution of the issue(s) presently before it. *Id.* at 53.

A third theory is that precedent exists in the rule(s) announced by the court in its judicial opinion. *Id.*[20] The increasing textualization of judicial opinions in modern American law has seemingly bolstered acceptance of this theory:

> It should be evident by now that current American opinions are very much "written" law and that, in determining the holding or ratio decidendi of a case, there is substantial emphasis on the court's exact words. . . . Especially noteworthy is that American courts are beginning to state their holdings explicitly, and that those statements of the holding are being treated more and more like a statute. Judicial opinions—or at least, the part that we regard as precedent or the holding—are gradually being textualized. . . .
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> . . . Recall that in the English and older American practice, finding the ratio decidendi could be a daunting task that often required sophisticated legal reasoning. Courts certainly did not lay it out on a platter for easy consumption. Instead, lawyers had to figure out the holding by analyzing the relationship of the facts to the outcome of the case while at the same time reconciling two or three opinions explaining in somewhat different terms why the court had decided as it did. [*The Textualization of Precedent*, 82 Notre Dame L Rev at 1247-1249.][21]

Under this theory, the scope of an announced rule has a significant effect on how broadly the judicial decision may be applied as precedent. The "degree to which the

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[20] "Rules of law announced in precedents are only infrequently pruned back by a deciding court to the bare minimum necessary for the precedent court's decision. Even less frequently are they disregarded entirely in favor of a rule pieced together out of the facts of the precedent and its results." *Id.* See also *An Advocate's Toolbox*, 81 Mich B J at 26.

[21] See also *Is the Constitution Special?* 101 Cornell L Rev at 719-720:

> Today . . . written opinions of the common law are subjected to at least a similar kind of textual scrutiny as other sources of law. . . . The point . . . is that the texts of judicial opinions themselves now have the force of law through stare decisis . . . and that judicial opinions are taken seriously as texts for purposes of interpreting what the law is.

decision in a particular precedential case will control the outcome in later litigation depends largely on the concreteness of the doctrine established in that case." Maltz, *The Nature of Precedent*, 66 N C L Rev 367, 377 (1988).

In *Miller*, 567 US at 465, the United States Supreme Court considered the constitutionality of a state law that mandated sentences of life without the possibility of parole for two 14-year-old offenders convicted of murder. The Supreme Court expressly identified its holding as follows: "We therefore hold that mandatory life without parole *for those under the age of 18* at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Id.* (emphasis added).[22] Defendant does not rely upon this *announced holding* as the foundation of his successive motion; *Miller*'s identified holding, standing alone, is of no help to defendant because he was not under the age of 18 at the time of his offenses. Instead, defendant relies upon certain propositions of reason[23] the Supreme Court offered to

[22] The Court reiterated its holding at the end of Section II of its opinion, stating, "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 479.

[23] The Supreme Court in *Miller* offered the following rationale (summarized):

I. The Eighth Amendment requires proportionate punishment:

- *a.* Children are constitutionally different than adults for sentencing purposes.
  - *i.* Juveniles have diminished culpability and greater prospects for reform.
  - *ii.* Significant psychological gaps exist between juveniles and adults, including that
    - *1.* children lack maturity and have an underdeveloped sense of responsibility,
    - *2.* children are more vulnerable to negative influences and outside pressures, and
    - *3.* children's traits are less fixed than adults.
  - *iii.* Science and social science studies show fundamental

justify its holding. See defendant's supp brief, pp 25-27 ("There is no meaningful scientific difference between 18-year-olds and younger adolescents.").

These reasons, though possessing value, do not carry the weight of precedential constraint like *Miller*'s holding. Recall that under the *ratio decidendi* theory of precedent, "the reason which the judge gives for his decision is never the binding part of the precedent." Goodhart, *supra*, at 162. This is so because the "logic of the argument, the analysis of prior cases, the statement of the historical background may all be demonstrably incorrect, but the case remain a precedent nevertheless." *Id.* Consider here the fact that defendant relies heavily on *Miller*'s reference to science and social science studies, which identified differences between juvenile and adult brain development. Hypothetically, these studies could be debunked, but that would

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differences between juvenile and adult minds including transient rashness, proclivity for risk, and an inability to assess consequences, which lessens a child's moral culpability.

b. These attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders.

c. Youth therefore matters for purposes of assessing the proportionality of imposing a state's most severe penalties.

II. The Eighth Amendment prohibits mandatory imposition of capital punishment:

a. Life-without-parole sentences imposed upon juvenile offenders are analogous to capital punishment.

i. Imprisoning an offender until he dies alters the remainder of his life by a forfeiture that is irrevocable.

ii. Imprisoning a juvenile is especially harsh because he invariably will serve more years and a greater percentage of his life than an adult offender.

b. Individualized sentencing is therefore required before a sentencing court may impose a life-without-parole sentence upon a juvenile.

not change that *Miller* nonetheless announced a rule of law that must be followed (unless or until the United States Supreme Court said otherwise).

Likewise, the results-oriented theory of identifying precedent "ignores or discounts the articulated rationale in favor of binding future courts based on the outcome in light of the material facts." *Ross*, *supra*, at 26. *Miller* involved 14-year-old defendants, a seemingly inescapable material fact. As such, under a results-oriented theory of precedent, the legally binding rule from *Miller* would again be of no help to defendant because it could not apply to persons older than 14 (a rule concededly narrower than the one announced by the Supreme Court in *Miller*).

And under the judicial-announcement theory, if the precedentially binding aspect of *Miller* is its announced holding, this holding is likewise expressly limited to persons under the age of 18, again providing no foundation upon which defendant can stand. That the "law" from *Miller* does not go beyond its holding is only strengthened by the fact that the *Miller* Court went to the trouble of identifying its holding:

> Appellate court decisions increasingly involve complex constitutional, statutory, or administrative law issues, and include lengthy discussions of case facts, findings below, hypothetical disputes of varying significance to the legal issues presented, and discursive and sometimes tendentious treatment of precedent. *Judges sometimes identify their holdings with precision.* ***In so doing, they imply that all other aspects of the discussion—however persuasive and seemingly relevant they might be to the immediate case disposition—are instead dicta.*** [Abramowicz & Stearns, *Defining Dicta*, 57 Stan L Rev 953, 955 (2005) (emphasis added).]

