STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

MONTEZ STOVALL

Defendant-Appellant
_____/

Supreme Court No. 162425

Court of Appeals No. 342440

Lower Court No. 92-0334-01

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

SOFIA V. NELSON (P77960)
ADRIENNE N. YOUNG (P77803)
Attorneys for Defendant-Appellant
_____

Defendant-Appellant's Supplemental Brief

STATE APPELLATE DEFENDER OFFICE

BY: SOFIA V. NELSON (P77960)
ADRIENNE N. YOUNG (P77803)
Assistant Defenders
3130 West Grand Blvd.
Suite #450
Detroit, Michigan 48202
(313) 256-9833

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Summary of Argument

In 1991, Montez Stovall was a mentally ill child who had endured severe abuse and neglect when he tragically shot and killed two people. He was charged with first degree murder and facing mandatory death in prison. He accepted a plea and sentencing agreement to two counts of second degree murder and life with the possibility of parole. At the time of his plea, the parties and the trial court were operating under two assumptions. First, that mandatory death in prison was the only allowable sentence for first degree murder, even for children. And second, that a sentence of life with the possibility of parole was more favorable than a term of years. The first of these assumptions was dissolved by the evolving standards of decency. And the second was rendered inaccurate by the Parole Board's adoption of a "life means life" policy. Under this policy, Montez is not even entitled to a parole interview, much less a public hearing, counsel, or an appeal.

Following *Miller v Alabama* 567 US 460 (2012) and *Montgomery v Louisiana* 577 US 190 (2016), children sentenced to life without the possibility of parole for first degree murder are now being afforded a meaningful and realistic opportunity for release through resentencing proceedings codified in MCL 769.25 *et seq*. These juvenile lifers are entitled to counsel, to present witnesses and other evidence, to an appeal, and to Due Process.

Solely because of Montez's putatively beneficial plea, he is being denied the meaningful and realistic opportunity for release afforded other juveniles convicted of

the more serious offense of first degree murder. He and 66 other children[1] have only a vanishingly small chance of release before they die. They are serving *de facto* life sentences, despite the United States Supreme Court's repeated incantation that youth matters and that children, even those who commit heinous murders, possess a "diminished culpability and heightened capacity for change[.]" *Jones v Mississippi*, __ US __; 141 S Ct 1307, 1316 (2021).

Because Montez's plea was premised on a misconception of law, inaccurate facts, and he received no benefit, his plea violates Due Process and is illusory. He must be afforded the opportunity to withdraw his plea. Montez is also entitled to resentencing or, at minimum, a remand for an evidentiary hearing to determine if a parolable life sentence under the parole board's policies and practices comports with his federal and state constitutional rights to Due Process and to be free from cruel and/or unusual punishment.

During his 29 years of imprisonment, Montez has grown into an earnest, spiritual, and creative 47-year-old who understands the value of the lives of others, an understanding he lacked as a youth due to his immaturity and exposure to severe trauma. Absent relief from this Court, Montez will likely die in prison having served the functional equivalent of the sentence he pled to avoid. This result is fundamentally unjust.

[1] Safe & Just Michigan, *Juvenile Life with the Possibility of Parole* (October 3, 2021), available at https://www.safeandjustmi.org/2021/10/03/juvenile-life-with-the-possibility-of-parole/.

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Statement of Questions Presented

I. Does Montez Stovall's plea deal to dismiss the charge of first degree murder in exchange for a guilty plea to two counts of second degree murder and a sentence of parolable life violate Due Process because it is illusory?

Court of Appeals answers, "No."

Montez Stovall answers, "Yes."

II. Do Montez's sentences violate Due Process because they are and were premised on a misconception of law and inaccurate information?

Court of Appeals answers, "No."

Montez Stovall answers, "Yes."

III. Are Montez's sentences cruel and/or unusual?

Court of Appeals answers, "No."

Montez Stovall answers, "Yes."

IV. Must youth be treated differently from adults in our criminal legal system?

Court of Appeals answers, "No."

Montez Stovall answers, "Yes."

Statement of Facts

Montez Stovall is currently serving life with the possibility of parole[2] for two plea-based convictions for second-degree murder stemming from the 1991 shooting deaths of Terrence Bass and Lester Edwards. *Appendix*, 10a-12a, 17a. Montez has served over 29 years in prison for his crimes. He was 17 years old at the time of the shootings; he is now 47.

Montez's childhood was plagued by violence and trauma which hindered his development.

Montez Stovall was born in Detroit in 1974 to Frankie Kelsey. Ms. Kelsey, a Black woman, was 21 at the time of his birth. Montez's biological father 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. *Appendix*, 131a, 141a. He was delivered with the umbilical cord wrapped around his neck, causing a slow and inconsistent heartbeat. *Appendix*, 131a. There are signs he suffered oxygen loss during the traumatic delivery. *Id.*

Montez was the second of his mother's four children, each fathered by different men. Ms. Kelsey had no partner and no family support. She was clinically depressed and incapable of providing a safe and nurturing environment for her children. About a year after Montez's birth, Ms. Kelsey attempted suicide. *Appendix* 131a, 149a.

When Montez was very young, his mother met and married Grady Kelsey. Mr. Kelsey physically and emotionally abused Montez. This abuse included "choking

[2] He is also serving two concurrent terms of two years for two counts of felony firearm arising from the same instances, which were imposed consecutive to the life sentences. *Appendix*, 17a.

