State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

v.

Edwin Lamar Langston

Defendant-Appellant.

MSC No. 163968

COA No. 358537

Van Buren County Circuit Court Case No. 76-002701-FC

Brief of Amicus Curiae
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Date: December 23, 2024

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***RCK*JLZ*CDAM Amicus*December 23, 2024**

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CDAM answers, "Yes."

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CDAM answers, "Yes."

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CDAM answers, "Yes."

Interest of Amicus Curiae

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

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

Statement of Facts

Amici relies on the Statement of Facts submitted by Mr. Langston in his Supplemental Brief.

Arguments

I. Sentencing a person to die in prison without a jury ever determining their guilty state of mind is cruel or unusual punishment.

Imposing Michigan's harshest penalty—death in prison—on Mr. Langston and people like him is a moral issue, a racial justice issue, and a constitutional issue.

Sentencing someone to die in prison without a jury finding a culpable state of mind is inconsistent with the Michigan Constitution's prohibition on cruel or unusual punishment. Const 1963, art 1, § 16. The Michigan Constitution's "cruel *or* unusual punishment" clause is broader than the United States Constitution's protection from "cruel *and* unusual punishment." *People v Parks*, 510 Mich 225, 241 (2022); *People v Bullock*, 440 Mich 15, 30 (1992); *People v Lorentzen,* 387 Mich 167, 172 n 3 (1972). Michigan's cruel or unusual punishment "standard is informed by 'evolving standards of decency that mark the progress of a maturing society.'" *Parks*, 510 Mich at 241, quoting *Lorentzen*, 387 Mich at 179. "[T]his standard is 'progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a human justice.'" *Id.*, quoting *Lorentzen*, 387 Mich at 178. See also *Trop v Dulles*, 356 US 86, 101 (1958) (holding that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

Sentences in Michigan must be proportional. *Parks*, 510 Mich at 241. Michigan has developed a four-prong test to determine if a sentence is proportional under the cruel or unusual punishment clause: "(1) the severity of the sentence relative to the gravity of the offense; (2) sentences imposed in the same jurisdiction for other offenses; (3) sentences imposed in other jurisdictions for the same offense; and (4) the

goal of rehabilitation, which is a criterion specifically 'rooted in Michigan's legal traditions . . . .'" *Id.* at 242, quoting *Bullock*, 440 Mich at 33-34.

Amici will focus on the first and fourth prongs.

A. Sentencing a person to die in prison without a factfinder determining their state of mind is disproportionate because it is possible there was no murder, yet the person is punished as if there were.

Murder is undoubtedly a grave offense. See *Parks*, 510 Mich at 256. However, no jury or judge ever found that Mr. Langston—and other people convicted pre-*Aaron*—actually committed murder with malice aforethought.

It is a fundamental principle of criminal law that juries must be properly instructed for a conviction to stand. Omitting an element of an offense when instructing a jury is "an error of constitutional magnitude." *People v Carines*, 460 Mich 750, 761 (1999). The prosecutor claims that Mr. Langston "mistak[es] malice for an element." *Prosecutor's Supplemental Brief,* p 29. But, according to this Court, it is the prosecutor who is mistaken:

> [T]he elements of felony murder are: 1) the killing of a human being, **2) malice**, and 3) the commission, attempted commission, or assisting in the commission of one of the felonies enumerated in the statute, among them armed robbery. [*Carines*, 460 Mich at 768 (emphasis added).]

Malice is an element of felony murder. *People v Dumas*, 454 Mich 390, 402 (1997); *People v Reichard*, 505 Mich 81, 87 (2020).

Therefore, people like Mr. Langston were sentenced to die in prison without a jury determining an essential element of the offense. This Court cannot say with any confidence that the harshest sentence possible in Michigan—death in prison—is the appropriate sentence for people convicted of felony murder without the element of malice.

