STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

MONTEZ STOVALL

Defendant-Appellant.
_____/

Supreme Court No. _____

Court of Appeals No. 342440

Lower Court No. 92-0334-01 -FC
92-0335-01-FC

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellant
_____/

APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

BY: SOFIA NELSON (P 77960)
Assistant Defender
3031 W. Grand Blvd, Ste 450
Detroit, Michigan 48202
(313) 256-9833

Table of Contents

Index of Authorities

Cases

Constitutions, **Statutes, Court Rules**

Other Authorities

Judgment appealed from, relief sought, and concise allegations of error

In 1992 Montez Stovall was mistaken about the law and the consequences of his sentencing agreement when he entered a plea to two counts of second degree murder for crimes he committed as a child. He pled to avoid being convicted as charged of first-degree murder and receiving a mandatory death in prison sentence. During Montez's plea and sentence everyone was operating under two misconceptions: 1) that a juvenile convicted of first degree murder must be condemned to die in prison and 2) that sentences of life with the possibility of parole are generally more favorable than term of years sentences because they provide meaningful opportunity at release sooner.

Now, 29 years later, as a result of these misconceptions, Montez is in a worse position than juvenile lifers who were convicted as charged. Following *Miller v Alabama*[1] and *Montgomery v Louisiana*[2], children sentenced to life without the possibility of parole are being afforded a meaningful opportunity to obtain release based upon the mitigating circumstances of youth and their capacity for rehabilitation through resentencing proceeding under MCL 769.25 *et seq*. Conversely, Montez's unconstitutional sentences of life with the possibility of parole under the parole board's life means life policy deprive him of any individualized consideration that accounts for his youth and rehabilitation. Montez's sentences violate Due Process and are cruel and unusual.

In 2016, following the United States Supreme Court's decision in *Montgomery v Louisiana*, Montez filed a motion for relief from judgement based on a retroactive change in law arguing that he was entitled to resentencing because his sentences contravened due process and the prohibition against cruel and unusual punishment and his plea was illusory. The trial court found his plea was not illusory and denied his motion without discussion of the other claim. The Court of Appeals denied leave, the Honorable Cynthia Stephens dissenting, then this Court remanded as on leave granted. On

[1] *Miller v Alabama*, 567 US 460 (2012)
[2] *Montgomery v Louisiana*, 136 S Ct 718, 724 (2016).

remand, in a split decision, the Honorable Elizabeth Gleicher dissenting, the Court of Appeals affirmed the trial court and concluded without explanation that parolable life sentences afford Montez a meaningful opportunity at release.

Now, at 46 years old, it is evident that absent relief from this Court, Montez will die in prison having served the functional equivalent of the unconstitutional sentence he bargained to avoid. Because he was sentenced under a mistake of law and fact, his sentences did not account for his youth, and his sentences provide no meaningful opportunity at release upon demonstrated rehabilitation they violate due process and are cruel and unusual. Therefore, Montez is also entitled to resentencing, or, at minimum, a remand for an evidentiary hearing to determine if a parolable life comports with the dictates of *Miller* and *Montgomery*. Because Montez received no benefit from his plea, and was in fact harmed by it, his plea was illusory. Due Process requires he be afforded the opportunity to withdraw his plea.

Montez asks this Court to grant leave to appeal to address his situation, and that of similarly situated children convicted of murder who were given and are serving sentences functionally indistinguishable from a life without parole. It is fundamentally unfair that juveniles like Montez, who were deemed worthy of plea deals to lesser offenses and took responsibility for their crimes, would languish in prison while other juveniles are afforded individualized resentencing proceedings that provide realistic hope of a life beyond prison. Montez' case involves a legal principle of major significance to this state's jurisprudence, and the decision below conflicts with United States Supreme Court precedent and this Court's decision in *People v Turner*, 505 Mich 954 (2020). MCR 7.305 (B)(3)&(4).

Statement of Appellate Jurisdiction

Montez Stovall pled guilty to two counts of second degree murder and two counts of felony firearm for crimes he committed as a child. He was sentenced pursuant to a sentencing agreement on December 15, 1992 to life with the possibility of parole. Following the United States Supreme Court's decision in *Montgomery v Louisiana*, 136 S Ct 718, 724 (2016), on February 22, 2016, Montez filed a subsequent motion for relief from judgment based on a retroactive change in law. On March 1, 2016 the trial court appointed the State Appellate Defender Office (SADO) to assist Montez in perfecting his post-conviction motion. SADO filed a perfected motion for relief from judgment, and on August 23, 2017 the trial court issued an opinion and order denying the motion. On August 23, 2018 the Court of Appeals denied leave. Montez filed a timely application for leave in this Court and on June 19, 2019 this Court remanded the case to Court of Appeals as on leave granted. On November 5, 2020 the Court of Appeals issued an opinion denying relief, E. Gleicher dissenting. This application is timely filed and properly before this Court. MCR 7.305(C)(2)(a). This is an application for leave to appeal pursuant to Const 1963, art 1, § 20; MCL 600.215(3); MCL 770.3(6); and MCR 7.303(B)(1).

Statement of Questions Presented

I. **Are Montez Stovall's sentences of life with the possibility of parole cruel and unusual and violates Due Process?**

Court of Appeals answers, "No."

Court of Appeals answers, "No."

Montez Stovall answers, "Yes."

II. **Was Montez Stovall's plea to second degree murder induced by the promise of an illusory benefit—avoiding an unconstitutional sentence of mandatory life without parole for first degree murder—therefore, entitling him to plea withdrawal? Moreover, were his Due Process rights violated when the trial court did not take his youth into consideration when accepting his plea or when ruling on his motion for relief from judgement?**

Court of Appeals answers, "No."

Court of Appeals answers, "No."

Montez Stovall answers, "Yes."

Statement of Facts

Montez Stovall is currently serving life with the possibility of parole[3] for two plea based convictions for second degree murder stemming from the December 1991 shooting deaths of Terrence Bass and Lester Edwards. PT [4]7-9, ST 3. Montez has served over 29 years in connection with these convictions.[5] He was 17 years old at the time of the shootings; he is now 46.

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

Montez Stovall was born in Detroit in 1974 to Frankie Kelsey. Ms. Kelsey, an African American woman, was 21 at the time of his birth. Montez' biological father, Carl Jackson, was never a part of his life. Montez experienced trauma during gestation, due to a failed abortion attempt by his mother three months into the pregnancy.[6] He was delivered with the umbilical cord wrapped around his neck, causing a slow and inconsistent heartbeat.[7] There are signs he suffered oxygen loss as a result of his traumatic delivery.[8]

Montez was the second of his mother's four children, all fathered by different men. With no partner to aid and no family support, Ms. Kelsey was clinically depressed and failed to provide a safe and nurturing environment for her children. About a year after Montez's birth, Ms. Kelsey attempted suicide.[9]

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

---

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

night" and "beating [Montez] with an extension cord."[10] Montez recalled that Mr. Kelsey would punish him by hitting his thumbs with a hammer or by tying him to the refrigerator and beating him with a belt.[11]

When Montez was nine, he was removed from his mother's home due to physical abuse and neglect.[12] Montez has numerous loop-shaped scars on his back and thighs from being beaten.[13] While he was receiving treatment at Methodist Children's Home Society (MCHS), his mother was brought in for an interview. Ms. Kelsey reported to MCHS that Montez deliberately hurt himself since toddlerhood using such methods as squeezing his fingers in doors.[14] She stated that he did not show any response to pain until later in life, around the time his abusive stepfather left the home.[15] When asked by MCHS staff what she might be able to do differently in parenting Montez, she was unable to think of anything.[16] The MCHS' psychiatrist's final impression was:

> Child born to depressed, rejected mother, who was ambivalent about delivering him (had attempted abortion, then changed mind). Delivery possibly traumatic. During infancy clearly rejected by mother's family, mother depressed and, one can speculate, only partially met his needs. In process of her ambivalent parenting, it appears that he did not develop a sense of his and his body's importance, as evidenced by his lack of response to pain and self-infliction of pain. Appears he subjected to marked abuse by stepfather and had feeling of non-protection by mother.[17]

After treatment at MCHS, Montez was placed in foster care. Montez spent the rest of his childhood, until his incarceration for the instant offenses, in and out of residential facilities and foster placements.[18] His mother failed to visit him or meaningfully engage in his treatment.[19]

---

[10] Methodist Children's Center Records at 1-2, attached as appendix F.
[11] PSIR at 5, attached as appendix G.
[12] *Id.*
[13] Methodist Children's Center Records at 1, attached as appendix F.
[14] *Id.* at 2.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 3.
[18] PSIR at 5, attached as appendix G.
[19] Hawthorn Center Records at 3, attached as appendix E.

