**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

**Appeal from the Michigan Court of Appeals**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

ROBIN RICK MANNING,

Defendant-Appellant.
_____/

Supreme Court No. 160034

Court of Appeals No. 345268

Circuit Court No. 84-000570-FC

## DEFENDANT-APPELLANT'S APPENDIX


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| *People v Adamowicz*, unpublished per curiam opinion of the Court of Appeals, issued June 22, 2007 (Docket No. 330612) | 199a |

| | |
|---|---|
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PEOPLE VS ROBIN MANNING

CASE: **84-005570-FC** OFFENSE: 8/06/1984

ACTIVE: 8/21/1984 JUDGE: JAMES T. BORCHARD
CLOSED: 6/17/1985 AGENCY: SAGINAW CITY POLICE DEPARTME

DEFENDANT DEFENSE ATTORNEY
**MANNING, ROBIN R #165580**
4713 WEST M-61
STANDISH, MI 48658
DOB: 4/27/1966
PHONE:( ) - CTN: SID:

| DSP | CT | SEQ | MCLA/ORDINANCE | CHARGES | DATE | TYPE |
|---|---|---|---|---|---|---|
| GT | 1 | 0 | 750.316-C | MURDER-FIRST DEGREE- | 8/20/1984 | F |
| GT | 2 | 0 | 750.227B | FIREARMS-POSS WHILE | 8/20/1984 | F |
| GT | 3 | 0 | 750.226 | DANGEROUS WEAPON-UNL | 8/20/1984 | F |

*** END OF CHARGES ***

| #/PD | JUDGE/BONDSMAN | TYP | AMOUNT | CHECK | SET/POST | FORF/REV |
|---|---|---|---|---|---|---|

*** END OF BONDS ***

| DATE | CODE | ACTIONS, JUDGMENTS, CASE NOTES | JD CLK |
|---|---|---|---|
| 8/21/1984 | ARR | ARRAIGNMENT DIST CT BOND NONE | |
| 8/30/1984 | PR | PRELIMINARY HEARING HELD (DIST CT #84 CR 3880) | |
| | BD | BIND OVER | |
| 9/06/1984 | C | COMPLAINT FILED CIR CT CT1 MURDER 1ST DEG CT2 POSS FIR | |
| | CNT | COM FEL | |
| | OTH | CT3 CARRYING DAN WEAPON W/U INTENT | |
| 9/17/1984 | ARR | ARRAIGNMENT S.M. W.W. FILED | |
| 10/09/1984 | | TRANSCRIPT OF PR RECEIVED AND FILED | |
| 10/29/1984 | APR | DATE ASSIGNED FOR APPEARANCE FOR 121184 T | |
| 12/03/1984 | H | HEARING HELD ;DFDT MTN SEPARATE TRIALS, MTN QUASH, MTN | |
| | CNT | NUE; TUA | |
| 12/20/1984 | APR | DATE ASSIGNED FOR APPEARANCE FOR 022085 T | |
| 2/22/1985 | APR | DATE ASSIGNED FOR APPEARANCE FOR 031285 09:00 T | |
| 3/12/1985 | JTB | JURY TRIAL BEGUN | |
| 3/13/1985 | JTC | JURY TRIAL CONTINUED DAY | |
| 3/14/1985 | JTC | JURY TRIAL CONTINUED DAY | |
| 3/15/1985 | JTC | JURY TRIAL CONTINUED DAY | |
| 3/19/1985 | JTC | JURY TRIAL CONTINUED DAY | |
| 3/20/1985 | JTC | JURY TRIAL CONTINUED DAY | |
| 3/21/1985 | JTE | JURY TRIAL ENDED | |
| | JV | JURY VERDICT OF GUITLY.CT.1-MURDER IN FIRST DEGREE CT.2 | |
| | CNT | . OF FIRE. | |
| | | CT.3 VERDICT WAS TAKEN ON THE 21ST,NOT 25TH. | |
| 3/25/1985 | JV | JURY VERDICT OF CT.3-CARRYING FIREARM W/UNLAWFUL INTENT | |
| 6/17/1985 | S | SENTENCED ;CT. 1, MURDER IN THE FIRST DEGREE, SPSM - | |
| | CT | (CONT) LIFE, CT. 3, CARRYING FIREARM WITH UNLAWFUL | |
| | CT | (CONT) INTENT, SPSM - 3-YRS TO 5-YRS, W/CRED TO BE | |
| | CT | (CONT) ON CTS. 1 & 3 ARE TO FUN CONCURRENTLY. CT. 2, | |
| | CT | (CONT) POSS OF FIREARM WHILE COMM FELONY, SPSM - 2-YRS, | |
| | CT | (CONT) TO BE SERVED CONSECUTIVELY WITH AND PRECEDING | |
| | CT | (CONT) ANY TERM OF IMPRISONMENT IMPOSED FOR THE FELONY | |
| | CT | (CONT) OR ATTEMPTED FELONY CONVICTION. | |
| | FDC | FINAL DISPOSITION--SETTLED | |

*** CONTINUED NEXT PAGE **

CASE: **84-005570-FC** OFFENSE: 8/06/1984

| DATE | CODE | ACTIONS, JUDGMENTS, CASE NOTES | JD | CLK |
|---|---|---|---|---|
| | OTH | RECEIPT OF NOTICE AS TO RIGHT OF APPEAL | | |
| | FDE | FINAL DISPOSITION--ERROR | | |
| | FDJ | FINAL DISPOSITION-JURY TRIAL | | |
| | | INDETERMINATE RECORD OF SENTENCE | | |
| 6/18/1985 | CT | (CONT) GIVEN FOR 306-DAYS, ON CTS. 1 & 3. SENTENCES | | |
| 6/21/1985 | | ORD APPT APPEAL COUNSEL & PROVIDING FOR TRIAL TRANS-SCRIPT OR PORTION THEREOF. AFF & PET FOR APPELLATE COUNSEL, AFF OF FINANCIAL CONDITION (NOTE, COUNSEL TO BE APPT'D BY P. JENSEN, ASSIGNMENT CLERK) | | |
| 6/24/1985 | | PET FOR ATT FEES, ORD FOR ATT FEES (AMT: $1,575) | | |
| 7/19/1985 | | CLAIM OF APPEAL FILED BY T. KOOPMAN | | |
| 7/24/1985 | | REP/RECORDERS CERTIFICATE OF TRANSCRIPT ON APPEAL | | |
| 10/30/1985 | | NTC OF FILING OF TRANS - CERT SERVICE /RG/ TRANSCRIPT OF MTN PRO OF 12-03-84 REC AND FILED /RG/ TRANSCRIPTS OF PRO OF 3-12-85, 3-13-85, TRANSCRIPT OF PRO OF 3-14-85, 3-19-85, 3-15-85, 3-20-85 AND 3-21-85 REC AND FILED (7 VOLUMES) TRANSCRIPT OF SENTENCE PRO REC AND FILED /RG/ | | |
| 1/07/1986 | | EX PARTE ORDER ALLOWING WITHDRAWAL OF COUNSEL. (T. KOOP WITHDREW, COUNSEL TO BE APPOINTED) /CK/ | | |
| 3/07/1986 | | ORDER APPOINTING APPEAL COUNSEL & PROVIDING FOR TRIAL TRANSCRIPT OR PORTION THEREOF (STATE APPELLATE DEFENDE OFFICE) /VKM | | |
| 4/11/1986 | | CERTIFIED COPY OF FILE, TRANSCRIPTS, AND CALENDAR ENTRI SENT TO DEFENDANT, ROBIN R. MANNING/GJO CERTIFIED COPY OF CALENDAR ENTRIES AND FILE SENT TO STATE APPELLATE DEFENDER/GJO | | |
| 9/17/1986 | | STIPULATION EXTENDING TIME W/I WHICH TO FILE PLNT-APPEL BRIEF/MM | | |
| 10/20/1986 | | COPIES OF NTC OF HEARING 10-21-86; PRF OF SERV COPY OF PLNT-AP-EE MOTION FOR EXTRAORDINARY EXTENSION O TIME; AFFIDAVIT IN SUPPORT/MM | | |
| 1/07/1987 | * | CASE AND TRANSCRIPTS MAILED TO THE COURT OF APPEALS | C3 | GJO |
| | - | GRAND RAPIDS, MICHIGAN. PRELIMINARY EXAMINATION, MOTIO | C3 | GJO |
| | - | SENTENCE AND TRANSCRIPTS VOLUMES I THROUGH VII. | C3 | GJO |
| 4/14/1987 | * | COPIES OF PLNT-APPELLEE'S BRIEF ON APPEAL; PRF OF SERV | C3 | MAM |
| 6/02/1987 | * | ANSWER TO DFNT'S MOTION TO REMAND; PRF OF SERV | C3 | MAM |
| 8/28/1987 | * | FROM COURT OF APPEALS MOTION TO REMAND IS DENIED | C3 | MAM |
| 9/04/1987 | * | COURT OF APPEALS "AFFIRMED" | C3 | MAM |
| 9/21/1987 | * | SUPREME COURT COPIES OF NTC OF HEARING; APPLICATION FOR | C3 | MAM |
| | - | LEAVE TO APPEAL; AFFIDAVIT; BRIEF IN SUPPORT; PRF OF SE | C3 | MAM |
| 10/12/1987 | * | COPIES OF ANSWER TO APPLICATION FOR LEAVE TO APPEAL AND | C3 | MAM |
| | - | PRF OF SERV | C3 | MAM |
| 9/19/1988 | * | COPIES OF NTC OF HEARING; MOTION FOR EXTENSION OF TIME | C3 | MAM |
| | - | FILE APPELLEE'S BRIEF ON APPEAL; AFFIDAVIT; PRF OF SERV | C3 | MAM |
| | - | THAT WERE SENT TO SUPREME COURT | C3 | MAM |
| 1/05/1990 | * | OPINION OF THE MICHIGAN SUPREME COURT (RECEIVED 3/2/90) | C3 | DAC |
| | - | WHICH AFFIRMS THE CONVICTION OF THE DEFENDANT: | C3 | DAC |
| | - | IN PART :"CONCLUSION | C3 | DAC |
| | - | THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING | C3 | DAC |

*** **CONTINUED NEXT PAGE** **

CASE: **84-005570-FC** OFFENSE: 8/06/1984

| DATE | CODE | ACTIONS, JUDGMENTS, CASE NOTES | JD | CLK |
|---|---|---|---|---|
| 1/05/1990 | - | THE MOTION FOR MISTRIAL AND, IN VIEW OF THE CAUTIONARY | C3 | DAC |
| | - | INSTRUCTION, DID NOT ERR IN REVEALING THE FACT OF THE | C3 | DAC |
| | - | PLEA AND THE OFFENSE TO WHICH THE PLEA HAD BEEN GIVEN. | C3 | DAC |
| | - | WHERE IT IS CLEAR THAT THE CREDIBILITY OF A WITNESS/ | C3 | DAC |
| | - | ACCOMPLICE'S TESTIMONY WILL BE PUT IN QUESTION, THE ORD | C3 | DAC |
| | - | IN WHICH FACTS REGARDING BIAS ARE ELICITED IS WITHIN TH | C3 | DAC |
| | - | DISCRETION OF THE TRIAL JUDGE. | C3 | DAC |
| | - | THE DECISION OF THE COURT OF APPEALS IS AFFIRMED." | C3 | DAC |
| 1/24/1990 | * | COPIES OF NTC OF HEARING, MOTION FOR REHEARING; PRF OF | C3 | MAM |
| | - | SERV THAT WERE SENT TO THE SUPREME COURT | C3 | MAM |
| 2/15/1990 | * | COPIES OF PEOPLES ANSWER TO MOTION FOR REHEARING; | C3 | MAM |
| | - | AFFIDAVIT IN SUPPORT; PRF OF SERV THAT WERE SENT TO THE | C3 | MAM |
| | - | MICHIGAN SUPREME COURT | C3 | MAM |
| 2/28/1990 | * | ORDER OF THE MICHIGAN SUPREME COURT: | C3 | DAC |
| | - | "THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL | C3 | DAC |
| | - | FROM THE DECISION OF THE COURT OF APPEALS AND HAVING BE | C3 | DAC |
| | - | ARGUED BY COUNSEL AND DUE DELIBERATION HAVING BEEN HAD | C3 | DAC |
| | - | THEREON BY THE COURT, IT IS HEREBY ORDERED THAT THE | C3 | DAC |
| | - | JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED." | C3 | DAC |
| 2/28/1990 | * | ORDER OF THE MICHIGAN SUPREME COURT: | C3 | DAC |
| | - | "IN THIS CAUSE, A MOTION FOR REHEARING IS CONSIDERED AN | C3 | DAC |
| | - | ON ORDER OF THE COURT, IT IS HEREBY DENIED." | C3 | DAC |
| 3/02/1990 | * | COMPLETE FILE AND TEN TRANSCRIPTS (10) RETURNED FROM TH | C3 | MAM |
| | - | THE MICHIGAN SUPREME COURT; TRANSCRIPTS ARE IN BOX "2-O | C3 | MAM |
| 4/27/1990 | * | TRANSCRIPTS HAVE BEEN MOVED TO BOX "2-R" | C3 | MAM |
| 12/19/1990 | * | COPY OF COMPLETE FILE, CERTIFIED COPY OF CALENDAR ENTRI | C3 | GJO |
| | - | PRELIMINARY EXAMINATION DATED 8/30/90, MOTION 12/3/90, | C3 | GJO |
| | - | VOLUMES I THROUGH VII, (3/12-3/21/85) AND SENTENCE DATE | C3 | GJO |
| | - | 6/17/85 MAILED TO JAMES L. STROPKAI, APPLLATE DIVISION, | C3 | GJO |
| | - | HEABEAS CORPUS SECTION, 720 LAW BLDG., LANSING, MI. 489 | C3 | GJO |
| 7/03/1991 | * | NOTICE OF DISQUALIFICATION AND REQUEST FOR REASSIGNMENT | C3 | JNN |
| | - | AS JUDGE HEATHSCOTT WAS THE TRIAL PROSECUTOR IN THIS | C3 | JNN |
| | - | MATTER. | C3 | JNN |
| 7/16/1991 | * | ORDER OF RE-ASSIGNMENT TO JUDGE WILLIAM A. CRANE | C3 | DAH |
| | * | WILLIAM A. CRANE REPLACES LYNDA L. HEATHSCOTT AS JUDGE | C4 | DAH |
| 8/07/1991 | * | PRF OF SERV ON DELAYED MOTION FOR NEW TRIAL, BRIEF IN | C4 | MAM |
| | - | SUPPORT; MOTION TO PROCEED IN FORMA PAUPERIS | C4 | MAM |
| 8/07/1991 | DM | DEFENSE MOTION | C4 | MAM |
| | - | FOR SUSPENSION OF FEES AND COSTS; AFFIDAVIT OF INDIGENC | C4 | MAM |
| | - | NTC OF HEARING (NO DATE OR TIME) | C4 | MAM |
| 8/07/1991 | DM | DEFENSE MOTION | C4 | MAM |
| | - | DELAYED MOTION FOR NEW TRIAL; BRIEF FOR DELAYED MOTION | C4 | MAM |
| | - | ***ORAL ARGUMENT REQUESTED***; APPENDIX TO BRIEF ON | C4 | MAM |
| | - | APPEAL | C4 | MAM |
| 9/26/1991 | * | LETTER FROM DFNT REGARDING DOCUMENTS OF 08-07-91 | C4 | MAM |
| 9/27/1991 | * | ORDER DENYING DELAYED MOTION FOR NEW TRIAL | C4 | JLD |
| 3/31/1992 | * | ORDER OF THE MICHIGAN COURT OF APPEALS: "THE COURT | C4 | DAC |
| | - | ORDERS THAT THE APPLICATION FOR LEAVE TO APPEAL IS | C4 | DAC |
| | - | DENIED FOR LACK OF MERIT IN THE GROUNDS PRESENTED." | C4 | DAC |
| 3/31/1992 | * | ORDER OF THE MICHIGAN COURT OF APPEALS: "THE COURT | C4 | DAC |
| | - | ORDERS THAT THE APPLICATION FOR LEAVE TO APPEAL IS DENI | C4 | DAC |

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CASE: **84-005570-FC** OFFENSE: 8/06/1984

| DATE | CODE | ACTIONS, JUDGMENTS, CASE NOTES | JD | CLK |
|---|---|---|---|---|
| 3/31/1992 | - | FOR LACK OF MERIT IN THE GROUNDS PRESENTED." | C4 | DAC |
| 4/30/1992 | * | TWO COMPLETE FILES AND CERTIFIED COPY OF CALENDAR ENTRI | C4 | GJO |
| | - | MAILED TO THE SUPREME COURT, RECORDS DIVISION, 2ND FLOO | C4 | GJO |
| | - | LAW BUILDING, 525 W. OTTAWA, LANSING, MI. 48955. THE | C4 | GJO |
| | - | TRANSCRIPTS WILL BE SENT WITHIN THE NEXT FEW DAYS. | C4 | GJO |
| 5/07/1992 | * | COPIES OF TEN TRANSCRIPTS MAILED TO SUPREME COURT - | C4 | GJO |
| | - | PRELIMINARY EXAMINATION 8/30/84; MOTION 12/3/84; | C4 | GJO |
| | - | TRIAL VOLUMES I, II, III, IV, V, VI AND VII DATED | C4 | GJO |
| | - | 3/12-13-14-15-19-20-21/85 AND SENTENCE DATED 6/17/92. | C4 | GJO |
| 10/30/1992 | * | ORDER OF THE MICHIGAN SUPREME COURT: "ON ORDER OF THE | C4 | DAC |
| | - | COURT, THE APPLICATION FOR LEAVE TO APPEAL IS CONSIDERE | C4 | DAC |
| | - | AND IT IS DENIED, BECAUSE THE DEFENDANT HAS FAILED TO | C4 | DAC |
| | - | MEET THE BURDEN OF ESTABLISHING ENTITLEMENT TO RELIEF | C4 | DAC |
| | - | UNDER MCR 6.508 (D)." | C4 | DAC |
| 11/05/1992 | * | COMPLETE FILE (2) AND THE COPIES OF TEN TRANSCRIPTS | C4 | MAM |
| | - | RETURNED FROM THE MICHIGAN SUPREME COURT; TRANSCRIPTS | C4 | MAM |
| | - | ARE IN BOX "2-R" | C4 | MAM |
| 7/15/1993 | * | DFNT IN PRO PER NTC OF HEARING (NO DATE OR TIME) | C4 | MAM |
| | DM | DEFENSE MOTION | C4 | MAM |
| | - | IN PRO PER FOR LEAVE TO PROCEED IN FORMA PAUPERIS | C4 | MAM |
| | - | CERTIFICATE ESTABLISHING PRISONER ACCOUNTACTIVITY | C4 | MAM |
| 7/15/1993 | DM | DEFENSE MOTION | C4 | MAM |
| | - | FOR APPOINTMENT OF COUNSEL, BREIF IN SUPPORT | C4 | MAM |
| 7/15/1993 | DM | DEFENSE MOTION | C4 | MAM |
| | - | DELAYED MOTION FOR NEW TRIAL AND EVIDENTIARY HEARING | C4 | MAM |
| | - | PRF OF SERV | C4 | MAM |
| | - | BRIEF | C4 | MAM |
| | - | (COPY TO PROSECUTOR AND ORIGINAL AND FILE TO COURTROOM) | C4 | MAM |
| | - | (COPY RETURNED TO DFNT) | C4 | MAM |
| 10/29/1993 | * | ORDER DENYING DELAYED MOTION FOR NEW TRIAL AND | C4 | JLD |
| | - | EVIDENTIARY HEARING | C4 | JLD |
| 10/29/1993 | RET | FILE RETURNED TO CLERK'S OFFICE | C4 | JLD |
| 12/09/1993 | * | PRF OF SERV ON COPY OF JURY INSTRUCTIONS TO MICHIGAN | C4 | MAM |
| | - | COURT OF APPEALS AND SAGINAW COUNTY COURTHOUSE | C4 | MAM |
| | - | (APPEARS TO BE A COPY OF VOL VII OF MARCH 21, 1985)_ | C4 | MAM |
| 3/24/1994 | * | ORDER OF THE MICHIGAN COURT OF APPEALS: "THE COURT | C4 | DAC |
| | - | ORDERS THAT THE APPLICATION FOR LEAVE TO APPEAL IS DENI | C4 | DAC |
| | - | FOR FAILURE TO ESTABLISH GROUNDS FOR RELIEF PURSUANT TO | C4 | DAC |
| | - | MCR 6.500 ET SEQ." | C4 | DAC |
| 5/19/1994 | * | COMPLETE FILE, TRANSCRIPTS, CERTIFIED CALENDAR ENTRIES | C4 | DLL |
| | - | MAILED TO SUPREME COURT CLERK'S OFFICE, RECORDS DEPT. | C4 | DLL |
| | - | 525 W. OTTAWA, 2ND FLR, LANSING, MI 48909 | C4 | DLL |
| 8/29/1994 | * | ORDER OF THE MICHIGAN SUPREME COURT: "...THE APPLICATI | C4 | DAC |
| | - | FOR LEAVE TO APPEAL IS CONSIDERED, AND IT IS DENIED, BE | C4 | DAC |
| | - | CAUSE THE DEFENDANT HAS FAILED TO MEET THE BURDEN OF | C4 | DAC |
| | - | ESTABLISHING ENTITLEMENT TO RELIEF UNDER MCR 6.508 (D). | C4 | DAC |
| 9/09/1994 | * | RETURNED FROM THE MICHIGAN SUPREME COURT, FILES (2) WIT | C4 | CMR |
| | - | COPIES OF TRANSCRIPTS: PROCEEDINGS VOLS I-VII, MOTION, | C4 | CMR |
| | - | SENTENCE AND PRELIM EXAM | C4 | CMR |
| 11/21/1994 | * | MAILED COMPLETE COPIES OF FILE AND DOCKET ENTRIES | C4 | CMR |
| | - | TO: STATE OF MI DEPT OF ATTY GENERAL, JULIE A GERSZEWS | C4 | CMR |

*** **CONTINUED NEXT PAGE** **

CASE: **84-005570-FC** OFFENSE: 8/06/1984

| DATE | CODE | ACTIONS, JUDGMENTS, CASE NOTES | JD | CLK |
|---|---|---|---|---|
| 11/21/1994 | - | HABEAS CORPUS DIVISION, PO BOX 30212, LANSING, MI 4890 | C4 | CMR |
| 7/03/1995 | * | *******ALL TRANSCRIPTS ARE NOW LOCATED IN BOX 9-V****** | C4 | NRP |
| 8/04/1997 | MRJ | MOTION FOR RELIEF FROM JUDGMENT | C4 | HLB |
| | - | BRIEF, MOTION FOR NEW TRIAL, EVIDENTIARY HEARING, MOTIO | C4 | HLB |
| | - | FOR APPOINTMENT OF COUNSEL, MOTION FOR LEAVE TO PROCEED | C4 | HLB |
| | - | IN FORMA PAUPERIS, AFFIDAVIT W/PRF OF SVC | C4 | HLB |
| | - | FILED BY ROBIN MANNING | C4 | HLB |
| 8/04/1997 | *AT | PRO PER REPLACES KOOPMAN,THOMAS R, AS ATTORNEY | C4 | HLB |
| | - | *********FWD TO CRTRM******** | C4 | HLB |
| 8/15/1997 | * | ORDER DENYING MTN FOR NEW TRIAL/EVIDENTIARY HEARING | C4 | JLD |
| | NUA | NO LONGER UNDER ADVISEMENT | C4 | JLD |
| 8/27/1997 | * | AFFIDAVIT IN SUPPORT OF 6.500 MOTION; PRF OF SVC, FILED | C4 | CMR |
| | - | ROBIN R MANNING #165580, ALGER MAX CORR FACILITY | C4 | CMR |
| 9/02/1997 | DM | DEFENSE MOTION | C4 | CMR |
| | - | MTN FOR REHEARING; PRF OF SVC, FILED BY #165580 ROBIN R | C4 | CMR |
| | - | MANNING,ALGER MAX CORR FAC, PO BOX 600, MUNISING MI 498 | C4 | CMR |
| 9/24/1997 | * | ORDER DENYING MOTION FOR REHEARING | C4 | JLD |
| 11/12/1997 | * | COPY OF APPLICATION FOR LEAVE TO APPEAL, PRF OF SVC, | C4 | ARK |
| | - | APPENDIX, FILED BY DFNT IN PRO PER, FWD TO CTRM | C4 | ARK |
| 3/24/1998 | * | ORDER OF THE MICHIGAN COURT OF APPEALS: "THE MOTION TO | C4 | DAC |
| | - | WAIVE FEES IS GRANTED FOR THIS CASE ONLY." | C4 | DAC |
| 7/29/1998 | * | **COURT OF APPEALS-ORDER** "THE COURT ORDERS THAT THE | C4 | BES |
| | - | MOTION FOR EVIDENTIARY HRG IS DENIED. THE DELAYED | C4 | BES |
| | - | APPLICATION FOR LEAVE TO APPEAL IS DENIED FOR FAILURE T | C4 | BES |
| | - | ESTABLISH GROUNDS FOR RELIEF FROM JUDGMENT PURSUANT TO | C4 | BES |
| | - | MCR 6.508 (D) FOR LACK OF MERIT IN THE GROUNDS PRESENTE | C4 | BES |
| 8/13/1998 | * | MOTION FOR REHEARING, PRF OF SVC, BY DFNT IN PRO PER | C4 | ARK |
| | - | FWD TO CTRM | C4 | ARK |
| 8/21/1998 | * | PER REQUEST, MAILED COMPLETE FILE (3), TRANSCRIPTS (9) | C4 | WOR |
| | - | AND DOCKET ENTRIES TO THE MICHIGAN SUPREME COURT 525 | C4 | WOR |
| | - | OTTAWA, LANSING, MICHIGAN 48909 | C4 | WOR |
| 9/28/1998 | * | **COURT OF APPEALS-ORDER**"THE COURT ORDERS THAT THE | C4 | BES |
| | - | MOTION FOR REHEARING IS DENIED | C4 | BES |
| 2/19/1999 | * | MOTION TO REMAND, PRF OF SVC FILED BY ROBIN MANNING | C4 | HLB |
| | - | ++++++FWD TO CRTRM++++++ | C4 | HLB |
| 3/30/1999 | * | ORDER OF THE MICHIGAN SUPREME COURT, DENYING MOTION TO | C4 | DAC |
| | - | REMAND, AND ALSO DENYING APPLICATION FOR LEAVE TO APPEA | C4 | DAC |
| | - | FROM THE JULY 29, 1998 ORDER OF THE MICHIGAN COURT OF | C4 | DAC |
| | - | APPEALS, "...BECAUSE THE DEFENDANT HAS FAILED TO MEET | C4 | DAC |
| | - | THE BURDEN ON ESTABLISHING ENTITLEMENT TO RELIEF UNDER | C4 | DAC |
| | - | MCR 6.508 (D). THE MOTION FOR HEARING IS ALSO CONSIDER | C4 | DAC |
| | - | AND IT IS DENIED." | C4 | DAC |
| 4/23/1999 | * | RETURNED FROM THE MICHIGAN SUPREME COURT FILES (3) | C4 | CMR |
| | - | ++++ (10) TRANSCRIPTS FILED IN BOX 9-V +++++ | C4 | CMR |
| 10/04/1999 | * | LETTER FROM WILLIAM K. SUTOR, CLERK, UNITED STATES | C4 | DAC |
| | - | SUPREME COURT, ADVISING THAT THE SUPREME COURT ENTERED | C4 | DAC |
| | - | AN ORDER ON 10/4/99 DENYING PETITION FOR WRIT OF | C4 | DAC |
| | - | CERTIORARI. | C4 | DAC |
| 12/06/2001 | * | MTN FOR NEW TRIAL WITH BRIEF IN SUPPORT; AFFIDAVIT IN S | C4 | JAS |
| | - | PORT OF MTN FOR NEW TRIAL; MTN FOR EVIDENTIARY HEARING; | C4 | JAS |
| | - | MTN FOR APPT OF COUNSEL W/BRIEF IN SUPPORT; MTN FOR LEA | C4 | JAS |

*** **CONTINUED NEXT PAGE** **

CASE: **84-005570-FC** OFFENSE: 8/06/1984

| DATE | CODE | ACTIONS, JUDGMENTS, CASE NOTES | JD | CLK |
|---|---|---|---|---|
| 12/06/2001 | - | TO PROCEED IN FORMA PAUPAR W/SUPPORTING AFFIDAVIT; PRF | C4 | JAS |
| | - | SVC FILED IN PRO PER BY DEF ***FWD TO CTRM*** | C4 | JAS |
| 1/16/2002 | * | LTR FROM DEF REQUESTING STATUS OF MTN FOR APPEALS | C4 | CMR |
| | - | FWD TO CTRM | C4 | CMR |
| 2/11/2002 | * | LTR FROM DEF REQUESTING STATUS OF HIS APPEAL FWD TO CTR | C4 | CMR |
| 2/26/2002 | PFC | PULLED FILE FOR COURTROOM | C4 | MIG |
| 2/28/2002 | RCO | FILE RETURNED FROM COURT TO CLERK'S OFFICE | C4 | NRS |
| 3/05/2002 | * | ORDER DENYING POST-APPELLATE RELIEF FOR FAILURE TO MEET | C4 | VKM |
| | - | THE BURDEN OF ESTABLISHING ENTITLEMENT TO RELIEF | C4 | VKM |
| | - | UNDER MCR 6.508(D) | C4 | VKM |
| 3/08/2002 | RET | FILE RETURNED TO CLERK'S OFFICE | C4 | VKM |
| | RCO | FILE RETURNED FROM COURT TO CLERK'S OFFICE | C4 | MIG |
| 8/16/2002 | * | PER REQUEST MAILED COPY OF DOCKET ENTRIES TO ROBIN RICK | C4 | FKL |
| | - | MANNING #165580 ALGER MAX. CORR. FAC. P.O. BOX 600 MUN- | C4 | FKL |
| | - | ISING, MI 49862 | C4 | FKL |
| 10/01/2002 | * | **COURT OF APPEALS-ORDER**"...MOTION TO WAIVE FEES IS | C4 | BES |
| | - | GRANTED FOR THIS CASE ONLY. THE PLEADING SUBMITTED IS | C4 | BES |
| | - | TREATED AS A DELAYED APPLICATION FOR LEAVE TO APPEAL | C4 | BES |
| | - | AND IS DISMISSED FOR LACK OF JURISDICTION BECAUSE THE | C4 | BES |
| | - | DEFENDANT CANNOT APPEAL THE DENIAL OR REJECTION OF A | C4 | BES |
| | - | SUCCESSIVE MOTION FOR RELIEF FROM JDG. SEE MCR6.502 G I | C4 | BES |
| 10/04/2002 | * | NTC OF HRG; APPLICATION FOR LEAVE TO APPEAL; BRIEF IN | C4 | JAS |
| | - | SUPPORT; TABLE OF CONTENTS; INDEX OF AUTHORITIES; STMT | C4 | JAS |
| | - | QUESTIONS IN DISPUTE; STMT OF FACT; MTN FOR APPT OF | C4 | JAS |
| | - | COUNSEL; BRIEF IN SUPPORT OF MTN; MTN TO REMAND FOR A | C4 | JAS |
| | - | EVIDENTIARY HRG FILED BY DEF IN PRO PER ***FWD TO CTRM* | C4 | JAS |
| | - | PRF OF SVC | C4 | JAS |
| 10/10/2002 | MRC | MOTION FOR RECONSIDERATION FILED | C4 | JAS |
| | - | PRF OF SVC FILED IN PRO PER BY DEF ***FWD TO CTRM*** | C4 | JAS |
| 10/30/2002 | * | **COURT OF APPEALS-ORDER**" DELAYED APPLICTION FOR | C4 | BES |
| | - | LEAVE TO APPEAL WITH SUPPORTING PAPERWORK RECEIVED ON | C4 | BES |
| | - | OCTOBER 4, 2002, IS DISMISSED FOR LACK OF JURISDICTION | C4 | BES |
| | - | BECAUSE THE DEFNT CANNOT APPEAL THE DENIAL OR REJECTION | C4 | BES |
| | - | OF A SUCCESSIVE MOTION FOR RELIEF FROM JUDGMENT. | C4 | BES |
| | - | SEE MCR 6.502(G)(1). APPLIES TO THIS CASE". | C4 | BES |
| 11/06/2002 | * | **COURT OF APPEALS-ORDER**"....MOTION FOR REHEARING | C4 | BES |
| | - | IS DENIED." | C4 | BES |
| 11/20/2002 | CA | CLAIM OF APPEAL FILED | C4 | YEG |
| | - | APPLICATION FOR LEAVE TO APPEAL; MTN FOR LEAVE TO PROCE | C4 | YEG |
| | - | IN FORMA PAUPERIS; REQUEST FOR NTC OF HEARING; PRF OF S | C4 | YEG |
| | - | FILED BY ROBIN R MANNING | C4 | YEG |
| 12/02/2002 | * | PER REQUEST MAILED (3) COMPLETE FILES, (10) TRANSCRIPTS | C4 | FKL |
| | - | & DOCKET ENTRIES TO MICH. SUPREME COURT 925 W. OTTAWA 4 | C4 | FKL |
| | - | FLOOR LANSIND, MI 48915 | C4 | FKL |
| 4/29/2003 | * | **ORDER-SUPREME COURT**"...APPLICATION FOR LEAVE TO | C4 | BES |
| | - | APPEAL FROM THE OCTOBER 1, 2002, DECISION OF THE COURT | C4 | BES |
| | - | OF APPEALS IS CONSIDERED AND IT IS DENIED, BECAUSE THE | C4 | BES |
| | - | DFNT'S MOTION FOR RELIEF FROM JDG IS PROHIBITED BY | C4 | BES |
| | - | MCR 6.502(G)(1), AND HE HAS FAILED TO DEMONSTRATE AN | C4 | BES |
| | - | EXCEPTION TO THAT RULE." | C4 | BES |
| 5/02/2003 | * | RETURNED FROM SUPREME COURT, (3) FILES & (10) TRANSCRIP | C4 | FKL |

*** **CONTINUED NEXT PAGE** **

CASE: **84-005570-FC** OFFENSE: 8/06/1984

| DATE | CODE | ACTIONS, JUDGMENTS, CASE NOTES | JD | CLK |
|---|---|---|---|---|
| | - | ++++++++++++++++++++LOCATED IN BOX 9-V++++++++++++++++ | C4 | FKL |
| 5/07/2003 | * | COPY OF DFNTS MOTION FOR RECONSIDERATION/REHEARING | C4 | HLB |
| | - | PRF OF SVC FILED BY ROBIN MANNING | C4 | HLB |
| 12/22/2005 | MRJ | MOTION FOR RELIEF FROM JUDGMENT | C4 | HLL |
| | - | BRIEF, MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, | C4 | HLL |
| | - | SUPPORTING AFFIDAVIT, MOTION FOR EVIDENTIARY HEARING | C4 | HLL |
| | - | (2), NTC OF HEARING, MOTION FOR APPT OF COUNSEL | C4 | HLL |
| | - | APPENDIX A, B, C, D, PRF OF SVC, FILED IN PRO PER | C4 | HLL |
| | - | ++FWD TO CRTRM++ | C4 | HLL |
| | - | AFFIDAVIT OF PRISONER'S ACTIVITY | C4 | HLL |
| 4/20/2006 | * | NOTIFICATION OF ADDRESS CHANGE SUBMITTED BY | C4 | HLL |
| | - | ROBIN MANNING MARQUETTE BRANCH PRISON 1960 U S 41 SOUTH | C4 | HLL |
| | - | MARQUETTE, MI 49855, PRF OF SVC | C4 | HLL |
| 6/02/2006 | DM | DEFENSE MOTION | C4 | HLL |
| | - | MOTION TO SUPPRESS, SUPPLEMENTAL MOTION FOR EVIDENTIARY | C4 | HLL |
| | - | HEARING TO ADDRESS TRIAL/APPELLATE COUNSELS ACTIONS | C4 | HLL |
| | - | MOTION FOR LEAVE TO FILE SUPPLEMENTAL ISSUES TO HIS | C4 | HLL |
| | - | APPEAL PENDING IN THIS COURT, SUPPLEMENTAL BRIEF IN | C4 | HLL |
| | - | SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT, PRF OF | C4 | HLL |
| | - | SVC FILED BY RICK MANNING ++FWD TO CRTRM++ | C4 | HLL |
| 6/14/2006 | PFC | PULLED FILE FOR COURTROOM | C4 | BRE |
| 6/21/2006 | * | ORDER DENYING POST-APPELLATE RELIEF | C4 | JAR |
| | RET | FILE RETURNED TO CLERK'S OFFICE | C4 | JAR |
| 6/26/2006 | RCO | FILE RETURNED FROM COURT TO CLERK'S OFFICE | C4 | CMJ |
| 7/10/2006 | MRC | MOTION FOR RECONSIDERATION FILED | C4 | HLL |
| | - | MOTION FOR REHEARING, MOTION FOR EXTENSION OF TIME | C4 | HLL |
| | - | PRF FILED IN PRO PER ++FWD TO CRTRM++ | C4 | HLL |
| 7/19/2006 | * | ORDER DENYING RECONSIDERATION RE: DEFT'S REQUEST | C4 | JAR |
| | - | DENYING POST-APPELLATE RELIEF | C4 | JAR |
| 10/16/2006 | DM | DEFENSE MOTION | C4 | HLL |
| | - | MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS | C4 | HLL |
| | - | MOTION FOR A ORDER TO HAVE DEPOSITIONS TAKEN BEFORE | C4 | HLL |
| | - | ACTION OR PENDING APPEAL, MOTION FOR APPT OF COUNSEL | C4 | HLL |
| | - | CERTIFICATE OF PRISONER'S ACCT ACTIVITY, PRF OF SVC | C4 | HLL |
| | - | FILED IN PRO PER ++FWD TO CRTRM++ | C4 | HLL |
| 10/24/2006 | * | ORDER DENYING APPOINTMENT OF COUNSEL | C4 | JAR |
| 10/31/2006 | * | ++++++++++COMPLETE FILE BOXED AND PLACED ON TOP++++++++ | C4 | CMJ |
| | * | ++++++++++OF SHELVES IN CLERK'S OFFICE++++++++++++++++ | C4 | CMJ |
| 11/17/2006 | MRJ | MOTION FOR RELIEF FROM JUDGMENT | C4 | HLL |
| | - | BRIEF, MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS | C4 | HLL |
| | - | W/SUPPORTING AFFIDAVIT OF INDIGENCY, MOTION FOR | C4 | HLL |
| | - | EVIDENTIARY HEARING, MOTION FOR APPT OF COUNSEL, | C4 | HLL |
| | - | APENDIX A, B, C & D, PRF OF SVC, FILED IN PRO PER | C4 | HLL |
| | - | +++FWD TO CRTRM+++ | C4 | HLL |
| 12/19/2006 | * | ORDER DENYING POST-APPELLATE RELIEF | C4 | JAR |
| 1/08/2007 | MRC | MOTION FOR RECONSIDERATION FILED | C4 | HLL |
| | - | REHEARING | C4 | HLL |
| | - | AFFIDAIVT OF MR GILBERT MORALES #186641, PRF OF SVC | C4 | HLL |
| | - | FILED BY ROBIN MANNING ++FWD TO CRTRM++ | C4 | HLL |
| 1/09/2007 | * | PER REQ. FOR APPEAL MAILED DOCKET ENTRIES TO DEF. ROBIN | C4 | FKL |
| | - | MANNING #165580 ALGER CORR. FAC. P.O. BOX 600 MUNISING | C4 | FKL |

*** **CONTINUED NEXT PAGE** **

CASE: **84-005570-FC** OFFENSE: 8/06/1984

| DATE | CODE | ACTIONS, JUDGMENTS, CASE NOTES | JD | CLK |
|---|---|---|---|---|
| 1/09/2007 | - | MI 49862 | C4 | FKL |
| 1/18/2007 | * | ORDER DENYING RECONSIDERATION OF DEFT'S MOTION FOR | C4 | JAR |
| | - | POST-APPELLATE RELIEF | C4 | JAR |
| 1/26/2007 | * | MOTION TO LEAVE TO PROCEED IN FORMA PAUPARIS, AFFIDAVIT | C4 | HLL |
| | - | APPLICATION FOR LEAVE TO APPEAL, MOTION TO REMAND, MOTI | C4 | HLL |
| | - | FOR APPT OF COUNSEL, APPENDIX A, B, C, D & E | C4 | HLL |
| | - | BRIEF, PRF OF SVC FILED BY ROBIN MANNING | C4 | HLL |
| 2/05/2007 | * | COPY OF MOTION FOR LEAVE TO FILE SUPPLEMENTAL MOTION | C4 | HLL |
| | - | SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE | C4 | HLL |
| | - | TO APPEAL, PRF OF SVC FILED IN PRO PER | C4 | HLL |
| 2/07/2007 | * | **ORDER-COURT OF APPEALS**"...MNT TO WAIVE FEES IS | C4 | BES |
| | - | GRANTED IN THIS CASE ONLY. DELAYED APPL FOR LEAVE TO | C4 | BES |
| | - | APPEAL,MNT TO REMAND AND MNT FOR APPT OF COUNSEL ARE | C4 | BES |
| | - | DISMISSED. DFNT CANNOT APPEAL THE DENIAL OR REJECTION | C4 | BES |
| | - | OF A SUCCESSIVE MNT FOR RELIEF FROM JDG....." | C4 | BES |
| 2/22/2007 | MRC | MOTION FOR RECONSIDERATION FILED | C4 | HLL |
| | - | PRF OF SVC FILED IN PRO PER +++FWD TO CRTRM+++ | C4 | HLL |
| 3/02/2007 | MRC | MOTION FOR RECONSIDERATION FILED | C4 | HLL |
| | - | REHEARING, PRF OF SVC FILED IN PRO PER +FWD TO CRTRM+ | C4 | HLL |
| 3/21/2007 | * | COURT OF APPEALS ORDER: MTN FOR RECONSIDERATION IS | C4 | CAK |
| | - | DENIED | C4 | CAK |
| 3/29/2007 | * | COPY OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPARIS | C4 | HLL |
| | - | SUPPORTING AFFIDAVIT, APPLICATION FOR LEAVE TO APPEAL | C4 | HLL |
| | - | MOTION TO REMAND, MOTION FOR APPT OF COUNSEL, | C4 | HLL |
| | - | APPENDIX A, B & C, PRF OF SVC FILED IN PRO PER | C4 | HLL |
| 4/16/2007 | * | PER REQUEST MAILED 5 FILES, 10 TRANSCRIPTS & ROA TO | C4 | FKL |
| | - | SUPREME CT. 925 W. OTTAWA LANSING, MI 48909 | C4 | FKL |
| 5/30/2007 | * | COPY OF MOTION FO EVIDENTIARY HEARING, MOTION FOR APPT | C4 | HLL |
| | - | OF COUNSEL, MOTION FOR LEAVE TO PROCEED IN FORMA | C4 | HLL |
| | - | PAUPERIS, MOTION FOR DIRECTED VERDICT OF ACQUITTAL | C4 | HLL |
| | - | PRF OF SVC FILED IN PRO PER | C4 | HLL |
| 6/26/2007 | * | **ORDER-SUPREME COURT**"..APPL FOR LEAVE TO APPEAL THE | C4 | BES |
| | - | 02-07-07 ORDER OF THE COA IS DENIED. MNT FOR APPT OF | C4 | BES |
| | - | COUNSEL AND TO REMAND ARE DENIED." | C4 | BES |
| 6/28/2007 | * | RETURNED FROM SUPREME CT 5 FILES & 10 TRANSCRIPTS | C4 | FKL |
| | - | ++++++++++ORDER FWD TO DAC++++++++++++ | C4 | FKL |
| | - | ++++++++++TRANSCRIPTS LOCATED IN BOX 9-V++++++++++++++ | C4 | FKL |
| | - | ++++COMPLETE FILE BOXED & PLACED ON TOP SHELVES++++++++ | C4 | FKL |
| | - | +++++++++++++ROW 9 IN CLERKS OFFICE+++++++++++++++ | C4 | FKL |
| 4/17/2008 | * | NOTIFICATION OF ADDRESS CHANGE & PRF OF SVC, FILED BY | C4 | MH |
| | - | ROBIN MANNING | C4 | MH |
| 4/17/2008 | *DI | ALIAS NAME ADDED: MANNING, ROBIN RICK | | MH |
| | *AD | ADDR CHG/NEW: 4713 WEST M-61 | C4 | MH |
| | *AD | ADDR CHG/NEW: STANDISH, MI 48658 | C4 | MH |
| | *DI | NAME CHANGED OLD: MANNING, ROBIN RICK | C4 | MH |
| | *DI | NAME CHANGED NEW: MANNING, ROBIN R #165580 | C4 | MH |
| 6/05/2008 | * | CORRESPONDENCE RECEIVED FROM ROBIN MANNING RE: STATUS O | C4 | MH |
| | - | CASE, BY ROBIN MANNING --FWD TO CRTRM-- | C4 | MH |
| 6/13/2008 | PFC | PULLED FILE FOR COURTROOM | C4 | NRS |
| | - | FILE 4-6 | C4 | NRS |
| 6/16/2008 | RCO | FILE RETURNED FROM COURT TO CLERK'S OFFICE | C4 | RLL |

*** CONTINUED NEXT PAGE **

PEOPLE VS ROBIN MANNING

CASE: **84-005570-FC** OFFENSE: 8/06/1984

| DATE | CODE | ACTIONS, JUDGMENTS, CASE NOTES | JD | CLK |
|---|---|---|---|---|
| | - | FILE 4 AND 5 | C4 | RLL |
| 6/19/2008 | * | ORDER DENYING RELIEF | C4 | CAK |
| | RET | FILE RETURNED TO CLERK'S OFFICE | C4 | CAK |
| 6/20/2008 | RCO | FILE RETURNED FROM COURT TO CLERK'S OFFICE | C4 | RLL |
| | - | FILE 6 | C4 | RLL |
| 6/27/2008 | * | REMAILED DEF'S COPY OF ORDER DENYING RELIEF, AS IT WAS | C4 | CAK |
| | - | RETURNED IN THE MAIL - MUNISING ADDRESS INCORRECT | C4 | CAK |
| 7/16/2008 | DM | DEFENSE MOTION | C4 | HLL |
| | - | MOTION FOR DIRECT VERDICT OF ACQUITTAL, MOTION FOR LEAV | C4 | HLL |
| | - | TO PROCEED IN FORMA PAUPERIS, MOTION FOR APPT OF COUNSE | C4 | HLL |
| | - | MOTION FOR EVIDENTIARY HEARING, NTC OF HEARING, | C4 | HLL |
| | - | AFFIDAVITS, PRF OF SVC FILED BY ROBERT MANNING | C4 | HLL |
| | - | AFFIDAVIT OF PRISONER'S ACCOUNTY ++FWD TO CRTRM++ | C4 | HLL |
| 7/28/2008 | * | ORDER DENYING RELIEF RE: DEFT'S RENEWED MOTION FOR | C4 | JAR |
| | - | DIRECTED VERDICT OF ACQUITTAL | C4 | JAR |
| 4/15/2011 | DM | DEFENSE MOTION | C4 | BRE |
| | - | FOR LEAVE TO PROCEED IN FORMA PAUPERIS; MTN FOR | C4 | BRE |
| | - | EVIDENTIARY HEARING; MTN TO AMEND JUDGMENT OF SENTENCE; | C4 | BRE |
| | - | BRIEF IN SUPPORT; CERTIFICATE OF PRISONER ACCOUNT | C4 | BRE |
| | - | ACTIVITY & AFFIDVT REGARDING SUSPENSION OF PRISONER | C4 | BRE |
| | - | FEES/COSTS; NTC OF HRG; PRF OF SVC (4/1/11) BY | C4 | BRE |
| | - | ROBIN MANNING +++ FWD TO CTRM +++ | C4 | BRE |
| 5/03/2011 | OPO | OPINION AND ORDER OF THE COURT | C4 | JAR |
| | - | DENYING RELIEF | C4 | JAR |
| 5/31/2011 | * | MOTION FOR REHEARING FILED BY DEFT. R. MANNING PRO PER; | C4 | JAR |
| | - | PROOF OF SERVICE | C4 | JAR |
| 6/01/2011 | OPO | OPINION AND ORDER OF THE COURT | C4 | JAR |
| | - | DENYING RELIEF RE: DEFT'S MOTION FOR REHEARING | C4 | JAR |
| 4/23/2012 | DM | DEFENSE MOTION | C4 | BRE |
| | - | FOR LEAVE TO PROCEED IN FORMA PAUPERIS; CERTIFICATE OF | C4 | BRE |
| | - | PRISONER ACCOUNT ACTIVITY; MTN FOR RESENTENCING; PRF OF | C4 | BRE |
| | - | SVC BY ROBIN MANNING +++ FWD TO CTRM +++ | C4 | BRE |
| 4/26/2012 | * | ORDER DENYING RELIEF RE: DEFT'S REQUEST FOR EVID HEARIN | C4 | JAR |
| 7/26/2012 | * | PER REQUEST, MAILED DOCUMENTS TO ROBIN MANNING #165580 | C4 | HLL |
| 7/27/2012 | * | PER REQUEST, MAILED DOCUMENTS TO R MANNING #12072062 | C4 | HLL |
| 7/31/2012 | DM | DEFENSE MOTION | C4 | BRE |
| | - | FOR LEAVE TO PROCEED IN FORMA PAUPERIS; CERTIFICATE OF | C4 | BRE |
| | - | PRISONER ACCOUNT ACTIVITY; MTN FOR RESENTENCING; | C4 | BRE |
| | - | AFFIDAVIT OF MR ROBIN RICK MANNING; MTN FOR EVIDENTIARY | C4 | BRE |
| | - | HRG; MTN FOR APPOINTMENT OF COUNSEL; PRF OF SVC BY | C4 | BRE |
| | - | ROBIN MANNING +++ FWD TO CTRM +++ | C4 | BRE |
| 8/30/2012 | OPO | OPINION AND ORDER OF THE COURT | C4 | JAR |
| | - | DENYING DEFT'S POST-APPELLATE RELIEF | C4 | JAR |
| 9/21/2012 | DM | DEFENSE MOTION | C4 | BRE |
| | - | FOR REHEARING; PRF OF SVC BY ROBIN MANNING | C4 | BRE |
| | - | +++ FWD TO CTRM +++ | C4 | BRE |
| 9/21/2012 | * | DFNTS REQUEST FOR DOCKET ENTRIES | C4 | HLL |
| 9/24/2012 | * | PER REQUEST, MAILED R.O.A TO ROBIN MANNING #165580 | C4 | HLL |
| | - | CARSON CITY CORRECTIONAL FACILITY | C4 | HLL |
| 10/19/2012 | * | DFNTS REQUEST FOR PRESENTENCE REPORT/R.O.A - FWD TO CRT | C4 | HLL |
| 10/22/2012 | * | PER REQUEST, MAILED R.O.A TO ROBIN MANNING #165580 | C4 | HLL |

*** CONTINUED NEXT PAGE **

CASE: **84-005570-FC** OFFENSE: 8/06/1984

| DATE | CODE | ACTIONS, JUDGMENTS, CASE NOTES | JD | CLK |
|---|---|---|---|---|
| | - | CARSON CITY CORRECTIONAL FACILITY | C4 | HLL |
| 10/24/2012 | * | DFNTS APPLICATION FOR LEAVE TO APPEAL, MOTION FOR REMAN | C4 | HLL |
| | - | MOTION FOR INFORMA PAUPERS, MOTION FOR APPT OF COUNSEL | C4 | HLL |
| | - | BRIEF IN SUPPORT OF APPLICATION, PRF OF SVC FILED | C4 | HLL |
| | - | IN PRO PER | C4 | HLL |
| 3/22/2013 | DM | DEFENSE MOTION | C4 | BRE |
| | - | TO CORRECT PRESENTENCE INVESTIGATIN REPORT; PROP'D ORDE | C4 | BRE |
| | - | NTC OF HRG (NO DATE); PRF OF SVC BY ROBIN MANNING | C4 | BRE |
| | - | +++ FWD TO CTRM +++ | C4 | BRE |
| 3/28/2013 | OPO | OPINION AND ORDER OF THE COURT | C4 | JAR |
| | - | DENYING RELIEF | C4 | JAR |
| 5/30/2013 | * | COURT OF APPEALS ORDER: MOTION TO WAIVE FEES IS GRANTED | C4 | HLL |
| | - | MOTION TO REMAND IS DENIED/MOTION TO APPOINT COUNSEL | C4 | HLL |
| | - | IS DENIED/DELAYED APPLICATION FOR LEAVE TO APPEAL | C4 | HLL |
| | - | IS DENIED | C4 | HLL |
| 6/27/2013 | * | APPLICATION FOR LEAVE TO APPEAL/MOTION FOR REMAND/FOR | C4 | HLL |
| | - | INFORMA PAUPERIS/APPOINTMENT OF COUNSEL/PRF OF SVC | C4 | HLL |
| | - | FILED IN PRO PER | C4 | HLL |
| 6/28/2013 | * | PER REQUEST, MAILED 7 FILES, 10 TRANSCRIPTS & R.O.A | C4 | HLL |
| | - | TO SUPREME COURT CLERKS OFFICE LANSING, MI 48909 | C4 | HLL |
| 9/30/2013 | * | SUPREME COURT ORDER: THE APPLICATION FOR LEAVE TO APPEA | C4 | HLL |
| | - | THE MAY 30, 2013 ORDER OF THE COURT OF APPEALS IS | C4 | HLL |
| | - | CONSIDERED & IT IS DENIED UNDER MCR 6.508(D). THE MOTIO | C4 | HLL |
| | - | FOR APPT OF COUNSEL & MOTION TO REMAND ARE DENIED | C4 | HLL |
| 10/03/2013 | * | RETURNED FROM APPEALS CRT, FILE/TRANSCRIPTS | C4 | HLL |
| 10/04/2013 | * | ++++++++COMPLETE FILE AND ALL TRANSCRIPTS BOXED(2)+++++ | C4 | CMJ |
| | - | ++++++++PLACED IN MAIN FILE AREA IN CLERK'S OFFICE+++++ | C4 | CMJ |
| 4/08/2015 | DM | DEFENSE MOTION | C4 | BRE |
| | - | TO PROCEED IN FORMA PAUPERIS; MTN TO CORRECT THE | C4 | BRE |
| | - | PRESENTENCE INVESTIGATION REPORT; PRF OF SVC BY ROBIN | C4 | BRE |
| | - | MANNING +++ FWD TO CTRM +++ | C4 | BRE |
| 4/27/2015 | * | ORDER DENYING RELIEF | C4 | JMW |
| 8/03/2015 | DM | DEFENSE MOTION | C4 | BRE |
| | - | FOR LEAVE TO PROCEED IN FORMA PAUPERIS; MTN FOR | C4 | BRE |
| | - | RESENTENCING; PRF OF SVC BY ROBIN MANNING | C4 | BRE |
| | - | +++ FWD TO CTRM +++ | C4 | BRE |
| 8/26/2015 | * | ORDER OF THE COURT DEFT'S REQUEST IS DENIED | C4 | PGD |
| 5/10/2018 | MRJ | MOTION FOR RELIEF FROM JUDGMENT | C4 | BRE |
| | - | BRIEF IN SUPPORT; MTN FOR WAIVER OF FEES & COSTS; MTN F | C4 | BRE |
| | - | EVIDENTIARY HRG; MTN FOR APPOINTMENT OF COUNSEL; PRF OF | C4 | BRE |
| | - | SVC BY ROBIN MANNING | C4 | BRE |
| 6/05/2018 | PFC | PULLED FILE FOR COURTROOM | C4 | BRE |
| | - | FILE 1 | C4 | BRE |
| 6/07/2018 | OPO | OPINION AND ORDER OF THE COURT | C4 | PGD |
| | - | DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT | C4 | PGD |
| 6/07/2018 | RET | FILE RETURNED TO CLERK'S OFFICE | C4 | PGD |
| | RCO | FILE RETURNED FROM COURT TO CLERK'S OFFICE | C4 | CMJ |
| | - | FILE 1 | C4 | CMJ |

*** **END OF CASE** ***

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff

vs. Case No: 84-5570-FC

ROBIN RICK MANNING
Defendant.
_____/



MOTION FOR RESENTENCING

NOW COMES Defendant ROBIN RICK MANNING, filing this Motion for Resentencing, stating the following in support:

On June 17, 1985 Defendant was sentenced to a non parolable life sentence for the felony conviction of first degree murder pursuant to MCL 750.316; MSA 28.548; MCL 791.234(6).

Defendant contends that his nonparolable life sentence required under MCL 750.316; MSA 28.548; and 791.234(6) is UNCONSTITUTIONAL because of a clear conflict with the Michigan Constitution of 1963, Art 4, § 46, that holds:

NO LAW SHALL BE ENACTED PROVIDING
FOR THE PENALTY OF DEATH

Defendant asserts that there is NO real distinction or difference between:

DEATH BY ELECTROCUTION
DEATH BY HANGING
DEATH BY LETHAL INJECTION
DEATH BY FIRING SQUAD; or
DEATH BY LIFE IN PRISON WITHOUT PAROLE

because any person sentenced to one of these ""PENALTIES"" will die in prison. All of these penalties ""END IN DEATH"".

Defendant moves this Court to address this conflict between MCL 750.316; 791.234(6) and Const. 1963, Art 4, §46 and determine whether the mandatory non parolable life sentence imposed upon Defendant reinforced by the TRUTH IN

SENTENCING STATUTE, is the equivalent of a death sentence because it is a penalty that ""ENDS IN DEATH"" and unconstitutional under the Michigan Constitution.

Defendant thus raises the following argument:

> THE SENTENCE OF A NON PAROLABLE LIFE TERM FOR THE FELONY CONVICTION OF FIRST DEGREE PURSUANT TO MCL 750.316; MCL 791.234(6) A PENALTY THAT ""ENDS IN DEATH"" IS UNCONSTITUTIONAL AND ""IN CONFLICT"" WITH MICHIGAN CONSTITUTION CONST. 1963, ART 4, § 46 THAT PROHIBITS ANY LAW FROM BEING ENACTED PROVIDING FOR THE PENALTY OF DEATH, REQUIRING THIS COURT TO RESENTENCE DEFENDANT TO A NUMBER OF YEARS

Defendant contends that his sentence required under MCL 750.316; MSA 28.548; is UNCONSTITUTIONAL because of a clear conflict with the Michigan Constitution of 1963, Art 4, § 46, which is the equivalent of a death sentence, which is UN constitutional in Michigan.

Defendant asks this Honorable Court pursuant to People v Board of State Canvassers, 323 Mich 523 (1949) and Attorney General v State Board Assessors, 143 Mich 73 ( ), to interpret the eleven words in the Michigan Constitution of 1963, Art 4, § 46: (NO LAW SHALL BE ENACTED PROVIDING FOR THE PENALTY OF DEATH), and determine whether the mandatory non parolable life sentence imposed that ""ENDS IN DEATH"", is the equivalent of a death sentence and unconstitutional under the Michigan Constitution.

