STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan

Plaintiff-Appellee,

v.

John Antonio Poole

Defendant-Appellant.

Supreme Court No. 161529
Court of Appeal No. 352569
Circuit Court No. 02-000893-02-FC

Filed under AO 2019-6

Mr. Poole's Reply Brief

Maya Menlo (P82778)
Assistant Defender
State Appellate Defender Office
3031 West Grand Blvd, Suite 450
Detroit, Michigan 48202
(313) 256-9833
mmenlo@sado.org

Counsel for John Antonio Poole

Date: February 8, 2022

Table of Contents

Index of Authorities

Cases **Page(s)**

Statutes and Constitutions

Rules

Other Authorities

Arguments

I. The Michigan Court Rules, MCR 6.502(G)(2)-(3), permit Mr. Poole's motion.

Mr. Poole overcomes the procedural hurdle for successive motions for relief from judgment in two distinct ways: (1) his motion is based on a retroactive change in law and, alternatively, (2) his motion is based on a claim of new evidence, specifically "changes in a field of scientific knowledge". MCR 6.502(G)(2); MCR 6.502(G)(3)(a).

In his supplemental brief, Mr. Poole presents the modern science of adolescent brain development, which has enjoyed enormous advances in recent years. The number of scientific publications on adolescent brain development increased ten-fold from 2000 to 2016, with the bulk of the new publications in 2010 or later.[1] The prosecutor's brief does not dispute that Mr. Poole's motion is based on a new claim of evidence. Mr. Poole meets the requirements of MCR 6.502(G)(2) given his new evidence claim alone.

Turning to the retroactive change in law, Mr. Poole's motion is based on the law of *Miller*: that the transient immaturities of youth render mandatory life without parole unconstitutional, even for the crime premeditated murder. 567 US 460, 479-480 (2012). Prior to *Miller*, the United States Supreme Court had not addressed whether mandatory LWOP for the crime of murder could ever be unconstitutional for any group. Mr. Poole requests relief from this Court based on this pivotal change in law, which *Montgomery* made retroactive. 577 US 190 (2016).

a. *Based on* means *based on*.

This Court interprets court rules using their plain language and, where necessary, dictionary definitions. *People v Petit*, 466 Mich 624 (2002); *Grievance Administrator v Underwood,* 462 Mich. 188, 194

[1] Spear & Silveri, *Special Issue on the Adolescent Brain*, 70 Neuroscience and Biobehavioral Reviews 1, fig 1 (2016), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5605811/

(2000); *McAuley v General Motors Corp.*, 457 Mich 513, 518 (1998). The prosecutor urges this Court to depart from this established practice and instead replace words in our court rules with terms from federal statutes. But federal statutes are inapplicable. This Court should adopt Justice Clement's interpretation of MCR 6.502(G)(2) and "avoid reading 'based on' as a high bar." *People v Manning*, 506 Mich 1033 (2020) (Clement, J., concurring).

In Section I of its brief, which Mr. Poole incorporates by reference, Amicus Curiae Criminal Defense Attorneys of Michigan explains that the plain language of MCR 6.502(G)(2), the context of the rule, and the relevant caselaw support reading *based on* to mean that a claim is derived from the retroactive change in law, or that the change in law provide the claim's foundation.[2]

If this Court intended for MCR 6.502(G)(2) to require a claim to be *governed by* a retroactive change in law, it would have said so. Indeed, the term *governed by* appears 118 times in the Michigan Court Rules. When this Court uses *based on*—81 times in the Court Rules—it means *based on*.

b. Federal habeas corpus caselaw is inapposite.

