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STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

vs

No. 162425

MONTEZ STOVALL,

Defendant-Appellant.

Third Circuit Court Nos. 92-0334 and 92-0335
Court of Appeals No. 342440

PLAINTIFF-APPELLEE'S APPENDIX

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JON P. WOJTALA (P-49474)
Chief of Research, Training, and Appeals
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5748

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TABLE OF CONTENTS

Page

People v. Michael Johnson,
unpublished opinion, COA #344322 (June 18, 2019) 1b-13b

People v. Patrick Kinney,
unpublished opinion, COA #351824 (September 16, 2021) 14b-19b

Baughman, Timothy
Section II(B), Appellee's Brief, People v. Poole, MSC# 161529 ..... 20b-42b

PEOPLE v JOHNSON
1b

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

MICHAEL JEFFERY JOHNSON,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
June 18, 2019

No. 344322
Berrien Circuit Court
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.

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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).

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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.

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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.

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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

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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).]
>
> * * *
>
> "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.

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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.]

* * *

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).

RECEIVED by MSC 1/18/2022 7:17:40 PM

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

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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]

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[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

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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.

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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,

PEOPLE v JOHNSON
12b

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* * *

> (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).

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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

PEOPLE v KINNEY 146

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RECEIVED by MSC 1/18/2022 7:17:40 PM

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK NEIL KINNEY,

Defendant-Appellant.

UNPUBLISHED
September 16, 2021

No. 351824
Genesee Circuit Court
LC No. 95-052345-FC

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

PER CURIAM.

This case centers around the application of *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *Montgomery v Louisiana*, 577 US 190; 136 S Ct 718; 193 L Ed 2d 599 (2016), to juveniles sentenced to parolable life imprisonment. *Miller* held that *mandatory* life-without-parole ("LWOP") sentences for juveniles violated the Eighth Amendment to the United States Constitution, and *Montgomery* applied *Miller* retroactively. See *Montgomery*, 577 US at 206-213. On June 19, 1995, defendant, Patrick Neil Kinney, pleaded guilty to one count of second-degree murder, MCL 750.317. On January 7, 1997, the sentencing court sentenced defendant to serve life in prison with the possibility of parole. Defendant appeals by delayed leave granted[1] the June 27, 2019 order of the Genesee Circuit Court denying his motion for relief from judgment under MCR 6.502(G)(2). We affirm.

[1] *People v Kinney*, unpublished order of the Court of Appeals, entered May 18, 2020 (Docket No. 351824). We originally denied defendant's delayed application for leave to appeal. *People v Kinney*, unpublished order of the Court of Appeals, entered March 18, 2020 (Docket No. 351824). However, on reconsideration, we granted the application on the basis of a potential change in law that the trial court relied upon when denying defendant's motion. The trial court relied on *People v Williams*, 326 Mich App 514; 928 NW2d 319 (2018), but that case was subsequently reversed in part by order of our Supreme Court in *People v Williams*, 505 Mich 1013; 940 NW2d 75 (2020), which was issued shortly after we initially denied defendant's leave to appeal.

PEOPLE v KINNEY
15b

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I. BACKGROUND

The facts are not in dispute for purposes of this appeal. Defendant was 16 years of age when he and his codefendant planned to murder two individuals and steal a van in order "to run away." Defendant and his codefendant murdered the victim, who was 15 years of age and the codefendant's twin brother. The planned murder of the victim's stepmother ultimately did not occur. Defendant pleaded guilty to second-degree murder and was sentenced to life in prison with the possibility of parole. Over the course of the coming decades, defendant filed numerous motions for relief from judgment and applications for leave to appeal, all of which were denied. Subsequent to the *Miller* and *Montgomery* decisions, defendant filed the instant action requesting relief from judgment.

Defendant argued in his motion that *Miller* and *Montgomery* applied retroactively to his sentence, despite it being life *with* parole, and required the sentencing court to have considered the attributes of youth before sentencing him. Defendant contended that his sentence of life with parole was the equivalent to a sentence of LWOP in part due to Parole Board treatment of such sentences thus *Montgomery* and *Miller* analysis applied to his sentence as well. Defendant maintained that his second-degree murder sentence violated the Equal Protection Clause of the United States Constitution as well as the Michigan Constitution because, under Michigan's statutory scheme, juveniles sentenced to mandatory LWOP would be resentenced either to LWOP or a term of years not to exceed 60 years, which meant that some offenders would receive a *lesser* sentence than defendant despite having been convicted of, and sentenced for, first-degree murder.

Defendant further argued that his sentence was disproportional because of the trial court's failure to consider mitigating factors at his original sentencing. The trial court rejected each of these arguments, citing *People v Williams*, 326 Mich App 514; 928 NW2d 319 (2018), rev'd in part 505 Mich 1013; 940 NW2d 75 (2020), and stated that "the Court of Appeals ruled that a sentence of life with the possibility of parole was not invalid under *Miller*"; without a sentence of mandatory LWOP, there could be no relief under *Miller* or *Montgomery*. The trial court ruled that defendant's sentence was valid and permitted under Michigan law. This appeal followed.

II. ANALYSIS

A. STANDARD OF REVIEW

We review the trial court's decision on a motion for relief from judgment for an abuse of discretion, and we review for clear error the findings of fact that support this decision. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). An abuse of discretion occurs when the trial court's "decision falls outside the range of reasonable and principled outcomes" or when it "makes an error of law." *Id.* at 628-629. Clear error occurs "when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Chaney*, 327 Mich App 586, 587 n 1; 935 NW2d 66 (2019).

B. DEFENDANT'S SENTENCE

Defendant contends that, with the reversal of *Williams* by our Supreme Court, he must be resentenced because *Miller* and *Montgomery* apply to more than just mandatory LWOP sentences

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for juveniles. He argues that these cases apply to life-with-parole sentences because such sentences in Michigan are effectively LWOP given the more stringent parole requirements for life offenders. Furthermore, he maintains that his sentence constituted cruel or unusual punishment under the Michigan Constitution and cruel and unusual punishment under the United States Constitution. He further argues that the parole process does not offer him a meaningful opportunity for release. We disagree.

