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STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN,	)	
Plaintiff-Appellee,	)	MSC No.: 166654
	)	COA No.: 348732
v.	)	Trial Court No.: 16-010813-FC
ANDREW MICHAEL CZARNECKI,	)	
Defendant-Appellant.	)	

BRIEF FOR THE STATE LAW RESEARCH INITIATIVE AND RODERICK & SOLANGE MACARTHUR JUSTICE CENTER AS *AMICI CURIAE* SUPPORTING DEFENDANT-APPELLANT

Allison L. Kriger (P76364)
LARENE & KRIGER, P.L.C.
500 Griswold Street, Suite 2400
Detroit, MI 48226
(313) 967-0100
akriger@larenekriger.com

Kyle C. Barry*
THE STATE LAW RESEARCH INITIATIVE
303 Wyman Street, Suite 300
Waltham, MA 02451
(802) 318-3433
kylecbarry@gmail.com
**Motion for temporary admission pending*

Christine A. Monta*
Jonathan Gibson*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3308
christine.monta@macarthurjustice.org
**Motion for temporary admission pending*

Counsel for Amici Curiae *The State Law Research Initiative and Roderick & Solange MacArthur Justice Center*

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STATEMENT OF INTEREST[1]

Amicus Curiae The State Law Research Initiative (SLRI), a fiscally-sponsored project of the Proteus Fund, Inc., is a legal advocacy organization dedicated to reviving and strengthening state constitutional rights that prevent extremes in our criminal systems, with a focus on excessive prison terms and inhumane conditions of confinement. SLRI's work includes, among other things, fostering and developing legal scholarship on the history and meaning of state constitutional rights, as well as working with legal scholars and criminologists to file amicus briefs in state courts of appeal.

Amicus Curiae the Roderick & Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have participated in civil rights campaigns in areas that include police misconduct, compensation for the wrongfully convicted, extreme sentences, and the treatment of incarcerated people.

[1] Counsel for a party did not author this brief, in whole or in part, and did not make a monetary contribution intended to fund the preparation or submission of this brief. The State Law Research Initiative is a fiscally-sponsored project of the Proteus Fund. Otherwise, no person or organization other than the *amici curiae* made any monetary contributions towards the writing of this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Mandatorily sentencing emerging adults to life without parole (LWOP) for crimes they committed when nineteen or twenty violates Michigan's ban on "cruel or unusual punishment," Mich. Const., art. 1, § 16, and this Court should extend its holding in *People v. Parks*, 510 Mich. 225 (2022), to reach this conclusion. As *amici curiae* here demonstrate, mandatorily sentencing someone to die in prison without any assessment of their prospects for rehabilitation and without any hope for release is per se "cruel" and therefore violates Mich. Const., art. 1, § 16. At a minimum, therefore, mandatorily sentencing someone to die in prison for an offense they committed at the age of nineteen or twenty must be unconstitutionally "cruel" as well.

True life without the possibility of parole (or, "death-by-incarceration") sentences are a relatively new innovation in criminal punishments. *See* CHRISTOPHER SEEDS, DEATH BY PRISON, THE EMERGENCE OF LIFE WITHOUT PAROLE & PERPETUAL CONFINEMENT (2022). For most of Michigan's history, they did not exist. Instead, Michigan maintained a constitutional commitment, made explicit in this Court's cases, to pursue rehabilitation as the primary goal of criminal sanctions. *See People v. Lorentzen*, 387 Mich. 167, 179-80 (1972). It is true that some people received "life" terms before parole existed, and that later, people with first-degree murder convictions were technically excluded from parole eligibility. But from the time of Michigan's first Constitution in 1850 through the 1980s, there remained a meaningful opportunity for eventual release for all life-sentenced persons—including those convicted of first-degree murder. Whether through executive clemency, parole,

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or those systems working in tandem, incarcerated people could demonstrate rehabilitation—could, as this Court put it over a century ago, "make the test"—and earn their release. *People v. Cook*, 147 Mich. 127, 132 (1907).

