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STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal From the Court of Appeals:
Murray, P.J., and Borrello and Mariani, JJ.

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v.

JAMES GREGORY EADS
Defendant-Appellee. **No. 168205**

COA No. 357332
No. 92-007359-01-FC

APPELLANT'S BRIEF ON APPEAL

*****Oral Argment Requested*****

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Bessler, John, "The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century," Brit. J. Am. Legal Stud. 297 (2013) 28

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 (2012) 28

20 Fed. Prac. & Proc. Deskbook (2d ed.) 17

Philip B. Kurland, Politics, the Constitution, and the Warren Court(1970) 44

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Robert J. Martineau, "Considering New Issues on Appeal: The General Rule and the Gorilla Rule," 40 Vand. L. Rev. 1023 (1987) 21

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Statement of Jurisdiction

Defendant was convicted of 2nd-degree murder and sentenced to 50-75 years in prison on November 4, 1992. His conviction was affirmed on November 9, 1994, and this Court denied leave to appeal on September 19, 1995. On May 6, 2021, Third Circuit Court Judge Mark T. Slavens entered an opinion and order denying defendant's motion for relief from judgment. See MCR 7.212(C)(4)(a)(I). On May 28, 2021, defendant, through retained counsel, filed a delayed application seeking leave to appeal. See MCR 7.212(C)(4)(a)(iv); see also MCR 6.509(A). After the Court of Appeals denied the application on July 19, 2021, defendant sought review from this Court. On September 8, 2023, this Court, in lieu of granting leave to appeal, remanded the case for consideration as on leave granted. See MCR 7.305(H)(1). The court was to consider whether the defendant is entitled to relief under *People v.Boykin*, 510 Mich. 171 (2022), or *People v.Stovall*, 510 Mich. 301 (2022). *People v.Eads*, 512 Mich. 918 (2023). The Court of Appeals then granted defendant sentencing relief. *People v. Eads*, —Mich. App.—, 2025 WL 223470 (No. 357332, Mich. Ct. App. Jan. 16, 2025). The People sought leave to appeal, which this Court granted on September 10, 2025.

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Statement of Question Presented

I

The Court of Appeals here created a new constitutional rule, extending the new rule of *People v. Stovall* that paroleable life sentences are cruel or unusual punishment when imposed on murderers under the age of 18 to at least some term-of-years sentences for 2nd-degree murder imposed on murderers under the age of 18, applied People v. Boykin retroactively and misapplied it, and applied People v. Milbourn so as to find the sentence given disproportionate, though that argument was rejected over 30 years ago by that court, this Court then denying leave to appeal so that the conviction and sentence were final.

A. **Does People v. Stovall, by its terms or by creating a further new rule, apply to term-of-years sentences?**

The People answer NO

B. **If so, is the finding of proportionality on appellate review 30 years ago law of the case?**

The People answer YES

C. **Is *People v. Boykin* retroactive on collateral review, and even if so, does it entitle defendant to relief here?**

The People answer NO

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Statement of Facts

Background facts, conviction, sentencing, and direct appeal

On May 19, 1992, 16-year-old defendant James Eads, a member of the Latin Counts, was a passenger in a car when he spotted 17-year-old Eric Kincaid, who was wearing a t-shirt with the name of a rival gang. Defendant told the driver to stop the car. Defendant exited the vehicle, produced a gun, and shot Kincaid in the chest, killing him.

On June 12, 1992, defendant stood mute at the arraignment on the charges of count 1: first-degree premeditated murder[1] and count 2: felony-firearm.[2] On October 1, 1992, a jury returned a verdict finding defendant guilty of second-degree murder[3] and felony-firearm.[4]

On the afternoon of November 4, 1992, defendant appeared, with attorney James Barney, for sentencing before Recorder's Court Judge John H. Hausner. Counsel for the parties reviewed the contents of the PSIR, and then reviewed the scoring of the judicial sentencing guidelines.[5] The court then heard from the victim's mother, who expressed her devastation over losing her only son,[6] and from one of the victim's sisters, who likewise described the senselessness of her brother's death.[7]

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[1] MCL § 750.316.

[2] MCL § 750.227b.

[3] MCL § 750.317.

[4] The jury therefore acquitted defendant of first-degree murder.

[5] Transcripts are cited in this brief as follows: month/day of proceeding, page number. See 11/04, 3-16.

[6] See 11/04, 25-27.

[7] See 11/04, 27-28.

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Because one of the key issues at the sentencing hearing was whether Judge Hausner was going to sentence defendant as a juvenile or as an adult, defense counsel made an impassioned argument for the court to hand down a lenient sentence, given defendant's troubled childhood and the strong possibility that, due to his youth, he had the potential to be rehabilitated.[8] Counsel's argument was based, in part, upon an evaluation done by a clinical psychologist, Donald M. Haytch, M.S.[9] The People strongly opposed the request to sentence defendant as a juvenile, pointing out "that the juvenile facility won't hold him past he's 19. For that, he's going to do two years? For Mr. Kincaid's life, he's going to do two years[?]"[10]

The court then heard from defendant, who allocuted at length.[11] Defendant apologized to the victim's family and then described his troubled upbringing, including how he came to become involved with the Latin Counts. Defendant focused on his age (17 at the time of sentencing) and his lack of maturity when making decisions.[12]

In handing down defendant's sentence, Judge Hausner made the following record:

> THE COURT: Well, I've read all the reports on this, and I apologize that you didn't get that one report. […] But I read it, and [Donald M. Haytch, M.S. is] the one person who recommended placement in a juvenile facility. But he's a person who speaks only from theory, Mr. Barney. All these people who have actually dealt with Mr. Eads have said that he has exhausted the facilities available in juvenile placement, and that he is a disruptive

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[8] See 11/04, 29-31.

[9] See 11/04, 22.

[10] 11/04, 32.

[11] See 11/04, beginning at 33.

[12] See 11/04, 35.

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influence on all the other people, and in fact in one of the facilities, he organized a gang, The Force, and physically assaulted other people who were inmates in those facilities.[13]

And I have to say this, Mr. Barney. I've been a judge for 17 years. I have never departed from the sentencing guidelines since they have been instituted, but I am going to depart from them in this case. If there was ever a crime that had no provocation at all to be committed, it's your client's. I don't care if the man wore a T-shirt that said 'Kill All Latin Counts' or 'Kill James Gregory Eads.' Shirts and words do not kill. He was driving by in a car. All he had to do was keep going. He didn't have to stop and do anything.

So—and I do not accept the philosophy that a person is—people commit crimes because of their environment. Many people who come from the same environment of Mr. Eads, the majority of them have remained law abiding citizens. That's not true.

All gangs are a tremendous evil in this society, especially in the area where he lives. In this case, I had to have one witness who was held in custody because of threats from gang members. We had another one we had to issue a warrant for their arrest because of threats from gang members. From the trial, we had at least two people. So, that influence is just tremendous in this area, and I think it's important for Mr. Eads and all members of gangs to realize that society does not tolerate that. The only rules that society tolerates are the rules that society creates, not the rules of some organization like a gang with special interests to enhance and promote their own membership.

And so, I find first of all there's nothing that a juvenile facility could do for him. First of all, I don't think he'd be there for 19 days let alone for 19—until he's age 19. Every opportunity he had being put in the juvenile facility, he didn't accept any help from that facility whatsoever. He would either truant himself or not participate in the classes, and would not avail himself of the help that was available to him, and this crime would have been avoided if he had done that.

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[13] Here, Judge Hausner was referring to the contents of the PSIR. See, e.g., ("While detained at the Wayne County Youth Home he has been described by Youth Home staff as threatening, intimidating, exhibiting terrorist type behavior, and insighting [sic] gang activity. […] Youth Home records indicate that the defendant formed 'a gang' called the 'Force' to intimidate, threaten, and even physically assault other residents.").

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> So, in this Court's view, there's nothing—he's exhausted anything that the juvenile facilities can give him. He would be disruptive to any juvenile facility, and in my opinion they would be unable to maintain him there even if he were sentenced as a juvenile.
>
> So, the decision of this Court—and as I say, I consider this to be the most unprovoked crime I've ever had in my 17 years as a judge. *There's no provocation, there's no reason to have killed this person*. Because they're wearing a shirt? How could you kill someone because they were wearing a shirt that is of a group that you dislike? I don't care what that shirt said. It could never be justification for killing anyone—
>
> […]
>
> So, I find first of all that he should be sentenced as an adult. Anyone who had dealt with him practically, has experienced dealing with him, says he should be sentenced as an adult. The only person contrary to that is a person who talked to him for a short period of time, and theoretically comes to a conclusion that I find completely unjustified by the practical experience of everyone who had dealt with him.
>
> And maybe your client can be rehabilitated, but I think it takes a long time for close supervision and training and demonstration—a long period of time, not just words—a long period of time under close supervision to develop the discipline and skills and self restraint that's needed in a civilized society like ours, and so other people also in the community who are gang members or think that—that there's any future or any benefit from gang membership will be dissuaded of it, and even [the victim's mother] said that she has been threatened because of her position of wanting Mr. Eads to be punished for what he did, and there's no doubt he committed the murder, and no doubt that he had no justification.[14]

Judge Hausner ordered defendant to serve an out-of-[judicial] guidelines sentence of 50 to 75 years of imprisonment for the crime of second-degree murder, to be served consecutively to a flat two years of imprisonment for felony-firearm.[15] In

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[14] 11/04, 36-40 (emphasis added).

[15] See 11/04, 40-41

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the court's view, this sentence gave defendant a chance for parole at an age where he would no longer be a danger to society.[16]

On January 19, 1993, defendant obtained appellate counsel and filed a claim of appeal in the Michigan Court of Appeals. See COA case no. 160735. On September 8, 1993, defendant filed his brief on appeal raising three issues, two of which related to sentencing: first, that he was entitled to resentencing because the judge had failed to provide his attorney with an opportunity to address the court before imposing the sentence; and second, that he was entitled to resentencing because the out-of-guidelines sentence he received was disproportionate to both the offense and the offender.[17] The guidelines employed were the judicial guidelines, the legislative guidelines not yet being in effect, and the judicial guidelines employed thus did not have the force of law.[18] In support of the latter argument, defendant focused, in part, on the fact that as a 16-year-old at the time of the offense, he could not be considered amongst the most serious class of offenders.[19]

On November 9, 1994, the Court of Appeals issued an unpublished per curiam opinion affirming defendant's convictions and sentences. With respect to the validity of defendant's sentence, the Court found as follows:

> We find no merit in defendant's arguments concerning the trial court's reasons for exceeding the guidelines' minimum sentence range for the second-degree murder conviction. Defendant was a member of a gang called 'The Latin Counts'. The court's reasons for departure included: that the attack resulting in the victim's death was unprovoked; defendant's gang activities; defendant's exhaustion of any rehabilitative services the juvenile facilities had

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[16] See 11/04, 41.

[17] Defendant's brief on appeal.

[18] *People v. Mitchell*, 454 Mich. 145, 176 (1997).

[19] See Defendant's brief. at page 23.