[Montez] at night" and "beating [Montez] with an extension cord." *Appendix,* 141-2a. 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. *Appendix*, 145a.

When Montez was nine, he was removed from his mother's home due to physical abuse and neglect. *Id*. Montez has numerous loop-shaped scars on his back and thighs from being beaten. *Appendix*, 141a. 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. *Appendix*, 142a. She stated that he did not show any response to pain until later in life, around the time his violent stepfather left the home. *Id*. 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. *Appendix*, 141a.

After treatment at MCHS, Montez was placed in foster care. Montez spent the rest of his childhood in and out of residential facilities and foster placements.

Appendix, 145a. His mother failed to visit him or meaningfully engage in his treatment. *Appendix*, 133a.

When Montez entered school, he was placed into classes for students who were emotionally impaired and consistently received low academic scores. *Appendix*, 131a; 141a. He was described as having an IQ in the low range. *Appendix*, 145a; 134a.

Montez was exposed to, and began using, drugs and alcohol at a very young age. He began drinking alcohol at 11 and using marijuana at 13. *Appendix*, 152a.

Montez attempted suicide numerous times. *Appendix*, 133a. He first attempted to kill himself at age nine by running into traffic on the freeway. *Appendix*, 152a. At 12, he attempted to hang himself. *Id*. At the time his Presentence Investigation Report was completed in 1992, it was estimated that he had attempted suicide on six or seven occasions. *Appendix*, 149a. As a young person, due 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 competency. *Appendix*, 2a.

Procedural History

Faced with an unconstitutional mandatory sentencing regime dictating a death-in-prison sentence if convicted as charged, Montez pled guilty to two counts of second degree murder and two counts of felony firearm. *Appendix*, 13a. He believed this was the only way he would have an opportunity for life outside of prison's walls. His guidelines for his minimum sentence were scored at 144 (12 years) to 300 months

(25 years). *Appendix*, 33a. Montez was sentenced by the trial court in accordance with the sentencing agreement to life with the possibility of parole. *Appendix*, 17a.

A common factual understanding of the criminal bar and trial court judges at the time of Montez's plea was that a sentence of life with the possibility of parole would result in a prisoner seeing the parole board after 10 years and serving approximately 15 years in prison prior to release. *Appendix*, 51a; 84a. 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. *Appendix*, 52a; 87-88a. Montez's plea included a sentencing agreement to a life with parole sentence. *Appendix*, 5-6a.

Following the United States Supreme Court's decision in *Montgomery v Louisiana* 577 US 190 (2016) (holding *Miller v Alabama* 567 US 460 (2012) applied retroactively), Montez filed a successive 6.500 motion based on a retroactive change in the law. *Appendix*, 3a. The trial court appointed the State Appellate Defender Office to perfect his post-conviction motion. *Appendix*, 89a.

After a mitigation investigation, 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. The trial court denied the motion on the grounds that the *Miller* and *Montgomery* decisions are not applicable to sentences of life with the possibility of parole. *Appendix*, 91-92a. The Court of Appeals denied leave to appeal. with the Honorable Cynthia Stephens dissenting. *Appendix*, 95a. In lieu of granting leave, this Court remanded the case to the Court of Appeals as on

leave granted. *Appendix*, 96a. In a published opinion, with the Honorable Elizabeth Gleicher dissenting, the Court of Appeals affirmed the trial court's ruling that Montez's plea was not illusory and that his sentences provide him a meaningful opportunity at release. It relied on precedent this Court overturned in *People v Williams*, __ Mich __; 940 NW2d 75 (2020). *Appendix*, 105a The dissent concluded:

> In 1992, Stovall and his counsel bargained for a sentence that would allow Stovall the ability to work toward his freedom….They fundamentally misconceived two things: that a parolable life sentence was preferable to a nonparolable life sentence, and that Michigan's parole system would allow Stovall to actually demonstrate his growth and rehabilitation. Stovall's sentence was predicated on fundamental legal and factual misunderstandings. Due to the misconception that Stovall's parolable life sentence offered him a realistic opportunity to demonstrate maturity and rehabilitation, Stovall is now serving a functional life sentence without parole in violation of Miller.
>
> Ironically, Stovall has fared worse than he would have if convicted of first-degree murder and sentenced to life without parole.
> *Appendix*, 109-110a.

On April 30, 2021 this Court granted leave.

Montez's 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 47-year-old adult housed at the lowest possible security classification authorized for those serving a life sentence—level II.[3] He has served over 29 years in prison.

[3] https://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=228511.