In deciding *Aaron*, this Court recognized that "[t]he United States Supreme Court has reaffirmed on several occasions the importance of the relationship between culpability and criminal liability." *People v Aaron*, 409 Mich 672, 711-712 (1980), quoting *Mullaney v Wilbur*, 21 US 684, 697 (1975), *Morissette v United States*, 342 US 246, 250-251 (1952), and *Lockett v Ohio*, 438 US 586, 620 (1978). Convicting a person of felony murder based on the commission of the underlying felony as sufficient for malice was "unacceptable, because it is based on a concept of culpability which is 'totally incongruous with the general principles of our jurisprudence' today." *Aaron*, 409 Mich at 712-713 (citations omitted).

Since *Aaron*, this Court has repeatedly recognized the need to reserve the harshest penalties for the most culpable people. See, e.g., *People v Parks*, 510 Mich 225 (2022); *People v Stovall*, 510 Mich 301, 316 n 4 (2022); *People v Lymon*, __ Mich __ , __ (2024) (Docket No. 164685), slip op at 15. The United States Supreme Court has done the same. See, e.g., *Atkins v Virginia*, 536 US 304, 317-321 (2002); *Roper v Simmons*, 543 US 551, 572-573 (2005); *Graham v Florida*, 560 US, 48, 67-68 (2010), *Miller v Alabama*, 567 US 460, 471 (2012). No factfinder determined that Mr. Langston acted with malice. And yet he is serving the harshest penalty that exists in Michigan.

Culpability is relevant when fashioning a proportionate, individualized sentence:

> The modern view of sentencing is that the sentence should be tailored to the particular circumstances of the case and the offender in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential. . . . A judge needs complete information to set a proper individualized sentence. [*People v McFarlin*, 389 Mich 557, 574 (1973)].

Michigan is committed to individualized sentencing. "[T]his Court has consistently required sentencing decisions to be based on the principle of proportionality across different sentencing regimes." *People v Posey*, 512 Mich 317, 352 (2023). Punishment must be proportionate to the "seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636 (1990). See also *People v Steanhouse*, 500 Mich 453, 474-475 (2017) (returning to the *Milbourn* test for proportionality after the guidelines became advisory in *Lockridge*).[1]

Proportionality is premised on a person's "own conduct." *Enmund v Florida* 458 US 782, 798 (1982). In other words, "[t]he focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims[.]" *Id.* (emphasis in original). "A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the [person] commits the crime." *Tison v Arizona*, 481 US 137, 156 (1987). The "ancient concept of malice aforethought was an early attempt to focus on mental state in order to

[1] The advisory guidelines regime "maintain[s] flexibility sufficient to individualize sentences when necessary." *People v Lockridge*, 498 Mich 358, 391 (2015).

distinguish those who deserved death from" those who might be spared. *Id*. Intent is often the linchpin for determining culpability, and thus proportionality as well. *Lockett*, 438 US at 608 (plurality opinion) (vacating death sentence for failure to fully consider "absence of direct proof that the [person] intended to cause the death of the victim").

Mr. Langston's jury was never instructed properly on the intent element. *People v Langston*, 86 Mich App 656, 660 (1978), *rev'd*, 413 Mich, 911, 911 (1982). It is disproportionate and unconstitutional for Mr. Langston to serve the same, mandatory, lifelong penalty as if he were convicted of murder (i.e. with malice) beyond a reasonable doubt.

This Court's analysis in *Parks* is equally applicable here:

> "While we emphatically do not minimize the gravity and reprehensibility of defendants' crime, it would be profoundly unfair to impute full personal responsibility and moral guilt" to those who are likely to be biologically incapable of full culpability. Such an automatically harsh punishment without consideration of mitigating factors is unconstitutionally excessive and cruel. [*Parks*, 510 Mich at 259-260, quoting *Bullock*, 440 Mich at 39.]

Here, this could read as follows, with little change from *Parks*:

> "While we emphatically do not minimize the gravity and reprehensibility of [Mr. Langston's] crime, it would be profoundly unfair to impute full personal responsibility and moral guilt" to those whose judges or juries never found they were culpable of committing murder. Such an automatically harsh punishment without consideration of

> a person's culpability is unconstitutionally excessive and cruel.