This Court's discussions of stare decisis also support that the concept applies

only to the "holding" or the "legal principle"[24] of the case, and not to whatever parallels might be drawn to the reasoning used by the court. See, e.g., *Putnam v Kinn*ey, 248 Mich 410, 415; 227 NW2d 741 (1929) ("[A]pplication of the doctrine of stare decisis demands that this court *accept the holding* of the court in that case as final.") (emphasis added); *St Helen Shooting Club v Carter*, 248 Mich 376, 379; 227 NW2d 746 (1939) ("The rule of stare decisis must be applied here. The *holding* in the Mogle Case must be treated here as final.") (emphasis added); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 584; 702 NW2d 539 (2005) (upon concluding that a case was wrongly decided, "[w]e must decide whether the doctrine of stare decisis nevertheless *obliges us to adhere to its holding*") (emphasis added); *McCormick v Carrier*, 487 Mich 180, 209-210; 795 NW2d 517 (2010), quoting *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365; 550 NW2d 215 (1996) ("Under the doctrine of stare decisis, 'principles of law deliberately examined *and decided* by a court of competent jurisdiction should

[24] Defendant cites one unpublished federal district court case, *Cruz v United States*, No 11-CV-787; 2018 WL 1541898 (D Conn, 2018), p 14, in which the court concluded that the binding principle from *Miller* is broader than the Court's holding: "*Miller*'s holding applies to a defendant under the age of 18, but the principle underlying the holding is more general[.] The Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. . . . [W]ho counts as a 'juvenile' [is a] question[] on the merits." *Cruz* is currently pending on appeal before the Second Circuit. And even if this Court believes that the law from *Miller* is not constrained by the Supreme Court's announced holding, the *Cruz* court's conclusion that the binding principle from *Miller* is broad enough to encompass persons over the age of 18 is flawed. *Miller* involved defendants under the age of 18, a fact that the Supreme Court quite clearly treated as material. See *infra* Issue II; Goodhart, *supra*, at 182 (the principle or *ratio decidendi* is determined by taking account of the facts treated as material by the court and its decision based on them); Wambaugh, *supra*, at 8 ("[A] case is not a precedent for any proposition that was neither consciously nor unconsciously in the mind of the court.").

not be lightly departed.' ") (emphasis added).

All this said, the modern shift in the mode of delivering written judicial opinions has created some unique questions for the theory of precedent. Increasingly, American legal institutions have pressed appellate courts to provide not only written judicial opinions, but *reasons* for their decisions *in* those opinions.[25] This novelty has in turn invoked debate regarding the question of how to characterize the reasons an appellate court gives in support of an announced holding. Are the reasons themselves also holdings? Are they dicta? Or are they something else entirely?

"Presumably, the terms holding and dictum have some objective meaning." Michaels, *The Holding-Dictum Spectrum*, 70 Ark L Rev 661, 661 (2017).[26] Historically, two propositions have been taken for granted: (1) that holdings are

[25] Tiersma, *supra*, at 1226. The Michigan Constitution itself states that all decisions of this Court "shall be in writing and shall contain a concise statement of the facts *and reasons* for each decision . . . ." Const 1963, art 6, § 6 (emphasis added).

[26] Some scholars may challenge even this basic premise:

> The word dictum is very commonly used by lawyers and judges. But what concrete idea does it represent, what specific facts does it describe? The definitions considered above were attempts to describe the concept which the word represents. They failed, as definitions will, because they lacked factual content. An idea or concept is merely a way of interpreting large numbers of facts. A number of actual examples of dictum have therefore been examined, both inductively and pragmatically. The result is a conclusion that there is no relation among the fact situations to which the word dictum has been applied sufficient to support a generalization. Dictum represents no definable concept. It does describe a multitude of factual examples. But no word can successfully represent such a multitude of facts. As a representative symbol, to repeat, dictum describes so much that it describes nothing at all. When a word describes nothing, the ordinary reaction is that it is meaningless. It may well be argued that, in this sense at least, the word dictum *is* meaningless. [*Dictum Revisited*, 4 Stan L Rev 509, 514 (1952).]

binding and dicta are not, and (2) that if a statement in a judicial opinion is not a holding, then it is dictum, and vice versa. Ambramowicz & Stearns, *supra*, at 1065 (stare decisis applies only to the holdings of announced precedents) ("If not a holding, a proposition stated in a case counts as dicta."). In the face of increasingly lengthy and complex appellate judicial opinions,[27] some scholars have given up on efforts to define these terms with precision, abandoning the binary paradigm altogether.[28] But even scholars who might challenge the characterization of reasoning propositions as "dicta" seemingly would not go so far as to say such rationale is the same as precedent.

Harvard University Professor Frederick Schauer, for instance, opined not long ago on the relationship between the concept of "law" and the judicial practice of providing reasons in appellate opinions:

> [W]hen judges write opinions, they seek to justify their conclusions, and they do so by offering reasons. The reasons they provide, however, are broader than the outcomes they are reasons for. Indeed, if a reason were no more general than the outcome it purports to justify, it would scarcely count as a reason. The act of giving a reason, therefore, is an exercise in generalization. The lawyer or judge who gives a reason steps behind and beyond the case at hand to something more encompassing. [Schauer, *Giving Reasons*, 47 Stan L Rev 633, 635 (1995).]

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[27] See Posner, *The Federal Courts: Crisis and Reform* (Cambridge: Harvard University Press, 1985), pp 112-116 (providing statistics on the increasing length of judicial opinions).

[28] George Washington University Professor Andrew Michaels, for instance, has proposed a "spectrum model" to determine the "weight" to be assigned to any given proposition of reason offered in an appellate judicial opinion:

> [A]s the statements become more narrowly tailored to the facts before the court . . . they approach the status of binding holding. As the statements gain breadth . . . their constraining force weakens, and they tend to approach the status of dicta. Constraining force weight is thus a scalar quantity with magnitude inversely proportional to breadth for path-to-judgment statements[.] [Michaels, *supra*, at 667.]

Schauer theorized that the giving of reasons[29] in support of a judicial decision demonstrates some level of commitment by the reason-giver to the reason articulated:

> The thesis I advance, therefore, is that giving reasons is committing, although not inviolably so. Having given a reason, the reason-giver has, by virtue of an existing social practice, committed herself to deciding those cases within the scope of the reason in accordance with the reason. Insofar as the word "commitment" might be too strong to capture the defeasible commitments to which I refer, it could be said simply that the very act of giving a reason provides an independent ground (i.e., a "reason" for action, in a different sense of "reason") for following that reason in future cases. [*Id.* at 656-657.]

Notably, however, Schauer declined to equate the reasons given in support of an announced holding in a judicial opinion as "precedent." *Id.* at 654 (explaining that reason-giving has potential to influence outcomes in future cases like "precedential constraint," but declining to conflate the two concepts). *Miller*'s rationale, although possessing future value, does not carry the force of law as precedent.

Moreover, even if we assume for argument's sake that the rationale from *Miller* carries the weight of law for purposes of MCR 6.502(G)(2), the question would remain whether the reasons given in *Miller* constitute a "retroactive *change* in law that occurred after the first motion for relief from judgment . . . ." (Emphasis added.) And did *Montgomery* hold that these *reasons* apply retroactively?