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, while the limbic system which drives sensation seeking is hyperactive during puberty. This brain development science explains why adolescents and young adults are more susceptible to influences and more likely to engage in reckless behavior without adequately considering the potential consequences.[4]

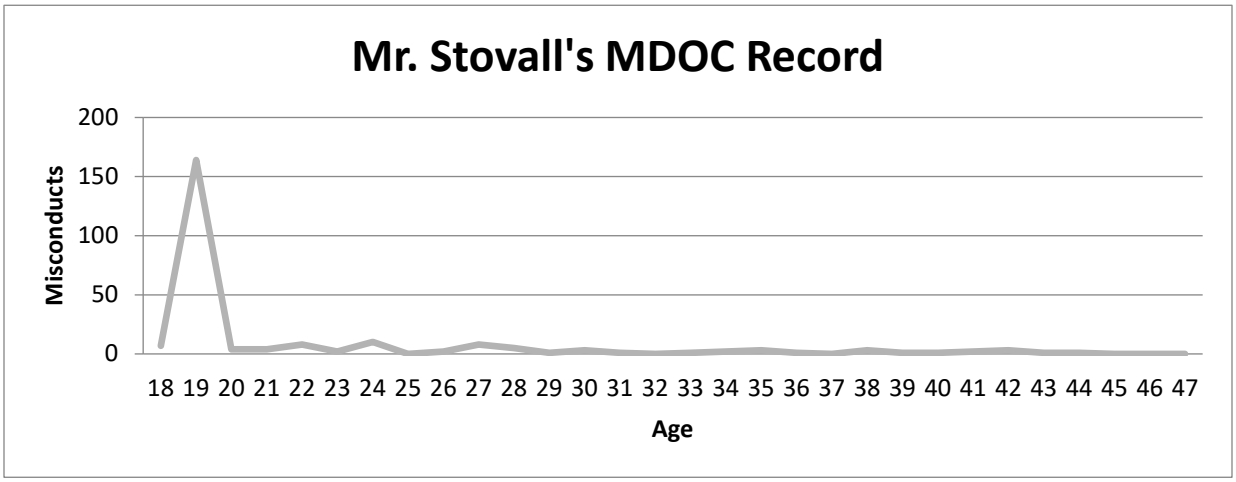
The developing nature of an adolescent's brain makes it more difficult for youth to regulate their behavior. Impaired behavioral regulation is only exacerbated for those who have suffered adverse childhood experiences. Childhood maltreatment negatively affects brain development and neurobiological responses to stress, leading to an increased risk of various negative behaviors for those who have endured adverse childhood experiences.[5] This can mean that children who endure multiple adverse

[4] 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).

[5] *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).

childhood experiences can be more impulsive and have less ability to rationally problem-solve than their more fortunate peers.[6] Montez suffered persistent and extreme childhood maltreatment and trauma, which 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 12 years. He has been misconduct free since 2017. Due to his behavior, he has been housed at the lowest possible security classification since 2015.



[6] 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. *Appendix*, 111a. 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. *Appendix*, 112a. Following completion of Family Focus, Montez received scores of 'excellent' in Substance Abuse Phase I. *Appendix*, 113a. Montez works as a unit porter and receives positive work evaluations. *Appendix*, 114-118a.

Unconstitutional Sentences

Montez was sentenced without any consideration of the mitigating circumstances of his youth or his capacity for rehabilitation. He also plead 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*, 577 US 190, (2016). A *Miller* hearing affords Due Process, counsel, requires the sentencing court to consider evidence of the mitigating circumstances for youth and capacity for rehabilitation, and includes a right to appeal.

Per class counsel in *Hill v Whitmer*,[7] of the juvenile lifers who have been resentenced to a term of years under MCL 769.25 *et seq*. and reached their earliest release date (ERD), all but four[8] have been granted paroled at their ERD, resulting in 160 releases or pending 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 has 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[9] and other specified offenses[10] 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. MCL 791.234(7)(a). 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. MCL 791.234(8)(b). Prisoners with term-of-years sentences are considered at intervals not to exceed two years after they reach their ERD, except in specific aggravating circumstances. *Appendix*, 123a.

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[7] *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).

[8] One of the people initially denied parole was granted parole upon reconsideration.

[9] 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.

[10] MCL 791.234(6).

Also, the Board composition was changed from civil service members to political appointees. MCL 791231a(1).

In 1999, further amendments were made 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. MCL 791.234(11). 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."[11]

The next year, two more changes were made to reinforce the "life means life" policy. First, after the initial interview, the Board is no longer required to interview a lifer in person; instead, a single Board member can decline an interview based solely on a file review. MCL 791.234(8). This means that after the initial interview, a prisoner has no right to speak to the Parole Board and no recourse. Second, the decision to deny a lifer parole was redefined as only occurring after a public hearing. MCL 791.234(8)(c). MDOC Policy Directive 06.05.104, para. O. 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." *Appendix*, 121a (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. Thus, for decades prisoners like Montez never see the Board and are never told why they are not being considered.

[11] Michigan Department of Corrections, Office of the Michigan Parole Board, Testimony in support of Proposed Legislation (Lansing, September 28, 1999).

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. The parole guidelines serve to assist the parole board in making "objective, evidence based release decisions…" MCL 791.233e(1). Montez's parole guidelines have never been scored.

When a prisoner scores "high probability of parole" he or she can only be denied parole if the board states "substantial and compelling objective reasons in writing" MCL 791.233e(6). Because of the parole board's "life means life" policy, Montez does not benefit from this Due Process protection afforded to prisoners with term-of-years sentences.

