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

**PEOPLE OF THE STATE OF MICHIGAN**
**Plaintiff-Appellee,**

**v.**

**CINECCA DAQUAN MADISON** **No. 167120**
**Defendant-Appellant.**

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**L.C. 22-45611-FC**
**COA No. 369559**

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# BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

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## Statement of the Question

**I.**

**The initial predicate to overruling a precedent is a determination that it was wrongly decided, which means more than that a majority of the current Court would have decided the matter differently, else every judicial decision is simply "up for grabs"; rather, the prior decision must have been outside the realm of reasonable interpretation. Was *People v. Carpenter* correctly decided, and even if it is possible to posit a different, plausible statutory construction, is it well within the realm of reasonable interpretation, so that principles of stare decisis compel its retention?**

**Defendant answers: NO**

**The People answer: YES**

**Amicus answers: YES**

## Statement of Facts

Amicus joins the People's statement of the facts.

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## Argument

### I.

**The initial predicate to overruling a precedent is a determination that it was wrongly decided, which means more than that a majority of the current Court would have decided the matter differently, else every judicial decision is simply "up for grabs"; rather, the prior decision must have been outside the realm of reasonable interpretation. Because *People v. Carpenter* was correctly decided, and even if it is possible to posit a different, plausible statutory construction, it is well within the realm of reasonable interpretation, principles of stare decisis compel its retention.**

### Introduction

The Court has directed the parties to brief:

- whether *People v Carpenter*, 464 Mich 223 (2001) "was correctly decided, and if not,
- whether "*Carpenter* should nonetheless be retained under principles of stare decisis, *Coldwater v . Consumers Energy Co*, 500 Mich 158, 172-174 (2017)."[1]

And so this Court, by way of a MOAA, is considering whether to overrule a 23 year-old precedent. This is not the first time the Court has addressed these questions. In *People v. Tyson*,[2] also by way of a MOAA, this Court considered the same questions but ultimately denied leave, given that the posture of the case involved a plain-error inquiry.[3] But four justices—a majority—of the current Court there expressed the view that *Carpenter* was wrongly decided.[4] Amicus has few illusions that minds might be

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[1] *People v. Madison*, —Mich.— , 12 N.W.3d 440 (2024).

[2] *People v. Tyson*, 511 Mich. 1080 (2023).

[3] Id.

[4] Chief Justice Clement "agree[d] with Justice CAVANAGH's analysis explaining why *Carpenter* was wrongly decided" but found that "preservation concerns present a

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changed through the course of this case *but* hopes that a review of principles of stare decisis will at least stay the Court's hand, even if a majority of the Court would decide *Carpenter* today as an original matter differently than did that Court.[5] Tested here is whether the summary of the matter by then Chief Justice McCormack—that to overrule a precedent "require[s] more than a majority of a court thinking that precedent was incorrectly decided. . . . After all, if we fully agreed with the way a previous case was decided we wouldn't need stare decisis—we'd just decide the next related question the same way. *If stare decisis means anything, it means not every judicial decision is up for grabs from scratch*"[6]—has meaning, or is simply a rather empty form of words.

And so amicus answers that *Carpenter* was not wrongly decided[7]—which merges with the stare decisis question—and that under principles of stare decisis, even if it is possible to posit another plausible interpretation of the statutory scheme than that laid out in *Carpenter*, this provides no basis for overruling it.

**Discussion**

**A. *People v. Carpenter* was not wrongly decided**

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barrier to overruling *Carpenter* through this case." Id. Justice Cavanagh, for herself and Justices Bolden and Welch, dissented from the denial of leave and would have overruled *Carpenter*, essentially for the reasons stated in the dissent in that case. *People v. Tyson*, 511 Mich. 1080 (2023).

[5] And Chief Justice Clement "question[ed] whether the Court is the appropriate body to reconsider the viability of a diminished-capacity defense in Michigan," urging legislative action. *Tyson*, at 1081 (Clement, C.J., concurring in the denial of leave to appeal).

[6] *People v. Stovall*, 510 Mich. 301, 331 (2022) (McCormack, C.J., concurring, with herself).

[7] The Court's order asks whether *Carpenter* should be overruled, and then whether nonetheless it should be retained, and so amicus takes the Court's first point to be whether the decision was *wrongly decided*, and then whether it should nonetheless be retained rather than overruled under principles of stare decisis, with whether it was wrongly decided a predicate "prong" in that analysis.

