STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals:
Karen M. Fort Hood, PJ, Christopher M. Murray and Cynthia Diane Stephens, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner-Appellee, **No. 161529**

v.

JOHN ANTONIO POOLE
Defendant-Appellant.

Wayne CC: 02-000893-FC
Court of Appeals No. 352569

APPELLEE'S BRIEF ON APPEAL

*****Oral Argument Requested*****

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Statement of the Questions

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 for its claim to relief on an extension of the reasoning from *Miller v Alabama* to seek to establish a further new rule, but not the Supreme Court's announced holding—the rule of law—of that case?

Defendant answers: YES

The People answer: NO

II.

Does a mandatory sentence of life in prison for 1st-degree murder with statute rendering the sentence one ineligible for parole for a person who was 18 years of age or older at the time of his or her murder violate either the Eighth Amendment of the United States Constitution or Const 1963, art 1, § 16, or both?

Defendant answers: YES

The People answer: NO

Statement of Facts

Appellee accepts appellant's statement of facts, with the exception of all argument, and facts not of record below, and the addition of those facts stated in the argument.

Argument

I.

Defendant's successive motion for relief from judgment is not "based on a retroactive change in law" under MCR 6.502(G)(2) when the motion relies for its claim to relief on an extension of the reasoning from *Miller v Alabama* to seek to establish a further new rule, but not the Supreme Court's announced holding—the rule of law—of that case.

A. Introduction: the issues

This Court has directed that the following issues be briefed:

- (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 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and *Montgomery v. Louisiana*, —— U.S. ——, 136 S. Ct. 718, 193 L.Ed.2d 599 (2016), should be applied to defendants who are over 17 years old[1] at the time they commit a crime and who are 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.[2]

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[1] The order has no stopping point; that is, in referencing those "who are over 17" the Court includes as a possibility the universe of all persons, no matter their age.

[2] *People v. Poole*, —Mich.— , 960 N.W.2d 529 (2021). The questions are virtually identical to those in the MOAA order in *People v. Manning*, 505 Mich. 881 (2019). This Court then denied leave to appeal after argument because "the

The People answer that:

- the change in the law—which must be retroactive on collateral attack—need not automatically entitle defendant to relief on a successive motion for relief from judgment to be appropriate under MCR 6.502(G)(2), though it may quite often do so. But it must be *that* retroactive new rule, and not a different

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defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. Manning*, 506 Mich. 1033 (2020). Justice Markman concurred in the denial, joined by Justice Zahra, expressing the view that

> While I would follow the Supreme Court's decision in *Miller* [*v. Alabama*] in an altogether faithful manner, as I must, I would not extend its applicability. For no such extension is warranted under *Miller*, our federal or state Constitutions, or the statutes of this state.
>
> Defendant's mandatory life-without-parole sentence also does not violate Const. 1963, art. 1, § 16, which prohibits "cruel or unusual punishment." As I asserted in *People v. Correa*, 488 Mich. 989, 992, 791 N.W.2d 285 (2010) (Markman, *J.*, concurring), I believe that *People v. Morris*, 80 Mich. 634, 45 N.W. 591 (1890), correctly held that proportionality review is not a component of Michigan's "cruel or unusual" punishment clause, and *People v. Bullock*, 440 Mich. 15, 485 N.W.2d 866 (1992), incorrectly held to the contrary.

Justice Clement, joined by Justices Markman and Zahra, concurred in the denial of relief, but expressed the view that the Court of Appeals should not have dismissed the defendant's application under MCR 6.502(G)(2) because "the retroactive change in law [to serve as an exception to the bar on successive motions for relief from judgment] must only 'serve as a foundation for' or 'base for' a defendant's claim in order to satisfy MCR 6.502(G)(2)." Chief Justice McCormack, joined by Justices Cavanagh and Bernstein, dissented from the denial of leave to appeal, saying that they should have remanded to the trial court "for reconsideration under MCR 6.508(D). And I would direct the trial court on remand to hold an evidentiary hearing to allow the defendant and the prosecution to present evidence about whether the rule from *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) and *Montgomery v. Louisiana*, 577 U.S. ——, 136 S. Ct. 718, 193 L.Ed.2d 599 (2016), should be extended to the defendant. MCR 6.508(C)." This concurrence agreed with Justice Clement's court rule analysis.

rule that the defendant seeks for the Court to newly establish, that entitles the defendant to relief under his or her factual circumstances. Put another way, a second or subsequent motion for relief from judgment is not "based on a retroactive change in law that occurred after the first motion for relief from judgment" if relief cannot be granted without a *second* change in the law.

- On the merits, it is not unconstitutional under either the federal or Michigan constitutions to deny parole consideration to a 1st-degree murderer who was 18 years of age or older when he or she committed the murder.

B. Under MCR 6.502(G)(2) it is the application of a retroactive change in the law, not application of a *second* new rule of law the movant argues should be created and applied retroactively on collateral attack, that justifies a successive motion for relief from judgment[3]

In *Miller v. Alabama*[4] the United States Supreme Court 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 punishments."[5] That decision was found to be retroactive on collateral review in *Montgomery v. Louisiana*[6]—with the Court observing that in *Miller* it had held that "mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on

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[3] It appears at least 5 current members of the Court reached a contrary conclusion in the statements accompanying the denial of leave in *Manning*. Though it has been held that "An order of the Michigan Supreme Court is binding precedent if it includes an understandable rationale supporting its decision," see e.g.*People v. Giovannini*, 271 Mich. App. 409, 414 (2006); *Sanders v. McLaren-Macomb*, 323 Mich. App. 254, 276 (2018); *People v. Crall*, 444 Mich. 463, 465, fn 8 (1993), the People believe that principle applies to dispositive orders, not simply denials of leave to appeal and any accompanying concurring and dissenting statements. In any event, the most that can be said from the *Manning* order is that leave was denied for "fai[ure] to meet the burden of establishing entitlement to relief under MCR 6.508(D)," and so the question specified by the Court remains open, despite the previous statements of view by Justices of the Court concurring and dissenting to the *Manning* order. And as T.S. Eliot said, "We fight for lost causes because we know that our defeat and dismay may be the preface to our successors' victory . . . . we fight rather to keep something alive than in the expectation that it will triumph." T.S. Eliot, *Selected Essays*, "Francis Herbert Bradley" (2nd Ed., 1934), p. 411.

[4] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

[5] Id., 132 S. Ct. at 2460. The Court also said that "mandatory life without parole for juveniles violates the Eighth Amendment." Id., 132 S. Ct. at 2458.

[6] *Montgomery v. Louisiana*, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).

'cruel and unusual punishments'"[7]—the Court concluding that *Miller* had announced a substantive rule of law, which, under the principles of *Teague v. Lane*,[8] must be applicable on collateral review.[9]

MCR 6.502(G)(2) provides that "A defendant may file a second or subsequent motion 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." The "change *in law*" that has occurred since defendant's prior motions for relief from judgment is that previously it did not constitute cruel and unusual punishment to sentence a defendant *"under the age of 18"* convicted of 1st-degree murder automatically to life in prison with statute not allowing for parole,[10] and now such a sentence may not be imposed without a specific sentencing hearing inquiring into the "mitigating factors of youth."[11] It should be kept in mind that the "doctrine of stare decisis concerns the holdings of previous cases, not the rationales: 'A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as

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[7] Id., 136 S. Ct. at 726.