Automatically sentencing a person to die in prison for felony murder is contrary to the evolving standards of decency in Michigan. This is especially true when a factfinder never found a person to have a guilty state of mind, let alone was it determined by the judge or jury beyond a reasonable doubt. The application of the felony-murder statute before *Aaron* is a vestige, yet there are approximately 100 people still expecting to die in prison because of it.

This Court recognized the "harshness" of the felony-murder rule. *Aaron*, 409 Mich at 689, 707. In Michigan, there can be no harsher application of the felony-murder rule than sentencing a person to die in prison without a finding of malice. Many people convicted of felony murder and sentenced to die in prison before Aaron have, in fact, died in prison. See *Pre-Aaron Chart*, attached.[2] Given that *Aaron* was decided in 1980, people convicted before this Court's decision have served *at least* 44 years in prison. The rule becomes harsher when looking at the people who were sentenced to die in prison before *Aaron*.

There were 157 people convicted of felony murder before *Aaron*. See *Pre-Aaron Chart*, attached. Of those, 51 people have either died or been

[2] This chart was created and is maintained by Safe & Just Michigan. It is attached as an appendix, along with a statement from Safe & Just Michigan's Executive Director John Cooper, certifying its accuracy.

released from prison.[3] The youngest pre-*Aaron* person who is serving LWOP for felony murder is 63 years old; the oldest is 86 years old. *Id.*

Modern standards of decency call for addressing the aging prison population.[4] Keeping elderly people locked up until they die is cruel or unusual and serves no purpose for public safety.[5]

This is a racial justice issue. There are 136 pre-*Aaron* people serving LWOP for felony murder whose race is identified on the chart. *Id.* Of

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[3] The Offender Tracking Information System uses the same term, "discharge," to describe both a person who has died in prison and a person who has been released and completed their parole term.

[4] Safe and Just Michigan, *Old, sick and expensive: The graying of Michigan's prison population*, <https://www.safeandjustmi.org/2019/03/21/old-sick-and-expensive-the-graying-of-michigans-prison-population/> (accessed December 23, 2024); see also The Sentencing Project, *A Second Look at Long-Term Imprisonment in Michigan*, <https://www.sentencingproject.org/fact-sheet/a-second-look-at-long-term-imprisonment-in-michigan/> (accessed December 23, 2024).

[5] The United States Sentencing Commission "found that younger offenders were more likely to be rearrested than older offenders, were rearrested faster than older offenders, and committed more serious offenses after they were released than older offenders." Kim Steven Hunt, Ph.D., & Billy Easley II J.D., The Effects of Aging on Recidivism Among Federal Offenders, Part V, p.22 (2017) <thttps://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf> (accessed December 23, 2024).

those people, 111 people are identified as Black. *Id.* While 14% of Michigan's overall population is Black, 82% of people serving LWOP for pre-*Aaron* felony murder are Black.[6] This racial disparity is not limited to people convicted before *Aaron*. 71% of people convicted of felony murder in Michigan are Black.[7] A person is 15.9 times more likely to be convicted of felony murder if they are Black than if they are white. *Id.*

The vast majority of people who are still serving pre-*Aaron* sentences are elderly Black men, incarcerated until they die even though no factfinder ever properly determined their guilt beyond a reasonable doubt. And they are unable to demonstrate they are not a risk to the public through the standard parole process. Their only hope of release is vanishingly rare: commutation by the Governor.[8]

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[6] United States Census Bureau, Quick Facts Michigan <https://www.census.gov/quickfacts/fact/table/MI/PST045223> (accessed December 23, 2024).

[7] The Felony Murder Reporting Project, Michigan Data <https://felonymurderreporting.org/states/mi/> (accessed December 21, 2024).

[8] Commutation is not a viable alternative for most of these people, given the rarity with which people convicted of murder are granted commutations. See *Graham v Florida*, 560 US 48, 69-70 (2010), citing *Solem v Helm*, 463 US 277, 300-301 (1983) ("The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not

Modern standards of decency require this Court to reckon with the racial disparity in sentencing people to LWOP for felony murder. Death in prison after a conviction for felony murder—pre-*Aaron* or post-*Aaron*—has a grossly disproportionate impact on Black people. A doctrine that imposes unusual punishment for one marginalized group should end under modern standards of decency.