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### 1. *Carpenter* correctly concluded that the so-called "diminished capacity" defense is an insanity defense under the statutory scheme

Justice Cavanagh's dissent from the denial of leave in *Tyson* says that "[w]hile the Legislature certainly has the authority to abrogate the common law, when it does so, it should speak in no uncertain terms. . . . The Legislature has never abolished the diminished-capacity defense,"[8] and that there is a difference between the legislature "failing to codify a recognized common-law defense and explicitly abolishing it."[9] *What* common-law-defense? Justice Campbell said for the Court long ago that "while we have recognized the common law as adopted into our jurisprudence, it is the English common law, unaffected by statute."[10] Further, as the Court of Appeals has noted, common-law defenses, such as justification and excuse, are "well-established in the common law."[11] But the so-called 'diminished capacity" or partial-responsibility defense has never been formally recognized by this Court, but first appeared in 1973 in the Court of Appeals decision of *People v. Lynch*.[12] *Lynch*, however, was decided before the legislature's enactment of 1975 PA 180 establishing legal insanity as a statutory affirmative defense, with the 1994 amendment providing that the defendant carries the burden of proving by a preponderance of the evidence that as a result of mental illness or intellectual

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[8] *Tyson*, at 1086 (Cavanagh, J., dissenting from the denial of leave) (cleaned up).

[9] Id, fn 8.

[10] *Lamphere's Case*, 61 Mich. 105, 108 (1886).

[11] *People v. Schurr*, —Mich. App.—, 2024 WL 292922, at 8 (No. 365104, Mich. Ct. App. Jan. 25, 2024). See also *People v. Gafken*, 510 Mich. 503, 511 (2022); *People v. Riddle*, 467 Mich. 116, 126 (2002) ("because our Legislature has not acted to change the law of self-defense since it enacted the first Penal Code in 1846, we are proscribed from expanding or contracting the defense as it existed at common law") [prior to enactment of the Self-Defense Act].

[12] *People v. Lynch*, 47 Mich. App. 8 (1973), superceded by statute as recognized in *People v. Mangiapane*, 85 Mich. App. 379 (1978).

Amicus believes it doubtful that an intermediate appellate court has authority to establish or create common law causes of action or defenses. See e.g. *Tynan v. Curzi*, 753 A.2d 187, 192 (N.J. App. Div., 2000).

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disability as defined in the mental health code he or she lacked "substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law."[13] Further, defendant is required to meet pretrial requirements of notice and examination.[14] The statutory scheme also defined and established the verdict of guilty but mentally ill. After the legislative scheme was enacted, the Court of Appeals promptly in 1978 treated partial responsibility/diminished capacity *as an insanity defense* on which defendant carried the burden of persuasion because it found that the "defense known as diminished capacity comes within th[e] codified definition of legal insanity. We further find that psychiatric testimony on the issue of defendant's capacity to form the specific intent comes within the codified definition of legal insanity."[15] So-called diminished capacity/partial responsibility, then, has thus been treated as within the statutory insanity defense since 1978. This Court in *Carpenter* took note of this, observing also that the *Mangiapane* decision "was then followed by a series of decisions continuing to address diminished capacity defense as a form of the statutory insanity defense."[16]

There was no diminished capacity defense at the common law, and that which the *Lynch* court viewed it had established was gone with 5 years, the "defense" becoming a form of insanity defense. The notion that "the Legislature must 'speak in no uncertain terms' to abrogate the common law"—a canard itself [17]—has no

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[13] MCL § 768.21a(1), MCL § 768.21a(3).

[14] MCL § 768.20a.

[15] *Mangiapane*, at 395.

[16] *Carpenter*, at 234-235.

[17] *Tyson*, at 1089 (Cavanagh, J., dissenting from the denial of leave to appeal). See MCL § 8.3a( "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning"; Corrigan and Thomas, "'Dice Loading' Rules of Statutory Interpretation," 59 N.Y.U. Ann. Surv. Am. L. 231, 232 (2003) ("The proper method of interpretation requires a judge to try to discern

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application here.