As to the first question, the general proposition that the Eighth Amendment requires proportionate punishment can be traced back decades before defendant's first motion for relief from judgment. See *Weems v United States*, 217 US 349, 367; 30 S Ct 544; 54 L Ed 793 (1910). Likewise, the propositions that children are

[29] To Schauer, " 'reason' labels what follows the word 'because' . . . ." *Id.* at 636.

developmentally different than adults, these differences diminish moral culpability, and these differences matter for constitutional and sentencing purposes were not new to *Miller*; the United States Supreme Court recognized as much in *Graham v Florida*, 560 US 48, 67-68; 130 S Ct 2011; 176 L Ed 2d 825 (2010), and before that in *Roper v Simmons*, 543 US 551, 570; 125 S Ct 1183; 161 L Ed 2d 1 (2005), and before that in *Thompson v Oklahoma*, 487 US 815, 835; 108 S Ct 2687; 101 L Ed 2d 702 (1988) ("The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult."), and before that in *Eddings v Oklahoma*, 455 US 104; 102 S Ct 869; 71 L Ed 2d 1 (1982) ("[Y]outh must be considered a relevant mitigating factor. [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors . . . generally are less mature and responsible than adults."), and so on. If these propositions of reason are the law upon which defendant relies, it is difficult to see how *Miller*'s reiteration of these propositions was a "change" in the law occurring after defendant's first motion.

As to the second question, in *Montgomery*, 136 S Ct at 732, the United States Supreme Court framed the question presented as "whether *Miller*'s *prohibition on mandatory life without parole for juvenile offenders* indeed did announce a new substantive rule that, under the Constitution, must be retroactive." (Emphasis added.) The *Montgomery* Court held that *Miller* announced a new substantive rule of constitutional law that applied retroactively, but it explained that "rule" in terms of

Miller's holding, i.e., "that mandatory life-without-parole sentences *for children*" violate the Eighth Amendment. *Id.* at 733 (emphasis added). Defendant's motion is not based on *Miller*'s holding, it's based on *Miller*'s reasoning,[30] which is not the "rule" the Court in *Montgomery* said applied retroactively to cases on collateral review.

In sum, defendant's motion is not based on the precedentially binding aspects—i.e., the law—from *Miller*; it therefore does not satisfy the procedural threshold of MCR 6.502(G)(2).[31] Alternatively, even if the rationale from *Miller* could be said to carry the force of law, it does not represent a "retroactive change" in law as required by MCR 6.502(G)(2). Finally, a better avenue to reach the merits exists: wait for a case on direct review.

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[30] Specifically, paralleling the line of reasoning provided in *Miller*, see footnote 23 *supra*, defendant argues that (a) 18-year-olds are constitutionally different than older adults for sentencing purposes because (*i*) 18-year-olds have diminished culpability and greater prospects for reform, (*ii*) significant psychological gaps exist between 18-year-olds and older adults, and (*iii*) science and social science studies now show fundamental differences between 18-year-olds and older adult minds; (b) these attributes diminish the penological justifications for imposing the harshest sentences on 18-year-olds; and (c) the age of an 18-year-old should therefore matter for purposes of assessing the proportionality of imposing a state's most severe penalties.

[31] See also *Jones v Walsh*, No 13-1316; 2013 WL 6159286 (ED Pa, 2013) (explaining that the claim of a petitioner in his 20s citing *Miller* "is not actually based on the law as set forth in *Miller*, but rather upon an argument that the law should be extended" to others); *Mobley v Coleman*, No 09-1558; 2013 WL 3943141 (ED Pa, 2013) (denying stay for lack of potential merit when the petitioner's claim was "not based upon the law as set forth in *Miller*, . . . but rather upon an argument that the law should be extended to persons between 18 and 24 years of age"); *Pritchard v Wetzel*, No. 13-5405; 2014 WL 199907 (ED Pa, 2014) ("[P]etitioner's claim . . . is not based upon the law as set forth in *Miller* which applies to juveniles, but rather upon an argument that the law should be extended to adults.").

C. Response to defendant's other procedural arguments.

1. Comparison to the newly-discovered-evidence exception.

Defendant argues that this Court's treatment of the newly-discovered-evidence exception in MCR 6.502(G)(2)[32] supports that his motion satisfies the retroactive-change-in-law exception, citing *People v Swain*, 499 Mich 920, 920; 878 NW2d 476 (2016). In *Swain*, this Court stated that the four-part test from *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003),[33] "does not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test." 499 Mich at 920. Defendant further cites an order from this Court, stating that an "allegation" of new evidence was sufficient to satisfy MCR 6.502(G)(2). See *People v Robinson*, 503 Mich 883, 883; 919 NW2d 59 (2018).

The language of the retroactive-change-in-law and newly-discovered-evidence exceptions is distinct; the latter requires *a claim* asserted by a defendant while the former contains no such language of leniency. See *Black's Law Dictionary* (11th ed) (defining "claim" as "[a] statement that something yet to be proved is true"); *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "claim" as "an assertion open to

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[32] Again, MCR 6.502(G)(2) states that a defendant may file a successive motion for relief from judgment when that motion 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*." (Emphasis added.)

[33] The *Cress* test provides that, for a defendant to receive a new trial on the basis of newly discovered evidence, he or she must show that: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *Id.* at 692 (quotation marks and citation omitted).

challenge"). Defendant argues that MCR 6.502(G)(2) does not require a defendant to "show an entitlement to relief on the merits at the filing stage," which is true. The merits standards required to obtain relief exist in MCR 6.508(D); they are different than the requirements of MCR 6.502(G)(2). The plain language of MCR 6.502(G)(2) requires a defendant to submit a motion "based on a retroactive change in law that occurred after the first motion for relief from judgment . . . ." But defendant's motion does not rely upon as its foundation the *law* from *Miller*, made retroactive by *Montgomery*. Under the plain language of the court rule, then, defendant's motion is procedurally barred. Nothing in *Swain* dictates a different result.

2. Surplusage.

Defendant argues that construing MCR 6.502(G)(2) to require a defendant to identify a retroactive change in law that applies to him at the filing stage would render MCR 6.508(D) mere surplusage. "A defendant required to show that a retroactive rule applies to him at the filing stage . . . will *always* be able to show that it 'undermines' a prior decision under MCR 6.508(D)(2) or serves as 'good cause' and 'actual prejudice' under MCR 6.508(D)(3)." Defendant's supp brief, pp 13-14 (emphasis added). Considering the requirements of MCR 6.508(D), defendant's argument lacks merit. MCR 6.508(D) states, in relevant part, the following:

> **(D) Entitlement to Relief.** The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
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> * * *
>
> (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. . . .

Under the plain language of MCR 6.508(D)(2), then, to be entitled to relief on the merits, a defendant must show not only that his motion was "based on a retroactive change in law," but that the alleged ground for relief was decided against him "in a prior appeal or proceeding under [subchapter 6.500]" and that the retroactive change in law undermined *such a prior decision*. If a defendant has not previously raised and been denied relief on the ground asserted, he will not be entitled to substantive relief under MCR 6.508(D)(2).

