STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN	Supreme Court No. 161529
Plaintiff-Appellee,	Court of Appeals No. 352569
Vs.	Circuit Court No. 02-000893-02-FC
JOHN ANTONIO POOLE,	
Defendant-Appellant.	

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QUESTIONS PRESENTED

1. **Is a defendant's successive motion for relief from judgment "based on a retroactive change in law," under MCR 6.502(G)(2), if the motion relies on the change in law?**

   The Court of Appeals answered: No.

   Defendant-Appellant Poole answers: Yes.

   Plaintiff-Appellee answers: No.

   Amicus CDAM answers: Yes.

2. **Does Our State Constitution Bar the Imposition of Mandatory Life Without Parole for Young Adults, Such as Poole, under Const 1963, art 1, § 16?**

   The Court of Appeals did not answer this question.

   Defendant-Appellant Poole answers: Yes.

   Plaintiff-Appellee answers: No.

   Amicus CDAM answers: Yes.

INTERESTS OF AMICUS CURIAE

The Criminal Defense Attorneys of Michigan ("CDAM") is an organization consisting of hundreds of criminal defense attorneys licensed to practice in this state. CDAM was organized for the purposes of: promoting expertise in criminal and constitutional law; providing training for criminal defense attorneys to improve the quality of representation; educating the bench, bar, and public of the need for quality and integrity in defense services; promoting enlightened thought concerning alternatives to and improvements in the criminal justice system; and guarding against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws. *CDAM Constitution and By-laws,* Art 1, sec 2.

This Court permits CDAM to file an *amicus curiae* brief without motion for leave from the Court. MCR 7.312(H)(2).

INTRODUCTION

Amicus CDAM addresses both questions presented by the Court.

On Question 1, Amicus argues that Poole's successive motion for relief from judgment is "based on a retroactive change in law," as defined by MCR 6.502(G)(2) due to the plain language of the provision, the meaning of related provisions of MCR 6.502(G) in the court rules, the function of MCR 6.502(G), and prior court practice. Given the importance of the well-functioning of our state post-conviction system - not just on this legal issue - Amicus delves deeper into Question 1 than the parties. In the alternative, if this Court accepts the Plaintiff's invitation to adopt a narrow and forced understanding of the "based on" language under MCR 6.502(G), Amicus then encourages this Court to articulate a more capacious understanding of what is retroactive for purposes of state law.

On Question 2, Amicus offers two points. First, Amicus draws on Michigan-specific sources to provide a deeper historical understanding of the broader protection of our state constitution in Art 1, Sec 16. Second, Amicus answers the Court's second question presented only as to Art 1, Sec 16 with a Michigan-specific focus. Our state constitution bans the mandatory minimum sentence of life without parole for every emerging adult convicted of any first-degree murder that occurs without any individualized inquiry into the impact of that person's youth and immaturity, the young person's role in the crime or the nature of the offense, or any other mitigating circumstances.

ARGUMENT

I. Poole's Successive Motion for Relief From Judgment is "Based on a Retroactive Change in Law," MCR 6.502(G)(2), Whether or Not the Changed Law Automatically Entitles Him to Relief.

The court rule at issue, MCR 6.502(G), precludes filing successive motions for relief from judgment except if the petitioner meets one of two exceptions or if the court waives imposition of

the rule based on a showing of innocence. See MCR 6.502(G)(1) (rule against successive motions); MCR 6.502(G)(2) (exceptions to this rule). If petitioners meets one of the exceptions - a claim "based on" either "new evidence" or "a retroactive change in law" – they "may file a second or successive motion." MCR 6.502(G)(2) establishes a procedural gateway for convicted prisoners seeking relief, which is distinct from the merits standard analyzed under MCR 6.508(D)(2). The change in law need not automatically entitle the petitioner to relief for three reasons. First, the plain language of the provision – "based on" a change in law – governs a reading where the change in law need not guarantee substantive relief but merely provides a basis to excuse the rule against successive petitions. Second, in the context of the new evidence exception, this Court has held that MCR 6.502(G)(2) establishes a procedural threshold, and that that procedural inquiry must not be conflated with analysis on the merits. *People v Swain*, 499 Mich 920, 920; 878 NW2d 476, 476 (2016). Third, our state courts have tacitly acknowledged in a series of cases that a successive petition need not entitle a petitioner to relief on the merits. To hold otherwise would defeat the purpose of merits review, allowing only winning claims to be considered on the merits and potentially closing the courthouse doors on other meritorious claims. Alternatively, this Court can reexamine our state's retroactivity law and read "a retroactive change in law" broadly for purposes of MCR 6.502(G), thereby addressing concerns over the current doctrine's inadministrability and injustice.

A. Under the Plain Language of the Provision and Read in Context With Other Court Rules, MCR 6.502(G)(2) Does Not Require That the Retroactive Change in Law Automatically Entitle a Petitioner to Relief.

Michigan court rules "are to be construed to secure simplicity in procedure, [and] fairness in administration." MCR 6.002. They "are intended to promote a just determination of every criminal proceeding." MCR 1.105.

The interpretation of a court rule is a question of law reviewed de novo. *People v Comer*, 500 Mich 278, 287; 901 NW2d 553 (2017). The words of a court rule should be given their plain and ordinary meaning. *People v Petit*, 466 Mich 624; 648 NW2d 193 (2002). Just as a statute is analyzed in the context of the entire legislative schema, a court rule should be analyzed in the context of our state's complete court rules. *Comer*, 500 Mich at 287 (explaining that the "same legal principles" governing the interpretation of statutes govern the interpretation of court rules); see also *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) ("context matters, and thus statutory provisions are to be read as a whole.")

The Michigan court rules provide that only one post-conviction motion for relief from judgment may be considered, MCR 6.502(G)(1), unless the provisions of MCR 6.502(G)(2) apply. MCR 6.502(G)(2) states that a "defendant may file a second or subsequent motion based on [1] a retroactive change in law that occurred after the first motion for relief from judgment or [2] a claim of new evidence that was not discovered before the first such motion."[1] Before this court rule was promulgated in 1995, collateral review procedure in Michigan permitted defendants to "repeatedly seek relief without limitation." *People v Reed*, 449 Mich 375, 388; 535 NW2d 496, 503 (1995); Staff Comment to 1995 Amendment of MCR 6.502 ("New MCR 6.502(G) limits criminal defendants to filing one motion for relief from judgment with respect to a conviction, except where the motion is based on a retroactive change in law or on newly discovered evidence."). The exceptions in MCR 6.502(G)(2) are provided because claims based on new evidence or new law could not have been raised earlier and, therefore, do not undermine the general rule that all claims

[1]A third exception, which does not contain the language at issue in this case, is where the petitioner has made a requisite showing regarding possible innocence; a court may also waive the bar on successive motions for postconviction relief "if it concludes that there is a significant possibility that the defendant is innocent." MCR 6.502(G)(2).

should be raised in the first motion. MCR 6.502(G)(2) (requiring that the relevant change in law "occurred *after* the first motion for relief from judgment") (emphasis added).

Reading 6.502(G)(2) to require that the claim is derived from the retroactive change in law, or that the change in law provide the claim's foundation, is consistent with the ordinary meaning of the phrase "based on." *People v Williams*, 491 Mich 164, 174; 814 NW2d 270, 276 (2013) (terms in a statute should be afforded their "plain and ordinary meaning"). In legal writing, the phrase "based on" is commonly used to mean "derived from." *Michigan Supreme Court, Michigan Appellate Opinion Manual*, Appendix 1 – Frequently Suggested Corrections, p 158 ("Use 'based on' (i.e., derived from) if the phrase is being used in relation to a noun") (emphasis added). A motion that is "based on" a particular judicial decision "use[s] particular ideas or facts" from that decision to "*develop* a theory." *Based*, *Macmillan Dictionary* (2020) (emphasis added); see e.g., *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281, 289 (2011) ("We may consult dictionary definitions to give words their common and ordinary meaning.") A petition is "based on" a new rule of law if it uses a new rule "as its basis." *Based*, *Collins Dictionary* (2020); see also *Based*, *Merriam-Webster* (2020) ("having a specified type of base or basis"). "[I]f one thing is based on another, it is *developed* from it," but does not need to indisputably follow from it. *Based*, *Cambridge Dictionary* (2020) (emphasis added). In brief, a legal theory "based on" a change in law need only be "developed" or "derived" from that change.

The court rule at issue, which describes when a successive motion for post-conviction relief may be filed, does not require that the change in law to have "undermined" the prior decision; it instead requires that the motion be "based on" the change in law.[2] If the Court intended for MCR

[2] MCR 6.502(G)(2) states that "[a] defendant may file a second or subsequent motion *based on a retroactive change in law* that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a

6.502(G)(2) to require entitlement to relief, or a more specific standard (e.g., that the change in law have "controlled by" the prior decision), it would have said so, and used the same language as MCR 6.508(D)(2). See *United States Fid Ins & Guar Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 14; 795 NW2d 101 (2009) ("[T]he use of different terms . . . generally implies that different meanings were intended."). Instead, MCR 6.502(G)(2) is a *procedural* gateway requirement that, if met, permits the defendant to file a subsequent motion for relief from judgment based on an underlying *substantive* claim. *People v Swain*, 499 Mich 920, 920; 878 NW2d 476, 476 (2016) (describing "the procedural threshold of MCR 6.502(G)(2)").