Nor is the criticism of *Carpenter* that the Court "determine[s] the Legislature's intent from its words, not from its silence,"[18] citing *Donajkowski v. Alpena Power Co.*,[19] well taken. The context of the quotation—the complete quote—is that "'*legislative acquiescence*' is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its words, not from its silence."[20] The Court was not discussing inferring principles from the context of a statutory scheme but whether legislative non-response to a judicial decision constitutes a sort of binding acquiescence to that interpretation, even if egregiously mistaken. But principles may be drawn from the context of a statutory scheme.[21]

Though observing that there was a "wide divergence of views among the states concerning the admissibility of evidence of mental illness short of insanity,"[22] this Court in *Carpenter* found no need to "join the affray" because it agreed with the proposition that comprehensive legislative framework had "conclusively determined when mental

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the fair meaning of the statutory text, free from dice-loading rules," for "dice-loading rules of construction as illegitimate. These preferential rules include . . . the rule that statutes in derogation of the common law are narrowly construed"); Roscoe Pound, "Common Law and Legislation," 21 Harv. L. Rev. 383, 387 (1908) ("The proposition that statutes in derogation of the common law are to be construed strictly has no such justification. It assumes that legislation is something to be deprecated").

[18] *Tyson*, at 1086 (Cavanagh, J., dissenting from the denial of leave to appeal).

[19] *Donajkowski v Alpena Power Co*, 460 Mich. 243, 261 (1999).

[20] Id.

[21] For example, preemption may be found from "the pervasiveness of the state regulatory scheme." *People v. Llewellyn*, 401 Mich. 314, 323 (1977), and a private cause of action may be found implicit in statutory scheme when the statute by its terms is silent on that issue. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378, 102 S. Ct. 1825, 1839, 72 L. Ed. 2d 182, 1982 WL 1065265 (1982).

[22] To which amicus will return.

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incapacity can serve as a basis for relieving one from criminal responsibility. . . . through this framework, the Legislature has created an all or nothing insanity defense." "Important to this Court was the creation of the guilty-but-mentally-ill verdict, as it demonstrated that "the Legislature has already contemplated and addressed situations involving persons who are mentally ill or retarded yet not legally insane."[23] The Legislature had thereby "demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent."[24]

Having concluded that this is, in fact, the legislative scheme, this Court then addressed defendant's claim that this scheme is unconstitutional, burying the various claims that it violates due process, relying on the Supreme Court case of *Fisher v. United States*.[25] And any remaining argument on the point was laid to rest by the Supreme Court in *Clark v. Arizona*,[26] which shoveled fresh dirt on the grave and added a marker. In *State v. Mott*[27] the Arizona Supreme Court held inadmissible psychiatric

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[23] *Carpenter*, at 236, 237.

[24] Id., at 237-238.

[25] Id., at 240, citing *Fisher v. United States*, 328 U.S. 463, 66 S.Ct. 1318, 90 L.Ed. 1382 (1946). And see, among other cases relying on *Fisher* on this point, *O'Brien v. United States*, 962 A.2d 282, 301, (D.C., 2008) ("The Court in Fisher noted that the refusal to recognize a 'theory of partial responsibility' was firmly established in our common law: '[t]his has long been the law of the District of Columbia.'" And see *State v. Taylor*, 781 N.E.2d 72, 84 (Ohio, 2002) ("Except in the mitigation phase, a defendant may not offer expert psychiatric testimony, unrelated to the insanity defense, to show that, due to mental illness, intoxication, or any other reason, he lacked the mental capacity to form the specific mental state required for a particular crime or degree of crime") (cleaned up); *State v. Wilcox*, 436 N.E.2d 523, 533 (Ohio, 1982).

And in *Metrish v. Lancaster*, 569 U.S. 351, 367, 133 S. Ct. 1781, 1792, 185 L. Ed. 2d 988 (2013) the United States Supreme Court rejected a claim that retroactive application of *Carpenter* to conduct occurring before that decision violates due process.

[26] *Clark v. Arizona*, 548 U.S. 735, 126 S. Ct. 2709, 165 L. Ed. 2d 842 (2006). The case is not discussed in either defendant's application for leave or supplemental brief.

[27] *State v. Mott*, 931 P.2d 1046 (Ariz., 1997).

