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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v **No. 162425**

MONTEZ STOVALL,
Defendant-Appellant.

Third Circuit Court No. 92-0334-01
Court of Appeals No. 342440

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL ON LEAVE GRANTED

Filed under AO 2019-6

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COUNTERSTATEMENT OF JURISDICTION

On November 5, 2020, the Court of Appeals, in a split decision, affirmed the decision of the Third Judicial Circuit Court, Judge Kelly Ramsey, denying defendant's successive motion for relief from judgment.

Defendant applied to this Supreme Court for leave to appeal the Court of Appeals opinion. On April 30, 2021, the Court granted leave to appeal and ordered oral arguments. The Court directed the parties to address in their briefs on appeal:

(1) whether the defendant's parolable life sentences for second-degree murder were the result of an illusory plea bargain;

(2) whether the defendant's sentences violate the prohibition against "cruel and unusual punishments" found in the Eighth Amendment to the United States constitution, and/or the prohibition against "cruel or unusual punishment" found in Const. 1963, art 1, § 16, where he was under the age of 18 at the time of the offenses;

(3) whether the Parole Board's "life means life" policy renders the defendant's sentences unconstitutional under *Miller v. Alabama*, 567 US 460 (2021), and *Montgomery v. Louisiana*, 577 US 190 (2016);

(4) whether, pursuant to *Miller* and *Montgomery*, the trial court was required to take the defendant's youth into consideration when accepting his plea and ruling on his motion for relief from judgment; and

(5) whether the Parole Board is similarly required to take his youth into consideration when evaluating him for release on parole.

The People now file their Brief on Appeal requesting the Court of Appeals opinion be affirmed. The Supreme Court has jurisdiction over these proceedings through MCR 7.303(B)(1).

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

Under MCR 6.502(G), a defendant is prohibited from filing a successive motion for relief from judgment unless he first overcomes the burden of showing that a retroactive change in the law occurred or new evidence was discovered following the first such motion. Here, defendant's motion was based on the retroactive application of a case that addressed sentencing of juvenile offenders to terms of natural Life and which provided no analysis of the validity of parolable Life sentences. Did defendant present a retroactive change in the law sufficient to satisfy MCR 6.502(G)?

The People answer, "NO."

Defendant would answer, "YES."

The Court of Appeals answered, "YES."

II

Under MCR 6.508(D)(3), the defendant is not entitled to relief on collateral review until he has established "actual prejudice," that is, his plea was involuntary to a degree that it is manifestly unjust to allow the conviction to stand. Here, defendant fails to show that his guilty plea was involuntary or based on an illusory promise. Did the circuit court abuse its discretion in denying defendant's successive motion for relief from judgment?

The People answer, "NO."

Defendant would answer, "YES."

The Court of Appeals answered, "NO."

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III

Under MCR 6.508(D)(3), a defendant is not entitled to relief unless he establishes that he suffered "actual prejudice" from his sentencing, that is, his sentence is invalid. Here, defendant's sentence of Life imprisonment was agreed to by defendant, was appropriate for his commission of Second-Degree Murder, and provides him with a meaningful opportunity to actually be paroled in the future. Is defendant's sentence valid under the law?

The People answer, "YES."

Defendant would answer, "NO."

The Court of Appeals answered. "YES."

IV

While a state is not constitutionally required to guarantee parole release, the Eighth Amendment requires that a state must provide juvenile offenders not serving terms of natural Life imprisonment "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Here, defendant is currently eligible for parole consideration and he may present any evidence to the Parole Board he wishes to demonstrate his maturity and rehabilitation. Has the Parole Board violated *Miller* or the Eighth Amendment by not yet granting defendant parole release?

The People answer, "NO."

Defendant would answer, "YES."

The Court of Appeals answered, "NO."

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V

While *Miller* addressed the need to consider a juvenile offender's youth before sentencing that offender to a term of natural Life, it neither discussed nor required any consideration of youth prior to accepting a guilty plea from an adult. Defendant was an adult at the time he entered his guilty plea. Does *Miller* silently require a court to consider a defendant's youth at the time of the offense before accepting an adult's voluntary guilty plea?

The People answer, "NO."

Defendant would answer, "YES."

The Court of Appeals answered, "NO."

VI

Whether constitutionally required or not, does the Michigan Parole Board consider a juvenile offender's youth at the time of the offense, and the prisoner's maturity and rehabilitation when deciding whether to provide the prisoner a lifer interview and when deciding whether to grant parole?

The People answer, "YES."

Defendant would answer, "YES."

The Court of Appeals did not answer this question.

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COUNTERSTATEMENT OF FACTS

On November 23, 1992, a plea hearing commenced in the Recorder's Court for the City of Detroit, the Honorable Thomas E. Jackson presiding. Defendant, Montez Stovall, was charged in Case No. 92-0334 with one count of Second-Degree Murder and one count of Felony Firearm. (6a) Defendant was also charged in Case No. 92-0335 with one count of First-Degree Murder and one count of Felony Firearm. (7a) Defendant agreed to enter a guilty plea in both cases. In exchange, the People agreed to reduce the charge of First-Degree Murder in Case No. 92-0335 to Second-Degree Murder. (5a) The parties agreed that defendant would be sentenced to a term of Life[1] imprisonment for each of the murder convictions. (5a-6a) The sentences for the murder convictions would be served consecutive to a term of two years imprisonment for the firearm convictions. Case No. 92-0334 and Case No. 92-0335 would be served concurrent with each other. Defendant was also advised that his Life sentence permitted the Parole Board to consider him for parole after he served ten years imprisonment on his murder convictions. (6a) Defendant indicated to the trial court that he understood the plea agreement and the rights he was waiving by entering guilty pleas. (7a-10a).

Regarding Case No. 92-0334, defendant admitted that, on December 18, 1991, he shot and killed Terrance Bass in front of 10244 12th Street in Detroit. (10a-11a) Defendant told the trial court that a

[1] To differentiate between Life without the possibility of parole and Life with the possibility of parole, the former will be referred as "natural Life" or LWOP and the latter as simply "Life."

friend of Bass had tried to rob defendant. The next day, defendant went looking for the friend but did not find him. So, defendant shot Bass instead. (11a) Defendant simply approached Bass and shot him three times with a .38 caliber firearm. (11a)

Regarding Case No. 92-0335, defendant admitted that, on December 15, 1991, he shot and killed Lester Edwards. Defendant believed that Edwards had, on an earlier date, shot a person named Pops. (12a) Edwards was outside of a house where defendant was. When someone opened the door of the house, defendant reached out the door and shot Edwards in the neck.[2] (12a) Defendant was a month shy of his eighteenth birthday when he committed these murders.[3]

On December 15, 1992, Judge Jackson sentenced defendant to concurrent terms of parolable Life imprisonment for both of the Second-Degree Murder convictions to be served consecutively to concurrent terms of two years imprisonment for the firearm convictions, in compliance with the plea agreement. On April 16, 1993, defendant moved to withdraw his guilty pleas. Defendant claimed that he did not properly understand that eligibility for parole did not necessarily mean that he would be paroled. Judge Jackson denied the motion, finding that there was no flaw in the plea proceeding or in the advice defendant's trial counsel had provided.

[2] The medical examiner's report indicated that the victim was actually shot in the chest.
[3] Defendant's date of birth is January 22, 1974.

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Defendant appealed his plea-based convictions to this Court of Appeals. On February 17, 1994, the Court affirmed the judgment. On July 29, 1994, the Michigan Supreme Court denied leave to appeal.

On May 9, 1995, defendant moved the trial court for relief from judgment. That motion was denied by Judge Jackson on June 7, 1995. Defendant attempted to appeal the denial of relief to the Court of Appeals. Defendant's application was dismissed on January 7,1998.

On April 5, 2006, defendant filed a second motion for leave to appeal. On June 30, 2006, Judge Jackson denied the motion. Defendant applied for leave in the Court of Appeals. That application was denied on May 4, 2007. On June 20, 2007, the Court denied reconsideration. Defendant's application to the Supreme Court was denied on November 29, 2007. Defendant filed another pleading in the Court of Appeals that was dismissed on September 3, 2008. The Supreme Court denied review on May 8, 2009.

The Third Circuit Court Register of Actions indicates that defendant filed a third motion for relief on August 20, 2012. (3a) That motion was denied on October 2, 2012.

Defendant filed a fourth motion for relief on July 15, 2014. On August 7, 2014, Judge Dana Hathaway denied defendant's motion. Defendant applied to the Court of Appeals to appeal the denial of his fourth successive motion. While the application was pending in the Court of Appeals, defendant filed a fifth motion for relief from judgment on February 22, 2016. On March 15, 2016, the Court of Appeals

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dismissed defendant's application pertaining to his fourth motion for relief.

Defendant was appointed appellate counsel—the State Appellate Defender—to assist in his fifth motion. On June 29, 2017, counsel filed an amended motion for relief asserting that defendant's plea was induced by an illusory benefit and that his Life sentence denies him a meaningful opportunity for parole. On August 23, 2017, Judge Kelly Ramsey denied defendant's motion. (91a-93a) The lower court found that the United States Supreme Court decisions in *Miller v. Alabama*[4] and *Montgomery v. Louisiana*[5] did not retroactively apply to defendant. Further, the lower court found that defendant's guilty pleas were not induced by an illusory benefit and that defendant had not been deprived of a meaningful opportunity for parole. Defendant's application was denied by the Court of Appeals on August 23, 2018. On June 19, 2019, the Supreme Court remanded the case back to this Court for consideration as on leave granted.

On November 5, 2020, the Court of Appeals, in a 2-1 opinion, affirmed the denial of relief from the judgment.[6] (97a-110a) The Court majority found that defendant received a benefit from his guilty plea agreement independent of the avoidance of a mandatory sentence of natural Life imprisonment, that being the assurance of a date-certain for parole eligibility and the avoidance of the risk of a conviction of First-Degree Murder and a more severe sentence. The majority further found,

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[4] *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012).
[5] *Montgomery v. Louisiana*, 577 US 190, 136 S Ct 718, 193 L Ed 2d 599 (2016).
[6] *People v. Stovall*, 334 Mich App 553 (2020).

