STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Kirsten Frank Kelly, P.J., Michael J. Talbot and Christopher M. Murray, JJ.

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

CORTEZ ROLAND DAVIS
Defendant-Appellant.

No. 146819

L.C. NO. 94-002089
COA No. 314080
Prior COA Nos. 183428, 192234, 242997, 246847, 224046, 304075

APPELLEE'S BRIEF ON APPEAL

Oral Argument Requested

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Statement of the Question

I.

Do either the Eighth Amendment to the United States Constitution, or Mich Const 1963, art 1, § 16, categorically bar imprisoning a juvenile murderer convicted of 1st-degree murder for having aided and abetted the commission of a 1st-degree felony murder for life without the possibility of parole; further, was defendant an aider and abettor in the murder of Raymond Davis?

The People answer: NO

Statement of Facts

The People accept defendant's statement of facts with the following addition and corrections, and with the addition of those facts laid out in section A.3 of this brief:

1. On page 3 defendant says that an aiding and abetting instruction was given that allowed "the jury to transfer intent for robbery to that for murder, which formed the basis of Cortez's [the defendant, Cortez Davis] conviction." This is argumentative. Defendant's cites to the instruction which is at 635a-637a, and is the instruction on the robbery armed count. The instructions on the 1st-degree murder count are at 623-631a, and speak for themselves, but clearly require a finding of one of the "malice" states of mind for conviction of 1st-degree murder on a theory of felony murder.

Summary of the Argument

Miller v Alabama holds that a juvenile convicted of 1st-degree murder may not be incarcerated for life without the possibility of consideration for parole *except* on an individualized determination taking into account factors concerning the commission of the offense and the background of the offender. Nothing in *Miller* suggests that instead of this procedural mechanism there is also a categorical prohibition on the incarceration of juvenile 1st-degree murderers where the statutory theory of 1st-degree murder employed is felony murder, and the evidentiary basis of the conviction is aiding and abetting. By law, the distinction between aiders and abettors and principals does not exist, and an accomplice is equally responsible for the crime, and subject to the same penalty.

Miller requires a "sorting out" of blameworthiness, so that while all juvenile 1st-degree murders are *subject* to the same penalty, not all may receive it when individualized consideration is made. Where the 1st-degree murder is one of the commission of a murder during the course of a statutorily enumerated felony, and on an evidentiary showing of aiding and abetting, in some circumstances that sorting out may result in a conclusion that the offender should not be denied all parole eligibility.[1] But in many cases the accomplice may fully share the intent of the principal, that intent may well be to kill, and the participation of the accomplice in the offense, and his or her background, may well justify denial of all parole consideration. The matter remains one of individualized assessment. And in many cases, distinguishing between an accomplice and a

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[1] And it appears that in such a case legislation is shortly to be enacted that will provide that those juvenile 1st-degree murders not found to be ineligible for parole will receive a term of years sentence, with a minimum of no less than 25 years, nor more than 40 years, and a maximum term of no less than 60 years. See House Substitute for Senate Bill 319.

principal will make no sense, as the participants—as in the present case—are simply coprincipals or joint principals in the commission of the crime. The defendant here was in fact a coprincipal in the murder.

Nor does the Michigan Constitution, Article 1, § 16, support such a categorical prohibition. Indeed, a review of the "law the People have made" does not support proportionality review of legislative sentences under Article 1, § 16. That review inevitably involves the judiciary as a super-legislature, turning court proceedings into a form of legislative hearing. Courts are both ill-equipped to consider psychological and sociological non-record materials, and without authority to do so. Further, if proportionality is a function of society's "evolving standards of decency," then it makes no sense for the judiciary to prescribe those standards rather than to discovery and identify them, so as to determine the moral consensus of the people.

Should the court conclude that either the Eighth Amendment or Article 1, § 16 requires such a categorical prohibition, then that rule *would* be applicable even to cases final on appeal, as the rule would constitute a substantive rule under *Teague v Lane*.[2] The *Teague* analysis would be required under the Eighth Amendment, and the People urge that *Teague*'s principles be followed as a matter of state law, which would require application to cases final on appeal should a categorical rule be found.

But such a categorical rule should not be found. And *Miller* should not be applied to cases final on appeal at the time of its decision under *Teague*'s principles, which should be applied both as a matter of federal and state law.

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[2] Discussed, infra.

Argument

I.

Neither the Eighth Amendment to the United States Constitution, nor Mich Const 1963, art 1, § 16, categorically bar imprisoning a juvenile murderer convicted of 1st-degree murder for having aided and abetted the commission of a felony murder for life without the possibility of parole; further, defendant was a principal not an aider and abettor in the murder of Raymond Davis.

Introduction

In the order granting leave to appeal, this Court specified the issues to be considered:

> (1)whether the prohibition against "cruel and unusual punishments" found in the Eighth Amendment to the United States Constitution, and/or the prohibition against "cruel or unusual punishment found in Const 1963, art 1, § 16, categorically bar the imposition of a life without parole sentence on a defendant under the age of 18 convicted of first-degree murder for having aided and abetted the commission of a felony murder; and
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> (2) if such a categorical bar exists, whether it applies retroactively, under federal or state law, to cases that have become final after the expiration of the period for direct review. See *Teague v. Lane,* 489 U.S. 288; 109 S Ct 1060; 103 L.Ed.2d 334 (1989); *People v. Maxson,* 482 Mich. 385 (2008).[3]

The People will certainly answer these questions. But a point, to which the People will return, must be made at the outset—defendant was *not* an aider and abettor in this case, but a principal.[4]

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[3] *People v. Davis,* __Mich__, 838 N.W.2d 876 (2013).

[4] Further, no one—juvenile or adult—currently is sentenced to "life without parole" for 1st-degree murder, but, as required by MCL § 750.316, to "life." It is the parole statute, MCL § 791.234(6)(a), that precludes parole for all those convicted of 1st-degree murder, and MCL § 769.1 provides that "The court shall sentence a juvenile convicted of any of the following crimes *in the same manner as an adult*: *** g) First degree murder . . . ." But at the time of defendant's trial, a defendant 17 years of age or younger tried as an adult for 1st-degree murder was *not*

A. The Eighth Amendment to the United States Constitution Does Not Categorically Bar the Denial of Any Parole Consideration Whatever to a Juvenile Murderer Who Aided and Abetted in the Commission of a Felony Murder and Was Sentenced to Life in Prison; Defendant Here, However, Was a Principal, Not an Aider and Abettor

1. At the common law, a principal in the first degree was "the immediate perpetrator of the crime," and one present, lending his countenance and encouragement, or otherwise aiding while another did the act, was a principal in the second degree, considered equally guilty, and so received the same punishment. as a principal in the first degree, a view embraced by MCL § 767.39

There is no separate *crime* of "accessory before the fact" or "aiding and abetting" in this state;[5] rather, our statute, MCL § 767.39, declares, with a statutory catch-line "Abolition of distinction between accessory and principal," that:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction ***shall*** *be punished as if he had directly committed such offense* (emphasis supplied).

This statutory abolition of the common-law distinctions between accessories before the fact and principals is of ancient vintage, existing in this state for at least a century and a half.[6] Because the

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automatically sentenced as an adult—that is, to life in prison, with parole eligibility denied under MCL § 791.234(6)(a)—but instead the statute required that a hearing be conducted to determine whether a juvenile should be sentenced as an adult. Defendant had such a hearing, and the sentencing judge ruled that he should be sentenced as an adult, a ruling upheld by the Court of Appeals. See *People v Davis*, COA #s 183428 & 192234 (1997), slip opinions pages 2-5. The trial judge sentenced defendant to a term of years, however, and the Court of Appeals reversed peremptorily, requiring that a sentence of life be imposed as required by the MCL § 750.316. See *People v Davis*, COA # 176985 (1994).

[5] See *People v. Robinson*, 475 Mich. 1, 6 (2006): "'being an aider and abettor is simply a theory of prosecution' that permits the imposition of vicarious liability for accomplices."

[6] See e.g. *People v. Brigham*, 2 Mich. 550 (1853), noting that "Sec. 1, chap. 161, title 30, makes an accessory before the fact to any *felony*, punishable in the same manner as may be

statute is but an abolition of common-law distinctions, it is the common law that one must first reconnoiter to gain some footing on the question.

At the common law, one could be guilty of a felony in one of four ways: either as principal in the 1st degree, a principal in the 2nd degree (sometimes known as an accessory *at* the fact), an accessory before the fact, or an accessory after the fact.[7] A principal in the 1st degree did the act either himself, or by means of an innocent agent (a dupe).[8] A principal in the 2nd degree was present during the crime, lending his countenance and encouragement, or otherwise aiding, while another did the act. As Sir James Stephen put it in *History of the Criminal Law of England*, "[E]very person *who takes part in the actual execution of a crime is a principal*, even if he is present only for the purpose of aiding or countenancing the person by whom the crime is actually committed. Such persons were formerly described as accessories *at* the fact, and are now called

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prescribed for the punishment of the principal felon," and *Shannon v. People*, 5 Mich 71 (1858), observing that "[T]he act of 1855, section 19 (*Laws of 1855, p. 145; sec. 6065 of Compiled Laws*), enacts 'that the distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, may hereafter be indicted, tried, and punished as principals, as in the case of a misdemeanor.'"

[7] 1 Bishop, *Criminal Law* (4th edition: 1867), § 595, p.343. The statute does not involve accessories *after* the fact, and accessory after the fact is treated as a separate, and less culpable, offense. MCL 750.505.