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testimony to negate specific intent and further held that Arizona does not allow evidence of a mental disorder short of insanity to negate the mens rea element of a crime; that is, that Arizona does not allow a defense of diminished capacity or partial responsibility. After his conviction, Clark challenged the Arizona rule, a challenge he had preserved. The Supreme Court took up the question of whether due process prohibited Arizona from excluding evidence of mental illness and incapacity due to mental illness to rebut evidence of the requisite criminal intent[28] and held that it *does not*, rejecting claims based on the presumption of innocence and the right to present a defense.[29]

The construction of the statutory scheme in *Carpenter* is perfectly logical and coherent.[30]

**2. This case demonstrates the principle that diminished capacity is an insanity defense**

Defendant's view is that a person who suffers from a mental illness or disability who employs deadly force because suffering from a delusion or hallucination can, due to that mental illness or disability, be viewed as having acted "reasonably" in self-defense, though in fact there was no actual threat of imminent harm apparent to a reasonable person not suffering that difficulty, self-defense requiring an "honest and reasonable belief" that death or great bodily harm is imminent before deadly force may be employed.[31] By so positing the defense, notice and submission to forensic testing on insanity may be avoided altogether. In this case, for example, defendant says he has been "diagnosed with schizophrenia among other mental health diagnoses" and "has an

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[28] *Clark v. Arizona*, 126 S. Ct. at 2718.

[29] Id., at 2729-2732.

[30] And it is noteworthy that in *Metrish v. Lancaster*, 569 U.S. 351, 365, 133 S. Ct. 1781, 1791, 185 L. Ed. 2d 988 (2013) a unanimous United States Supreme Court upheld retroactive application of *Carpenter*.

[31] *People v. Heflin*, 434 Mich. 482, 502 (1990).

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IQ of 66 and operates at the reasoning ability of a 13-year-old or below."[32] He "began hearing voices at age ten" and "was diagnosed ADHD prior to kindergarten and prescribed Adderall."[33] Defendant "is the subject of a Mental Illness Proceeding opened just 10-months prior to the shooting . . . . . Previously, Defendant was seen at Holland Hospital on July 25, 2021, due to paranoia and hallucinations. He was reportedly agitated, psychotic and disorganized."[34] On "January 27, 2022, Defendant informed Community Mental Health of Ottawa County (CMH) that "the voices are getting to be bad now, I need to talk to someone about them. I can't sleep because of them," and an assessment concluded that defendant suffered from schizophrenia disorder, and he was later diagnosed with paranoid schizophrenia.[35]

According to the prosecution's statement of the anticipated testimony, one victim, Antory "Tory" Burrell was shot from behind by Defendant four times while riding a bicycle and listening to music, and died at the scene, while the second victim, Demontae "Montae" Knight, who was shot from behind by Defendant five times while riding a bicycle with Tory and listening to music. Knight played dead. Burrell had a gun in his waistband, but never took it out, and he was found tangled in his bicycle with the firearm still secured in his waistband. Knight saw Defendant walk up to Burrell as he laid motionless in the road and shoot him again.[36] Defendant fled the scene.[37] The gun used by defendant was owned by his mother and he returned to their home.[38] In a jail call that was recorded Defendant "told a female friend that he saw Burrell 'clutching

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[32] Defendant's application, p. 6

[33] Id.

[34] Id.

[35] Id., at 7.

[36] PE 10-20-2022 at 28-29.

[37] PE 10-20-2022 at 30; People's answer at 1.

[38] People's answer at 2.

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it (meaning holding the illegal pistol through his clothing in a threatening manner) and that Burrell was going to shoot him, and went on to say that he then heard Knight state "get em."[39]

The Forensic Center found defendant criminally responsible but said, "Although it is entirely possible, given his report to CMH prior to the alleged offense of hearing, seeing[,] and believing things that are not real, that Mr. Madison could have imagined that the alleged victims were talking about him and planning to kill him, potentially impairing his capacity to appreciate the nature, quality[,] or wrongfulness of his behavior, as well as the capacity to conform his behavior to the requirements of the law, thus causing him to act in what he believed was genuine self-defense, this cannot be shown to be true within reasonable medical or clinical certainty due to lack of available corroborating information."[40] A proposed defense expert also said defendant was criminally responsible, but that "he described a scenario where in *his perception* he acted in self-defense," and another would say that his intellectual disability would make it harder for him "to combat the confusion that he was experiencing at and around the time of the alleged criminal activity"[41]

In other words, defendant's claim is that, assuming that in fact no threatened word or action was taken toward him and the shootings were thus unjustified, because of mental illness he was unable to appreciate that his conduct was wrongful or to conform his conduct to the requirements of the law. He falls, by his argument, within the legal definition of insanity, but by calling his defense self-defense and arguing diminished capacity/partial responsibility, he avoids the responsibility of carrying the burden of persuasion by a preponderance of the evidence, instead placing the burden on the prosecution by a standard of beyond a reasonable doubt. And this would follow even if defendant's claim was that he shot the victims because he thought they were

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[39] Id., at 10.

