STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EFRAN PAREDES, JR.,

Defendant-Appellant.
_____/

SC No. 166129

COA No. 359130

Berrien CC No. 1989-001127-FC

AMICUS CURIAE BRIEF
OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN

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QUESTION PRESENTED

When a crime is committed by a child, is a sentence of life in prison without any possibility of parole a cruel or unusual punishment in violation of Article 1, § 16 of the Michigan Constitution?

Amicus's Answer: Yes.

INTEREST OF AMICUS CURIAE[1]

The American Civil Liberties Union of Michigan ("ACLU") is the Michigan affiliate of a nationwide, nonpartisan organization with over a million members dedicated to protecting the civil rights and civil liberties guaranteed by the United States Constitution and our state constitutions. The ACLU has long advocated for an end to the practice of sentencing children in Michigan to life in prison, including through litigation, as amicus curiae, and through public education. See, e.g., *Hill v Snyder*, 900 F3d 260 (CA 6, 2018); *People v Carp*, 496 Mich 440; 852 NW2d 801 (2014), vacated 577 US 1186 (2016); ACLU of Michigan, *Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons* (2004) <https://bit.ly/45X5mRz>; Second Chances 4 Youth & ACLU of Michigan, *Basic Decency: Protecting the Human Rights of Children* (2012) <https://bit.ly/3RjreTa>; ACLU of Michigan, *Unlocking Hope: Juvenile Life Without Parole Sentences in Michigan* (2013) <https://bit.ly/3soDt7h>.

[1] Pursuant to MCR 7.312(H)(5), amicus states that no counsel for a party authored this brief in whole or in part, nor did anyone, other than amicus, its members, or its counsel, make a monetary contribution intended to fund the preparation or submission of the brief.

INTRODUCTION

In Michigan, a sentence of life in prison without the possibility of parole is the most severe punishment available under the law. Yet despite decades of consensus that children are less culpable than adults and more capable of change and rehabilitation, Michigan continues to impose this irrevocable punishment for offenses committed before the age of 18—including for offenses committed when the person was as young as 15, for felony murder, and for aiding or abetting.

In persisting in this uniquely harsh sentencing practice, Michigan is now a clear national and international outlier. No country in the world other than the United States allows children to be sentenced to life in prison without the possibility of parole. Within the United States, a majority of states have now eliminated this punishment, and it has become exceedingly rare. Michigan is among just a handful of states that continues to impose this sentence on a significant number of children, and in fact has the highest population of juvenile lifers in the country (and thus the world). Even within our state, the sentence is disproportionately imposed and is largely concentrated in just a few counties where prosecutors seek it and judges impose it. Moreover, judges who are asked to impose this sentence are forced into a game of impossible guesswork, attempting to forecast who will turn out to be "irreparably corrupt" or "permanently incorrigible"—a prediction that even expert psychologists cannot make with any confidence or reliability. The result is that children face sentences that are not only exceedingly severe, but also largely arbitrary.

The punishment of youth in this way is intolerable in a civilized society. It does not serve the state's interests, it undermines respect for the rule of law, and it denies children who are capable of change the opportunity to ever demonstrate their rehabilitation. The Michigan Constitution, and specifically its prohibition on cruel or unusual punishment, was written to protect the people of our state, including our children, from such a practice.

The time has come to do away, once and for all, with sentencing children in Michigan to die in a prison cell with no hope of ever being even considered for release. Amicus urges this Court to grant leave to appeal, hold that Article 1, § 16 of the Michigan Constitution prohibits life-without-parole sentences for offenses committed before the age of 18, and reverse the judgment below.

BACKGROUND AND LEGAL LANDSCAPE

Efren Paredes is one of hundreds of Michigan youth who were subject to a mandatory sentence of life without the possibility of parole. Efren was only 15 at the time of his offense, which occurred in 1989. He has served nearly 35 years in prison.

In the decades since, "the evolving standards of decency that mark the progress of a maturing society," *Estelle v Gamble*, 429 US 97, 102; 97 S Ct 285; 50 L Ed 2d 251 (1976), have led to a sea change in the way children are treated in our criminal justice system. At the federal constitutional level, a trio of groundbreaking United States Supreme Court cases—*Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005), *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010), and *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012)—led the way.

First, in *Roper*, the United States Supreme Court held that the Eighth Amendment prohibits our country's most severe sentence, the death penalty, from being imposed on those who were under the age of 18 when their crimes were committed. In reaching this holding, the Court noted that a majority of states had rejected the imposition of the death penalty on children. *Roper*, 543 US at 568. And the Court recognized the growing consensus of scientific and sociological research demonstrating that children are categorically different from adults: their "lack of maturity and an underdeveloped sense of responsibility," resulting in impetuous and reckless behavior; their heightened vulnerability to negative outside influences such as peer pressure and a lack of control

over their own environment; and that their character and personality traits are "more transitory" and "less fixed," such that even a heinous crime is not conclusive evidence of an "irretrievably depraved character" incapable of reform. *Id*. at 569-570. In light of these differences, the Court concluded, the penological justifications for the death penalty apply with less force to youth, as "retribution is not proportional if law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, or a substantial degree, by reasons of youth and immaturity," and "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.* at 571. The Court further concluded that a categorical prohibition was needed rather than a case-by-case approach, as in any given case "an unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth," and because "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 whose crime reflects irreparable corruption." *Id*. at 573. The Court noted, as well, "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty," which is prohibited by international agreements and authorities. *Id.* at 575.

Next was *Graham*, in which the Supreme Court applied a similar framework and rationale to hold that sentences of life without the possibility of parole are categorically unconstitutional for those convicted of non-homicide offenses committed before the age of 18. As the Court later summarized:

> [*Graham*] emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this

> context, because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment.
>
> Similarly, incapacitation could not support the life-without-parole sentence . . . [because] [d]eciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible—but incorrigibility is inconsistent with youth. And for the same reason, rehabilitation could not justify that sentence. Life without parole forswears altogether the rehabilitative ideal. It reflects an irrevocable judgment about an offender's value and place in society, at odds with a child's capacity for change. [*Miller*, 567 US at 472-473 (cleaned up).]

Finally, in *Miller*, the Court reaffirmed that "children are constitutionally different from adults for purposes of sentencing," *id*. at 471, and held that any statutory scheme that mandates a life-without-parole sentence for an offense committed before the age of 18 is unconstitutional. The Court reasoned that when the punishment is mandated, courts are unable to consider (1) the youth's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; (4) "that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and (5) "the possibility of rehabilitation even when the circumstances most suggest it." *Id.* at 477-478. These factors, the Court held, counsel against irrevocably sentencing a child to a lifetime in prison, and must be considered by the sentencing court. *Id*. at 480. Although the Court did not categorically ban life-without-parole sentences for youth under the Eighth Amendment, it stated that appropriate

occasions for imposing the sentence would be uncommon. "That is especially so," the Court observed, "because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 479-480.