This deep commitment to rehabilitation as a matter of both fairness and public safety dates to the original meaning of "cruelty" in the 1850 "cruel or unusual" clause. During convention debates, Delegates repeatedly objected to permanent punishments that effectively banished people from civil society and undermined the goal of rehabilitation. This commitment is also reflected in this Court's cases explaining that rehabilitative sanctions are deeply "rooted in Michigan's legal tradition[s]," *Parks*, 510 Mich. at 265, in sentencing legislation and corrections policy, and in the State's constitutional history spanning more than a century, including its early abolition of capital punishment.

Yet, more recently, Michigan has broken from this commitment and joined a national tide of harsh and ineffective sentencing practices. Today, Michigan is an international outlier in imposing death-by-incarceration sentences that "forswear[] altogether the rehabilitative ideal." *Parks*, 510 Mich. at 265. This is true despite decades of experience and recidivism data showing that lifers have among the "best prospects for rehabilitation and successful adjustment in the community," a proposition that once fundamentally shaped Michigan Department of Corrections (DOC) policy. Exhibit 1 at 1 (Ltr. Gus Harrison, Dir. Mich. Dep't of Corr. To Hon George Romney, Michigan Governor (Oct. 5, 1964)). Yet unrestrained majoritarian pressure—driven by fear rather than sound research—has contributed to a "one-way

ratchet" of "ever-increasing penalties" that has extinguished any hope of release for persons sentenced to life without parole. *See* Anne Yantus, *Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform*, 47 U. MICH. J. L. REFORM 645, 667 (2014).

Today, Michigan's mandatory life-without-parole scheme ensnares people who have already achieved or who retain the capacity to reform. This includes people with lower-culpability felony murder convictions, sent to die in prison for deaths they did not cause or intend to happen; people who are now elderly and pose virtually zero public safety risk; people raised amid trauma who never before had the chance to heal or live apart from horrendous circumstances; people who have simply accepted responsibility for the harm they caused, expressed remorse, and can make positive contributions to society; and, as relevant here, people convicted as young adults, before their brains fully developed.

For decades this Court has been rightly skeptical of life-without-parole sentences for certain categories of offenders, enforcing the constitutional commitment to rehabilitation on a case-by-case basis. We agree that death-by-incarceration is especially cruel in certain cases, and here we agree with Appellant that mandatorily sentencing someone to life without parole for an offense committed as a nineteen- or twenty-year-old is cruel or unusual punishment. But that is in part because *all* death-by-incarceration sentences in Michigan violate the state's constitutional commitment to rehabilitative sentencing.

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ARGUMENT

I. Legal Background.

For over fifty years this Court has consistently held that it is "duty-bound" to independently interpret Article 1, § 16, which under "longstanding Michigan precedent" demands "a broader interpretation" than the federal Eighth Amendment's ban on "cruel and unusual" punishment. *People v. Bullock*, 440 Mich. 15, 41, (1992); *People v. Stovall*, 510 Mich. 301, 313-14 (2022). As this Court recently explained, Article 1, § 16's "use of 'or' rather than 'and' provides additional protection" beyond the federal Eighth Amendment, as it "prohibits punishments that are cruel, even if they are not unusual, *and* prohibits punishments that are unusual, even if they are not cruel." *People v. Lymon*, ___ Mich. ___; No. 164685, 2024 WL 3573528, *4 n.7 (S. Ct. Mich. July 29, 2024) (citing *People v. Bullock*, 440 Mich. 15, 32-33 (1992)).

Here, our focus is on the cruelty of sentencing people to life without the possibility of parole, a conclusion that is informed, as it must be, by "evolving standards of decency that mark the progress of a maturing society." *Parks*, 510 Mich. at 241. Under evolving standards review, courts assess the efficacy of challenged punishments, asking whether they serve a legitimate penological goal "more effectively than a less severe punishment," *Furman v. Georgia*, 408 U.S. 238, 280 (1972) (Brennan, J., concurring), or at least make a "measurable contribution to acceptable goals of punishment." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). If a "significantly less severe punishment" exists that is "adequate to achieve the purposes for which the punishment is inflicted," the punishment imposed is

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"unnecessary and therefore excessive." *Furman*, 408 U.S. at 279 (Brennan, J., concurring) (citations omitted); *see also* Robert J. Smith, Zoë Robinson, & Emily Hughes, *State Constitutionalism & the Crisis of Excessive Punishment*, 108 IOWA L. REV. 537, 578-79 (2023) ("The independent judgment component [of evolving standards review] requires courts to evaluate whether the challenged punishment practice meaningfully serves a legitimate purpose of punishment . . . or if a less severe punishment would suffice.").