[40] Id., at 11.

[41] Id, at 11-12.

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monsters attacking him with axes at the time he shot them. *Carpenter*'s rule avoids this facile maneuver, and requires that the notice and examination process be followed.[42] And defendant misstates the objective "reasonable person" test. As one court puts it, "[c]ontrary to Willerson's assertion that his history of abuse and mental illness supports his claim of self-defense, 'the subjective fears of a particular defendant are irrelevant in the evaluation of this defense,' and '[t]he critical factor in a justification defense is whether a defendant acted with the fear of a reasonable person under the circumstances.'"[43] While it may be that the physical context of an encounter is relevant to the response of a reasonable person, such as size disparities, as Professor LaFave has said

> [i]f every circumstance is factored into the analysis, including the prior beliefs, values, and mental faculties of the defendant, the approach ends up looking like a purely subjective approach, in the sense that a cataloguing of every circumstance facing an individual would only describe one person in the world—the defendant. The best approach is to consider some, but not every, circumstance. So, a factfinder should consider not just the physical attributes of the attacker but also the physical attributes of the defender, and whether they are physically strong or fragile, and even their prior experiences with the attacker, if any, that may have influenced their assessment in that moment. . . . *But the defendant's idiosyncratic beliefs and considerations, such as their irrational beliefs regarding dangerousness, should not be considered*.[44]

Defendant's claim is that because of mental disability he did not perceive the situation

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[42] Though defendant *did* follow that process here, if *Carpenter* is overruled that would not be required if a defendant chooses not to raise an insanity defense.

[43] *Willerson v. State*, 863 S.E.2d 50, 53 (Ga., 2021).

[44] LaFave *2 Substantive Criminal Law* (3d ed.) § 10.4(c) (emphasis supplied).

See *Passarelli v. State*, 201 N.E.3d 271, 278-279 (Ind. Ct. App., 2023), transfer denied, 208 N.E.3d 1260, 2023 WL 3214161 (Ind. 2023) ("evidence that Passarelli suffered from PTSD and reacts more harshly to stressful situations than an ordinary person is inadmissible to support his claim of self-defense. That evidence does nothing to show that Passarelli's actions were objectively reasonable. The objective component of self-defense, as adopted by our courts, is analyzed from the standpoint of an ordinary 'reasonable person.'").

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as it was, and thus *did not know he was doing wrong*. This is an insanity defense.

**B. Under principles of stare decisis, *Carpenter* should be continued even if a different statutory construction can be posited; *Carpenter* was not wrongly decided and at the least is within the realm of permissible interpretation: how wrong is wrong?**

As noted previously, Chief Justice McCormack has observed that because "stare decisis is an important commitment for courts," the Court "normally require[s] more than a majority of a court thinking that precedent was incorrectly decided" in order to overrule existing authority, for "[i]f stare decisis means anything," the Chief Justice continued, "it means not every judicial decision is up for grabs from scratch."[45] After all, the whole point of stare decisis is to protect previous decisions where members of a current court, if addressing the matter as in the first instance, would reach a different conclusion; "[w]e hardly need stare decisis to adhere to precedents that we regard as correct; we would do that anyway."[46] As Justice Scalia put it, "The whole function of the doctrine is to make us say that what [we believe] is false under proper analysis must nonetheless be held to be true, all in the interest of stability."[47] In the words of the United States Supreme Court,"[r]especting stare decisis means sticking to some wrong decisions.. . . stare decisis has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent."[48]

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[45] See footnote 5, supra.

[46] Id.

[47] Antonin Scalia, A *Matter of Interpretation: Federal Courts and the Law* 139 (1997)

[48] *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455, 135 S.Ct. 2401, 2409, 192 L.Ed.2d 463 (2015).