B. Sentencing a person to die in prison does not serve Michigan's sentencing goal of rehabilitation.

A sentence of life imprisonment slams the door shut on any possibility of rehabilitation. *Parks*, 510 Mich at 265. "[T]he goal of rehabilitation is not accomplished by mandatorily sentencing an individual to life behind prison walls without any hope of release." *Id.* at 264-265.

People generally rehabilitate. This Court has noted the "important belief that only the rarest individual is wholly bereft of the capacity for redemption." *Bullock,* 440 Mich at 39-40 n 23, quoting *People v Schultz,* 435 Mich 517, 533-534 (1990).

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mitigate the harshness of the sentence.") Commutation is even rarer—and more political—than the process for paroling from a life *with* parole sentence, which this Court acknowledged contributed to the unconstitutional nature of a life with parole sentence for young people See *People v Stovall*, 510 Mich 301, 321 (2022) ("[W]hether the Parole Board practically considers whether to grant parole to an offender serving a parolable life sentence is subject to the fluctuations of executive branch policies.:)

Those sentenced to life in prison have tremendous capacity for redemption. "[T]he majority of lifers are at a low risk for reoffending."[9] See also Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment,* 87 UMKC L Rev 113 (2018) (arguing that "unduly long prison terms are counterproductive for public safety and contribute to the dynamic of diminishing returns as the prison system has expanded").

Importantly, "extra time behind bars neither prevented crimes during the period of incarceration nor kept offenders from committing crimes once released from prison."[10] After a certain amount of time, additional incarceration does little to "seek restoration of the moral imbalance caused by the offense." *Graham*, 560 US at 71. Instead, life without the possibility of parole reflects "a final judgment at sentencing

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[9] Citizens Alliance on Prisons and Public Spending, *Parolable Lifers in Michigan: Paying the price of unchecked discretion*, <https://www.prisonpolicy.org/scans/cappsmi/Parolable-Lifers-in-Michigan-Paying-the-price-of-unchecked-discretion.pdf> (accessed December 22, 2024).

[10] The Pew Charitable Trusts, *Prison Time Served and Recidivism*, <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2013/10/08/prison-time-served-and-recidivism> (accessed December 22, 2024). See also The Sentencing Project, *Counting Down: Paths to a 20-Year Maximum Prison Sentence*, <https://www.sentencingproject.org/app/uploads/2023/02/Counting-Down-Paths-to-20-Year-Maximum-Prison-Sentence.pdf?emci=f989c954-0dab-ed11-994d-00224832eb73&emdi=ea000000-0000-0000-0000-000000000001&ceid=> (accessed December 23, 2024).

that no matter what a person does, no matter how he changes, he will never be fit to rejoin society." Judith Lichtenberg, *Against Life Without Parole*, 11 Wash U Jurisprudence Rev 39, 46 (2018). Our sentencing jurisprudence acknowledges that generally, people rehabilitate and can be released with lessened risk to public safety. *Parks*, 510 at 265. Ignoring individuals like Mr. Langston would be an affront to these rehabilitation efforts, "a specific goal of our criminal-punishment system." *Id.*

It is this Court's job to ensure the constitutionality of legislatively enacted sentences and that they are not excessive:

> [W]e are duty-bound to interpret the Constitution, no matter the outcome. Contrary to what the dissent argues, determining whether the Legislature's chosen sentence runs afoul of our Constitution's protections is well within the purview of this Court and does not violate any separation-of-power principles. We cannot shirk our duty and defer to the Legislature's choice of punishment when its choice is offensive to our Constitution. [*Parks*, 510 Mich at 255].

Sentencing a person to die in prison without a factfinder determining they had malice is "offensive to our Constitution." *Id.*

II. This Court should overrule *People v Hall* because it is poorly reasoned and out-of-step with Michigan's evolving standards of decency.

This Court has a "duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question." *Robinson v City of Detroit,* 462 Mich 439, 464 (2000) (quotation marks and citation omitted).