After this Court granted leave in this case, the Michigan Department of Corrections (MDOC) issued an amended version of policy directive 06.05.104, effective date October 4, 2021. There are two amendments to the "Lifer Interviews" portion of the directive, specifically paragraphs N and O now read:

> The Parole Board shall consider the following as mitigating factors for a prisoner serving for a crime committed prior to the age of 18; 1. The diminished culpability of youth; 2. The hallmark features of youth including immaturity, impetuosity, a failure to appreciate risks and consequences, and susceptibility to peer and familial pressures; and; 3. Growth and maturity since the time of the commission of the offense(s)
> MDOC Policy Directive 06.05.104, para. N.
>
> ***
>
> 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. If the Parole Board takes no interest in interviewing a prisoner serving a life sentence, the prisoner shall receive a Parole Board Notice of Decision (CFJ-279) that shall set forth the factors considered for that

> decision and what corrective action the prisoner may take to improve the probability of being granted a parole in the future. If the Parole Board is interested in considering an eligible prisoner for parole, it must first conduct a public hearing in accordance with MCL 791.244. A decision to grant or deny parole shall not occur until after the public hearing. *Appendix,* 121a.

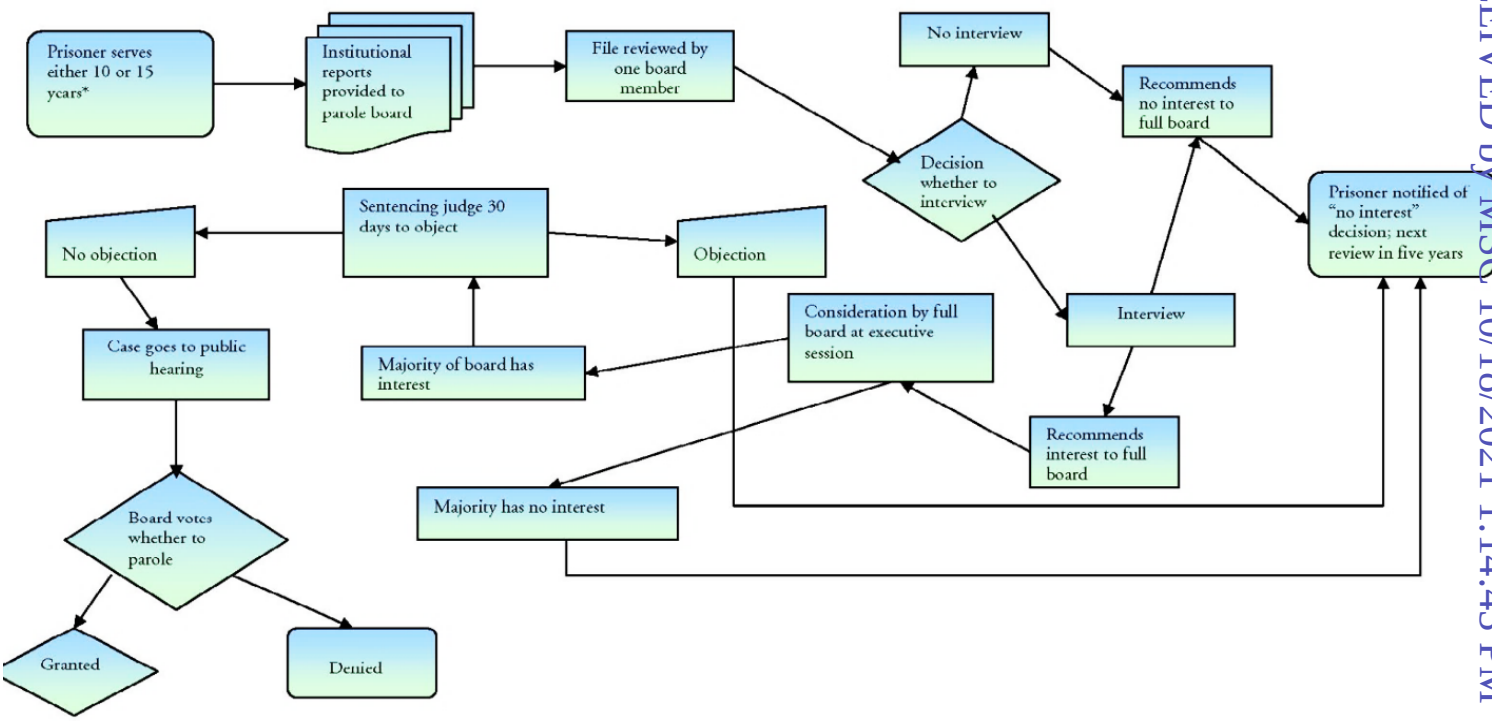
These amendments do not give prisoners a right to an interview or access to the resources necessary, including counsel, to provide the Board with the mitigating evidence the Board is to now consider. Nor do they require the Board to score parolable lifers' parole guidelines or allow a prisoner to appeal a decision of the Board. These amendments do not increase the mere 30 days a prison has to prepare for a potential interview with a Board member. MCL 791.234(9)(a). Finally, this policy could be changed at any time at the MDOC's discretion.

Michigan courts have acknowledged that the Parole Board's "life means life" 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 notice that the Board has no interest in proceeding to a public hearing, without explanation, on September 27, 2018. Meaning his case will not be considered by the Board again until December 18, 2023. *Appendix,* 130a.

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 on the next page.[12]

[12] 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.

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.

A study found that the average life expectancy for Black males, like Montez, sentenced as juveniles to life in the Michigan Department of Corrections is 50½ years. *Kelly v Brown*, 851 F3d 686, 688 (CA 7 2017) (Posner, R. dissenting). Montez is 47 and will be nearly 50 before the board reviews his file again. A disproportionate 77 percent of juvenile parolable lifers in Michigan are men of color.[13] Given the Parole Board's "life means life" policy and the lack of process providing him a meaningful and realistic opportunity at release, Montez expects to die in prison unless he is granted relief by this Court.