The prosecution recognizes that a majority of this Court interprets MCR 6.502(G)(2) to authorize Mr. Poole's successive motion for relief from judgment and therefore concedes its procedural argument is a "lost cause". Appellee's Supplemental Brief, p 6 n 3; see also *Id.*, p 3-4 n 2. Nevertheless, the prosecution invites this Court to change course and graft federal habeas corpus requirements onto the Michigan Court Rules. As it has before, this Court should decline this invitation. Compare 758a (Comment on ADM 2014-46 by Prosecuting Attorneys Association of Michigan, suggesting this Court modify MCR 6.508(D)(2)

---

[2] See, e.g., p 9 ("Reading the 'change in law' portion of the rule to require an automatic entitlement to relief, but reading the 'new evidence' portion of the rule to not require an automatic entitlement to relief cannot be squared with this Court's command that court rules 'are to be construed to secure simplicity in procedure, [and] fairness in administration.' MCR 6.002.").

to incorporate the language of 28 USC 2255(h)(1)) with 759a (Administrative Order No. 2014-46, which uses language entirely different from 28 USC 2255).

The federal habeas statutes are designed to place severe limitations on federal courts in disturbing state court judgments. By contrast, MCR 6.500 *et seq*. intentionally provides a different, broader path to relief. The life cycle of a successive motion for relief from judgment differs from a habeas petition from the outset: the certification requirement that applies to successive habeas petitions does not apply to successive motions for relief from judgment. 28 USC 2244(b)(3). And while 28 USC 2254(b)(1) requires a change in law to have been explicitly "made retroactive to cases on collateral review by the Supreme Court," MCR 6.502(G)(2) simply states that a defendant may file a successive motion "based on a retroactive change in law that occurred after the first motion for relief from judgment was filed." Further, the Michigan Court Rules specify that "new evidence" sufficient to file a successive 6.500 motion includes evidence "in a field of scientific knowledge, including shifts in scientific consensus". MCR 6.502(G)(3)(a). No such language appears in 28 USC 2254 or 28 USC 2255.

The prosecution relies heavily on *In re Rosado*, 7 F4th 152 (CA 3, 2021). But the Third Circuit Federal Court of Appeals opinion on a successive habeas petition is inapplicable to Mr. Poole's motion for relief from judgment filed in state court, particularly with respect to Mr. Poole's state constitutional claim. *People v Betts*, 507 Mich 527, 541 (2021).

Before reaching the merits, the *Rosado* court held that Rosado's successive habeas petition was untimely due to the one-year filing deadline outlined in 28 USC 2244(d)(1). *Rosado*, 7 F4th at 157. The absence of such a deadline from the Michigan Court Rules is yet another example of how our state system of collateral review differs intentionally from its federal analogue. Federal habeas is a red herring.

II. It is the province of this Court to determine that Const 1963, art 1, § 16 prohibits Mr. Poole's mandatory life without parole sentence.

It is the legislature's responsibility to codify punishments. But those punishments are subject to review by the judiciary. It is up to this Court to interpret Michigan's Constitution and to determine whether a punishment is consistent with society's evolving standards of decency. See, e.g., *Trop v Dulles*, 356 US 86, 101 (1958); *People v Lorentzen*, 387 Mich 167, 178-179 (1972). See also *Crowell v Benson,* 285 US 22, 60 (1932) (in cases involving the enforcement of constitutional rights, the judicial power "necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function").

On occasion, the legislature must modify sentencing schemes to comport with the judiciary's constitutional determinations. The Michigan Legislature's actions after *Miller* are an example. In response to the United States Supreme Court's ruling, the Michigan Legislature passed 2014 PA 22, which enacted MCL 769.25 and MCL 769.25a. The Michigan Legislature drew the line at 18 years not based on its own findings, but rather in response to the United States Supreme Court, going so far as to incorporate citations to *Miller* into the statutes. See MCL 769.25(6); MCL 769.25a(2)-(3). The Legislature also printed into MCL 769.25a(2)-(3) its deference to the courts on the question of retroactivity. *Id.*

a. *Or* means *or*.

The prosecution urges this Court to overrule *People v Bullock*, 440 Mich 15 (1992), and hold that Const 1963, art 1, § 16 is coextensive with

the Eighth Amendment.[3] In support, the prosecution posits that, since Congress used the phrase "no cruel or unusual punishments" in the Northwest Ordinances of 1787 and 1789, but used the phrase "no cruel and unusual punishments" in the 1789 resolution proposing the Bill of Rights, *or* must be synonymous with *and*. This is unconvincing, especially when interpreting the Michigan Constitution, a document drafted more than sixty years later by different framers.