In construing the Constitution, the interpretation to be given, it is that which reasonable minds, the great mass of people themselves, would give it.

The Constitution of 1963, derives its force NOT from its framers, but from the PEOPLE who ratified it. The intent to be arrived at, is that of the PEOPLE. It is not to be, supposed, that they looked for any dark or obtruse meaning of the words employed, but have accepted them in their most obvious and common sense meaning and ratified the instrument in the belief that was the sense which they conveyed. See Attorney General v Riley, 417 Mich 119

(1983).

The Constitution of 1963, Art 4, § 46, which provides in pertinent part: (NO LAW SHALL BE ENACTED PROVIDING FOR THE PENALTY OF DEATH) in plain simple and direct language, explicitly prohibits the Legislature fro enacting a statute providing for a punishment for any crime that ""ENDS IN DEATH"".

MCL 750.316; MCL 791.234(6): MSA 28.548; MSA 28.2304(6) runs contrary to Art 4, § 46 by requiring a defendant to spend the rest of his natural life in prison. A mandatory non parolable life sentence is a sentence ""LONGER THEN DEFENDANTS LIFE EXPECTANCY"" which has been authorized ""ILLEGALLY"" by MCL 750.316 and MCL 791.234(6). MCL 750.316 and MCL 791.234(6) were enacted contrary to Michigans Constitution of 1963, Art 4, § 46.

Defendant challenges the validity of his mandatory non parolable life sentence because the life sentence imposed without the possibility of parole is the equivalent of a death sentence, therefore MCL 750.316; MSA 28.548 is UN CONSTITUTIONAL on its face.

The Michigan Constitution prior to 1846 provided for the death penalty. After 1846, 167 years ago, the People of the State of Michigan abolished the death penalty and have no reinstated it. The intent of enacting § 46 was to reaffirm and reinforce the Peoples committment against enacting any law providing for the penalty of death.

§ 46 ""DID NOT STATE""

> No law shall be enacted providing for the penalty of death, except first degree murder. .(EMPHASIS ADDED)

The intent of § 46 is in direct conflict with ML 750.316 and MCL 791.234(6).

On matters affecting Constitutional construction, this Court is bound by the clear language and mandate of Art 4, 4 46 Construing the mandate of the Constitution to be the Supreme law in Michigan, AS WE MUST, there is no

constitutional grant of power to the legislature under Art 4, § 46 to implement a mandatory, non parolable life sentence or a life sentence which ""'ENDS IN DEATH'"".

Michigan's first degree murder statute, MCL 750.316; MSA 28.548 does not limit a life sentence which must expire after serving 10, 20, 50, or 100 years, but the sentence under MCL 750.316 goes into infinity and such a sentence is longer then anyones life expectancy.

In People v Cooper, 236 Mich App 643 at 661 (1999) the Court held that the Michigan Constitution of 1963, Art 4, § 45 empowers the legislature to impose an indeterminate sentence and a determinate sentence as punishment for crimes and for the detention and release of persons imprisoned or detained under such sentence as LONG AS THE SENTENCE DOES NOT VIOLATE ANY PROVISIONS OF EITHER THE MICHIGAN CONSTITUTION OR FEDERAL LAW I.d. at 664.

The legislature, in exercise of its power to provide for the length of imprisonment, has distinguished between MCL 769.28; MSA 28. 1097(1) i.e. crimes for which the punishment is one year or less, MCL 750.227b; MSA 28.424(2), a two year determinate sentence for possession of a firearm as oppose to MCL 750.316; MSA 28.548 i.e. a LIFE SENTENCE. Pursuant to MCL 769.9(1) the Michigan legislature has determined that the provisions of the indeterminate sentencing statute shall not apply to persons serving mandatory life sentences.

The imposition of a mandatory life sentence without the possibility of parole is not within the constitutional grant of authority to the legislature under the Michigan Constitution of 1963, Art 4, § 46. The determinate sentence provision and the indeterminate sentence provision under Constitution 1850, Art 4, § 47, Constitution 1908, Art 5, § 28 and Constitution 1963, Art 4, § 45, has never authorized the legislature to enact any statute providing

for a penalty of death like the mandatory non parolable life sentence which will ONLY EXPIRE AFTER DEFENDANTS DEATH.

The Michigan Supreme Court in In re Brewster St. HOusing Site, 291 Mich 313 at 333; 289 NW 493 £1939•, held:

> In passing upon the constitutionality of state legislation, it is necessary to point out in the Constitution of the State the limitation which has been placed by the People through the Constitution upon the power of the legislature to act...

Defendant asserts that the first degree murder statute MCL 750.316; MSA 28.548 under the penalty phase must be found to be unconstitutional because specific limitation contained in the Constitution itself, restricts legislative power. Defendant finds such limitation is clearly mandated by Michigan Constitution of 1963, Art, 4, $ 46 which prohibits enactment of any law providing for the penalty of death. The Constitution empowers the legislature to enact laws unless it has been prohibited. The Michigan Supreme Court in Bowerman v Sheehan, 242 Mich 95; 210 NW 69; (1928) held:

> In declaring a statute unconstitutional, a Court must be able to [lay its finger] on the part of the constitution violated, and...the infraction should be clear, and free from a reasonable doubt.

For example: in People v Legree, 177 Mich App 134, 143-144 (1989) the Court of Appeals struck down, as impermissable, a 150 to 500 year sentence because said sentence cannot be said to be an indeterminate sentence, rather the Court said: "It is clearly nothing more then a determinate sentence".

Therefore People v Legree, supra, verifies that § 46 does not authorize a sentence ""ENDING IN DEATH"".

Defendant asserts that, under the validity of § 46 forbidding a determinate sentence or mandatory non parolable life term, this sentence is so offensive to the judiciary process in Michigan, that the life sentence ought not to be allowed to stand irrespective of the outcome of this proceeding.

Moreover, relief can be granted under MCR 6.508(D)(3)(b)(iv), where as here in the case of sentence inquiry, the mandatory non parolable life sentence is INVALID. Therefore prejudice is conclusively presumed insofar as our Constitution is concerned. See People v Den Uyl, 320 Mich 477-494 (1948). Accordingly, Defendant is entitled to relief UNDER MCL 6.508(D)(3)(b)(iii) or under the provision of MCR 6.508(D)(3)(b)(iv), an invalid sentence.

The provision of Article 4, § 46 constitutes an issue of first impression because No State Court has ever interpreted the exact meaning of those eleven words or compared the prohibition set forth in Article 4, § 46 to a mandatory non parolable life sentence as mandated under MCL 750.316 and MCL 791.234(6).

Defendant asserts that after careful consideration of this case, and extensive examination of the language of § 46, it would appear that the main problem for this Court to determine is the intent of the framers of § 46 and of the people adopting it. The question whether § 46 is or is not self executing becomes ultimately one of intention. Surdick v Secretary of State, 373 Mich 578 (1964); 16 Am Jur 2d. Constitutional Law § 58. p. 230, § 64, p. 23, and § 9, p. 283; 16 CJS Constitutional law, § 16, p.722.

WHAT DOES ELEVEN WORDS REALLY MEAN ??

Do they bar a mandatory non parolable life sentence ? What were the intent of the framers of § 46 and the People adopting it ?

In Youth Foundation v Benona Twp., 8 Mich App 516 (1967) the Court of Appeals held: "In arriving at the intent of the Framers of the Constitution and the People adopting it, certain rules have been stressed by the Court. People v Board of State Canvassers, 323 Mich 523 at 529 (1949) (quoting from Attorney General v State Board Assessors, 143 Mich 73, 76. The first resort: "In all cases where a constitutional provision is to be interpreted, is to the

natural signification of the words employed in the order and grammatical arrangement i which the Framers of the instrument have placed them, and, if thus regarded, the words used to convey a definite meaning, which involves no absurdity and no contradiction between parts of the same writing, then the meaning apparent on the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such cases, there is no room for construction. Cooley on Constitutional Limitations (5th Ed.) pp 5, 70. Rules of Interpretation further stress that: "it is presumed that words in a Constitution have been used according to their plain, natural import and that the Court is not at liberty to disregard the plain meaning of the words of a Constitution in order to search for some other meaning". (EMPHASIS ADDED).

The Framers of the Constitution are presumed to have knowledge of existing laws and do act in reference to that knowledge. Hall v Ira Twp, 348 Mich 402 (1957).

Defendant is asking this Court to declare that Article 4, § 46 supercedes and makes VOID a life sentence under MCL 750.316; MSA 28.548 or in other words, to declare said sentence under this statute un-constitutional.

In all matters of constitutional law, the "SUPREME LAW" is the Constitution, State and Federal. See United States Constitution, Article 5, § 2; and Michigan Constitution of 1963, Article 4, § 46, and Article 11, § 1. Every clause in every constitution is held to express the ""INTENTION OF THE PEOPLE"" who ratified it. The INTENTION of the People is law and not the interpretation of the legislature.

There is no statute enacted by the Michigan Legislature which specifically mandates a termination of a life sentence before a criminal defendant DIES IN PRISON.

MCL 750.316; MSA 28.548 was enacted without any consideration of § 46 by the legislature because a life sentence under MCL 750.316 set no specific limit on the amount of time a criminal defendant must serve, but left this important sentencing aspect up to the Executive Branch of Government. The legislature has determined under MCL 791.234(4) NOW MCL 791.234(6) that a defendant convicted of first degree murder does not come under the jurisdiction of the Michigan Parole Board, but must serve a mandatory non parolable life sentence. This misinterpretation has denied persons convicted for first degree murder serving a life term from Parole Board Jurisdiction.

Defendant contends that he is unable to locate any similar authority or statutory authorization for a sentence of life without parole for first degree murder under MCL 791. 234(6); MSA 28.2304(6) HOWEVER, while such may be desirable public policy, "IT IS NOT UP TO THE LEGISLATURE TO AUTHORIZE SUCH A SENTENCE CONTRARY TO ART 4 § 46". The legislature is the source of a Courts sentencing power. People v Roosevelt Moore, 51 Mich App 48, 54; 214 NW2d 548 (1974).

As the Courts are unable to discern any legislative authorization for Defendants sentence, this court must conclude that the sentence given to Defendant WAS NOT VALID.

Defendant relies on the above cases that a defendant convicted of first degree murder comes under the jurisdiction of the parole board, and his life term violates Constitution Art 4, § 46.

As a matter of Constitutional law, construing the mandates of the Michigan Constitution 1963, Art 4, § 46 bars all state statutes requiring a life sentence by its implication and language. Consequently, the mandatory non parolable life sentence is INVALID and as such Defendant calls upon this Court to correct this unconstitutional travesty of justice, by ordering a

resentencing or his discharge immediately. Otherwise this Court will continue to subject Defendant to an unauthorized sanction prohibited by the Michigan Constitution: Art 4, § 46.

In Ex parte Bain, Jr., 121 US 1 (1987) the Supreme Court held:

> ".. But if it shall appear that the Court had no jurisdiction to render judgement which it gave, and it will be the duty of this Court to order his discharge (EMPHASIS ADDED).

The United States Supreme Court further held:

> To disregard such a deliberate choice of words and their natural meaning, would be a departure from the first principle of Constitution interpretation. In expounding the Constitution of the United States, said Chief Justice Toney, "Every word must have its due force and appropriate meaning, for it is evident from the whole instrument, that, no word was unnecessarily used or needlessly added.. See Homes v Jennison, 14 US 540, 570-571 ( ); Wright v US, 302 US 583 (1938)

The Michigan Constitution under Art 4, § 46 is the ""'SUPREME LAW'"" for all of the People in this State and must be equally binding on the legislature, Courts and officials of the Courts. See Constitution of 1963, Art 11, § 1. This has been well stated by the United States Supreme Court in relevant part:

> Decency, security and liberty alike demand that government officials shall be subject to the same rules of conduct that are common to the citizen. In a government of law, existence of the government will be imperiled if it fails to observe the potent, the omnipresent teacher. For good or for ill, it teachs the whole people by its example. Crime is contagious, If the government becomes a lawbreaker, it breads contempt for the law, it invites every man to become a law unto himself, it invites anarchy. To declare that in the administration of the criminal law the end justifies the means.. would bring terrible retribution. Against that pernicious doctrine the Court should resolutely set its face...See Olmstead v US, 277 US 43 (1928) (EMPHASIS ADDED).

Defendants sentence violates the intent of the Michigan Constitution of 1963, Art 4, § 46, because § 46 forbids a mandatory non parolable sentence. This claim follows from the ""UNMISTAKABLEY MANDATORY LANGUAGE OF ART 4, § 46

WHICH PROHIBITS A PENALTY OF DEATH"".

In the present case, the "unmistakably mandatory" term of § 46 vested Defendant with a liberty interest in not receiving a punishment of death in keeping with § 46. The big question here is whether § 46 authorized a mandatory non parolable life sentence in this state ?? This Court must interpret those eleven words: "NO LAW SHALL BE ENACTED PROVIDING FOR THE PENALTY OF DEATH"" added to our Michigan Constitution of 1963 and rule this sentence invalid and order a resentencing.

The Michigan Constitution of 1963 did not authorize Defendants trial judge to impose a sentence that ""ENDS IN DEATH"".

The Michigan Legislature has failed to set a time limit on a "LIFE TERM", but left this important sentence determination up to the executive branch of government under the authority of MCL 791.244. Without availability of parole, the statutes preventing a parole for persons convicted of first degree murder, created a conflict between MCL 750.316, MCL 791.234(6) and Michigan Constitution of 1963, Art 4, § 46. This conflict violates constitutional provisions of both State and Federal Due process and Equal Protection under the laws, and leaves standing a prisoners rights to parole who has been convicted of first degree murder, as well as, other felony crimes which carry a life sentence. U.S. Const. AM XIV; Const. 1963, Art 1, § 17. The statute prohibiting parole board jurisdiction is unconstitutional on its face and it deprives Defendant of a constitutional right to fundamental due process of law and it renders a chilling effect on the rights of Defendant contrary to Equal Protection of law. U.S.Const. AM XIV; Const. 1963, Art 1, § 2.

MCR 6.429(A) provides that while a Court may correct a invalid sentence, it may not modify a valid sentence after it has been imposed. People v Barfield, 411 Mich 700 (1981); People v Whalen, 412 Mich 156 (1981).

The Commentary to MCR 6.429(A) states that an invalid sentence refers to: "Any error or defect in the sentence or sentencing procedure that entitled a defendant to be resentenced or to have the sentence terminated".

The Sixth Circuit has held that a defendant must be allowed to appeal his sentence if he identifies "A specific legal error in the formulation of the sentence. U.S. v Lovine, 933 F3d 1244, 1245-1246 (6th Cir 1993); U.S. v Lovole, 19 F3d 1102, 1103 (6th Cir. 1994).

Defendant is entitled to an evidentiary hearing on this issue regarding whether or not Art 4, § 46 authorized the legislature to create statutes demanding a determinate sentence: LIFE TERM WITHOUT PAROLE IN THIS STATE. People v Ginther, 390 Mich 436 (1973).

Defendant asserts that there is no real distinction or difference between:

DEATH BY ELECTROCUTION
DEATH BY HANGING
DEATH BY LETHAL INJECTION
DEATH BY FIRING SQUAD
DEATH BY LIFE IN PRISON WITHOUT PAROLE

because all of these penalties result in the person dieing in prison, if their sentence is not reduced in a Court of law or commuted by the Governor.

Pursuant to the TRUTH IN SENTENCING STATUTE, the Parole Board and Governor has expressed that LIFE MEANS LIFE.

Under such law, Defendant is serving a penalty that ""ENDS IN DEATH"" that is prohibited by Const 1963, Art 4, § 46.

In Defendants case, back in 1985 when Defendant was sentenced to a non parolable life term, the Michigan Department of Corrections issued Defendant a Proposed Early Release Date of 2002, pursuant to MDOC POLICY DIRECTIVE P.D.DWA 45.12 requiring Defendant to serve 18 years before he became eligible for release under the Commutation process of MCL 791.244.

In 1999, the TRUTH IN SENTENCING STATUTE was enacted, which brought about

the mentality of ""LIFE MEANS LIFE"".

That reality was reinterated by the following denials:

FILE REVIEWS: (Mandated every 5 years)

2001

ALL DENEID

2011

COMMUTATION REQUEST (submitted every 2 years)

2001
2003

ALL DENIED

2007
2009
2011

Defendant is now serving his 28th year of incarceration with no hopes of eer being released because of the statutes imposed that effectively create a PENALTY THAT ENDS IN DEATH IN VIOLATION OF CONST. 1963, ART 4, § 46.

REQUESTED RELEIF

WHEREFORE, based upon the above reasons, Defendant moves this Court to grant his Motion for a Evidentiary Hearing and/or GRANT his Motion for Resentencing or discharge Defendant.

Thank You !!

Respectfully Submitted,

Robin Rick Manning

MR.ROBIN RICK MANNING # 165580
Carson City Correctional Facility
10274 Boyer Rd.
Carson City Mi. 48811-9746

Dated: April 15 2012

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACINAW

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

vs. L.C. No. 84-005570-FC

ROBIN RICK MANNING

Defendant-Appellant,

_____/

MOTION FOR RELIEF FROM JUDGEMENT

NOW COMES Defendant ROBIN RICK MANNING, in pro se, filing this Motion for Relief from Judgement pursuant to MCR 6.500 et. seq; stating the following in support:

On August 6th, 1984, when Defendant was 3 months past his 18th birthday, he went to backup his friend in a fight at a party that turned into a murder Unknown to Defendant, his codefendant Gilbert Morales who had got into a fight with the victim Mr.Newvine, made threats to return to kill the victim. On the last day of trial, the Defendant rejected 3 plea offers to plead guilty to a reduced charge of 2nd degree murder with a reduced sentence Subsequently Defendant was found guilty by a jury of first degree murder, carrying a concealed weapon and felony firearm The Court sentenced Defendant to

> A life term for the felony conviction of first degree murder via MCL 750.316;
>
> A 3 to 5 year sentence for the felony conviction of Carrying a concealed weapon via MCL 750.226B to run concurrent to the life term;
>
> A 2 year term for the felony conviction of Felony Firearm via MCL 750.227b to run consecutive to the life

term.

Defendant asserts that based on the NEWLY DISCOVERED Scientific Evidence on Brain Development, as presented by, Scientist Dr. Laurence Steinberg, in the recent 2018 case of Cruz v US, 2018 US Dist Lexis 52924, decided March 29, 2018 where Dr.Steinberg testified about the comparison of the scientific evidence before the Court in 2005 in Roper, that only affected 17 year olds and younger and the recent development of scientific evidence relevant today that now applies to 18 year olds, such as Defendant who was 18 years old at the time of his crime, Defendant now seeks relief similar to that as ordered in Miller v Alabama, under the following issues:

II • THE MICHIGAN STATUTE MCL 750.316 WHICH MANDATED A SENTENCE OF LIFE FOR DEFENDANT THAT BARRED ANY DISCRETION BY THE SENTENCING JUDGE TO CONSIDER ANY FACTORS OF MITIGATION INCLUDING HIS AGE LEVEL OF CULPABILITY AND PROSPECT OF REHABILITATION EFFECTIVELY VIOLATED THE PROPORTIONALLY EQUAL PROTECTION AND DUE PROCESS CLAUSE OF THE MICHIGAN AND FEDERAL CONSTITUTION

a • WHETHER IT IS UN CONSTITUTIONAL TO SENTENCE A 18 YEAR TO LIFE WITHOUT PAROLE ?

(2) DEFENDANT IS ENTITLED TO RELIEF FROM JUDGEMENT PURSUANT TO MCR 6 508(G)(2) IN WAKE OF INTERVENING RULES OF CONSTITUTIONAL LAW INVOKED BY THE U.S. SUPREME COURT IN MONTGOMERY V LOUSIIANA THAT ACTIVATES THE RETROACTIVITY OF MISSOURI V FRYE AND LAFLER V COOPER THAT HAVE UNDERMINED THE PRIOR RULES IN THIS MATTER RELATIVE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL, WHERE LAFLER HELD THAT IMPERMISSABLE CONDUCT AND INADEQUATE ASSISTANCE BY A DEFENSE ATTORNEY THAT LED TO THE DENIAL OR REJECTION OF A GUILTY AGREEMENT ENCROACHES UPON THE SUBSTANTIVE DUE PROCESS AND SIXTH AMENDMENT GUARANTEES OF THE CONSTITUTION

a • DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING TO MAKE FACTS NOT OF RECORD WHERE THERE IS A GENUINE ISSUE OF MATERIAL FACT IN DISPUTE

See Brief in Support

GOOD CAUSE/ACTUAL PREJUDICE

DEFENDANT HAS SHOWN GOOD CAUSE FOR FAILURE TO RAISE HIS ISSUES IN A PRIOR APPEAL AND ACTUAL PREJUDICE THEREFROM

Based on the following reasons Defendant asserts that he has shown GOOD CAUSE AND ACTUAL PREJUDICE in regards to both of his arguments, addressed below respectively.

GOOD CAUSE

ARGUMENT ONE:

IN regards to Argument ONE, Defendant asserts that there is GOOD CAUSE for failure to raise those arguments in a prior appeal, as verified by Dr Laurence Steinberg who testified in the 20118 case of Cruz v US, 20118 US Dist Lexis 52924, decided March 29, 20118, about the comparison of the scientific evidence on brain development before the Court in 2005 that only affected 17 year olds and younger and the recently developed scientific evidence on brain development relevant today that effects 18 year olds such as Defendant who was 18 at the time of his crime, for which Dr Steinberg stated, in pertinent part

> In the Mid to late 2000's virtually NO research looked at brain development during late adolescence or young adulthood. People began to do research on that point of time toward the end of the decade and as we moved into 20110 and beyond, there began to accumulate same research on the development in the brain beyond it. So we didn't know a great deal about brain development during late adolescent until much more recently

As testified to by Dr Steinberg who was the leading EXPERT witness in ROPER, GRAHAM, MILLER for which the Courts foundated their decisions on, this class of individuals are less culpable for our actions and less deserving of Societies harshest penalty of Life without Parole.

The scientific evidence on Brain development noted above was not available during Defendants Court proceedings over three decades ago nor during his

prior appeals for which obviously Defendant did not raise any issues addressing his issues noted herein.

For the first time, Defendant is challenging the constitutionality of his sentence via MCL 750.316 that mandates a non discretionary life without parole sentence for a conviction of first degree murder, that forbids the sentencing judge to consider any mitigating factors such as Defendants age level of culpability and Prospect for Rehabilitation that would have allowed the judge to sentence Defendant to a number of years

The UN-availability of the scientific evidence on brain development during the decades after his conviction establishes GOOD CAUSE as to why he failed to raise these issues in prior appeals

ARGUMENT TWO

In regards to Argument TWO, Defendant asserts that there is GOOD CAUSE for his failure to raise this issue, where Michigan did not declare it to be a issue that could be raised until after Lafler was decided, for which Lafler was not declared to be retroactive until Montgomery v Louisiana was decided that defined Teague v Lane

## ACTUAL PREJUDICE

ARGUMENT ONE:

In regards to Argument ONE Defendant asserts that he suffered Actual Prejudice based on the followin, points ONE Deprivation of Scientific Evidence applicable to him TWO The Un-constitutionality of MCL 750.316; and THREE: Conflict of law; FOUR: Equal Protection violation, addressed below respectively:

ONE: DEPRIVATION OF SCIENTIFIC EVIDENCE APPLICABLE TO DEFENDANT

The Scientific Evidence on Brain development as presented by Dr Steinberg,

who established that recent developments in scientific evidence on brain development establishes that 18 year olds are also less culpable and less deserving of societies harshest penalty Life without parole.

The deprivation of this scientific evidence has caused Defendant to be deprived of a review by the Sentencing judge regarding the mitigating factors surrounding his Age, level of culpability and Prospect for Rehabilitation, causing Defendant to be sentenced to the harshest penalty, instead of a lesser possible sentence

TWO: THE UN-CONSTITUTIONALITY OF MCL 750.316

MCL 750.316 still mandates a LIFE WITHOUT PAROLE SENTENCE specifically for Defendant who was 18 years old at the time of his crime, who was convicted of first degree murder, barring the Sentencing Judge from taking into consideration any mitigating factors of Defendants Age, Level of Culpability and Prospect for Rehabilitation, prohibiting the Judge from sentencing Defendant to a number of years This factor establishes ACTUAL PREJUDICE for Defendant.

THREE: CONFLICT OF LAW

The U.S Supreme Court in it's purported review of legislative enactments and practices overlooked the GUN CONTROL ACT and the NATIONAL MINIMUM DRINKING AGE ACT that created a conflict of law with Roper v Simmons and Miller v Alabama, based on when the Court Ad hoc framed the question of What the bright line should be between Childhood and Adulthood, the Court failed to address What rights we are entitled to at what age and what punishments should be imposed based on our age and level of culpability, for which clearly created a Conflict of law, as noted below:

> The U.S Supreme Court in essence held that 18 to 20 year olds are MATURE, RESPONSIBLE AND NOT RECKLESS WHEN USING GUNS AND ALCOHOL THAT CONTRIBUTES TO OUR

PROPENSITY FOR VIOLENCE THAT HAS CAUSED MANY DEATHS and deserving of Societies harshest penalties

BUT UPHELD

CONGRESS enactments of the GUN CONTROL ACT AND THE NATIONAL MINIMUM DRINKING AGE ACT that prohibits the sale of guns and alcohol to youth under the age of 21 due to our IM-MATURITY, IRRSPONSIBILITY, AND RECKLESSNESS, that contributes to our propensity for violence that has caused many deaths

FOUR: EQUAL PROTECTION VIOLATION

When the State finds people blameworthy, the requirement that equal treatment becomes much stronger because UN-equal treatment implies that we are UN-equally blameworthy. Drawing a bright line between those of us who are UNDER AND OVER 18 for mitigating punishments thus implies that we are UN-equally blameworthy, even though we might possess the same developmental traits that render us less culpable.

This deprivation of equal protection causes Defendant Actual Prejudice.

ARGUMENT TWO:

In regards to Argument TWO, as a result of his counsel failing to advise Defendant on the law of Aiding and Abetting, Defendant was not fully informed and unable to make a KNOWINGLY, INTELLIGENTLY AND VOLUNTARY choice to plead guilty, resulting in Defendant suffering ACTUAL PREJUDICE where he rejected three plea bargains that would have allowed Defendant top receive a Term of Years to serve, instead of a sentence of LIFE WITHOUT PAROLE.

IN CONCLUSION, Defendant has shown both GOOD CAUSE AND ACTUAL PREJUDICE for failing to raise his issue and Actual Prejudice from the deprivation.

REQUESTED RELIEF

Defendant moves this Honorable Court to GRANT the following relief:

(1) Find that the NEW RULE and PRINCIPLE announced in Miller made retroactive can be applied to Defendant who was 18 years old at the time of his crime;

(2) Find that Defendant has presented NEWLY DISCOVERED EVIDENCE with the recent developments in Scientific Evidence on Brain Development as presented by Scientist Dr. Steinberg, who established that this science applies to 18 year olds, such as Defendant, who was 18 years old at the time of his crime, establishing that Defendant was less culpable and less deserving of societies harshest Penalty Life without parole;

(3) Find that MCL 750 316 was UN-constitutional in this case based on it did not allow the sentencing judge any discretion to evaluate the mitigating factors of Defendants Age, level of culpability and Prospect for Rehabilitation, that would allow this Court to Resentence Defendant to a number of years;

(4) ORDER a Sentencing Mitigation Hearing based on the scientific evidence of brain development and allow Defendant to demonstrate how he meets the hall mark features of youth and should be entitled to Resentencing;

(5) ORDER A EVIDENTIARY HEARING for Defendants ineffective assistance f counsel claim to establish facts not of record as noted in Argument TWO, regarding his plea negotiations, that establishes the foundation of why this Court should GRANT relief in regards to this issue;

(6) APPOINT Counsel to represent Defendant for this Appeal in this Court, at this Hearing;

(7) RESENTENCE Defendant to a number of years

Thank You !!

Respectfully Submitted,

Robin Rick Manning

MR.ROBIN RICK MANNING # 165580
Kinross Correctional Facility
4533 W Industrial Park Dr
Kincheloe Mi. 49788

Dated: April 25, 2018

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff,

Case No. 84-00570-FC
Hon. James T. Borchard

-vs-

ROBIN RICK MANNING

Defendant.

A TRUE COPY
Michael J. Hanley, Clerk

JOHN A. McCOLGAN
Saginaw Prosecuting Attorney
111 S. Michigan Ave.
Saginaw MI 48602

ROBIN RICK MANNING #165580
*Pro Per*
Kinross Correctional Facility
4533 W. Industrial Park Dr.
Kincheloe, MI 49788

**ORDER AND OPINION OF THE COURT DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGEMENT**

AT A SESSION OF SAID COURT HELD IN THE COURTHOUSE IN THE CITY AND COUNTY OF SAGINAW, STATE OF MICHIGAN, THIS 7 DAY OF June 2018.

PRESENT: THE HONORABLE JAMES T. BORCHARD, CIRCUIT COURT JUDGE.

**Status**

Presently before the Court is Defendant's Motion for Relief from Judgement. For the reasons set forth below, Defendant's motion is hereby **DENIED.**

On March 21, 1985, Defendant was found guilty by a jury of first degree murder[1] and one count of felony firearm.[2] On June 17, 1985, Defendant was sentenced to life in prison without the possibility of parole; and 24 months preceding and consecutive to the following

[1] MCL 750.316
[2] MCL 750.227(B)

other count. On July 29, 1998, the Court of Appeals denied Defendant's appeal due to the failure of establishing grounds for relief from judgment. The Court also notes that August 4, 1997, Defendant filed a Motion for Relief from Judgment and this Court on August 15, 1997, sent an order and opinion denying Defendant's motion. On December 22, 2005, Defendant filed a Motion for Relief from Judgement and this Court denied that motion on June 21, 2006. Yet again, Defendant filed another Motion for Relief from Judgement on July 10, 2006, and this Court denied the motion on July 19, 2006. On November 17, 2006, Defendant filed another Motion for Relief from Judgement and this Court denied that motion on December 19, 2006. Again on February 22, 2007, and March 2, 2007, Defendant filed Motions for Relief from Judgement and this Court denied those motions on March 21, 2007.

## Law and Analysis

A motion for relief from judgment may not be granted if the motion "alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding" unless Defendant establishes a "retroactive change in the law [that] has undermined the prior decision." MCR 6.508(D)(2). Additionally, the motion may not be granted if it "alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence" unless good cause for failure to raise such grounds and actual prejudice are both established. MCR 6.508(D)(3)(a), (b); *People v Clark*, 274 Mich App 248, 253; 732 NW2d 605 (2007).

Here, Defendant raised the following issue of ineffective assistance of defense counsel and newly discovered evidence; Defendant alleges that all of these actions violated his right and asks for an Evidentiary Hearing based on these arguments. None of the arguments have merit.

All of these issues could have been raised in Defendant's original appeal. And he does not even attempt to put forward good cause for his failure to do so. In short, all of Defendant's arguments could have been raised on appeal or we already ruled on by our Court of Appeals. Defendant has not established any good cause and prejudice for failing to raise these issues previously, or in regard to the issues that have already been ruled on, Defendant has not established a retroactive change in the law that undermines the prior decision. Thus, Defendant is not entitled to any relief on those grounds pursuant to MCR 6.508(D)(2) and MCR 6.508(D)(3)(a), (b).

Defendant could have issued a standard 4 brief; making the argument to the Court. The Court notes that it is not enough for a defendant "in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." Mitchmam v Detroit, 355 Mich 182, 203; 94 NW2d 388 (1959).

Successive motions for relief from judgement are prohibited absent a retroactive change in the law or newly discovered evidence. MCR 6.502(G)(1), (2). Here, Defendant has already filed five

*motions for relief from judgment.*[3] *Therefore, he must show that his motion falls into one of* the two previously-described categories. Therefore, because Defendant has not established either of those two requirements, this successive motion is procedurally barred by MCR 6.5029(G), and it is thus denied.

**Conclusion**

For the reasons stated above, Defendant's Motion for Relief from Judgement is **DENIED.** Additionally, for the reasons stated above, all other relief requested by Defendant, including his request for an Evidentiary Hearing, is **DENIED.**

IT IS THEREFORE ORDERED that Defendant's Motion for Relief from Judgment is **DENIED.**

IT IS SO ORDERED.

James T. Borchard #P27015
Circuit Court Judge

[3] Defendant's first motion for relief from judgment was denied on April 1, 2013; the second motion was denied on February 17, 2016.

# Court of Appeals, State of Michigan

## ORDER

People of MI v Robin Rick Manning

Docket No. 345268

LC No. 84-000570-FC

Stephen L. Borrello
Presiding Judge

Amy Ronayne Krause

Brock A. Swartzle
Judges

---

The Court orders that the motion to waive fees is GRANTED for this case only.

The Court further orders that the motion to file a brief in excess of 50 pages and the motion to extend time to file a current register of actions are GRANTED.

The Court further orders that the delayed application for leave to appeal and motions to remand and to appoint counsel are DISMISSED. Defendant has failed to demonstrate the entitlement to an application of any of the exceptions to the general rule that a movant may not appeal the denial of a successive motion for relief from judgment. MCR 6.502(G).

Borrello, J. I respectfully dissent and would GRANT defendant's motion for leave to appeal limited to the issue of whether the analysis set forth in *Cruz v United States* 2018 WL 1541898 is applicable. I would additionally GRANT defendant's motion for the appointment of appellate counsel. In all other issues raised in defendant's motion for leave to appeal, I hold that defendant has failed to present to this Court any supporting authority and argument for his remaining issues, hence, the remaining issues have been abandoned. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

FEB 21 2019
Date

Chief Clerk

# Court of Appeals, State of Michigan

## ORDER

People of MI v Robin Rick Manning

Docket No. 345268

LC No. 84-000570-FC

Stephen L. Borrello
Presiding Judge

Amy Ronayne Krause

Brock A. Swartzle
Judges

---

The Court orders that the motion for reconsideration is DENIED.

Borrello J., would grant the motion for reconsideration.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JUN - 7 2019
Date

Chief Clerk

December 11, 2019

160034

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 160034
COA: 345268
Saginaw CC: 84-000570-FC

ROBIN RICK MANNING,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the February 21, 2019 order of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1).

The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the defendant's successive motion for relief from judgment is "based on a retroactive change in law," MCR 6.502(G)(2), where the law relied upon does not automatically entitle him to relief; and (2) if so, whether the United States Supreme Court's decisions in *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 136 S Ct 718 (2016), should be applied to 18 year old defendants convicted of murder and sentenced to mandatory life without parole, under the Eighth Amendment to the United States Constitution or Const 1963, art 1, § 16, or both. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

86145

STATE OF MICHIGAN

IN THE 70TH DISTRICT COURT FOR THE COUNTY OF SAGINAW

THE PEOPLE OF THE STATE OF MICHIGAN

vs

ROBIN RICK MANNING, aka FROG,

Defendant.

8405570FC

File No. 84 CR 3880

THE PEOPLE OF THE STATE OF MICHIGAN

vs

WILLIAM JOHN LUNA,

Defendant.

8405572FC

File No. 84 CR 3881

no appeal 1/8/87

PRELIMINARY EXAMINATION

BEFORE THE HONORABLE JOSEPH G. DE FRANCESCO, DISTRICT JUDGE

Saginaw, Michigan - Thursday, August 30, 1984

APPEARANCES:

MRS. LYNDA MC LEOD, Assistant Prosecuting Attorney
On Behalf of The People

MR. THOMAS KOOPMAN
On Behalf of The Defendant Manning

MR. JOSEPH L. SCORSONE
On Behalf of The Defendant Luna

Prepared by:
Sharleen A. Ardin CER 0156
Certified Electronic Recorder

TERRY ANN ZAMUDIO

called at about 10:24 a.m. by the People, sworn by the Clerk, testified:

DIRECT EXAMINATION

BY MRS. MC LEOD:

Q State your full name and spell you last, please?

A Terry Zamudio.

MR. SCORSONE: Excuse me, your Honor, we can't--

THE COURT: You, you're going to have to speak up, now, please.

THE WITNESS: Terry Zamudio.

BY MRS. MC LEOD:

Q How do you spell your last name, Terry?

A Z-a-m-u-d-i-o.

Q Terry, are you familiar with a location, ah, of the 2300 block of Hiland in the City and County of Saginaw, State of Michigan?

A Yes.

Q Did you happen to be there on, ah, the night and early morning hours of August--well, the early morning hours of August 6th of this year?

A Yes.

Q What were you doing there?

A There was a party over there.

Q Was it at a home on Hiland?

A Yeah.

Q --near the back of the car?
A He was--yeah.
Q Was he on the ground?
A Yes.
Q Do you know whether he had been shot?
A No.
Q Where did you go then, Terry?
A I didn't get out on my side of the car; I got out on the other side of the car.
Q Why didn't you get out on your side?
A Because I didn't see him nowhere by there.
Q Did Mary Helen get out of the passenger's side?
A Yeah, and she ran over there to where he was, but they--my friends wouldn't let me go over there.

MRS. MC LEOD: That's all, your Honor.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. SCORSONE:

Q Would you spell your last name for me again, please?
A Z-a-m-u-d-i-o.
Q Okay, now would you pronounce it for me?
A Ah, Zamudio.
Q Zamudio. Miss Zamudio, you're not married are you?
A No.
Q How old are you?

A Seventeen.
Q Do you go to school?
A No.
Q How far did you go in school?
A Tenth grade.
Q Tenth grade? Now, how well did you know Mr. Newvine?
A Ah, for around three years.
Q Around three years? If you know, did you happen to know how old he was?
A Twenty.
Q Did you know Gilbert Morales?
A Yes.
Q How long had you known him?
A Ah, probably for about a year.
Q About a year? I mean did--now, was this Mr. Morales, was this just somebody you saw around or, ah--
A Yeah.
Q All right. If you know, would you happen to know how old he was?
A Eighteen, somewhere around there.
Q Now, you're going to have to speak up 'cause you're starting to speak softly again, okay? Ah, your testimony was that you got to this party at Grace Matta's home about 12:30 in the morning; is that correct?
A It was in--midnight--

Oxford English Dictionary | The definitive record of the English language

# base, *v.3*

**Pronunciation:** Brit. /beɪs/, U.S. /beɪs/

**Forms:** 15 **bace**, 18– **base**.

**Frequency (in current use):**

**Origin:** Formed within English, by conversion. **Etymon:** BASE *n.*[1]

**Etymology:** < BASE *n.*[1] Compare post-classical Latin *basari* to be based (1417 in a British source), Middle French *basser* , French *baser* (1504 in architectural use (1401 as past participle); 1787 in figurative use, often with *sur* on, upon; in form *basser* probably after *bas* BASE *adj.*). Compare BASED *adj.*[3]

**1.** *transitive*. To make, lay, or form a foundation for.

1587 J. HIGGINS *Mirour for Magistrates* (new ed.) f. 54 By bloudshed they doe founde, bace, builde, and prop their state.

1807 J. BARLOW *Columbiad* IV. 158 Long toils..Must base the fabric of so vast a throne.

1858 G. MACDONALD *Phantastes* 69 Great roots based the tree-columns.

1977 *Sci. Amer.* Sept. 56/2 The roads were always carefully based and drained, built up in many layers and not always paved.

**2.** *transitive*. To place *on* (also *upon*) a foundation, fundamental principle, or underlying basis. Frequently in *pass*. Cf. BASED *adj.*[3] 2. (Now the dominant use.)

1776 W. J. MICKLE tr. L. de Camoens *Lusiad* X. 462 Though fortified with all the brazen mounds That art can rear, and watch'd by eagle eyes, Still will some rotten part betray the structure That is not based on honesty.

1807 R. FULTON *Let.* 8 Dec. in *Amer. Reg.* (1808) **3** 533/2 I will base my calculations on the Lancaster turnpike road.

1814 *Rhode-Island Literary Repository* June 163 And each hope of my bosom, I based on her truth.

1841–8 F. MYERS *Catholic Thoughts* II. IV. §12. 247 The foundations on which any moral judgement..can be based.

1868 J. E. T. ROGERS *Man. Polit. Econ.* iv. 46 These [bank-]notes were based on gold.

1912 W. Z. RIPLEY *Railroads* (1913) v. 180 Proportioning transportation charges to the value of the service must always be clearly distinguished from basing them upon the mere value of the goods.

1931 *Economist* 10 Jan. 54/1 A working-class budget of expenditure, such as that on which the Ministry of Labour's index is based.

1950 *Life* 6 Mar. 118/2 It gave this figure to Congress recently in support of a request for funds to employ 3000 more investigators, and based it on a sort of Gallup poll it made on the 1948 returns.

1960 F. RAPHAEL *Limits of Love* I. viii. 103 His pools forecasts were based entirely on what the experts said.

1987 *National Jrnl.* 17 Jan. 159 Courts should prohibit lawyers from basing their fees on a percentage of the gross amount of judgment.

2009 G. P. LATHAM *Becoming Evidence-based Manager* vii. 146 Pete based his approach on research evidence.

**3.** To place or have a military base or an administrative or operational centre *at* (*in*, etc.) a place. Cf. BASED *adj.*[3] 3. Chiefly in *passive*.

1919 *Outlook* 5 Feb. 206/1 They are started towards one of the ships of the Board's Atlantic Training Squadron, which is based at Boston.

1925 J. G. BRUCE in E. F. Norton et al. *Fight for Everest: 1924* 57 No. 1 party was to..remain based there for the purpose of getting the next camp on to the North Col.

1943 *Billboard Mus. Year Bk.* 20/2 The musician at home has thrown himself wholeheartedly into the business of entertaining the uniformed men based in this country.

1987 N. W. MOORE *Bird of Time* p. xxi That is not because it was more important from the conservation point of view, but because it suffered the main threats from habitat destruction and pollution during the period under review and because it was where I was based.

1999 *Building Design* 13 Aug. 34/3 (*advt.*) Experienced architect with an interest in church projects required by busy practice based in attractive cathedral city.

2010 D. M. DELIYANNIS *Ravenna in Late Antiq.* ii. 36 Direct evidence for an imperial fleet based at Ravenna comes only from the *Notitia Dignitatum* of the late fourth or early fifth century.

This entry has been updated (OED Third Edition, September 2011).

# The New Oxford American Dictionary

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Elizabeth J. Jewell
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West while touring with the Kirov Ballet. He served as the American Ballet Theater's artistic director 1980–89.

**ba•ry•ta** |bəˈrītə| ▸n. Chemistry barium hydroxide. ▪Chem. formula: $Ba(OH)_2$.

–ORIGIN early 19th cent.: from **BARYTE**, on the pattern of words such as *soda*.

**bar•yte** |ˈberit| (also **barytes** |bəˈrītēz|) ▸n. Brit. variant spelling of **BARITE**.

–ORIGIN mid 19th cent.: from **BARIUM** + **-ITE**[1].

**bar•y•tone**[1] ▸n. & adj. variant spelling of **BARITONE**.

**bar•y•tone**[2] |ˈbarēˌtōn| ▸adj. Greek Grammar not having the acute accent on the last syllable.

–DERIVATIVES **bar•y•tone** n.

**ba•sal** |ˈbāsəl; -zəl| ▸adj. [attrib.] chiefly technical forming or belonging to a bottom layer or base.

**ba•sal bod•y** (also **basal granule**) ▸n. an organelle that forms the base of a flagellum or cilium and that is similar to a centriole in structure and function. Also called **KINETOSOME**.

**ba•sal cell** ▸n. a type of cell in the innermost layer of the epidermis.

**ba•sal cell car•ci•no•ma** ▸n. technical term for **RODENT ULCER**.

**ba•sal gan•gli•a** ▸plural n. Anatomy a group of structures linked to the thalamus in the base of the brain and involved in coordination of movement.

**ba•sal met•a•bol•ic rate** ▸n. the rate at which the body uses energy while at rest to keep vital functions going, such as breathing and keeping warm.

–DERIVATIVES **ba•sal me•tab•o•lism** n.

**ba•salt** |bəˈsôlt| ▸n. a dark, fine-grained volcanic rock that sometimes displays a columnar structure. It is typically composed largely of plagioclase with pyroxene and olivine.

▪ a kind of black stoneware resembling such rock.

–DERIVATIVES **ba•sal•tic** |-tik| adj.

–ORIGIN early 17th cent. (in the Latin form): from Latin *basaltes* (variant of *basanites*), from Greek *basanitēs*, from *basanos* 'touchstone.'

**bas•cule** |ˈbæskyo͞ol| (also **bascule bridge**) ▸n. a type of bridge with a moveable section that is raised and lowered using counterweights.

▪ a moveable section of road forming part of such a bridge.

–ORIGIN late 19th cent.: earlier denoting a lever apparatus of which one end is raised while the other is lowered, from French (earlier *bacule*), 'seesaw,' from *battre* 'to bump' + *cul* 'buttocks.'

**base**[1] |bās| ▸n. **1** the lowest part or edge of something, esp. the part on which it rests or is supported: *she sat down at the base of a tree.*

▪ Architecture the part of a column between the shaft and pedestal or pavement. ▪ Botany & Zoology the end at which a part or organ is attached to the trunk or main part: *a shoot is produced at the base of the stem.* ▪ Geometry a line or surface on which a figure is regarded as standing: *the base of the triangle.* ▪ Surveying a known line used as a geometric base for trigonometry. ▪ Heraldry the lowest part of a shield. ▪ Heraldry the lower third of the field.

**2** a conceptual structure or entity on which something draws or depends: *the town's economic base collapsed.*

▪ something used as a foundation or starting point for further work; a basis: *uses existing data as the* ***base for*** *the study.* ▪ [with adj.] a group of people regarded as supporting an organization, for example by buying its products: *a client base.*

**3** the main place where a person works or stays: *she makes the studio her base.*

▪ chiefly Military a place used as a center of operations by the armed forces or others; a headquarters: *an airbase | he headed back to base.* ▪ a place from which a particular activity can be carried out: ***a base for*** *shipping operations.*

**4** a main or important element or ingredient to which other things are added: *soaps with a vegetable oil base.*

▪ a substance used as a foundation for makeup. ▪ a substance such as water or oil into which a pigment is mixed to form paint.

**5** Chemistry a substance capable of reacting with an acid to form a salt and water, or (more broadly) of accepting or neutralizing hydrogen ions. Compare with **ALKALI**.

▪ Biochemistry a purine or pyrimidine group in a nucleotide or nucleic acid.

**6** Electronics the middle part of a bipolar transistor, separating the emitter from the collector.

**7** Linguistics the root or stem of a word or a derivative.

▪ the uninflected form of a verb.

**8** Mathematics a number used as the basis of a numeration scale.

▪ a number in terms of which other numbers are expressed as logarithms.

**9** Baseball one of the four stations that must be reached in turn to score a run.

▸v. [trans.] **1** (often **be based**) have as the foundation for (something); use as a point from which (something) can develop: *the film is* ***based on*** *a novel by Pat Conroy | inaccurate conclusions based on incomplete facts.*

**2** situate as the center of operations: *a research program* ***based at*** *the University of Arizona* | [as adj., in combination] (**-based**) *a London-based band.*

–PHRASES **get to first base** [usu. with negative] informal achieve the first step toward one's objective. **first base, second base, third base** informal used to refer to progressive levels of sexual intimacy. **off-base** informal mistaken: *the boy is way off-base.* **touch base** informal briefly make or renew contact with (someone).

–ORIGIN Middle English: from Old French, from Latin *basis* 'base, pedestal,' from Greek.

**base**[2] ▸adj. (of a person or a person's actions or feelings) without moral principles; ignoble: *the electorate's baser instincts of greed and selfishness | we hope his motives are nothing so base as money.*

▪ archaic denoting or befitting a person of low social class. ▪ (of coins or other articles) not made of precious metal: *the basest coins in the purse were made in the seventh century AD.*

–DERIVATIVES **base•ly** adv.; **base•ness** n.

–ORIGIN late Middle English: from Old French *bas*, from medieval Latin *bassus* 'short' (found in classical Latin as a cognomen). The senses in late Middle English included 'low, short' and 'of inferior quality'; from the latter arose a sense 'low on the social scale, menial,' and hence (mid 16th cent.) 'reprehensibly cowardly, selfish, or mean.'

**base•ball** |ˈbāsˌbôl| ▸n. a ball game played between two teams of nine on a field with a diamond-shaped circuit of four bases. It is played chiefly in the US, Canada, Latin America, and East Asia.

▪ the hard ball used in this game.

**base•ball cap** ▸n. a cotton cap of a kind originally worn by baseball players, with a large bill and an adjustable strap at the back.

**base•board** |ˈbāsˌbôrd| ▸n. a narrow wooden board running along the base of an interior wall.

**base•born** |ˈbāsˌbôrn| ▸adj. [attrib.] archaic of low birth or origin.

▪ illegitimate.

**base bur•ner** ▸n. a coal stove or furnace into which coal is fed automatically from a hopper as the lower layers are burned.

**base camp** ▸n. a camp from which mountaineering expeditions set out.

**base dress•ing** ▸n. the application of manure or fertilizer to the earth, which is then plowed or dug in. Compare with **TOP DRESSING**.

▪ manure or fertilizer applied in this way.

**base ex•change** (abbr.: **BX**) ▸n. a nonprofit store for the purchase of personal items, clothing, refreshments, etc., at a naval or air force base.

**base•head** |ˈbāsˌhed| ▸n. informal a habitual abuser of freebase or crack cocaine.

–ORIGIN 1980s: from a shortened form of **FREEBASE** + **-HEAD**[2].

**base hit** ▸n. Baseball a fair ball hit such that the batter can advance safely to a base without aid of an error committed by the team in the field.

**base hos•pi•tal** ▸n. a military hospital situated at some distance from the area of active operations during a war.

**base jump** (also **BASE jump**) ▸n. a parachute jump from a fixed point, typically a high building or promontory, rather than an aircraft.

▸v. [intrans.] [often as n.] (**base jumping**) perform such a jump.

–DERIVATIVES **base jump•er** n.

–ORIGIN 1980s: *base* from *b*uilding, *a*ntenna tower, *s*pan, *e*arth (denoting the types of structure used).

**Ba•sel** German name for **BASLE**.

**base•less** |ˈbāslis| ▸adj. **1** without foundation in fact: *baseless allegations.*

**2** Architecture (of a column) not having a base between the shaft and pedestal.

–DERIVATIVES **base•less•ly** adv.; **base•less•ness** n.

**base•line** |ˈbāsˌlīn| ▸n. **1** a minimum or starting point used for comparisons.

**2** (in tennis, volleyball, etc.) the line marking each end of the court.

▪ Baseball the line between bases, which a runner must stay close to when running.

**base•man** |ˈbāsmən| ▸n. (pl. **-men**) Baseball a fielder designated to cover first, second, or third base.

**base•ment** |ˈbāsmənt| ▸n. the floor of a building partly or entirely below ground level.

▪ Geology the oldest formation of rocks underlying a particular area.

–ORIGIN mid 18th cent.: probably from archaic Dutch *basement* 'foundation,' perhaps from Italian *basamento* 'column base.'

**base•ment mem•brane** ▸n. Anatomy a thin, delicate membrane of protein fibers and glycosaminoglycans separating an epithelium from underlying tissue.

**base met•al** ▸n. a common metal not considered precious, such as copper, tin, or zinc.

**ba•sen•ji** |bəˈsenjē| ▸n. (pl. **basenjis**) a smallish hunting dog of a central African breed, which growls and yelps but does not bark.

–ORIGIN 1930s: a local word.

**base on balls** (abbr.: **BB**) ▸n. Baseball another term for **WALK** n. 3.

**base pair** ▸n. Biochemistry a pair of complementary bases in a double-stranded nucleic acid molecule, consisting of a purine in one strand linked by hydrogen bonds to a pyrimidine in the other. Cytosine always pairs with guanine, and adenine with thymine (in DNA) or uracil (in RNA).

–DERIVATIVES **base pair•ing** n.

**base path** ▸n. Baseball the straight-line path from one base to the next, defined by the position of the base runner while a play is being made.

**base pay** ▸n. the base rate of pay for a job or activity, not including any additional payments such as overtime or bonuses.

**base•plate** |ˈbāsˌplāt| ▸n. a sheet of metal forming the bottom of an object.

**base run•ner** (also **baserunner**) ▸n. Baseball a player on the team at bat who is on a base, or running between bases.

–DERIVATIVES **base-run•ning** (or **baserunning**) n.

**ba•ses** |ˈbāsēz| plural form of **BASIS**.

**base u•nit** ▸n. a fundamental unit that is defined arbitrarily and not by combinations of other units. The base units of the SI system are the meter, kilogram, second, ampere, kelvin, mole, and candela.

**bash** |bæsH| ▸v. [trans.] informal strike hard and violently: *bash a mosquito with a newspaper.*

▪ (**bash something in**) damage or break something by striking it violently: *the car's rear window had been bashed in.* ▪ [intrans.] (**bash into**) collide with: *the other vehicle bashed into the back of them.* ▪ figurative criticize severely: *a remark bashing the Belgian brewing industry.*

▸n. informal **1** a heavy blow: *a* ***bash on*** *the head.*

**2** [usu. with adj.] informal a party or social event: *a birthday bash.*

▸**bash something out** produce something rapidly without preparation or attention to detail.

–ORIGIN mid 17th cent. (as a verb): imitative, perhaps a blend of **BANG**[1] and **SMASH, DASH**, etc. Sense 2 is a 20th-cent. usage.

**ba•shaw** |bəˈsHô| ▸n. another term for **PASHA** (sense 1).

**bash•ful** |ˈbæsHfəl| ▸adj. reluctant to draw attention to oneself; shy: *don't be bashful about telling folks how you feel.*

–DERIVATIVES **bash•ful•ly** adv.; **bash•ful•ness** n.

–ORIGIN late 15th cent.: from obsolete *bash* 'make or become abashed' (from **ABASH**) + **-FUL**.

**bash•ing** |ˈbæsHiNG| ▸n. [usu. with modifier] informal violent physical assault: *nine incidents of gay bashing were reported to the police.*

▪ severe criticism: *press bashing.*

**Bash•kir** |bæsHˈkir| ▸n. **1** a member of a Muslim people living in the southern Urals.

**2** the Turkic language of this people.

▸adj. of or relating to this people or their language.

–ORIGIN via Russian from Turkic *Bashkurt*.

**Bash•kir•i•a** |bæsHˈkirēə| an autonomous republic in central Russia, west of the Urals; pop. 3,964,000; capital, Ufa. Also called **BASHKIR AUTONOMOUS REPUBLIC, BASHKORTOSTAN**.

**BASIC** |ˈbāsik| ▸n. a simple high-level computer programming language that uses familiar English words, designed for beginners and formerly widely used on microcomputers.

–ORIGIN 1960s: acronym from *Beginners' All-purpose Symbolic Instruction Code*.

**ba•sic** |ˈbāsik| ▸adj. **1** forming an essential foundation or starting point; fundamental: *certain basic rules must be obeyed | the laying down of arms is* ***basic to*** *the agreement.*

▪ offering or consisting in the minimum required without elaboration or luxury; simplest or lowest in level: *basic and unsophisticated resorts | the food was good, if a bit basic.* ▪ common to or required by everyone; primary and ineradicable or inalienable: *basic human rights.*

**2** Chemistry having the properties of a base, or containing a base; having a pH above 7. Often contrasted with **ACID** or **ACIDIC**; compare with **ALKALINE**.

See page xxxviii for the **Key to Pronunciation**

# Black's Law Dictionary®

## Eleventh Edition

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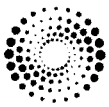

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tenures>. See *base estate* under ESTATE (1). **3.** Morally low; not having good moral principles; low-minded <base attitudes and desires>. **4.** Suitable to someone of inferior position; menial <a base, unskilled person>. **5.** Having little value <base metals>. **6.** Of, relating to, or involving a starting point; minimum <base pay>.

**base,** *n.* (14c) **1.** The lowest or supporting part of something; the foundation <the base of the tower>. **2.** A determining ingredient; a common element that is united with others to form a product <gin is the base for many cocktails>. **3.** The starting point or foundational part of something from which new ideas will develop <a sound research base>. **4.** A point, part, line, or quantity from which a reckoning or conclusion proceeds; a principle or datum <the base on which this argument proceeds>. **5.** BASELINE (1). **6.** A place or region that forms a military headquarters or center from which supplies or reinforcements are drawn <the military base at Wiesbaden>. **7.** The main place from which a company controls its activities; headquarters <the base of operations>. **8.** The people, money, groups, etc. that form the principal part of something <tax base>.

**base,** *vb.* (16c) **1.** To make, form, or serve as a foundation for <the left hand based her chin>. **2.** To establish (an agreement, conclusion, etc.); to place on a foundation; to ground <the claim is based in tort>. **3.** To use (something) as the thing from which something else is developed <their company is based on an abiding respect for the employees>. **4.** To take up or maintain one's headquarters; to have one's main place of work in a particular place <based in Dallas>.

**base and meridian.** (1856) *Property.* The east–west and north–south lines used by a surveyor to demarcate the boundaries of real property. • A baseline runs east and west; a meridian line runs north and south. — Also termed *baseline and meridian.* See BASELINE (1); MERIDIAN.

**baseball arbitration.** See ARBITRATION.

**base court.** See COURT.

**based on.** *Copyright.* Derived from, and therefore similar to, an earlier work. • If one work is "based on" an earlier work, it infringes the copyright in the earlier work. To be based on an earlier work, a later work must embody substantially similar expression, not just substantially similar ideas. See *derivative work* under WORK (2).

**base estate.** See ESTATE (1).

**base fee.** (1800) **1.** See FEE (2). **2.** See *fee simple determinable* under FEE SIMPLE.

**Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal.** A 1992 treaty establishing formal rules and procedures for the transportation and disposal of hazardous waste across national borders. • The United States had not ratified the treaty as of 2013. — Often shortened to *Basel Convention.*

**baseless,** *adj.* (17c) Having no basis in fact or sound reason; without any foundation or support; groundless.

**baseline.** (1808) **1.** *Property.* In a land survey, a line from which an angle or distance is measured. • In contemporary usage, the term usu. refers to an east–west line segment from which north–south distances are measured. In the Public Land Survey System, township tiers are measured and numbered north or south of a baseline. — Also written *base line.* — Sometimes shortened to *base.* See PUBLIC LAND SURVEY SYSTEM; TOWNSHIP (2). Cf. BASE AND MERIDIAN; MERIDIAN. **2.** *Int'l law.* The line, usu. the low-water line along the coast or the seaward limit of the internal waters of a coastal state, from which the breadth of the state's sovereignty over the bordering sea is measured.