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*Robinson v. City of Detroit*[49] states the Michigan understanding of stare decisis, an understanding consistent in its main features with the common statements of the doctrine by the United States Supreme Court. Stare decisis is generally "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process"[50]; nonetheless, "stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions."[51] The approach is essentially three-pronged, with an occasional fourth prong:

- the first question should be whether the earlier decision was wrongly decided;
- if so, considered is whether the prior decision defied "practical workability"; also considered is
- whether reliance interests would work an undue hardship if the authority were overturned; and finally, the court sometimes has occasion to consider
- whether changes in the law made the decision no longer justified.[52]

And this Court has recently cited and applied *Robinson* in the case to which the Court directed the parties in its MOAA order, *City of Coldwater v. Consumers Energy Company.*[53] With regard to stare decisis concerning statutory decisions, the Court has

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[49] *Robinson v. City of Detroit*, 462 Mich. 439 (2000). And see *People v. Davis*, 509 Mich. 52 (2022); *People v. Wilson*, 500 Mich. 521, 528 (2017); *People v. McKinley*, 496 Mich. 410, 422 (2014).

[50] *Robinson.* at 463, quoting *Hohn v. United States*, 524 U.S. 236, 251,, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

[51] *Id.*

[52] *See, e.g., People v. Smith*, 478 Mich. 292, 340 (2007), summarizing the *Robinson* factors.

[53] *City of Coldwater v. Consumers Energy Co*., 500 Mich. 158 (2017).

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been somewhat schizophrenic. On the one hand, the Court has said that it has "rejected any notion that cases involving statutory interpretation are to be afforded any greater stare decisis weight than other cases."[54] On the other hand, the Court has said that "the policy of stare decisis is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions,"[55] which would necessarily mean that the policy of stare decisis is stronger with statutory decisions.

> There *are* degrees of wrong, as a character in a popular sitcom makes clear:
>
> Stuart: Oh, Sheldon, I'm afraid you couldn't be more wrong.
>
> Sheldon: More wrong? Wrong is an absolute state and not subject to gradation.

---

[54] *People v. Wilson*, 500 Mich. 521, 531 (2017), citing *Robinson* at 467, and *Nawrocki v. Macomb Co. Rd. Comm.*, 463 Mich. 143, 181 (2000) (which do not seem to stand precisely for that proposition)..

[55] *People v. Tanner*, 496 Mich. 199, 251 (2014) (citing *Kyser v. 682 Kasson Twp.*, 486 Mich. 514, 534, n. 15 (2010), which quotes *Agostini v. Felton*, 521 U.S. 203, 235, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)).

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> Stuart: Of course it is. It's a little wrong to say a tomato is a vegetable, it's very wrong to say it's a suspension bridge.[56]

A necessary prerequisite under stare decisis principles to overruling a precedent—the first required step— is a determination that the precedent was "wrongly decided"; that first step must be established before proceeding further. But what does this mean? How wrong is wrong? It does not simply mean that the current Court would reason the matter differently than did the prior Court or that a current majority would have joined a dissent from that decision if a member of that Court.

"[N]ot all wrong precedents are created equal. Rather, while some incorrect precedents are at least debatable, others are flat-out wrong—or, in the lexicon of the Court, 'manifestly erroneous.'"[57] Various adjectives are employed to describe just how wrong a prior decision must be before proceeding further, such as "manifestly erroneous," "demonstrably wrong," "egregious," "gravely mistaken."[58] "[W]hen a court says that a past decision is demonstrably erroneous, it is saying not only that it would have reached a different decision as an original matter, but also that the prior court went *beyond the range of indeterminacy created by the relevant source of law*."[59] The

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[56] Episdoe "The Hofstadter Isotope," Season 2, Episode 20, *The Big Bang Theory*, aired April 13, 2009/

[57] Randy J. Kozel, "Stare Decisis As Judicial Doctrine," 67 Wash. & Lee L. Rev. 411, 418 (2010).