[8] Bishop, § 596, p. 343.

And see Perkins, *Criminal Law* (1st Edition: 1957), Chapter 6, § 8(C)(1), p. 569 ("A principal in the first degree is the immediate perpetrator of the crime"); Clark and Marshall, *A Treatise on the Law of Crimes* (7th Ed: 1967)("A principal in the first degree is the one who actually commits the crime").

principals in the second degree."[9] For example, "[A] person waiting outside of a house to receive goods which his confederate is stealing within, is an illustration of a principal of the second degree,"[10] and, at the common law, "[A]n accessory before the fact is one whose will contributes to another's felonious act, committed while too far himself from the act to be a principal."[11] The distinction between an accessory before the fact and a principal in the second degree, then, was presence.[12] And the common law "recognize[d] *no difference in the punishment*, between principals in the first and second degree, but regard[ed] them as *equally guilty*, and *subject to the same punishment*."[13] Over time, it was recognized that these distinctions were "only formal, having no practical use or effect whatever,"[14] and it came to be said that for this reason they should "should not be preserved in the books,"[15] leading to statutory abolitions such as MCL § 767.39.

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[9] 2 Stephen, *History of the Criminal Law of England* (3rd Ed: 1883), p. 230 (emphasis supplied).

[10] Bishop, § 602, p. 347.

[11] Bishop, § 616, p. 354.

[12] Perkins, Chapter 6, § 3, p. 575: an accessory before the fact is "one who meets very requirement of a principal in the second degree except that of presence at the time."

[13] Clark and Marshall, *A Treatise on the Law of Crimes* (7th Ed: 1967), § 8.05, p. 521 (emphasis added). See also 2 LaFave, *Substantive Criminal Law*(2nd Ed.), § 13.6: "Unlike the principal in the second degree and accessory before the fact, the accessory after the fact is generally not treated as a party to the felony nor subject to the same punishment prescribed for the felony"'; 1 *Wharton's Criminal Law* (15th Ed.), § 34: "in the ordinary case the principal in the first degree and the principal in the second degree were treated as equally guilty and subject to the same punishment."

[14] Bishop, § 596, p. 343.

[15] Bishop, § 596, p. 344.

At the common law, then, one present, lending his countenance and encouragement, or otherwise aiding, while another did the act, was a principal in the second degree, and considered equally guilty as a principal in the first degree, and so *received the same punishment.* This venerable common-law rule was *embraced* by the elected political branches of government, and simplified by statute in Michigan in MCL § 767.39 and its predecessors, going back over a century and a half. Under the statute, one is not charged as an "aider and abettor" or principal, as both are equally culpable; the common-law offense of accessory *after* the fact is viewed as not on the same level of culpability, and in Michigan remains a felony under MCL § 750.505, subject to a possible five-year maximum punishment.

2. When the Legislature abolished the distinction between principals and accessories, it viewed all such participants in the crime as equally culpable, and responsible for the intended offense, as well as the natural and probable consequences of that offense

As explained in *People v Robinson,*[16] "at common law, one could be guilty of the natural and probable consequences of the intended crime or the intended crime itself, depending on whether the actor was a principal in the second degree or an 'accessory before the fact.'"[17] These distinctions were abrogated long ago by legislative action, and so under the statute "a defendant can be held criminally liable as an accomplice if: (1) the defendant intends or is aware that the principal is going to commit a specific criminal act; or (2) the criminal act committed by the principal is an 'incidental consequence[ ] which might reasonably be expected to result from the

[16] *People v Robinison*, 475 Mich. 1 (2006).

[17] *Robinson*, 475 Mich at 7-8.

intended wrong.'"[18] The legislature in abolishing these common-law distinctions, "intended for all offenders to be convicted of the intended offense . . ., as well as the natural and probable consequences of that offense. . . ."[19] An accomplice to 1st-degree murder under the theory of felony murder is responsible, then, if he or she acted with malice; that is, that he or she intended to kill, intended to do great bodily harm, or acted with a wanton and willful disregard of the likelihood that the natural tendency of his or her behavior was to cause death or great bodily harm,[20] and if the death that occurred was a natural and probable consequence of the conduct undertaken. While principals and accomplices may share the identical intent, "sharing the identical intent is not a *prerequisite* to the imposition of accomplice liability . . . ."[21]

Moreover, there may be *joint principals*, sometimes known as *coprincipals*, in the commission of some crime.[22] Take the case of an armed robbery of a convenience store, where one person holds a gun on the owner, another cleans out the till, and a third guards the door. Who is aiding whom? Is the person with the gun the principal, being aided by the one taking the money and the one guarding the door? Or is the one taking the money being aided by the one with the gun and the one guarding the door? Or perhaps the one guarding the door is the principal, being aided by both the one with the gun and the one cleaning out the till. Parsing the parties to the

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[18] *Robinson*, 475 Mich at 9.

[19] *Robinson*, 475 Mich at 9.

[20] *People v. Kelly*, 423 Mich. 261, 272-273 (1985).

[21] *People v. Robinson*, 475 Mich 1 at 14.

[22] *Perkins*, at p. 568; 2 Lafave, at § 13.1: "There can be more than one principal in the first degree."

crime makes no sense. *All three* are principals. As one case has said, "we decline to carve the defendants' extortion scheme into discrete subparts . . . Just as, in the crime of armed bank robbery, *the getaway driver and robber holding only a canvas sack are generally joint principals along with the robber carrying the firearm*, the hostage-holder and his colleague in contact with the bank officer were jointly principals in this extortion attempt."[23] Because the common law, and in Michigan for over a century and a half, the People's elected representatives, view all such actors as equally culpable, it is not necessary to "carve the offense into discrete subparts." The facts reveal that defendant was a joint or coprincipal with his companion in the 1st-degree murder here.

3. The facts: Defendant was a principal in the 1st-degree murder of Raymond Davis, Jr.

Shortly after midnight on a Tuesday in the middle of December, 1993, Raymond Davis, wearing a new Fila coat, and his friend, Martin Arnold, were walking to a liquor store to buy something to drink. Defendant Cortez Davis and one Michael Scott approached them from behind brandishing guns.[24] Defendant held Arnold on one side of the street, and Scott took Raymond Davis[25] to the other side of the street, thus separating the two victims. With a handgun in his hands, defendant ordered Arnold to empty his pockets, and Arnold did so, throwing a small amount of money on the ground.[26] Arnold saw Raymond Davis begin to remove his coat as Scott

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[23] *United States v. Bell*, 812 F.2d 188, 195 (CA 5, 1987) (emphasis supplied).

[24] 327-328a.

[25] To avoid confusion with the defendant, Cortez Davis, the People will refer to the murder victim, Raymond Davis, and defendant, by both their first and last names.

[26] 329-330a, 338-339a, 341a, 347-348a.

held a long gun on him.[27] Defendant left Mr. Arnold and told him to stay where he was, and then crossed the street, rejoining his companion in crime as Raymond Davis was still removing his coat.[28] After Raymond Davis got his coat off, he tried to run away.[29] Arnold saw *both* the defendant and Scott shoot at Raymond Davis's back as he ran; Arnold testified that he saw them both shooting, and that defendant Cortez Davis fired his pistol three times, and his companion his long gun twice.[30] He was adamant that they both shot, and that he knew how many times they shot.[31] Defendant Davis and Scott then took Raymond Davis's jacket and ran from the scene.[32] Raymond Davis was shot in the back five times, and died from his wounds.[33]

Neighbors in the area heard five or six shots, and saw a person running from the area of the shots who then fell to the ground between the shots.[34] Sandra Mitchell saw two people get out of a car. She saw a person running, and the two who had left the car, "*they started to shooting.*"[35] She heard shooting; she saw the muzzle flash from a long gun.[36] She heard five or six shots, or

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[27] 329a.

[28] 330a.

[29] 331a..

[30] 341a, 350a, 354-356a, 358-359a.

[31] 359a.

[32] 351a, 359a.

[33] 320a, 323a.

[34] 303a, 309a.

[35] 301-303a.

[36] 303a.

so.[37] Her son, Bryan Mitchell, also heard gunshots, and saw someone fall after being shot;[38] he saw two men running, one carrying a long gun.[39] These neighbors were unable to identify the person who was shooting,[40] They saw the shooter and his companion enter a vehicle and leave the scene.[41]

A Detroit Police Sergeant in the Firearms and Explosives Unit of the Crime Laboratory, Dale Johnston, concluded that four shell casings found at the scene of the murder were fired from the same weapon, a .22 caliber firearm. That caliber cartridge could be fired from either a pistol or a long gun.[42] Automatic firearms eject casings; revolvers do not.[43] Given the casings, the indicators on the casings, and the lans and grooves on two recovered bullets, Johnston concluded that the most likely firearm that fired the recovered bullets was one made by a gun manufacturer named Jennings, or one of its successor companies, or Marlon; Jennings made a small (palm size) .22 caliber automatic pistol, Marlon a long gun.[44]

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[37] 303a.

[38] 309a.

[39] 312a.

[40] 303a, 309a, 312a.

[41] 304a, 311a.

[42] 410-412a.

[43] 411-412a.

[44] 415-416a, 420a.