When Montez entered school, he was placed into emotionally impaired courses and consistently received low academic scores.[20] He was described as having an IQ in the low range.[21] Montez was exposed to, and began using, drugs and alcohol at a very young age. He began drinking at 11 and using marijuana at 13.[22]

Montez attempted suicide numerous times.[23] He first attempted to kill himself at age nine by running into traffic on the freeway.[24] At 12 he attempted to hang himself.[25] At the time his Presentence Investigation Report was completed in 1992, it was estimated that he had attempted suicide on six or seven occasions.[26] As a young person, due in large part to the abuse and neglect he suffered, he did not value his life or the lives of others. Prior to entering a plea in the instance case, Montez was found incompetent and sent to the Forensic Center to restore him to competency.[27]

Procedural History

Because Montez was facing an unconstitutional mandatory sentencing regime dictating a death in prison sentence if convicted as charged, he pled guilty to two counts of second degree murder and two counts of felony firearm, believing this was the only way he would have an opportunity for life outside of prison's walls. PT 10. His guidelines for his minimum sentence were scored at 144 (12 years) to 300 months (25 years).[28] Montez was sentenced by the trial court in accordance to the sentencing agreement to life with the possibility of parole. ST 3.

A common factual understanding of the criminal bar and trial court judges at the time of Montez' plea was that a sentence of life with the possibility of parole would result in a defendant

[20] Methodist Children's Center Records at 1, attached as appendix F; Hawthorn Center Records at 1, attached as appendix E.
[21] PSIR at 5, attached as appendix G; Hawthorn Center Records at 4, attached as appendix E.
[22] MDOC Evaluation of Suicide Risk, attached as appendix H.
[23] Hawthorn Center Records at 3, attached as appendix E.
[24] MDOC Evaluation of Suicide Risk, attached as appendix H.
[25] *Id.*
[26] PSIR at 6, attached as appendix G.
[27] ROA at 2, attached as appendix M.
[28] SIR, attached as appendix I.

seeing the parole board after 10 years, and serving approximately 15 years in prison prior to release.[29] Therefore, a sentence to a term of years exceeding 15 years on the minimum was thought to be a harsher punishment than a life with parole sentence.[30]

Following his plea and sentencing, Montez requested appellate counsel who filed a Motion for Plea Withdrawal on the grounds that Montez' plea was not knowing and voluntary. MT 7. That motion was denied. MT 10. The Court of Appeals affirmed, and the Michigan Supreme Court denied leave.[31]

Since he lost his direct appeal, Montez has filed several Motions for Relief from Judgment—in 1995, 2006, 2008, and 2012—all denied.[32] Following the United States Supreme Court's decision in *Montgomery*, on February 22, 2016, Montez filed a subsequent 6.500 based on a retroactive change in the law.[33] On March 1, 2016 the trial court appointed the State Appellate Defender Office to perfect his post-conviction motion.[34]

Undersigned counsel perfected that pro per filing, arguing that Montez was entitled to plea withdrawal and/or resentencing pursuant to a retroactive change in law. On August 23, 2017 the trial denied the motion on the grounds that the *Miller* and *Montgomery* decisions are not applicable to sentences of life with the possibility of parole.[35] On August 23, 2018 the Court of Appeals denied leave with the Honorable Cynthia Stephens dissenting.[36] One June 19, 2019, in lieu of granting leave, this Court remanded as on leave granted to the Court of Appeals.[37] And on November 5, 2020, in a published opinion with the Honorable Elizabeth Gleicher dissenting, the Court of Appeals affirmed

[29] *What Should "Parolable Life" Mean? Judges Respond to the Controversy* at 15, attached as appendix J; Letter from Judge John O'Brien, attached as appendix K.
[30] Appendix J at 16; Affidavit of Judge Samuel Gardner, attached as appendix L.
[31] Register of Actions, attached as appendix M.
[32] *Id.*
[33] *Id.*
[34] Order of Appointment, attached as appendix N.
[35] TC Order, attached as appendix O.
[36] COA Order, attached as Appendix P.
[37] MSC Order, attached as Appendix Q.

the trail court ruling that Montez' plea was not illusory and that his sentences provide him a meaningful opportunity at release citing precedent this Court overturned *People v Williams*, 940 NW2d 75 (2020).[38]

Montez' Demonstrated Maturity and Capacity for Rehabilitation

Montez was 17 years old when he shot and killed Terrence Bass and Lester Edwards. He is now a 46 year old adult housed at the lowest possible security classification authorized for those serving a life sentence—level II.[39] At the time of this filing he has served over 29 years in prison.

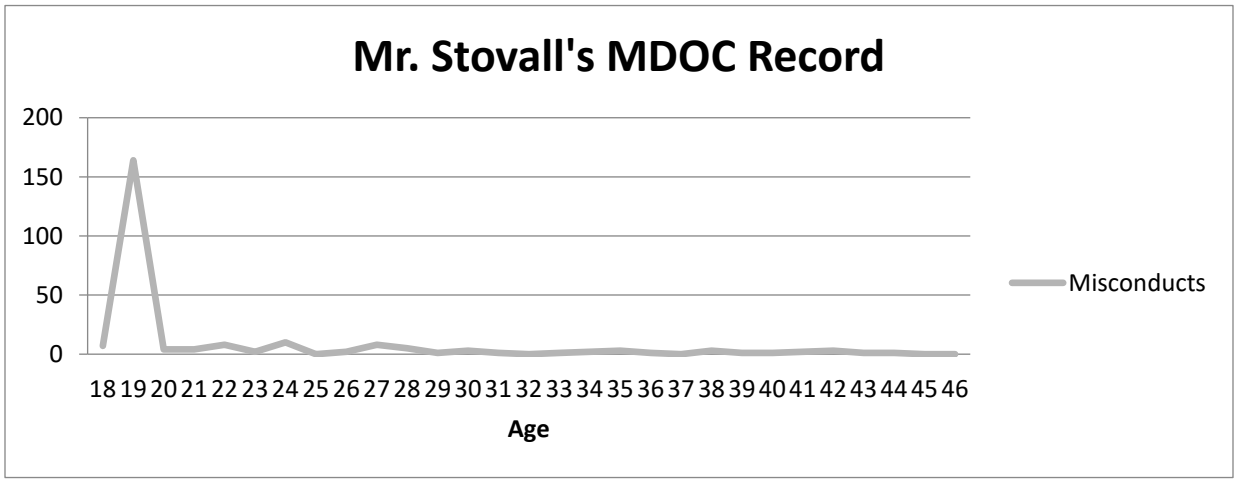
Montez experienced severe abuse, neglect, instability, emotional impairment, and chronic depression throughout his childhood and continued to struggle in the beginning of his prison sentence. Developmental neuroscience has established that adolescents and young adults (under age 25) have poor impulse control and a lessened ability to resist negative influences. This is in part because the portion of the brain that controls decision making (pre-frontal cortex) is still developing into young adulthood and does so independent of puberty. Underdevelopment of this portion of the brain explains why adolescents and young adults are more susceptible to peer influences and more likely to engage in reckless behavior.[40]

The developing nature of adolescent's brains makes it more difficult for youth to regulate their behavior. Impaired behavioral regulation is only exasperated for those who have suffered adverse childhood experiences. Childhood maltreatment negatively affects brain development and neurobiological responses to stress, leading to an increased risk of various negative behaviors for those

[38] COA Opinion, attached as Appendix R.
[39] https://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=228511.
[40] This science underpins the United States Supreme Court's juvenile sentencing precedent. "'[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds'—for example, in 'parts of the brain involved in behavior control.'" *Miller v Alabama*, 567 US 460; 132 S Ct 2455, 2464 (2012) (quoting *Graham v Florida*, 560 US 48, 68; 130 S Ct 2011, 2026 (2010); *See also See* Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives From Brain and Behavioral Science*, Current Directions in Psychological Science, Vol 16, No 2 (Apr., 2007).

who have endured adverse childhood experiences.[41] This can mean that children who are exposed to multiple types of adverse childhood experiences can be more impulsive and have less ability to rationally problem-solve than their more fortunate peers.[42] Montez suffered persistent and extreme childhood maltreatment and trauma, which likely slowed his development and affected his decision making at the time of the offenses.

As the chart below shows, prior to the age at which one's brain is fully developed, Montez received 199 misconducts or tickets in prison and spent long periods of time in solitary confinement. The chart also demonstrates that with age, Montez grew up and proved his ability to conform his behavior to the rules. He changed and matured. Montez has not received a misconduct for violence or threatening behavior in over eleven years. Due to his improved prison conduct, he has been housed at the lowest possible security classification since 2015.



[41] *See e.g.* Robert Anda et al, *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood*, European Archives of Psychiatry and Clinical Neuroscience, Vol 256 , Issue 2 (April 2006).
[42] See e.g. Nadine Burke et al, *The Impact of Adverse Childhood Experiences on Urban Pediatric Population*, Childhood Abuse and Neglect ,Vol 35 Issue 6 (June 2011); Vanessa Sacks and David Murphey, *The Prevalence of Adverse Childhood Experiences, Nationally, by State, and by Race and Ethnicity*, Child Trends (Feb 12, 2018), available at <https://www.childtrends.org/publications/prevalence-adverse-childhood-experiences-nationally-state-race-ethnicity>; Pamela Clarkson Freeman, *Prevalence and Relationship Between Adverse Childhood Experiences and Child Behavior Among Young Children, Infant Mental Health Journal*, Vol 35 Issue 6 (Nov/Dec 2014) .