Under the Michigan Constitution, this evolving standards analysis ensures that the "passing judgments of temporary legislative or political majorities" are subjected to the "deeper, more profound judgment of the [Michigan] people," which is reflected in the state's unique constitutional history. *Bullock*, 440 Mich. at 41. Indeed, across its state constitutional jurisprudence, this Court considers heavily the "peculiar state or local interest[s]" of the Michigan people. *See e.g.*, *People v. Tanner*, 496 Mich. 199, 223 n.17 (2014). It is for this reason that this Court has long applied its own unique test for determining whether a punishment is unconstitutionally excessive when compared to the purported purposes of criminal punishment in Michigan. *See e.g.*, *Lymon*, 2024 WL 3573528, at *14-17.[2]

[2] Under this test, this Court has articulated a flexible four-factor inquiry, which considers: "(1) the severity of the sentence imposed compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed on other offenders in Michigan, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the penological goal of rehabilitation." *People v. Stovall*, 510 Mich. 301, 314 (2022); *see also People v. Bullock*, 440 Mich. 15, 33-36 (citing *People v. Lorentzen*, 387 Mich. 167, 176-81 (1972)).

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Consistent with this Court's concern for Michigan's own unique constitutional history, the penological goal of rehabilitation holds heightened constitutional significance. Rehabilitation is deeply "rooted in Michigan's legal tradition[]" as a matter of both fairness and public safety, and courts must weigh this interest when deciding whether punishment is unconstitutionally severe. *Parks*, 510 Mich. at 265.[3] Michigan has long rejected the death penalty as appropriate punishment for this very reason, and we argue that, originally understood, Article 1, § 16 prohibits any punishment that wholly conflicts with the State's constitutional commitment to rehabilitation. Because modern day life without parole in Michigan conflicts with this rehabilitative commitment, mandatorily imposing life without parole on nineteen- and twenty-year-olds—a class that, just like the eighteen-year-olds at issue in *Parks*,

[3] Michigan is not entirely unique in this regard, and promoting rehabilitation over other penological goals is one of several ways in which state constitutions generally provide greater individual protections against excessive punishment than the Eighth Amendment. In 2022, for example, the North Carolina Supreme Court held that it is unconstitutional to impose life without parole on children found to be neither incorrigible nor irredeemable in part because "the North Carolina Constitution . . . expressly provid[es] that '[t]he object of punishments' in North Carolina are 'not only to satisfy justice, *but also to reform the offender* and thus prevent crime.'" *State v. Kelliher*, 381 S.E. 558, 585 (2022) (quoting N.C. Const. Art. XI, § 2). In Illinois, the state constitution provides that "[a]ll penalties shall be determined . . . with the objective of restoring the offender to useful citizenship." ILL. CONST., art. I, § 11; *see also* Maria Hawilo & Laura Nirider, *Past Prologue, & Constitutional Limits On Criminal Penalties*, 114 J. CRIM. L. & CRIMINOLOGY 51 (2024). But more than any other state high court, this Court has been clear that whether and to what extent punishments further rehabilitation is *always* a factor in excessive sentencing claims.

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is especially capable of rehabilitation—is "particularly antithetical to [the Michigan] Constitution's professed goal of rehabilitative sentences." *Parks*, 510 Mich. at 265.

II. Life Sentences Without The Possibility Of Parole Are "Cruel" Under Article 1, § 16 Because They Undermine Michigan's Constitutional Commitment To Rehabilitation And Rejection Of Permanent Punishment.