The *Hall* Court's cruel-or-unusual analysis was short:

> As for the cruel and unusual punishment claim, under *People v. Lorentzen*, the punishment exacted is proportionate to the crime. Defendant has not contended that Michigan's punishment for felony murder is widely divergent from any sister jurisdiction. The third *Lorentzen* factor, rehabilitation, was not the only allowable consideration for the legislature to consider in setting punishment.
>
> '(S)ociety's need to deter similar proscribed behavior in others, and the need to prevent the individual offender from causing further injury to society' were also recognized. In any event rehabilitation and release are still possible, since defendant still has available to him commutation of sentence by the Governor to a parolable offense or outright pardon. A mandatory life sentence without possibility of parole for this crime does not shock the conscience.
>
> The power to establish sentences historically has resided in the legislature. The separation of powers clause is not

> offended by the legislature delegating sentencing discretion in part and retaining sentence discretion in part.
>
> The courts have no discretionary power in this respect unless it be conferred upon them by law.

People v Hall, 396 Mich 650, 657-658 (1976) (cleaned up).

There are several problems with this short holding. There was essentially no analysis on the first three prongs of Michigan's cruel-or-unusual test. In fact, this Court appears to have combined the first two, given that it refers to "rehabilitation" as the third prong, when it is the fourth prong. See *Stovall,* 510 Mich at 314. This Court misread the fourth prong, however, given that the question is whether the sentence fosters rehabilitation, not whether rehabilitation is a goal of sentencing. *Id.* This Court erred in relying on the remote chance of a commutation or pardon as a factor that allows for rehabilitation from a death-in-prison sentence. See n 8 *supra*. Lastly, this Court abdicated its duty to interpret the constitutionality of a sentencing scheme, completely deferring to the Legislature. This Court's job is the opposite:

> "[T]he people of Michigan, speaking through their constitution, have forbidden the imposition of cruel or unusual punishments, and we are duty-bound to devise a principled test by which to enforce that prohibition, and to apply that test to the cases that are brought before us." . . . This conclusion is therefore precisely a determination of what the law requires and not, as the dissent asserts, an intrusion upon the Legislature's authority of determining what the law should be. We have done this without controversy many times before and will undoubtedly do so

> again. [*Stovall*, 410 Mich at 322 (internal citations omitted)].

This Court should not follow a decision that is "badly reasoned." *People v McKinley*, 496 Mich 410, 424 (2014); *Robinson v City of Detroit*, 462 Mich 439, 463-464 (2000). *Hall* was badly reasoned.

In addition, *Hall* was decided before *Aaron*. Therefore, it was not even settled law at the time of *Hall* how a person could be found guilty of felony murder. *Hall* did not consider the question now before the Court: whether it is cruel or unusual to sentence a person to die in prison without a finding of malice. Given the evolution of the law since 1976, *Hall* is obsolete.

This Court should also consider whether *Hall* "defies practical workability, whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision." *Robinson*, 462 Mich at 463-464 (cleaned up).

Hall could be considered workable, given it affirms a mandatory LWOP sentence for anyone convicted of felony murder (except, of course, for a person aged 18 or younger. See *Parks*, *supra*). But, just because mandatory sentences are easy for the State to impose does not make a sentence workable, especially given how outdated and inapposite *Hall* is with this Court's other, more thorough decisions on cruel or unusual punishment. See generally, *Parks*, *Stovall*, *Lymon, supra*.

While the State places special emphasis on reliance interests, *Prosecutor's Supplemental Brief*, p 45-46, those do not necessarily stem from *Hall*, but rather from wanting to maintain convictions and sentences that are at least 44 years old. Regardless, these reliance interests are mitigated by their age: anyone convicted of felony murder

before *Aaron* has served, *at a minimum*, 44 years in prison. The youngest person serving LWOP for felony murder pre-*Aaron* is 63 years old, and we know people age out of crime. But, to further address the issue of reliance, a possible remedy for this Court is to enter convictions for the underlying felony and vacate the felony-murder charges—a suggestion posed by the State. *Prosecutor's Supplemental Brief*, p 35-37. This would eliminate the need to re-try people, while still allowing the Parole Board jurisdiction after resentencing. While there may be victims[11] still alive who would not like this resolution, this Court recognized that "[w]hile it is understandable that little compassion may be felt for the criminal whose innocent victim dies, this does not justify ignoring the principles underlying our system of criminal law." *Aaron*, 409 Mich at 710.