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> to offer; defendant's disruptive influence while in the juvenile facilities, including organizing a new gang while in one of the facilities and physically assaulting other inmates in those facilities; the need for a long period of rehabilitation under close supervision, and the need to deter others from becoming involved in gang memberships. While the trial court stated as one of its reasons for departure the actions of gang members towards witnesses, it was but one reason of many given for an upward departure from the sentencing guidelines.
>
> The court also noted that the defendant had a life expectancy of 53.11 years,[20] and that defendant's sentence should not afford him with a chance for parole until defendant reaches an age 'where he would not be a danger to society'. We find these reasons sufficient to depart upward from the sentencing guidelines' range.[21]

On September 19, 1995, this Court issued an order denying defendant's application seeking leave to appeal.[22]

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[20] This Court in *People v. Rushlow*, 437 Mich. 149, 155 (1991) allowed consideration of disciplinary credits in determining whether a term-of-years sentence was one the defendant had a reasonable prospect of actually serving but said that as to "special" disciplinary credits there was distinction, as the additional two days each month for good institutional conduct were awarded on the recommendation of the disciplinary credit committee and with the warden's consent, and thus on an ad hoc basis. The People believe that is not how the system works presently. It is the People's understanding that a prisoner in defendant's position receives 5 days of regular and 2 days of special disciplinary credits for each month that they serve major misconduct free, and that the time is assumed. Defendant, then, could receive 4200 days of credit (7 x 600 months), or 11.5 years (4200 divided by 365). This is not entirely accurate, however, as credits may only be earned or granted for the portion of the sentence that is actually served, and so would be reduced. And defendant has lost 2471 days of those credits (or 6.75 years) due to misconducts, forfeitures, and days not being granted during his annual time reviews, which is entirely his responsibility. And when he is paroled, Eric Kincaid, of course, will still be dead. See e.g. *People v. Nard*, —Mich. App—, 2025 WL 1559524 (No. 369185, Mich. Ct. App., June 2, 2025), where the defendant was convicted of the gruesome murders of *two* pre-teen boys in 1975 and resentenced from parolable life to 60 to 150 years after *Stovall* was decided, and, by the time of the appellate decision where defendant attacked *that* sentence, had been paroled, where serving a full 60 years would have placed parole sometime in 2035.

[21] Slip opinion.

[22] *People v. Eads*, 450 Mich. 865 (1995).

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Post-conviction proceedings and subsequent appeal

On January 19, 2021, defendant, through retained counsel, filed a motion for relief from judgment (MFRJ). In the motion, defendant argued that he was entitled to resentencing because "his sentence violates equal protection, based on [a] retroactive change in law[,]" that change supposedly being *Montgomery v.Louisiana*.[23] Specifically, defendant contended that he—a person who was convicted of second-degree murder under MCL 750.317—is being treated more harshly than juvenile defendants convicted of first-degree murder under MCL 750.316, as those defendants now have the *possibility* of receiving a more favorable term-of-year sentence under MCL 769.25 or MCL 769.25a[24]—they also, of course, have the possibility of receiving a sentence of life without parole, which defendant did not. Defendant also separately argued that Judge Hausner failed to conduct an individualized sentencing hearing and that he had failed to make adequate factual findings under *Miller*[25]—decided 24 years after his sentencing—at sentencing. In the prayer for relief, defendant asked for the trial court to order a new sentencing hearing, one that comports with *Miller's* requirements for those under 18 convicted of 1st-degree murder.

On May 17, 2021, Third Circuit Court Judge Mark T. Slavens issued an opinion and order denying defendant's motion.[26] In the opinion, the court, citing to the recent Supreme Court decision in *Jones v.Mississippi*,[27] rejected defendant's collateral attack on his sentence, as well as defendant's reliance upon *Miller* and *Montgomery*. Contrary to what was argued in defendant's MFRJ,

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[23] *Montgomery v.Louisiana*, 577 U.S. 190, 136 S.Ct. 718, 193 L.Ed. 2d 599 (2016).

[24] The brief filed in support of this argument constitutes one page.

[25] *Miller v.Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012).

[26] In accordance with MCR 7.205(B)(2), defendant filed a copy of the opinion with the court on May 28, 2021.

[27] *Jones v.Mississippi*, 539 U.S. 98, 141 S.Ct 1307, 209 L. Ed. 2d 390 (2021).

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Judge Slavens found that the United States Supreme Court had made clear in *Jones* that judges are not constitutionally required to provide an on-the-record sentencing explanation. Moreover, "[i]n a case involving an individual who was under 18 when he or she committed a homicide, a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient."[28] Because defendant had been sentenced in 1992 under a discretionary scheme, Judge Slavens found that defendant could not establish entitlement to relief under MCR 6.508(D)(3).

On May 28, 2021, defendant, through counsel, filed a delayed application seeking leave to appeal the trial court's order denying his MFRJ.[29] See MCR 6.509(A). This application raised two issues: (1) defendant's entitlement to relief under MCR 6.508(D)(3) because MCL 769.25 and MCL 769.25a violate the equal protection clause as applied to his sentence; and (2) defendant's entitlement to relief under MCR 6.508(D)(3) due to a retroactive change in the law (*Miller*) and Judge Hausner's failure to properly weigh the *Miller* factors at the 1992 sentencing hearing.

On July 19, 2021, the Court of Appeals issued an order denying defendant's application for his "failure to establish that the trial court erred in denying the motion for relief from judgment."

On August 8, 2021, defendant, through counsel, filed an application seeking leave to appeal in this Court raising the same two issues as were advanced in the Court of Appeals. See MCR 7.305(A). On January 4, 2023, this Court entered an order directing the Wayne County Prosecutor's Office to respond to the application. "In particular," the Supreme Court directed the People to address the following two new issues:

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[28] *Id.* at 1313.

[29] Defendant filed an amended delayed application on June 14, 2021.

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> (1) whether the trial court was required to consider the defendant's youth as a mitigating factor before sentencing him to a term of years for second-degree murder, see *People v.Boykin*, 510 Mich. __ (2022) (Docket No. 157738); and (2) if so, whether the trial court properly considered the defendant's youth as a mitigating factor in accordance with *Miller v.Alabama*, 567 US 460, 479 (2012), *Roper* v.*Simmons*, 543 US 551, 570 (2005), and *People v.Snow*, 386 Mich. 586, 592, 594 (1972).[30]

The order did not insert a cruel or unusual punishment issue. On March 1, 2023, the People filed an answer opposing defendant's application.

On May 28, 2023, the Criminal Defense Attorneys of Michigan (CDAM) filed a brief as amicus curiae—this brief injected another new issue into the case, to wit: whether a juvenile defendant's lengthy term-of-year sentence constitutes cruel and/or unusual punishment under article 1, §16 of the Michigan Constitution. In so arguing, amicus relied, in part, upon *People v.Stovall*, 510 Mich. 301 (2022). No cruel or unusual punishment argument was made in defendant's application for leave to appeal.

On September 8, 2023, the Court issued an order remanding "this case to the Court of Appeals for consideration as on leave granted" and directing the Court of Appeals to "consider whether the defendant is entitled to relief under *People v. Boykin*, 510 Mich. 171 (2022), or *People v. Stovall*, 510 Mich. 310 (2022),"[31] thus inserting the cruel or unusual punishment issue. Justices Viviano and Zahra dissented. In their view, neither *Boykin* nor *Stovall* was implicated in this case, making a remand to this Court wholly unwarranted.

On October 26, 2023, defendant, through counsel, filed his brief on remand.[32] The People filed their brief, and the Court of Appeals found the

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[30] *People v. Eads*, __ Mich. __; 982 N.W.2d 674 (2023). Justice Bolden did not participate in the Court's order.

[31] *People v. Eads*, 512 Mich. 918 (2023).

[32] Defendant filed a corrected brief on November 13, 2023, which was accepted on

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defendant's sentence to constitute cruel or unusual punishment, extending this Court's decision in *Stovall*, and also to be disproportionate,[33] despite the earlier appellate finding to the contrary, essentially ignoring it. The People sought leave, which this Court granted on September 10, 2025.[34]

November 21, 2023.

[33] *People v. Eads*, 2025 WL 223470, supra.

[34] *People v. Eads*, 25 N.W.3d 118 (Mich. 2025).

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Argument

I.

The Court of Appeals here created a new constitutional rule, extending the new rule of *People v. Stovall* that paroleable life sentences are cruel or unusual punishment when imposed on murderers under the age of 18 to at least some term-of-years sentences for 2nd-degree murder imposed on murderers under the age of 18, applied *People v. Boykin* retroactively and misapplied it, and applied *People v. Milbourn* so as to find the sentence given disproportionate, though that argument was rejected over 30 years ago by that court, this Court then denying leave to appeal so that the conviction and sentence were final.

Introduction: **standard of review, party presentation, and issue preservation**

A. The issues and the People's answer

This Court's order granting the People's application for leave to appeal specified that the issues to be briefed are whether the Court of Appeals erred by holding that:

- the defendant is entitled to relief under *People v Stovall*, 510 Mich. 301 (2022); and
- the defendant is entitled to relief under *People v Boykin*, 510 Mich. 171 (2022).[35]

The People answer that defendant is entitled to relief under neither for his murder of Eric Kincaid. But first, some remarks regarding the issues presented for decision.

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[35] Id.

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B. Party presentation

Defendant was sentenced over 32 years ago, which was before the legislative guidelines were enacted. This Court in its order of September 8, 2023, directed the Court of Appeals to consider this case as on leave granted and address whether the defendant is entitled to relief under *People v. Stovall* or *People v. Boykin*, cases decided three decades after the sentencing here, as defendant was sentenced on November 4, 1992, and decades after the direct appeal was concluded. At that time, the so-called "judicial" guidelines were in force, the legislature not yet having enacted guidelines, and the judicial guidelines did not have the force of law, so that even an error in scoring did not entitle a defendant to relief.[36] Sentences, whether within the guidelines or outside the guidelines, were reviewed for proportionality, with it being understood that there is no one proportionate sentence.[37] Though the guidelines had no force of law, this Court said nonetheless in *Milbourn* that sentences outside the guidelines provided an "alerting" circumstance to appellate courts:

> Even though sentencing within the guidelines is recommended rather than compulsory, departures from the guidelines, unsupported by reasons not adequately reflected in the guidelines variables, should nevertheless alert the appellate court to the possibility of a misclassification of the seriousness of a given crime by a given offender and a misuse of the legislative sentencing scheme.
>
> *****
>
> Where there is a departure from the sentencing guidelines, an appellate court's first inquiry should be whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines. A departure from the recommended range in the absence of factors not adequately reflected in the guidelines should alert the appellate court to the

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[36] *People v. Mitchell*, 454 Mich. 145, 176 (1997) ("*Milbourn*'s correct observation that guidelines do not have the force of law is controlling").

[37] *People v. Babcock*, 469 Mich. 247, 267 (2003).

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> possibility that the trial court has violated the principle of proportionality and thus abused its sentencing discretion. Even where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality. . . . [and] [i]n some cases, there may be important sentencing factors that are not included in the sentencing guidelines.[38]

But even review for proportionality was not de novo; "[w]e do not suggest that in the day-in-day-out review of sentencing issues appellate courts should simply substitute their judgment for that of the trial court. Indeed, such de novo review of sentences would be unprecedented in the realm of criminal appeals and at odds with any reasonable construction of the term 'abuse of discretion.'"[39]

Defendant raised the issue of the proportionality of his sentence in his appeal of right, alleging that "the 600 month minimum sentence, which constituted a departure from the guidelines, is disproportionate to the offense committed and the offender, and an abuse of discretion."[40] The Court of Appeals *rejected* the claim:

> We find no merit in defendant's arguments concerning the trial court's reasons for exceeding the guidelines' minimum sentence range for the second-degree murder conviction. Defendant was a member of a gang called "The Latin Counts." The court's reasons for departure included: that the attack resulting in the victim's death was unprovoked; defendant's gang activities; defendant's exhaustion of any rehabilitative services the juvenile facilities had to offer; defendant's disruptive influence while in the juveniles facilities, including organizing a new gang while in one of the facilities and physically assaulting inmates in those facilities; the need for a long period of rehabilitation under close supervision, and the need to deter others from becoming involved in gang memberships....The Court also noted that defendant had a life expectancy of 53.11 years, and that defendant's sentence should

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[38] *People v. Milbourn*, 435 Mich. 630, 659–660 (1990).