Since *Miller*, the Supreme Court has twice more addressed life-without-parole sentencing for youth. In *Montgomery v Louisiana*, 577 US 190, 195; 136 S Ct 718; 193 L Ed 2d 599 (2016), the Court held that *Miller* must be applied retroactively, emphasizing that under the Eighth Amendment "a lifetime in prison is a disproportionate sentence for all but the rarest of children" and may be imposed, if at all, only on youth "whose crimes reflect irreparable corruption." Most recently, in *Jones v Mississippi*, 593 US __; 141 S Ct 1307, 1313, 1323; 209 L Ed 2d 390 (2021), although the Court held that "a separate factual finding of permanent incorrigibility" was not required by the Eighth Amendment to impose a life-without-parole sentence, the Court reaffirmed that youth and its attendant characteristics must be considered as mitigating factors, and specifically noted that "states may impose additional sentencing limits" and ultimately "may categorically prohibit life without parole for all offenders under 18."

Consistent with *Jones*, other states' practices have indeed shifted, remarkably and significantly, when it comes to life-without-parole sentencing for youth. At the time *Miller* was decided, all but five jurisdictions either mandated or allowed the sentence.[2] But in the decade since, the majority of states have come to reject it. Thirty-three states plus the District of Columbia have either abolished the sentence or have no one serving it.[3] For those states that continue to impose

[2] Campaign for the Fair Sentencing of Youth, *Tipping Point: A Majority of States Abandon Life-Without-Parole Sentences for Youth* (2018), p 5 <https://cfsy.org/wp-content/uploads/Tipping-Point.pdf>.

[3] Campaign for the Fair Sentencing of Youth, *States That Ban Life Without Parole for Children* <https://cfsy.org/media-resources/states-that-ban-juvenile-life-without-parole/> (accessed

this sentence on youth, it is exceedingly rare: only 12 states have imposed it at all in the past five years (for a total of 65 cases), and only four states have imposed it more than five times in the past five years.[4] Those states are Alabama, Georgia, Mississippi… and Michigan.[5]

Michigan's persistence truly stands out as a national outlier. Overall, our state has more than 60 individuals who committed their offense as children serving a life-without-parole sentence.[6] This is more than any other state in the country—and, because the United States stands alone in allowing it,[7] Michigan now has the unfortunate distinction of "leading" the world in imposing this most severe punishment.[8]

Meanwhile, a series of recent decisions by this Court, grounded in state law and consistent with *Jones*, have begun to place new limits on harsh sentencing for youth. In *People v Taylor*, 510 Mich 112; 987 NW2d 132 (2022), the Court held that under Michigan law there is a presumption against a life-without-parole sentence for children, and the prosecution bears the burden of proof by clear and convincing evidence to overcome that presumption. In *People v Boykin*, 510 Mich 171; 987 NW2d 58 (2022), the Court held that Michigan's sentencing jurisprudence required courts to consider youth and its attendant circumstances as mitigating factors even when imposing

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November 28, 2023); Campaign for the Fair Sentencing of Youth, *Juvenile Life Without Parole: Unusual. Unequal.* (2023), p 3 <https://cfsy.org/wp-content/uploads/Unusual-Unequal-JLWOP.pdf>.

[4] *Juvenile Life Without Parole: Unusual. Unequal.*, *supra*, pp 2, 4.

[5] *Id.*, p 4.

[6] *Id.*, p 5.

[7] Rovner, *Juvenile Life Without Parole: An Overview*, Sentencing Project (April 7, 2023) <https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview/>.

[8] See *States That Ban Life Without Parole for Children*, *supra* note 3; *Juvenile Life Without Parole: Unusual. Unequal.*, *supra* note 3, p 5.

term-of-years sentences. And in two landmark cases—*People v Parks*, 510 Mich 225; 987 NW2d 161 (2022), and *People v Stovall*, 510 Mich 301; 987 NW2d 85 (2022)—this Court expressly turned to the protections of the Michigan Constitution and held that its own independent prohibition on cruel or unusual punishment, Const 1963, art 1, § 16, which is broader and more protective than the Eighth Amendment, governs and limits life sentences imposed on youth.

In *Parks*, the Court held that under the Michigan Constitution's "broader . . . counterpart" to the Eighth Amendment, Const 1963, art 1, § 16, it was left with the "inescapable conclusion" that mandatory life-without-parole sentences for 18-year-olds are unconstitutional. *Parks*, 510 Mich at 241, 244. Although the United States Supreme Court had determined in *Miller* that mandatory life-without-parole sentences are unconstitutional under the Eighth Amendment only for individuals younger than 18, this Court held that under the Michigan Constitution the principles of *Miller* extend further and apply to 18-year-olds as well: "In other words, we may draw our own line, and we do so today." *Id*. at 247. To do so, this Court examined the prevailing scientific research on brain science for 18-year-olds, much as the United States Supreme Court had done in *Roper*, *Graham*, and *Miller*. *Id*. at 248-252. The Court next reiterated its longstanding four-factor proportionality test for "cruel or unusual punishment" analysis under the Michigan Constitution:

> (1) the severity of the sentence relative to the gravity of the offense; (2) sentences imposed in the same jurisdiction for other offenses; (3) sentences imposed in other jurisdictions for the same offense; and (4) the goal of rehabilitation, which is a criterion specifically rooted in Michigan's legal traditions. [*Id*. at 254-255.]

In applying the first two factors of that test, the Court noted that the most severe sentence available in Michigan was being imposed on individuals who according to scientific research are less culpable, and who because of their youth would likely serve more time and spend a greater percentage of their lives in prison than older adults who were more culpable as well as younger individuals most of whom receive non-life sentences under MCL 769.25. *Id*. at 257-262. Under

the third factor, the Court also found that the practices of other states, a majority of which did not mandate life without parole for 18-year-olds, weighed in favor of its ruling. *Id*. at 262-263. Finally, with regard to the fourth factor, the Court emphasized that the penological goal of rehabilitation had special salience as "rooted in Michigan's legal traditions" and reasoned that "it is particularly antithetical to our Constitution's goal of rehabilitative sentences" to mandatorily impose a punishment of life imprisonment without the possibility of parole on a group of individuals "who are otherwise at a stage of their cognitive development where rehabilitative potential is quite probable." *Id*. at 265.

In *Stovall*, this Court deployed a similar analysis and held that for second-degree murder when the offense is committed before the age of 18, sentences of life *with* the possibility of parole are categorically unconstitutional under Article 1, § 16 of the Michigan Constitution. Again, although acknowledging that the Eighth Amendment as interpreted by the United States Supreme Court did not prohibit such a sentence, this Court reiterated that the "Michigan Constitution . . . is different" and "called for a broader interpretation of Michigan's prohibition against 'cruel or unusual punishment' than the Supreme Court's interpretation of the federal counterpart." *Id.* at 314. Then, applying the established four-factor proportionality test for "cruel or unusual punishment" analysis under the Michigan Constitution, see *supra*, the Court determined that a parolable life sentence for a defendant who commits second-degree murder before the age of 18 violates Article 1, § 16. With regard to the first two factors, the Court reiterated that a life sentence "is particularly severe when imposed on a juvenile, given the important mitigating ways that children are different from adults." *Id.* at 314-315. Under the third factor, the Court also found that in surveying the practices of other states, "there is a clear national trend toward treating juveniles less harshly than adults and extending *Miller* beyond just the mandatory [life-without-parole]

context." *Id*. at 318. And finally, under the fourth factor, the Court determined that, as a practical matter, a parolable life sentence did not sufficiently advance the state's penological goal of rehabilitation, because "for juvenile offenders the question is whether that parolable life sentence provides a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 320. Given that individuals with life sentences typically lack access to rehabilitative programming in Michigan prisons and the state's parole board has complete discretion whether to grant release, the Court held that "parolable life does not necessarily further the sentencing goal of rehabilitation." *Id*. at 321.