Defendant gave a statement to Sergeant Arlie Lovier of the Detroit Police Department.[45] He said that his companion, who had a gun, handed him a handgun so they could rob the deceased victim of his coat. He was there to back his partner in the crime up in case anything happened. The deceased began to run after removing his coat, and, according to defendant, his companion then shot Raymond Davis in the back.[46] In his trial testimony, defendant denied he gave the statement,[47] and said his companion had *tried* to hand him a gun, but he did not take it. His companion and a third person, known to him as "Shay-man," robbed the deceased, but defendant testified he left the scene before the shooting began; though he heard gunshots, he did not see the shooting.[48]

These facts demonstrate that defendant and Scott were both principals in the 1st-degree murder of Raymond Davis. Their criminal plan was to rob both Raymond Davis and Martin Arnold, and to achieve that end, each displayed a firearm to the intended victims. The two victims were then separated. As Raymond Davis was being relieved of his Fila coat by Scott, defendant crossed the street, and when Raymond Davis ran, *both* he and Scott fired their weapons as Raymond Davis fled. Raymond Davis received five gunshot wounds to his back. Without the recovery of the firearms, it could not be said whose bullets hit their mark. But by his use of a deadly weapon during the course of the robbery, firing that weapon at the back of the fleeing

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[45] 29-152a.

[46] 468-484a.

[47] 482-484a.

[48] 469-472a.

Raymond Davis, defendant intended to kill,[49] and therefore acted with malice in the commission of the murder.

Neither perpetrator should be viewed as an accomplice who "procures, counsels, aids, or abets in" the commission of the murder here; rather *each* "directly committed the acts constituting the offense." And again, both the common law and our State's elected political representatives determined long ago that both the individuals "directly committing the acts" constituting the offense, and those who "procure, counsel, aid, or abet" in its commission, are equally blameworthy.[50]

4. The Eighth Amendment as construed in *Miller v Alabama* does not *categorically* bar the denial of any parole consideration whatever to a juvenile murderer convicted of 1st-degree murder on the theory of murder in the course of an enumerated felony, on an evidentiary showing of aiding and abetting, and does not bar the denial of any parole consideration to one who was, as defendant here was, a joint or coprincipal, firing a deadly weapon at a fleeing victim

> Our decision *does not categorically bar a penalty for a class of offenders or type of crime*—as, for example, we did in Roper or Graham. Instead, it mandates *only that a sentencer follow a certain process*—considering an offender's youth and attendant characteristics—before imposing a

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[49] See *People v. Carines,* 460 Mich. 750, 759 (1999); 2 LaFave, *Substantive Criminal Law*, § 14.2: "it may properly be inferred (i.e., the conclusion *may* be drawn, rather than *must* be drawn, in the absence of counter proof) from the fact that the killer intentionally used a deadly weapon upon the deceased that he intended to kill the deceased."

[50] Defendant here would, at the common law, be a principal in the first degree, and even if not so considered, he would be a principal in the second degree, for he was "present, lending his countenance and encouragement, or otherwise aiding." But because he was not aiding "while another did the act," but an actor himself, he is a joint or coprincipal of his companion in the murder of Raymond Davis.

> particular penalty. United States Supreme Court, in *Miller v Alabama*.[51]
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> The evolution of Federal Law *has created a categorical ban* on non-parolable life sentences for accessory, diminished culpability juveniles involved in serious crimes. *Defendant's Brief*.[52]

Miller v Alabama held that the Eighth Amendment precludes a sentence of incarceration of the rest of a defendant's life without eligibility for parole for one 17 years or younger who has been convicted of 1st-degree murder, where that denial of parole eligibility is automatic and *categorical*. The denial of parole eligibility for a juvenile murderer *is* permissible under the Eighth Amendment, said the Court, only if there is an individualized assessment in each case, so that parole is possible in some cases: "Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, *it mandates only that a sentencer follow a certain process*—considering an offender's youth and attendant characteristics—before imposing a particular penalty."[53] Defendant's statement that "Federal Law" *has* created a "categorical ban on non-parolable life sentences" for juveniles he characterizes as "accessories" cannot be squared with this specific disclaimer by the Supreme Court. And defendant's underlying assumption—that "accessories" [read as "aiders and abettors"] *always* have "diminished culpability" when compared to principals—comports neither with the law, nor common experience. Indeed, it was precisely because the distinctions between principals

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[51] *Miller v Alabama*, 567 U.S. ——, 132 S Ct 2455, 2471, 183 L.Ed.2d 407 (2012) (emphasis supplied).

[52] Defendant's Briefs, p. 9 (emphasis supplied)..

[53] 132 S Ct at 2471 (emphasis supplied).

and aiders and abettors came to be understood as making no sense—as being "only formal, having no practical use or effect whatever"—that both the common law and statute repudiated them.

The Court of Appeals has identified factors that should be considered in the *individualized* parole-eligibility hearing:

> (a) the character and record of the individual offender [and] the circumstances of the offense,
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> (b) the chronological age of the minor,
>
> (c) the background and mental and emotional development of a youthful defendant,
>
> (d) the family and home environment,
>
> (e) the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected [the juvenile],
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> (f) whether the juvenile might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with youth, and
>
> (g) the potential for rehabilitation.[54]

These factors are drawn from *Miller*, as the Court in *Miller* pointed to circumstances in each of the two cases before it that it viewed as illustrative of the "problem" with categorical life-without-parole sentences for juvenile murderers. In each of the cases before it, the Court majority looked to 1)circumstances going to the *culpability* of the defendant in the commission of the offenses, and 2)circumstances concerning the *background* of the defendant.

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[54] *People v. Eliason,* 300 Mich.App. 293, 310 (2013), quoting *People v Carp,* 298 Mich App 472, 532 (2012), which cited *Miller*, 132 S.Ct. at 2467–2468.

As to the Jackson case, the Court majority pointed out, concerning his *culpability* for the murder, that:

- Jackson *did not fire the bullet* that killed Laurie Troup; *nor did the State argue that he intended her death.*

- Jackson's conviction was instead *based on an aiding-and-abetting theory*; and the appellate court affirmed the verdict only because the jury could have believed that when Jackson entered the store, he warned Troup that "[w]e ain't playin'," rather than told his friends that "I thought you all was playin'."

- [Though] Jackson learned on the way to the video store that his friend Shields was carrying a gun, . . . his age could well have affected his calculation of the risk that posed, as well as his willingness to walk away at that point.

Concerning mitigating factors in Jackson's *background*, the Court said that relevant were:

- Jackson's family background and immersion in violence: Both his mother and his grandmother had previously shot other individuals. . . . [so that at] the least, a sentencer should look at such facts before depriving a 14–year–old of any prospect of release from prison.[55]

As to Miller's *culpability* in his murder conviction, the Court majority said that:

- No one can doubt that he and Smith committed a vicious murder. *But they did it when high on drugs and alcohol consumed with the adult victim.*

The Court also identified relevant factors in Miller's background:

- if ever a pathological background might have contributed to a 14–year–old's commission of a crime, it is here. Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten.

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[55] *Miller*, 132 S.Ct. at 2468 -2469.

- Miller's past criminal history was limited—two instances of truancy and one of "second-degree criminal mischief."[56]

The Court concluded that while that "Miller deserved severe punishment for killing Cole Cannon is beyond question," "a sentencer needed to examine all these circumstances *before concluding that life without any possibility of parole was the appropriate penalty.*"[57] Again, then, the Court suggested no categorical ban on the denial of parole consideration to juvenile murderers convicted on a theory of aiding and abetting, finding only that individualized consideration is required. Put another way, while aiders and abetters are equally guilty with principals, and *subject* to the same penalty, in the case of juvenile murderers, at least, they need not *receive* the same precise penalty—again, though subject to it—after individualized consideration is made. And certainly there are aiders and abettors, juvenile and otherwise, who share the intent of the principal, and on individualized consideration may well be viewed as *at least* equally blameworthy.

Nothing in *Miller* suggests that a juvenile murderer convicted of a 1st-degree murder charged on a theory of murder during the course of a statutorily enumerated felony, and on an evidentiary showing of aiding and abetting—whom the People's elected political representatives, as well as the common law, have long considered equally as culpable as a principal actor—can *never* be denied all parole consideration. Rather, the clear import of the Court's observations in the *Jackson* case that 1) he did not file the fatal shot; 2) there was no evidence that he intended the death of the victim, and 3) his conviction was thus based on an aiding and abetting theory, is that these are *factors* to be considered in the parole-eligibility inquiry. Even the concurring opinion by

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[56] *Miller*, 132 S.Ct. at 2469.

[57] *Miller*, 132 S.Ct.at 2469 (emphasis supplied).

Justice Breyer for himself and Justice Sotomayor did not suggest that a juvenile convicted of 1st-degree murder based on a theory of aiding and abetting can *never* receive a life sentence that is not eligible for parole. These Justices expressed the view that "The only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who 'kill or intend to kill.'" This opinion expressed the further concern that in Jackson's case, to be found guilty under the applicable statute "Jackson did not need to kill the clerk (it is conceded he did not), *nor did he need to have intent to kill or even 'extreme indifference.'* As long as one of the teenage accomplices in the robbery acted with extreme indifference to the value of human life, Jackson could be convicted of capital murder."[58] Of course, the opinion of two justices does not establish any Eighth Amendment principle; it remains an open question whether intent to kill is either necessary or sufficient for a nonparolable life sentence for a juvenile murderer, as it is also an open question whether the intent to do great bodily harm, or what the concurring opinion calls "extreme indifference" is sufficient. What the *majority* opinion indicates is that these are *factors* in the inquiry, but not necessarily determinative standing alone.