The use of the phrase "based on" in other court rules confirms that this phrase takes on a flexible meaning in the court rules, and must be construed in order to harmonize the reading of the court rules as a whole. See e.g., *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340, 345 (2010) ("When considering the correct interpretation, the statute must be read as a whole."); *Tuscola Cty Bd Of Com'rs. v Tuscola Cty Apport Comm'n*, 262 Mich App 421, 427; 686 NW2d 495, 498(2004) ("we focus on the existing provisions, in context, in an attempt to construct a harmonious statute."). The phrase "based on" is used 81 times in Michigan court rules, whereas the less flexible phrase "governed by" is used 118 times. Compare *Based on, Black's Law Dictionary* (11th ed) (in copyright, "based on" means "Derived from, and therefore similar to, an earlier work.") with *Govern, Black's Law Dictionary* (11th ed) ("to control a point in issue"). The phrase "governed by" is consistently used before a specific legal authority that controls or regulates a particular issue, and it has a binding quality. See e.g., MCR 2.306(C)(3)(d) (video depositions "are governed by MCR 2.315."); MCR 3.925(F)(1) ("The setting aside of juvenile adjudications is governed by

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successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions." (emphasis added).

MCL 712A.18e.") In comparison, "based on" is used to indicate greater flexibility. For instance, a motion or stipulation for an adjournment must be "based on good cause." MCR 2.503. For purposes of joinder, MCR 6.120(B)(1) provides that "offenses are related if they are based on," inter alia, "(a) the same conduct or transaction." MCR 2.116 provides that a motion for summary disposition "may be based on one or more . . . grounds," such as lack of jurisdiction, insufficient service of process, among others. Similarly, the requirement that initial disclosures in civil litigation be "based on the information then reasonably available to the party," MCR 2.302(A)(6), does not require that the parties have "perfect knowledge of their case at the initial disclosure stage." *State Bar of Michigan, The Guidebook to the New Civil Discovery Rules*, at 19 (effective Jan. 1, 2020).

B. Requiring a Gatekeeping Inquiry to Determine Whether A Petition Is "Based On" a Retroactive Change in Law Is Necessary in Order to Harmonize the Interpretation of MCR 6.502(G)'s "New Evidence" Exception and Discretionary Actual Innocence Waiver.

This Court has already recognized that the filing stage requirement under MCR 6.502(G)(2) does not require intensive merits analysis or automatic entitlement to relief. In *People v. Swain*, this Court found that it was reversible error to apply the standard for obtaining a new trial based on newly-discovered evidence, to the new evidence exception under MCR 6.502(G)(2). 499 Mich 920, 920; 878 NW2d 476, 476 (2016) (discussing *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003), which established the standard for obtaining a new trial based on newly-discovered evidence). In the case below, the Court of Appeals had concluded that Swain's petition did not meet the (G)(2) new evidence exception because she "ha[d] not shown *entitlement* to relief on the basis of newly discovered evidence." *People v. Swain*, unpublished per curiam opinion of the Court of Appeals, issued Feb 5, 2015 (Docket No. 314564), 2015 WL 521623, p 2 (emphasis added). This Court held that the Court of Appeals had erroneously applied a merits standard to a procedural

question, that is, by requiring the petitioner to demonstrate entitlement to relief at the filing stage. *Swain*, 499 Mich at 920. "*Cress* does not apply to the *procedural threshold* of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test." *Id*. (emphasis added); see also *People v Swain*, 288 Mich App 609, 631; 794 NW2d 92, 104 (2010) ("The court rules are silent on the procedure to be used by a trial court for determining whether a successive motion for relief from judgment falls within either of the two exceptions of MCR 6.502(G)(2).") Since *Swain*, this Court has reaffirmed that a court commits reversible error if it applies *Cress* "to an analysis of whether the defendant's motion was improperly successive under MCR 6.502(G)." *People v Watkins*, 500 Mich 851, 851; 883 NW2d 758, 758 (2016).

In the new evidence context, this Court has clarified since *Swain* that the bar to satisfy the procedural threshold of MCR 6.502(G)(2) is low. A successive motion satisfies MCR 6.502(G)(2) where it is based on several statements that were not previously presented to the trial court. *People v Robinson*, 503 Mich 883, 883; 919 NW2d 59, 59 (2018). Even a successive motion that relies on a single piece of new evidence, such as an affidavit that was not previously presented to the trial court, satisfies the new evidence exception. *People v McClinton*, 501 Mich 944, 944; 904 NW2d 619, 619 (2017) (emphasis added).

The retroactivity provision of 6.502(G)(2) should be read harmoniously with the new evidence provision of the same court rule. If they are read consonantly, the change in law exception in MCR 6.502(G)(2) cannot require that a defendant establish entitlement to relief on the merits. It can only require that the petitioner present a retroactive change in law that his successive motion relies upon, or that provides the foundation for his claim. Reading these two related parts of the same rule as having related meaning and function is a matter of fundamental construction. See e.g., *Griffith ex rel Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 533; 697 NW2d 895,

902 (2005) ("words and clauses will not be divorced from those which precede and those which follow"). Court rules which relate to the same subject should be "*construed together* as one law, regardless of whether they contain any reference to one another." *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 312; 596 NW2d 591, 595 (1999) (emphasis added). Two exceptions to the same rule are *in pari materia* and thus must be interpreted "without repugnancy, absurdity, or unreasonableness." *Id*. Because this Court has rejected an entitlement to relief standard for MCR 6.502(G)(2)'s new evidence exception, *Swain*, 499 Mich at 920, it would be unreasonable and arbitrary to require that same standard for MCR 6.502(G)(2)'s change in law exception. *State Treasurer v. Schuster*, 456 Mich 408, 417; 572 NW2d 628, 632 (1998) ("all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although . . . containing no reference one to the other."). This principle is even stronger here because the two exceptions are in the same court rule. See *Griffith*, 472 Mich at 533 ("words grouped in a list should be given related meaning"). Reading the "change in law" portion of the rule to require an automatic entitlement to relief, but reading the "new evidence" portion of the rule to not require an automatic entitlement to relief cannot be squared with this Court's command that court rules "are to be construed to secure simplicity in procedure, [and] fairness in administration." MCR 6.002.

Before *Swain*, the lower courts had conflated the new evidence exception under MCR 6.502(G)(2) and the merits standard under *Cress* in other cases. See Note, *Disentangling Michigan Court Rule 6.502(G)(2): The "New Evidence" Exception to the Ban on Successive Motions for Relief from Judgment Does Not Contain a Discoverability Requirement*, 113 Mich L Rev 1427 (2015) (discussing e.g., *People v Vinson*, unpublished per curiam opinion of the Court of Appeals, issued July 26, 2012 (Docket No. 303593) 2012 WL 3046236, p 7, and concluding that "if the

court of appeals had not conflated section 6.502(G)(2)'s new evidence exception with *Cress*, Vinson would likely have prevailed.") Without clarification from this Court, lower courts may again conflate the filing and merits questions under the change in law exception, preventing petitioners from obtaining review who should receive it.

Finally, the recent amendments to MCR 6.502 demonstrate a willingness to not shut the courthouse doors on colorable claims for procedural reasons, and to allow them to be reviewed on the merits. The 2018 amendment to MCR 6.502, inserting a discretionary waiver of the ban on successive petitions for those who are "actually innocent," reflects a turn towards greater generosity in allowing the substance of claims to be reviewed instead of relying on procedural hurdles. *Amendments of Rule 6.502 of the Michigan Court Rules and Rule 3.8 of the Michigan Rules of Professional Conduct*, ADM File No. 2013-05; ADM File No. 2014-46 (Sep 20, 2018). Likewise, the addition of 6.502(G)(3), providing a non-exhaustive list of what type of evidence is "new evidence" for purposes of 6.502(G)(2) allows more petitioners to have their new evidence claims considered on the merits. Michigan Innocence Clinic, *Re: Comments on Proposed Revisions to MCR 6.502(G) and MRPC 3.8* (Aug. 27, 2018). Heightening the procedural bar for the change in law exception alone, after loosening the bar for the new evidence exception, would be inconsistent and confusing. See e.g., *Omne Financial*, 460 Mich at 312.

C. Whether a Petitioner Is Entitled to Relief is a Merits Question That Is Distinct From the Question of Whether a Petitioner Fits Within One of MCR 6.502(G)(2)'s Exceptions, Which is A Threshold Procedural Question.

Whether a successive motion is "based on a retroactive change in law" that occurred after the first round of collateral review is a procedural question. *See e.g., People v Johnson*, 502 Mich 541, 566; 918 NW2d 676, 688 (2018) (interpreting MCR 6.502(G)(2)). As this Court has explained, a successive petition may only be considered on the merits if it is not "procedurally

barred" by MCR 6.502(G)(2). *Id.* see also *People v Robinson*, unpublished per curiam opinion of the Court of Appeals, issued July 30, 2019 (Docket No. 337865), 2019 WL 3433078, p 5 (A judge's determination that a petition is "within one of the exceptions," MCR 6.502(G)(2), is "only the initial qualifying step for defendant to receive a merits review of his motion for post-judgment relief."). Once that procedural threshold is satisfied, a petitioner must establish entitlement to relief under caselaw and MCR 6.508(D). See *Johnson*, 502 Mich at 566.