Despite these monumental changes in the legal landscape since Efren Paredes's conviction for a crime that occurred in 1989 when he was 15 years old, in 2023 he was resentenced (in fact, re-resentenced) to life without the possibility of parole in Berrien Circuit Court, which the Court of Appeals promptly affirmed. Paredes now seeks leave to appeal. Amicus agrees with Paredes's argument that, in his individual case, the trial court erred in failing to properly weigh and apply the *Miller* factors, the prosecutor's burden of proof as established in *People v Taylor*, and the United States Supreme Court's overall admonition that, under the Eighth Amendment, "a lifetime in prison is a disproportionate sentence for all but the rarest of children" and is reserved for those "whose crimes reflect irreparable corruption," *Montgomery*, 577 US at 195.

Amicus writes separately, however, to strongly urge this Court to move beyond piecemeal appellate review of juvenile life-without-parole sentences under the Eighth Amendment. As argued below, when properly considered under the Michigan Constitution, such sentences are categorically unconstitutional.

ARGUMENT

I. The Michigan Constitution's prohibition on cruel or unusual punishments is broader and more protective than the Eighth Amendment, including in ways that limit severe punishment of youth.

"Michigan's Constitution has its own [cruel/unusual] punishment provision, but it is broader than the federal Eighth Amendment counterpart." *Parks*, 510 Mich at 241. Michigan's Constitution, which prohibits "unusually excessive imprisonment," *id*. at 241, incorporates a "proportionality principle," *id*. at 243, and is "informed by evolving standards of decency that mark the progress of a maturing society," a "standard [that] is progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," *id*. at 241.

In *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992), this Court outlined three "compelling reasons" why Article 1, § 16 of the Michigan Constitution must be interpreted more broadly than the Eighth Amendment of the United States Constitution. First, the text of the two constitutional provisions is different. *Id*. at 30-31. The relevant provision of the Eighth Amendment prohibits "cruel *and* unusual punishments," US Const, Am VIII (emphasis added), whereas the Michigan Constitution prohibits "cruel *or* unusual punishment," Const 1963, art 1, § 16 (emphasis added). The disjunctive "or" is necessarily broader than the conjunctive "and," *Bullock*, 440 Mich at 30 n 11, which "does not appear to be accidental or inadvertent," *id*. at 30, and prohibits punishments that are "unusual but not necessarily cruel" and vice-versa, *id*. at 31 & n 13. This intentional disjunctive language prohibiting cruel *or* unusual punishment thus implies an overall broader and more rights-protective meaning than the federal Eighth Amendment proscription against cruel *and* unusual punishments. *Id*. at 31.

Second, the two provisions have different historical backgrounds and origins. *Id*. at 32. In the Eighth Amendment, the prohibition on "cruel *and* unusual punishments" tracked the English

Declaration of Rights of 1689. See *Harmelin v Michigan*, 501 US 957, 966; 111 S Ct 2680; 115 L Ed 2d 836 (1991) (opinion of Scalia, J.). By contrast, in Michigan, "[t]he history of constitutional language banning 'cruel *or* unusual punishment,' as distinguished from 'cruel *and* unusual punishment,' can be traced back to the Northwest Ordinance 1787." *People v Lorentzen*, 387 Mich 167, 172 n 3; 194 NW2d 827 (1972). Additionally, by contrast with the Eighth Amendment, which was ratified in 1791, the current version of the Michigan Constitution was adopted in 1963, and by that time the common understanding of a prohibition on "cruel or unusual punishment" was different, broader, and more protective than that which was contemplated two centuries earlier. *Bullock*, 440 Mich at 32. In particular, "by 1963, the words 'cruel' and 'unusual' had been understood for more than half a century to include a prohibition on grossly disproportionate sentences, indicating that the framers and adopters of the 1963 Constitution had intended a broader view of the state constitutional protection." *Parks*, 510 Mich at 242.

Third, this Court's longstanding precedent supports interpreting Article 1, § 16 of the Michigan Constitution more broadly than the Eighth Amendment. *Bullock*, 440 Mich at 33. As early as 1972, this Court began to formulate a different framework of analysis under Article 1, § 16, than that which would develop under the Eighth Amendment. See *People v Lorentzen*, 387 Mich 167, 176-181; 194 NW2d 827 (1972). That framework would eventually ripen into the four-factor test used in *Bullock*, 440 Mich at 33-34,[9] which directly resulted in the Court declaring a life-without-parole punishment unconstitutional under the Michigan Constitution when that punishment had been specifically upheld as not violative of the Eighth Amendment, *id.* at 27, 40. This Court has continued to apply the four-factor test, and in doing so has repeatedly stated that

[9] As previously stated, the four factors are (1) the severity of the sentence, (2) sentences imposed in Michigan, (3) sentences imposed in other jurisdictions, and (4) the goal of rehabilitation. *Bullock*, 440 Mich at 33-34. Each factor will be examined in further depth below.

Article 1, § 16 is broader and more protective than its Eighth Amendment analog. See, e.g., *Parks*, 510 Mich at 241-242; *Stovall*, 510 Mich at 313-314.

The fact that Article 1, § 16 of the Michigan Constitution is to be interpreted more broadly than the Eighth Amendment has several important implications for the sentencing of Michigan's children, and for this case. In at least three other states where state constitutional protections against cruel/unusual punishment are broader than those of the Eighth Amendment, those states' supreme courts have held that life-without-parole sentences for youth are categorically unconstitutional. See *State v Bassett*, 192 Wash 2d 67, 77-91; 428 P3d 343 (2018); *State v Sweet*, 879 NW2d 811, 834-839 (Iowa, 2016); *Diatchenko v Dist Attorney for Suffolk Dist*, 466 Mass 655, 668-671; 1 NE3d 270 (2013). Moreover, as previously stated, this Court has already held that two sentencing practices involving youth violate the Michigan Constitution even though they do not violate the Eighth Amendment: mandatory life-without-parole sentences for 18-year-olds, *Parks*, 510 Mich at 268, and discretionary parolable life sentences for minors convicted of second-degree murder, *Stovall*, 510 Mich at 322. Thus, in examining the constitutionality of life-without-parole sentences for youth, this Court does not write on a blank slate.

Additionally, viewed through both a textual and doctrinal lens, the current laws and practices of other states, as well as current practices within this state, take on heightened significance under the Michigan Constitution. Recall that the phrase "cruel *or* unusual" in the Michigan Constitution uses the disjunctive "or"—as distinct from "cruel *and* unusual" in the Eighth Amendment with its conjunctive "and." *Bullock*, 440 Mich at 30 n 11. Consequently, the "unusualness" of a harsh punishment can, by itself, establish its constitutionality in our state. See *Lorentzen*, 387 Mich at 172 ("The prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that

prohibition."). Along the same lines, this Court has recognized that the meaning of Article 1, § 16 is a "progressive" one which incorporates "evolving standards," *Parks*, 510 Mich at 241. For this reason, the dynamic, *changing* practices of other states and within our state, including relatively recent ones, can likewise help establish the unconstitutionality of a punishment that has become more unusual and less accepted over time. In short, a harsh but commonplace punishment that was constitutionally permissible a decade ago may well have become so unusual as to be unconstitutional now.