[13] Safe & Just Michigan, *Juvenile Life with the Possibility of Parole* (October 3, 2021), available at https://www.safeandjustmi.org/2021/10/03/juvenile-life-with-the-possibility-of-parole/.

Argument

I. Montez Stovall's plea deal to dismiss the charge of first degree murder in exchange for a guilty plea to two counts of second-degree murder and a sentence of parolable life violates Due Process because it is illusory.

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,* 577 US 190 (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 Montez'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).

A. Montez's plea is illusory because it was premised on a mistake of law.

Montez pled guilty because he, and everyone else involved, believed that pleading was the only way to avoid spending the rest of his life in prison. The United States Supreme Court has since 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).[14] Because this rule was applied retroactively, the mandatory sentence Montez bargained to avoid was always outside the power of the state to inflict. *Montgomery*, 577 US at 209 (the constitution prohibits a life without parole sentence for most juvenile offenders), citing *Teague v Lane,* 489 US 288, 311 (1989).

Montez accepted a plea offer that was ultimately to his detriment, to avoid a mandatory death-in-prison sentence that the state could not impose. Montez's 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 as applied to Montez. *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

[14] 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, as discussed *infra* III. *People v Bullock*, 440 Mich 15, 30 (1992).

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*, 577 US at 211-12. Instead, under Montez's current sentences, there is no process whereby he can establish his diminished culpability and rehabilitation. The fact that his plea and sentencing agreement was to his detriment highlights its illusory nature.

The majority opinion in the Court of Appeals relied on *Brady v United States*, 397 US 742, 757 (1970) to assert that even if the only benefit Montez's received from his plea was avoiding an unconstitutional sentence that does not render his plea illusory. *Appendix,* 100-101a. While *Brady*, appears to suggest a subsequent legal decision rendering a sentence unconstitutional does not render a plea illusory, it is distinguishable in significant ways that make its reasoning inapplicable to Montez.

Mr. Brady pled guilty to kidnapping after his co-defendant confessed, 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. 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.

Critically, Mr. Brady did not face a sentence that was unconstitutional for a class of defendants, as Montez did. *Montgomery*, 577 US at 209. And *Brady* was decided prior to the United States Supreme Court's retroactivity jurisprudence set forth in *Teague v Lane*.

The statute at issue in Mr. Brady's case 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). *Jackson* is akin to the United States Supreme Court's decision in *Ramos v Louisiana,* 140 S Ct 1390 (2020) (Sixth Amendment right to jury trial requires unanimous verdict). In *Edwards v Vannoy*, 141 S Ct 1547 (2021) the Court found that *Ramos* did not meet *Teague's* retroactivity requirements. Sixth Amendment violations, like those at issue in *Jackson* and *Ramos* are more likely to be procedural as opposed to substantive, and therefore not retroactive. Conversely, *Montgomery* found that the holding in *Miller* was a substantive rule and did meet *Teague's* retroactivity requirements. *Montgomery v Louisiana*, 577 US at 208.

The United States 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 A*tkins v Virginia*, 536 US 304 (2002). Put differently, substantive rules of federal constitutional law, like that announced in *Miller*, were always so. *Teague v Lane*, 489 US 288, 311 (1989). Thus, at the time Montez faced mandatory life without parole that sentencing regime was

unconstitutional as applied to him. *Montgomery*, 577 US at 195. At the time Mr. Brady faced the death penalty it was not unconstitutional as applied to him.

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 collapse the manner by which most criminal cases are resolved—guilty pleas.

Montez's claim is not that his plea is involuntary because it was coerced as was Mr. Brady's. Instead, he asserts 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 "juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery*, 577 at 208. Montez bargained to avoid a mandatory sentencing regime that per *Montgomery* was unconstitutional not only prospectively but retroactively—meaning it was unconstitutional at the time of Montez's plea. When someone pleads to avoid a sentencing regime outside the state's power to impose their plea is illusory because they bargained for an illusory benefit. *Bollinger*, 224 Mich at 493; *Graves*, 207 Mich at 220; *Sanders*, 91 Mich at 741.

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's sentence was induced not by a prospectively unconstitutional

statutory scheme as at issue in *Brady*, but by the prospect of a mandatory sentencing regime that was unconstitutional as applied to him. Montez's case is no different from Mr. Bollinger's who pled to avoid a habitual enhancement the state had no authority to impose. *Bollinger*, 224 Mich at 493. The state had no authority to hang z mandatory life without parole sentence over Montez's head to induce a guilty plea. He pled to avoid a mandatory sentencing regime the state had no authority to impose so his plea is illusory.

B. Montez plea is illusory because it was premised on a mistake of fact.

The Parole Board has made clear that its policy is life means life in prison.[15] Absent relief from this Court, Montez will likely 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). This is the result of a mistake of fact underlying Montez's plea—that a parolable life sentence would provide him a meaningful and realistic opportunity at release before he is elderly. Because of changes in the Parole Board's approach, this is now false. As detailed in the statement of facts, Montez's chances at parole are remote and subject to nearly unfettered and unreviewable discretion. His bargained for sentences do not provide him with the meaningful and realistic opportunity at release that he would receive had he been convicted as charged.

[15] Michigan Department of Corrections, Office of the Michigan Parole Board, Testimony in support of Proposed Legislation (Lansing, September 28, 1999).

After *Graham v Florida*, 560 US 48, 75 (2010) states must provide juveniles convicted of non-homicide offenses a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Miller* and *Montgomery* established that children convicted of murder must have this same meaningful opportunity for release—except where that particular child "exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 577 US at 207; *See also Jones v Mississippi*, 14 S CT 1307, 1317-8 (2021), quoting *Montgomery* 577 US at 210 ("A hearing where youth and its attendant characteristics are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not.")

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. Conversely, Montez has never been provided a public hearing and is not entitled to one.

The Court of Appeals concluded that Montez's sentences do provide him with a meaningful opportunity at release. *Appendix*, 103a. The Court of Appeals relied on *People v Williams*, 326 Mich App 514 (2018), vacated by *People v Williams*, __ Mich __; 940 NW2d 75 (2020), for the assertion that because Montez is technically eligible for parole every five years, his sentences comport with *Miller*. *Id.* The Court of Appeals provided no factual explanation for why Montez's sentences are not *de facto*

life sentences in practice. Similarly, the Court of Appeals' analysis is devoid of any explanation for how Montez's parole opportunity is sufficiently connected to mitigating evidence when there is no process for him to develop that evidence as a prisoner. Further, case law belies the majority's conclusion that Montez has a meaningful opportunity for release. A Federal Court found that only 0.15 percent of parole eligible lifers receive parole. *Foster v Booker*, 595 F 3d 353, 366 (CA 6 2010).

A mistake of fact resulted in Montez pleading with a sentencing agreement that ended up being functionally indistinguishable from the unconstitutional sentence he bargained to avoid. For this reason, his plea is illusory as it was believed to have one value but ended up having a lesser value. *Williams*, 152 Mich at 250-251.

C. The proper remedy for an illusory plea is 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. *Appendix*, 4a-17a.. 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.

Invalidating Montez plea would advance justice for a very small but left behind group of children—38 individuals who took plea deals and received life with parole sentences and are now being denied the meaningful and realistic opportunity at release their peers convicted of more serious crimes are being afforded.[16]

II. Montez's sentences violate Due Process because they are and were premised on a misconception of law and inaccurate information.

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,* 577 US 190 (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 is unpreserved.

[16] Safe & Just Michigan, *Juvenile Life with the Possibility of Parole* (October 3, 2021), available at https://www.safeandjustmi.org/2021/10/03/juvenile-life-with-the-possibility-of-parole/.

Argument

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 because it is fundamentally unfair to have a person serve a sentence premised on inaccurate information. *Francisco*, 474 Mich at 89-90.

Similarly, sentences are invalid if they are based on a misconception of law. *People v Whalen*, 412 Mich 166, 170; 312 NW2d 638, 640 (1981); See also *People v Williams*, 940 NW2d 75 (2020); *People v Turner*, 505 Mich 954 (2020); *People v Miles*, 454 Mich 90, 96, 99 (1997). 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).

Recently, this Court held that in the *Miller* resentencing context, trial court' may resentence a juvenile not only for first degree murder but also on concurrent sentences for lesser offenses because those sentences may have been based on the legal misconception that the juvenile was required to serve life without parole. *People v Turner*, 505 Mich 954 (2020). *Turner* should control here as Montez's sentences were part of a plea deal premised on the same legal misconception. As the dissent explained, Montez's sentence were based on the legally erroneous belief "that he would be imprisoned for life without possibility of parole if convicted of first-degree murder." *Appendix,* 109a.

As also outlined in the dissent, Montez's sentences were premised on two factual misconceptions: "that a parolable life sentence was preferable to a non-parolable life sentence, and that Michigan's parole system would allow Stovall to demonstrate his growth and rehabilitation." *Appendix,* 109a. As the dissent correctly determined, these misconceptions, require a remand for resentencing based on this Court's recent precedent in *People v Williams* and *People v Turner*. *Appendix,* 109a.

The majority opinion distinguished this case from *Williams* and *Turner* by emphasizing that Montez was not facing life without the possibility of parole sentence at the time of sentencing. *Appendix,* 103a, fn 7. 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." *Appendix,* 109a. Furthermore, the trial court was following the sentencing agreement that was part of the plea 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 *supra* I. Because Montez's sentences are based on mistakes of law and fact, they violate Due Process and he is entitled to a remand for resentencing.

III. Montez's sentences are cruel and/or unusual.

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,* 577 US 190 (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 Montez's Motion for Relief from Judgment filed in the trial court.

Argument

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), reversed on other grounds. 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 US 349, 378 (1910).

Proportionality to the offense and the offender is also central to Eighth 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 deny him a meaningful opportunity for release and are excessive, therefore violating both the federal and state constitutions.

Finally, *Miller* requires sentencing courts to recognize that children are fundamentally different than adults for the purpose of sentencing. *Id*. At 471. Yet, at sentencing Montez was 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).

A. Montez's sentences deny him a meaningful or realistic opportunity for release before he is elderly.

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 where the prisoner is denied Due Process and a meaningful opportunity to present mitigating evidence to the decision maker. While prisoners do not typically have a protected liberty interest in a grant of parole[17], "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) *See also Bonilla v Iowa Bd of Parole*, 930 NW2d 751, 778 (Iowa, 2019) ("a juvenile offender has a liberty interest in the proper application of *Graham-Miller* principles under the Due Process Clause in the Fourteenth Amendment…."); *Grieman v Hodges*, 79 F Supp 3d 933, 945 (2015) (recognizing Due Process rights for juveniles in parole proceedings post-*Graham*).

