No. _____

State of Michigan
In the Supreme Court

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

EFRÉN PAREDES JR,

Defendant-Appellant.

On Appeal from the Court of Appeals
Court of Appeals No. 359130
Berrien Circuit No. 1989-001127-FH
Hon: Charles T. LaSata

APPLICATION FOR LEAVE TO APPEAL

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RECEIVED by MSC 9/18/2023 10:51:43 AM

TABLE OF CONTENTS

RECEIVED by MSC 9/18/2023 10:51:43 AM

RECEIVED by MSC 9/18/2023 10:51:43 AM

RECEIVED by MSC 9/18/2023 10:51:43 AM

RECEIVED by MSC 9/18/2023 10:51:43 AM

STATEMENT OF QUESTIONS INVOLVED

I. DID THE TRIAL COURT ERR, IN CONSIDERING HIGHLY DISPUTED EVIDENCE THAT MR. PARADES WAS INVOLVED WITH A STRATEGIC THREAT GROUP, TAMPERED WITH A WITNESS, OR ENGAGED IN AN ATTEMPT AT IDENTITY THEFT IN THE 1990S WHERE THE STATE DID NOT PRODUCE EVIDENCE THAT THESE EVENTS OCCURRED; ONLY EVIDENCE THAT THE DEPARTMENT INVESTIGATED BUT DID NOT ESTABLISH THESE FACTS IS NOT EVIDENCE THAT THEY OCCURRED?

The Defendant-Appellant answers, "Yes."
The People will probably answer, "No."

II. WHETHER THE TRIAL COURT ERRED IN RULING THAT EFRÉN PAREDES SHOULD AGAIN BE SENTENCED TO LIFE IMPRISONMENT WITHOUT PAROLE WHERE HE WAS JUST FIFTEEN AT THE TIME OF THE OFFENSE AND WHERE HE HAS A LONG HISTORY AND IMPRESSIVE HISTORY OF PRISON ACCOMPLISHMENTS TO SHOW HE WAS CAPABLE OF REHABILITATION AND NOT

IRREPERABLY CORRUPT?

The Defendant-Appellant answers, "Yes."
The People will probably answer, "No."

III. **DOES THE MICHIGAN CONSTITUTION IMPOSE A HIGHER STANDARD THAN MILLER V ALABAMA CATEGORICALLY BAR JLWOP SENTENCES FOR MINORS WHO HAVE COMMITTED FIRST DEGREE MURDER?**

The Defendant-Appellant answers, "Yes."
The People will probably answer, "No."

IV. **SHOULD THIS CASE BE REASSIGNED TO A DIFFERENT JUDGE ON REMAND WHERE TRIAL JUDGE'S RESENTENCING UNDER THE NEW TAYLOR STANDARD WAS NEARLY A WORD-PER-WORD REPEAT OF HIS PRIOR SENTENCE?**

The Defendant-Appellant answers, "Yes."
The People will probably answer, "No."

RECEIVED by MSC 9/18/2023 10:51:43 AM

RECEIVED by MSC 9/18/2023 10:51:43 AM

TABLE OF AUTHORITIES

Cases

RECEIVED by MSC 9/18/2023 10:51:43 AM

RECEIVED by MSC 9/18/2023 10:51:43 AM

RECEIVED by MSC 9/18/2023 10:51:43 AM

Statutes

Rules

Other Authorities

RECEIVED by MSC 9/18/2023 10:51:43 AM

RECEIVED by MSC 9/18/2023 10:51:43 AM

JURISDICTION

Defendant was convicted by jury of first-degree murder in 1989 for a crime committed when he was 15. His original appeal and subsequent 6500 were unsuccessful. A resentencing hearing was held pursuant to *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012). On September 10, 2021, Judge Charles L. LaSata found that Defendant would again be sentenced to life imprisonment without parole and officially so sentenced him on October 22, 2021, (App. 33a). As part of these hearings, per the parties' stipulation, also on October 22, 2021, the Court ordered that the premeditated and felony murder convictions be consolidated into one count and that the accompanying armed robbery conviction be conditionally vacated to be reinstated only if Defendant's murder conviction was ever vacated. The claim of appeal as to the life sentence on the consolidated murder conviction was filed within 56 days of resentencing on November 1, 2021.

The Court of Appeal after hearing oral argument, remanded for resentencing under the *People v Taylor* standard on March 16, 2023 [1] The Court retained jurisdiction, (App. 1a).

Following the remand, the Court granted Defendant permission file a supplemental brief. This brief was filed on July 20, 2023 contemporaneous with the motion. The Court of Appeals reaffirmed the Trial Court on July 27, 2023, (App 1a). No oral arguments were held and the prosecution filed no response. This appeal follows within 56 days of that date.

[1] *People v Taylor*, 510 Mich 112; 987 NW2d 132 (2022).

RECEIVED by MSC 9/18/2023 10:51:43 AM

RECEIVED by MSC 9/18/2023 10:51:43 AM

STATEMENT OF FACTS

This is an appeal of the resentencing of a juvenile convicted of first degree murder to a life sentence without the possibility of parole.

Defendant's conviction arose from the murder of Richard Tetzlaff on March 8, 1989, during a robbery of Vineland Foodland, a supermarket in St. Joseph Township, Michigan. He was fifteen years old at the time of the murder and robbery and worked as a bagger at the store.

A. *The 1989 Trial*

On Monday evening, March 6, a group of boys including Efrén Paredes, Jason Williams, Eric Mui, and Alex Mui were riding around together. Eric Mui had brought a gun that his brother, Alex Mui, stated he had gotten in Chicago the previous December, (TT V, 926). During this ride, the testimony was the boys were passing the gun around and Mr. Paredes said that he had the keys to the register and he was going to rob Vineland and kill the manager. During this ride Jason Williams loaded the gun, (TT V, 932). They drove by the store several times and were seen by the neighbors.

On Wednesday, Efrén was working until close. He called his mother and said that he would be working slightly late. Eric gave the gun to Efrén the night of the murder, (TT V, 941). Alex drove up at five to nine to pick Efrén up and he told him to come back later as he was still working. Alex picked Efrén up from the store in Eric's car a few minutes later, (TT V, 941). Efrén came out and said he had done it. Alex asked him if he was crazy. Efrén then said he had forgotten the money and went back in for it, (TT V, 941). He told Alex that he had called Rick into the locker room with the paging system and shot him when he came back. Efrén put the gun on the dashboard (TT V 946).

Andy Dura had not been previously involved in any of the conversations regarding the robbery or murder. The morning afterward he was sleeping when Alex came to his house with a gym bag. The next day Eric picked him up from school and gave him a gun. He then looked in the gym bag and there were cartridges, used bullets and a box. The following week Alex came over and put a brown paper bag in the gym bag, (TT IV, 727). He told two friends that if anything happened to him Eric and Alex had killed him, (TT IV, 744).

After the murder keys were found in Efrén's bedroom by his stepfather, (TT IV, 774). Efrén stated he found them at school and meant to return them, (TT IV, 777). He later returned them to the principal where they disappeared from the lost and found, (TT IV 803-807). His stepfather also found $2000.00 in the rafters which was turned over to the police through their lawyer, (TT IV, 780-782).

B. *The Original Sentencing*

Mr. Paredes was convicted by jury of pre-meditated murder, felony murder, and armed robbery. The law then allowed the sentencing judge two choices on the murder charges, to sentence the Defendant as a juvenile or as an adult to the mandatory sentence of life imprisonment without the possibility of parole. Mr. Paredes was sentenced as an adult. His appeals were unsuccessful.

Alex Mui, who testified against Mr. Paredes was sentenced as an adult to 18-45 years. His brother Eric who was seventeen and thus legally an adult for criminal law purposes, did not testify against Paredes. Still, he eventually pled guilty and was also sentenced to 18-45 years. Jason Williams, who was only involved on Monday night received six months in a juvenile facility on a weapons charge.

C. *The Miller Proceedings*

RECEIVED by MSC 9/18/2023 10:51:43 AM

RECEIVED by MSC 9/18/2023 10:51:43 AM

After the holdings in *Miller v Alabama* and *Montgomery v Louisiana,* each county needed to decide if they would accept a lesser sentence for each involved Defendant or if they would argue for a continuation of the mandatory sentence. The People of Berrien County chose to argue for a resentencing to life in prison.

In October of 2021 the Court held a two-day hearing. Counsel stated in opening arguments that while the Defendant has always maintained his innocence, since this was a sentencing hearing, it would be conducted without reference to the possibility of Defendant's innocence.

The People called a single witness. Berrien County Detective Sergeant Michael Dannefell retired in 2011 but continued to work for them part-time (HT I, 12-13). He stated that he investigated juvenile lifers for Berrien County and had investigated Mr. Paredes. He indicated that he had worked in the Berrien County jail early in his career but had never worked or had training in a prison environment, (HT I – 32). He went through Mr. Paredes's family history and his file with the Michigan Department of Corrections. The following table highlights some of his concerns and the Defense's response to these. The table also refers to the Defense testimony of Mr. Paredes, Daniel Manville, and Richard Stapleton. Neither Mr. Manville nor Mr. Stapleton knew Mr. Paredes. Mr. Manville represented a number of the members of the Melanic Islamic House of the Rising Sun (not including Mr. Paredes who renounced membership).

Mr. Stapleton is the retired long-time Administrator of Legal Affairs for the Department of Corrections and was called for his knowledge of Department of Corrections policies and procedures. He does not know Mr. Paredes and none of his comments reflect actual knowledge of the events of Mr. Paredes misconducts. Mr Stapleton stated that he retired in 2011. At that time he was responsible for how the disciplinary process worked. He stated that since 2010 tickets have been classified as Level 1, 2, and 3 instead of the old classifications of

major and minor. Both levels 1 and 2 are majors, but Level 1 are tickets such as drugs that are predictors of recidivism and Level 2 have to do with prison discipline such as disobeying a direct order. The standard of proof for all tickets is preponderance of the evidence, (HT II, 46-47) . The average inmate gets around two tickets a year (HT II ,56). Inmates are found guilty approximately 95% of the time (HT II, 62). The list of misconducts is as follows:

Dannefell (HT I)	**Paredes (HT II)**	**Other witnesses**
24 – (2000) Was a member of the Melanic Islamic House of the Rising Sun group which was termed a threat group. He was given an opportunity to leave in January of 2000 and did not leave until July of 2000. 30- This was a Strategic Threat Group (STG). 32- It was considered a religion until just before Mr. Paredes was informed that it would be considered a strategic threat group. No misconduct ticket ever issued.	131 – he was attracted to their religious teachings early in his prison years because the teachings were not set in stone. You could write articles and bring new ideas. 132 – he never attended a single meeting with them that was not an authorized service for which he was called out. No one was notified that the religious services had been terminated until the day of the Security Threat designation. 133 – He never received any misconducts from his relationship with them. He was designated a spiritual advisor to share messages of hope. 134- Once they were designated his involvement ended. He renounced the same day he was told and given the correct form (January 18, 2000) but the inspector did not approve until six months later after feeling assured he was no longer involved.	**Daniel Manville** – 30 (HT II, 30) Professor of Law at University of Michigan who represented the Melanic Muslims from the very late 80s until they lost the appeals as to being a STG. 32- for some time it was recognized as a religion by the DOC and had about 1100 members. In 2000 it was designated a STG. The leaders were sent to federal prison and none of them has ever been sent back to Michigan. 35- since litigation was pending until 2001 they were not pressing people hard to renounce. Once a renunciation is signed it goes to the warden, then the Deputy Director of Corrections and renunciation is not accepted until then.

RECEIVED by MSC 9/18/2023 10:51:43 AM

Dannefell (HT I)	Paredes (HT II)	Other witnesses
26 – (1991) Involved in a suspected plot to kill the Muis and put into administrative segregation. 32 - No misconduct ticket ever issued.		**Dennis Watson** (Defense Exhibit Book #10). He sent letter to Muis without Paredes knowledge and even then was only looking for an exculpatory affidavit (discussed at 32-33) **Stapleton**, (HT II, 54) they will put someone in administrative segregation on as little as a rumor if they believe that someone may be in danger.
27 (1991) person on his visiting list had the social security number and credit card of a staff member. Staff did not believe it was a coincidence – No misconduct ticket ever issued.		**Stapleton** (HT II, 50) If they believe a felony has been committed they are required to report it to police.
27 (1993) Unauthorized occupation of a room	77-78 - Guilty	**Stapleton,** (HT II, 50). This normally involves entering another inmate's cell with their consent.
28 (1994) found guilty of two gambling tickets one involving currency the other involving possession of gambling paraphernalia	78 - Guilty. Included possession of a $20.00 bill.	
28 (1995) sexual misconduct for fondling the breast of his then girlfriend (later first wife) – Helen Brown 44 – appears was consensual	Guilty	**Stapleton (HT II, 52).** By definition sexual misconduct is always consensual. Non-consensual is sexual assault.

RECEIVED by MSC 9/18/2023 10:51:43 AM

Dannefell (HT I)	Paredes (HT II)	Other witnesses
28 (1995) investigated for a plot to riot along with other inmates. No misconduct ticket ever issued. He was transferred. 41- did not receive a ticket. Transfer was lateral.		**Stapleton (HT II, 47).** Incitement to Riot is a non-bondable offense and must be written up if seen by guard. If found not guilty there should be no reference whatsoever in the file. Normally it would be a transfer to a level 5 security and even with minor involvement a lateral transfer would be unusual but possible.
28-29 (1995) substance abuse misconduct ticket apparently for refusing a drug test.	79 - Guilty but the name doesn't describe the offense which is not refusing the test but being unable to urinate within one hour of being told to take a test. Never had a positive test for drugs	**Stapleton,** (HT 51). An inmate receives a ticket for substance abuse if they cannot urinate within one hour of a random order to take a test. If someone is on the list for having not taken one they will be on a non-random list to be tested again shortly thereafter.
29 (1998) investigated for selling a booklet to other inmates through his wife. No misconduct ticket ever issued.		
30 (2009) – Convicted of assault and battery, disobeying a direct order, and possession of dangerous contraband, to wit, a broadband internet card. 39 – police investigated his searches and found them about baby cribs; cars, Latinos in jail and legal research.	79 - Guilty of all counts while working in Braille lab. Assault and battery was pushing the guard's hand away while trying to hide what he was doing. Did not own the broadband card but was using it so was guilty. An inspector came up and grabbed his arm and he pulled away. He was behind him the entire time and he wasn't even standing.	**Stapleton** (HT II, 53) Q. Under that — under the elements of the physical resistance, physical touching, it's not consensual. To tap a staff member on the shoulder while talking to them can amount to an assault and battery as a non-consensual contact.

RECEIVED by MSC 9/18/2023 10:51:43 AM

Dannefell (HT I)	Paredes (HT II)	Other witnesses
31 (2015) Possession of Cell phone	(HT II, 80) Guilty but used it only to talk to his wife and other family members	**Burgos** (71) the price of prison phone calls is extremely high and the vast majority of inmates with them use them just so they don't have to pay the crazy prices.
31 (2015) Refusal to submit to drug test	**79** - Guilty but the name doesn't describe the offense which is not refusing the test but being unable to urinate within one hour of being told to take a test. Never had a positive test for drugs	**Stapleton, (HT 51**). An inmate receives a ticket for substance abuse if they cannot urinate within one hour of a random order to take a test. If someone is on the list for having not taken one they will be on a non-random list to be tested again shortly thereafter**.**
31 (2016) Possession of Cell Phone	80 - Guilty but used it only to talk to his wife and other family members	**Burgos** (71) the price of prison phone calls is extremely high and the vast majority of inmates with them use them just so they don't have to pay the crazy prices.

Defendant called several witnesses. Jose Burgos was also a juvenile lifer convicted of first-degree murder, felony murder, armed robbery, and assault to commit murder, (HT 67) . He was released in 2018 and is currently working for the State Appellate Defender's office, preparing re-entry plans and assisting with parole plans for clients being re-sentenced, (HT, 66). Mr Burgos testified that he met Mr. Paredes when they were both in prison and where Mr. Paredes had been transferred to help start the Braille program. He was always positive and always helpful. He never saw him act violently, (HT, 70).

The next several witnesses were character witnesses. Angelina Ruiz, Arielle Brandy, and Isaac Ruiz were family members who testified to both his character and to his continued closeness to his family. John Masterton and

RECEIVED by MSC 9/18/2023 10:51:43 AM

Thomas Rico also provided character evidence as to his behavior when working with outside organizations.

Stephanie Elyse Blennerhasset was a very different type of character witness. She is a podcast producer for a company called Magnificent Noise which counts the New York Times, Spotify, Ted, and the United Nations Development Program as clients (HT I, 111-112). She met Efrén in the beginning of 2015 when the documentary producer Tirtza Even was producing a film about him, (HT I, 112). She was compelled and spoke to him by phone. She has worked with Tirtza who was producing a documentary. She, as a Columbia student, has now produced a series of audio pieces about Efrén and has worked with Ms. Even (HT I, 113-114).

She also spoke of his daughter and the very real and inspiring connection that he had with her, (HT I, 114). She also stated that she has personally struggled with hope after a very difficult health crisis and he was the one who inspired her not to give up, (HT I, 116).

Tirtza Even is a documentary filmmaker and an associate professor at the School of the Art Institute of Chicago who has produced numerous shorts and two feature length films and has won many awards (HT II, 6-7). In 2010 she began working with Deborah LaBelle on a project focusing on juvenile lifers. She was introduced to Efrén's case as well as several other juvenile lifers. Her first film relating to juvenile lifer's featured a number of them; but later she started a project with Meg McLaglin and Elyse Blennerhasset focusing solely on Efrén. The first project is called Natural Life and the second Half Truths and Full Lies, (HT II, 8-9). The first focused on five lifers; she included Efrén because she found him articulate, knowledgeable, honest, and generous and she found his stories complicated and interesting. He was exceptional in his positive outlook, his activism inside and outside prison, and his frank portrayal of life inside.

RECEIVED by MSC 9/18/2023 10:51:43 AM

There was glaring convincing evidence of his change and maturity during incarceration, (HT II, 9).

Her second film focusing on Efrén is not complete because of the pandemic but she did it because she had developed serious doubts as to the integrity of his conviction, (HT II, 10). She discussed all of the research and interviewing she had completed to date and then two very short videos were shown. The first was of a former South Bend Tribune journalist who had conducted her own research and believed that he was innocent, (two minute video of Carol Draeger played).

She further stated that Efrén did not approach her or suggest either film, both projects were her own initiative, (HT II, 18). She stated:

> I think the record of his accomplishments and acts of kindness and support is endless and rare. I think he's active, generous, responsible. engaged, empathetic, and endlessly curious, thoughtful, always eager to grow, and to give, and I have seen the signs of that in the ten years of growth that I have known him. He does more for others inside the prison than most people do outside, (HT II, 20)
>
> .

She then played a six-minute video encompassing highly positive words about Efrén from Paul Ciolino, an innocence expert; Jeffrey Clark, a retired prison guard; Inga, his high school teacher, and Jack Ebling a radio producer who has worked with him. Perhaps the most salient comment was Mr. Clark's that prison isn't an environment that allows you to pretend. It is soon apparent who you really are and he had nothing but praise for Mr. Paredes.

RECEIVED by MSC 9/18/2023 10:51:43 AM

Deborah LaBelle is an attorney who has done considerable work with juvenile lifers. She testified that at there were 363 people in Michigan entitled to resentencing under *Montgomery*. As of October of 2020, 162 had not yet been resentenced. Of the 200 who had been resentenced, only 14 cases (7%) had received a life sentence and only 2 of those were under 16 (HT II, 100). She stated that she knew Efrén relatively well through phone calls and correspondence related to juvenile lifers. In the class of juvenile lifers in a case filed in federal court the attorneys chose Mr. Paredes as a class representative. That is someone that can be relied on for purpose of effectively communicating about settlement and who is respected by other members of the class, (HT II, 104). She also stated that Mr. Paredes is a poster child for Miller/Montgomery rehabilitation (HT II, 104). She also stated that she found him far down the scale from irreparably corrupt and stated there were good reasons he was chosen as the representative, (HT II, 105). She further stated that she did not know whether or not Efrén was guilty, but it was actually much harder on him to not admit his guilt and whether guilty or not she considered his behavior to show rehabilitation, (HT II, 117-118).

Mr. Paredes testified to the misconduct tickets as above, and to both his difficulties and his prison successes. But he also testified about other matters. He stated that his mother was 14 years old when he was born and that they did not have much money and moved a lot. There were two homes in Benton Harbor, and others in Sodus, St. Joe's, and Eau Claire. He believed that they moved six times before the age of 8 (HT II, 71). He went to three different schools for kindergarten, first grade, and second grade before beginning to attend Lakeshore Public Schools where he remained a student until arrested, (HT II, 71). He stated that in the time he went to school it was a challenge being Latino as he went to schools that were either primarily black or primarily white

RECEIVED by MSC 9/18/2023 10:51:43 AM

(HT II, 72). His father was absent in his life once his parents divorced when he was seven and he had seen his father frequently abuse drugs and alcohol, (HT II, 73).

Mr. Paredes further stated that he was guilty of most of the misconducts that he received but that none of them had involved criminal behavior, (HT II, 77). He listed the below positive accomplishments during his more than 30 years in prison (all Pages in the HT II volume):

Tr II Page No.	Summary
86	Worked on Power of Peace project at Muskegon based on a program of Kit Cummings in Georgia. 50 people selected by the warden are selected to participate
87	Was part of My Brother's Keeper Outreach Program in 2017. This was a program developed by Dr. Austin Jackson and was the only one behind bars. Program was for 20 men who had to submit applications to Dr. Austin Jackson and also be approved by the warden. It involved developing mentoring skills to help children in Detroit Public Schools specifically African-American youth at Paul Robeson Academy.
88	2015 or 2016 participated in Chance for Life, an outside agency that sent facilitators into the prison to receive training on becoming a person of integrity.
88-89	Co-created a conflict resolution program at Kinross. They developed a curriculum training 50-75 inmates at a time about de-escalation, dealing with challenging and difficult people and impulse control. A psychologist sat in the sessions and offered feedback as did three social workers and a prison counselor. It did reduce the violence at the prison.
89	At one time President of the National Lifers of America and was approached by Natalie Holbrook of the American Friends Service Committee to help prepare prisoners to see the parole board. They developed the Peer Enrichment and Parole Readiness Workshop which is now used at numerous prisons in the state of Michigan.
122	Served 14 six months terms on Warden's Forum – about seven years total. He believed he was elected Chairman ten times
123	Has participated in charitable fund raising including several thousand dollars for breast cancer.
123	Requested and had approved a $75,000 grant to build a recreation area at the Cotton Correctional Facility. Nothing like this had been done before
123-124	Has taken as much mental health counseling as was allowed. In 2010 started having some issues with depression sought treatment from social workers and psychologists and still sees them monthly

RECEIVED by MSC 9/18/2023 10:51:43 AM

Tr II Page No.	Summary
124	Completed the Thinking for Change program which is a three month cognitive restructuring program
124-125	Completed programs in Healthy Boundaries, Thinking Errors, Mediation, Anger Management, Stress Management, and Grief and Loss
125	Not currently a member of NAACP but was for several years and was responsible for bringing in outside speakers
126	LASSO is a Latin American Spanish Speaking Organization. He has been involved for many years and started many chapters. It is designed to teach cultural competence, and to discuss identity and history.
126	Indian Nations United is an organization the deals with anyone have indigenous background in the US or Mexico and teaches about the value of culture, identity and history. He has served on the board of directors at several prisons but cannot definitively say if he has an indigenous background.
127-128	He got involved in these groups because his own family is very multicultural and he wanted to have people from these groups get to know each other.
128	He is certified by the Microsoft Digital Literacy Program
128	He is certified by the Workforce Development Program
128	Completed the FDIC Smart Money program
129	Took a course in male leadership taught by Bishop Chui of the Shire of the Black Madonna in Detroit. It stressed the importance of males as protectors rather than predators.
130	In addition to attending religious services of the Melanic Muslims in the 1990s, he has also attended Buddhist, Islamic, a number of different Christian services, Jewish services, and Native American services. Has been invited to speak at many of them.
136	Took the InsideOut Dad program around 2014 to learn about responsible parenting
136	Involved in the 2009 approval of the Anahuacalmecac Preparatory North America, a middle school Charter School in Los Angeles. They were a poor indigenous group without a lot of resources and he helped with the media and generating support.
137	Co-founder of presente.org which is the largest on-line social justice organization that helps promote political empowerment for Latino people.
137	Has spoken (remotely) at the University of California Berkeley, University of Michigan, Michigan State University, and Columbia among others. Has also spoken to people in Ecuador, Venezuela, and Toronto
137	At Ionia in 2017 was selected to work on Warden's Garden Project with food grown going to Meals on Wheels
138	Has been involved in bringing many speakers into the prison including a Chippewa County Judge and a political poster artist from California
138-139	Worked hard on media awareness of the Covid epidemic in prison and he believes this prevented more deaths at Lakeland.

RECEIVED by MSC 9/18/2023 10:51:43 AM

Tr II Page No.	Summary
140	Has developed a relapse prevention plan for himself

The defense also admitted recent, highly positive psychological and evidence based reports. Efrén's Inventory of Offender Risk, Needs, and Strengths (IORNS) test results, administered by an MDOC psychologist, indicate his overall risk index is low. It states he has good mechanisms for regulating his behavior and managing anger, few treatment and supervision needs, and greater strengths and fewer risks/needs than 94% of prisoners. The test results also indicate he was honest, and the results were valid.

The IORNS is the only actuarial risk assessment instrument that assesses all three factors (i.e., static, dynamic, and protective factors) important to recidivism. It provides a more comprehensive risk assessment than is currently available through concomitant assessment. The instrument consists of four indexes, eight scales, 14 subscales, and two validity scales.

Efrén's most recent Minnesota Multiphasic Personality Inventory-2 (MMPI-2) test results, administered by an MDOC psychologist, indicate he has tendencies toward moralistic thinking, is sincere, and socially responsible. He prizes agreeableness, trust, and avoidance of conflict. The results also indicate he is receptive to treatment and wants to work on himself.[2]

The parties held oral arguments on January 15, 2021. Judge LaSata handed down his ruling on September 10, 2021.

[2] App. 159a.

RECEIVED by MSC 9/18/2023 10:51:43 AM

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After briefly articulating the standards set forth in Miller and Montgomery, Judge LaSata went on to rule against Mr. Paredes finding all five factors favored the People:[3]

- *Factor 1: Age, Immaturity, Impetuosity, and Failure to Appreciate Risks.* The Court recognized that Mr. Paredes was 15 years and 11 months old. The Court stated that the age component favored the accused, (Ruling 13; App. 16a). The Court stated that even though the Defendant was "quite young," he was "rather mature." The Court pointed to his status as an honor student holding a 3.5 GPA, active in athletics (soccer and track), active in the German club, Kiwanis, and Junior Achievement. He thus ruled that maturity favored the state. He then ruled that the murder was planned with deliberation by the defendant, (14; App. 17a). The Defendant procured the firearm, laid in wait, and planned to shoot Mr. Tetzlaff and thus was not impulsive, *Id* .
- *Factor 2 – Family and Home Environment.* The Court studied the evidence from Dr. Daniel Keating as to brain development and childhood trauma. There's little, if any evidence, of childhood trauma experienced by the Defendant, (14; App. 17a). The Court noted that the Defendant's father was a drug abuser, but he separated from his mother and had no contact with his father since the divorce, (15; App. 18a). The judge juxtaposed the situation with the defendant in Miller, (15; App. 18a). The Court rejected the Defendant's testimony about suffering racial harassment when he was young, (16).

[3] The Court's ruling appears in the Appendix starting at App. 15a et seq.

- *Factor 3 - Circumstances of the Offense.* The Defendant had charisma, intelligence, and personality traits that allowed him to lead the "Eight-Ball gang," (16; App. 19a). The brutality of the offense could not be overstated. The shooting exhibited numerous aggravating circumstances in the judge's mind, (16; App. 19a).
- *Factor 4 Incompetencies Associated With Youth.* Because the Defendant asserted his innocence the Court found that there was no evidence that he would have dealt differently with the criminal justice system, (17; App. 20a). Defendant had high quality counsel, could work with his attorney, and this favored the People, (17; App. 20a).
- *Factor Five - Rehabilitation*. The Court accepted that the Defendant had many positive accomplishments during his 32 years of incarceration,(20a-21a). These included his work as a Braille translator, work as school, clerk, and completing his GED and some college, (21a). The Court, however, focused on his alleged involvement in Melanic Islamic Palace of the Rising Sun in 1989, the alleged possession of social security number of staff in 1991, a 1993 unauthorized occupation of another cell, his possession of contraband cell phones and broadband cards, and his inability to urinate when requested (substance abuse). He also focused on the birth of a child to Mr. Paredes' now wife during his incarceration. The Court credited the testimony of Mr. Burgos but stated that he had no experience with him prior to prison, (19; App. 22a). The Court therefore stated that factor five slightly favored the State, (19; App. 22a).

The Court never mentioned the testimony of Daniel Manville or Richard Stapleton as to any of the misconducts and most especially as to transition of the Melanic Islamic group from a DOC accepted religion to a Strategic Threat Group and Mr. Paredes' renunciation of the group at the first opportunity. He also

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made no mention of the positive character witnesses and especially the documentary filmmakers and some of their underlying evidence. He referenced the 1989 psychological report completed as part of the original sentencing, but not the modern positive ones done by the Michigan Department of Corrections.

On March 16, 2023 the Court remanded for resentencing, retaining jurisdiction. They denied the Defendant's request that the case be assigned to an alternate judge believing that the record as it stood then did not support grounds for disqualification.

On remand, Judge LaSata allowed briefing and oral arguments by both parties. Oral arguments were held on May 8, 2023. On May 26th he read his decision from the bench and resentenced Defendant to non-parolable life on the same date. The Judgment of Sentence is the same date. The order of the court is dated June 1, 2023. He found that all five factors were neutral. As to the first factor, he stated, "planned. As to the first factor, age is mitigating, maturity is neutral, impetuosity and ability to appreciate risks are neutral," (ST 05/26/2023, 8; App. 26a). The court then found Home Environment neutral (*Id*, 9). He found the same for circumstances of the offense, and ability to work with his attorney, (*Id*, 9; App 27a). Lastly, while he had previously found the issue of rehabilitation close under the pre-Taylor standard, in this finding it found it neutral, (*Id*, 11; App. 29a).

As the Court of Appeals had retained jurisdiction, Defendant requested that he be allowed to file a supplemental brief. The transcript of the two hearings were filed on July 11, 2023 (a notice of filing was filed by the Court reporter on June 21, 2023 but apparently she did not file the transcripts as Counsel was requested to file them and promptly did so). Also on July 11, Counsel filed a request to file a brief after remand, filing the proposed brief on the same date. This motion was granted on July 20, 2023. The Court of Appeals

RECEIVED by MSC 9/18/2023 10:51:43 AM

opinion affirming the trial judge came down July 27th and did not address the issues raised in the brief.

This is the Defendant's application for appeal.

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REASONS FOR GRANTING LEAVE TO APPEAL

In *People v Taylor*,[4] this Court attempted to set down a uniform standard to be applied in assessing when a life without the possibility of parole sentence was appropriate for a juvenile who committed first degree murder. The Court created a strong presumption against this sentence and made it clear that it wanted a uniform status with then Chief Justice making it clear that the Court did not want regional variations. When this case was remanded to the trial court for resentencing, the trial court edited its prior ruling to nominally comply with Taylor. It substituted the words "neutral" in place of its prior ruling of favoring the people and redacted from its discussion any factors it previously found were close after noting that youth was a mitigating factor.

On remand, the trial court again placed significant reliance on the fact that the offense was premeditated and the Defendant was the shooter, even though the evidence made it clear that the co-defendants acquired the gun, provided the transportation, taught the defendant how to use a gun, and in other ways assumed a leadership role. Some of the issues presented in this appeal overlap the issues before the Court in *People v Mussleman*, Supreme Court No. 163290. *Mussleman* raises the question of whether the trial court placed too much emphasis on the crime rather than post-offense rehabilitative efforts by the defendant. This is pertains to Issue II of this appeal.

Because the Court of Appeals upheld the reasoning on remand, it only gave minimal attention to the request for a remand before a different judge that Court stated that it believed that Judge LaSata was not incapable of moving

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[4] *Taylor*, 510 Mich at 133–34,

beyond his prior ruling. Judge LaSata imposing virtually a verbatim opinion on remand for a de novo resentencing undercuts that assumption.

After this case was remanded to the trial court for resentencing, the Defendant challenged the accuracy of numerous pieces of evidence below. The Defendant stated that the State demonstrated that the MDOC *investigated* various allegations of misconduct which Mr. Parades supposedly committed over twenty-years ago, but they could not *substantiate* them. The State readily conceded that their only witness was not competent to opine on or interpret this evidence. The Defendant briefed the issue in the trial court and objected on multiple occasions. The trial court never addressed the challenge in any intelligible fashion. The Court of Appeals granted Mr. Parades permission to file a supplemental brief raising this issue but never addressed the issue. Redacting these allegations from Judge LaSata's ruling is likely outcome-determinative. Because this was a resentencing, not simply a Crosby style remand, the issue was properly preserved and should have been addressed by the lower courts.

This matter also presents the outstanding issue of whether the Michigan Constitution should create a per se bar on life without the possibility of parole for juveniles who kill.

For these reasons, the Defendant believes that this case presents an important issue for this Court to address and the ruling below was plainly erroneous.

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STANDARD OF REVIEW

MCL 769.25(6) adopts by reference the factors listed in *Miller v Alabama*[5] to determine whether a juvenile should receive a life without the possibility of parole sentence or a term of years. The statute also provides that the Court "may consider any other criteria relevant to its decision, including the individual's record while incarcerated." Section (7) states that "the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing." MCL 769.25.

The trial court's fact-finding at sentencing is reviewed for clear error.[6] "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made."[7] Issues of law are reviewed de novo.[8]

The trial court's ultimate decision is reviewed for abuse of discretion.[9] In undertaking this analysis, this Court must carefully review the Court's reasoning rather than simply whether the trial court correctly restated that the statutory

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

[6] *People v Lampe*, 327 Mich App 104, 125–126; 933 NW2d 314 (2019).

[7] *People v Antwine*, 293 Mich App 192, 194; 809 NW2d 439 (2011).

[8] *People v Al-Shara*, 311 Mich App 560, 567; 876 NW2d 826 (2015); *People v Wiley*, 324 Mich App 130, 165; 919 NW2d 802 (2018).

[9] *People v Skinner*, 502 Mich 89, 99; 917 NW2d 292 (2018).

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standards.[10] Merely articulating the *Miller* factors is not sufficient.[11] Nor is reliance solely on a trial court's familiarity with the facts of a case and its experience in sentencing cannot effectively combat unjustified disparity in sentencing because it construes sentencing review so narrowly as to avoid dealing with disparity altogether ...."[12]

A. Challenge to Accuracy of Information at Sentencing.

Defendant's challenge to the trial court's consideration of allegations which were investigated by the MDOC and rejected was properly raised on remand to the trial court for a reconsideration of its ruling in lieu of the *Taylor* decision.[13] At resentencing, the case was before the trial court in a presentence posture."[14] Where information is deemed inaccurate it must be either stricken or the Court must make it clear that it was not considering it.[15] Here the Court did not explain why it deemed the information accurate. It simply agreed with the

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[10]*See, e.g. State v Fletcher*, 112 So 3d 1031, 1036 (La Ct App, 2013) *(finding that while sentencing court considered some of the factors enumerated in Miller, the court's consideration lacked depth).*

[11] *People v Garay*, 320 Mich App 29; 903 NW2d 883 (2017*), judgment rev'd in part, vacated in part* 506 Mich 936; 949 NW2d 673 (2020) (trial court's merely articulating Miller factors does not end analysis).

[12] *People v Dixon-Bey*, 321 Mich App 490, 530; 909 NW2d 458 (2017).

[13] *People v Rosenberg*, 477 Mich 1076; 729 NW2d 222 (2007) (*citing People v Ezell*, 446 Mich 869; 522 NW2d 632 (1994)).

[14] *Rosenberg*, 477 Mich 1076. *See also People v Williams (After Second Remand*), 208 Mich App 60, 65; 526 NW2d 614 (1994*); People v Williams*, 208 Mich App 60, 65; 526 NW2d 614 (1994).

[15] *People v Robinson*, 147 Mich App 509; 382 NW2d 809 (1985); *People v Taylor*, 146 Mich App 203; 380 NW2d 47 (1985).

uncontested position that the relating witness was not an expert on prison matters. To the extent that the Defendant's claim raises a constitutional claim, it is reviewed *de novo*.[16]

B. The Trial Court's Decision to Reimpose LWOP and Clear and Convincing Error Standard.

On remand, a trial court reviews the question of whether to impose life without the possibility of parole under the clear and convincing evidence standard. "Clear and convincing evidence standard is the most demanding standard applied in civil cases."[17] Justice Coleman in her concurring opinion in *Serafin v. Serafin* noted that: "clear and convincing" evidence means something more than a preponderance of evidence. Such evidence of rebuttal must be "very convincing", "of such cogency as to render belief necessary" and "beyond all reasonable doubt. [18]

In *Kefgen v Davidson*,[19] the Court defined clear and convincing evidence as evidence that:[20]

> 'produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the

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[16] *People v Carp,* 496 Mich 440, 460; 852 NW2d 801 (2014). Carp's retroactivity holding was overruled by *Montgomery v Louisiana*, 577 US 190; 136 S Ct 718, 732; 193 L Ed 2d 599 (2016), as revised (Jan. 27, 2016), as revised (Jan. 27, 2016).

[17] *In re Martin*, 450 Mich 204, 226–27; 538 NW2d 399 (1995).

[18] *Serafin v Serafin*, 401 Mich 629, 637; 258 NW2d 461 (1977). *See also Shepherd v Shepherd*, 81 Mich App 465, 469; 265 NW2d 374 (1978).

[19] *Kefgen v Davidson*, 241 Mich App 611, 625; 617 NW2d 351 (2000).

[20] *Kefgen*, 241 Mich App at 625.

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> precise facts in issue.' ... Evidence may be uncontroverted, and yet not be 'clear and convincing.' ... Conversely, evidence may be 'clear and convincing' despite the fact that it has been contradicted.

The *Taylor* Court rejected the former no-burden for a number reasons, including:[21]

> Finally, a no-burden standard is unworkable as it leaves a juvenile defendant to the whims of individual sentencing courts, instead of promoting uniformity and fairness. See McCormick, § 336, p. 694 (explaining that a possible risk posed by not allocating a burden is that a court might assign its own burden "describing that burden as it saw fit by substituting its own notions of policy"). This is particularly troublesome in a *Miller* hearing—when the trial court is faced with imposing the harshest possible punishment under Michigan law on some of the potentially least culpable offenders.

The Court set forth this standard because it wanted the same sentence imposed if a similarly situated offender committed the same offense in Berrien, Wayne, or Marquette County Michigan.

C. *Appellate Review of the Trial Court Decision to Impose Life Without Parole.*

On appeal, the trial court's decision to sentence a juvenile to LWOP is reviewed for an abuse of discretion, *Taylor*.[22] A sentencing court's factual findings in support of a sentence are reviewed for clear error. A sentencing court may not impose LWOP unless the prosecution proves facts and circumstances

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[21] *Taylor*, 510 Mich at 133–34.

[22] Id. at 128

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that rebut the presumption against LWOP by clear and convincing evidence.[23] "[A] trial court necessarily abuses its discretion when it makes an error of law."[24] Thus, "the abuse of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions."[25] A trial court also abuses its discretion when it makes an error of law or "operates within an incorrect legal framework."[26]

RECEIVED by MSC 9/18/2023 10:51:43 AM

[23] *Id.* at 135–126

[24] *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013); *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996)

[25] *People v Paredes*, unpublished opinion of the Court of Appeals, issued March 16, 2023 (Docket No. 359130), 2023 WL 2543725, p *2; *Koon,* 518 US at 100.

[26] *Paredes* at p *2

RECEIVED by MSC 9/18/2023 10:51:43 AM

ARGUMENT

I. THE TRIAL COURT ERRED ON REMAND IN CONSIDERING HIGHLY DISPUTED EVIDENCE THAT MR. PARADES WAS INVOLVED WITH A STRATEGIC THREAT GROUP, TAMPERED WITH A WITNESS, OR ENGAGED IN AN ATTEMPT AT IDENTITY THEFT IN THE 1990S. THE STATE DID NOT PRODUCE EVIDENCE THAT THESE EVENTS OCCURRED; EVIDENCE THAT THE DEPARTMENT INVESTIGATED BUT DID NOT ESTABLISH THESE FACTS IS NOT EVIDENCE THAT THEY OCCURRED.

The Court of Appeals remanded this matter for a new resentencing consistent with this Court's ruling in *Taylor*. On remand, Defendant objected in writing and orally to any consideration of alleged misconduct by Mr. Parades committed in the 1990s concerning his involvement in strategic threat group (Mellanic Muslims), an attempt to persuade the Mui brothers to change their testimony, or a disputed act of identity theft. The State could only show evidence that the Department of Corrections investigated the actions and rejected the allegations. Defendant's position was proof that an allegation was made and rejected by the Department of Corrections was not proof that the violation occurred. This argument was presented to the trial court on multiple occasions and not addressed.[27] The Defendant sought permission to file a supplemental

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[27] The issue was raised as Issue II in the Defendant's Brief on Remand in the Circuit Court. *People v Paredes*, 2023 MiA 359130-62 (April 24, 2023). It was raised at Counsel's May 8th oral arguments in the trial court, OHT 2 ("I would also note my other issue, which I'm not arguing today, about the Danneffel testimony not meeting in the -- even at the preponderance of the evidence as to what happened in prison in early 90's, and that -- that probably has to be taken off the table as well."). After the trial court did not address it in his ruling, the Defendant pressed for a ruling. The Court initially

brief to the Court of Appeals raising this issue. The Court of Appeals granted permission to file the brief, which was filed simultaneously with the request for permission, but did not address the issue in its decision.

At the original Miller hearing, the People called a single witness. Berrien County Detective Sergeant Michael Dannefell retired in 2011, but continued to work for them part time (HT I, 12-13). He stated that he investigated juvenile lifers for Berrien County and had investigated Mr. Paredes. He indicated that he had worked in the Berrien County jail early in his career but had never worked or had training in a prison environment, (HT I – 32). He went through Mr. Paredes family history and his file with the Michigan Department of Corrections. The following table highlights some of his concerns and the Defense response to these.

On remand the Defendant's brief on remand incorporated the same table of misconducts that were included in the Defendant's original brief. It contrasted the testimony of Mr. Paredes, Daniel Manville, and Richard Stapleton. Neither Mr. Manville nor Mr. Stapleton knew Mr. Paredes. Mr. Manville represented a number of the members of the Melanic Islamic House of the Rising Sun (not including Mr. Paredes who renounced membership).

Mr. Stapleton is the retired long-time Administrator of Legal Affairs for the Department of Corrections and was called for his knowledge of Department of Corrections policies and procedures. He does not know Mr. Paredes and none of his comments reflect actual knowledge of the events of Mr. Paredes'

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found the testimony credible. When counsel made it clear that it was a reliability (rather than a credibility) issue, the Court then stated that the evidence was reliable. ORT 14-15.

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misconducts. Mr. Stapleton stated that he retired in 2011. At that time he was responsible for how the disciplinary process worked. He stated that since 2010 tickets have been classified as Level 1, 2, and 3 instead of the old classifications of major and minor. Both levels 1 and 2 are majors, but Level 1 are tickets such as drugs that are predictors of recidivism and Level 2 have to do with prison discipline such as disobeying a direct order. The standard of proof for all tickets is preponderance of the evidence, (HT II, 46-47). The average inmate gets around 2 tickets a year (HT II ,56). Inmates are found guilty approximately 95% of the time (HT II, 62).

On remand, the Defendant objected to the consideration of allegations which were rejected by the Department of Corrections because the State did not present evidence above and beyond the fact that the allegation was made.

Specifically:

- Mr. Parades was allowed to withdraw from the Mellanic Muslim group and remained in MDOC custody. The MDOC originally treated the group as a bona fide religion. The group carried on religious activities, but the leaders of the group were also using the organization for criminal activities. Its leaders were transferred to federal custody and never returned to state custody. Withdrawal was only permitted if the MDOC believed that the Defendant did not play a leadership role and only after a careful investigation. These procedures were established through the testimony of Richard Stapleton and Professor Manville. Professor Manville represented the Mellanic group and stated that to the best of his knowledge, Mr. Parades' name never came up in a leadership role;

- The individual who did contact the Mui brothers stated that Mr. Parades was not involved. The MDOC investigated the allegations and took no action. Richard Stapleton testified that they would have taken action if they could sustain the allegation. The State presented no contra testimony;

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- The same is true for the allegation about the disputed identity theft attempt. According to Mr. Stapleton, the MDOC would take such allegations very seriously if they could have been sustained.

Mr. Stapleton testified that such allegations should have been removed from Mr. Parades file, but that purging is not always a perfect process.

Even the misconduct tickets explained through Mr. Stapleton were considered adversely. For example, Mr. Stapleton testified that Mr. Parades old substance abuse ticket was actually based on his inability to urinate within a half hour of being requested to do so. After such a ticket, the MDOC carefully watches a prisoner, demands more frequent drug testing and the record does not reveal that Mr. Parades ever either possessed or used drugs or alcohol.

On remand, the Defendant called on the Court to reevaluate Detective Sargent Michael Dannefell's testimony in lieu of the *Taylor* case and the heightened burden of proof. Defendant did so in his brief on remand, reminded the court of it in the oral arguments, and again after the court ruled against the defendant on the decision of whether a life sentence was reimposed. Defendant clearly and properly raised the issue at the remand hearing and it was properly before both the trial court and the Court of Appeals.[28] The trial court only tangentially alluded to the issue when prodded. The Court of Appeals ignored the issue. This Court should remand this matter for resentencing based on this omission or at minimum remand the matter to the Court of Appeals for plenary consideration of the issue.

[28] This issue is properly raised at the resentencing for reasons outlined in the Standard of Review section of this brief.

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Evidence that an allegation was investigated and rejected by the agency is not evidence that it occurred. Sentencing facts are normally established by a preponderance of the evidence.[29] While the Detective could point to old notations that the Department investigated matters, he could not point to the disposition and did not know the standard of proof. As the state conceded below, he was not an expert and was testifying similarly to a keeper of the records. The problem is that he was not competent to testify to the significance of the records. His testimony is not sufficient to find that that the Defendant engaged in these acts only that the MDOC investigated issues and opted not to proceed.

While the Rules of Evidence do not apply at a *Miller* hearing, the Defendant still had a right to be sentenced on reliable evidence.[30] Evidence that an allegation was made against the Defendant but the Department did not move forward with the allegation is not proof that the incident occurred. Rather, according to the testimony of both Mr. Stapleton and Professor Manville, it is strong evidence that the Department of Corrections could not substantiate the allegations.

The State must prove the reliability of this information.[31] Similarly, the Government must prove facts underlying a guideline variable by a

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[29] *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

[30] *Williams v People of State of NY*, 337 US 241; 69 S Ct 1079; 93 L Ed 1337 (1949); *People v Eason*, 435 Mich 228, 239; 458 NW2d 17 (1990).

[31] *See United States v Weston*, 448 F2d 626, 634 (CA 9, 1971)*United States v Fatico*, 441 F Supp 1285, 1294 (EDNY, 1977)*United States v Fatico, 441 F Supp 1285, 1294 (EDNY, 1977);* Standards, supra note 1, § 18-6.4, at 465 (once defendant "effectively challenges" PSI, burden of persuasion should fall on government).

RECEIVED by MSC 9/18/2023 10:51:43 AM

preponderance of the evidence.[32] Notably, *Hardy* overruled the Court of Appeals opinions which had previously permitted the scoring of guideline variables based on the any evidence test.

The Detective could not validate the veracity of the allegations. The Defendant presented evidence directly negating the witness tampering allegation and the paperwork demonstrates that the MDOC did not attach any weight to the allegations at the time that they occurred.

The required hearings that would have to have been held if they believed that there was evidence of the events were not held. The trial court should have disregarded the allegations. This Court has found that "it is difficult to imagine something 'more inconsistent with substantial justice' than requiring a defendant to serve a sentence that is based upon inaccurate information."[33]

Instead, they figured actively into the court's rulings. They were expressly relied on in reimposing the life sentence, both in the 2021 and the 2023 ruling. Redacting these allegations from the Court's ruling, it is not clear that any reasonable court could have found that Mr. Parades was one of the rare individuals where clear and convincing evidence established that life without the possibility of parole was appropriate.

As a matter of law, this Court should find that the burden was not established and remand this matter for resentencing to a term of years where this "evidence" may not be considered. Alternatively, for reasons stated in the remaining issues, the matter should be remanded for reevaluation before a different judge.

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[32] *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

[33] *People v Francisco*, 474 Mich 82, 91; 711 NW2d 44 (2006). *See also People v Kimble*, 470 Mich 305; 684 NW2d 669 (2004).

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II. THE TRIAL COURT'S NOMINAL COMPLIANCE WITH THE COURT'S REMAND ORDER SHOULD BE REJECTED, AND A TERM OF YEARS SENTENCE SHOULD BE ORDERED. WHILE JUDGE LASATA CITED TAYLOR, HE DID NOT GENUINELY RECONSIDER HIS RULING. HIS NEARLY WORD-FOR-WORD OPINION ON REMAND RAISES GRAVE DOUBTS THAT HE GENUINELY TOOK A HARD LOOK AT THE CASE.

Efrén Paredes was described by witnesses as the "poster child" of rehabilitation. A videographer who examined *every* historical Miller case in Michigan selected him as one of the top cases in Michigan. Deborah Labelle who was lead counsel in the federal class action suit regarding juvenile lifers and had studied all the Michigan cases opined that he was one of the top cases of rehabilitation. Despite the absence of any evidence to the contrary, Judge LaSata deemed this behavior manipulative and disregarded it.

Efrén was undeniably highly intelligent at the time of the offense, but he was also undeniably a fifteen-year-old who never had a driver's license. Defendant offered extensive written exhibits (received by consent) about the delayed maturation of impulse control in the prefrontal cortex. Even *Miller* is based on the notion that society didn't appreciate these issues until recently. Judge LaSata relied on a 1979 psychological report to find that Efrén at the age of 15 was functionally the equivalent of an 18 year old.

The state's only physical witness admitted that he was not an expert on corrections law. The defense called the former legal affairs director of the Department of Corrections, a professor of corrections law at Michigan State University Law School, and others to explain that many of the acts of disputed prison misconduct were never substantiated, were being misinterpreted, or were

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not correctionally significant. The problems with this testimony and why it should have been disregarded were discussed in the prior issue.

The Court of Appeals initially remanded this matter for "for resentencing under the Taylor framework consistent with this opinion."[34] The Honorable Charles LaSata presented a post-Miller set of finding that was close to identical to his finding in 2021. It was not just the decision that was the same, the core decision part of his ruling was a word-for-word recitation of what he found in 2021. After citing *People v Taylor* and acknowledging that the law in the matter has been changing rapidly, he recited the same findings that he had made in 2021. The only difference was at the end of each of the Miller factors, instead of stating that it favored the prosecution, instead he found each one neutral. He did not address that *Taylor* actually changed the standard under which the ruling was made.

A. People v Taylor Placed a Very High Burden on the State in Rebutting the Presumption Against a JLWOP Sentence

As this Court has noted, JLWOP is presumptively disproportionate. "If the prosecutor seeks to have a juvenile offender sentenced to LWOP pursuant to MCL 769.25, it is the prosecutor's burden to overcome the presumption that LWOP is disproportionate."[35]

It is also important to note that *Taylor* was released the same day as a series of other cases which collectively made it much more difficult to impose life sentences on juveniles or near juveniles. The Court should also remember that *Taylor* remanded the case to the Court of Appeals for a determination of whether

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[34] *Paredes*, 2023 WL 2543725

[35] *Taylor*, 510 Mich at 134.

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the Michigan Constitution categorically prohibited Taylor from receiving a natural life sentence. This militates against a narrow construction of *Taylor* in this regard.[36] Lastly, the Court has remanded for further consideration the defendants in both *Hyatt* and *Skinner*.[37]

B. *The Trial Judge's Nearly Verbatim Reaffirmance of its Original Ruling Demonstrates that the Court Did Not Take the Hard Look at its Original Ruling Required Under Taylor.*

The trial court's reimposition of its original ruling with minor linguistic modifications to superficially bring it in compliance with *Taylor* by substituting previous language that a factor favored the state with language calling each factor "neutral" was not in compliance with the *ratio decidendi* of the Court's ruling. A copy of the two rulings appear in the Appendix. The rulings are as if he retrieved the original document from the word processor and substituted the words "neutral" for "favor the People" and hit the "replace button." No factor was reweighed, Defendant's challenge to the consideration of the evidence in the first issue was overlooked despite being formally briefed and being referenced at oral arguments. The Court did not try to explain why the rehabilitation factor which he had previously called close was still neutral despite the shift of the law.

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[36] *People v Parks*, 510 Mich 225; 987 NW2d 161 (2022) (extending Miller protections to 18 year olds under Michigan Constitution); *People v Stovall,* 510 Mich 301; 987 NW2d 85 (2022) (extending *Miller* protections to parolable life sentences under Michigan Constitution)

[37] *People v Skinner,* 982 NW2d 387 (Mich, 2022); *People v Hyatt*, 982 NW2d 386 (Mich, 2022).The prior citations in that case are *People v Hyatt*, 316 Mich App 368, 420–421; 891 NW2d 549 (2016), *aff'd in part, rev'd in part sub nom.* People v Skinner, 502 Mich 89; 917 NW2d 292 (2018).

RECEIVED by MSC 9/18/2023 10:51:43 AM

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Judge LaSata stated in one breath age was a mitigating factor but then proceeded to negate that it was. In the original ruling, Judge LaSata stated that the rehabilitation factor was "close," yet with the heightened burden of proof that factor was inexplicably left at neutral.

The New Jersey *Miller* case of *State v Comer*,[38] condemns exactly what Judge LaSata did. *Comer* stated that the court's explanation must be substantive, as "[m]erely enumerating factors does not provide any insight into the sentencing decision, which follows not from a quantitative, but from a qualitative, analysis." Another New Jersey Supreme Court ruling adds that "When the trial court fails to provide a qualitative analysis of the relevant sentencing factors on the record, an appellate court may remand for resentencing."[39] While there is no doubt that Judge LaSata did enumerate factors, the fact that he made no changes despite what he correctly called a major change in the law is indicative of the fact that he was not applying *Taylor* but merely reiterating the decision that he had previously reached. Mr. Parades received a resentencing in name only; in reality the trial judge did a "search and replace" of his old ruling replacing some *Taylor* verbiage in his rerun of his prior ruling.

C. *Application of the Miller Factors Under the Forgoing Factors Requires Either a Reduction of Sentence to a Term of Years or at Minimum a Remand for Sentencing (Before a New Fact Finder).*

A fair application of the *Miller* factors demonstrates that this is not one of the rare and unique cases where the Defendant is incapable of rehabilitation or change.

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[38] *State v Comer,* 249 NJ 359, 379; 266 A3d 374 (2022).

[39] *State v Fuentes*, 217 NJ 57, 70; 85 A3d 923 (2014).

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In *Miller*, the Supreme Court identified five factors for the sentencing court to consider as part of its assessment:[40]

(1) the defendant's "chronological age [at the time of the crime] and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences";

(2) the family and home environment;

(3) the circumstances of the homicide offense;

(4) the possibility age may have affect legal representation;

(5) the possibility of rehabilitation.

In addition, this Court has stated that the sentencing court may also consider any other criteria relevant to its decision, including the individual's record while incarcerated. This will be treated as the sixth factor in the discussion below.

i. Factor 1: Maturity at the Time of the Offense. Under Miller Maturity at the Time of the Offense is Not Synonymous With Intelligence at the Time of the Offense.

The first *Miller* factor is chronological age; Efrén was still fifteen. Efrén was undeniably intelligent at the time of the offense, but he was also undeniably a fifteen-year-old who never had a driver's license. Defendant offered extensive written exhibits (received by consent) about the delayed maturation of impulse control in the prefrontal cortex. Even *Miller* is based on the notion that society didn't appreciate these issues until recently.

The court inappropriately discounted this *Miller* factor. Mr. Parades "chronological age," "immaturity," and "impetuosity" were there because he

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[40] *Id.* at 477–478.

was fifteen and did not disappear because he was intelligent and in some ways mature for a fifteen year old[41]

The United States Supreme Courts have consistently relied upon just this kind of social science research and literature in performing proportionality review.[42] The pertinent social science teaches that even if Mr. Parades was a bright 15-year-old, this says nothing about his immaturity or impetuosity.[43] Meanwhile, the court disregarded the most relevant proof because the defense found little or no evidence of trauma in his "idyllic" childhood.

The fact that this crime was planned on Monday and carried out two days later on Wednesday is certainly relevant for establishing premeditation and deliberation, but it does not undercut the Defendant's youth and/or brain development. As Justice McCormick stated in her concurring opinion in *Taylor*:[44]

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[41] *Miller*, 567 US at 477.

[42] *See, e.g., Miller*, 567 US at 471, 472 (quoting *Roper v Simmons*, 543 US 551, 569; 125 S Ct 1183; 161 L Ed 2d 1 (2005) (in citing psychiatric and neurological studies of adolescent development, and noting, "science and social science . . . have become even stronger"); *Graham v Florida*, 560 US 48, 68; 130 S Ct 2011; 176 L Ed 2d 825 (2010), as mod (July 6, 2010), as mod (July 6, 2010) ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."); *see also Atkins v Virginia*, 536 US 304, 317–18; 122 S Ct 2242; 153 L Ed 2d 335 (2002) (citing social science literature in finding individuals with intellectual disability insufficiently culpable for the death penalty).

[43] *See* Lawrence D. Cohn & P. Michiel Westenberg, *Intelligence and Maturity: Meta-Analytic Evidence for the Incremental and Discriminant Validity of Loevinger's Measure of Ego Development,* 86 J. of Personality & Social Psych. 760, 767 (2004) (meta-analysis of 42 studies involving over 5600 participants concluded "unequivocally" that "intelligence" and "impulse control, perspective taking, [and] self-reflection," are "conceptually and functionally distinct concepts.").

[44] *Taylor*, 510 Mich at 146 (McCormack, C.J., concurring).

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> Juveniles make rash decisions, cannot assess consequences, and are often unable to extricate themselves once criminal situations are set in motion."

The promise of Miller is that "children who commit even heinous crimes are capable of change."[45] Neurodevelopmental growth continues into the mid- to late-twenties.[46]

The trial court considered the defense evidence from Dr. Daniel Keating as to brain development and childhood trauma. The Court stated, "There's little, if any, evidence of childhood trauma experienced by the defendant. A careful review of the total record discloses a mature, intelligent, manipulative individual who completed the crime he planned."[47]

However, while Dr. Keating's work (and many other works on this issue) does deal with trauma, it does not deal exclusively with it. As this Court and the Supreme Court has repeatedly recognized, trauma may exacerbate some childhood issues; the issues are by no means unique to traumatized children. Dr. Keating recognized that.

In *State v Comer* the trial court stated, "There was nothing specific by way of testing or otherwise that was provided about the defendant's lack of brain development."[48] But as the New Jersey case ruled, this holding ignores the *legal*

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[45] *Montgomery*, 577 US at 212.

[46] *See Beaulieu & Lebel, Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 27 J Neuroscience 31 (2011); Pfefferbaum, *Variation in Longitudinal Trajectories of Regional Brain Volumes of Health Men and Women*, 65 Neuro Image 176, 176-193 (2013).

[47] Sentencing Decision transcripts 9/10/21 at 14; App. 17a and 6/26/23 at 8; App. 26a.

[48] *State v Comer*, 249 NJ 359, 379; 266 A3d 374 (2022).

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significance, under the precedents of the Supreme Court and now of this Court as well, that the Defendant was only 15 years old. That is, individualized proof that youth affected his actions is not necessary for purposes of the first *Miller* factor, especially in the case of a 15-year-old. Rather, the modern revolution in juvenile sentencing is premised on "[t]hree *general* differences," well-established in the literature, that are common to all adolescents.[49] Accordingly, the trial court should have accorded significant weight to the first *Miller* factor.[50]

At the original ruling on the *Miller* motion, this Court found that the Defendant's status as nearly sixteen made him sufficiently close to eighteen years old in terms of maturity to warrant the ultimate sanction of life without parole. Since July of last year, that age is now nineteen and the Supreme Court might raise it further.[51]

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[49] *Roper*, 543 US at 569 (citing "scientific and sociological studies") (emphasis added); *accord Miller*, 567 US at 472 ("'[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions' [in Roper regarding the ways in which all juveniles are different].") (citation omitted).)

[50] *See State v Roby*, 897 NW2d 127, 145 (Iowa, 2017) ("The [first Miller] factor draws upon the features expected to be exhibited by youthful offenders that support mitigation" and is "the basis for the core constitutional protection extended to juvenile offenders").

[51] *People v Parks*, 510 Mich 225; 987 NW2d 161 (2022). As Justice Zahra noted in dissent: "I would not be surprised if the Court extends its current line in the near future. The science defendant offers indicates that there is significant neurological development until age 25, and while the majority acknowledges this science, the majority today extends Miller's and Montgomery's holdings only to offenders who are 18 years old. *Parks*, 510 Mich at 298 (Zahra, J. dissenting).

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Justice McCormack's separate opinion in *Taylor* is helpful in approaching the prosecution's attempts to bump fifteen years eleven months up to effectively eighteen years old. Commenting on Dr. Keating (the same doctor whose reports were introduced in this case), the Court stated:[52]

> A juvenile defendant need not be the same age as the petitioners from *Miller* to receive the benefit of the *Miller* decision. The Supreme Court drew the line at 18, not 14. Proximity to age 18 can affect the *extent* of the mitigation; the Supreme Court suggested as much. But that is the question: how does a juvenile's age affect the extent of mitigation? Proximity to age 18 is emphatically not an aggravating factor.
>
> The trial court also concluded—despite the brain science presented—that because an 18 year old could not benefit from consideration of that information, neither should a 16-year-old defendant. This was also error. As I have stated, "*Miller* did not suggest that 18-year-olds are, as a class, equipped with the decision-making faculties that 17-year-olds lack. Nor did *Miller* suggest that a sentencer should disregard the expanding body of scientific knowledge on adolescent brain development merely because an older offender who, although developmentally similar, may be subject to mandatory LWOP sentencing."
>
> In other words, *Miller* requires that juveniles under 18 are to be treated, categorically, as having diminished culpability. That the Eighth Amendment might not require the same for similarly situated 18-year-olds is not constitutionally relevant. It is not a juvenile defendant's burden to prove that they were especially immature, impetuous, or risk-seeking. *Miller* requires that we start from the premise that every youthful offender possesses these characteristics. Moreover, the

[52] *Taylor*, 510 Mich at 142–43 (citations omitted).

> Court of Appeals' view that Keating's testimony was only minimally relevant because he did not personally interview the defendant turns the starting presumption upside down. Rather, Keating's testimony reflects the starting presumption that LWOP is not appropriate.

This point was also made on page is also made on pages 3 to 6 of the Keating paper below. Dr. Keating did not simply indicate that individuals with low intellect or trauma would suffer from these issues. This portion of his writings make it clear that until adult maturity is reached in the early to mid-20s, the prefrontal cortex is not developed and juveniles have limited capacity to undertake additional tasks that require judgment. They engage in risky behavior and that execution of a plan will use up much of the available capacity that would normally be devoted to judgment.[53]

Judge LaSata focused on the premeditation of the of the offense in that the offense was planned several days before it was executed. Dr. Keating and Justice McCormack both note that once a plan has been commenced, a juvenile has substantially more difficulty than an adult extracting themselves from the criminal plan. They have difficulty with "engagement with other activities that demand PFC resources, such as dealing with emotionally arousing situations or in the face of peer pressure[. This] may make the limited PFC resource effectively unavailable."[54]

As people reach their mid-twenties, they also develop ability to offload portions of their decisionmaking to other portions of the brain.[55] This is a

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[53] Executive Summary at *3.*

[54] Executive Summary at *3-4.*

[55] *Id.* at 4.

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gradual process which involves a "maturational mismatch" which will on average be more marked the younger the individual.[56] Again, Mr. Parades was fifteen when this offense took place. The issue isn't whether a juvenile abstractly understands right from wrong or could answer the question appropriately on a test ("cold cognition").[57] The problem is that they value the immediate gratification over the forgoing.[58]

The part of the brain that causes adolescents to be sensation-seeking and reward-seeking kicks into high gear at puberty.[59] But the part of the brain responsible for self-control, regulating impulses, thinking ahead, evaluating the consequences of a risky act, and resisting peer pressure is still undergoing dramatic change well into the mid-twenties.[60] Thus, while the law has established the age of 18

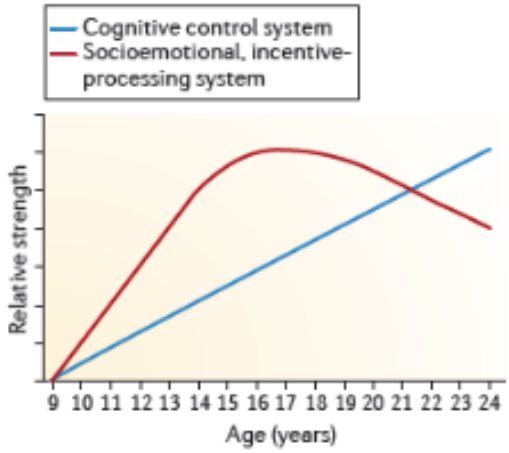

Figure 1. Dr. Keeting's chart demonstrates that brain divergence happens from early adolescence with the frontal cortex continuing to grow but not reaching adult levels until a person's mid-20s.

[56] *Id.* at 4.

[57] *Id.*

[58] *Id.* at 6

[59] *Id.* at 5.

[60] *See, e.g., A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death Penalty*, 40 NYU Rev L & Soc Change 139, 163 (2016) (citing research that found antisocial peer pressure was a highly significant predictor of reckless behavior in emerging adults 18 to 25); and *Weingard, Effects of Anonymous Peer Observation in Adolescents' Preference for Immediate Rewards*, 17 Dev Sci 71 (2013) (finding that a propensity for risky behaviors exists into early adulthood past age 18, because of a young adult's "still maturing cognitive control system").

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as a bright line in sentencing decisions, no such bright line is supported by the science.

Keating also speaks of a developmental mismatch that happens during this time period.[61] The insetted chart reproduced from the Keating summary speaks about brain divergence which happens rapidly from early adolescence with the frontal system continuing to grow but not reaching adult levels until the mid-20s. This creates a significant chance of risk based behavior in juveniles including crime, accidental injuries, driving mishaps, etc.

A review of Mr. Paredes behavior at the time of the offense shows precisely the type of immaturity described above. The record shows that Mr. Paredes told his friends that they would be forming the "Eight Ball Posse" three weeks before the murder.[62] None of the witnesses testified about any criminal behavior by the group.

The trial court found that Efrén was the leader in this offense. He was the shooter with the extra responsibility and onus that properly carries. But he was certainly not the only active participant. All of the older Defendants took affirmative actions. Sixteen year old Alex Mui was the driver and was active in hiding evidence. Eric Mui, who was nearly eighteen, obtained the gun the prior December according to his own brother's testimony, (TT V, 926). Again, according to Alex Mui, Eric gave the gun to Efrén the night of the murder, (TT V, 941). Alex picked Efrén up from the store in Eric's car, and took the gun back. It

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[61] Executive Summary *at 7.*

[62] The boys were classmates at Stevensville High School and there is no testimony of gang affiliation. It appears the name was derived from the 1987 rap song of that name:
https://en.wikipedia.org/wiki/N.W.A._and_the_Posse

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was the Mui brothers who dumped a bag, originally containing coin rol1s and ammunition on Andy Dura and added a bag containing the gun the next day, (TT IV, 737). Mr. Dura testified that Eric Mui told him that they would "take him out" if he mentioned the bag to anyone, (TT IV, 741). He told two of his friends that if anything happened to him, Eric and Alex had killed him, (TT IV, 744).

Furthermore, the behavior of all of them was hardly that of experienced criminals but rather of impulsive teenagers. As criminals, the group made a number of mistakes. The casing of the Vineland store was executed two days earlier was done with a vehicle with one headlight and carried out in a way that was so obvious that two store neighbors noticed a grocery store being cased during business hours. Efrén told a circle of teenagers with no criminal history that he had the keys to the register and his plan to kill his manager, (TT V, 933).

After the offense was committed, Efrén forgot the loot and had to go back. Even though the group had made plans to dispose of the weapon, the Mui brothers first entrusted it with someone (Andy) who was untested and unlikely to stand up to any police interrogation. They then forgot the gun when they took the bullets to Andy for storage. Efrén did equally poorly. The money was stored in the basement rafter at Efrén's home and keys (probably the ones for Vineland) were under Efrén's mattress. Even though Efrén was the last person to be seen with the deceased, there was no planning (or at least execution) to withstand even a cursory police investigation.

The People rely on the fact that according to Alex Mui, Mr. Paredes forgot the money and had to go back in for it as proof that the reason for the crime was a thrill killing with the money having no importance. However, it is at least equally likely that it was a panicked reaction of a young teenager who realizes he has actually gone through with a terrible crime.

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Relevant to youth and immaturity was snippy and extremely juvenile responses he made to Officer William Tucker who arrested him. These comments would seem juvenile for a seventeen year old, but Efrén was not 17 but 15, an age where children have not yet learned control. According to Officer Tucker, while in the car after arrest Efrén stated: "I'm only 15 and I ain't going to do no time. You can't prove nothing", (TT IV, 716-717). After they arrived at the station, he made the unsolicited comment: "I'm not worried, I'm only 15, I ain't going to do no time for this one," (TT IV, 718).

The bravado and lack of a realistic outlook are typical of a young teenager. Even in the unlikely event he had been charged as a juvenile, he could have done over five years' incarceration in a juvenile facility. Certainly, he does not appear to be the exceptionally mature person the People have attempted to paint.

During the trial, Mr. Sepic tried to discern Efrén's motives for committing the offense:

> Mr. Burch asked you, I guess without expecting an answer, if Paredes was so stupid as to tell where he was going to hide stuff. I think there was something else there, and what – and how he did it inside? Is he so stupid to tell someone that? Well, two comments about that. First of all, remember I talked to you about the possible reason for this happening at all? Was he trying to be the leader? Was he trying to get friends? Was he trying to do something big? He wanted to know – let people know, his buddies know, that he did this, that he could do this, he had the capacity to do this?

Stated another way, under Mr. Sepic's theory at the time of the trial the Defendant's motives were childish and immature, not adult and calculating. Significantly, Mr. Sepic (in 1989) never maintained that Mr. Paredes was the leader of a gang. The Court of Appeals misinterpreted the record on this point. There is no allegation that the group of boys treated themselves as a gang, there

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was not a single piece of gang insignia, nor were there any other joint activities (prior to the offense), other than riding around in a car, attending a sports event and once lifting weights at Eric's house. There is testimony that Efrén told the boys that they were the Eight Ball Posse; but a name without more does not make a gang. There is not even a discussion of the other boys accepting the name and at trial none of the boys called it a gang.

At trial Steve Miller, who was never charged, stated that they went to the Lutheran game together and lifted weights once, (TT I, 248). He further stated Efran had named it three weeks earlier, (TT II, 277). Co-Defendant Alex Mui testified that the group was about a month old, (TT V, TT 928).

Even Mr. Sepic did not call it a gang, saying in closing, "Lakeshore High School students, this group of Eric and Alex Mui and Jason Williamson and Steve Miller and Brian Hanson, maybe, and Efran, Paredes, Jr., were members of a group. And somebody thought they needed a name. And Efran Paredes, Jr. came up with the Eight Ball Posse. This is as they indicated, some two, three, four weeks before the 8th of March, (TT VII, 1161)."

The trial court's ruling on this point is not in accordance with *Taylor* or the Keating paper relied on by the Court below. While the Court stated that youth was a mitigating factor, he discounted it in virtually the next sentence.

ii. Factor 2: Defendant Was Born from a Relationship Between a 13 Year Old Mother and Drug Addicted Father. While His Quality of Life Improved by Age 15, It Was Not "Idyllic." Given the Fact that the Original 1989 Reviewer of the Defendant Identified the Defendant's "Somewhat Idealized Beliefs" and Emotional Attempt to Push Aside His "Sad Feelings About the Loss of His Biologic Father," the Court Erred in Determining this Factor Was Neutral.

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Considering the second factor, the "family and home environment,"[63] the court assigned no weight because, because the Defendant's upbringing was "nearly idyllic." He then called this factor neutral. In doing so, the Court disregarded the fact that the Defendant's mother was 13 when she was impregnated by his father – a man with a history of alcohol and drug abuse who was twenty-one. She was fourteen and four months at his birth. Mr. Paredes father left when he was six. At the time of the PSI he was living in Texas and they had no known address for him. At that time Efrén stated that his father drank too much and was into drugs, (PSI, 8/3/89).

While the Defendant's upbringing clearly stabilized following his mother's remarriage, the 1989 contemporaneous evaluation of the Defendant stated that the Defendant was in denial and overstated the quality of his upbringing: " He may be giving a somewhat idealized social history as he denies any sad feelings about the loss of biologic father."[64] Defendant emphasized this finding in written and oral arguments after remand. The trial court did not address this despite again referring to the Defendant's "idyllic" upbringing.

This point was raised in the Defendant's brief on remand and at oral arguments, but was ignored by Judge LaSata. Judge LaSata did not consider or address how this "background might have contributed to a [15]–year–old's commission of a crime."[65]

iii. Factor 3: "The circumstances of the homicide offense, including the extent of [her] participation in the conduct and the way familial and peer pressures may have affected him."

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[63] *Miller*, 567 US at 477.

[64] 1989 Forensic Center Report, p. 2; Circuit Court Remand Appendix, p. 14a.

[65] *Miller*, 567 US at 479–80

The trial court found the third Miller factor, the circumstances of the offense was neutral. This may be accurate because except for his very young age, the crime is in the heartland of first degree murders.

Mr. Paredes was the shooter, but the older co-Defendants were by no means passive participants. Of the three individuals actively involved he was the youngest participant by almost a year. Eric Mui provided the car and the gun and according to the evidence was carefully providing himself an alibi at the time of the offense. Alex Mui was the driver.

These individuals also provided for the disposal of the gun and took original control of the money. In determining offender culpability in this offense, the Defendant encourages this Court to also review the co-defendant sentencings. Counsel's understanding of their sentence was that both defendants were given substantial adult sentences based in part on the fact that they minimized their own involvements in the offense. Even so, testimony at this Defendant's trial was that Alex Mui was actually shocked that the Defendant carried out the offense. The peer pressure situation of this was significant. Group talk evolved into a murder plan carried out in a couple of days because Eric Mui had previously obtained the gun.

In fact, the testimony at trial was that Mr. Paredes did not even know how to work a firearm and had to be taught it by Jason Williamson, who also loaded the gun. After the shooting, Mr. Paredes forgot the "loot" and had to go back to get the money. This causes the prosecution theorizes that this was a thrill killing (which would be consistent with impulsivity); youth and inexperience committing criminal offenses is equally as consistent with these actions.

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While the loss of a human being is a tragedy,[66] this murder lacks many of the aggravating factors of other murders where individuals have been granted *Miller* resentencings. The offense is not excessively brutal. The deceased was killed by shooting and died very quickly. As was noted elsewhere in this brief, Defendant was inexperienced with firearms, and the issue of one shot versus multiple successive shots is of no significance. There was no torture, sexual abuse, or multiple killings.[67] (before the offense).

The Court of Appeals incorrectly stated that the crime was not done quickly.[68] The actual crime (as opposed to planning) involved calling the deceased to come to the back of the store and shooting him very quickly four times. Death was instantaneous. As Defendant had never before shot a gun the fact that he fired four times in very quick succession shows nothing but inexperience with a gun. But even counting calling the Defendant into the room (when they were the only two in the store), it appears that it didn't take more than a minute or two. Alex Mui stated that Efrén told him that he called him into the storeroom over the intercom and that he shot at Rick and missed. And he said Rick said, "Efrén" and then he knew he had to take him out," (TT V, 950).

The loss of life in every murder is a tragedy and it is all too easy to treat the loss of the life as dispositive. That is why the Supreme Court has warned that sentencing courts must not allow the "brutality or cold-blooded nature of any

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[66] *See Maynard v Cartwright*, 486 US 356, 364; 108 S Ct 1853; 100 L Ed 2d 372 (1988) ("[A]n ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'").

[67] *Cf People v. Howard,* No 17-1364-FC (Mich. Cir. Ct. July 26, 2018) (defendant stabbed the deceased twelve times).

[68] *Paredes,* 2023 WL at p *2.

particular crime" to "overpower" the analysis of whether a sentence is constitutionally permissible.[69] Put another way, "[i]ncapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity."[70] In *Miller* and *Montgomery* themselves, the offenders' horrific crimes did not preclude the Court's inquiry into the children's individualized circumstances and potential for rehabilitation.[71]

It is for this reason that our Supreme Court has acknowledged the "brutality or cold-blooded nature" of homicide may make it difficult to "distinguish the few incorrigible juvenile offenders from the many that have the capacity for change" "with sufficient accuracy."[72] Here, the Court of Appeals plainly relied on the fact that the offense had several days between planning and execution to find that the Defendant would be incapable of rehabilitation: "The court concluded that defendant's crime was not the result of impetuosity or recklessness. "

Many of the offenses where term of year sentences were imposed involved multiple stabbings, sexual abuse, multiple victims, and or excessive force. Jose Burgos who testified before this Court testified that he committed a double murder during the course of a robbery, yet he was determined to be eligible for a second chance. Like Mr. Paredes, Mr. Burgos was only fifteen at the time of the

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[69] *Roper v Simmons,* 543 US 551, 573; 125 S Ct 1183; 161 L Ed 2d 1 (2005).

[70] *Graham v Florida,* 560 US 48, 73; 130 S Ct 2011; 176 L Ed 2d 825 (2010), as mod (July 6, 2010).

[71] *See Miller*, 567 US at 468 (Evan Miller declared, "I am God, I've come to take your life," as he beat his neighbor to death with a baseball bat).

[72] *Graham*, 560 US at 77–78 *(internal quotation marks omitted).*

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offense and was deemed to be an appropriate candidate for a term of years sentence.

As regrettable as this murder was, when benchmarked against other first degree murders, it was not out of the ordinary.

> *iv. Factor 4: Whether the defendant "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, [her] inability to deal with police officers or prosecutors (including on a plea agreement) or [her] incapacity to assist [her] own attorneys."*

Mr. Paredes continues to maintain his innocence to this day which makes discussions of potential pleas impossible. Whether a casual mention of a plea was ever exchanged between counsel has been lost to the pages of time and whether such a mention would have ever turned into a plea deal is little more than speculation at this point and counsel does not press this issue. Defendant agrees that the fourth Miller factor is neutral.

The Court of Appeals stated "He continued to maintain his innocence of this crime despite the clear evidence to the contrary." In the trial court Defendant extensively briefed why protestations of innocence cannot be used against a Defendant. As Judge LaSata did not rely on this, Defendant did not brief it to the Court of Appeals only to find the appellate court making this leap. It is also worth briefly noting that the Defendant presented evidence that the reporter who covered the case in 1989 had serious doubts about the validity of the conviction. This was not being offered as evidence of innocence, but instead was offered to contest the state's argument that the evidence was "clear."[73]

[73] See page 136 of appendix from Power Point from 2021 closing argument.

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Indeed, it is clear that his unchanging protestations of innocence have hurt him throughout this process. The Court of Appeals did not properly assess this factor.

v. Factor 5: Under the Clear and Convincing Evidence Standard, the Rehabilitation Factor Now Favors the Defendant. Defendant Has Had an Exemplary Prison Record. He Has Less Tickets than the Average Inmate and There is No Record Support for the Prosecution Claim that He is a Master Manipulator.

The fifth Miller factor clearly favors the Defendant. Defendant argues that it did even prior to Taylor, but after Taylor it is hard to conceive of an argument that it does not favor the Defendant. When the trial court initially evaluated the State's evidence under the neutral presumption, it found the last Miller factor (rehabilitation) was close but favored the State. The Court deleted this language from its reimposed sentence finding without explanation even though the Defendant's brief on remand expressly eluded to it.[74] As noted earlier in this brief, "clear and convincing" is the highest standard applied in civil cases and approximates the beyond-a-reasonable doubt standard. The fact that the Court previously found this question was close applying a neutral presumption now means that it favors the accused.

"In the usual sense, "rehabilitation" involves the successful completion of vocational, educational, or counseling programs designed to enable a prisoner to lead a useful life, free from crime, when released. The evidence supported that

[74] *Id.*

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Bennett had achieved rehabilitation"[75] A prisoner's rehabilitation is a *strong* mitigating factor.[76]

Deborah Labelle is an attorney who was deeply enmeshed in the litigation concerning the implementation of Miller in Michigan. She has tracked all juvenile lifer cases in Michigan and testified that he was the poster child of rehabilitation.

Mr. Paredes's accomplishments in prison include:

- Completion of his GED (1989);
- Completion of College Classes at Montcalm Community College (1989-1994);
- Becoming Certified as a Braille Translator (1997);
- His work reports as a Braille Translator were so high that it was said that he could not only be a translator in the community, but that his skill set were such that he could run the Braille Translation Service which is one of the world's largest;
- He has worked as a teacher's aide, tutor, and clerk for the school principal;
- Together with a member of American Friend's Service Committee, he has created a peer enrichment program and parole readiness program that was adopted by the Department of Corrections and now given state wide;

Most remarkably, Efrén's accomplishments have extended beyond the prison walls:

- He worked with the founder of original "My Brother's Keeper Program" to mentor students in Detroit schools;
- He assisted in the creation of the Anahuacalmecac International University Preparatory School in Los Angeles California for Native American youth. The school is still functioning today; and,[77]

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[75] *People v Bennett*, 335 Mich App 409, 426; 966 NW2d 768 (2021).

[76] *Id. at 428.*

[77] https://www.dignidad.org (last visited September 15, 2023).

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- He is a published poet.

Awarding winning documentary producer, Tirtza Even, has made two films on Michigan's juvenile lifers. Attorney Deborah Labelle made all of her files available to her and she used those files to select the five most compelling candidates to report on. Mr. Paredes was one of them. She spent hundreds of hours studying these files and believed that Efrén was one of the most compelling candidates for release that she heard. Through her, this court heard excerpts of various individuals including Geoffrey Clark who used to guard Mr. Paredes day in and day out. Mr. Clark testified that based on this exposure, it was impossible to fool guards and Mr. Paredes was the real deal.

Reviews of prisoners' family relationships yield two consistent findings: prisoners who maintain strong family ties during imprisonment have higher rates of post-release success, and men who assume husband and parenting roles upon release have higher rates of success than those who do not." [78] Mr. Paredes has done so. He is still close with his parents and has been married to his wife Maria for over a decade.[79] He has also made many friends, both men and women, where his relationships have lasted for many, many years.

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[78] Joan Petersilia, "*When Prisoners Come Home: Parole and Prisoner Reentry*" *41 (2003).*

[79] A *Miller* hearing is not the appropriate place to present a reentry plan, and counsel made this point clear in his brief. *People v Hernandez*, unpublished opinion of the Court of Appeals, issued December 22, 2020 (Docket No. 350565), 2020 WL 7635454, p *17 ("Considering the procedural posture of the case, a concrete reentry plan would have little practical value, nor would it bolster the value of defendant's plan as evidence of rehabilitation. After all, the trial court was not tasked with considering when and under what circumstances defendant ought to be released from prison"). He did, however proffer, that if released, Mr. Paredes will join his wife and daughter at her residence in Van Buren County. The trial also heard testimony that the Defendant also has significant relationships in neighboring Indiana together with friends and family

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The number of witnesses who testified that Efrén Paredes was a positive influence in their life is overwhelming. From fellow juvenile lifer Jose Burgos who regarded Efrén is instrumental in his rehabilitation and testified to Efrén's positive impact on him to filmographer Stephanie Bellerhasset who testified to Efrén's positive impact on her life, people saw him as a source of strength and optimism.

Evidence Based Results. Judge LaSata also ignored the evidence based evaluations conducted by the Department of Corrections. The evidence based evaluations conducted by the Defendant also support the Defendant's showing of release. His COMPAS, IORNS, TAPs, and MMPI scores are very good.[80] These tests are discussed in greater detail below. Efrén is at the lowest security level (Level II) that can be reached with his sentence. Additionally, by analogy the law from prosecution parole appeals all show that these tests are strong evidence that the Defendant is likely to successfully reintegrate into the community.[81]

The IORNS is the only actuarial risk assessment instrument that assesses all three factors (i.e., static, dynamic, and protective factors) important to recidivism. It provides a more comprehensive risk assessment than is currently available through concomitant assessment. The instrument consists of four indexes, eight scales, 14 subscales, and two validity scales.

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throughout the State of Michigan and beyond who will help him. His skills with Braille translation make him highly employable, even from his home.

[80] See App. 34a et seq.

[81] *See In re Elias,* 294 Mich App 507, 520; 811 NW2d 541, 548 (2011) (explaining various MDOC evidence based practices and finding that these tests are significant evidence that the offender will not be a menace when released).

Efrén's most recent Minnesota Multiphasic Personality Inventory-2 (MMPI-2) test results, administered by an MDOC psychologist, indicate he has tendencies toward moralistic thinking, is sincere, and socially responsible. He prizes agreeableness, trust, and avoidance of conflict. The results also indicate he is receptive to treatment and wants to work on himself. The MMPI-2 is, by far, the most common of all the psychological assessments employed, and can be a valuable tool in the assessment of those charged with or convicted of murder.[82]

According to Dr. Richard Vickers, a licensed psychologist in private practice in New York who has administered and interpreted over 3,000 MMPI tests, the MMPI-2 is "highly reliable" and "well represented in the peer-reviewed literature, with approximately 250 MMPI-2 studies published per year" and its "Retest coefficients for 8 of the 10 basic scales surpass .80, and validity coefficients can approach 100%."[83]

The Defendant's most recent Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) test indicates his risk of violence, recidivism, and supervision levels are all low. It also revealed no inconsistent response or faking concerns. COMPAS is a comprehensive risks and needs assessment instrument widely used by Corrections departments and sentencing bodies across the nation, which takes into account both static information (such as the prisoner's past criminal offenses) and dynamic data (such as the prisoner's evolving attitudes and mental condition). The software generates a score ranking

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[82] Kenneth S. Pope, Joyce Seelen & James Neal Butcher, "*The MMPI-2, and the MMPI-A in Court: A Practical Guide for Expert Witnesses and Attorneys*" 9 (2d ed. 1999).

[83] *Shea v Long Island R Co,* No. 05 CIV. 9768 (LLS), 2009 WL 1424115 (SDNY, May 21, 2009).

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the offender's statistical likelihood of violence, recidivism, success on parole, and other factors.

Research has shown that judgments using actuarial risk assessment "has been found to outperform human judgment in virtually all decision-making situations."[84] Such tools contribute consistency and predictability, removing arbitrariness from the decision-making process. They produce "an objective estimate of violence risk" based upon statistical relationships between individual risk factors and criminal behavior.[85]

Nearly every state uses a risk assessment tool for at least one point of decision in corrections. A 2008 national survey found that 87% of parole releasing authorities reported using some type of risk assessment instrument.[86]

Actuarial risk assessment has also been incorporated into various stages of judicial decision-making. A survey of chief judges in state courts administered by the National Center for State Courts revealed that the judiciary views the incorporation of risk assessment tools as desirable among the most important sentencing reform priorities.[87]

Efrén's Extensive Mental Health Treatment. For the past ten years Efrén has voluntarily been receiving monthly therapy for depression through the

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[84] Stephen D. Gottfredson & Laura J. Moriarty, "*Statistical Risk Assessment: Old Problems and New Applications,*" 52 Crime & Delinq. 178, 180 (2006). *See also United States v Bannister*, 786 F Supp 2d 617, 658 (ED NY, 2011) (discussing the value of actuarial instruments in predicting recidivism).

[85] John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 Va L Rev 391, 408–09 (2006)

[86] Susan C. Kinney & Joel M. Caplan, Ctr. for Research on Youth & Soc. Pol'y, "*Findings from the APAI International Survey of Releasing Authorities*" *1 (2008).*

[87] Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 USFL Rev 585, 587 (2009).

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Outpatient Mental Health (OPMH) program. He has benefited from several years of therapeutic treatment from psychologists and social workers. While participating in OPMH he has successfully completed several classes including Grief and Loss, Healthy Boundaries, Thinking Errors, Meditation, Stress Management, Character Development, and Anger Management. Half of all citizens will experience a mental health issue in their lives, but only 13% will seek professional help because of denial. Efrén's willingness to seek help reflects his ability to recognize personal struggles and address them in a responsible way.

Extremely Low Recidivism for Former JLWOP Defendants. At the evidentiary hearing, Deborah Labelle testified that the state with the closest demographics to Michigan with respect to juvenile lifers is Pennsylvania. According to a Press Release from the Philadelphia District Attorneys Office, in Pennsylvania they have experienced a 1% recidivism rate.[88] Ms. Labelle testified that in Michigan, there have been no JLWOP defendants who have reoffended. As this brief and the evidence makes clear, there is no evidence that Mr. Paredes is likely to be part of this 1% or less group of individuals. Judge LaSata did not address this factor.

vi. The Catchall Michigan Factor: The court may also consider "any other criteria relevant to its decision, including the individual's record while incarcerated."

While not formally a *Miller factor in Skinner* the Court held that in addition to the five factors articulated in *Miller* and *Montgomery*, a Court can consider all the traditional factors used in sentencing. While there is a great deal of overlap

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[88] *New Study Finds 1% Recidivism Rate Among Released Philly Juvenile Lifers, https://medium.com/philadelphia-justice/new-study-finds-1-recidivism-rate-among-released-philly-juvenile-lifers-607f19d6d822*

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between this category and fifth *Miller* factor, Defendant has made the decision to include the factors which the prosecution claimed went to showing Efrén's alleged incorrigibility here. This includes his prison misconduct tickets and incidents, claims that he is manipulative, and the strategic threat group that the Defendant was briefly involved in twenty-two years ago.

Prison Misconduct Tickets. Prison misconduct tickets are frequently looked at by courts in determining an inmate's rehabilitation. Because every aspect of a prisoner's life is scrutinized, these tickets run from the mundane to the significant. Richard Stapleton is the retired hearings director for the Michigan Department of Correction and oversaw their prison misconduct ticket process. He testified that many tickets have no predictive value as to prisoner rehabilitation. 95% of prisoner misconduct tickets result in findings of guilty, (HT II, 62). Where an inmate is found not guilty, the ticket should be purged from the prisoner file. Sometimes remnants of these tickets remain in the file, (HT II, 47). The tickets which have predictive value are generally Class 1 tickets and it is important to focus on the conduct rather than the title of the ticket. In relation to this, Mr. Stapleton testified to the following points:

- "Substance Abuse" tickets can be charged when an inmate is unable to urinate for a drug test within one hour. Individuals who are unable to urinate are placed on increased monitoring, (HT II, 53). Here, there is no evidence that Mr. Paredes was ever found to have a controlled substance of any type in his blood or urine.
- *Assault on a Prison Guard* includes even minor resistance. Thus, pulling away from a search constitutes an "assault", (HT II, 53). This is all that happened in Mr. Paredes' ticket for possession of a cellular modem and there were no allegations by the guard of anything that would constitute even a minor assault outside of prison.

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- *Cellular Phones/Modems*. Mr. Paredes admitted to using a contraband cellular modem during his employment at the Braille project, (HT II, 79) . Per Detective Dannefell, a forensic search of his computer did not show that Mr. Paredes visited dangerous cites or engaged in additional violations on the computer. The unauthorized searches were limited to information about juvenile lifers, looking for a replacement part for his wife's car, and other equally benign searches, (HT I, 30). Similarly, Mr. Burgos and others testified that while contraband cell phones present institutional security concerns many of the calls are made by prisoners simply trying to avoid the cost of prison calls and or the long lines at prisoner phones, (HT I, 71).;
- *Alleged Threats Against Mui Brothers.* The prosecution has also tried to suggest that the Defendant may have been involved in a threat against the Mui brothers. The Department of Corrections investigated this assertion and rejected it. The fact that the Defendant may have been momentarily detained pending investigation is of not proof of anything. Mr. Stapleton stated that the Department will often place an inmate or inmates under brief detention while they investigate a matter. No quantum of proof or due process is needed. They will act on unsupported rumors, (HT II, 54). The fact that the matter was investigated by the Department and not pursued is not reliable evidence that the incident occurred. It should not have been considered. Further, disputed information must be proven. "Due process requires a sentence to be based on accurate information,[89] and

[89] *People v Miles*, 454 Mich 90, 100; 559 NW2d 299 (1997),

in *Bennett* the Court of Appeals held that "a purely theoretical and uncertain prediction"[90]

- *Alleged Incitement to Riot.* The prosecution has similarly tried to suggest that the Defendant may have been involved in an incitement to riot in the 1990s. There is no evidence to support this. Richard Stapleton's testimony makes it clear that a charge would have to be investigated, that the standards of proof to find Mr. Paredes guilty was preponderance of the evidence, and a guilty finding would have resulted in a security reclassification which did not happen, (HT II, 47). It was error to rely on this unsubstantiated allegation as well.
- *Melanic Islamic Palace STG.* The Prosecution has attempted to claim that the Defendant's brief attendance at service with the Melanci Islamic Palace of the Rising Sun was an indication of his lack of rehabilitation. At the time of his attendance, this was an organization recognized as a religious group by the Department of Corrections. While it was later recognized as a strategic threat group, the Defendant promptly withdrew from the organization. As Professor Manville and Richard Stapleton both testified, the Department only offered the opportunity to withdraw to individuals they did not regard as threats. The leaders were transferred to federal prison where most of them still remain. As Mr. Paredes testified, he attended every religious service that he could attend in prison as part of the process of finding himself.

Manipulative. The prosecution repeatedly alleged and the trial judge accepted the notion that Efrén was "manipulative," (HT II 116-117, 2021 Closing 6-8).

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[90] *People v Hernandez*, 508 Mich 972; 965 NW2d 554, 556 (2021) (Viviano, J.). *See also Bennett*, 335 Mich App at 413.

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Despite seriously trying, counsel cannot find the *facts* underlying this allegation. Efrén is intelligent, articulate, and charismatic, but there is no evidence that the Efrén was "manipulative." Manipulative means "intentional or willful conduct designed to deceive or defraud."[91] There is no evidence that any act of persuasion was for this purpose. Being a model inmate is not manipulative, working in Braille is not manipulative, taking a leadership role in prisons is not manipulative. Getting people outside of prison as supporters is not manipulative. Indeed, the pejoratives used by the prosecutor in closing highlight this,

> [A]nd look at the manipulation through a prison, leading up to his request for commutation. He marshalled a considerable number of liberal do-gooders on juvenile justice. A reverend out of Detroit. Scott Elliott, local activist. And a junk legal fa -- faculty member at Mary Grove College. Individuals active in Amnesty International. The sec -- a secretary at the Medill School of Journalism innocence project. Students at Michigan State University. Journalists. Former Lakeshore teachers. Therapists in the prison. (2021 Closing, 8)

As used in this case, it is nothing more than a pejorative designed to minimize his accomplishments and to denigrate his supporters. That fact that an inmate behaves in the system with some hope that it may aid release is not "manipulation." It is an implied part of the correctional system.

Mr. Paredes was an immature and impulsive teenager whereas the adult Mr. Paredes is probably one of the most extraordinary inmates in the prison system. Reduced to its essence, *Miller* is about the question of whether the

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[91] *Ernst & Ernst v Hochfelder*, 425 US 185, 199; 96 S Ct 1375; 47 L Ed 2d 668 (1976).

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youthful offender is capable of change and whether a deserve a second chance at life. Mr. Paredes has now served more than thirty-three years and deserves that chance.

Judge LaSata should have focused on who Mr. Parades was in 2021 (or even who he might be by 2049), not who he may have been when he committed the offense or in the early years of his prison sentence.[92] In a *Montgomery* analysis the focus turns on rehabilitation. As the Court of Appeals recently explained in a published opinion:[93]

> The focus of the analysis necessarily shifts when a court considers an appropriate sentence for an adult who was sentenced to a lifetime of imprisonment for a crime committed as a juvenile. While sentencing a young person, a judge looks forward and endeavors to predict the future. *Miller* counsels that a careful examination of the offender's developmental characteristics, his or her family environment, and the circumstances surrounding the crime help guide a determination of whether that child will ever be capable of change. Resentencing an adult requires restructuring the evidentiary review; the older the adult, the larger the predictive canvas becomes. *While the Miller factors remain highly relevant, a judge resentencing an offender who has served many years in prison has the benefit of actual data regarding whether the offender's life in prison is truly consistent with "irreparable corruption," the only ground Miller specifically identified for imposing a life-without-parole sentence.*

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[92] As noted in Issue I, most of the disputed incidents were not even established and should not have been considered.

[93] *Bennett*, 335 Mich App at 415–16 (emphasis added).

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Similarly, Justice McCormack noted in her *Taylor* concurrence:[94]

> Permanent incorrigibility "is inconsistent with youth. Few juveniles are truly incorrigible, and "many ... have the capacity for change." While a trial court might "encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and [LWOP] is justified," this will be uncommon because of "children's diminished culpability and heightened capacity for change[.]"

Justice McCormack also noted: "Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood. * * * That is, juvenile criminal behavior does not inevitably predict adult criminal behavior."[95] She concluded: "The question is not whether the defendant was rehabilitated in 2014, but whether he could be rehabilitated within a statutory term of years—which can be up to 60."[96] As the Court of Appeals noted in this case: "While *Miller* did not categorically ban sentences of LWOP for juveniles; nevertheless the Court anticipated that "this harshest possible penalty will be uncommon."[97]

In making this decision, the latest negative information that he cited was that defendant fathered a child in 2009. He did not explain how this undercut claims of rehabilitation. He also failed to acknowledge that Defendant has been as active a participant in the raising of his daughter that it is possible for an incarcerated person to be. (Defendant does have tickets in 2015 and 2016 for

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[94] *Taylor*, 510 Mich at 148 (McCormack, J. concurring) (citations omitted).

[95] *Id.* at 149.

[96] *Id*, at 149.

[97] *Paredes,* at *2.

RECEIVED by MSC 9/18/2023 10:51:43 AM

possession of a cell phone but has not had misconduct tickets of any kind since 2016).

Reliance on incidents that happened many years ago early in the prison sentence has limited predictive value. In *Granger*, the Court went on to note that:[98]

> "[t]o the extent that the resentencing court made a factual finding regarding [Granger's] risk of reoffending, it was clearly erroneous because no evidence supported it."[99] The resentencing court's conclusion that Granger's exemplary prison record is not predictive of how he would act on release is improperly speculative, if not inaccurate. No record evidence of Granger's actions over the last 35 years supports a finding that he is a risk to reoffend. The extensive "predictive canvas" gleaned from the prison records and other evidence supports that Granger's behavior is inconsistent with irreparable corruption."

Only those juvenile homicide offenders who are incorrigible may be sentenced to life imprisonment without parole. The record in this case shows that Mr. Parades had less misconduct tickets than most inmates and that his behavior patterns has steadily been improving over the decades.

Deterrence and rehabilitation have worked. The only remaining justification would be retribution. "'[T]he case for retribution is not as strong with a minor as with an adult'" because juveniles' immaturity and impetuosity make them less culpable for their crimes, and "'personal culpability'" is at "'[t]he

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[98] *People v Granger*, unpublished opinion of the Court of Appeals, issued August 4, 2022 (Docket No. 355477), 2022 WL 3133787, p *9.

[99] *Id.* quoting *Bennett*, 335 Mich App at 434.

RECEIVED by MSC 9/18/2023 10:51:43 AM

heart of the retribution rationale.'"[100] And the "'same characteristics'" make juveniles "'less susceptible to deterrence,'" as their propensity for "'impetuous and ill-considered actions and decisions'" means that "they are less likely to take a possible punishment into consideration when making decisions."[101]

This leaves only the incapacitation and rehabilitation rationales. But incapacitation can "justify life without parole . . . [only if] the juvenile offender forever will be a danger to society," *i.e.*, only if "the sentencer [] make[s] a judgment that the juvenile is incorrigible."[102] And because life without parole "forswears altogether the rehabilitative ideal," that penalty is, likewise, compatible with the rehabilitation rationale only for a juvenile who is incorrigible.[103] Thus, life without parole is proportional only for incorrigible juveniles convicted of homicide.[104]

Judge LaSata erred in focusing on the undeniable premeditation of the offense as a basis for not imposing a term of years sentence. As the Supreme Court has repeatedly noted, at the time of sentencing, "it 'is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender

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[100] *Graham*, 560 US at 71 (citations omitted).

[101] *Id.* at 72 (citations omitted).

[102] *Id.* at 72.

[103] *Id.* at 74.

[104] *See State v Zuber*, 227 NJ 422, 451; 152 A3d 197 (2017); *Montgomery, 577 US at 20. See also Montgomery*, 577 US at 208(*"[Miller]* rendered life without parole an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth."). All other juveniles are entitled to "'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Miller*, 567 US at 479 *(quoting Graham*, 560 US at 75*).*

RECEIVED by MSC 9/18/2023 10:51:43 AM

whose crime reflects irreparable corruption.'"[105] Indeed, *Graham* prohibited life without parole for juveniles convicted of non-homicide specifically on this basis.[106]

There is no evidence that the Defendant was a psychopath. It was ruled out by the 1989 contemporaneous evaluation of the Defendant which cannot be overridden by the immunized testimony of co-defendants with no psychological training, an apparent motive to minimize their involvement. It is also not overridden by the personal beliefs of opposing counsel. The 1989 report states that there was no evidence of psychopathy, that he might be amenable to treatment, but he would need more time for this to happen than was available in the juvenile system.[107]

Extensive research shows that several of the core diagnostic items for psychopathy – those that are most often used to predict future dangerousness – overlap with inherent and transitory features of youth. [108] Consequently,

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[105] *Jones v Mississippi*, 141 S Ct 1307, 1315; 209 L Ed 2d 390 (2021) (quoting *Roper*, 543 US at 573).

[106] *Graham*, 560 US at 75 ("Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset.").

[107] Forensic Center Report, *p. 5-6.*

[108] *See* Daniel Seagrave & Thomas Grisso, *"Adolescent Development and the Measurement of Juvenile Psychopathy,"* 26 L. & Human Behavior 219, 224 (2002) (citing "many ways in which operational definitions of psychopathy have parallels in characteristics of children and adolescents"); *John F. Edens, et al., "Assessment of 'Juvenile Psychopathy' and Its Association with Violence: A Critical Review," 19 Behavioral Sci. & L. 53, 58 (2001) (*psychopathy diagnostics of "need for stimulation/proneness to boredom, impulsivity, and poor behavioral controls" are problematic in assessing juveniles because "sensation and thrill seeking . . . increase from mid to late adolescence . . . , and then decline over the course of adulthood").

RECEIVED by MSC 9/18/2023 10:51:43 AM

empirical data confirms such assessments confuse normal features of adolescent development with a probability of future dangerousness, resulting in many more false positives than accurate predictions.[109]

In the case of Mr. Paredes, there is evidence that the murder (and related theft) were discussed with other juveniles on Monday and almost took place that night, but actually occurred on Wednesday. Certainly, this is enough for premeditation, but it is also within the period of the crime being set in motion.

The allegations that the Defendant is manipulative and had the patience to be an ideal inmate for decades as is opposing counsel's theory has no record support. Applying the *Taylor* standard, this Court should sentence Mr. Parades to a term of years.

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[109] *See* Elizabeth Cauffman, et al., *"Comparing the Stability of Psychopathy Scores in Adolescents Versus Adults: How Often Is "Fledgling Psychopathy" Misdiagnosed?,"* 22 Psych., Public Pol'y, & L. 77, 84 (2016) (diagnoses of psychopathy in adolescence are not stable over even short periods of time); *Richard Rogers, et al., "Predictors of adolescent psychopathy: Oppositional and conduct-disordered symptoms,"* 25 J Am Acad Psych & L 261, 269 (1997)(empirical study finding weak correlation between diagnosis of psychopathy in adolescence and later physical aggression). *See also John F. Edens, et al., "Youth Psychopathy and Criminal Recidivism: A Meta-Analysis of the Psychopathy Checklist Measures,"* 31 L. & Human Behavior 53, 59 (2006) (meta-analysis with sample size of nearly 3,000 individuals finding weak correlation between youth psychopathy diagnosis and violent recidivism); *John F. Edens & Justin S. Campbell, "Identifying Youths at Risk for Institutional Misconduct: A Meta-Analytic Investigation of the Psychopathy Checklist Measures," 4 Psychological Servs. 13, 23 (2007*) (empirical study examining behavior of juveniles diagnosed with psychopathy in institutional settings "revealed that physical violence occurred too infrequently to examine").

RECEIVED by MSC 9/18/2023 10:51:43 AM

III. MICHIGAN IMPOSES A HIGHER STANDARD THAN *MILLER V ALABAMA* BOTH IN TERMS OF THE BURDEN OF PROOF AND IN IMPOSING A CATEGORICAL RULE AGAINST SENTENCING JUVENILES UNDER THE AGE OF EIGHTEEN TO LIFE WITHOUT THE POSSIBILITY OF PAROLE.

In the Court of Appeals, the Defendant argued that Michigan as a matter of state constitutional law categorically prohibited the imposition of a LWOP on an offender who committed the offense before their 18th birthday.[110] He also repeatedly invoked the Michigan Constitutional prohibition on cruel *or* unusual punishment in the trial court. This Court should use this case as an opportunity to decide whether there is a state constitutional prohibition on life without the possibility of parole for juveniles who commit the offense before their 18th birthday.

A state can impose a higher state standard than *Miller* under its own Constitution. Michigan' Constitution protects against cruel *or* unusual punishment. This disjunctive language has been held to provide a higher state standard.[111] This linguistic difference is highly significant, because the U.S.

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[110] *People v Paredes*, 2022 MiA 359130-23, *Issue III*, *p. 46* et seq.

[111] *People v Bullock*, 440 Mich 15, 27; 485 NW2d 866 (1992); *People v Parks*, 510 Mich 225; 987 NW2d 161 (2022); *People v Stovall*, 510 Mich 301; 987 NW2d 85 (2022). *See also Matter of Monschke*, 197 Wash 2d 305, 325; 482 P3d 276 (2021) (extending Miller protections to age 21 as a matter of state constitutional law); *State v Sweet*, 879 NW2d 811 (Iowa, 2016) (categorically banning juvenile life without the possibility of parole sentences for juveniles who kill as a matter of state constitutional law); *Diatchenko v Dist Attorney for Suffolk Dist*, 466 Mass 655; 1 NE3d 270 (2013) (same).

Supreme Court has often upheld a punishment scheme on the theory that it may have been cruel, but it was not "unusual."[112]

In *People v Taylor*, this Court left open the higher state standard issue. The regional disparity in the application for natural life without the possibility of parole sentences shows how the Miller individualized determination has proven unworkable. Mr. Sepic's reference to "liberal do-gooders" in his closing highlights this disparity, (Closing, 8) Defendant also asks this Court to monitor *Taylor* and when applicable find that the sentence is violative of the Michigan Constitution. Massachusetts has opted to provide its children greater protection under its state constitution than under Miller.[113]

The US Supreme Court expressly reminded state courts of this.[114] Nothing in the Court's ruling in *Jones v Mississippi*, "preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder." These include the abrogation of life sentences, requiring enhanced

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[112] *Harmelin v Michigan*, 501 US 957; 111 S Ct 2680; 115 L Ed 2d 836 (1991).

[113] *See Commonwealth v Perez*, 477 Mass 677, 683; 80 NE3d 967 (2017) ("The point of our departure from the Eighth Amendment jurisprudence was our determination that, under art. 26, the 'unique characteristics of juvenile offenders' should weigh more heavily in the proportionality calculus than the United States Supreme Court required under the Eighth Amendment"). *See also Richard Zhao,* Richard Zhao, *Second Chances: Why Michigan Should Categorically Prohibit the Sentence of Juvenile Life Without Parole*, 55 U Mich JL Reform 691 (2022) Juliet Liu, *Closing The Door On Permanent Incorrigibility: Juvenile Life Without Parole After Jones V Mississippi, 91 Fordham L Rev 1033, 1065 (2022).*

[114] *Jones v Mississippi*, 141 S Ct 1307, 1323; 209 L Ed 2d 390 (2021).

factfinding, or more detailed factfinding. The United States is the only country which sentences juvenile lifers to die in prison.[115]

The notion that a juvenile can be detained based on the notion of "incorrigibility" is flawed in the abstract, but, as this case, is also flawed in the real world application because it inevitably allows courts to focus on historical events without regard to progress. "Incorrigibility" was seen as a mismatch between a juvenile's needs and the support he had received; it was not seen as a fixed aspect of a juvenile's character."[116] Moreover, trial judges who are opposed to *Taylor/Miller*, have demonstrated a remarkable ability to convert mitigating circumstances into aggravating or at least neutral circumstances.[117] As the Washington Supreme Court noted (in dicta): "a categorical constitutional rule may be appropriate prohibiting LWOP sentences for offenders younger than 18."[118]

This case demonstrates the problem with the discretionary approach to justice. In most counties in the State, the People would never have even filed the motion for life. A comparison between this case and Borgos case is a good example. As the California General argued in *Gutierrez,* sentencing a juvenile (at least under the age of 16) to life without the possibility of parole should be presumptively or categorically barred. [119] In neighboring Canada, a juvenile

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[115] *Here Are All The Countries Where Children Are Sentenced To Die In Prison* https://www.huffingtonpost.com/2013/09/20/juvenile-life-without-parole_n_3962983.html.

[116] *Taking Corrigibility Seriously*, 28 Berkeley J Crim L 35, 54 (2023).

[117] Zhao, 55 U Mich JL Reform at 709–10 (noting how courts have classified the MDOC's inability to provide proper treatment as an aggravator).

[118] *Matter of Monschke*, 197 Wash 2d at 325.

[119] *People v Gutierrez*, 58 Cal 4th 1354, 1380; 324 P3d 245 (2014).

RECEIVED by MSC 9/18/2023 10:51:43 AM

convicted of first degree murder, and sentenced as an adult, would be parole-eligible between five and ten years after sentencing.[120]

Thirty-one states and the District of Columbia do not have any individuals serving juvenile life without parole sentences.[121] Since 2012, 33 states and the District of Columbia have changed their laws for people under 18 convicted of homicide, primarily by banning life without parole for people under 18, but also eliminating life without parole for felony murder or re-writing penalties that were struck down by Graham. Twenty-seven of the 32 reforms, plus that of the District of Columbia, banned life without parole for people under 18; the other seven states limited its application.[122] "There is clear international consensus against juvenile life without parole. There are no known cases of juvenile life without parole sentences being imposed outside the United States. Furthermore, the United Nations General Assembly consistently calls for the abrogation of juvenile life without parole sentences."[123]

This Court should either declare this sentence invalid under the Michigan Constitution or at minimum use this case to emphasize the message which too many courts have glazed over – *People v Taylor* truly made life without the possibility of parole the exception, not a word exercise.

This Court should reverse.

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[120] Canadian Criminal Code, Sec. 745.1.

[121] Juliet Liu, *Closing The Door on Permanent Incorrigibility: Juvenile Life Without Parole After Jones v Mississippi*, 91 Fordham L Rev 1033, 1067 *(2022)*.

[122] https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview/ *(last visited September 16, 2023).*

[123] Liu, 91 Fordham L. Rev at 1067–68(collecting international sources).

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IV. THIS CASE SHOULD BE REASSIGNED TO A DIFFERENT JUDGE ON REMAND.

This matter should be sent back for a hearing by a different judge. Despite the fact that the burden of proof shifted from a neutral burden of proof to the clear and convincing evidence standard, that Michigan adopted a presumption against life without a possibility of parole, and the fact that the trial court previously conceded that the rehabilitation factor was "close," the Court applied precisely the same reasoning changing only the legal standards of proof and inexplicably deleting the prior reference that rehabilitation was close. As counsel feared in the prior actions in this appeal, the trial court became so wedded to the prior result that he could not take the required fresh look. This issue was raised in the Defendant's post-remand brief and was rejected by the Court of Appeals as moot. Should this Court agree with the Defendant's other issues, the Defendant requests this Court remand this matter for further proceedings before a different judge.

A fair tribunal is a basic requirement of due process.[124] Recusal of a judge is required when "the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable."[125]

MCR 2.003(C) also protects a defendant's due process rights to a fair tribunal and a tribunal that provides the appearance of fairness:[126]

> Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

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[124] *In re Murchison*, 349 US 133, 136; 75 S Ct 623; 99 L Ed 942 (1955); US Const amend. XIV; Const 1963, art 1, § 17.

[125] *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975).

[126] MCR 2.003(C)(1).

> The judge is biased or prejudiced for or against a party or attorney.
>
> The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, 556 US 868 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

Under the court rule, a judge should disqualify herself when she is biased or prejudiced for or against a party.[127]

Even if disqualification cannot be met under the precise language of the rule, parties may establish disqualification on the basis of due process impartiality requirements.[128] The United States Supreme Court articulated a "stringent rule" in a criminal case arising out of Michigan: "Every procedure which would offer a *possible* temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law."[129] The Court explained such a stringent rule is necessary because justice and the appearance of justice are inexorably tied to each other: "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice." *Id.* (internal quotations omitted). "The inquiry is an objective one. The

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[127] MCR 2.003(C)(1)(a).

[128] *Cain v Michigan Dept of Corr*, 451 Mich 470, 497; 548 NW2d 210 (1996).

[129] *In re Murchison*, 349 US at 136 *(emphasis added; internal quotations omitted).*

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Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional *potential* for bias."[130]

As this Court previously noted in denying the Defendant's request to remand the matter to a different judge, a case should be reassigned to a different judge on remand, an appellate court must consider:[131]

> whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

The Sixth Circuit dealt with an analogous problem in *United States v Robinson*.[132] The late Judge Tarnow did not believe that a sympathetic defendant deserved the harsh sentence provided by the sentencing guidelines. He originally varied from the advisory guidelines to one day of incarcerated based on his policy disagreement with the sentencing guidelines. The Sixth Circuit reversed stating that the Court needed to consider the severity of the offense.[133]

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[130] *Caperton*, 556 US at 880–81 *(emphasis added)*.

[131] *Paredes at p* *4; *People v Walker*, 504 Mich 267, 285–286; 934 NW2d 727 (2019) *(citing People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997)*)* (quotation marks and citations omitted). *See People v Unger, People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008)

[132]*United States v Robinson*, 778 F3d 515, 524 (CA 6, 2015)

[133] *Robinson*, 778 F3d at 518.

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On remand, the Defendant presented some additional evidence about the Defendant's health conditions. The District Court nominally applied the Court's ruling, but reimposed another one day sentence with additional supervision conditions. The Court reversed again but this time on its own motion removed Judge Tarnow noting:[134]

> We are dismayed to discover that the district court did not heed our instructions. After some delay occasioned by Defendant's petition for writ of certiorari to the United States Supreme Court, which was denied, the district court rejected both the government's below-guidelines request for three years of incarceration and Defendant's own suggestion of a lengthy period of home confinement. Instead, the court re-imposed the sentence of one day of incarceration, lengthened the period of supervised release to ten years, and added several new conditions of release restricting Defendant's potential to interact with minors and requiring him to continue his therapy and medication. As discussed below, the district court's second sentencing decision failed to adequately address the three factors that we previously held were given insufficient weight. Although it is true that the district court was presented with new evidence regarding Defendant's mental health condition and his alleged post-sentence rehabilitation, both of which it could properly take into account under *Pepper v United States*, 562 US 476; 131 S Ct 1229; 179 L Ed 2d 196 (2011), this mitigating evidence could not overcome the fundamental deficiencies in the district court's reasoning resulting in the district court's sentencing decision

[134] *Id.*

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After reciting a similar test for reassignment,[135] the Sixth Circuit stated: "On the nearly identical facts of *Bistline,* this Court ordered reassignment because the record demonstrated that the "original judge would reasonably be expected ... to have substantial difficulty in putting out of his mind previously-expressed views or findings[.]" [136] To be clear, the Defendant is not basing his request for a new judge on the fact that the Court ultimately reached the determination that life without the possibility of parole was the correct sentence for Mr. Parades. He is basing it on the fact that the despite the quantum shift in presumptions and burden of proof, the record does not appear that the Court was able to take the fresh look at the facts that was required of him.

This case should be remanded for resentencing before a new judge.

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[135] *Robinson*, 778 F3d at 524

[136] *Robinson*, 778 F3d at 524 *(United States v Bistline*, 720 F3d 631, 634–35 (CA 6, 2013) *(quoting United States v Garcia-Robles*, 640 F3d 159, 168 (CA 6, 2011)*)*.

RELIEF

WHEREFORE, Defendant-Appellant asks this Court to grant leave to appeal, schedule a mini-oral argument, and ultimately a resentencing to a term of years together with all necessary ancillary hearings and procedures needed to accomplish this.

Respectfully submitted,

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Dated: September 18, 2023

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CERTIFICATION

The attached Brief contains 22,036 words. The cover page, table of contents, statement of questions, table of authorities, this certification, and proof of service are excluded. This brief was produced using Microsoft Office 365 (2019 version).

Respectfully submitted,

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PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF OAKLAND)

The undersigned declarant being first duly sworn, deposes and says that on September 18, 2023, (s)he did electronically serve a copy of the attached APPLICATION FOR LEAVE TO APPEAL, on the Berrien County Prosecutor's Office at the email addresses registered with said system.

Declaration in Lieu of Notarization. I declare that the foregoing is true and correct to the best of my information, knowledge, and belief.

Respectfully submitted,

/s/Stuart G. Friedman

_____
Declarant

DATED: September 18, 2023