Access to programming is limited for prisoners like Montez who lack an earliest release date. Despite this, Montez earned his GED in 1999.[43] In 2003 he completed a career education program in custodial maintenance. He also successfully completed a self-help program called Family Focus designed to address thought and behavior issues resulting from dysfunctional family upbringings.[44] Following completion of Family Focus, Montez received scores of 'excellent' in Substance Abuse Phase I.[45] Montez works as a unit porter and receives positive work evaluations.[46]

Unconstitutional Sentences

Montez was sentenced without any consideration of the mitigating circumstances of his youth or his capacity for rehabilitation. He was also sentenced under a mistake of law—that he was subject to a mandatory sentence of life without parole—and a mistake of fact—that a parolable life sentence would be more favorable to him than a term of years' sentence. Had Montez declined the plea deal and instead been convicted as charged and sentenced to life without parole, he may have already been resentenced to a term of years pursuant to MCL 769.25a and paroled. At minimum, he would be entitled to a *Miller* hearing and resentencing as required by MCL 769.25a, *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 136 S Ct 718, 724 (2016), that accounted for the mitigating circumstances for youth and his capacity for rehabilitation.

According to class counsel in *Hill v Whitmer*,[47] of the juvenile lifers who have been resentenced to a term of years under MCL 769.25 *et seq.* (the vast majority of those who have had resentencing proceedings) and reached their earliest release date (ERD), all but two have been paroled at their ERD,

[43] GED Certificate, attached as appendix S.
[44] Family Focus Certificate, attached as appendix T.
[45] Phase I Substance Abuse Completion, attached as appendix U.
[46] Work Evaluations, attached as appendix V.
[47] *Henry Hill, et al, v Gretchen Whitmer, et al*, unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued June 2, 2020 (Case No. 10-cv-14568), p 3 (a class action brought behalf of Michigan's juvenile lifers).

resulting in 122 releases. Conversely, a federal court found that 0.15 percent of parole eligible lifers receive parole. *Foster v Booker*, 595 F 3d 353, 366 (CA 6 2010).

Since the time of Montez's plea, the parole process for lifers changed significantly. Montez is serving a sentence that is functionally indistinguishable from a life without parole sentence. The corrections code dictates whether a life sentence is parolable. Specifically, MCL 791.234(7) & (8) define when those serving sentences of life for an offense other than first degree murder[48] and other specified offenses[49] come under the jurisdiction of the Parole Board.

In 1992, the time a lifer must serve prior to reaching parole eligibility was increased from ten to 15 years.[50] The law was also amended to increase the interval at which lifers cases would be reviewed by the Board, increasing the period from every two years to every five years.[51] And again that year, the Board composition was changed from civil service members to political appointees.[52]

In 1999, further amendments were passed to MCL 791.234, eliminating a prisoner's right to appeal a parole denial by leave to the Circuit Court; however, a parole grant is still appealable by a victim or prosecutor.[53] That same year the chairperson of the Board testified before the Legislature definitively stating the Board's policy toward lifers: "It has been a long standing philosophy of the Michigan Parole Board that a life sentence means just that- life in prison."[54]

The next year two more changes were made to reinforce the "life means life" policy. First, after the initial interview, the Board would no longer be required to interview a lifer in person; instead, a single Board member could decline an interview based simply on a file review.[55] Second, the decision

[48] All non-juveniles convicted for first degree murder must be sentenced to life and are not eligible for parole. MCL 750.316. Juveniles convicted of first degree murder fall under MCL 769.25a.
[49] MCL 791.234(6).
[50] MCL 791.234(7)(a).
[51] MCL 791.234(8)(b).
[52] MCL 791231a(1).
[53] MCL 791.234(11).
[54] Michigan Department of Corrections, Office of the Michigan Parole Board, Testimony in support of Proposed Legislation (Lansing, September 28, 1999).
[55] MCL 791.234(8).

to deny a lifer parole was redefined as only occurring after a public hearing.[56] MDOC Policy Directive 06.05.104, para. M. now provides, "the Parole Board's decision not to interview a prisoner serving a life sentence, or not to proceed with a public hearing, is not a denial of parole."[57] (emphasis added). This change allowed the Board to circumvent the requirement of MCL 791.235(12) that prisoners receive a written explanation detailing the reasons the Board denied parole. Instead, the Board can now inform the prisoner, without even conducting an interview, that the Board has no interest in taking action at this time, and ignore the prisoner's file for another five years.

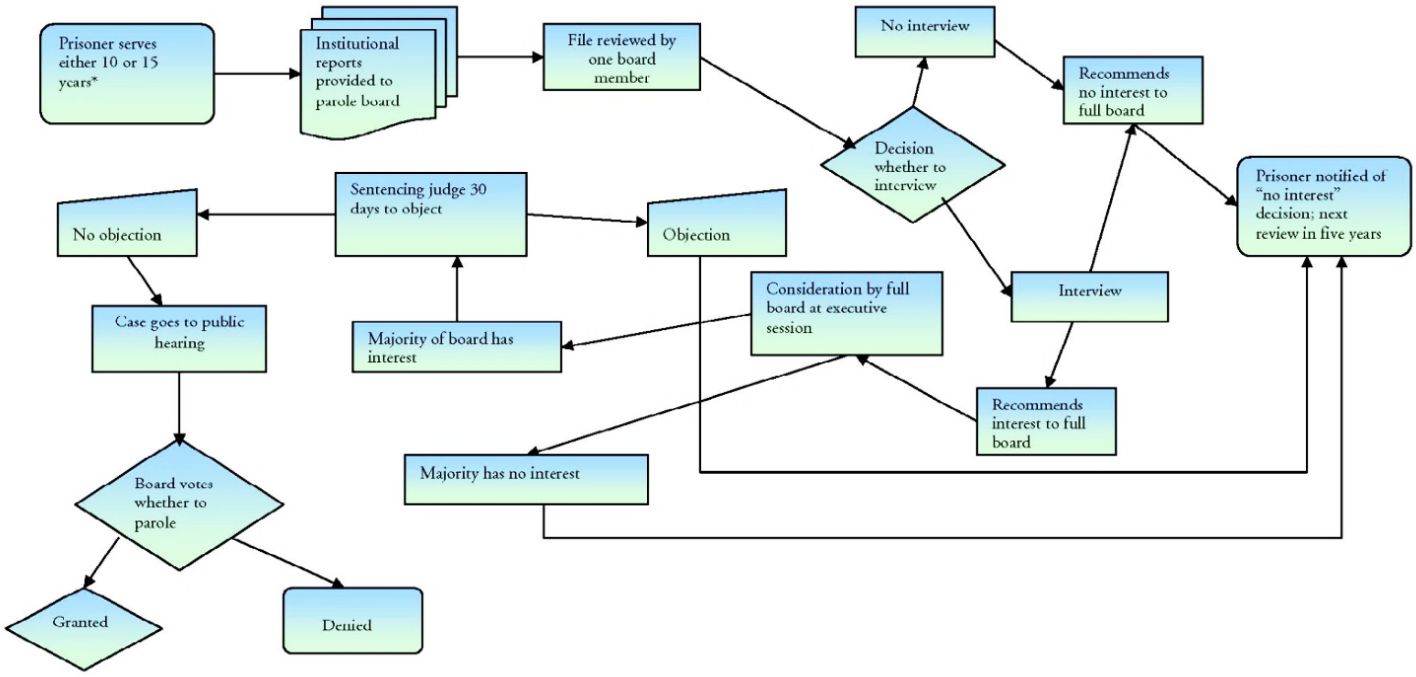
The Court of Appeals previously acknowledged that the parole board's policy means those with parolable life sentences are likely to serve a lifetime in prison. *People v Carp*, 298 Mich App 472, 533-35, rev'ed on other grounds, 499 Mich 903 (2016). Montez last received a no interest notice on September 27, 2018, meaning his case will not be considered by the board again till December 18, 2023.[58]

MCL 791.233[59] is the only guidance to the Parole Board on what to consider in granting or denying parole. Nothing in that statute requires the Board to consider a defendant's age at the time of the offense, family and home environment, how peer influences may have affected the defendant, subsequent maturity, or capacity for rehabilitation, all of which are required by *Miller*. Nothing in the statute requires the board to treat juveniles differently from adults. On its own, the Parole Board has declined to score the parole guidelines for parolable lifers, although the applicable statute MCL 791.233e contains no such exception. Montez's parole guidelines have never been scored.

[56] MCL 791.234(8)(c).
[57] MDOC Policy Directive 06.05.104, attached as appendix W.
[58] Parole Board Notice, attached as appendix Y.
[59] The statute reads, "A prisoner shall not be given liberty on parole until the board has reasonable assurance, after consideration of all the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to public safety."