[11] Victims, of course, are individual people. Some may wish to see people reform, rehabilitate, and come back to the world. Alliance for Safety and Justice, *Crime Survivors Speak*, <https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf> (accessed December 22, 2024) (finding that by a 2 to 1 margin, victims would prefer a greater focus on rehabilitation than punishment).

III. This Court should apply *Aaron* to Mr. Langston and others like him.

The prosecutor has confused what is a straightforward question on retroactivity. At the outset, no deference is owed to a single sentence that has been improperly interpreted to mean that *Aaron* is not retroactive: "This decision shall apply to all trials in progress and those occurring after the date of this opinion." *Aaron*, 409 Mich at 734. This sentence was a declaration, not a conclusion made after a thoughtful and complete retroactivity analysis. The *Aaron* opinion included no discussion of Michigan's retroactivity principles or case law. This Court did not explicitly forbid relief for a trial which already occurred, including those pending on direct or collateral review. This single sentence is not entitled to the benefit of stare decisis.

This Court has never issued an opinion on whether *Aaron* applies retroactively.[12] Justice Levin repeatedly urged the Court to grant leave and decide whether *Aaron* applied retroactively. *People v Lonchar*, 411 Mich 923, 923 (1981) (Levin, J., dissenting from denial of leave to appeal); *People v Lonchar*, 447 Mich 980 (1994) (Levin, J., dissenting from denial of leave to appeal).

This Court never granted leave, supplemental briefing, or argument, until now. The State and its amicus urge this Court to shackle itself to a single sentence without this Court having engaged in any retroactivity analysis. This Court writes on a clean slate here. There are four reasons that the statutory interpretation this Court conducted in *Aaron* applies

[12] A leave denial is not precedent, only "decisions" are. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369 (2012). See also Const 1963, art 6, § 6.

retroactively: (1) Mr. Langston's claim was pending on direct appeal; (2) this Court interpreted what the felony-murder statute has always meant; (3) even if this Court did create a new rule, it was substantive; and (4) even if the rule was procedural, it should be retroactively applied under Michigan law.

A. *Aaron* should apply to all cases that were pending on direct appeal at the time of the decision.

Because Mr. Langston's case was on direct appeal at the time of *Aaron*, he should benefit from its holding. See *Schafer v Kent County*, __ Mich __, __ (2024) (Docket No. 165219); slip op at 11 (explaining that decisions of this Court apply 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."). See also *Griffith v Kentucky*, 479 US 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past."). *Aaron*'s rule should have been applied to Mr. Langston, who had the very same issue pending on direct appeal at the time of *Aaron*. See also *Desist v United States*, 394 US 244, 258–59 (1969) (Harlan, J., dissenting) ("We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law."). In *Aaron*, this Court did not address people whose cases were pending on direct review and therefore, the default rules of retroactivity apply.

B. This Court clarified the meaning of the felony-murder statute in *Aaron* and did not announce a new rule.

As argued by Mr. Langston in his supplemental brief, the rule from *Aaron* was a rule of statutory interpretation, where this Court interpreted what the felony-murder statute has always meant. See *Mr. Langston's Supplemental Brief*, p 15-22.[13] Thus, *Aaron* must be applied retroactively.

C. If this Court finds that *Aaron* announced a new rule, that new rule is substantive and must be given full retroactive effect.

If this Court determines that *Aaron* announced a new rule, the new rule was substantive: a factfinder must find, and a prosecutor must prove, the element of malice beyond a reasonable doubt before a person can be convicted of felony murder.