And under MCR 6.508(D)(3), even when a defendant's motion is "based on a retroactive change in law," the defendant must demonstrate "good cause" for failing to raise the ground for relief on direct review or in an earlier 6.500 motion. In *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995) (opinion by BOYLE, J.), a plurality of this Court explained that a defendant can satisfy the "good cause" requirement by "proving ineffective assistance of appellate counsel, . . . or by showing that some external factor prevented counsel from previously raising the issue." An appellate attorney's decision to winnow out weaker arguments is not necessarily evidence of

ineffective assistance, however, and an appellate attorney need not assert all arguable claims. *Id.* at 391. External factors include "showing that the factual or legal basis for a claim was not reasonably available . . . ." *Id.* at 385 n 8, citing *Reed v Ross*, 468 US 1, 16; 104 S Ct 2901; 82 L Ed 2d 1 (1984). In *Ross*, the United States Supreme Court held that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim . . . ." *Ross*, 468 US at 16. When a constitutional claim becomes "reasonably available" isn't entirely clear cut.[34] But, in any event, a defendant would need to persuade this Court that a currently alleged ground for relief wasn't reasonably available at the time of direct appeal or when he or she filed a previous motion under subchapter 6.500. The requirements of MCR 6.502(G)(2) and MCR 6.508(D)(2) and (3) are distinct; the latter are not satisfied simply because a defendant can point to a retroactive change in law that applies to him for purposes of MCR 6.502(G)(2).

3. The procedural-default rule.

Defendant next argues that requiring a defendant to identify a change in law that applies to him under MCR 6.502(G)(2) would mean this rule could no longer serve as an adequate or independent state law basis for denying relief under the procedural-default doctrine because it would require a defendant to prove entitlement to relief on

[34] See generally *Ross*, 468 US at 17 (explaining that when a new decision expressly overrules a precedent or overturns a practice accepted by a near-unanimous body of lower court authority, an attorney would have no reasonable basis earlier to raise the issue. However, when a decision disapproves of a practice the Court has only arguably sanctioned, whether the failure earlier to raise the issue will be excused depends on the directness of the Court's sanction of the practice, the strength of the material available to oppose the practice, and how entrenched the practice was at the time).

the merits. Defendant again improperly conflates the threshold standards of MCR 6.502(G)(2) and the diligence standards of MCR 6.508(D). Even when a defendant identifies a retroactive change in law that applies to him, to receive relief on the merits, the defendant must satisfy the additional and more stringent diligence requirements of MCR 6.508(D). A defendant who satisfies MCR 6.502(G)(2) is not entitled to certain relief under MCR 6.508(D). More important still, this Court interprets the court rules by applying the principles that govern statutory interpretation. *Haliw v City of Sterling Heights*, 471 Mich 700, 705-706; 691 NW2d 753 (2005). This Court begins by analyzing the plain language of the court rule, *Henry v Dow Chemical Co*, 484 Mich 483, 495; 772 NW2d 301 (2009), not by considering the federal habeas consequences of applying the plain language of the rule as written.

4. Unpublished Court of Appeals' opinions.

Defendant cites several unpublished Court of Appeals' opinions to support his argument that his motion satisfies the procedural threshold of MCR 6.502(G)(2). See *People v Miller*, unpublished per curiam opinion of the Court of Appeals, issued June 25, 2019 (Docket No. 341425); *People v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued June 18, 2019 (Docket No. 344322).[35] In both cases, defendants under the age of 18 sought to challenge their life-*with*-parole sentences,

[35] Defendant further cites *People v Robinson*, unpublished per curiam opinion of the Court of Appeals, issued July 30, 2019 (Docket No. 337865), but *Robinson* involved the newly-discovered-evidence exception, not the retroactive-change-in-law exception. And he cites *People v Jones* (Circuit Court No. 1979-1104-FC), but *Jones* involved an apparent stipulation by the prosecutor that the defendant satisfied MCR 6.502(G)(2), without further analysis.

arguing that their sentences amounted to *de facto* life-without-parole sentences because of stringent parole-board policies. Numerous factors make these opinions unpersuasive, notwithstanding their non-precedential status. See MCR 7.215(J)(1). In *Miller*, the interpretation of MCR 6.502(G)(2) was not squarely before the court; Miller raised his *de facto* challenge during an appeal as of right following resentencing for a separate offense, and the Court of Appeals concluded it had jurisdiction to hear the issue as part of that appeal, making its comments regarding MCR 6.502(G)(2) a mere aside. And in *Johnson*, the panel readily acknowledged that Johnson's satisfaction of MCR 6.502(G)(2) was only "arguable" before proceeding to deny Johnson relief on all substantive grounds.

5. Federal courts' interpretations of 28 USC § 2255(h)(2).

Defendant argues that federal courts have interpreted MCR 6.502(G)(2)'s federal counterpart—28 USC § 2255(h)(2)—in a manner that would allow the filing of a motion like his, so MCR 6.502(G)(2) should be interpreted the same way. 28 USC § 2255(h)(2) allows a federal prisoner to file a successive motion to vacate, set aside, or correct his sentence when that motion "contain[s] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Defendant asserts that MCR 6.502(G)(2) and 28 USC § 2255(h)(2) are nearly identical, so courts reasonably can conclude that both share common purposes, goals, and cautions. See *Henry*, 484 Mich at 499.

Defendant cites no authority to support the proposition that MCR 6.502(G)(2) and 28 USC § 2255(h)(2) are nearly identical. The provisions contain distinct

language; whereas MCR 6.502(G)(2) requires that a successive motion be "based on a retroactive change in law," 28 USC § 2255(h)(2) states that a successive motion must "contain . . . a new rule of constitutional law . . . ."[36] The language of the latter is arguably broader, given that "contain" could be interpreted to mean only that a motion must "include" or cite within a new rule of constitutional law, but need not rely upon such a rule as its foundation. Further, although defendant cites the opinions of several federal courts that have authorized successive motions under 28 USC § 2255(h)(2), raising issues similar to the one he presents here, numerous federal courts have reached the opposite conclusion. See, e.g., *In re Frank*, 690 F Appx 146, 146 (CA 5, 2017) ("*Miller* is unhelpful to Frank. The relevant conduct . . . occurred after he had attained age 18. Thus, Frank has not demonstrated that *Miller* entitled him to authorization to file a successive § 2255 motion."); *White v Delbalso*, No 17-443; 2017 WL 939020 (ED Pa, 2017) ("White cites to an Illinois state court decision that extended the reasoning from *Miller* to a defendant who was 19 at the time of his underlying offense. That state court decision does not affect the limits of the federal constitutional right that binds this Court on habeas review. White is not entitled to file a second habeas petition based on *Miller*."); *La Cruz v Fox*, No 16-304-C; 2016 WL 8137659 (WD Okla, 2016).