The parole process for lifers is markedly different and more complex than the process for those serving term of years sentences. A chart summarizing the process lifers must go through appears below.[60]

The Michigan parole process: lifers



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

[60] This chart is an updated version of a chart originally created by Citizens Alliance on Prisons & Public Spending available at http://www.capps-mi.org/wp-content/uploads/2013/03/5.4-Michigan-parole-process-for-lifers.pdf. The chart was updated to reflect current law.

A study found that the average life expectancy for African American males, like Montez, sentenced as juveniles to life in the Michigan Department of Corrections is 50 ½ years. *Kelly v Brown*, 851 F3d 686, 688 (CA 7 2017) (Posner, R. dissenting). Montez is 46 and will be nearly 50 before the board reviews his file again. Given the Parole Board's policy that life means life, the board's unfretted discretion, no requirement that the board treat juveniles differently than adults, and no process providing Montez a meaningful opportunity at release upon demonstrated maturity and rehabilitation, Montez expects to die in prison relief from this Court.

Argument

I. Montez Stovall's sentences of life with the possibility of parole are cruel and unusual and violate Due Process.

Standard of Review / Issue Preservation

Constitutional questions and questions of law are reviewed de novo. *People v Carp*, 496 Mich 440, 460 (2014), overruled on other grounds in *Montgomery v Louisiana,* 136 S Ct 718, 732 (2016). A trial court's ruling on a motion for relief from judgment is reviewed for abuse of discretion. *People v Grissom*, 492 Mich 296, 312 (2012).

This issue was preserved by Mr. Stovall's Motion for Relief from Judgement in the trial court.

Argument

In *Graham v. Florida*, 560 US 48 (2010), *Miller*, 576 US 460 (2012), and *Montgomery v. Louisiana*, 136 S Ct 718 (2016), the United States Supreme Court placed constitutional limits on the sentences that may be imposed on children. *Graham* barred sentences of life without parole for children convicted of nonhomicide offenses and held that juveniles must have a "realistic" and "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 US at 75, 82. *Miller* and *Montgomery* established that children convicted of murder must have this same meaningful opportunity for release—except in the very rarest of cases where it is determined that the particular child "exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S Ct at 733; *See also Tatum v Arizona,* 137 S Ct 11, 12 (2016) (Sotomayor concurring) (clarifying that only "the very rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility" and "such irretrievable depravity that rehabilitation is impossible" can constitutionally be condemned to die in prison.). The prohibition of death in prison sentences for children was deemed a substantive rule of constitutional law in *Montgomery* that must be applied retroactively. *Montgomery*, 136 S Ct at 734.

The cruel and unusual punishment clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Atkins v Virginia*, 536 US 304, 311-312 (2002) (internal quotation omitted); *People v Carp*, 496 Mich 440, 531 n.11 (2014) (quoting same). The Supreme Court has long "maintained that the Clause does not have a fixed meaning, but instead 'may acquire meaning as public opinion becomes enlightened by humane justice.'" *Carp*, 496 Mich at 530-531 (Kelly, J., dissenting), quoting *Weems v United States*, 217 U.S. 349, 378 (1910).

Proportionality to the offense and the offender is also central to Eight Amendment jurisprudence. *People v Eliason*, 300 Mich App 293, 319 (2013). "Recklessness, impulsivity, and thoughtlessly engaging in risk-taking behaviors are but three unpleasant hallmarks of adolescent behavior. These characteristics of youth render children less culpable than adults." *Id.* At 374 (2013). A sentence that was imposed without consideration of youth and provides a juvenile with only an illusory possibility of release on an ad hoc basis defies evolving standards of decency and proportionality.

Further, the Michigan Constitution's ban on "cruel *or* unusual punishment" is interpreted more broadly than the United States Constitution's ban on "cruel *and* unusual punishments." *People v Bullock*, 440 Mich 15, 27-36 (1992). Montez's sentences, which were imposed by the trial court, deny him a meaningful opportunity for release and are excessive, therefore violating, at minimum, Michigan's Constitution.

Moreover, this Court's jurisprudence dictates that sentences based on a mistake of fact or law are invalid because they violate Due Process. *People v Williams*, 940 NW2d 75 (2020); *People v Turner*, 505 Mich 954 (2020); *People v Miles*, 454 Mich 90, 96, 99 (1997). As the Honorable Elizabeth Gleicher explained in her dissent, Montez' sentences are invalid because they were based on a mistake of law and fact:

> 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.[61]

As this Court has explained, it is fundamentally unfair to have a defendant serve a sentence based on inaccurate information. *People v Francisco*, 474 Mich 82, 90 (2006). Because Montez' sentences were based on inaccurate information and a mistake of law, his sentences are invalid and he is entitled to resentencing.

Finally, *Miller* dictates that children are fundamentally different than adults for the purpose of sentencing. *Id.* At 471. Yet, at sentencing and by the parole board Montez was and is treated no differently than if he had been an adult at the time of his offense. A sentence that fails to consider Montez's youth and denies him a meaningful opportunity at release violates *Miller*. *People v Buffer*, No. 122327, 2019 WL 1721435, at *5 (Ill, April 18, 2019) ("*Miller* contains language that is significantly broader than its core holding. None of what the Court said is specific to only mandatory life sentences. Surveying case law from other states…. The greater weight of authority has concluded that *Miller* and *Montgomery* send an unequivocal message: Life sentences, whether mandatory or discretionary, for juvenile defendants are disproportionate and violate the eighth amendment, unless the trial court considers youth and its attendant characteristics.") (cleaned up).

The Court of Appeals asserts that Montez sentences do provide him with a meaningful opportunity at release, but do not explain why.[62] Available case law suggests he has less than a one percent chance of obtaining release under his current sentence. *Foster*, 595 F 3d at 366. As detailed in the statement of facts, this remote possibility is in no way tethered to his diminished culpability or greater capacity for change. All Montez has ever heard from the parole board is that they have no

[61] COA Opinion dissent at 3, attached as appendix R.
[62] COA Opinion at 7, attached as appendix R.

interest at this time and they will review his file again in five years.[63] The board is not even required to speak to Montez.[64] There certainly is no requirement that Montez's youth, maturity, or rehabilitation ever be considered.

The board has made clear that their policy is life means life in prison.[65] Absent relief from this court Montez will almost certainly die in prison, serving a sentence that is functionally indistinguishable to the one he bargained to avoid. *See*, e.g., *Kelly v Brown*, 851 F3d 686, 688 (CA 7 2017) (Posner, R. dissenting) (life expectancy for African American males sentenced as juveniles to life in prison is 50 ½ years).

A. Montez's sentences deny him a meaningful or realistic opportunity for release upon demonstrated rehabilitation.

The Constitution requires that the opportunity for release for individuals who offended as youth not only be meaningful in its consideration of youth and rehabilitation, but also realistic and timely realized. See, e.g., *Graham*, 560 US at 75, 82. A sentence fails to provide a realistic opportunity for release if, as here, the chance of parole is remote, and the release decision is subject to unfettered discretion. While prisoners do not typically have a protected liberty interest in a grant of parole, "the parole process takes on a constitutional dimension that does not exist for other offenders" when applied to juvenile offenders, because denying that class of people a meaningful opportunity at release violates the Eighth Amendment. *Diatchenko v Dist Attorney for Suffolk Dist*, 471 Mass 12, 19 (2015).

Again, the Honorable Elizabeth Gleicher's dissent explains Montez' sentences are infirmed in this respect:

> 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

[63] Parole Board Notice, attached as appendix Y.
[64] MCL 791.234(8).
[65] Michigan Department of Corrections, Office of the Michigan Parole Board, Testimony in support of Proposed Legislation (Lansing, September 28, 1999).

> 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*.[66] (cleaned up).

Simply put Montez' sentences are invalid because they deny him individualized consideration that accounts for his rehabilitation and the mitigating circumstances of youth and deny him all hope of release.

In Michigan, the Parole Board has made clear that life means life in prison.[67] The Board's approach is to keep the vast majority of people serving life sentences in prison until they die. E.g., *People v Hill*, 267 Mich App 345, 349 (2005) ("It has been a long standing philosophy of the Michigan Parole Board that a life sentence means just that-life in prison."). Courts have recognized that the Board's "life means life" approach renders the chance of parole extremely remote. See, e.g., *Foster v. Booker*, 595 F3d 353, 360–64 (CA 6, 2010); *Bey v Rubitschun,* unpublished opinion of the Eastern District, 2007 WL 7705668, at *15 (ED Mich, October 23, 2007), *rev'd and remanded sub nom. Foster v Booker,* 595 F3d 353 (CA 6, 2010) (quoting testimony from a Board official that it was "very rare" to even reach the parole hearing phase).