**baseline and meridian.** See BASE AND MERIDIAN.

**baseline documentation.** (1996) *Real estate.* A written report supplemented with maps, photographs, and other information describing the physical and biological condition of land that is subject to a conservation easement when the easement is granted. • The report, signed by the landowner and a representative of the land trust, records the condition of the conservation values protected in the conservation easement and establishes photo points or other means for perpetually monitoring the restricted, expressed, permitted, and retained rights to protect these conservation values. 26 CFR § 1.170A-14(g)(5)(i).

**basement court.** (1995) *Slang.* A low-level court of limited jurisdiction, such as a police court, traffic court, municipal court, or small-claims court.

**base of bearings.** See BASIS OF THE BEARINGS.

**base-point pricing.** (1973) **1.** A pricing method that adds the price at the factory to the freight charges, which are calculated as the cost of shipping from a set location to the buyer's location, regardless of the actual cost of transportation. • The chosen shipping base-point may be the same for all customers, or it may be a specific, established location, such as a manufacturing plant nearest to the buyer. **2.** A uniform pricing policy in which the cost of transportation to all locations is presumed to be the same.

**base rate.** See INTEREST RATE.

**base service.** See SERVICE (6).

**base tenure.** See TENURE.

**basic crops.** See CROPS.

**basic fact.** See *intermediate fact* under FACT.

**basic-form policy.** See INSURANCE POLICY.

**basic goods.** See GOODS.

**basic mistake.** See MISTAKE.

**basic norm.** See NORM.

**basic patent.** See *pioneer patent* under PATENT (3).

**basic wage.** See *minimum wage* under WAGE.

**basilica** (bə-**sil**-i-kə), *n.* [Greek] (16c) *Hist.* **1.** (*cap.*) A 60-book Greek summary of Justinian's *Corpus Juris Civilis,* with comments (*scholia*). • The *Basilica* ("royal law") was begun by the Byzantine emperor Basil I, and it served as a major source of the law of the Eastern Empire from the early 10th century until Constantinople's fall in 1453. **2.** A colonnaded hall used as a law court or meeting place; specif., in ancient Rome, a public building most commonly used as a court of justice. • A basilica typically featured a nave with two aisles and an apse. Architects adopted the basilica's layout for the design of early Christian churches.

**basis,** *n.* (14c) **1.** A fundamental principle; an underlying fact or condition; a foundation or starting point. **2.** *Tax.* The value assigned to a taxpayer's investment in property

# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee,<br><br>v<br><br>WALTER MILLER,<br><br>Defendant-Appellant. | UNPUBLISHED<br>June 25, 2019<br><br>No. 341425<br>Wayne Circuit Court<br>LC No. 86-008310-05-FC |

Before: CAMERON, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

This appeal stems from defendant's resentencing pursuant to *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *Montgomery v Louisiana*, ___ US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016). For the reasons set forth in this opinion, we affirm.

## I. BACKGROUND

In 1987, defendant was convicted of first-degree murder, MCL 750.316; assault with intent to commit murder (AWIM), MCL 750.83; kidnapping, MCL 750.349; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant's convictions were based on his role in a shooting that occurred in 1986, when defendant was 17 years old. Following his jury trial convictions, the trial court sentenced defendant to life imprisonment without parole for his first-degree murder conviction, life imprisonment for his AWIM conviction, 30 to 60 years' imprisonment for his kidnapping conviction, and two years' imprisonment for his felony-firearm conviction, with the felony-firearm to be served consecutively to and preceding the sentences for his other three convictions, which were to be served concurrently.

In 2017, defendant was resentenced to 30 to 60 years' imprisonment for his first-degree murder conviction after the United States Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments,' " *Miller*, 567 US at 465, and that this rule announced in *Miller* was to be applied retroactively to cases on collateral review, *Montgomery*, ___ US at ___; 136 S Ct at 732.

At the March 30, 2017 resentencing hearing, the trial court specifically stated that it was only resentencing defendant on his first-degree murder conviction. The trial court entered an amended judgment of sentence on the same day that only referenced defendant's 30 to 60 year sentence for the first-degree murder conviction, with credit for 10,424 days served. On April 7, 2017, the trial entered another amended judgment of sentence that included defendant's previously imposed sentences for his other three convictions in addition to his new sentence on his first-degree murder conviction. Defendant filed a claim of appeal in this Court from the March 30, 2017 judgment of sentence pertaining to his resentencing on the murder conviction. However, defendant subsequently moved the trial court for resentencing and a *Ginther*[1] hearing, arguing (1) that his sentence for AWIM was constitutionally invalid as it was a violation of defendant's Eighth Amendment rights,[2] because it was harsher than his murder sentence and did not provide him with a meaningful opportunity for release; and (2) that defense counsel provided ineffective assistance of counsel by failing to challenge this sentence, failing to object to the denial of good time credits when defendant was resentenced on his murder conviction, and for not objecting to the trial court's failure to update the presentence investigation report (PSIR) to provide a guidelines score for defendant's AWIM conviction. On March 7, 2018, the trial court entered an order denying defendant's motion, reasoning that (1) the "original sentence is valid and not subject to re-sentence unless the Court of Appeals, Supreme Court or Legislature decide otherwise" and (2) that " 'Good time credit' is a function of the Michigan Department of Corrections; not the trial court."[3] Defendant now indicates in his appellate brief filed through counsel that his appeal is from this March 7, 2018 order denying his motion for resentencing, and defendant requests that this Court remand this matter to the trial court for resentencing.

## II. JURISDICTION OVER THIS APPEAL

As an initial matter, we must address the prosecution's challenge to our jurisdiction over this appeal. The prosecution argues that defendant's appeal is solely devoted to challenging his AWIM sentence of life with the possibility of parole and that such a challenge is procedurally barred because it could only have been made through a motion for relief from judgment under MCR 6.502, which was a motion that defendant was prohibited by MCR 6.502(G)(1) from making since he had previously availed himself of his one permissible opportunity for bringing a motion for relief from judgment. The prosecution further argues that defendant's motion challenging his AWIM sentence therefore could only be construed, at best, as a successive

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] See Const 1963, art 1, § 16.

[3] We note that we have been provided with a seemingly incomplete lower court file, which does not contain all of these motions and orders. However, defendant has provided this Court with copies of the missing items that are pertinent to the various arguments he raises on appeal, both through counsel and in his Standard 4 brief. For purposes of addressing defendant's appellate issues, we operate under the assumption that these motions and orders are, in fact, part of the complete lower court record.

motion for relief from judgment and that MCR 6.502(G)(1) does not allow a defendant to "appeal the denial or rejection of a successive motion."

"Whether this Court has jurisdiction to hear an appeal is always within the scope of this Court's review." *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009); see also MCR 7.216(A)(10). "The jurisdiction of the Court of Appeals is governed by statute and court rule." *Chen*, 284 Mich App at 191. We review de novo, as a question of law, the existence of our jurisdiction. *Id*. Issues involving the interpretation of statutes and court rules are also questions of law that are reviewed de novo. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

In this case, the prosecution's argument, although couched in terms of "jurisdiction," is, in reality, an argument regarding the proper scope of an appeal from a *Miller* resentencing, as well as a general objection to the somewhat confusing procedural posture of the instant appeal. A review of the pertinent procedural facts illustrates the issue presented by the prosecution's argument.

On March 30, 2017, defendant was resentenced on his life-without-parole first-degree murder sentence to a term of 30 to 60 years' imprisonment pursuant to the United States Supreme Court's decisions in *Miller* and *Montgomery*, as well as Michigan's statutory provisions containing governing rules for carrying out *Miller* resentencing proceedings—those being MCL 769.25 and MCL 769.25a. Defendant filed a claim of appeal in this Court from his March 30, 2017 resentencing. This Court has jurisdiction over appeals from "a sentence imposed following the granting of a motion for resentencing," and such appeals are by right. MCR 7.202(6)(b)(*iii*); MCR 7.203(A)(1).

Defendant subsequently moved in the trial court for resentencing pursuant to MCR 7.208(B)(1), which provides that "[n]o later than 56 days after the commencement of the time for filing the defendant-appellant's brief as provided by MCR 7.212(A)(1)(a)(iii), the defendant may file in the trial court a motion for a new trial, for judgment of acquittal, to withdraw a plea, or to *correct an invalid sentence*." (Emphasis added.) Under MCR 6.429(A), the trial court "may correct an invalid sentence . . . on motion by either party. But the court may not modify a valid sentence after it has been imposed except as provided by law." "If a claim of appeal has been filed, a motion to correct an invalid sentence may . . . be filed in accordance with the procedure set forth in MCR 7.208(B) . . ." MCR 6.429(B)(2). "[T]he trial court lacks authority to set aside a valid sentence once the defendant begins serving it." *People v Wybrecht*, 222 Mich App 160, 166; 564 NW2d 903 (1997). "*[A]bsent a tangible legal or procedural error that makes a sentence invalid*, the trial court cannot alter a sentence that a defendant has begun to serve." *Id*. at 167 (emphasis added). The trial court denied defendant's motion for resentencing. A defendant may continue with his or her appeal of right following a trial court's denial of the motion for resentencing. See MCR 7.208(B)(6). Thus, we have jurisdiction over defendant's

appeal in which he argues that the trial court erred by denying his motion for another resentencing.[4]

## III. DEFENDANT'S APPELLATE ISSUES

We now turn to the substantive merits of defendant's appellate arguments challenging the validity of his sentence, which raise issues related to the constitutionality of defendant's sentence, ineffective assistance of counsel, and the interpretation and application of statutes and court rules.

"In Michigan, a trial court's authority to resentence a defendant is limited." *People v Whalen*, 412 Mich 166, 169; 312 NW2d 638 (1981). A trial court is "without authority to set aside a valid sentence and impose a new one, because to do so would infringe upon the exclusive

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[4] We note that like the prosecution, we understand the central argument advanced by defendant, both in his motion for resentencing and on appeal, to be that the rational of *Miller* applies with equal force to his life-with-parole sentence for AWIM such that he should also have been resentenced on that conviction in addition to his first-degree murder conviction. For the reasons to be explained later in this opinion, defendant's AWIM sentence did not clearly fall within the purview of the holding in *Miller*. Thus, defendant's challenge to this sentence appears to be more of a collateral attack on his sentence that would have been more properly raised through a motion for relief from judgment under MCR 6.502. See MCR 6.429(B)(4) ("If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500."). The record indicates that defendant has previously made his one motion for relief from judgment that is permitted by MCR 6.502(G)(1) and that this motion was denied. Accordingly, had defendant raised his present challenges to his AWIM sentence by a motion for relief from judgment, it would have been a successive motion, which is generally prohibited by MCR 6.502(G)(1).

However, MCR 6.502(G)(2) permits a defendant to "file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment." In this case, defendant essentially argues that the retroactive effect of *Miller* also applies to life-with-parole sentences. Had defendant raised such an argument through a proper successive motion for relief from judgment under MCR 6.502(G)(2), that subrule further provides that the motion would have been referred "to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions," which in this case would be the exception involving a retroactive change in law. Appeals from motions for relief from judgment are by leave, MCR 6.509(A), and appellate courts will review a trial court's decision on a successive motion for relief from judgment that is made under MCR 6.502(G)(2) and based on a claimed retroactive change in law that occurred after the first motion for relief from judgment, see *People v Barnes*, 502 Mich 265, 267-268, 274-275; 917 NW2d 577 (2018). Therefore, we would still have been able to exercise our discretion to review defendant's arguments even if they had been made through a motion for relief from judgment. Had this appeal resulted from that procedure instead, we would have reached the same result that we reach in this opinion.

power of the governor under the Constitution to commute sentence." *Id*. (quotation marks and citation omitted). Appellate review of whether a trial court exceeded its authority to set aside a sentence, and the related question of a sentence's validity, is de novo. See *id*. at 169-171; *People v Miles*, 454 Mich 90, 96-98; 559 NW2d 299 (1997). We review constitutional issues de novo. *People v Williams*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 339701); slip op at 2. We also review de novo issues involving the interpretation of statutes and court rules. *Cole*, 491 Mich at 330. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007) (quotation marks and citation omitted). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *Id*. However, because no *Ginther* hearing was held in this case, our review is "limited to errors apparent on the record." *Id*.

As previously stated, defendant in this case was required to demonstrate a "tangible legal or procedural error" that made his sentence invalid in order to be entitled to any relief on his motion for resentencing. *Wybrecht*, 222 Mich App at 167. In his motion, defendant raised several challenges that depended on his fundamental contention that his *AWIM sentence of life with the possibility of parole* was a "de facto life sentence" that was constitutionally invalid. Defendant argued that defense counsel was ineffective for failing to challenge this sentence and for not objecting to the trial court's failure to update the PSIR to provide a guidelines score for defendant's AWIM conviction. Additionally, defendant made a cursory argument that defense counsel provided ineffective assistance of counsel by failing to object to the trial court's "denial" of good time credits at the resentencing. This last argument was the only argument that defendant raised that related to his resentencing on his murder conviction. The trial court denied defendant's motion for resentencing on the grounds that the original sentence was valid and that good time credit was determined by the Michigan Department of Corrections rather than the trial court. Defendant resurrects these arguments on appeal, both through counsel and in his Standard 4 brief. Defendant also raises additional arguments in his Standard 4 brief. We will address all of these arguments in turn.

First, defendant did not demonstrate any legal or procedural error with his *Miller* resentencing based on the fact that he was not resentenced on his AWIM sentence of life with the possibility of parole.

In *Miller*, 567 US at 465, the United States Supreme Court held that "*mandatory life without parole*" sentences for individuals who were under the age of 18 when they committed their crimes are unconstitutional violations of the Eighth Amendment. (Emphasis added.) The *Miller* Court explained that its holding was concerned with the mandatory imposition of this particular "harshest prison sentence" on juveniles without any consideration of "how children are different." *Id*. at 479-480. The Court also clarified that a "State is not required to guarantee eventual freedom, but must provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. at 479 (quotation marks and citation omitted). Further, in *Montgomery*, ___ US at ___; 136 S Ct at 736, the United States Supreme Court explicitly condoned life-with-the-possibility-of-parole sentences as an option for satisfying the holding of *Miller*: "A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient

immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." (Citation omitted.)

Similarly, this Court subsequently held that a sentence of "life with the possibility of parole satisfied *Miller*'s mandate." *Williams*, ___ Mich App at ___; slip op at 4. We reasoned that the defendant's eligibility for parole constituted a "meaningful opportunity to obtain release," even though attaining parole status when serving a life sentence involves a somewhat difficult process. *Id.*

In addition, MCL 769.25 and MCL 769.25a are the relevant statutory provisions governing the procedures for resentencing individuals like defendant in the wake of *Miller* and *Montgomery*. MCL 769.25a(2) provides in pertinent part that if the United States Supreme Court determines that the decision in *Miller* "applies retroactively to all defendants who were under the age of 18 at the time of their crimes, and that decision is final for appellate purposes, the determination of whether *a sentence of imprisonment for a violation set forth in section 25(2) of this chapter* shall be imprisonment for life without parole eligibility or a term of years as set forth in section 25(9) of this chapter shall be made by the sentencing judge or his or her successor as provided in this section." (Emphasis added.) MCL 769.25(2), in turn, provides a list of criminal offenses that includes first-degree murder[5] and "[a]ny violation of law involving the death of another person for which parole eligibility is expressly denied under state law."[6] AWIM does not appear in this list of offenses to which a resentencing based on the retroactive application of *Miller* applies pursuant to the statute. MCL 769.25(2); MCL 769.25a(2). Moreover, AWIM is not brought within these statutory provisions through MCL 769.25(2)(d) because AWIM is not a "violation of law involving the death of another person" and the AWIM statute does not expressly deny parole eligibility. See MCL 750.83.

Accordingly, pursuant to *Miller*, *Montgomery*, MCL 769.25a(2), and MCL 769.25(2), defendant was not entitled to be resentenced for his AWIM sentence of life with the possibility of parole. When a sentence is partially invalid, the sentence may only be corrected to the extent that the sentence was legally invalid and the valid portion of the sentence remains intact; the entire judgment of sentence is not wholly set aside. *People v Thomas*, 447 Mich 390, 393-394; 523 NW2d 215 (1994); see also MCL 769.24.[7] Pursuant to *Miller*, *Montgomery*, MCL

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[5] See MCL 769.25(2)(b) (listing MCL 750.316, which is the first-degree murder statute).

[6] See MCL 769.25(2)(d).

[7] MCL 769.24 provides as follows:

> Whenever, in any criminal case, the defendant shall be adjudged guilty and a punishment by fine or imprisonment shall be imposed in excess of that allowed by law, the judgment shall not for that reason alone be judged altogether void, nor be wholly reversed and annulled by any court of review, but the same shall be valid and effectual to the extent of the lawful penalty, and shall only be reversed or annulled on writ of error or otherwise, in respect to the unlawful excess.

769.25a(2), and MCL 769.25(2), defendant's first-degree murder sentence was the only portion of his sentence that was determined to be unconstitutional under *Miller* and *Montgomery* and for which resentencing was provided for by our Legislature's response to *Miller* that was set forth in MCL 769.25a(2) and MCL 769.25(2). Defendant's sentence of life *with the possibility of parole* for his AWIM conviction was not rendered unconstitutional under *Miller* because this sentence provided defendant with a meaningful opportunity for release.[8] *Miller*, 567 US at 465, 479; *Montgomery*, ___ US at ___; 136 S Ct at 736; *Williams*, ___ Mich App at ___; slip op at 4. Therefore, defendant did not show that the trial court made a legal or procedural error in his *Miller* resentencing by not also resentencing him on his AWIM sentence of life with the possibility of parole, and the trial court did not err by determining that defendant's sentence was not invalid on this basis.[9]

Next, defendant did not demonstrate any legal or procedural error with his *Miller* resentencing based on his claim that defense counsel was ineffective by failing to object to the trial court's "denial" of good time credits.

"To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different." *Jordan*, 275 Mich App at 667. "[I]t is the defendant's burden to prove that counsel did not provide effective assistance." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

In this case, the trial court did not *deny* defendant from receiving good time credits, and the trial court did not mention good time credits at all in resentencing defendant. Good time

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[8] We note that defendant was paroled on May 29, 2019. See Offender Tracking Information System, <http://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=185506> (accessed June 3, 2019).

[9] To the extent defendant seems to imply in his Standard 4 brief that he believes that a life-with-parole sentence imposed on a juvenile offender may violate the Michigan Constitution, he only argues about how such a sentence *should* be treated under Michigan law but does claim that any binding authority exists for the proposition that such a sentence is actually prohibited in Michigan such that it would be legally erroneous to impose that sentence. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Green*, 313 Mich App 526, 535; 884 NW2d 838 (2015) (quotation marks and citation omitted). Consequently, he has not shown a tangible legal error that would allow this Court to conclude that his *Miller* resentencing was legally invalid such that the trial court had any authority to revisit or modify his AWIM sentence. He also ignores the opportunity for release that actually exists for a life-with-the-possibility-of-parole sentence. It is further worth noting, as is evident from the analytical framework employed in this opinion, that our review at this juncture concerns whether defendant's *Miller* resentencing itself was invalid; this case is long past the stage of direct review of defendant's convictions and original sentences.

credits "are applied to a prisoner's minimum and/or maximum sentence in order to determine his or her parole eligibility dates." *People v Wiley*, 324 Mich App 130, 156; 919 NW2d 802 (2018) (quotation marks and citation omitted). A prisoner's eligibility for earning good time credits applicable to his or her sentence is defined by statute and generally depends on when the prisoner's crime was committed and the nature of that crime. See generally MCL 791.233b; MCL 800.33; *Lowe v Dep't of Corrections*, 206 Mich App 128, 130-136, 138; 521 NW2d 336 (1994).

However, defendant has not provided any indication regarding how much good time credit he believes he earned and has therefore failed to establish the factual predicate for his claim. *People v Jackson (On Reconsideration)*, 313 Mich App 409, 432; 884 NW2d 297 (2015) ("Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim.") (quotation marks and citation omitted).

Moreover, it nonetheless appears that defendant was actually not entitled to earn good time credits at all because he was convicted of first-degree murder, AWIM, kidnapping, and felony-firearm, (which are crimes listed in MCL 791.233b)[10] and he committed these crimes after January 1, 1983. MCL 800.33(5); MCL 791.233b(d), (n), (q); MCL 750.227b(4); *Lowe*, 206 Mich App at 131-134, 138 (holding that an MDOC policy directive provided a "constitutional interpretation of MCL 800.33(5)" where the policy directive stated in pertinent part that prisoners serving sentences for crimes listed in MCL 791.233b and committed after January 1, 1983, only earned "disciplinary credit" on their minimum and maximum sentences, rather than good time credit as had previously been statutorily authorized for offenses committed earlier; the Court also discussed the distinction between good time credits and disciplinary credits); Michigan Department of Corrections, *Good Time Credits*, PD 03.01.100(H), Attachment A (July 10, 2017) (stating, similarly to the earlier MDOC policy directive quoted in *Lowe*, that prisoners "sentenced for an offense committed before April 1, 1987" are not eligible to earn good time credits if the offense was one of the specifically enumerated offenses (which included felony-firearm, first-degree murder, AWIM, and kidnapping) and "was committed on or after January 1, 1983"). "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Defendant has not established that he received ineffective assistance of counsel on this ground; he has failed to demonstrate that defense counsel rendered deficient performance by not raising the issue of good time credits at resentencing, and he has also failed to establish that he was prejudiced by defense counsel's performance. *Jordan*, 275 Mich App at 667.

Next, defendant argues that defense counsel was ineffective for not objecting to the updated PSIR that was prepared for his *Miller* resentencing on the ground that the updated PSIR did not contain a guidelines score for his AWIM conviction. Defendant also suggests in his

[10] These crimes were listed in MCL 791.233b(d), (n), and (q) in the version of the statute as it existed when defendant was convicted. See 791.233b, as amended by 1982 PA 458.

Standard 4 brief that a guidelines score should have been calculated for his kidnapping conviction. As previously discussed, defendant was only resentenced on his first-degree murder conviction, which was a fact that the trial court specifically noted on the record at the resentencing hearing; defendant was not entitled to be resentenced on his AWIM conviction or any other conviction. Furthermore, defendant committed his crimes in 1986, and the legislative guidelines do not apply to crimes committed before January 1, 1999. MCL 769.34(1) and (2)[11]; *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000); see also *Williams*, ___ Mich App at ___; slip op at 7 (rejecting the same argument now made by defendant under similar circumstances to those present in this case). Defense counsel was not ineffective for declining to advance this meritless argument. *Ericksen*, 288 Mich App at 201.

Next, defendant argues in his Standard 4 brief that he was denied due process by the trial court's sua sponte amendment of a valid judgment of sentence. As we already noted, the trial court entered a March 30, 2017 amended judgment of sentence resentencing defendant to a term of years for his first-degree murder conviction, and it entered an April 7, 2017 amended judgment of sentence that also included defendant's original sentences for assault with intent to commit murder, kidnapping, and felony-firearm. Defendant seems to believe that *Miller* and the March 30, 2017 resentencing proceeding operated to vacate *all* of his sentences. As discussed above, with the sole exception of his first-degree murder sentence, defendant's sentences were not affected by *Miller* or his resentencing hearing. The trial court clearly understood that this was the case, as it explicitly stated on the record that it was only resentencing defendant on his first-degree murder conviction. Clearly, the omission of defendant's other sentences on the March 30, 2017, was a clerical error, and the trial court had the authority to sua sponte correct this clerical mistake. MCR 6.435(A) ("Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative . . ."). Defendant further argues in his Standard 4 brief that defense counsel was ineffective for failing to object to the April 7, 2017 amended judgment of sentence. However, since such an objection would have been meritless, defense counsel was not ineffective for declining to raise it. *Ericksen*, 288 Mich App at 201.

Next, defendant argues in his Standard 4 brief that his AWIM life sentence is a determinate sentence that violates the provision of the Michigan Constitution authorizing indeterminate sentences. See Const 1963, art 4, § 45 ("The legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences."). We again emphasize that this is an appeal from defendant's *Miller* resentencing, pursuant to which defendant had no entitlement to be

[11] MCL 769.34(2) has been held by our Supreme Court to be unconstitutional "to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory." *People v Lockridge*, 498 Mich 358, 364; 870 NW2d 502 (2015). The *Lockridge* Court remedied this constitutional violation by making a guidelines minimum sentence range calculated based on judicial fact-finding advisory. *Id*. at 365. However, *Lockridge* did not have any effect on this statutory provision to the extent that it sets forth the date of applicability for the legislative guidelines.

resentenced on any of his convictions other than his first-degree murder conviction. As such, the question is whether his resentencing sentence was somehow rendered invalid when the trial court did not also resentence defendant on his AWIM conviction. We have concluded that defendant's resentencing sentence was not invalid on this ground. This appeal does not provide a vehicle for defendant launch a collateral attack on his AWIM sentence that was imposed more than 30 years ago. Thus, this particular argument advanced by defendant necessarily must be rejected.

Moreover, defendant's argument is without merit nonetheless. Defendant's life sentence was specifically authorized by the AWIM statute. MCL 750.83 ("Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years."). In *People v Cooper*, 236 Mich App 643, 661-664; 601 NW2d 409 (1999), this Court held that determinate sentences are not barred by the Michigan Constitution. The *Cooper* Court reasoned that although the constitutional provision in Const 1963, art 4, § 45 "plainly authorizes indeterminate sentencing, it includes no *prohibition* against a statute *requiring* determinate sentencing as a punishment for crime." *Id*. at 661. The Court further explained that because the Legislature was previously recognized as having the power to provide for determinate sentences, the inclusion of Const 1963, art 4, § 45 in the Michigan Constitution "reflects an *expansion* of legislative power to include the power to provide for indeterminate sentences for crimes, not a *removal* of the previously existing power to provide for determinate sentences." *Id*. at 662. Pursuant to *Cooper*, defendant's life sentence did not violate the Michigan Constitution.

Finally, defendant also argues in his Standard 4 brief that defense counsel was ineffective for failing to object to his AWIM life sentence under *Miller* and on the ground that it was a determinate sentence that violated the Michigan Constitution. As discussed above, neither of these arguments would have been successful. Defense counsel therefore was not ineffective for refraining from raising them. *Ericksen*, 288 Mich App at 201.

## IV. CONCLUSION

Because defendant failed to show that his *Miller* resentencing was invalid in any respect, the trial court did not err by denying his motion for further resentencing. *Wybrecht*, 222 Mich App at 167. We therefore affirm the trial court's decisions related to defendant's *Miller* resentencing and the trial court's denial of defendant's motion for additional resentencing.

Affirmed.

/s/ Thomas C. Cameron
/s/ Jane E. Markey
/s/ Stephen L. Borrello

# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee,<br><br>v<br><br>MATTHEW LEE ROBINSON,<br><br>Defendant-Appellant. | UNPUBLISHED<br>July 30, 2019<br><br>No. 337865<br>Kent Circuit Court<br>LC No. 05-012604-FC |

Before: SAWYER, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying his motion for relief from his judgment of sentence on the basis of newly discovered evidence and seeking a new trial under MCL 6.500 *et seq*. Although it did not hold an evidentiary hearing, the trial court determined that certain newly discovered evidence would not have altered the outcome of defendant's 2007 jury trial. We denied defendant's application for leave to appeal on technical grounds after concluding that defendant could not appeal the denial of a successive motion for relief from judgment. The Supreme Court remanded the matter to this Court for consideration as on leave granted. See *People v Robinson*, 503 Mich 883; 919 NW2d 59 (2018). In its remand order, the Supreme Court instructed:

> The defendant alleges new evidence in the form of (1) the full and unredacted incident report, which the defendant claims was suppressed in violation of *Brady v Maryland*, 373 US 83 (1963); and (2) statements from two suspects identified in that report, including a confession from one of the suspects. Under MCR 6.502(G)(2), a defendant may file a second or subsequent motion for relief from judgment based on "a claim of new evidence that was not discovered before the first such motion." See also *People v Swain*, 499 Mich 920 (2016). [*Robinson*, 503 Mich at 883.]

With this instruction in mind, we now conclude that the trial court erred by prematurely and summarily denying defendant's motion for relief from judgment. We reverse and remand to the trial court for further proceedings consistent with this opinion.

## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. DEFENDANT'S 2007 JURY TRIAL

In 2007, a jury convicted defendant of two counts of armed robbery in violation of MCL 750.529 and the trial court sentenced him as a fourth-offense habitual offender to concurrent terms of 33 to 50 years' imprisonment. We glean the following facts from the original trial court record.

On August 23, 2005, an armed robbery occurred at a convenience store in Tyrone Township, Kent County, Michigan. At around 10:05 p.m., just after the store closed for the night, a man came through the door "covered in black" and with his face only partially visible. Wielding a silver and black handgun, the man insisted that the two store attendants, who happened to be husband and wife, "[p]ut all the money in this bag," pointing to his dark-colored duffle bag. He also demanded cigarettes. Having obtained about $650 in cash and two cigarette cartons, the man fled from the store. After he left, one of the victims went to the door to see what type of car the robber was fleeing in. The victim then got into his pickup truck and attempted to follow the car, which "took off at a high rate of speed." The victim could not get close enough to see the license plate number and, ultimately, lost control of the truck while making a sharp turn and the truck went off the road and into a ditch.

Shortly after the robbery took place, law enforcement arrived on the scene and took the statements of both victims. Sometime thereafter, police dispatch advised that a road-rage incident had occurred nearby that might have related to the armed robbery. The instigating vehicle in this separate incident was a white Lincoln Town Car. One of the law enforcement officers responded to that vehicle's registered address. The house was dark. No one answered at the door. The law enforcement officer also acknowledged that several bystanders told him that they had seen a suspicious white car around the convenience store prior to the robbery. Nevertheless, the officer made no further investigation.

The responding officers turned over their reports to the detective assigned to the case. The detective testified that he identified defendant as a possible suspect. At a physical lineup, both victims were "positive" that defendant was the man who robbed them, identifying him both by sight and by voice, emphasizing his light complexion and distinctive voice. While adamant that defendant was the perpetrator, both victims separately testified that the perpetrator had pulled up his black hooded sweatshirt over his face so that they could only see "a few strands of hair," eyebrows, and cheeks. When presented with his original statement to the police in which he stated that the robber had worn a black ski mask, one of the victims, who also happened to be an NRA licensed instructor for personal protection, insisted that the police officer who took the statement had made a mistake and that the robber did not, in fact, wear a black ski mask as originally reported. The detective also testified that defendant had made some statements that he believed incriminating, including saying, "Yeah, I know," after the detective told him that no one was shot during the armed robbery, and asking after the physical lineup whether "she" picked him out. The detective took this latter statement as evidence that defendant had knowledge of the gender of one of the two victims. At this point, the detective closed the case and obtained a warrant for defendant's arrest.

Subsequently, the detective learned that a man named Thomas Grantham had information about an armed robbery and "was looking for some exchange on some charges that he was going through, consideration." The detective described how this scenario was not unusual at all, and "a lot of times it is very helpful in getting through some particularly hard cases." Grantham believed that another man named James Eller had committed the armed robbery. The detective interviewed Eller, who was incarcerated at the prison in Muskegon. At a second interview, Eller admitted that what he had told the detective in Muskegon was not entirely truthful. Eller asserted that Grantham committed the robbery and indicated that he might be able to identify Grantham's accomplice. Overall, the detective considered Eller uncooperative. During cross-examination, defense counsel focused her questioning on the detective's interaction with Grantham and Eller, and each individual's respective accusations. The detective described how Eller claimed that Grantham "wanted him to go and get the black bag that the money was put in" and gave Eller directions north from the store. Eller stated that he found the black bag, which contained money, shoes, and a mask. Although Eller referred to a red-haired man as Grantham's accomplice, Eller did not accuse defendant of any involvement and could not pick defendant out of a photographic line-up.

The detective also testified that the defendant's vehicle, a Chevy Beretta, was not white. However, after that vehicle had been impounded for a reason unrelated to this case, investigators identified a smashed carton of Basic Lights cigarettes in the vehicle's inventory, which, although a common brand, was notably the same brand stolen from the store. The detective acknowledged that "there was talk of a white vehicle from different people" and that he attempted "to track that white vehicle down" but never actually saw the white '92 Lincoln that the responding officer had located the night of the incident. The detective did not refer to the investigation of any other white vehicles.

On this evidence, the prosecution rested. Defendant did not present any witnesses. At the close of evidence, defense counsel moved for a mistrial based on an allegation of a discovery violation by the prosecution, asserting that she had received only one police report at the start of trial and that she had never seen the report referring to the smashed cigarette carton inventoried in defendant's impounded vehicle. She argued that had she obtained the information concerning Eller and Grantham earlier, she "would have been able to investigate those to determine exactly what was going on."

In response, the prosecutor maintained that he had given defense counsel "an opportunity for the past ten or fifteen minutes" to go through the detective's file and did not "believe there is any exculpatory evidence that was kept from the defense." He admitted that he was not previously aware of the cigarette package and that the reports concerning Eller and Grantham "didn't come over in the initial package of materials." He maintained that "[w]hat those reports mainly consist of are those two individuals pointing the finger at one another" and "[t]here is a lot of material in there, none of it which really pertains to this particular incident." He acknowledged that there were additional reports but believed them unrelated to the armed robbery at issue in this case.

After hearing this argument, the trial court denied defendant's motion for a mistrial. Notably, the trial court acknowledged that exchange of discovery was a "chronic problem" and that "[i]t doesn't always surface as an issue but when it does, it has the same explanation, that

material has been gathered by the detective which was not communicated to either party." The jury convicted defendant of two counts of armed robbery in violation of MCL 750.529. The trial court sentenced defendant as a fourth-offense habitual offender to concurrent terms of 33 to 50 years' imprisonment.

In an unpublished per curiam opinion, this Court affirmed defendant's convictions. See *People v Robinson*, unpublished per curiam opinion of the Court of Appeals, issued July 1, 2008 (Docket No. 277796).

B. UNREDACTED POLICE REPORTS

For several years, defendant unsuccessfully sought all of the police reports related to the investigation under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. The Sheriff's Department eventually produced a heavily redacted copy of the police reports. Unsatisfied with the redactions, defendant and his mother made additional FOIA requests. In 2014, defense counsel made a FOIA request for the same reports. Finally, in 2015, after an appeal to the Kent County Board of Commissioners, defense counsel obtained a copy of the entire, unredacted police reports. These reports formed the basis of defendant's motion for post-judgment relief.

Without the benefit of an evidentiary hearing, we cannot discern with certainty which documents were available to the defense at the time of trial. The prosecution maintains that none of these documents are new because defense counsel had the opportunity to review the detective's file during the course of trial. Notably, however, when considering defendant's application for leave to appeal, our Supreme Court issued an interim order directing the prosecution to respond and specifically ordered that "the prosecutor shall address what reports were referenced at trial during the parties' arguments on the defendant's motion for a mistrial and who reviewed those reports." See *People v Robinson*, 915 NW2d 373 (2018). The prosecution was evidently unable to comply with this mandate as its response did not provide any specific information resolving this question. Our review of the complete and unredacted reports leads us to the conclusion that there were several, possibly significant reports containing information only provided to defendant for the first time in 2015. While we cannot catalog each report definitively on this record, the trial court appeared to accept that the reports constituted newly discovered evidence.

Several reports detailing the competing accusations of Eller and Grantham were potentially significant to the defense. Multiple bystanders canvassed by police described a suspicious white vehicle; at least one witness identified the white car as possibly a Grand Am. Notably, another report detailed Grantham's claims to the investigating detective that Eller, his former roommate, had confessed to using Grantham's white Grand Am to commit the robbery and had ruined the vehicle's tires in the ensuing getaway. According to the detective's report:

> Grantham said that Eller asked to use his car. He returned later and said I just ruined your car. They checked on it and it appeared that Eller had slammed on his brakes and flat-sided the front tires.
>
> Eller told him what happened. Eller told him that he robbed the store at 17 and Sparta. Eller parked the car by the trailer park. He said that there was an old man

> and woman in the store. He went in and demanded money. Eller told him that it was funny how scared the older woman was. Eller told him that he took a black duffel bag in with him with the words bum on the side.
>
> Eller told him that he got money. Grantham said that Eller would usually tell him if he got cigarettes from doing a job and this time he did not say anything other than he got money and that he would pay for the new tires.
>
> Eller left the store and said that someone in a truck was chasing him north on Sparta from 17 Mile Rd. Eller told him that he had to slam on his brakes to make the turn eastbound on 18 Mile from Sparta and barely made the turn. The truck did not make it and went into the ditch.
>
> Eller told him that he threw the gun out near 18 and Sparta into the ditch. Eller told Grantham that he wiped the gun off before throwing it out the window. He also told Grantham that he went back up to the area in an attempt to find the gun but was not able to locate it.
>
> Grantham said that Eller got the gun for the robbery from his son. He said that the gun was a metal dart type gun. He said that it was chrome and black and had a black extension on the barrel.

Importantly, in addition to knowing these remarkably unique facts concerning the circumstances of the crime, Grantham also evidently told the detective that he went to an auto repair shop and had both front tires replaced the next day. The detective was able to confirm that Grantham had his white Grand Am serviced at a Firestone Complete Auto Care on August 24, 2005, the day after the robbery, for two new tires. In fact, the detective was able to obtain the work order and noted "that should be included with this report," although it apparently never was.

For his own part, in a separate police report, Eller initially denied having any knowledge of the robbery and denied that he ever had to replace tires on Grantham's car. Eller accused Grantham of having committed the robbery. Eller claimed that he overheard Grantham and "some red-haired guy" who "were talking about getting chased and having some fun." Eller thought the red-haired individual's name was Kevin or Keith. Eller claimed that he could take a polygraph and pass it. At a subsequent interview, Eller once again said that he still wanted to take the polygraph exam but admitted that he had not been truthful before because "he was not sure how the whole case was going to go so he held back some information." According to the detective, Eller said "at this point now, he was sure he had no involvement." Eller again accused Grantham of having committed the robbery, and said that, on the night of the robbery, Grantham directed him to look in a particular ditch north of the store and, when he did so, "[h]e found a black bag with money, shoes, and a mask that was used." Eller did not know who the red haired male was who was with Grantham. Eller also "said there were other crimes that he and Grantham were involved in but he would not talk about those unless he was granted immunity." The detective showed Eller a six-person photo lineup containing defendant's picture. Eller denied that the person that was with Grantham was in the lineup. Later that day, the detective picked Eller up for the polygraph examination. While in the exam room, he decided not to take the exam.

C. DEFENDANT'S INDEPENDENT INVESTIGATION

With the information gained from the unredacted police reports, defense counsel continued to seek additional evidence supporting an anticipated motion for post-judgment relief. On August 8, 2015, Eller wrote to defense counsel that he "know[s] 100% for sure your client is innocent" and asked for a face-to-face meeting with a guarantee of confidentiality. Eller claimed that he could give evidence of defendant's innocence, but "will not put myself under any prosecution heat, for lack of a better phrase." He also asked and circled at the bottom of the handwritten letter "Is there a statute of limitations on Robbery?" Defense counsel hired a former Wyoming Police detective to investigate further. Eller initially denied involvement but eventually confessed to the private investigator that he committed the armed robbery while Grantham drove the white Pontiac Grand Am. Eller also provided several unique details including how he asked the victims for cigarettes, wore a black ski mask and black clothes, and that another vehicle chased them. According to the private investigator, Eller claimed notoriety as "The Carton Kid" as portrayed by local news media because it was his custom to always demand cartons of cigarettes during robberies. Grantham denied involvement but once again admitted that Eller had told him that Eller used his car—the white Grand Am—in a robbery. Grantham's ex-wife and the two victims declined to speak with the private investigator.

Defense counsel also obtained statements from both trial counsel and original appellate counsel, both of whom suggested that the complete, unredacted reports included new information that would have been helpful to defendant's case.

D. DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

In March 2017, defendant filed his motion under MCR 6.500 *et seq.* to set aside the judgment of conviction and sentence based on arguments of newly discovered evidence, ineffective assistance of counsel, and an alleged *Brady*[1] violation.

The trial court denied defendant's motion without holding an evidentiary hearing. Accepting that the complete and unredacted reports contained newly discovered evidence, the trial court nevertheless concluded that the information would not "have had any likelihood of changing the outcome of trial, i.e., acquitting [d]efendant of any of the charges against him." The trial court believed that the testimony and in-court identifications of the two victims "was substantial evidence against [d]efendant, upon which any reasonable juror could have found [d]efendant guilty beyond a reasonable doubt." The trial court did not specifically address Eller's confession, Eller's knowledge of particulars of the crime, or the auto repair work order reflecting that Grantham's white Pontiac Grand Am had its tires replaced the day after the robbery and high-speed car chase.

[1] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

## II. DISCUSSION

### A. STANDARD OF REVIEW

We review a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Johnson*, 502 Mich 541, 564; 918 NW2d 676 (2018). "An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes." *Id.* (quotation marks and citation omitted). "A mere difference in judicial opinion does not establish an abuse of discretion." *Id*.

### B. DEFENDANT'S MOTION FOR A NEW TRIAL

Subchapter 6.500 of the Michigan Court Rules sets forth the procedure for post-appeal relief from a criminal conviction and provides the exclusive means for challenging a conviction once a defendant has exhausted the normal appellate process. *People v McSwain*, 259 Mich App 654, 678; 676 NW2d 236 (2003). Because defendant's motion was a successive motion for post-judgment relief, defendant was required to first meet a threshold requirement of presenting " 'new evidence that was not discovered before the first such motion.' " See *Robinson*, 503 Mich at 883, quoting *People v Swain*, 499 Mich 920; 878 NW2d 476 (2016); MCR 6.502(G)(2). Although it did not hold an evidentiary hearing, the trial court accepted that the evidence presented by defendant was new and satisfied this procedural bar to successive motions. We find no reason to disturb the trial court's determination that defendant presented new evidence, which also appears to be the understanding accepted by our Supreme Court. See *Robinson*, 503 Mich at 883.

Satisfying the new evidence procedural threshold for successive motions was only the initial qualifying step for defendant to receive a merits review of his motion for post-judgment relief. See *People v Swain*, 288 Mich App 609, 635-636; 794 NW2d 92 (2010). In order to obtain relief, once that initial threshold for reviewing a successive motion was met, defendant still needed to separately satisfy the requirements of MCR 6.508(D)(3), which "by its own language, applies to successive motions." See *id*. "MCR 6.508(D)(3) provides that a court may not grant relief to a defendant if the motion alleges grounds for relief that could have been previously raised, unless the defendant demonstrates both good cause for failing to raise such grounds earlier as well as actual prejudice." *Johnson*, 502 Mich at 565. " 'Cause' for excusing procedural default is established by proving ineffective assistance of appellate counsel, pursuant to the standard set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), or by showing that some external factor prevented counsel from previously raising the issue." *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995).

Although the trial court did not expound on its reasoning, it was evidently satisfied that defendant's showing of new evidence satisfied the "good cause" standard. Because defendant was only able to obtain the complete and unredacted police reports as a result of his defense counsel's successful 2015 FOIA appeal, we agree that defendant could not have raised his claims at an earlier juncture. See *Johnson*, 502 Mich at 565. We disagree, however, with the trial court's application of the "actual prejudice" standard. The trial court determined only that the complete and unredacted police reports would not have had any likelihood of changing the outcome of trial. In coming to this conclusion, the trial court lumped together defendant's

separate claims of (1) newly discovered evidence; (2) a *Brady* violation; and (3) ineffective assistance of counsel, reasoning that "all require a showing that the outcome of [d]efendant's trial would have been different" and that defendant failed to make this showing.

As an initial matter, we conclude that the trial court misunderstood and incorrectly stated the governing legal standard for satisfying this particular element of each defense theory. In rejecting defendant's argument that there was a reasonable probability that the outcome of defendant's trial could have differed, the trial court held that there "was substantial evidence against [d]efendant, upon which any reasonable juror could have found [d]efendant guilty beyond a reasonable doubt," that this evidence "would have lead [sic] a reasonable juror to find [d]efendant guilty," and that "it cannot be said that there is a 'reasonable probability' that no reasonable juror would have found [d]efendant guilty." This recitation of the governing legal standard for reviewing a motion for post-judgment relief required too much from defendant because it more closely approached the higher legal standard for establishing "actual innocence," not "actual prejudice." See *Swain*, 288 Mich App at 638.[2]

This Court has held that the "actual prejudice" requirement for obtaining post-judgment relief "is similar to the prejudice standard in an ineffective assistance-of-counsel claim." See *id*. Stated simply, to obtain relief, defendant did not need to demonstrate that no reasonable juror would have found him guilty. Rather, he needed only to establish a reasonable probability that the result of his jury trial would have been different. See *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). This determination hinged not on whether any reasonable juror could find him guilty beyond a reasonable doubt or "whether the defendant would have been more likely than not to have received a different verdict, but whether he received a fair trial in the absence of the evidence, *i.e.*, a trial resulting in a verdict worthy of confidence." See *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998). Defendant was not required to prove that the outcome would have resulted in acquittal. See *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014).

We find our Supreme Court's recent decision in *Johnson* dispositive. In that decision, our Supreme Court held that "[i]n order to determine whether newly discovered evidence makes a different result probable on retrial, a *trial court must first determine whether the evidence is credible*." See *Johnson*, 502 Mich at 566-567 (emphasis added). The *Johnson* Court explained:

> In making this assessment, the trial court should consider all relevant factors tending to either bolster or diminish the veracity of the witness's testimony. *A trial court's function is limited when reviewing newly discovered evidence, as it is not the ultimate fact-finder; should a trial court grant a motion*

[2] "To satisfy the "actual innocence" standard, a defendant "must show that it is more likely than not that no reasonable juror would have found [the defendant] guilty beyond a reasonable doubt." *Swain*, 288 Mich App at 638, quoting *Schlup v Delo*, 513 US 298, 327; 115 S Ct 851; 130 L Ed 2d 808 (1995). Although defendant maintains his actual innocence, as a matter of law, this is a separate legal theory for relief.

> *for relief from judgment, the case would be remanded for retrial, not dismissal. In other words, a trial court's credibility determination is concerned with whether a reasonable juror could find the testimony credible on retrial.* See *Connelly v United States*, 271 F2d 333, 335 (CA 8, 1959) ("The trial court has the right to determine the credibility of newly discovered evidence for which a new trial is asked, and if the court is satisfied that, on a new trial, *such testimony would not be worthy of belief by the jury*, the motion should be denied.") (quotation marks and citation omitted; emphasis added).
>
> * * *
>
> If a witness's lack of credibility is such that *no* reasonable juror would consciously entertain a reasonable belief in the witness's veracity, then the trial court should deny a defendant's motion for relief from judgment. However, if a witness is not patently incredible, a trial court's credibility determination must bear in mind what a reasonable juror might make of the testimony, and not what the trial court itself might decide, were it the ultimate fact-finder. [*Id*. at 567-568 (first emphasis added).]

In this case, the trial court exceeded its gatekeeping role and acted prematurely in denying defendant's motion. At the very least, the evidence presented by defendant necessitated an evidentiary hearing for the purpose of ascertaining the credibility of the evidence presented. See MCR 6.508(B). The trial court was required to determine in the first instance only whether defendant's new evidence was "patently incredible," and, if not, to contemplate "what a reasonable juror might make of the testimony" at a future retrial. See *Johnson*, 502 Mich at 568. By not making any initial credibility determination, the trial court improperly substituted itself as the ultimate fact-finder. See *id*. Furthermore, *Johnson* also instructs that "[i]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Johnson*, 502 Mich at 576 n 16 (quotation marks and citation omitted).

An abuse of discretion is cognizable where "the record discloses a clear mistake or omissions that preclude meaningful review . . . ." *People v Blevins*, 314 Mich App 339, 361; 886 NW2d 456 (2016). Because the trial court did not hold an evidentiary hearing before concluding that a different result was not probable on retrial, as required by *Johnson*, and did not apply the correct legal standard when considering defendant's motion, the trial court abused its discretion.

Reversed and remanded for additional proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro

# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellant/Cross-Appellee, | UNPUBLISHED<br>June 18, 2019 |
| v | No. 344322<br>Berrien Circuit Court |
| MICHAEL JEFFERY JOHNSON,<br><br>Defendant-Appellee/Cross-Appellant. | LC No. 1980-001229-FH |

Before: BECKERING, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

The prosecution appeals by leave granted the trial court's order granting defendant's MCR 6.500 motion for relief from judgment. Defendant cross-appeals the same order. In August 1980, defendant pled guilty to second-degree murder, MCL 750.317, for a crime he committed as a juvenile, and the sentencing court sentenced him to life with the possibility of parole. As a result of defendant's 2017 motion for relief from judgment, the trial court held that this sentence was unconstitutional under *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and it ordered that defendant be resentenced. For the reasons set forth below, we reverse.

## I. RELEVANT FACTS AND PROCEDURAL HISTORY

This case involves a defendant who was sentenced as a juvenile to life with the possibility of parole for murdering his classmate. Defendant was 17 years old at the time of the offense. Defendant was attempting to sexually assault the victim when he panicked, tied her hands behind her back, and pushed her into a steep irrigation ditch. Defendant knew that the victim fell into the water head first, and he waited approximately five minutes, until he no longer heard her splashing, before leaving. He admitted that he intended to kill the victim to keep her from telling the authorities that he had tried to sexually assault her.

Defendant has now served nearly 40 years in prison.[1] He has been eligible for seven regularly scheduled parole board reviews during his time in prison. The Board personally interviewed him the first four times, in 1986, 1991, 1996, and 2001. Each interview resulted in a "no interest" decision with no reason provided. The 2001 letter also noted:

> The Parole Board acknowledges the many positive accomplishments you have made throughout your years of incarceration. At this time the parole board has voted not to advance your case to the public hearing stage of the lifer law process. Your next review/interview will be in five (5) years. The parole board urges your continued positive adjustment.

For the next three reviews, the parole board declined to interview defendant and instead chose to do a "file review." Those reviews resulted in a "no interest" decision in 2006, 2011, and 2016, without providing a reason.

In January 2017, defendant filed a motion for relief from judgment, MCR 6.502, arguing that he is serving a de facto life sentence that offers him no "meaningful opportunity for release" in violation of the Constitution, citing various relevant federal cases.[2] He argued that recent research involving the juvenile's brain development qualified as newly discovered evidence because none of that research was available when he was sentenced. Defendant also argued that he was entitled to be resentenced because the purpose and effect of his sentence has not afforded him a meaningful opportunity for release and that his sentence is actually longer than juveniles convicted of first-degree murder and who have since received term of years sentences. See MCL 769.25(9). Defendant also contended that state statutes governing his sentence fail to protect his constitutional liberty interest in violation of the due-process clause. Defendant supported his motion with various letters in support of his release, including multiple letters from the victim's parents, a referral from the warden of the prison, and letters from multiple Michigan Department

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[1] Defendant has mounted a number of challenges to his conviction and sentence. He challenged the voluntariness of certain incriminating statements made to the police, the factual basis for his guilty plea, and the trial court's failure to advise him that second-degree murder was a "Proposal B offense," MCL 791.234(4), which could negatively affect his eligibility for parole. *People v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued October 8, 1982 (Docket No. 55053). In 2003, he moved for relief pursuant to MCR 6.500, but later withdrew his motion. In 2009, he filed a motion pursuant to MCR 6.508(D)(*iv*), in which he argued that the parole board practices were unconstitutional because they ex post facto altered the nature of defendant's sentence. The trial court denied the motion, and this Court and our Supreme Court denied his applications for leave to appeal. *People v Johnson*, unpublished order of the Court of Appeals, entered January 25, 2010 (Docket No. 295013); *People v Johnson*, 488 Mich 1038 (2011).

[2] *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005); *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010); *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012).

of Corrections employees. Defendant included with his motion numerous awards and positive reviews for his performance in prison.

After a hearing on defendant's motion, the trial court held that defendant's due-process, equal protection, and Eighth Amendment constitutional rights were violated by the lack of a meaningful opportunity for release afforded to a juvenile under Michigan's parole system. This appeal followed.

## II. MCR 6.500 MOTION FOR RELIEF

The prosecution first argues that the trial court erred in applying the newly discovered evidence exception to the prohibition on successive motions for relief from judgment.

In a motion for relief pursuant to MCR 6.500 *et seq*., a defendant has the burden to establish entitlement to relief. MCR 6.508(D). A defendant is generally only entitled to file one motion for relief from judgment. MCR 6.502(G)(1). However, this rule is not absolute. MCR 6.502(G)(2) permits the filing of a successive motion under two circumstances:

> 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 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.]

Any successive motion that does not assert one of these two exceptions is to be returned to the defendant without filing by the court. MCR 6.502(G)(1). No appeal of the denial or rejection of a successive motion is permitted. MCR 6.502(G)(1).

Defendant had already filed a motion for relief from judgment in 2009 before filing the motion involved in the instant appeal. In the case at bar, defendant invoked the new-evidence exception, in support of which he identified as a series of scientific studies regarding the development and maturation of the human brain. However, it is clear from defendant's argument, and the trial court's ruling, that both defendant and the trial court relied less on newly discovered evidence and more on "a retroactive change in the law that occurred after [his] first motion for relief." MCR 6.50(G)(2). Defendant's successive motion was arguably reviewable based on retroactive changes in the law; specifically with regard to how *Miller* and related cases interpreting and extending its principles to juvenile offenders sentenced to *de facto* life sentences affected defendant's sentence. We conclude, therefore, the trial court did not err in granting defendant's successive motion for relief from judgment.

## III. ENTITLEMENT TO RESENTENCING

The prosecution next argues that the trial court erred as a matter of law in concluding that *Miller* and related cases apply to defendant's valid sentence. According to the prosecution, those cases do not apply to defendant's sentence of life with eligibility for parole after 10 years.

Whether the Michigan parole system operates in a constitutional manner is a very different question from whether defendant was sentenced in a constitutional manner, and requires a different kind of legal procedure. We agree.

In *Miller*, the Supreme Court of the United States held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments." *Miller*, 567 US at 465. The Supreme Court explained:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. [*Id.* at 477-478 (quotation marks and citation omitted).]

In 2016, the Supreme Court clarified that although "*Miller*'s holding had a procedural component" because it "require[d] a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence," "*Miller* announced a substantive rule of constitutional law" that applied retroactively to juvenile offenders. *Montgomery v Louisiana*, __ US __, __; 136 S Ct 718, 734; 193 L Ed 2d 599 (2016) (quotation marks and citations omitted).

*Miller* and *Montgomery* clearly apply to juveniles sentenced to life in prison *without* the possibility of parole. One month after granting leave in the instant case, this Court addressed whether *Miller* and *Montgomery* invalidated a sentence of life *with* the possibility of parole in *People v Williams*, __ Mich App __; __ NW2d __ (2018) (Docket No. 339701).[3] In *Williams*, a jury convicted the defendant in 1987 of "first-degree murder, MCL 750.316, second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-

[3] The Michigan Supreme Court is currently holding the defendant's application for leave to appeal in abeyance in *Williams*, pending the Court's decision in *People v Turner* (Docket No. 158068), as that decision may resolve an issue raised in *Williams*. *People v Williams*, ___ Mich ___; ___ NW2d ___ (Issued April 5, 2019, Docket No. 158853). In the meantime, *Williams* remains binding precedent.

firearm), MCL 750.227b." *Williams*, __ Mich App at __; slip op at 1. The trial court sentenced the defendant to "mandatory life imprisonment without the possibility of parole for his first-degree murder conviction, life with the possibility of parole for his second-degree murder conviction, and a consecutive two years' imprisonment for his felony-firearm conviction." *Id*. In response to *Miller* and *Montgomery*, "the prosecution filed a notice to seek a term-of-years sentence for defendant's first-degree murder conviction[,]" and the trial court eventually resentenced him to "25 to 60 years' imprisonment for the first-degree murder conviction, leaving the other two sentences intact." *Id*. at __; slip op 1-2. "Defendant later filed a motion for relief from judgment, in which he argued that he was entitled to resentencing on his second-degree murder conviction because his life with the possibility of parole sentence was also invalidated by *Miller* and *Montgomery*." *Id*. at __; slip op at 2. The trial court agreed, and the prosecutor appealed. *Id*.

On appeal, this Court discussed the backdrop provided by the United States Supreme Court's reasoning and holdings in *Miller* and *Montgomery*, and then ruled as follows:

> Against this backdrop, it is clear that, at maximum, *Miller* and *Montgomery* guarantee that defendants convicted as juveniles are afforded " 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' " *Miller*, 567 US at 479, quoting *Graham*[*v Florida*], 560 US [48,] 75[; 130 S Ct 2011; 176 L Ed 2d 825 (2010)]. At minimum, these cases apply only to mandatory sentences of life with the possibility of parole. See, e.g., *People v Wines*, __ Mich App __, __; NW2d __ (2018) (Docket No. 336550); slip op at 3; lv pending, ("[T]he constitutional holding in *Miller* applied only to life-without-parole decisions."). Here, under either interpretation, defendant's sentence of life with the possibility of parole satisfied *Miller*'s mandate. Defendant once served a sentence of life without the possibility of parole, but is now eligible for parole on each of his sentences. Stated differently, defendant has been granted a meaningful opportunity to obtain release, see *Miller*, 567 US at 479, on his sentences for first- and second-degree murder. And because defendant has some meaningful opportunity to obtain release on his sentence of life with the possibility of parole, that sentence was not invalid under *Miller*. [*Williams*, __ Mich App at __; slip op at 4.]

As a published opinion, *Williams* dictates the outcome of this issue. MCR 7.215(C)(2). Thus, whether we view *Miller* and *Montgomery* as applicable only to juveniles sentenced to mandatory life without the possibility of parole, or as guaranteeing juvenile offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," defendant's sentence of life with the possibility of parole satisfies *Miller's* mandate. *Miller*, 567 US at 479, quoting *Graham*, 560 US at 75. In other words, defendant's sentence of life with the possibility of parole is not invalid under *Miller* such that he is entitled to resentencing.

Defendant seeks to distinguish his case from *Williams* by pointing out that, unlike the *Williams* defendant, he has presented evidence showing that a parolable life sentence does not actually afford juvenile offenders the same meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation that a term-of-life sentence imposed to comply with *Miller* affords other juvenile offenders. The essence of defendant's complaint seems to be that

the review process for term-of-life juvenile offenders provides meaningful review and relevant information and results in appealable decisions. By contrast, the process for parolable lifers is similar to the review process for prisoners serving non-parolable life sentences who might be seeking pardon or commutation, and leaves juvenile offenders in a state of prison purgatory, with no information for improvement and no appealable decisions.

We explained the parole process for a prisoner sentenced to a term of years in considerable detail in *In re Elias*, 294 Mich App 507, 511-521; 811 NW2d 541 (2011).