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relying upon *Brady v. United States*,[7] that the later pronouncement of the Supreme Court in finding a mandatory sentence of natural Life unconstitutional did not render the plea agreement illusory or the plea invalid. The majority additionally found that there was no evidence that defendant lacked the capacity to, or actually did not, understand the terms of the plea agreement. Addressing defendant's claim that his Life sentence was unconstitutional, the majority found that the sentence was not in violation of *Miller*, because defendant was presently eligible for parole. This constituted a meaningful opportunity for release based upon maturity and rehabilitation. As to defendant's claim that the policies of the Parole Board, in purportedly failing to consider his youth at the time of the offense, constituted cruel or unusual punishment, the challenge was a matter to be asserted directly against the Parole Board and was not a ground for vacating defendant's sentences. Further, defendant's challenge to the Parole Board's policies did not implicate a due process right. Finally, the majority held that neither *Miller* nor *Montgomery* required the sentencing court to consider the defendant's youth before imposing a sentence of Life.

In dissent, Judge Gleicher found that defendant was under a misappreciation at the time of the plea that, if convicted of First-Degree Murder, he would serve a mandatory term of natural Life imprisonment. Further, defendant was under the misappreciation that a Life sentence offered him a realistic opportunity of release based upon a

[7] *Brady v. United States*, 397 US 742, 757, 90 S Ct 1463, 251 L Ed 2d 747 (1970).

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demonstration of maturity and rehabilitation. Based upon those misconceptions, defendant was entitled to relief from the judgment.

On April 30, 2021, this Court issued an order granting defendant's application for leave to appeal.

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ARGUMENT

I.

Under MCR 6.502(G), a defendant is prohibited from filing a successive motion for relief from judgment unless he first overcomes the burden of showing that a retroactive change in the law occurred or new evidence was discovered following the first such motion. Here, defendant's motion was based on the retroactive application of a case that addressed sentencing of juvenile offenders to terms of natural Life and which provided no analysis of the validity of parolable Life sentences. Defendant did not present a retroactive change in the law sufficient to satisfy MCR 6.502(G).[8]

Standard of Review

This Court reviews a lower court's decision denying or granting a motion for relief from judgment for an abuse of discretion and the findings of facts supporting that decision for clear error.[9] The lower court's interpretation of the Michigan Court Rules, as well as any constitutional questions, are issues of law reviewed de novo.

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[8] The People acknowledge that, in an order denying leave to appeal, five members of this Court seemingly reached a contrary view on whether *Miller* can act as a retroactive change in the law to satisfy MCR 6.502(G)(2) when the moving defendant was not a juvenile offender challenging a mandatory sentence of natural Life. See, *People v. Manning*, 506 Mich 1033 (2020). That this opinion is contained in an order denying leave where the most that can be said from its language is that leave was denied for failing to "meet the burden of establishing entitlement to relief under MCR 6.508(D)," the People view the issue of MCR 6.502(G)(2) as not definitively closed.

[9] *People v. McSwain*, 259 Mich App 654, 681 (2003).

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Discussion

Defendant claims that the trial court abused its discretion in denying his fifth successive motion for relief from judgment. Defendant argues that his guilty pleas in this case were induced by an illusory benefit and were therefore not understandingly and voluntarily entered. Defendant asserts that he entered his guilty pleas in 1992 in order to avoid the natural Life imprisonment sentence mandated by the First-Degree Murder charge in Case No. 92-0335. According to defendant, because he was under the age of 18 at the time of the murders, it would now be "unconstitutional" to sentence him to natural Life. Defendant asks that the Court retroactively apply *Miller* to find his pleas and sentences for the crime of Second-Degree Murder to be invalid.

Defendant filed four motions for relief from judgment prior to the one that is the subject of this appeal. A defendant is prohibited from filing a successive motion for relief from judgment. A successive motion is allowed only if it is "based on a retroactive change in the law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion."[10] The purpose of the rules governing motions for relief from judgment is to "provide finality of judgments after one full and fair appeal and to end repetitious motions for new trial."[11] Because his current motion for relief is successive, defendant was required to first meet the procedural requirements of MCR 6.502(G)(2) before any consideration of the cause

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[10] MCR 6.502(G)(2).

[11] *People v. Clark*, 274 Mich App 248, 253 (2007), citing *People v. Reed*, 449 Mich 375, 378-379 (1995).

and prejudice requirements of MCR 6.508(D) was allowed. Failure to satisfy the initial requirements of MCR 6.502(G) barred any further inquiry by the trial court and required the denial of relief.

Defendant attempted to meet his burden under MCR 6.502(G)(2) by arguing that the opinion in *Montgomery v. Louisiana* was a retroactive change in the law. On January 25, 2016, the United States Supreme Court, in *Montgomery*, found that the decision in *Miller* v. *Alabama* applied retroactively to defendants whose convictions were already final. In *Miller*, two 14-year-old offenders challenged a statutory sentencing scheme which mandated the imposition of natural Life for a homicide offense committed by a juvenile. The Supreme Court held, in a 5-4 opinion, "that *mandatory* life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"[12] This is so, the Court explained, because by wholly "removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these [mandatory LWOP] laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender."[13] In the Court's view, this contravened "*Graham*'s[14] (and also *Roper's*[15]) foundational principle: that imposition of a State's most severe penalties

[12] *Montgomery,* at 465 (emphasis added); see also *id.* at 479 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders.").
[13] *Miller*, 567 US at 474.
[14] *Graham v Florida*, 560 US 48; 130 SCt 2011; 176 LEd2d 825 (2010).
[15] *Roper v Simmons*, 543 US 551; 125 SCt 1183; 161 LEd2d 1 (2005).

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on juvenile offenders cannot proceed as though they were not children."[16]

To remedy this constitutional violation, *Miller* did "not categorically bar a penalty for a class of offenders or type of crime" as the Court had in *Roper*[17] and *Graham*.[18] [19] Instead, *Miller* "mandated 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence."[20] So long as the sentencer takes "into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison[,]" the Court did "not foreclose a sentencer's ability" to order a LWOP sentence.[21] In essence, Miller recognized two aspects of Eighth Amendment analysis—the procedure and the resulting sentence. Miller did not render a substantive rule of law finding that the sentence of Life without parole was unconstitutional when imposed upon a juvenile. Instead, it was the procedure of mandatorily imposing that sentence without first

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[16] *Miller*, 567 US at 474 (internal citations added).
[17] *Roper*, 543 US at 568 (holding that the Eighth Amendment bars the imposition of the death penalty on offenders under the age of 18); see also *People v. Carp*, 496 Mich 440, 513 (2014) (noting "the holding in *Roper* was specifically limited to capital punishment[.]").
[18] *Graham*, 560 US at 74 (holding "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole."); see also *Carp*, 496 Mich at 513 (noting that "*Graham's* holding was specifically limited so as to categorically bar only the imposition of life-without-parole sentences for juvenile offenders convicted of nonhomicide offenses.").
[19] *Miller*, 567 US at 483.
[20] *Jones v Mississippi*, __ US __; 141 SCt 1307, 1316; 209 LEd2d 390 (2021), quoting *Miller*, 567 US at 483.
[21] *Miller*, 567 US at 480; accord *Carp*, 496 Mich at 513-514.

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considering an offender's youth and attendant characteristics that violated the constitution.

The *Montgomery* decision triggered the provisions of MCL 769.25a to be applicable allowing defendants who were under the age of 18 when they committed the crime of First-Degree Murder to be resentenced on their murder convictions where a term of natural Life was imposed.[22] The Michigan Legislature, neither prior nor subsequent to the *Montgomery* decision, has enacted any legislation that has identified or required a different sentence or sentencing procedure for offenses carrying a possible sentence of Life imprisonment with parole consideration.

While *Montgomery* certainly acts as a retroactive change in the law that affects the procedure of sentencing juvenile murderers to a term of natural Life for the crime of First-Degree Murder, it has no retroactive application to the conviction and sentence at issue in defendant's motion for relief—a sentence of Life with the possibility of parole for the crime of Second-Degree Murder. *Miller* was extremely clear on the limits of its holding—sentencing schemes mandating natural Life sentences for juvenile murderers. When Miller did discuss other sentencing schemes or sentences, such as parolable Life, it did so only to distinguish those sentences from those sentencing procedures central to its holding. Further, neither Miller nor Montgomery reached any holdings or devoted any discussion to the validity of any convictions, not even convictions carrying a sentence of mandatory natural Life

[22] Second-Degree Murder is not among the enumerated offenses cited in MCL 769.25a(2) where a hearing consistent with *Miller* is required.

imprisonment for a juvenile murderer. *Miller* and *Montgomery* are not retroactive changes in the law sufficient to satisfy MCR 6.502(G)(2) for defendant's motion for relief from judgement challenging his conviction of Second-Degree Murder and sentence of parolable Life imprisonment.

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II.

Under MCR 6.508(D)(3), the defendant is not entitled to relief on collateral review until he has established "actual prejudice," that is, his plea was involuntary to a degree that it is manifestly unjust to allow the conviction to stand. Here, defendant fails to show that his guilty plea was involuntary or based on an illusory promise. The circuit court did not abuse its discretion in denying defendant's successive motion for relief from judgment.

Standard of Review

This Court reviews a lower court's decision denying or granting a motion for relief from judgment for an abuse of discretion and the findings of facts supporting that decision for clear error.[23] The lower court's interpretation of the Michigan Court Rules, as well as any constitutional questions, are issues of law reviewed de novo.

Discussion

Defendant claims that the trial court abused its discretion in denying his fifth successive motion for relief from judgment.

Even if defendant could satisfy the procedural requirements under MCR 6.502(G)(2) for filing his fifth successive motion for relief from judgment, defendant's claim would then need to pass the procedural requirements under MCR 6.508(D). Included in these requirements is the defendant's burden of establishing "good cause" and "actual prejudice." The "good cause" and "actual prejudice" provisions

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[23] *McSwain*, supra at 681.