A. A punishment that does not allow for any consideration of an individual's potential for rehabilitation is per se "cruel" under Article 1, § 16.

Since Michigan's founding, the goal of rehabilitation has underpinned the State's entire criminal-punishment system. Beginning as early as 1888, this Court has placed rehabilitation at the center of its Article 1, § 16 jurisprudence. And ratification history from constitutional changes in 1850, 1902, and 1961 all demonstrate that Michigan's constitutional framers considered a punishment cruel if it wholly abandoned the ideal of rehabilitation. Longstanding sentencing policy from the founding era until the 1980s confirms that understanding. For most of Michigan's history, even those ostensibly facing life sentences retained a meaningful chance of early release based on rehabilitative principles. Thus, there is ample evidence for this Court to conclude that, whatever the term "cruel" might mean at the margins, a punishment that entirely forecloses the possibility of rehabilitation is per se "cruel" under Article 1, § 16.

1. The goal of rehabilitation is explicitly "enshrined" in state supreme court doctrine.

This Court has repeatedly emphasized that "[r]ehabiliation is a specific goal of our criminal-punishment system," and that "it is the only penological goal enshrined in our proportionality test [for excessive punishment] as a 'criterion rooted in

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Michigan's legal traditions.'" *Parks*, 510 Mich. at 265 (quoting *Bullock*, 440 Mich. at 34). Whether and to what extent punishment promotes rehabilitation has been so enshrined since at least 1972, when in *People v. Lorentzen* this Court identified rehabilitation as a core constitutional value that "has long [been] recognized . . . in criminal punishment," including in the State's constitutional embrace of indeterminate sentencing. 387 Mich. at 179-80.

Since then, this factor has weighed heavily in decisions restricting the State's use of life with and without the possibility of parole, along with mandatory term-of-years sentences. For example, as early as 1888, this Court "foreshadowed modern *constitutional* proportionality analysis," *Bullock*, 440 Mich. at 35 n.18, when, in *People v. Murray*, 72 Mich. 10 (1888), it held that term of years sentences should not "be made to extend beyond the average period of persons in prison life, which seldom exceeds 25 years." *Id.* at 17.[4]

Though the Court did not explicitly mention the goal of rehabilitation, *Murray* served as a pillar for this Court's landmark 1972 decision in *Lorentzen*. *Lorentzen* struck down a 20-year minimum sentence for selling marijuana, in part because if "we apply the goal of rehabilitation, it seems dubious" that a then 26-year-old defendant would "be a better member of society" after serving a prison sentence of

[4] In 1989, this Court adopted a similar life expectancy rule under statutes that permitted "life, or any term of years," reasoning that a sentence longer than a defendant's life violated the statute. *See People v. Moore*, 432 Mich. 311 (1989). The Court later impliedly overruled that statutory principle. *See People v. Merriweather*, 447 Mich. 799 (1994). However, the 1888 Murray case, and its constitutional analysis, "has never been overruled." Yantus, *supra*, at 694.

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ten and a half years or more. 387 Mich. at 181. Twenty-years later, in *People v. Bullock*, the Court reiterated that Article 1, § 16 is more expansive than the Eighth Amendment, and struck down Michigan's mandatory life-without-parole sentencing statute for possessing 650 grams of cocaine—a law that the U.S. Supreme Court had upheld just one year before. 440 Mich. at 41-42; *see Harmelin v. Michigan*, 501 U.S. 957 (1991). Key to the analysis was *Lorentzen's* explicit embrace, absent from federal case law, of "the goal of rehabilitation." 440 Mich. at 34.

More recently, this Court has cited the goal of rehabilitation in banning mandatory life without parole for people who are age eighteen at the time of their offense, *Parks*, 510 Mich. at 255, and in banning life *with* the possibility of parole for youth convicted of second-degree murder, *Stovall*, 510 Mich. 301, 320-22 (2022). "It is particularly antithetical to our Constitution's professed goal of rehabilitative sentences," this Court said in *Parks*, "to uniformly deny this group of defendants the chance to demonstrate their ability to rehabilitate themselves." *Parks*, 510 Mich. at 265 (citing *Bullock*, 440 Mich. at 34.)