Examination of the language in MCR 6.502(G) and the language of the other relevant court rules shows that MCR 6.502(G)(2) addresses the circumstances under which a defendant may *file* a second or successive motion for relief from judgment, whereas MCR 6.508(D) addresses when courts may *grant* relief for such motions. See e.g., *Duffy v. Mich Dept of Nat Res*, 490 Mich 198, 206; 805 NW2d 399, 404 (2011) ("It is elementary that . . . courts will regard all statutes upon the same general subject matter as part of 1 system."). More specifically, MCR 6.508(D)(2), which is in a section captioned "Entitlement to Relief," provides that where a successive motion raises an issue that was presented in a prior appeal, the court can grant relief only if "the defendant establishes that a retroactive change in the law *has undermined* the prior decision." MCR 6.508(D)(2) (emphasis added).[3] Our court rules recognize a distinction between the gatekeeping function of MCR 6.502(G) and the merits determination subject to MCR 6.508(D) which would be substantially eroded by requiring automatic entitlement to relief under MCR 6.502(G)(2). Were the Court to do so, it would be effectively adding a new step of analysis prior to merits review, thereby collapsing the distinction between procedural and merits questions. See e.g., *Johnson*, 502

[3] MCR 6.508(D)(2) states that "[t]he court may not grant relief to the defendant if the motion alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, *unless the defendant establishes that a retroactive change in the law has undermined the prior decision*." (emphasis added).

Mich at 566 (treating procedural analysis under MCR 6.502(G)(2) separately from analysis on the merits). If only winning claims could satisfy the change in law exception, there would be no purpose for the merits stage, because only winning claims would be considered on their merits. Reading a new step into the threshold procedural inquiry would controvert the plain text of the court rule, which does not contain the words "automatic," "entitlement," or similar language. MCR 6.502(G)(2). Requiring a merits-like screening before dismissing the claim on procedural grounds is inconsistent with the purpose of criminal procedural court rules, which are "to be construed to secure simplicity in procedure," MCR 6.002, and should be administered in a manner that minimizes any "error[s] that . . . affect the substantial rights of the parties." MCR 1.105.

The federal collateral review provision most analogous to MCR 6.502(G)(2) also performs a gatekeeping function, but it is narrower than our state's rule based on the plain text of the statute and the deference given to state courts when undertaking federal review. Where MCR 6.502(G)(2) requires only that the "change in law" is "retroactive," the federal habeas statute requires that a change in law have been "*made* retroactive to cases on collateral review by the Supreme Court." 28 USC § 2254(b)(1) (governing federal review of state convictions); 28 USC § 2255(h)(2) (review of federal convictions). It follows that under the Michigan court rule, the relevant "change in law" need not have been specifically held retroactive before a successive petition is filed. MCR 6.502(G)(2) ("based on a retroactive change in law"). A non-frivolous, good-faith argument that a new rule of criminal law applies to a defendant, or should be extended to apply to him, should be sufficient to invoke this rule to file a successive petition. MRPC 3.1.

Some federal courts have found that a successive petition fits within the retroactive change in law exception to the federal habeas statute—which on its face appears narrower than the Michigan rule—if that change in law supports the petitioner's claim, reasoning that § 2255(h)

merely performs a gatekeeping function. For example, the First Circuit took a permissive, case-by-case approach to whether a successive petition fit within the federal habeas statute's change in law exception. *Moore v United States*, 871 F3d 72, 82 (CA 1, 2017). Noting that section 2255 uses words such as "rule" and "right," rather than "holding," the First Circuit reasoned that "Congress presumably used these broader terms because it recognizes that the Supreme Court guides the lower courts not just with technical holdings but with general rules that are logically inherent in those holdings, thereby ensuring less arbitrariness and more consistency in our law." *Id.*

Requiring automatic entitlement to relief to establish the court's jurisdiction over a successive petition increases the risk that some meritorious claims will be erroneously dismissed at the procedural, pre-merits stage. Pro se prisoners, for instance, should not have their petitions weeded out before a thorough examination, which would be more prone to happen with a requirement that a petitioner demonstrate they are automatically entitled to relief. This would allow for some arbitrary dismissals, which would controvert the purpose of the court rule to achieve "fairness in administration." MCR 6.002. If the court holds that the law relied upon must automatically entitle a petitioner to relief, then some prisoners who are entitled to relief under a retroactive change in law will not receive it. See e.g., Ruthanne M. Deutsch, *Federalizing Retroactivity Rules: The Unrealized Promise of* Danforth v. Minnesota *and the Unmet Obligation of State Courts to Vindicate Federal Constitutional Rights*, 44 Fl S L Rev 53, 75 (2016) (arguing that "state habeas courts must provide relief precisely because federal habeas courts will not" and "[o]therwise, litigants will lack any forum to vindicate their constitutional rights"). The number of prisoners without an opportunity to seek redress and challenge their convictions will increase and public confidence in the courts as guarantors of liberty may decrease. See e.g., *Marbury v Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right

of *every individual* to claim the protection of the laws, whenever he receives an injury.") (emphasis added); *Montgomery v. Louisiana*, 136 S Ct 718, 732; 193 L Ed 2d 599 (2016) ("There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose"), quoting *Mackey v. United States*, 401 US 667, 693; 91 S Ct 1171, 1180 (HARLAN, J., concurring). MCR 6.502(G)(2)'s gatekeeping function can be preserved only if entitlement to relief on the merits is reserved for the merits stage, and not required at the filing stage.

D. There is No Reason to Change Existing Practice; Our State Courts Have Not Previously Required, Under MCR 6.502(G)(2), That the Retroactive Change in Law Relied Upon In a Successive Petition Automatically Entitle the Petitioner to Relief.

The Michigan Court of Appeals has tacitly acknowledged that it have jurisdiction over successive petitions under MCR 6.502(G)(2) where the retroactive change in law relied on does not automatically entitle the petitioner to relief. See e.g., *People v. Owens*, unpublished per curiam opinion of the Court of Appeals, issued July 8, 2021 (Docket No. 353908), 2021 WL 2877828; *People v. Miller*, unpublished per curiam opinion of the Court of Appeals, issued June 25, 2019 (Docket No. 341425), 2019 WL 2605760; *People v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued June 18, 2019 (Docket No. 344322), 2019 WL 2517815. The petitioners in these cases were not automatically entitled to relief under *Montgomery* because they were sentenced to life with the possibility of parole. *Miller*, 2019 WL 2605760; *Johnson*, 2019 WL 2517815. While they were each denied relief, the Court of Appeals recognized that their arguments based on *Montgomery*'s principles satisfied the MCR 6.502(G)(2) procedural hurdle. *Miller*, unpub op at 2 n 4; *Johnson*, unpub op at 2. For instance, in *People v Miller*, the Court denied relief on the merits but characterized MCR 6.502(G) as a "preliminary showing, not the ultimate burden" and contrasted it with MCR 6.508(D) merits relief. *Miller*, unpub op at 2 n 4. Similarly, in *People v Johnson*, the court found that the petitioner's successive motion under MCR

6.502(G)(2) "was arguably reviewable based on retroactive changes in the law." *Johnson*, unpub op at 2. The appellate court elaborated on this point, recognizing that MCR 6.502(G)(2) may be satisfied by a claim that relies on "*Miller* and related cases interpreting and *extending* its principles to juvenile offenders sentenced to de facto life sentences." *Id.* (emphasis added). This Court should read the rule consistent with prior practice.

E. In the Alternative, The Court Should Give Broader Meaning to Our State's Retroactivity Analysis to Address Concerns over Inadministrability and Injustice.

This Court must give the robust meaning to our state retroactivity analysis that is permitted under *Danforth v Minnesota*, 552 US 264, 288; 128 S Ct 1029, 1046; 169 L Ed 2d 859 (2008), and consistent with our state's rules for postconviction proceedings. The current Michigan retroactivity standard is based on federal law that has been largely abandoned due to its inadministrability and inequity. Given the Court's ruling in *Danforth*, Michigan has the ability to modify its state retroactivity standard to lead to more predictable and just outcomes.

1. The current Michigan retroactivity standard.

The Michigan standard for determining when a new constitutional rule will apply retroactively on collateral review was set forth in *People v Hampton* 384 Mich 669; 187 NW2d 404 (1971), and it remains in effect. *People v Barnes*, 502 Mich 265, 273; 917 NW2d 577, 583 (2018) (per curiam). In *Hampton*, the Court adopted a three-factor test, modeled after then-existing federal retroactivity standard, which considered "(1) The purpose of the new rule; (2) The general reliance on the old rule; and (3) The effect [of the new rule] on the administration of justice." *Hampton*, 384 Mich at 674 (same) (quoting *Linkletter v Walker*, 381 US 618; 85 S Ct 1731, 14 L Ed 2d 601(1965), overruled by *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989)). Courts have treated a "change in law" within the meaning of the MCR 6.502(G)(2) as the

same concept as a "new rule" within the meaning of the three-factor test. *Barnes*, 502 Mich at 271-72.