> A prisoner sentenced to a term of years comes under the jurisdiction of the Board when he or she has served the minimum sentence, adjusted for any good time or disciplinary credits. MCL 791.233(1)(b) through (d); MCL 791.234(1) through (5). Several months before the prisoner's earliest release date, a DOC staff member must conduct an in-depth evaluation of the prisoner in order to advise the Board. A prison staff member prepares for the Boards review a "Parole Eligibility Report" (PER) summarizing the "prisoner's prior record, adjustment and other information[.]" DOC Policy Directive 06.05.103, p. 1; see also MCL 791.235(7). In preparing a PER, the staff member interviews the prisoner and gathers vital documentation, such as the results of any mental-health examinations and evaluations from prison programs. DOC Policy Directive 06.05.103, ¶¶ I, M, p. 2. The PER "shall contain information as required by MCL 791.235" and any other information requested by the Board for its review. *Id*. at ¶ O, p. 2. Prison officials submit the PER to the Board's "Case Preparation Unit," along with the contents of the prisoner's central file. The unit uses the PER and file documents to score the prisoner's parole guidelines. DOC Policy Directive 06.05.100, ¶ D, p. 1.
>
> Statutorily mandated parole guidelines form the backbone of the parole-decision process. As described by this Court in *In re Parole of Johnson*, 219 Mich App 595, 599, 556 NW2d 899 (1996), "[t]he parole guidelines are an attempt to quantify the applicable factors that should be considered in a parole decision" and are "intended to inject more objectivity and uniformity into the process in order to minimize recidivism and decisions based on improper considerations such as race." [*In re Elias*, 294 Mich App at 511-12 (footnotes and internet citations to DOC documents omitted).]
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> * * *
>
> "That score is then used to fix a probability of parole determination for each individual on the basis of a guidelines schedule.[4] Prisoners are categorized

[4] Although decisions by the parole review board are not grievable, prisoners may "challenge the calculation of their parole guideline score, including the accuracy of the information used in calculating the score, by filing a grievance pursuant to Policy Directive 03.02.130, 'Prisoner/Parolee Grievances.' " Policy Directive 06.05.100, ¶ G.

> under the guidelines as having a high, average, or low probability of parole." *Johnson*, 219 Mich App at 599, 556 NW2d 899. A prisoner with a score of +3 or greater merits placement in the high-probability category, a score of -13 or less warrants assignment to the low-probability category, and a score between those figures falls within the average-probability category. DOC Policy Directive 06.05.100, Attachment A, p. 10. [*Id.* at 518.]
>
> A prisoner being considered for parole may also undergo an interview conducted by one or more Board members assigned to the prisoner's panel. If the prisoner's guidelines score falls within either the high- or low-probability-of-parole categories and the Board intends to follow the guidelines recommendation to grant or deny parole respectively, the Board need not interview the prisoner. . . . Following the parole interview, a "Case Summary Report" is created for the Board's review." [*Id.*]
>
> In 2005, the DOC began implementing the Michigan Prisoner ReEntry Initiative (MPRI) in various stages. The MPRI is a multiagency, multicommunity project designed to promote public safety and reduce the likelihood of parolee recidivism. [*Id.* at 519.]
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> * * *
>
> A staff member from the DOC must formulate a TAP[5] with each prisoner, mostly to assess the prisoner's reentry into society, but also to assist the Board in rendering its parole decision. [*Id.* at 519-520.]

"Ultimately, 'matters of parole lie solely within the broad discretion of the [Board] . . . .' " *Id.* at 521, quoting *Jones v Dep't of Corrections*, 468 Mich 646, 652; 664 NW2d 717 (2003). "Notwithstanding, the Legislature has clearly imposed certain statutory restrictions on the Board's exercise of its discretion." *In re Elias*, 294 Mich App at 521-522. For example:

> The parole board may depart from the parole guidelines by denying parole to a prisoner who has a high probability of parole as determined by the guidelines or by granting parole to a prisoner who has a low probability of parole as determined under the parole guidelines. A departure under this subsection shall be for substantial and compelling reasons stated in writing. [MCL 791.233e(6).]
>
> Once the Board has rendered its decision, it must issue in writing "a sufficient explanation for its decision" to allow "meaningful appellate review," *Glover v*

[5] TAP is an acronym for Transition Accountability Plan, "the lynchpin of the MRPI Model." *In re Elias*, 294 Mich App 507, 519; 811 NW2d 541 (2011) (quotation marks and citation omitted). The TAPs "consist of summaries of the offender's Case Management Plan at critical junctures in the transition process[] and are prepared with each prisoner . . . at the point of the parole decision . . . ." *Id.* (quotation marks and citation omitted).

> *Parole Bd*, 460 Mich. 511, 519, 523; 596 NW2d 598 (1999), and to inform the prisoner of "specific recommendations for corrective action" if necessary "to facilitate release," MCL 791.235(12). [*In re Elias*, 294 Mich App at 522–23.]

By contrast, parolable lifers sentenced for a crime committed before October 1, 1992, as is the case with the present defendant, become eligible for parole after they have served 10 calendar years of their sentence. MCL 791.234(7)(a). The prisoner may be placed on parole according to the conditions prescribed in MCL 791.234(8), which provide in relevant part:

> (a) At the conclusion of 10 calendar years of the prisoner's sentence and thereafter as determined by the parole board until the prisoner is paroled, discharged, or deceased, and in accordance with the procedures described in subsection (9), 1 member of the parole board shall interview the prisoner. The interview schedule prescribed in this subdivision applies to all prisoners to whom subsection (7) applies, regardless of the date on which they were sentenced.
>
> (b) In addition to the interview schedule prescribed in subdivision (a), the parole board shall review the prisoner's file at the conclusion of 15 calendar years of the prisoner's sentence and every 5 years thereafter until the prisoner is paroled, discharged, or deceased. A prisoner whose file is to be reviewed under this subdivision shall be notified of the upcoming file review at least 30 days before the file review takes place and must be allowed to submit written statements or documentary evidence for the parole board's consideration in conducting the file review.
>
> (c) A decision to grant or deny parole to the prisoner must not be made until after a public hearing held in the manner prescribed for pardons and commutations in sections 44 and 45. Notice of the public hearing must be given to the sentencing judge, or the judge's successor in office. Parole must not be granted if the sentencing judge files written objections to the granting of the parole within 30 days of receipt of the notice of hearing, but the sentencing judge's written objections bar the granting of parole only if the sentencing judge is still in office in the court before which the prisoner was convicted and sentenced. A sentencing judge's successor in office may file written objections to the granting of parole, but a successor judge's objections must not bar the granting of parole under subsection (7). If written objections are filed by either the sentencing judge or the judge's successor in office, they must be made part of the prisoner's file.

Even a cursory comparison of the parole procedures applicable to juvenile offenders resentenced after *Miller* to term-of-years sentences with those applicable to juvenile offenders who received parolable life sentences leads to the conclusion that parole procedures are more favorable to the former than to the latter. "[P]arole guidelines need not be prepared for prisoners serving parolable life sentences until the parole board is faced with the decision whether to release the prisoner." *Jackson v Dep't of Corrections*, 247 Mich App 380, 384; 636 NW2d 305 (2001). In other words, parolable lifers do not get the benefit of the parole guidelines until after an interview with a member of the parole board, after the sentencing judge or the judge's

successor has had an opportunity to register any objections, and after a public hearing of the type contemplated for prisoners seeking pardon or commutation. If after regular review of the parolable lifer's paper file the board issues a "no interest" decision, it is not required "to inform the prisoner of "specific recommendations for corrective action" if necessary "to facilitate release," MCL 791.235(12), because a "no interest" decision is not a "final determination." *Gilmore v Parole Bd*, 247 Mich App 205, 227-228; 635 NW2d 345 (2001). Likewise, a "no interest" decision is not appealable because it did not progress "through all the steps in the parole eligibility process to the point where an appealable 'ultimate decision' to grant or deny parole was rendered." *Id*. at 230-231. As envisioned, the parole procedure does give juvenile offenders sentenced to parolable life an opportunity to submit written statements or documentary evidence establishing reasons for parole, such as their maturity and rehabilitation. However, we are sympathetic to defendant's point that the procedures for term-of-years sentences are better than those for parolable life sentences, and that the potential for meaningful review in his case has gone largely unrealized for an unknown reason.

The essence of defendant's sentence challenge, however, is not that the sentence itself is invalid. Rather, it is that the policies and procedures of the parole board are unconstitutional based on an application of *Miller* and *Graham* to those policies and procedures because they deprive defendant of any real possibility of parole, and hence, do not "give [juvenile] defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 US at 75. However, invalidating defendant's valid sentence and resentencing him to a term-of years is not the answer. The appropriate vehicle in which to seek redress of the alleged wrong done by the parole board is a claim for relief under 42 USC § 1983 filed against the parole board. See *Wershe v Combs*, 763 F 3d 500 (CA 6, 2014) (indicating that a § 1983 action was the appropriate vehicle to challenge a change in the procedures used to determine whether a defendant is eligible for parole); *Greiman v Hodges*, 79 F Supp 3d 933 (SD Iowa, 2015) (denying parole board's motion to dismiss the juvenile offender's § 1983 action alleging that parole procedures denied him a meaningful opportunity to obtain release); *Hayden v Keller*, 134 F Supp 3d 1000 (ED NC, 2015) (juvenile offender prevailed in § 1983 motion alleging that North Carolina parole process denied him a meaningful opportunity to obtain parole release), app dismissed 667 Fed Appx 416 (CA 4, 2016).[6]

[6] Defendant relied on *Atwell v Florida*, 197 So 3d 1040 (2016), in which Florida's Supreme Court held that the defendant's sentence of parolable life violated the Eighth Amendment because, under the statutes governing Florida's parole process, Atwell would not be eligible for parole until 2130, thus effectively making his parolable life sentence a *de facto* life sentence. *Atwell*, 197 So 3d at 1050. The Florida court concluded that the only way to correct Atwell's sentence was to remand the matter for resentencing. *Id*. Like Atwell, the present defendant argues that the parole process has effectively turned his sentence into a *de facto* life sentence without the possibility of parole, and that resentencing is the only way to correct it. However, the Florida Supreme Court abrogated *Atwell* in *Franklin v Florida*, 258 So 3d 1239 (2018). Relying on *Virginia v LeBlanc*, __ US __, 137 S Ct 1726; 198 L Ed 2d 186 (2017), which held that because the Virginia geriatric release program employed normal parole factors, it satisfied

In sum, a sentence of life with the possibility of parole was a valid sentence for second-degree murder under state law, MCL 750.317, and it meets the demands of *Miller* and its associated cases, *Williams*, __ Mich App at __; slip op at 4. "A trial judge has the authority to resentence a defendant only when the previously imposed sentence is invalid." *People v Moore*, 468 Mich 573, 579; 664 NW2d 700 (2003). Defendant's sentence is not invalid; therefore, he is not entitled to resentencing.

## IV. CONSTITUTIONAL VIOLATIONS

The prosecution argues that the trial court erred as a matter of law in rather summarily concluding that defendant's sentence violates his due process and equal protection rights. We agree.

In order to have a protected liberty interest, defendant must have a right or entitlement to something, not just a possibility. See *Glover*, 460 Mich at 521. "[T]he due process right at a typical sentencing hearing is the right to be sentenced on the basis of accurate information." *People v Eason*, 435 Mich 228, 239; 458 NW2d 17 (1990). In addition, because sentencing is a critical stage of criminal proceedings, a defendant has a Sixth Amendment right to counsel. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). Defendant has not argued that the sentencing court violated either of these due-process rights, nor has he identified any other due-process right that the sentencing court allegedly violated. Defendant's original sentence provided him the opportunity for parole; to the extent he implies that the trial court should have made obtaining parole easier by sentencing him to a term-of-years sentence, he again demonstrates that his dispute is with the parole board, not the sentencing court. Moreover, the trial court's sentence allowed defendant to be considered for parole after ten years; a term-of-years sentence would likely have delayed by a significant period of time his opportunity to be considered for parole.

The equal protection clause, US Const, Am XIV, Const 1963, art 1, § 2, does not create substantive rights; rather, it embodies the general rule that states must treat like cases alike but may treat unlike cases accordingly. *Vacco v Quill*, 521 US 793, 117 S Ct 2293; 138 L Ed 2d 834 (1997). The equal protection clause guarantees that states must treat people similarly situated alike, but it does not guarantee that people in different circumstances will be treated the same. *In re Parole of Hill*, 298 Mich App 404, 420; 827 NW2d 407 (2012).

Defendant sought relief from judgment on the ground that his sentence was invalid. A trial court may sentence a juvenile convicted of first degree murder to life in prison without the possibility of parole, MCL 750.316, MCL 769.25(2), MCL 769.25a(3), or to a term of years with

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*Graham*'s "meaningful opportunity" requirement, the Florida Supreme Court held that it had previously misapplied *Graham* and *Miller*. *Franklin*, 258 So 3d at 1241. The Florida court concluded that because "[the defendant's] sentences include eligibility for parole there is no violation of the categorical rule announced in *Graham*. *Id.* A petition for certiorari of *Franklin* was docketed in the United States Supreme Court on April 4, 2019.

a maximum of not more than 60 years and a minimum between 25 and 40 years, MCL 769.25(9). Juveniles sentenced for first-degree murder are not eligible for parole until they have served at least 25 years in prison. A trial court may sentence a juvenile convicted of second-degree murder to a parolable life sentence or to a term of years. MCL 750.317. Juveniles sentenced for second-degree murder before October 1, 1992, are eligible for parole after 10 years, while those sentenced after October 1, 1992, are eligible for after 15 years.

Neither the trial court nor defendant points to anything in these statutes that discriminates against juveniles sentenced for second-degree murder. To the extent that the trial court construed an equal protection violation based on the parole procedures applicable to defendant when compared to those applicable to a juvenile with a term of years sentence, the fact that these two groups are treated differently does not give rise to an equal protection violation because they are not similarly situated. To be considered similarly situated, the challenger and his comparators must be prima facie identical in all relevant respects or directly comparable in all material respects. See *People v James*, __ Mich App __; __ NW2d __ (2018) (Docket No. 342504); slip op at 4. Although both groups are comprised of juvenile offenders, each group has been convicted of a materially different crime, and those juveniles sentenced to parolable life are not similarly situated to those sentenced to life without the possibility of parole or to a term-of-years sentence. Therefore, although one would think that a juvenile receiving a parolable life sentence for second-degree murder would have an easier parole consideration process than a juvenile sentenced to a term of years for first degree murder, their different treatment by the statutes pertaining to parole procedures does not constitute an equal protection violation. See *In re Parole of Hill*, 298 Mich App at 420. Finally, to the extent that the trial court's opinion regarding equal protection arises from the parole board's handling of defendant's opportunities for parole, this is not a sentencing matter. As we said before, the appropriate vehicle in which to seek redress of the alleged wrong done by the parole board is a claim for relief under 42 USC § 1983 filed against the parole board.

## V. DEFENDANT'S CROSS-APPEAL

On cross-appeal, defendant argues that the trial court erred in rejecting his argument for resentencing based *People v Coles*, 417 Mich 523, 549; 339 NW2d 440 (1983), overruled in part and on other grounds by *People v Milbourn*, 453 Mich 630, 644; 461 NW2d 1 (1990). We disagree.

Relevant to the present appeal, MCR 6.508(D)(3) provides that a court may not grant relief on a motion for relief from judgment which:

> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> > (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
> >
> > (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

* * *

> (ii) in a conviction entered on a plea of guilty . . . the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;
>
> (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;
>
> (iv) in the case of a challenge to the sentence, the sentence is invalid. [MCR 6.508(D)(3).]

Thus, in order for defendant to be entitled to relief under MCR 6.508(D)(3), defendant had to show "good cause" for his failure to raise the *Coles* argument in his prior motion for relief, and "actual prejudice," which, in this case, involves demonstrating that his parolable life sentence for second-degree murder was invalid. Assuming for the sake of argument that defendant established the necessary "good cause" by way of ineffective assistance of his appellate counsel in failing to raise a *Coles* argument when it was issued three years after defendant's sentence, defendant has failed to meet his burden to establish "actual prejudice"; specifically, he has failed to show that his sentence for second-degree murder was invalid at the time.

The *Coles* Court held in relevant part that, in order to facilitate appellate review, sentencing courts must articulate on the record the reasons for the sentences they were imposing. *Coles*, 417 Mich at 549. Further, an appellate court

> shall, upon a defendant's request in an appeal by right or in an appeal by leave granted, review a trial court's exercise of discretion in sentencing, but may afford relief to the defendant only if the appellate court finds that the trial court, in imposing the sentence, abused its discretion to the extent that it shocks the conscience[7] of the appellate court. If under this standard the appellate court deems that resentencing is warranted, the appellate court shall, after specifically stating its reasons for such action, remand the case to the trial court for resentencing. [*Id.* at 550.]
>
> Defendant admitted at his plea colloquy that he had tied the victim's hands behind her back, pushed her and caused her to fall head first into the water, waited until he no longer heard her splashing before he left, and that he had intended to kill her. In addition, the presentence investigation report prepared for his

[7] The "shocks the conscience" test was later replaced with a proportionality test. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

sentencing revealed that prior to the offense giving rise to his guilty plea, defendant had been arrested and charged with first-degree criminal sexual conduct upon a different victim, and that also involved tying the victim's hands behind her back. In that matter, defendant had been allowed to plead guilty to assault with a deadly weapon. In imposing sentence, the trial court explained:

> "[A]fter deep, careful, lengthly [sic] consideration and soul-searching, I have concluded that the sentence in this case should be life. This does not slam the door entirely as to future possible release. However, it does give an insurance [sic] that there will be careful consideration before there is a release.
>
> Furthermore, other than a contingent one that I will later mention, I make no recommendations as to what anyone should or should not do regarding future possible release.
>
> * * *
>
> I further make recommendations that he be given complete psychological, psychiatric, physical examinations, whatever is necessary, and that he be given the treatment as indicated by those examinations.

Thus, after considering the severity of defendant's actions, the trial court imposed a life sentence that appeared to take into consideration defendant's particular circumstances and need for treatment, and provided an eventual opportunity for possible release.

Defendant has failed to show that his sentence was invalid or disproportionate to the crime to which he pled guilty. Consequently, he has failed to show that he is entitled to relief from his sentence for second-degree murder of life with the possibility for parole. Because we conclude that defendant's *Coles* argument lacks merit, we decline to consider his associated claim of ineffective assistance of appellate counsel. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Reversed and remanded for entry of an order denying defendant's motion for relief from judgment. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens

2011 WL 7404445 (Mich.Cir.Ct.) (Trial Order)
Circuit Court of Michigan,
Ninth Circuit Court.
Kalamazoo County

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff,
v.
Anthony Shamont JONES, Defendant.

No. 1979-1104-FC.
December 21, 2011.

**Opinion and Order Granting Defendant's Motion for Relief from Judgment**

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Hon. Gary C. Giguere, Jr., Circuit Court Judge.

**At a session of said Court held in the City and County of**
**Kalamazoo, State of Michigan, on this 21 st Day of December, 2011.**

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

The testimony at a trial, presided over by C.H. Mullen [1], established that on January 3, 1979, at the age of 17, Defendant Anthony Shamont Jones and two co-defendants discussed going to Lesman's Market with the intent to rob its owner, Ronald Hermans. (Trial Tr. III, 20-22, June 29, 1979). Defendant's co-defendants produced a .32-calliber handgun and a pellet gun. (Trial Tr. III, 21). Although they decided against doing it that day, they went to Lesman's the next day, January 4, 1979, to carry out their plan. (Trial Tr. III, 21). At one point during the robbery, Defendant struck Mr. Hermans about the head or neck with the pellet gun. (Trial Tr. III, 104). The co-defendants, one of whom possessed the handgun, then grabbed Mr. Hermans and a struggle ensued. (Trial Tr. III, 104). Defendant started running away from the scene. (Trial Tr. III, 105). While running, he heard the shot that killed Mr. Hermans. (Trial Tr. III, *105).*

1 Mullen was a Judge of the 9 th Circuit Court from 1977 until he retired in 1987.

Defendant was charged with first-degree felony murder pursuant to MCL 750.316 under the theory that he aided and abetted pursuant to MCL 767.39, and also with assault with the intent to rob while armed pursuant to MCL 750.89. At the time, the

felony murder statute did not require proof that Defendant had the malicious state of mind necessary for murder. *See* *People v Aaron,* 409 Mich 672, 299 NW2d 304 (1980). Rather, simply an intent to commit the underlying felony, or robbery in this case, was sufficient to sustain a conviction. *Id.* Consequently, during trial, the trial court instructed the jury that malice could be inferred from the intent to commit the underlying robbery alone. (Trial Tr. III, 201-02; Trial Tr., 15, July 2, 1979).

Defendant was convicted of both charges, and on August 13, 1979, he was sentenced to a mandatory life sentence for the murder conviction and a concurrent prison term of 15 to 30 years for the assault charge. (Sent. Tr., 6, August 13, 1979). Because Defendant was convicted of first-degree murder, he was ineligible for parole. MCL 791.234. The co-defendant who fired the shot that killed Mr. Hermans, on the other hand, plead to second-degree murder and received a life sentence. *See People v Anthony Bruce Dunigan,* No. 1979-2058-FY. Having been convicted of second-degree and not first-degree murder, he was eligible for parole after serving ten years. MCL 791.234(7).

After trial, Defendant filed a motion for a new trial outlining a number of issues including whether malice could be inferred from an intent to commit the underlying crime alone. At the hearing, the trial court discussed the conflicting authority on the subject, noting that in *People v Fountain,* 71 Mich App 491, 248 NW 2d 589 (1976), the Court of Appeals held that malice is not imputed to an act of killing from the intent to commit the underlying felony. (Mot. For New Trial Tr., 31, October 20, 1980). However, it was also aware of *People v Till,* 80 Mich App 16, 263 NW2d 586 (1977), where a different Court of Appeals panel held that the commission of, or attempt to commit, a dangerous felony is the equivalent of malice. (Mot. For New Trial Tr., 31-32, October 20, 1980). Ultimately, the trial court concluded that *Till, supra,* not *Fountain, supra,* stated the correct rule, and it denied Defendant's motion for new trial. (Mot. For New Trial Tr., 32, October 20, 1980). However, his conviction and sentence for the assault charge was vacated. (Order Vacating Conviction and Sentence and Order Den. Mot. for New Trial, October 29, 1980).

One month later, the Michigan Supreme Court in *Aaron, supra,* adopted *Fountain, supra,* and overruled *Till, supra,* holding that: "in order to convict a defendant of murder, as that term is defined by Michigan case law, it must be shown that he acted with intent to kill or to inflict great bodily harm or with a. wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm. We further hold that the issue of malice must always be submitted to the jury." *Aaron, supra* at 734.

Subsequently, on direct appeal, Defendant's conviction and sentence were both affirmed by the Court of Appeals on June 11, 1982. On February 28, 1983, our Supreme Court denied Defendant's application for leave to appeal. Defendant again moved this Court for a new trial and that request was denied on August 15, 1995. An application for leave to appeal to our Court of Appeals was denied on July 24, 1997.

On July 23, 2009, Defendant filed his first Motion for Relief from Judgment. This Court denied that Motion on July 29, 2009, because the issues alleged were previously decided. Subsequent applications for leave to appeal were denied by both our Court of Appeals and Supreme Court.

In 2010, the United States Supreme Court established a new rule in *Graham v. Florida,* 560 US ___, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010). In that case, the U.S. Supreme Court held that a sentence of life in prison without parole is cruel and unusual punishment in violation of the Eighth Amendment when imposed on a juvenile convicted of a non-homicide crime. *Id.* at 2030.

As a result of the decision in *Graham,* Defendant filed the instant Motion for Relief from Judgment on April 26, 2011. In it, Defendant seeks relief based on the following grounds: 1) his sentence is categorically unconstitutional under the Eighth Amendment because he was younger than 18 years old at the time of the offense and he did not commit the homicide within

the meaning articulated in *Graham;* 2) his sentence is unconstitutional under the Eighth Amendment because it is grossly disproportionate to his offense; and 3) his sentence is unconstitutional under the Michigan Constitution's ban on cruel *or* unusual punishment because it is broader than the Eighth Amendment's ban on cruel *and* unusual punishment. The relief he seeks is to have this Court strike down the prohibition of parole pursuant to *People v Bullock,* 440 Mich 15, 42, 485 NW2d 866 (1992)(finding that the appropriate remedy for an unconstitutional life sentence without the possibility of parole is to ameliorate the no-parole feature of the sentence).

In response, the People claim Defendant has not established actual prejudice by the life without parole sentence because the categorical rule in *Graham* only applies to non-homicide cases.

## STANDARD OF REVIEW

Subchapter 6.500 of the Michigan Court Rules establishes the procedures for pursuing post-appeal relief from a criminal conviction. This subchapter is the exclusive means to challenge a conviction in Michigan once a defendant has exhausted the normal appellate process or when the conviction and sentence are not subject to appellate review under subchapter 7.200 or 7.300. MCR 6.501. A defendant may file only one motion for relief from judgment. MCR 6.502(G)(1). However, a defendant may file a second or subsequent motion based on a retroactive change in the law that occurred after the first motion for relief from judgment. MCR 6.502(G)(2).

Pursuant to MCR 6.508(D)(1), a defendant "has the burden of establishing entitlement to the relief requested." Rule 6.508(D) is phrased in the negative and sets out three procedural bars to relief from judgment. *People v McSwain,* 259 Mich App 654, 679-80, 676 NW2d 236 (2003). It states a court may not grant relief from judgment if: 1) the criminal defendant's motion seeks relief from a judgment that is still subject to challenge on appeal under MCR 7.200 or MCR 7.300; 2) the criminal defendant's motion alleges grounds for relief which were decided against the defendant in a prior appeal "unless the defendant establishes that a retroactive change in the law has undermined the prior decision"; or 3) the criminal defendant's motion "alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence" if one was filed. MCR 6.508(D); *see also McSwain, supra* at 679-80.

Relief may not be granted under the third bar unless the defendant demonstrates both good cause for failure to have raised the grounds for relief on appeal, or in a prior motion under the subchapter, and actual prejudice from the alleged irregularities that support the claim for relief. MCR 6.508(D)(3); *People v Watroba,* 193 Mich App 124, 126, 483 NW2d 441 (1992). In the case of a challenge to a sentence, as is the case here, actual prejudice is established if the sentence is invalid. MCR 6.508(D)(3)(b)(iv).

If the procedural rules set forth above do not bar recovery, the court may proceed in any lawful manner and may apply the rules applicable to criminal proceedings, as it deems appropriate. MCR 6.508(A). After reviewing the motion and response, if any, as well as the record, the court determines whether an evidentiary hearing is required. MCR 6.508(B). If required, the court shall schedule and conduct the hearing as promptly as practicable. MCR 6.508(C).

The Michigan Supreme Court has held that post conviction relief is reserved only for the "extraordinary case in which a conviction constitutes a miscarriage of justice." *People v Reed,* 449 Mich 375, 381, 535 NW2d 496 (1995). The trial court's grant or denial of relief from judgment is reviewed for an abuse of discretion and the findings of fact supporting its ruling are reviewed for clear error. *McSwain, supra* at 681.

## DISCUSSION

### A. Second or successive motion for relief from judgment

Preliminarily, Defendant's current Motion for Relief From Judgment is a second or successive Motion and would normally be prohibited pursuant to MCR 6.502(G)(1). However, it is permitted because *Graham* is a retroactive change in the law which occurred after Defendant's first motion for relief from judgment. MCR 6.502(G)(2). Retroactive rules are those that prohibit "a certain category of punishment for a class of defendants because of their status or offense." *Penry v Lynaugh,* 492 US 302, 320, 109 S Ct 2934 (1989). Under this definition, the *Graham* Court itself acknowledged the retroactive effect of its holding, saying it: "implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes." *Graham, supra* at 2022-23. Thus, this Court finds, and the parties do not dispute, that Defendant's instant Motion for Relief from Judgment is properly before this Court.

### *B. Graham's* applicability to Jones

Although retroactive, *Graham's* application to the case at bar is a point of contention between the parties. In 2010, the U.S. Supreme Court held that the Constitution prohibits sentencing a juvenile who did not commit homicide to life imprisonment without the possibility of parole. *Id.* at 2034. The facts in that case are as follows:

> In July, 2003, when Graham was age 16, he and three other school-age youths attempted to rob a barbeque restaurant in Jacksonville, Florida. One youth, who worked at the restaurant, left the back door unlocked just before closing time. Graham and another youth, wearing masks, entered through the unlocked door. Graham's masked accomplice twice struck the restaurant manager in the back of the head with a metal bar. When the manager started yelling at the assailant and Graham, the two youths ran out and escaped in a car driven by the third accomplice. The restaurant manager required stitches for his head injury. No money was taken. *Id.* at 2018.

Procedurally, Graham was charged as an adult for armed burglary with assault or battery, a first-degree felony carrying maximum penalty of life imprisonment without parole, and attempted armed robbery, a second-degree felony carrying a maximum penalty of 15 years imprisonment. *Id.* Graham pleaded guilty to both charges under a plea agreement and was placed on probation after some jail time. *Id.* Months later, he violated his probation by engaging in subsequent, more serious criminal activity. *Id.* Consequently, he was sentenced to life without parole for the armed burglary and 15 years for the attempted robbery; the maximum allowed under the law. *Id.* at 2020.

When analyzing whether the sentence was constitutional pursuant to the Eighth Amendment, the U.S. Supreme Court stated:
[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.

...

To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible.

...

Here one cannot dispute that this defendant posed an immediate risk, for he had committed, we can assume, serious crimes early in his term of supervised release and despite his own assurances of reform. Graham deserved to be separated from society for some time in order to prevent what the trial court described as an "escalating pattern of criminal conduct," App. 394, but it does not follow that he would be a risk of society for the rest of his life. Even if the State's judgment that Graham was incorrigible

were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity. *Id.* at 2027, 2029.

The Court went on to stress the need for juvenile sentences to be confined by some boundaries. *Id.* at 2031-32. For example, a state need not guarantee the eventual release, but if a state imposes a life sentence, there must be some realistic opportunity to obtain release before the end of that term. *Id.* at 2034.

Defendant is one of the juveniles whom the U.S. Supreme Court in *Graham* attempts to shield from a life in prison without even the potential for re-entry into society. This is so primarily because Defendant did not kill Mr. Hermans, and evidence of any malicious intent is non-existent. The malice required for a murder conviction requires either: 1) an intent to kill; 2) an intent to cause great bodily injury; or 3) wanton and willful disregard of the natural tendency the defendant's behavior will cause death or great bodily harm. *People v Nowak,* 462 Mich 392, 408, 614 NW2d 78 (2000)(quoting *Aaron, supra* at 714). However, none of these elements were proven or considered by the jury in Defendant's case. Instead, malice was simply implied through the felony-murder rule. Even considering the evidence, Judge Mullen found Defendant's malicious intent questionable. In fact, at sentencing, Judge Mullen stated he was satisfied that neither Mr. Jones nor his co-defendants intended to kill or hurt Mr. Hermans. (Sent. Tr., 5). Soon thereafter, the Michigan Supreme Court emulated Judge Mullen's reserve in this case and unraveled the legal doctrine which had made it possible for Defendant to be convicted of first-degree murder without proof of malice. *See generally Aaron, supra.* It is plainly evident Defendant's conviction differs greatly from those where each element is properly presented, proven, and considered by twelve jurors.

In spite of this issue, Judge Mullen had no discretion at sentencing. Not only did the lack of malicious intent have no bearing, he could not consider any mitigating factors. For example, Judge Mullen noted Defendant lacked any prior criminal record, he appeared to be a follower, and he simply became involved with the wrong crowd. (Sent. Tr., 5-6). Realizing these factors as well as Defendant's age would not untie his hands, the hesitancy and regret with which Judge Mullen fulfilled his non-discretionary duty of sentencing Defendant to life without parole is irrefutable. (Sent. Tr., 5-6). Decades later, *Graham* would seem to acknowledge and address Judge Mullen's hesitancy, stating: "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Graham, supra* at 2031.

Moreover, when compared to Graham, Defendant seems much less incorrigible. Graham's life sentence occurred as a result of his failed, meager attempt at a second chance. After having spent minimal time in jail and while only six months back in society, he committed even more serious crimes than that for which he was on probation. *Graham, supra* at 2018. As a result, the trial court discretionarily sentenced him to the maximum sentence; against the recommendations of all parties involved. *Id.* at 2019-2020. In doing so, it found Graham hopeless, a danger to society, and in need of incapacitation. *Id.* This case, however, lacks any resemblance. Mr. Jones was committed indefinitely to prison prior to being afforded any second chances. Judge Mullen himself indicated that Defendant seemed like a product of unfortunate circumstances. His conviction and sentence resulted from an unsound common-law doctrine that the Michigan Supreme Court soon thereafter fixed, and a mandatory sentencing statute. If the US Supreme Court considers the defendant in *Graham* as capable of one day demonstrating growth and maturity, its reasoning and analysis in making such a determination should surely apply to the Defendant here. [2]

[2] While it should be obvious, it bears noting that recognizing *the possibility* of growth, maturity, and rehabilitation is quite different than saying that such changes *have* occurred. These assessments are best made by our sister branch the executive, acting through the Parole Board.

  

**C. Procedural bars pursuant to MCR 6.508(D)**

Further, the instant case is not subject to the procedural bars articulated in MCR 6.508(D). First, the judgment of conviction and sentence are not still subject to challenge on appeal to the Michigan Court of Appeals or Supreme Court. Defendant exhausted those remedies through direct appeal and leave to appeal shortly after his conviction and sentence. Next, although the current arguments were decided against Defendant in prior appeals or proceedings, as discussed above, Defendant has established a retroactive change in the law through *Graham,* and thus he may still seek relief through this avenue. The new rule in *Graham* is also good cause as to why Defendant's current arguments could not have been made previously. Because *Graham* is applicable to this case, Defendant's life without parole sentence is invalid, which demonstrates actual prejudice. Thus, this Court is not prevented from granting relief from judgment to Defendant.

**D. Juvenile culpability and ability to reform**

Additionally, this Court finds persuasive and compelling the U.S. Supreme Court's position that studies, statistics, and general trends support the notion that juveniles have lessened culpability. As the U.S. Supreme Court in *Roper v Simmons,* 543 US 551, 125 S Ct 1183 (2005) explained, juveniles have a lack of maturity, an underdeveloped sense of responsibility, and an increased vulnerability and susceptibility to peer pressure and influence. *Id.* at 569-70. In *Graham,* the Supreme Court found no reason to reconsider these observations because "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Graham, supra* at 2026. Because a juvenile's actions are less likely to be evidence of irretrievably depraved character, it naturally follows that indefinite incapacitation is an inappropriate penological goal for juveniles. *See id.* at 2027. While this court recognizes the *Graham* Court considered these factors in a non-homicide context, the *Roper* Court considered and, in fact, found persuasive, those same factors while considering the culpability of a juvenile murderer. *Roper, supra* at 569-71. Thus, the differences that exist between juveniles and adults neither change nor become less persuasive whether the underlying conviction is for a homicide or otherwise.

**CONCLUSION**

For these reasons, this Court finds that the holding in *Graham* is applicable to this case. Defendant's sentence violates the prohibition against cruel and unusual punishment of the Eighth Amendment to the United States Constitution and Michigan's ban on cruel or unusual punishment found in Article I, Section 16 of the Michigan Constitution. Accordingly, Defendant is entitled to resentencing.

IT IS SO ORDERED.

Dated: December 21, 2011

<<signature>>

Hon.Gary G.Giguere Jr.

*Circuit* Court Judge

***PROOF OF MAILING***

I, Chelsea C. Huber, certify that on this date I mailed a copy of this OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT to the parties interest at their above stated addresses via first-class mail.

December 21, 2011

<<signature>>

Chelsea C. Huber

Law Clerk to the Hon. Gary C. Giguere, Jr.

2018 WL 1541898
Only the Westlaw citation is currently available.
United States District Court, D. Connecticut.

Luis Noel CRUZ, Petitioner,
v.
UNITED STATES of America, Respondent.

CIVIL ACTION NO. 11-CV-787 (JCH)
|
Signed 03/29/2018

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**RULING RE: SUCCESSIVE PETITION TO VACATE, SET ASIDE, OR CORRECT SENTENCE**

Janet C. Hall, United States District Judge

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## I. INTRODUCTION

The Second Circuit authorized the petitioner, Luis Noel Cruz, to file a successive habeas petition pursuant to section 2255 of title 28 of the United States Code on July 22, 2013. See Mandate of the USCA (Doc. No. 23). On August 19, 2014, Cruz filed the Successive Petition to Vacate, Set Aside, or Correct Sentence currently pending before the court. See Successive Petition to Vacate, Set Aside, or Correct Sentence ("Pet. to Vacate") (Doc. No. 37). In it, Cruz argues, inter alia, that his sentence of mandatory life imprisonment without the possibility of parole violates the Eighth Amendment of the United States Constitution, relying on the rule announced in Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). See id. at 10–22. The respondent, the United States ("the Government"), opposes Cruz's Petition. See Government's Response to Pet. to Vacate ("Resp. to Pet.") (Doc. No. 64).

For the reasons set forth below, Cruz's Petition is **GRANTED**.

## II. FACTUAL BACKGROUND

Luis Noel Cruz was born on December 25, 1975. See Transcript of Evidentiary Hearing ("Cruz Tr.") (Doc. No. 114) at 77. Beginning on or about November 1991, when Cruz was 15 years old, he joined the Latin Kings, a violent gang with branches of operations in Connecticut. See Pet. to Vacate, Ex. 1, Indictment (Doc. No. 37-1) at ¶ 14. Cruz testified at an evidentiary hearing before this court that he never held a position of leadership in the gang and that members were expected to obey the orders, called "missions," of the leaders. See Cruz Tr. at 14–15, 19. He testified that a mission could include anything, including murder, and that disobedience would result in the same mission being carried out on the person who disobeyed. See id. at 14, 19. Cruz further testified that he attempted to renounce his membership in the Latin Kings prior to the occurrence of the murders for which he is

  

now serving concurrent life sentences. See id. at 16–17. While he believed at the time that he had successfully left the gang, he later learned that the leaders of the Latin Kings had viewed his attempt to resign as an act of disrespect and that his status in the gang was uncertain. See id. at 17, 19.

Cruz turned 18 on December 25, 1993. On May 14, 1994, when Cruz was 18 years and 20 weeks old, Cruz and another member of the Latin Kings, Alexis Antuna, were given a mission by gang leader Richard Morales. See United States v. Diaz, 176 F.3d 52, 84 (2d Cir. 1999). The mission was to kill Arosmo "Rara" Diaz. See id. Carrying out that mission, Cruz and Antuna shot and killed Diaz and his friend, Tyler White, who happened to be with Diaz at the time. See id. Cruz testified at the hearing before this court that he now admits to committing both murders. See Cruz Tr. at 27. He further testified that Antuna informed him at the time that the leaders of the Latin Kings were debating what would happen to him as a result of his attempt to leave the gang. See id. at 19. According to his testimony, Cruz believed that, if he did not carry out the mission, he himself would be killed. See id.

***2** In December 1994, a grand jury indicted Cruz for, inter alia, three Violent Crimes in Aid of Racketeering ("VCAR"), in violation of section 1959(a) of title 18 of the United States Code. See Indictment at ¶¶ 75–81; United States v. Millet, No. 94-CR-112, Superseding Indictment (Doc. No. 625) at ¶¶ 74–79. The three VCAR crimes were the conspiracy to murder Diaz (Count 24), the murder of Diaz (Count 25), and the murder of White (Count 26). See id. Cruz and a number of his co-defendants went to trial and, on September 29, 1995, a jury convicted Cruz on all three VCAR counts, in addition to violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), conspiracy to violate RICO, and conspiracy to commit a drug offense. See Millet, Verdict Form (Doc. No. 945); Millet, Judgment (Doc. No. 1072) at 1. On January 30, 1996, Cruz was sentenced to, inter alia, four concurrent terms of mandatory life without parole for the two VCAR murders, the RICO violation, and the conspiracy to violate RICO. See Judgment at 2.

Cruz is now 42 years old. He testified at the hearing before this court that, during his incarceration, he renounced the Latin Kings and has been a model inmate, teaching programs to other inmates and receiving only one disciplinary ticket during his 24 years of incarceration. See Cruz Tr. at 23, 70. His testimony is supported by letters from the staff at the Bureau of Prisons. See Pet. to Vacate, Ex. 2, 3.

## III. PROCEDURAL BACKGROUND

On May 4, 1999, the Second Circuit affirmed Cruz's conviction on appeal. See Diaz, 176 F.3d at 73. Cruz subsequently filed four habeas petitions under section 2255 of title 28 of the United States Code, from 2001 to 2013, each of which was denied. See Resp. to Pet. at 4–6. On July 22, 2013, the Second Circuit granted Cruz's request to file a successive petition under section 2255(h)(2) to raise a claim under Miller. See Mandate of USCA. The Second Circuit determined that Cruz made a prima facie showing that he satisfied the requirements of section 2255(h) and directed this court to address "whether the United States Supreme Court's decision in Miller announced a new rule of law made retroactive to cases on collateral review." Id. at 1.

Cruz filed his Petition on August 18, 2014. See Pet. to Vacate. In it, he raised two arguments. [1] First, Cruz argued that he was 15 years old when he first joined the Latin Kings and, because membership in a RICO enterprise is an element of his VCAR conviction, he was a juvenile at the time that he committed the element of the crime that triggers mandatory life imprisonment, thereby making his sentence unconstitutional under Miller. See id. at 4–9. Second, he argued that Miller's prohibition of mandatory life imprisonment for adolescents should also be applied to those who were 18 at the time of their crimes because scientific research and national consensus indicate that 18-year-olds exhibit the same hallmark features of youth that justified the decision in Miller. See id. at 10–22.

On May 12, 2015, this court granted Cruz's Motion to Stay the proceedings, pending the Supreme Court's decision on the retroactivity of Miller. See Order Granting Motion to Stay (Doc. No. 49). In 2016, the Supreme Court held in Montgomery v. Louisiana, —— U.S. ——, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), that Miller v. Alabama announced a new substantive constitutional rule that was retroactive on collateral review. See Montgomery, 136 S.Ct. at 734.

On April 3, 2017, after briefing and argument, the court granted Cruz's Motion for a Hearing. See Ruling re: Motion for Hearing and Supplemental Section 2255 Motion ("Ruling re: Mot. for Hr'g") (Doc. No. 86). The court held that there was no issue of fact regarding Cruz's first argument, finding that Cruz remained a member of the Latin Kings after turning 18 and committed the murders at age 18. See id. at 19–22. Therefore, he was 18 "during his commission of each of the elements of the crime of VCAR murder." Id. at 21.

Accordingly, the court declined to grant him a hearing to offer evidence in support of that theory. See id. at 22. The court found, however, that an issue of fact existed as to whether Miller's protections should apply to an 18-year-old and ordered the parties to present evidence of national consensus and scientific research on this issue. See id. at 23–29. The court denied the Government's Motion for Reconsideration of its decision. See Ruling re: Motion for Reconsideration ("Ruling re: Reconsideration") (Doc. No. 99).

***3** On September 13 and 29, 2017, the court held evidentiary hearings at which an expert witness, Dr. Laurence Steinberg, testified about the status of scientific research on adolescent brain development and Cruz testified about the trajectory of his life.[2] See Transcript of Evidentiary Hearing ("Steinberg Tr.") (Doc. No. 111); Cruz Tr. After the hearing, the court permitted the parties to file supplemental briefings and held oral argument on February 28, 2018. See Petitioner's Post-Hearing Memorandum in Support of Pet. to Vacate ("Post-Hr'g Mem. in Supp.") (Doc. No. 115); Government's Post-Hearing Memorandum in Opposition to Pet. to Vacate ("Post-Hr'g Mem. in Opp.") (Doc. No. 117); Petitioner's Reply to Government's Post-Hr'g Mem. in Opp. ("Post-Hr'g Reply in Supp.") (Doc. No. 120); Minute Entry, Oral Argument Hearing (Doc. No. 124).

## IV. LEGAL STANDARD

Section 2255 of title 28 of the United States Code permits a federal prisoner to move to vacate, set aside, or correct his sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a) (2016). Therefore, relief is available "under § 2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law that constitutes a fundamental defect which inherently results in a complete miscarriage of justice." Cuoco v. United States, 208 F.3d 27, 30 (2d Cir. 2000) (quoting United States v. Bokun, 73 F.3d 8, 12 (2d Cir. 1995)). The petitioner bears the burden of proving that he is entitled to relief by a preponderance of the evidence. See Skaftouros v. United States, 667 F.3d 144, 158 (2d Cir. 2011).

## V. DISCUSSION

The court adopts the analysis in its prior Ruling finding no issue of fact regarding Cruz's first argument that he was under the age of 18, when at least one element of the VCAR murders was committed. See Ruling re: Mot. for Hr'g at 19–22. Accordingly, Cruz's Petition is denied on that ground. The court undertakes in this Ruling to address Cruz's second argument: that Miller applies to him as an 18-year-old.

### A. Requirements of Section 2255(h)(2)

#### 1. Standard of Review Under Section 2255(h)

Before reaching the merits of Cruz's Petition, the court must first address the threshold issue of whether the requirements of section 2255(h)(2) have been satisfied. When a petitioner is filing a second or successive petition for habeas relief under section 2255(h), as here, the petitioner must receive authorization from the appropriate Court of Appeals to file the petition. See 28 U.S.C. § 2255(h). The Court of Appeals may certify the petition if it finds that the petition has made a prima facie showing that the petition "contain[s] ... a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Id.; 28 U.S.C. § 2244(b)(3)(C) (establishing a prima facie standard, which section 2255(h) incorporates); see also Bell v. United States, 296 F.3d 127, 128 (2d Cir. 2002). Without such certification by the Court of Appeals, the district court lacks jurisdiction to decide the merits of the petition. See Burton v. Stewart, 549 U.S. 147, 157, 127 S.Ct. 793, 166 L.Ed.2d 628 (2007).

***4** Once the Court of Appeals has certified the petition, however, this court must conduct a "fuller exploration" of whether the petition has satisfied the requirements of section 2255(h). See Bell, 296 F.3d at 128 (quoting Bennett v. United States, 119 F.3d 468, 469–70 (7th Cir. 1997)). In doing so, the court is serving a gate-keeping function prior to determining the merits of the peition. If the court finds that the Petition has not satisfied the requirements of section 2255(h), the court must dismiss the Petition. See 28 U.S.C. § 2244(b)(4) ("A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section."); In re Bradford, 830 F.3d 1273, 1276 (11th Cir. 2016) (holding that section 2255(h) incorporates section 2244(b)(4)). "Even where the Court of Appeals has authorized the filing of a successive petition, its order authorizing the district court to review the petition does not foreclose the district court's independent review of whether the petition survives dismissal." Ferranti v.

United States, No. 05-CV-5222 (ERK), 2010 WL 307445, at *10 (E.D.N.Y. Jan. 26, 2010), aff'd, 480 Fed.Appx. 634 (2d Cir. 2012). Although Ferranti cites section 2244(b)(4) for the proposition that the district court is authorized to dismiss a claim that does not meet the requirements of section 2255(h), id., the language of section 2244(b)(4) actually requires the district court to dismiss the claim in such situations. See 28 U.S.C. § 2244(b)(4) (stating that the district court "shall dismiss" such a claim); Ferranti v. United States, 480 Fed.Appx. 634, 636–37 (2d Cir. 2012) (stating that such a claim "will be dismissed").

While the Court of Appeals' inquiry is limited to whether the petitioner has made a prima facie showing that the requirements are met, the district court must determine that they are actually met. See id.; see also Tyler v. Cain, 533 U.S. 656, 661 n.3, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001). Because the standards used by the Court of Appeals and the district court are different, this court must determine de novo that the requirements of section 2255(h) are satisfied. See In re Moore, 830 F.3d 1268, 1271 (11th Cir. 2016) ("We rejected the assertion that the district court owes 'some deference to the court of appeals' prima facie finding that the requirements have been met." (citation omitted)); In re Pendleton, 732 F.3d 280, 283 (3d Cir. 2013) ("However, we stress that our grant is tentative, and the District Court must dismiss the habeas corpus petition for lack of jurisdiction if it finds that the requirements for filing such a petition have not been met."); Johnson v. United States, 720 F.3d 720, 720–21 (8th Cir. 2013).

2. Second Circuit's Mandate Authorizing Successive Petition

In this case, the Second Circuit authorized Cruz to "file a § 2255 motion raising his proposed claim based on Miller v. Alabama." Mandate of USCA at 1. The Mandate then directs this court to "address, as a preliminary inquiry under § 2244(b)(4), whether the United States Supreme Court's decision in Miller announced a new rule of law made retroactive to cases on collateral review."[3] Id. The Government argues that the Mandate only authorizes Cruz to file a successive petition on his claim that Miller applies to him because he was under the age of 18 at the time of the crime—that is, the claim rejected by this court in its Ruling on the Motion for a Hearing. See Motion for Reconsideration ("Mot. for Recons.") (Doc. No. 94) at 2–3. However, at oral argument on the Petition before this court, the Government acknowledged that the Mandate is ambiguous as to the nature of the proposed claim.

Cruz's Memorandum in Support of Application to File a Second or Successive Section 2255 Petition, filed before the Second Circuit, is unclear as to the exact nature of the argument he intended to raise. See Cruz v. United States (Second Circuit Court of Appeals), No. 13-2457, Memorandum of Law in Support of Application to File a Second or Successive Section 2255 Petition ("App. to File Successive Pet.") (Doc. No. 2). However, Cruz does state in the Memorandum that "the case involves conduct that is open to much speculation and interpretation, in that the charges include juvenile and non-juvenile conduct." Id. at 8. He also quotes a case stating that "modern scientific research supports the common sense notion that 18-20-year-olds tend to be more impulsive than young adults ages 21 and over." Id. (quoting Nat'l Rifle Assoc. of Am. v. Bureau of Alcohol, 700 F.3d 185, 209 n.21 (5th Cir. 2012)). Additionally, Cruz states in a Supplemental Memorandum that his crime involved two predicate acts—"one juvenile and the other 5 months after Applicant's 18th birthday."[4] Cruz v. United States (Second Circuit Court of Appeals), No. 13-2457, Supplementary Papers to Motion for Successive Petition (Doc. No. 14) at 2. Based on these statements, this court concludes that, when the Second Circuit authorized Cruz to file a successive petition, it was aware that he was at least 18 years old during an element of the offense.

***5** Therefore, the court reads the Second Circuit's Mandate as authorizing this court's jurisdiction over both of Cruz's arguments under Miller. This reading of the Mandate is especially appropriate because Cruz was proceeding pro se when he petitioned the Second Circuit for certification to bring his successive petition. The court must interpret pro se filings liberally "to raise the strongest arguments that they suggest." See Willey v. Kirkpatrick, 801 F.3d 51, 62 (2d Cir. 2015). Therefore, the court liberally reads any ambiguity in Cruz's filings before the Second Circuit to include the claim now before the court and reads the Second Circuit's Mandate to include the claim now before the court. It will proceed to analyze whether such a claim satisfies the requirements of section 2255(h).[5]

As noted previously, the court makes such a determination de novo. See, e.g., In re Moore, 830 F.3d at 1271. Thus, Cruz's argument that section 2255(h) is satisfied because "the Second Circuit's 2013 order is, by now, res judicata" is unavailing. See Post-Hr'g Reply in Supp. at 2. The Second

Circuit's certification of the Petition under a prima facie standard does not determine the court's current, de novo inquiry of whether the Petition meets the requirements of section 2255(h).

3. Timeliness

Cruz also argues that the court should reject as untimely the Government's argument that section 2255(h) has not been satisfied because the Government failed to raise the argument at the outset of the case. See Post-Hr'g Reply in Supp. at 1. The court already addressed the Government's untimeliness in its prior Ruling. See Ruling re: Mot. for Recons. at 6–7. The court again reiterates that, by failing to raise this issue prior to oral argument, the Government "unnecessarily delayed and complexified this proceeding." Id. at 6. However, the court is not prepared to go so far as to treat the Government's untimeliness as a waiver of the argument.

***6** Other district courts in this Circuit have held that a district court lacks subject matter jurisdiction to rule on the merits of a successive petition under section 2255(h) if the petition has not been certified by the Court of Appeals according to the procedure set out in section 2244(b)(3). See Canini v. United States, No. 10 CIV. 4002 PAC, 2014 WL 1664240, at *1 (S.D.N.Y. Apr. 17, 2014); Otrosinka v. United States, No. 12-CR-0300S, 2016 WL 3688599, at *3 (W.D.N.Y. July 12, 2016), certificate of appealability denied, No. 16-2916, 2016 WL 9632301 (2d Cir. Dec. 14, 2016). To that extent, the requirements of section 2255(h) are jurisdictional and not subject to waiver. Whether the district court's responsibility to dismiss a petition certified under section 2244(b)(4) is also jurisdictional, however, is less clear. One case from the Third Circuit contains language indicating that section 2244(b)(4) is also jurisdictional. See In re Pendleton, 732 F.3d 280, 283 (3d Cir. 2013) ("[T]he District Court must dismiss the habeas corpus petition for lack of jurisdiction if it finds that the requirements for filing such a petition have not been met." (emphasis added)). Cruz has not pointed the court to any contrary case in which the Government's failure to timely raise the issue waived the argument and absolved the court of its responsibility to dismiss the claim under section 2244(b)(4).

Even if the 2255(h) issue as raised by the government is not jurisdictional, the court still declines to treat the Government's tardy raising of the argument as a waiver. The issue has since been thoroughly briefed by both parties, such that no party has been prejudiced by the Government's untimeliness. See Mot. for Recons.; Opposition to Mot. for Recons. (Doc. No. 95); Post-Hr'g Mem. in Opp.; Post-Hr'g Reply in Supp. Therefore, the court proceeds to consider whether section 2255(h) has been satisfied.

4. Section 2255(h)(2) in the Miller Context

To find that section 2255(h) has been satisfied, the court must determine that the Petition contains "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). The Government does not disagree that Miller satisfies these three requirements. The Supreme Court in Montgomery v. Louisiana held that Miller establishes a new substantive rule that applies retroactively on collateral review. See Montgomery, 136 S.Ct. at 734. That rule was previously unavailable to Cruz prior to the Miller decision in 2012.

However, the Government argues that Miller does not apply to Cruz's Petition because the Government reads the "new rule" in Miller to protect only defendants under the age of 18. See Post-Hr'g Mem. in Opp. at 2–6. According to the Government, Miller held the following: "We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments." Id. at 3 (emphasis omitted) (quoting Miller, 567 U.S. at 465, 132 S.Ct. 2455). Therefore, the Government argues that Cruz's Petition does not rely on Miller, as Miller would not grant him relief as an 18-year-old. See id. at 2–6. Instead, the Government characterizes Cruz's Petition as asking the court to create a new rule expanding Miller, which the Government argues the court cannot do on a 2255 petition. See id.

The threshold inquiry before the court, then, is whether the Petition "contains" the new rule in Miller, according to the requirement of section 2255(h). This inquiry turns on whether "contains" is read to require a petition to raise the specific set of facts addressed by the holding in Miller or whether it permits a petition to rely on the principle of Miller to address a new set of facts not specifically addressed by Miller, but also not excluded by it. Neither party has pointed the court to any binding case law addressing what it means for a petition "to contain" a "new rule" of constitutional law.

***7** The Government has, however, identified two cases in which the courts determined that section 2255(h) did not authorize the filing of a successive petition under Miller for defendants who were 18 years old or older. See Post-Hr'g Mem. in Opp. at 5 (citing In re Frank, 690 Fed.Appx. 146 (Mem.) (5th Cir. 2017); La Cruz v. Fox, No. CIV-16-304-C, 2016 WL 8137659, at *6 (W.D. Okla. Dec. 22, 2016), report and recommendation adopted, No. CIV-16-304-C, 2017 WL 420159 (W.D. Okla. Jan. 31, 2017)). In Frank, the Fifth Circuit declined to certify a petition under section 2255(h)(2) for a defendant who was 18 and 19 years old at the time of two of the murders for which he was sentenced to mandatory life without parole. See In re Frank, 690 Fed.Appx. at 146. In La Cruz, the district court for the Western District of Oklahoma declined to transfer the case to the Court of Appeals for the Tenth Circuit to consider whether to authorize a successive 2255 petition. The court determined that such a transfer would be futile, as Miller did not apply to the petitioner, who was not under the age of 18 at the time of his crime. See La Cruz, 2016 WL 8137659, at *6.

The court also located two other cases with a similar outcome. See White v. Delbalso, No. 17-CV-443, 2017 WL 939020, at *2 (E.D. Pa. Feb. 21, 2017) (finding that the defendant was not entitled to file a second habeas petition under section 2244(b)(2) because he was 23 years old at the time of the crime); United States v. Evans, No. 2:92CR163-5, 2015 WL 2169503, at *1 (E.D. Va. May 8, 2015) (denying a successive 2255 motion, after certification by the Court of Appeals, because Graham did not apply to the 18-year-old petitioner).

The court is not bound by these precedents. To the extent that they may serve as persuasive authority, the court finds them unpersuasive because none of these opinions discuss what it means for the petition to "contain" a new rule in Miller. The cases assume, without analysis, that section 2255(h) only permits a petition to directly apply the holding of Miller. Rather than following such assumptions, this court will conduct its own analysis of what it means for a petition to "contain" a "new rule" of constitutional law.

In doing so, the court first notes that the D.C. Circuit reached the opposite conclusion on this question than the Fifth Circuit did in Frank. See In re Williams, 759 F.3d 66, 70–72 (D.C. Cir. 2014). In Williams, the petitioner was sentenced to life without parole for his role in a conspiracy to participate in a racketeer influenced corrupt organization ("RICO") and to distribute illegal drugs. See id. at 67. Like Cruz, Williams was a juvenile for the early years of his participation in the conspiracy from 1983 to 1987, but turned 18 in 1987 and continued to participate in the conspiracy until 1991. See id. Williams moved for authorization to file a successive petition raising claims under both Miller and Graham v. Florida, 560 U.S. 48, 74, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), which held life imprisonment without parole unconstitutional for juvenile non-homicide offenders. See id. at 68, 130 S.Ct. 2011. The government in Williams argued that "Williams cannot rely on Graham, and therefore is not entitled to relief on the basis of Graham, because Graham's holding does not extend to conspiracies straddling the age of majority." See id. at 70, 130 S.Ct. 2011; see also id. at 71, 130 S.Ct. 2011 (making the same argument for Williams's Miller claim). The D.C. Circuit rejected the government's argument, however, and granted certification on both claims. See id. at 70–72, 130 S.Ct. 2011.

In doing so, the D.C. Circuit reasoned that the government's argument "goes to the merits of the motion, asking us in effect to make a final determination of whether the holding in Graham will prevail for Williams." Id. at 70, 130 S.Ct. 2011. As such, the D.C. Circuit held that such an argument was not an appropriate inquiry for the court to consider in deciding whether the petitioner had made a prima facie case that the petition "contain[s] ... a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." See id. The court finds the D.C. Circuit's approach in Williams more persuasive than the Fifth Circuit's approach in Frank because Williams expressly considers what it means for a petition to "rely on" a new rule and articulates its reasons for certifying the position.