[8] *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

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

[10] In Michigan there is no such thing as a sentence of "life without parole," though that term, and its acronym "LWOP," are used colloquially. The sentence that is required by statute is, or in the case now of those under 18 years of age, *was*, life; it is the parole statute that operates to deny parole for those convicted of 1st-degree murder. See MCL 791.234(6). MCL 750.316 does say that one convicted of 1st-degree murder "shall be punished by imprisonment for life without eligibility for parole," but the sentence remains one of life.

[11] *Miller*, 132 S. Ct. 2475.

furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.'"[12] Defendant's claim that as an 18-year-old he could not automatically be sentenced to life without the possibility of parole consideration is not based on *Miller*'s holding that a juvenile 1st-degree murderer—one *under* the age of 18—cannot be sentenced to life with statute denying the possibility of parole consideration without a hearing considering the mitigating factors of youth, as the holding does not apply to him; rather, he wishes to base his claim on the rationale of *Miller,* arguing the holding should be *extended* to 18 year olds (and, of course, the next claim will be 19 year olds, then 20 year olds, and on from there—there is no real stopping point if the judiciary rather than the legislature is to make this policy decision). One may make such an argument—though it should be rejected[13]—but on direct appeal.

Defendant argues that granting relief by recognizing a second new as yet-unrecognized constitutional rule that "builds" on—which is to say, expands—a new recognized and retroactive constitutional rule is within MCR 6.502(G)(2) because the rule sought to be created is in that sense

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[12] *In re Osborne*, 76 F.3d 306, 309 (CA 9, 1996).

[13] The petitioners in *Miller* were both 14 years old. The issue thus actually before the Court was whether the Eighth Amendment requires sentencing hearings before life may be imposed as a sentence where the law denies the possibility of parole consideration on 14-year-old defendants. But the Court drew the line at 18-year-old defendants, when, if it was going to consider ages beyond those of the criminal defendants before it, it could have chosen another age, such as 21. The Court chose the age of majority for a reason—and it has *repeatedly* done so—and if it is to be extended that argument must be made on a direct appeal—and the matter is, under our constitutional structure, one for the legislature, not the courts.

"based" on the recognized and retroactive rule, and thus within the language of the rule. And indeed, in concurring to the denial of leave in *Manning* Justice Clement, joined essentially by five other justices (Justice Markman having since retired), articulated agreement with this argument, looking to dictionary definitions of the word "base":

> the retroactive change in law must only "serve as a foundation for" or "base for" a defendant's claim in order to satisfy MCR 6.502(G)(2). This standard is satisfied here—*Miller* forms the foundation of defendant's claim that Miller's holding should be extended to 18-year-olds. While defendant argues that *Miller*'s holding should be extended to another class of defendants rather than simply arguing that he merits relief under the holding, *Miller*'s holding is still the change in law "from which [defendant's claim] is developed." Defendant's claim is therefore "based on" *Miller*'s holding, which is a retroactive change of law.

And Justice Clement expressed concern with reading the rule otherwise:

> Reading MCR 6.502(G)(2) otherwise, as demanding that defendants show that their claims fall squarely within a retroactive change in law, would, as a practical matter, very often (if not always) merge the initial procedural hurdle in MCR 6.502(G)(2) with the merits analysis in MCR 6.508(D).[14]

But it is not true that a movant would have to show that the new and retroactive change in the law results automatically in a reward of relief to him or her, though one would think that is actually the essential purpose of the rule; that is, to grant relief to all those in the same position as the litigant to whom a change in the law was applied retroactively on collateral review. Compare the federal system.

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[14] *People v. Manning*, supra.

28 USC 2244(b)(2)(A) provides that a "claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—(A)the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." "Relies on" and "based on" are, the People submit, indistinguishable for purposes here, "rely" being defined by Merriam-Webster as "dependant on," and a claim for creation of a second new rule "based on" a newly recognized and retroactive change in the law is certainly "dependant on" that change in the law. And 28 USC 2255(h)(2) has the same provision with regard to the federal analogue to motions for relief from judgment.

A recent federal case—and one concerning an attempt to expand the holding of *Miller*—explicates the difference between relying, or basing, a claim on a new and retroactive rule by applying that rule to a different situation, as opposed to creating a second new rule. In *In re Rosado*[15] Rosado sought to file a successive petition that claimed that supposedly "relied" on *Miller* for his claim that an automatic sentence of life without parole is unconstitutional as applied to 18-year olds, basing the claim on the "rationale" of *Miller*. Citing a dictionary definition,[16] the court agreed that "reliance" "leaves prisoners some leeway," for a prisoner "may rely on a new rule even if he seeks to apply it to a new situation. . . . [h]is claim need not match the Court's precise holding, as long as it

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[15] *In re Rosado*, 7 F.4th 152, 158–60 (CA 3, 2021).

[16] "To 'rely' on something is to 'depend on ... [it] with full trust or confidence' or to 'rest upon [it] with assurance.' Rely, Oxford English Dictionary (2d ed. 1989) (def. 5)." Id.

follows from the broader rule supporting that holding. . . . [a]s we have explained, a claim 'relies' on a new rule if that rule 'substantiates the ... claim.' . . . That is true 'even if the rule does not 'conclusively decide[ ]' the claim or if the petitioner needs a 'non-frivolous extension of' ' it.'"[17] The court gave an example. The United States Supreme Court held that the residual clause of the Armed Career Criminal Act was unconstitutionally vague.[18] A challenge to the residual clause of the career-offender Sentencing Guideline, said the court, properly "relied on" that retroactive change in the law, though the challenge was to a different statute.[19]

But, continued the court, "to rely on a rule, the prisoner must ground his argument within the rule's limits. He may not read it so broadly that he 'contradict[s] binding precedents' or seeks a 'facially implausible' extension of it," such as using *Miller* to "challenge discretionary sentences."[20] "In short," the court said, "we ask if the new rule sets out strict limits and if the prisoner's case falls beyond those limits. If so, he cannot rely on the new rule."[21] To rely on a new rule, then, "a prisoner must show that his case plausibly falls within the rule's limits."[22]

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[17] Id., at 159.

[18] *Johnson v. United States*, 576 U.S. 591, 597, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015).

[19] *In re Rosado*, supra.

[20] Id.

[21] Id.

[22] Id., at 158.

The claim that the constitution forbids automatically imposing a sentence of life imprisonment without parole on an 18-year old did not, the court concluded, rely on *Miller*, requiring instead creation of another change in the law.