"The Michigan Constitution prohibits cruel *or* unusual punishment, whereas the United States Constitution prohibits cruel *and* unusual punishment." *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011) (citations omitted). Generally, the protection afforded under the Michigan Constitution is considered to be broader than that provided for under the United States Constitution. As a result, "[i]f a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *Id.* (quotation marks and citation omitted). "The Eighth Amendment's prohibition on cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions." *Miller*, 567 US at 469 (quotation marks and citation omitted). In construing this principle, the Supreme Court held in *Miller* 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 465. While these sentences violate the Eighth Amendment, the Supreme Court further stated that "[a] State is not required to guarantee eventual freedom but must provide [juveniles] with some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 479 (quotation marks and citation omitted). Further, in *Montgomery*, the Supreme Court held that the rule announced in *Miller* applied retroactively to juvenile offenders. *Montgomery*, 577 US at 212.

We have already expressly addressed and rejected the arguments raised by defendant. In *People v Stovall*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 342440); slip op at 1, lv gtd ___ Mich ___; 957 NW2d 827 (2021), the defendant pleaded guilty to two counts of second-degree murder, and he was sentenced to two concurrent sentences of life *with* parole. Similar to the present case, the defendant filed numerous motions for relief from judgment "[o]ver the next quarter-century." *Id.* After *Miller* and *Montgomery*, the defendant sought relief based on the retroactive change in the law that *Miller* set forth. See *id.* ___; slip op at 1-2. He contended on appeal that *Miller* and *Montgomery* "constituted a retroactive change in the law that rendered his sentences of life imprisonment with the possibility of parole invalid." *Id.* at ___; slip op at 3. The defendant asked "this Court to extend the provisions of *Montgomery* and *Miller* to sentences beyond those labeled 'life without parole,' " but we expressly rejected this argument. *Id.* at ___; slip op at 3, 7-8.

In doing so, we referenced our prior decision in *Williams*, in which we held that the holdings of *Miller* and *Montgomery* applied "only to *mandatory* sentences of life without the possibility of parole," not parolable life sentences. *Williams*, 326 Mich App at 521 (emphasis added). We acknowledged the fact that our Supreme Court had reversed *Williams* on other unrelated grounds:

> The Michigan Supreme Court thereafter reversed, holding that the trial court "shall consider whether the sentence for second-degree murder was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole for first degree murder." That is, it accepted the defendant's

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> second argument, an argument not available to defendant in our case as he was not facing a mandatory life sentence.
>
> Our consideration of *Williams* in this case is only in regards to the defendant's first argument, whether *Miller* applies to sentences of life with parole for second-degree murder. The Michigan Supreme Court did not consider, nor did it reverse, this Court's analysis and conclusion on that issue. [*Stovall*, ___ Mich App at ___; slip op at 7 n 3.]

Therefore, we held that the "defendant's sentences do not constitute cruel or unusual punishment." *Id.* at ___; slip op at 7. Under the "minimal reading" of *Miller* and *Montgomery*, "defendant's sentences do not violate the Eighth Amendment, because defendant did not receive a mandatory sentence of life imprisonment without parole"; and, under the "maximal reading, defendant's sentences still comport with the Eighth Amendment's requirement that juvenile offenders be given a meaningful opportunity to obtain release on the basis of his maturity and rehabilitation." *Id.* We explicitly stated that the defendant's opportunity for parole constituted a "meaningful opportunity for release" under *Miller*. *Id.*

Stovall noted that the defendant in *Stovall* cited from other jurisdictions, as does this defendant, but underscored that such cases were nonbinding and distinguishable because they dealt "with the constitutionality of term-of-years sentences that act as *de facto* life sentences," not a sentence of life with the possibility of parole. *Id.* at ___; slip op at 7-8. Importantly, *Stovall* rejected the defendant's contention that the parole process for individuals serving sentences of life imprisonment with the possibility of parole denied him a meaningful opportunity for release, reasoning that,

> [w]hile we accept the possibility that the parole board's policies and procedures may not comport with the requirements of *Miller* and *Montgomery*, a motion for relief from judgment is not the proper procedural vehicle through which defendant can pursue those claims. Defendant's sentences, as imposed by the sentencing court, comport with the Eighth Amendment because they provide him with a meaningful opportunity for release. That the parole board's policies stymie defendant's efforts is a matter to be asserted against the parole board, and is not a ground for vacating defendant's sentences. [*Stovall*, ___ Mich App at ___; slip op at 8.]

We continued:

> Generally, a parole board's consideration of an individual's application for parole does not implicate a due process right. . . . There is nothing in these opinions to imply that defendant's sentences to life imprisonment with the possibility of parole are invalid because they deny defendant a parole process aimed toward a meaningful opportunity for release. As discussed earlier, while the parole board's policies and procedure may not comport with the Eighth Amendment, defendant's constitutional claim lies with those policies and not with the validity of his sentences. [*Id.* at ___; slip op at 9.]

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Finally, we rejected the defendant's argument "that his sentences violate due process because neither the sentencing court nor the parole board have considered his juvenile status and attendant circumstances." *Id.* at ___; slip op at 8. We reasoned that *Miller* and *Montgomery* did "not support the proposition, as defendant asserts, that consideration of a defendant's juvenile status is a procedural requirement when sentencing all individuals convicted of a crime committed while a juvenile." *Id.* at ___; slip op at 8-9. Rather, because the defendant had not been sentenced to mandatory or even discretionary LWOP, and instead had received a sentence that permitted parole, his argument necessarily failed. *Id.*

Accordingly, we rejected the same arguments in *Stovall* that defendant raises in the present appeal. *Miller* and *Montgomery* do not apply to defendant's sentence because he was not sentenced as a juvenile to mandatory LWOP; instead, he was sentenced to life *with* parole, and this offered him a meaningful opportunity for release. In fact, we note that he is currently being considered for parole. Given that defendant was not sentenced to mandatory LWOP, the sentencing court was not required to consider the mitigating characteristics of youth espoused in *Miller*. Furthermore, his sentence did not violate either the United States or Michigan Constitution. Any issues defendant may have with the parole process pertains not to his sentence but, rather, the parole policies themselves. A motion for relief from judgment is not the proper procedural avenue to raise this issue; rather, he must raise such concerns before the Parole Board.

C. MISCONCEPTION OF THE LAW

Defendant alternatively argues that his sentence was based on a misconception of the law, in violation of the due process clause of the fourteenth amendment. We disagree.

We first note that this issue was not raised in the trial court and, therefore, is unpreserved. See *People v Konopka*, 309 Mich App 345, 356; 869 NW2d 651 (2015). Unpreserved nonconstitutional issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In *People v Turner*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2018 (Docket No. 336406), rev'd 505 Mich 954; 936 NW2d 827 (2020), the primary authority relied upon by defendant, the *Turner* defendant was convicted in 1995 as a juvenile of first-degree murder, assault with intent to commit murder ("AWIM"), and felony-firearm; he was sentenced to mandatory LWOP for the first-degree murder conviction, life with parole for the AWIM conviction, and two years for the felony-firearm conviction. *Id.* at 1. Under *Miller*, the defendant was entitled to resentencing on his LWOP sentence for his first-degree murder conviction; however, the defendant also sought resentencing for his AWIM conviction. *Turner*, unpub op at 1-2. The trial court agreed and resentenced the defendant to serve 20 to 27 years in prison for the AWIM conviction. *Id.* at 2. We disagreed and reversed the trial court's decision. *Id.* at 3.

In an order reversing this Court's decision, our Supreme Court remanded for the trial court to reinstate the resentence for the AWIM conviction:

> A sentence is invalid if it is "based upon . . . a misconception of law . . . ." In the *Miller* context, a concurrent sentence for a lesser offense is invalid if there is reason to believe that it was based on a legal misconception that the defendant was

PEOPLE v KINNEY
196

RECEIVED by MSC 1/18/2022 7:17:40 PM

> required to serve a mandatory sentence of life without parole on the greater offense. Accordingly, at a *Miller* resentencing, the trial court may exercise its discretion to resentence a defendant on a concurrent sentence if it finds that the sentence was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole on the greater offense. [*Turner*, 505 Mich at 954 (citation omitted; alterations in original).]

In the present case, defendant contends that *Turner* should be applied to his case. However, this is an improper interpretation and extension of *Turner*. The misconception addressed in *Turner* involved *concurrent* sentences of mandatory LWOP parole and whether the sentencing court believed that a defendant was required to serve mandatory LWOP for the greater offense. The sentencing court believed that the defendant was required to serve mandatory LWOP for the first-degree murder offense and that this necessarily influenced the sentence for AWIM. Defendant in the present case was *not* sentenced to a concurrent mandatory LWOP sentence; rather, he was sentenced *only* to life with parole. Therefore, *Turner* is inapposite.

Affirmed.[2]

/s/ Stephen L. Borrello
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens

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[2] Defendant also contends that his sentence was not proportional under *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). This issue could have been raised in any one of defendant's numerous prior motions for relief from judgment and is therefore barred from consideration. MCR 6.508(D)(3); MCR 6.502(G); MCR 6.504(B)(2). See also *Swain*, 288 Mich App at 629-630. Although there are exceptions to this rule, defendant fails to persuasively show why any of the listed exceptions are applicable. *Milbourn* was decided long before he filed his first motion for relief from judgment in 1999, and the proportionality of his sentence could have been raised at that time. Furthermore, we are convinced that the sentence was proportional. The undisputed facts show that defendant and his codefendant planned to murder two individuals and that, while the victim was held down, defendant stabbed him 45 times to the face and body. Defendant's sentence gave an opportunity for eventual rehabilitation and release despite the brutality of this offense, and, in fact, defendant is currently being considered for parole. Defendant claims he has been rehabilitated, but it is the Parole Board that will review these claims and ultimately decide whether such claims hold merit.

BAUGHMAN & POOLE BRIEF
206

RECEIVED by MSC 1/18/2022 7:17:40 PM

B. Article I, § 16 of the Michigan Constitution does not render a mandatory sentence of life for 1st-degree murderers where statute prohibits parole consideration unconstitutional as to any class or subset of adults; the authority to set the sentence for the offense belongs to the legislature

The Eighth Amendment does not bar a mandatory sentence of life in prison, where statute denies the possibility of any parole consideration whatever, for an adult—a person 18 years of age or older—sentenced to life in prison, nor does the Michigan Constitution. While a state court must, of course, *apply* the Eighth Amendment as construed by the United States Supreme Court, a state is not compelled to construe its *own* fundamental charter in the same fashion; indeed, a state could in its constitution provide no protection against cruel and unusual, or cruel *or* unusual, sentences at all. The matter is one of consideration of the text, history, and structure of the state constitution, to ascertain its original public meaning. Where identical language is employed in the state constitution as in the federal, and nothing in the review of text, history, or structure suggests a different meaning, the meaning may well be–and generally is—the same.[31] But an examination of the text, history, and structure of the provision may on rare occasion lead to a different understanding[32] of the state provision than the parallel federal

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[31] Indeed, this Court has said, in construing several parallel provisions of the state constitution to federal provisions, that absent a compelling reason to conclude otherwise they should be construed the same. See e.g. *People v. Slaughter*, 489 Mich. 302, 311 (fn 14) (2011) (collecting cases regarding Mich. Const. 1963, Art. 1, § 11); *People v. Davis*, 472 Mich. 156, 167–68 (2005) (concerning Mich. Const. 1963, Art. 1, § 15).

[32] And though the interpretation of the federal constitution by the United States Supreme Court must be applied by the state court, the state court may, in construing its own constitution, conclude that the federal construction is mistaken.

BAUGHMAN - POOLE BRIEF
21b

RECEIVED by MSC 1/18/2022 7:17:40 PM

constitutional provision as interpreted by the United States Supreme Court.[33] This Court should conclude that Article 1, § 16 does not include judicial review of the proportionality of legislatively-mandated statutory sentences. *People v Bullock*[34] should be overruled, and the Court should find that the Michigan Constitution provides no basis for requiring case-specific sentencing hearings for any class of offenders convicted of 1st-degree murder, and certainly not for any class of adult offenders. But in all events, just as review for gross disproportionality under the federal constitution supplies defendant with no relief, neither is relief available under the Michigan Constitution if that test is applied.

1. Interpreting the Michigan Constitution

Our state constitution, no less than our federal constitution, is a durable expression of the will of the people, both authorizing and limiting government, and standing outside of and superior to all agencies of government, including the judiciary. Its source of authority is the people of the State: "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection."[35] The judicial

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[33] In *Sitz v. Dep't of State Police*, 443 Mich. 744, 758 (1993) the Court *found* such compelling reasons with regard to Art. 1, § 11 when applied to sobriety checklanes, noting that the compelling reason test for departure does not create a conclusive presumption which would completely bar State departure from interpretations of parallel federal constitutional provisions by the United States Supreme Court.

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

[35] See Mich. Const. 1963, Art. I, § 1. The same provision appears in Mich. Const. 1908, Art. II, § 1. In our first State Constitution, this language is divided between Article I, § 1 and § 2, § 1 providing that "First. All political power is inherent in the people" and Art. § 2 providing that "Government is instituted for the protection, security, and benefit of the people; and they have the right

BAUGHMAN – POOLE BRIEF
22b

RECEIVED by MSC 1/18/2022 7:17:40 PM

branch is as much an agent or servant of the sovereign people as are the legislative and executive branches. It does not stand outside of government, but is a part of it. The judge as servant of the people must search for the public meaning of a constitutional text as understood by the lawgiver. As Madison said, concerning our federal constitution:

> I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful, exercise of its powers.[36]

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

> in the position of the Framers of the Constitution, and ascertain what was meant at the time; for, if we are successful in doing this, we have solved the question of its meaning for all time. It could not mean one thing at the time of its adoption, and another thing today, when public sentiments have undergone a change.[37]

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at all times to alter or reform the same, and to abolish one form of government and establish another, whenever the public good requires it."

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

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

BAUGHMAN – POOLE BRIEF
23b

RECEIVED by MSC 1/18/2022 7:17:40 PM

Certainly new circumstances to which a provision must be applied may arise, but as Justice Campbell said long ago, "That the constitution means nothing now that it did not mean when it was adopted, I regard as true beyond doubt. But it must be regarded as meant to apply to the present state of things as well as to all other past or future circumstances."[38]

As tools to aid in the interpretation of our state constitution, this Court has consistently held that the Address to the People and the constitutional convention debates may be highly relevant in determining the public meaning to the *ratifiers* of particular constitutional provisions.[39] The Address is particularly important in this regard because it represents what the ratifiers—the people—were told about the proposed constitution *before* they voted to adopt it.[40] This Court has emphasized that "the proper objective in consulting constitutional convention debates is not to discern the intent of the framers in proposing or supporting a specific provision, but to determine the intent of the ratifiers in adopting the provision," and so "the primary focus ... should not [be] on the intentions of the delegates . . . but, rather, on any

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occasions have gone to the constitutional convention debates and addresses to the people to decide the meaning of the Constitution").

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

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

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

BAUGHMAN – POOLE BRIEF
246

RECEIVED by MSC 1/18/2022 7:17:40 PM

statements they may have made that would have shed light on why they chose to employ the particular terms they used in drafting the provision to aid in discerning what the common understanding of those terms would have been when the provision was ratified by the *People*."[41]

> As Justice Cooley, perhaps our greatest justice, put the matter:
>
> > A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.[42]

The task of the judge when confronting the meaning of a state constitutional text is, then, as a matter of long-established Michigan precedent, to ascertain what the ratifiers "understood themselves to be enacting." As one commentator has said, the text "must be taken to be what the public of that time would have understood the words to mean. . . . In other words, the objective or publicly-accessible meaning of the terms is sought."[43] Whether an interpretation of a provision of our state

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

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

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

BAUGHMAN - POOLE BRIEF
25b

RECEIVED by MSC 1/18/2022 7:17:40 PM

constitution is entitled to adherence under principles of stare decisis thus involves consideration of whether that decision was itself faithful to the task of the Court as established in the decisions of this Court described above. And "statutes are presumed to be constitutional, and [courts] have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.' "[44]

2. The law the People have made: that Article 1, § 16 of the Michigan Constitution employs the phrase "cruel or unusual" rather than "cruel and unusual" provides no basis to find MCL 791.234(6) and MCL § 750.316 unconstitutional as applied to any class of adults

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

There *is* a textual difference between the Eighth Amendment and Article 1, § 16—the former uses the phrase "cruel and unusual punishment" while the latter refers to cruel "*or*" unusual punishment—and this Court in *People v. Bullock* said that the "difference does not appear to be accidental or inadvertent."[45] But little proof was offered for this assertion other than the very fact of the textual difference.[46] Is there anything in the history of the language used that

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[44] *In re Certified Questions From United States Dist. Ct. , W. Dist. of Michigan, S. Div.*, 506 Mich. 332, 340 (2020), quoting *People v. Skinner*, 502 Mich 89, 100 (2018), quoting *In re Sanders*, 495 Mich. 394, 404 (2014), in turn citing *Taylor v. Gate Pharm.*, 468 Mich. 1, 6 (2003).

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

[46] "While the historical record is not sufficiently complete to inform us of the precise rationale behind the original adoption of the present language by the Constitutional Convention of 1850, it seems self-evident that any adjectival phrase in the form A *or* B' necessarily encompasses a broader sweep than a

BAUGHMAN - POOLE BRIEF
26b

RECEIVED by MSC 1/18/2022 7:17:40 PM

suggests that the use of "or" rather than "and" was designed to accomplish some purpose? And if so, to what end was the choice made?

The Northwest Ordinance was passed on July 13, 1787 by the Confederation Congress establishing the Northwest Territory, which included the territory that later became the State of Michigan, as well as principles for its governance. Included was a provision in Article 2 that "no cruel or unusual punishments shall be inflicted." On August 6, 1789, the Northwest Ordinance of 1789, which essentially continued the 1787 Ordinance, was signed into law under the new Constitution, and it too provided that "no cruel or unusual punishments shall be inflicted." On September 25, 1789 by joint resolution Congress Proposed the Bill of Rights Amendments to the States, the tenth of which was what came to be the Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It would be far more than passing strange if Congress proposed to the States an amendment to the Constitution concerning punishments that it intended to be *different* than that it had enacted as to the Northwest Territory only six weeks earlier. And there is no evidence that it so intended.

Indeed, founding-era evidence establishes that no difference was intended when the disjunctive was used rather than the conjunctive in a particular constitution of the era.

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phrase in the form 'A *and* B.' The set of punishments which are *either* 'cruel' *or* 'unusual' would seem necessarily broader than the set of punishments which are *both* 'cruel' *and* 'unusual.'" *People v. Bullock*, 440 Mich. at 31 (emphasis in the original).

BAUGHMAN - POOLE BRIEF
275

RECEIVED by MSC 1/18/2022 7:17:40 PM

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

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The state constitutions enacted during and shortly after the Bill of Rights' ratification also counsel against a literal interpretation. Pennsylvania and South Carolina each enacted constitutions during 1790, while ratification of the Bill of Rights was still pending. In addition, Delaware and Kentucky enacted constitutions in 1792 during the year following the Bill of Rights' ratification. All of these constitutions prohibited "cruel punishments," omitting entirely any reference to the term "unusual." Numerous state constitutions enacted after the Founding period used this same language. There is no evidence that this formulation was understood to mean anything different from either the Eighth Amendment's proscription of "cruel and unusual punishments" or the ban of the many state constitutions enacted during the Revolutionary and post-Revolutionary periods against "cruel or unusual" punishments.[47]

- [T]he phrases "cruel and unusual" and "cruel or unusual" were often used interchangeably, with early American state constitutions often employing "cruel or unusual" instead of the "cruel and unusual" verbiage.[48]

- [N]either the Framers nor their English predecessors attributed much difference between the phrases cruel

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

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

BAUGHMAN – POOLE BRIEF
28b

RECEIVED by MSC 1/18/2022 7:17:40 PM

> *and* unusual and cruel *or* unusual. . . . "the available evidence indicates that the Founders understood [both formulations] to capture the same meaning."[49]

And in the debate on ratification of the Constitution, where much concern was expressed regarding the absence of a Bill of Rights, the disjunctive and conjunctive were used interchangeably, and "cruel" and "unusual," however expressed, referred to a unitary concept. At the Massachusetts Ratifying Convention, Abraham Holmes complained that in the absence of a Bill of Rights Congress was not "restrained from inventing the most cruel *and unheard of* punishments . . . RACKS and GIBBETS, may be amongst the most mild instruments of their discipline."[50] The minority dissent of the Pennsylvania Ratifying Convention offered a series of suggested amendments to the proposed Constitution, including that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel *nor* unusual punishments inflicted."[51] The New York ratifying convention proposed amendments to the proposed Constitution constituting a Bill of Rights, and including that "excessive bail ought not to be required, nor excessive fines imposed; nor cruel *or* unusual punishments inflicted."[52] The North Carolina ratifying convention

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

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

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

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

BAUGHMAN - POOLE BRIEF
295

RECEIVED by MSC 1/18/2022 7:17:40 PM

resolved that there should be a Declaration of Rights added to the proposed Constitution, to include a provision that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel *and* unusual punishments inflicted."[53] The phrases were used interchangeably, and nothing suggests any difference in meaning was intended.

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

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

BAUGHMAN – POOLE BRIEF
30b

RECEIVED by MSC 1/18/2022 7:17:40 PM

And as to text itself, this Court said in *Bullock* that "it seems self-evident that *any* adjectival phrase in the form 'A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B.'"[54] But this is not necessarily so. While "and" is generally taken to be "used to join words or groups of words; added to; plus," "[o]r, on the other hand, while used as 'expressing an alternative, contrast, or opposition," is also often used "to indicate ... (3) the synonymous, equivalent, or substitutive character of two words or phrases,' as in '[the off [or] far side], [lessen [or] abate].'"[55] In any event, here history gives context to the expression—no difference in meaning was intended by the use on occasion of "or" rather than "and" to couple "cruel" and "unusual"; indeed, no difference in meaning was intended by the occasional use of "cruel" standing alone. And as Justice Holmes once said, "a page of history is worth a volume of logic."[56]

b. "The law the people have made": that Article 1, § 16 of the Michigan Constitution employs the phrase "cruel or unusual" rather than "cruel and unusual" provides no basis to find MCL 791.234(6) and MCL § 750.316 unconstitutional as applied to any class of adults under the text of the Michigan provision

Though the *Bullock* opinion offered little support for its assertion that "use of the phrase 'cruel or unusual' in the Michigan constitution

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

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

[56] *New York Tr. Co. v. Eisner*, 256 U.S. 345, 349, 41 S. Ct. 506, 507, 65 L. Ed. 963 (1921).

BAUGHMAN – POOLE BRIEF
31b

RECEIVED by MSC 1/18/2022 7:17:40 PM

rather than 'cruel and unusual' does not appear to be accidental or inadvertent," assume that it is accurate. Does it afford any basis for finding MCL 791.234(6) and MCL § 750.316 unconstitutional as applied to any class of adults? It does not.

What would an "unusual" punishment be? It requires reference to its context of use along with "cruel." Surely the constitutional provision would not ban all innovations in punishment, such as use of electronic monitoring devices. Justice Holmes pointed out over a century ago, with regard to the phrase "cruel or unusual" in the Massachusetts constitution, that "the word 'unusual' must be construed with the word 'cruel,' and cannot be taken so broadly as to prohibit every humane improvement not previously known in [the state]."[57] And Professor Stinneford[58] has thoroughly explicated the point.

"Unusual" as used both the Eighth Amendment and Article I, § 16 does not mean "out of the ordinary," or any innovation in punishment would be prohibited by these provisions. Rather, as demonstrated by Professor Stinneford, in this context as historically understood "unusual" means "'contrary to long usage' or 'immemorial usage.'"[59] In the 17th and 18th centuries "[a]ctions that comported with long usage were often said to be 'usual,'" while "[a]ctions that were contrary to long usage, on the

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[57] *In re Storti*, 60 N.E. 210, 211 (Mass., 1901).

[58] Professor of Law, University of Florida Levin College of Law.

[59] John F. Stinneford, "The Original Meaning of 'Unusual': The Eighth Amendment As A Bar to Cruel Innovation," 102 NW. U. L. Rev. 1739, 1745 (2008).

BAUGHMAN – POOLE BRIEF
325

RECEIVED by MSC 1/18/2022 7:17:40 PM

other hand, were described as 'unusual.'"[60] Indeed, "[t]hroughout the first half of the nineteenth century, American courts that were called upon to determine whether a punishment was 'cruel and unusual' almost invariably noted that a punishment could only be 'unusual' if it was contrary to the long usage of the common law."[61] And so

> the provisions in the various state constitutions and bills of rights for preserving the common law and prohibiting cruel punishments reflected a general consensus on two points: First, the government should not impose cruel punishments. Second, the common law was essentially reasonable, so that governmental efforts to "ratchet up" punishment beyond what was permitted by the common law were presumptively contrary to reason. Given this dual consensus, the words "cruel" and "unusual" acted as synonyms when employed in the context of punishment. The word "cruel" stated the abstract moral principle, and the word "unusual" provided a concrete reference point for determining whether that principle had been violated. Thus, it makes sense that some states outlawed "cruel punishments," some outlawed "cruel and unusual punishments," and some outlawed "cruel or unusual punishments." *Each formulation is simply a different way of saying the same thing.*[62]

Similarly, "cruel" has reference to historically employed punishments; a punishment is "cruel" if "its effects are unjustly harsh in light of longstanding prior punishment."[63] The first use of the phrase "cruell and unusual punishments" appeared in the English Bill of Rights of 1689, which was the model the prohibition on cruel and unusual

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[60] Id., at 1770.

[61] Id., at 1771.

[62] Id., at 1799 (emphasis suppled).

[63] John F. Stinneford, "The Original Meaning of 'Cruel'," 105 Geo. L. J. 441, 464 (2016).

BAUGHMAN - POOLE BRIEF
336

RECEIVED by MSC 1/18/2022 7:17:40 PM

punishments in the Virginia Declaration of Rights, and, ultimately, the Eighth Amendment.[64] The likely English impetus was the case of Titus Oates, who was convicted of only perjury for falsely claiming there was a popish plot to kill the king, the claim resulting in many executions. Justice Withins sentenced Oates to be dragged across the City of London while being whipped "from Aldergate to Newgate," and two days later from Newgate to Tyburn, to pay a fine, to be pilloried four times a year for life, and to life imprisonment.[65] Oates survived scourging, and petitioned Parliament after the adoption of the Bill of Rights to suspend his punishment on the ground that it was cruel and unusual, with which the members of Parliament agreed because the punishment was too harsh for the crime of conviction in "light of longstanding prior practice."[66] Justice Cooley well put the matter in his treatise, relating the provision to historical practice:

> It is somewhat difficult to determine precisely what is meant by cruel and unusual punishments. Probably a punishment declared by statute for an offense which was punishable in the same way at the common law could not be regarded as cruel or unusual in the constitutional sense. And probably any new statutory offence may be made punishable to the extent permitted by the common law for similar offences. But those degrading punishments which in any State *had become obsolete before its existing constitution was adopted*, we think may well be held to be forbidden by it as cruel and unusual.[67]

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[64] Id., at 474.

[65] Id., at 477.

[66] Id.

[67] Cooley, *Constitutional Limitations*, at 329.

If "unusual" punishments must be cruelly so, and include reinstitution

BAUGHMAN – POOLE BRIEF
345

RECEIVED by MSC 1/18/2022 7:17:40 PM

Plainly, a mandatory sentence of life imprisonment, the law not permitting parole, is not a degrading punishment for any class of adults that had become obsolete before the adoption of the Michigan constitutions.[68] It is not unconstitutional under the Michigan cruel or unusual punishment provision.

c. Gross proportionality review should not be applied to MCL 791.234(6) and MCL § 750.316

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

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of those long obsolete, this solves the "one-way ratchet" problem. That is, if a punishment is found unconstitutional because "evolving standards of decency" have turned against it, society may never decide it has made a mistake and return to more rigorous punishment, for any such legislation is perforce unconstitutional. But if a punishment that has been set aside only becomes "cruel and unusual" if in long disuse, society has the ability to return to a former punishment, and the ratchet turns both ways. Professor Stinneford suggests one hundred years as the relevant time period: "The relevant reference point for determining whether a punishment is cruel and unusual is not some abstract and absolute notion of unnecessary pain, but rather the range of pain (or risk of pain) caused by traditional punishment practices that have been used within the last one hundred years. States are free to experiment in order to find more humane methods of punishment without worrying that the moment they adopt a new practice, the old one becomes unconstitutional." Stinneford, "The Original Meaning of 'Cruel,'" at 504.

[68] For example, see the Revised Statutes of 1846, Chapter 153, providing the 1st-degree murder "shall be punished by solitary confinement at hard labor in the state prison for life" (the Revised States of 1838 had provided in Chapter 3 that 1st-degree murder was punishable by death, and 2nd-degree murder by life in prison, or any term of years); see also Compiled Laws of 1948, MCL 750.316, 1st-degree murder punished by "solitary confinement at hard labor in the state prison for life." And see Compiled Laws of 1948, MCL 791.32, precluding parole for those convicted of 1st-degree murder, reenacting § 4 of Ch. 3 of Act 255 of 1937) (now see MCL 791.234(6)).

BAUGHMAN - POOLE BRIEF
355

RECEIVED by MSC 1/18/2022 7:17:40 PM

in 1850 when they ratified "Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted"; and in 1908 when they ratified a text almost identical to that of 1850; and finally in 1963, when that language was again continued? Because, as the People have argued, "or" and "and" were used interchangeably at the time of the Founding, one must return to the beginning. What was the understanding at the time of the Founding, and in 1835?

The People will not belabor the point, but direct the Court to Justice Scalia's lead opinion in *Harmelin v Michigan*,[69] joined by Chief Justice Rehnquist as to the proportionality discussion, which the People believe applicable to the Michigan provision.[70] The People agree that:

- [T]he Clause disables the Legislature from authorizing particular forms or "modes" of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed.[71]

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

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

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

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

BAUGHMAN – POOLE BRIEF
366

RECEIVED by MSC 1/18/2022 7:17:40 PM

aware of such provisions, yet chose not to replicate them.[72]

- We think it enough that those who framed and approved the Federal Constitution chose, for whatever reason, not to include within it the guarantee against disproportionate sentences that some State Constitutions contained. It is worth noting, however, that there was good reason for that choice . . . . While there are relatively clear historical guidelines and accepted practices that enable judges to determine which *modes* of punishment are "cruel and unusual," *proportionality* does not lend itself to such analysis.[73]

- The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate—and to say that it is not. For that real-world enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.[74]

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

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

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

BAUGHMAN - POOLE BRIEF
376

RECEIVED by MSC 1/18/2022 7:17:40 PM

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

Proportionality review should be rejected as a matter of Michigan law. It inevitably involves the court in matters that are legislative. As Justice Scalia pointed out in the *Roper*[75] case:

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

Further, if the constitutional proportionality of a sentence "is an ever changing reflection of the evolving standards of decency' of our society, it

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[75] Roper v. Simmons, 125 S.Ct. at 1222 (Scalia, J., dissenting).

BAUGHMAN - POOLE BRIEF
386

RECEIVED by MSC 1/18/2022 7:17:40 PM

makes no sense for the Justices then to *prescribe* those standards rather than *discern* them from the practices of our people. On the evolving standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?"[76]

The *Morris* decision, quoting Justice Cooley's treatise, best explains the matter:

> defendant claims that, as properly understood, [cruel or unusual punishment] means, when used in this connection, punishment out of proportion to the offense. If by this is meant the degree of punishment, we do not think the contention correct. . . . in England . . . . the declaration was intended to forbid the imposition of punishment of a kind not known to the law or not warranted by the law. Justice Cooley says: "Probably any punishment declared by statute for an offense which was punishable in the same way at the common law could not be regarded as cruel or unusual, in the constitutional sense; and probably any new statutory offense may be punished to the extent and in the mode permitted by the common law for offenses of similar nature. But those degrading punishments, which in any state had become obsolete before its existing constitution was adopted, we think may well be held forbidden by it as cruel and unusual.[77]

Finally, to conclude here, Justice Riley quoted the Prosecuting Attorneys Association amicus brief:

> I believe that the amicus curiae supplemental brief of the Prosecuting Attorneys Association correctly identifies the problems with an evolving standards test. . . . "if 'evolving

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[76] Id.

[77] *People v. Morris*, 80 Mich. 634, 638–39 (1890).

BAUGHMAN - POOLE BRIEF
39b

RECEIVED by MSC 1/18/2022 7:17:40 PM

standards of decency' as to the appropriate (proportionate) sentence for a crime are to be the measure of the constitutionality of a legislatively set penalty, how is such an inquiry to be carried out? What is the measure? What informs the judgment? What tools does a court have to make it? What enables a court to overrule society's expression of its 'standard of decency,' communicated through statute, imposing a different standard, which is also supposed to be *society's* standard and not the court's? Would not the court's role be to *discover* or *identify* society's 'standard of decency'—not what it should be, but what it *is*, and how better could society express its standard of decency than through its elected lawmakers? The alternative for the judiciary is that

> it is for *us* (the judiciary) to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society its democratic processes now overwhelmingly disapproves, but on the basis of what we think "proportionate" and "measurably contributory to acceptable goals of punishment"—to say and mean that, is to replace judges of the law with a committee of philosopher kings.[78]

3. Even under review for "gross disproportionality" there is no basis to find MCL 791.234(6) and MCL § 750.316 unconstitutional as applied to any class of adults

Even if *Bullock* is followed, the test there is whether the legislatively established sentence is "*grossly* disproportionate"[79]; the Court does not superintend the legislature for an abuse of discretion, as

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

[79] "{W]e conclude . . . that the penalty at issue here is so grossly disproportionate as to be 'cruel or unusual.'" *People v. Bullock*, 440 Mich. at 37.