The trial court imposed Montez's sentences. Under MCL 791.234 those sentences do not require the board to differentiate between Montez and an adult, and in practice render Montez's chances of parole so remote that his right to Due Process and to be free of cruel and/or unusual punishment is violated. It is the sentences that trigger the parole board's policies and practices. Under a term of years' sentence, Montez would be subject to different policies and practices that would afford him a meaningful opportunity at release.

[66] COA Opinion dissent at 5, attached as appendix R.
[67] Michigan Department of Corrections, Office of the Michigan Parole Board, Testimony in support of Proposed Legislation (Lansing, September 28, 1999).

The Iowa Supreme Court recently decided a case on the issue of whether "mere eligibility for parole like any other adult sufficient to satisfy the requirement that a juvenile offender be provided with a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' or is more required?" *Bonilla v Iowa Bd of Parole*, 930 NW2d 751, 767 (Iowa, 2019). The Court concluded that if the board "incorporates into its parole review the *Graham–Miller* lodestar of 'demonstrated maturity and rehabilitation,' does not unduly emphasize the heinous nature of the crime, and provides a meaningful opportunity to demonstrate maturity and rehabilitation" then eligibility for parole can satisfy *Miller*. *Id.* at 774. The Court further held that "a juvenile offender has a liberty interest in the proper application of *Graham-Miller* principles under the Due Process Clause in the Fourteenth Amendment…." *Id.* at 778.

Nothing in the process under his current sentence affords Montez the right to even speak to a member of the Parole Board, let alone requires the Board to consider his demonstrated rehabilitation or the mitigating factors of youth. MCL 791.233; MCL 791.234(8). "Parole reviews cannot involve repeated incantations of ritualistic denials."[68] And yet, Montez receives the same letter from the parole board every five years: no interest. [69] Montez's sentences deny him a process through which he can demonstrate his capacity for change. He is being denied all hope for a life outside of prison's walls.

The trial court offered no evidence or explanation for its assertion that Montez "has an opportunity to be released under his current sentence."[70] A mere "opportunity" is not the same as a meaningful or realistic opportunity. *Graham v. Florida*, 560 US 48, 75, 82 (2010). Montez' sentences also fail to comply with the mandate in *Miller* and *Montgomery* that release decisions focus on post-crime maturity and rehabilitation (and not base decisions, for example, on the severity of the offense

[68] Beth Caldwell, *Creating Meaningful Opportunities for Release*: Graham, Miller *and California's Youth Offender Parole Hearings*, 40 N.Y.U. Rev. L. & Soc. Change 245, 285 (2016)
[69]Parole Board Notice, attached as appendix Y.
[70] Trial Court Opinion at 2, attached as appendix O.

alone). See *Miller*, 567 US at 478; *Montgomery*, 136 S Ct at 736; see also *Bonilla*, 930 NW2d at 772 (the focus of a parole decision for a juvenile cannot be "the heinousness of the underlying offense.").

In order to comply with *Graham* and *Miller*, numerous states have directed parole boards to account for youth- often through consideration of the factors enumerated in *Miller*. See, e.g.: Conn, Gen. Stat. § 54-125a(f)(4) (West, Westlaw through June 18, 2019) (requiring special consideration for juveniles at parole hearings to ensure focus on rehabilitation and maturity and recognition of mitigating factors of youth); Ark Code 16-93-621(b)(2) (directing consideration of "[t]he diminished culpability of minors," "the hallmark features of youth," and certain mitigating factors or youth); W Va Code 62-12-13b(b) (same); RI Parole Board, 2018 Guidelines § 1.5(F)(2) (same); Cal Penal Code 4801(c) (same, except extending to all offenders under the age of 25); ND Cent Code 12.1-32-13.1(3)(e) (requiring consideration of whether a juvenile offender "has demonstrated maturity, rehabilitation, and a fitness to re-enter society sufficient to justify a sentence reduction"). Other entities provide sentence reduction opportunities for juvenile offenders based on youth. DC Code 24-403.03(c)(5) (requiring sentence-modification proceedings to consider "[w]hether the defendant has demonstrated maturity, rehabilitation, and a fitness to reenter society"). These reforms recognize that in order to comply with the Constitution there must be consideration of the mitigating characteristics of youth and demonstrated rehabilitation either through a resentencing or through the parole process.

Montez's sentences do not allow for compliance with the Eighth Amendment's demand that individuals who offend as juveniles have a realistic and meaningful opportunity for release based on maturity and rehabilitation. Nor do they allow for adequate process. Rather, his sentences allow the board to have has unfettered discretion to deny even the opportunity to be considered for parole. The Board is free to ignore youth and rehabilitation and base its decision solely on the crime. Without articulated criteria to guide the Board's decision, and without procedures to safeguard a meaningful process, Montez's constitutional rights will continue to be violated.

Michigan has articulated only two criteria upon which the Board should base its decision:

- "[T]hat the prisoner will not become a menace to society or to the public safety," and
- "[T]hat arrangements have been made for such honorable and useful employment as the prisoner is capable of performing, for the prisoner's education, or for the prisoner's care if the prisoner is mentally or physically ill or incapacitated."
  MCL 791.233(1)(a), (e).

Neither of these criteria accounts for what *Miller* and *Montgomery* require—namely, consideration of the youth's age and immaturity at the time of the offense and a focus of post-crime maturity and rehabilitation. Indeed, Michigan fails to account for youth, maturity, or rehabilitation at all in its parole scheme. See generally MCL 791.233 – MCL 791.235; MDOC Policy Directives 06.05.100, 06.05.103, and 06.05.104.

The trial the court was made aware of the rules governing parole release for prisoners serving life with the possibility of parole sentences via Montez's motion for relief from judgement, yet the trial court declined to act. For Montez's sentences to be constitutional the parole board would have to have criteria and procedures to assess Montez' suitability for release that account for his youth at the time of the crime and subsequent growth and change, and provide a realistic, non-remote chance for release within his lifetime. Because no such provisions exist, this Court must intervene to ensure that Montez is not condemned to die in prison in violation of both the state and federal constitutions.

B. Montez' sentences violate due process because they and were premised on a mistake of law and fact.

Due Process requires that sentences be based on accurate information. US Const, Am XIV; Const 1963, art 1, § 17; see *Townsend v Burke*, 334 US 736, 741-742; 68 S Ct 1252 (1948); *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006). A sentence is invalid if it is based upon inaccurate information. *Francisco*, 474 Mich at 89. Similarly, sentences are invalid if they are based on a mistake of law. *People v Whalen*, 412 Mich 166, 170; 312 NW2d 638, 640 (1981). The proper remedy for these

Due Process violations is resentencing. *People v Thomas*, 223 Mich App 9, 16 (1997); *People v Lucker*, 504 Mich 938 (2019).

As was outlined in the Honorable Elizabeth Gleicher's dissent, Montez' sentences were premised on two misconceptions: "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."[71] As the dissent correctly determined, these two misconceptions, require a remand for resentencing based on this Court's recent precedent in *People v Williams* and *People v Turner*. *Id.* at 5.

The majority opinion distinguished this case from *Williams* by holding that Montez was not facing life without the possibility of parole sentence at the time of sentencing.[72] As the dissent points out, "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."[73] Furthermore, the trial court was merely following the sentencing agreement so the trial court's discretion at the time of sentencing was infected with the same factual and legal misconceptions that invalidate the plea, discussed *infra* II. Because Montez' sentences are based on mistakes of law and fact he is entitled to a remand for resentencing.

C. Montez' sentences are unconstitutional because the sentencing judge failed to consider the mitigating circumstances of his youth and his capacity for rehabilitation in sentencing him to life in prison.

Montez has a Due Process right to be sentenced based on accurate information. US Const, Am V, XIV; Const 1963, art 1, § 17; *Townsend v Burke,* 334 US 736, 741-742 (1948); *People v Francisco,*

[71] COA Opinion dissent at 4, attached as appendix R.
[72] Court of Appeals Opinion at 7 fn 3, attached as appendix R.
[73] *Id.* at dissent 4.

474 Mich 82, 89-92 (2006). A sentence is invalid if it is based upon inaccurate information, especially when that inaccurate information is of a "constitutional magnitude." *Roberts v United States,* 445 US 552, 556 (1980). Montez' sentences were based on inaccurate information because they were imposed with no consideration of his youth as required by *Miller* and *Montgomery*, and there is no available process under his current sentences for this error to be remedied.

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

> chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences[,]…the family and home environment that surrounds [them]—and from which [they] cannot usually extricate [themselves]—no matter how brutal or dysfunctional…the circumstance of the homicide offense, including the extent of [their] participation in the conduct and the way familiar and peer pressures may have affected [them][,]…[and the] incompetency's associated with youth—for example [] inability to deal with police officers or prosecutors (including on a plea agreement) or [their] incapacity to assist his own attorneys."
> *Miller v Alabama*, 567 US 460, 477 (2012).