> *Miller drew a firm line*: "those under the age of 18" cannot be sentenced to mandatory life without parole. . . . Just a few months ago, the Court recognized this line, repeatedly describing *Miller*'s holding as applying to those under eighteen. *Jones v. Mississippi*, —— U.S. ——, 141 S. Ct. 1307, 1311–23, 209 L.Ed.2d 390 (2021); see also *United States v. Sierra*, 933 F.3d 95, 97 (2d Cir. 2019) (reading *Miller* as setting a bright line at eighteen); *United States v. Marshall*, 736 F.3d 492, 498–99 (6th Cir. 2013) (same).
> Indeed, *Miller* is part of a series of youth-sentencing cases, all of which drew the line at eighteen. See *Roper v. Simmons*, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (barring the death penalty for those under eighteen); *Graham v. Florida*, 560 U.S. 48, 74–75, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (barring life-without-parole sentences for those under eighteen who did not kill).[23]

With regard to defendant's claim that *Miller* "covers all youths who 'manifest[ed] age-related immaturity' at the time of their crimes" and that "[s]cientific evidence . . . shows that those just over eighteen are similarly immature, so *Miller* must apply to them too," the court responded that "the Supreme Court has already rejected that argument," for in "*Roper*, the Court expressly conceded Rosado's point that aging is a spectrum, not a switch flipped at eighteen. . . . But 'a line must be drawn.' . . . And *Miller*, relying on *Roper* and *Graham*, drew it at eighteen.". . . Those cases grounded that line in our society's consensus: 'The age of 18 is the point where society draws the line for many purposes

[23] Id. (emphasis supplied).

between childhood and adulthood.' *Graham*, 560 U.S. at 74–75, 130 S.Ct. 2011 (quoting *Roper*, 543 U.S. at 574, 125 S.Ct. 1183)."[24]

In the end, then, Rosado's claim was not in reliance on *Miller* because "*Miller* set a clear age limit" and "Rosado f[ell] on the wrong side of that limit. . . . *A nonfrivolous extension of a precedent cannot go beyond the precedent's bright line*. . . . we cannot find that he relies on *Miller* when he falls beyond the bounds of the class that it protects."[25] So here. Defendant's claim is not "based on" *Miller* because that case set a bright line, and an extension of it beyond that bright line is the creation of a new rule. The claim here belongs in a case on direct review—and should be rejected in any event, whether based on the federal or Michigan constitution.

[24] Id., at 159-160.

[25] Id. (emphasis supplied).

II.

A mandatory sentence of life in prison for 1st-degree murder with statute rendering the sentence one ineligible for parole for a person who was 18 years of age or older at the time of his or her murder does not violate either the Eighth Amendment of the United States Constitution or Const 1963, art 1, § 16, or both.

A. The 8th Amendment to the United States Constitution does not render a mandatory sentence of life in prison which is ineligible for parole for 1st-degree murderers unconstitutional as to any class or subset of adults; the authority to set the sentence for the offense belongs to the legislature

> *[T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.*[26]

The parole statute, MCL 791.234(6) renders the offense of 1st-degree murder one that is ineligible for parole consideration, as does the punishment provision for the offense itself, which makes mandatory a sentence to life. The question here, then, as put by the Court, is whether MCL 791.234(6) and MCL 750.316 are unconstitutional under the Eighth Amendment as applied to everyone or anyone 18 years of age or older, here a 1st-degree murderer who was 18 years of age when he took the life of another person.

Defendant makes little argument that a mandatory sentence to life imprisonment, with no possibility of parole, is unconstitutional under the Eighth Amendment for those 18 years of age or older when they

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[26] *United States v. Wiltberger*, 18 U.S. 76, 95, 5 L. Ed. 37, 5 Wheat. 76 (1820).

murdered.[27] This is understandable. No federal circuit has so held, and all that have considered the issue have rejected it. See e.g. The second circuit in *United States v. Sierra*[28]:

> The defendants argue that *Miller*'s holding should be extended to apply to them, because scientific research purportedly shows that the biological factors that reduce children's "moral culpability" likewise affect individuals through their early 20s. The Supreme Court has acknowledged that "[d]rawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules," such as that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18," and that "[b]y the same token, some under 18 have already attained a level of maturity some adults will never reach." *Roper v. Simmons* . . . . Nevertheless, "a line must be drawn," and the Supreme Court has repeatedly chosen in the Eighth Amendment context to draw that line at the age of 18, which "is the point where society draws the line for many purposes between childhood and adulthood." . . . Since the Supreme Court has chosen to draw the constitutional line at the age of 18 for mandatory minimum life sentences, *Miller*, 567 U.S. at 465, 132 S.Ct. 2455, the defendants' age-based Eighth Amendment challenges to their sentences must fail.

Similarly, the fourth circuit in *United States v. Chavez*[29] said that:

> The Supreme Court has held that mandatory life sentences are unconstitutional as to defendants who committed their crimes as juveniles. . . . But this is no help to the

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[27] Appellant's Brief, II.d. (p. 38-39).

[28] *United States v. Sierra*, 933 F.3d 95, 97 (CA 2, 2019), cert. denied sub nom. *Beltran v. United States*, —— U.S. ——, 140 S. Ct. 2540, 206 L.Ed.2d 480 (Mar. 23, 2020), and cert. denied sub nom. *Lopez-Cabrera v. United States*, —— U.S. ——, 140 S. Ct. 2541, 206 L.Ed.2d 480 (2020). See also *Cruz v. United States*, 826 F. App'x 49, 51 (CA 2, 2020), cert. denied, 141 S. Ct. 2692, 210 L. Ed. 2d 846 (2021), reversing the district court.

[29] *United States v. Chavez*, 894 F.3d 593, 609 (CA 4, 2018).

defendants, both of whom were adults at the time they committed murder in aid of racketeering. Contemporary "society draws the line for many purposes between childhood and adulthood" at 18 years old. *Roper v. Simmons*. . . . It is true, of course, that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Id. At the same time, "some under 18 have already attained a level of maturity some adults will never reach." Id. . . . rules based on age are historically common and appear in many areas of the law. Consider the legal age requirements for driving, drinking alcohol, registering for the draft, voting, holding certain public offices, and marrying, among other things. The lines drawn by age in all of these examples will be imperfect fits for some individuals. But we cannot say that this makes them unconstitutional.

The Sixth Circuit has made the same points.[30] And the People have already discussed the third circuit case of *In re Rosado*, to the same effect.

There is simply no reasonable possibility that the United States Supreme Court would extend *Miller* beyond the limit of 18 years of age it set there, and in other situations, such as *Roper*, involving the Eighth Amendment and sentencing of juveniles.

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[30] *United States v. Marshall*, 736 F.3d 492, 499 (CA 6, 2013).

See also *Heard v. Snyder*, 2019 WL 6508194, at 2 (CA 6, 2019), cert. denied, 140 S. Ct. 1141, 206 L. Ed. 2d 198, 2020 (2020):

> The plaintiffs' equal-protection challenge to Michigan Compiled Laws §§ 769.25 and 769.25a—Michigan's sentencing statutes that exclude juvenile offenders from Michigan Compiled Laws § 791.234(6)—fares no better. The plaintiffs, who were either 18 or 19 years old when they committed their respective crimes, argue that it is illogical to treat them differently than 17-year-olds who commit first-degree murder. The plaintiffs cited medical evidence in support of this claim. But the Supreme Court acknowledged this precise argument in *Roper v. Simmons*, 543 U.S. 551, 574 (2005), when it recognized that "[d]rawing the line at 18 years of age is subject ... to the objections always raised against categorical rules," but nonetheless concluded that "a line must be drawn." Id. The Court observed that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18," but, "[b]y the same token, some under 18 have already attained a level of maturity some adults will never reach." Id. Noting that "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," the Court concluded that 18 is "the age at which the line for death eligibility ought to rest" as well. Id.; see also *Marshall*, 736 F.3d at 499. *Michigan Compiled Laws §§ 769.25 and 769.25a comport with Roper and Miller's rationale* (emphasis supplied).