Substantive rules are given retroactive effect: "[W]hen non-procedural or substantive rights of a fundamental nature are affected, they are normally to be accorded retrospective application." *People v Gay*, 407 Mich 681, 706 (1980). A decision is substantive if it "alters the range of conduct of the class of persons that the law punishes," including decisions that "narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Welch v United States*, 578 US 129, 130 (2016). The *Aaron* rule is a substantive rule because it interpreted the terms of the felony-

[13] See also *People v Walker*, 328 Mich App 429, 449 (2019) (holding that the rule from *Lafler v Cooper*, 566 US 156 (2012) "did not create a new rule and . . . therefore applies retroactively to this case.").

murder statute and required proof of an additional element before a person could be convicted.

First, the *Aaron* rule "alter[ed] the range of conduct for the class of persons that the law punishes." *Welch*, 578 US at 130. After *Aaron*, a person can no longer be punished with LWOP for felony murder unless the malice was proven beyond a reasonable doubt.

Second, the *Aaron* rule "narrow[ed] the scope of a criminal statute by interpreting its terms." *Id.* This was fully briefed by Mr. Langston. See *Mr. Langston's Supplemental Brief*, p 15-22. This Court interpreted Michigan's felony murder statute to require proof of malice, which narrowed its scope.

Third, *Aaron* did in fact include a "constitutional determination[]." *Id.* "[A]n error in omitting an element of the felony murder instructions would be an error of constitutional magnitude." *People v Carines*, 460 Mich 750, 761 (1999).

The State argued that incorrect jury instructions do not implicate constitutional rights because the State believes malice is not an element of felony murder. *Prosecutor's Supplemental Brief*, p 27-29. Make no mistake about it, "malice remains an indispensable element in the crime of murder." *Aaron*, 409 Mich at 702. "The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense." *Carella v California*, 491 US 263, 265 (1989). "Jury instructions relieving States of this burden violate a [person's] due process rights." *Id.*

Jury instructions—particularly when it comes to the elements of a charged offense— implicate constitutional rights, including due process.

US Const, Am XIV; *Sullivan v Louisiana*, 508 US 275, 278 (1993) (noting Fifth and Sixth Amendments are "interrelated"). Whether the jury is instructed on the wrong burden of proof, *In re Winship*, 397 US 358, 363 (1970); an element is missing from the instructions, *Id.* at 361; the language of an instruction is too vague, *Percoco v United States*, 598 US 319, 329 (2023); or an element is given a conclusive presumption, *Sandstrom v Montana*, 442 US 510, 517 (1979), it violates due process to deprive a person of liberty "unless the prosecution proves beyond a reasonable doubt every element of the charged offense." *Carella*, 491 US at 265. The State's argument to the contrary is without merit. An erroneous jury instruction is a substantive violation of a person's constitutional rights.

Mr. Langston "has the right to have a properly instructed jury consider the evidence against him." *People v Mills*, 450 Mich 61, 80 (1995), modified on other grounds, 450 Mich 1212 (1995). Jury instructions on the elements of the offense implicate the fundamental right to a jury trial. "[T]he right to trial by jury" itself is already incorporated through the Due Process Clause. *Duncan v Louisiana*, 391 US 145, 149 (1968). No matter the evidence, each person "has an absolute right to a jury determination upon all essential elements of the offense." *People v Reed*, 393 Mich 342, 349 (1975). If jury instructions lack constitutional value, the "right mentioned twice in the Constitution would be reduced to an empty promise. That can't be right." *Ramos v Louisiana*, 590 US 83, 98 (2020). This is a right of constitutional magnitude. *Reed*, 393 Mich at 349. *See* also Const 1963, art 1, § 14.

Proper jury instructions are so essential to protecting fundamental rights that, if defense counsel at trial fails to request an appropriate jury instruction, counsel ceases to be "counsel" in the constitutional sense.

People v Ogilvie, 341 Mich App 28, 42 (2022) (failure to request non-deadly force instruction is ineffective assistance of counsel).