[39] *Id*., at 666.

[40] Defendant's Brief on Appeal, issue III.

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> not afford him with a chance for parole until defendant reaches an age where "he would not be a danger to society." We find these reasons sufficient to depart upward from the sentencing guidelines' range.[41]

This Court denied leave to appeal from this holding.[42] As to an "ordinary" proportionality claim (not one based on Article 1, § 16, which supposedly guards against not disproportionate sentences in the mind of an appellate court, but *grossly* disproportionate sentences set by the legislature,[43] so as to serve as a check on the legislature while avoiding the Court simply substituting its judgment for that of the legislature as a matter of policy), then, the claim is a decades delayed motion for reconsideration.

In 2021 defendant filed a motion for relief from judgment arguing that defendant's sentence constituted a violation of equal protection because defendants who were juveniles when committing their murders but committed 1st-degree rather than 2nd-degree murder were governed by a lower possibility of term of years—though they remained eligible for life without parole—and that the trial judge allegedly failed to properly weigh the "*Miller* factors" at the 1992 sentencing hearing for a 2nd-degree rather than 1st-degree murder. The Court of Appeals denied leave to appeal, and this Court, on defendant's application, directed the People to address two new issues not raised by the defendant; that is, "whether the trial court was required to consider the defendant's youth as a mitigating factor before sentencing him to a term of years for second-degree murder, see *People v. Boykin*," and "if so, whether the trial court properly considered the defendant's youth as a mitigating factor in accordance with *Miller*

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[41] *People v. Eads*, slip opinion, p. 1 (No. 160735, 11-9-1994).

[42] *People v. Eads*, 450 Mich. 865 (1995).

[43] See *People v. Bullock*, 440 Mich. 15, 35 (n. 17) (1992) ("the issue under Const. 1963, art. 1, § 16, as raised in these cases and others, concerns whether the punishment concededly chosen or authorized by the Legislature is so grossly disproportionate as to be unconstitutionally 'cruel or unusual'").

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v. Alabama."[44] No cruel or unusual punishment issue was added. After the People answered, this Court remanded to the Court of Appeals on the issues noted above, including whether defendant is entitled to relief under *Boykin*, decided 30 years after defendant's sentencing, or *Stovall*,[45] thus inserting the cruel or unusual punishment issue, though *Stovall*'s holding went to paroleable life sentences, *not* term-of-years sentences, and so defendant could not be entitled to relief by application of *Stovall* but only by an extension of the holding in that case.

MCR 7.305(H)(4)(b) provides that "On motion of any party establishing good cause, the Court may grant a request to add additional issues not raised in the application for leave to appeal or not identified in the order granting leave to appeal," and MCR 7.316(A)(3) provides that the Court may "permit the reasons or grounds of appeal to be amended or new grounds to be added." Though these rules suggest that the grounds for consideration may be expanded only on motion, there is no doubt that the Court can add issues on its own motion. And the Court regularly does so,[46] on occasion deciding a case on a ground not raised at all by the appellant,[47] sometimes even without briefing or argument on the question.[48] But when is this appropriate? And is the Court consistent in so doing?

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[44] *People v.Eads*, __ Mich. __, 982 N.W.2d 674 (2023). Justice Bolden did not participate in the Court's order. See *id.*

[45] *People v. Eads*, 512 Mich. 918 (2023).

[46] See e.g. such cases as *People v. Wilder*, 505 Mich. 1052 (2020), directing briefing as to "whether the harmless error test of *People v. Lukity* . . . should be refined or amended in all cases . . . or where the question turns on the evaluation of conflicting testimony at trial," though no such arguments were made in either the Court of Appeals or in the application for leave to appeal.

[47] See *People v. Temelkoski*, 501 Mich. 960 (2018),

[48] See *People v. McKinley*, 496 Mich. 410, 438 (2014) ("I also disagree with the majority's decision to disregard one of the foundational principles of our adversarial system of justice by failing to give each party an opportunity to be heard in order to assist this Court in understanding the issue before it." Cavanagh, J., dissenting).

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On the flip side, concerning the appellee, MCR 7.307 provides that "A party is not required to file a cross-appeal *to advance alternative arguments in support of the judgment* or order appealed" (emphasis supplied); rather, a cross-appeal is required from the appellee only "to seek *new or different relief* than that provided by the judgment or order appealed" (emphasis added). This is because a judgment of the trial court should be affirmed for *any reason supported by the record, even if not relied upon by the trial court*.[49] This principle is universal, and consistent with statements of the United States Supreme Court that it is "settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."[50] Further, there is a distinction between arguments and issues. Particularly when a case advances to the highest court of the jurisdiction, "[p]arties are not confined . . . to the *same arguments* which were advanced in the courts below upon a . . . question there discussed."[51] And

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[49] See *Allen v. USAA Cas. Ins. Co.*, 790 F.3d 1274, 1278 (CA 11, 2015). See *People v. Brownridge*, 459 Mich. 456, 462 (1999).

[50] *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 481, 96 S. Ct. 2158, 2159, 48 L. Ed. 2d 784 (1976). See also 20 Fed. Prac. & Proc. Deskbook § 111 (2d ed.) ("An appellee may defend a judgment on any ground consistent with the record, even if rejected in the lower court. But it cannot attack the decree with a view either to enlarging its own rights thereunder or to lessening the rights of its adversary unless it files a cross–appeal, whether what it seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below"); *Reed v. Commonwealth*, 834 S.E.2d 505, 509 (Va. App., 2019).

[51] *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 86, 108 S. Ct. 1645, 1655, 100 L. Ed. 2d 62 (1988); *Dewey v. Des Moines*, 173 U.S. 193, 197–198, 19 S.Ct. 379, 380–381, 43 L.Ed. 665 (1899).

And see Andrey Spektor, Michael A. Zuckerman, "Ferrets and Truffles and Hounds, Oh My: Getting Beyond Waiver," 18 Green Bag 2d 77, 79 (2014) (discussing the "oft-forgotten distinction between 'issues' and 'arguments': you cannot raise an entirely new issue on appeal, but you can, in some cases, make new arguments relating to an already-raised issue").

Recently this Court noted the distinction between issues and arguments where involved were two arguments but one issue under the Fourth Amendment:

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yet, though raising new arguments, even new issues, for the appellant on its own, and, as indicated, sometimes deciding the case on the new argument or issue without an opportunity for briefing and argument, the Court has on occasion considered additional *arguments* in *opposition* to reversal—that is, in *support* of the judgment—to be *waived* if not raised by the prosecutor in the Court of Appeals,[52] despite MCR 7.307(B) and the universal rule that the judgment may be

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> Defendants argue that plaintiffs cannot proceed with a trespass argument because it was not properly raised before the lower courts and is therefore unpreserved. But plaintiffs have consistently raised and presented a Fourth Amendment challenge . . . .That the United States Supreme Court recognizes two separate tests for determining whether a search has occurred under the Fourth Amendment does not change the fact that the underlying constitutional argument has been preserved. See *Yee v. Escondido* . . . .("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.... Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate claims. They are, rather, separate arguments in support of a single claim—that the ordinance effects an unconstitutional taking.").

Johnson v. VanderKooi, 509 Mich. 524 (2022), at FN 5.

[52] See, e.g, *People v. Walker*, 504 Mich. 267, 276 (2019) ("The prosecution argues for the first time in its supplemental brief to this Court that defendant waived any challenge to the instruction by approving of the instruction before it was given. The prosecution abandoned this theory"); *People v. McGraw*, 484 Mich. 120, 131 (2009) (but note that *McGraw* does not actually support *Walker*, which cites it, as *McGraw* said that "we do not contend that an appellee is required to file a cross-appeal to raise a waiver argument. We simply conclude that an appellee should *at some point* actually raise the waiver argument" (emphasis supplied). And so a new argument raised by the appellee in the Supreme Court in support of the judgment should be considered).

> And in *People v. Jemison*, 505 Mich. 352, 359 fn 4 (2020) this Court said: The prosecution argues that the defendant waived appellate review of this issue by failing to object in writing when it notified the defendant that it intended to admit Cutler's written report into evidence under MCR 6.202. In other words, the prosecution argues that a defendant's failure to comply with a court rule which governs the admissibility of an expert's report waives his constitutional right to confront the witness who authored the report. Merits aside, because the prosecution did not raise this argument before the Court of Appeals, we decline to address it. [citing *Walker* and *McGraw*].

Without noting the irony, the Court later overlooked defendant's failure to argue *Crawford v. Washington*, 541 US 36, 124 S.Ct.1354, 158 L.Ed. 2d 177 (2004) in the Court of Appeals ("Perhaps because the defendant did not cite *Crawford* in his briefing in the Court of Appeals, or perhaps because this Court has cited *Craig* without the need to consider

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affirmed on any ground supported by the record, along with the requirement in MCL § 769.26 that "***No*** judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice" (emphasis supplied).

In *Michigan Gun Owners, Inc. v. Ann Arbor Pub. Sch.,*[53] this Court rejected Justice Markman's attempt to resolve the case on an *argument* not raised by a party as to the issue in the case, calling it a "judicial overreach," and saying that "[i]f it is truly 'of no consequence [that the party had not made the argument],' best we ditch the adversarial system of law today, as under the dissent's approach we the Court will always know not only the better answer than any supplied by the parties *but even the better questions than those asked by the parties*."[54] And not long ago, Justice Viviano, concurring in the denial of leave to appeal, responded to the dissenting justice by saying that "it is not our role to find and develop unpreserved arguments on behalf of litigants. See *Carducci v. Regan*, 230 U.S. App. D.C. 80, 86, 714 F.2d 171 (1983) (Scalia, J.) ('The premise of our adversarial system is *that appellate courts do not sit as self-directed boards of legal inquiry and research*, but essentially as arbiters of legal questions presented and argued by the parties before them')."[55] Yet Justice Scalia, obviously a strong

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Crawford's sea change to Confrontation Clause jurisprudence . . . the Court of Appeals did not address *Crawford*").

[53] *Michigan Gun Owners, Inc. v. Ann Arbor Pub. Sch*., 502 Mich. 695 (2018).

[54] Id., at 710 (emphasis added).