And certainly, as this court said in *Robinson*,"While principals and accomplices may share the identical intent, 'sharing the identical intent is not a *prerequisite* to the imposition of accomplice liability.'" While both common law and statutory law very long ago determined that accomplices and principals in crime are equally blameworthy, *Miller* says that with regard to juvenile murderers, as a matter of the interpretation of the Eighth Amendment, this is not necessarily so. Rather, before all parole eligibility can be denied, at sentencing a "sorting out" of blameworthiness in each particular case that takes account of the individual participation of the

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[58] *Miller*, 132 S Ct at 2476-2477 (concurring opinion of Justice Breyer).

juvenile in the murder must occur, along with consideration of any possible mitigating circumstances in the juvenile murderer's background. There can be no doubt that *some* accomplices to murders—even juvenile accomplices—*intend* the death of the victim. *Miller* says that the *lack* of such an intent is a mitigating factor, and so its *presence* is a an aggravating one, and one that should be entitled to much weight. *Miller* thus requires that factors going to *individual culpability* be considered, but it does *not* rule out the possibility of parole-eligibility denial for juvenile murderers convicted on a theory of aiding and abetting—and so, under both statute and common law, *subject to the same punishment* as a principal—some of whom may, in fact, have intended the death of the victim, as in the present case.

5. Conclusion

The Eighth Amendment does not categorically bar a sentence that results in life in prison with no possibility of parole for a juvenile convicted of 1st-degree murder on the theory of murder in the course of an enumerated felony, on an evidentiary showing of aiding and abetting. *Miller* requires a "sorting out" of degrees of culpability of juvenile murderers, though both at the common law and by statute aiders and abettors are viewed as *equally* as blameworthy and culpable as a principal Whether the juvenile murderer intended to kill—which certainly an aider and abettor to a murder might well—is a factor in the weighing process.

Here, however, defendant was *not* an aider and abettor. He was a principal in the robbery and murder of Raymond Davis, and, should *Miller* be found retroactive to cases on postconviction review—that is, cases where the direct appeal has been had and concluded—parole eligibility could well be denied.

B. Article I, § 16 of the Michigan Constitution Does Not Categorically Bar the Denial of Any Parole Consideration Whatever to a Juvenile 1st-degree Murderer Convicted on a Theory of Murder During the Course of an Enumerated Felony, on an Evidentiary Showing of Aiding and Abetting, and Sentenced to Life in Prison; Defendant Here, However, Was a Principal, Not an Aider and Abettor

Though the Eighth Amendment does not, in the People's view, categorically bar the denial of any parole consideration whatever to a juvenile 1st-degree murderer convicted on a theory of murder during the course of an enumerated felony, on an evidentiary showing of aiding and abetting, and sentenced to life in prison, the Michigan Constitution could, though it is somewhat telling that no case in Michigan has so found up to the present. Our state constitution, in Article 1, § 16, might mean the same thing as the Eighth Amendment as construed in *Miller*, or it might categorically bar the denial of any parole consideration whatever to a juvenile 1st-degree murderer convicted on a theory of murder during the course of an enumerated felony, on an evidentiary showing of aiding and abetting, and sentenced to life in prison, whether the eighth Amendment does or not, or it might *permit* a sentence of life in prison with no parole eligibility for *every* juvenile murderer, including those convicted on a theory of murder during the course of an enumerated felony, on an evidentiary showing of aiding and abetting, and sentenced to life in prison, without regard to whether that juvenile intended to kill. While a state court must, of course, *apply* the Eighth Amendment as construed by the United States Supreme Court, nothing compels a state to construe its *own* fundamental charter in the same fashion; indeed, a state could provide no protection against cruel and unusual, or cruel *or* unusual, sentences at all.[59]

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[59] This court has noted the possibility that the Michigan Constitution might provide, in a given area, "less" or different protection than does the federal constitution. See *Sitz v. Department of State Police*, 443 Mich. 744, 762 (1993): "because the texts were written at different times by different people, the protections afforded may be greater, lesser, or the same."

This court should conclude that Article 1, § 16 does not include judicial review of the proportionality of legislatively-mandated sentences; that the United States Supreme Court has gone off course in construing the Eighth Amendment does not require this court to do the same with regard to our state constitution. *People v Bullock*[60] should be overruled, and the court should find that the Michigan Constitution, unlike the federal constitution, provides no basis for requiring case-specific sentencing hearings on the question of parole eligibility for juvenile murders.

1. Interpreting the Michigan Constitution

Our state constitution, no less than our federal constitution, is a durable expression of the will of the People, both authorizing and limiting government, and standing outside of and superior to all agencies of government. Its source of authority is the People of the State.[61] The judicial branch is as much an agent or servant of the sovereign People as are the legislative and executive branches. It does not stand outside of government, but is a part of it. The judge as servant of the People should search for the public meaning of a constitutional text as understood by the lawgiver. As Madison said, concerning our federal constitution:

See also *People v. Russell* 471 Mich. 182, 188 (FN 6) (2004): "the federal Supremacy Clause, U.S. Const., art. VI, cl. 2, requires that we apply the federal constitutional analogue to the degree that our Constitution provides less protection to a criminal defendant."

[60] *People v Bullock*, 440 Mich. 15 (1992).

[61] See Mich. Const. 1963, Art. I, § 1: "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection." The same provision appears in Mich. Const. 1908, Art. II, § 1. In our first State Constitution, this language is divided between Article I, § 1 and § 2, § 1 providing that "First. All political power is inherent in the people" and Art. § 2 providing that "Government is instituted for the protection, security, and benefit of the people; and they have the right at all times to alter or reform the same, and to abolish one form of government and establish another, whenever the public good requires it."

> I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful, exercise of its powers.[62]

It has been established since the early days of our State that our state constitution is law through the act of ratification by the People, and that the task of the judge is to determine what the provisions of the constitution meant to the ordinary people who made it law. A court interpreting a constitutional text should endeavor to place itself

> in the position of the Framers of the Constitution, and ascertain what was meant at the time; for, if we are successful in doing this, we have solved the question of its meaning for all time. It could not mean one thing at the time of its adoption, and another thing today, when public sentiments have undergone a change.[63]

Certainly new circumstances to which a provision must be applied may arise, but as Justice Campbell said long ago, "That the constitution means nothing now that it did not mean when it was adopted, I regard as true beyond doubt. But it must be regarded as meant to apply to the present state of things as well as to all other past or future circumstances."[64]

As tools to aid in the interpretation of our state constitution, this court has consistently held that the Address to the People and the constitutional convention debates may be highly

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[62] Letter from Madison to Henry Lee (June 25, 1824), reprinted in 9 *The Writings of James Madison* 191-192 (G. Hunt ed., 1910).

[63] *Pfieffer v Board of Education of Detroit*, 118 Mich 560, 564 (1898). See also *Holland v Clerk of Garden City*, 299 Mich 465, 470-471 (1941)("It is a fundamental principle of constitutional construction that we determine the intent of the framers of the Constitution and of the People adopting it") and *Burdick v Secretary of State*, 373 Mich 578, 584 (1964)("Courts on numerous occasions have gone to the constitutional convention debates and addresses to the people to decide the meaning of the Constitution").

[64] *People v Blodgett*, 13 Mich 127, 140 (1865)(Campbell, J.).

relevant in determining the meaning to the *ratifiers* of particular constitutional provisions.[65] The Address is particularly important in this regard because it represents what the ratifiers, the People, were told about the proposed constitution *before* they voted to adopt it.[66] This court has emphasized that "the proper objective in consulting constitutional convention debates is not to discern the intent of the framers in proposing or supporting a specific provision, but to determine the intent of the ratifiers in adopting the provision," and so "the primary focus ... should not [be] on the intentions of the delegates . . . but, rather, on any statements they may have made that would have shed light on why they chose to employ the particular terms they used in drafting the provision to aid in discerning what the common understanding of those terms would have been when the provision was ratified by the *people.*"[67]

As perhaps our greatest justice, Justice Cooley, put the matter, "A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the

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[65] See, e.g., *Studier v. Mich. Pub. Sch. Employees' Retirement Bd.*, 472 Mich. 642, 655–656 (2005).

[66] See *People v. Nutt*, 469 Mich. 565, 590 n. 26 (2004) ("The Address to the People, widely distributed to the public prior to the ratification vote in order to explain the import of the ... proposals, 'is a valuable tool....' "). And see *Mich. United Conservation Clubs v. Secretary of State (After Remand)*, 464 Mich. 359, 378 (2001) (Young, J., concurring), noting that the Address was "officially approved by the members of the constitutional convention ...."

[67] *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich. 295, 309-310 (2011).

sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed."[68]

In sum, as this court has unanimously put it, "For over a century, [the] Court has followed a number of consistent, 'dovetailing rules of constitutional construction,'" including:

- The cardinal rule of construction, concerning language, is to apply to it that meaning which it would naturally convey to the popular mind.

- When interpreting a constitutional text, a court should endeavor to place itself in the position of the framers of the Constitution, and ascertain what was meant at the time; for, if in doing that, it has solved the question of its meaning for all time. It could not mean one thing at the time of its adoption, and another thing today, when public sentiments have undergone a change.

- The intent of the framers, however, must be used as part of the primary rule of common understanding. A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.* The Constitution does not derive its force from the convention which framed, but from the people who ratified it, and so *the intent to be arrived at is that of the people,* and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding,* and ratified the instrument in the belief that that was the sense designed to be conveyed.