B. Article I, § 16 of the Michigan Constitution does not render a mandatory sentence of life for 1st-degree murderers where statute prohibits parole consideration unconstitutional as to any class or subset of adults; the authority to set the sentence for the offense belongs to the legislature

The Eighth Amendment does not bar a mandatory sentence of life in prison, where statute denies the possibility of any parole consideration whatever, for an adult—a person 18 years of age or older—sentenced to life in prison, nor does the Michigan Constitution.[31] While a state court must, of course, *apply* the Eighth Amendment as construed by the United States Supreme Court, a state is not compelled to construe its *own* fundamental charter in the same fashion; indeed, a state could in its constitution provide no protection against cruel and unusual, or cruel *or* unusual, sentences at all. The matter is one of consideration of the text, history, and structure of the state constitution, to ascertain its original public meaning. Where identical language is employed in the state constitution as in the federal, and nothing in the review of text, history, or structure suggests a different meaning, the meaning may well be–and generally is—the same.[32] But an examination of the text, history, and structure of the provision may on rare occasion lead to a different

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[31] This Court has previously in *People v. Hall*, 396 Mich. 650, 657–658 (1976) upheld a required sentence of life, not subject to parole, for 1st-degree murder, the overruling at least in part which would be required for defendant to obtain relief.

[32] Indeed, this Court has said, in construing several parallel provisions of the state constitution to federal provisions, that absent a compelling reason to conclude otherwise they should be construed the same. See e.g. *People v. Slaughter*, 489 Mich. 302, 311 (fn 14) (2011) (collecting cases regarding Mich. Const. 1963, Art. 1, § 11); *People v. Davis*, 472 Mich. 156, 167–68 (2005) (concerning Mich. Const. 1963, Art. 1, § 15).

understanding[33] of the state provision than the parallel federal constitutional provision as interpreted by the United States Supreme Court.[34] This Court should conclude that Article 1, § 16 does not include judicial review of the proportionality of legislatively-mandated statutory sentences. *People v Bullock*[35] should be overruled, and the Court should find that the Michigan Constitution provides no basis for requiring case-specific sentencing hearings for any class of offenders convicted of 1st-degree murder, and certainly not for any class of adult offenders. But in all events, just as review for gross disproportionality under the federal constitution supplies defendant with no relief, neither is relief available under the Michigan Constitution if that test is applied.

1. Interpreting the Michigan Constitution

Our state constitution, no less than our federal constitution, is a durable expression of the will of the people, both authorizing and limiting government, and standing outside of and superior to all agencies of government, including the judiciary. Its source of authority is the people of the State: "All political power is inherent in the people. Government is

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[33] And though the interpretation of the federal constitution by the United States Supreme Court must be applied by the state court, the state court may, in construing its own constitution, conclude that the federal construction is mistaken.

[34] In *Sitz v. Dep't of State Police*, 443 Mich. 744, 758 (1993) the Court *found* such compelling reasons with regard to Art. 1, § 11 when applied to sobriety checklanes, noting that the compelling reason test for departure does not create a conclusive presumption which would completely bar State departure from interpretations of parallel federal constitutional provisions by the United States Supreme Court.

[35] *People v Bullock*, 440 Mich. 15 (1992).

instituted for their equal benefit, security and protection."[36] The judicial branch is as much an agent or servant of the sovereign people as are the legislative and executive branches. It does not stand outside of government, but is a part of it. The judge as servant of the people must search for the public meaning of a constitutional text as understood by the lawgiver. As Madison said, concerning our federal constitution:

> I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful, exercise of its powers.[37]

It has been established since the early days of our State that our state constitution is law through the act of ratification by the people, and that the task of the judge is to determine what the provisions of the constitution meant to the ordinary people who made it law. State precedent establishes that a court interpreting a constitutional text should endeavor to place itself

> in the position of the Framers of the Constitution, and ascertain what was meant at the time; for, if we are successful in doing this, we have solved the question of its meaning for all time. It could not mean one thing at the

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[36] See Mich. Const. 1963, Art. I, § 1. The same provision appears in Mich. Const. 1908, Art. II, § 1. In our first State Constitution, this language is divided between Article I, § 1 and § 2, § 1 providing that "First. All political power is inherent in the people" and Art. § 2 providing that "Government is instituted for the protection, security, and benefit of the people; and they have the right at all times to alter or reform the same, and to abolish one form of government and establish another, whenever the public good requires it."

[37] Letter from Madison to Henry Lee (June 25, 1824), reprinted in 9 *The Writings of James Madison* 191-192 (G. Hunt ed., 1910).

> time of its adoption, and another thing today, when public sentiments have undergone a change.[38]

Certainly new circumstances to which a provision must be applied may arise, but as Justice Campbell said long ago, "That the constitution means nothing now that it did not mean when it was adopted, I regard as true beyond doubt. But it must be regarded as meant to apply to the present state of things as well as to all other past or future circumstances."[39]

As tools to aid in the interpretation of our state constitution, this Court has consistently held that the Address to the People and the constitutional convention debates may be highly relevant in determining the public meaning to the *ratifiers* of particular constitutional provisions.[40] The Address is particularly important in this regard because it represents what the ratifiers—the people—were told about the

[38] *Pfieffer v Board of Education of Detroit*, 118 Mich 560, 564 (1898). See also *Holland v Clerk of Garden City*, 299 Mich 465, 470-471 (1941)("It is a fundamental principle of constitutional construction that we determine the intent of the framers of the Constitution and of the People adopting it") and *Burdick v Secretary of State*, 373 Mich 578, 584 (1964)("Courts on numerous occasions have gone to the constitutional convention debates and addresses to the people to decide the meaning of the Constitution").

[39] *People v Blodgett*, 13 Mich 127, 140 (1865)(Campbell, J.).

[40] See e.g., *Studier v. Mich. Pub. Sch. Employees' Retirement Bd.,* 472 Mich. 642, 655–656 (2005).

proposed constitution *before* they voted to adopt it.[41] This Court has emphasized that "the proper objective in consulting constitutional convention debates is not to discern the intent of the framers in proposing or supporting a specific provision, but to determine the intent of the ratifiers in adopting the provision," and so "the primary focus ... should not [be] on the intentions of the delegates . . . but, rather, on any statements they may have made that would have shed light on why they chose to employ the particular terms they used in drafting the provision to aid in discerning what the common understanding of those terms would have been when the provision was ratified by the *People*."[42]

> As Justice Cooley, perhaps our greatest justice, put the matter:
>
> > A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the

[41] See *People v. Nutt,* 469 Mich. 565, 590 n. 26 (2004) ("The Address to the People, widely distributed to the public prior to the ratification vote in order to explain the import of the ... proposals, 'is a valuable tool....' "). And see *Mich. United Conservation Clubs v. Secretary of State (After Remand),* 464 Mich. 359, 378 (2001) (Young, J., concurring), noting that the Address was "officially approved by the members of the constitutional convention."