[55] See *People v. Worthington*, 503 Mich. 863 (2018) (Viviano, J., concurring). And see *Greenlaw v. United States*, 554 U.S. 237, 243–44, 128 S. Ct. 2559, 2564, 171 L. Ed. 2d 399 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of

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proponent of the party-presentation principle, concurred in the reversal of the Court of Appeals in *United States v. Burke*,[56] though his rationale was, he acknowledged, one that the United States as appellant had neither argued below nor in the Supreme Court, a rationale going to the nature of the claim raised itself. Justice Scalia emphasized the importance of the principle of party presentation, which, he said "is more than just a prudential rule of convenience," as "its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one."[57] Nonetheless, he believed that deciding the case on the basis he suggested was appropriate, for the reason that "there must be enough play in the joints that the Supreme Court need not render judgment on the basis of a rule of law *whose nonexistence is apparent on the face of things*, simply because the parties agree upon it—particularly when the judgment will reinforce error already prevalent in the system."[58]

Despite the statements in *Michigan Gun Owners* and *People v. Worthington*, the Court *does* raise arguments and issues not raised in the

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neutral arbiter of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a pro se litigant's rights. . . . But as a general rule, '[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief')."

And only recently in *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579, 206 L. Ed. 2d 866 (2020) the Court reversed the 9th Circuit's "takeover of the appeal," saying that "Courts are essentially passive instruments of government. . . . They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties" (cleaned up). The Court recognized that the "party presentation principle is supple, not ironclad," but found that the actions of the panel of the 9th Circuit had gone "well beyond the pale." See also *Clark v. Sweeney*, –U.S.–, 2025 WL 3260170, at 1 (U.S.. Nov. 24, 2025) ("To put it plainly, courts 'call balls and strikes'; they don't get a turn at bat," citing *Sineneng-Smith*).

[56] *United States v. Burke*, 504 U.S. 229, 246, 112 S. Ct. 1867, 1877, 119 L. Ed. 2d 34 (1992) (Scalia, J., concurring).

[57] Id., 112 S.Ct. at 1877.

[58] Id.

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application,[59] sometimes, as the People have noted, deciding cases on these issues, and, on occasion without opportunity for briefing and argument. Given that this is so—and it is certainly sometimes appropriate for the Court to direct briefing on additional *arguments*—the People suggest the Court at some point—perhaps even here—consider setting out some principle for when the raising of an argument by the Court not raised by the appellant is appropriate,[60] and, most particularly, also at some point establish that the raising of additional arguments by the appellee to *support* a judgment is permissible, so long as supported by the record.[61] It is, the People submit, inappropriate for the judiciary to act as a "self-directed board of legal inquiry and research" for the appellant by raising additional *issues*, while denying to the appellee additional arguments in *support* of the judgment, *arguments* raised by the appellee him or herself and *not* the Court; the former should be rare, the latter should always be permissible,[62] especially given this Court's duty under MCL § 769.26.

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[59] See recently *In re Baby Boy Doe*, 509 Mich. 1056 (2022) ("we directed the parties to brief the unraised and unpreserved issue of 'whether application of the [Safe Delivery of Newborns Law (SDNL), MCL 712.1 et seq.,] violates the due process rights of an undisclosed father'") (Welch, J., concurring).

[60] See Timothy A. Baughman, "Appellate Decision Making in Michigan: Preservation, Party Presentation, and the Duty to 'Say What the Law Is'," 97 U. Det. Mercy L. Rev. 223, 245-57 (2020); Robert J. Martineau, "Considering New Issues on Appeal: The General Rule and the Gorilla Rule," 40 Vand. L. Rev. 1023, 1060 (1987).

[61] The Supreme Court routinely disallows the People to raise a new *argument* when they are acting as the appellee defending a judgment. See, e.g., *People v. Jemison*, 505 Mich. 352, 359 n 4394 (2020), citing *People v. Walker*, 504 Mich. 267, 276 n 3 (2019) and *McGraw*, 484 Mich. at 131 n 36. The People are aware of no case in which the Supreme Court has added a new (and potentially helpful) issue to their appeal when they are acting as the appellant, such as that which occurred here. To the extent that the Supreme Court exercises its inherent authority to interject new issues into cases, that authority should, at a minimum, be exercised in an even-handed manner and not done routinely in favor of only one class of litigants.

[62] And there is no unfairness to the appellant, who may respond by way of a reply brief, allowed under the rules. MCR 7.305(E); MCR 7.312(E).

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Here, the Court raised not an additional *argument* but a new *issue* for the defendant-appellant, and this, the People believe, is not appropriate. As the United States Supreme Court has said, rejecting the raising of a issue raising a new statutory argument, "[i]t is true that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.' . . . But this principle stops well short of legitimizing Exxon's untimely motion. If 'statutory preemption' were a sufficient claim to give Exxon license to rely on newly cited statutes anytime it wished, *a litigant could add new constitutional claims as he went along, simply because he had 'consistently argued' that a challenged regulation was unconstitutional."*[63] Here a claim under equal protection and one of a supposed improper consideration and weighing of defendant's youth is not a claim of cruel or unusual punishment but adds a "new constitutional claim" to the case "as it goes along."

B. Preservation and standard of review

A defendant's obligation to preserve issues for appellate review applies to all claims of error.[64] The cruel or unusual punishment claim was not raised in the motion for relief from judgment (MFRJ) that defendant filed in the trial court, and so Judge Slavens did not address it in his opinion and order denying defendant's MFRJ.[65] Because defendant never raised this issue when his case was in the trial court,[66] it is unpreserved for appellate review.

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[63] *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487, 128 S. Ct. 2605, 2617–18, 171 L. Ed. 2d 570 (2008) (emphasis supplied).

[64] See *People v.Carines*, 460 Mich. 750, 767 (1999); *People v.Carter*, 462 Mich. 206, 214 (2000)' *People v.Metamora Water Service, Inc.*, 276 Mich. App. 376, 382 (2007).

[65] See *supra* at footnote 30.

[66] Although the opinions in *Boykin* and *Stovall* were released after defendant filed his MFRJ on January 19, 2021, the legal issues addressed in each case could have been raised in defendant's MFRJ. For example, *Boykin* affirmed *People v.Wines*, 323 Mich. App.

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This Court reviews unpreserved claims of error—both constitutional and non-constitutional—for plain error affecting substantial rights.[67] To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third prong requires a showing of prejudice, which is defendant's burden to bear. Finally, even if defendant establishes each of these three elements, "an appellate court must exercise its discretion in deciding whether to reverse. Reversal is only warranted when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence."[68]

Discussion

A. *Stovall* does not apply to term-of-years sentences

The cruel or unusual claim raised by this Court is not a federal constitutional claim but one based on the Michigan Constitution, as this Court's holding, by a bare majority, in *Stovall* that a paroleable life sentence for a juvenile

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343 (2018), rev'd on other grounds 506 Mich. 954 (2020), which held that "the constitutional holding in *Miller* applied only in life-without-parole decisions and does not constitutionally compel a sentencing judge to consider only the factors defined in *Miller* when the sentence of life imprisonment without parole is not sought by the prosecutor per MCL 769.25a." *Id.* at 350. *Wines*, however, went on to hold that because there were no sentencing guidelines to help the judge exercise his discretion when fashioning a sentence under the statute, the judge should consider traditional penological goals of sentencing, including the offender's age. See *id.* at 350-352. This holding, which was affirmed in *People v.Boykin*, 510 Mich. 171, 192-193 (2022), was not cited in defendant's MFRJ, nor did the motion refer to *Wines* at all. Defendant could have challenged the constitutionality of his sentence as cruel or unusual punishment on its receipt or when the case was on direct appeal. See, e.g., *People v.Bullock*, 440 Mich. 15 (1992) (discussing cruel or unusual punishment under the Michigan Constitution)—*Bullock* was released months prior to defendant's sentencing hearing in this case. Defendant, however, failed to do so and provides no explanation for this failure, contrary to MCR 6.508(D)(3)(a).

[67] See *Carines*, 460 Mich. at 764; see also *People v.Bowling*, 299 Mich. App. 552, 557-560 (2013); *People v.Burkett*, 337 Mich. App. 631, 635-642 (2021).

[68] *Id.* at 763-764 (cleaned up).

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convicted of 2nd-degree murder is cruel or unusual punishment is a *state* constitutional decision. No cruel or unusual punishment issue was raised at sentencing, the direct appeal, the motion for relief from judgment, or the applications from the trial court decision on the motion for relief from judgment. The Court of Appeals found there was "good cause" (though the issues were not raised in the motion for relief from judgment) under MCR 6.508(D)(3)(a)-(b) because *Miller v. Alabama*,[69] an opinion that construed the Eighth Amendment of the United States Constitution and not a provision of the Michigan Constitution, had not yet been decided at the time of the direct appeal. *Miller*, of course, precludes no sentence for a juvenile, prohibiting, instead, the imposition of life without parole *automatically* on conviction without consideration of the "mitigating factors of youth." But the sentence is still available, and the rule applies only to 1st-degree murder and automatic sentences to life without parole. The Court of Appeals concluded that given *Miller*'s Eighth Amendment ruling as to juveniles and automatic sentences to life without parole for 1st-degree murder, as well as *Stovall*, it was free to create a new rule under the Michigan Constitution, Article 1, § 16, that a term-of-years sentence for 2nd-degree murder committed by a juvenile may be cruel or unusual punishment if an appellate court finds it disproportionate (grossly?—the term does not appear in the *Stovall* opinion either),[70] extending this Court's decision in *Stovall* that a parolable life sentence for a juvenile 2nd-degree murderer is cruel or unusual punishment under the Michigan Constitution, in large part because it would not be "on the table" for a juvenile convicted of 1st-degree murder to be sentenced as Eads has been (though that juvenile could receive a sentence of life without parole); permitting such sentencing 'for a less serious offense is disproportionate and therefore cruel

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[69] *Miller v.Alabama*, supra.

[70] Cf. *People v. Bullock*, 440 Mich. 15, 32 (1992) ("Whatever the legal terms 'cruel' and 'unusual' were understood to mean in 1791 when the Eighth Amendment was ratified—or in 1689 when its antecedent, the English Bill of Rights, was adopted—by 1963 those words had been interpreted and understood by . . . this Court for more than half a century to include a prohibition on *grossly disproportionate* sentences" (emphasis supplied).

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or unusual,"[71] the court ignoring that life without parole is "on the table" for a juvenile convicted of 1st-degree murder.

1. *Stovall* was wrongly decided

Make no mistake; the People believe that *Stovall* was, for the reasons stated by the three dissents, wrongly decided and should be overruled. There the Court repeated its *ipse dixit* that "the textual difference between Michigan's prohibition on 'cruel or unusual punishment' and the Eighth Amendment's bar on 'cruel and unusual punishments,' the historical circumstances when the Eighth Amendment was ratified, and longstanding Michigan precedent call[] for a broader interpretation of Michigan's prohibition against 'cruel or unusual punishment' than the Supreme Court's interpretation of the federal counterpart."[72] But the Court has never explained *why* this textual difference results in a different understanding, other than noting it, despite the fact that there is a large volume of historical evidence to the contrary. Though the People are under no illusion that the Court may revisit its thinking on the question, "it is beyond human nature to

[71] *People v. Eads*, No. 357332, 2025 WL 223470, at 9 (Mich. Ct. App. Jan. 16, 2025).

[72] *Stovall*, at 313–314.

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leave unanswered"[73] the unanswered question in *Stovall* and its antecedents: how and why does the textual difference make a difference?

That there *is*, of course, a textual difference between the Eighth Amendment and Article 1, § 16, is unassailable—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*[74] said that the "difference does not appear to be accidental or inadvertent." But no proof was offered for this

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[73] *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 981, 112 S. Ct. 2791, 2875 (1992) (Scalia, J., dissenting), overruled by *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022).