[36] *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "base" as "**1 :** to make, form, or serve as a base for **2 :** to find a base or basis for" and defines "basis" as "**1 :** the bottom of something considered as its foundation **2 :** the principal or component of something **3 a :** something on which something else is established or based . . . **4 :** the basic principle." By contrast, "contain" is defined as "to have within: HOLD" and "COMPRISE, INCLUDE." *Id.*

II. Defendant is not entitled to relief on the merits.[37]

Assuming defendant satisfies the procedural threshold of MCR 6.502(G)(2), he still must prove that he is entitled to relief under MCR 6.508(D)(2) or (3).[38] To begin, MCR 6.508(D)(2) does not apply. Under MCR 6.508(D)(2), a defendant must show that the alleged ground for relief was decided against him "in a prior appeal or proceeding under [subchapter 6.500]," and that a retroactive change in law undermined that prior decision. Defendant did not raise in any earlier appeal or proceeding under subchapter 6.500 the alleged grounds for relief he raises here—that a mandatory sentence of life without parole for someone 18 at the time of the crime violates the Eighth Amendment, Const 1963, art 1, § 16, or both. Thus, this issue has never been decided against him and he cannot show that *Miller* undermined such a prior decision. In fact, in defendant's instant successive motion for relief from

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[37] To the extent this issue implicates constitutional questions, this Court reviews those de novo. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

[38] Again, MCR 6.508(D) states that a defendant bears the burden of establishing entitlement to relief, and a court may not grant relief to the defendant 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. . . .

judgment, he conceded, "For the first time, Defendant is challenging the constitutionality [of] MCL 750.316 that mandates a non discretionary life without parole sentence . . . ." (App 26a.) On appeal, defendant notes that he filed a motion for resentencing in 2012, which the trial court denied. But in that motion defendant argued only that his sentence was unconstitutional under Const 1963, art 4, § 46 ("No law shall be enacted providing for the penalty of death."). (App 11-22a.) Defendant has not shown that he now "alleges grounds for relief" that were previously decided against him and that a retroactive change in law undermines.[39]

Alternatively, under MCR 6.508(D)(3), when a defendant alleges grounds for relief that could have been raised on direct appeal or in a prior motion under subchapter 6.500,[40] he must demonstrate "good cause" for his failure earlier to raise the issue, as well as "actual prejudice." MCR 6.508(D)(3)(a) and (b). In his application, defendant claimed he had established "good cause," citing the plurality opinion in *Reed*, 449 Mich at 385 n 8,[41] quoting *Ross*, 468 US at 16, which states that a defendant may demonstrate good cause by " 'showing that the factual or legal basis for a claim was not reasonably available' " at the time of an earlier appeal or 6.500 motion. In *Ross*, 468 US at 16, the United States Supreme Court held "that where a constitutional claim is so novel that its legal basis is not reasonably available to

[39] As discussed *infra*, nor can defendant show that the retroactive change in law announced by *Miller* and *Montgomery* undermined any earlier decision affirming generally his sentence.

[40] Defendant does not argue that he could not have raised a challenge to his sentence under the Eighth Amendment or Const 1963, art 1, § 16 on direct appeal or in an earlier 6.500 motion.

[41] Defendant's leave app, p 24.

counsel, a defendant has cause for failure to raise the claim . . . ." Defendant thus argued in his application that he had "established good cause because the legal basis for his challenge to his mandatory life-without-parole sentence was not available before *Miller* and *Montgomery*."[42] But again, defendant does not rely on *Miller*'s unique holding; instead, the "legal bases" for his current constitutional challenge are the more general propositions of reason reiterated in *Miller*—that children are developmentally different than adults, that these differences diminish moral culpability, and that these differences matter for constitutional and sentencing purposes—which were not new to *Miller*, but were also articulated in *Graham* (2010), *Roper* (2005), *Thompson* (1988), and *Eddings* (1982). Defendant in his supplemental brief states that he sought to challenge his sentence on different constitutional grounds as recently as 2012. Defendant's supp brief, p 21 n 2. The propositions upon which defendant now relies to argue that his sentence is unconstitutional were available to defendant in 2012 and earlier. Defendant's conclusory statement that he has established "good cause" should not suffice; "the defendant has the burden of establishing entitlement to the relief requested." MCR 6.508(D)(1). Nor can defendant demonstrate actual prejudice, i.e., "in the case of a challenge to a sentence, the sentence is invalid,"[43] because his sentence violates the Eighth Amendment, Const 1963, art 1, § 16, or both.

[42] Defendant's leave app, p 24. In his supplemental brief, defendant says nothing more about "good cause" other than making, in footnote two, a conclusory statement that he has satisfied the requirement.

[43] MCR 6.508(D)(3)(b)(iv).

A. The rule from *Miller* does not (and should not) apply to persons over 18; so, defendant's sentence does not violate the Eighth Amendment.

At the outset, statutes such as MCL 750.316 "are presumed to be constitutional" and this Court has "a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *People v Skinner*, 502 Mich 89, 110; 917 NW2d 292 (2018) (quotation marks and citation omitted). In the past decade, the United States Supreme Court has issued a series of opinions concerning the constitutional validity of punishments for offenders who were under the age of 18 at the time they committed their crimes. In *Roper*, 543 US at 578, the Supreme Court held that the Eighth and Fourteenth Amendments barred the execution of juvenile offenders. Five years later in *Graham v Florida*, 560 US at 75, the Court held that the Eighth Amendment prohibits courts from sentencing juvenile offenders to life without parole for non-homicide offenses. In *Miller*, 567 US at 465, the Court then held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishment.' " And most recently, in *Montgomery v Louisiana*, ___US___; 136 S Ct 718, 732; 193 L Ed 2d 599 (2016), the Court held that *Miller* announced a new substantive rule of constitutional law that applies retroactively on collateral review for juvenile offenders sentenced to mandatory life without parole.

In *Roper*, 543 US at 569, the Supreme Court justified its holding by explaining that juveniles differ from adults in three general ways: (1) juveniles lack maturity and possess "an underdeveloped sense of responsibility," (2) "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer

pressure," and (3) the character of a juvenile is "more transitory, less fixed." *Id.* at 569-570. The *Roper* Court reasoned that these traits allowed for a "greater possibility . . . that a minor's character deficiencies will be reformed," and "as individuals mature, the impetuousness and reckless that may dominate in younger years can subside." *Id.* Recognizing these traits, the *Roper* Court then defined "juvenile" as someone chronologically under the age of 18:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. *The qualities that distinguish juveniles from adults do not disappear when an individual turns 18*. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest. [*Roper*, 543 US at 574 (emphasis added).]

In *Graham*, 560 US at 68, the Supreme Court acknowledged that "developments in psychological and brain science continue to show fundamental differences between juvenile and adults minds," including that "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." The *Graham* Court reiterated, however, that relief from a sentence of life without parole for a juvenile non-homicide offender applies only to persons under the age of 18, citing *Roper*'s bright-line age cutoff. *Id.* at 74-75.

The Supreme Court in *Miller* doubled down, again expressly drawing the line at 18 years of age. 567 US at 465. The *Miller* Court further demonstrated its understanding of who qualified as a "juvenile" when it expressed concern that, under

mandatory sentencing schemes, "every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old." *Id.* at 477. Noteworthy is that both defendants in *Miller* were 14 years old. *Id.* at 465. When announcing its holding, then, the Supreme Court in *Miller* did not consider itself bound to declare a constitutional rule only for the ages of the defendants actually before it—i.e., to decide only whether mandatory life imprisonment without the possibility of parole was unconstitutional for 14-year-olds. The Supreme Court thus declined to hold that mandatory life imprisonment without the possibility of parole for an 18-year-old offender constitutes disproportionate punishment under the Eighth Amendment.