The dissent explains why Montez's sentences are infirm 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 evolution, and his worthiness for parole. Instead, he has no meaningful

[17] See eg *Jones v Dept of Corrections*, 468 Mich 651 (2003). This Court would not have to overrule cases concerning adults lacking a liberty in parole in order to grant Montez and other juvenile parolable lifers relief.

> 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*. *Appendix,* 110a. (cleaned up).

Simply put Montez's sentences violate the Federal and State Constitutions because they deny him a process that allows for meaningful consideration of his rehabilitation and the mitigating circumstances of youth, thereby denying him all hope of release. He has no right to an attorney or advocate to assist him in developing and presenting mitigating evidence. No access to expert testimony. No right to speak to anyone involved in the decision-making process. No protections afforded by an evidence-based and objective system like the parole guidelines. MCL 791.233e. And no right to appeal. Instead, he faces an entrenched Parole Board policy that a life sentence should mean death in prison.

In Michigan, the Parole Board has made clear that life means life in prison.[18] 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*

[18] Michigan Department of Corrections, Office of the Michigan Parole Board, Testimony in support of Proposed Legislation (Lansing, September 28, 1999).

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. The Board's policies and practices 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 Board's policies and practices. Also, as demonstrated both by the adoption of a "life means life" and recent amendments, the Parole Board is free to change its approach at any time—stripping away the new requirement that the Board give some weight to a juvenile's youth.

Under a term-of-years' sentence, Montez would be subject to a drastically different process that would afford him a meaningful opportunity at release as is being realized by the vast majority of juvenile lifers in Michigan who originally received the unconstitutional sentence Montez bargained to avoid. If resentenced to a term of years, Montez would be afforded the protections of presumptive parole under the parole guidelines. MCL 791.233e. He would have an earliest release date. And his case would be considered for parole on shorter intervals, not to exceed two years, except in very specific circumstances. MDOC Policy Directive 06.05.104, para. AA. Most importantly, he would not be laden by the Board's commitment to "life means life." The trial court offered no evidence or explanation for its assertion that Montez "has an opportunity to be released under his current sentence." *Appendix,* 92a.

A mere "opportunity" is not the same as a meaningful or realistic opportunity. *Graham v*, 560 US at 75. Montez's 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 alone). See *Miller*, 567 US at 478; *Montgomery*, 570 US at 212; see also *Bonilla*, 930 NW2d at 772 (the focus of a parole decision for a juvenile cannot be "the heinousness of the underlying offense.").

For example, the Court of Appeals recently cautioned trial courts conducting *Miller* hearings under MCL 769.25a that decisions cannot be based simply on the heinousness of the offense. *People v Bennett*, No. 350649, 2021 WL 220035, at *7 (Mich Ct App, January 21, 2021). There is no similar limit on the Board's discretion or review process that ensures the Board is adhering to the federal and state constitution when making its decisions.

The Michigan Department of Corrections' recent amendments to policy directive 06.05.104 directing the Board to consider youth and growth in reviewing parolable lifer's prison files and to provide an explanation for not interviewing a prisoner are steps in the right direction. However, these changes are wholly insufficient to counter an engrained practice of incarcerating lifers till they die or are geriatric. These changes also do not cure the violation of Montez's constitutional rights. Additional reforms would have to be undertaken to protect juvenile paroable lifers' constitutional rights including right to counsel to assist in developing and

presenting mitigating evidence, a longer notice period to allow time to adequately prepare, a right to a hearing, and a right to an appeal.

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 nearly unfettered discretion to deny even the opportunity to be considered for parole. The Board is free to base its decision to decline an interview solely on the crime. Without procedures to safeguard a meaningful process, Montez's constitutional rights will continue to be violated.

The trial 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. 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's 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,* 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's sentences were based on inaccurate information because they were imposed with no consideration of his youth as required by *Miller* and *Montgomery*, and the process available under his current sentences do not remedy this error.

In forbidding sentences that deny a meaningful opportunity for release to children convicted of homicide, the Supreme 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 not optional. See *Montgomery*, 570 US at 208. In this vein, the Washington Supreme Court held that courts must consider the mitigating circumstances of youth when sentencing all juveniles, not just those facing life sentences, and that those circumstances can justify a sentence below the statutory requirement. *State v Gilbert*, 193 Wash 2d 169, 176 (2019). Children are different and these differences must be accounted for in sentencing.

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. As the Judge Gleicher detailed 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. *Appendix*, 109a. (cleaned up).

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.[19] He has been misconduct free since 2017. Montez has

[19] https://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=228511.

spent 29 years in prison without access to much rehabilitative programming because of his status as a lifer[20], and yet he has grown and matured into an adult who seeks out education and what little programming is available to him. *Appendix,* 111-113a. He has proven that he can be a responsible worker. *Appendix,* 114-118a. He has grown from an abused and mentally unstable child who was unable 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 prison 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 were imposed without any consideration of his youth or assessment of his capacity for change. He is therefore entitled to a resentencing where

[20] 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's 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).

the mitigating circumstances of his youth and capacity for rehabilitation are considered.