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applicable to an original motion for relief do not operate as a third exception to the general bar to successive motions for relief from judgment.[24]

Defendant asserts good cause prevented him from claiming that *Miller* retroactively affected his case until 2016 when the Supreme Court issued *Montgomery* which recognized *Miller*'s retroactivity. If the Court believes that defendant's claim that *Miller* and *Montgomery* constitute a retroactive change in the law that would satisfy MCR 6.502(G)(2), it would be difficult to argue that the same retroactive change in the law would not also satisfy the good cause requirement of MCR 6.508(D)(3)(a).

Still, no relief would be appropriate unless defendant also satisfies the "actual prejudice" requirement. As applied here, defendant had the burden of showing that a defect in the plea proceedings "was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand" or that "the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case."[25] Defendant cannot meet the actual prejudice requirement for any of his claims.

Defendant first claims that the *Miller* decision rendered his guilty plea involuntary. Defendant's claim rests upon the argument that he entered his pleas solely to avoid the prospect of a mandatory sentence of

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[24] *People v. Swain*, 288 Mich App 609, 635 (2010).
[25] MCR 6.508(D)(3)(b)(ii) and (iii).

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natural Life, a sentence that has now been deemed unconstitutional when applied to defendants under the age of 18. Defendant contends that the change in the law 20 years after he entered his guilty pleas retroactively renders the benefit he received from pleading guilty worthless. Generally, a plea of guilty will not be set aside where it was knowingly, intelligently, and voluntarily given. But, a plea may be invalidated where the underlying bargain was illusory, meaning that a defendant did not receive any benefit from the agreement.[26] Still, "where the facts in a case indicate that a plea is voluntary, the plea will be upheld regardless of whether the defendant received consideration in return."[27] It is only when the defendant was misinformed about the benefits that the plea is not understanding and voluntary.[28]

Defendant's argument that his 1992 plea agreement is illusory and that the retroactive application of *Miller* requires the vacation of his convictions suffers both factually and legally. Factually, defendant cannot show that a retroactive application of *Miller* renders his plea agreement without any benefit to him. Even if it is assumed that the sole reason defendant chose to enter his guilty pleas was to avoid the mandatory sentence attached to the First-Degree Murder charge, the plea agreement certainly had a defined benefit to defendant at the time of the pleas. Considering the facts that defendant admitted to during his plea, there was a great chance that defendant would be convicted of First-Degree Murder if he chose to proceed to trial. Defendant admitted

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[26] *People v. Gonzalez*, 197 Mich App 385, 391 (1992).
[27] *People v. Harris*, 224 Mich App 130, 132-133 (1997).
[28] *People v. Graves*, 207 Mich App 217, 220 (1994).

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to intentionally pointing a firearm at the victim, Lester Edwards, and, without adequate justification, shot him and killed him. At the time of the pleas, the sole punishment for a conviction of First-Degree Murder was mandatory Life without the possibility of parole. By entering the pleas, defendant avoided the probability of a lifetime in prison with no prospect of ever being released. Instead, defendant chose not to risk the real probability of a mandatory natural Life sentence by accepting the certainty of a conviction and sentence that would allow him to be considered for parole after ten years and the probability that he would be released at some point prior to his death. There is no question that defendant's plea agreement had value at the time he chose to accept it.[29]

After *Miller*, the plea agreement still has a genuine value to defendant today. Defendant's argument suffers from a misconception that, whether he was convicted in 1992 for First-Degree Murder or was convicted of that crime today, it would be unconstitutional for him to be sentenced to a term of natural Life. In other words, defendant contends that the benefit that existed in 1992 no longer exists because he can no longer be sentenced to natural Life imprisonment. Defendant is incorrect. *Miller* did not categorically bar a sentence of natural Life imprisonment for juvenile murderers.[30] *Miller* only found that those natural Life sentences are unconstitutional absent an individualized sentencing hearing where the attributes of the defendant's youth are

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[29] "Because the plea bargain was not illusory when it was made, I am convinced that it was not involuntary as a matter of law." *People v. Clemons*, 462 Mich 864 (2000) (Taylor, J. concurring), emphasis in original.
[30] *Miller*, supra at 479.

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considered in mitigation. If the factors described in *Miller*[31] are meaningfully considered and the procedures outlined in MCL 769.25 or MCL 769.25a are followed, a judge very well may still decide to sentence a juvenile murderer to serve a sentence of natural Life imprisonment. Such a sentence would not violate the Eighth Amendment of the federal constitution or Michigan's constitutional prohibition against cruel or unusual punishment.[32] It would still be a benefit to a juvenile murder defendant to plead to a lesser offense and avoid the risk that a conviction for First-Degree Murder may result in a sentence of natural Life, even if that sentence is only possible and not mandated.[33]

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[31] In *Miller*, the Supreme Court held that, before imposing a sentence of Life without the possibility of parole upon a juvenile murderer, the sentencing court must consider the murderer's "youth (and all that accompanies it)" including "children's diminished culpability and heightened capacity for change." Among the factors that a sentencing court should consider prior to imposing mandatory Life without parole for a juvenile murderer are "his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences…the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional….the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him….that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth…[and] the possibility of rehabilitation even when the circumstances most suggest it." *Miller*, supra at 477-478.

[32] See, *Miller*, supra at 480; *People v. Carp*, 496 Mich 440 (2014).

[33] Even at the time of the plea, it was still only a possibility that defendant would eventually be sentenced to a term of natural Life imprisonment. To be sentenced to natural Life, a jury or judge, after hearing all the evidence at trial, would have needed to find him guilty of First-Degree Murder beyond a reasonable doubt. Despite the apparent evidence that defendant intentionally killed Lester Edwards with premeditation and deliberation, it was not a certainty that a finder of fact would have found that way. In entering his plea, defendant made a calculus of the known and unknown to decide what was in

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Even if a defendant was somehow assured that a conviction for First-Degree Murder would not result in a sentence of Life imprisonment without the possibility of parole, it is still beneficial to a defendant to instead plead to the lesser offense of Second-Degree Murder and accept the sentence of parolable Life. *If* defendant elected to reject the plea offer in 1992 and *if* he was convicted of First-Degree Murder after a trial, he would now be allowed resentencing under MCL 769.25a. The statute would allow the trial court to sentence defendant to a term of years instead of natural Life. The court, in its discretion, could impose a sentence anywhere in the range of 25 to 40 years imprisonment on the minimum and 60 years imprisonment on the maximum.[34] Choosing to risk a possible conviction of First-Degree Murder brings with it the possibility that, even if the sentence court chooses not to impose a term of Life imprisonment without the possibility of parole, the sentencing court could impose a sentence that would make the defendant ineligible for parole release until after 40 years. Alternatively, a plea to the lesser offense of Second-Degree Murder and agreeing to a term of parolable Life imprisonment would make the defendant eligible for parole anywhere from 15 to 30 years earlier. While the plea would not bring the assurance that the defendant would be released any earlier than he would have if convicted of First-Degree Murder and sentenced to a term of years, it would make the

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his best interest. As in every plea ever entered, defendant made his decision risking the chance that a different decision could have or would have resulted in a different outcome.

[34] Or, if the term of years sentence occurred following a *Miller* hearing under MCL 769.25, as allowed through MCL 769.25a, the maximum would be at least 60 years and possibility higher.

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possibility of an earlier release a certainty. The certainty of earlier parole eligibility is a benefit of choosing not to risk a conviction of First-Degree Murder and sentences associated with that crime in favor of a plea to the lesser offense of Second-Degree Murder and a sentence of Life imprisonment with the possibility of parole, in this case eligibility after only ten years of imprisonment.[35]

Defendant's claim is also unsupported by the law. For a sentence to be constitutionally valid, the defendant must be aware of all the direct, but not the collateral, consequences of the plea. Direct consequences are those consequences that have a definite, immediate, and largely automatic effect on the range of the defendant's punishment.[36] Here, the *Miller* decision had no effect on defendant's punishment. Defendant is serving the exact sentence of Life with parole eligibility that he negotiated and was promised. Defendant appears to implicitly argue that his plea was involuntary because he was under a misconception of fact that his chances for the Parole Board to grant him release were better than they turned out. In support, defendant presents information purportedly supporting that sentencing judges and attorneys at the time of defendant's plea commonly believed that a Life sentence would give a defendant a better chance to be released sooner than a term-of-years sentence. This is the same claim addressed by this Court in *People v. Louis Moore*.[37] Some of the very same information defendant cites and appends to his Brief was presented to the Court in

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[35] MCL 791.234(7)(a).
[36] *People v. Cole*, 491 Mich 325, 334 (2012).
[37] *People v. Moore*, 468 Mich 573 (2003).

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Moore. Still, the Court found that no misconception of law or fact existed to question the voluntariness of the defendant's plea. "The failure to accurately predict the actions of the Parole Board does not constitute a misappreciation of the law that could render the sentence invalid."[38] In *Moore*, the sentencing judge indicated to the defendant that he would be eligible for parole after ten years, "if that were seen as a realistic and reasonable thing by the parole authorities." This is similar to what defendant's trial counsel stated at the plea hearing that the Parole Board would "consider him for probation [sic] at the end of ten years on this type of life sentence." (6a) What was told to the defendant in *Moore*, and to defendant here, was accurate. No promise was made by Judge Jackson or trial counsel that defendant would be paroled after only ten years or at any other time. At all times, defendant was accurately informed that parole release was only a possibility, and not a certainty, after serving ten years imprisonment on the murder charges. A defendant "need not know all the possible consequences of his plea and a plea can be knowingly entered where the defendant agreed to a life sentence even though he misunderstood the implications of a parolable life sentence in Michigan and believed he would be paroled in a number of years."[39]

The later change in the law created by *Miller* and *Montgomery* also does not amount to a misconception of the law or fact allowing for the withdrawal of defendant's plea. A possibility of a favorable change

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[38] *Moore*, at 580.
[39] *McAdoo v. Elo*, 365 F3d 487, 494-495 (CA 6, 2004).