- As aids in interpretation, the "Address to the People"' and the convention debates may be consulted. The reliability of the "Address to the People" lies in the fact that it was approved by the general convention as an explanation of the proposed constitution,

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[68] Cooley, *A Treatise on the Constitutional Limitations* (1886), p. 81. And see *People v. Smith,* 478 Mich. 292, 298-299 (2007); *Attorney General v. Renihan,* 184 Mich. 272, 281 (1915).

> and was widely disseminated prior to adoption of the constitution by vote of the people.[69]

The task of the judge when confronting the meaning of a state constitutional text is, then, as a matter of long-established Michigan precedent, to ascertain what the ratifiers "understood themselves to be enacting." As one commentator has said, the text "must be taken to be what the public of that time would have understood the words to mean. . . . In other words, the objective or publicly-accessible meaning of the terms is sought."[70] Whether an interpretation of a provision of our state constitution is entitled to adherence under principles of stare decisis thus involves consideration of whether that decision was itself faithful to the task of the court as established in the decisions of this court described above.

2. Interpreting Michigan Constitutional Provisions that are Identical to Provisions of the Federal Constitution

In *Sitz v. Dep't of State Police*[71] this court reaffirmed that it is its duty to interpret the Michigan Constitution, and that this review may lead to an interpretation of a particular provision of the state constitution that provides greater, equal, or lesser protection that its federal counterpart. But this court has repeatedly held that where the state provision is identical to a provision of the federal constitution, the Michigan provision will be interpreted differently from

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[69] See *Committee for Constitutional Reform v. Secretary of State of Mich.*, 425 Mich. 336, 340-342 (1986), a unanimous opinion of this court.

[70] See Randy Barnett, "An Originalism for Nonoriginalists," 45 Loy L Rev 611, 636 (1999).

[71] *Sitz v. Dep't of State Police*, 443 Mich. 744 (1993).

the corresponding federal provision only if there is a compelling reason to do so.[72] And in determining whether a compelling reason exists to depart from the interpretation given a parallel provision by the United States Supreme Court, this court has identified factors critical to the inquiry:

- the textual language of the state constitution,
- significant textual differences between parallel provisions of the two constitutions,
- state constitutional and common-law history,
- state law preexisting adoption of the relevant constitutional provision,
- structural differences between the state and federal constitutions, and
- matters of peculiar state or local interest.[73]

There is compelling reason to conclude that "proportionality review" of the *legislative* assignment of a particular sentence to a particular crime is not to be found in Article 1, § 16.

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[72] *People v. Nash*, 418 Mich. 196 (1983). See also *People v Collier,* 426 Mich 23 (1986); *People v Collins*, 438 Mich 8 (1991); *People v. Pickens*, 446 Mich 298, 315-316 (1994)("In accordance with our time-honored rules of constitutional construction, to justify an expansion of the Michigan Constitution beyond federal protections for identically worded phrases and provisions, such protections must be deeply rooted in the document"); *People v Champion*, 452 Mich 92 (1996); *People v Goldston*, 470 Mich 523 (2004).

[73] *People v. Collins*, 438 Mich. 8, 31, 39 (1991), *People v. Catania*, 427 Mich. 447, 466 (1986); *Sitz*, supra at 763, n. 14.

3. The law the People have made: judicial review of the "proportionality" of the legislative assignment of a particular sentence to a particular crime is not authorized by Article 1, § 16 of the Michigan Constitution

a. "The law the people have made," article 1, § 16, and proportionality review: the "and" and the "or" of it

There *is* a textual difference between the Eighth Amendment and Article 1, § 16—the former uses the phrase "cruel and unusual punishment" while the later refers to cruel *or* unusual punishment—and this Court in *People v. Bullock* said that the "difference does not appear to be accidental or inadvertent."[74] But the only proof offered for this assertion was the very fact of the textual difference.[75] The argument from the text is a separate argument; is there anything in the history of the language used that suggests that the use of "or" rather than "and" was deliberate, and designed to accomplish some purpose? And if so, to what end was the choice made?

The Northwest Ordinance was passed on July 13, 1787 by the Confederation Congress, establishing the Northwest Territory, which included the territory that later became the State of Michigan, and principles for its governance. Included was a provision in Article 2 that "no cruel or unusual punishments shall be inflicted." On August 6, 1789, the Northwest Ordinance of 1789, which essentially continued the 1787 Ordinance, was signed into law under the new Constitution, and it too provided that "no cruel or unusual punishments shall be inflicted." On September 25,

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[74] *People v. Bullock,* 440 Mich. at 30-31.

[75] "While the historical record is not sufficiently complete to inform us of the precise rationale behind the original adoption of the present language by the Constitutional Convention of 1850, it seems self-evident that any adjectival phrase in the form A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B.' The set of punishments which are *either* 'cruel' *or* 'unusual' would seem necessarily broader than the set of punishments which are *both* 'cruel' *and* 'unusual.'" *People v. Bullock,* 440 Mich. at 31 (emphasis in the original).

1789, by joint resolution, Congress Proposed the Bill of Rights Amendments to the States, the 10th of which was what came to be the Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It would be far more than passing strange if Congress proposed to the States an amendment to the Constitution concerning punishments that it intended to be *different* than that it had enacted as to the Northwest Territory only six weeks earlier. And there is no evidence that it so intended.

Indeed, the founding-era evidence has been said to establish that no difference was intended when the disjunctive was used rather than the conjunctive in a particular constitution.

- As evidenced by the state constitutions they wrote, the Founders used the phrases "cruel and unusual," "cruel or unusual," and "cruel" interchangeably as referring to a unitary concept.

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The state constitutions enacted during and shortly after the Bill of Rights' ratification also counsel against a literal interpretation. Pennsylvania and South Carolina each enacted constitutions during 1790, while ratification of the Bill of Rights was still pending. In addition, Delaware and Kentucky enacted constitutions in 1792 during the year following the Bill of Rights' ratification. All of these constitutions prohibited "cruel punishments," omitting entirely any reference to the term "unusual." Numerous state constitutions enacted after the Founding period used this same language. There is no evidence that this formulation was understood to mean anything different from either the Eighth Amendment's proscription of "cruel and unusual punishments" or the ban of the many state constitutions enacted during the Revolutionary and post-Revolutionary periods against "cruel or unusual" punishments.[76]

- . . . *the phrases "cruel and unusual" and "cruel or unusual" were often used interchangeably*, with early American state constitutions

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[76] Stacy, Tom, "Cleaning Up the Eighth Amendment Mess," 14 Wm. & Mary Bill Rts. J. 475, 503 -504 (December 2005) (footnotes omitted).

often employing "cruel or unusual" instead of the "cruel and unusual" verbiage.[77]

- . . . neither the Framers nor their English predecessors attributed much difference between the phrases cruel *and* unusual and cruel *or* unusual. . . ."the available evidence indicates that the Founders understood [both formulations] to capture the same meaning."[78]

And in the debate on ratification of the Constitution, where much concern was expressed regarding the absence of a Bill of Rights, the disjunctive and conjunctive were used interchangeably, and "cruel" and "unusual," however expressed, referred to a unitary concept. At the Massachusetts Ratifying Convention, Abraham Holmes complained that in the absence of a Bill of Rights Congress was not "restrained from inventing the most cruel *and unheard of* punishments . . . RACKS and GIBBETS, may be amongst the most mild instruments of their discipline."[79] The minority dissent of the Pennsylvania Ratifying Convention offered a series of suggested amendments to the proposed Constitution, including that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel *nor* unusual punishments inflicted."[80] The New York ratifying convention proposed amendments to the proposed Constitution, constituting a Bill of Rights, and including that "excessive bail ought not to be required, nor excessive fines

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[77] Bessler, John, "The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century," 2 Brit. J. Am. Legal Stud. 297, 313 (2013) (footnotes omitted) (emphasis supplied).

[78] Casale, Robert, and Katz, Johanna, "Would Executing Death-sentenced Prisoners after the Repeal of the Death Penalty Be Unusually Cruel under the Eighth Amendment?," 86 Conn. B.J. 329, 336 (2012) (footnote omitted).

[79] Bernard Bailyn, 1 *The Debate on the Constitution*, p. 912 (emphasis supplied, capitalization in the original).

[80] Bernard Bailyn, 1 *The Debate on the Constitution*, p. 532 (emphasis supplied).

imposed; nor cruel *or* unusual punishments inflicted."[81] The North Carolina ratifying convention resolved that there should be a Declaration of Rights added to the proposed Constitution, to include a provision that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel *and* unusual punishments inflicted."[82] The phrases were used interchangeably, and connoted no difference in meaning.

Michigan achieved Statehood in 1837, and its first constitution, that of 1835, provided in Article 1, § 18 that "Excessive bail shall not be required; excessive fines shall not be imposed; and cruel and unjust punishments shall not be inflicted." There is no historical evidence that the textual change from the Northwest Ordinance—from "cruel or unusual" to "cruel and unjust"—was meant to accomplish some change from the prohibition in the Northwest Ordinance. In the Constitution of 1850, Article 6, § 31, our constitution returned essentially to the language used in the Northwest Ordinance: "cruel or unusual punishment shall not be inflicted." And the 1908 Constitution, in Article 2, § 15, continued that language, which also appears in our current constitution: "cruel or unusual punishment shall not be inflicted." Nothing in any convention record or journal that the People can find indicates that the text employed in the Northwest Ordinance, the text employed in the Constitution of 1835, or the text employed in the Constitutions of 1850, 1908, and 1963 were intended to mean anything different. Again, "the phrases 'cruel and unusual,' 'cruel or unusual,' and 'cruel'" were employed "interchangeably as referring to a unitary concept" throughout the country.