***8** As none of these cases are binding on this court, however, the court does not end its inquiry here, but also considers other cases reviewing successive habeas petitions based on other "new rules" of constitutional law beyond Miller, to the extent that those cases offer guidance in interpreting the requirements of section 2255(h).

### 5. Analogous Interpretation of Section 2255(h) from Cases Under Johnson v. United States

Thus, in addition to Williams, the court looks to an analogous situation in which courts have considered the meaning of section 2255(h), that is, in the context of successive habeas petitions following Johnson v. United States, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). While these cases consider a different "new rule" than the one contained

in Miller, the circuits in the Johnson context have more thoroughly engaged with the meaning of section 2255(h)'s requirement that the petition "contain" a new rule and therefore provide relevant guidance to the court's analysis here.[6] Before addressing the circuits' various interpretations of section 2255(h), the court first briefly explains the context in which the question arises in the Johnson context.

In Johnson, the Supreme Court held "that imposing an increased sentence under the residual clause of the Armed Career Criminal Act [ ("ACCA") ] violates the Constitution's guarantee of due process." Johnson, 135 S.Ct. at 2563. The Supreme Court then held that Johnson announced a new substantive rule that applies retroactively in cases on collateral review. See Welch v. United States, —— U.S. ——, 136 S.Ct. 1257, 1265, 194 L.Ed.2d 387 (2016). Following Johnson and Welch, Courts of Appeals were faced with applications to file successive petitions under section 2255, seeking relief from sentences determined under the residual clause of section 4B1.2 of the Sentencing Guidelines. That section was not itself addressed by Johnson, but contains similar language to the residual clause of the ACCA that was held to be unconstitutionally vague in Johnson. See, e.g., Blow v. United States, 829 F.3d 170, 172–73 (2d Cir. 2016), as amended (July 29, 2016); In re Hubbard, 825 F.3d 225, 235 (4th Cir. 2016); In re Arnick, 826 F.3d 787, 788 (5th Cir. 2016); In re Patrick, 833 F.3d 584, 588–89 (6th Cir. 2016); In re Embry, 831 F.3d 377, 379, 382 (6th Cir. 2016); Donnell v. United States, 826 F.3d 1014, 1015–17 (8th Cir. 2016); In re Encinias, 821 F.3d 1224, 1226 (10th Cir. 2016); In re McCall, 826 F.3d 1308, 1309 (11th Cir. 2016).

***9** Analogous to the case here, those cases required the circuit courts to consider whether a successive petition under section 2255(h)(2) "contains" a new rule of constitutional law only when the petition involved the same statute as the holding in Johnson, or also when it relied on Johnson as applied to similar language in another statute. On this question, the circuits split. Compare Blow, 829 F.3d at 172–73 (certifying the successive petition and holding it in abeyance pending the Supreme Court's decision in Beckles v. United States, —— U.S. ——, 137 S.Ct. 886, 197 L.Ed.2d 145 (2017)); In re Hubbard, 825 F.3d at 235 (certifying the successive petition); In re Patrick, 833 F.3d at 588 (same); In re Encinias, 821 F.3d at 1226 (same); with In re Arnick, 826 F.3d at 788 (denying the application to file a successive petition); Donnell, 826 F.3d at 1017 (same); In re McCall, 826 F.3d at 1309 (same).

In 2016, the Supreme Court in Beckles v. United States held that the rule in Johnson did not apply to the Sentencing Guidelines, as made advisory by United States v. Booker, 543 U.S. 220, 233, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). See Beckles, 137 S.Ct. at 890. The Beckles Court held that the advisory Sentencing Guidelines are not subject to vagueness challenges under the Due Process Clause, but did not reach the question of whether the Sentencing Guidelines, as applied mandatorily prior to Booker, could be subject to such a challenge under Johnson. See id. Notably, because Beckles was decided on certiorari from a first petition under section 2255, not a second or successive petition implicating section 2255(h), see id. at 891, the Court did not address whether the circuits that certified successive petitions under Johnson had correctly interpreted section 2255(h).

As a result, after Beckles, the circuits faced similar applications to file successive petitions under section 2255(h), seeking relief under Johnson from sentences imposed when the Sentencing Guidelines were mandatory. The circuits have again split on whether authorizing such petitions would be an appropriate application of section 2255(h)(2). Compare Moore v. United States, 871 F.3d 72, 74 (1st Cir. 2017) (certifying the successive petition); In re Hoffner, 870 F.3d 301, 309–12 (3d Cir. 2017) (same); Vargas v. United States, No. 16-2112, 2017 WL 3699225, at *1 (2d Cir. May 8, 2017) (certifying the successive petition and directing the district court to consider staying the proceeding pending the Supreme Court's decision in Lynch v. Dimaya, —— U.S. ——, 137 S.Ct. 31, 195 L.Ed.2d 902 (Mem.) (2016)); with Mitchell v. United States, No. 3:00-CR-00014, 2017 WL 2275092, at *4–*5, *7 (W.D. Va. May 24, 2017) (dismissing the petition as failing to satisfy the requirements of section 2255(h)); United States v. Gholson, No. 3:99CR178, 2017 WL 6031812, at *3 (E.D. Va. Dec. 5, 2017) (denying the petition as barred by section 2255(h)).

This court looks to these cases addressing Johnson as instructive for analyzing the reach of section 2255(h).[7] In the absence of binding precedent reviewing district court decisions made in the court's current posture, the reasoning of the circuit courts in deciding certification can provide relevant guidance in interpreting the meaning of section 2255(h) before this court. The court briefly summarizes below the interpretation and analysis of each side of the circuit split.

The most thorough analysis in favor of reading 2255(h) broadly is found in the Third Circuit case of In re Hoffner. In Hoffner, the Third Circuit interpreted section 2255(h), which

requires that the claim "contain" a new rule of constitutional law," in accordance with the Supreme Court's reading of similar language in section 2244(b)(2)(A), which requires that the claim "relies on a new rule of constitutional law." See In re Hoffner, 870 F.3d at 308 (quoting Tyler v. Cain, 533 U.S. 656, 662, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001)). In interpreting "relies on," the Third Circuit held that "whether a claim 'relies' on a qualifying new rule must be construed permissively and flexibly on a case-by-case basis." Id.

***10** At a policy level, the court reasoned that construing the new rule flexibly advances "the need to meet new circumstances as they rise and the need to prevent injustice," which it concluded are particularly salient concerns in the context of a section 2255(h)(2) motion dealing with new substantive rules addressing the potential injustice of an unconstitutional conviction or sentence.[8] Id. at 309. Additionally, Hoffner cites Montgomery for the proposition that the state's countervailing interest in finality is not implicated in habeas petitions that retroactively apply substantive rules. See id. (quoting Montgomery, 136 S.Ct. at 732 (noting that "the retroactive application of substantive rules does not implicate a State's weighty interests in ... finality")). Accordingly, the Hoffner court describes its reading of section 2255(h) as follows:

> [A] motion relies on a qualifying new rule where the rule substantiates the movant's claim. This is so even if the rule does not conclusively decide [ ] the claim or if the petitioner needs a non-frivolous extension of a qualifying rule. Section 2255(h)(2) does not require that qualifying new rule be the movant's winning rule, but only that the movant rely on such a rule.

Id. (internal quotation marks and citations omitted) (quoting In re Arnick, 826 F.3d at 789 (5th Cir. 2016) (Elrod, J., dissenting)).

The Third Circuit then concludes that the question of whether the new rule applies to the facts in the specific case is not part of the preliminary, gate-keeping inquiry under section 2255(h), but is instead a "merits question for the district court to answer in the first instance." Id. at 310–11 (emphasis added). In this way, the Third Circuit agrees with the D.C. Circuit's decision in Williams discussed previously. See In re Williams, 759 F.3d at 70–72. To support its distinction between the preliminary, gatekeeping inquiry and the merits question, the Hoffner court further draws support from other circuits that have likewise certified successive petitions in analogous situations by finding that whether the rule applies to the facts is a merits question. See In re Hoffner, 870 F.3d at 310–11 (citing In re Pendleton, 732 F.3d 280, 282 n.1 (3d Cir. 2013); In re Sparks, 657 F.3d 258, 260 n.1 (5th Cir. 2010); In re Williams, 759 F.3d at 70–72); see also In re Hubbard, 825 F.3d at 231; United States v. Garcia-Cruz, No. 16CV1508-MMA, 2017 WL 3269231, at *3–*4 (S.D. Cal. Aug. 1, 2017) (finding that the petitioner had satisfied the "statutory prerequisite for filing a second or successive motion" under section 2255, but denying the motion on the merits).[9]

In line with the Third Circuit's analysis, the First Circuit reasoned in Moore v. United States that Congress used the words "rule" and "right" in section 2255 rather than the word "holding" for a reason:

> ***11** 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.

Moore, 871 F.3d at 82. Therefore, the Moore court held that, while the "technical holding" of Johnson was that the residual clause in the ACCA is unconstitutionally vague, the "new rule" it established was broader than that and "could be relied upon directly to dictate the striking of any statute that so employs the ACCA's residual clause to fix a criminal sentence." Id. In so distinguishing the new rule from the holding, Moore supports the Third Circuit's broader reading of section 2255(h).

Additionally, the Tenth Circuit in In re Encinias considered and rejected the government's argument that the petition challenging the Sentencing Guidelines relied not on Johnson, but on a later Tenth Circuit decision applying Johnson to the Guidelines. See In re Encinias, 821 F.3d at 1225–

26. The Tenth Circuit concluded that the petition was "sufficiently based on Johnson to permit authorization under § 2255(h)(2)" because of "the similarity of the clauses addressed in the two cases and the commonality of the constitutional concerns involved." Id. at 1226. Not restricting section 2255(h) to Johnson's narrow holding, the Tenth Circuit granted the certification and stated, "[A]lthough the immediate antecedent for Encinias' challenge to the career-offender Guideline is our decision in Madrid, that decision was based, in turn, on the seminal new rule of constitutional law recognized in Johnson and now made retroactive to collateral review by Welch." Id. at 1225–26.

The court recognizes, however, that the answer to the question before it is, as with many issues of statutory construction, not clear cut. The clearest contrary argument for reading section 2255(h) narrowly is found in the Eighth Circuit's decision in Donnell v. United States. Donnell held that "to contain" in section 2255(h) means that "the new rule contained in the motion must be a new rule that recognizes the right asserted in the motion." Donnell, 826 F.3d at 1016. In the Eighth Circuit's view, mere citation of a new rule without such a nexus to the right would be insufficient. See id. Like the Third Circuit in In re Hoffner, the Eighth Circuit in Donnell also reasons from context that section 2255(h)(2) should be read to be consistent with section 2244(b)(2)(A), which requires that the claim "relies on" a new rule. See id. However, the Donnell court adopts a narrower interpretation of the words "relies on" than the approach endorsed by the Hoffner court. Compare Donnell, 826 F.3d at 1016–17; with In re Hoffner, 870 F.3d at 309. The Donnell court concludes that the claim cannot depend on the district court's creation of a second new rule different from that specifically articulated by the Supreme Court. See id. The Eighth Circuit states that the new rule created by Johnson "must be sufficient to justify a grant of relief" and cannot "merely serve[ ] as a predicate for urging adoption of another new rule that would recognize the right asserted by the movant." Id. at 1017.

The Sixth Circuit in In re Embry recognized a similar logic and looked to Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), to determine whether the petition relies on a new rule recognized by the Supreme Court or requires the district court to create a second new rule. See In re Embry, 831 F.3d at 379. A "new rule" is one that is "not dictated by precedent." Id. (quoting Teague, 489 U.S. at 301, 109 S.Ct. 1060). "A rule is not dictated by precedent ... unless it is 'apparent to all reasonable jurists.' " Id. (quoting Chaidez v. United States, 568 U.S. 342, 133 S.Ct. 1103, 1107, 185 L.Ed.2d 149 (2013)). Therefore, a rule is a new rule "unless all reasonable jurists would adopt the rule based on existing precedent." Id. (internal quotation marks omitted). [10] On the other hand, "a case does not announce a new rule, when it is merely an application of the principle that governed a prior decision to a different set of facts." Id. (quoting Chaidez, 133 S.Ct. at 1107).

***12** Like the Sixth Circuit, the Government at oral argument urged this court to look to Teague in interpreting the requirements of section 2255(h). While there is no question that Teague is binding on this court, Teague does not address the issue currently before the court. Teague enunciated the above definition of a "new rule" in the context of determining whether a new rule should be applied retroactively on collateral review. See Teague, 489 U.S. at 301, 109 S.Ct. 1060. Teague does not address the question of whether a successive habeas petition "contains" or "relies on" a new rule for the purposes of satisfying the requirements of section 2255(h). Rather, it is the Sixth Circuit in Embry and the Eighth Circuit in Donnell that read the section 2255(h) inquiry to require courts to determine whether the petition asks the district court to recognize "a 'new rule' of its own." See In re Embry, 831 F.3d at 379; Donnell, 826 F.3d at 1017. Unlike Teague, Embry and Donnell are not binding on this court. [11]

Additionally, the language in Embry indicating that courts should determine whether a petition requires a second new rule is dicta. The Sixth Circuit articulated that reasoning, but declined to so hold. See id. at 381. Instead, the court granted Embry's application to file a successive petition and instructed the district court to hold the petition in abeyance, pending the Supreme Court's then-anticipated decision in Beckles. See id. at 382. The Sixth Circuit did so in part because it recognized that "[t]he inquiry is not an easy one." Id. at 379. The Sixth Circuit stated, "When it comes to deciding whether Embry has made a prima facie showing of a right to relief, there are two sides to this debate, each with something to recommend it." Id.

### 6. Interpretation of Section 2255(h) and Application to This Case

This court likewise acknowledges that the question of which of the above two approaches correctly interprets the requirements of section 2255(h) is a difficult one, and one on which the Supreme Court has not yet spoken. [12] In the

absence of additional guidance, however, this court finds persuasive the Third Circuit's reading of section 2255(h) and applies in this case its approach to determining whether Cruz's petition contains the new rule enunciated by Miller for the following reasons. [13]

***13** First, the court considers the Third Circuit's approach in Hoffner to be more supported by the statutory text. The text of section 2255(h) contains only three prerequisites and does not expressly require that the court additionally "scrutinize a motion to see if it would produce a second new rule." In re Hoffner, 870 F.3d at 311 (internal quotation marks omitted). The court agrees with the First Circuit in Moore that Congress's use of "rule" rather than "holding" indicates that it did not intend to limit the reach of the phrase "new rule" required by section 2255(h)(2) strictly to a case's "technical holding." See Moore, 871 F.3d at 82. The words "new rule" must then be read "in their context and with a view to their place in the overall statutory scheme." See Food & Drug Admin. V. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). The Sixth Circuit in Embry fails to do this when it focuses exclusively on the words "new rule" without engaging with the meaning of the rest of the sentence, which requires the petition "to contain" the new rule or, as in section 2244, to "rely on" the new rule. The court agrees with the Third Circuit that the meaning of "contain" requires the petition to rely on the new rule to substantiate its claim, but does not require the new rule to conclusively decide the claim on its facts. See In re Hoffner, 870 F.3d at 309.

Second, the court considers the Hoffner approach to be more consistent with the purposes of the Great Writ. "It (the Great Writ) is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." Schlanger v. Seamans, 401 U.S. 487, 491 n.5, 91 S.Ct. 995, 28 L.Ed.2d 251 (1971). Thus, in the Supreme Court's decisions "construing the reach of the habeas statutes," "[t]he Court uniformly has been guided by the proposition that the writ should be available to afford relief to those 'persons whom society has grievously wronged' in light of modern concepts of justice" and "has performed its statutory task through a sensitive weighing of the interests implicated by federal habeas corpus adjudication of constitutional claims." Kuhlmann v. Wilson, 477 U.S. 436, 447–48, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). While the Antiterrorism and Effective Death Penalty Act has narrowed the scope of the writ, the court agrees with the Third Circuit's weighing of the interests. In the context of retroactive application of a substantive rule, the state's countervailing interest in finality is less compelling, and the purpose of the Great Writ in preventing unjust confinement tips the scales in favor of a less narrow reading of section 2255(h). See In re Hoffner, 870 F.3d at 309 (citing Montgomery, 136 S.Ct. at 732).

Finally, in interpreting section 2255(h), this court seeks to anticipate how the Second Circuit would decide the issue. The Second Circuit cases addressing successive habeas petitions under Johnson did not address the question to the same analytical extent as the Third, Eighth, or Sixth Circuits. In two instances, however, the Second Circuit granted the application to file the successive petition and instructed the district court to consider staying the proceedings pending a Supreme Court decision in a potentially relevant case. See Blow, 829 F.3d at 172–73; Vargas, 2017 WL 3699225, at *1. Although the Second Circuit's order to stay the proceedings makes the import of these cases less compelling, such an outcome is certainly more in line with the reading of section 2255(h) adopted by the Third Circuit in Hoffner than by that of the Eighth or Sixth Circuits in Donnell or Embry.

Additionally, the Second Circuit denied certification to file a successive petition in Jackson v. United States and, in doing so, reasoned:

> Johnson does not support Petitioner's claim because he was not convicted under the statute involved in Johnson, 18 U.S.C. § 924(e), and he has not made a showing that any of the statutes under which he was convicted and sentenced contains language similar to the statutory language found unconstitutional in Johnson.

Jackson v. United States, No. 3:14-CV-00872-JCH, Mandate from USCA (Doc. No. 16) at 1–2. The second half of the above sentence implies that the Second Circuit would have considered certification appropriate if the petitioner had identified such a statute. This indicates that the Second Circuit does not read section 2255(h) as limited to the holding in Johnson. As such, the Mandate in Jackson is again more consistent with the Third Circuit's interpretation of section

2255(h) in Hoffner than the interpretations of the Eighth or Sixth Circuits in Donnell or Embry.

***14** For all of the above reasons, the court interprets section 2255(h) using the approach articulated by the Third Circuit. Applying that reading of section 2255(h) to this case, the court finds that Cruz has satisfied the requirements for filing a successive petition. [14] See In re Hoffner, 870 F.3d at 308. As noted above, Miller is a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." See 28 U.S.C. § 2255(h)(2); Montgomery, 136 S.Ct. at 734. Cruz's Petition "contains" and "relies on" Miller because Miller "substantiates [his] claim." See In re Hoffner, 870 F.3d at 309. Even if Cruz's claim may require a "non-frivolous extension of [Miller's] qualifying rule" to a set of facts not considered by the Miller Court, see id., his claim, nonetheless, depends on the rule announced in Miller. Miller's holding applies to a defendant under the age of 18, but the principle underlying the holding is more general: "[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." Miller, 567 U.S. at 479, 132 S.Ct. 2455. Thus, who counts as a "juvenile" and whether Miller applies to Cruz as an 18-year-old are better characterized as questions on the merits, not as preliminary gate-keeping questions under section 2255(h).

B. Miller's Application to 18-Year-Olds

Having found that Cruz has satisfied the requirements of section 2255(h), the court now turns to the merits of Cruz's Petition. Cruz asks the court to apply the new rule in Miller to his case, arguing that the national consensus disfavors applying mandatory life imprisonment without parole to 18-year-olds and that the science indicates that the same indicia of youth that made mandatory life imprisonment without parole unconstitutional for those under the age of 18 in Miller also applies to 18-year-olds.

Before the court addresses the evidence of national consensus and scientific consensus, it first considers a preliminary argument raised by the Government. The Government argues that the court is prevented from applying Miller to an 18-year-old because it must follow the Supreme Court's binding precedents. See Post-Hr'g Mem. in Opp. at 6–8. It goes without saying that the court agrees that it is bound by Supreme Court precedent. However, it does not consider application of Miller to an 18-year-old to be contrary to Supreme Court (or Second Circuit) precedent.

As noted previously, Miller states, "We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " Miller, 567 U.S. at 465, 132 S.Ct. 2455. The court does not infer by negative implication that the Miller Court also held that mandatory life without parole is necessarily constitutional as long as it is applied to those over the age of 18. The Miller opinion contains no statement to that effect. Indeed, the Government recognizes that, "The Miller Court did not say anything about exceptions for adolescents, young adults, or anyone else unless younger than 18." Post-Hr'g Mem. in Opp. at 8. Nothing in Miller then states or even suggests that courts are prevented from finding that the Eighth Amendment prohibits mandatory life without parole for those over the age of 18. Doing so would rely on and apply the rule in Miller to a different set of facts not contemplated by the case, but it would not be contrary to that precedent. [15]

***15** Such a reading of Miller is consistent with the Supreme Court's traditional "reluctance to decide constitutional questions unnecessarily." See Bowen v. United States, 422 U.S. 916, 920, 95 S.Ct. 2569, 45 L.Ed.2d 641 (1975). In Miller, it was unnecessary for the Court to address the constitutionality of mandatory life imprisonment for those over the age of 18 because both defendants in Miller were 14 years old. See Miller, 567 U.S. at 465, 132 S.Ct. 2455. Therefore, the question of whether mandatory life imprisonment without parole is constitutional for an 18-year-old was not before the Court in Miller, and it would be contrary to the Court's general practice to opine on the question unnecessarily.

The Government argues nonetheless that Miller drew a bright line at 18 years old, which prevents this court from applying the rule in Miller to an 18-year-old. See Post-Hr'g Mem. in Opp. at 8; see also Roper v. Simmons, 543 U.S. 551, 574, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (recognizing that the line may be over- and under-inclusive, but stating nonetheless that "a line must be drawn"). However, in so arguing, the Government fails to recognize that there are different kinds of lines. By way of illustration, in Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), the Supreme Court held that the death penalty was unconstitutional for offenders under the age of 16. Id. at 838, 108 S.Ct. 2687. It was not until Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), rev'd by Roper, 543 U.S. at 574, 125 S.Ct. 1183, however, that

the Supreme Court held that the Eighth Amendment did not prohibit the execution of offenders ages 16 to 18. Id. at 380. In Stanford, the Court did not say that the ruling it set forth was found in the Thompson holding. Indeed, Stanford was not redundant of Thompson because the line drawn in Thompson looked only in the direction of offenders under the age of 16 and found them to be protected by the Eighth Amendment. Thompson's line did not simultaneously apply in the other (i.e. older) direction to prohibit the Eighth Amendment from protecting those over the age of 16. In contrast, Stanford's line did.

This distinction between the type of line drawn in Thompson and the type of line drawn in Stanford is reflected in the difference in the Supreme Court's treatment of these two cases in Roper v. Simmons. In deciding that the death penalty was unconstitutional as applied to offenders under the age of 18, the Roper Court considered itself to be overturning Stanford, but not Thompson. Compare Roper, 543 U.S. at 574, 125 S.Ct. 1183 ("Stanford v. Kentucky should be deemed no longer controlling on this issue."); with id. ("In the intervening years the Thompson plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of Thompson extends to those who are under 18."). If the Government's argument that the line drawn in Miller prevents this court from applying its rule to an 18-year-old were correct, the same logic applied to the line drawn in Thompson would have required Roper to overturn Thompson rather than relying on and endorsing it. The language in Roper, however, makes clear that the court endorsed, rather than overturned, Thompson. See Roper, 543 U.S. at 574, 125 S.Ct. 1183.

In drawing the line at 18, then, Roper, Graham, and Miller drew lines similar to that in Thompson, protecting offenders that fall under the line while remaining silent as to offenders that fall above the line. In the case of mandatory life imprisonment without parole, no Supreme Court precedent draws a line analogous to that in Stanford. Therefore, while this court recognizes that it is undoubtedly bound by Supreme Court precedent, it identifies no Supreme Court precedent that would preclude it from applying the rule in Miller to an 18-year-old defendant.

***16** The Government also points in its Memorandum to a number of cases in which courts, faced with the question of applying Miller to defendants ages 18 or over, declined to do so. See Post-Hr'g Mem. in Opp. at 8–9, 10 n.1 (citing, inter alia, United States v. Marshall, 736 F.3d 492, 498 (6th Cir. 2013); Cruz v. Muniz, No. 2:16-CV-00498, 2017 WL 3226023, at *6 (E.D. Cal. July 31, 2017); Martinez v. Pfister, No. 16-CV-2886, 2017 WL 219515, at *5 (N.D. Ill. Jan. 19, 2017); Meas v. Lizarraga, No. 15-CV-4368, 2016 WL 8451467, at *14 (C.D. Cal. Dec. 14, 2016); Bronson v. Gen. Assembly of State of Pa., No. 3:16-CV-00472, 2017 WL 3431918, at *5 (M.D. Pa. July 17, 2017); White v. Delbalso, No. 17-CV-443, 2017 WL 939020, at *2 (E.D. Pa. Feb. 21, 2017)). The Government argues that this court should do the same.

In response, Cruz offers a number of reasons for distinguishing those cases from his, including that some of the cases cited by the Government did not involve mandatory life without parole, some involved defendants over the age of 21, and all but one did not involve expert testimony. [16] See Post-Hr'g Reply in Supp. at 6–7. While the court is cautious in disagreeing with these other courts, it agrees with Cruz that very few of the courts that declined to apply Miller to 18-year-olds had before them a record of scientific evidence comparable to the one that this court now has before it. As to the few courts that did consider scientific evidence on adolescent brain development and nonetheless declined to apply Miller, [17] this court respectfully acknowledges those decisions to the extent that they constitute persuasive authority, but recognizes its duty to decide this case on the law and record now before this court. [18]

***17** The court now turns to the evidence presented by Cruz and the standard of cruel and unusual punishment under the Eighth Amendment. The Eighth Amendment's prohibition of cruel and unusual punishment requires that "punishment for crime should be graduated and proportioned to [the] offense." Roper, 543 U.S. at 560, 125 S.Ct. 1183 (internal quotation marks omitted). This proportionality principle requires the court to evaluate " 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." Id. at 561, 125 S.Ct. 1183 (quoting Trop v. Dulles, 356 U.S. 86, 100–01, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958)). In its prior Ruling, the court traced the development of Eighth Amendment jurisprudence as applied to juveniles. See Ruling re: Mot. for Hr'g at 5–19. Rather than repeat its lengthy discussion of that history, the court incorporates herein the relevant discussion and focuses here on comparing the evidence relied on in Roper and the additional evidence presented to the court by Cruz.

In 2005, the Roper Court held the death penalty unconstitutional for persons under the age of 18 and, in drawing that line, stated:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. The plurality in Thompson drew the line at 16. In the intervening years the Thompson plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of Thompson extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Roper, 543 U.S. at 574, 125 S.Ct. 1183. The Roper Court relied on national consensus and the diminished penological justification resulting from the hallmark characteristics of youth. See id. at 567, 572–73, 125 S.Ct. 1183. In Roper, the defendant was 17 years and 5 months old at the time of the murder. Id. at 556, 618, 125 S.Ct. 1183.

In 2010, the Supreme Court in Graham v. Florida extended the reasoning in Roper to find that life imprisonment without parole is unconstitutional for juvenile nonhomicide offenders. See Graham v. Florida, 560 U.S. 48, 74, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). Like the Roper Court, the Graham Court again considered national consensus and the fact that the characteristics of juveniles undercut the penological rationales that justified life without parole sentences for nonhomicide offenses. See id. at 62–67, 71–74, 130 S.Ct. 2011. In Graham, the defendant was 16 at the time of the crime. See id. at 53, 130 S.Ct. 2011. Thus, the Graham Court did not need to reconsider the line drawn at age 18 in Roper, but rather adopted that line without further analysis, quoting directly from Roper. See id. at 74–75, 130 S.Ct. 2011 ("Because '[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,' those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime." (quoting Roper, 543 U.S. at 574, 125 S.Ct. 1183)).

In 2012, as noted earlier in this Ruling, the Supreme Court in Miller further extended Graham to hold that mandatory life imprisonment without parole is unconstitutional for juvenile offenders, including those convicted of homicide. See Miller, 567 U.S. at 465, 132 S.Ct. 2455. The defendants in Miller were 14 years old at the time of the crime, and the Miller Court, like the Graham Court, adopted the line drawn in Roper at age 18 without considering whether the line should be moved or providing any analysis to support that line. See id. at 465, 132 S.Ct. 2455 ("We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' ").

***18** Because Cruz was 18 years and 20 weeks old at the time of the murders in this case, this court is now presented with a set of facts the Supreme Court has not yet had need to consider—whether the new rule in Miller can be applied to an 18-year-old. In considering this question, the court looks to the same factors considered by the Supreme Court in Roper, Graham, and Miller—national consensus and developments in the scientific evidence on the hallmark characteristics of youth. The court notes that it need only decide whether the rule in Miller applies to an 18-year-old. On the facts of this case, it need not decide whether Miller also applies to a 19-year-old or a 20-year-old, as Cruz was 18 years old at the time of his crime. Although Cruz asks the court to draw the line at 21, the court declines to go any further than is necessary to decide Cruz's Petition.

1. National Consensus

The decisions in Roper, Graham, and Miller all address "whether 'objective indicia of society's standards, as expressed in legislative enactments and state practice,' show a 'national consensus' against a sentence for a particular class of individuals." Miller, 567 U.S. at 482, 132 S.Ct. 2455 (quoting Graham, 560 U.S. at 61, 130 S.Ct. 2011). In Roper, the Supreme Court identified three "objective indicia of

consensus" in determining that societal standards considered the juvenile death penalty to be cruel and unusual: (1) "the rejection of the juvenile death penalty in the majority of States;" (2) "the infrequency of its use even where it remains on the books;" and (3) "the consistency in the trend toward abolition of the practice." Roper, 543 U.S. at 567, 125 S.Ct. 1183. The court considers each of these indicia in turn.

a. Legislative Enactments

"[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Graham, 560 U.S. at 62, 130 S.Ct. 2011 (internal quotation marks and citation omitted). The Government argues that 24 states and the federal government have statutes prescribing mandatory life imprisonment without the possibility of parole for offenders who commit murder at the age of 18 or older. See Post-Hr'g Mem. in Opp. at 22; see also id., Ex. A. The Government further claims that Congress has enacted 41 statutes with a sentence of mandatory life without parole for premeditated murder. See Post-Hr'g Mem. in Opp. at 23 (citing five examples). Based on this tally, the Government concludes that there is no national consensus that a mandatory life sentence without the possibility of parole is unconstitutional as applied to persons aged 18 or older. See id. at 22–23.

However, the Supreme Court in both Graham and Miler indicated that merely counting the number of states that permitted the punishment was not dispositive. See Graham, 560 U.S. at 66, 130 S.Ct. 2011 ("The evidence of consensus is not undermined by the fact that many jurisdictions do not prohibit life without parole for juvenile nonhomicide offenders."); Miller, 567 U.S. at 485, 132 S.Ct. 2455 (relying on reasoning in Graham and Thompson to "explain[ ] why simply counting [the statutes] would present a distorted view"). The Miller Court specifically noted that "the States' argument on this score [is] weaker than the one we rejected in Graham." Miller, 567 U.S. at 482, 132 S.Ct. 2455. In Graham, 39 jurisdictions permitted life imprisonment without parole for juvenile nonhomicide offenders, see Graham, 560 U.S. at 62, 130 S.Ct. 2011, while, in Miller, 29 jurisdictions permitted mandatory life imprisonment without parole for juvenile homicide offenders, see Miller, 567 U.S. at 482, 132 S.Ct. 2455. The Government has cited the court to 25 jurisdictions in this case, a lower number than that in Graham or Miller.

Moreover, the reasoning of the Court in Miller that the tally of legislative enactments is less significant than other considerations to its ultimate conclusion is also applicable to the current issue before the court. The Miller Court reasoned:

> ***19** For starters, the cases here are different from the typical one in which we have tallied legislative enactments. 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 sentence follow a certain process—considering an offender's youth and attendant circumstances—before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents: specifically, the principle of Roper, Graham, and our individualized sentencing cases that youth matters for purposes of meting out the laws' most serious punishments. When both of those circumstances have obtained in the past, we have not scrutinized or relied in the same way on legislative enactments.

Miller, 567 U.S. at 483, 132 S.Ct. 2455. Because the issue before the court now is whether to apply Miller to an 18-year-old, the same circumstances identified above in Miller are necessarily also true here, so the court need not rely too heavily on legislative enactments. Cruz asks this court to rule that the mandatory aspect of the sentence applied to him be held to be unconstitutional. He does not seek a ruling that would prevent such a sentence from being applied in the discretion of the sentencing judge, after consideration of a number of sentencing factors, including his youth and immaturity at the time of the offense.

Additionally, Cruz argues that, beyond the context of statutes pertaining specifically to mandatory life imprisonment without parole, states have enacted a number of statutes providing greater protections to offenders ages 18 into the early 20s than to adults. For example, while the Government indicates that no state treats individuals aged 18 to 21

differently than adults for homicide offenses, see Post-Hr'g Mem. in Opp. at 23, the Government acknowledges that a number of states do recognize an intermediate classification of "youthful offenders" applicable to some other crimes. See id., Ex. A (indicating that 18-year-olds are classified as "youthful offenders" in California, Colorado, Florida, New Mexico, and New York). Cruz also identifies 16 states that provide protections, such as expedited expungement, Youth Offender Programs, separate facilities, or extended juvenile jurisdiction, for offenders who are 18 years old up to some age in the early 20s, depending on the state. See Post-Hr'g Mem. in Supp. at 34–38; see also, e.g., Cal. Penal Code § 3051(a)(1) (providing a youth offender parole hearing for prisoners under the age of 25); Va. Code. Ann. § 19.2-311(B)(1) (permitting persons convicted of nonhomicide offenses under the age of 21 to be committed to a state facility for youthful offenders in lieu of any other penalty provided by law). Although the Government argues that these protections often do not apply to youthful offenders who commit the most serious crimes, such as the double homicide for which Cruz was convicted, see Post-Hr'g Mem. in Opp. at 23, these statutes nonetheless indicate a recognition of the difference between 18-year-olds and offenders in their mid-twenties for purposes of criminal culpability.

The Government also argues that these statutes are not persuasive of a national consensus because the question is not whether there is a national consensus that the adolescent brain is not mature until the mid-20s, but rather whether there is a national consensus about the sentencing practice at issue. See Post-Hr'g Mem. in Opp. at 26 n.10 (quoting Graham, 560 U.S. at 61, 130 S.Ct. 2011 (describing the inquiry as whether "there is a national consensus against the sentencing practice at issue")). While the court agrees with the Government that the issue before it is whether a national consensus exists as to the practice of sentencing 18-year-olds to mandatory life imprisonment without parole, the court considers other evidence of line-drawing between juveniles and adults still to be relevant. In drawing the line at age 18, the Roper Court pointed to evidence beyond the strict context of the death penalty. See Roper, 543 U.S. at 574, 125 S.Ct. 1183 ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest."). Therefore, while the court places greater weight on national consensus about mandatory life imprisonment without parole, the court, like the Roper Court, considers "where society draws the line for many purposes between childhood and adulthood" to be a relevant consideration. Id.

b. Actual Use

***20** In finding the government's reliance on counting to be "incomplete and unavailing," the Graham Court emphasized the importance of actual sentencing practices as part of the Court's evaluation of national consensus. Graham, 560 U.S. at 62, 130 S.Ct. 2011. Along these lines, Cruz points to a 2017 Report by the United States Sentencing Commission on offenders ages 25 or younger who were sentenced in the federal system between 2010 and 2015. See Post-Hr'g Mem. in Supp., Ex. 3, United States Sentencing Commission, Youthful Offenders in the Federal System, Fiscal Years 2010 to 2015 ("Youthful Offenders") (Doc. No. 115-3).

The Sentencing Commission reported that 86,309 youthful offenders (aged 25 and under) were sentenced in the federal system during that five-year period. See id. at 2. Of those, 2,226 (2.6%) were 18 years old, 5,800 (6.7%) were 19 years old, and 8,809 (10.2%) were 20 years old. See id. at 15. Of the 86,309 youthful offenders, 96 received life sentences. See id. at 48, 130 S.Ct. 2011. Of those 96, 85 were 21 years or older at the time of sentencing, 6 were 20 years old, 4 were 19 years old, and only one was 18 years old. See id. Although the Sentencing Commission's findings are imperfectly tailored to the question before the court, [19] they nonetheless indicate the rarity with which life sentences are imposed on 18-year-olds like Cruz, at least in the federal system.

***21** The Government argues that the court should not place weight on the Sentencing Commission's Report because it is "simply a report on statistics regarding offenders aged twenty-five or younger. It makes no recommendation to the Commission to change the Sentencing Guidelines. Nor does it establish anything about trends regarding mandatory life sentences." Post-Hr'g Mem. in Opp. at 27. In so arguing, the Government would overly restrict the type of evidence that the court may consider in determining whether a national consensus exists. Notably, the Graham Court also considered actual sentencing practices, as reported by a study done by the United States Department of Justice. See Graham, 560 U.S. at 62–63, 130 S.Ct. 2011. The Graham Court did not mention whether the study recommended legislative changes or reported trends over time, but rather considered its findings about the infrequency of life without parole as a sentence for juvenile nonhomicide offenders to be significant evidence of a national consensus regardless. See id.; see also Roper, 543 U.S. at 567, 125 S.Ct. 1183 (including as a separate

indicia of consensus "the infrequency of [the punishment's] use even where it remains on the books," independent of the indicia for legislative enactments or directional trends). Thus, while certainly not dispositive of national consensus, the Sentencing Commission's Report is relevant evidence in the court's consideration on that issue. To that end, the Report clearly indicates the extreme infrequency of the imposition of life sentences on 18-year-olds in the federal system.

c. Directional Trend

Cruz additionally points to evidence of trends since Roper indicating a direction of change toward recognizing that "late adolescents require extra protections from the criminal law" and more generally that society "treats eighteen- to twenty-year-olds as less than fully mature adults." Post-Hr'g Mem. in Supp. at 38, 40. As noted previously, the Government challenges Cruz's reliance on such evidence because the issue is whether "there is a national consensus against the sentencing practice at issue," not whether there is a national consensus that adolescent brains are not fully mature until the mid-20s. Post-Hr'g Mem. in Opp. at 26 n.10 (quoting Graham, 560 U.S. at 61, 130 S.Ct. 2011).

The court acknowledges that the most persuasive evidence of a directional trend would be changes in state legislation prohibiting mandatory life imprisonment without parole for 18-year-olds. Cruz has not provided evidence of this. However, the court again looks for guidance to the Roper Court, which drew the line at age 18 based on "where society draws the line for many purposes between childhood and adulthood." Roper, 543 U.S. at 574, 125 S.Ct. 1183. Thus, trends as to where society draws that line are relevant, and the court is not confined to consider only evidence in the strict context of mandatory life imprisonment without parole.

While Roper emphasized that society draws the line at age 18 for many purposes, including voting, serving on juries, and marrying without parental consent, Cruz identifies other important societal lines that are drawn at age 21, such as drinking. See Post-Hr'g Mem. in Supp. at 40–41 (citing 23 U.S.C. § 158); Roper, 543 U.S. at 569, 125 S.Ct. 1183. Some lines originally drawn at age 18 have also begun to shift to encompass 18- to 20-year-olds. For example, a Kentucky state court in Bredhold v. Kentucky declared the state's death penalty statute unconstitutional as applied to those under the age of 21, based on a finding of a "consistent direction of change" that "the national consensus is growing more and more opposed to the death penalty, as applied to defendants eighteen (18) to twenty-one (21)." Post-Hr'g Mem. in Supp., Ex. 5, Bredhold v. Kentucky (Doc. No. 115-5) at 6. The Kentucky court cited the fact that, in the 31 states with a death penalty statute, a total of only 9 defendants under the age of 21 at the time of the offence were executed between 2011 and 2016.

Likewise, recognizing the same directional trend, the American Bar Association ("ABA") issued a Resolution in February 2018, "urg[ing] each jurisdiction that imposes capital punishment to prohibit the imposition of a death sentence on or execution of any individual who was 21 years old or younger at the time of the offense." See Petitioner's Notice of Supplemental Authority, Ex. A ("ABA Resolution") (Doc. No. 121-1) at 1. In doing so, the ABA considered both increases in scientific understanding of adolescent brain development and legislative developments in the legal treatment of individuals in late adolescence. See id. at 6–10. For example, it recognized "a consistent trend toward extending the services of traditional child-serving agencies, including the child welfare, education, and juvenile justice systems, to individuals over the age of 18." Id. at 10.

***22** Additionally, Cruz points out that, between 2016 and 2018, 5 states and 285 localities raised the age to buy cigarettes from 18 to 21. See Campaign for Tobacco-Free Kids, States and Localities That Have Raised the Minimum Legal Sale Age for Tobacco Products to 21, http://www.tobaccofreekids.org/assets/content/what_we_do/state_local_issues/sales_21/states_localities_MLSA_21.pdf. Furthermore, as of 2016, all fifty states and the District of Columbia recognized extended age jurisdiction [20] for juvenile courts beyond the age of 18, in comparison to only 35 states in 2003. See Post-Hr'g Mem. in Supp., Ex. 8, National Center for Juvenile Justice, U.S. Age Boundaries of Delinquency 2016 (Doc. No. 115-8) at 2; Elizabeth Scott, Richard Bonnie & Laurence Steinberg, Young Adulthood as a Transitional Legal Category, 85 Fordham L. Rev. 641, 666 n.156 (2016).

While there is no doubt that some important societal lines remain at age 18, the changes discussed above reflect an emerging trend toward recognizing that 18-year-olds should be treated different from fully mature adults.

2. Scientific Evidence

"Community consensus, while entitled to great weight, is not itself determinative of whether a punishment is cruel and unusual." Graham, 560 U.S. at 67, 130 S.Ct. 2011 (internal quotation marks omitted). The court retains the responsibility of interpreting the Eighth Amendment. Id. (citing Roper, 543 U.S. at 575, 125 S.Ct. 1183). To that end, "[t]he judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." Id. at 67, 130 S.Ct. 2011.

The Court in Roper, Graham, and Miller thus looked to the available scientific and sociological research at the time of the decisions to identify differences between juveniles under the age of 18 and fully mature adults—differences that undermine the penological justifications for the sentences in question. See Roper, 543 U.S. at 569–72, 125 S.Ct. 1183; Graham, 560 U.S. at 68–75, 130 S.Ct. 2011; Miller, 567 U.S. at 471, 132 S.Ct. 2455 ("Our decisions rested not only on common sense—on what "any parent knows"—but on science and social science as well."). The Supreme Court in these cases identified "[t]hree general differences between juveniles under 18 and adults": (1) that juveniles have a "lack of maturity and an underdeveloped sense of responsibility," often resulting in "impetuous and ill-considered actions and decisions;" (2) that juveniles are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;" and (3) that "the character of a juvenile is not as well formed as that of an adult." Roper, 543 U.S. at 569–70, 125 S.Ct. 1183; see also Graham, 560 U.S. at 68, 130 S.Ct. 2011; Miller, 567 U.S. at 471–72, 132 S.Ct. 2455.

Because of these differences, the Supreme Court concluded that juveniles are less culpable for their crimes than adults and therefore the penological justifications for the death penalty and life imprisonment without the possibility of parole apply with less force to them than to adults. See Roper, 543 U.S. at 570–71, 125 S.Ct. 1183; Graham, 560 U.S. at 69–74, 130 S.Ct. 2011; Miller, 567 U.S. at 472–73, 132 S.Ct. 2455. Retribution is less justifiable because the actions of a juvenile are less morally reprehensible than those of an adult due to diminished culpability. See Graham, 560 U.S. at 71, 130 S.Ct. 2011. Likewise, deterrence is less effective because juveniles' "impetuous and ill-considered actions" make them "less likely to take a possible punishment into consideration when making decisions." Id. at 72, 130 S.Ct. 2011. Nor is incapacitation applicable because juveniles' personality traits are less fixed and therefore it is difficult for experts to "differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 72–73, 130 S.Ct. 2011 (quoting Roper, 543 U.S. at 572, 125 S.Ct. 1183). Finally, rehabilitation cannot be the basis for life imprisonment without parole because that "penalty altogether forswears the rehabilitative ideal" by "denying the defendant the right to reenter the community." Id. at 74, 130 S.Ct. 2011.

***23** In reaching its decision, the Roper Court relied on the Court's prior decision in Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), which held that the Eighth Amendment prohibited the execution of a defendant convicted of a capital offense committed when the defendant was younger than 16 years old. See Roper, 543 U.S. at 570–71, 125 S.Ct. 1183. The Roper Court pointed to the Thompson Court's reliance on the significance of the distinctive characteristics of juveniles under the age of 16 and stated, "We conclude the same reasoning applies to all juvenile offenders under 18." Id. The court now looks to the Roper Court's reliance on these same characteristics and concludes that scientific developments since then indicate that the same reasoning also applies to an 18-year-old. See Steinberg Tr. at 70–71 (stating that he is "[a]bsolutely certain" that the scientific findings that underpin his conclusions about those under the age of 18 also apply to 18-year-olds); Alexandra Cohen et al., When Does a Juvenile Become an Adult? Implications for Law and Policy, 88 Temple L. Rev. 769 (2016); Post-Hr'g Mem. in Supp., Ex. 1, Laurence Steinberg et al., Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation, Developmental Science 00 (2017) (Doc. No. 115-1).

As to the first characteristic identified by the Roper Court—"lack of maturity and an underdeveloped sense of responsibility" as manifested in "impetuous and ill-considered actions and decisions"—the scientific evidence before the court clearly establishes that the same traits are present in 18-year-olds. See Roper, 543 U.S. at 569, 125 S.Ct. 1183. Cruz's evidence consists of the expert testimony of Dr. Laurence Steinberg and scientific articles offered as exhibits. See, e.g., Cohen et al., When Does a Juvenile Become an Adult?; Steinberg et al., Around the World. [21]

In his testimony, Dr. Steinberg defined early adolescence as occurring between the ages of 10 and 13, middle adolescence between the ages of 14 and 17, and late adolescence

between the ages of 18 and 21. See Steinberg Tr. at 11. He distinguished between two different decision-making processes: cold cognition, which occurs when an individual is calm and emotionally neutral, and hot cognition, which occurs when an individual is emotionally aroused, such as in anger or excitement. See id. at 9–10. Cold cognition relies mainly on basic thinking abilities while hot cognition also requires the individual to regulate and control his emotions. See id. at 10. While the abilities required for cold cognition are mature by around the age of 16, the emotional regulation required for hot cognition is not fully mature until the early- or mid-20s. See id. at 10, 70; see also Cohen et al., When Does a Juvenile Become an Adult?, at 786 (finding that, "relative to adults over twenty-one, young adults show diminished cognitive capacity, similar to that of adolescents, under brief and prolonged negative emotional arousal").

Dr. Steinberg also testified that late adolescents "still show problems with impulse control and self-regulation and heightened sensation-seeking, which would make them in those respects more similar to somewhat younger people than to older people." Steinberg Tr. at 19. For example, he testified that impulse control is still developing during the late adolescent years from age 10 to the early- or mid-20s. [22] See id. at 20; Post-Hr'g Mem. in Supp. at 10; Cohen et al. at 780. Additionally, late adolescents are more likely to take risks than either adults or middle or early adolescents. See Steinberg Tr. at 20. According to Dr. Steinberg, risk-seeking behavior peaks around ages 17 to 19 and then declines into adulthood. See id.; Steinberg et al., Around the World, at 10 (graphing the trajectory of sensation-seeking behavior, as related to age, as an upside-down "U" with the peak at age 19). The scientific evidence therefore reveals that 18-year-olds display similar characteristics of immaturity and impulsivity as juveniles under the age of 18.

***24** The same conclusion can be drawn for susceptibility of 18-year-olds to outside influences and peer pressure, the second characteristic of youth identified in Roper. Dr. Steinberg testified that the ability to resist peer pressure is still developing during late adolescence. See Steinberg Tr. at 20–21. Therefore, susceptibility to peer pressure is higher in late adolescence than in adulthood, but slightly lower than in middle adolescence. See id. According to Dr. Steinberg's research, up until the age of 24, people exhibit greater risk-taking and reward-sensitive behavior when in the presence of their peers. See id. at 24–25. Adults after the age of 24 do not exhibit this behavior, but rather perform the same whether they are by themselves or with their peers. See id. Therefore, like juveniles under the age of 18, 18-year-olds also experience similar susceptibility to negative outside influences.

Finally, on the third characteristic of youth identified by Roper—that a juvenile's personality traits are not as fixed—Dr. Steinberg testified that people in late adolescence are, like 17-year-olds, more capable of change than are adults. See id. at 21.

Thus, in sum, Dr. Steinberg testified that he is "absolutely confident" that development is still ongoing in late adolescence. See id. at 62, 130 S.Ct. 2011. In 2003, Dr. Steinberg co-wrote an article, the central point of which was that adolescents were more impetuous, were more susceptible to peer pressure, and had less fully formed personalities than adults. See id. at 22; see also Laurence Steinberg & Elizabeth Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychol. 1009 (2003). Although the article focused on people younger than 18, Dr. Steinberg testified that, if he were to write the article today, with the developments in scientific knowledge about late adolescence, he would say "the same things are true about people who are younger than 21." Steinberg Tr. at 22.

The court today is not asked to determine whether the line should be drawn at age 20. Rather, the issue before the court is whether the conclusions of Miller can be applied to Cruz, an 18-year-old. To that end, Dr. Steinberg testified that he was not aware of any statistically significant difference between 17-year-olds and 18-year-olds on issues relevant to the three differences identified by the Court in Roper, Graham, and Miller. See id. at 69, 130 S.Ct. 2011; see also, supra, at 48–49, 130 S.Ct. 2011. When asked whether he could state to a reasonable degree of scientific certainty that the findings that underpinned his conclusions as to the defendants in Graham and Miller, who were under the age of 18, also applied to an 18-year-old, Dr. Steinberg answered that he was "[a]bsolutely certain." See id. at 70–71, 130 S.Ct. 2011.

The Government does not contest Dr. Steinberg's scientific opinion or with Cruz's presentation of the scientific findings. See Post-Hr'g Mem. in Opp. at 15 ("To be clear, the Government did not, and has not, taken issue with Professor Steinberg's scientific opinion on these matters. Nor, generally, does the Government dispute the scientific findings presented by the petitioner in his brief, which largely mirror those to which Professor Steinberg testified."). [23] Rather, the

Government argues only that the court has before it the same scientific evidence that was before the Supreme Court in Miller, so the court should draw the same line at age 18 as did the Miller Court. See id. at 12–20. The Government presents a side-by-side comparison of some of the facts presented by Dr. Steinberg at the evidentiary hearing before this court and the facts presented in two amicus briefs submitted in Miller. See id. at 16–18. [24]

***25** The Government's comparison is misguided, however, because the Supreme Court in Miller did not have occasion to consider whether the indicia of youth applied to 18-year-olds. As discussed above, the Supreme Court has historically been "reluctan[t] to decide constitutional questions unnecessarily." See Bowen, 422 U.S. at 920, 95 S.Ct. 2569. In Miller, both defendants were 14 years old at the time of their crimes. See Miller, 567 U.S. at 465, 132 S.Ct. 2455. The issue before the Court in Miller was whether mandatory life imprisonment without the possibility of parole was unconstitutional for juvenile offenders who committed homicides. See id. Thus, the Miller Court merely adopted without analysis the line at age 18, drawn seven years earlier by the Roper Court, because the facts before the Court did not require it to reconsider that line. See Miller, 567 U.S. at 471–80, 132 S.Ct. 2455. As evidence of this, when the Supreme Court asked counsel for Miller where to draw the line, rather than pointing to any scientific evidence, counsel answered, "I would draw it at 18 ... because we've done that previously; we've done that consistently." See Miller, Oral Argument Transcript, at 10, available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/ 2011/10-9646.pdf.

A more appropriate comparison, then, would be the evidence before the court today and the evidence before the Roper Court in 2005. Dr. Steinberg testified that, in the mid- to late-2000s, "virtually no research ... looked at brain development during late adolescence or young adulthood." Steinberg Tr. at 14. He stated:

> People began to do research on that period of time toward the end of that decade and as we moved into 2010 and beyond, there began to accumulate some research on development in the brain beyond age 18, so we didn't know a great deal about brain development during late adolescence until much more recently.

Id. Therefore, when the Roper Court drew the line at age 18 in 2005, the Court did not have before it the record of scientific evidence about late adolescence that is now before this court.

Thus, relying on both the scientific evidence and the societal evidence of national consensus, the court concludes that the hallmark characteristics of juveniles that make them less culpable also apply to 18-year-olds. As such, the penological rationales for imposing mandatory life imprisonment without the possibility of parole cannot be used as justification when applied to an 18-year-old.

The court therefore holds that Miller applies to 18-year-olds and thus that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole" for offenders who were 18 years old at the time of their crimes. See Miller, 567 U.S. at 479, 132 S.Ct. 2455. As applied to 18-year-olds as well as to juveniles, "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." See id. As with Miller, this Ruling does not foreclose a court's ability to sentence an 18-year-old to life imprisonment without parole, but requires the sentencer to take into account how adolescents, including late adolescents, "are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." See id. at 480, 132 S.Ct. 2455.

## VI. CONCLUSION

For the reasons stated above, Cruz's Petition to Vacate, Set Aside, or Correct Sentence (Doc. No. 37) is **GRANTED**.

**SO ORDERED**.

**All Citations**

Not Reported in Fed. Supp., 2018 WL 1541898

## Footnotes

1 Cruz also filed a Supplemental Section 2255 Motion seeking relief pursuant to Montcrieffe v. Holder, 569 U.S. 184, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013). See Supplemental Memorandum of Law (Doc. No. 43). This court denied relief on Cruz's supplemental argument. See Ruling re: Motion for Hearing and Supplemental Section 2255 Motion (Doc. No. 86) at 29–30.

2 The Government objected to the relevance of Cruz's testimony, arguing that "his specific characteristics have no bearing on whether this Court is authorized to rethink the Supreme Court's decision in Miller, much less whether any change would be warranted in Eighth Amendment jurisprudence." See Government's Post-Hearing Memorandum in Opposition to Pet. to Vacate ("Post-Hr'g Mem. in Opp.") (Doc. No. 117) at 29. The Government argues that such evidence is appropriately addressed only at a resentencing hearing for Cruz, should the court grant Cruz's petition. See id.

The court notes that Cruz's testimony was admitted only as a case study, or as one example, of the trajectory of adolescent brain development. See Miller, 567 U.S. at 478, 132 S.Ct. 2455 (describing the facts surrounding each defendant's case as "illustrat[ing] the problem"). The court does not base this Ruling on the specific facts of Cruz's case.

3 The Mandate focuses on retroactivity because the Petition was authorized prior to the Supreme Court's ruling in Montgomery v. Louisiana, —— U.S. ——, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), and likely also because Cruz's Memorandum likewise focused on the issue of retroactivity. See App. to File Successive Pet. at 2–8.

4 Like Cruz's original Memorandum in Support of Application to File a Successive Petition, the Supplemental Memorandum is also ambiguous. It does appear to reference the argument that he was under the age of 18 for one of the predicate acts of the offense. See Cruz v. United States (Second Circuit Court of Appeals), No. 13-2457, Supplementary Papers to Motion for Successive Petition (Doc. No. 14) at 2. However, the Supplemental Memorandum does not elaborate the argument with much clarity, nor is the rest of the Memorandum clear as to whether other arguments are also raised. In the face of such ambiguity, the court reads Cruz's pro se filings liberally to raise the strongest arguments that they suggest, as explained above. See Willey v. Kirkpatrick, 801 F.3d 51, 62 (2d Cir. 2015).

5 Even if Cruz's Application before the Second Circuit is read not to contain the current claim that Miller applies to him as an 18-year-old, the court would nonetheless likely proceed to its gate-keeping inquiry of whether the claim satisfies the requirements of section 2255(h). By way of comparison, while Cruz's current successive petition was pending before this court, Cruz moved for leave before the Second Circuit to file another successive 2255(h) petition based on Moncrieffe v. Holder, 569 U.S. 184, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013), an entirely separate claim unrelated to either of his Miller claims. See Supplemental Memorandum of Law (Doc. No. 43) at 2; Response to 2255 Motion (Doc. No. 64) at 7. The Second Circuit denied his motion because it had already granted him leave to file the current petition, which was then already pending before this court. See Response to 2255 Motion at 7. In doing so, the Second Circuit stated, "If a § 2255 motion is already pending in district court pursuant to this Court's authorization under § 2255(h) motion, the movement [sic] may seek to amend that motion to add claims without first requesting leave of this Court." Id. (quoting the Second Circuit).

Therefore, the court considers it likely that, even if it found that Cruz's current Miller argument were not included in his Application to File Successive Petition before the Second Circuit, the Second Circuit would treat this claim in a similar manner as Cruz's Moncrieffe claim and permit him to seek permission from this court to include the claim in his Petition without seeking leave from the Circuit. As such, the court would then proceed to consider whether the claim satisfies the requirements of section 2255(h), leading to the same analysis the court conducts in this Ruling. Therefore, it is not significant to the outcome of this case whether Cruz's Memoranda before the Second Circuit expressly included the current claim or not.

6 At oral argument, the Government argued that the Johnson line of cases is distinguishable from the Miller context. The Government argued that, because the language of the residual clause of the Armed Career Criminal Act ("ACCA") is nearly identical to the language of the residual clause in the Sentencing Guidelines,

applying the rule in Johnson to petitions based on the Sentencing Guidelines is different than applying the rule in Miller to petitions of defendants who were 18 years old at the time of their crimes.

The court, however, does not consider this distinction significant. Just as Miller said nothing about defendants who were 18 years old at the time of the crime, Johnson says nothing about the Sentencing Guidelines. Thus, like Cruz's Petition here, successive 2255(h) petitions seeking to rely on Johnson to vacate convictions under the Sentencing Guidelines require the courts to consider whether section 2255(h) is limited to petitions raising the specific set of facts addressed in Johnson or whether it permits petitions to rely on the rule of Johnson to address a new set of facts not specifically addressed by that case. Cases considering that question provide relevant guidance for this court's inquiry because they address the meaning of the statutory words "to contain" in section 2255(h), which should maintain the same meaning regardless of the content of the new rule of constitutional law at issue.

Additionally, the court notes that, even if the analogy between the Johnson and Miller contexts for considering the section 2255(h) requirements is not perfect, there is no binding Second Circuit precedent indicating how the court should interpret section 2255(h) in the context of Miller. In such a situation, the court finds it helpful to consider persuasive authority interpreting the statute at issue, even in different contexts, in order to best anticipate how the Second Circuit would decide the question before the court.

7 In doing so, the court recognizes that its task requires a higher bar than that of the Court of Appeals because this court must determine that the requirements of section 2255(h) are actually met, not merely that the Petition has put forth a prima facie showing.

8 The Hoffner court additionally made pragmatic arguments based on the prima facie standard of the Court of Appeals' inquiry and the protections of a fuller exploration by the district court. See In re Hoffner, 870 F.3d at 308–09. This court acknowledges that these arguments are irrelevant to its current inquiry due to the different standard and posture of the Court of Appeals' inquiry, but the court does not consider these arguments to undermine the rest of the Third Circuit's analysis, which is relevant to this court's inquiry into the meaning of section 2255(h)(2).