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in the law after the plea is one of the ordinary risks of pleading guilty.[40] In *Brady v. United States*,[41] the United States Supreme Court addressed circumstances very similar to those involved here. In *Brady*, the defendant was charged with a federal kidnapping charge that carried with it the possibility of the death penalty. One of the circumstances leading to defendant entering a guilty plea was to avoid the possibility of a death sentence. Years later, the Supreme Court held in *United States v. Jackson*[42] that the death penalty provision of the statute was unconstitutional. The defendant moved to withdraw his guilty plea claiming that it was involuntarily entered to avoid an unconstitutional sentence. Defendant's motion was denied in the lower courts and he sought relief from the Supreme Court. The Court affirmed defendant's plea-based conviction and sentence. The Court found that, even if the penalty provision of the kidnapping statute caused the plea, it did not necessarily prove that the plea was coerced and invalid as an involuntary act. "*Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not. *Jackson* prohibits the imposition of the death penalty under [the statute], but that decision neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test

[40] *United States v. Roque*, 421 F3d 118, 122 (CA 2, 2005); *United States v. Sahlin*, 399 F3d 27, 31 (CA 1, 2005); *United States v. Archie*, 771 F3d 217, 222 (CA 4, 2014).
[41] *Brady v. United States*, 297 US 742, 90 S Ct 1463, 25 L Ed 2d 747 (1970).
[42] *United States v. Jackson*, 390 US 570 (1968).

theretofore fashioned by courts and since reiterated that guilty pleas are valid if both 'voluntary' and intelligent'"[43]

> Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentations or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to the possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than what was reasonably assumed at the time the plea was entered.
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> The fact that Brady did not anticipate [the Court holding the death penalty unconstitutional as it applied to him] does not impugn the truth or reliability of his plea. We find no requirement in the Constitution that a

[43] *Brady*, at 747.

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> defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.[44]

The Fourth Circuit applied the reasoning of *Brady* to the situation where a juvenile defendant chose to plead guilty to avoid a sentence of death.[45] Years after the plea, in *Roper v. Simmons*,[46] the death penalty was held to be unconstitutional as applied to juvenile felons not convicted of murder. The defendant sought plea withdrawal because, in light of *Roper*, he no longer received the benefit of a bargain premised on avoiding the death penalty. Defendant contended that his guilty plea was involuntary because it was based upon the promise of an illusory benefit. Following *Brady*, the Fourth Circuit affirmed that the defendant was not entitled to plea withdrawal.

> Contracts in general are a bet on the future. Plea bargains are not different: a classic guilty plea permits a defendant to gain a present benefit in return for the risk that he may have to forego future favorable legal developments. Dingle received that present benefit—avoid the death penalty and life without parole—under the law as it existed at the time. Although *Roper*, in hindsight, altered the calculus underlying Dingle's decision to accept a plea agreement, it does not undermine the voluntariness of his plea. Some element of pressure exists in every deal, as the tradeoff between present certainty and future uncertainty is emblematic of the process of plea

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[44] *Brady*, supra at 756-757.
[45] *Dingle v. Stevenson*, 840 F3d 171 (CA 4, 2016).
[46] *Roper v. Simmons*, 543 US 551, 125 S Ct 1183, 161 L Ed 2d 1 (2005).

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> bargaining. *Brady* makes all that exceptionally clear and in following its teachings we find no infirmity in the plea that Dingle entered.[47]

The decisions in *Brady* and *Dingle* have been applied to specifically hold that *Miller* does not apply retroactively to render pleas entered to avoid a mandatory life without the possibility of parole sentence invalid. In *Contreras v. Davis*,[48] the defendant was charged with First-Degree Murder which carried a sentence of mandatory Life imprisonment without parole. The defendant entered a guilty plea to avoid the mandatory sentence. The defendant sought habeas relief on the ground that his sentence amounted to a violation of the Eighth Amendment under *Miller*. On remand from the Supreme Court, the federal district court granted relief because defendant's sentence was a de facto sentence of Life and because the plea was involuntarily entered under threat of a now-unconstitutional punishment. The Fourth Circuit reversed the district court finding that *Miller* was not applicable to defendant, because he was not subject to a term of mandatory Life imprisonment without parole. Pertinent to the case here, the Court further held, following *Dingle*, that, even if the defendant entered his plea to avoid a mandatory Life without parole sentence, *Miller* did not render the plea involuntary.[49]

The United States District Court for the Eastern District of Michigan has similarly followed the guidance of *Brady* and *Dingle*. In

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[47] *Dingle*, supra at 175-176.
[48] *Contreras v. Davis*, 716 Fed Appx 160 (CA 4, 2017).
[49] *Id.*, at 164.

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Carter v. Horton,[50] on habeas review, the defendant claimed that: "A child's waiver of his fundamental right to jury trial and acceptance of a plea offer to second degree murder to avoid a seemingly constitutional but actually unlawful (cruel and unusual) sentence of mandatory life imprisonment is invalid, illusory, unknowing and/or unintelligently made." The Court held that *Miller* did not render the plea unconstitutional. "Petitioner's situation here is analogous to that of the Petitioner in *Brady*. Petitioner's plea bargain therefore was not illusory, and Petitioner's plea was not involuntary."[51]

Defendant's plea is likewise analogous to the defendant in *Brady*. Like *Jackson*, *Miller* did not rule that all pleas of guilty encouraged by the fear of a possible mandatory natural Life sentence are involuntary or that such encouraged pleas are invalid whether involuntary or not. *Miller* did not fashion a new standard for judging the validity of guilty pleas. The sole standard for judging defendant's plea is whether it was voluntary and intelligent at the time it was entered.[52] Defendant voluntarily entered his guilty pleas with a then accurate understanding of the possible penalty for the offense of First-Degree Murder. Defendant, an adult at the time of the plea, stated his understanding of the rights he was waiving and the sentence he was receiving. (7a-10a) With a full understanding of the consequences of his plea, defendant

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[50] *Carter v. Horton*, 2019 WL 3997149 (E.D. Mich, 2019).
[51] *Id*. See also, *Turner v. Skipper*, 2019 WL 3388486 (ED Mich, 2019).
[52] See, *McMann v. Richardson*, 397 US 759, 774, (1970) (a defendant who pleads guilty "does so under the law then existing." Absent some serious impairment at the time of the plea, although a defendant "might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction.")

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received the exact sentence that he negotiated and accepted through his plea. By doing so, he accepted the risk of later judicial pronouncements regarding the application of mandatory natural Life imprisonment for juvenile murderers. The later decision in *Miller* and its retroactive application through *Montgomery* does nothing to render defendant's plea illusory, invalid, unintelligent, or unconstitutional.

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III.

Under MCR 6.508(D)(3), a defendant is not entitled to relief until he establishes that he suffered "actual prejudice" from his sentencing, that is, his sentence is invalid. Here, defendant's sentence of Life imprisonment was agreed to by defendant, was appropriate for his commission of Second-Degree Murder, and provides him with a meaningful opportunity to actually be paroled in the future. Defendant's sentence is valid under the law.

Standard of Review

This Court reviews a lower court's decision denying or granting a motion for relief from judgment for an abuse of discretion and the findings of facts supporting that decision for clear error.[53]

Defendant has waived any challenge to his sentence by understandingly and voluntarily entering into a plea that is knowing and intelligent. "An unconditioned guilty plea of guilty or no contest waives all nonjurisdictional defects in the proceedings, even claims of constitutional dimension."[54] Defendant received the exact sentence that he bargained for. Defendant agreed to the specific sentence of Life imprisonment. A defendant who pleads guilty with knowledge of the sentence—either from a sentence bargain, prosecutorial recommendation, or judge's statement of the sort discussed in *Cobbs*—must be expected to be denied relief on the ground that the plea demonstrated his agreement to the sentence imposed.[55] Defendant's

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[53] *McSwain*, supra at 681.
[54] *People v. Likine*, 492 Mich 367, 409 (2012).
[55] *People v. Cobbs*, 443 Mich 276, 285 n 11 (1993); *People v. Wiley*, 472 Mich 153, 154 (2005).

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acceptance of the sentence agreement here prevents this Court from granting him any relief in the form of resentencing.[56]

Discussion

The Court has ordered the parties to answer whether a sentence of Life with the possibility of parole imposed upon a juvenile violates the Eighth Amendment or Const. 1963, art 1, § 16. The People interpret the Court's question as asking whether *Miller*'s holding that a sentencer must follow a certain process—considering an offender's youth and attendant characteristics—before imposing a life-without-parole sentence constitutionally must also extend to other sentences not considered in *Miller*, in this case a term of Life with the possibility of parole, imposed upon juveniles. In other words, whether the Eighth Amendment *requires* trial court judges to consider the distinctive attributes of youth, such as those described in *Miller*, before handing down a Life sentence. *Miller* does not directly supply the answer, as the opinion limited its holding to the proper sentencing procedure for natural Life sentences for juvenile murderers.[57] Nonetheless, *Miller*

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[56] The People also remind the Court that defendant's sentence was the product of a plea agreement between defendant and the People. As such, if the Court was inclined to find defendant's negotiated sentence of Life unconstitutional and invalid, the relief granted here would not simply be resentencing. Instead, the changed terms of the plea agreement would allow the People to withdraw from the agreement and once again impose the original charges against defendant, including the First-Degree Murder charge which still carries the possibility of a natural Life sentence.

[57] See *Miller*, 567 US at 465, 479; see also *Atkins v Crowell*, 945 F3d 476, 478 (CA 6, 2019) ("Whether read broadly or narrowly, *Miller* creates a legal rule about [LWOP] sentences. And, whether one looks at [the defendant's] sentence formally or functionally, he did *not* receive a [LWOP] sentence. He will be

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identified the Eighth Amendment violation as the limitation placed on the sentencer's exercise of discretion—his inability to consider defendant's youth before ordering a natural Life sentence. *Miller* corrected the constitutional infirmity by requiring "that the sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing" a natural Life sentence.[58] While the Eighth Amendment requires the defendant's youth and attendant characteristics to be a consideration before sentencing a juvenile to a sentence of natural Life, it does not mandate an on-the-record explanation of those factors or the weight those factors had in the sentence imposed. Since "the Constitution does not require an on-the-record explanation of mitigating circumstances by the sentencer in *death penalty cases*, it would be incongruous to require an on-the-record explanation of the mitigating circumstances of youth by the sentencer in *life-without-parole cases*." [59] It is additionally incongruous to require an on-the-record explanation of the mitigating circumstances of youth by the sentencer in cases carrying a discretionary sentence of parolable Life imprisonment.