The State argues *Aaron* did not announce a substantive new rule because this Court's decision "was not issued as a matter of constitutional jurisprudence, but in this Court's authority in developing the common law." *Prosecutor's Supplemental Brief*, p 34. But neither this Court nor the United States Supreme Court has held that a rule must be constitutional in order to be substantive. In fact, the Supreme Court has held the opposite. See, e.g. *Welch*, 578 US at 130-131 ("[A] new rule is substantive or procedural by considering the function of the rule, not its underlying constitutional source.") (internal citations omitted). In any event, *Aaron* plainly implicated constitutional rights.

The *Aaron* rule—that a person must be found guilty beyond a reasonable doubt of having malice to convict a person of felony murder—is a substantive rule that is entitled to retroactive application.

D. Even if this Court determines the rule from *Aaron* is procedural, it nevertheless must be given full retroactive effect.

Retroactive application of *Aaron* "is required to assure the fair distribution of a fundamental right." *Gay*, 407 Mich at 709—that is, the right to be convicted only when a jury is properly instructed on each element of the offense. The inquiry should stop here. But even if this Court determines that *Aaron* announced a new, procedural rule, it nevertheless applies retroactively.

"When considering procedural rules governing trial conduct, the *Linkletter-Hampton* criteria play a predominant role." *Gay*, 407 Mich at 706. Under the *Linkletter*/*Hampton* tests, the *Aaron* rule must still be given retroactive application. To determine whether a new procedural

rule is retroactive under Michigan law, this Court considers: (1) the purpose of the new rule; (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 Hampton*, 384 Mich 669, 674 (1971).

The first prong controls. For the same reasons the *Aaron* rule is substantive, the purpose of the rule supports retroactive application. The purpose of the rule is to ensure that people are not convicted of felony murder—and sentenced to die in prison—without a finding of malice beyond a reasonable doubt:

> "If one had to choose the most basic principle of the criminal law in general * * * it would be that criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result * * *."
>
> The most fundamental characteristic of the felony-murder rule violates this basic principle in that it punishes all homicides, committed in the perpetration or attempted perpetration of proscribed felonies whether intentional, unintentional or accidental, without the necessity of proving the relation between the homicide and the perpetrator's state of mind. This is most evident when a killing is done by one of a group of co-felons. The felony-murder rule completely ignores the concept of determination of guilt on the basis of individual misconduct. The felony-murder rule thus "erodes the relation between criminal liability and moral culpability." [*Aaron*, 409 Mich at 708 (cleaned up) (internal citations omitted)].

The *Aaron* rule protects a person's rights under the statute and their constitutional due process rights.

As to the second factor, the old rule was unsettled at the time this Court decided *Aaron*, as this Court acknowledged in *Aaron*. 409 Mich at 686-689. "When a decision overrules settled law, more reliance is likely to have been placed in the old rule than in cases in which the law was unsettled or unknown." *People v Sexton*, 458 Mich 43, 63–64 (1998). Because the law was unsettled, the reliance interest is minimal.

Regarding the third and final prong, applying *Aaron* retroactively will not significantly impact the administration of justice. The pre-*Aaron* rule applies to a discrete, known number of people. *Pre-Aaron Chart*, attached. While the prosecutor suggests that it will be difficult to re-prosecute people decades later, that argument loses force when considering both that (1) people convicted before *Aaron* have served, at minimum, nearly half a century in prison, and (2) prosecutors frequently prosecute cold cases, and here there is a trial record. And, as the prosecutor suggests, the issue could be remedied with little impact to the administration of justice if convictions for felony murder were vacated and people were re-sentenced on the underlying felony. *Prosecutor's Supplemental Brief*, p 35-37.

* * *

Keeping Mr. Langston—and others like him—in prison until he dies, even though no factfinder ever found beyond a reasonable doubt that he committed murder, is the essence of cruel or unusual punishment. This Court should find that *Aaron* applies retroactively and that it violates Michigan's Constitution to sentence a person convicted before *Aaron* to death in prison.

Conclusion and Relief Requested

For the reasons stated above, the Criminal Defense Attorneys of Michigan respectfully request that this Honorable Court grant the relief requested herein and by Mr. Langston.

Respectfully submitted,

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This Brief contains 5,874 countable words.

Date: December 23, 2024