2. Michigan's retroactivity standard is easily manipulated and favors prospective-only application. This Court should consider amending it, as most states and the federal government have done.

Our state's retroactivity standard has been "attacked as being both difficult to apply and easy to manipulate to reach a desired result." *People v Sexton*, 458 Mich 43, 75; 580 NW2d 404, 418-419 (1998) (BRICKLEY, J., dissenting), quoting Honorable Blair Moody, Jr., *Retroactive application of law-changing decisions in Michigan*, 28 Wayne L Rev 439, 455 (1982). The courts have been inconsistent in weighing the three factors of a *Linkletter* approach, leading to less predictable outcomes from the bench. For instance, in *Desist*, the U.S. Supreme Court noted that the Court rested heavily on the reliance and administration-of-justice factors "only when the purpose of the rule in question did not clearly favor retroactivity or prospectivity." *Desist v. United States*, 394 US 244, 251-52; 89 SCt 1030; 22 LEd2d 248 (1969). And yet, in other cases the purpose prong has been outweighed by reliance and effect. *See e.g. Adams v. Illinois*, 205 US 278; 92 SCt 916; 31 LEd2d 202 (1972); *Michigan v. Payne*, 412 US 47; 93 SCt 1966; 36 LEd2d 736 (1973). The Court has not provided lower courts a clear explanation of the relative significance of the criteria that compose the three-pronged test. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1605 (1975). Confusion in the application of the factors was one of the main reasons that the U.S. Supreme Court reconsidered the *Linkletter* approach. *See, e.g., Griffith v. Kentucky*, 479 US 314; 107 SCT 708; 93 LEd2d 649 (1987) (breaking from the *Linkletter* rule).

Beyond concerns over administrability, the second and third factors have been criticized as placing too high an interest in the finality of state conviction, as they almost always weigh

strongly in favor of prospective application only. *Retroactive application of law-changing decisions in Michigan*, 28 Wayne L Rev at 455. Where the second factor (reliance on the old rule) counsels against retroactivity, the same tends to be true of the third factor (effect of the new rule if given retroactive effect), because "the greater the reliance by prosecutors of this state on a rule in pursuing justice, the more burdensome it will generally be for the judiciary to undo the administration of that rule." *Carp*, 496 Mich at 502. But that is true of any new rule, and the inconvenience to the government in applying the law is not the same burden on the administration of justice as a denial of liberty. In the federal courts, Justice Scalia explained in a concurrence that *Linkletter* "was usually employed…to favor the government." *Harper v. Va. Dep't of Taxation*, 509 US 86, 104-05 n.1; 113 SCt 2510; 125 LEd2d 74 (1993). Similarly, Justice Marshall urged the Court to overrule *Linkletter* because the test offered little guidance to the lower courts and had a pro-government bias. *Payne*, 412 US at 62-64 (Marshall, J., dissenting) ("I see little point in forcing lower courts to flounder without substantial guidance in the morass of our cases, by informing them that they are to apply a balancing test, when in fact it invariably occurs that the balancing test results in holdings of nonretroactivity.")

Historically, the U.S. Supreme Court's decision in *Linkletter* was a departure from a general rule of retroactivity. Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv. L. Rev. 1055 (1997). *Linkletter* reached the Court at a time when the Justices were expanding defendants' rights, and the Court, along with lower courts and commentators, was anxious about the effects of this revolution in criminal procedure. Peter Bozzo, *What We Talk About When We Talk About Retroactivity*, 46 Am. J. Crim. L. 13 (2019). We are in a different time now, with largely settled rules of criminal procedure, and one that calls for an approach in line with the historical presumption of retroactive application, a presumption that still can be seen in

Michigan law. In a civil context, Michigan courts have stated that rulings are generally given full retroactive effect. *Wayne Co. v. Hatchcock*, 471 Mich. 445, 484, 684 N.W.2d 765 (2004); *Holmes v. Michigan Capital Med. Ctr.*, 242 Mich App 703, 713, 620 NW2d 319 (2000). The courts have gone further, stating that prospective application of a judicial decision is a departure from the general rule and is only appropriate in exigent circumstances. *Devillers v. Auto Club Ins. Ass'n*, 472 Mich 562, 586, 702 NW2d 539 (2005).

Both federal law and most states have abandoned *Linkletter* in favor of other approaches. The United States Supreme Court has recognized "the *inequity inherent* in the *Linkletter* approach," and clarified that this injustice was a motivating factor leading to its abandonment of that standard thirty years ago. *Danforth*, 552 US at 280 (emphasis added). The federal courts have adopted the *Teague* retroactivity standard, under which new constitutional rules apply on direct review and do not have retroactive effect on collateral review except for substantive rules of constitutional law. 489 US at 311. Substantive rules include "rules forbidding criminal punishment of certain primary conduct as well as rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Montgomery*, 136 S Ct at 728, quoting *Penry v Lynaugh*, 492 US 302, 330; 109 S Ct 2934; 106 L Ed 2d 256 (1989). Most states have similarly abandoned the Linkletter framework; with at least 37 states adopting an approach outside of the *Linkletter* framework. Christopher N. Lasch, *The Future of Teague Retroactivity, or "Redressability," After Danforth v. Minnesota: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 Am. Crim. L. Rev. 1 (2009). Given the widespread recognition of *Linkletter*'s shortcomings, a new approach should be adopted in Michigan.

3. State law retroactivity standards may be broader than federal standards.

Michigan need not adopt an equally flawed federal standard, articulated in *Teague*. In *Danforth v. Minnesota*, the United States Supreme Court stated that "the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law." 552 US at 288. The Court held that States may adopt their own retroactivity standard, which can be more protective that the *Teague* standard; federal law sets "certain minimum requirements that States must meet but may exceed." *Id.* In *Montgomery v. Louisiana*, the Court elaborated on those minimum requirements, holding that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution *requires* state collateral review courts to give retroactive effect to that rule." 136 S Ct at 729 (emphasis added). The Court emphasized that "[u]nder the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution." *Id.* at 731. In short, while states are not required to adopt *Teague*'s federal retroactivity standard, *Teague* provides an inflexible floor for when states must provide relief on collateral review of federal constitutional claims. *Danforth*, 552 US at 275.

This Court can and should provide broader relief to convicted persons asserting constitutional claims than those they are mandated to provide under federal retroactivity law. *Danforth*, 552 US at 275; see also *People v Carp*, 496 Mich 440, 500; 852 NW2d 801, 832 (2014), vacated on other grounds by *Davis v. Michigan*, 136 S Ct 1356; 194 L Ed 2d 339 (2016) ("*Teague* provides a floor . . . with a state nonetheless free to adopt its own broader test . . ."). Federal law "does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*."

Id. at 282. *Teague* did not "constrain[] the authority of the States to provide remedies for a *broader* range of constitutional violations than are redressable on federal habeas." *Danforth*, 552 US at 275 (emphasis added); see also *People v Maxson*, 482 Mich. 385, 393; 759 NW2d 817, 822 (2008) ("A state may accord broader effect to a new rule of criminal procedure than federal retroactivity jurisprudence accords.")

4. The restrictive approach under the *Teague* standard is rooting in concerns about comity and federal habeas which have to application in the state law context and thru pose no obstacle to implementing a broader standard in Michigan.

Both the text and reasoning of *Teague*

"illustrate that the rule was meant to apply only to federal courts considering habeas corpus petitions challenging state-court criminal convictions." *Danforth*, 552 US at 288. *Teague*'s general rule of nonretroactivity on federal habeas review was justified "in part by reference to comity and respect for the finality of state convictions," both of which are "unique to *federal* habeas review of state convictions." *Id.* at 279 (emphasis in original). Because "finality of state convictions is a *state* interest, not a federal one," states "should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts. *Id.* at 280 (emphasis in original). The "fundamental interest in federalism that allows individual States to" control their own criminal law and procedure within constitutional bounds "is not otherwise limited by any general, undefined federal interest in uniformity." *Id.* "If anything, considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*." *Id.* at 279-80 (emphasis added).

The justification for *Danforth* and the need for our state to broaden its retroactivity doctrine are stronger than ever given the "collapse of [federal] habeas corpus as a remedy for even the most glaring constitutional violations" against state prisoners. See Judge Stephen R. Reinhardt, *The*

Demise of Habeas Corpus and the Rise of Qualified Immunity, 113 Mich L Rev 1219, 1219 (2015) (arguing that "habeas corpus has been transformed over the past two decades from a vital guarantor of liberty into an instrument for ratifying the power of state courts to disregard the protections of the Constitution.") Given that our state's collateral review proceedings have effectively "become the only real venue for relief" for our state's prisoners, "it is critically important that [we] provide that venue and 'get it right.'" *Hughes v State*, 901 So2d 837, 863; 30 Fla LW S285 (Fla. 2005) (ANSTEAD, J., dissenting), overruled by *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

II. *Miller* and *Montgomery* Should be Applied to Defendants Who Are Young Adults at the Time of the Crime and Sentenced to Mandatory Life Without Parole Under the Michigan Constitution, Article 1, Sec. 16.