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eligible for release after at least 51 years' imprisonment. *Miller's* holding simply does not cover a lengthy term of imprisonment that falls short of" LWOP) (internal citation omitted); *Moore v Biter*, 742 F3d 917, 920 (CA 9, 2014) (acknowledging that the United States Supreme Court has not squarely addressed the constitutionality of term of years sentences for juveniles); *People v Williams*, 326 Mich App 514, 521 (2018), vacated in part on other grounds by *People v Williams*, 505 Mich 1013 (2020).

[58] *Miller*, 567 US at 483; see also *Jones*, 141 SCt at 1324 (Thomas, J., concurring).

[59] *Jones,* at 1320-1321 (emphasis in the original).

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The sentencing scheme implicated in this case places no constraints on what the trial court judge may consider before handing down a term of Life imprisonment. Judges are free to consider an offender's youth and its distinctive attributes at a sentencing hearing and may adjust their sentence accordingly, within the parameters set by the statute.[60] This discretionary sentencing system is "constitutionally sufficient."[61] It should be remembered that even in the natural Life context, *Miller* and *Montgomery* speak to a requirement that the sentencer "have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."[62] Although neither the federal nor Michigan sentencing guidelines "use age as a sentencing factor[, a] reasonable sentence may include a limited consideration of a defendant's age in terms of other permissible and relevant individual factors such as the absence or presence of a prior record."[63] "While age may be considered a mitigating or aggravating factor in terms of the individual defendant and the circumstances of the particular crime, its consideration should be limited. Any predictions of a defendant's future behavior based on a status character such as race, religion, gender, or age are suspect."[64] Here, nothing prevented defendant from exercising his right to present any mitigating evidence associated with his youth as he wished, to then be considered by the sentencing judge. That is, except for defendant's

[60] Compare *Miller*, 567 US at 465 with *Jones*, 141 SCt at 1322.
[61] *Id.* at 1313.
[62] *Miller*, 567 US at 489.
[63] *People v Fleming*, 428 Mich 408, 423 n 17 (1987)
[64] *Id.*

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own actions in entering the plea agreement. "For the certainty of a plea agreement, he simply chose not to exercise it."[65] Further, because Judge Jackson had the option to accept or reject the plea agreement defendant entered and enter a judgment consistent with the agreement, his decision necessarily constituted an exercise of discretion removing this case from the prohibitions presented in *Miller*. Accordingly, there is no basis upon which this Court can find that the individualized sentencing process devised by the Michigan Legislature and applicable both now and at the time of defendant's sentencing here[66] violates the Eighth Amendment.

Defendant additional fails to show that the sentencing court was required to consider the attributes of youth when sentencing him to parolable Life imprisonment for the offense of Second-Degree Murder. Essentially, defendant argues that the same youthful characteristics that a court is required to consider prior to deciding whether to impose a sentence of natural Life also are required prior to sentencing any youth of any crime. "[T]here is no constitutional mandate requiring the trial court to specifically make findings as to the *Miller* factors except in the context of a decision of whether to impose a sentence of life without

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[65] *Jones v. Commonwealth*, 795 SE 2d 705, 713 (2017).

[66] It would speculation to determine that defendant's youth at the time of the offenses was or would have been completely ignored in Judge Jackson's sentencing decision, since defendant's own actions in requesting the very sentence imposed limited the breadth of the sentencing record. Having accepted the plea agreement presented by the parties, the court's considerations at sentencing focused less on which sentence among the range of those permitted under the Second-Degree Murder statute was appropriate and more on whether the single sentence that defendant explicitly requested was appropriate.

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parole."[67] The *Miller* decision specifically addressed one class of sentences—mandatory Life sentences being served by juveniles under the age of eighteen.[68] The predicate of the *Miller* decision was its analogy to death-penalty cases because the defendant would die in prison without any meaningful opportunity for release.[69] Application of *Miller* and *Graham* to a case involving a sentence of Life would require an extension of that precedent.[70] *Miller* viewed sentences of Life as lesser sentences that did not require that same analysis as sentences of natural Life. *Miller* did not make any findings as to the validity of non-mandatory, parolable terms of Life imposed against juvenile defendants.[71] The Court did not indicate that sentencing courts are required to consider the same factors required for mandatory Life without the possibility of parole terms before imposing any other sentences. Instead, the Supreme Court has acknowledged that the constitutional infirmities involved in *Miller* are noticeably absent when the sentence is a term of Life with the possibility of parole at some future date.[72] Nothing in *Miller*, *Montgomery*, or any other case or statute stands for the legal proposition that a juvenile defendant's sentence, for

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[67] *People v. Wines*., 323 Mich App 343, 352 (2018). And, even in the context of a decision of whether to impose a sentence of life without parole, courts are not required under the Eighth Amendment to make explicit findings of fact. *Jones v. Mississippi*, supra at 1319; *People v. Skinner*, 502 Mich 89, 125 (2018).

[68] *Miller v. Alabama*, at 477.

[69] *Id.*, at 479, (citing *Graham v. Florida*, 560 US 48, 69-70, 130 S Ct 2011, 2030, 176 L Ed 2d 825 (2010) for the proposition that the state must provide juveniles "some meaningful" opportunity to obtain release based on demonstrated maturity and rehabilitation).

[70] *Atkins v. Crowell*, 945 F3d 476, 479 (CA 6, 2019).

[71] See, *Bunch v. Smith*, 685 F3d 546, 553 (CA 6, 2012).

[72] *Miller*, supra at 479; *Montgomery*, supra at 736.

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any crime other than one carrying a possible penalty of natural Life imprisonment without the possibility of parole or death, is rendered invalid requiring resentencing simply because the defendant's "underdeveloped sense of responsibility" was not first considered before the sentence imposed. Defendant's purported belief that the *Miller* factors should equally apply when a juvenile defendant is sentenced to a term of Life imprisonment is a dramatic and unsupported extension of the breadth of what the Supreme Court held in *Miller*.

Defendant's attempt to bring the Michigan Constitution in to do what the Eighth Amendment has not must fail. First, defendant posits that because the Eighth Amendment requires a trial court judge to consider an offender's youth before imposing a term of parolable Life, the same must be said for Const. 1963, art 1, §16.[73] However, neither *Miller* nor any other persuasive or controlling federal determination has held that the Eighth Amendment imposes any such requirement that can be adopted in whole or piece-meal into the Michigan Constitution to require a different sentencing procedure than the one employed at defendant's sentencing here or when sentencing any other juvenile

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[73] Const. 1963, art 1, §16 provides: "Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witness be unreasonably detained." The People do not dispute that this provision of the Michigan Constitution has been read more broadly than its federal counterpart. See *People v Bullock*, 485 Mich 15, 30; 485 NW2d 866 (1992). However, the People direct the Court's attention to and adopt the arguments presented by Timothy Baughman in Issue II(B) of Appellee's Brief on Appeal in the pending case of *People v. Poole*, MSC # 161529 addressing Bullock's interpretation that "cruel or unusual" under Const. 1963, art 1, § 16 was meant to mean anything different than "cruel and unusual." A copy of that section of the brief is supplied in the People's Appendix.

offender to a term of Life imprisonment. No compelling reason exists for this Court to read a requirement into the Michigan Constitution that has no support in the Eighth Amendment.

Defendant's argument for why his sentence violates either the Eighth Amendment or the Michigan Constitution has little to do with the procedure used at sentencing. Instead, his arguments center upon a claim that a Life sentence itself is disproportionate when imposed upon juvenile offenders. However, to paraphrase this Court's opinion in *People v. Carp*, "the people of this state, acting through their Legislature, have . . . exercised their judgment—to which we owe considerable deference—that the sanction they have selected" for the commission of Second-Degree Murder and, even after *Miller* and *Montgomery*, continuing to extend that sanction to juvenile murder offenders is "in fact, a proportionate sanction."[74] Again, it should be noted that defendant specifically requested the sentence he received and, through his plea, waived his right to challenge the sentence on appeal as disproportionate. Defendant does not appeal a sentence that imposes punishment not authorized by law, nor does he appeal from a sentence that imposes punishment greater than what he bargained for. Defendant's guilty plea waived any disproportionality challenge and no error exists for this Court to review.

Defendant's claim that his sentence is invalid must be considered against the backdrop of the Eighth Amendment and the Michigan constitutional protection against cruel or unusual punishment.[75]

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[74] *People v. Carp*, 496 Mich 440, 516-517 (2014).
[75] Const. 1963, art. 1, § 16.

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Defendant's sentence of Life with the possibility of parole is not disproportionate or cruel and unusual. Defendant was eligible for parole release from prison by his early 30's, hardly the type of lifetime scenario contemplated in *Miller*. When this Court hears argument in this case, defendant will be 48 years old and still eligible for parole release at his next opportunity. Defendant undoubtedly has some "hope for some years of life outside prison walls."[76] It is not beyond belief that, especially with the Parole Board's amended policies favoring juvenile offenders, that defendant may be granted release at that next opportunity or at a subsequent one. MCL 750.317 expressly permits a sentence of Life for the commission of a Second-Degree Murder. Defendant specifically agreed to the sentences he received. (6a-7a) "In deciding if punishment is cruel or unusual, this Court looks to the gravity of the offense and the harshness of the penalty, comparing the punishment to the penalty for other crimes in this state, as well as the penalty imposed for the same crime in other states."[77] The constitutional proscription includes a prohibition of grossly disproportionate sentences.[78] Here, defendant was sentenced to a term of Life imprisonment with the possibility of parole for one of the most severe crimes a person may commit: the malicious killing of another person. Defendant's penalty is identical to the penalty that may be imposed for other serious crimes that do not involve the taking of another person's life, such as First-Degree Criminal Sexual Conduct,[79] and Armed

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[76] *Montgomery*, supra at 213.
[77] *People v. Brown*, 294 Mich App 377, 390 (2011).
[78] *People v. Burkett*, ___ Mich App ___ (2021).
[79] MCL 750.520b(2)(a).