Other provisions in the 1850 Constitution shed light. Consider, for instance, Const 1850, art VI, § 24: "Any suitor in any court of this State shall have the right to prosecute or defend his suit, either in his own proper person, or by an attorney or agent of his choice." There, the Michigan framers used the disjunctive *or* three times in a row.

In Const 1850, art VI, § 26, the framers demonstrate their understanding of *and* and *or* as conjunctions with distinct meanings: "The person, houses, papers, and possessions of every individual shall be secure from unreasonable searches and seizures; and no warrant to search any place or to seize any person or things, shall issue without describing them, nor without probable cause, supported by oath or affirmation." Indeed, the prosecutor does not identify any other sections of the Michigan Constitution where *or* can or should be interpreted to mean *and*.

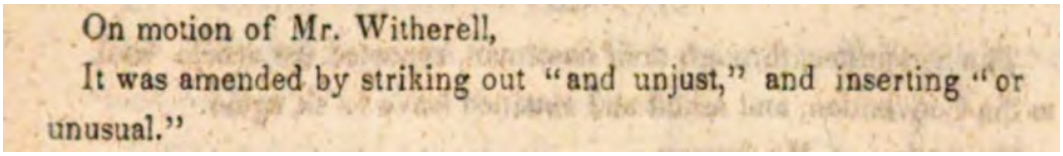
There is ample evidence that, in 1850, when Michigan adopted its prohibition of cruel or unusual punishment, *or* was understood to provide alternatives. A grammar textbook published in 1850 used this example: " 'Belladonna *or* arsenic will kill a man.' Here the *or* shows that *one* will do it; it is not necessary to join them. Hence these words may be

---

[3] The prosecution does not address that the holding in *Bullock* relied on this Court's now 50-year-old opinion in *Lorentzen*, which acknowledged the Michigan Constitution's "prohibition of punishment that is unusual but not necessarily cruel". 387 Mich at 172. The relevant factors—the practical workability of *Bullock*/*Lorentzen*, reliance interests, the lack of relevant changes in the law or facts—counsel in favor of applying stare decisis. *City of Coldwater v Consumers Energy Company*, 500 Mich 158, 173 (2017).

called *Disjunctive Conjunctions*."[4] An estate law treatise published in 1826 explained that "the word 'or' is a disjunctive, and not to be taken as a copulative, but where it would make the whole clause nonsense to construe it otherwise, and where there is an absolute necessity for doing so." William Ward, *A Treatise on Legacies Or Bequests of Personal Property*, at 224 (J.S. Littell 1826).

It was with this disjunctive understanding of *or* that the 1850 Constitutional Convention adopted the proposed amendment by then-judge and later Michigan Supreme Court Justice Benjamin Witherell to strike "and unjust" and insert "or unusual":


On motion of Mr. Witherell,
It was amended by striking out "and unjust," and inserting "or unusual."

Report of the Proceedings and Debates in the Convention to Revise the Constitution of the State of Michigan, at 67 (1850).[5] And, though it was replaced, the Michigan framers' use of the word *unjust* rather than *unusual* during drafting demonstrates their willingness and intention to depart from the language used in federal governing documents. The use of the disjunctive in the 1850 Constitution was no mistake. Nor were Michigan's reenactments of the provision in 1908 and 1963.

In their book on interpreting legal texts, Justice Scalia and grammarian Bryan A. Garner explain, "The conjunctions *and* and *or* are two of the elemental words in the English language. Under the conjunctive/disjunctive canon, *and* combines items while *or* creates

---

[4] William C. Goldthwait, *A Treatise Upon Some Topics on English Grammar, with Selections for Analysis, Recitation & Reading: Designed for Schools*, at 57 (H.S. Taylor 1850) (emphasis in original), available at https://play.google.com/books/reader?id=f4sXAAAAYAAJ&pg=GBS.PA56&hl=en

[5] Available at https://babel.hathitrust.org/cgi/pt?id=mdp.39015071175213&view=1up&seq=7

alternatives. Competent users of the language rarely hesitate over their meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 12, at 116 (2002). Today, as in the mid-1800s, schoolchildren and scholars agree that *or* means *or*.

b. Cruel and unusual are distinct concepts.