On the second question presented, Amicus offers two points. First, Amicus draws on Michigan-specific sources to provide a deeper historical understanding of the broader protection of our state constitution in Art 1, Sec 16. Second, Amicus answers the Court's second question presented, specifically as to Art 1, Sec 16 with a Michigan-specific focus. Our state constitution bans the mandatory minimum sentence of life without parole for every emerging adult convicted of any first-degree murder that occurs without any individualized inquiry into the impact of that person's youth and immaturity, the young person's role in the crime or the nature of the offense, or any other mitigating circumstances.

A. The Michigan Constitution's Prohibition On Cruel Or Unusual Punishments Provides Broader Protection Than The Eighth Amendment Based on Michigan's Distinct Constitutional Text, History, and Caselaw.

Michigan's constitution provides robust protections against unconstitutional punishments based on differences in our constitutional text, Michigan's unique history, and this Court's precedent. See Mich. Const. 1963 Art 1, Sec. 16, *People v. Lorentzen*, 387 Mich 167, 194 NW2d

827 (1972). As this Court has explored, the text of the Michigan constitution differs from the text of the Eighth Amendment to the U.S. Constitution. *People v. Bullock*, 440 Mich 15, 27; 485 NW2d 866 (1992). Whereas the Eighth Amendment prohibits "cruel and unusual punishments," the Michigan constitution bans "cruel or unusual punishment." *Id*. at 30.

1. The textual difference between Michigan's Constitution and the Eighth Amendment is a broader protection for individuals facing criminal punishment, reflecting Michigan implementation of more humane and rational approaches to criminal punishment.

The textual difference between the Michigan constitution's prohibition on "cruel or unusual" punishment and the Eighth Amendment's prohibition on "cruel and unusual" punishment is neither "accidental" nor "inadvertent." *Bullock*, 440 Mich 15, 27. While our constitutional provision was most-recently ratified in 1963, the current language of our constitution has been in place since the 1850 Michigan constitution, the state's second constitution. Mich Const 1850; *Bullock*, 440 Mich at 27, 31.

Given the history of the text and the historical circumstances around its adoption, Michigan made a choice to pursue this broader protection. In this section, Amicus draws upon Michigan-specific sources to provide further historical understanding of the longstanding and broader protection of our state prohibition on unconstitutional punishments.

Before achieving statehood in 1837, the territory that would become Michigan was governed by the terms of the Northwest Ordinance of 1787. This established the Northwest Territory and set forth principles for governance—including a provision that "no cruel or unusual punishments shall be inflicted." Northwest Ordinance of 1787, art II.

In 1791, the states ratified the federal Bill of Rights, which included the provision that would ultimately become the Eighth Amendment to the U.S. Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." US Const,

Am VIII. The federal language use for punishment prohibitions, therefore, differed from the disjunctive language provided by the Northwest Ordinance provision in favor of the conjunctive language.

Officials of the territory, which was moving towards statehood, held a Constitutional Convention in 1835. In relevant part, the 1835 Constitutional Convention resulted in a constitutional requirement that: "Excessive bail shall not be required; excessive fines shall not be imposed; and cruel and unjust punishments shall not be inflicted." Mich Const 1835, art I, § 18. The state's use of "and" in its provision mirrored the then-extant federal constitutional provision. The 1835 Constitution was adopted by voters in the territory and took effect in October of 1835. Michigan Manual (2011-12), "Michigan's Constitutions," ch 2. p 25. In 1837, the territory achieved statehood as Michigan, and the 1835 Constitution was again adopted as the controlling authority for the new state. *Id*. Thus, the 1835 Constitution served as the first constitution for the new state of Michigan.

Critically, however, Michigan did not keep the language of its federal counterpart. In the Constitution of 1850, the state's second constitution, the language of the punishment prohibition provision changed: "…cruel or unusual punishment shall not be inflicted." Const 1850, art VI, § 31.

The language choice reflects Michigan's intent to broaden protections for Michigan citizens, a goal that existed at the time the 1835 territorial Constitution was drafted and persisted when the second constitution was drafted fifteen years later. Specifically, the Michigan Constitutional Conventions, which resulted in the state adopting the "cruel or unusual" language, took place within the backdrop of the movement to abolish capital punishment and the slavery

abolition movement. These reform movements were ingrained in the public discourse by the mid-nineteenth century and aimed to form a penal system that protected against inhumane treatment.

The 1835 Constitution emphasized individual liberties and provided individuals of the territory with greater protections than the federal constitution. Most prominently, Michigan's progressive approach to expanding individual liberties was seen in the 1835 Michigan Constitution's prohibition against slavery. Const 1835, art XI, § 1 ("Neither slavery nor involuntary servitude shall ever be introduced into this state, except for the punishment of crimes of which the party shall have been duly convicted"). The prohibition came thirty years prior to the Thirteenth Amendment, the federal counterpart prohibiting slavery within the United States. US Const, Am XIII ("Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction"). The attention to individual rights and protection of individual Michiganders that fueled Michigan's slavery prohibition provision fifteen years prior is also reflected in the state's broadening its constitutional protection from prohibiting "cruel and unusual" punishments to prohibiting "cruel or unusual" punishments.

2. Michigan's evolution towards enacting more humane systems of punishment is further evidenced by citizens' engagement with the capital punishment abolition movement and the elimination of capital punishment in Michigan.

Michigan's intent to promote individual rights and liberties within its new government, specifically during the period between the 1835 constitution and the 1850 constitution, is evidenced by the state's participation in the capital punishment debate. The arguments for and against capital punishment were well known and of interest to the people of Michigan by the early-to-mid nineteenth century, according to a legal historian of this period. David G. Chardavoyne, *A Hanging in Detroit: Stephen Gifford Simmons and the Last Execution Under Michigan Law*,

(Detroit: Wayne State University Press, 2003) ch 9, p 144. The last hanging in Michigan took place in 1830, a spectacle that aroused immense public interest and resulted in an unexpected reaction from its viewers: a collective feeling of disgust for the proceeding. David G. Chardavoyne, *George A. O'Keefe: Pioneer Irish-American Lawyer*, 79 Mich B J 1581, 82 (Nov 2000). The public's reaction to what would be the final hanging in Michigan's history served as a catalyst for the capital punishment abolition movement in the state. *Id*. In the years just following the execution, newspapers such as the *Oakland Chronicle* and Detroit's *Democratic Free Press* printed articles directly addressing the issue of abolition, characterizing capital punishment as a "relic of barbarism" that was incongruous with the "enlightened and liberal spirit" the young territory had developed. *A Hanging in Detroit*, p 145, quoting Democratic Free Press (August 21, 1833). The evolution of the public's view toward humane and modern punishment was underway, a reality that would be reflected in subsequent attempts in the state to eliminate capital punishment.

The first constitutional discussion of capital punishment was during the Constitutional Convention of 1835. A committee recommended that the state's constitution provide that "the legislature of [the] state shall pass laws prohibiting capital punishment." Daily Journal of the Convention to Form a Constitution, Monday, May 11, 1835- Friday, June 19, 1835, p 67. The committee's proposal was rooted to the notion that "the true design of all punishment [was] to reform, not to exterminate mankind," channeling the public's budding distaste for the practice into the proposal. Harold M. Dorr, *The Michigan Constitutional Convention of 1835, Debates and Minutes*, (Ann Arbor: University of Michigan Press, 1940) p 349.

The proposal was ultimately defeated by a narrow margin of thirty-eight to thirty-five votes. *Id*. at Appendix A, roll call 53, pp 349-50. The rationale resulting in this split, however, was of a practical nature. Specifically, the delegates noted that since Michigan was on the cusp of

statehood, it was wise to avoid controversial provisions in favor of a strong show of unity. *Id*. pp 451-52. Additionally, delegates weighed the practical hurdle of Michigan prisons lacking capacity to house prisoners for long sentences. *A Hanging in Detroit*, p 147, citing Democratic (Detroit) Free Press (June 12, 1835).

After Michigan achieved statehood and two years after this initial failure, the push for abolition resurfaced in the legislature. Prior to achieving statehood, the territory was governed by a set of territorial statutes. *See generally* Compiled Laws of the Territory of Michigan, 1806-1835 (Lansing: W.S. George & Co., State Printers and Binders, 1884). Post-statehood, the legitimacy of these statutes was called into question, leading the new state to reorganize the existing statutes into a comprehensive code of laws to be proposed to the legislature for enactment. 1836 PA 128 ("An Act providing for the preparing, digesting, and arranging a code of law"). Once the territorial statutes were organized into a proposed code, it was presented to the state legislature where members of the House of Representative and Senate could propose new laws and amendments. *A Hanging in Detroit,* p 147. Several reforms were presented with respect to the administration of capital punishment. *Id.* p 148, citing 1838 Senate Journal 47. These reforms, proposed and accepted into what became known as the Revised Statutes of 1838, included staying executions for individual who had become legally insane by the time of execution and a prohibition on public executions. 1838 Revised Statutes, ch 8, § 9, 10. Additionally, the new code divided murder into first and second degree, whereby only individuals convicted of first-degree murder would be eligible for the death penalty. 1838 Revised Statutes, ch 3, § 1.

After these reforms, there was a five-year lull in new legislation. Chardavoyne attributes this to the fact that the state had no impending executions, and there was, therefore, a lack of urgency to enact the prohibition on the practice. *A Hanging in Detroit*, p 148.