9 The Government argues to the contrary that whether Miller applies to Cruz is a preliminary gatekeeping question that should be decided under the requirements of section 2255(h). See Post-Hr'g Mem. in Opp. at 2–6. However, if the gate-keeping inquiry under section 2255(h) includes whether the new rule of constitutional law applies to the petitioner, there would often likely remain no issue to be decided on the merits.

10 The Supreme Court has clarified, however, that the mere existence of disagreement does not necessarily indicate that the rule is new. See Beard v. Banks, 542 U.S. 406, 416 n.5, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) ("Because the focus of the inquiry is whether reasonable jurists could differ as to whether precedent compels the sought-for rule, we do not suggest that the mere existence of a dissent suffices to show that the rule is new." (emphasis in original)); id. at 423, 124 S.Ct. 2504 (Souter, J., dissenting) (noting that the majority acknowledges that the all-reasonable-jurists standard "is objective, so that the presence of actual disagreement among jurists and even among Members of this Court does not conclusively establish a rule's novelty"); see also Moore, 871 F.3d at 81 ("In fact, it would not necessarily be a new rule of constitutional law even if we did disagree on the constitutional issue." (citing Beard, 542 U.S. at 416 n.5, 124 S.Ct. 2504)).

11 If, of course, Donnell had been a Second Circuit opinion, the court's duty to address the difficult question now before it would have been easy.

12 The Supreme Court has granted certiorari in the case of Lynch v. Dimaya. See Lynch v. Dimaya, —— U.S. ——, 137 S.Ct. 31, 195 L.Ed.2d 902 (Mem.) (2016). In Lynch, the Supreme Court will decide whether the residual clause of 18 U.S.C. § 16(b), using language similar to that struck down by Johnson in the ACCA, is unconstitutionally vague. See Dimaya v. Lynch, 803 F.3d 1110, 1111 (9th Cir. 2015).

While this decision may add clarity to the circuit split discussed above, it will do so by resolving the merits issue, not by determining the correct approach to section 2255(h). Lynch reaches the Supreme Court on certiorari from an appeal of a decision by the Board of Immigration Appeals, not on a successive habeas petition under section 2255. See id.

13 Again, the court recognizes that its responsibility to review the requirements of section 2255(h) requires it to apply a higher standard than the prima facie showing required of the Court of Appeals in certifying a successive petition. See, e.g., Ferranti, 2010 WL 307445, at *10. Therefore, the court acknowledges that these circuit precedents considering certification are imperfect guides for the court's current inquiry under section 2255(h). However, because there is no binding precedent reviewing a district court's assessment of the section 2255(h) requirements, the court nonetheless looks to these certification cases as persuasive authority. As such, the court looks to the Court of Appeals cases discussed above for guidance in interpreting the language of section 2255(h). See, e.g., In re Moore, 830 F.3d at 1271.

14 The court acknowledges that, in its previous Orders and Rulings, it used the language of "expanding" Miller, rather than "containing" or "relying on" the new rule in Miller. See, e.g., Order on Motion for Appointment of Counsel (Doc. No. 20) at 3 ("Counsel shall file a federal habeas motion and supporting memorandum ... addressing whether Miller ... may be expanded to apply to those who were over the age of 18 at the time of their crimes...."); Ruling re: Mot. for Hearing at 23 ("Cruz argues that Miller's protection should be expanded to individuals who were under 21 at the time they committed their crimes."). The court does not, however, consider itself bound in this current Ruling by its less-than-thoughtful choice of language in prior Rulings, which could admittedly have been the result of sloppy drafting. At the time of the Order and Ruling cited above, the court was not considering the issue of whether Cruz's Petition "relied on" the new rule in Miller and therefore may have been less mindful of its choice of language in that regard.

15 The Government argues that the court should not deviate from the bright line drawn in Miller at age 18, "even where it believe[s] that the underlying rationale of that precedent ha[s] been called into question by subsequent cases." Post-Hr'g Mem. in Opp. at 6–7 (citing, inter alia, Agostini v. Felton, 521 U.S. 203, 237–38, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)). Distinct from this case, however, Agostini involved Supreme Court precedent that "directly control[led]" the case. See Agostini, 521 U.S. at 237, 117 S.Ct. 1997. As noted above, Miller does not hold that mandatory life imprisonment without parole is constitutional as long as it is applied to those over the age of 18.

16 The one case that Cruz identifies as including expert testimony is United States v. Marshall, 736 F.3d 492 (6th Cir. 2013). See Post-Hr'g Reply in Supp. at 6–7. The expert testimony in Marshall, however, was substantially different from the expert testimony before this court, as the testimony in Marshall did not focus on the science of typical adolescent brain development. Although the expert in that case did testify that "the adolescence period does not end at 18 but actually extends into an individual's mid-20s," id. at 496, his testimony did not focus on the scientific evidence of development in typical 18-year-olds. Rather, the expert's testimony focused on a condition unique to the defendant in Marshall called Human Growth Hormone Deficiency, which "basically prevents maturation." See id. Therefore, the defendant in Marshall argued that his condition made him different from others who shared his chronological age. See id. at 497 (describing the defendant's developmental delay as "unique"). He was not arguing that 18-year-olds generally present the same hallmark characteristics of youth as 17-year-olds, as Cruz is arguing here. Thus, while the Marshall court considered expert testimony, it did not consider expert testimony comparable to that presented by Dr. Steinberg before this court.

17 The court notes three cases cited by the Government that do consider scientific evidence. The petitioner in White v. Delbaso argued that "validated science and social science adopted by the high court has established that the human brain continues to develop well into early adulthood, specifically until the age of 25," but the district court for the Eastern District of Pennsylvania rejected such an argument and found that the petitioner was not entitled to file a second habeas petition based on Miller. See White v. Delbalso, No. 17-CV-443, 2017 WL 939020, at *2 (E.D. Pa. Feb. 21, 2017). That case differs from Cruz's in two key respects. First, the petitioner in White was 23 years old at the time of his crime, while Cruz was 5 months past his 18th birthday. As noted by the scientific evidence discussed in this Ruling, the evidence of continued development is stronger for 18-year-olds than it is for 23-year-olds. See Steinberg Tr. at 70–71 (indicating that he is "[a]bsolutely certain" that the scientific conclusions concerning juveniles also apply to 18-year-olds, but not as confident about 21-year-olds). Second, the court in White notes that the petitioner made an argument

based on "validated science and social science," but does not discuss whether such evidence was presented to the court. Therefore, the court is unable to compare the depth or robustness of the evidence considered in White, if any.

At oral argument, the Government also cited two additional cases in which scientific evidence of adolescent brain development was presented. The Government noted that, in Adkins v. Wetzel, the petitioner cited to Dr. Steinberg's research to support the petitioner's argument that Miller's protections should apply to him despite the fact that he was 18 years old at the time of his underlying offenses. See Adkins v. Wetzel, No. 13-3652, 2014 WL 4088482, at *3–*4 (E.D. Pa. Aug. 18, 2014). The opinion states:

> In his habeas petition, he asserted that convicted eighteen year olds are similarly situated to younger teenagers because the frontal lobes of their brains are still developing. (Doc. No. 1 at 7) (citing Laurence Steinberg & C. Monahan, Age Differences in Resistance to Peer Influence, 43 Developmental Psychology 1531 (2007)). Likewise, in his objections, Petitioner contends that at the time of the underlying offenses, he suffered from the same diminished culpability as teenagers under the age of eighteen. (Doc. No. 26 at 25.) Petitioner did not submit any evidence in support of these arguments.

Id. at *4. While the petitioner in Adkins cited to one of Dr. Steinberg's articles from 2007, the Adkins court's above description of the lack of evidence reflects a record that is not comparable to the one before this court. The evidence presented by Cruz here includes numerous articles and studies by Dr. Steinberg and others, as well as Dr. Steinberg's expert testimony before the court. Among other things, Dr. Steinberg testified that most of the research on adolescent brain development for late adolescents beyond age 18 did not emerge until the end of the 2000s and early 2010s. See Steinberg Tr. at 14. Therefore, it is unlikely that one article from 2007 could capture the breadth or depth of scientific evidence on late adolescence presented before this court, which includes, inter alia, research published in 2016 and 2017. See Alexandra Cohen et al., When Does a Juvenile Become an Adult? Implications for Law and Policy, 88 Temple L. Rev. 769 (2016) (introduced by Cruz at the evidentiary hearing before this court in Marked Exhibit and Witness List (Doc. No. 113)); Post-Hr'g Mem. in Supp., Ex. 1, Laurence Steinberg et al., Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation, Developmental Science 00 (2017) (Doc. No. 115-1)

Finally, the Government points to United States v. Lopez-Cabrera, No. S5-11-CR-1032 (PAE), 2015 WL 3880503 (S.D.N.Y. June 22, 2015), appeal docketed, No. 15-2220(L) (2d Cir. July 13, 2015). The court acknowledges that the Lopez-Cabrera court had before it "voluminous scientific evidence," as does the court here. See id. at *4. However, it is not clear to the court from the docket in Lopez-Cabrera whether the district court in that case also had the benefit of expert testimony. To the extent that this court's Ruling differs from Lopez-Cabrera, the court respectfully disagrees with its sister court in the Southern District of New York. The court notes that Lopez-Cabrera is now pending before the Second Circuit on appeal, but the Second Circuit has yet to issue a decision in the case.

18 As noted in the previous footnote, the Government has identified one case currently pending before the Second Circuit, in which the Circuit will consider whether Miller should prohibit mandatory life without parole sentences for those just over the age of 18. See United States v. Lopez-Cabrera, No. S5-11-CR-1032 (PAE), 2015 WL 3880503 (S.D.N.Y. June 22, 2015), appeal docketed, No. 15-2220(L) (2d Cir. July 13, 2015). The court, in its previous Ruling on the Motion for Reconsideration, declined to stay this case pending the resolution of Lopez-Cabrera by the Second Circuit. See Ruling re: Mot. for Recons. at 9–10. In doing so, the court reasoned in part that Cruz is entitled to a prompt hearing on the evidence. See id. The court now considers this same reasoning determinative in its decision to issue this Ruling rather than stay the case pending the Second Circuit's decision. Not only has oral argument not yet been set in Lopez-Cabrera, but parts of the case itself has been stayed pending the Supreme Court's decision in Lynch v. Dimaya, No. 15-1498, and the Second Circuit's decision in United States v. Hill, No. 14-3872. See Lopez-Cabrera, Motion Order Granting Motion to Hold Appeal in Abeyance (Doc. No. 153). As the court noted in its prior Ruling, "the court will not make [Cruz] wait longer than the four years he has already waited" to have his Petition decided. See Ruling re: Mot. for Recons. at 10.

19 The court acknowledges that these statistics are incomplete and are not perfectly tailored to the question before the court for a number of reasons. First, the Sentencing Commission reports on those that received life sentences, without distinguishing whether those sentences were with or without the possibility of parole. Nor does the Report indicate whether the life sentence was mandatory or discretionary. However, the court notes that the number of youthful offenders receiving a mandatory sentence of life without the possibility of parole is likely fewer than those reported by the Sentencing Commission as receiving a life sentence, as the category of offenders receiving life sentences also includes those receiving discretionary life sentences and those sentenced to life with the possibility of parole. As in Miller, the court's Ruling would not prohibit life imprisonment without parole for 18-year-olds, but would merely require the sentence to follow a certain process before imposing such a penalty.

Second, the Report tracks age at sentencing rather than at the time of the crime. Because the court does not have available the time between crime, plea, and sentencing, the Report is at best an approximation. Third, the Report reflects only sentencing practices in the federal system. Cruz has not provided comparable information for the states.

Finally, the Report does not indicate how many of the 86,309 offenders were eligible for life sentences, which would be the appropriate denominator for comparison with the 96 youthful offenders who received life sentences. The Report does indicate that 91.9% of the offenses were nonviolent. See Youthful Offenders at 23. Nonetheless, the Graham Court faced the same situation and stated: "Although it is not certain how many of these numerous juvenile offenders were eligible for life without parole sentences, the comparison suggests that in proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual." Graham, 560 U.S. at 66, 130 S.Ct. 2011.

Thus, while acknowledging the limitations of the Sentencing Commission's Report, this court likewise considers it relevant evidence of the infrequency of the use of life imprisonment on 18-year-old offenders.

20 "Extended age boundaries are statutory provisions that indicate the oldest age a juvenile court can retain or resume jurisdiction over an individual whose delinquent conduct occurred before the end of the upper age boundary." U.S. Age Boundaries of Delinquency 2016 at 3. "The upper age boundary refers to the oldest age at which an individual's alleged conduct can be considered delinquent and under original juvenile court jurisdiction." Id. at 1. Cruz's argument focuses on extended age boundaries rather than upper age boundaries. Most upper age boundaries remain at 17, but many states that previously had upper age boundaries below 17 recently raised the age to 17. See id. at 2.

21 The court notes that the Government has not challenged Dr. Steinberg's expertise or his "scientific opinion on these matters." See Post-Hr'g Mem. in Opp. at 15; Steinberg Tr. at 6.

22 Cruz's materials differ as to whether development in impulse control plateaus at age 21 or age 25. See Steinberg Tr. at 19 (describing a linear development in impulse control from age 10 to age 25); Post-Hr'g Mem. in Supp. at 10 (stating in one sentence that impulse control plateaus sometime after age 21 and in another sentence that it does not plateau until about age 25). The inconsistency does not impact the court's decision here, as both plateau ages are several years beyond Cruz's age at the time of his offense.

23 The Government does note in a footnote that the science is "not as convincing for individuals aged 18 to 21 as it is for individuals younger than 18," but it does not argue that the scientific evidence pertaining to 18-year-olds is insufficient to support the conclusions drawn by the court. See Post-Hr'g Mem. in Opp. at 15 n.5.

24 The Government makes much of the fact that the Miller Court cited a 2003 scientific article authored by Professor Steinberg and two amicus briefs in support of its conclusion that "developments in psychology and brain science continue to show fundamental differences between juvenile and adolescent minds." See Post-Hr'g Mem. in Opp. at 15 (quoting Miller, 567 U.S. at 471–72, 132 S.Ct. 2455); Brief for the Am. Psych. Ass'n et al., Nos. 10-9646, 10-9647, 2012 WL 174239 (Jan. 17, 2012); Brief of Amici Curiae J. Lawrence Aber et al., Nos. 10-9646, 10-9647, 2012 WL 195300 (Jan. 17, 2012). However, the court disagrees with the importance that the Government attributes to these citations in the Miller opinion and does not consider them to indicate

that the Court considered whether 18-year-olds exhibit the same hallmark characteristics of youth as those under the age of 18 in Miller.

First, the court notes that the 2003 article, while authored by Steinberg, does not contain the same findings about which he testified before this court. The aim of that article was to argue that "[t]he United States should join the majority of countries around the world in prohibiting the execution of individuals for crimes committed under the age of 18." Laurence Steinberg & Elizabeth Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychol. 1009, 1017 (2003); see also Steinberg Tr. at 22 ("The focus of the article was about people younger than 18. If we were writing it today, I think we would say that the same things are true about people who are younger than 21.").

Second, where the Miller Court cites to the two amicus briefs, it cites to portions of those briefs that support the conclusions of the Roper and Graham Courts. See Miller, 567 U.S. at 472 n.5, 132 S.Ct. 2455 ("The evidence presented to us in these cases indicates that the science and social science supporting Roper's and Graham's conclusions have become even stronger." (citing Brief for Am. Psych. Ass'n et al.; Brief for J. Lawrence Aber et al.)). While the Government's Memorandum identifies sentences in the briefs that refer to late adolescence or young adulthood, see Post-Hr'g Mem. in Opp. at 16–18, the Miller Court does not cite or refer to those aspects of the briefs. Indeed, the APA Brief, from which the Government draws all but one of its references to late adolescence and young adulthood, expressly states:

> We use the terms 'juvenile' and 'adolescent' interchangeably to refer to individuals aged 12 to 17. Science cannot, of course, draw bright lines precisely demarcating the boundaries between childhood, adolescence, and adulthood; the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Roper, 543 U.S. at 574, 125 S.Ct. 1183. Likewise, younger adolescents differ in some respects from 16- and 17-year olds. Nonetheless, because adolescents generally share certain developmental characteristics that mitigate their culpability, and because "the age of 18 is the point where society draws the line for many purposes between childhood and adulthood," this Court's decisions have recognized age 18 as a relevant demarcation. Graham, 130 S.Ct. at 2030; see Roper, 543 U.S. at 574, 125 S.Ct. 1183. The research discussed in this brief accordingly applies to adolescents under age 18, including older adolescents, unless otherwise noted.

Brief for Am. Psych. Ass'n et al., 2012 WL 174239, at *6 n.3. Thus, consistent with the issue to be decided in Miller, both the briefs and the Miller opinion were primarily concerned with the scientific evidence to the extent that it corroborated the conclusions in Roper and Graham as to the immaturity and diminished culpability of those under the age of 18.

End of Document

UNITED STATES DISTRICT COURT.

DISTRICT OF CONNECTICUT

| | |
|---|---|
| LUIS NOEL CRUZ<br>Petitioner<br>v.<br>UNITED STATES OF AMERICA<br>Respondent | September 13, 2017<br>1:25 p.m.<br><br>3:11cv787(JCH) |

141 Church Street
New Haven, Connecticut

HEARING

B E F O R E:
THE HONORABLE JANET C. HALL, U.S.D.J.

FOR THE PETITIONER: W. Theodore Koch , III
P.O. Box 222
Niantic, CT 06357

FOR THE RESPONDENT: Patricia Stolfi Collins
John Trowbridge Pierpont
William Nardini
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possible to do an autopsy, cut open the brain and look at it. When you do that, you can't see how the brain functions. You can only look at the anatomy of the brain. It wasn't until there was FMRI and brain imaging that scientists could look at the living brain and see what's going on inside when it was at work. Studies that began to be done during the late 1990s illustrated that the brain was continuing to change during adolescence in ways that weren't visible by looking at the exterior of the brain. This was not known. And the first published studies of how the brain was changing during adolescence didn't really appear until about the year 2000 so relatively recently in terms of the history of science, history of the study of development.

During the period, let's say from 2000 into the middle or latter part of the decade, most of the research on adolescence brain development focused on people who were 18 and younger. There was to my knowledge virtually no research that went past that age and that looked at brain development during late adolescence or young adulthood.

People began to do research on that period of time toward the end of that decade and as we moved into 2010 and beyond, there began to accumulate some research on development in the brain beyond age 18, so we didn't know a great deal about brain development during late adolescence until much more recently.

Q. Okay. I would like to show you what I have previously marked as Petitioner's Exhibit for Identification One. I have shared this with the Government. May I approach, Your Honor?

THE COURT: You may.

Q. That's an article titled "Young Adulthood as a Transitional Legal Category: Science, Social Change and Justice Policy" by yourself. Just briefly can you tell us what's the central point of that article?

A. The central point of that article is that recent discoveries in psychological science and in brain science as well as changes in society, should ask us to rethink how we view people in the late adolescence period and even to the young adult period in terms of their treatment under the law because a lot of the --

MR. PIERPONT: Your Honor, the Government is going to object to the answer at this point. We understand that Professor Steinberg is here to talk about brain sciences, but to the extent we start to get to policy and how people should be treated under the law, that goes a little further upfield of what the Government expected testimony to be about here today.

THE COURT: I will let the answer stand to the point of the objection. I understand it is summarizing the point of an article. I think the Government's objection has some

legs in the sense that he isn't here to tell us about what the policy of the law should be. He's here to tell us what might be a basis for law makers or courts to change.

Q. Let me ask you this: Does that article reliably present the scientific knowledge as regards to late adolescence as of the present moment?

A. Yes. And that was the part of the article that I was responsible for writing.

Q. Okay. I would like to offer that as an exhibit at this time, Your Honor.

MR. PIERPONT: Your Honor, the Government -- I have spoken to Attorney Koch about this. The Government is not going to object again to the extent that it is being offered for the extent of what the current science is. If there was a jury here, we might have some concerns about the policy decisions, but with the understanding that the reason and limited reason it is being offered, the Government does not have an objection.

THE COURT: Do I fairly understand, Professor, that if I read this article, I will be informed to the extent that you understand it, the extent of scientific knowledge studies that have been undertaken, et cetera, in the area of late adolescence up to the time the article was written?

THE WITNESS: Yes, Your Honor.

THE COURT: Then on that basis, I will accept it.

MR. KOCH: Thank you, Your Honor.

THE COURT: Exhibit 1 is a full exhibit, Diahann.

MR. PIERPONT: Thank you.

BY MR. KOCH:

Q. Now I'm going to show you what's previously been marked for identification as Exhibit 2 which is an article entitle "When does a juvenile become an adult? Implications of law and policy." If I may approach, Your Honor.

THE COURT: You may.

Q. Do you recognize that article?

A. Yes, I do.

Q. I will cut right to the main question. Does that article, like the first one, reliably present the scientific knowledge as to late adolescence as of the present moment?

A. Yes, it does.

MR. KOCH: I would offer that, Your Honor, for the same purposes of the previous article.

MR. PIERPONT: Again, Your Honor, subject to the same discussion that I had previously with the Court to the extent there's science in here, there's no objection. The Government does think to the extent there's policy discussions and things along those lines, it is beyond what we're here to do today.

THE COURT: Is your offer -- do you have any objection to how the Government frames their lack of

objection to the purpose of the article?

MR. KOCH: No, Your Honor. That's in accordance with our agreement.

THE COURT: For example, there's a summary at the beginning of this article, it says at the end in this article, we summarized recent behavioral and neurological findings on cognitive capacity in young adults. That's what you are offering it for as opposed to and highlight several ways which they bear on legal policies. That's the thrust of your offer is the second part?

MR. KOCH: Correct.

THE COURT: That's fine then. Exhibit 2 is received as a full exhibit with that understanding.

BY MR. KOCH:

Q. About those articles, is there any question or debate in the scientific community about the findings in these articles?

A. No.

THE COURT: May I inquire as to where they were published. Before you add to your answer, could you tell me. One is Fordham Law Review.

THE WITNESS: I believe the other is Temple Law Review.

THE COURT: Thank you.

A. Well, in accord with the back and forth questioning,

I will limit my answer to your question with respect to the scientific findings that are discussed in the article rather than the policy implications, but there's broad consensus among scientists with respect to the scientific information that's contained in each of these articles.

Q. Thank you. Are there ways in which the brains and behavior of 18 to 20-year-olds are similar to adults?

A. Yes.

Q. Can you describe some of those similarities with adults?

A. As we were discussing earlier, with respect to behaviors that we might think of as cold cognitive driven so things like logical reasoning or the ability to solve problems under neutral nonarousing situations, people that age period perform just as well as adults do.

Q. Are there any ways in which the brain's behavior of 18 to 20-year-olds are more similar to younger adolescence than they were to adults?

A. There is still immaturity in certain brain systems in the behaviors that those brain systems govern, so during this age period, late adolescence relative to adults, still show problems with impulse control and self-regulation and heightened sensation seeking which would make them in those respects more similar to somewhat younger people than to older people.

Q. Thank you. I want to go down a few characteristics of adolescence and ask you for each one of these whether late adolescence are more similar to younger adolescence or to adults. In terms of risk-taking, when does risk-taking peak on average?

A. Well, it depends on the specific type of risk-taking that you are talking about, but in general, people in the late adolescent years are more likely to take risks than people who are adults and more likely to take risks than young adolescents are to, so if you were to -- if you were to draw a graph showing the prevalence of risk-taking by age, it would look like an upside down U. The peak would be somewhere, you know, around 17, 18, 19, approximately that age range. That's when most type of risky behavior are at their height.

Q. What about impulsivity?

A. Impulsivity is still developing during the late adolescent years. I'm sorry. Correct that. Impulse control is still developing during the late adolescent years, so if you were to draw a graph of that, you would see a straight upward trending line that goes from age 10 to age 25 or so.

Q. How about susceptibility to the influence of one's peers?

A. Susceptibility to peers is higher during late adolescence than it is in adulthood. It is slightly lower

than it is during middle adolescence, but it is -- but the ability to resist peer pressure is developing during the late adolescent years.

Q. What about the capacity for change?

A. We think that people are more amenable to change when they're younger than when they're older. We think that people are still capable of change -- are more capable of change when they're in their late adolescent years than when they're adults. That would be supported by personality research that shows that more changes are taking place during that time than if you were looking at people who were in their late 20s, 30s or 40s.

Q. With regards to reward-seeking behavior, is the prefrontal cortex everything in terms of regulating that when it comes to rewards?

A. No. Because reward-seeking is a combination of an urge to go after a reward and the ability to put the reins on that urge. So in order to understand reward-seeking at a given age, you have to ask both about how the prefrontal cortex is functioning, but also about the arousal of the limbic system that might lead to reward-seeking.

I think I said before, but it is worth repeating, that the metaphor that I and other scientists use to describe this is having the accelerator pressed down without a good braking system in place. That would be true of mid

find are more in the realm of cold cognition. In hot cognition is where you would find the differences between people that age and adults.

Q. Would it be fair to say under hot cognition, that's where late adolescence are more similar to mid adolescence than they are to adults?

A. Absolutely. That's exactly how I would put it.

MR. KOCH: Nothing further. Thank you.

THE COURT: Just based on something that you said a moment ago or it was imbedded in a very long answer of something you said a moment ago, I want to have the record be clear. Is it your opinion to a reasonable degree of psychological science certainty that the findings which underpinned your conclusions as to the petitioner's in, for example, Graham, under 18, actually they were 14 but the opinion says under 18, you have the same opinion as to 18?

THE WITNESS: Yes. And had that been the question that was asked in Graham, I would have said the same things. I would have changed the age in the brief.

THE COURT: The number would have changed?

THE WITNESS: Exactly.

THE COURT: If someone said could you change it to 21, would you have been able to do that based upon your expertise as a psychologist?

THE WITNESS: I don't think I would be confident

enough. I think I would be confident enough about 20, but not 21, but we're really, you know, in terms of reasonable scientific certainty, I am more certain about 20 than I am about 21.

THE COURT: As to 18?

THE WITNESS: Absolutely certain.

THE COURT: All right. I don't have if you have questions on that.

MR. KOCH: I have one follow-up question. When you said 20, up to 20 or through 20?

THE COURT: I was asking and if you didn't understand me, when I was using 18, 20, 22, I was referring to a person who nominally has that age. In other words, not under, but is at the moment a 20-year-old, i.e, a person who could be 20 years and a day or 20 years and 11 months and 29 days.

THE WITNESS: That's how I understood your question.

MR. KOCH: Thank you, Professor.

THE COURT: Professor, I think we'll get you back to Philadelphia. I apologize for the delay this morning.

THE WITNESS: It happens.

THE COURT: It shouldn't. I'm thinking of sending some other agency of the government your bill, but we'll deal with that later. Thank you very much.

# 19-989

*To Be Argued By:*
JOHN T. PIERPONT, JR.

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 19-989**

---

LUIS NOEL CRUZ, aka Noel,
*Petitioner-Appellee,*

-vs-

UNITED STATES OF AMERICA,
*Respondent-Appellant.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

## BRIEF FOR THE UNITED STATES OF AMERICA

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**Exhibit A – 50 State Survey**

**All sentences described below are for premeditated, intentional murder committed by an adult.**

**Alabama**

Minimum: Life without parole ("LWOP").

Maximum: Death.

*See* Ala. Code § 13A-6-2 (murder statute); Ala Code. § 13A-5-2 (penalties).

**Alaska**

Minimum: 30 years with the possibility of parole ("WPP") after 20 years.

Maximum: 99 years without the possibility of parole.

*See* Alaska Stat. § 11.41.100 (murder statute); Alaska Stat. § 12.55.125 (penalties); Alaska Stat. § 33.16.090 (parole eligibility).

**Arizona**

Minimum: LWOP.

Maximum: Death.

*See* Ariz. Rev. Stat. Ann. § 13-1105 (murder statute); Ariz. Rev. Stat. Ann. § 13-751 (penalties); Ariz. Rev. Stat. Ann. § 13-752 (penalties).

**Arkansas**

Minimum: LWOP.

Maximum: Death.

*See* Ark. Code Ann. § 5-10-101 (capital murder statute); Ark. Code Ann § 5-4-104 (penalties).

**California**

Minimum: Life with the possibility of parole ("LWPP") after 25 years.

Maximum: Death.

*See* Cal. Penal Code § 187 (murder statute); Cal. Penal Code § 189 (degrees of murder); Cal. Penal Code § 190 (penalties).

**Colorado**

Minimum: LWOP.

Maximum: Death.

*See* Colo. Rev. Stat. § 18-3-102 (first degree murder statute); Colo. Rev. Stat. § 18-1.3-401

(penalties); Colo. Rev. Stat. § 17-22.5-104 (parole eligibility).

**Connecticut**

Minimum: 25 years WPP.

Maximum: LWPP.[3]

*See* Conn. Gen. Stat. § 53a-54a (murder statute); Conn. Gen. Stat. § 53a-35a (penalties); Conn. Gen. Stat. § 54-125(a) (parole eligibility).

**Delaware**

Minimum: LWOP.

Maximum: Death.

*See* Del. Code. Ann. tit. 11, § 636 (murder statute); Del. Code. Ann. tit 11, 4209(a) (penalties).

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[3] Both the minimum and maximum penalties in Connecticut are increased to LWOP where a murder is committed under special circumstances, which includes the "murder of two or more persons at the same time or in the course of a single transaction." *See* Conn. Gen. Stat. § 53a-54b (murder with special circumstances); Conn. Gen. Stat. § 53a-35a (penalties).

**District of Columbia**

Minimum: 30 years without the possibility of parole ("WOP").

Maximum: 60 years WOP.

*See* D.C. Code § 22-2102 (murder statute); D.C. Code § 22-2104 (penalties).

**Florida**

Minimum: LWOP.

Maximum: Death.

*See* Fla. Stat. § 782.04 (murder statute); Fla. Stat. § 775.082 (penalties).

**Georgia**

Minimum: LWPP.

Maximum: Death.

*See* Ga. Code Ann. § 16-5-1 (murder statute and penalties).

**Hawaii**

Minimum: LWPP.[4]

Maximum: LWOP.

*See* Haw. Rev. Stat. § 707-701.5 (second degree murder statute); Haw. Rev. Stat. § 706-656 (penalties); Haw. Rev. Stat. § 706-657 (enhancements for second degree murder).

**Idaho**

Minimum: LWPP.

Maximum: Death.

*See* Idaho Code Ann. § 18-4001 (murder statute); Idaho Code Ann. § 18-4003 (degrees of murder); Idaho Code Ann. § 18-4004 (penalties).

**Illinois**

Minimum: 20 years WOP.

Maximum: Death.

---

[4] The minimum penalty in Hawaii is increased to LWOP for first degree murder, which includes a defendant that knowingly causes the death of "[m]ore than one person in the same or separate incident." Haw. Rev. Stat. § 707-701 (first degree murder statute); *see also* Haw. Rev. Stat. § 706-656 (penalties).

*See* 720 Ill. Comp. Stat. § 5/9-1 (first degree murder statute); 720 Ill. Comp. Stat. § 5/5-4.5-20(a) (penalties).

**Indiana**

Min: 45 years.

Max: Death.

*See* Ind. Code § 35-42-1-1 (murder statute); Ind. Code § 35-50-2-3 (penalties).

**Iowa**

Min: LWOP.

Max: LWOP.

*See* Iowa Code § 707.2 (first degree murder statute); Iowa Code § 902.1(1) (penalties).

**Kansas**

Minimum: LWPP after 25 years.

Maximum: LWPP after 50 years.[5]

---

[5] The minimum penalty in Kansas increases to LWOP and the maximum penalty to death in cases where the defendant is convicted of capital murder, which includes the "intentional and premeditated killing of more than one person as a part of the same

*See* Kan. Stat. Ann. § 21-5402 (first degree murder statute); Kan. Stat. Ann. § 21-6620 (penalties).

**Kentucky**

Minimum: 20 years.

Maximum: Death.

*See* Ky. Rev. Stat. Ann. § 507.020 (murder statute); Ky. Rev. Stat. Ann. § 532.030 (penalties).

**Louisiana**

Minimum: LWOP.

Maximum: LWOP.

*See* La. Rev. Stat. Ann. § 14:30.1 (second degree murder statute and penalties)

**Maine**

Minimum: 25 years.

Maximum: LWPP.

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act or transaction[.]" Kan. Stat. Ann. § 21-5401(a)(6) (capital murder statute); Kan. Stat. Ann. § 21-6617 (sentences for defendants convicted of capital murder).

*See* Me. Rev. Stat. Ann. tit. 17-A, § 201 (murder statute); Me. Rev. Stat. Ann. tit., 17-A § 1603 (penalties).

**Maryland**

Minimum: LWPP after 25 years.

Maximum: LWOP.

*See* Md. Code Ann., Crim. Law § 2-201 (first degree murder statute and penalties); Md. Code Ann., Corr. Servs. § 7-301 (parole eligibility).

**Massachusetts**

Minimum: LWOP.

Maximum: LWOP.

*See* Mass. Gen. Laws. ch. 265, § 1 (murder statute); Mass. Gen. Laws. ch. 265, § 2 (penalties).

**Michigan**

Minimum: LWOP.

Maximum: LWOP.

*See* Mich. Comp. Laws § 750.316 (first degree murder statute and penalties).

**Minnesota**

Minimum: LWOP.

Maximum: LWOP.

*See* Minn. Stat. § 609.185 (first degree murder statute and penalties); Minn. Stat. § 609.106 (parole eligibility).

**Mississippi**

Minimum: LWOP.

Maximum: LWOP.

*See* Miss. Code Ann. § 97-3-19 (murder statute); Miss. Code. Ann. § 97-3-21 (penalties); Miss. Code. Ann. § 47-7-3 (parole eligibility).

**Missouri**

Minimum: LWOP.

Maximum: Death.

*See* Mo. Rev. Stat. § 565.020 (first degree murder statute and penalties)

**Montana**

Minimum: 10 years.

Maximum: Death.

*See* Mont. Code Ann. § 45-5-102(2) (murder statute and penalties).

**Nebraska**

Minimum: LWOP.

Maximum: Death.

*See* Neb. Rev. Stat. § 28-303 (first degree murder statute); Neb. Rev. Stat. § 28-105 (penalties).

**Nevada**

Minimum: 50 years WPP after 20 years.

Maximum: Death.

*See* Nev. Rev. Stat. Ann § 200.030 (murder statute and penalties).

**New Hampshire**

Minimum: LWOP.

Maximum: LWOP.

*See* N.H. Rev. Stat. Ann. § 630:1-a (first degree murder statute and penalties).

**New Jersey**

Minimum: 30 years WOP.

Maximum: LWPP after 30 years.

*See* N.J. Stat. Ann. § 2C:11-3 (murder statute and penalties).

**New Mexico**

Minimum: LWPP.

Maximum: LWOP.

*See* N.M. Stat. § 30-2-1 (murder statute); N.M. Stat. § (penalties).

**New York**

Minimum: 20 years.

Maximum: LWOP.

*See* N.Y. Penal Law § 125.25 (second degree murder statute); N.Y. Penal Law § 70.00 (penalties).

**North Carolina**

Minimum: LWOP.

Maximum: Death.

*See* N.C. Gen. Stat. § 14-17 (murder statute and penalties).

**North Dakota**

Minimum: None specified.

Maximum: LWOP.

*See* N.D. Cent. Code § 12.1-16-01 (murder statute); N.D. Cent Code § 12.1-32-01 (penalties).

**Ohio**

Minimum: 15 years.

Maximum: LWOP.

*See* Ohio Rev. Code Ann. § 2903.02 (murder statute); Ohio Rev. Code Ann. § 2929.02 (penalties).

**Oklahoma**

Minimum: LWPP.

Maximum: Death.

*See* Okla. Stat. tit. 21, § 701.7 (first degree murder statute); Okla. Stat. tit., § 701.9 (penalties).

**Oregon**

Minimum: LWPP after 25 years.

Maximum: LWPP after 25 years.[6]

*See* Or. Rev. Stat. § 163.115 (murder statute and penalties).

**Pennsylvania**

Minimum: LWOP.

Maximum: Death.

*See* 18 Pa. Cons. Stat. § 2502 (murder statute); 18 Pa. Cons. Stat. § 9711 (sentencing procedures for first degree murder); 61 Pa. Cons. Stat. § 6137 (parole eligibility).

**Rhode Island**

Minimum: LWPP after 25 years.

Maximum: LWPP after 25 years.

---

[6] The minimum penalty increases to LWPP after 30 years and the maximum penalty increases to death in Oregon for aggravated murder, which includes instances where "[t]here was more than one murder victim in the same criminal episode." *See* Or. Rev. Stat. § 163.095 (aggravated murder statute); Or. Rev. Stat. § 163.105 (aggravated murder penalties).

*See* R.I. Gen. Laws § 11-23-1 (murder statute); R.I. Gen. Laws § 11-23-2 (penalties); R.I. Gen Laws § 13-8-13 (parole eligibility).

**South Carolina**

Minimum: 30 years.

Maximum: Death.

*See* S.C. Code Ann. § 16-3-10 (murder statute); S.C. Code Ann. § 16-3-20 (penalties).

**South Dakota**

Minimum: LWOP.

Maximum: Death.

*See* S.D. Codified Laws § 22-16-4 (first degree murder statute); S.D. Codified Laws § 22-16-12 (classifying murder in the first degree as a Class A felony); S.D. Codified Laws § 22-6-1 (penalties by felony class); S.D. Codified Laws § 24-15-4 (parole eligibility).

**Tennessee**

Minimum: LWPP.

Maximum: Death.

*See* Tenn. Code Ann. § 39-13-202 (first degree murder statute and penalties).

**Texas**

Minimum: 5 years.

Maximum: 99 years.[7]

*See* Tex. Penal Code Ann. § 1902 (murder statute); Tex. Penal Code Ann. § 12.32 (penalties).

**Utah**

Minimum: 15 years.

Maximum: LWPP.[8]

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[7] The minimum penalty increases to LWOP and maximum penalty to death in Texas in cases of capital murder, which includes instances where "the person murders more than one person during the same criminal transaction." Tex. Penal Code Ann. § 19.03 (capital murder); Tex. Penal Code Ann. § 12.31 (capital murder penalties).

[8] The minimum penalty increases to 25 years and maximum penalty to death in Utah for aggravated capital felonies, which include crimes where "the homicide was committed incident to one . . . criminal episode during which two or more persons were killed." *See* Utah Code Ann. § 76-5-202 (aggravated

*See* Utah Code Ann. § 76-5-203 (murder statute and penalties).

**Vermont**

Minimum: 35 years.

Maximum: LWPP.[9]

*See* Vt. Stat. Ann. tit. 13, § 2301 (first degree murder statute) Vt. Stat. Ann. tit. 13, § 2303 (penalties).

**Virginia**

Minimum: 20 years.

Maximum: LWPP after 15 years.[10]

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murder statute); Utah Code Ann. § 76-3-206 (aggravated murder penalties).

[9] The minimum penalty increases to LWOP and maximum penalty to LWOP in Vermont if "[a]t the time of the murder, the defendant also committed another murder." *See* Vt. Stat. Ann. tit. 13, § 2311 (aggravated murder statute and penalties).

[10] The minimum penalty increases to LWPP after 25 years and maximum penalty to death in Virginia if there was a "deliberate, and premeditated killing of more than one person as a part of the same act or transaction." *See* Va. Code Ann. § 18.2-31 (capital murder statute); Va. Code Ann. § 18.2-10 (penalties)

*See* Va. Code Ann. § 18.2-32 (murder statute); Va. Code Ann. § 18.2-10 (penalties).

**Washington**

Minimum: 20 years.

Maximum: 45 years.[11]

*See* Wash. Rev. Code. § 9A.32.030 (first degree murder statute); Wash. Rev. Code. § 9.94A.540 (mandatory minimum terms); Wash. Rev. Code § 9.94A.515 (crimes listed by seriousness level); Wash. Rev. Code § 9.94A.510 (table providing sentence based on seriousness level and offender score).

**West Virginia**

Minimum: LWPP after 15 years.

Maximum: LWOP.

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[11] The minimum penalty increases to LWOP and maximum penalty to LWOP in Washington if "[t]here was more than one victim and the murders were … the result of a single act of the person" *See* Wash. Rev. Code § 10.95.020(10) (aggravated first degree murder statute); Wash. Rev. Code § 10.95.030 (penalties).

*See* W. Va. Code Ann. § 61-2-1 (murder statute); W. Va. Code Ann. § 61-2-1 (penalties); W. Va. Code Ann. § 62-3-15 (parole eligibility).

**Wisconsin**

Minimum: LWPP after 20 years.

Maximum: LWOP.

*See* Wis. Stat. § 940.01 (first degree murder statute) Wis. Stat. § 939.50 (penalties); Wis. Stat. § 973.014 (parole eligibility).

**Wyoming**

Minimum: LWOP.

Maximum: Death.

*See* Wyo. Stat. Ann. § 6-2-101(b) (first degree murder statute); Wyo. Stat. Ann. § 6-10-301 (parole eligibility).

**Federal**

Minimum: LWOP.

Maximum: Death.

*See* 18 U.S.C. § 1111 (murder statute and penalties); 18 U.S.C. § 3591 (death penalty statute).

# 19-989

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUIS NOEL CRUZ, AKA NOEL,
Petitioner - Appellee,
v.
UNITED STATES OF AMERICA,
Respondent - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT (NEW HAVEN)

**APPENDIX OF APPELLEE LUIS NOEL CRUZ**
**VOLUME 2 of 4 (AA225 – AA517)**

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This is not a hindrance to Petitioner's claim now, just as it was not for the Thompson Court.

States around the country offer greater protections over youthful offenders into their early twenties. Following are examples of some statutes.

**Alabama:** See Ala. Code § 15-19-1, et. seq, known as the Youthful Offender Act of 1975. "The Youthful Offender Act is intended to extricate persons ***below twenty-one years of age*** from the harshness of criminal prosecution and conviction. It is designed to provide them with the benefits of an informal, confidential and rehabilitative system." Raines v. State, 294 Ala 360, 363 (Alabama 1975) (emphasis added).

**California**: See Cal. Penal Code § 3051(a)(1): "A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was ***under 23 years of age*** at the time of his or her controlling offense" (emphasis added).

**Colorado:** See C.R.S.A. § 18-1.3-407(1)(c)(2): "For the purposes of public safety, academic achievement, rehabilitation, the development of pro-social behavior, or reentry planning for youthful offenders, the executive director or his or her designee may transfer any offender ***age twenty-four years or younger*** and sentenced to the department of corrections into and out of the youthful offender system at his or her discretion" (emphasis added).

**Florida:** In a section of Florida's statutory scheme entitled "Continuing care for young adults," Florida law defines "child" as "an individual who has not attained 21 years of age" and "young adult" as "an individual who has attained 18 years of age but who has not attained 21 years of age." Fla. Stat. Ann. § 39.6251.

In the criminal context, Fla. Stat. Ann. § 958.04, Judicial disposition of youthful offenders, provides:

> (1) The court may sentence as a youthful offender any person:
> (a) Who is at least 18 years of age or who has been transferred for prosecution to the criminal division of the circuit court pursuant to chapter 985;
> (b) Who is found guilty of or who has tendered, and the court has accepted, a plea of nolo contendere or guilty to a crime that is, under the laws of this state, a felony if the offender is ***younger than 21 years of age*** at the time sentence is imposed; and
> (c) Who has not previously been classified as a youthful offender under the provisions of this act; however, a person who has been found guilty of a capital or life felony may not be sentenced as a youthful offender under this act...

**Georgia:** Ga. Code Ann. § 42-7-2(7) provides: "'Youthful offender' means any male offender who is ***at least 17 but less than 25 years of age*** at the time of conviction and who in the opinion of the department has the potential and desire for rehabilitation" (emphasis added).

GA Code. Ann. § 35-3-37(j)(4) provides for the expungement of misdemeanors of youthful offenders who have stayed out of trouble.

**Hawai'i**: Haw. Rev. Stat. Ann. § 706-667(1) provides: "....A young adult defendant is a person convicted of a crime who, at the time of the offense, is ***less than twenty-two years of age*** and who has not been previously convicted of a felony as an adult or adjudicated as a juvenile for an offense that would have constituted a felony had the young adult defendant been an adult" (emphasis added). It does not apply to murder.

Haw. Rev. Stat. Ann. § 712-1256(1) provides: "Upon the dismissal of such person and discharge of the proceeding against the person under section 712-1255, this person, if the person was ***not over twenty years of age*** at the time of the offense, may apply

to the court for an order to expunge from all official records all recordation relating to the person's arrest, indictment, or information, trial, finding of guilt, and dismissal and discharge pursuant to this section" (emphasis added).

**Indiana**: Ind. Code Ann. § 11-14-1-5 defines "youthful offender" as an offender who "is ***less than twenty-one (21) years of age***" (emphasis added). It does not apply to those sentenced to greater than eight years.

**Michigan**: The Holmes Youthful Trainee Act of 1927, which originally protected youths up to age twenty-one, in 2015 was revised to allow for the expungement of the record of a youthful offender ***up to age twenty-four***. See Mich. Comp. Laws Ann. § 762.11. For those over age twenty-one, the prosecutor's consent is required, and it does not apply to any "felony for which the maximum penalty is imprisonment for life," or a" major controlled substance offense."

**New Jersey**: NJ Stat. Ann. § 2C:43-5 provides: "Any person who, at the time of sentencing, is ***less than 26 years of age*** and who has been convicted of a crime may be sentenced to an indeterminate term at the Youth Correctional Institution Complex...." (emphasis added). However: "This section shall not apply to any person less than 26 years of age at the time of sentencing who qualifies for a mandatory minimum term of imprisonment without eligibility for parole, pursuant to subsection c. of N.J.S. 2C:43-6; however, notwithstanding the provisions of subsection c. of N.J.S. 2C:43-6, the mandatory minimum term may be served at the Youth Correctional Institution Complex...." Id.

33A N.J. Prac., Criminal Law § 46:11 (5th ed.) provides: "Any person who was ***21 years of age or younger*** at the time the person committed certain drug related

offenses is eligible for an expedited proceeding to expunge the records relating to those convictions" (emphasis added).

**North Carolina**: See N.C. Gen. Stat. § 15A-145.2. "Expunction of records for first offenders ***not over 21 years of age*** at the time of the offense of certain drug offenses" (emphasis added).

**New York:** CPL 720.35 classifies a youthful offender as a person charged with a crime alleged to have been committed when he/she was at least sixteen years old and ***less than nineteen years old.***

**Oklahoma:** Though the statute strictly limits eligibility to nonviolent offenders, Okla. Stat. tit. 22, § 996 provides: "As used in the Delayed Sentencing Program for Young Adults: "Offender" means any adult ***eighteen (18) through twenty-one (21) years of age*** as of the date of a verdict of guilty or a plea of guilty or nolo contendere...." (emphasis added).

**South Carolina**: S.C. Code Ann. § 24-19-10(d)(ii) defines as a youthful offender anybody charged with a misdemeanor or a relatively less serious felony, up to ***age twenty-four.***

S.C. Code Ann. § 22-5-920 provides for expungement of youthful offenders' nonviolent crimes.

**Virginia**: VA Code Ann. § 19.2-311(B)(1) establishes a Youthful Offender Program for any person who was "convicted before becoming ***twenty-one years of age***," not counting murder convictions. (emphasis added).

**Vermont**: VT H.95, signed in 2016, raises the age of juvenile jurisdiction over criminal matters to twenty-one, except for the most serious crimes.

**West Virginia**: W.V. Code § 25-4-6 provides separate facilities for those ***under age twenty-five.***

W.V. Code § 61-11-26 provides for expungement of misdemeanors committed "***between the ages of eighteen and twenty-six***," (emphasis added).

The exemption of protections for adolescents who commit the most serious crimes does not undermine petitioner's argument. Petitioner does not argue that he should have been tried in juvenile court, or that he should have received a diversionary program. He admits his crime was serious and his penalty should reflect that. These laws are intended to deal with the top, wide part of the criminal justice system's funnel—crimes that would never be considered for prosecution in federal court.

As of 2003—two years before Roper—thirty-five states had already extended "dispositional jurisdiction beyond age eighteen." Young Adulthood, *supra*, at 666, n. 156. By 2016, all fifty states, the District of Columbia, American Samoa, Guam, Northern Mariana, Puerto Rico and the Virgin Islands had done so. See Angel Zang, U.S. Age Boundaries of Delinquency 2016, National Center for Juvenile Justice. Geography, Policy, Practice & Statistics: *StateScan* at *2, July, 2017, Appendix 8. This study shows a unanimous national consensus that late adolescents require extra protections from the criminal law. Indeed, there is *more* consensus that turning eighteen does not magic away one's immaturity, than there is that seventeen is the proper jurisdictional age for juvenile court. This matters. To be clear, Petitioner is *not* claiming that he should have been prosecuted as a juvenile. The Constitution allows the Government to indict eighteen-year-olds. What the Constitution does *not* allow is the imposition of the law's harshest penalties upon individuals, such as Noel, who demonstrate the hallmark characteristics of youth. Therefore, the consensus about the age of juvenile court

No. 18-2418

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**FILED**
Apr 25, 2019
DEBORAH S. HUNT, Clerk

In re: DERAY SMITH,

Movant.

O R D E R

Before: GUY, GILMAN, and DONALD, Circuit Judges.

Deray Smith, a Michigan prisoner proceeding pro se, moves this court for an order authorizing the district court to consider a second or successive petition for a writ of habeas corpus under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(b).

In 2004, a jury in the Wayne Circuit Court convicted Smith of first-degree felony murder and armed robbery. The trial court sentenced Smith to life imprisonment without parole. On direct appeal, the Michigan Court of Appeals affirmed Smith's convictions. *People v. Smith*, No. 254523, 2006 WL 1293477 (Mich. Ct. App. May 11, 2006), *perm. app. denied*, 722 N.W.2d 821 (Mich. 2006) (mem.).

In 2009, after unsuccessfully seeking state post-conviction relief, Smith filed a federal habeas petition in the United States District Court for the Eastern District of Michigan. *Smith v. Rapelje*, No. 2:09-cv-14876 (E.D. Mich.). The district court dismissed Smith's habeas petition as barred by the one-year statute of limitations and declined to issue a certificate of appealability. Smith appealed, and this court denied him a certificate of appealability.

Smith now moves this court for an order authorizing the district court to consider a second or successive habeas petition. *See* 28 U.S.C. § 2244(b). In support of his motion, Smith relies on *Miller v. Alabama*, 567 U.S. 460 (2012), which prohibited mandatory life sentences without parole for juvenile offenders. Smith, who was eighteen years old when he committed his crimes, asserts

that his sentence should be vacated based on the scientific research on brain development suggesting that penal consequences for young people should be approached differently.

We may authorize the district court to consider a second or successive habeas petition if the applicant makes a prima facie showing that his proposed claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). "A prima facie showing, in this context, simply requires that the applicant make a showing of possible merit sufficient to 'warrant a fuller exploration by the district court.'" *In re Watkins*, 810 F.3d 375, 379 (6th Cir. 2015) (quoting *In re Lott*, 366 F.3d 431, 432-33 (6th Cir. 2004)). This prima facie showing "is not a difficult standard to meet." *In re Lott*, 366 F.3d at 432.

In *Miller*, the Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 567 U.S. at 465. *Miller* requires a sentencing court "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. The Supreme Court has held that *Miller* announced a new substantive rule of constitutional law retroactively applicable on collateral review. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

Smith seeks to extend the rule announced in *Miller* to offenders who were eighteen years old at the time of their crimes. *See Cruz v. United States*, No. 11-CV-787, 2018 WL 1541898, at *25 (D. Conn. Mar. 29, 2018) (holding that *Miller* applies to eighteen-year-olds). Other circuits have held that whether a new rule "extends" to an applicant "goes to the merits of the motion and is for the district court, not the court of appeals." *In re Williams*, 759 F.3d 66, 72 (D.C. Cir. 2014); *see also In re Hoffner*, 870 F.3d 301, 309 (3d Cir. 2017) ("It is for the district court to evaluate the merits of the second or successive habeas petition in the first instance. This includes 'whether the invoked new rule should ultimately be extended in the way the movant proposes' or whether his 'reliance is misplaced.'") (quoting *In re Arnick*, 826 F.3d 787, 791 (5th Cir. 2016) (Elrod, J., dissenting)); *In re Hubbard*, 825 F.3d 225, 231 (4th Cir. 2016) ("[I]t is for the district court to

determine whether the new rule extends to the movant's case, not for this court in this proceeding."). Smith has made a prima facie showing that his proposed claim relies on *Miller* to warrant authorization of a second or successive habeas petition; we leave the merits of that habeas petition to the district court.

Accordingly, we **GRANT** Smith's motion for an order authorizing the district court to consider a second or successive habeas petition.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 18-1726

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



In re: ANDREW J. LAMBERT, JR.,

Movant.

O R D E R

Before: MOORE and DONALD, Circuit Judges; BERTELSMAN, District Judge.*

Andrew J. Lambert, Jr., a Michigan prisoner proceeding pro se, moves this court for an order authorizing the district court to consider a second or successive petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(b).

In 1996, a jury in the Detroit Recorder's Court convicted Lambert of first-degree murder, assault with intent to murder, and possession of a firearm during the commission of a felony. The trial court sentenced Lambert to life imprisonment without parole. On direct appeal, the Michigan Court of Appeals affirmed Lambert's convictions. *People v. Lambert*, No. 195145, 1998 WL 1997696 (Mich. Ct. App. Jan. 13, 1998), *leave app. denied*, 589 N.W.2d 286 (Mich. 1998) (table).

Lambert filed his first habeas petition in 2000. The district court denied it as well as his request for a certificate of appealability. This court also denied a certificate of appealability. Since then, Lambert has continued to seek relief in the state and federal courts.

Lambert now moves this court for an order authorizing the district court to consider a second or successive habeas petition. *See* 28 U.S.C. § 2244(b). In support of his motion, Lambert relies on *Miller v. Alabama*, 567 U.S. 460 (2012), which prohibited mandatory life

*The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

sentences without parole for juvenile offenders, and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), which made the decision in *Miller* retroactive to cases on collateral review. Lambert, who was 18 years old when he committed his crimes, seeks to raise the following claim: "Whether the protections of *Miller* should be extended to 18 year olds based on the societal evidence of national consensus and scientific evidence demonstrating that a youth of 18 years of age is legally and developmentally a child."

We may authorize the district court to consider a second or successive habeas petition if the applicant makes a prima facie showing that his proposed claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). "A prima facie showing, in this context, simply requires that the applicant make a showing of possible merit sufficient to 'warrant a fuller exploration by the district court.'" *In re Watkins*, 810 F.3d 375, 379 (6th Cir. 2015) (quoting *In re Lott*, 366 F.3d 431, 432-33 (6th Cir. 2004)). This prima facie showing "is not a difficult standard to meet." *In re Lott*, 366 F.3d at 432.

In *Miller*, the Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 567 U.S. at 465. *Miller* requires a sentencing court "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. In *Montgomery*, the Supreme Court held that *Miller* announced a new substantive rule of constitutional law retroactively applicable on collateral review. 136 S. Ct. at 736.

Lambert seeks to extend the new rule announced in *Miller* to offenders who were 18 years old at the time of their crimes. *See Cruz v. United States*, No. 11-CV-787, 2018 WL 1541898, at *25 (D. Conn. Mar. 29, 2018) (holding that *Miller* applies to 18-year-olds). Other circuits have held that whether a new rule "extends" to an applicant "goes to the merits of the motion and is for the district court, not the court of appeals." *In re Williams*, 759 F.3d 66, 72 (D.C. Cir. 2014); *see also In re Hoffner*, 870 F.3d 301, 309 (3d Cir. 2017) ("It is for the district

court to evaluate the merits of the second or successive habeas petition in the first instance. This includes 'whether the invoked new rule should ultimately be extended in the way the movant proposes' or whether his 'reliance is misplaced.'" (quoting *In re Arnick*, 826 F.3d 787, 791 (5th Cir. 2016) (Elrod, J., dissenting))); *In re Hubbard*, 825 F.3d 225, 231 (4th Cir. 2016) ("[I]t is for the district court to determine whether the new rule extends to the movant's case, not for this court in this proceeding."). Lambert has made a prima facie showing that his proposed claim relies on *Miller* to warrant authorization of a second or successive habeas petition; we leave the merits of that habeas petition to the district court.

Accordingly, we **GRANT** Lambert's motion for an order authorizing the district court to consider a second or successive habeas petition.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
SEVENTH DIVISION
CASE NO. 14-CR-161

COMMONWEALTH OF KENTUCKY PLAINTIFF

v.

TRAVIS BREDHOLD DEFENDANT

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**ORDER DECLARING KENTUCKY'S DEATH PENALTY STATUTE AS UNCONSTITUTIONAL**

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This matter comes before the Court on Defendant Travis Bredhold's Motion to declare the Kentucky death penalty statute unconstitutional insofar as it permits capital punishment for those under twenty-one (21) years of age at the time of their offense. Mr. Bredhold argues that the death penalty would be cruel and unusual punishment, in violation of the Eighth Amendment, for an offender under twenty-one (21) at the time of the offense. The defense claims that recent scientific research shows that individuals under twenty-one (21) are psychologically immature in the same way that individuals under the age of eighteen (18) were deemed immature, and therefore ineligible for the death penalty, in *Roper v. Simmons*, 543 U.S. 551 (2005). The Commonwealth in turn argues that Kentucky's death penalty statute is constitutional and that there is no national consensus with respect to offenders under twenty-one (21). Having the benefit of memoranda of law, expert testimony, and the arguments of counsel, and being otherwise sufficiently advised, the Court sustains the Defendant's motion.

## FINDINGS OF FACT

Travis Bredhold was indicted on the charges of Murder, First Degree Robbery, Theft by Unlawful Taking $10,000 or More, and three Class A Misdemeanors for events which occurred on December 9, 2013, when Mr. Bredhold was eighteen (18) years and five (5) months old.

On July 17, 2017, the Court heard testimony from Dr. Laurence Steinberg in the case of Commonwealth v. Diaz, et al., No. 15-CR-584.[1] Dr. Steinberg, an expert in adolescent development, testified to the maturational differences between adolescents (individuals ten (10) to twenty-one (21) years of age) and adults (twenty one (21) and over). The most significant of these differences being that adolescents are more impulsive, more likely to misperceive risk, less able to regulate behavior, more easily emotionally aroused, and, importantly, more capable of change. Additionally, Dr. Steinberg explained how these differences are exacerbated in the presence of peers and under emotionally stressful situations, whereas there is no such effect with adults. Dr. Steinberg related these differences to an individual's culpability and capacity for rehabilitation and concluded that, "if a different version of *Roper* were heard today, knowing what we know now, one could've made the very same arguments about eighteen (18), nineteen (19), and twenty (20) year olds that were made about sixteen (16) and seventeen (17) year olds in *Roper*."[2] Dr. Steinberg supplemented his testimony with a report further detailing the structural and functional changes responsible for these differences between adolescents and adults, as will be discussed later in this opinion.[3]

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[1] See Order Supplementing the Record. Com. v. Diaz is also a Seventh Division case. The Commonwealth was represented by Commonwealth Attorney Lou Anna Red Corn, and her assistants in both cases, 14-CR-161 & 15-CR-584. Dr. Steinberg was aptly cross-examined by the Commonwealth Attorney.