Considering—and placing determinative weight on—the mitigating circumstances of youth is non-optional. See *Montgomery*, 136 S Ct at 734; see also *State v Young,* 369 NC 118, 123-25 (2016) (rejecting North Carolina's sentence review procedures as constitutionally insufficient because it fails to treat juveniles differently than adults). For example, the Washington Supreme Court held that courts must consider the mitigating circumstances of youth when sentencing juveniles, and that those circumstances can justify a sentence below the statutory requirement even when life without parole is not on the table. *State v Gilbert*, 193 Wash 2d 169, 176 (2019).

Due Process and state and federal prohibitions on disproportionate sentences require consideration of the reality that some juveniles become trapped in particularly "brutal or dysfunctional

family situations over which they have no control, and that juveniles struggle to competently deal with the criminal justice system." *United States v Briones*, 929 F3d 1057, 1063 (CA 9, 2019). Montez's cruel upbringing is precisely the type of brutal or dysfunctional environment sentencing courts are required consider.

No consideration, either at his original sentencing or in ruling on his motion for relief from judgment, was given to Montez's youth and the circumstances of his childhood, despite their devastating impact on his development and actions. There is no indication that the Board has considered the mitigating circumstances of his youth, nor are they required to. As the Honorable Elizabeth Gleicher detailed in her dissent: As the Honorable Elizabeth Gleicher explained in her dissent:

> 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 severe 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. (cleaned up).[74]

Such an individualized sentencing is exactly what Montez seeks.

Since being extracted from his dangerous childhood environment and having matured into an adult, Montez has demonstrated that he can conform his behavior to expectations. As a result, he is housed at the lowest possible security level for prisoners with his sentence.[75] Montez has spent 29

[74] Court of Appeals Opinion at dissent 4, attached as appendix R.
[75] https://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=228511.

years in prison without access to much rehabilitative programming because of his status as a lifer[76], and yet he has grown and matured into an adult who seeks out education and what little programming is available to him.[77] He has proven that he can be a responsible worker.[78] He has grown from an abused and mentally unstable child who failed to regulate his behavior and was determined to be incompetent into an adult capable of contributing via work, learning via programming, and abiding by the rules. The evolution of Montez's prisoner record alone demonstrates his capacity for change. "[W]hen courts consider *Miller's* central inquiry, they must reorient the sentencing analysis to a forward-looking assessment of the defendant's capacity for change or propensity for incorrigibility, rather than a backward-focused review of the defendant's criminal history." *Briones,* 929 F3d 1066.

Montez sentences, and the review available through the Board, require no such assessment of his capacity for change. He is therefore entitled to a resentencing where the mitigating circumstances of his youth and capacity for rehabilitation are considered.

D. Michigan is an outlier in juvenile sentencing.

In order to show a violation of the Michigan Constitution, a defendant must show that Michigan is an "outlier." *People v Carp*, 852 N.W.2d 801, 843 (Mich 2014). Unusually excessive

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

[77] GED Certificate, attached as appendix S; Family Focus Certificate, attached as appendix T; Substance Abuse Phase I, attached as appendix U.

[78] Work Evaluations, attached as appendix V.

imprisonment is forbidden by Art. 1, § 16 of the Michigan Constitution. *People v Lorentzen,* 387 Mich 167, 172 (1972).

A large and growing number of states have abolished sentences that deny juveniles a meaningful opportunity at release. When *Miller* was decided in 2012, 41 states allowed a sentence of life without parole to be imposed on children under some circumstances. *Miller*, 567 US at 482 n.9, 483 n.10; *Carp*, 496 Mich at 518. In 2014, when *Carp* was decided, six states had abandoned the practice and 35 states allowed life without parole for children under some circumstances. *Id.* at 517-518. While the majority in *Carp* found this six-state change unconvincing, progress towards a more merciful contemporary standard has continued.

Today, 29 states and the District of Columbia ban or no longer impose death in prison sentences on children.[79] The number of states banning this draconian sentence for children has quadrupled in the last five years. *Id.* And globally, the United States is alone in the world in condemning children to a life within the confines of prison's walls.[80] These developments demonstrate a global norm and a growing national majority consensus against death in prison sentences for children.

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

- *State v Ramos*, 187 Wash 2d 420, 430 (2017), as amended (Feb. 22, 2017) (concluding *Miller* "clearly" applied to "any juvenile homicide offender who might be sentenced

[79] *States that Ban Life Without Parole for Children*, The Campaign for the Fair Sentencing of Youth, available at https://www.fairsentencingofyouth.org/media-resources/states-that-ban-life/.
[80] Connie De La Vega, et al, *Cruel and Unusual: U.S. Sentencing Practices in a Global Context*, 58 (2012) available at https://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf.

to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation.")

- *State v Zuber*, 227 NJ 422, 429 (2017) (Holding that *Miller* applies "to sentences that are the practical equivalent of life without parole, like the ones in these appeals. The proper focus belongs on the amount of real time a juvenile will spend in jail and not on the formal label attached to his sentence.")
- *State v Moore*, 149 Ohio St3d 557 (2016) ("We agree with these other state high courts that have held that for purposes of applying the Eighth Amendment protections discussed in *Graham* and *Miller*, there is no distinction between life-without-parole sentences for juveniles and term-of-years sentences that leave a juvenile offender without a meaningful opportunity to demonstrate rehabilitation and growth leading to possible early release within the juvenile offender's expected lifespan." *Id.* at 1146.)
- *People v Buffer*, 2019 IL 122327 (2019) (*de facto* life sentences imposed without consideration of an individual's youth are unconstitutional pursuant to *Miller* and *Montgomery*).
- *Casiano v Comm'r of Corrections*, 115 A3d 1031, 1033-34 (Conn 2015), *cert. denied*, 136 S. Ct. 1364 (2016) (Holding that *Miller* applies to the imposition of a sentence of 50 years. "We, too, reject the notion that, in order for a sentence to be deemed 'life imprisonment,' it must continue until the literal end of one's life." *Id.* at 1045)
- *Henry v State*, 175 So3d 675, 680 (Fla 2015) (*Graham* is not limited to the "exclusive term of 'life in prison'" and a juvenile offender must have a meaningful opportunity to obtain release during his or her natural life.)

- *State v Boston*, 363 P3d 453 (Nev 2015) ("[T]he *Graham* rule applies to aggregate sentences that are the functional equivalent of a sentence of life without the possibility of parole." *Id.* at 457.)
- *Bear Cloud v State*, 334 P3d 132, 136 (Wyo. 2014) (Holding "that the teachings of the *Roper/Graham/Miller* trilogy require sentencing courts to provide an individualized sentencing hearing to weigh the factors for determining a juvenile's 'diminished culpability and greater prospects for reform' when, as here, the aggregate sentences result in the functional equivalent of life without parole." *Id.* at 141-42 quoting *Miller*, 567 US at 471. The court explained: "To do otherwise would be to ignore the reality that lengthy aggregate sentences have the effect of mandating that a juvenile die in prison." *Id.* at 142. *Davis v Wyoming*, 415 P3d 666, 666-7 (Wyo. 2018). The Wyoming Supreme Court affirmed *Bear Cloud* holding that individuals with sentences that are functionally equivalent to life without parole are entitled to *Miller* hearings. "A faithful application of *Miller* and *Montgomery* requires… a presumption against imposing a life sentences without parole, or its functional equivalent, on a juvenile offender." (emphasis provided))
- *Brown v State*, 10 NE3d 1 (Ind 2014) (Holding that defendant's aggregate sentence of 150 years imprisonment "forswears altogether the rehabilitative ideal" and exercised state constitutional authority to impose a lesser sentence.)
- *State v Ragland*, 836 NW2d 107, 110-11 (Iowa 2013) ("the rationale of *Miller*, as well as *Graham*, reveals that the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole." *Id.* at 121); *State v. Null*, 836 NW2d 41, 71-72 (Iowa 2013) (Holding that *Miller*'s principles are fully applicable to a

lengthy term-of-years sentence where the juvenile offender would otherwise face the prospect of geriatric release.) *see also Id.* at 71 ("while a minimum of 52.5 years imprisonment is not technically a life-without-parole sentence, such a lengthy sentence imposed on a juvenile is sufficient to trigger *Miller*-type protections.)

- *Commonwealth v Brown*, 1 NE3d 259, 261 (Mass 2013), superseded by statute in *Commonwealth v Perez*, 106 NE3d 620 (Mass 2018) (In remanding for resentencing the Supreme Judicial Court of Massachusetts instructed the lower court that under *Miller* they must "avoid imposing on juvenile defendants any term so lengthy that it could be seen as a functional equivalent of a life-without-parole sentence." *Id.* at 270 n 11.)
- *People v. Franklin*, 370 P3d 1053, 1060 (Cal 2016) (Holding that a juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller*.) *People v. Contreras*, 411 P3d 445 (Cal. 2018) (Holding that *Graham*'s prohibition extends even to sentences which do not necessarily exceed a juvenile defendant's life expectancy).