C. Michigan is an outlier in juvenile sentencing.

To show a violation of the Michigan Constitution, a defendant must show that Michigan is an outlier. *People v Carp*, 496 Mich 440, 520 (2014), reversed on other grounds. Unusually excessive 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 less draconian contemporary standard has continued.

Today, 34 states and the District of Columbia either ban or have no children serving death in prison sentences.[21] And globally, the United States is alone in the world in condemning children to a life within the confines of prison's walls.[22] These

[21] Josh Rovner, *Juvenile Life Without Parole: An Overview* (May 24, 2021), The Sentencing Project, available at https://www.sentencingproject.org/publications/juvenile-life-without-parole/

[22] 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.

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 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.[23]

- *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 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, and the Eight Circuit Court of Appeals affirmed, 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

[23] The 6th Circuit has declined to follow 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).

and rehabilitation." *Norman Brown, et al, Plaintiffs, v Anne Precythe, et al*, 2018 WL 4956519, at *10 (WD Mo, October 12, 2018); *Office of the Prosecuting Attorney v Brown et al*, 2021 WL 423546 (CA 8, September 17, 2021). Missouri's parole process for juvenile offenders serving life with parole is even more favorable to lifers than Michigan's, providing for hearings. *Precythe, et al*, 2018 WL at *9. At these required hearings the Missouri Board must consider "[e]fforts made toward rehabilitation since the offense or offenses occurred," "[t]he subsequent growth and increased maturity of the person since the offense or offenses occurred," and "[t]he degree of the [person's] culpability in light of his or her age and role in the offense." *Office of Prosecuting Attorney*, 2021 WL at *1. Montez is not even entitled to this level of process.

Among the fatal defects in Missouri's process identified by the District Court is that the reasons for denial of parole for juveniles can be the same as for adult prisoners. *Precythe, et al*, 2018 WL at *6. Moreover, the Eighth Circuit was unconvinced that absent state funded counsel juvenile's "whose crimes reflect only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence", and therefore remanded to the District Court for consideration of whether counsel is necessary to protect juveniles Eighth Amendment rights. *Office of Prosecuting Attorney*, 2021 WL at *8. Absent the right to a hearing and counsel, Montez lacks a meaningful ability to develop and present necessary mitigating evidence, just like juveniles in the Missouri prison system.

The central principle and mandate of *Miller* 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*, 570 US. at 193, 212. 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 212. 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 meaningful 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*, 570 US at 212. Montez's 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. *Appendix*, 33a Because Montez's current sentences violates the Eighth 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.

IV. Youth must be treated differently from adults in our criminal legal system.

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,* 570 US 190 (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 is unpreserved.

Argument

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). Per MCR 6.302 pleas must be understanding, voluntary, and accurate. 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 people charged with crimes resolve their cases through plea deals. *Missouri v Frye*, 566 US 134, 143 (2012). Young people, 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). "[Y]outhfulness is a risk factor for rash and uninformed plea bargain decisions, and Black youth in particular are again at the greatest risk and they are also the least likely to benefit from plea concessions."[24] Montez was further disadvantaged having previously been declared incompetent. *Appendix* 2a.

Miller focuses on why "children are constitutionally different from adults for the purposes of sentencing." *Miller*, 567 at 467. But, the social and neurological science cited within the Court's analysis has implications beyond sentencing. In

[24] Haney-Caron, Emily and Fountain, Erika; *Young, Black, and Wrongfully Charged: A Cumulative Disadvantage Framework*;125 DICKLR 653 (2021).

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 US at 569. The plea stage, like sentencing, must be one in which youth is taken into consideration. Montez was a mentally ill, emotionally impaired, intellectually low-performing, and abused youth[25] 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. 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.

This is true even though at the time Montez entered his plea he was 18 years old. The Washington Supreme Court recently acknowledged that there is "no meaningful neurological bright line [] between age 17 and age 18 or, as relevant here, between age 17 on the one hand, and ages 19 and 20 on the other hand. Thus, sentencing courts must have discretion to take the mitigating qualities of youth—those qualities emphasized in *Miller* and *Houston-Sconiers*—into account for defendants younger and older than 18." *Matter of Monschke*, 197 Wash 2d 305, 326; (2021). Similarly, in our nation's Capital all individuals who were sentenced for crimes committed before age 25 are now entitled to resentencing proceedings where mitigating circumstances of youth can now be considered. DC Code 24-403.03. The scientific developments that were at the heart of *Roper*, *Graham*, *Miller*, and

[25] While 17 when he committed the instant offenses, Montez was 18 when he had been restored to competency and pled guilty.

Montgomery, are now teaching us that the hallmark features of youth extend into a person's mid-twenties.

For nearly 30 years, at every stage of the criminal process, Montez has been treated as if he was an adult—plea, sentencing, appeal, and parole[26]. Montez was a child when he committed these offenses and both the federal and state constitutions require that his youthfulness be taken into account.

[26] Any benefit of the Parole Board's policy directive amendments are purely speculative as they just want into effect this month and will not apply to Montez till he is next eligible for a file review in December of 2023, assuming those changes are still in effect then.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Montez Stovall asks that this Honorable Court 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)
Adrienne N. Young (P77803)
Assistant Defenders
3031 W Grand Blvd., Suite 450
Detroit, MI 48202
(313) 256-9833
snelson@sado.org

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