[2] Hearing July 17, 2017 at 9:02:31.

[3] Defendant's Supplement to Testimony of Laurence Steinberg, July 19, 2017.

14 CR 161

On May 25th and 26th, 2016, an individual assessment of Mr. Bredhold was conducted by Dr. Kenneth Benedict, a clinical psychologist and neuropsychologist. A final report was provided to the Defendant's counsel and the Commonwealth and has been filed under seal. After reviewing the record, administering multiple tests, and conducting interviews with Mr. Bredhold, members of his family, and former teachers, Dr. Benedict found that Mr. Bredhold was about four years behind his peer group in multiple capacities. These include: the development of a consistent identity or "sense of self," the capacity to regulate his emotions and behaviors, the ability to respond efficiently to natural environmental consequences in order to adjust and guide his behavior, and his capacity to develop mutually gratifying social relationships.[4] Additionally, he found that Mr. Bredhold had weaknesses in executive functions, such as attention, impulse control, and mental flexibility.[5] Based on his findings, Dr. Benedict diagnosed Mr. Bredhold with a number of mental disorders, not the least being Attention Deficit Hyperactivity Disorder (ADHD), learning disabilities in reading and writing, and Post Traumatic Stress Disorder (PTSD).[6]

## CONCLUSIONS OF LAW

The Eighth Amendment to the United States Constitution states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S.C.A. Const. Amend. VIII. This provision is applicable to the states through the Fourteenth Amendment. The protection flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). Eighth Amendment jurisprudence has seen the consistent reference to "the evolving standards of decency that mark the progress of a maturing

[4] *Id* at 6.
[5] *Id* at 3.
[6] *Id* at 5.

society" to determine which punishments are so disproportionate as to be "cruel and unusual." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). The two prongs of the "evolving standards of decency" test are: (1) objective indicia of national consensus, and (2) the Court's own determination in the exercise of independent judgment. *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Atkins*, 536 U.S. 304; *Roper v. Simmons*, 543 U.S. 551 (2005).

## I. Objective Indicia of National Consensus Against Execution of Offenders Younger than 21

Since *Roper*, six (6) states[7] have abolished the death penalty, making a total of nineteen (19) states and the District of Columbia without a death penalty statute. Additionally, the governors of four (4) states[8] have imposed moratoria on executions in the last five (5) years. Of the states that do have a death penalty statute and no governor-imposed moratoria, seven[9] (7) have *de facto* prohibitions on the execution of offenders under twenty-one (21) years of age, including Kentucky. Taken together, there are currently thirty states in which a defendant who was under the age of twenty-one (21) at the time of their offense would not be executed – ten (10) of which have made their prohibition on the death penalty official since the decision in *Roper* in 2005.

Of the thirty-one (31) states with a death penalty statute, only nine (9) executed defendants who were under the age of twenty-one (21) at the time of their offense between 2011 and 2016.[10]

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[7] The states that have abolished the death penalty since *Roper* and year of abolition: Connecticut (2012), Illinois (2011), Maryland (2013), New Jersey (2007), New Mexico (2009), and New York (2007).

[8] The governors of Pennsylvania and Washington imposed moratoria on the death penalty in 2015 and 2014, respectively. The governor of Oregon extended a previously imposed moratorium in 2015. The governor of Colorado granted an indefinite stay of execution to a death row inmate in 2013.

[9] Kansas and New Hampshire have not executed anyone since 1977. Montana and Wyoming have never executed anyone who was under twenty-one (21) years of age at the time of their offenses, and they currently have no such offenders on death row. Utah has not executed anyone who was under twenty-one (21) years of age at the time of their offense in the last fifteen (15) years, and no such offender is currently on Utah's death row. Idaho and Kentucky have not executed anyone who was under twenty-one (21) years old at the time of their offense in the last fifteen (15) years.

[10] Chart of Number of People Executed Who Were Aged 18, 19, or 20 at Offense from 2000 to Present, By State [current as of February 29, 2016]

Those nine (9) states have executed a total of thirty-three (33) defendants under the age of twenty-one (21) since 2011 – nineteen (19) of which have been in Texas alone.[11] Considering Texas an outlier, there have only been fourteen (14) executions of defendants under the age of twenty-one (21) between 2011 and 2016, compared to twenty-nine (29) executions in the years 2006 to 2011, and twenty-seven (27) executions in the years 2001 to 2006 (again, excluding Texas).[12] In short, the number of executions of defendants under twenty-one (21) in the last five (5) years has been cut in half from the two (2) previous five- (5) year periods.

Looking at the death penalty as practically applied to all defendants, since 1999 there has been a distinct downward trend in death sentences and executions. In 1999, 279 offenders nationwide were sentenced to death, compared to just thirty (30) in 2016 – just about eleven (11) percent of the number sentenced in 1999.[13] Similarly, the number of defendants actually executed spiked in 1999 at ninety-eight (98), and then gradually decreased to just twenty (20) in 2016 – only two of which were between the ages of eighteen (18) and twenty (20).

Contrary to the Commonwealth's assertion, it appears there is a very clear national consensus trending toward restricting the death penalty, especially in the case where defendants are eighteen (18) to twenty-one (21) years of age. Not only have six more states abolished the death penalty since *Roper* in 2005, four more have imposed moratoria on executions, and seven more have *de facto* prohibitions on the execution of defendants eighteen (18) to twenty-one (21). In addition to the recent legislative opposition to the death penalty, since 1999 courts have also shown a reluctance to impose death sentences on offenders, especially those eighteen (18) to

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[11] *Id.*
[12] *Id.*
[13] Death Penalty Information Center, Facts About the Death Penalty (Updated May 12, 2017), downloaded from https://deathpenaltyinfo.org/documents/FactSheet.pdf.

twenty-one (21. "[T]he objective indicia of consensus in this case – the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice – provide sufficient evidence that today our society views juveniles … as 'categorically less culpable than the average criminal.'" *Roper*, 543 U.S. at 567 (quoting *Atkins*, 536 U.S. at 316). Given this consistent direction of change, this Court thinks it clear that the national consensus is growing more and more opposed to the death penalty, as applied to defendants eighteen (18) to twenty-one (21).

**2. The Death Penalty is a Disproportionate Punishment for Offenders Younger than 21**

As the Supreme Court in *Roper* heavily relied on scientific studies to come to its conclusion, so will this Court. On July 17, 2017, in the case of Commonwealth of Kentucky v. Diaz, this Court heard expert testimony on this topic. Dr. Laurence Steinberg testified and was also allowed to supplement his testimony with a written report. The report cited multiple recent studies supporting the conclusion that individuals under twenty-one (21) years of age are categorically less culpable in the same ways that the Court in *Roper* decided individuals under eighteen (18) were less culpable. It is based on those studies that this Court has come to the conclusion that the death penalty should be excluded for defendants who were under the age of twenty-one (21) at the time of their offense.

If the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates this ruling.

Through the use of functional Magnetic Resonance Imaging (fMRI), scientists of the late 1990s and early 2000s discovered that key brain systems and structures, especially those involved in self-regulation and higher-order cognition, continue to mature through an individual's late

teens.[14] Further study of brain development conducted in the past ten (10) years has shown that these key brain systems and structures actually continue to mature well into the mid-twenties (20s); this notion is now widely accepted among neuroscientists.[15]

Recent psychological research indicates that individuals in their late teens and early twenties (20s) are less mature than their older counterparts in several important ways.[16] First, these individuals are more likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation.[17] Second, they are more likely to engage in "sensation-seeking," the pursuit of arousing, rewarding, exciting, or novel experiences. This tendency is especially pronounced among individuals between the ages of eighteen (18) and twenty-one (21).[18] Third, individuals in their late teens and early twenties (20s) are less able than older individuals to control their impulses and consider the future consequences of their actions and decisions because gains in impulse control continue to occur during the early twenties (20s).[19] Fourth, basic cognitive abilities, such as memory and logical reasoning, mature before emotional abilities, including the

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[14] B. J. Casey, et al., *Imaging the Developing Brain: What Have We Learned About Cognitive Development?*, 9 TRENDS IN COGNITIVE SCI. 104-110 (2005).

[15] N. Dosenbach, et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI. 1358-1361 (2011); D. Fair, et al., *Functional Brain Networks Develop From a "Local to Distributed" Organization*, 5 PLOS COMPUTATIONAL BIOLOGY 1-14 (2009); A. Hedman, et al., *Human Brain Changes Across the Life Span: A Review of 56 Longitudinal Magnetic Resonance Imaging Studies*, 33 HUM. BRAIN MAPPING 1987-2002 (2012); A. Pfefferbaum, et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 10 to 85 Years) Measures with Atlas-Based Parcellation of MRI*, 65 NEUROIMAGE 176-193 (2013); D. Simmonds, et al., *Developmental Stages and Sex Differences of White Matter and Behavioral Development Through Adolescence: A Longitudinal Diffusion Tensor Imaging (DTI) Study*. 92 NEUROIMAGE 356-368 (2014); L. Somerville, et al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 BRAIN & COGNITION 124-133 (2010).

[16] For a recent review of this research, see: LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE (2014).

[17] T. Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333-363 (2003).

[18] E. Cauffman, et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEV. PSYCHOL. 193-207 (2010); L. Steinberg, et al., *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, DEV. SCI. Advance online publication. doi: 10.1111/desc.12532. (2017).

[19] L. Steinberg, et al., *Age Difference in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28-44 (2009); D. Albert, et al., *Age Difference in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCHOL. 1764-1778 (2008).

ability to exercise self-control, to properly consider the risks and rewards of alternative courses of action, and to resist coercive pressure from others. Thus, one may be intellectually mature but also socially and emotionally immature.[20] As a consequence of this gap between intellectual and emotional maturity, these differences are exacerbated when adolescents and young adults are making decisions in situations that are emotionally arousing, including those that generate negative emotions, such as fear, threat, anger, or anxiety.[21] The presence of peers also amplifies these differences because this activates the brain's "reward center" in individuals in their late teens and early twenties (20s). Importantly, the presence of peers has no such effect on adults.[22] In recent experimental studies, the peak age for risky decision-making was determined to be between nineteen (19) and twenty-one (21).[23]

Recent neurobiological research parallels the above psychological conclusions. This research has shown that the main cause for psychological immaturity during adolescence and the early twenties (20s) is the difference in timing of the maturation of two important brain systems. The system that is responsible for the increase in sensation-seeking and reward-seeking—sometimes referred to as the "socio-emotional system"—undergoes dramatic changes around the time of puberty, and stays highly active through the late teen years and into the early twenties (20s). However, the system that is responsible for self-control, regulating impulses, thinking ahead,

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[20] L. Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583-594 (2009).

[21] A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 4 PSYCHOLOGICAL SCIENCE 549-562 (2016); L. Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583-594 (2009).

[22] D. Albert, et al., *The Teenage Brain: Peer Influences on Adolescent Decision-Making*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 114-120 (2013).

[23] B. Braams, et al., *Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development and Risk Taking Behavior*, 35 J. OF NEUROSCIENCE 7226-7238 (2015); E. Shulman & E. Cauffman, *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, 50 DEV. PSYCHOL. 167-177 (2014).

evaluating the risks and rewards of an action, and resisting peer pressure—referred to as the "cognitive control system"—is still undergoing significant development well into the mid-twenties (20s).[24] Thus, during middle and late adolescence there is a "maturational imbalance" between the socio-emotional system and the cognitive control system that inclines adolescents toward sensation-seeking and impulsivity. As the cognitive control system catches up during an individual's twenties (20s), one is more capable of controlling impulses, resisting peer pressure, and thinking ahead.[25]

There are considerable structural changes and improvements in connectivity across regions of the brain which allow for this development. These structural changes are mainly the result of two processes: synaptic pruning (the elimination of unnecessary connections between neurons, allowing for more efficient transmission of information) and myelination (insulation of neuronal connections, allowing the brain to transmit information more quickly). While synaptic pruning is mostly complete by age sixteen (16), myelination continues through the twenties (20s).[26] Thus, while the development of the prefrontal cortex (logical reasoning, planning, personality) is largely finished by the late teens, the maturation of connections between the prefrontal cortex and regions which govern self-regulation and emotions continues into the mid-twenties (20s).[27] This supports the psychological findings spelled out above which conclude that even intellectual young adults

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[24] B. J. Casey, et al., *The Storm and Stress of Adolescence: Insights from Human Imaging and Mouse Genetics*, 52 DEV. PSYCHOL. 225-235 (2010); L. Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78-106 (2008); L. Van Leijenhorst, et al., *Adolescent Risky Decision-making: Neurocognitive Development of Reward and Control Regions*, 51 NEUROIMAGE 345-355 (2010).

[25] D. Albert & L. Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. OF RES. ON ADOLESCENCE 211-224 (2011); S-J Blakemore & T. Robbins, *Decision-Making in the Adolescent Brain*, 15 NAT. NEUROSCIENCE 1184-1191 (2012).

[26] S-J, Blakemore, *Imaging Brain Development: The Adolescent Brain*, 61 NEUROIMAGE 397-406 (2012); R. Engle, *The Teen Brain*, 22(2) CURRENT DIRECTIONS IN PSYCHOL. SCI. (whole issue) (2013); M. Luciana (Ed.), *Adolescent Brain Development: Current Themes and Future Directions*, 72(2) BRAIN & COGNITION (whole issue) (2010).

[27] L. Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions Involving Adolescents' Criminal Culpability*, 14 NAT. REV. NEUROSCIENCE 513-518 (2013).

may have trouble controlling impulses and emotions, especially in the presence of peers and in emotionally arousing situations.

Perhaps one of the most germane studies to this opinion illustrated this development gap by asking teenagers, young adults (18-21), and mid-twenties adults to demonstrate impulse control under both emotionally neutral and emotionally arousing conditions.[28] Under emotionally neutral conditions, individuals between eighteen (18) and twenty-one (21) were able to control their impulses just as well as those in their mid-twenties (20s). However, under emotionally arousing conditions, eighteen– (18) to twenty-one– (21) year–olds demonstrated levels of impulsive behavior and patterns of brain activity comparable to those in their mid-teens.[29] Put simply, under feelings of stress, anger, fear, threat, etc., the brain of a twenty– (20) year–old functions similarly to a sixteen– (16) or seventeen– (17) year–old.

In addition to this maturational imbalance, one of the hallmarks of neurobiological development during adolescence is the heightened plasticity—the ability to change in response to experience—of the brain. One of the periods of the most marked neuroplasticity is during an individual's late teens and early twenties (20s), indicating that this group has strong potential for behavioral change.[30] Given adolescents' ongoing development and heightened plasticity, it is difficult to predict future criminality or delinquent behavior from antisocial behavior during the teen years, even among teenagers accused of committing violent crimes.[31] In fact, many

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[28] A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 4 PSYCHOL. SCI. 549-562 (2016).
[29] *Id.*
[30] LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE (2014).
[31] T. Moffitt, *Life-Course Persistent Versus Adolescent-Limited Antisocial Behavior*, 3(2) DEV. & PSYCHOPATHOLOGY (2016).

researchers have conducted studies finding that approximately ninety (90) percent of serious juvenile offenders age out of crime and do not continue criminal behavior into adulthood.[32]

Travis Bredhold was eighteen (18) years and five (5) months old at the time of the alleged crime. According to recent scientific studies, Mr. Bredhold fits right into the group experiencing the "maturational imbalance," during which his system for sensation-seeking, impulsivity, and susceptibility to peer pressure was fully developed, while his system for planning and impulse control lagged behind, unable to override those impulses. He also fits into the group described in the study above which was found to act essentially like a sixteen– (16) to seventeen– (17) year–old under emotionally arousing conditions, such as, for example, robbing a store. Most importantly, this research shows that eighteen– (18) to twenty-one– (21) year–olds are categorically less culpable for the same three reasons that the Supreme Court in *Roper* found teenagers under eighteen (18) to be: (1) they lack maturity to control their impulses and fully consider both the risks and rewards of an action, making them unlikely to be deterred by knowledge of likelihood and severity of punishment; (2) they are susceptible to peer pressure and emotional influence, which exacerbates their existing immaturity when in groups or under stressful conditions; and (3) their character is not yet well formed due to the neuroplasticity of the young brain, meaning that they have a much better chance at rehabilitation than do adults.[33]

Further, the Supreme Court has declared several times that "capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568

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[32] K. Monahan, et al., *Psychosocial (im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persistent Antisocial Behavior*, 25 DEV. & PSYCHOPATHOLOGY 1093-1105 (2013); E. Mulvey, et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 DEV. & PSYCHOPATHOLOGY 453-475 (2010).

[33] *Roper*, 543 U.S. at 569-70.

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(quoting *Atkins*, 536 U.S. at 319); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim); *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) ("the death penalty must be reserved for 'the worst of the worst'"). Given Mr. Bredhold's young age and development, it is difficult to see how he and others his age could be classified as "the most deserving of execution."

Given the national trend toward restricting the use of the death penalty for young offenders, and given the recent studies by the scientific community, the death penalty would be an unconstitutionally disproportionate punishment for crimes committed by individuals under twenty-one (21) years of age. Accordingly, Kentucky's death penalty statute is unconstitutional insofar as it permits capital punishment for offenders under twenty-one (21) at the time of their offense.

It is important to note that, even though this Court is adhering to a bright–line rule as promoted by *Roper* and not individual assessment or a "mental age" determination, the conclusions drawn by Dr. Kenneth Benedict in his individual evaluation of Mr. Bredhold are still relevant. This evaluation substantiates that what research has shown to be true of adolescents and young adults as a class is particularly true of Mr. Bredhold. Dr. Benedict's findings are that Mr. Bredhold operates at a level at least four years below that of his peers. These findings further support the exclusion of the death penalty for this Defendant.

So ORDERED this the 1 day of August, 2017.

JUDGE ERNESTO SCORSONE
FAYETTE CIRCUIT COURT

14CR161



**CERTIFICATE OF SERVICE**

The following is to certify that the foregoing was served this the 1st day of August, 2017, by mailing same first class copy, postage prepaid, to the following:

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Markita A. NORRIS, a/k/a Markita Anita Norris and Makita A. Norris, Defendant–Appellant.

DOCKET NO. A–3008–15T4
|
Submitted February 27, 2017
|
Decided May 15, 2017

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment No. 10–07–0774.

**Attorneys and Law Firms**

Joseph E. Krakora, Public Defender, attorney for appellant (Rochelle Watson, Assistant Deputy Public Defender, of counsel and on the brief).

Grace H. Park, Acting Union County Prosecutor, attorney for respondent (Cynthia L. Ritter, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

Before Judges Sabatino, Nugent and Haas.

**Opinion**

PER CURIAM

***1** Defendant Markita A. Norris appeals from her judgment of conviction on resentencing for murder and attempted murder. We previously affirmed defendant's convictions, *State v. Markita A. Norris*, No. A–1561–12 (App. Div. Nov. 30, 2015), *certif. denied*, 226 *N.J.* 213 (2016), but remanded for resentencing. *Id.* (slip op. at 2).

On remand, after finding one less aggravating factor on the murder count, and two fewer aggravating factors on the attempted murder count, the court imposed the same consecutive sentences it had previously imposed. [1] The court did not explain why, on remand, the elimination of the most serious aggravating factors it had considered in its original sentence did not affect the resentence. For this and the reasons that follow, we are constrained to remand again for further sentencing proceedings. In doing so, we reject defendant's suggestion that the sentencing was a product of the sentencing court's intransigence.

The facts underlying defendant's conviction are detailed in our previous opinion and need not be repeated in their entirety. Rather, we recount the facts relevant to defendant's sentence. The State established at trial that following a fundraiser at the Black United Fund in Plainfield, defendant and her uncle instigated a verbal altercation with the surviving victim and the decedent. *Id.* (slip op. at 3–4). During the verbal altercation, defendant's uncle punched the surviving victim, and a fight ensued. *Id.* (slip op. at 4). Although the trial witnesses were not entirely consistent as to the sequence of events, their testimony, considered collectively, established that while defendant's uncle fought with the surviving victim, defendant stabbed the surviving victim twice in the left arm and once in the back. The surviving victim suffered a collapsed lung and other injuries. *Id.* (slip op. at 4–5, 8).

The testimony of witnesses also established that defendant fought with and stabbed the decedent, who collapsed on the sidewalk. Defendant walked away but returned and kicked the victim, once or repeatedly, according to differing witness accounts. *Id.* (slip op. at 5–8). After stabbing the decedent and then attacking him a second time, defendant danced in the middle of the street before she and her uncle drove away in his car. *Id.* (slip op. at 5). The autopsy revealed the cause of decedent's death to be multiple stab wounds to the chest, abdomen, and right arm. *Id.* (slip op. at 8).

***2** When the trial court sentenced defendant the first time, the court did not distinguish between the aggravated assault and murder counts when it considered aggravating and mitigating factors. The court explained the basis for finding aggravating factors one and two:

> In this matter, supporting those factors, by the facts on this case, the [c]ourt finds the cruel manner in the attack as this person attacked two individuals, both separately, two separate victims with a knife, one of which she was having a dispute, and then when finishing with one, turned her attentions to the other, stabbing one from the back.
>
> Next, the excessive force. There were multiple stab wounds involved in this case.

  

> Next supporting factor, the brutal and senseless nature. The victims were attacked in this matter after a fund raiser dance. This was at a place in Plainfield called the BUF. It was there for a youth sports night. This whole incident appeared to occur due to a bump on the dance floor, it spilled over to the streets outside, after people were leaving. Brutal and senseless.
>
> Overall, the nature of this case is horrific, the acts depraved, and the dancing over the victim uncalled for, showing this [c]ourt a lack of remorse, and in a review of the papers, the [c]ourt believes demonstrates lack of remorse in this case.
>
> [*Id.* (slip op. at 27–28).]

In our opinion affirming defendant's convictions, we remanded for resentencing, explaining:

> There are several problems with the trial court's finding of factors one and two. First, the trial court's opinion does not include for each factor "a distinct analysis of the offense for which the court sentences the defendant." *State v. Lawless*, 214 *N.J.* 594, 600 (2013).
>
> Second, the trial court referred to the "cruel" manner of the attack on the victims without any discussion or finding as to whether defendant inflicted pain or suffering gratuitously, as an end in itself, rather than merely as a means of committing the crimes. [*State v. O'Donnell*, 117 *N.J.* 210, 217–18 (1989)]. If the trial court intended to make this distinction, it did not explain the facts upon which it relied.
>
> Third, the trial court's emphasis on two crimes and two attacks was central to its determination to impose consecutive sentences under *Yarbough*. Thus, it appears the court considered the same factors in sentencing defendant to consecutive sentences and in sentencing defendant to upward ranges of the consecutive sentences.
>
> We have other concerns as well. For example, the court cites the use of "excessive force," but does not explain how the force used in this case is different from any other first-degree murder or first-degree aggravated assault committed with a knife. In fact, it appears the excessive force—multiple stab wounds—caused decedent's death, thereby subjecting defendant to a sentence for murder. And though the court found the attacks to be brutal and senseless, the question is whether there is something about what occurred here that is more brutal and senseless than any other first-degree murder or first-degree aggravated assault.
>
> In short, it appears from this record that the court double-counted aggravating factors one and two. Accordingly, we vacate defendant's sentence and remand for resentencing. In view of this disposition, we need not address whether the eighty-year aggregate sentence of the twenty-one-year-old defendant—in effect, a sentence to life imprisonment without any likelihood of parole—shocks the judicial conscience.
>
> ***3** [*Id.* (slip op. at 28–29.]

When the remand hearing commenced, the court stated that it would not consider aggravating factors one and two in resentencing defendant. During the course of oral argument, however, the court was apparently persuaded by the State's contention that, though aggravating factor two was without "a solid justification," aggravating factor one was at least applicable as to the decedent.

Before imposing sentence, the court confirmed defendant's eligibility for a discretionary extended term under *N.J.S.A.* 2C:44–3(a), the persistent offender statute. Defendant, age twenty-one when she committed the murder and attempted murder, had been convicted of four previous adult offenses: third-degree resisting arrest and fourth-degree criminal trespass, both committed when she was eighteen years old; and third-degree possession of a weapon for an unlawful purpose and third-degree possession of a controlled dangerous substance, both committed when she was nineteen years old. Defendant thus qualified as a persistent offender. She had "been convicted of a crime of the first, second or third degree [when] [twenty-one] years of age or over, [and had] been previously convicted on at least two separate occasions of two crimes, committed at different times, when [she] was at least eighteen years of age, ... within [ten] years of the date of the crime for which [she was] being sentenced." *N.J.S.A.* 2C:44–3(a).

Next, as to the crime of murder, the court found aggravating factor one, the nature and circumstances of the offense. The court found that defendant left the decedent lying face down on the sidewalk after she stabbed him, and "returned ... to attack him about the face, head and chest."

The court also found aggravating factor number three, the risk of re-offense. The court based its determination on defendant's record, including her "lack of success" on

probation and parole. She served two probationary terms resulting in two violations of probation. The court pointed out "[s]he had four New Jersey State Prison terms and four parole violations[.]" The court also noted defendant's juvenile record.

The court found aggravating factor six, defendant's prior criminal record. The court explicitly stated it was considering factor six only insofar as it was a consideration as to the extended-term sentence.

Lastly, the court found aggravating factor number nine based on defendant's criminal record, the need to protect the public, and the need to deter others by sending a message that such conduct will not be tolerated. The court added that defendant demonstrated a lack of remorse by dancing in the street after stabbing the victims. The court found no mitigating factors.

After explaining the reasons for imposing consecutive sentences, the court made clear it was applying aggravating factors three and nine to defendant's sentence for attempted murder, and aggravating factors one, three and nine to her sentence for murder. In both instances, the court found that the aggravating factors substantially outweighed the non-existent mitigating factors.

***4** In summary, when the court first sentenced defendant, it appeared to find aggravating factors one, two, three and nine on both counts, giving great weight to aggravating factors one and two. In contrast, on resentencing, the court found only aggravating factors one, three and nine on the murder count, and only three and nine on the remaining count. Yet, notwithstanding this significant quantitative and qualitative difference in aggravating factors, the court imposed the same sentence.

The court imposed its original sentence of fifty-years on the murder count. Applying NERA, the court determined defendant must serve forty-two years, six months and two days before becoming eligible for parole. As to the attempted murder count, the court again imposed the same sentence, thirty years subject to NERA. Thus, on the attempted murder count, defendant must serve twenty-five years, six months and two days before becoming eligible for parole. The court imposed the sentences consecutively, resulting in an aggregate eighty year term with sixty-eight years of parole ineligibility. Defendant will become eligible for parole when she is eighty-nine years old. In effect, the court imposed a life sentence on the twenty-one-year-old defendant.

On the resulting judgment of conviction, under a printed directive to include all aggravating and mitigating factors, the judgment states: "The [c]ourt finds that aggravating factors 1, 2, 3 and 9 substantially outweigh the non-existent mitigating factors as originally noted." Defendant appealed from the judgment of conviction entered after resentencing.

On appeal, defendant raises the following arguments:

POINT I

THE 80 YEAR SENTENCE IMPOSED AT THE RESENTENCING—THE SAME AS THAT PREVIOUSLY IMPOSED—IS MANIFESTLY EXCESSIVE.

A. Because The Court Reimposed The Same Sentence As Previously Imposed After Eliminating Significant Aggravating Factors, The Case Should Be Remanded For Sentencing.

B. The Sentencing Court Erred In Finding That Aggravating Factor One Applied To The Murder Conviction, After The Appellate Division Remanded For Resentencing For Impermissible Double–Counting.

C. Defendant's Aggregate Sentence Of 80 Years Subject To NERA, Which Will Make Her Eligible For Parole When She Is 89 Years Old, Shocks The Judicial Conscience.

We agree that the trial court, having eliminated significant aggravating factors, should not have imposed the same sentence, at least in the absence of a compelling explanation —something we cannot discern from the record.

Our review of a trial court's sentencing determination is deferential. *State v. Fuentes*, 217 *N.J.* 57, 70 (2014). Reviewing courts must not substitute their judgment for that of the sentencing court. *O'Donnell*, *supra*, 117 *N.J.* at 215. Nonetheless, "[a]ppellate courts are 'expected to exercise a vigorous and close review for abuses of discretion by the trial courts.' " *Lawless*, *supra*, 214 *N.J.* at 606 (citations omitted). Thus, for example, when a trial court fails to provide a qualitative analysis of the relevant sentencing factors on the record, or considers an aggravating factor that is inappropriate to a particular defendant or to the defense at issue, an appellate court may remand for resentencing. *Fuentes*, *supra*, 217 *N.J.* at 70.

Moreover, "[a] clear explanation 'of the balancing of aggravating and mitigating factors with regard to imposition of sentences and periods of parole ineligibility is particularly important.' " *Id.* at 73 (quoting *State v. Pillot*, 115 *N.J.* 558, 565–66 (1989)). "That explanation should thoroughly address the factors at issue." *Ibid.*

***5** In short, "a trial court should identify the relevant aggravating and mitigating factors, determine which factors are supported by a preponderance of evidence, balance the relevant factors, and explain how it arrives at the appropriate sentence." *O'Donnell*, *supra*, 117 *N.J.* at 215. In cases such as the one before us, where on remand the sentencing court has substantially eliminated the most serious aggravating factors underlying the original sentence, the sentencing court must explain its rationale for nonetheless imposing an identical sentence. Imposing the identical sentence after eliminating the most serious aggravating factors, without explaining how eliminating those factors has had no impact on the sentence, raises the specter of capriciousness and does not instill confidence that the sentence has been imposed only after careful consideration of the relevant criteria in the New Jersey Code of Criminal Justice.

Here, although the sentencing court on remand initially announced it would not consider aggravating factors one or two, it went on to consider aggravating factor one nonetheless. That aggravating factor is supported by the record. After stabbing the decedent and walking away, defendant returned and gratuitously inflicted additional pain, either by kicking the dying decedent once or kicking him repeatedly. The sentencing court eliminated, however, aggravating factor two.

Of greater significance is the sentencing court imposing on the attempted murder count the identical sentence despite eliminating aggravating factors one and two, which appeared to have driven the lengthy extended term the court originally imposed. These circumstances raise concerns about the propriety of the resentence imposed on the attempted murder count.

We note the sentencing court had already exercised its discretion to impose both an extended term and a consecutive sentence on the attempted murder count. As our Supreme Court has noted, "the decision whether sentences for different counts of conviction should run consecutively or concurrently often drives the real-time outcome at sentencing." *State v. Zuber*, 227 *N.J.* 422, 449 (2017). We also note the United States Supreme Court's recognition of "the mitigating qualities of youth" and the need for courts to consider at sentencing a youthful offender's "failure to appreciate risks and consequences" as well as other factors often peculiar to young offenders. *Miller v. Alabama*, 567 *U.S.* 460, 476–77, 132 *S. Ct.* 2455, 2467–68, 183 *L. Ed.* 2d 407, 422–23 (2012). Our Supreme Court noted "that the same concerns apply to sentences that are the practical equivalent of life without parole[.]" *Zuber*, *supra*, 227 *N.J.* at 429.

That is not to say that defendant in the case before us, who was twenty-one-years old when she committed murder and attempted murder, should be given the same consideration as a juvenile offender. But certainly the real life consequences of a consecutive, extended-term sentence should be considered, particularly under circumstances such as these, where on the attempted murder charge the most serious aggravating factors had been eliminated and the two that remained were somewhat ubiquitous.

For the foregoing reasons, we again remand this matter for resentencing. We do not retain jurisdiction.

**All Citations**

Not Reported in Atl. Rptr., 2017 WL 2062145

## Footnotes

1 The aggravating factors set forth in *N.J.S.A.* 2C:44–1(a), relevant to this appeal, include: (1) The nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner; (2) The gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme

youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance; (3) The risk that the defendant will commit another offense; (6) The extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted; and, (9) The need for deterring the defendant and others from violating the law.

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253 F.Supp.3d 1033
United States District Court, E.D. Wisconsin.

UNITED STATES of America, Plaintiff,
v.
Daryl WALTERS, Defendant.

Case No. 16–CR–198
|
Signed May 30, 2017

**Synopsis**

**Background:** Defendant pled guilty to theft of mail and assaulting/impeding a postal employee.

At sentencing, the District Court, Lynn Adelman, J., held that sentence of time served with three years supervised release with condition of six months of home confinement was warranted.

Ordered accordingly.

**Attorneys and Law Firms**

John W. Campion, Federal Defender Services of Wisconsin Inc., Milwaukee, WI, for Defendant.

## STATEMENT OF REASON MEMORANDUM

LYNN ADELMAN, District Judge

Defendant Daryl Walters pleaded guilty to theft of mail and assaulting/impeding a postal employee, and I set the case for sentencing. The charges arose out of an incident in which defendant and a co-actor attempted to take two parcels (which, as it turned out, contained 10 kilograms of marijuana) from a postal employee, struggling with him when he resisted.

In imposing sentence, the district court must first determine the defendant's imprisonment range under the guidelines, then make an individualized assessment of ***1034** the appropriate sentence based on the factors set forth in 18 U.S.C. § 3553(a). E.g., United States v. Kappes, 782 F.3d 828, 837 (7th Cir. 2015). This memorandum sets forth the reasons for the sentence imposed.

### I. GUIDELINE CALCULATION

Defendant's pre-sentence report ("PSR") set a base offense level of 14 on the mail theft count, as the taking of a controlled substance was an object of the offense. U.S.S.G. § 2B1.1(c); U.S.S.G. § 2D1.1(c)(13). On the assault count, the PSR set a base level of 10, U.S.S.G. § 2A2.4(a), then added 3 levels because the offense involved physical contact, U.S.S.G. § 2A2.4(b)(1)(A). The PSR grouped the two counts, U.S.S.G. § 3D1.2(c), then subtracted 2 levels for acceptance of responsibility, U.S.S.G. § 3E1.1, for a final offense level of 12. The PSR set the criminal history category at III, based on a prior unlawful firearm possession offense, for which defendant was sentenced to 3 years probation and 120 days jail, U.S.S.G. § 4A1.1(b), and for which he was on supervision at the time he committed the instant offenses, U.S.S.G. § 4A1.1(d). Level 12 and category III produced an imprisonment range of 15–21 months. I adopted these calculations without objection.

### II. SECTION 3553(a)

**A. Sentencing Factors**

Section 3553(a) directs the court to consider:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the [advisory sentencing guideline range;]

(5) any pertinent policy statement ... issued by the Sentencing Commission[;]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

The court must, after considering these factors, impose a sentence that is "sufficient but not greater than necessary" to satisfy the purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation of the defendant. Id. In determining a sufficient sentence, the district court may not presume that a guideline term would be proper. E.g., United States v. Coleman, 763 F.3d 706, 708 (7th Cir. 2014). Rather, after calculating the advisory range so that it "can derive whatever insight the guidelines have to offer, [the district court] must sentence based on 18 U.S.C. § 3553(a) without any thumb on the scale favoring a guideline sentence." United States v. Sachsenmaier, 491 F.3d 680, 685 (7th Cir. 2007).

**B. Analysis**

**1. The Offense**

The convictions in this case were for stealing mail and assaulting a postal employee, but they arose out of a drug offense. On November 17, 2016, postal employee "S.K.P." tried to deliver two large ***1035** parcels to an address in Milwaukee. S.K.P. parked his delivery van in front of the address, and as he carried the parcels up the steps to the porch of the residence a man walked up and told S.K.P. the parcels were his. S.K.P. requested identification, but the man responded he did not have his identification; a friend coming down the street supposedly had it.

Defendant then arrived at the residence, claiming the parcels were his. He too was unable to provide any identification. S.K.P. picked up the parcels from the porch and told the men that after they found their identification they could retrieve their parcels from the post office.

Defendant and the co-actor climbed the steps from the sidewalk towards the porch of the residence as S.K.P. was carrying the parcels down the steps. The men knocked the parcels from S.K.P.'s arms, retrieved them from the ground, and began to run away. S.K.P. screamed at the men to stop and pursued the co-actor, who was carrying one parcel, for a couple of blocks. The co-actor eventually threw the parcel over a fence into a backyard, then tried to get over the fence himself. S.K.P. attempted to stop the co-actor and as they engaged in a physical altercation, the co-actor yelled to defendant to "Get him off me!" Defendant dropped the package he was carrying and attacked S.K.P. from behind, forcing S.K.P. to release the co-actor. The co-actor was able to get over the fence, where he picked up the parcel and ran through neighboring backyards.

Defendant threw his own parcel over a fence and attempted to flee, but S.K.P. then engaged defendant. During this altercation, defendant hit S.K.P. in the groin, allowing him to get away. S.K.P. pursued defendant, caught him, and another physical altercation ensued. A woman yelled from her porch asking if she should call 911, and S.K.P. yelled back that she should. Defendant was again able to free himself and began to run. S.K.P. continued to pursue him while yelling at him to stop. Eventually, S.K.P. tackled defendant. With the assistance a witness, defendant was detained until police arrived.

When the police arrived, officers recovered the parcel defendant had thrown over a fence; the parcel carried by the co-actor was found abandoned along the side of a nearby alley. The parcels each contained over five kilograms of high grade marijuana.

**2. The Defendant**

Defendant was very young, just 19. At age 18, he was convicted of unlawful firearm possession, receiving probation with jail time. He was on probation for that offense at the time he committed these crimes but was not revoked.

Defendant was raised by his mother in California, and it appeared he had a decent childhood with his extended family there. Apparently, he came to visit a family friend in Wisconsin in the fall of 2016; shortly thereafter, he was arrested for these offenses. When he was released on bond in December 2016, he relocated to Columbus, Georgia to reside with an aunt, attending barber school. In April 2017, I allowed him to move back to California, where he lived with his grandmother. He was able to obtain employment in California but planned to return to barber school after resolution of this matter.

Substance abuse has been an issue, with marijuana use starting at age 14. Defendant admitted smoking daily from the age of 18 until his arrest. He indicated he was under the influence of marijuana when he committed these offenses. To his credit, all of his screens on pre-trial release had been negative. Defendant was a high school graduate, with some additional college education and a decent work record, which was also to his credit.

***1036 3. The Sentence**

The guidelines called for a term of 15–21 months in prison, and the government recommended a sentence of 12 months and 1 day, stressing the seriousness of the offenses and defendant's status on probation at the time he committed them. Stressing his age and good conduct on bond, defendant asked for a sentence served in the community. Under all the circumstances, I found a sentence along the lines recommended by the defense sufficient.

First, while these were serious offenses, I took into account that defendant was a teen at the time he committed them. Courts and researchers have recognized that given their immaturity and undeveloped sense of responsibility, teens are prone to doing foolish and impetuous things, like stealing parcels to get marijuana and struggling with postal carriers. See, e.g., Miller v. Alabama, 567 U.S. 460, 471, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (collecting cases and authorities). Defendant's drug use at the time also likely played a role in his poor decision-making, and it appeared that he was brought into this by the co-actor, also not unusual with young offenders, who are more susceptible to peer pressure. Further, it did not appear that defendant or his co-actor wanted to hurt the postal employee; rather, they were trying to get the parcels and run off.

Second, while there was a need to protect the public and deter, I found that these goals could be accomplished in the community. Regarding the guidelines' prison recommendation, I found that criminal history category III somewhat overstated the seriousness of defendant's prior record. He had just one prior adult conviction, a misdemeanor, which scored all 4 of his points. He had no prior felonies, and he had not previously served prison time. Defendant was on supervision at the time he committed these offenses, but it appears to have been highly informal. He would be watched much more closely on federal supervision. The effectiveness of federal supervision was demonstrated by defendant's conduct on pre-trial release, which included just one violation (travel out of state without permission to attend a funeral). All drug screens had been negative, a significant fact given the contribution of marijuana use to the offenses. If defendant could stay drug free, he would be less likely to re-offend. He also seemed to have plans for the future. These factors suggested that supervision with strict conditions, including drug testing and treatment, would suffice. [1]

## III. CONCLUSION

Therefore, I imposed a sentence of time served, based on the roughly 30 days defendant spent in pre-trial detention, followed by three years of supervised release with a condition of 6 months home confinement. The home confinement, coupled with the time in pre-trial detention, served as just punishment, while the supervision with close monitoring provided deterrence and public protection.

**All Citations**

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## Footnotes

1 As the government correctly noted, while factors like youth and drug addiction can mitigate a defendant's culpability, they may also suggest an increased risk to the public. Several months shy of his twentieth birthday, defendant was not yet at the point on the curve when recidivism starts to sharply decline. However, the record showed that defendant had separated himself from the negative peers who led him into these offenses, returned to his extended family in California, and taken steps to overcome his substance abuse.

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# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 21, 2020 |
| v | No. 344130<br>Jackson Circuit Court |
| ANTHONY JOSEPH GELIA,<br><br>Defendant-Appellant. | LC No. 16-005361-FC |

Before: CAMERON, P.J., and SHAPIRO and SWARTZLE, JJ.

PER CURIAM.

Defendant forcibly entered a home and discharged a handgun multiple times, while streaming live video of his conduct on social media. One of the bullets shot by defendant struck and killed a woman who was with her young child. Defendant appeals as of right from the jury conviction of first-degree felony murder and other crimes, arguing that he received ineffective assistance of counsel, that his sentence for the conviction of first-degree felony murder constituted cruel and unusual punishment, and that the trial court erred when it admitted into evidence the audio recording of a 911 call and a video that defendant recorded of his own conduct before the shooting. We affirm.

## I. BACKGROUND

This case arises from the death of a woman in Jackson, Michigan, in November 2016. On the night in question, defendant was with his girlfriend and his brother's ex-girlfriend, who drove him to a house in Jackson. The driver informed defendant that his brother was staying at the house. Various witnesses testified that defendant's brother was indeed present in the house, where he had been staying with defendant's ex-girlfriend.

Upon arrival, defendant violently forced open the door to the house, wielding a handgun in one hand and his cellphone in the other. Defendant recorded himself breaking into the house and firing his handgun several times. Defendant did not record the entire incident, however, and witness testimony presented at trial indicated that defendant fired his handgun a total of nine times, while nine shell casings were found in the house. Defendant fired four shots into the living-room floor, one shot into a kitchen cupboard, and four shots in the basement. One of

those shots struck and killed the victim. At trial, defendant did not contest that he forcibly entered the house, that he fired the handgun inside the house, and that he fired the shot that killed the victim.

The homeowner testified that he was upstairs when he heard a knock at the front door. He looked out the window and saw a vehicle he did not recognize. As he headed downstairs, he saw defendant kick in the front door and begin firing a handgun. The homeowner admitted that defendant never spoke to him, looked at him, pointed the handgun at him, or moved toward him. Instead, defendant moved through the living room, firing the handgun. The homeowner retreated upstairs and called 911, and the prosecutor played an audio recording of this 911 call for the jury.

The victim, her child, and her boyfriend were all in the basement when defendant began shooting. The victim's boyfriend testified that defendant pointed a handgun at him while defendant was on the stairs leading to the basement, and that defendant fired twice at him. The victim's boyfriend also described how he ran into a bedroom, slammed the door, called 911, and then heard additional gunshots. He testified that defendant saw him enter the bedroom and close the bedroom door. Although defendant never attempted to enter the bedroom after him, defendant shot twice through the door. Once in the bedroom, the victim's boyfriend called 911. As he did so, he noticed the victim lying on the ground with her eyes open. He noticed blood and began to scream and yell for the victim.

The trial court allowed the prosecutor to play an audio recording of the boyfriend's 911 call for the jury. Before trial, defendant had moved to exclude the recording of this 911 call from evidence, arguing that it was not relevant under MRE 401 and unfairly prejudicial under MRE 403. At the pretrial motion hearing, the trial court rejected defendant's arguments and ruled that the recording was admissible. Accordingly, the trial court allowed the prosecutor to play the 911 call for the jury at trial.

After firing his handgun in the house, defendant fled the scene. Paramedics arrived and transported the victim to the hospital where she was pronounced dead from a gunshot wound. Meanwhile, police stopped and arrested defendant in his vehicle. Defendant was in possession of a handgun on which the serial number had been obliterated. The arresting police officer testified that defendant had alcohol on his breath and that his speech was slurred at the time of his arrest.

Police interviewed defendant and the prosecutor played a recording of the interview for the jury. In that interview, defendant confessed to the shooting. Defendant stated that he was with his girlfriend and his brother's ex-girlfriend on the night of the shooting. He claimed that his brother had threatened to kill him. He stated that, when he arrived at the house in Jackson, he peeked in the window and saw his ex-girlfriend in the living room. Defendant admitted that he had loaded 13 bullets into the handgun, and that he fired shots inside the house, but claimed that he was not aiming at anyone because he just wanted to scare everyone in the house. Defendant stated that he deserved to go to prison for what he had done, and that he planned to flee to Mexico after the shooting. Numerous times during this interview, defendant expressed the desire to kill himself.

During this interview, defendant also told police that he had consumed marijuana and alcohol, that he was intoxicated, and that he was too drunk to drive his own vehicle. Accordingly, police administered a breathalyzer test to defendant. Although the prosecutor did not admit the results of the breathalyzer test into evidence, the interviewing officer stated that the test revealed a .09 bodily alcohol content, which exceeded the legal limit for driving a motor vehicle. The police officer testified, however, that he thought defendant was not too intoxicated to have a cogent conversation with police during the interview.

The next day, police again interviewed defendant. The prosecutor played a recording of the second interview for the jury. At this second interview, defendant told police that he was drunk and that he had taken Xanax on the day of the shooting. Defendant did not claim that he had taken Xanax involuntarily or that someone had slipped it into his drink without his knowledge. Defendant again confessed to the shooting, but stated that he was persuaded to do what he did by his brother's ex-girlfriend. When defendant realized that he had killed someone, he lamented, "I just killed someone's mom," and asked if he was going to be spending the rest of his life in prison.

During cross-examination, the police officer who interviewed defendant admitted that defendant had the opportunity to shoot one of the guests in the living room, but that instead of doing so, defendant only fired shots into the living-room floor. The investigating officer also conceded that defendant was consistent in stating—during his interviews with police— that he did not intend to kill anyone.

Police obtained two videos of defendant's conduct that had been posted to social media on the night of the incident. The trial court allowed the prosecutor to play these videos for the jury, over defendant's objection. In the first video, defendant stated several times that he wanted to shoot or kill people. Specifically, defendant made repeated threats to shoot police officers. Defendant also made more threats to shoot other people or saw their heads off, and the video showed him running one of the chainsaws that he had in the vehicle, while making these threats. Defendant stated on the video that he was going to prison and joining the Aryan Brotherhood. The second video showed defendant breaking into the house and firing the handgun multiple times.

Defendant chose not to testify in his own defense.

On appeal, defendant admits that he was evaluated before trial for competency and criminal responsibility. Defendant further admits that the examiner found him competent to stand trial and that the examiner determined that the available information did not support a defense of temporary insanity. At a pretrial motion hearing regarding the admissibility of the videos, defense counsel stated on the record that he had considered raising a temporary-insanity defense, but that he chose not to do so because defendant's intoxication on the date of the shooting appeared to him to be voluntary. As defense counsel stated:

> There is some testimony that will be coming through the video with the officer of [defendant] being on Social Security Disability for ODD, ADHD, and some other issues. I just want the record to be clear that I have researched ODD, I have researched ADHD, I have sent him to forensics, that being [defendant], I

> have reviewed those forensic reports yet again this weekend. I cross referenced those with other cases with individuals with ODD and ADHD to determine whether or not I needed to seek potentially an expert regarding his mental state of mind on that evening. And again, I'm just making a record because I've looked at all those avenues and I don't see where I can, because of the voluntary intoxication, do that. So, I have reviewed that with [defendant]. He is aware of our trial strategy at this point. I mean, it really doesn't change my trial strategy too much, so we're prepared for trial to start tomorrow, your Honor.

At trial, defense counsel did not argue that defendant was not guilty of first-degree home invasion or possession of a firearm during the commission of a felony. Instead, defense counsel argued that defendant was guilty of involuntary manslaughter, rather than first-degree or second-degree murder. Therefore, it is apparent that defense counsel's trial strategy was to create reasonable doubt regarding defendant's intent and lack of premeditation at the time of the shooting, rather than to argue temporary insanity.

The jury acquitted defendant of first-degree premeditated murder, MCL 750.316(1)(a), but convicted defendant of first-degree felony murder, MCL 750.316(b), first-degree home invasion, MCL 750.110(a)(2), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). The trial court sentenced defendant to concurrent sentences of life in prison without the possibility of parole for his conviction of first-degree felony murder, 14 to 20 years in prison for his conviction of first-degree home invasion, and a consecutive sentence of two years in prison for his conviction of felony-firearm.

Defendant submits on appeal an affidavit from a psychiatrist, Dr. Gerald A. Shiener, opining that "it is possible" that a 20-year-old man with a diagnosis of Attention Deficit Disorder and Oppositional Defiant Disorder who consumes alcohol and Xanax might become temporarily insane. In that affidavit, the psychiatrist conceded that he did not personally evaluate defendant and he did not opine that defendant was temporarily insane at the time he committed the shooting.

Defendant also submits on appeal an affidavit from his appellate counsel recounting defendant's statements to his appellate counsel that defendant's girlfriend told him that she saw his brother's ex-girlfriend slip Xanax into his drink on the night of the incident. Defendant does not offer an affidavit from his brother's ex-girlfriend, who purportedly placed the Xanax in his drink, or from his girlfriend, who purportedly saw this happen. Notably, no testimony was offered at trial suggesting that defendant consumed Xanax involuntarily on the night of the shooting, and defendant has offered no testimony by way of affidavit that any witness is willing to testify that he did so.

Defendant now appeals, arguing that he received ineffective assistance of counsel, that his sentence for the conviction of first-degree felony murder constituted cruel and unusual punishment, and that the trial court erred when it admitted into evidence the video taken by defendant before the shooting and the audio recording of the 911 call made by the victim's boyfriend.

## II. ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he received ineffective assistance of counsel because defense counsel did not secure an expert witness to testify that he was temporarily insane at the time of the shooting. We conclude that defendant's argument is without merit.

Determining whether a defendant received ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). This Court reviews findings of facts for clear error and questions of law de novo. *Id.* When the trial court does not hold an evidentiary hearing, there are no factual findings to which the reviewing court must defer, and this Court's review is limited to mistakes apparent from the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

To receive a new trial based on ineffective assistance of counsel, defendant must show both that counsel's representation fell below an objective standard of reasonableness, and a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Accordingly, a defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Because defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

The failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A defense is substantial if it is one that might have made a difference in the outcome of the trial. See *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). Defense counsel is afforded wide latitude on matters of trial strategy, and we will not substitute our own judgment for that of defense counsel on matters of trial strategy. See *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). There are countless ways to provide effective assistance in any given case, and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *People v Fackelman*, 489 Mich 515, 598; 802 NW2d 552 (2011), quoting *Strickland*, 466 US at 689. "An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy," *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), and the "fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel," *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000).

Essentially, defendant argues that his trial counsel should have pursued a defense strategy of arguing temporary insanity, and that counsel's failure to pursue that strategy constituted ineffective assistance. This argument is without merit. Defense counsel presented a substantial defense that defendant lacked the requisite intent to establish premeditation and deliberation. For example, defense counsel questioned the homeowner during cross-examination about defendant breaking into the house and how defendant never spoke to, looked at, pointed the handgun at, or moved toward the homeowner. Defense counsel also questioned the victim's boyfriend about how defendant saw him enter the bedroom and close the door, but that defendant never entered

the bedroom in pursuit. Moreover, defense counsel questioned the police officer who interviewed defendant to elicit testimony that defendant had the opportunity to shoot one of the guests in the house, but he instead fired shots into the living-room floor. Choosing to argue that defendant lacked the requisite intent, which led to defendant's acquittal of first-degree premeditated murder, was a reasonable trial strategy. We will not substitute our own judgment for that of defense counsel regarding his choice of trial strategy. See *Unger*, 278 Mich App at 242-243.

Nonetheless, defendant cites *People v Ackley*, 497 Mich 381; 870 NW2d 858 (2015), for the proposition that defense counsel should have called an expert witness to opine that defendant was temporarily insane at the time of the shooting. *Ackley* is distinguishable, however, because the defense counsel in that case never "read any medical treatises or other articles about the medical diagnoses at issue." *Id.* at 386. In this case, defense counsel stated on the record at a pretrial motion hearing that he thoroughly researched defendant's medical issues and considered raising an insanity defense, but decided against it because of defendant's voluntary intoxication. To establish an insanity defense, a defendant must show that, as the result of a mental illness, the defendant lacked the "substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." *People v Lacalamita*, 286 Mich App 467, 470; 780 NW2d 311 (2009) (cleaned up). Yet, a defendant "who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances." MCL 768.21a(2). In defendant's recorded statements to police, he admitted that he voluntarily consumed alcohol on the night of the shooting. Therefore, defendant lacked a potential defense that he was temporarily insane.

Defendant attempts to refute the voluntariness of his intoxication by arguing that it was the combination of the alcohol and Xanax that may have caused him to become temporarily insane, and that he consumed the Xanax involuntarily, even if he consumed the alcohol voluntarily. Defendant's argument is not factually supported by the record. Defendant admitted to police that he consumed Xanax in combination with alcohol, but did not claim that he had taken Xanax involuntarily or that someone had slipped it into his drink without his knowledge. Furthermore, no testimony was offered at trial that defendant consumed Xanax involuntarily on the night of the shooting.

Defendant attempts to establish that his consumption of Xanax was involuntary by submitting an affidavit from his appellate counsel. In that affidavit, appellate counsel states that defendant told her that his girlfriend told him that she saw defendant's brother's ex-girlfriend "put Xanax in [defendant]'s alcoholic drink and that [defendant] drank it not knowing that it had been spiked." Notably, defendant does not offer an affidavit from his brother's ex-girlfriend, who allegedly placed the Xanax in defendant's drink, or from his girlfriend, who purportedly saw this happen. Appellate counsel's affidavit is not a proper offer of proof because it does not establish that any witness would testify on remand that defendant consumed Xanax involuntarily on the night of the shooting.

Defendant also argues that, even if he consumed both the alcohol and Xanax voluntarily, he was nonetheless entitled to raise the defense of temporary insanity. To support his argument,

defendant relies on *People v Conrad*, 148 Mich App 433; 385 NW2d 277 (1986).[1] In *Conrad*, a panel of this Court held that, although MCL 768.21a(2) excludes voluntary drug or alcohol intoxication from the definition of legal insanity, "if a defendant is actually and demonstrably rendered insane by the ingestion of mind-altering substances, an insanity defense is not absolutely precluded." *Id*. at 441. In that case, the defendant presented evidence that the ingestion of PCP caused defendant to suffer from a long-term mental illness, and it was that mental illness that gave rise to a potential insanity defense. Because there is no indication in this case that defendant's ingestion of Xanax caused him to suffer from a long-term mental illness, *Conrad* is readily distinguishable.

Furthermore, defendant's offer of proof regarding this issue is deficient. Defendant provided this Court with an affidavit from Dr. Shiener, opining that "it is possible" that a 20-year-old man with a diagnosis of Attention Deficit Disorder and Oppositional Defiant Disorder who consumes alcohol and Xanax might become temporarily insane. In that affidavit, the psychiatrist conceded that he did not personally evaluate defendant and he did not opine that defendant himself was temporarily insane at the time he committed the shooting. As the affidavit does not establish the factual basis for a conclusion that defendant's consumption of alcohol and Xanax in combination caused him to suffer from a long-term mental illness, as in *Conrad*, and does not establish how the consumption of alcohol and Xanax impacted this defendant specifically, defendant has not established the factual predicate for his claim of ineffective assistance of counsel. See *Carbin*, 463 Mich at 600.

Even if we agreed that defense counsel's representation fell below an objective standard of reasonableness, defendant would still be "required to demonstrate prejudice to obtain relief on a claim of ineffective assistance." *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). To prove prejudice, defendant would have to prove a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. Defendant did not argue that defense counsel's failure to call the now-desired expert witness would have resulted in a different outcome. Instead, defendant simply argues that the failure to call such an expert witness "may have" prejudiced him, and this is not sufficient. Accordingly, defendant has failed to establish that he is entitled to relief based on his counsel's failure to argue temporary insanity or to elicit testimony from an expert witness on this issue.

## B. CRUEL AND UNUSUAL PUNISHMENT

Defendant next argues that the trial court's imposition of a mandatory sentence of life in prison without the possibility of parole for the conviction of felony-murder violates his due-process rights and constitutes cruel and unusual punishment because he was only 19 years old at the time of the offense. Defendant essentially invites this Court to extend the United States

[1] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority." *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2013).

Supreme Court's holding in *Miller v Alabama*, 567 US 460, 465; 132 S Ct 2455; 183 L Ed 2d 407 (2012), to the facts of this case.

Because defendant did not raise this argument at sentencing, it is unpreserved for appellate review. This Court reviews unpreserved issues of constitutional error for plain error affecting defendant's substantial rights. See *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To avoid issue forfeiture under the plain-error rule, defendant must prove the following: (1) there was an error, (2) the error was plain, and (3) the plain error affected substantial rights, i.e., the outcome of the trial-court proceedings. *Id*. at 763. Once defendant has established these requirements, this Court "must exercise its discretion in deciding whether to reverse." *Id*. Reversal is warranted only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings or resulted in the conviction of an actually innocent person. See *id*.

The United States Constitution prohibits "cruel *and* unusual punishments," and the Michigan Constitution forbids "cruel *or* unusual punishment." US Const, Am VIII (emphasis added); Const 1963, art 1, § 16 (emphasis added). Michigan's prohibition against cruel or unusual punishment is interpreted more broadly than the federal prohibition. See *People v Bullock*, 440 Mich 15, 30-35; 485 NW2d 866 (1992). Accordingly, if a sentence is constitutional under Michigan's Constitution, it is also constitutional under its federal counterpart. *People v Nunez*, 242 Mich App 610, 618-619 n 2; 619 NW2d 550 (2000). A sentence constitutes cruel or unusual punishment when it is grossly disproportionate to the seriousness of the circumstances surrounding the offense and the offender. See *Bullock*, 440 Mich at 32. "In deciding if punishment is cruel or unusual, this Court looks to the gravity of the offense and the harshness of the penalty, comparing the punishment to the penalty imposed for other crimes in this state, as well as the penalty imposed for the same crime in other states." *People v Bowling*, 299 Mich App 552, 557-558; 830 NW2d 800 (2013).