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[81] Bernard Bailyn, 2 *The Debate on the Constitution*, p. 536 (emphasis supplied).

[82] Bernard Bailyn, 2 *The Debate on the Constitution*, p. 567 (emphasis supplied).

And as to text itself, this court said in *Bullock* that "it seems self-evident that *any* adjectival phrase in the form 'A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B.'"[83] But this is not necessarily so, though it is, at least to modern ears, the more natural reading. While "and" is generally taken to be "used to join words or groups of words; added to; plus," "[o]r, on the other hand, while used as 'expressing an alternative, contrast, or opposition," is also often used "to indicate ... (3) the synonymous, equivalent, or substitutive character of two words or phrases,' as in '[the off [or] far side], [lessen [or] abate].'"[84] And in any event, here history gives context to the expression—no difference in meaning was intended by the use on occasion of "or" rather than "and" to couple "cruel" and "unusual"; indeed, no difference in meaning was intended by the occasional use of "cruel" standing alone.

b. "The law the people have made," article 1, § 16, and proportionality review: how the words and phrases would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted[85]

What would the ratifiers of the Michigan Constitutions have understood themselves to be enacting in 1835 when they ratified the language "Excessive bail shall not be required; excessive fines shall not be imposed; and cruel and unjust punishments shall not be inflicted"; and in 1850 when they ratified "Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted"; and in 1908 when they ratified a text almost

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[83] *People v. Bullock*, 440 Mich. at 30-31 (emphasis added).

[84] Webster's Third New International Dictionary (1981).

[85] See Vasan Kesavan & Michael Stokes Paulsen, "The Interpretive Force of the Constitution's Secret Drafting History," 91 Geo. L.J. 1113, 1132 (2003).

identical to that of 1850; and finally in 1963, when that language was again continued? Because, as the People have argued, "or" and "and" were used interchangeably at the time of the Founding, one must return to the beginning. What was the understanding at the time of the Founding, and in 1835?

The People will not belabor the point, but direct the Court to Justice Scalia's lead opinion in *Harmelin v Michigan*,[86] joined by Chief Justice Rehnquist as to the proportionality discussion.[87] The People agree that:

- . . . the Clause disables the Legislature from authorizing particular forms or "modes" of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed.[88]

- . . . to use the phrase "cruel and unusual punishment" to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly. The notion of "proportionality" was not a novelty. . . . There is little doubt that those who framed, proposed, and ratified the Bill of Rights were aware of such provisions, yet chose not to replicate them.[89]

- We think it enough that those who framed and approved the Federal Constitution chose, for whatever reason, not to include within it the guarantee against disproportionate sentences that some State Constitutions contained. It is worth noting, however, that there was good reason for that choice . . . . While there are relatively clear historical guidelines and accepted practices that enable judges to

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[86] *Harmelin v. Michigan* 501 U.S. 957, 976, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991).

[87] And Justice Thomas has also made essentially the same points. See e.g. *Graham v Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2011)(Thomas, J., dissenting).

[88] *Harmelin*, 111 S.Ct. at 2691 - 2692.

[89] *Harmelin*, 111 S.Ct. at 2692.

determine which *modes* of punishment are "cruel and unusual," *proportionality* does not lend itself to such analysis.[90]

- The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate—and to say that it is not. For that real-world enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.[91]

This was the understanding, the People submit, which informed the punishment provision of the Northwest Ordinance, and the Michigan Constitution of 1835, with subsequent constitutions ratified with no understood change to that understanding.

c. "The law the people have made," article 1, § 16, and proportionality review: the jurisprudential history of the provision

For the sake of economy, the People here mention only this court's latest decision on the issue, *People v Bullock*. The United States Supreme Court, in *Harmelin v. Michigan, supra,* rejected a challenge brought under the "cruel and unusual punishments" clause of the Eighth Amendment to Michigan's mandatory penalty of life in prison without possibility of parole for possession of 650 grams or more of a mixture containing cocaine. This court in *Bullock* reached a

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[90] *Harmelin*, 111 S.Ct. at 2692. And see John F. Stinneford, "The Original Meaning of 'Unusual': the Eighth Amendment as a Bar to Cruel Innovation,"102 NW. U. L. Rev. 1739, 1757 (Fall 2008): "The Roper majority wanted to strike down the death penalty for seventeen-year-olds, despite the fact that the evidence did not demonstrate that such executions violated any societal moral consensus, at least within the United States, and so it simply pretended that the evidence supported the desired result. One may like the results of Roper and still find the case profoundly troubling. If evolving standards of decency is merely window-dressing for judicial will, then it is not merely an incorrect standard; it is not a standard at all. In the long run, a standardless standard will cause more harm than good to those criminal defendants who seek the protection of the Eighth Amendment."

[91] *Harmelin*, 111 S.Ct. at 2697.

different conclusion based on Art. I, § 16, applying proportionality review to the legislative sentencing determination, and finding the sentence unconstitutional as disproportionate. The court based its conclusion on three points: 1)the textual difference, which the People have discussed; 2) its determination that the punishment clause had been determined by the court for "more than half a century to include a prohibition on grossly disproportionate sentences" and that jurisprudence informed the framing and ratification of Article 1, § 16[92]; and 3)"longstanding" Michigan precedent supported proportionality review.[93]

The People have remarked regarding the textual analysis and history; as to Michigan's jurisprudence, space precludes little other than observing that several justices have expressed the view that *Bullock* was wrongly decided,[94] and directing the court's attention to Justice Riley's partial dissent in *Bullock*, rejecting proportionality after reviewing Michigan's jurisprudential history on the point, with which the People agree.

4. Conclusion

Proportionality review should be rejected as a matter of Michigan law. It inevitably involves the court in matters that are legislative. For example, sociological and psychological treatises and articles are presented to the court reviewing a penalty for proportionality, which are not part of the record of the case, and which are not put to any rigorous examination or testing.

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[92] *People v. Bullock*, 440 Mich. at 32.

[93] *People v. Bullock*, 440 Mich. at 33.

[94] See *People v. Correa*, 488 Mich. 989, 992 (2010) (Markman, J., concurring in the denial of leave, joined by Justice Corrigan and Justice Young): " . . . at some point, this Court should revisit *Bullock's* establishment of proportionality review of criminal sentences, and reconsider Justice Riley's dissenting opinion in that case."

They are appropriate, rather, to a legislative hearing on the wisdom of a particular sentence, and courts are neither equipped for such hearings nor authorized to conduct them. As Justice Scalia pointed out in the *Roper*[95] case:

> the American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In . . . *Hodgson v. Minnesota* . . . the APA found a "rich body of research" showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement. Brief for APA as *Amicus Curiae,* . . . The APA brief, citing psychology treatises and studies too numerous to list here, asserted: "[B]y middle adolescence (age 14–15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems.". . . . courts—which can only consider the limited evidence on the record before them—are ill equipped to determine which view of science is the right one. Legislatures "are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.' "

Further, if the constitutional proportionality of a sentence "is an ever-changing reflection of the evolving standards of decency' of our society, it makes no sense for the Justices then to *prescribe* those standards rather than *discern* them from the practices of our people. On the evolving-standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?"[96]

To conclude, Justice Riley quoted the Prosecuting Attorneys Association amicus brief:

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[95] *Roper v. Simmons,* 543 U.S. 551, 617-618, 125 S.Ct. 1183, 1223, 161 L.Ed.2d 1 (2005)(Scalia, J., dissenting).

[96] *Roper v. Simmons,* 125 S.Ct. at 1222 (Scalia, J., dissenting) (2nd emphasis added).

. . . I believe that the amicus curiae supplemental brief of the Prosecuting Attorneys Association correctly identifies the problems with an evolving standards test. . . . "if 'evolving standards of decency' as to the appropriate (proportionate) sentence for a crime are to be the measure of the constitutionality of a legislatively set penalty, how is such an inquiry to be carried out? What is the measure? What informs the judgment? What tools does a court have to make it? What enables a court to overrule society's expression of its 'standard of decency,' communicated through statute, imposing a different standard, which is also supposed to be *society's* standard and not the court's? Would not the court's role be to *discover* or *identify* society's 'standard of decency'-not what it should be, but what it *is,* and how better could society express its standard of decency than through its elected lawmakers? The alternative for the judiciary is that

> "'it is for *us* (the judiciary) to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think "proportionate" and "measurably contributory to acceptable goals of punishment"-to say and mean that, is to replace judges of the law with a committee of philosopher kings.' . . . "[97]

[97] *People v. Bullock,* 440 Mich. at 63-64 (Riley, J. dissenting).

C. ***Miller v Alabama*'s requirement that punishment of juvenile 1st-degree murderers by incarceration for life without any possibility of parole be imposed only after an individualized hearing considering aggravating and mitigating factors concerning the offense and the offender, is inapplicable to cases—such as this one—where the conviction was final on appeal at the time of the decision; a categorical ban, on the other hand, on imposition of incarceration without parole of juvenile murderers convicted of 1st-degree murder on an evidentiary showing of aiding and abetting the form of 1st-degree murder of murder during the course of a statutorily specified felony—a ban the People insist does not exist—*would* apply to cases that have been become final after the expiration of direct review or the period for direct review**

Whether either the Federal or Michigan Constitutions categorically bar incarceration of a juvenile murderer for life with no possibility of parole after conviction of the form of 1st-degree murder of murder during the course of a statutorily specified felony, on an evidentiary theory of aiding and abetting, or not—and the People have argued not—there is the question of whether such a categorical bar would apply to cases where the conviction is final, and also the question whether *Miller v Alabama* itself, which imposes no such bar, applies to cases where the conviction was final at the time of its decision. The retroactivity argument differs on each question; the People begin with the question of a categorical bar.