The People also note that the Court of Appeals here created a new rule in a motion for relief from judgment rather than "basing" its ruling on a retroactive change in the law. MCR 6.502(G)(2) provides that "A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion." The "change *in law*" that has occurred is that now life with parole is, though a statutorily permissible sentence for a juvenile, barred by this Court for juveniles. The Court of Appeals has held here that a lengthy term-of-years sentence may be cruel and unusual sentence for a juvenile murderer. But this is a second new rule after *Stovall*. As the third circuit put it in *In re Rosado*, 7 F.4th 152, 158–160 (CA 3, 2021), to rely on a new rule "a prisoner must show that *his case plausibly falls within the rule's limits.*" And Justice Viviano in his dissent agreed with *Donnell v United States*, 826 F.3d 1014, 1016 (CA 8, 2016), where the court explained that "A claim 'relies on' a new rule when it is 'based on' a new rule .... A claim is truly "based on" a new rule only when the new rule recognizes the right asserted. . . . Where a claim depends on recognition of a second new rule, the claim is best understood as relying on that second rule for a grant of relief." *See Stovall*, at 366-367 (Viviano, J., dissenting). Further, said the Eighth Circuit in *Donnell*, "[i]t is not enough for the successive motion to cite a new rule that merely serves as a predicate for urging adoption of another new rule that would recognize the right asserted by the movant." And the Eleventh Circuit in *In re Thomas*, 823 F.3d 1345, 1348 (CA 11, 2016) held that "it is not enough for a federal prisoner to simply identify [the new Supreme Court decision] as the basis for the claim or claims he seeks to raise in a second or successive § 2255 motion, but also must show that he falls *within the scope* of the new substantive rule announced in [that new Supreme Court decision]" (emphasis added).

But as with the cruel or unusual punishment holding of *Stovall*, the People have no illusions that the Court will reconsider its expansive view of MCR 6.502(G)(2), though they urge the Court to do so. See *Mr. Smith Goes to Washington* (1939), speech by Jefferson Smith: "you fight for the lost causes harder than for any others."

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

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assertion beyond the very fact of the textual difference.[75] And there *is* historical evidence. 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, the 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.

- 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

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

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

- [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.[77]

- [N]either the Framers nor their English predecessors attributed much difference between the phrases cruel *and* unusual and cruel *or* unusual. . . . "the available evidence indicates that the Founders understood [both formulations] to *capture the same meaning*."[78]

And in the debate on ratification of the Constitution, where much concern was expressed regarding the absence of a Bill of Rights, the disjunctive and conjunctive were used interchangeably, and "cruel" and "unusual," however expressed, referred to a unitary concept. At the Massachusetts Ratifying Convention, Abraham Holmes complained that in the absence of a Bill of Rights

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

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

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

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Congress was not "restrained from inventing the most cruel *and unheard of* punishments . . . RACKS and GIBBETS, may be amongst the most mild instruments of their discipline."[79] The minority dissent of the Pennsylvania Ratifying Convention offered a series of suggested amendments to the proposed Constitution, including that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel *nor* unusual punishments inflicted."[80] The New York ratifying convention proposed amendments to the proposed Constitution constituting a Bill of Rights, and including that "excessive bail ought not to be required, nor excessive fines imposed; nor cruel *or* unusual punishments inflicted."[81] The North Carolina ratifying convention resolved that there should be a Declaration of Rights added to the proposed Constitution, to include a provision that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel *and* unusual punishments inflicted."[82] The phrases were used interchangeably, and 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

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

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

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

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

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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.

And as to text itself, this Court said in *Bullock* that "it seems self-evident that *any* adjectival phrase in the form 'A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B.'"[83] But this is not necessarily so. While "and" is generally taken to be "used to join words or groups of words; added to; plus," "[o]r, on the other hand, while used as 'expressing an alternative, contrast, or opposition," is also often used "to indicate ... (3) the synonymous, equivalent, or substitutive character of two words or phrases,' as in '[the off [or] far side], [lessen [or] abate].'"[84] 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."[85]

Whether the phrase "cruel and unusual" or "cruel or unusual is employed, it is the *mode* of punishment rather than its length at which the prohibition is aimed. As Justice Cooley said:

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

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

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

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> 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 offense may be punished to the extent permitted by the common law for similar offenses. 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. We may well doubt the right to establish the whipping-post and the pillory in States where they were never recognized as instruments of punishment, or in States whose constitutions, revised since public opinion had banished them, had forbidden cruel and unusual punishments. In such a case, *the public sentiment had condemned them as cruel*, and they had not merely become unusual, but altogether ceased to be inflicted.[86]

It is rather shocking that today, rather than "public sentiment condemning" a particular punishment as cruel through the enacted political representatives in whom rests the responsibility for the creation of offenses and the establishment of punishments for their violation, the judiciary views *itself*—an elite group—as "the public." In *People v. Taylor*,[87] this Court extended its expansion of Michigan's cruel or unusual prohibition in *People v. Parks*[88] to 18-year-olds to 19- and 20-year-olds. The Court said that what constitutes cruel or unusual punishment is guided by " 'evolving standards of decency that mark the progress of a maturing society,'" and that "[t]he definition of this standard is

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[86] Thomas M. Cooley, *Constitutional Limitations* (1868), p 338-339 (emphasis supplied).

And see *Harmelin v. Michigan*, 501 U.S. 957, 985, 111 S. Ct. 2680, 2696, 115 L. Ed. 2d 836 (1991) ("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."

[87] *People v. Taylor*, — Mich. —, 2025 WL 1085247 (No. 166428, Mich. Apr. 10, 2025).

[88] *People v Parks*, 510 Mich. 225 (2022),

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progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'"[89] To say this is to say:

> it is for *us* (the judiciary) to judge, not on the basis of what we perceive [Article I, § 16] originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think "proportionate" and "measurably contributory to acceptable goals of punishment"—to say and mean that, is to replace judges of the law with a committee of philosopher-kings.[90]

After all, it is not the case that all significant questions of public policy are left to the judiciary, with only trivial or mechanical issues left to the legislature. If public sentiment viewed the penalty for those under 18 for 2nd-degree murder as inhumane, one would expect to see it expressed through the political representatives of the State. How are seven—or six, or five, or four—lawyers better equipped?

But failing reconsideration, *Stovall* should at least be limited to its holding.

2. Review of individual sentences within a legislative range is for an abuse of discretion guided by proportionality

In *Stovall* the defendant, who had murdered two people *in separate incidents*, pled guilty to both in avoidance of a trial for 1st-degree murder, with a sentence agreement of life, subject to parole. This Court held that a parolable life sentence for a juvenile violates Michigan's cruel or unusual punishment provision[91] (meaning the plea terms can no longer be carried out, and the

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[89] *Taylor*, 2025 WL 1085247, at 3.

[90] *Stanford v. Kentucky,* [492 U.S. 361, 379, 109 S.Ct. 2969, 2980, 106 L Ed 2d 306 (1989)." (Opinion of Scalia, J., emphasis in original.)

[91] There are, of course, many other offenses punishable by a sentence of "life or any term of years," which, presumably, are no longer punishable by life for a juvenile offender. See e.g., among many others, armed robbery, criminal sexual conduct in the 1st degree, assault with intent to murder; assault with intent to rob, kidnaping; carjacking; torture; 1-

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prosecutor, if she wished, could withdraw the plea and take the case to trial on 1st-degree murder[92]). As to lengthy term-of-year sentences, though the Court expressed "no opinion on whether a long term-of-years sentence imposed on a juvenile would violate Const. 1963, art. 1, § 16," it noted that although "[a] trial court could impose a long term-of-years sentence that would theoretically deprive a defendant of any chance of being paroled during their lifetime. . . . such a defendant, unlike a paroleable lifer, would have an early release date and therefore be given higher priority for scarce rehabilitative and educational programming. . . . Other considerations also *make a term-of-years sentence less harsh than a life sentence*. For example, a prisoner subject to a term-of-years sentence is generally considered for parole at no more than two-year intervals, but a paroleable lifer is reviewed only at five-year intervals after serving 15 years of their sentence."[93] And so *Stovall* itself recognizes the distinction between paroleable life sentences and term-of-years sentences.

The Court of Appeals nonetheless here found that the 50-75 year sentence imposed "violates the Michigan Constitution's prohibition against cruel or unusual punishment."[94] But review of term-of-years sentences within the legislatively authorized range makes little sense given this Court's establishment of a standard of measure to be employed by sentencing judges—proportionality—and review by an appellate court of an exercise of a trial judge's sentence discretion for an abuse of discretion, guided by the principle of proportionality. If the proportionality decision of a sentencing judge is subject to appellate review for something other (lesser) than whether it is

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degree arson, and many others.

[92] See *People v. Smith*, 502 Mich. 624 (2018).

[93] *Stovall*, at 315, FN 3.

[94] *People v. Eads*, —Mich. App.—, 2025 WL 223470, at 1 (No. 357332, ,Mich. Ct. App. Jan. 16, 2025), appeal granted, 25 N.W.3d 118, 2025 WL 2618729 (Mich. 2025).

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unconstitutional—that is, grossly disproportionate[95]—reviewing the same sentence for whether it is cruel or unusual—as the Court of Appeals did here—is more than passing strange. The legislatively authorized maximum penalty may be reviewed for constitutionality as to whether, when imposed, it is grossly disproportionate, but, as the Ohio Supreme Court has put it, sentences "within the range of penalties authorized by the legislature . . . are not grossly disproportionate or shocking to a reasonable person or to the community's sense of justice and do not constitute cruel and unusual punishment."[96]

Review of *any* sentence[97] in Michigan goes to whether the proportionality decision by the sentencing judge is an abuse of discretion.[98] That decision was made here 31 years ago and the sentence affirmed. This Court denied leave to appeal from that decision 30 years ago. Unless not only are precedents to be "up for grabs from scratch" but also individual sentencing decisions that have been affirmed, sentencing review in this case should be over. Again, on this issue the

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[95] See *Bullock*, supra.

[96] *State v. Hairston*, 888 N.E.2d 1073, 1079 (OH, 2008).

[97] If *People v. Posey,* 512 Mich. 317 (2023) is ultimately confirmed by a rationale endorsed by a majority of the Court, as the various statements that MCL § 769.34(10) is unconstitutional are not binding beyond the parties, as no rationale is endorsed by a majority of the Court. See *People v. Anderson*, 389 Mich. 155, 170 (1973), overruled on other grounds by *People v. Hickman*, 470 Mich. 602 (2004) ("The clear rule in Michigan is that a majority of the Court *must agree on a ground for decision in order to make that binding precedent for future cases*. If there is merely a majority for a particular result, then the parties to the case are bound by the judgment, but *the case is not authority beyond the immediate parties*" (emphasis supplied). See also *Spectrum Health Hosps. v. Farm Bureau Mut. Ins. Co. of Michigan*, 492 Mich. 503, 535 (2012); *Auto-Owners Ins. Co. v. All Star Lawn Specialists Plus, Inc*., 497 Mich. 13, 21 (2014); *Frankenmuth Mut. Ins. Co. v. Masters*, 460 Mich. 105, 115 (1999).

[98] *People v. Steanhouse*, 500 Mich. 453, 471 (2017) (the appellate inquiry is "whether the trial court abused its discretion by violating the principle of proportionality"). See also *People v. Posey*, supra at 325 (opinion of Bolden, J.).

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case is a decades-old motion for reconsideration. The Court of Appeals should not have considered the proportionality of the sentence, and it did so without even mentioning that 31 years ago it had done so.