The prosecution quotes three law review articles to support its contention that "cruel and unusual" and "cruel or unusual" were intended to have the same meaning. Appellee's Supplemental Brief, p 25-26 n 48-50. But all three articles rebut the prosecution's position.

Professor Tom Stacy rejects the United States Supreme Court's position in *Harmelin v Michigan*, 501 US 957 (1991), that "an unconstitutional punishment must be both cruel and unusual, just as the literal text [of the federal Eighth Amendment] provides," and explains, "An inflexible textual requirement that an unconstitutional punishment be both cruel and unusual would make little sense as a matter of either interpretation or principle. Contrary to Justice Scalia's view, historical evidence ranging from the English Bill of Rights to the first federal criminal code reveals that the Framers endorsed proportionality on both subconstitutional and constitutional levels." *Cleaning Up the Eighth Amendment Mess*, 14 Wm & Mary Bill Rts J 475 (2005).

Likewise, Professor John D. Bessler distinguishes between cruel and unusual: "executions are cruel—and were, in fact, labeled as such long ago, even by some of America's founders—and have, over time, become unusual." *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 Brit J Am Legal Stud 297, 310 (2013). He goes on to explain, "The concepts of cruelty and unusualness, linked together like a chain and related to one another in at least some fashion, do, of course, have separate meanings, as English dictionaries have long shown." *Id*. at 314. Professor Bessler quotes *Harmelin* for the proposition that "cruel *or* unusual" is "more expansive wording" than US Const, Am VIII. *Id*. at 303 n 31 (quotation marks and citation omitted).

Finally, Robert Casale and Johanna Katz write, "Interestingly, our research suggests that the terms 'cruel' and 'unusual' were intended to

safeguard against related but different evils." *Would Executing Death-Sentenced Prisoners After the Repeal of the Death Penalty Be Unusually Cruel Under the Eighth Amendment?*, 86 Conn B J 329, 331 (2012). They explain that "the term 'unusual' was neither without independent meaning in the English Bill of Rights nor constitutional surplusage in the Eighth Amendment." *Id*. at 336.

c. As this Court has recognized, compelling reasons exist to interpret Const 1963, art I, § 16 differently from US Const, Am VIII.

The textual difference between Const 1963, art I, § 16 and US Const, Am VIII is a critical factor in this Court's determination of whether to interpret the Michigan Constitution differently from its federal counterpart. *People v Goldston*, 470 Mich 523, 534 (2004) (listing factors), citing *People v Collins*, 438 Mich 8, 31 n 39 (1991) So, too, is Michigan's common law. *Id*. See *Lorentzen*, 387 Mich 167; . See also *People v Steanhouse*, 500 Mich 453, 472 (2017) ("The principle of proportionality has a lengthy jurisprudential history in this state.").

This Court also considers the state's constitutional history and "the state law preexisting adoption of the relevant constitutional provision." *Goldston*, 470 Mich at 534. Michigan first adopted its ban on cruel or unusual punishment against the backdrop of two abolition movements in our state—the movements to end slavery and to ban capital punishment. In 1835, Michigan adopted a constitutional prohibition against slavery and involuntary servitude, Const 1835, art XI § 1, thirty years before the Thirteenth Amendment was ratified. In 1847, Michigan was the first state and the first government in the English-speaking world to abolish capital punishment for first-degree murder. David G. Chardavoyne, *A Hanging in Detroit: Stephen Gifford Simmons and the Last Execution Under Michigan Law*, (Detroit: Wayne State University Press, 2003) ch 9, p 157. By the Constitutional Convention of 1850,

Michigan was no stranger to adopting liberty protections broader than those afforded by the federal government.[6]

Finally, Michigan's longtime emphasis on rehabilitation weighs in favor of interpreting Const 1963, art I, § 16 more broadly than US Const, Am VIII. See *Goldston*, 470 Mich at 534 (listing "matters of peculiar state or local interest" as a factor to consider). "Michigan has long recognized rehabilitative considerations in criminal punishment by sanctioning indeterminate sentences." *Lorentzen*, 387 Mich at 179. The 1850 Constitutional Convention reflected Michigan's emphasis on rehabilitation. *Report of the Proceedings and Debates in the Convention to Revise the Constitution of the State of Michigan*, at 297-298, 352, 475-476 (1850) (commentary by delegates Justice Witherell, Joseph H. Bagg, DeWitt C. Walker, Ebenezer Raynale, Isaac E. Crary, and Alfred H. Hanscom).

d. Proportionality and the evolving standards of decency require relief for Mr. Poole.