In 1843, the capital punishment abolition movement again moved to the forefront of the legislative agenda. In the years just prior to 1843, details of a string of executions occurring in Canada were reported in Michigan. *Id*. pp 148-50. Several miscarriages of justice were detailed in these reports, including accounts of executions of individuals who were subsequently proven innocent and of gruesome public displays. *Id*. p 149. These reports left a "feeling in the general population of [Michigan] that the stain of tyranny had returned to the institution of capital punishment." *Id*.

Accordingly, the House of Representatives reignited the capital punishment debate in 1843. The relevant bill proposed changing the penalty for first degree murder from death by hanging to life in prison. *Id*. p 151, citing 1843 House Journal 194. The crux of the abolitionists' argument relied on their belief in human progress and in the possibility for reformation, and the general sentiment that death by hanging was a barbarous remnant of a tyrannical past. *Id*. pp 151-53, citing Democratic Free Press (February 6, 1843) (quoting the House of Representatives speech of Charles Bush: "…at this age of the world, under our government, knowledge goes hand in hand with improvement, and laws are framed not so much to keep up customs of olden times as the spirit and principles of constitutional liberty. We have declared ourselves free from the government of the old world—we have adopted new and more correct principles in the exercise of which, we aim at happiness instead of power. Our government, instead of being sustained by cruelty or terror, must be kept up by intelligence and virtue"); (February 9, 1843) (quoting the House of Representatives speech of William Mottram, who argued that "all men, however bad, are susceptible of amendments so he thought that the very worst use you can put a man to, is to hang him")). The Michigan House voted in favor of the bill, marking the first time that a legislative house had voted to abolish capital punishment. *Id*. p 155, citing 1843 House Journal 534. However,

the bill was rejected in the Senate. *Id.*, citing 1843 Senate Journal 216.

In 1844, the legislature began two years of research to compile a new proposed legal code to replace the Revised Statutes of 1838. 1844 PA 26 ("An Act to provide for consolidating and revising the general laws of the State of Michigan").The proposed code was first presented to the Senate in 1846, where abolitionists proposed an amendment that would end capital punishment altogether by replacing death with life imprisonment in solitary confinement. *A Hanging in Detroit*, p 156 (citing 1846 Senate Journal on the Revision 82). After compromises were made regarding the relevant language, the amendment successfully passed both chambers and was adopted into the legal code. 1846 Revised Statutes of the State of Michigan, ch 153, § 1. The law banning capital punishment for first-degree murder went into effect in March 1847. *Id*. at ch 173, § 1. At the time Michigan passed this law, it was the first state and the first government in the English-speaking world to abolish capital punishment for first-degree murder. *A Hanging in Detroit*, p 157.[4] Subsequent support for the prohibition came from famous Michiganders of the late 1800s ranging from Sojourner Truth to Justice Thomas M. Cooley.[5]

The debate and public discourse that led to the end of capital punishment in Michigan centered on principles of punishment broadly, rehabilitation and finding ways to approach punishment that were more rational, just, and humane. *A Hanging in Detroit*, p 151, citing Democratic Free Press (January 30, 1843) (summarizing House of Representative debates where speakers contended "that mild and humane laws would exercise a material moral influence upon society in the prevention of crime"); *Id.* p 145 (citing *Messages of the Governors of Michigan*, Ed. George Newman Fuller (Lansing, MI: Michigan Historical Commission, 1925-27), pp. 64-65

[4] The ban on capital punishment was incorporated into the 1963 Michigan constitution. Mich Const 1963 Art IV, Sec 46.

[5] Eugene G. Wanger, *Michigan and Capital Punishment*, MICH. BAR. J. 38, 40 (Sept. 2002).

(quoting Territorial Governor Cass in his 1831 annual message to the Legislative Council, "…it will be universally acknowledged, that all the just objects of human laws may be answered, without the infliction of capital punishment.")). The prospect of creating systems of government with "humane" laws that achieve the "just objects" of society and the "prevention of crime" reflected Michigan's evolving understanding of what punishments are acceptable in our state.

The historical buildup to Michigan's abolition of the death penalty is relevant to the language change that occurred in the state's constitutional punishment prohibition clause. In 1835, the language of Michigan state's punishment prohibition clause mirrored the language of its federal counterpart: "cruel and unjust punishments shall not be inflicted." Const 1835, art I, § 18. After 1835, the debates both in the public and the legislature concerning capital punishment increased in fervor, intensity, and regularity, culminating in its eventual abolition just over a decade later in 1847. And, in the 1850 Constitutional Convention, the language of Michigan's punishment prohibition clause, which governs punishment proportionality broadly, changed to "cruel or unusual." Const 1850, art VI, § 31.

The shift in language, therefore, was not accidental but rather a direct reflection of the animus to harsh punishment that was seen as regressive and outdated for the times. By 1850, debates about criminal punishment broadly had infiltrated the legislative and public discourse. Advocates debated "the deterrent effect of mild and harsh criminal penalties, the relative importance of punishment and reformation as goals of the judicial system," and "the possibility of mistaken convictions." *A Hanging in Detroit*, p 154. Further, the notion that Michigan had developed into a progressive and forward-thinking society was well established. *Id.* p 151, citing Democratic Free Press (February 3, 1843) (quoting the House of Representatives speech of Flavius Littlejohn who lauded "the enlightened views of the present generation,"); (February 6, 1843)

(quoting House of Representative speech of Simeon Johnson, who expressed pride "in the advanced state of science and of civilization, in the progress of liberty and our near approach to the perfection of civil government")). The debates centered on the justifications and purposes of criminal punishment, coupled with Michigan's consciousness of its own forward-thinking lens, resulted in the expansion of protections in the criminal punishment context. In 1850, Michigan channeled these increasingly accepted understandings into its constitution and changed the language of the punishment prohibition to "cruel or unusual," broadening the reach of the language and extending protections.

B. The Mandatory Imposition of Life Without Parole – Our State's Harshest Punishment - on Young Adults Violates Michigan's Constitution, Mich Const 1963, Art. 1, Sec 16.

One hundred and thirty-two years of jurisprudence on the question of whether a punishment is constitutionally proportional to the crime charged led to the four-factor test used in *Bullock*, which is "firmly and sufficiently rooted in Const 1963, art 1, § 16." Bullock, 440 Mich at 34. Defining the scope of Michigan's protection against cruel *or* unusual punishment is a principle of proportionality, first explored in Michigan in 1888, where this Court determined that a fifty-year prison sentence was too excessive to be imposed on a twenty-three year-old defendant accused of raping a ten year-old girl. *See People v Lorentzen*, 387 Mich 167, 174-75; 194 NW2d 827 (1972) (referencing *People v Murray*, 72 Mich 10, 11; 40 NW 29 (1888)). The Plaintiff's brief asks this Court to ignore the long and deep history of this constitutional provision and the language of our constitution, and it ignores modern binding Eighth Amendment and Michigan constitutional law in favor of its own invented interpretation. *Plaintiff Brief* at 29-37.[6]

[6] In the section that would typically lay out the legal standard for what our "cruel or unusual" punishment provision means, *Pl. Br.* at p 29-33, the Plaintiff cites no caselaw or other binding authority and articulates instead what it wishes were the standard.

The *Bullock* factors ask: Whether the penalty is tailored or tailorable to the offender's personal culpability, whether the punishment is inconsistent with the way the Michigan legislature views the offense or offender, whether the penalty comports with evolving standards of decency by looking at punishments outside the jurisdiction, and whether the penalty is effective in either rehabilitating, deterring, or holding the offender accountable. *See Bullock*, 440 Mich at 37-42. Under this analysis in *Bullock*, this Court created a categorical rule banning mandatory sentences for first-time drug offenses as cruel *or* unusual under the Michigan Constitution. *See Bullock*, 440 Mich at 42-43; *Lorentzen*, 387 Mich at 181.

1. Sentencing young adults to mandatory life without parole is not tailored or tailorable to the offense punished and is disproportionate.

The first factor in the *Bullock* analysis looks at the gravity of the offense compared to the severity of the penalty, asking whether the penalty is tailored or tailorable to the offender's personal culpability. Instead of discussing the voluminous material on youth neurological and other development, and the resulting impact on the behavior of young people, including impulsivity, risk-taking and judgment, susceptibility to the influence of others, and capacity for change, Amicus relies on and refers the Court to briefing for Petitioner, *see, e.g.*, Poole Supp. Br. at 11 - 21, as well as other Amici.

Michigan's constitutional case law has given particular scrutiny to extreme and mandatory sentences that do not allow tailoring to the individual defendant. In *Lorentzen* and *Bullock*, the Court rejected *mandatory* sentencing schemes. *See Lorentzen*, 387 Mich at 181 (mandatory minimum 20 year sentence found unconstitutional; *Bullock*, 440 Mich at 37 n.22 & 41 (holding the sentence was disproportionate when it was imposed on defendants with "markedly different backgrounds" without regard for either's particular record or individual circumstances). Even a trial court's sentence of fifty to eighty years is proportional when they are able to consider

characteristics of the defendant and underlying offense and given discretion in sentencing. *See People v Burton*, 396 Mich 238, 243 n.10; 240 NW2d 239 (1976) (distinguishing the proportional fifty to eighty year sentence from a disproportional *mandatory* minimum sentence of twenty years). This scrutiny of mandatory punishments under our state constitution is longstanding. *See, e.g., Robinson v. Miner and Haug*, 68 Mich 549, 37 NW 21 (1888) (overturning an "imperative and not discretionary" penalty, cited in *Lorentzen*). This is, in part, because while these sentences might not be, under the Eighth Amendment "unusual," they may still be excessive and, therefore, cruel, under our state constitution. *See Lorentzen* at 172 ("The prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition."). When unable to consider individualized factors, as when a sentence is under a mandatory sentencing scheme, this Court is more likely to find the punishment disproportionate, and therefore barred as cruel or unusual.