Importantly, the Court's concern in these cases was not whether criminal punishments merely permit the theoretical *possibility* of rehabilitation. Instead, it was whether these sanctions actually *advance* and provide *opportunities* for rehabilitation and reentering society that are *meaningful*. In *Stovall*, for example, this Court declined to find that parolable life sentences "advance the penological goal of rehabilitation" in part because "prisoners who receive parolable life sentences are given lower priority when it comes to educational and rehabilitative programming."

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Stovall, 510 Mich. at 320. So too in *Parks*, this Court held that eighteen-year-olds convicted of first-degree murder "should be given 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" 510 Mich. at 237 (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)).

In sum, this Court's caselaw makes clear the primacy of rehabilitation in its constitutional proportionality analysis and provides strong support for the conclusion that a penalty that abandons rehabilitation altogether is "cruel" under Article 1, § 16.

2. Ratification history shows that the framers of Michigan's Constitution understood that a punishment was "cruel" if it abandoned the idea of rehabilitation.

This jurisprudence prioritizing rehabilitation aligns with ratification history showing that the framers of Michigan's Constitution saw rehabilitation as the lodestar of whether a punishment was "cruel."

To begin, delegates at Michigan's 1850 constitutional convention adopted more expansive language for the State's anti-punishment clause. Michigan's first constitution, adopted in 1835, had provided that "cruel and unjust punishments shall not be inflicted." MICH. CONST. 1835, art. 1, § 18 (1835). Fifteen years later, delegates not only replaced "unjust" with "unusual," but also adopted the broader disjunctive formulation to prohibit "cruel *or* unusual" punishment. MICH. CONST. 1850, art. 6, § 31 (1850) (emphasis added). As this Court has recognized, this textual change, since re-ratified in 1908 and 1963, was not "accidental or inadvertent." *Bullock*, 440 Mich. at 30. Instead, it "'provide[s] reason to believe that those who framed and adopted the state provision had a different purpose in mind'—different, at any rate, from the

historical understanding" of the Eighth Amendment recognized by the U.S. Supreme Court. *Id*. at 32-33 (quoting *People v. Collins*, 438 Mich. 8, 32 (1991)).

Convention delegates explained this purpose, and their general philosophy of criminal punishment, while debating—and ultimately rejecting—a proposal to permanently bar people convicted of "infamous" crimes from voting. That discussion illustrates how the prevailing view among Article 1, § 16's framers was that "cruelty" attached to permanent punishments that abandoned the ideal of rehabilitation. *See generally* Molly Bernstein & David Shapiro, *The Meaning of Life, In Michigan: Mercy from Life Sentences Under the State Constitution*, Working Paper (Oct. 19, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4993230.

Then-Judge (and later Justice) Benjamin F.H. Witherell—the delegate who also introduced the "cruel or unusual" language—argued against the disenfranchisement provision on the grounds that there are only two reasons for inflicting punishment: "warning to the community and reformation of the offender." REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN 298 (1850). Other delegates agreed. For example, Delegate Alfred H. Hanscom said that "[t]here was no reason to suppose that an individual who underwent imprisonment may not be made a good and moral citizen by the operation of the reformatory training which had been adopted in our prison." *Id*. at 476. Similarly, Delegate DeWitt C. Walker "believed the object of punishment to be the reformation of crime." *Id*. at 352.

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One of the most ardent opponents of the defeated disenfranchisement measure, Delegate Isaac E. Crary, spoke in even stronger language regarding the collective belief that, "if a man go [sic] into prison it is for the purpose of being reformed." *Id.* at 476. Crary decried that the disenfranchisement amendment would "forever disqualif[y] [a person] from being one of our citizens!" *Id.* at 475. After all, the amendment would mean that "those individuals who had been sent to the penitentiary, and there reformed" would nevertheless have "a constitutional provision hanging over them during the remainder of their life" no matter how "well they might conduct themselves" or "however good citizens of the community they might become." *Id.*