[58] See e.g. *United States v. Gaudin*, 515 U.S. 506, 521, 115 S. Ct. 2310, 2319, 132 L. Ed. 2d 444, 63 USLW 4611, 1995 WL 360212 (1995); *N. Am. Brokers, LLC v. Howell Pub. Sch.*, 502 Mich. 882, 913 N.W.2d 638, 647 (2018) (Zahra, J., dissenting); *Gamble v. United States*, 587 U.S. 678, 139 S.Ct. 1960, 1980-1989, 204 L.Ed.2d 322 (2019); *Ramos v. Louisiana*, 590 U.S. 83, 106, 140 S. Ct. 1390, 1405, 206 L. Ed. 2d 583 (2020); *Karaczewski v. Farbman Stein & Co.*, 478 Mich. 28, 39 (2007), overruled on other grounds, *Bezeau v. Palace Sports & Ent., Inc.*, 487 Mich. 455 (2010).

[59] Caleb Nelson, "Stare Decisis and Demonstrably Erroneous Precedents," 87 Va. L. Rev. 1, 8 (2001) (emphasis supplied).

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Supreme Court's *Ramos* opinion, overruling its prior precedent that nonunanimous juries are permissible in criminal cases,[60] provides a good example.

The Court there said that "[w]hether we look to the plurality opinion or Justice Powell's separate concurrence, *Apodaca* was gravely mistaken," as it was simply "an implacable fact that the plurality spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right, this Court's long-repeated statements that it demands unanimity, or the racist origins of Louisiana's and Oregon's laws," with instead "the plurality subject[ing] the Constitution's jury trial right to an incomplete functionalist analysis of its own creation for which it spared one paragraph," not to mention that "five Justices expressly rejected the plurality's conclusion that the Sixth Amendment does not require unanimity."[61] Moreover, *Apodaca* sat "uneasily with 120 years of preceding case law,"[62] so that "calling *Apodaca* an outlier would be perhaps too suggestive of the possibility of company."[63] As Justice Kavanaugh put it concurring, to overrule "[f]irst, *is the prior decision not just wrong, but grievously or egregiously wrong*? A garden-variety error or disagreement does not suffice to overrule. In the view of the Court that is considering whether to overrule, the precedent must be egregiously wrong as a matter of law in order for the Court to overrule it,"[64] which he found met with *Apodoca*.[65]

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[60] *Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972), abrogated by *Ramos v. Louisiana*, 590 U.S. 83, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020).

[61] Id., 140 S. Ct. at 1405.

[62] Id.

[63] Id., 140 S. Ct. at 1406.

[64] Id, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part) (emphasis supplied)..

[65] "*Apodaca* is egregiously wrong." 140 S. Ct. at 1416 (Kavanaugh, J., concurring in part).

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Amicus submits that Justice Thomas supplies an appropriate measure of "wrongness" in his concurring opinions in *Ramos* and in *Gamble v. United States*.[66] Justice Thomas said that when, after looking to the tools of construction, principally text, history, and context, if a decision is "outside the realm of permissible interpretation," it was wrongly decided.[67] This is consistent with Professor Nelson's statement that to overrule a Court must determine that "not only that it would have reached a different decision as an original matter, but also that the prior court went beyond the range of indeterminacy created by the relevant source of law."[68]

Defendant makes no showing that *Carpenter* is outside the realm of reasonable interpretation, gravely mistaken, or in conflict with the plain language of any statute. His argument is essentially not that the decision misconstrued the statutory scheme for the reasons stated in the *Carpenter* dissent, which he would have this Court follow. But *Carpenter* is not wrongly decided, and, in all events, is not outside the realm of permissible interpretation so as to permit a later Court to simply take the side of the dissent in the previous case; "pursuant to our standards governing stare decisis, this ship has already sailed."[69]

Defendant's stare decisis argument, then, fails on the first prong.

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[66] *Gamble v. United States*, 587 U.S. 678, 711, 139 S. Ct. 1960, 1981, 204 L. Ed. 2d 322 (2019).

[67] 140 S. Ct. at 1421 (Thomas, J., concurring); 139 S. Ct. at 1981 (Thomas, J., concurring) . For Justice Thomas, this along is enough to justify overruling. Amicus would this Court to consider that position. (this Court's decision in the *City of Coldwater* case overruled a precedent that"was wrongly decided because it conflict[ed] with the plain language of" the operative statute.).

[68] See FN 59.

[69] *State v. Pitkanen*, 520 P.3d 305, 312 (Mont., 2022).

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## Relief

Wherefore, amicus requests that this Court deny defendant's application for leave to appeal, or reaffirm *Carpenter*.

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## Certificate of Compliance

I certify that the foregoing brief text font is 12 point set to 150% line spacing. This document contains 5301 countable words.

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