[42] *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38,* 490 Mich. 295, 309-310 (2011).

instrument in the belief that that was the sense designed to be conveyed.[43]

The task of the judge when confronting the meaning of a state constitutional text is, then, as a matter of long-established Michigan precedent, to ascertain what the ratifiers "understood themselves to be enacting." As one commentator has said, the text "must be taken to be what the public of that time would have understood the words to mean. . . . In other words, the objective or publicly-accessible meaning of the terms is sought."[44] Whether an interpretation of a provision of our state constitution is entitled to adherence under principles of stare decisis thus involves consideration of whether that decision was itself faithful to the task of the Court as established in the decisions of this Court described above. And "statutes are presumed to be constitutional, and [courts] have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.' "[45]

2. The law the People have made: that Article 1, § 16 of the Michigan Constitution employs the phrase "cruel or unusual" rather than "cruel and unusual" provides no basis to find MCL 791.234(6) and MCL § 750.316 unconstitutional as applied to any class of adults

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[43] Cooley, *A Treatise on the Constitutional Limitations* (1886), p. 81. And see *People v. Smith,* 478 Mich. 292, 298-299 (2007); *Attorney General v. Renihan*, 184 Mich. 272, 281 (1915).

[44] See Randy Barnett, "An Originalism for Nonoriginalists," 45 Loy L Rev 611, 636 (1999).

[45] *In re Certified Questions From United States Dist. Ct. , W. Dist. of Michigan, S. Div.*, 506 Mich. 332, 340 (2020), quoting *People v. Skinner*, 502 Mich 89, 100 (2018), quoting *In re Sanders*, 495 Mich. 394, 404 (2014), in turn citing *Taylor v. Gate Pharm.*, 468 Mich. 1, 6 (2003).

a. "The law the people have made": article 1, § 16, and the "and" and the "or" of it

There *is* a textual difference between the Eighth Amendment and Article 1, § 16—the former uses the phrase "cruel and unusual punishment" while the latter refers to cruel *"or"* unusual punishment—and this Court in *People v. Bullock* said that the "difference does not appear to be accidental or inadvertent."[46] But little proof was offered for this assertion other than the very fact of the textual difference.[47] Is there anything in the history of the language used that suggests that the use of "or" rather than "and" was designed to accomplish some purpose? And if so, to what end was the choice made?

The Northwest Ordinance was passed on July 13, 1787 by the Confederation Congress establishing the Northwest Territory, which included the territory that later became the State of Michigan, as well as principles for its governance. Included was a provision in Article 2 that "no cruel or unusual punishments shall be inflicted." On August 6, 1789, the Northwest Ordinance of 1789, which essentially continued the 1787 Ordinance, was signed into law under the new Constitution, and it too provided that "no cruel or unusual punishments shall be inflicted." On September 25, 1789 by joint resolution Congress Proposed the Bill of

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[46] *People v. Bullock,* 440 Mich. at 30-31.

[47] "While the historical record is not sufficiently complete to inform us of the precise rationale behind the original adoption of the present language by the Constitutional Convention of 1850, it seems self-evident that any adjectival phrase in the form A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B.' The set of punishments which are *either* 'cruel' *or* 'unusual' would seem necessarily broader than the set of punishments which are *both* 'cruel' *and* 'unusual.'" *People v. Bullock,* 440 Mich. at 31 (emphasis in the original).

Rights Amendments to the States, the tenth of which was what came to be the Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It would be far more than passing strange if Congress proposed to the States an amendment to the Constitution concerning punishments that it intended to be *different* than that it had enacted as to the Northwest Territory only six weeks earlier. And there is no evidence that it so intended.

Indeed, founding-era evidence establishes that no difference was intended when the disjunctive was used rather than the conjunctive in a particular constitution of the era.

- As evidenced by the state constitutions they wrote, the Founders used the phrases "cruel and unusual," "cruel or unusual," and "cruel" interchangeably as referring to a unitary concept.

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  The state constitutions enacted during and shortly after the Bill of Rights' ratification also counsel against a literal interpretation. Pennsylvania and South Carolina each enacted constitutions during 1790, while ratification of the Bill of Rights was still pending. In addition, Delaware and Kentucky enacted constitutions in 1792 during the year following the Bill of Rights' ratification. All of these constitutions prohibited "cruel punishments," omitting entirely any reference to the term "unusual." Numerous state constitutions enacted after the Founding period used this same language. There is no evidence that this formulation was understood to mean anything different from either the Eighth Amendment's proscription of "cruel and unusual punishments" or the ban of the many state constitutions enacted during the Revolutionary and

post-Revolutionary periods against "cruel or unusual" punishments.[48]

- [T]he phrases "cruel and unusual" and "cruel or unusual" were often used interchangeably, with early American state constitutions often employing "cruel or unusual" instead of the "cruel and unusual" verbiage.[49]

- [N]either the Framers nor their English predecessors attributed much difference between the phrases cruel *and* unusual and cruel *or* unusual. . . . "the available evidence indicates that the Founders understood [both formulations] to capture the same meaning."[50]

And in the debate on ratification of the Constitution, where much concern was expressed regarding the absence of a Bill of Rights, the disjunctive and conjunctive were used interchangeably, and "cruel" and "unusual," however expressed, referred to a unitary concept. At the Massachusetts Ratifying Convention, Abraham Holmes complained that in the absence of a Bill of Rights Congress was not "restrained from inventing the most cruel *and unheard of* punishments . . . RACKS and GIBBETS, may be amongst the most mild instruments of their discipline."[51] The minority

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[48] Stacy, Tom, "Cleaning Up the Eighth Amendment Mess," 14 Wm. & Mary Bill Rts. J. 475, 503-504 (December, 2005) (footnotes omitted).

[49] Bessler, John, "The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century," 2 Brit. J. Am. Legal Stud. 297, 313 (2013) (footnotes omitted).

[50] Casale, Robert, and Katz, Johanna, "Would Executing Death-sentenced Prisoners after the Repeal of the Death Penalty Be Unusually Cruel under the Eighth Amendment?," 86 Conn. B.J. 329, 336 (2012) (footnote omitted).

[51] Bernard Bailyn, 1 *The Debate on the Constitution*, p. 912 (emphasis supplied, capitalization in the original).

dissent of the Pennsylvania Ratifying Convention offered a series of suggested amendments to the proposed Constitution, including that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel *nor* unusual punishments inflicted."[52] The New York ratifying convention proposed amendments to the proposed Constitution constituting a Bill of Rights, and including that "excessive bail ought not to be required, nor excessive fines imposed; nor cruel *or* unusual punishments inflicted."[53] The North Carolina ratifying convention resolved that there should be a Declaration of Rights added to the proposed Constitution, to include a provision that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel *and* unusual punishments inflicted."[54] The phrases were used interchangeably, and nothing suggests any difference in meaning was intended.