Also notable is that, at the time the Supreme Court decided *Miller*, it had before it literature showing that brain development continues well after the age of 18; yet, the Court nonetheless refused to go beyond *Roper*'s bright-line age cutoff:

> It is clear that the science of adolescent brain development is more advanced today than it was when *Miller* was decided in 2012. That science is indeed undoubtedly advancing with each passing day. But the fact that adolescent brains are not fully developed until after age 18 was also a fact which was widely understood in the scientific community (and doubtless by the Supreme Court) at the time *Miller* was decided . . . . [*People v Sanchez*, 63 Misc 3d 938, 944-945; 98 NYS3d 719 (2019).]

The United States Supreme Court has not extended its holding from *Miller* to offenders who were 18 at the time of their crimes, and the federal courts of appeal having addressed this issue have soundly refused to apply the reasoning from *Miller, Roper*, and *Graham* to persons 18 and older at the time of their crimes. See, e.g., *United States v Sierra*, 933 F3d 95, 97 (CA 2, 2019) ("Since the Supreme Court has chosen to draw the constitutional line at the age of 18 for mandatory minimum life

sentences, the defendants' age-based Eighth Amendment challenges to their sentences must fail."); *In re Garcia*, No 13-2968; 2013 US App Lexis 26139 (CA 3, 2013) ("Petitioner's reliance [on *Miller*] is misplaced because he was not under the age of 18 when he committed his crime."); *United States v Dock*, 541 F Appx 242, 245 (CA 4, 2013) (because the defendant was older than 18 at the relevant time, "*Miller* is of no help to [the defendant]"); *Doyle v Stephens*, 535 F Appx 391, 395 (CA 5, 2013) ("Doyle was over eighteen, so he cannot use [*Roper*] as a shield."); *United States v Davis*, 531 F Appx 601, 608 (CA 6, 2013) ("Davis is not a juvenile, which precludes him from invoking *Miller* to ward off life imprisonment."); *Wright v United States*, 902 F3d 868, 871 (CA 8, 2018) ("Wright was sentenced for conspiratorial conduct that extended well into his adult years . . . . Thus, . . . the new substantive rule of constitutional law made retroactive in *Montgomery* does not apply[.]"); *Ong Vue v Henke*, 746 F Appx 780, 783 (CA 10, 2018) ("[B]ecause Vue was at least 18 years old at the time he committed his crime, [his] argument is self-defeating.").[44] Several state courts, too, have held that *Miller's* rationale may not be applied to persons 18 or older at the time of their crimes.[45] See, e.g., *Missouri v Barnett*, ___SW3d___, ___; 2020 WL 1861732 (Mo, 2020); *Burgie v Arkansas*, 2019 Ark 185; 575 SW3d 127, 128 (2019);

[44] Defendant again relies on *Cruz*, No 11-CV-787; 2018 WL 1541898 (D Conn, 2018), in which the court ruled that *Mill*er's rationale should be applied to 18-year-olds. Again, though, *Cruz* is an outlier and is currently pending before the Second Circuit.

[45] Defendant notes that in *Commonwealth v Bredhold*, No 14-CR-161; 2017 WL 8792559 (Ky Cir Ct, 2017), a Kentucky circuit court held that the death penalty was a disproportionate punishment for offenders under the age of 21 based on further study of brain development. However, the Kentucky Supreme Court recently vacated the circuit court's decision. *Commonwealth v Bredhold*, ___ SW3d ___, ___; 2020 WL 1847082 (Ky, 2020).

Sanchez, 63 Misc 3d at 942-945; *Commonwealth v Owens*, No 1784 WDA 2012; 2013 WL 11264096 (Pa Sup, 2013). And panels of the Michigan Court of Appeals have consistently declined to apply the rationale from *Miller* to persons 18 or older at the time of their crimes.[46]

The United States Supreme Court has recognized that, like all categorical rules, drawing a bright line at the age of 18 may be over- and under-inclusive, but a bright line is nonetheless necessary. *Roper*, 543 US at 574. See also *United States v Marshall*, 736 F3d 492, 499 (CA 6, 2013) (drawing a bright line at the age of 18 "is a not-entirely desirable but nonetheless necessary approach"). Without such a rule, the mandatory minimum sentencing scheme would cease to exist in practice; the sentences of defendants far older than 18 would be open to challenge on claims that a defendant lacked maturity, brain development, control over his or her environment, etc. "Whatever the merits of such a sentencing regime might be as a matter of policy, the precedents in *Roper*, *Graham*, and *Miller* give . . . no charter to impose it, or to raise above age 18 the chronological line drawn in those cases." *United States v Lopez-Cabrera*, No S5 11CR 1032; 2015 WL 3880503 (SDNY, 2015), aff'd sub nom *United States v Sierra*, 933 F3d 95, 96 (CA 2, 2019).

[46] See, e.g., *People v Gelia*, unpublished per curiam opinion of the Court of Appeals, issued January 21, 2020 (Docket No. 344130); *People v Conner*, unpublished per curiam opinion of the Court of Appeals, issued December 17, 2019 (Docket No. 343286); *People v Stanton-Lipscomb*, unpublished per curiam opinion of the Court of Appeals, issued September 20, 2018 (Docket No. 337433); *People v Adamozwicz*, unpublished per curiam opinion of the Court of Appeals, issued June 22, 2007 (Docket No. 330612); *People v Jordan*, unpublished per curiam opinion of the Court of Appeals, issued March 7, 2017 (Docket No. 328474).

Defendant argues for a constitutional requirement of individualized sentencing by focusing on one of the factors the Supreme Court considered in *Miller*—the "fundamental differences between juvenile and adult minds." 567 US at 471-472; Defendant's supp brief, pp 26-27. But this was only one of many factors the Supreme Court considered to distinguish between juveniles and adults under the Eighth Amendment. See *Miller*, 567 US at 471 (for instance, children also "have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings") (cleaned up). Defendant points to several state and federal laws, which he believes reveal that legislators recognize the characteristics of youth extend beyond age 18. Defendant's supp brief, pp 28-29. But these laws do not alter the line drawn in *Miller*. See *Endreson v Ryan*, No CV-18-1403-PHX-DGC; 2019 WL 1040960 (D Ariz, 2019) ("*Miller* placed a constitutional limitation on the states' authority to sentence offenders who committed their offenses when they were under the age of 18, not offenders who committed their offenses before they reached the age of majority as that may be defined by each individual state.") (citation omitted). Finally, defendant contends that the Supreme Court in *Miller* did not prohibit extending its rule to 18-year-olds. Defendant's supp brief, p 36. Yet, by its holding, the Court limited the reach of its rationale to those under the age of 18. See *Prather v Gilmore*, No 1:18-CV-973; 2019 WL 247397 (MD Pa, 2019) ("The Supreme Court in *Miller* did not extend its rationale or application of its holding beyond application to juveniles, and by its plain language the Court excluded application of its holding to individuals eighteen . . . years of age and older.").