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Robbery.[80] Defendant's penalty is also consistent with the penalties imposed in the federal system and multiple other states for malice murder.[81] In no way is defendant's sentence grossly disproportionate to the offenses he committed. Imposing a sentence specifically allowed by the murder statute and commensurate to the seriousness of the offense committed does not violate a defendant's protection against cruel or unusual punishments.

Sentences of Life imprisonment with the possibility of parole have been affirmatively upheld as not violating *Miller*'s mandate of providing juvenile murderers with a meaningful opportunity for parole release. *Miller* itself endorsed Life sentences with the possibility of parole release at some future date as a remedy.[82] In *People v. Williams*,[83] the Court of Appeals questioned whether *Miller* applied to all juvenile defendants, not just those sentenced to a mandatory term of Life without the possibility of parole, to guarantee a meaningful opportunity for parole.[84] In the end, the Court held that this question was immaterial for purposes of reaching its decision. The possibility for conditional release resolves the constitutional concerns central to the Court in

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[80] MCL 750.529.

[81] The People have determined that at least 20 other states allow some form of a Life sentence for a conviction of malice murder.

[82] *Miller*, supra at 479.

[83] *People v. Williams*, 326 Mich App 514 (2018), vacated in part on other grounds by *People v Williams*, 505 Mich 1013 (2020). As the Court of Appeals noted below, this Court did not consider, nor did it reverse, the analysis and conclusion in Williams that the Miller decision did not apply to non-mandatory sentences of Life. See also, *People v. Kinney*, unpublished opinion, (COA # 351824, September 16, 2021).

[84] *Williams*, at 520-521.

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Miller.[85] The Court held that a sentence of Life satisfied *Miller*'s mandate and did not violate the prohibitions against cruel or unusual punishment, because, even if the process for actually attaining parole release may be somewhat difficult, the defendant is actually provided with a meaningful opportunity for parole. Defendant's sentence of Life with the possibility of parole is not invalid under *Miller* such that defendant is entitled to relief from the judgment.

In *Montgomery*, Justice Kennedy, writing for the majority, specifically found that a term of Life with the possibility of parole was not disproportionate and did not violate the Eighth Amendment protection against cruel and unusual punishment simply because the offender being sentenced was a juvenile. Parolable Life sentences do not suffer from the same infirmities as those discussed in *Miller* because "[a]llowing those [juvenile homicide] 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."[86] The possibility for conditional parole release resolves the constitutional concerns central to the Court in *Miller*. "Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change."[87]

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[85] *Williams*, at 522.
[86] *Montgomery*, supra at 736.
[87] *Id.*

Importantly, the Supreme Court's proposed remedy for the unconstitutional imposition of a mandatory sentence of natural Life upon a juvenile—to convert the sentence to one of parolable Life—did not come with a direction or mandate that any type of resentencing hearing take place prior to the conversion, much less one where the mitigating factors of youth could or should be considered. The Court determined it sufficient to remedy a *Miller* violation if the various state legislatures just simply decreed, in their authority, that a sentence of natural Life imposed upon a juvenile offender would henceforth be a sentence of parolable Life. If a resentencing hearing where the factors of youth are considered is not an Eighth Amendment requirement when a legislature exercises its authority to permit a juvenile convicted of First-Degree Murder to be sentenced to a term of parolable Life, it logically follows that a hearing where the mitigating factors of youth are considered is not an Eighth Amendment requirement when sentencing a juvenile convicted of a lesser offense carrying the discretionary sentence of parolable Life imprisonment.

Even if this Court believed that it would be good public policy to require sentencing judges to expressly consider and apply the *Miller* factors (or something similar) when imposing a Life sentence on a juvenile murderer, that is a matter which must be left to the Michigan Legislature. The fixing of prison terms for specific crimes is properly within the providence of the legislature, not courts.[88] This Court's "highest judicial duty is to recognize the limits on judicial power and to

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[88] *Harmelin v. Michigan*, 501 US 957, 998, 111 S Ct 2680, 115 L Ed 2d 836 (1991) (Kennedy, J., concurring in part).

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permit the democratic process to deal with matters falling outside of those limits."[89] This Court has expressly acknowledged that "judicial misgivings regarding the wisdom" of a policy choice deliberately adopted by the Legislature "does not provide a legal foundation for overriding legislative intent."[90] Whether the policy choice made by the Legislature was a wise one "is a political question to be resolved in the political forum. To reach a contrary result would be simply to repudiate the legislative choice."[91]

Even after *Miller* and *Montgomery*, the Michigan Legislature has chosen not to exercise its authority to enact legislation requiring trial court judges to consider and apply the *Miller* factors (or something similar) at a juvenile murderer's sentencing hearing where a sentence of parolable Life, or any other sentence not amounting to natural Life, is imposed.[92] If this is the direction Michigan sentencing law is headed,

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[89] *Furman v Georgia*, 408 US 238, 405; 92 SCt 2726; 33 LEd2d 346 (1972) (Burger, J., dissenting); see also *Jones*, 141 SCt at 1322; *Miller*, 567 US at 493 ("Determining the appropriate sentence for a teenager convicted of murder presents grave and challenging questions of morality and social policy. Our role, however, is to apply the law, not to answer such questions.") (Roberts, J., dissenting).

[90] *People v Morris*, 450 Mich 316, 336 (1995).

[91] *Id.*; see also *Adams Outdoor Advertising, Inc. v. City of Holland*, 234 Mich App 681,692 (1999) (reaffirming that all laws passed by the Legislature come to the Court "clothed with every presumption of validity" and, "[i]n view of the constitutionally mandated separations of powers, the judicial branch of government should not impose by judicial fiat its policy and philosophical decisions on another branch of government.").

[92] Even if the legislation in this area is read in the most beneficial way to defendant, the most that could be inferred is that the Legislature's language in MCL 769.25a expressed a belief that, absent a hearing for the express purpose of evaluating the mitigating qualities of youth, a term of 40 years without parole eligibility was the maximum a judge could impose upon a

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the citizens of the State of Michigan must be the one to say so, either through direct political action or through legislative enactment.[93] This Court is free to bring this issue to the Legislature's attention[94] and individual members of the Court may sit on committees to do the same,[95] but the Court is not free to invade the province of the Legislature to determine the appropriate sanction for a criminal offense.

Defendant has failed to establish that his sentence of Life imprisonment is invalid. Defendant has been provided with a meaningful opportunity for parole release by being sentenced to a term of imprisonment that specifically provides for parole. Defendant's failure to show that he is serving an invalid sentence prevents him from receiving relief under MCR 6.508(D)(3).

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juvenile offender. *Kitchen v. Whitmer*, 486 F Supp 3d 1114, 1124 (E.D. Mich, 2020). Defendant here became parole eligible at ten years, well short of this theoretical limit.

[93] See *Jones*, 141 SCt at 1323; see, e.g., Governor Gretchen Whitmer's Executive Order 2021-6: Task Force on Juvenile Justice Reform (creating a committee which acts "in an advisory capacity with the goal of developing ambitious, innovative, and thorough analysis of Michigan's juvenile justice system, complete with recommendations for changes in state law, policy, and appropriations to improve youth outcomes.").

[94] See, e.g., *Greer v Advantage Health*, 499 Mich 975 (2016) (Zahra, J., concurring) (writing to bring the case to the attention of the Legislature).

[95] See, e.g., *Staying Off the Sidelines: Judges as Agents for Justice System Reform*, The Yale Law Journal, Vol 131, Bridget Mary McCormack, Chief Justice, Michigan Supreme Court (October 24, 2021).

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IV.

While a state is not constitutionally required to guarantee parole release, the Eighth Amendment requires that a state must provide juvenile offenders not serving natural Life sentences with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Here, defendant is currently eligible for parole consideration and he may present any evidence to the Parole Board he wishes to demonstrate his maturity and rehabilitation. The Parole Board has not violated *Miller* or the Eighth Amendment by not yet granting defendant parole release.

Standard of Review

Questions of constitutional law are reviewed de novo.[96]

Discussion

Defendant's claim that his Life sentence violates the constitution pivots away from a challenge to the sentencing scheme imposed by the sentencing court and the sentence actually imposed and towards a challenge to the Parole Board's application of its policies to purportedly render the sentence equivalent to a term of de facto natural Life. As the Court of Appeals has repeatedly recognized, a (multiple successive) motion for relief is not the appropriate vehicle through which defendant can pursue his claim. "That the parole board's policies stymie defendant's efforts is a matter to be asserted against the parole board, it is not a ground for vacating defendant's sentences."[97] Once a

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[96] *People v. Trakhtenberg*, 493 Mich 38, 47 (2012).

[97] *Stovall*, supra at 570; *People v. Michael Johnson*, unpublished opinion COA # 344322 (June 18, 2019); *People v. Kinney*, supra.

defendant is committed to the custody of the Michigan Department of Corrections, authority over a defendant passes out of the hands of the judicial branch.[98] The Michigan Department of Corrections, an administrative agency within the executive branch of government, possesses exclusive jurisdiction over questions of parole.[99] Whether or when a defendant should be released on parole is devoted exclusively to the discretion of the Parole Board.[100] By statute, the Parole Board has been entrusted to develop its own guidelines for exercising its discretion in considering prisoners for parole and deciding whether to grant release.[101] Prisoners "have no legal right to seek judicial review of the denial of parole by the Parole Board."[102] Importantly, this Court has no subject-matter jurisdiction to consider defendant's challenge to the Parole Board's decisions in determining a prisoner's eligibility for parole or to deny him parole.[103] Still, the legality of a prisoner's detention "is not insulated from judicial oversight," a prisoner may file a complaint against the Board challenging the legality of the detention or seeking compliance with the Board's statutory duties.[104] But, it is only through these avenues, and not by an appeal of the underlying sentences, that a defendant may challenge the guidelines or decisions of the Parole Board concerning parole.