And finally, the goal of rehabilitation has special salience. This Court deliberately added the goal of rehabilitation as a fourth factor in its Article 1, § 16 analysis because it is specifically "rooted in Michigan's legal traditions." *Bullock*, 440 Mich at 34. In cases involving the sentencing of youth to life in prison without the possibility of parole, such punishment "forswears altogether the rehabilitative ideal," *Graham*, 560 US at 74, despite scientific consensus that young people are "at a stage of their cognitive development where rehabilitative potential is quite probable," *Parks*, 510 Mich at 265. Thus, the heightened importance of rehabilitation under Article 1, § 16 highlights a critical difference between the Michigan Constitution and the Eighth Amendment when it comes to life sentences for youth.

II. Sentencing children to life in prison without the possibility of parole violates Article 1, § 16 of the Michigan Constitution.

As stated, this Court considers four factors to determine whether a sentence is cruel or unusual in violation of Article 1, § 16 of the Michigan Constitution:

> (1) the severity of the sentence imposed compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed on other offenders in Michigan, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the penological goal of rehabilitation. [*Stovall*, 510 Mich at 314.]

Applying these factors here, this Court should hold that a sentence of life in prison without the possibility of parole for an offense committed before the age of 18 is categorically unconstitutional.

A. First Factor: A sentence of life in prison without any possibility of parole is an unacceptably severe punishment to impose for any offense committed by a child.

In examining the first factor—the severity of the sentence imposed—this Court has already recognized that the extreme severity of a life-without-parole sentence carries special significance for youth, and weighs in favor of it being found unconstitutional. See *Parks*, 510 Mich at 257-259. As discussed extensively in federal and state case law, for children, the permanence and irrevocability of a sentence of life without the possibility of parole makes it "akin to the death penalty." *Miller*, 567 US at 475; see also *Graham*, 560 US at 69; *Parks*, 510 Mich at 257; *Diatchenko*, 466 Mass at 670. In fact, as this Court has recognized, "[t]his fate is particularly acute for young persons . . . because they will inevitably serve more time and spend a greater percentage of their lives behind prison walls than similarly situated older adult offenders." *Parks*, 510 Mich at 257.

Moreover, this Court has also recognized, in its analysis under the Michigan Constitution, that "the unique characteristics of [children's] brains make this penalty even more severe." *Id*. at 258. Children are less culpable than adults "because of the neuroplasticity of their brains, causing a general deficiency in the ability to comprehend the full scope of their decisions." *Id*. at 259. Similarly, their heightened vulnerability to negative outside influences such as peer pressure, a lack of control over their own environment, a diminished capacity to navigate the legal system, and other hallmark features of youth render a life-without-parole sentence imposed on a child more severe than such a sentence imposed on an adult. See *Miller*, 567 US at 471. By the same token, a child's greater capacity for maturation, rehabilitation, and reform, "as the years go by and as neurological development occurs," *id*. at 472, likewise renders the irrevocable life sentence a

disproportionately severe punishment to impose on those for whom "rehabilitative potential is quite probable," *Parks*, 510 Mich at 265.

Additional facts specific to Michigan make this sentence uniquely harsh in our state. Whereas in a majority of the states the death penalty is the harshest possible sentence reserved for the most culpable adults,[10] in Michigan a life-without-parole sentence is already the most severe punishment available for adults, leaving no room for the law to recognize or account for the diminished culpability of children. See *Parks*, 510 Mich at 257; see also *Diatchenko*, 466 Mass at 670. Additionally, Michigan is a state where children convicted and sentenced to life without parole have long been placed directly in adult prisons and subjected to solitary confinement and assaults, rendering a young person's conditions of confinement, not just its length, disproportionately harsh.[11] Similarly, those serving life sentences in Michigan are denied access to core educational and rehabilitative programming in prison. See *Stovall*, 510 Mich at 320; see also *Hill v Whitmer*, unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued June 2, 2020 (Case No. 10-14568), 2020 WL 2849969, at *6. Then there is the tragic fact that children in Michigan who are sentenced to life in prison have a significantly shorter life expectancy than adults who receive that sentence—50.8 years for

[10] See Death Penalty Information Center, *State by State* <https://deathpenaltyinfo.org/states-landing> (accessed November 28, 2023).

[11] See Michigan Department of Attorney General, *MI AG Nessel and MDOC Director Announce Settlement in Doe Case* (February 27, 2020) <https://www.michigan.gov/ag/news/press-releases/2020/02/27/mi-ag-nessel-and-mdoc-director-announce-settlement-in-doe-case>; Sentencing Project, *Youth in Adult Courts, Jails, and Prisons* (December 2021), p 4 <https://www.sentencingproject.org/app/uploads/2022/09/Youth-in-Adult-Courts-Jails-and-Prisons.pdf>.

children, as compared to 58.5 years for adults.[12] In Michigan the sentence quite literally takes years off a child's life as compared to that of a more culpable adult.

It is no answer to contend, as the state may try to do, that the punishment is not disproportionately severe because it has been restricted by *Miller* to "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 567 US at 479-480. Although the *Miller* Court clearly anticipated and hoped that further imposition of the sentence would be limited in this way, a differently constituted Supreme Court in *Jones* later held that no separate factual finding of irreparable corruption or permanent incorrigibility would be required to impose it. *Jones*, 141 S Ct at 1318. This Court came to a similar conclusion under its own Eighth Amendment and statutory analyses. See *People v Skinner*, 502 Mich 89, 114; 917 NW2d 292 (2018); *Taylor*, 510 Mich at 134. So, while *Miller* resulted in the sentence being imposed less often and even abolished in the majority of states (more on that later), the practical reality of post-*Miller* case law and practice is that it has not actually stopped courts from exercising their discretion to "impos[e] the harshest possible punishment under Michigan law on some of the potentially least culpable offenders." *Taylor*, 510 Mich at 134.

In other states with broader protections under their state constitutions than those provided by the Eighth Amendment, state supreme courts have concluded that "this type of discretion produces the unacceptable risk that children undeserving of a life without parole sentence will receive one," and have accordingly banned the sentence altogether. *Bassett*, 192 Wash 2d at 90; see also *Sweet*, 879 NW2d at 837-838 (concluding that "the likelihood that the multifactor [*Miller*] test can be consistently applied by our [trial] courts is doubtful at best" and that the "risk of error

[12] See *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences* <https://cfsy.org/wp-content/uploads/MI-Life-Expectancy-Data-Youth-Serv-Life-Update-10-30-23.pdf> (accessed November 28, 2023).

is unacceptably high"). Indeed, the United States Supreme Court reached that conclusion with regard to the death penalty in *Roper* and non-homicide offenses in *Graham*: "an unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than [that which was imposed]." *Roper*, 543 US at 553-554; see also *Graham*, 560 US at 77-78. Under the Michigan Constitution's broader protections, the same logic supports a conclusion that life-without-parole sentences are likewise categorically unconstitutional for all youth—who, "*as a group*, are less culpable than adults." *Taylor*, 510 Mich at 135.