This Court has also scruntinized mandatory sentences imposed without regard for age, or where the offender was youthful. "Youth" has been considered among the relevant character traits when sentences are evaluated for disproportionality. *See Lorentzen*, 387 Mich at 170, 176 (noting that defendant was twenty-three and holding that the sentence was disproportionate when it could be equally applicable to "a first offender high school student" and a "wholesaling racketeer" and there is no difference in sentencing for different quantities of the drug).

The imposition of mandatory life without parole robs the trial court of its ability to determine whether life without parole is proportionate to Poole's offense, his immaturity, vulnerability to negative influences, the greater apparent criminal and legal sophistication of his uncle, or his potential for rehabilitation. Mandatory life without parole renders meaningless factors like Poole's age, the influence of others on his conduct, his history of previous offenses, and other

considerations that mitigate his culpability. Additionally, under a mandatory life without parole sentencing regime, a repeat offender and a first-time offender are subject to the same penalty. This amounts to cruel or unusual punishment, prohibited under Const 1963, art 1, § 16. *See Lorentzen*, 387 Mich at 176; *Bullock*, 440 Mich at 37 n.22.

2. Sentencing young adults to mandatory life without parole is disproportionate compared to other Michigan statutes' treatment of young adults.

The second factor to determine whether the penalty at issue is disproportionate to the crime, and therefore cruel or unusual, involves comparing whether the penalty is inconsistent with the way the Michigan legislature views the offense or offender. *See Lorentzen*, 387 Mich at 176-79; *Bullock*, 440 Mich at 40. The Court in both *Lorentzen* and *Bullock* examined mandatory sentencing schemes for drug-related crimes. 387 Mich at 171; 440 Mich at 22.

As the sentence before this Court is a mandatory life without parole penalty inflicted upon young adults, this Court should look to the way the Michigan legislature views young adults. A key provision of our criminal law is the Holmes Youthful Trainee Act ("HYTA"), adopted in 1967 by the Michigan legislature to create an alternative sentencing regime for youthful offenders where a judgment of conviction is not entered and conditions of employment or monitoring are imposed. *See* MCL § 762.11(1). Originally open to teenagers under 20 years old, the HYTA age limit was broadened in 1993 to 21, again in 2015 to protect youths under 24 years old, and again in 2020 to youth under 26 years old. *See* H.B. No 4587, 87th Leg., Reg. Sess. (Mi. 1993); H.B. No. 4069, 98th Leg., Reg. Sess. (Mi. 2015); S.B. No 1049 (Mi. 2020). In establishing HYTA for youthful offenders, the Michigan legislature indicated 18-year-olds and other young adults are "unreflective and immature;" as a result, they are less culpable than offenders over twenty, and should not be subject to the stigma of a criminal record. *See People v Perkins*, 107 Mich App 440, 444; 309

NW2d 634 (1981). Although those under 17 (at the time) were under juvenile court's jurisdiction, the legislature "apparently wanted to provide an alternative procedure for teenagers over 17." *Id.*

HYTA also reflects the Michigan legislature's belief in the greater potential for young adults' rehabilitation, as compared to older offenders. For a qualifying young person, the maximum term of imprisonment that can be imposed is two years. *See* MCL § 762.13(1). While imprisoned, youthful trainees are reviewed at least annually to evaluate whether the trainee can be recommended for early release. Mich. Dep't of Corrections, Policy Directive No. 03.02.120, Youthful Trainees 2 (Sep. 1, 2018), https://www.michigan.gov/documents/corrections/03_02_120631433_7.pdf.

Other aspects of our state criminal law show that our legislature has not consistently demarcated 17 as the end of youth, but instead has drawn different lines based on an understanding of adolescence at the time and placed an emphasis on an individualized assessment. Although 18-years is considered the age of majority in Michigan, for years, Michigan's juvenile code did not draw the same line. *See* MCL § 712A.1(1)(i) (2018); 2019 Mich. Pub. Acts 108 (October 31, 2019) (only in 2019 did Michigan establish 18 as the age of adult criminal culpability as part of "Raise the Age" legislation, which did not take effect until last year). At the extreme youthful end, Michigan has no minority age for criminal liability, and Michigan permits, on a case-by-case basis, those as young as fourteen to be tried in adult court for equivalent felony offenses, even though fourteen-year-olds are below the age of majority, and cannot vote, have a driver's license, or drink. *Compare e.g.* US Const amend XXVI; MCL §§ 257.303(1)(a); 436.1701(1); *with* 712A.3(1); 712A.4(1) (2018). The Michigan legislature views the line between adolescence and adulthood as context-specific and, often, individualized; and has based that decision on the current understanding of adolescent decision making and development.

Our state also takes a paternalistic and protective view of young adults in other aspect of juvenile and criminal law and policy. Although juvenile court has "exclusive original jurisdiction" over individuals under 18, jurisdiction may be continued until the individual is 20 or 21. MCL §§ 712A.2(a); 712A.2a(1), (5). Accordingly, the definition of the term, "child," "minor," or "youth," used to refer to the juvenile court's authority over a sentenced individual, is expanded to reference those between 18 and 21. MCL § 712A.2a(6). A youth between 18 and 21 may also receive "extended guardianship assistance" in which case the juvenile court retains authority over the youth. MCL § 400.665; 712A.2a(4). Further, the Young Adult Voluntary Foster Care Act provides that a youth who is at least 18 but under 21 can still receive "extended foster care services" if the court determines that continuing in foster care is in the "youth's best interests" and they meet a pre-employment requirement MCL §§ 400.643; 400.657; 712A.2a(2). During their incarceration, the Michigan Department of Corrections ("MDOC") provides special education instruction or related transition services to eligible youths under 22. These incarcerated youths under 22 receive the highest priority for placement in academic classes, receiving priority over incarcerated people who are "fast track GED" students and people with life or long indeterminate sentences. Mich Dep't of Corrections, Policy Directive No 05.02.112, Education Programs for Prisoners 4 (Mar. 1, 2016), https://www.michigan.gov/documents/corrections/05_02_112_515776_7.pdf.

This belief in a young adult's underdeveloped maturity and their ability to grow and rehabilitate is also borne out in Michigan's parole guidelines, with "age category" as part of parole review. Mich. Dep't of Corrections, Policy Directive No. 06.05.100, Parole Guidelines 3 (Nov. 1, 2008), https://www.michigan.gov/documents/corrections/06_05_100_330065_7.pdf. A higher point value in the "age category" contributing to the overall score reflects a higher probability of parole. *See id.* at 2. For those serving "medium" and "long" terms, being under 22 and 23 years

old at the time of your parole review results in negative point values, indicating those individuals who are under 22 and 23 years of age are less likely to be paroled. *See id.* at 10. However, as one ages past 30, the parole point value becomes a greater positive number. *Id.* The parole scheme holds young adults accountable for their "unreflective and immature" acts while acknowledging an increased capacity to gain skills of reflection and maturity, making them more eligible for parole as they grow older.

Imposing mandatory life without parole on young adults is inconsistent with both the Michigan legislature's and MDOC's prevailing view of young adults as immature, less culpable and more open to rehabilitation. *Miller* barred mandatory life without parole sentencing schemes for 17-year-olds as less culpable teen offenders, as they "preclude consideration of [their] chronological age and [their] hallmark features. . . immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller v. Alabama*, 567 US 460, 477; 132 SCt 2455; 183 LEd2d 407 (2012). Following *Miller*, Michigan's legislature required a hearing to evaluate those "hallmark features" as mitigating circumstances that determine whether life without parole would be imposed on a teenage defendant. *See* MCL § 769.25(6)-(7). Young people like Poole are denied this hearing, despite the Michigan legislature recognizing these same "hallmark features" in young adults in the HYTA sentencing regime, the jurisdiction of juvenile courts, and the imposition of parole. Mandatory life without parole schemes additionally "forswear altogether the rehabilitative ideal" for 17 year olds, but also young adults like Poole by mandating they spend their whole lives incarcerated without a chance to demonstrate rehabilitation and re-enter society. *Miller*, 567 US at 473. Mandatory life without parole sentencing schemes contradict the Michigan legislature's understanding of young adults as less culpable, and more open to rehabilitation. Mandatory life

without parole schemes are therefore disproportionate and barred as cruel or unusual punishment under the Michigan Constitution.

3. Different jurisdictions' sentencing regimes applying to young adults similarly urges barring mandatory life without parole under the Michigan Constitution.