1. **A categorical bar on incarceration that permits no parole consideration for juvenile murderers convicted of 1st-degree murder on an evidentiary showing of aiding and abetting the form of 1st-degree murder of murder during the course of a statutorily specified felony—a ban the People insist does not exist—*would* apply to cases that have been become final after the expiration of direct review or the period for direct review**

Retroactivity jurisprudence developed federally because of the sea change in constitutional jurisprudence worked by the Warren Court that virtually demanded limitation of the effects of that

Court's many overruling decisions,[98] and thus consideration of a doctrine of retroactivity. In part because the purpose of the exclusionary rule is to deter unlawful police conduct, a purpose that cannot be served when the conduct condemned occurs before it is declared improper, the Court limited the reach of *Mapp v Ohio*[99] in *Linkletter v Walker*[100] regarding habeas proceedings, limited its reach on direct appeal in *Johnson v New Jersey*,[101] and continued on to limit other new rules of criminal procedure to preclude their application to conduct occurring before the Court's overruling construction of the Constitution.[102]

The test developed by the United States Supreme Court—since repudiated by that Court, as will be discussed below—applied three factors:

- the purpose of the new rule;
- the general reliance on the old rule; and
- the effect of retroactive application of the new rule on the administration of justice.

The concern that reliance on the old rule may well have created "settled expectations" was considered important in resolving the question of applicability of a new rule to cases already tried and to conduct which has already taken place.

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[98] "The list of opinions destroyed by the Warren Court reads like a table of contents from an old constitutional law casebook." Philip B. Kurland, *Politics, the Constitution, and the Warren Court,* 90-91 (1970).

[99] *Mapp v. Ohio*, 367 US 643, 81 S Ct 1684, 6 L Ed 2d 1081 (1961).

[100] *Linkletter v. Walker*, 381 US 618, 85 S Ct 1731, 14 L Ed 2d 601 (1965).

[101] *Johnson v. New Jersey*, 384 US 719, 732, 86 S Ct 1772, 16 L Ed2d 882 (1966).

[102] See discussion in *Griffin v. Kentucky*, 479 US 314, 321, 107 S Ct 708, 93 L Ed 2d 649 (1987).

But because a construction of a statute or constitutional provision, even one overruling prior precedent, is considered an expression of what the law "is," this three-prong retroactivity test was abrogated by the United States Supreme Court in favor of Justice Harlan's view that these overruling decisions are applicable on direct appeal to the case before the court, and to *all* cases then pending on direct appeal with the issue preserved.[103] As to decisions *final* at the time of the overruling decision—that is, where the direct appeal is over or the time for it has run—a new rule was held applicable only in very limited circumstances, the Court adopting, with some modification, Justice Harlan's view on this point as well. A new rule will be applied retroactively on collateral attack if it 1)places "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe" or 2)announces a new watershed rule of criminal procedure necessary to the fundamental fairness of the criminal proceeding.[104] Another way to describe the "first prong" of the *Teague* test is that it covers new "substantive rules." A rule is substantive rather than procedural if it "alters the range of conduct *or the class of persons that the law punishes*. . . ."[105] The categorical rule of *Graham v Florida* that *no* juvenile may be sentenced to life without parole for a nonhomicide offense is thus substantive, and the case retroactive even on collateral review.[106] If this court finds here that the Eighth Amendment

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[103] *Griffith v Kentucky*, 479 US 314, 322-23.

[104] *Teague v. Lane,* 489 US 288, 109 S Ct 1060, 103 L Ed 2d 334 (1989) (emphasis supplied).

[105] *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 2523, 159 L Ed 2d 442 (2004).

[106] See e.g. *In re Sparks*, 657 F.3d 258, 261 (CA 5, 2011); *Bonilla v State*, 791 N.W.2d 691 (Iowa, 2010) (also finding the "no parole" provision severable, leaving the sentence at life, but subject to parole); *People v Rainer*, __P3d__ , 2013 WL 1490107 (Colo.App., 2013); *St. Val v State*, 107 So.2d 553 (Fla.App, 2013).

bars—categorically—incarceration of juvenile murderers convicted of 1st-degree murder on an evidentiary showing of aiding and abetting the form of 1st-degree murder of murder during the course of a statutorily specified felony, then that categorical rule *would* apply retroactively to collateral attacks, just as does the rule in *Graham*. If this court were to find such a categorical bar based not on the Eighth Amendment, but instead on Article 1, § 16, then federal retroactivity principles would not, as a matter of federal constitutional law, govern the question. But because the People believe that those principles should be followed as a matter of state law, such a categorical bar based on the State Constitution should *also* be retroactive to cases brought on collateral attack. But no such bar can or should be found in Article 1, § 16, as the People have argued.

2. *Miller* does not apply to convictions final on appeal at the time of its decision under federal retroactivity principles

If, as the People have argued, neither the Eighth Amendment nor Article 1, § 16 categorically bar incarceration without possibility of parole consideration of a juvenile murderer conviction of 1st-degree murder for commission of a murder during the course of a statutorily enumerated felony, on an evidentiary theory of aiding and abetting—a factual scenario the People have argued inapplicable to this case—there remains the question of whether defendant is entitled to relief under *Miller* itself. As this question is central to the arguments in the companion to this case of *People v Carp*,[107] the People will be brief.

Though defendant argues that Miller created a substantive rule, the Supreme Court expressly disclaimed that it was altering the "the range of conduct or the class of persons that the

[107] *People v Carp*, 838 N.W.2d 873 (2013).

law punishes," which is that which would make the decision substantive rather than procedural, saying "Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty."[108] The new rule of *Miller*, then, is plainly procedural, and if it is to apply to collateral review, must fall within the second ground of *Teague*—a new watershed rule of criminal procedure necessary to the fundamental fairness of the criminal proceeding.

As to new procedural rules, the Supreme Court has said:

> New rules of procedure . . . generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." . . . That a new procedural rule is "fundamental" in some abstract sense is not enough; the rule must be one "without which the likelihood of an accurate conviction is seriously diminished.". . . This class of rules is extremely narrow, and "it is unlikely that any ... 'ha[s] yet to emerge.' "[109]

The case of *Schriro v. Summerlin*[110] demonstrates the point. The defendant was convicted of 1st-degree murder. Whether aggravating factors existed justifying imposition of the death penalty was determined, under the statutory scheme then in place, by the judge, not the jury. Subsequently, the Supreme Court held such sentencing schemes unconstitutional, requiring, in

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[108] *Miller v. Alabama*, 132 S Ct at 2471 (emphasis supplied).

[109] *Schriro v. Summerlin*, 124 S Ct at 2523 (final emphasis supplied).

[110] *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519 (2004).

Ring v Arizona,[111] that the determination of aggravating factors be made by a jury. The question before the Supreme Court in *Summerlin*, then, was whether Summerlin, who had been sentenced to death under a sentencing process where the judge determined the existence of aggravating factors, a procedure now held unconstitutional, was entitled to have a new sentencing hearing where a jury determined the existence of aggravating factors rather than the judge.

Though Summerlin had received a death sentence under a procedure the Supreme Court had later held unconstitutional, the Supreme Court held that Summerlin was not entitled to relief, as his case was "final"—that is, the direct appeal was over—at the time of decision in *Ring*. Because the decision in *Ring* that a jury rather than a judge must determine the existing of aggravating factors justifying the death penalty did not alter the range of conduct or the class of persons that the law punishes, but instead concerned the manner of determining the punishment to be imposed, the decision in *Ring* was procedural, held the Court. Nor, said the Court, was the rule in *Ring* applicable as a "watershed" rule:

> The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.[112]

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[111] *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

[112] *Schriro v. Summerlin,* 124 S Ct at 25236. And see *Whorton v. Bockting,* 549 U.S. 406, 406, 127 S.Ct. 1173, 1175, 167 L Ed 2d 1 (2007) (holding *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) not retroactive on collateral review); *Burton v. Fabian* 612 F 3d 1003, 1010 (CA 8, 2010)(rule of *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and its progeny that all facts that may allow an enhancement

So here.

State courts that have addressed the issue have split on the question.[113] The *Chambers* decision from Pennsylvania cogently explains that *Miller* is a procedural not a substantive rule: "Since, by its own terms, the *Miller* holding "does not categorically bar a penalty for a class of offenders," . . . (and because it does not place any conduct beyond the State's power to punish at all, see supra note 6), it is procedural and not substantive for purposes of Teague."[114] Nor is *Miller* a watershed rule of procedure under *Teague*—rules which the Supreme Court has said are *unlikely to exist* beyond those already identified.