B. Second Factor: The sentence has become unusual in Michigan and is disproportionate to other offenders and offenses.

The second factor—the penalty imposed for the offense compared to penalties imposed on other offenders in Michigan—also weighs in favor of holding life-without-parole sentencing for youth to be unconstitutional, for several reasons. First, despite having less culpability as a group, children sentenced to life in prison without the possibility parole "will spend more time behind prison bars than . . . adult defendants convicted of the same crime or similarly severe crimes." *Parks*, 510 Mich at 260. As this Court has previously concluded as to 18-year-olds, that fact alone makes the young person's experience "disproportionate to other offenders in this state." *Id.*

Post-*Miller* developments over the past decade have only heightened the disproportionality within Michigan. At the time *Miller* was decided, approximately 370 individuals were serving mandatory life-without-parole sentences for offenses committed before the age of 18.[13] Of the

[13] Swift, *Significant Racial Discrepancies in Michigan's Juvenile Life Without Parole Population, Report Finds*, Juvenile Justice Information Exchange (May 18, 2012) <https://jjie.org/2012/05/18/significant-racial-discrepancies-michigans-juvenile-life-without-parole-population-report-finds/>.

approximately 334 individuals who have been resentenced following *Miller* under MCL 769.25a, 22 now have life-without-parole sentences reimposed.[14] Since 2012, it is believed that seven additional life-without-parole sentences have been imposed in Michigan in the first instance, for post-*Miller* offenses and/or under MCL 769.25. Thus, compared to hundreds of other youth in Michigan who are convicted of the same offense, few have been subjected to this uniquely severe and irrevocable punishment. It is, in a word, unusual.

To make matters worse, whether a young person actually receives this sentence essentially comes down to the luck of the draw, dependent on arbitrary factors such as their location *within* Michigan, the practices of the local prosecuting attorney, and the judge. Nearly three-fourths of those currently serving the sentence come from just five of Michigan's 83 counties.[15] For those who are resentenced to life without parole following a *Miller* hearing, half come from just three counties.[16] In one county, the sentence has been reimposed seven times by just two judges; statewide, just four judges were responsible for eleven such resentencings.[17] Thus, within Michigan, this punishment is best described as unusual *and* arbitrary, in addition to disproportionate. Cf. *Glossip v Gross*, 576 US 863, 920; 135 S Ct 2726; 192 L Ed 2d 761 (2015) (Breyer, J., dissenting) (concluding that the death penalty violates the Eighth Amendment because it is administered arbitrarily, given that even "*within* a death penalty state, the imposition of the

[14] Data supplied by Michigan Department of Corrections and on file with amicus ACLU of Michigan.

[15] *Id.* The counties are Genesee, Kent, Oakland, Saginaw, and Wayne.

[16] The counties are Kent, Oakland, and Saginaw.

[17] Data on file with amicus ACLU of Michigan.

death penalty heavily depends on the county in which a defendant is tried," rather than the egregiousness of the offense).

C. Third Factor: The sentence is now highly unusual, as it is prohibited in a majority of states, is rarely imposed in the vast majority of states, and is banned internationally.

The third factor—the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other jurisdictions—weighs strongly in favor finding life-without-parole sentences for children unconstitutional. In fact, there has been a monumental sea change across the country with regard to this practice in the past decade, leaving Michigan standing nearly alone with just a handful of other states.

When *Miller* was decided in 2012, life-without-parole sentencing of youth was widespread. Forty-five states plus the District of Columbia and the federal government allowed the sentence to be imposed for offenses committed by children; only five states disallowed it.[18] And approximately 2,800 individuals were serving the sentence.[19]

In the decade since, however, the number of states allowing the sentence and total number of individuals serving it have plummeted. A majority of states (28) plus the District of Columbia now ban it entirely, and several others (5) have no one serving the sentence.[20] Fewer than 500 individuals are serving the sentence (the majority of whom are still awaiting resentencing post-*Miller*), concentrated in just 18 states.[21] The practice of actually imposing the sentence is

[18] *Tipping Point*, *supra* note 2, p 5.

[19] *Id.*, p 6.

[20] See *States That Ban Life Without Parole for Children*, *supra* note 3; *Juvenile Life Without Parole: Unusual. Unequal.*, *supra* note 3, p 3.

[21] See *Juvenile Life Without Parole: Unusual. Unequal.*, *supra* note 3, pp 2, 5.

concentrated in even fewer states: only 12 states have imposed it *at all* in the past five years (for a total of 65 cases), and only four states have imposed it more than five times in the past five years: Alabama, Georgia, Mississippi, and Michigan.[22] And among those four, Michigan has the highest juvenile lifer population in the United States—standing nearly alone not only in the country, but also in the world.[23]

Over five years ago, the Supreme Court of Washington observed that "the direction of change in this country is unmistakably and steadily moving toward abandoning the practice of putting child offenders in prison for their entire lives," with "a clear trend of states rapidly abandoning or curtailing juvenile life without parole sentences." *Bassett*, 192 Wash 2d at 86. That trend has only accelerated since. "The majority of jurisdictions now reflect a society and a criminal-punishment system more 'enlightened by a humane justice' than Michigan's current sentencing scheme set forth in this matter." *Parks*, 510 Mich at 264, quoting *Lorentzen*, 387 Mich at 178. Therefore, the growing national consensus against this uniquely harsh, and now unusual, practice weighs strongly in favor of finding that it violates Article 1, § 16 of the Michigan Constitution.

D. Fourth Factor: The sentence is in stark and irreconcilable conflict with the goal of rehabilitation because it is impossible to predict at sentencing that a young person is beyond repair.

The fourth and final factor—whether the penalty imposed advances the penological goal of rehabilitation—also strongly supports finding life-without-parole sentences for youth

[22] *Id.*, pp 2, 4.

[23] See Rovner, *supra* note 7; De la Vega & Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 USFL Rev 983, 985 (2008); Thompson, *Congress to Examine Juvenile Life Without Parole — A Human Rights Stain for the U.S.*, ACLU (September 11, 2008) <https://www.aclu.org/news/voting-rights/congress-examine-juvenile-life-without-parole-human-rights-stain-us>.

unconstitutional under the Michigan Constitution. The rehabilitation factor stands out in the Michigan Constitution's Article 1, § 16 jurisprudence as "a specific goal of our criminal-punishment system" and "[i]ndeed, . . . the only penological goal enshrined in our proportionality test as a criterion rooted in Michigan's legal traditions, despite the . . . Court's clear awareness of . . . other penological goals . . . ." *Parks*, 510 Mich at 265 (cleaned up). Thus, to the extent a punishment may be a close call under the Eighth Amendment but is deemed constitutional, its failure to stand up to scrutiny under a goal-of-rehabilitation microscope ought to push it over the Article 1, § 16 constitutional edge.

When considering the sentencing of youth, there is a stark and irreconcilable conflict between the penological goal of rehabilitation under Article 1, § 16 of the Michigan Constitution and a sentence of life in prison without any possibility of parole. This is so for three interlocking reasons. First, as recognized by the United States Supreme Court in *Graham* and *Miller*, "the penalty forswears altogether the rehabilitative ideal," as it "reflects an irrevocable judgment about the offender's value and place in society, at odds with a child's capacity for change." *Miller*, 567 US at 473, quoting *Graham*, 560 US at 74. Second, the punishment is particularly suspect in light of the scientific and sociological research demonstrating that for most youth, "rehabilitative potential is quite *probable*," *Parks*, 510 Mich at 265 (emphasis added), as their immaturity is transient, and it is only the *rare* juvenile whose crime reflects irreparable corruption, see *Montgomery*, 577 US at 195, 208-209; *Miller*, 567 US at 479-480. Third—and most critically in this case—even allowing for the possibility that a rare child will not be capable of rehabilitation, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime

reflects irreparable corruption." *Roper*, 543 US at 573; see also *Miller*, 567 US at 479-480; *Graham*, 560 US at 68.

It is this third point that should be dispositive for this Court under the rehabilitation factor of the Article 1, § 16 test. The life-without-parole sentence essentially requires courts to *predict* at the outset that rehabilitation in a given case is impossible—a prediction that even experts cannot make with the accuracy or reliability necessary to justify an irrevocable judgment with such profound, life-altering consequences. As the American Psychological Association and others have documented, study after study has failed to "suggest that anyone could reliably determine, *ex ante*, whether particular juveniles will reoffend," including "among adolescents convicted of the most serious crimes." Brief for the American Psychological Association et al as Amici Curiae Supporting Petitioners, *Miller v Alabama*, 567 US 460 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174239, at *21-25. This near-impossibility of prediction has driven numerous compelling critiques of the *Miller* Court's willingness to leave the Eighth Amendment's door open to continuing the practice of sentencing children to life without the possibility of parole. See, e.g., Marshall, *Miller v Alabama and the Problem of Prediction*, 119 Colum L Rev 1633 (2019); Galvan, Moffitt & Poldrack, *New Brain Science Shows Future Dangerousness Cannot Be Predicted in Defendants Under 21*, American Constitution Society (July 1, 2020) <https://perma.cc/BAZ8-ET6K>. In a state like Michigan that highly values the goal of rehabilitation in its cruel/unusual punishment test, the inability to predict irreparable corruption or permanent incorrigibility is fatal to the state's interest in retaining life without parole as a sentencing option for youth.

For state supreme courts that have declared the practice categorically unconstitutional under their states' constitutions, this very point has been central to their determinations. The Supreme Judicial Court of Massachusetts reasoned as follows:

> Given current scientific research on adolescent brain development, and the myriad significant ways that this development impacts a juvenile's personality and behavior, a conclusive showing of traits such as an irretrievably depraved character can never be made, with integrity, by the Commonwealth at an individualized hearing to determine whether a sentence of life without parole should be imposed on a juvenile homicide offender. Simply put, because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved. Therefore, it follows that the judge cannot ascertain, with any reasonable degree of certainty, whether imposition of this most severe punishment is warranted. [*Diatchenko*, 466 Mass at 669-670 (cleaned up).]

The Supreme Court of Iowa's reasoning was nearly identical:

> In reviewing the caselaw development, we believe, in the exercise of our independent judgment, that the enterprise of identifying which juvenile offenders are irretrievable at the time of trial is simply too speculative and likely impossible given what we now know about the timeline of brain development and related prospects for self-regulation and rehabilitation. . . . [A] district court at the time of trial cannot apply the *Miller* factors in any principled way to identify with assurance those very few adolescent offenders that might later be proven to be irretrievably depraved. In short, we are asking the sentencer to do the impossible, namely, to determine whether the offender is "irretrievably corrupt" at a time when even trained professionals with years of clinical experience would not attempt to make such a determination. [*Sweet*, 879 NW2d at 836-837.]

And most recently, the Supreme Court of Washington reached a similar conclusion, noting that while Washington's "*Miller*-fix statute requires sentencing courts to consider [a] 'youth's chances of becoming rehabilitated,' it is extremely difficult to make that determination," and such a difficulty "produces the unacceptable risk that children undeserving of a life without parole sentence will receive one." *Bassett*, 192 Wash 2d at 89-90.

The same concerns, moreover, have been central to at least two concurring and/or dissenting opinions in this state's Court of Appeals in which the authors concluded that life-without-parole sentences for children violate the Michigan Constitution: *People v Hyatt*, 316 Mich

App 368, 430-447; 891 NW2d 549 (2016) (BECKERING, J., concurring), aff'd in part and rev'd in part sub nom *People v Skinner*, 502 Mich 89 (2018); and *People v Eliason*, 300 Mich App 293, 318-338; 833 NW2d 357 (2013) (GLEICHER, J., concurring in part and dissenting in part), remanded sub nom *People v Carp*, 496 Mich 440 (2014). In *Hyatt*, Judge BECKERING concluded that "the difficulty of predicting when a juvenile is truly incapable of change and thus deserving of a life-without-parole sentence, the admitted lack of reliability in a case-by-case sentencing approach, and the significance of the sentencing decision" combined to render such a sentence unconstitutional. *Hyatt*, 316 Mich App at 435 (BECKERING, J., concurring). She further explained:

> [A] sentencing judge is, to a large degree, guessing whether the juvenile is capable of reform, on the basis of information that is widely recognized as unreliable given the malleability of a juvenile's still-developing brain. . . .
>
> . . . If the imposition of the harshest possible penalty available under the law cannot be done with any degree of reliability given the offender being a minor about whom the court must predict his or her entire future, how can the sentence not be rendered either cruel due to guesswork or unusually unfair? . . . How could such a speculative, roll-of-the-dice approach to meting out the most serious punishment on a group of offenders who are categorically less culpable not be cruel or unusual punishment? . . . While juvenile offenders are certainly deserving of punishment for their offenses, the task of accurately pegging the rare individual who is truly irreparably corrupt is simply too imprecise and speculative to pass muster under Michigan's Constitution. [*Id*. at 437-439.]

Judge GLEICHER's opinion in *Eliason* was much the same: "It is simply *impossible to predict* whether [the defendant] will someday develop the ability to grasp the full horror of his crime and to employ that knowledge in his emotional growth. . . . Because youthful offenders may grow and change, irrevocable judgments about their characters offend our Constitution's proportionality guarantee." *Eliason*, 300 Mich App at 334 (GLEICHER, J., concurring in part and dissenting in part) (cleaned up) (emphasis added). These concerns are no less valid today, and should lead this Court to the same conclusion.

In contrast with expecting courts to predict the impossibility of future rehabilitation in any individual case when a person is still young, Michigan's post-*Miller* term-of-years statutes, MCL 769.25 and MCL 769.25a, allow the Parole Board to make that assessment later in life, when actual present-day evidence of rehabilitation, growth and maturity can be appropriately considered. Because those statutes have maximum sentences that exceed the life span of the average individual sentenced to life in prison,[24] they can effectively function as a sentence of life *with* a meaningful opportunity for parole for those who can demonstrate rehabilitation. See MCL 791.233 ("A prisoner must not be given liberty on parole until the board has reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety."). Demanding that sentencing courts make those determinations at the outset, before any evidence of rehabilitation can be presented, leaves judge to speculate, often based solely on the facts of the offense itself, whether they are dealing with a rare case of "irreparable corruption." As was recognized in *Roper* and *Graham*, that inevitably leads to "an unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth," *Roper*, 543 US at 553; see also *Graham*, 560 US at 77-78, and thus "produces the unacceptable risk that children undeserving of a life without parole sentence will receive one," *Bassett*, 192 Wash 2d at 89-90.

In sum, life-without-parole sentences imposed on youth are not only inconsistent with the penological goal of rehabilitation, they make a mockery of it. This factor, therefore, strongly weighs in favor of finding that life-without-parole sentences for offenses committed before the age of 18 are categorically unconstitutional under Article 1, § 16 of the Michigan Constitution.

[24] See note 12, *supra*.

III. This Court's decade-old, vacated decision in *People v Carp* does not preclude a determination that imposing life-without-parole punishment on children is now unconstitutional.

The state may contend that this Court already held, in *People v Carp*, 496 Mich 440, 518-521; 852 NW2d 801 (2014), vacated 577 US 1186 (2016), that life-without-parole sentences for youth do not categorically violate the Michigan Constitution. But this Court should treat *Carp*'s decade-old precedential value, in the context of the wholesale evolution of the standards for punishing youth since the *Carp* decision, as either completely null or extremely limited, and revisit the issue today.

A. *Carp* was vacated in full and not just in part, so it should be treated as carrying no precedential weight.

Although some lower courts have treated *Carp*'s state constitutional ruling as binding,[25] they have been mistaken in doing so. *Carp*'s precedential value has been nullified by the combined effect of the United States Supreme Court vacating this Court's judgment and this Court's subsequent orders on remand.

In *Carp*, this Court ruled that *Miller* was not retroactive under either federal or state law *and* that life-without-parole sentences imposed on youth were not categorically unconstitutional under either the Eighth Amendment or Article 1, § 16 of the Michigan Constitution. *Carp*, 496 Mich at 469-521. Having done so, this Court affirmed the lower courts' orders denying relief from judgment under MCR 6.501 *et seq*. in the cases of Raymond Carp and Cortez Davis (whose case

[25] See, e.g., *People v Taylor (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued March 9, 2023 (Docket No. 325834), p 11; 2023 WL 2439473 at *8; *People v Wheeler*, unpublished per curiam opinion of the Court of Appeals, issued February 24, 2022 (Docket No. 354746), pp 11-12; 2022 WL 569365 at *9, rev'd in part and vacated in part 981 NW2d 721 (Mich, 2022). But see *Hyatt*, 316 Mich App at 430 n 1 (BECKERING, J., concurring) (addressing whether Article 1, § 16 prohibits life-without-parole sentences for youth "in light of the fact that the opinion in *Carp* was vacated").

was decided with Carp's). *Id*. at 528. Shortly thereafter, however, the United States Supreme Court decided in *Montgomery* that *Miller* was retroactive, and issued "GVR" orders in both Michigan cases: it granted Carp's and Davis's petitions for a writ of certiorari, vacated this Court's judgments, and remanded the cases to this Court for further consideration in light of *Montgomery*. *Carp v Michigan*, 577 US 1186; 136 S Ct 1355; 194 L Ed 2d 339 (2016); *Davis v Michigan*, 577 US 1186; 136 S Ct 1356; 194 L Ed 2d 339 (2016). Then, on remand, this Court entered docket-text orders stating "Case revived per SCOTUS mandate,"[26] and issued published orders as follows:

> On order of the Court, in conformity with the mandate of the Supreme Court of the United States, we REVERSE the November 15, 2012 judgment of the Court of Appeals, we VACATE the defendant's sentence for first-degree murder, and we REMAND this case to the St. Clair Circuit Court for resentencing . . . . ***In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court***. [*People v Carp*, 499 Mich 903, 903-904 (2016) (emphasis added).]
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> On order of the Court, in conformity with the mandate of the Supreme Court of the United States, we REVERSE the January 16, 2013 order of the Court of Appeals, we VACATE the defendant's sentence for first-degree murder, and we REMAND this case to the Wayne Circuit Court for resentencing . . . . ***In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court***. [*People v Davis*, 499 Mich 903, 903-904 (2016) (emphasis added).]

In essence, the United States Supreme Court's GVR orders had the effect of erasing this Court's 2014 judgments and reopening (or "reviv[ing]") Carp's and Davis's applications for leave to appeal as though they were still pending, awaiting this Court's disposition. Then, when this Court entered its 2016 orders, not only did it remand Carp's and Davis's cases for resentencing, it denied Carp and Davis leave to appeal "in all other respects . . . because we are not persuaded that

[26] *People v Carp*, Supreme Court No. 146478, docket entry 154 (April 8, 2016); *People v Davis*, Supreme Court No. 146819, docket entry 38 (April 8, 2016).

the remaining questions presented should be reviewed by this Court." *Carp*, 499 Mich at 903; *Davis*, 499 Mich at 903-904. The 2016 orders denying leave to appeal "in all other respects" could mean only one thing: the "remaining questions presented" included Carp's and Davis's claims for relief on any grounds *other* than the retroactivity of *Miller*—including the question of whether life-without-parole sentences for youth were categorically unconstitutional under Article 1, § 16 of the Michigan Constitution. The Court thus treated the entire 2014 ruling as having been vacated, and entered orders accordingly.

This analysis aligns with "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more." *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 598 n 59; 957 NW2d 731 (2020), quoting *PDK Labs Inc v US Drug Enforcement Agency*, 360 US App DC 344, 357; 362 F3d 786 (2004) (Roberts, J., concurring). It was only because this Court initially ruled (incorrectly, it turned out) that *Miller* was not retroactive did it proceed to consider whether Carp and Davis were nonetheless entitled to relief on the alternative grounds that life-without-parole sentences imposed on juveniles were categorically unconstitutional. (As the Court recognized, categorical rulings of unconstitutionality are automatically entitled to retroactive application. *Carp*, 496 Mich at 477-478.) Had the Court decided the federal retroactivity issue correctly, it would have been unnecessary to reach the state constitutional issue, and the *Carp* opinion would not have included an analysis under Article 1, § 16.[27] In this way, the Court's discussion of the Michigan Constitution became dicta once it was

[27] The three-justice dissent's treatment of this issue in *Carp* confirms that the Article 1, § 16 analysis would have been unnecessary had the majority correctly decided the retroactivity question. See *Carp*, 496 Mich at 529-556 (KELLY, J., dissenting). The dissent concluded that *Miller* is retroactive as a matter of federal and/or state law, and therefore would have remanded Carp's and Davis's cases for resentencing. *Id*. at 529, 556. The dissenting opinion did not address the question of whether life-without-parole sentences for youth were categorically

determined that Carp and Davis must be resentenced pursuant to *Montgomery*, which this Court recognized by reopening their cases and denying leave on that question.

Not only does this treatment of *Carp* make sense as a jurisprudential exercise, it aligns with this Court's thinking in the *Carp* opinion itself. In addition to Carp and Davis, the appeal of a third defendant, Dakotah Eliason, was before this Court in *Carp*. Eliason, who was only 14 years old at the time of his offense and received a mandatory life-without-parole sentence before *Miller* was decided, argued separately that life-without-parole sentences for 14-year-olds were categorically unconstitutional under Article 1, § 16 of the Michigan Constitution. However, because Eliason's appeal was before the Court on direct review (as opposed to the collateral-review posture of Carp's and Davis's appeals), this Court determined that he, unlike Carp and Davis, was entitled to remand for resentencing under *Miller*. Therefore, this Court concluded that "it [was] no more than speculation whether the trial court [would] . . . impose a life-without-parole sentence," and consequently that his categorical challenge under the Michigan Constitution failed on ripeness grounds and was "no longer justiciable." *Carp*, 496 Mich at 527-528.

If Eliason's categorical challenge was non-justiciable after *Miller*, so were Carp's and Davis's after *Montgomery*.[28] Therefore, the same reasoning that led this Court to refrain from deciding the Article 1, § 16 question in Eliason's case compels the conclusion that the Court's 2016 orders denying leave to appeal "in all other respects" nullified its Article 1, § 16 ruling with respect to Carp and Davis as well.

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unconstitutional, presumably because doing so would have been unnecessary had the cases been remanded for resentencing as the dissenting justices would have done.

[28] In fact, neither Eliason, Carp, or Davis received a life-without-parole sentence on remand. So in addition to their categorical challenges not being ripe, they became moot.

In sum, by denying leave to appeal in Carp's and Davis's "revived" cases after the United States Supreme Court's GVR orders, this Court signaled that its Article 1, § 16 analysis should not be treated as retaining precedential value. Therefore, this Court may revisit the issue now without deference to the vacated *Carp* opinion.

B. *Carp* is no longer good law under Article 1, § 16 because it has been undermined by subsequent factual and legal developments, it is unworkable, and continuing to rely on it would be unjust.

Even if *Carp* could be considered to have survived and is determined to have precedential force, this Court can and should recognize that it is no longer good law, and, if necessary, overrule it. As this Court has recognized many times, "stare decisis is a principle of policy rather than an inexorable command," and "is not to be applied mechanically to forever prevent the Court from overruling erroneous decisions." *Robinson v Detroit*, 461 Mich 439, 464; 613 NW2d 307 (2000); see also *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 367; 792 NW2d 686 (2010); *Pohutski v Allen Park*, 465 Mich 675, 694; 641 NW2d 219 (2002). "When questions before this Court implicate the Constitution, this Court arguably has an even greater obligation to overrule erroneous precedent." *People v Tanner*, 496 Mich 199, 251; 853 NW2d 653 (2014). It is "not only [this Court's] prerogative but also [its] duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question." *Robinson*, 461 Mich at 464. "This Court has overruled prior precedent many times in the past," *Pohutski*, 465 Mich at 695, and should do so again if necessary to vindicate the constitutional rights of children in our criminal justice system.

In deciding whether to overrule erroneous precedent, the Court considers whether less "injury" or "mischief" will result from overruling than from following it. *Tanner*, 496 Mich at 250, citing *People v Graves*, 458 Mich 476, 481; 581 NW2d 229 (1998). In doing so, the Court is generally guided by such factors as (1) whether changes in the facts or law no longer justify the

questioned decision, (2) whether the decision defies practical workability, and (3) whether reliance interests would work an undue hardship. *Id.* at 250-251, citing *Robinson*, 461 Mich at 464. Here, these considerations all weigh strongly in favor of overruling *Carp* should doing so be necessary to hold that life-without-parole sentences for youth violate Article 1, § 16 of the Michigan Constitution. Indeed, no injury or mischief will result from overruling *Carp*, whereas continuing to follow it would allow the state to continue to violate the constitutional rights of Michigan's children.

Beginning with the factor of whether changes in the facts or law no longer justify the questioned decision, it is clear that dramatic changes in the facts and the law have occurred in the decade since *Carp* was decided, changes which undermine *Carp*'s holding and require a different result today. Most notably, in *Carp* this Court counted only six states that had eliminated life-without-parole sentencing for youth in the aftermath of *Miller*, still leaving 35 states that continued to allow the sentence. *Carp*, 496 Mich at 517-518. By contrast, as detailed above,[29] nearly a decade later 28 states plus the District of Columbia now ban it entirely, an additional five have no one serving the sentence, only 12 have imposed the sentence at all in the past five years, and only four states have imposed it more than five times in the past five years. This sea change in state laws and practices throughout the country has rendered this uniquely severe sentence "unusual," which standing alone can be dispositive in an Article 1, § 16 analysis. See *Lorentzen*, 387 Mich at 172; *Parks*, 510 Mich at 241; see also *Graham*, 560 U.S. at 85 (Stevens, J., concurring) ("Society changes. Knowledge accumulates. Punishments that did not seem cruel and unusual at one time may, in light of reason and experience, be found cruel and unusual at a later time . . . .").

[29] See Argument II.C, *supra*.

Additional subsequent changes in the law justify revisiting the conclusion in *Carp*. Since *Carp* was decided, the supreme courts of two other states with broader state constitutional protections against cruel/unusual punishment than that which is provided by the Eighth Amendment have held that life-without-parole sentences for youth are categorically unconstitutional. See *Bassett*, 192 Wash 2d at 77-91; *Sweet*, 879 NW2d at 834-839. And this Court, in *Parks* and *Stovall*, has articulated a considerably more expansive understanding of Article 1, § 16's protections for youth than that which was advanced in *Carp*. Compare *Carp*, 496 Mich at 521 ("While the language of the Michigan counterpart to the Eighth Amendment is at some variance from the latter, it is not so substantially at variance that it results in any different conclusion in its fundamental analysis of proportionality.") with *Parks*, 510 Mich at 247 (holding that Article 1, § 16 prohibits mandatory life sentences for 18-year-olds while acknowledging that the Eighth Amendment does not prohibit them), and *Stovall*, 510 Mich at 313 (same holding with respect to parolable life sentences for minors). Particularly considering that the legal standard for Article 1, § 16 is itself dynamic, "progressive, and . . . not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," *Parks*, 510 Mich at 241, these changes in facts and law no longer justify *Carp*'s conclusion that the Michigan Constitution allows life-without-parole sentences for offenses committed by children.

Turning to the second stare decisis factor, whether the decision in question defies practical workability, here too *Carp* fails the test. *Carp* failed to mention, let alone address, the central practical problem and fatal flaw highlighted by the state supreme courts in Washington, Iowa, and Massachusetts, as well as the opinions of Judges BECKERING and GLEICHER in our Court of Appeals: "a lifetime in prison is a disproportionate sentence for all but the rarest of children and is reserved for those whose crimes reflect irreparable corruption," *Taylor*, 510 Mich at 127, and yet

it is all but impossible for experts, let alone judges, to distinguish with confidence or reliability at the time of sentencing between transient immaturity and those who will be forever incapable of rehabilitation.[30] The result is a rule that defies practical workability—at an unacceptably high cost to those who face a permanent and irrevocable punishment for offenses committed at an age when the Constitution counsels against it.

The final stare decisis factor, whether reliance interests would work an undue hardship, likewise presents no barrier to overruling *Carp*. In *Paige v Sterling Hts*, 476 Mich 495, 511; 720 NW2d 219 (2006), this Court observed that a prior decision, "having been decided just eight years ago, has not become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." That is surely the case here, as well; no one can be said to have changed their conduct in reliance on *Carp* such that a ruling more protective of children's constitutional rights will cause practical real-world dislocations. To the contrary, given that Article 1, § 16's protections are dynamic, progressive, and track "evolving standards of decency," *Parks*, 510 Mich at 241, revisiting whether a punishment is cruel or unusual after a decade of its sharply declining use should be an expected (or, at least, not unexpected) development in this state's jurisprudence, and does not work an undue hardship. In fact, continuing to allow a categorically unconstitutional sentence to be imposed on children would, by far, work the greater undue hardship and injustice. In light of these considerations, then, it is clear that *Carp* does not preclude this Court from ruling that life-without-parole sentences are categorically unconstitutional when imposed on youth.

[30] See Argument II.D, *supra*.

CONCLUSION

For the foregoing reasons, amicus urges this Court to grant leave to appeal, hold that life-without-parole sentences for offenses committed by children are unconstitutional under Article 1, § 16 of the Michigan Constitution, and reverse the judgment below.

Respectfully submitted,

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WORD-COUNT STATEMENT

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