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[98] *People v. Wybrecht*, 222 Mich App 160, 166 (1997).
[99] MCL 791.204.
[100] MCL 791.234(7); *Lee v. Withrow*, 76 F Supp 789, 792 (ED Mich, 1999).
[101] MCL 791.233e.
[102] MCL 791.234(11); *Morales v. Michigan Parole Board*, 260 Mich App 29, 52 (2003).
[103] *Morales*, supra.
[104] *Id.*, at 40.

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Neither defendant's claim nor this Court's concern with the policies and procedures of the Parole Board concerning prisoner's serving a term of Life imprisonment are new. For decades, courts and defendants have cited to the purported policy of the Board to treat parolable Life sentences akin to terms of natural Life.[105] Defendant was certainly aware of this purported policy shortly after his sentencing hearing when he sought to withdraw his plea. (20a-21a) Despite the attention paid to the alleged unfairness of the policy, no court has decreed the perceived policy as unlawfully trampling on a prisoner's constitutional rights.

Defendant additionally claims that his sentence of Life does not provide him with a meaningful opportunity for parole as required by *Miller*. The "meaningful opportunity" language cited has its origins in the Supreme Court's decision in *Graham v. Florida*.[106] In *Graham*, the Supreme Court held that "[a] State is not required to guarantee eventual freedom," but the Eighth Amendment requires that it must provide juvenile offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[107] The *Graham* Court did not define a "meaningful opportunity" to obtain release and the People are unaware of any binding authority that has fully interpreted the phrase.[108]

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[105] See, *Moore*, supra. In this regard, it is questionable that defendant could satisfy either MCR 6.502(G)(2) or the good cause requirement of MCR 6.508(D).
[106] *Graham v. Florida*, 560 US 48, 130 S Ct 2011, 2030, 176 L Ed 2d 825 (2010).
[107] *Graham*, supra at 69-70.
[108] See, *Kitchen*, supra at 1126, citing *Graham*, at 123 (Thomas, J. dissenting) ("[W]hat, exactly, does such a 'meaningful' opportunity entail? When must it

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Defendant argues that his parolable Life sentence violates his right to due process. Yet, the Fourteenth Amendment has no application to defendant's case. Because parole is a discretionary function, no due process right is implicated. "That the state holds out the possibility of parole provides no more than a mere hope that the benefit will be obtained…a hope which is not protected by due process."[109]

> The Michigan parole statute…does not create a right to be paroled. Because the Michigan Parole Board has the discretion whether to grant parole, a defendant does not have a protected liberty interest in being paroled prior to the expiration of his or her sentence. The Sixth Circuit has held that Michigan Compiled Laws § 791.233 does not create a protected liberty interest in parole, because the statue does not place any substantive limitations on the discretion of the parole board through the use of particularized standards that mandate a particular result.[110]

Graham, *Miller*, and *Montgomery* based their analysis on the defendant's protections in the Eighth Amendment against cruel and unusual punishments, not the Due Process Clause of the Fourteenth

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occur? . . . The Court provides no answers to these questions, which will no doubt embroil the courts for years.") In *Kitchen*, the Court examined several different methods for divining a "meaningful opportunity" and found none of them availing.

[109] *Glover v. Parole Board*, 460 Mich 511, 520 (1999), quoting, *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 US 1, 11, 99 S Ct 2100, 60 L Ed 2d 668 (1979); *Sweeton v. Brown*, 27 F3d 1162, 1164-1165 (CA 6, 1994)(en banc)(the Michigan system does not create a liberty interest in parole).

[110] *Lee v. Withrow*, 76 F Supp 789, 792 (ED Mich, 1999); *Canales v. Gabry*, 844 F Supp 1167, 1171 (ED Mich, 1994).

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Amendment.[111] As such, none of those authorities created a due process right to parole. Even if any of those decisions had a due process application, defendant here does not fall under that application. *Graham* specifically is applicable to non-homicide convictions and *Miller* and *Montgomery* are applicable to homicide offenses where the punishment is a mandatory term of natural Life. Defendant has no due process right to a "meaningful opportunity" for parole release.

Neither the length of a prisoner's sentence nor the number of times that parole has been denied that prisoner is determinative of whether the sentence imposed constitutes an Eighth Amendment violation.[112] What matters is not that the prisoner remains imprisoned, but whether a meaningful opportunity has been provided to the prisoner to prove that he has changed.[113] The prohibition against cruel and unusual punishment is not violated if a prisoner, convicted of crimes as a juvenile and who has shown "an inability to reform," remains

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[111] "Because the Eighth Amendment expressly addresses Kitchen's concern about earliest parole date, the Due Process Clause should not be read to provide yet another avenue for relief." *Kitchen*, supra at 1133.

[112] A prisoner's disappointment from the failure to allow his release from prison does not offend the standards of decency in modern society or amount to a violation of the Eighth Amendment. *Baumann v. Ariz. Dep't of Corr.*, 754 F2d 841, 846 (CA 9, 1985). The Supreme Court has not held in *Miller*, *Graham*, or any other opinion that the Eighth Amendment prohibits a sentence which leaves the juvenile ineligible for parole until late in life or makes parole difficult but not impossible.

[113] There is question as to whether Graham's "meaningful opportunity to obtain release" language was even adopted by the Supreme Court to apply in this context. See, *United States v. Grant*, 9 F 4th 186, 194, 195 (CA 3, 2021) noting that Miller used the phrase only once—in a quoting parenthetical following a "cf" or "compare" citation to *Graham*. And, *Montgomery* never referred to the phrase.

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imprisoned for the remainder of his life. Defendant has been considered for parole by the Parole Board on a number of occasions. In the discretion of the Board, defendant is not yet suitable for release. The Board's past decisions do not foreclose defendant from again being considered for parole nor his eventual release. Undoubtedly, defendant has been and will continue to be provided opportunities to prove that he is worthy of release and should be granted parole.[114]

Defendant further argues that the Parole Board policies do not adequately take youth into consideration when deciding on whether to allow release to a prisoner serving a parolable Life sentence and, subsequently, do not provide for a realistic opportunity for parole. In *People v. Johnson*,[115] similar to the circumstances involved here, the defendant pleaded guilty to a charge of Second-Degree Murder and was sentenced to a term of parolable Life imprisonment. Following the decisions in *Miller* and *Montgomery*, the defendant was granted relief from the judgment based on a finding that defendant's Life with the possibility of parole sentence was a de facto Life sentence which essentially provided him no meaningful opportunity for parole. The Court recognized that the "essence of defendant's sentence challenge, however, is not that the sentence itself is invalid. Rather, it is that the policies and procedures of the parole board are unconstitutional based on an application of *Miller* and *Graham* to those policies and procedures because they deprive defendant of any real possibility of parole, and

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[114] MCL 791.234(8).

[115] *People v. Michael Johnson*, unpublished opinion COA # 344322 (June 18, 2019).

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hence, do not 'give [juvenile] defendants…some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'"[116] The Court concluded that parole procedures are more favorable for juvenile murderers who were resentenced to a term-of-years sentence for First-Degree Murder than they are for juvenile offenders that were sentenced to a term of parolable Life imprisonment. Yet, the Court held that, since the defendant's dispute was with the Parole Board and not the sentencing court, the appropriate remedy for the defendant's challenge to the Parole Board's policies and procedures was not invalidating the defendant's valid sentence. Instead, the "appropriate vehicle in which to seek redress of the alleged wrong done by the parole board is a claim of relief under 42 USC §1983 filed against the parole board."[117] Citing *Williams*, the Court concluded that, since the defendant's sentence of parolable Life was appropriate under MCL 750.317 and met the demands of *Miller*, the sentence was not invalid and the defendant was not entitled to resentencing.

Defendant relies upon outdated information to support his argument that those opportunities for parole have not been meaningful. Defendant argues that both federal and state courts have noted that the Parole Board has adopted a de factor "life means life" policy. In one of the cases relied upon by defendant, *Foster v. Booker*,[118] the Sixth Circuit commented that only 0.15% of offenders are released on parole each year. The Court reached that number by analyzing statistics from before

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[116] *Id.*, slip at *9.
[117] *Id.*, slip at *9.
[118] *Foster v. Booker*, 595 F2d 353 (CA 6, 2010).

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2005. Numbers from more recent years illustrate that the prospects for a lifer to be released on parole are far better now and the opportunity for parole is far more meaningful.

If a parolable Life sentence ever was the equivalent of a natural Life sentence, the same cannot currently be said today. According to the Michigan Department of Corrections, as of November 29, 2016, there were 1386 offenders in this state serving a Life sentence with the opportunity for parole.[119] In 2011, 27 of the 424 offenders reviewed for parole were released, a rate of 6.4%. In 2012, 15 of 519 offenders reviewed were paroled, a rate of 2.9%. In 2013, 30 of the 388 offenders reviewed were paroled, a rate of 7.8%. In 2014, 25 of 385 offenders were paroled, a rate of 6.5%. In 2015, 38 of 357 offenders reviewed were paroled, a rate of 10.6%. Through the first ten months of 2016, 35 of 343 offenders reviewed were paroled, a rate of 10.2%. In total for these recent six years, 170 of the 2416 offenders reviewed were paroled, a rate of 7.0%.[120] Assuming a stable community of parolable lifers each year, the current rate would mean that 2% of all lifers (whether up for review or not) have been paroled each year during this time.[121] That rate of 2% is

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[119] Statistics as provided to the Michigan Attorney General by the Michigan Department of Corrections. Attempts to obtain more current statistics from the Department of Corrections were unsuccessful.