Unless or until the United States Supreme Court rules otherwise, it is not clearly apparent that defendant's sentence violates the federal Constitution. It is also worth noting that, although defendant argues his sentence is unconstitutional, he offers no aid in constructing a new line or rule—should the prohibition on mandatory life-without-parole sentences continue to be based on chronological age, only that age now be 19, 20, or 21? Or should it be based on IQ? Or something else entirely? This Court should decline to wade into these murky waters. Because defendant by age was not a juvenile for federal constitutional purposes at the time he committed his crime, he does not qualify for the Eighth Amendment protections outlined in *Miller*.

B. Defendant's sentence does not violate Const 1963, art 1, § 16.

1. Defendant's sentence is not unconstitutional under the *Lorentzen*/*Bullock* proportionality test.

The Eighth Amendment proscribes the imposition of "cruel *and* unusual punishments." (Emphasis added.) Similarly, but not identically, Const 1963, art 1, § 16 states that "cruel *or* unusual punishment shall not be inflicted . . . ." (Emphasis added.) In *People v Lorentzen*, 387 Mich 167, 172; 194 NW2d 827 (1972), this Court concluded that the textual differences between the Eighth Amendment and Article 1, § 16 support that the latter may provide greater protection than its federal counterpart in that, if a punishment must be "cruel" *and* "unusual" to be barred by the Eighth Amendment, a "punishment that is unusual but not necessarily cruel" would also be barred by Article 1, § 16. In light of *Lorentzen*'s conclusion that our state Constitution provides greater protection than its federal counterpart, this Court has adopted a slightly broader test for assessing proportionality than that used by

the Supreme Court. Compare *id.* at 176-181, *People v Bullock*, 440 Mich 15, 33-34; 485 NW2d 866 (1992), with *Graham*, 560 US at 60-61. Michigan's test assesses proportionality by considering the following factors: (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 rehabilitation. *Bullock*, 440 Mich at 33-34.

Not long ago, in *People v Carp*, 496 Mich 440, 521; 852 NW2d 801 (2014),[47] this Court addressed whether life-without-parole sentences imposed upon juvenile offenders, regardless of whether such sentences were individualized before being imposed, were facially unconstitutional under the Eighth Amendment, Const 1963, art 1, § 16, or both. The Court held that such sentences were not categorically barred under either the Eighth Amendment's proportionality test from *Graham*, 560 US at 60, or Michigan's *Lorentzen*/*Bullock* test:

> [D]efendants have failed to meet their burden of demonstrating that it is facially unconstitutional under Article 1, § 16 to impose [a life-without-parole] sentence on a juvenile homicide offender. *While the language of the Michigan counterpart to the Eighth Amendment is at some variance from the latter, it is not so substantially at variance that it results in any different conclusion in its fundamental analysis of proportionality.* [*Carp*, 496 Mich at 521 (emphasis added).]

Despite that the United States Supreme Court vacated the judgment in *Carp* in light

[47] Vacated on other grounds by *Davis v Michigan*, ___ US ___; 136 S Ct 1356; 194 L Ed 2d 339 (2016).

of *Montgomery*,[48] this Court's proportionality analysis in *Carp* remains, at the very least, highly relevant to the constitutional question presented here.

As to the first factor, "first-degree murder is almost certainly the gravest and most serious offense that can be committed under the laws of Michigan—the premeditated taking of an innocent human life." *Carp*, 496 Mich at 514. Eighteen-year-olds, 19-year-olds, and all perpetrators older who commit the offense of first-degree murder face the same mandatory sentence: life without parole. Although a sentence of mandatory life without parole is the most severe punishment under Michigan law, the offense at issue here—first-degree murder—is likewise the gravest and most serious offense that can be committed in the state.

As to the second factor, this Court observed in *Carp*, 496 Mich at 516, that non-homicide offenses exist in Michigan that may be viewed as less grave or serious than first-degree murder, but for which adult offenders will face mandatory life-without-parole sentences. "For instance, an adult who commits successive first-degree criminal sexual conduct offenses against an individual under the age of 13 faces a sentence of [mandatory] life without parole." *Id.*, citing MCL 750.520b(2)(c). When the commission of a non-homicide offense by an offender over the age of 18 may result in the mandatory imposition of a life-without-parole sentence, it does not follow that sentencing an 18-year-old offender for the gravest and most serious homicide offense

[48] Also at issue in *Carp* was the question whether the rule from *Miller* applied retroactively to cases on collateral review; this Court held that it did not. *Id.* at 495, 512. The defendant appealed, and in 2016, the United States Supreme Court vacated this Court's judgment and remanded the case for further consideration in light of *Montgomery*. *Davis v Michigan*, ___ US ___; 136 S Ct 1356; 194 L Ed 2d 339 (2016).

is categorically disproportionate compared to the penalties imposed on other offenders in the state.

As to the third factor, 19 states[49] and the federal government impose, at a minimum, mandatory sentences of life without parole for first-degree murder. (App 123-141a.) Six more states impose mandatory life-without-parole sentences in the face of aggravating circumstances. (*Id.*) This data simply does not demonstrate that Michigan is an outlier in the nation. Compare *People v Benton*, 294 Mich App 191, 206-207; 817 NW2d 599 (2011), lv den 491 Mich 917 (2012) (the third factor supported the constitutionality of a sentence when 18 other states imposed the same mandatory-minimum sentence as Michigan for the offense), with *Lorentzen*, 387 Mich at 179 (the third factor supported that a sentence was unconstitutional when "[o]nly one state, Ohio, has as severe a minimum sentence for the sale of marijuana as Michigan") and *Bullock*, 440 Mich at 37 (adopting Justice WHITE's dissenting analysis from *Hamelin v Michigan*, 501 US 957, 1026; 111 S Ct 2680; 115 L Ed 2d 836 (1991) ("No other jurisdiction imposes a punishment nearly as severe as Michigan's for possession of the amount of drugs at issue here.")).

A sentence of mandatory life without parole admittedly does not serve the penological goal of rehabilitation, if by rehabilitation the Court means successful reintegration into society. See *Carp*, 496 Mich at 521 n 38, citing *Graham*, 560 US at 74. But when the fourth factor alone suggests that a sentence is disproportionate,

[49] Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Pennsylvania, South Dakota, Wyoming.

this Court has concluded that such a sentence may nonetheless be constitutional under Article 1, § 16. *Carp*, 496 Mich at 521. Applying the *Lorentzen*/*Bullock* factors, this Court should conclude that defendant has failed to show that his sentence is unconstitutional under Article 1, § 16.

2. Alternatively, this Court should reconsider *Lorentzen* and *Bullock*.

If this Court concludes that defendant's sentence is disproportionate under the *Lorentzen*/*Bullock* test, it should reexamine whether *Lorentzen* and *Bullock* were rightly decided. In *Carp*, 496 Mich at 519 n 37, this Court explained:

> The inclusion of proportionality review under Article 1, § 16 has been the subject of significant disagreement. *Bullock*, 440 Mich at 46 (RILEY, J., concurring in part and dissenting in part) ("I believe that *People v Lorentzen* . . . , the principle case relied on by the majority to support its conclusion, was wrongly decided and that proportionality is not, and has never been, a component of the 'cruel or unusual punishment' clause of this state's constitution."); *People v Correa*, 488 Mich 989, 992; 791 NW2d 285 (2010) (MARKMAN, J., joined by CORRIGAN and YOUNG, JJ., concurring) ("[A]t some point, this Court should revisit *Bullock*'s establishment of proportionality review of criminal sentences, and reconsider Justice RILEY's dissenting opinion in that case."). However, because life without parole is not a categorically disproportionate sentence for a juvenile homicide offender, we find it unnecessary in this case to resolve whether proportionality review is rightly a part of the protection in Article 1, § 16 against "cruel or unusual punishment," instead assuming for the sake of argument that it has a place in an analysis under Article 1, § 16.

In her opinion in *Bullock*, Justice RILEY opined that the concept of proportionality "is not, and has never been, a component of the 'cruel or unusual punishment' clause of this state's constitution." *Bullock*, 440 Mich at 46 (RILEY, J., concurring in part and dissenting in part). Secondly, Justice RILEY opined that the majority had failed to articulate a sufficient "compelling reason" to interpret Const

1963, art 1, § 16 differently than its federal counterpart. *Id.*[50] Lastly, Justice RILEY concluded that the *Bullock* majority violated the separation-of-powers doctrine mandated by our Constitution:

> Our role is limited; we must make a principled neutral decision with regard to whether the legislative choice of punishment violates Const 1963, art 1, § 16 prescriptions against cruel or unusual punishments. If the question is whether punishment meets the 'evolving standards of decency,' the answer must come from the democratically elected representatives of the people: the Legislature. [*Id.* at 66.]

Several years later, in *People v Correa*, 488 Mich 989, 989; 791 NW2d 285 (2010) (MARKMAN, J., concurring), Justice MARKMAN, joined by Justices YOUNG and CORRIGAN, wrote an opinion concurring in the denial of leave to appeal for the purpose of criticizing the opinion in *Bullock*. "*Bullock* held that proportionality is a component of 'cruel or unusual' punishment even though as early as 1890, this Court had rejected such an understanding of the Constitution." *Id.*, citing *People v Morris*, 80 Mich 634; 45 NW 591 (1890). In *Morris*, 80 Mich at 638-639, this Court opined that the state's prohibition against cruel or unusual punishment referred to the "mode" or "method" of punishment, not its degree. The *Morris* Court held that because "[i]mprisonment . . . is, and always has been, in this country and in all civilized countries, one of the *methods* of punishment," it does not violate the cruel or unusual punishment clause. *Id.* at 639 (emphasis added). In *Correa*, Justice MARKMAN likewise opined that

[50] "The majority . . . contends that there is a 'significant' textual difference in the Eighth Amendment (cruel *and* unusual punishment), from that in Const 1963, art 1, § 16 (cruel *or* unusual punishment), which enables the Court to give 'broader' interpretation of our constitutional prohibition against 'cruel or unusual punishment.' History, and this Court's use of the text of the clause, does not support its conclusion." *Id.* at 58-59.

"[b]ecause imprisonment is not a cruel or unusual method of punishment, the Court of Appeals did not err in holding that [the] defendant's minimum sentence of 25 years in prison does not violate the cruel or unusual punishment clause." *Correa*, 488 Mich at 992 (MARKMAN, J., concurring).

Assuming defendant can demonstrate that his sentence is disproportionate under the *Lorentzen/Bullock* test, this Court should reconsider whether *Lorentzen* and *Bullock* were rightly decided in light of the reasons given by Justice RILEY in her opinion in *Bullock* and by Justice MARKMAN, joined by Justices YOUNG and CORRIGAN, in his opinion in *Correa*. "Stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions . . . ." *Robinson v City of Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000). And *Lorentzen* and *Bullock* are not so engrained in Michigan law that overruling them "would work an undue hardship because of that reliance." *Id.* at 466. See *Michigan Sentencing Law: Past, Present, and Future*, 30 Fed Sent R 146, 149 (2017) ("The Michigan Supreme Court has exhibited a . . . lack of mercy vis-à-vis cruel or unusual punishment challenges, last reversing on this ground in 1992.").[51]

C. Defendant's conviction under an aiding-and-abetting theory does not render his sentence unconstitutional.

Lastly, defendant contends that his sentence is unconstitutional because he

[51] "The last sentences reversed by the Michigan Supreme Court for cruel or unusual punishment were drug sentences [in *Lorentzen* and *Bullock*]. The Court of Appeals last reversed a sentence in response to a cruel or unusual punishment challenge in [1988]. . . ." *Id.* at 149 n 81, citing *People v Shultz*, 172 Mich App 674, 687; 432 NW2d 742 (1988), aff'd 435 Mich 517 (1990).

was convicted under an aiding-and-abetting theory and neither killed "nor intended to kill." Defendant's supp brief, pp 29, 40. The People would first challenge defendant's claim that no evidence of his intent to kill was presented at trial. A jury can infer intent to kill from the circumstances, *Reed*, 449 Mich at 395, and the testimony presented at trial was sufficient to allow a rational jury to infer that defendant possessed such an intent. See counterstatement of facts, *supra*, pp 1-2. Further, in *Carp*, this Court rejected an aiding-and-abetting argument nearly identical to the one defendant makes here:

> [W]e note that our Legislature has chosen to treat offenders who aid and abet the commission of an offense in exactly the same manner as those offenders who more directly commit the offense:
>
> > Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in tis commission he may hereafter be prosecuted, indicted, tried, and on conviction shall be punished as if he had directly committed the offense. [MCL 767.39.]
>
> . . . These choices by the Legislature must be afforded great weight in light of the fact that *Lockett*, one of the capital-punishment cases relied on by the United States Supreme Court in forming the rule in *Miller*, specifically instructs:
>
> > That States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge. [*Carp*, 496 Mich at 522, quoting *Lockett v Ohio*, 438 US 586, 602; 98 S Ct 2954; 57 L Ed 2d 973 (1978).]

Defendant has not shown that he lacked an intent to kill or did not foresee that a life would be taken as a result of his crime, nor has he shown that his conviction under an aiding-and-abetting theory rendered his sentence unconstitutional.

Summary and Relief Sought

Defendant has not demonstrated that his successive motion for relief from judgment satisfies the procedural threshold of MCR 6.502(G)(2), nor has he shown that he is entitled to substantive relief under MCR 6.508(D) or that his sentence violates the Eighth Amendment or Const 1963, art 1, § 16. Accordingly, the trial court did not abuse its discretion by denying his successive motion. The People respectfully ask this Honorable Court to deny defendant's application for leave to appeal.

Respectfully submitted,

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Dated: June 18, 2020

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