B. The opinion of the Court of Appeals majority mistakenly applied *Boykin* retroactively and incorrectly

1. *Boykin* is inapposite here

The defendant in *Boykin* was a juvenile convicted of 1st-degree murder and sentenced to serve a term of years under MCL § 769.25a(4)(c). This Court held "that trial courts must *consider* a juvenile defendant's youth to be a mitigating factor when sentencing [him] to a term-of-years sentence[] under MCL 769.25 or MCL 769.25a; however, we find no basis for requiring trial courts to articulate on the record how a defendant's youth affected the decision."[99] The Court of Appeals applied its new rule extending *Boykin* to 2nd-degree murder term-of-year sentences retroactively to cases on collateral review (this case), saying that "it is clear from the existing record that the court in this case did not consider Eads's youth and its attendant characteristics as potentially mitigating factors. In justifying its sentence, the court described the murder as 'the most unprovoked crime' it had ever seen, emphasizing that a phrase on a t-shirt 'could never be justification for killing anyone,'" saying that the trial court had "dismissed the very notion that such characteristics [those of youth] might have a mitigating effect and instead considered them as aggravating factors in support of a significant departure sentence—an approach plainly contrary to *Miller* and its progeny."[100]

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[99] *Boykin.* at 177; see also *id.* at 189 ("We thus hold, consistent with the [United States] Supreme Court's repeated recognition of youth's effect on sentencing and our own sentencing jurisprudence, that in all sentencing hearings conducted under MCL § 769.25 or MCL § 769.25a, trial courts are to consider the defendant's youth and must treat it as a mitigating factor.").

[100] *People v. Eads*, 2025 WL 223470, at 11.

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But *Boykin* is inapposite. *Boykin* says that "in all sentencing hearings *conducted under MCL 769.25 or MCL 769.25a*, trial courts are to consider the defendant's youth and must treat it as a mitigating factor."[101] The defendant in this case was *not* sentenced to serve a term of years under MCL 769.25 or MCL 769.25a—these statutes were enacted more than two decades after his conviction and apply only to juvenile offenders convicted of 1st-degree murder. Defendant, instead, was sentenced under the *judicial* sentencing guidelines applicable to the crime of 2nd-degree murder, and, because these guidelines were created by this Court and promulgated by administrative order, they did not have the force of law. Sentencing judges, therefore, were "not necessarily obligated to impose a sentence within" the calculated range.[102] The guidelines, instead, "were 'mandatory' only in the sense that the sentencing court was obligated to follow the procedure of 'scoring' a case on the basis of the circumstances of the offense and the offender and articulate the basis for any departure from the recommended sentence range yielded by this scoring."[103] For these reasons, the Supreme Court's holding in *Boykin* simply does not apply to defendant.[104]

This Court has made clear that sentencing judges in this state have never been required—either by statute or by the constitution—to provide "an on-the-record explanation of the mitigating circumstances of youth *in term-of-years* cases."[105] All that is required is that the judge consider the offender's youth and

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[101] *Boykin*, at 189 (emphasis added).

[102] *People v.Hegwood*, 465 Mich. 432, 438 (2001).

[103] *Id.*

[104] See *People v. Eads*, 512 Mich. 918 (2023) (Viviano, J., dissenting) ("However, defendant in the present case was not sentenced under MCL 769.25 or MCL 769.25a, and *Boykin* did not broadly hold that trial courts must consider youth to be a mitigating factor in all sentencing proceedings.").

[105] *Boykin.* at 191 (emphasis in the original); see also *id.* at 192 ("[N]one of this Court's sentencing jurisprudence requires trial courts to fulfill these responsibilities by articulating specific factors on the record. Instead, our sentences must follow the principle

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then "adequately explain [his] sentence on the record in order to facilitate appellate review."[106] This point was emphasized by the United States Supreme Court in *Jones v. Mississippi*[107]*:* "First, and most fundamentally, an on-the-record sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth."[108]

Here, review of the record shows both that Judge Hausner considered defendant's youth at the 1992 sentencing hearing and that he provided a detailed sentencing explanation in support of the resulting out-of-guidelines sentence.[109] This record was more than sufficient to facilitate appellate review,[110] and defendant's youth was argued to the judge. The sentence was not an abuse of discretion, as previously ruled.[111] Surely, the trial judge was not disabled from taking into account that multiple attempts had been made previously with regard to defendant' conduct, but none with success.[112]

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of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender").

[106] *Id.* at 194.

[107] *Jones v. Mississippi*, 593 U.S. 98, 114, 141 S. Ct. 1307, 1319, 209 L. Ed. 2d 390 (2021).

[108] Id., 141 S.Ct. at 1319-1320.

[109] See generally 11/04, 29-31 (defense counsel specifically focusing on his client's home life and youth), 31-33 (prosecutor making a sentencing argument based on defendant's age), 33-6 (defendant highlighting his troubled childhood and his status as a 17-year-old at the time of sentencing), 36-40 (judge's sentencing decision).

[110] As discussed above, two out of the three issues defendant raised on direct appeal concerned the propriety of his sentence. This Court affirmed in a unanimous per curiam opinion.

[111] See the dissent of Judge Murray in the Court of Appeals.

[112] See sentencing transcript, quoted in the Statement of Facts: "All these people who have actually dealt with Mr. Eads have said that he has exhausted the facilities available in juvenile placement, and that he is a disruptive influence on all the other people, and in fact in one of the facilities, he organized a gang, The Force, and physically assaulted other people who were inmates in those facilities."

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2. *Boykin*, at least as applied to term-of-years sentences for offenses other than 1st-degree murder, should not apply retroactively on collateral attack

Nor should *Boykin* as applied to term-of-years sentences for crimes other than 1st-degree murder be retroactive to cases on collateral review, and so even *Boykin* read more broadly than its plain holding should afford defendant no relief. In *People v. Poole,*[113] this court rejected "the prosecution's invitation to abandon the *Linkletter-Hampton* factors." This is curious, given the Court's criticism of that test in *Schafer v. Kent County.*[114] There, this Court said that "[t]here exists considerable confusion in our caselaw surrounding the retroactivity of court decisions. This is derived in no small part from the confusion in then-existing federal law, which Michigan adopted decades ago as its standard to resolve questions of retroactivity of judicial decisions,"[115] noting that on application "the *Chevron Oil* [for retroactivity of civil decisions] and *Linkletter* decisions became prone to considerable confusion"[116] and that "[n]ot surprisingly, our retroactivity test drawn from *Chevron Oil* and *Linkletter* also produced confusion in Michigan law."[117] The Court took steps in *Schafer* to ameliorate the confusion in Michigan retroactivity law concerning civil cases; it should do likewise with regard to its adoption of the now federally repudiated *Linkletter* test in criminal cases. The People urge this Court to do the same in criminal cases and recognize that principles of retroactivity of new rules are different as to cases final at the time of the decision of the new rule than those applicable to cases pending on appeal at

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[113] *People v. Poole*, —Mich. —, 2025 WL 978646, at 3 (fn 3) (No. 166813, Mich. Apr. 1, 2025).

[114] *Schafer v. Kent County*, —Mich.—, 2024 WL 3573500 (No. 164975, Mich. July 29, 2024).

[115] Id., at 9.

[116] Id.

[117] Id, at 10.

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that time, to adopt the principles of *Teague v. Lane*[118] on retroactivity, and to find that under those principles, the rule created in *Eads*, if confirmed, should not apply to cases final at the time of its decision.[119]

a. Defining terms: the four faces of retroactivity

An overruling decision or new rule is considered retroactive if it is applied to conduct or events occurring before the decision. Levels or degrees of retroactivity exist because courts sometimes do not apply an overruling decision to conduct or events occurring before the decision at all; sometimes apply it to only that conduct or those events occurring before the decision litigated in the very case announcing the decision; sometimes apply it to that conduct or those events occurring before the decision where an adjudication on direct review has not yet been completed and the question has been properly raised; and sometimes apply it to that conduct or those events occurring before the decision even when adjudication on direct review has been completed, allowing the judgment rendered to be attacked collaterally.[120]

Both the cases and the literature in the field tend to use terms such as "prospective," "fully prospective," "partially prospective," "retroactive," and "fully retroactive" without precision, so that what is defined by some cases or

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[118] *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334] (1989).

[119] The Court of Appeals found that the decades-old sentencing of the trial judge violated *Boykin* without discussing retroactivity, with which the People, as previously indicated, disagree. See

[120] One could view the question as one of the level of specificity, or, on the other hand, the level of generality, that application of the new rule is to have. *See* Bradley Scott Shannon, "The Retroactive and Prospective Application of Judicial Decisions," 26 Harv J. L. & Pub. Pol'y 811, 812 (2003).

Retroactivity on collateral review is extremely limited in civil cases, See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540, 111 S. Ct. 2439, 2446, 115 L. Ed. 2d 481 (1991) ("in the civil arena . . . there is little opportunity for collateral attack of final judgments").

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commentators as "full retroactivity" is described by others as "partial retroactivity." One court has defined the terms in this manner:

- *Purely prospective*: a new rule or overruling decision is not applied even to the parties to the case in which the rule or overruling is announced, but applies only to future events;

- *Prospective*: a new rule or overruling decision is applied to the parties to the case in which the rule or overruling is announced, but to no others, including pending cases with the issue preserved, applying only, aside from the parties, to future events.

- *Retroactive*: a new rule or overruling decision is applied to the parties to the case in which the rule or overruling is announced, and to all other cases then pending on direct review where the issue is preserved; and

- *Fully retroactive*: a new rule or overruling decision is applied not only to the parties to the case in which the new rule or overruled is announced and all other cases then pending on direct review where the issue is preserved, but also after the direct review is over where asserted by way of collateral proceedings.[121]

Though this description of what might be termed the four faces of retroactivity is both accurate and useful, some adjustment of the nomenclature is required; it is confusing to refer to one application of an overruling decision as "prospective" if there is also an application that is "purely prospective." If there is a greater degree of prospectivity than prospective, then the lesser degree is more sensibly known as partial prospectivity.[122] The differences in the opportunity for review between civil and criminal cases also require some adjustment in the terminology. Once direct review is completed in a civil case, a collateral attack

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[121] *Blackwell v. Commonweatlh, State Ethics, Comm'n*, 589 A.2d 1094, 1103 (PA, 1991) (Justice Zappala concurring); *see also PNC Bank v. Workers' Compensation Appeal Board*, 831 A.2d 1269, 1282-1283 (Commonwealth Ct, 2003).

[122] A rule of partial prospectivity is also necessarily one of partial retroactivity, applying to some conduct or events that occurred prior to the overruling decision, but in the scheme of things is more usefully referred to as partially prospective.