[120] For comparison, "from 1941 through 1974, only about twelve parole-eligible lifers were paroled a year. From 1975 through 1992, even before this alleged 'life means life' policy was instituted according to defendant, fewer than four parolable lifers were paroled a year. . . However, even after this so-called 'life means life' policy was allegedly adopted in 1992, fourteen parolable lifers were paroled in 1994 and twelve were paroled from 1995 through 1998." *People v. Hill*, 267 Mich App 345, 350-351 (2005).

[121] Calculated by dividing 170 (offenders paroled) by 1386 (total parolable lifers) by 6 (years).

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a thirteen-fold increase over the rate discussed in *Foster*. When those rates are extended over time, a lifer currently serving time in the Michigan Department of Corrections has approximately a 50% chance of being paroled after 25 years of parole consideration.[122]

Certainly, as evidenced by defendant's history to date, there is no guarantee that a prisoner will be paroled within 25 years or even ever. But, a guarantee of parole is not what the Eighth Amendment requires. *Graham* speaks only of a "meaningful opportunity" for parole. When defendant was interviewed for parole in the past and presumptively each time he may be interviewed in the future, he had, based on the rate over a recent six-year period, a 7% chance of being paroled. Based upon the rates in the last two years of that six-year period, defendant had a better than 10% chance of being paroled. Defendant has every reason to expect that he has an objectively reasonably probability of being released on parole within his lifetime. In itself, that defendant has served more than 25 years in the custody of the Michigan Department of Corrections and has yet to be released on parole does not amount to an Eighth Amendment violation. Defendant has been and continues to be provided with realistic and meaningful opportunities to earn parole. It is those opportunities, and not the promise of parole, that are constitutionally required.

[122] Calculated by multiplying 2% (offenders paroled each year) by 25 (years), which equals 50%; or 7% (reviewed offenders paroled each year) by 6 (the number of reviews that will occur over a 26 year period), which equals 42%.

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V.

While *Miller* addressed the need to consider a juvenile offender's youth before sentencing that offender to a term of natural Life, it neither discussed nor required any consideration of youth prior to accepting a guilty plea from an adult. Defendant was an adult at the time he entered his guilty plea. *Miller* does not silently require a court to consider a defendant's youth at the time of the offense before accepting an adult's voluntary guilty plea.

Standard of Review

Defendant failed to preserve his claim by presenting it in his successive motion for relief from judgment in the circuit court. This Court reviews unpreserved claims of error for plain error affecting defendant's fundamental rights.[123]

Discussion

The Court has asked the parties to answer whether, pursuant to Miller and Montgomery, the trial court was required to take the defendant's youth into consideration when accepting his plea and ruling on his motion for relief from judgment.

The Supreme Court did not devote any opinion space in Miller or Montgomery to the question of what standards apply when a court accepts a guilty plea from a juvenile murderer for a crime that mandates a sentence of natural Life imprisonment. Nor did either Court address the standards for accepting a guilty plea on a crime that only carries the possibility of parolable Life imprisonment. The Court's focus was

[123] *People v. Carines*, 460 Mich 750, 764 (1999).

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entirely on the mandatory sentencing schemes at issue before it. The Courts silence on the issue is thus unsurprising. But, the Court's silence is an indication that neither opinion "fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts and since reiterated that guilty pleas are valid if both 'voluntary and intelligent.'"[124] In short, Miller and Montgomery created no requirement on courts to take the defendant's youth into consideration when accepting his plea.

Defendant claims that juvenile offenders categorially lack the capacity of understanding guilty plea proceedings or the complexity of the plea agreements entered. To ensure that these juveniles voluntarily and understandingly enter guilty pleas, defendant asserts that the plea court must consider the *Miller* factors before accepting the plea. Again, defendant's argument suffers factually and legally. First under neither the statutory definition[125] nor the definition applied in *Miller* was defendant a "juvenile" at the time he entered his guilty plea. Defendant was two months shy of his nineteenth birthday at the time of the plea. The cases defendant cites in support of his claim do not discuss the capabilities or inabilities of an eighteen-year old to understand his constitutional rights when entering a guilty plea. Defendant presents no authority that eighteen-year-olds, or any other defendant who has reached the age of majority, categorically lack the ability to understanding and appreciating plea procedures. Even if was assumed that, because defendant was a juvenile under the *Miller* definition at the

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[124] *Brady*, supra at 747.
[125] MCL 712A.1(1)(I).

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time of the murders, he somehow remained a juvenile throughout the court proceedings even after his eighteenth birthday, defendant presents no authority for the proposition that juveniles categorically lack the ability to enter a guilty plea. To the contrary, the Michigan Supreme Court has drafted court rules that specifically allow for pleas by juvenile defendants under the age of 17.[126]

Defendant additionally fails to show that he actually lacked the capacity to understand the plea proceedings. A guilty plea is understanding if the defendant is advised of and understands the rights set forth in MCR 6.302(B). Here, defendant told the court that he was pleading of his own free will. Defendant testified at the plea hearing that he understood his rights and the plea agreement, he indicated that he was not under any pressure to enter a plea, and avowed that he wanted to enter a plea. (7a-10a) Under such circumstances, defendant is held to his record admission.[127] Where a defendant has been found guilty by reason of his own admissions, neither he nor his attorney will be permitted to deny the truth of the prior representations.[128] To return to court and claim his prior representations were untrue indicates that defendant is either unhappy with his possible sentence and is attempted to gain "another shot" by asserting that he lied or is attempting to work the judicial system to his advantage.[129] This Court is barred from

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[126] MCR 3.941.
[127] *People v. Weir*, 111 Mich App 360, 361 (1981).
[128] *People v. Serr*, 73 Mich App 19, 28 (1976).
[129] *People v. Shanes*, 155 Mich App 423, 428 (1986).

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considering argument inconsistent with defendant's own statements at the plea hearing.

> It is the opinion of this court that where a defendant has been found guilty by reason of his own statements as to all of the elements required to be inquired into [] and his attorney has also confirmed the agreement and the defendant has been sentenced, neither he nor his attorney will be permitted thereafter to offer their own testimony to deny the truth of their statements made to induce the court to act. To do so would be to permit the use of its own process to create what amounts to a fraud upon the court. This is based on public policy designed to protect the judicial process.[130]

The plea record fails to reveal any circumstances that would have made the trial court question whether defendant was capable of understanding the plea offer or the proceedings. Defendant's answers to the trial court's questions were appropriate and there is no indication that defendant was confused about what was happening. No basis exists to find that defendant lacked the capacity to understand the plea proceeding and to enter a voluntary, understanding, and knowing guilty plea.

Similarly, Miller and Montgomery expressed no requirement that courts consider the Miller factors when deciding a juvenile murderer's claims of error on collateral review. While a reviewing court certainly would have to consider the Miller factors when determining merits of a Miller claim, there seems to be no rationale for consideration when Miller is not an issue, simply because the defendant might have been a

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[130] *People v. White*, 307 Mich App 425, 430-431 (2014), quoting *Serr*, supra at 28.

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juvenile at the time the offense was committed. But, whatever rationale there might be to require consideration of the Miller factors when deciding a motion for relief, the Supreme Court did not disclose it in Miller or Montgomery and did not sanctify the unspoken rationale as a constitutional requirement. The Court's silence leaves to the states the task of rooting out a valid rationale and incorporating it into its own court rules. This Court has not done that, so no requirement, constitutional or otherwise, has been imposed upon the circuit courts to consider youth when ruling on a motion for relief from judgment

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VI.

Whether constitutionally required or not, the Michigan Parole Board considers a juvenile offender's youth at the time of the offense, and the prisoner's maturity and rehabilitation when deciding whether to provide the prisoner a lifer interview and when deciding whether to grant parole.

Standard of Review

"Matters of constitutional and statutory interpretation are reviewed de novo[,]" as are questions of law.[131]

Discussion

The Court's final question to the parties involves whether the Michigan Parole Board is required to take the prisoner's youth at the time of the offense into consideration when deciding on parole release. Whether required or not, the fact of the matter is that the Parole Board **does** consider the prisoner's youth when deciding whether to grant that prisoner parole release.

In June of last year, the MDOC agreed to settle a pending lawsuit in the United States District Court for the Eastern District of Michigan: *Chmielewski v. MDOC*. In exchange for Plaintiff releasing all claims against the Defendants, the MDOC agreed to "modify its policies and procedures for lifer interviews and parole eligibility for all offenders who committed their offenses prior to the age of eighteen (18)." Specifically, in deciding whether to grant or deny a lifer interview, the Parole Board shall consider as mitigating factors for a prisoner serving for a crime

[131] *People v Skinner*, 502 Mich 89, 99, 137 n 27 (2018).

committed prior to the age of eighteen: (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). 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 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." And, in deciding whether to grant or deny parole for a prisoner serving a sentence (not limited to only Life terms) for a crime committed prior to the age of eighteen, the Parole Board shall consider the same mitigating factors previously listed. On October 4, 2001, these amendments went into effect. (119a-127a)

If there was any question previously as to whether a lifer's youth at the time of the offense was a consideration in granting or denying an interview or in granting or denying parole release, that question has been definitively answered. Moving forward, defendant's youth at the time of the offense will be a consideration for the Parole Board when deciding whether to interview him for parole consideration. If the Board decides not to grant an interview, the Board must provide defendant with an explanation of the factors that were considered and what corrective action defendant may take to improve the probability of being granted parole in the future. If the Board proceeds to a consideration of whether defendant should be released, the same mitigating factors of youth must again be considered. The Parole Board undoubtedly will

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consider defendant's youth at the time of the murders in considering the opportunity for parole release. If defendant is unsatisfied by this consideration, he is welcome to, like the Plaintiff in *Chmielewski v. MDOC*, file suit against the MDOC to have the policy and procedures changed.

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RELIEF

THEREFORE, the People request that this Honorable Court affirm defendant's convictions and sentences.

Respectfully submitted,

KYM WORTHY
Prosecuting Attorney
County of Wayne

/s/ *Jon P. Wojtala*

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Dated: January 18, 2022

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with AO 2019-6. The body font is 12 pt. Century Schoolbook set to 150% line spacing. This document contains 14,770 countable words.

/s/ *Jon P. Wojtala*

JON P. WOJTALA (P49474)
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