In addition, three federal courts of appeals, applying the more stringent AEDPA standard on habeas review, have also held that sentences functionally equivalent to life without parole are unconstitutional as applied to children.[81]

- *Mckinley v Butler*, 809 F3d 908, 911 (7th Cir 2016) (Holding that *Miller* applies to "a *de facto* life sentence…")
- *Budder v Addison*, 851 F3d 1047, 1057 (10th Cir 2017) (Holding that "the sentencing practice that was the Court's focus in Graham was any sentence that denies a juvenile

[81] The 6th Circuit has declined to following the reasoning of the 7th, 10th, and 9th Circuits. *Atkins v Crowell*, 945 F3d 476, 478 (CA 6, 2019), cert den 140 S Ct 2786 (2020).

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

- *Moore v Biter*, 725 F3d 1184 (9th Cir 2013) (*Graham* applies to sentences that are "is materially indistinguishable from a life sentence…" *Id.* at 1192.)

Most analogous to Montez's case, the Western District of Missouri ruled that the Eighth Amendment prohibits juveniles from being subjected to life with the possibility of parole sentences where the parole board's policies, procedures, and customs deny those juveniles a "meaningful and realistic opportunity for release based on demonstrated maturity and rehabilitation." *Norman Brown, et al, Plaintiffs, v Anne Precythe, et al*, 2018 WL 4956519, at *10 (WD Mo, October 12, 2018). Missouri's parole process for juvenile offenders serving life with parole sentences is even more robust than Michigan's, allowing for hearings and providing reasons for the denial—two things Montez has never been provided. *Id.* at *9. Like Michigan, however, and key to showing an Eighth Amendment violation, is that Missouri's parole process does not guarantee defendants the opportunity to present evidence relevant to the *Miller* factors and meaningfully advocate for release based on demonstrated maturity and rehabilitation. *Id.* Among the fatal defects identified by the federal court was that the notices of denial given to prisoners by the parole board do not "provide any guidance to the inmate regarding steps they should take to become better suited for parole." *Brown, et al v Precythe, et al,* 2019 WL 3752973, at *4 (WD Mo, August 8, 2019). And that the reasons for denial for juveniles can be the same as for adult prisoners. *Id.* at *6. Similarly, Montez's sentences have denied him an opportunity to meaningfully advocate for his release based on the diminished culpability of youth and demonstrated rehabilitation.

The central principle and mandate of *Miler* and *Montgomery* is that sentencing courts must consider a "juvenile's special circumstances" because "children who commit even heinous crimes are capable of change and, in all but the very rarest of circumstances, must be afforded hope for some

years of life outside of prison walls." *Montgomery*, 136 S. Ct. at 725, 736–37. Under Montez's sentences he is being denied all hope.

In *Montgomery*, the Supreme Court suggested it could be possible for states to remedy the constitutional violation at issue by "permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Montgomery* at 736. The Court went on to explain that, "[a]llowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Id.*

This is not the remedy Michigan chose. MCL 769.25a. Under MCL 791.234, which governs parole eligibility for Montez's sentences, there is no provision for individualized consideration based on maturity or youth as is required by MCL 760.25a. Montez is being denied access to the *Miller* remedy Michigan chose and his current sentences do not provide an adequate alternative remedy.

The Eighth Amendment is not triggered by the magic words "life without parole," but rather by any sentence that does not allow a person convicted as a child a realistic opportunity to obtain release upon demonstrating maturity and rehabilitation. *Montgomery*, 136 S Ct at 736. Montez' experience demonstrates that his sentences foreclose a realistic opportunity at release based on maturity and rehabilitation.

The proper remedy for an unconstitutional sentence is resentencing. *People v Eliason*, 300 Mich App 293, 311 (2013) (finding a juvenile defendant's sentence unconstitutional, vacating sentence, and remanding for an individualized sentence within the strictures of *Miller*). The proper remedy for an invalid sentence is also resentencing. *Miles*, 454 Mich at 101.

Montez's sentencing guidelines were calculated at the time of his sentence to be 144 months (12 years) to 300 months (25 years) or life.[82] Because Montez's current sentences violates the Eighth

[82] SIR, attached as appendix I.

Amendment, Art. 1, § 16 of the Michigan Constitution, and Due Process, he is entitled to resentencing. He asks this court to vacate the Court of Appeals Opinion and remand for resentencing within his originally calculated guidelines.

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

Montez has previously filed motions for relief from judgment, pursuant to MCR 6.500 *et seq* and all were denied.[83] None of these prior motions based on the United States Supreme Court's 2016 decision in *Montgomery*. On February 22, 2016 Montez filed a subsequent motion for relief from judgment on these grounds and requested appointment of counsel.[84] On March 1, 2016 the State Appellate Defender Office was appointed to perfect Montez's motion for relief from judgment based on a retroactive change in law.[85] The State Appellate Defender Office perfected the February 22, 2016 pro per filing, and on August 23, 2017 the trial court issued a brief opinion and order denying relief.[86]

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

Importantly, neither the trial court nor the Court of Appeals ruled that the motion was barred pursuant to MCR 6.500 *et seq*..[87] As Justice Clement explained in her concurrence in *People v Manning*, motions for relief from judgement are based on *Miller* even when they ask courts to extend

[83] Register of Actions, attached as appendix M.
[84] *Id.*
[85] Order of Appointment, attached as appendix N.
[86] Trial Court Order, attached as appendix O.
[87] *Id*; Court of Appeals Opinion at 3, attached as appendix R.

Miller's reasoning, and should not be dismissed on procedural grounds. *People v Manning*, __ Mich__. (2020) (Docket No. 160034).

III. Montez Stovall's plea to second degree murder was induced by the promise of an illusory benefit—avoiding an unconstitutional sentence of mandatory life without parole for first degree murder—therefore, he is entitled to plea withdrawal. Moreover, his Due Process rights were violated when the trial court did not take his youth into consideration when accepting his plea or when ruling on his motion for relief from judgement.

Standard of Review / Issue Preservation

Constitutional questions and questions of law are reviewed de novo. *People v Carp*, 496 Mich 440, 460 (2014), overruled on other grounds in *Montgomery v Louisiana,* 136 S Ct 718, 732 (2016). A trial court's ruling on a motion for relief from judgment is reviewed for abuse of discretion. *People v Grissom*, 492 Mich 296, 312 (2012).

This issue was preserved by Mr. Stovall's Motion for Relief from Judgement in the trial court.

Argument

"[A]n illusory plea bargain is one in which the defendant is led to believe that the plea bargain has one value when, in fact, it has another lesser value." *People v Williams*, 152 Mich App 346, 250-251 (1986); *See also People v Bollinger*, 224 Mich App 491, 493 (1997) (plea bargain deemed illusory where plea was induced by prosecutor's promise to forego opportunity to prosecute defendant as a repeat offender, an opportunity the prosecutor had already lost; plea and conviction therefore vacated); *People v Graves*, 207 Mich App 217, 220 (1994) (defendant entitled to withdraw his plea because it was based on an erroneous assumption that he could be charged with two counts of robbery, rendering the plea illusory).

Montez pled guilty because he believed that pleading was the only way to avoid having to spend the rest of his life in prison. The United States Supreme Court has made clear, "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." *Miller*, 567 US at 465 (cleaned up).[88] Because this rule was applied retroactively, we know that the mandatory sentence Montez bargained to avoid was always outside the power of the state to impose. *Teague v Lane*, 489 US 288, 311 (1989); *Montgomery*, 136 S Ct at 734 (the constitution prohibits a life without parole sentence for the vast majority of juvenile offenders).

Montez took a plea deal, that was ultimately to his determent, to avoid mandatory sentences the state could not impose. His plea was illusory and therefore violates Due Process. Montez asks this court to grant his motion for relief from judgement, allow him the opportunity to withdraw his plea, and thereby vacate his convictions and sentences. Because Montez's plea was a package deal, he is entitled to withdraw his plea on all counts. *People v Blanton*, 317 Mich App 107 (2016).

A. Montez' plea was illusory because it was not only benefit-less, it was detrimental.

A plea bargain is illusory if it is induced by a promise to forgo a legally inapplicable sentence. *People v Sanders*, 91 Mich App 737, 741 (1979). The illusory benefit here was avoiding a mandatory life without parole sentence. That sentencing regime is unconstitutional. *Miller*, 567 US at 465.

Had Montez gone to trial and been convicted of first-degree murder, he would now be a candidate for resentencing to a term of years under MCL 769.25a pursuant to *Miller* and *Montgomery*. He would be afforded a process to demonstrate his maturity and rehabilitation. The Eighth Amendment forbids sentences that deny juveniles "the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Montgomery*, 136 S Ct at 736–37. Instead, under Montez's current sentences, he is entitled to

[88] Art. 1, § 16 of the Michigan Constitution goes further, prohibiting "cruel or unusual punishments…." Michigan's prohibition on "cruel *or* unusual punishments" is more expansive than the federal prohibition. *People v Bullock*, 440 Mich 15, 30 (1992)

nothing but a file review every five years where his youth and demonstrated maturity is not considered. The fact that his plea and sentencing agreement was to his detriment demonstrates that it was illusory.