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on the judgment is extremely rare, save for fraud,[123] and thus to use the term partially retroactive to refer to those decisions applicable to the parties to the case in which the new rule or overruling is announced and to all other cases then pending on direct review where the issue is preserved makes no sense in civil cases, for in civil cases this is "full" retroactivity. In criminal cases, collateral attack is more generally available through such mechanisms as state postconviction proceedings—in Michigan, the motion for relief from judgment—though the grounds for relief are ostensibly narrower than on direct review. It is more sensible to call decisions establishing new rules that are applicable to the parties and to those cases pending on appeal where the issue has been preserved "fully retroactive," so to have a consistent terminology with civil and criminal cases, and to have a separate category of retroactivity for criminal cases where a new rule is applicable even on collateral attack. And indeed, federal decisions refer to this sort of retroactivity as "retroactive on collateral attack" or "retroactive to cases on collateral review."[124]

The four faces of retroactivity are thus described here as follows:

- *Purely prospective*: a new rule or overruling decision is not even applied to the parties to the case in which the rule or overruling is announced, but applies only to future events;
- *Partially Prospective*: a new rule or overruling decision is applied to the parties to the case in which the rule or overruling is announced, but to no others, including pending cases with the issue preserved, applying only, besides to the parties, to future events.
- *Fully Retroactive*: a new rule or overruling decision is applied to the parties to the case in which the rule or overruling is announced, and to all other cases then

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[123] *See, e.g.*, *Matter of Bulic*, 997 F.2d 299 (CA 7, 1993); *Rogoski v. Muskegon*, 107 Mich. App. 730, 736 (1981).

[124] *See, e.g.*, *Bottone v. United States*, 350 F.3d 59 (CA 2, 2003).

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pending on direct review where the issue is preserved;[125] and

- *Retroactive on Collateral Attack*: a new rule or overruling decision is applied not only to the parties to the case in which the new rule or overruled is announced and all other cases then pending on direct review where the issue is preserved, but also after the direct review is over where asserted by way of collateral proceedings. This principal essentially has application only in criminal cases.

b. The development of the law of retroactivity federally

Whatever view one may take of retroactive application of decisions that overrule prior decisions with regard to the common law—and the matter is extremely complex—that decisions construing statutes and constitutional provisions, even decisions overruling previous constructions, do no more than express what the law actually *is*, applying necessarily to events occurring before the overruling construction, was long the orthodox, if not the only, view, though this did not mean that final judgments could be upset. The view that the Constitution itself *changes*—as determined by the Supreme Court—with regard to cruel and unusual (or in Michigan, cruel or unusual) punishment is a marked departure from that understanding.[126] From the beginning of our constitutional

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[125] In *Schafer*, supra, 2024 WL 3573500, at 11, the Court essentially adopted this formulation:

> A more precise reading of relevant caselaw is that the "usual" retroactive application in Michigan applies to: (1) the case before the court, (2) all cases that could have and did raise the issue that are pending at the time of the decision, and (3) all cases timely filed after the decision. Michigan caselaw has described this standard as "limited retroactivity," but this phrase is an anachronism from the traditions of *Chevron Oil and Linkletter*. This phrase appears to be a comparison to complete retroactive application on collateral review.
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> [T]he term "limited retroactive effect" is an artifact from prior federal caselaw that has been subsequently clarified and refined. "Limited retroactive effect" in Michigan law is more accurately termed "full retroactive effect."

[126] This occurs by application of an "evolving standards of decency" test. See *Roper*

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democracy it has been understood that it is "the province and duty of the judicial department to say what the law is,"[127] not what it shall be. And Chief Justice Marshall was simply expressing the commonly accepted Blackstonian understanding that when a "former determination is most evidently contrary to reason," a decision setting that decision aside would "not pretend to make a new law, but to vindicate the old one from misrepresentation," the former decision not being declared bad law, but "that it was *not law*."[128] As stated by Justice Holmes, "I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years."[129] Though considering the effect of a statute that had intervened after a decision, Chief Justice Marshall's statement in *The Schooner Peggy*[130] case was understood to apply also to intervening changes in a judicial construction of a statute:

> If subsequent to [a] judgment, *and before the decision of the appellate court*, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . [T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but

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v. Simmons, 543 U.S. 551, 608, 125 S. Ct. 1183, 1217, 161 L. Ed. 2d 1 (2005) (Scalia, J., dissenting) ("the Court's conclusion [is] that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was wrong, but that the Constitution has changed"); *Atkins v. Virginia*, 536 U.S. 304, 348, 122 S. Ct. 2242, 2265, 153 L. Ed. 2d 335 (2002) (Scalia, J., dissenting) ("'[T]he Constitution,' the Court says, 'contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.' . . . *The arrogance of this assumption of power takes one's breath away*") (emphasis supplied).

[127] *Marbury v. Madison*, 5 U.S .(1 Cranch), 137, 177, 2 L Ed 60 (1803).

[128] 1 BLACKSTONE, COMMENTARIES 69-70 (1803) (emphasis in the original).

[129] *Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 372, 30 S.Ct. 140, 148 (1910) (Holmes, J., dissenting).

[130] *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801).

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> which cannot be affirmed, but in violation of law, the judgment must be set aside.[131]

The "new rule," then, was understood to apply to cases not yet final ("and before the decision of the appellate court').

The entire notion of retroactivity, then, is a relative newcomer[132] to American jurisprudence, the notion that an overruling construction of a statute, or other source of law, might *not* apply on review of actions that occurred before the overruling decision simply not existing. It was the sea change in constitutional jurisprudence worked by the Warren Court that virtually demanded limitation of the effects of that Court's many overruling decisions,[133] and thus consideration of a doctrine of retroactivity. In part because the purpose of the exclusionary rule is to deter unlawful police conduct, a purpose that cannot be served when the conduct condemned occurs before it is declared improper, the Court limited the reach of *Mapp v Ohio*[134] in *Linkletter v Walker*[135] regarding habeas proceedings, limited its reach on direct appeal in *Johnson v New Jersey*,[136] and continued on to

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[131] Id. (emphasis supplied).

As stated, courts understood that this principle applied to overruling judicial decisions as well, for the law—the statute—had pre-existed the overruling decision, and its correct meaning had to be applied in the case at hand: courts were required to "conform their orders to the. . . law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered." *Vanderbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 542, 61 S.Ct. 347, 85 L.Ed. 327 (1941)..

[132] Kermit Roosevelt III, "A Little Theory Is A Dangerous Thing: The Myth of Adjudicative Retroactivity," 31 Conn. .L Rev. 1075, 1082 (1999).

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

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

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

[136] *Johnson v. New Jersey*, 384 U.S. 719, 732, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966).

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limit other new rules of criminal procedure to preclude their application to conduct occurring before the Court's overruling construction of the Constitution.[137]

The test for retroactivity developed by the United States Supreme Court—since repudiated by that Court[138]—applied three factors:

- the purpose of the new rule;
- the general reliance on the old rule; and
- the effect of retroactive application of the new rule on the administration of justice.[139]

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

But because a new construction of a statute or constitutional provision, even one overruling prior precedent, is considered an expression of what the law is, this three-prong retroactivity test was eventually abrogated by the United States Supreme Court in favor of Justice Harlan's view that overruling decisions are applicable on direct appeal to the case before the court and all cases then pending on appeal with the issue preserved—which is here termed full retroactivity.[140] As to decisions final at the time of the overruling decision in the criminal arena, where collateral attack is possible, an overruling decision will be applicable on collateral attack only in very limited circumstances, the Court

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

[138] *See Teague v. Lane,* supra.

[139] Michigan currently continues to follow this test, though now abandoned in the federal system. *See, e.g.*, *People v. Maxson*, 482 Mich. 385, 392–394 (2008).

[140] *Griffin v Kentucky* at 322-23.

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adopting, with some modification, Justice Harlan's view on this point as well. A new rule was initially said to be applied retroactively on collateral attack if it 1) alters the range of conduct or the class of persons that the law punishes, or 2) announces a new watershed rule of criminal procedure necessary to the fundamental fairness of the criminal proceeding;[141] very recently, the Court abolished the second category: "New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund. It must 'be regarded as retaining no vitality.'"[142]

c. Development of the law of retroactivity in Michigan

Though the Court has, despite its repudiation by the United States Supreme Court, professed adherence to the principles of the three-prong *Linkletter* test for retroactivity,[143] it has not been consistent in their application. In *People v. Aaron*[144] the Court changed the law of homicide by "abrogating"—and so amending the statute—the portion of the common-law definition of murder

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[141] *Teague v. Lane*, *supra*; see *Jones v. Mississippi*, supra.

[142] *Edwards v. Vannoy*, 593 U.S. 255, 272, 141 S. Ct. 1547, 1560, 209 L. Ed. 2d 651 (2021).

Civil retroactivity principles that closely approximated the *Linkletter* test were created in the *Chevron Oil* case, and have also been laid to rest by the Court. *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

[143] *See, e.g.*, *People v. Sexton*, 458 Mich. 43, 60–61 (1998) ("we recognize[ ] [a] three-part test of retroactivity that assesses (1) the purpose of the new rules; (2) the general reliance on the old rule, and (3) the effect of retroactive application of the new rule on the administration of justice."); *People v. Carp*, 496 Mich. 440, 451, cert. granted, judgment vacated sub nom. *Carp v. Michigan*, 136 S. Ct. 1355, 194 L. Ed. 2d 339 (2016) (referring to "Michigan's separate and independent test for retroactivity set forth in *People v. Sexton*"). The Court appears to have first applied the *Linkletter* factors to a decision based on state law in *People v. Hampton*, 384 Mich. 669, 674 (1971) ("The United States Supreme Court has discussed various factors to be used in determining whether a law should be applied retroactively or prospectively. There are three key factors which the court has taken into account: (1) The purpose of the new rule; (2) The general reliance on the old rule; and (3) The effect on the administration of justice. See, e.g., *Linkletter v. Walker*").

[144] *People v Aaron*, 409 Mich. 672 (1980).

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that any killing during the course of a felony is murder, the statute then elevating the degree of the offense to 1st-degree murder where certain felonies are involved. The Court then made this change applicable to all future trials and trials in progress, not applying the change even to cases then pending on appeal.[145] And in the *Stevenson*[146] case, where the Court abolished the year-and-a-day rule of causation for homicide, the new rule was made purely prospective so as not to be applicable even in the case at hand,[147] rendering the opinion an advisory opinion, something the Court has since doubted is permissible.[148].

The inconsistency in retroactivity terminology is further illustrated by *People v. Tanner*.[149] There the Court, construing the statutory requirement[150] that a sentence be indeterminate, established that the minimum could be no more than two-thirds of the stated maximum. The Court said that its holding was "prospectively limited" but held that it was applicable to "those cases in which sentence is to be or has been imposed after date of filing of this opinion and to those cases which on date of filing of this opinion are pending on appeal and

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[145] *People v. Aaron*, at 733–34. This application follows from the Court acting legislatively in amending the murder statute. Murder is a statutory crime, not a common-law crime, and when the legislature uses a common-law term without alteration, it has enacted the common-law meaning, which the Court is not free to change. As this Court has now recognized, "[w]hen the Legislature codifies a common-law crime without articulating its elements, we must look to the common law for the definition of the crime. . . . *We are bound by the common-law definition until the Legislature modifies it*." *People v. Perkins*, 468 Mich. 448 (2003) (emphasis added).

Recently this Court has directed argument as to whether this portion of this 44-year-old precedent should be overruled. *People v. Langston*, 6 N.W.3d 404, 405 (Mich. 2024).

[146] *People v. Stevenson*, 416 Mich. 383 (1982).

[147] Id., 416 Mich. at 400.

[148] See *Hathcock*, supra, fn 77 and accompanying text.

[149] *People v Tanner*, 387 Mich 683, 690 (1972);.

[150] MCL § 769.9.

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which have properly raised and preserved the issue for appeal."[151] This sort of application is a *fully* retroactive application (though not an application retroactively on collateral attack).