Const 1963, art I, § 16 has a unique feature—it is intended to evolve over time to keep pace with society's standards of decency. "The decency test, of necessity, looks to comparative law for guidelines in determining what penalties are widely regarded as proper for the offense in question." *Lorentzen*, 387 Mich at 179. Mr. Poole's supplemental brief offers comparisons to other Michigan laws and to punishments in other states; these indicate that society's standards are to consider young adults' vulnerabilities and rehabilitative potential before imposing harsh penalties.

This Court has interpreted the prohibition on cruel or unusual punishment to include a prohibition on "excessive" or "disproportionate" sentences. *Lorentzen*, 387 Mich at 172; *Bullock,* 440 Mich at 37. See also *Steanhouse*, 500 Mich at 472-473. This "prohibition is progressive"—in other words, it " 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.' " *Lorentzen*,

---

[6] See Brief of Amicus Curiae Criminal Defense Attorneys of Michigan, p 22-30, for a discussion of state-specific historical context.

387 Mich at 178, quoting *Weems v United States*, 217 US 349, 378 (1910). The prohibition on excessive sentences " 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' " *Lorentzen*, 387 Mich at 178-179, quoting *Trop v Dulles*, 356 US 86, 101 (1958).

This Court should stand by its opinion in *Bullock*:

> While two members of the *Harmelin* majority maintained that the historical circumstances and background of the adoption of the Eighth Amendment preclude the notion that the federal clause contains a "proportionality principle," . . . such a conclusion cannot be reached with regard to the framing and adoption of the Michigan Constitution of 1963.

440 Mich at 27.

Modern scientific research demonstrates that young adults' brains are not fully developed; they share the traits that mitigate juveniles' culpability. See Mr. Poole's Supplemental Brief at p. 11-21. Legislatures and courts have recognized that young adults are vulnerable and deserve special protection. *Id*. at 21-24; 25-32. Mr. Poole's youth and his individual circumstances are necessary considerations at sentencing. His mandatory LWOP sentence is disproportionate and violates the Michigan Constitution's ban on cruel or unusual punishment.

Relief Requested

For the reasons set forth above, John Antonio Poole respectfully requests this Court:

a. Hold that Mr. Poole was permitted to file the instant successive motion for relief from judgment and appeal its denial;

b. Remand for resentencing on Mr. Poole's first-degree murder conviction, where the sentencing court shall consider Mr. Poole's youth and attendant characteristics and shall have discretion to impose a term-of-years sentence or LWOP.

c. Hold that, when a person was 18 years to 25 years old at the time of their crime, the sentencing court must consider their youth and attendant characteristics before deciding whether to impose a term-of-years sentence or LWOP; and

If this Court feels it cannot grant the relief described above, Mr. Poole alternatively requests this Court remand for an evidentiary hearing where the circuit court shall determine whether Mr. Poole's youth and attendant characteristics are mitigating and, if they are, shall resentence Mr. Poole with the discretion to impose a term-of-years sentence or LWOP.

Respectfully submitted,

State Appellate Defender Office

/s/ *Maya Menlo*
Maya Menlo (P82778)
State Appellate Defender Office
3031 West Grand Blvd, Suite 450
Detroit, Michigan 48202
(313) 256-9833
mmenlo@sado.org

Date: February 8, 2022

Certificate of Compliance

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 3,163 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

/s/ Maya Menlo
Maya Menlo (P82778)
State Appellate Defender Office
3031 West Grand Blvd, Suite 450
Detroit, Michigan 48202
(313) 256-9833
mmenlo@sado.org