The third factor to determine whether the penalty at issue is disproportionate to the crime, and therefore cruel or unusual, involves interrogating whether the penalty at issue is also imposed in other jurisdictions for the same offender or offense. *See Lorentzen*, 387 Mich at 178-79. In conducting this analysis in *Lorentzen*, this Court looked to "clearly discernible trends" to evaluate whether a mandatory minimum sentence for a first-time drug offense was appropriate. *Id.* The mere existence of a comparable penalty does not itself mean the penalty at issue is neither cruel nor unusual. *See id.*; *Bullock* 440 Mich at 40.

By 2021, applying the individualized sentencing mandate in *Miller* to youths already sentenced to life without parole, the number of individuals across the United States serving life without parole sentences for crimes committed as children was reduced by nearly 75%. Only three percent of former juvenile lifers were resentenced to life without parole. *See Montgomery v Louisiana*, 136 S Ct 718; 193 L Ed 2d 599 (2016); CFSY, National trends in sentencing children to life without parole (February 2021) https://cfsy.org/wp-content/uploads/CFSY-National-Trends-Fact-Sheet.pdf.

Other courts have extended *Miller*'s individualized assessment of the mitigating qualities of youth and ban on mandatory LWOP to young adults. *See, e.g., In the Matter of Monschke*, 197 Wash 2d 305; 482 P3d 276 (Wash 2021) (extending ban on mandatory life without parole under the state constitution to those who are 18 to 21-year-olds).

"Discernible trends" show that other jurisdictions see young adults as more immature and less culpable than adults; and that this trend is only increasing. As of 2019, all states also allow

for juvenile court jurisdiction to be extended to 18-years old or beyond. Forty-five states extend juvenile court jurisdiction until at least age 21, as Michigan does. Office of Juvenile Justice and Delinquency Prevention, Extended Age of Juvenile Court Jurisdiction, 2019, https://www.ojjdp.gov/ojstatbb/structure_process/qa04106.asp (last accessed Apr. 26, 2020).

Similar to HYTA, in Alabama, Florida, Hawaii, and Virginia, for example, certain offenders under the age of twenty-one are eligible for an alternative sentencing scheme.[7] These schemes allow the judge discretion when sentencing young adults – from 18 to 21 depending on the state - in some cases choosing from probation, enrollment in community programs, and limited sentences of incarceration. Other states have created other types of youthful offender provisions.[8] Yet other states have passed statutes that give consideration to the diminished culpability of young adults when being reviewed by the parole board.[9] Vermont extended, effective in 2020, juvenile court jurisdiction to certain 18-year olds; and, this year, to certain 19-year olds. *See* S. 234, 2018 Leg., Gen. Assemb. (Vt. 2018). The Vermont legislature was motivated by the greater likelihood of

[7] *See, e.g.*, Ala. Code §§ 15-19-1, 26-1-1 (2020) (any defendant under 19, subject to court determination); Fla. Stat. § 958.04 (2020) (non-capital or life defendants between 18 and 21 who have not had "youthful offender" status before); Haw. Rev. Stat. § 706-667 (2020) (non-homicide defendants under 22 who have not been convicted of felony offenses before); Va. Code § 19.2-311 (2020) (for certain crimes, first-time convicted defendants under 21).

[8] *See, e.g.*, Colorado, CRSA Secs 18 – 1.3 – 407; 18-1-1-407.5 (between ages of 18 and 20 at time of offense); Georgia, Ga. Code Ann Sec 42-7-2(7) (youthful offenders between ages 17 and 25); New Jersey, N.J. Stat. Ann. Sec. 523:17B-183(d).

[9] *See, e.g.*, A.B. 1308 (Cal. 2017) (amending Cal. Penal Code Sec 3051) (youthful offenders who committed offense before age 25) (available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB1308); 730 Ill. Comp. Stat 5/5-4.5-115(b) (parole review with consideration of youth and immaturity for most offenses committed under 21).

success in putting 18-year-olds through "combined juvenile and adult system" rather than "the adult" system in rehabilitating criminal behavior.[10]

Federal statutes treat young adults as in need of education and protection, even when within the criminal system. For incarcerated youth under twenty-one years old, federal programs like IDEA provide grants to states to provide special education. *See* 20 USC §§ 1411; 1412. This includes those convicted in adult prisons. *See generally* 20 USC § 1412(a)(1)(A), (a)(11)(c). Another federal program, the Neglected and Delinquent State Agency and Local Educational Agency Program ("Title I Part D") provides educational grants to youth under twenty-one years as well, including young people in juvenile and adult facilities. *See* Elementary and Secondary Education Act, Pub. L. No. 107-110 § 1416, 115 Stat. 1425, 1585 (2002) (amended 2015). Title I Part D includes incarcerated youths up to twenty-one in order to ensure those youths can make "a successful transition from institutionalization to further schooling or employment" once they are released from state institutions. *See* Elementary and Secondary Education Act, Pub. L. No. 107-110 § 1401, 115 Stat. 1425, 1580 (2002) (amended 2015). Programs like these indicate a national belief in capacity of young adults—even those serving in adult prisons—for growth, rehabilitation and re-entry into society.

More generally, young adults are seen as immature like their younger peers: young adults under 21 cannot purchase alcohol, 23 USC 158, purchase tobacco, 21 USC 387f; be sold a firearm other than a shotgun or a rifle, 18 USC 922(b)(1); or open a credit card without a cosigner. Car rental companies have long internalized the lessons of cognitive neuroscience and barred or placed additional restrictions on young adults attempting to rent vehicles. *See, e.g.,* Alamo, Renting a Car

[10] *See* David Jordan, *Vermont rolls out a new idea to rehabilitate young offenders*, Christian Science Monitor (July 6, 2018), https://www.csmonitor.com/USA/Justice/2018/0706/Vermont-rolls-out-a-new-idea-to-rehabilitate-young-offenders.

Under 25 (barring rental if under 21 and charging extra for youth from 21 to 24 years old); https://www.alamo.com/en/customer-support/car-rental-faqs/age-to-rent-a-car.html.

Mandatory life without parole sentences for young adults contravene these national trends that see these young people with a great potential for rehabilitation. And as mandatory life without parole schemes "forswear altogether the rehabilitative ideal," they are therefore cruel or unusual under the third *Bullock* factor.

4. Sentencing young adults to mandatory life without parole is disproportionate as it does not fulfil a rehabilitative, deterrent, or retributive purpose.

The fourth *Bullock* factor analysis concludes that if the penalty imposed does not fulfil the purposes of sentencing, that is, if it does not rehabilitate, deter, or hold the offender accountable, then it is disproportionate and cruel or unusual under Const 1963, art 1, § 16. *See Lorentzen*, 387 Mich at 179-81. The "modern view" of sentencing is that the sentence should balance society's immediate need for protection—thereby fulfilling deterrent and incapacitate purposes—against maximizing the offender's rehabilitative potential. *See People v McFarlin*, 389 Mich 557, 574; 208 NW2d 504 (1973). Michigan has recognized that protecting society through effective rehabilitation, rather than vengeance, is the "ultimate goal" of sentencing in Michigan. *See People v Schultz*, 435 Mich 517, 532; 460 NW2d 505 (1990); *Lorentzen*, 387 Mich at 180. To achieve this sentencing goal, "the sentence should be tailored to the particular circumstances of the case and the offender," as a "judge needs complete information to set a proper individualized sentence." *McFarlin*, 389 Mich at 574.

Michigan incorporated an individualized sentencing mandate after *Miller* was decided in order to decide whether life without parole was appropriate for a given case. *See* MCL § 769.25. Michigan *Miller* hearings must consider the "mitigating qualities of youth," among them, the transient "immaturity, irresponsibility, impetuousness, and recklessness," as well as "particularly

relevant" factors like the offender's family background or emotional disturbance. *See* MCL § 769.25(6); *Miller*, 567 US at 476. At *Miller* hearings in Michigan, courts allow the additional presentation of evidence for these factors and have heard recognized experts testifying generally on cognitive neuroscience and on the offender's present mental state to contextualize whether life without parole is appropriate for a given case, to "set a proper individualized sentence." *See* MCL § 769.25(7).

Miller hearings are available to those who are convicted of first-degree murder, subject to a life without parole sentence and whose offense occurred when they were under 18-years-old. *See* MCL §§ 769.25, 769.25a. However, the rationale that animates the need for *Miller* hearings also animates the need for similar hearings or other meaningful consideration of youth for young adults who face life without parole for felony murder or premeditated murder. *See* MCL 750.316. Mandatory minimum life without parole sentences for these young adults make it impossible to arrive at a "tailored sentence" that achieves Michigan's sentencing goals. Nothing changes in the year between 17 and 18 that renders the need for the individualized review in *McFarlin*, achieving the goals of sentencing in *Lorentzen*, moot. A few months more should not overwhelm "the equally important belief that only the rarest individual is wholly bereft of the capacity for redemption." *See Bullock*, 440 Mich at 39 n.5 (quoting *Schultz*, 435 Mich at 533-534 (1990). Without an opportunity for individualized sentencing and the possibility to earn review by the parole board, young adults are subjected to cruel or unusual punishment under Const 1963, art 1, § 16.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated in this brief, as well as the supplemental brief of Mr. Poole and the briefs of other amici for Mr. Poole, Amicus requests that this Court reverse the decision below and remand for further proceedings.

s/Kimberly Thomas (P66643)

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