Michigan achieved Statehood in 1837, and its first constitution, that of 1835, provided in Article 1, § 18 that "Excessive bail shall not be required; excessive fines shall not be imposed; and cruel and unjust punishments shall not be inflicted." There is no historical evidence that the textual change from the Northwest Ordinance—from "cruel or unusual" to "cruel and unjust"—was meant to accomplish some change from the prohibition in the Northwest Ordinance. In the Constitution of 1850, Article 6, § 31, our constitution returned essentially to the language

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[52] Bernard Bailyn, 1 *The Debate on the Constitution*, p. 532 (emphasis supplied).

[53] Bernard Bailyn, 2 *The Debate on the Constitution*, p. 536 (emphasis supplied).

[54] Bernard Bailyn, 2 *The Debate on the Constitution*, p. 567 (emphasis supplied).

used in the Northwest Ordinance: "cruel or unusual punishment shall not be inflicted." And the 1908 Constitution, in Article 2, § 15, continued that language, which also appears in our current constitution: "cruel or unusual punishment shall not be inflicted." The People can discover nothing in any convention record or journal that indicates that the text employed in the Northwest Ordinance, the text employed in the Constitution of 1835, or the texts employed in the Constitutions of 1850, 1908, and 1963 were intended to mean anything different. Again, "the phrases 'cruel and unusual,' 'cruel or unusual,' and 'cruel'" were employed "interchangeably as referring to a unitary concept" throughout the country.

And as to text itself, this Court said in *Bullock* that "it seems self-evident that *any* adjectival phrase in the form 'A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B.'"[55] But this is not necessarily so. While "and" is generally taken to be "used to join words or groups of words; added to; plus," "[o]r, on the other hand, while used as 'expressing an alternative, contrast, or opposition," is also often used "to indicate ... (3) the synonymous, equivalent, or substitutive character of two words or phrases,' as in '[the off [or] far side], [lessen [or] abate].'"[56] In any event, here history gives context to the expression—no difference in meaning was intended by the use on occasion of "or" rather than "and" to couple "cruel" and "unusual"; indeed, no difference in meaning was intended by the occasional use of "cruel" standing alone.

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[55] *People v. Bullock*, 440 Mich. at 30-31 (emphasis added).

[56] Webster's Third New International Dictionary (1981).

And as Justice Holmes once said, "a page of history is worth a volume of logic."[57]

b. "The law the people have made": that Article 1, § 16 of the Michigan Constitution employs the phrase "cruel or unusual" rather than "cruel and unusual" provides no basis to find MCL 791.234(6) and MCL § 750.316 unconstitutional as applied to any class of adults under the text of the Michigan provision

Though the *Bullock* opinion offered little support for its assertion that "use of the phrase 'cruel or unusual' in the Michigan constitution rather than 'cruel and unusual' does not appear to be accidental or inadvertent," assume that it is accurate. Does it afford any basis for finding MCL 791.234(6) and MCL § 750.316 unconstitutional as applied to any class of adults? It does not.

What would an "unusual" punishment be? It requires reference to its context of use along with "cruel." Surely the constitutional provision would not ban all innovations in punishment, such as use of electronic monitoring devices. Justice Holmes pointed out over a century ago, with regard to the phrase "cruel or unusual" in the Massachusetts constitution, that "the word 'unusual' must be construed with the word 'cruel,' and cannot be taken so broadly as to prohibit every humane improvement not

[57] *New York Tr. Co. v. Eisner*, 256 U.S. 345, 349, 41 S. Ct. 506, 507, 65 L. Ed. 963 (1921).

previously known in [the state]."[58] And Professor Stinneford[59] has thoroughly explicated the point.

"Unusual" as used both the Eighth Amendment and Article I, § 16 does not mean "out of the ordinary," or any innovation in punishment would be prohibited by these provisions. Rather, as demonstrated by Professor Stinneford, in this context as historically understood "unusual" means "'contrary to long usage' or 'immemorial usage.'"[60] In the 17th and 18th centuries "[a]ctions that comported with long usage were often said to be 'usual,'" while "[a]ctions that were contrary to long usage, on the other hand, were described as 'unusual.'"[61] Indeed, "[t]hroughout the first half of the nineteenth century, American courts that were called upon to determine whether a punishment was 'cruel and unusual' almost invariably noted that a punishment could only be 'unusual' if it was contrary to the long usage of the common law."[62] And so

> the provisions in the various state constitutions and bills of rights for preserving the common law and prohibiting cruel punishments reflected a general consensus on two points: First, the government should not impose cruel punishments. Second, the common law was essentially reasonable, so that governmental efforts to "ratchet up" punishment beyond what was permitted by the common law were presumptively contrary to reason. Given this dual consensus, the words

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[58] *In re Storti*, 60 N.E. 210, 211 (Mass., 1901).

[59] Professor of Law, University of Florida Levin College of Law.

[60] John F. Stinneford, "The Original Meaning of 'Unusual': The Eighth Amendment As A Bar to Cruel Innovation," 102 NW. U. L. Rev. 1739, 1745 (2008).

[61] Id., at 1770.

[62] Id., at 1771.

> "cruel" and "unusual" acted as synonyms when employed in the context of punishment. The word "cruel" stated the abstract moral principle, and the word "unusual" provided a concrete reference point for determining whether that principle had been violated. Thus, it makes sense that some states outlawed "cruel punishments," some outlawed "cruel and unusual punishments," and some outlawed "cruel or unusual punishments." *Each formulation is simply a different way of saying the same thing.*[63]

Similarly, "cruel" has reference to historically employed punishments; a punishment is "cruel" if "its effects are unjustly harsh in light of longstanding prior punishment."[64] The first use of the phrase "cruell and unusual punishments" appeared in the English Bill of Rights of 1689, which was the model the prohibition on cruel and unusual punishments in the Virginia Declaration of Rights, and, ultimately, the Eighth Amendment.[65] The likely English impetus was the case of Titus Oates, who was convicted of only perjury for falsely claiming there was a popish plot to kill the king, the claim resulting in many executions. Justice Withins sentenced Oates to be dragged across the City of London while being whipped "from Aldergate to Newgate," and two days later from Newgate to Tyburn, to pay a fine, to be pilloried four times a year for life, and to life imprisonment.[66] Oates survived scourging, and petitioned Parliament after the adoption of the Bill of Rights to suspend his punishment on the ground that it was cruel and unusual, with which

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[63] Id., at 1799 (emphasis suppled).

[64] John F. Stinneford, "The Original Meaning of 'Cruel'," 105 Geo. L. J. 441, 464 (2016).

[65] Id., at 474.

[66] Id., at 477.

the members of Parliament agreed because the punishment was too harsh for the crime of conviction in "light of longstanding prior practice."[67] Justice Cooley well put the matter in his treatise, relating the provision to historical practice:

> It is somewhat difficult to determine precisely what is meant by cruel and unusual punishments. Probably a punishment declared by statute for an offense which was punishable in the same way at the common law could not be regarded as cruel or unusual in the constitutional sense. And probably any new statutory offence may be made punishable to the extent permitted by the common law for similar offences. But those degrading punishments which in any State *had become obsolete before its existing constitution was adopted*, we think may well be held to be forbidden by it as cruel and unusual.[68]

Plainly, a mandatory sentence of life imprisonment, the law not permitting parole, is not a degrading punishment for any class of adults

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[67] Id.

[68] Cooley, *Constitutional Limitations*, at 329.

If "unusual" punishments must be cruelly so, and include reinstitution of those long obsolete, this solves the "one-way ratchet" problem. That is, if a punishment is found unconstitutional because "evolving standards of decency" have turned against it, society may never decide it has made a mistake and return to more rigorous punishment, for any such legislation is perforce unconstitutional. But if a punishment that has been set aside only becomes "cruel and unusual" if in long disuse, society has the ability to return to a former punishment, and the ratchet turns both ways. Professor Stinneford suggests one hundred years as the relevant time period: "The relevant reference point for determining whether a punishment is cruel and unusual is not some abstract and absolute notion of unnecessary pain, but rather the range of pain (or risk of pain) caused by traditional punishment practices that have been used within the last one hundred years. States are free to experiment in order to find more humane methods of punishment without worrying that the moment they adopt a new practice, the old one becomes unconstitutional." Stinneford, "The Original Meaning of 'Cruel,'" at 504.

that had become obsolete before the adoption of the Michigan constitutions.[69] It is not unconstitutional under the Michigan cruel or unusual punishment provision.

c. Gross proportionality review should not be applied to MCL 791.234(6) and MCL § 750.316

What would the ratifiers of the Michigan Constitutions have understood themselves to be enacting in 1835 when they ratified the language "Excessive bail shall not be required; excessive fines shall not be imposed; and cruel and unjust punishments shall not be inflicted"; and in 1850 when they ratified "Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted"; and in 1908 when they ratified a text almost identical to that of 1850; and finally in 1963, when that language was again continued? Because, as the People have argued, "or" and "and" were used interchangeably at the time of the Founding, one must return to the beginning. What was the understanding at the time of the Founding, and in 1835?

The People will not belabor the point, but direct the Court to Justice Scalia's lead opinion in *Harmelin v Michigan*,[70] joined by Chief

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[69] For example, see the Revised Statutes of 1846, Chapter 153, providing the 1st-degree murder "shall be punished by solitary confinement at hard labor in the state prison for life" (the Revised States of 1838 had provided in Chapter 3 that 1st-degree murder was punishable by death, and 2nd-degree murder by life in prison, or any term of years); see also Compiled Laws of 1948, MCL 750.316, 1st-degree murder punished by "solitary confinement at hard labor in the state prison for life." And see Compiled Laws of 1948, MCL 791.32, precluding parole for those convicted of 1st-degree murder, reenacting § 4 of Ch. 3 of Act 255 of 1937) (now see MCL 791.234(6)).

[70] *Harmelin v. Michigan* 501 U.S. 957, 976, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991).

Justice Rehnquist as to the proportionality discussion, which the People believe applicable to the Michigan provision.[71] The People agree that:

- [T]he Clause disables the Legislature from authorizing particular forms or "modes" of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed.[72]

- [T]o use the phrase "cruel and unusual punishment" [or cruel or unusual punishment] to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly. The notion of "proportionality" was not a novelty. . . . There is little doubt that those who framed, proposed, and ratified the Bill of Rights were aware of such provisions, yet chose not to replicate them.[73]

- We think it enough that those who framed and approved the Federal Constitution chose, for whatever reason, not to include within it the guarantee against disproportionate sentences that some State Constitutions contained. It is worth noting, however, that there was good reason for that choice . . . . While there are relatively clear historical guidelines and accepted practices that enable judges to determine which *modes* of punishment are "cruel and unusual," *proportionality* does not lend itself to such analysis.[74]

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[71] And Justice Thomas has also made essentially the same points. See e.g. *Graham v Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2011)(Thomas, J., dissenting).

[72] *Harmelin*, 111 S.Ct. at 2691 - 2692.

[73] *Harmelin*, 111 S.Ct. at 2692.

[74] *Harmelin*, 111 S.Ct. at 2692. And see Stinneford, "The Original Meaning of 'Unusual': the Eighth Amendment as a Bar to Cruel Innovation,"at

- The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate—and to say that it is not. For that real-world enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.[75]

This was the understanding that informed the punishment provision of the Northwest Ordinance, and the Michigan Constitution of 1835, with subsequent constitutions ratified with no understood change to that understanding.

Proportionality review should be rejected as a matter of Michigan law. It inevitably involves the court in matters that are legislative. As Justice Scalia pointed out in the *Roper*[76] case:

> the American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In . . . *Hodgson v. Minnesota* . . . the APA found a "rich body of research" showing that juveniles are mature enough to decide whether to obtain an

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1757 (Fall 2008): "The *Roper* majority wanted to strike down the death penalty for seventeen-year-olds, despite the fact that the evidence did not demonstrate that such executions violated any societal moral consensus, at least within the United States, and so it simply pretended that the evidence supported the desired result. One may like the results of *Roper* and still find the case profoundly troubling. *If evolving standards of decency is merely window-dressing for judicial will*, then it is not merely an incorrect standard; it is not a standard at all. In the long run, a standardless standard will cause more harm than good to those criminal defendants who seek the protection of the Eighth Amendment" (emphasis supplied).

[75] *Harmelin*, 111 S.Ct. at 2697.

[76] Roper v. Simmons, 125 S.Ct. at 1222 (Scalia, J., dissenting).

> abortion without parental involvement. Brief for APA as *Amicus Curiae,* . . . The APA brief, citing psychology treatises and studies too numerous to list here, asserted:
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> > "[B]y middle adolescence (age 14–15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems."
>
> . . . . courts—which can only consider the limited evidence on the record before them—are ill equipped to determine which view of science is the right one. Legislatures "are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.'"

Further, if the constitutional proportionality of a sentence "is an ever changing reflection of the evolving standards of decency' of our society, it makes no sense for the Justices then to *prescribe* those standards rather than *discern* them from the practices of our people. On the evolving standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?"[77]

The *Morris* decision, quoting Justice Cooley's treatise, best explains the matter:

> defendant claims that, as properly understood, [cruel or unusual punishment] means, when used in this connection, punishment out of proportion to the offense. If by this is meant the degree of punishment, we do not think the contention correct. . . . in England . . . . the declaration was intended to forbid the imposition of punishment of a kind not known to the law or not warranted by the law. Justice

[77] Id.

> Cooley says: "Probably any punishment declared by statute for an offense which was punishable in the same way at the common law could not be regarded as cruel or unusual, in the constitutional sense; and probably any new statutory offense may be punished to the extent and in the mode permitted by the common law for offenses of similar nature. But those degrading punishments, which in any state had become obsolete before its existing constitution was adopted, we think may well be held forbidden by it as cruel and unusual.[78]

Finally, to conclude here, Justice Riley quoted the Prosecuting Attorneys Association amicus brief:

> I believe that the amicus curiae supplemental brief of the Prosecuting Attorneys Association correctly identifies the problems with an evolving standards test. . . . "if 'evolving standards of decency' as to the appropriate (proportionate) sentence for a crime are to be the measure of the constitutionality of a legislatively set penalty, how is such an inquiry to be carried out? What is the measure? What informs the judgment? What tools does a court have to make it? What enables a court to overrule society's expression of its 'standard of decency,' communicated through statute, imposing a different standard, which is also supposed to be *society's* standard and not the court's? Would not the court's role be to *discover* or *identify* society's 'standard of decency'—not what it should be, but what it *is,* and how better could society express its standard of decency than through its elected lawmakers? The alternative for the judiciary is that
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> > it is for *us* (the judiciary) to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society its democratic processes now overwhelmingly disapproves, but on the basis of what we think "proportionate" and "measurably contributory

[78] *People v. Morris*, 80 Mich. 634, 638–39 (1890).

> to acceptable goals of punishment"—to say and mean that, is to replace judges of the law with a committee of philosopher kings.[79]

3. Even under review for "gross disproportionality" there is no basis to find MCL 791.234(6) and MCL § 750.316 unconstitutional as applied to any class of adults

Even if *Bullock* is followed, the test there is whether the legislatively established sentence is "*grossly* disproportionate"[80]; the Court does not superintend the legislature for an abuse of discretion, as it does the sentencing of trial courts under *Steanhouse*.[81] Michigan's test assesses proportionality by considering:

> whether a penalty may be considered cruel or unusual is to be determined by a three-pronged test that considers (1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty and penalties imposed for the same offense in other states. . . . under the Michigan Constitution, the prohibition against cruel or unusual punishment included a prohibition on grossly disproportionate sentences.[82]

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[79]People v. Bullock, 440 Mich. at 63-64 (Riley, J. dissenting).

[80] "{W]e conclude . . . that the penalty at issue here is so grossly disproportionate as to be 'cruel or unusual.'" *People v. Bullock*, 440 Mich. at 37.

[81] "[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion."*People v. Steanhouse*, 500 Mich. 453, 471 (2017).

[82] *People v. Benton*, 294 Mich. App. 191, 204 (2011).

Some cases, including *Bullock*, include "the goal of rehabilitation." But where the gravest of all crimes—1st-degree murder—has been committed, nothing in the constitution requires that the legislature consider rehabilitation

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."[83] To paraphrase Justice Boyle in *Bullock*, "[b]ecause the absolute magnitude of the crime is grave [here, the gravest possible] and the principle of proportionality does not permit the judiciary to impose on the Legislature its subjective view of appropriate responses to perceived evils, the statutory scheme passes constitutional muster."[84] All "classes" of adults face the same mandatory sentence of life in prison, not subject to parole, for the gravest and most serious offense that can be committed in the state.

Regarding the second factor, this Court observed in *Carp*[85] that non-homicide offenses exist in Michigan that may be viewed as less grave or serious than first-degree murder, but for which all 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."[86] Given that the commission of a non-homicide offense

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as a goal, at least a goal to lead to release the defendant from prison. The legislature may certainly consider other penological goals, including punishment, as the overriding purpose of the sentence provided, at least for all adult offenders.

[83] *People v. Carp*, 496 Mich 440, 514 (2014), judgment vacated 577 U.S. 1186, 136 S.Ct. 1355,194 L.Ed.2d 339 (2016).

[84] See Bullock, at 72-73 (Boyle, J.,concurring and dissenting).

[85] *Carp*, at 516.

[86] *Id.*, citing MCL 750.520b(2)(c).

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

Under the third factor, at least 19 states[87] and the federal government impose, at a minimum, mandatory sentences of life without parole for 1st-degree murder; Michigan's legislature is, then, not an outlier in penological choice.[88]

But the real issue here is that the defense argues that certain scientific evidence—that was not presented below—shows that, as a general matter, human brains are not fully mature at 18 years of age, so that what the defense opts to denominate "young adults" are not as mature in their decision making as those who are 25 years of age, and older. But the policy question is not whether those between the ages of 18 and 25 are as mature as those 25 years of age and older, but whether

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

[88] Compare *People v Benton*, 294 Mich App 191, 206-207 (2011) (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.").

they are *sufficiently* mature so that, if they take another human life under circumstances constituting 1st-degree murder—here, a murder-for-hire—they, having committed the gravest crime, should suffer the gravest penalty. Defendant thinks not. The legislature thinks so. Those who think not are free to present their scientific evidence to the legislature and call for a change, a call to which the legislature may respond favorably, or to which the legislature may determine that those 18 years or older are sufficiently mature to suffer the penalty of life without parole for committing a 1st-degree murder. It was, after all, understood in *Roper* that full maturity may not arrive at the age of 18. But the Court said that while "[d]rawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules," as "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18," it is also true that "[b]y the same token, some under 18 have already attained a level of maturity some adults will never reach." And thus a line must be drawn, and "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood."[89] The Court has repeatedly drawn that line, drawing it at 18 years of age in *Miller*, in a case involving 14-year-old defendants, where the Court could have drawn the line at a different, higher, age. This Court should leave the matter to the legislature.

C. Conclusion

On an early December morning Henry Covington left the house to start up his fiance's car to warm it up, as was his practice, before he drove her to work. When he did so, an assassin—defendant Poole—shot him,

[89] *Roper v. Simmons*, 125 S. Ct. at1197–1198.

resulting in his death. The murder was a murder for hire—defendant killed Covington for money—$300—and kept phoning his uncle and codefendant, Harold Varner, who had paid him for the killing, for more money (in jurisdictions with the death penalty for murder, receiving payment for the murder is an aggravating factor for the death penalty).[90] Defendant committed a premeditated murder, ending another person's life, for monetary gain. Mr. Covington future was ended that day,[91] and those who loved him and cherished his life and his company are without him forever. To paraphrase Justice Boyle as she so well put the matter in discussing a proportionality argument under *Milbourn*,[92] "elaborate rationalizations for lowering sentences distance the appellate judiciary from meaningful connection with reality." As the tragedy of the murder victim here and his survivors is "mediated through the processes of proportionality," "the focus of the reviewing court shifts from the horror" of the assassination of the victim, "to the image of . . . sympathetic defendant, incarcerated at great cost to the state."[93]

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[90] See e.g. 18 U.S.C.A. § 3592(c)(8): "Aggravating factors for homicide.—In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist: ****(8) Pecuniary gain.—The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

[91] "Hell of a thing, killin' a man. Take away all he's got and all he's ever gonna have." William Munny (Clint Eastwood), *Unforgiven* (Malpaso Productions/Warner Brothers 1992).

[92] Where "defendant himself described how he terrorized, tortured, burned, and sodomized eighty-four-year-old Marie Green; then left her for dead" *People v. Merriweather*, 447 Mich. 799, 802 (1994).

[93] Id., at 805.

This Court should not permit itself to be used as a legislative committee; "[t]he Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary."[94] The United States Supreme Court has decided that life without parole cannot be imposed on juvenile 1st-degree murderers without a case-specific consideration of the "mitigating factors of youth." So be it. But if parole consideration is to be granted to classes of adult 1st-degree murderers, that is a decision for the legislature to make. There is no federal constitutional rule requiring it, and this Court should not require it under the state constitution; the matter is for the legislature.

[94] *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 858 (CA9, 1996)(en banc)(Kleinfeld, J., dissenting), rev'd sub nom. *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

Relief

WHEREFORE, the People request that this Honorable Court affirm defendant-appellant's sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with AO 2019-6. The body-text font is 12 point Century Schoolbook set to 150% line spacing. This document contains _11795_____ countable words.

/s/ Timothy A. Baughman

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