BAUGHMAN - POOLE BRIEF
406

RECEIVED by MSC 1/18/2022 7:17:40 PM

it does the sentencing of trial courts under *Steanhouse*.[80] Michigan's test assesses proportionality by considering:

> whether a penalty may be considered cruel or unusual is to be determined by a three-pronged test that considers (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. . . . under the Michigan Constitution, the prohibition against cruel or unusual punishment included a prohibition on grossly disproportionate sentences.[81]

As to the first factor, "first-degree murder is almost certainly the gravest and most serious offense that can be committed under the laws of Michigan—the premeditated taking of an innocent human life."[82] To paraphrase Justice Boyle in *Bullock*, "[b]ecause the absolute magnitude of the crime is grave [here, the gravest possible] and the principle of proportionality does not permit the judiciary to impose on the Legislature its subjective view of appropriate responses to perceived evils, the

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[80] "[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion."*People v. Steanhouse*, 500 Mich. 453, 471 (2017).

[81] *People v. Benton*, 294 Mich. App. 191, 204 (2011).

Some cases, including *Bullock*, include "the goal of rehabilitation." But where the gravest of all crimes—1st-degree murder—has been committed, nothing in the constitution requires that the legislature consider rehabilitation as a goal, at least a goal to lead to release the defendant from prison. The legislature may certainly consider other penological goals, including punishment, as the overriding purpose of the sentence provided, at least for all adult offenders.

[82] *People v. Carp*, 496 Mich 440, 514 (2014), judgment vacated 577 U.S. 1186, 136 S.Ct. 1355,194 L.Ed.2d 339 (2016).

BAUGHMAN – POOLE BRIEF
415

RECEIVED by MSC 1/18/2022 7:17:40 PM

statutory scheme passes constitutional muster."[83] All "classes" of adults face the same mandatory sentence of life in prison, not subject to parole, for the gravest and most serious offense that can be committed in the state.

Regarding the second factor, this Court observed in *Carp*[84] that non-homicide offenses exist in Michigan that may be viewed as less grave or serious than first-degree murder, but for which all adult offenders will face mandatory life-without-parole sentences. "For instance, an adult who commits successive first-degree criminal sexual conduct offenses against an individual under the age of 13 faces a sentence of [mandatory] life without parole."[85] Given that the commission of a non-homicide offense by an offender over the age of 18 may result in the mandatory imposition of a life-without-parole sentence, it does not follow that sentencing an 18-year-old offender for the gravest and most serious homicide offense is categorically disproportionate compared to the penalties imposed on other offenders in the state.

Under the third factor, at least 19 states[86] and the federal government impose, at a minimum, mandatory sentences of life without

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[83] See Bullock, at 72-73 (Boyle, J.,concurring and dissenting).

[84] *Carp*, at 516.

[85] *Id.*, citing MCL 750.520b(2)(c).

[86] Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Pennsylvania, South Dakota, Wyoming.

BAUGHMAN – POOLE BRIEF
415

RECEIVED by MSC 1/18/2022 7:17:40 PM

parole for 1st-degree murder; Michigan's legislature is, then, not an outlier in penological choice.[87]

But the real issue here is that the defense argues that certain scientific evidence—that was not presented below—shows that, as a general matter, human brains are not fully mature at 18 years of age, so that what the defense opts to denominate "young adults" are not as mature in their decision making as those who are 25 years of age, and older. But the policy question is not whether those between the ages of 18 and 25 are as mature as those 25 years of age and older, but whether they are *sufficiently* mature so that, if they take another human life under circumstances constituting 1st-degree murder—here, a murder-for-hire—they, having committed the gravest crime, should suffer the gravest penalty. Defendant thinks not. The legislature thinks so. Those who think not are free to present their scientific evidence to the legislature and call for a change, a call to which the legislature may respond favorably, or to which the legislature may determine that those 18 years or older are sufficiently mature to suffer the penalty of life without parole for committing a 1st-degree murder. It was, after all, understood in *Roper* that full maturity may not arrive at the age of 18. But the Court said that while "[d]rawing the line at 18 years of age is subject, of course, to

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[87] Compare *People v Benton*, 294 Mich App 191, 206-207 (2011) (the third factor supported the constitutionality of a sentence when 18 other states imposed the same mandatory-minimum sentence as Michigan for the offense), with *Lorentzen*, 387 Mich at 179 (the third factor supported that a sentence was unconstitutional when "[o]nly one state, Ohio, has as severe a minimum sentence for the sale of marijuana as Michigan") and *Bullock*, 440 Mich at 37 (adopting Justice White's dissenting analysis from *Hamelin v Michigan*, 501 US 957, 1026; 111 S Ct 2680; 115 L Ed 2d 836 (1991) ("No other jurisdiction imposes a punishment nearly as severe as Michigan's for possession of the amount of drugs at issue here.").

BAUGHMAN - POOLE BRIEF
426

RECEIVED by MSC 1/18/2022 7:17:40 PM

the objections always raised against categorical rules," as "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18," it is also true that "[b]y the same token, some under 18 have already attained a level of maturity some adults will never reach." And thus a line must be drawn, and "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood."[88] The Court has repeatedly drawn that line, drawing it at 18 years of age in *Miller*, in a case involving 14-year-old defendants, where the Court could have drawn the line at a different, higher, age. This Court should leave the matter to the legislature.

C. Conclusion

On an early December morning Henry Covington left the house to start up his fiance's car to warm it up, as was his practice, before he drove her to work. When he did so, an assassin—defendant Poole—shot him, resulting in his death. The murder was a murder for hire—defendant killed Covington for money—$300—and kept phoning his uncle and codefendant, Harold Varner, who had paid him for the killing, for more money (in jurisdictions with the death penalty for murder, receiving payment for the murder is an aggravating factor for the death penalty).[89] Defendant committed a premeditated murder, ending another person's

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[88] *Roper v. Simmons*, 125 S. Ct. at1197–1198.

[89] See e.g. 18 U.S.C.A. § 3592(c)(8): "Aggravating factors for homicide.—In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist: ****(8) Pecuniary gain.—The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.