Only 0.15 percent of parole eligible lifers receive parole. *Foster v Booker*, 595 F 3d 353, 366 (CA 6 2010). Less than a one percent chance at parole is hardly meaningful. *Graham v Florida*, 560 US 48, 75 (2010) (States must provide juvenile offenders a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.") Conversely, the vast majority of juvenile lifers who have been afforded Michigan's *Miller* remedy, have received term of years sentences that provide not only a meaningful but a highly likely opportunity at release. *Henry Hill, et al, v Gretchen Whitmer, et al*, unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued June 2, 2020 (Case No. 10-cv-14568), p 3.

The Court of Appeals relied on *People v Williams*, 326 Mich App 514 (2018), vacated by *People v Williams*, 940 NW2d 75 (2020), for the assertion that because Montez is technically illegible for parole every five years, his sentences comport with *Miller*.[89] The Court of Appeals provides no factual explanation for why Montez' sentences are not *de facto* life sentences in practice. Similarly, the Court of Appeal's analysis is devoid of any explanation for how Montez' parole opportunity is connected to the *Miller* factors or demonstrated rehabilitation.

The mere possibility of parole through an ad hoc system does not protect Montez' Due Process rights to have his youth and demonstrated maturity and rehabilitation considered. *Brown, et al v Precythe*, *et al,* 2019 WL 3752973, at *5 n 3 (WD Mo, August 8, 2019). As The Honorable Elizabeth Gleicher explained in her dissent, "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 sentences, *Miller*, 576 US at 476, is not a substitute for a *Miller* hearing. Uncertain,

[89] COA Opinion at 7, attached as appendix R.

unpredictable, and unlikely parole does not substitute for factoring in on the 'front end' a juveniles' lessened culpability."[90]

The majority opinion in the Court of Appeals also relies on *Brady v United States*, 397 US 742, 757 (1970) to assert that even if the only benefit Montez' received from his plea was avoiding an unconstitutional sentence that does not render his plea illusory.[91] However, *Brady* is distinguishable.

In *Brady* the United States Supreme Court stated, "We decline to hold…that a guilty plea is compelled and invalid…whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law…." *Id.* at 751. To hold otherwise would have collapse the manner by which most criminal cases are resolved—guilty pleas.

Mr. Brady pled guilty to kidnapping after his co-defendant confessed and pled guilty and was available to testify against him. *Id.* at 743. Subsequently the statute permitting the death penalty for kidnapping following a jury trial but not a guilty plea was struck down, and Mr. Brady contended that his plea under the now unconstitutional statute was coerced and involuntary. *Id.* at 745-6, 749. The lower court found that his plea was induced by his co-defendant's availability to testify against him and not the unconstitutional statute. *Id.* at 745.

Mr. Brady did not face a sentence that was unconstitutional for a class of defendants, as Mr. Stovall did. *Montgomery*, 136 S Ct at 734. Rather, the statute that permitted the death penalty only upon exercising one's constitutional right to a jury trial was found to infringe on defendant's Sixth Amendment rights. *United States v Jackson*, 390 US 570, 583 (1968). Montez' claim is not that his plea is involuntary because it was coerced. Instead, his plea was illusory because it was premised on a mistake of law: that mandatory life without the possibility of parole is a constitutional sentence for

[90] COA Opinion, dissent at 5, attached as appendix R.
[91] COA Opinion at 4, attached as appendix R.

"juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery*, 136 S Ct at 734.

The United State Supreme Court has instructed that rules of constitutional law that prohibit "a certain category of punishment for a class of defendants because of their status" must be given retroactive effect. *Penry v Lynaugh*, 492 US 302, 330 (1989), overruled on other grounds by *Atkins v Virginia*, 536 US 304 (2002). Substantive rules of federal constitutional law, like that announced in *Miller*, were always so. *Teague v Lane*, 489 US 288, 311 (1989). At the time Montez faced mandatory life without parole that sentence was unconstitutional for all but the rarest of juvenile whose crime reflected irreparable corruption. *Montgomery*, 136 S Ct at 726. Therefore, Montez' plea was induced by avoiding a mandatory sentence that could not be imposed, rendering his plea illusory.

Under this state's post-*Brady* jurisprudence, a plea violates Due Process when induced by an illusory bargain. *People v Graves*, 207 Mich App 217, 220 (1994). Montez' sentence was induced not by an unconstitutional statutory scheme as at issue in *Brady*, but by the prospect of a sentence that was unconstitutional as applied to him. Montez' case is no different from Mr. Bollinger who pled to avoid a habitual enhancement the state had no authority to impose. *People v Bollinger*, 224 Mich App 491, 493 (1997). The state had no authority to impose mandatory life without parole on Montez. He pled to avoid a sentence the state had no authority to impose so his plea was illusory.

B. Juveniles, like Montez, are incapable of appreciating the full weight of a plea deal and enter into plea agreements that may go against their best interest.

Juveniles are uniquely vulnerable in the criminal justice system**.** *Montgomery*, 567 US at 477-8 (the incompetencies associated with youth disadvantage juveniles when engaging in plea negotiations). The voluntariness of a plea "can be determined only by considering all of the relevant circumstances surrounding it." *Brady*, 397 US at 749. The disadvantages of Montez's youth should have been

considered by the trial court when weighing the voluntariness of his plea—both at the time it was entered and when ruling on his motion for relief from judgement. This did not occur.

The vast majority of defendants resolve their cases through plea deals. *Missouri v Frye*, 566 US 134, 143 (2012). Juveniles, like Montez, are prone to pled guilty without making a knowing and intelligent decision to waive their constitutional rights. J.*B.D. v North Carolina*, 564 US 261, 272 (2011). Montez with further disadvantaged having previously been declared incompetent.[92] What Montez understood at the time of his plea was what his attorney advised him: that he would be "eligible" for "probation", not parole, after ten years.[93] Montez has now been in prison for over 29 without any meaningful opportunity for release or adequate Due Process. The illusory possibility of parole is not a meaningful benefit, especially when compared to the process that Montez would be afforded if he had been convicted as charged.[94] MCL 769.25a.

In *Graham,* the Supreme Court held that "criminal procedure laws that fail to take a defendant's youthfulness into account at all would be flawed." *Graham*, 560 U.S. at 76; *see also Miller*, 567 U.S. at 473-74; *Roper* 543 U.S. at 569. Given this, the plea stage must be one in which a defendant's youth is taken into consideration. Montez was a mentally ill, emotionally impaired, intellectually low-performing, and abused youth[95] when he committed his crime and was later tasked with evaluating a plea offer. He was not able to effectively navigate the criminal justice system. His plea violates Due Process both because it was illusory and because it was unknowing. In rejecting his motion for relief from judgement the trial court abused its discretion in failing to consider the circumstances of his youth in evaluating the constitutionality of his plea.

---

[92] ROA at 2, attached as appendix M.
[93] PT 3.
[94] "Illusory possibilities of parole do not amount to a realistic opportunity for release under *Miller-Graham*." Beth Caldwell, *Creating Meaningful Opportunities for Release*: Graham, Miller *and California's Youth Offender Parole Hearings*, 40 N.Y.U. Rev. L. & Soc. Change 245, 285 (2016).
[95] While 17 when he committed the instant offenses, Montez was 18 when he had been restored to competency and pled guilty.

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

Plea withdrawal is the proper remedy where the bargain is illusory. *See People v Falkenberg*, 124 Mich App 173 (1983) (finding plea withdrawal the proper remedy if the prosecuting attorney made an illusory promise for a concurrent sentence where consecutive sentencing would have been prohibited). Because the benefit of Montez's plea and sentencing agreement was illusory, he is entitled to plea withdrawal. *Id.* Because the plea and sentencing agreement was an indivisible package deal, he is entitled to withdraw his plea on all counts. *People v Blanton*, 317 Mich App 107, 125-126 (2016).

This plea encompassed Case Nos. 92-000334-01-FC and 92-000335-01-FC, which is evidenced by both pleas being tendered and accepted in the same proceeding and sentencing on all counts also taking place in one proceeding. PT; ST. Montez's plea and sentencing agreement is an indivisible package deal. *Blanton*, 317 Mich App at 125. If Montez is entitled to withdraw his plea as to one count, he necessarily is entitled to withdraw his plea on all counts. *Id.* at 126.

For the same reasons stated, *supra* I., this claim is not precluded by MCR 6.502(g).

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Montez Stovall asks that this Honorable Court to grant leave to appeal, or in lieu of granting leave, vacate the opinion of the Court of Appeals and remand to the trial court for an offer of plea withdrawal and/or resentencing, or grant any other relief to which he may be entitled.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Sofia V. Nelson

BY: _____

Sofia V. Nelson (P77960)
Assistant Defender
3031 W Grand Blvd., Suite 450
Detroit, MI 48202
(313) 256-9833
snelson@sado.org

Dated: January 4, 2021