In *People v. Markham*[152] the Court held that its then (and at the time newly established) same-transaction jeopardy rule[153] would apply "only when the prosecution upon which a former jeopardy claim is based began on or after November 20, 1973" when the new rule was established.[154] With regard to the newly established, and later overruled, Michigan dual-sovereignty jeopardy rule,[155] the Court said that "an analytical distinction has evolved. When considering procedural rules governing trial conduct, the *Linkletter-Hampton* criteria play a predominant role. However, when non-procedural or substantive rights of a fundamental nature are affected, they are normally to be accorded retrospective application. The *Linkletter-Hampton* considerations may be addressed, but only in the rare instance will they have determinative effect."[156] But when construing the new trial statute so as to preclude trial judges as acting as 13th juror in the *Lemmon*[157] case, the Court applied its ruling purely prospectively, so as to *affirm* the grant of a new trial that, under the construction of the statute it was announcing should have been *reversed*. More recently, the Court held that Michigan continues to follow *Linkletter*, despite its repudiation

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[151] *Tanner supra* at 690, 199 N.W.2d at 205.

[152] *People v. Markham*, 397 Mich. 530 (1976) (a pre-*Teague* decision).

[153] *People v. White*, 390 Mich. 245 (1973), overruled by People v. Nutt, 469 Mich. 565 (2004).

[154] *Markham*, 397 Mich. at 535.

[155] *People v. Cooper*, 398 Mich. 450 (1976), overruled by *People v. Davis*, 472 Mich. 156 (2005).

[156] *People v. Gay*, 407 Mich. 681, 706–07, 660 (1980) (a pre-*Teague* decision).

[157] *People v. Lemmon*, 456 Mich 625 (1998).

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federally.[158] *People v. Barnes* declined, based on Michigan law, to apply the rule of *People v. Lockridge*[159] that the sentencing guidelines are advisory only retroactively to collateral attacks. The Court did not distinguish between cases on direct review and those bringing a collateral attack, simply applying the *Linkletter/Hampton*[160] analysis to the case and saying that "we recognized the *Hampton/Linkletter* standard's continued viability as the state-specific standard in *People v. Sexton*."[161] But none of the three consolidated cases in *Sexton* were on collateral review, and so whether a different standard of retroactivity should apply on collateral attack as opposed to direct review was not before the Court in *Sexton*.[162] And the Court in *Barnes*, though saying it was applying the *Linkletter/Hampton* standard and rejecting retroactivity on collateral attack under that test "[b]ecause of this general reliance on the old rule, the effect on the administration of justice to extend the *Lockridge* rule retroactively on collateral review would be incalculable, with potentially every criminal defendant sentenced in at least the last 19 years being eligible for relief" so that "*Lockridge* will be given only prospective application on collateral review," also referred to "retroactive application" of the new rule on collateral review as an "*extraordinary remedy*" to which defendant was not entitled.[163]

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[158] "The state-law test in *Hampton* was derived from *Linkletter* . . . . *Linkletter* was subsequently disavowed as the federal standard for retroactivity in *Griffith v. Kentucky* . . . but we recognized the *Hampton/Linkletter* standard's continued viability as the state-specific standard in *People v. Sexton." People v. Barnes*, 502 Mich. 265, 274 (2018).

[159] *People v. Lockridge*, 498 Mich. 358 (2015).

[160] *People v. Hampton*, 384 Mich. 669 (1971).

[161] *Barnes*, at 274 (fn 5).

[162] It is well-established that "A point thus assumed without consideration is, of course, not decided." *Allen v. Duffy*, 43 Mich. 1, 11 (1880); *Rott v. Rott*, 508 Mich. 274, 290 (2021).

[163] Id., at 274-275 (emphasis supplied).

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d. A rule of retroactivity of new rules or overruling decisions on collateral review

This Court has not adopted the United States Supreme Court's *Teague* approach regarding retroactivity of new rules and overruling decisions on collateral attack after the conviction is final; that is, the direct appeal is over. In civil cases, judgments final on appeal may only be reopened for fraud,[164] but in criminal cases, *Teague* allows judgments to be set aside, though final on appeal, but only where the new rule or decision is substantive in the sense that it forbids criminal punishment of certain primary conduct or prohibits a certain category of punishment for a class of defendants because of their status or offense.[165] These principles make sense for cases where the direct appeal is over, which is, of course, why the Supreme Court adopted them. Michigan continues to apply its adoption of *Linkletter* both on direct appeal and collateral attack as a "state rule" of retroactivity,[166] but that formulation was originally simply adopted by this Court from *Linkletter* rather than fashioned as a Michigan rule. As it should with new rules and overruling decisions on direct appeal, Michigan should follow the lead of the United States Supreme Court with regard to retroactivity of new rules on collateral attack.[167] Retroactivity *should* be rare on collateral review, and, as the *Vannoy* case says, never apply to new rules of criminal procedure. Adoption of *Teague* has a further virtue. The United States Supreme Court never announces the retroactive effect of a new rule in the case establishing the rule, as, other than its application to the parties, such an announcement is actually pure dicta, having nothing to do with resolution of the case. But establishment of retroactivity

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[164] *See supra* note 20.

[165] As noted previously, the United States Supreme Court no longer considers the possibility of new procedural rules being retroactive on collateral attack.

[166] *See supra* note 94.

[167] The state is free, of course, to have a different, more expansive, retroactivity rule or rules even for new federal constitutional than does the United States Supreme Court. *Danforth v. Minnesota*, 552 U.S. 264, 267-268, 128 S Ct 1029, 169 L Ed 2d 859 (2008).

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principles in *Jim Beam* and *Teague* allows lower courts to make that determination; in criminal cases, the only litigated matter is whether (as here) a new rule is substantive or procedural. Where that question is not subject to dispute, the retroactivity question is readily resolved, which, in most cases, would be the case in Michigan (the present case being an exception) were *Teague* followed.

e. *Boykin*, especially as extended here to term-of-years case in other than 1st-degree murder, should not apply retroactively on collateral attack

This Court should adopt *Teague* as a matter of state law and find that even if *Boykin* extends to term-of-years sentences for offenses other than 1st-degree murder it is inapplicable to the collateral attack here. *Jones,* though not formally overruling *Montgomery*,[168] found the *Teague* analysis in that case wanting. *Miller*, it said, "required a sentencing procedure similar to the procedure that this

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[168] Principally, it appears, because already "as a result of *Montgomery*, many homicide offenders under 18 who received life-without-parole sentences that were final before *Miller* have now obtained new sentencing proceedings and have been sentenced to less than life without parole" and "[b]y now, most offenders who could seek collateral review as a result of *Montgomery* have done so and, if eligible, have received new discretionary sentences under *Miller*." Id, 141 S. Ct. at 1318, 1322.

> As one court has said:
>
> In its recent decision in *Jones v. Mississippi* . . . the Supreme Court appears to have "[o]verrule[d] *Montgomery* in substance but not in name." . . . The *Jones* Court expressly declined to overrule "*Montgomery*'s holding that Miller applies retroactively on collateral review [because b]y now, most offenders who could seek collateral review as a result of *Montgomery* have done so and, if eligible, have received new discretionary sentences under *Miller*." . . . However, *the Court effectively rejected Montgomery's finding that Miller announced a new substantive rule of constitutional law*. The Court *recognized it had employed a unique approach in deciding Montgomery*, one that was "in tension with the Court's retroactivity precedents that both pre-date and post-date *Montgomery*[.]" . . . Significantly, the Court cautioned that "those retroactivity precedents — and not *Montgomery* — must guide the determination of whether rules other than *Miller* are substantive." Id. (emphasis added). *The decision in Jones leads to one inescapable conclusion: Montgomery's key holding (declaring Miller retroactive) has been preserved, but the Court's reasoning behind that conclusion has not*.

Commonwealth v. Cobbs, 256 A.3d 1192, 1221 (Pa. 2021) (emphasis supplied).

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Court has required for the individualized consideration of mitigating circumstances in capital cases . . . . [which] require sentencers to consider relevant mitigating circumstances when deciding whether to impose the death penalty."[169] And most importantly, the Court said that "[a]s the Court's post-*Montgomery* decision in *Welch*[170] already indicates, to the extent that *Montgomery*'s application of the *Teague* standard is in tension with the Court's retroactivity precedents that both pre-date and post-date Montgomery, *those retroactivity precedents—and not Montgomery*—must guide the determination of whether rules other than *Miller* are substantive."[171] *Jones* establishes that *Montgomery*'s *Teague* analysis is an outlier—a "one-off" that should not be followed in future cases.

If this Court adopts *Teague*, it should, then, be guided by the Court's pre- and post-*Montgomer*y precedents that "are in tension with *Montgomery*," as "those retroactivity precedents—and not *Montgomery*—must guide the determination" of whether new rules are substantive, and should guide this Court. So applied, those cases compel the result that the rule in *Parks* is procedural, so that it should not be applied on collateral attack. As said in the *Welch* case, a Court determines whether a rule is substantive or procedural "by considering the function of the rule" itself and not "by asking whether the constitutional right underlying the new rule is substantive or procedural," so that a rule is procedural if it regulates "'only the manner of determining the defendant's culpability."[172] This is the case here. Following Justice Scalia's cogent dissent in *Montgomery*

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[169] Id, 141 S. Ct. at 1315-1316.

[170] "The Court determines whether a rule is substantive or procedural for retroactivity purposes 'by considering the function of the rule' itself—not 'by asking whether the constitutional right underlying the new rule is substantive or procedural.'" *Welch v. United States*, 578 U. S. 120, 130–131, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016)..

[171] *Jones*, 141 S. Ct. at 1318.

[172] *Welch*, 136 S.Ct. 1264 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).

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and the ruling and statements in *Jones*, *Boykin* does not categorically bar a penalty for a class of offenders but mandates that the sentencer follow a certain process before imposing a particular penalty, as the Court said itself in *Miller*.[173] Under the *Teague* framework, new procedural rules do not apply on collateral attack, and *Boykin* should not apply here (though it is inapplicable in any event, and if applied, should not disturb the sentence).

And finally, even application of the obsolete *Linkletter* test should lead to the conclusion that *Boykin* and an expanded *Boykin* to term-of-years sentences should not apply on collateral review. The purpose of the rule is to ensure that judges sentencing those under 18 to term-of-years sentences for murder should consider that youth may mitigate the crime, though no specific statement of findings need be made, and the youth of the defendant was presented to the judge here and there is no reason to believe that judges did not understand generally that youth might in a particular case make a difference. And the general reliance on the "old rule"—which is to say no specific consideration of any designated mitigating factors of youth need be laid out by the judge (and still not under *Boykin*) was universal, and so the effect on the administration of justice if *Boykin/Eads* were applied retroactively to all sentences to term of years in all convictions had previously would be massive.

The sentence here should be affirmed; Eric Kincaid's surviving family members should not have to re-live his murder.

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[173] See *Montgomery*, 136 S. Ct. at 743 (Scalia, J., dissenting).

This is very similar to *Beck* and *Lockridge*, which are not retroactive on collateral review. See *Barnes,* supra, and *People v. Motten*,—Mich. App.— , 2024 WL 1684853 (No. 363044, Mich. Ct. App. Apr. 18, 2024)

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Relief

THEREFORE, the People request that this reverse the Court of Appeals.

Respectfully submitted,

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Certificate of Compliance

I certify that the foregoing brief contains 18,263 countable words; a motion to exceed is filed with this brief.

/s/ *Timothy A. Baughman*