> To fit within the second exception, it is not enough that a new rule "is aimed at improving the accuracy of trial," . . . or even that it promotes "[t]he objectives of fairness and accuracy," . . . .The new rule must also be a "watershed rule[ ]" that "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding." . . . In short, it must be a "groundbreaking occurrence," . . ."sweeping" change that applies to a large swathe of cases rather than a "narrow right" that applies only to a "limited class" of cases, ...
>
> The Supreme Court has underscored the narrowness of the second *Teague* exception by invoking the "sweeping rule" of *Gideon v. Wainwright*, . . . as an example of the type of rule that fits within the exception, . . . and by repeatedly noting that "we believe it unlikely that many such components of basic due process have yet

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of the statutory maximum must be submitted to the factfinder at trial and proven beyond a reasonable doubt—other than the fact of prior conviction—not retroactive on collateral attack).

[113] See e.g., finding *Miller* not to be retroactive, *State v. Tate*, --- So.3d ----, 2013 WL 5912118 (La.,2013); *Commonwealth. v. Cunningham*, 81 A.3d 1 (Pa.,2013); *Chambers v. State*, 831 N.W.2d 311 (Minn.,2013). Finding to the contrary, see e.g. *Thomas v. State*, --- So.3d ----, 2014 WL 114637 (Miss.App.,2014); *Diatchenko v. District Attorney for Suffolk Dist.*, 1 N.E.3d 270 (Mass., 2013); *State v. Ragland*, 836 N.W.2d 107 (Iowa,2013). See also *In re Morgan*, 713 F.3d 1365, 1367–68 (CA 11, 2013) (finding *Miller* to be non-substantive because it regulates only the manner of determining the degree of a defendant's culpability).

[114] *Commonwealth v Cunningham*, 83 A.3d at 10.

> to emerge." . . . The Supreme Court has further underscored the narrowness of the second *Teague* exception by its example. Beginning with the rule at issue in *Teague,* the Court has measured at least eleven new rules, or proposed new rules, of criminal procedure against the criteria for the second exception and, in every case, has refused to apply the rule at issue retroactively.[115]

As the Minnesota Supreme Court concluded in *Chambers,* "the rule announced in *Miller v. Alabama* . . . is a new rule of criminal constitutional procedure that is neither substantive nor a watershed rule that alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding. Therefore, Chambers is not entitled to the retroactive benefit of the *Miller* rule in a postconviction proceeding."[116]

3. *Miller* is not applicable under state retroactivity principles to cases final on appeal when it was decided

Michigan has yet to consider whether the *Teague* view of retroactivity to cases final at the time of a decision creating a new rule should be adopted as a matter of state law. It should.[117] This court has stated its own reluctance to apply new rules to cases where the conviction is final:

> A state may accord broader effect to a new rule of criminal procedure than federal retroactivity jurisprudence accords. *Danforth v. Minnesota,* 552 U.S. 264, 128 S.Ct. 1029, 1045, 169 L.Ed.2d 859 (2008). . . . Michigan law has regularly declined to apply new rules of criminal procedure to cases in which a defendant's conviction has become final. See *Sexton, supra* (requirement that the police inform a suspect when retained counsel is available for consultation);

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[115] *United States v Mandanici*, 205 F.3d 519, 529 (CA 2, 2000).

[116] *Chambers v State*, 831 N.W.2d at 331.

[117] See Blair Moody, Jr., "Retroactive Application of Law-Changing Decisions in Michigan," 28 Wayne L Rev 439, 441 (1982): ". . . there has been inconsistency in both analysis and result in the Supreme Court of Michigan's application of its law-changing decisions" so that there should be a "new and detailed look at both the factors which should enter into a retroactivity determination and the means by which this decision should be reached."

> *People v. Stevenson,* 416 Mich. 383, 331 N.W.2d 143 (1982) (abrogation of common-law "year and a day" rule); *People v. Young,* 410 Mich. 363, 301 N.W.2d 803 (1981) (preconviction filing of habitual offender notice); *People v. Smith,* 405 Mich. 418, 433, 275 N.W.2d 466 (1979) (repeal of criminal sexual psychopath statute barring criminal action against those adjudicated criminal sexual psychopaths); *People v. Markham,* 397 Mich. 530, 245 N.W.2d 41 (1976) (double jeopardy "same transaction" test); *People v. Rich,* 397 Mich. 399, 245 N.W.2d 24 (1976) (erroneous "capacity standard" jury instruction); *People v. Butler,* 387 Mich. 1, 195 N.W.2d 268 (1972) (waiver of a defendant's constitutional rights in taking a guilty plea); *Jensen v. Menominee Circuit Judge,* 382 Mich. 535, 170 N.W.2d 836 (1969) (constitutional right to appeal in criminal cases); *People v. Woods,* 382 Mich. 128, 169 N.W.2d 473 (1969) (custodial interrogation procedures); *People v. Fordyce,* 378 Mich. 208, 144 N.W.2d 340 (1966) (custodial interrogation procedures).[118]

And this court has only recently denied leave to appeal the decision of the Court of Appeals that held that *Padilla v Kentucky*[119] is not retroactive to cases on collateral review under Michigan retroactivity principles, the Court of Appeals stating that:

> the Michigan retroactivity analysis mandates that *Padilla* be applied prospectively only. Three factors govern the Michigan retroactivity analysis: " '(1) the purpose of the new rules; (2) the general reliance on the old rule[;] and (3) the effect of retroactive application of the new rule on the administration of justice.' " *Maxson,* 482 Mich. at 393, 759 N.W.2d 817, quoting *People v. Sexton,* 458 Mich. 43, 60–61, 580 N.W.2d 404 (1998) (alteration in original). In *Maxson,* our Supreme Court held that these factors precluded retroactive application of a new procedural rule that affected appeals from guilty pleas. *Id.* at 393–399, 759 N.W.2d 817. Like the rule held to

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[118] *People v. Maxson,* 482 Mich. 385, 392-393 (2008).

[119] *Padilla v Kentucky,* 559 U.S. ——, 130 S.Ct. 1473, 1481 n. 8, 176 L.Ed.2d 284 (2010).

> be prospective in *Maxson*, the *Padilla* rule cannot reasonably be deemed to require retroactive application.[120]

The *Teague* test is superior, and should be followed in Michigan. After all, the test Michigan currently applies—(1) the purpose of the new rules; (2) the general reliance on the old rule; and (3) the effect of retroactive application of the new rule on the administration of justice—was *itself* simply taken from then-extant federal retroactivity principles as articulated in *Linkletter v. Walter*[121] and employed as a matter of Michigan retroactivity law.[122] Michigan should now follow the Supreme Court's lead in *Teague*.

4. Conclusion

Because, then, Michigan should follow *Teague*, should the court find that either the Eighth Amendment or Article 1, § 16 categorically bar the denial of any parole consideration whatever to

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[120] *People v Gomez*, 295 Mich App 411 (2012), leave denied, 494 Mich. 865 (2013). The United States Supreme Court has also now held that as a matter of federal retroactivity principles *Padilla* is not retroactive to cases final when it was decided. *Chaidez v United States*, —— U.S. ——, ——, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013).

[121] *Linkletter v. Walter*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

[122] See e.g. *People v. Hampton* 384 Mich. 669, 674 (1971): "this Court is under no constitutional compulsion to apply the Cole rule, either prospectively or retrospectively. The United States Supreme Court has discussed various factors to be used in determining whether a law should be applied retroactively or prospectively. There are three key factors which the court has taken into account: (1) The purpose of the new rule; (2) The general reliance on the old rule; and (3) The effect on the administration of justice." And see *People v. Matthews*, 53 Mich.App. 232, 239 (1974): "In determining whether a new rule of law should be applied retroactively, *our Supreme Court has followed the lead of the United States Supreme Court and emphasized three key factors* which are involved in making that decision: (1) the purpose of the new rule; (2) the general reliance on the old rule by law-enforcement officials; and (3) the effect on the administration of justice of retroactive application."

a juvenile murderer who aided and abetted in the commission of a felony murder and was sentenced to life in prison, that ruling must be applied even to cases final on appeal. *Teague* governs as a matter of federal law if the rule is one required by the Eighth Amendment, and *Teague* should control as a matter of state law if the rule is found to be required by Article 1, § 16. Should the court not so find, and the People insist there is no such rule, then the "noncategorical" rule of *Miller v Alabama* should not, either as a matter of federal or state retroactivity principles, and again, the state should follow *Teague*, be applied to cases final on appeal when *Miller* was decided.

D. Conclusion

This court should conclude then, that *Miller* is applicable to all forms of 1st-degree murder, and to all evidentiary showings of guilt; that is, an individualized determination of whether the defendant should be denied all parole consideration should be made, there being, under neither the Eighth Amendment nor Article 1, § 16, any removal from this individualized assessment in the case of a 1st-degree murder committed by murder during the course of a statutorily enumerated felony, on an evidentiary showing of aiding and abetting. Further, here the defendant was a coprincipal.

Should the court find such a categorical prohibition under either the Eighth Amendment or the Michigan Constitution, then it would apply even to cases final on appeal, as *Teague* would compel that result as to an Eighth Amendment rule, and *Teague*'s retroactivity principles should be followed in Michigan as to any prohibition found under Article 1, § 16. By the same token, because, as the People argue, no such categorical prohibition should be found, application of

Teague under both federal and state law leads to the conclusion that *Miller* is inapplicable to cases final on appeal when it was decided, and thus inapplicable to the present case.

Relief

Wherefore, the People request that the Court of Appeals be affirmed.

Respectfully submitted,

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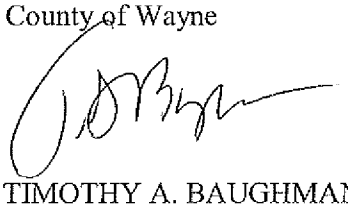

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