In this case, defendant has not demonstrated that his sentence is cruel or unusual by comparing it to the penalties imposed for other crimes in this state and the same crime in other states. Nor has defendant demonstrated that he has the maturity of the typical defendant under the age of 18, or that he has lessened culpability or a greater capacity for change than other persons. Defendant simply argues that his birthdate and age on the date of the offense entitle him to relief from his sentence. Without any proof regarding his intelligence, maturity level, impulse control, appreciation for the consequences of his actions, appreciation for delayed gratification, and ability to control his actions, defendant has not demonstrated entitlement to relief on this issue. We decline to accept defendant's invitation to extend the holding in *Miller* in this case.

## C. ADMISSION OF EVIDENCE

Lastly, defendant argues that the trial court abused its discretion when it admitted the 911 call from the victim's boyfriend and the video taken by defendant before the shooting.

This Court reviews preserved claims of evidentiary error for an abuse of discretion. See *People v Bergman*, 312 Mich App 471, 482; 879 NW2d 278 (2015). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and

principled outcomes." *Id*. at 483 (cleaned up). "If the court's evidentiary error is nonconstitutional and preserved, then it is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative—i.e., that it undermined the reliability of the verdict." *People v Douglas*, 496 Mich 557, 565-566; 852 NW2d 587 (2014) (cleaned up).

MRE 401 defines relevant evidence as evidence "having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 402 provides that all relevant evidence is admissible unless otherwise prohibited by the United States or Michigan Constitutions, the rules of evidence, or other rules adopted by the Supreme Court. MRE 403 prohibits the admission of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of the cumulative evidence. In the context of MRE 403, "prejudice means more than simply damage to the opponent's cause." *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). It means that evidence has an undue tendency to move the jury to decide on an improper basis such as an emotional bias. *Id*. Relevant considerations in determining unfair prejudice include whether the jury will give the evidence undue or preemptive weight and whether the use of the evidence is inequitable. See *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995). Mere prejudice is insufficient to justify reversal of a conviction. *People v Albers*, 258 Mich App 578, 591; 672 NW2d 336 (2003).

In this case, the trial court admitted the videos that defendant recorded and posted to social media, over defendant's pretrial objection and motion to suppress. Defendant appeals only the admission of the video of his conduct leading up to the shooting. Defendant does not appeal the admission of the video that he recorded while committing the charged offenses. Defendant argues that his statements in the first video about killing police officers and joining the Aryan Brotherhood were not relevant to the shooting that he committed just minutes later and that these statements gave rise to unfair prejudice.

Importantly, the prosecutor offered the video to prove—with defendant's own words and conduct—that defendant possessed premeditation and deliberation sufficient to support a conviction of first-degree murder. Yet, the jury only convicted defendant of first-degree felony murder, first-degree home invasion, and felony-firearm, which suggests that the jury did not believe beyond a reasonable doubt that defendant had the requisite intent to have committed first-degree murder. Nonetheless, the trial court's decision to admit the video in its entirety was not outside the range of reasonable and principled outcomes. See *Bergman*, 312 Mich App 483. The videos could have allowed the jury to determine defendant's intent leading up to the shooting, notwithstanding the jury's actual verdict with the added benefit of hindsight.

Even assuming that defendant's statements and conduct depicted in the first video created the danger of unfair prejudice, the trial court properly instructed the jury that it was not to allow sympathy or prejudice influence its decision. A jury is presumed to follow its instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). The challenged evidence was not substantially more prejudicial than probative. See *id*. at 235.

With regard to the 911 calls, defendant appeals only the admission of the second call placed by the victim's boyfriend; he does not appeal the admission of the call placed by the homeowner. Even assuming for the sake of argument that the second 911 call should not have been entered in evidence, reversal is not required because its admission was not outcome-determinative. See *Douglas*, 496 Mich at 565-566. Given the overwhelming evidence of defendant's guilt, the reliability of the outcome is not undermined by the admission of this evidence. See *id.*

Affirmed.

/s/ Thomas C. Cameron
/s/ Douglas B. Shapiro
/s/ Brock A. Swartzle

# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 17, 2019 |
| v | No. 343286<br>Oakland Circuit Court |
| DARYL CONNER,<br><br>Defendant-Appellant. | LC No. 2017-261380-FC |

Before: BECKERING, P.J., and BORRELLO and M. J. KELLY, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life imprisonment without the possibility of parole for the murder conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appeals by delayed leave granted. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

## I. BACKGROUND

On the afternoon of August 31, 2016, defendant and his friends, Cordai Wallace and Deshawn Jones, were walking to a basketball court in a neighborhood in Pontiac, Michigan. As they were proceeding to the basketball court, an individual later identified as Jesson Iglesias approached defendant, pulled eight dollars out of his pocket and asked to buy some marijuana. According to Wallace, defendant took Iglesias' money and the entire group ran away, with Iglesias in pursuit yelling at defendant to give him back his money. Wallace testified that as they ran away, he heard two gunshots, looked back and saw defendant running toward him with a gun in his hand. Iglesias later died from a gunshot wound to the chest.

Wallace testified that after hearing the shots, he and Jones ran in a different direction than defendant. At some point Jones called his cousin, Breanna Hughes, to come and get him and Wallace. When her car arrived at the spot where Jones and Wallace had run to, Wallace noted that defendant was already in the car. Hughes then dropped the three off at a party store.

A woman who was babysitting her grandchildren near where the shooting occurred, testified that she saw a group of four people walking down the street. The group consisted of three black males, between the ages of 18 and 22, and one Hispanic male, who was "35, 40 maybe." The three black males were walking ahead of the Hispanic man, later identified as Iglesias. One of the black males turned and pointed a gun at Iglesias. A few seconds later, she heard two gunshots. The gunman put the gun back in his pocket, continued walking, and Iglesias followed him. At that time, it did not appear to the witness that Iglesias had been shot because he continued to walk behind the group.[1] The women briefly lost sight of the group because of a tree. Approximately five minutes later, she saw Iglesias coming back down the street, "covered in blood," and realized he had been shot. When she and others[2] approached him, Iglesias stated: "They done shot me in my heart."

The neighbor went to the police station on August 31, 2016, where she was shown several photographic arrays, and selected Jones as resembling the person who pointed the gun at Iglesias. At trial, she testified that she was not sure that she selected the right person, stating she was focused more on the gun than on their faces.

Detective Maurice Martin testified that he and his partner, Detective Dawn Mullins, investigated the case and interviewed defendant on November 11, 2016. After waiving his *Miranda*[3] rights, defendant gave a statement to the police, which was videotaped and played for the jury. Martin testified that defendant first denied having any knowledge of the shooting, stating that he was walking with two other individuals, talking on his phone, heard gunshots, and ran. After Martin inquired of defendant how he would know "exactly where the area was that the victim was hit" if he ran after hearing the gunshots, defendant "paused and he stated that he was the person who actually shot Mr. Iglesias." Defendant stated that as he and his two friends were walking down the street, Iglesias approached them, and Jones told defendant to take Iglesias's wallet. Defendant took the wallet and ran, and Iglesias ran after him. Some items fell out of defendant's pocket, he stopped to pick them up, and Iglesias was catching up to him causing defendant to fear "that . . . Iglesias was going to do something to him and he fired the shots." Defendant stated that he got the gun from Jones.

A jury convicted defendant as stated above. Defendant now appeals by delayed leave granted.

## II. ANALYSIS

[1] An Oakland County Sheriff's crime scene investigator testified that he found a fired .380 cartridge case and a blood trail from that point that continued past a nearby barbershop. A video from the barbershop surveillance camera was admitted into evidence at trial and played for the jury.

[2] Another female testified that, as she was driving to work, she saw a wounded man and called the police. A male neighbor testified that after hearing gunshots, he observed a man who had been shot "going back and forth" down the street.

[3] *Miranda v Arizona,* 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

## I. GREAT WEIGHT OF THE EVIDENCE

On appeal, defendant first contends that the prosecution's evidence establishing his identity as the shooter was so inconsistent and incredible that the jury's verdict is against the great weight of the evidence and it would be a miscarriage of justice and a denial of his due process rights to allow the verdict to stand. Defendant raised this issue in a motion for a new trial, which the trial court denied.

We review a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). A new trial may be granted if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). In evaluating whether a verdict is against the great weight of the evidence, the question is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). A verdict should be vacated only when it "does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (citation omitted). Absent compelling circumstances, the credibility of witnesses is for the jury to determine. See *Lemmon,* 456 Mich at 642-643.

Identity is an essential element in a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must prove the identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Positive identification by a witness or circumstantial evidence and reasonable inferences arising from it may be sufficient to support a conviction. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000); *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The credibility of identification testimony is for the trier of fact to resolve and this Court will not resolve it anew. *Davis*, 241 Mich App at 700.

In seeking to have this Court hold that the verdict was against the great weight of the evidence, defendant directs us to the neighbor's identification of Jones as the shooter. Further, defendant argues that the same witness testified that the shooter wore dark clothes, but on the date and time of the shooting defendant was wearing a white t-shirt and black-and-white gym shorts. Additionally, defendant argues, Jones was approached as the drug dealer, and until Martin told defendant that he did not believe him, defendant's statements to police were similar to those of other eyewitnesses. Additionally, defendant vociferously argues that Wallace never testified that he actually saw defendant shoot the victim. However, defendant's arguments ignore a majority of the record. The record reveals that numerous people observed that Iglesias had been shot. Wallace, a friend of defendant, and someone whom defendant admitted he was with on the day of the shooting, testified that defendant took money from the victim and then as they began to run away from the victim, Wallace heard gun shots, turned around and saw defendant with a gun in his hand. Defendant admitted to police that he took the victim's wallet. Defendant admitted to police that he ran from the victim because he had taken the victim's wallet. Defendant also admitted to police that he shot the victim as the victim was catching up to defendant.

While we recognize the inconsistencies defendant argues in his brief on appeal, we cannot find that any of these inconsistencies render any testimony inherently implausible. Additionally, all of the alleged inconsistences were presented to the jury. Our Supreme Court has made clear that in cases where a jury is confronted with inconsistent and impeached testimony, it is not for this Court to act as a 13th juror. See, *Lemmon*, 456 Mich at 640 ("…the thirteenth juror approach has a potential to undermine the jury function and why we now reject it"). Rather, we observe as a cornerstone of our jurisprudence that in matters wherein conflicting testimony is presented, that: "in general conflicting testimony or a question as to the credibility of a witness are not sufficient grounds for granting a new trial," *Lemon*, 456 Mich at 643, quoting *United States v Garcia*, 978 F2d 746,748 (CA1, 1992). Our Courts have been clear on this issue as far back as *Anderson v Conterio,* 303 Mich 75, 79; 5 NW2d 572 (1942) when our Supreme Court held that when testimony is in direct conflict and testimony supporting the verdict has been impeached, if: "it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it," the credibility of witnesses is for the jury.

Here, after due consideration of the entire record, we concur with the conclusions of the trial court that the contradictions in testimony cited by defendant are not particularly incredible, nor was the complained of testimony inherently implausible such that it could not be believed by a reasonable juror. *Lemmon*, 456 Mich at 644. Essentially, these findings formed the basis for the trial court's denial of defendant's motion for a new trial and we find no error in the trial court's analysis or its conclusions. Accordingly, defendant is not entitled to relief on this issue.

## II. MANDATORY LIFE SENTENCE

Defendant next argues that because he was only 18 years old at the time of the offense, imposition of the statutory sentence of mandatory life imprisonment without the possibility of parole violates the Eighth Amendment "because the mitigating factors of youth should be considered before a court imposes the harshest sentence."

Whether a statute is constitutional is a question of law that this Court reviews de novo. *People v Beam*, 244 Mich App 103, 105; 624 NW2d 764 (2000). "Statutes are presumed to be constitutional, and the party challenging the statute has the burden of showing the contrary." *People v Dillon*, 296 Mich App 506, 510; 822 NW2d 611 (2012). "The Michigan Constitution prohibits cruel *or* unusual punishment, Const 1963, art 1, § 16,[4] whereas the United States Constitution prohibits cruel *and* unusual punishment, U.S. Const. Am. VIII.[5]" *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011). "If a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *Id.* (citation and

[4] The Michigan Constitution provides, "cruel or unusual punishment shall not be inflicted[.]" Const 1963, art 1, § 16.

[5] The Eighth Amendment of the United States Constitution provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." US Const, Am VIII.

quotation marks omitted). Whether a penalty or sentence imposed against a defendant can be considered cruel or unusual is to be determined by a three-pronged test including: "(1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty and penalties imposed for the same offense in other states." *Id.* (citation omitted).

The Legislature has mandated a sentence of life imprisonment without the possibility of parole for adult offenders who commit the crime of first-degree murder. MCL 750.316. In *People v Hall*, 396 Mich 650, 657-658 (1976); 242 NW2d 377 (1976), our Supreme Court upheld this mandated life sentence for felony murder, under both the United States and Michigan Constitutions. Our Supreme Court expressly rejected the defendant's assertions that a mandatory life sentence under MCL 750.316 violated both US Const, Am VIII, prohibiting "cruel and unusual" punishment, and Const 1963, art 1, § 16, forbidding "cruel or unusual" punishment. The Court found that "the punishment exacted is proportionate to the crime," that no indication existed that "Michigan's punishment is widely divergent from any sister jurisdiction," and that the sentence served the Legislature's permissible goal to deter similar conduct by others. *Hall*, 396 Mich at 658. "Legislatively mandated sentences are presumptively proportional and presumptively valid." *People v Brown*, 294 Mich App 377, 390; 811 NW2d 531 (2011). "[A] proportionate sentence does not constitute cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

We concur with defendant that the United States Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Miller v Alabama*, 567 US 460, 465; 132 S Ct 2455; 183 L Ed 2d 407 (2012). In *Miller*, the Court concluded that such mandatory sentencing "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' *Graham v Florida*, 560 US 48, 68, 74; 130 S Ct 2011; 176 L Ed 2d 825 (2010), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." *Miller*, 567 US at 465. The issue, however, is whether *Miller* is applicable here. Defendant does not dispute that at the time the murder was committed he was over the age of 18. Having been over the age of 18 at the time of the commission of the crime, we find *Miller* and *Graham* inapplicable.

Defendant also argues that scientific studies support that the same basis the Supreme Court applied in *Miller* and *Graham* to hold mandatory life without parole sentences unconstitutional applies to 18-year-old offenders, like defendant, whose brains are continuing to mature. Again, defendant is not a member of that class of individuals addressed in *Miller* and *Graham*. While we understand the argument advanced by defendant, that for social scientists youth is an ever-evolving concept, at their core, defendant's arguments are merely an attempt to have this Court expand *Miller* and *Graham* beyond their holdings. Notably, the Supreme Court's decisions in *Graham* and *Miller* are rooted in that Court's prior decision in *Roper v Simmons*, 543 US 551, 574; 125 S Ct 1183; 161 L Ed 2d 1 (2005), in which the Court stated:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never

> reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in *Thompson* [*v Oklahoma*, 487 US 815; 108 S Ct 2687; 101 L Ed 2d 702 (1988),] drew the line at 16. In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Accordingly, the Eighth Amendment does not bar Michigan from imposing a mandatory sentence of life without parole on offenders who commit first-degree murder after reaching the age of 18. Therefore, we reject defendant's claim that he is entitled to a "*Miller* hearing."

## III. DEFENDANT'S STANDARD 4 BRIEF

In a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant argues that he was denied his constitutional right to a properly instructed jury because the verdict form did not provide the jury with a general "not guilty" option, and did not allow the jury the opportunity to find him not guilty of the lesser offense of second-degree murder. We review this unpreserved claim of instructional error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Due process requires that the trial court "properly instruct the jury so that it may correctly and intelligently decide the case." *People v Clark*, 453 Mich 572, 584-585; 556 NW2d 820 (1996) (citations omitted). Defendant correctly observes that "a criminal defendant is deprived of his constitutional right to a jury trial when the jury is not given the opportunity to return a general verdict of not guilty." *People v Wade*, 283 Mich App 462, 467; 771 NW2d 447 (2009). However, that is not what occurred here. In this case, the verdict form provided the jury with the following three options for the first-degree felony-murder count:

> ____Not Guilty
>
> ____Guilty of Homicide - First Degree Felony Murder
>
> ____Guilty of the lesser offense of Second Degree

Relative to this case, the verdict form specifically allowed the jury to select a general "Not Guilty" verdict regarding the felony-murder charge. The trial court also instructed the jury that one of the available options for the felony-murder charge was "not guilty" and to "return only one verdict on each count." The jury convicted defendant of the highest offense, first-degree felony murder. Accordingly, defendant's unpreserved challenge to the jury verdict form

does not warrant relief.

Affirmed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Michael J. Kelly

# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 20, 2018 |
| v | No. 337433<br>Wayne Circuit Court |
| BRENDON DIYAMO STANTON-LIPSCOMB,<br><br>Defendant-Appellant. | LC No. 16-002452-01-FC |

Before: M. J. KELLY, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

Defendant, Brendon Stanton-Lipscomb, appeals as of right his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced Stanton-Lipscomb to life in prison without parole for the murder conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. For the reasons stated in this opinion, we affirm.

## I. BASIC FACTS

Stanton-Lipscomb's convictions arise from a gang-related shooting at the Eastland Mall in Harper Woods. Approximately two years before the offense, Stanton-Lipscomb's close friend and cousin, Rob Carter, was killed in a drive-by shooting. Members of the Hob Squad gang were allegedly responsible for that shooting. Before Carter's death, Stanton-Lipscomb was associated with the Eastside Ghetto Boys (EGB) gang. After Carter was killed, Stanton-Lipscomb formed the Rob Gang, which operated as a rival to the Hob Squad gang. Tyler Tate, Demetrius Armour, and Tyshon Taylor were all members or supporters of the Rob Gang or affiliated gangs.

On December 26, 2015, Tyrell Lane, a Hob Squad member, was shot and killed after exiting the Burlington Coat Factory store at the Eastland Mall. At trial, the prosecution presented evidence that Tate and Taylor encountered Lane at the mall and called Stanton-Lipscomb to notify him of Lane's presence. Thereafter, Stanton-Lipscomb, Armour, and Stanton-Lipscomb's girlfriend drove together to the mall. Stanton-Lipscomb went inside and Armour parked the car near the exit to the Burlington store. Stanton-Lipscomb spoke with Taylor inside the mall and then went back outside. The prosecution's theory was that Stanton-Lipscomb concealed himself behind a concrete pillar outside the Burlington store entrance, that

Tate escorted Lane through the Burlington store to the store's exterior exit, and that Stanton-Lipscomb shot Lane when Lane exited the store. Stanton-Lipscomb fled the scene in Armour's waiting vehicle. At trial, Stanton-Lipscomb's girlfriend, who was present during the shooting, identified him as the shooter. Her testimony was corroborated by surveillance videos from the mall's security camera system. In addition, numerous postings and messages from Facebook and cell phone accounts associated with Stanton-Lipscomb supported his identity as the person responsible for murdering Lane.

Stanton-Lipscomb, Tate, Taylor, and Armour were all eventually charged with first-degree premeditated murder in connection with Lane's death, but they were prosecuted separately. Stanton-Lipscomb was convicted in June 2016. Thereafter, Taylor pleaded guilty to a reduced charge of second-degree murder, MCL 750.317. In January 2017, a jury convicted Armour of first-degree premeditated murder, and in April 2017, another jury convicted Tate of first-degree premeditated murder, as well as making a false report of a felony, MCL 750.411a(1)(B), and lying to a police officer in a criminal investigation, MCL 750.479c(2)(d)(*i*). Armour's appeal in Docket No. 337434, and Tate's appeal in Docket No. 338360 have been submitted with the instant appeal.

## II. RIGHT TO PRESENT A DEFENSE

### A. STANDARD OF REVIEW

At trial, Stanton-Lipscomb attempted to introduce a police officer's testimony that Tate had identified someone else as a possible suspect. The trial court sustained the prosecutor's objection to this testimony as inadmissible hearsay. Stanton-Lipscomb now argues that the exclusion of this testimony violated his constitutional right to present a defense. Because Stanton-Lipscomb did not raise this constitutional claim in the trial court, this issue is unpreserved. We review unpreserved issues for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

### B. ANALYSIS

"There is no doubt that based on the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's Compulsory Process or Confrontation Clauses, 'the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.' " *People v King*, 297 Mich App 465, 473; 824 NW2d 258 (2012), quoting *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986) (quotation marks omitted). Yet, "[t]he right to present a complete defense 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' " *King*, 297 Mich App at 473, quoting *Chambers v Mississippi*, 410 US 284, 295; 93 S Ct 1038; 35 L Ed 2d 297 (1973). "Thus, an accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *King*, 297 Mich App at 474 (quotation marks and citations omitted). "Michigan, like other states, has a legitimate interest in promulgating and implementing its own rules concerning the conduct of trials." *Id*. at 473 (quotation marks and citation omitted). "The Michigan Rules of Evidence do not infringe on a defendant's constitutional right to present a defense unless they are arbitrary or disproportionate to the purposes they are designed to serve." *Id*. at 474 (quotation marks and citation omitted).

MRE 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Stanton-Lipscomb sought to admit Tate's out-of-court statement identifying someone other than Stanton-Lipscomb as a possible perpetrator. Because this statement was offered for its truth (i.e., to prove that someone other than Stanton-Lipscomb was identified as the possible perpetrator), it was hearsay as defined in MRE 801(c). Under MRE 801(d)(1)(C), however, a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . (C) one of identification of a person made after perceiving the person . . . ." Nevertheless, Tate did not testify at trial and was not subject to cross-examination concerning the statement, so the exemption to the definition of hearsay in MRE 801(d)(1)(C) is inapplicable. And, as no other exemption or exception to the hearsay rule applies, the statement was inadmissible. MRE 802.

Furthermore, we reject Stanton-Lipscomb's reliance on *People v Barrera*, 451 Mich 261; 547 NW2d 280 (1996), as supporting his argument that the trial court violated his constitutional right to present a defense by mechanistically excluding Tate's statement as inadmissible hearsay, without acknowledging that his right to present evidence in his defense outweighed adherence to the hearsay rule. In *Barrera*, the three defendants, Barrera, Johnson, and Musall, were prosecuted for the murdering a prostitute. A fourth defendant, Copeland, also was charged with the murder, but tried separately. *Id*. at 264-265. The three defendants sought to admit Copeland's admission to the police that, because he was under the influence of drugs that made him believe that the victim was his girlfriend, he stabbed the victim while she gave oral sex to Musall. *Id*. at 265. Two of the defendants, Barrera and Musall, argued that Copeland's police statement was admissible under the hearsay exception for statements against penal interest, MRE 804(b)(3). *Id*. at 266. The trial court disagreed and excluded the statement. *Id*. Our Supreme Court extensively analyzed the requirements for admission of a statement under MRE 804(b)(3). With respect to the requirement of corroborative evidence, the Court stated that

> the defendant's constitutional right to present exculpatory evidence in his defense and the rationale and purpose underlying MRE 804(b)(3) of ensuring the admission of reliable evidence must reach a balance. We believe they may be viewed as having an inverse relationship: the more crucial the statement is to the defendant's theory of defense, the less corroboration a court may constitutionally require for its admission . . . . [*Barrera*, 451 Mich at 279.]

The Court concluded that when the reliability of Copeland's statement was balanced against its exculpatory value for Barrera and Musall, the defendants' due process rights required admission of the statement. *Id*. at 290-291.

*Barrera* is distinguishable from the instant case. In *Barrera*, the non-testifying codefendant's statement qualified for admission under the hearsay exception for statements against penal interest. MRE 804(b)(3). The Supreme Court ultimately determined that the statement was sufficiently reliable in consideration of its exculpatory value for the defendants. *Barrera*, 451 Mich at 290-291. In this case, Tate's identification does not qualify under *any* hearsay exception, and it is not excluded from the definition of hearsay. Moreover, there are no indicia of reliability in Tate's statement. On the contrary, the circumstances of his identification indicate that he was attempting to exculpate himself by deflecting suspicion away from a co-

participant. At the time the photographic lineup was conducted, Tate was considered a possible additional victim. After further investigation, however, he had been identified as a co-participant for his role in knowingly luring Lane to the location where Stanton-Lipscomb shot him. These circumstances indicate that he had a motive to deflect suspicion away from Stanton-Lipscomb. Accordingly, application of the rules of evidence to exclude this hearsay statement did not violate Stanton-Lipscomb's constitutional right to present a defense.

## III. SENTENCE

### A. STANDARD OF REVIEW

Next, Stanton-Lipscomb argues that because he was only 18½ years old at the time of the offense, imposition of the statutory sentence of mandatory life imprisonment without the possibility of parole violates his Eighth Amendment right against cruel and unusual punishment. Because defendant did not challenge the constitutionality of this statutory penalty at sentencing, this issue is unpreserved. *People v Bowling*, 299 Mich App 552, 557; 830 NW2d 800 (2013). We review unpreserved claims of sentencing error for plain error affecting defendant's substantial rights. *Id*.

### B. ANALYSIS

In *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010), the United States Supreme Court held that the Eighth Amendment's Cruel and Unusual Punishments Clause prohibits a sentence of life in prison without parole for a juvenile offender convicted of a non-homicide crime. Later, in *Miller v Alabama*, 567 US 460, 489; 132 S Ct 2455; 183 L Ed 2d 407 (2012), the Court held that a mandatory sentence of life imprisonment without the possibility of parole for juvenile offenders under the age of 18 convicted of murder constitutes cruel and unusual punishment. Stanton-Lipscomb acknowledges that *Graham* and *Miller* do not apply to him because he was convicted of murder and because he was 18 ½ years old at the time of the offense. He argues, however, that use of an offender's eighteenth birthday as the cutoff for when a mandatory life sentence becomes constitutionally permissible is arbitrary, unscientific, and a baseless legal fiction, and that the rationale in *Miller* applies equally to him, rendering his mandatory sentence of life without parole unconstitutionally cruel and unusual.

However, the decisions in *Graham* and *Miller* are rooted in the Court's prior decision in *Roper v Simmons*, 543 US 551, 574; 125 S Ct 1183; 161 L Ed 2d 1 (2005), in which the Court stated:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in *Thompson* [*v Oklahoma*, 487 US 815; 108 S Ct 2687; 101 L Ed 2d 702 (1988),] drew the line at 16. In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age

> of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

The Supreme Court's statement in *Roper* reflects that categorical distinctions, albeit imperfect, are necessary in the administration of justice. This statement also reflects that the age of 18 is widely accepted as the point at which adult privileges and responsibilities begin in a broad spectrum of activities. Accordingly, the Eighth Amendment does not bar Michigan from imposing a mandatory sentence of life without parole on offenders who commit first-degree murder after reaching the age of 18.

Affirmed.

/s/ Michael J. Kelly
/s/ Jane E. Markey
/s/ Karen M. Fort Hood

# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 22, 2017 |
| v | No. 330612<br>Oakland Circuit Court |
| ALEX JAY ADAMOWICZ,<br><br>Defendant-Appellant. | LC No. 2014-251162-FC |

Before: STEPHENS, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree murder, MCL 750.316(1)(a). The trial court sentenced defendant to life imprisonment without parole. We affirm.

## I. FACTS AND PROCEDURAL HISTORY

This case arises from the death of John Watson at the Tivoli Apartments in Walled Lake. Watson and defendant lived in the same building. In the early morning hours of April 12, 2014, Watson entered defendant's apartment to drink and smoke "weed." According to defendant, Watson became agitated. When defendant asked Watson to leave and threatened to call the police, an altercation ensued, which ended with defendant cutting Watson's throat.[1] Watson died from the injury.

Defendant covered Watson's body with blankets, and moved him from the couch to a closet in the apartment. He also attempted to clean the blood spatter from the walls and the couch. Defendant continued to live in the apartment until May 11, 2014, when defendant's mother, Marie Holley, discovered Watson's body. That day, the two drove to the Wixom Police Station. While at the station, defendant spoke with Walled Lake Police Detective Andrew Noble and confessed to killing Watson, but maintained that he did so in self-defense.

[1] Dr. Ruben Ortiz-Reyes, the deputy medical examiner that conducted Watson's autopsy, testified that the injury to Watson's neck was 6 inches by 2 inches and 4 inches deep.

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that his trial counsel was ineffective for failing to call an expert witness that could explain his behavior following Watson's death.

Generally, to preserve an ineffective assistance of counsel argument, a defendant must file a motion for a new trial or *Ginther*[2] hearing in the trial court to establish evidentiary support for the argument. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Defendant failed to raise this issue in a motion for a new trial or *Ginther* hearing in the trial court, and this Court denied defendant's motion to remand. *People v Adamowicz*, unpublished order of the Court of Appeals, entered September 23, 2016 (Docket No. 330612). Thus, our review is limited to the appellate record. *Sabin (On Second Remand)*, 242 Mich App at 658-659.[3]

Analysis of ineffective assistance of counsel arguments involves mixed questions of law and fact. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). We review a trial court's findings of fact for clear error, and questions of constitutional law de novo. *Id*.

To evaluate whether ineffective assistance of counsel was provided, we use the standard established in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999), citing *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). The defendant must show: "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Trakhtenberg*, 493 Mich at 51. The effective assistance of counsel is presumed, *People v Roscoe*, 303 Mich App 633, 644; 846 NW2d 402 (2014), and the defendant must overcome the presumption that defense counsel's actions constituted sound trial strategy, *Trakhtenberg*, 493 Mich at 52. Further, the defendant must establish a factual predicate for his claim. *Hoag*, 460 Mich at 6.

"An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). However, such a decision must be made only after counsel has conducted an adequate investigation of the relevant facts and law. *People v Ackley*, 497 Mich 381, 390; 870 NW2d 858 (2015). "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it 'deprives the defendant of a substantial defense.' " *Payne*, 285 Mich App at 190, quoting *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). " 'A substantial defense is one that might have made a difference in the outcome of the trial.' " *People v Chapo*,

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[3] Defendant's submission of Coryanna Ku's and Edward Bajoka's affidavits violates the court rule that prohibits citing to matters outside the record. MCR 7.210(A)(1); see also *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000) ("[P]arties cannot enlarge the record on appeal by the use of affidavits.").

283 Mich App 360, 371; 770 NW2d 68 (2009), quoting *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant correctly asserts that the prosecution focused its case on the theory that, had he killed Watson in self-defense, he would have immediately come forward to the police. In his opening statement and closing argument, the prosecutor repeatedly said, "The guilty flee when no man pursues, but an innocent man is as bold as a lion." Further, the prosecution's witnesses testified regarding defendant's calm demeanor when speaking to the police about the incident, as well as the actions defendant took to conceal Watson's death, including hiding the body and attempting to clean the blood.

However, defendant failed to establish a factual predicate for his argument that, had defense counsel called an expert witness to explain defendant's behavior following Watson's death, there is a reasonable probability that the outcome of trial would have been different. He merely speculates that expert testimony regarding behaviors associated with post-traumatic stress disorder would have been favorable and would have effectively countered the prosecution's theory. See *Payne*, 285 Mich App at 190 (holding that the defendant failed to demonstrate ineffective assistance of counsel because he "merely speculated that an independent expert could have provided favorable testimony").

Moreover, defendant cannot overcome the presumption that defense counsel's decision not to call an expert constituted sound trial strategy. Rather than placing more intense focus on defendant's behavior following Watson's death, it appears that defense counsel attempted to rebut the prosecution's argument by acknowledging defendant's actions, but concentrating on defendant's description of, and state of mind during, his altercation with Watson. As an example, in his opening statement, defense counsel opined that people react to traumatic events differently, and that defendant may not have had the best reaction, but asked the jury not to judge the case based on defendant's behavior after Watson's death. Further, during direct examination of defendant, he asked defendant to describe what happened during the altercation with Watson, and inquired as to whether defendant feared for his life at the time of the incident. Although this strategy may have ultimately been unsuccessful, this Court "will not second-guess counsel regarding matters of trial strategy," or "assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Thus, defendant's ineffective assistance of counsel argument fails.

## II. PROSECUTORIAL ERROR

Defendant next argues that he is entitled to a new trial because the prosecutor's questions to him and to Detective Noble regarding his ability to flee during the altercation with Watson, as well as the prosecutor's statements during closing argument suggesting that he could have safely retreated, constituted prosecutorial misconduct. He also asserts that defense counsel provided ineffective assistance when he failed to object to the questions and statements.

To preserve a prosecutorial error[4] argument, a defendant must contemporaneously object to the alleged error and ask for a curative instruction. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). If a defendant fails to timely and specifically object below, review is generally precluded " 'except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.' " *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008), quoting *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defense counsel failed to object to the prosecution's questions regarding defendant's ability to flee during the incident, or to the prosecutor's statements during closing argument. Thus, the issue is not preserved for appellate review.

Unpreserved issues of prosecutorial error are reviewed for "outcome-determinative, plain error." *Unger*, 278 Mich App at 235. To establish plain error affecting substantial rights "three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). " 'Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.' " *Unger*, 278 Mich App at 235, quoting *Callon*, 256 Mich App at 329.

"[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "[W]e consider issues of prosecutorial misconduct on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

During direct examination, the prosecutor asked Detective Noble several times whether, during the interviews with defendant, defendant ever said that he could have fled the apartment during the altercation with Watson. He also asked defendant similar questions during cross-examination, and referenced this testimony throughout his closing argument. Defendant argues that these questions and statements were legally irrelevant and prejudicial because defendant had no duty to retreat before killing Watson in self-defense.

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[4] Although this type of issue is generally referred to as "prosecutorial misconduct," this Court has stated that, "the term 'misconduct' is more appropriately applied to those extreme . . . instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct," but that arguments "premised on the contention that the prosecutor made a technical or inadvertent error at trial" are "more fairly presented as claims of 'prosecutorial error[.]' " *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015) (citation omitted). Nevertheless, regardless of "what operative phrase is used, [this Court] must look to see whether the prosecutor committed errors during the course of trial that deprived defendant of a fair and impartial trial." *Id*. at 88, citing *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Here, we will refer to defendant's argument as prosecutorial error, as the argument is limited to technical errors by the prosecutor.

In 2006,[5] the Legislature enacted the Self-Defense Act (SDA), MCL 780.971 *et seq*., which "codified the circumstances in which a person may use deadly force in self-defense or in defense of another person without having the duty to retreat." *People v Dupree*, 486 Mich 693, 708; 788 NW2d 399 (2010). MCL 780.972 provides, in pertinent part:

> (1) An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

"The reasonableness of a person's belief regarding the necessity of deadly force 'depends on what an ordinarily prudent and intelligent person would do on the basis of the perceptions of the actor.' " *People v Guajardo*, 300 Mich App 26, 42; 832 NW2d 409 (2013), quoting *People v Orlewicz*, 293 Mich App 96, 102; 809 NW2d 194 (2011).

We note initially that "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence," *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), and prosecutors "are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case," *People v Mann*, 288 Mich App 114, 120; 792 NW2d 53 (2010) (citation and quotation marks omitted). Defendant has presented no evidence that the prosecutor did not act in good faith when he elicited the now-challenged testimony, or when, during closing argument, he reasonably inferred from this testimony that defendant lacked an honest and reasonable belief that the use of deadly force against Watson was necessary.

Further, the record and relevant caselaw support the conclusion that the prosecutor acted in good faith when presenting the evidence. In *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002), decided before enactment of the SDA, the Michigan Supreme Court stated: "We reaffirm today that the touchstone of *any* claim of self-defense, as a justification for homicide, is *necessity*. An accused's conduct in failing to retreat, or to otherwise avoid the intended harm, may in some circumstances – other than those in which the accused is the victim of a sudden, violent attack – indicate a lack of reasonableness or necessity in resorting to deadly force in self-defense." But the Court further reasoned that "[i]t is universally accepted that retreat is not a factor in determining whether a defensive killing was necessary when it occurred in the accused's dwelling[.] *Id*. at 134.

However, in *People v Richardson*, 490 Mich 115, 118-121; 803 NW2d 302 (2011), a case where the defendant fired shots from his porch, the Court upheld the following jury instruction:

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[5] Except as provided in MCL 780.972, the Self-Defense Act (SDA) did "not modify the common law of this state in existence on October 1, 2006 regarding the duty to retreat before using deadly force or force other than deadly force." MCL 780.973.

> (1) A person can use deadly force in self-defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed [he/she] needed to use deadly force in self-defense.
>
> (2) However, a person is never required to retreat if attacked in [his/her] own home, nor if the person reasonably believes that an attacker is about to use a deadly weapon, nor if the person is subject to a sudden, fierce, and violent attack.

In so doing, the Court reasoned: "At trial, the prosecutor never argued that defendant was required to, or even should have, retreated from the altercation. In attempting to rebut defendant's self-defense claim, the prosecutor argued only that defendant could not establish that he honestly and reasonably believed that he needed to use deadly force." *Id*. at 120. The prosecutor clearly stated, in his closing argument, that defendant had no duty to retreat by law, and that he introduced testimony regarding defendant's ability to flee during the altercation with Watson for the purpose of challenging whether defendant honestly and reasonably believed he needed to use deadly force.

Regardless, even assuming, without deciding, that the prosecutor erred by eliciting the testimony, defendant fails to demonstrate that the error affected the outcome of his trial. The court instructed the jury that a person attacked in his own home has no duty to retreat. Curative instructions will cure most inappropriate prosecutorial statements, and it is presumed that jurors follow their instructions. *Unger*, 278 Mich App at 235.

Further, the jury's conviction of defendant for first-degree murder demonstrates that it found he killed Watson with premeditation and deliberation, not just that he lacked an honest and reasonable belief deadly force was necessary to prevent imminent death or great bodily injury. Substantial evidence beyond the testimony regarding defendant's ability to flee supported this determination. " 'The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation.' " *People v Bass*, 317 Mich App 241, 265-266; 893 NW2d 140 (2016) (citation omitted). " 'To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem.' " *Id*. at 266, quoting *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998) (citation and quotation marks omitted). One factor to consider when analyzing premeditation is a defendant's actions before and after a crime. *Bass*, 317 Mich App at 266. The extreme measures defendant took to conceal Watson's death, the injury defendant inflicted, the searches on defendant's laptop regarding drinking bleach and rat poison, and defendant's testimony that he wanted to get back at Watson for hitting him during the altercation, demonstrate premeditation and deliberation.

Because defendant cannot establish that the prosecutor committed an outcome-determinative error, his ineffective assistance of counsel argument also fails. Defense counsel need not make fruitless or meritless objections. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

## III. EVIDENTIARY ERROR

Defendant asserts that the court abused its discretion when it admitted into evidence testimony regarding, and a booking photograph from, his April 13, 2014 interaction with police, as well as an audio-less video of his first interview with Detective Noble.

To preserve an evidentiary error for appeal, "a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001), citing MRE 103(a)(1) and *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). Prior to trial, the prosecution filed a notice of intent to introduce evidence of defendant's April 13, 2014 contact with police under MRE 404(b), asserting that the court should admit the evidence for the non-character purpose of demonstrating defendant's intent and knowledge. On that day, defendant was pulled over by Novi Police Officer Daniel Jenkinson for drunk driving, but failed to disclose Watson's death to the officer. In response, defendant argued that the contact could not be used to prove his guilty mind because the prosecution had not proven that Watson was deceased on that date, evidence of drunk driving is not relevant to murder, and evidence of drunk driving would be overly prejudicial.

Defendant's arguments are not preserved. Defendant did not argue in the trial court, as he does on appeal, that the evidence was not relevant to his guilty mind because silence is a symptom of psychological trauma. Further, defense counsel withdrew the arguments related to drunk driving at the motion hearing when the court ordered that it would admit evidence of the incident without reference to the fact that defendant was pulled over for drunk driving, and failed to object at trial when Officer Jenkinson testified that defendant was intoxicated, or when the prosecution offered defendant's booking photograph for admission.

With regard to the video, when the prosecutor moved to admit the video of defendant's first interview with Detective Noble, and play the video for the jury, defense counsel objected on the basis that, with no audio, "it would potentially prejudice [defendant] if the jury would interpret some of his hand movements or gestures in a way that's totally out of context . . . ." However, defense counsel then admitted that he opened the door to the video's admission. Thus, defendant waived his evidentiary error argument as to the video.

Unpreserved evidentiary claims are reviewed for plain error affecting substantial rights. *People v Chelmicki*, 305 Mich App 58, 62; 850 NW2d 612 (2014). A plain error affects substantial rights when "the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. (citation and quotation marks omitted).

In general, other-acts evidence may not be introduced "to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). However, such evidence may be admissible to demonstrate "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident . . . ." MRE 404(b)(1).

Defendant asserts that the evidence regarding his April 13 interaction with police constituted character evidence masquerading as evidence of intent because it did not "make a material fact – guilty mind – more or less probable than it would be without the evidence." Evidence is relevant if it has " 'any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence.' " *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003), quoting MRE 401. " 'The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation.' " *Bass*, 317 Mich App at 265-266 (citation omitted). Further, "[o]nce a defendant raises the issue of self-defense and 'satisfies the initial burden of producing some evidence from which a jury could conclude that the elements necessary to establish a prima facie defense of self-defense exist,' the prosecution must 'exclude the possibility' of self-defense beyond a reasonable doubt." *People v Stevens*, 306 Mich App 620, 630; 858 NW2d 98 (2014), quoting *Dupree*, 486 Mich at 709-710.

Despite defendant's argument to the contrary, evidence that he interacted with a police officer on April 13, after Watson's death, was relevant to proving that defendant did not act in self-defense, but intended to kill Watson. Factors to consider when analyzing premeditation include a defendant's actions before and after a crime. *Bass*, 317 Mich App at 266. Officer Jenkinson testified that, during his 1½ to 2 hour interaction with defendant, defendant never mentioned killing Watson in self-defense. From that testimony, a rational juror could conclude both that defendant did not act in self-defense, and that he killed Watson with premeditation, because it is reasonable to infer that a person who believes they committed a justifiable killing would divulge such to another. This is especially true considering that, in his written statement to police, defendant said he "was so scared people would just call from the smell and [he] would just confess if anyone asked."

Additionally, the probative value of the testimony and defendant's booking photograph was not outweighed by their prejudicial effect. Relevant evidence may be excluded if the "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. " 'Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury." *People v Danto*, 294 Mich App 596, 600; 822 NW2d 600 (2011), quoting *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005).

Defendant argues that the reason for his interaction with police and booking photograph – drunk driving – became apparent during Officer Jenkinson's testimony, making the evidence overly prejudicial because it "implied that just days after Mr. Watson's death, [he] was making reckless decisions and endangering himself and others." However, defendant himself testified that he was put in the "drunk tank" during his interaction with police on April 13, and that after Watson's death, he stayed home all the time and drank and smoked "weed." "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence . . . ." *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), overruled on other grounds by *People v Thompson*, 477 Mich 146 (2007). Further, it is unlikely that knowing defendant was intoxicated during the April 13 contact with police affected the jury's perception of Officer Jenkinson's testimony or defendant's photograph, or its ultimate decision in the case. The evidence was clearly intended to demonstrate that defendant had the opportunity to tell the police

about Watson's death, but failed to do so. And, as discussed, substantial evidence beyond this police interaction existed from which the jury could have concluded that defendant killed Watson with premeditation and deliberation, rather than in self-defense.

With regard to defendant's argument that the trial court erred by admitting into evidence the video of his first interview with Detective Noble, we initially hold that defendant waived this issue. During defense counsel's cross-examination of Detective Noble regarding the interview, the following exchange occurred:

> *Q*. And it's your testimony that [defendant] was completely calm that entire time, correct?
>
> *A*. Yes, correct, for what had taken place.
>
> *Q*. He wasn't crying?
>
> *A*. I didn't see tears.
>
> * * *
>
> *Q*. Okay, and had there been a video of that interview we could have seen what his demeanor was, correct?
>
> *A*. Correct.

Defense counsel admitted that he opened the door to admission of the video with this line of questioning. Again, "error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence . . . ." *Griffin*, 235 Mich App at 46.

Regardless, the probative value of the video's admission was not outweighed by the danger of unfair prejudice. Defendant admitted that he appeared calm throughout the interview depicted in the video, and explained the hand gestures he made. At trial, defendant used one hand to demonstrate for the jury how he pushed the knife into Watson's neck. However, when questioned further by the prosecutor, defendant clarified that he used two hands to push the knife into Watson's neck, as demonstrated in the video.[6] Thus, the jury did not interpret the gestures out of context, as defendant suggests, and the trial court did not err by admitting the video into evidence.

[6] Defendant appears calm throughout the video. Further, defendant does appear, in the video, to demonstrate how he held the knife when cutting into Watson's neck. He begins with two hands, and then switches to one as he seemingly pulls the knife through Watson's neck.

## IV. CRUEL AND UNUSUAL PUNISHMENT

Finally, defendant argues that the life sentence mandated by MCL 750.316(1), is unconstitutional both on its face and as applied, because it violates the prohibitions against cruel and unusual punishment in both the Michigan and United States Constitutions.

To preserve the argument that a sentence is unconstitutionally cruel or unusual, a defendant must advance the claim in the trial court. *People v Bowling*, 299 Mich App 552, 557; 830 NW2d 800 (2013). Defendant failed to advance this argument in the trial court, so it is not preserved for appellate review.

In general, this Court reviews constitutional questions de novo. *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). " 'Statutes are presumed to be constitutional, and the courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.' " *Id*., quoting *People v Dipiazza*, 286 Mich App 137, 144; 778 NW2d 264 (2009) (citation and quotation marks omitted). However, unpreserved issues are reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

In *People v Hall*, 396 Mich 650, 657-658; 242 NW2d 377 (1976), the Michigan Supreme Court upheld the life sentence mandated by MCL 750.316, under both the United States and Michigan Constitutions. Defendant cites *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and scientific studies, in support of his argument that it is unconscionable to apply mandatory minimum sentences to all offenders, including those whose brains are still developing. But *Miller* only held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments,' " *id*. at 2460, 2468, and defendant was over 18 at the time he killed Watson. As he points to no further legal authority directly supporting his argument, his sentence did not violate the United States and Michigan Constitutions.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray

# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 7, 2017 |
| v | No. 328474<br>Wayne Circuit Court |
| ALVIN PERRY JORDAN,<br><br>Defendant-Appellant. | LC No. 15-000968-01-FC |

Before: SERVITTO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

A jury convicted defendant, Alvin Perry Jordan, of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] The trial court sentenced defendant to life imprisonment without the possibility of parole for each murder conviction, and to 15 years to life imprisonment for the robbery conviction, those sentences to be served concurrently, but consecutive to a two-year term of imprisonment for the felony-firearm conviction. We affirm defendant's convictions, but remand for resentencing on his armed robbery conviction, and for correction of the judgment of sentence to specify one conviction for first-degree murder, supported by two different theories.

Defendant's convictions arise from the December 29, 2014 shooting death of Will Wright, who was shot and killed during a robbery after a drug sale. Testimony at trial indicated that Wright went to an apartment building to sell narcotic pills to Tanzania Corbin, the mother of defendant's girlfriend. After the sale, as Wright was exiting the building, he was approached by defendant. According to a witness, Lee Butler, the two men struggled over a gun. Defendant prevailed and Wright attempted to run away, but defendant shot him in the back. Defendant thereafter went through Wright's pockets and then left.

Both Corbin and Wright's friend, Nathan Lemons, who had accompanied Wright to the apartment building, denied that Wright was armed with a gun. Corbin also denied seeing defendant with a gun on the date of the offense, but admitted seeing him with a gun the day

[1] The jury acquitted defendant of an additional count of felonious assault.

before. According to Corbin, after she heard two gunshots outside her apartment, defendant returned to her apartment and told her that he had shot Wright. Defendant removed his jacket, placed it in a closet, and then left. Shortly thereafter, the police arrived and seized a hooded sweatshirt during a search of Corbin's apartment. The sweatshirt contained blood, and DNA testing confirmed that the blood matched Wright's DNA. Defendant was also identified as a "possible contributor" to DNA taken from blood found under fingernail clippings from Wright's left hand.

## I. SELF-DEFENSE

On appeal, we first address defendant's argument that defense counsel was ineffective for failing to request a jury instruction on self-defense, despite alluding to such a theory during his closing argument. Because defendant did not raise an ineffective assistance of counsel claim in a motion for a new trial or request an evidentiary hearing, our review of this issue is limited to errors apparent from the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000), citing *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish a claim of ineffective assistance of counsel, defendant must show that: (1) counsel's representation "fell below an objective standard of reasonableness"; and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012), citing *Strickland v Washington*, 466 US 668, 688-694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). This Court presumes that defense counsel rendered effective assistance and exercised reasonable professional judgment in all significant decisions. *Vaughn*, 491 Mich at 670. Defendant must "overcome the strong presumption that counsel's performance was born from a sound trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Because defendant bears the burden of demonstrating both deficient performance and prejudice, he necessarily bears the burden of establishing the factual predicate for his claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Whether to request a particular jury instruction can be a matter of trial strategy, and counsel is given wide discretion with regard to matters of strategy. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Although defense counsel discussed Butler's testimony that he saw two men wrestling over a gun, counsel used this testimony, not to argue self-defense, but to argue that defendant could not be guilty of premeditated or felony-murder, and, at most, was guilty only of second-degree murder due to the lack of time to premeditate. Counsel also argued that the prosecution had not shown that defendant took anything from Wright. Counsel further argued that someone else, perhaps a bystander, could have taken the gun after the shooting.

We cannot conclude that counsel's decision to pursue this line of strategy, and to not request a self-defense instruction, was objectively unreasonable, particularly considering the lack of evidence supporting a legally viable claim of self-defense. A person is entitled to use deadly force in self-defense if the person honestly and reasonably believes "that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force[.]"

*People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). A person who acts as the initial aggressor cannot be found to have acted in justifiable self-defense. *People v Guajardo*, 300 Mich App 26, 35-36, 43; 832 NW2d 409 (2013). Apart from Butler's testimony describing an actual struggle for the weapon, very little other evidence supported a finding that defendant acted in self-defense. Indeed, the great body of evidence directly refuted such a theory. Although Butler described a struggle over the gun, he also stated that the gun was never in Wright's hands while the two men were wrestling. Moreover, Butler testified that after defendant prevailed in the struggle, Wright was trying to run away when defendant shot him. The physical evidence confirmed that Wright was shot in the back from a distance of more than two feet, at an angle consistent with someone bent over trying to run away. Lemons stated that Wright was unarmed, and Corbin similarly stated that she had never seen Wright with a gun. Lemons also testified that it was defendant who approached Wright as Wright was exiting the apartment building after the drug sale. No evidence indicated that Wright approached or attacked defendant, or acted as an initial aggressor in the confrontation with defendant. Defendant did not testify about his own version of the shooting, or offer any witnesses who were supportive of a self-defense claim.

Given this evidence, counsel's strategy to attack the element of premeditation and to argue the lack of evidence of an underlying felony to support the felony-murder charge was not objectively unreasonable. Moreover, to the extent that the testimony describing a struggle over the gun could be deemed minimally sufficient to support a self-defense instruction, considering the lack of other evidence supporting a self-defense claim, and the body of evidence refuting any legal claim of self-defense, it is not reasonably probable that the outcome of the trial would have been different if a self-defense instruction had been requested and given. Therefore, defendant was not prejudiced by counsel's failure to request the instruction.[2]

## II. DEFENDANT'S LIFE-WITHOUT-PAROLE SENTENCES

Defendant argues that his mandatory sentence of life imprisonment without the possibility of parole violates the constitutional prohibition on cruel and unusual punishment considering his age, 18 years, at the time of the offense. Because defendant did not challenge the constitutionality of his mandatory life sentence in the trial court, this issue is unpreserved. Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

As defendant observes, in *Miller v Alabama*, 567 US ___ ; 132 S Ct 2455, 2460; 183 L Ed 2d 407 (2012), the United States Supreme Court held that a sentence of "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " The Court explained the

[2] We also reject any suggestion that defense counsel improperly conceded defendant's guilt of second-degree murder during counsel's closing argument. Initially, we note that counsel specifically stated that he was not making such a claim. Regardless, the decision whether to concede guilt on a lesser is a matter of trial strategy, which this Court will not second-guess. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

rationale behind drawing a distinction between 18-year-old offenders and their younger counterparts, stating:

> To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys . . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. [*Id*., 132 S Ct at 2468.]

On appeal, defendant urges this Court to extend the holding in *Miller* to 18-year-old offenders. As discussed by this Court in *People v Skinner*, 312 Mich App 15, 23-27; 877 NW2d 482 (2015), the *Miller* decision represents a culmination of several decisions by the United States Supreme Court over the last 30 years that have gradually eased the automatic imposition of harsh sentencing for young offenders. As noted in *Skinner*, these decisions are based on the perceived differences between juvenile offenders and those who have reached the age of majority. *Id.* at 23-27. In contrast, defendant points only to a study noting that young adult brains share common risk-taking or impulse control features with those of juveniles. Defendant's study does support a position that, globally, mandatory life sentences for young offenders who have not reached full brain development is somehow unfair, or that the distinction between a 17-year-old and an 18-year-old is somehow "pure legal fiction." Any philosophical merit to defendant's position aside, defendant points to no legal authority to support his position. Accordingly, we decline defendant's invitation to extend *Miller* to 18-year-old offenders. The trial court did not violate the constitutional prohibition on cruel and unusual punishment by adhering to the demarcation between those who have attained the age of 18 years and those under 18 years of age, and by thereby imposing the mandatory sentence of life imprisonment without parole for defendant's conviction of first-degree murder.

We agree with defendant, however, that the trial court erred by entering a judgment of sentence reflecting two convictions and two life sentences for first-degree murder. Although the jury found defendant guilty of both first-degree premeditated murder and first-degree felony murder, because the two convictions arise from the death of a single victim, they violate the double jeopardy protection against multiple punishments for the same offense. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Accordingly, we remand for modification of the judgment of sentence to specify a single conviction of first-degree murder supported by two theories: premeditated murder and felony murder. *Id.*; *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998).

## III. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

A. ADMISSIBILITY OF EVIDENCE

Defendant challenges the admission at trial of (1) photographs of him that were obtained from his cell phone, and (2) the hooded sweatshirt recovered by the police during their search of Corbin's apartment. Defendant argues that each of these items should have been excluded as evidence because they were obtained through an illegal search. Defendant acknowledges that he never challenged the admissibility of this evidence in the trial court, leaving the issues unpreserved. Therefore, our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. To constitute a "plain" error, the error must be "clear or obvious." *Id.* Defendant further argues, however, that defense counsel was ineffective for failing to seek suppression of this evidence. Because defendant did not raise an ineffective assistance of counsel claim in an appropriate motion in the trial court, review of that issue is limited to errors apparent from the record. *Snider*, 239 Mich App at 423.

"In general, searches conducted without both a warrant and probable cause to believe evidence of wrongdoing might be located at the place searched are unreasonable per se." *Lavigne v Forshee*, 307 Mich App 530, 537; 861 NW2d 635 (2014). Unless an exception applies, evidence that has been seized in violation of the constitutional prohibition against unreasonable searches and seizures must be excluded from trial. *Id*. at 537-538; *People v Chowdhury*, 285 Mich App 509, 516; 775 NW2d 845 (2009).

Defendant correctly asserts that a warrant is generally required before the police may lawfully search a suspect's phone. *Riley v California*, ___ US ___; 134 S Ct 2473, 2494-2495; 189 L Ed 2d 430 (2014); *People v Gingrich*, 307 Mich App 656, 665-666; 862 NW2d 432 (2014). Although defendant argues that the police unlawfully searched his phone, he points to no evidence addressing the circumstances under which the police obtained the photos or other data from his phone. The lower court record discloses that plaintiff filed a pretrial motion to admit photos obtained from defendant's cell phone. Plaintiff's brief in support of that motion specifically states that "[a] search warrant was executed on the contents of Defendant's cell phone that resulted in 692 images being recovered." Defendant never challenged the veracity of that statement, and he has presented nothing on appeal to indicate that this assertion is false or inaccurate, that the referenced warrant was somehow defective, or to establish any other irregularity. Because the record indicates that the cell phone photos were obtained pursuant to a search warrant, and defendant has not presented anything to suggest otherwise, we conclude that defendant has failed to demonstrate a plain error related to the seizure or admission of the cell phone photographs. Furthermore, absent any basis for concluding that the cell phone photos were illegally obtained, defendant's related ineffective assistance of counsel claim cannot succeed. Counsel is not required to raise a meritless issue. *People v Moorer*, 262 Mich App 64, 76, 683 NW2d 736 (2004).

Defendant also challenges the admission of the hooded sweatshirt that the police recovered during a search of Corbin's home shortly after the offense. "One established exception to the general warrant and probable cause requirements is a search conducted pursuant to consent." *People v Borchard–Ruhland*, 460 Mich 278, 294, 597 NW2d 1 (1999). "The

consent exception to the warrant requirement allows a search and seizure when consent is unequivocal, specific, and freely and intelligently given." *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001) (quotation omitted). Defendant lacks standing to assert this issue. "The right to be free from unreasonable searches and seizures is personal, and the right cannot be invoked by a third party." *People v Mahdi*, ___ Mich App ___, ___; ___ NW2d ___ (2016); slip op at 5. Therefore, defense counsel's stipulation to the sweatshirt's admission was not ineffective assistance and we deny defendant's request for a remand on this issue.

B. JURY VERDICT FORM

Defendant next argues that the jury verdict form was defective because it did not allow the jury to choose a "general not guilty" option in which it could find defendant not guilty of all charges. Defendant acknowledges that there was no objection to the verdict form at trial. Thus, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. We find no merit to this issue.

Defendant correctly observes that "a criminal defendant is deprived of his constitutional right to a jury trial when the jury is not given the opportunity to return a general verdict of not guilty." *People v Wade*, 283 Mich App 462, 467; 771 NW2d 447, lv den 486 Mich 909 (2009). However, this is not what occurred here. The jury verdict form used at trial presented the jury with the following options for count 1, first-degree premeditated murder:

> ____ NOT GUILTY
>
> OR
>
> ____ GUILTY OF HOMICIDE –MURDER FIRST DEGREE-PREMEDITATED
>
> OR
>
> ____ GUILTY OF THE LESS SERIOUS OFFENSE OF HOMICIDE- MURDER SECOND DEGREE [Jury verdict form, p 1.]

Similar options, including a specific "not guilty" option, were provided for each of the other charged offenses. The verdict form clearly provided the jury with the option of finding defendant "not guilty" of each charged offense. Thus, there was no error, plain or otherwise. In addition, because defense counsel is not required to raise a meritless issue, *Moorer*, 262 Mich App at 76, counsel was not ineffective for failing to object to the verdict form.

C. ARMED ROBBERY SENTENCE

Defendant also argues, and we agree, that the trial court erred when it imposed a sentence of 15 years to life for defendant's armed robbery conviction. The trial court's sentence violates MCL 769.9(2), which provides that "[t]he court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence." A violation of MCL 769.9(2) renders a sentence wholly invalid and requires

resentencing de novo. *People v Parish*, 282 Mich App 106, 108; 761 NW2d 441 (2009). Accordingly, we vacate defendant's invalid sentence for armed robbery and remand for resentencing on that offense.

We affirm defendant's convictions, but vacate his sentence for armed robbery and remand for resentencing on that offense, and remand for correction of the judgment of sentence to specify a single conviction for first-degree murder, supported by two different theories. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause