STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MONTEZ STOVALL,

Defendant-Appellant.

FOR PUBLICATION
November 5, 2020
9:05 a.m.

No. 342440
Wayne Circuit Court
LC No. 92-000334-01-FC

Before: GLEICHER, P.J., and SAWYER and METER, JJ.

SAWYER, J.

This case is before us on remand from our Supreme Court for consideration as on delayed leave granted.[1] Defendant appeals the trial court's order denying his successive motion for relief from judgment. We affirm.

In 1991, while still a juvenile, defendant shot and killed two men. As part of a plea agreement with the prosecution, defendant pleaded guilty to two counts of second-degree murder, MCL 750.317, and two counts of possessing a firearm when committing or attempting to commit a felony (felony-firearm), MCL 750.227b(1). In exchange for defendant's guilty pleas, the prosecution reduced the charges in one of the cases from first-degree murder, MCL 750.316, to second-degree murder, MCL 750.317, with defendant sentenced to two concurrent-sentences of life imprisonment with the possibility of parole after 10 years and the mandatory two-year sentence for the felony-firearms conviction. In pleading guilty to second-degree murder, defendant avoided the mandatory sentence of life imprisonment without the possibility of parole, were he found guilty of first-degree murder.

Over the next quarter-century, defendant filed several motions for relief from judgment in the trial court, all of which were denied. In 2016, after several United States Supreme Court decisions regarding the sentencing of juvenile offenders, defendant filed another successive motion for relief of judgment in the trial court asserting that there has been a retroactive change in

[1] *People v Stovall*, 504 Mich 892 (2019).

the law warranting the withdrawal of his guilty plea and the vacating of his sentences. After considering defendant's motion, the trial court determined defendant was not entitled to relief from judgment because of the validity of his sentences. This appeal ensued.

I. STANDARDS OF REVIEW

This Court reviews "a trial court's decision on a motion for relief from judgment for an abuse of discretion and its findings of facts supporting its decision for clear error. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes or makes an error of law." *People v Swain*, 288 Mich App 609, 628-629; 794 NW2d 92 (2010) (citations omitted). "Interpretation of a court rule is treated like interpretation of a statute, it is a question of law that is reviewed de novo." *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). Similarly, questions of constitutional law are reviewed de novo. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012).

Unpreserved constitutional claims are reviewed against the plain-error standard. *People v Vandenberg*, 307 Mich App 57, 61; 859 NW2d 229 (2014), citing *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [*Id*. at 763-764 (quotation marks, citations, brackets, and footnote omitted).]

II. APPLICABLE LEGAL PRINCIPLES

Defendant premises much of his argument on two recent cases decided by the United States Supreme Court that exerted a significant change on the sentencing of juvenile offenders. In *Miller v Alabama*, 567 US 460, 479; 132 S Ct 2455; 183 L Ed 2d 407 (2012), the Supreme Court held that the prohibition against cruel and unusual punishment in the Eighth Amendment to the United States Constitution, forbids "a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." In reaching this conclusion, the *Miller* Court's reasoning was concerned with the mandatory nature of these punishments denying a sentencing judge the opportunity to make individualized sentencing determinations and considering a juvenile's age or circumstances before deciding whether a sentence of life imprisonment without the possibility of parole was appropriate. *Id.* at 477-478, 480. However, *Miller* did not categorically reject life imprisonment without the possibility of parole for juvenile offenders. Rather, it required that sentencing courts consider an offender's juvenile status and connected circumstances before

determining whether a sentence of life without the possibility of parole was a proportionate sentence. *Id*. at 479.

Six years later, the Supreme Court revisited its *Miller* holding in *Montgomery v Alabama*, ___ US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016). Writing for the majority, then Justice Anthony Kennedy described *Miller* as holding "that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing." *Id*. at ___; 136 S Ct at 725. While *Miller* expressed a procedural requirement, its holding established that the penological justifications that supported sentencing juvenile offenders to life in prison without the possibility of parole "collapse in light of 'the distinctive attributes of youth.'" *Id*. at ___; 136 S Ct at 734 (quoting *Miller*, 132 S Ct at 2469). As a result, *Miller* announced a substantive rule of law that life imprisonment without the possibility of parole is an excessive punishment for juvenile offenders "whose crimes reflect transient immaturity." *Id*. at ___; 136 S Ct at 735. And because *Miller* announced a substantive rule of constitutional law, its holding had retroactive effect for those juvenile offenders who had been sentenced before *Miller* was decided. *Id*. at ___; 136 S Ct at 736. The Supreme Court suggested that, as an alternative to relitigating sentences that violated *Miller*'s holding, states could remedy the situation by providing juvenile offenders serving mandatory sentences of life imprisonment without the possibility of parole the possibility to be considered for parole. *Id*. at ___; 136 S Ct at 736.

Defendant asserts that these two decisions constituted a retroactive change in the law that rendered his sentences of life imprisonment with the possibility of parole invalid. And, as a result, the trial court erred in denying his successive motion for relief from judgment. We disagree.

III. ANALYSIS

Before turning to defendant's substantive claims, we must first address a procedural argument put forward by the prosecution. Under MCR 6.502(G)(1), one of several court rules that govern motions for relief from judgment, a criminal defendant is entitled to file "one and only one motion for relief from judgment . . . with regard to a conviction." However, a defendant can file a second or subsequent motion for relief from judgment on the basis of "a retroactive change in law that occurred after the first motion for relief from judgment . . . ." MCR 6.502(G)(2). It is undisputed that *Miller* and *Montgomery* brought about a retroactive change in the law after defendant filed his first motion for relief from judgment in 1995. The court rule allows a defendant to file a motion for relief from judgment on the basis of a retroactive change in the law that occurred after a defendant's first motion for relief from judgment, which is precisely what defendant did in the trial court. And defendant's arguments in the trial court and before us rely on the retroactive change defined in *Miller* and *Montgomery*. While these Supreme Court cases may not, as the trial court concluded, provide substantive support for defendant's motion, they tenuously meet the procedural requirement to allow defendant to file a successive motion for relief from judgment. As a result, we will address defendant's substantive claims.

A. ILLUSORY PLEA BARGAIN

Defendant first asserts the trial court abused it discretion in denying his successive motion for relief from judgment because his guilty plea was the result of an illusory plea bargain. We disagree.

Defendant pleaded guilty to two counts of second-degree murder and two counts of felony-firearm, as a result of a plea agreement he entered into with the prosecution. "A defendant pleading guilty must enter an understanding, voluntary, and accurate plea." *People v Brown*, 492 Mich 684, 688-689; 822 NW2d 208 (2012) (footnote and citation omitted). "To ensure that a guilty plea is accurate, the trial court must establish a factual basis for the plea. In order for a plea to be voluntary and understanding, the defendant must be fully aware of the direct consequences of the plea." *People v Pointer-Bey*, 321 Mich App 609, 616; 909 NW2d 523 (2017) (quotation mark and citations omitted). When, as is the case here, "a plea is offered pursuant to a bargain with the prosecutor, voluntariness depends upon the defendant's knowledge of the actual value of the bargain." *People v Williams*, 153 Mich App 346, 350; 395 NW2d 316 (1986). "A criminal defendant may be entitled to withdraw his or her guilty plea if the bargain on which the guilty plea was based was illusory, i.e., the defendant received no benefit from the agreement." *Pointer-Bey*, 321 Mich App at 621. Similarly, "an illusory plea bargain is one in which the defendant is led to believe that the plea bargain has one value when, in fact, it has another lesser value." *Williams*, 153 Mich App at 351 (citation omitted). In this case, the prosecution reduced the first-degree murder charge for defendant's killing of an individual, in exchange for defendant pleading guilty to two counts of second-degree murder. Defendant asserts that, because he pleaded guilty to a lesser offense to avoid an unconstitutional sentence, his plea bargain was illusory. However, this is neither supported by the facts nor by the law.

Undoubtedly, defendant's plea bargain allowed him to avoid a sentence that would subsequently be declared unconstitutional by the Supreme Court in *Miller* and *Montgomery*. It does not follow, however, that the plea bargain was wholly without benefit. Under the terms of the second-degree murder statute, MCL 750.317, defendant could have been sentenced to imprisonment for "any term of years," in the sentencing court's discretion. But, consistent with the terms of the plea agreement, defendant was sentenced to life imprisonment with the possibility of parole after serving 10 years of the second-degree murder sentences and the two-year felony-firearm sentence. Wholly apart from avoiding the unconstitutional sentence, defendant received the benefit of a certain-date at which he would become eligible for consideration of release on parole and avoided the risk of being found guilty of first-degree murder, and a more severe sentence. Moreover, *Miller* and *Montgomery* did not categorically bar sentences of life imprisonment without parole for juveniles but required an individualized sentencing hearing to determine whether such a sentence is proportionate after considering a defendant's juvenile status. *Miller*, 567 US at 479; *Montgomery*, ___ US at ___; 136 S Ct at 734. Thus, defendant's choice to plead guilty to a lesser offense definitively removed a life imprisonment without parole sentence from the range of possible penalties facing defendant. As a result, defendant received a benefit for having pleaded guilty, apart from avoiding an unconstitutional sentence.

Yet, even if the only benefit defendant received was the avoidance of an unconstitutional sentence, this would not, as a matter of law, render the plea bargain illusory. As articulated by the Supreme Court in *Brady v United States*, 397 US 742, 757; 90 S Ct 1463; 25 L Ed 2d 747 (1970):

> absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

There is nothing in the record to suggest that the prosecution or defendant's counsel misrepresented the applicable law to defendant when defendant chose to accept the plea bargain or enter his guilty plea. Nor is there any evidence that any party in this case was aware that mandatory sentences of life imprisonment without the possibility of parole for juvenile offenders were impermissible under the Eighth Amendment. Defendant voluntarily admitted to killing two people and received the agreed-upon sentences. As the Supreme Court further articulated in *Brady*, the United States Constitution does not require "that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that . . . the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions." *Id*. The record indicates that all parties in this case, including the sentencing judge, moved forward in good faith, applying the law as it was understood at the time. Defendant was aware of the terms of the plea agreement and stated, on the record, that he understood the terms of his sentences. That one part of defendant's calculus in deciding to accept the plea bargain—the mandatory sentence of life without the possibility of parole if found guilty of first-degree murder—was rendered unconstitutional nearly 20 years later does not, under the terms of *Brady*, render the plea bargain illusory or invalidate defendant's pleas.

Finally, defendant asserts his pleas were invalid because he lacked the capacity to understand the terms and consequences of the plea bargain. Rather, the sentencing court should have considered his juvenile status as part of the plea-process and, defendant alleges, the court's failure to do so violated due process. We note that defendant did not raise this argument in the trial court as part of his successive motion for relief from judgment and, as a result, it is unpreserved for appeal. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). As unpreserved constitutional error, this claim is subject to plain-error review. *Vandenberg*, 307 Mich App at 61.

Defendant asserts that the sentencing court was required to take account of his juvenile status when accepting his guilty plea in accordance with the terms of the plea bargain. However, defendant was more than 18 years old when he agreed to the plea bargain and entered his plea. At defendant's plea hearing, the court and defendant's counsel explained to defendant the terms of the plea agreement and sentence; and defendant stated on the record that he understood the terms. At no point did defendant state that he did not or could not understand. Further, defendant states in his brief to this Court that he understood the terms of the plea agreement to mean he would be sentenced to life imprisonment and be eligible for parole after serving 10 years. Considering these are the terms of the plea agreement entered on the record and the sentence defendant received, this undermines his assertion that, somehow, he lacked the capacity to understand what he was

agreeing to. Rather, this seems more akin to a defendant seeking to withdraw his plea because he is dissatisfied with the sentence to which he agreed. However, dissatisfaction with a sentence does not render a guilty plea invalid. See *People v Foster*, 291 Mich App 363, 378; 804 NW2d 878 (2011) (stating "dissatisfaction with the sentence or incorrect advice from the defendant's attorney" does not constitute justification for withdrawal of a guilty plea). Considering all these factors and the record available, we cannot conclude the sentencing court erred when it failed to consider defendant's purported juvenile status when it accepted his guilty pleas under the terms of the agreed-upon plea bargain.

Because defendant's sentences were not premised on a guilty plea resulting from an illusory plea bargain, it was not outside the range of principled outcomes for the trial court to deny defendant's successive motion for relief from judgment on this basis.

B. CONSTITUTIONAL CLAIMS

Defendant next asserts that the trial court abused its discretion in denying defendant's successive motion for relief from judgment because his sentences violate due process and constitute cruel or unusual punishment. We disagree.[2]

We begin with defendant's claim that his sentences constitute cruel or unusual punishment. "The Michigan Constitution prohibits cruel *or* unusual punishment, Const 1963, art 1, § 16, whereas the United States Constitution prohibits cruel *and* unusual punishment, US Const, Am VIII." *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011). Generally, the protection afforded under the Michigan Constitution is considered to be broader than that provided for under the United States Constitution. As a result, "[i]f a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *Id*. (quotation marks and citation omitted).

"The Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions." *Miller*, 567 US at 469. In construing this principle, the Supreme Court held in *Miller* 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*. at 465. While these sentences violate the Eighth Amendment, the Supreme Court further stated that "[a] State is not required to guarantee eventual freedom, but must provide [juveniles] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. at 479 (quotation marks and citation omitted). Further, in *Montgomery*, the Supreme Court held that the rule announced in *Miller* applied retroactively to juvenile offenders. *Montgomery*, ___ US at ___; 136 S Ct at 736. This Court has interpreted the holding of these two cases to guarantee that defendants convicted as juveniles "at a maximum are afforded some meaningful opportunity to obtain release based on demonstrated

[2] Although the trial court did not address these issues in its order denying defendant's motion, we exercise our discretion to resolve these issues which defendant presented to the trial court because the record provides "all the facts necessary to resolve [the] issue[s] . . . ." *Metamora Water Serv, Inc*, 276 Mich App at 382 (citation omitted).

maturity and rehabilitation. At a minimum, these cases apply only to mandatory sentences of life without the possibility of parole." *People v Williams*, 326 Mich App 514, 521; 928 NW2d 319 (2018), rev'd on other grounds ___ Mich ___; 940 NW2d 75 (2020).[3]

Applying these principles, as they were construed in *Williams*, we conclude that defendant's sentences do not constitute cruel or unusual punishment. If the rule articulated in *Miller* and *Montgomery* is given a minimal reading, defendant's sentences do not violate the Eighth Amendment, because defendant did not receive a mandatory sentence of life imprisonment without parole. *Williams*, 326 Mich App at 521-522. Conversely, if *Miller* and *Montgomery* are given a maximal reading, defendant's sentences still comport with the Eighth Amendment's requirement that juvenile offenders be given a meaningful opportunity to obtain release on the basis of his maturity and rehabilitation. *Id.* at 521. As is demonstrated by the record, defendant is eligible and has been considered for parole. Under this Court's decision in *Williams*, this constitutes a meaningful opportunity for release, as required by *Miller*. *Id*. at 522. "And because defendant has some meaningful opportunity to obtain release from his sentence of life with the possibility of parole, that sentence was not invalid under *Miller*." *Id*. While defendant has, until now, been unsuccessful in obtaining release does not render his sentences violative of the Eighth Amendment. *Miller* requires only that defendant be provided a meaningful opportunity to obtain release, not that he be guaranteed eventual freedom. *Miller*, 567 US at 479 (citation omitted).

Defendant invites this Court to extend the provisions of *Montgomery* and *Miller* to sentences beyond those labeled "life without parole." In support of this invitation, defendant makes mention of a multitude of cases decided by the supreme courts of our sister states and

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[3] In *Williams*, unlike the case at bar, the defendant was convicted of both first-degree murder and second-degree murder. Like the current case, the defendant received resentencing in light of *Miller v Alabama*. And like defendant in this case, the defendant in *Williams* argued that he was also entitled under *Miller* to be resentenced on his second-degree murder conviction. The defendant in *Williams* advanced two principal arguments: (1) that the decision in *Miller* also invalidated his life-with-parole sentence for second-degree murder and (2) that the sentencing judge's belief that the defendant's mandatory sentence of life without parole on the first-degree murder conviction, now deemed invalid, may have improperly influenced the judge's sentencing decision on the second-degree murder conviction. This Court rejected both arguments. *Williams*, 326 Mich App at 519. The Michigan Supreme Court thereafter reversed, holding that the trial court "shall consider whether the sentence for second-degree murder was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole for first degree murder." ___ Mich at ____. That is, it accepted the defendant's second argument, an argument not available to defendant in our case as he was not facing a mandatory life sentence.

Our consideration of *Williams* in this case is only in regards to the defendant's first argument, whether *Miller* applies to sentences of life with parole for second-degree murder. The Michigan Supreme Court did not consider, nor did it reverse, this Court's analysis and conclusion on that issue.

several federal circuit courts of appeal. We note that these sorts of cases lack precedential authority, but can be considered for their persuasive value. See *People v Walker (On Remand)*, 328 Mich App 429, 444-445; 938 NW2d 31 (2019) (quotation marks and citation omitted) ("While the decisions of lower federal courts and other state courts are not binding on this Court, they may be considered as persuasive authority."). However, none of the cases defendant relies on address the sentence at-issue here—life imprisonment with the possibility of parole in 10 years. Rather, they deal with the constitutionality of term-of-years sentences that act as de facto life sentences. "[A] sentence of life *with* the possibility of parole is not a de facto sentence of life *without* the possibility of parole." *Williams*, 326 Mich App at 521 n 3. Defendant's sentences are different not only in degree, but kind, and the cases which he relies on to extend *Miller* and *Montgomery* are inapposite to this goal.

Defendant also asserts that his sentences constitute cruel or unusual punishment because the parole process for individuals serving sentences of life imprisonment with the possibility of parole denies him the opportunity to demonstrate his maturity and rehabilitation. This, in turn, denies defendant a meaningful and realistic opportunity for release. In support, defendant asserts that the parole review procedures available for juvenile offenders who were resentenced after *Miller* and *Montgomery* invalidated their unconstitutional mandatory sentences of life imprisonment without the opportunity for parole are less onerous than those faced by defendant. Defendant asserts that the parole board must consider his youth at the time of the crime and his subsequent maturity and rehabilitation for his sentences to be constitutional. And in support of this assertion, he relies on an unpublished case from a federal district court.[4] While we accept the possibility that the parole board's policies and procedures may not comport with the requirements of *Miller* and *Montgomery*, a motion for relief from judgment is not the proper procedural vehicle through which defendant can pursue those claims. Defendant's sentences, as imposed by the sentencing court, comport with the Eighth Amendment because they provide him with a meaningful opportunity for release. That the parole board's policies stymie defendant's efforts is a matter to be asserted against the parole board, and is not a ground for vacating defendant's sentences.

Finally, defendant asserts that his sentences violate due process because neither the sentencing court nor the parole board have considered his juvenile status and attendant circumstances. However, none of the authorities on which defendant relies support this assertion. While *Miller*, 567 US at 480, requires a sentencing court to consider "how [juveniles] are different," these differences are to be considered "before determining that life without parole is a proportionate sentence," *Montgomery*, ___ US at ___; 136 S Ct at 734. The clear language of these opinions does not support the proposition, as defendant asserts, that consideration of a

[4] While "state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004) (citations omitted). As a result, "[a]lthough lower federal court decisions may be persuasive, they are not binding on state courts." *Id*. at 607.

defendant's juvenile status is a procedural requirement when sentencing all individuals convicted of a crime committed while a juvenile. In this case, defendant was not sentenced to either a mandatory or a discretionary sentence of life imprisonment without the possibility of parole. Rather, he received a sentence that expressly provided for the possibility of parole. As a result, he was afforded some "hope for some years of life outside prison walls . . . ." *Id*. at 736-737.

This discussion also undermines defendant's claim that he is being denied due process by the parole board's policies and procedures. Generally, a parole board's consideration of an individual's application for parole does not implicate a due process right. "That the state holds out the possibility of parole provides no more than a mere hope that the benefit will be obtained . . . a hope which is not protected by due process." *Glover v Parole Bd*, 460 Mich 511, 520; 596 NW2d 598 (1999), quoting *Greenholtz v Inmate of the Nebraska Penal & Correctional Complex*, 442 US 1, 11; 99 S Ct 2100; 60 L Ed 2d 668 (1979). *Miller* and *Montgomery* undoubtedly establish a procedure at sentencing that requires a sentencing court to weigh a juvenile offender's status before determining whether that individual is one of the rare juvenile offenders who "may be sentenced to life without parole . . . ." *Montgomery*, ___ US at ___; 136 S Ct at 735 (citation omitted). And the Supreme Court's solution in *Montgomery* was to allow those juvenile offenders who had not been given the opportunity to demonstrate they did not fall into that class to be considered for parole. *Id*. at ___; 136 S Ct at 736. But, defendant was never a member of that class of offenders and, after serving the required minimum sentence, has always been eligible for parole. There is nothing in these opinions to imply that defendant's sentences to life imprisonment with the possibility of parole are invalid because they deny defendant a parole process aimed toward a meaningful opportunity for release. As discussed earlier, while the parole board's policies and procedure may not comport with the Eighth Amendment, defendant's constitutional claim lies with those policies and not with the validity of his sentences.

Because defendant's sentences of life imprisonment with the possibility of parole do not violate due process or constitute cruel or unusual punishment, the trial court did not abuse its discretion in denying defendant's successive motion for relief from judgment.

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter

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GLEICHER, P.J. (*dissenting*).

In 1992, the prosecution charged Montez Stovall with one count of first-degree murder, one count of second-degree murder, and two counts of felony-firearm. Stovall was 17 years old. He faced a mandatory sentence of life imprisonment without the possibility of parole if convicted of first-degree murder.

To avoid the imposition of a life-without-parole sentence, Stovall pleaded guilty to two counts of second-degree murder and the felony-firearm charges. At the guilty plea hearing, Stovall's counsel stated, "I've advised him that the statute permits the Parole Board to consider him for probation [sic] at the end of ten years. On this type of life sentence, after ten years." Counsel's advice was consistent with the law then in effect, which provided that Stovall would be eligible for parole consideration after serving 10 years. MCL 791.234(7)(a).

Stovall's sentencing guidelines were scored in preparation for his sentencing; the calculated minimum sentence ranged from 144 to 300 months, with the maximum being life. Under MCL 750.317, the court alternatively could have sentenced Stovall to "imprisonment in the state prison for life, or any term of years[.]" The judge imposed a life sentence rather than a guidelines sentence. The life sentence permitted Stovall to be considered for parole after serving 10 years. A guidelines sentence would have delayed his parole eligibility to 12 years of incarceration.

In the 28 years that have elapsed since Stovall entered prison, two changes have undermined the legal foundation for Stovall's sentence. The first was evolutionary. Over time, it became progressively more difficult for an inmate convicted of second-degree murder to obtain

parole. In 1992, the Legislature extended the amount of time that must be served before eligibility for parole consideration from 10 to 15 years. MCL 791.234(7)(a).[1] In 1997, the parole board chairperson announced that for the parole board, "life means life":

> It has been a long standing philosophy of the Michigan Parole Board that a life sentence means just that—life in prison. Of course there are exceptions and parole may be appropriate under certain circumstance. It is the parole board's belief that something exceptional must occur which would cause the parole board to request the sentencing judge or Governor to set aside a life sentence. Good behavior is expected and is not in and of itself grounds for parole. [Citizens Alliance on Prisons and Public Spending, *No Way Out: Michigan's Parole Board Redefines the Meaning of "Life"* (2004), p 10 (ellipsis omitted), available at <https://static.prisonpolicy.org/scans/cappsmi/fullliferreport.pdf]/> (accessed September 30, 2020).]

In 1999, the Legislature eliminated a prisoner's right to appeal a parole denial. MCL 791.234(11). Subsequent statutes tightened parole procedures, making it more difficult for a prisoner to enter even the initial steps of the process. See MCL 791.234(8). As a result of these legislative overhauls, Michigan's parole system now affords virtually unbridled discretion to politically appointed parole board members and the sentencing judge. See Citizens Alliance on Prisons and Public Spending, *Parolable Lifers in Michigan: Paying the Price of Unchecked Discretion* (2014), available at <https://www.prisonpolicy.org/scans/cappsmi/Parolable-Lifers-in-Michigan-Paying-the-price-of-unchecked-discretion.pdf> (accessed September 30, 2020).[2] In *People v Carp*, 298 Mich App 472, 533-535, 828 NW2d 685 (2012), rev'd on other grounds, 499 Mich 903 (2016), this Court acknowledged that a parolable life sentence likely results in lifetime imprisonment.

Stovall has been incarcerated for 28 years and has not been granted even a single interview, the preliminary step to parole eligibility. Nor have his parole guidelines been scored. Although the statute underlying his guilty plea permitted parole review in 10 years, 28 years have passed without a formal review and, according to the record, Stovall will wait at least another three years for an opportunity for parole consideration.

The changes in the law and the parole board's approach, standing alone, do not afford Stovall a legal ground for withdrawing his guilty plea or being resentenced. See *Jones v Dep't of Corrections*, 468 Mich 646, 651; 664 NW2d 717 (2003) ("A prisoner enjoys no constitutional or

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[1] This change does not apply to Stovall, who remained eligible for parole consideration after serving 10 years.

[2] For an overview of the changes in Michigan's parole system, see also *Foster v Booker*, 595 F3d 353, 358-359 (CA 6, 2010) (summarizing that statutory amendments "(1) altered the structure and composition of the Board; (2) reduced the frequency of parole reviews after an initial ten-year interview; (3) substituted paper reviews for in-person interviews; (4) eliminated [prisoners'] right to appeal a denial of parole; and (5) contained new language consistent with the Board's practice of not giving written reasons for a statement of 'no interest' in moving forward with parole").

inherent right to be conditionally released from a validly imposed sentence."). In combination with a much more dramatic change, however, the shift in parole processes invalidates Stovall's sentence and compels a resentencing hearing.

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 a mandatory sentence of life imprisonment without the possibility of parole violates the Eighth Amendment's prohibition of "cruel and unusual punishments" when imposed on an offender who had not reached the age of 18 at the time of his crime. The Supreme Court imbued *Miller* with retroactive effect in *Montgomery v Louisiana*, ___ US __; 136 S Ct 718; 193 L Ed 2d 599 (2016).

Because "youth matters" in determining whether lifetime incarceration without the possibility of parole is warranted, "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Miller*, 567 US at 473-474 (quotation marks and citation omitted). "*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Montgomery*, 136 S Ct at 733 (quotation marks and citation omitted). A mandatory life imprisonment sentence precludes the individualized consideration that *Miller* and the Eighth Amendment demand and is therefore unconstitutional. Ultimately, *Miller* instructs that a juvenile homicide offender must be afforded a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Miller*, 567 US at 479 (quotation marks and citation omitted).

Stovall was sentenced to an ostensibly parolable term of life imprisonment that should have afforded him a meaningful opportunity to obtain release if he demonstrated personal growth and positive change. But his plea and sentence were predicated on two misconceptions, one legal and the other factual: that he would be imprisoned for life without possibility of parole if convicted of first-degree murder, and that he would have a genuine opportunity for parole after serving 10 years of a parolable life sentence.

Legally, had Stovall been convicted of or pleaded to first-degree murder, he would have been sentenced to a mandatory term of life imprisonment without parole. But post-*Miller*, likely he would have been automatically eligible to be resentenced to a minimum term of no less than 25 years and no more than 40 years' imprisonment. See MCL 769.25a(4)(c). Factually, if Michigan's parole system functioned in the manner envisioned by the Legislature when it enacted the version of MCL 791.234(7) applicable to Stovall, he would have been considered for release by now, if not paroled. Instead, Stovall is serving a de facto sentence of life in prison without the possibility of parole, with no reasonable ability to demonstrate that he has matured and been rehabilitated.

A sentence is invalid if it is "based upon . . . a misconception of law . . . ." *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). In my view, the factual misconception at the heart of Stovall's appeal magnifies the injustice of the legal misconception. In two cases somewhat analogous to this one, our Supreme Court has identified a misconception of law necessitating a new sentencing hearing. In *People v Turner*, 505 Mich 954; 936 NW2d 827 (2020), the defendant was convicted of first-degree murder at age 16 and sentenced to life without parole. *People v Turner*, unpublished opinion of the Court of Appeals, issued May 17, 2018 (Docket No 336406), unpub op at 1. He was also convicted of assault with intent to commit murder and sentenced to life

imprisonment with the possibility of parole, the same sentence that Stovall received. *Id*. Invoking *Miller* and *Montgomery*, Turner sought resentencing on both his first-degree murder sentence and his AWIM sentence. This Court held that he was not entitled to be resentenced for AWIM "because the retroactive change in law did not apply to the AWIM sentence." *Id*. at 3.

The Supreme Court reversed, explaining that Turner's AWIM sentence could not stand because "[i]n the *Miller* context, a concurrent sentence for a lesser offense is invalid if there is reason to believe that it was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole on the greater offense." *Turner*, 505 Mich at 954-955. The Court directed that at Turner's *Miller* resentencing, the trial court could exercise its discretion to resentence Turner for his AWIM conviction "on a concurrent sentence if it finds that the sentence was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole on the greater offense." *Id*. at 955.

And in *People v Williams*, ___ Mich ___; 940 NW2d 75 (2020), the defendant was convicted as a juvenile of both first and second-degree murder, and sentenced to life without parole and parolable life, respectively. *People v Williams*, 326 Mich App 514, 517; 928 NW2d 319 (2018). This Court held that Williams was not entitled to resentencing for second-degree murder. *Id*. at 521. As in *Turner*, the Supreme Court remanded for consideration of "whether the sentence for second-degree murder was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole for first-degree murder. If so, the trial court may exercise its discretion to resentence the defendant for second-degree murder." *Williams*, ___ Mich at ___.

The majority holds that *Williams* is simply inapposite here, as Stovall "was not facing a mandatory life sentence" and *Miller* does not apply to a parolable life sentence for second-degree murder. I disagree for two reasons. First, Stovall *was* facing a mandatory sentence of life without parole. His plea to second-degree murder was based on the legal misconception that if convicted of first-degree murder by verdict or plea, he would serve a mandatory sentence of life without parole. Accordingly, the reasoning of the orders in *Williams* and *Turner* governs this case.

Second, and aside from the legal misconception at the heart of Stovall's sentence, as a juvenile convicted of first-degree murder, Stovall was and is entitled to a sentencing process focused on any individualized circumstances mitigating his crimes as mandated by *Miller*. The record reflects a host of such circumstances, including severed childhood abuse and neglect. With his background taken into account, *Miller* counsels that Stovall's sentence must offer him a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" unless a judge determines that Stovall is irreparably corrupt. *Miller*, 567 US at 479 (quotation marks and citation omitted).

In 1992, Stovall and his counsel bargained for a sentence that would allow Stovall the ability to work toward his freedom. They believed that parole eligibility would undercut the harshness of a life sentence and offered Stovall a rational hope for release. They fundamentally misconceived two things: that a parolable life sentence was preferable to a nonparolable life sentence, and that Michigan's parole system would allow Stovall to actually demonstrate his growth and rehabilitation. Stovall's sentence was predicated on fundamental legal and factual misunderstandings. Due to the misconception that Stovall's parolable life sentence offered him a

realistic opportunity to demonstrate maturity and rehabilitation, Stovall is now serving a functional life sentence without parole in violation of *Miller*.

Ironically, Stovall has fared worse than he would have if convicted of first-degree murder and sentenced to life without parole. In that circumstance, he would have had a right to an individualized resentencing hearing at which he would be able to demonstrate his own growth and evolution, and his worthiness for parole. Instead, he has no meaningful opportunity for release before he is elderly. Stovall now serves a life sentence that is parolable in name only, and therefore violates the central precepts of *Miller*.

The unlikely chance that he will ever appear before a parole board disinterested in evaluating Stovall's diminished moral culpability at the time he committed the crimes, the "wealth of characteristics and circumstances attendant to" his youth, and the harshness of a functional life sentence, *Miller*, 567 US at 476, is not a substitute for a *Miller* hearing. Uncertain, unpredictable, and unlikely parole does not substitute for factoring in on the "front end" a juvenile's lessened culpability. Because Stovall's sentence rests on a misconception of the law and facts that undercut the sentence's constitutionality, I would remand for a resentencing hearing consistent with *Miller*.

/s/ Elizabeth L. Gleicher