Underscoring the goal of rehabilitation, Crary also likened permanent disenfranchisement to "fix[ing] a mark" of Cain upon a person that, "though you may have reformed [them]," would stigmatize the person, "follow [them] through life," and prevent their reformation since others would be "constantly pointing at the black mark upon [them]." *Id.* at 298. This conflicted with punishment's purpose to be "an example to others and to reform the individual" *Id.*

In 1902, the Michigan people likewise embraced this commitment to rehabilitation in a ballot initiative that amended the Michigan Constitution to declare that the "legislature may provide for indeterminate sentences." *Lorentzen*, 378 Mich. at 179 n.26; *see* MICH. CONST. 1963, art. 4, § 47. The Michigan legislature had previously passed an indeterminate sentencing law in 1889, but the Michigan Supreme Court found the law unconstitutional two years later on separation of

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powers grounds in *People v. Cummings*, 88 Mich. 249 (1891). Although unnecessary to the merits, the Court in *Cummings* also criticized the law, arguing that it "would fill our state with convicts – they could not be called freemen – running at large outside our prison walls." *Id.* at 259-60. As a result, in constitutionally overruling *Cummings*, the Michigan people not only created the legislative authority for indeterminate sentencing but also appeared to renounce this anti-rehabilitation dicta in *Cummings*.

Just one year later, the state legislature carried out these rehabilitative ends by making Michigan one of the first states to establish a modern sentencing system via indeterminate sentencing. Yantus, *supra*, at 647. As this Court recognized in 1907, the "design" of that system was "to reform criminals and to convert bad citizens into good citizens, and thus protect society." *Cook*, 147 Mich. at 132. "In order to accomplish this result," this Court said, "when the prisoner has shown by his conduct that he may turn from this criminal career, he should have the opportunity, under favorable circumstances, to make the test." *Id.*

Finally, the framers of the Michigan Constitution again reaffirmed rehabilitation as the essential purpose of punishment in 1961, when they re-adopted Article 1, § 16, while simultaneously constitutionalizing the abolition of the death penalty—a moment that capped over a century of Michigan leading the English-speaking world in recognizing the cruelty of capital punishment. *See* MICH. CONST. 1963, art 4, § 46 ("No law shall be enacted providing for the penalty of death."); OFF. REC. OF FRED I. CHASE, SEC'Y OF THE CONVENTION, AUSTIN C. KNAPP, EDITOR, AND

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LYNN M. NETHAWAY, ASSOC. EDITOR *in* University of Michigan Library Digital General Collection, at 545 https://name.umdl.umich.edu/1749827.0001.001 [hereinafter 1961 Constitutional Convention Debates] (adopting the "cruel or unusual" punishment clause after stating that the language of the provision was "satisfactory as now stated and require[s] no change from the present constitution.").

Even before statehood in 1837, Michigan's constitutional framers and legislators expressed unease about the death penalty because of their commitment to rehabilitation as the principal purpose of punishment. For example, at the 1835 Constitutional Convention, a nineteen-person committee proposed a constitutional provision that "[c]apital punishment ought not to be inflicted: the true design of all punishment being to reform, not to exterminate mankind." Eugene G. Wanger, *Historical Reflections on Michigan's Abolition of the Death Penalty*, 13 T.M. COOLEY L. REV. 755, 759 (1996) (quoting THE MICHIGAN CONSTITUTIONAL CONVENTIONS OF 1835-36 DEBATES AND PROCEEDINGS 86, (Harold M. Dorr ed. 1940)). That provision ultimately failed after delegates narrowly voted it down out of concern that the State was not yet prepared to safely incarcerate death-sentenced individuals. *Id.* The prevailing sentiment remained, however, that "capital punishment, [was] in itself an evil" because it extinguished any chance at rehabilitation. *Id.* (quoting Dorr, CONSTITUTIONAL CONVENTION DEBATES).

That sentiment was further confirmed in the years afterwards, as Michigan never executed anyone following the adoption of the 1835 Constitution. In fact, there have only been twelve executions in all Michigan's history—all of which occurred

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prior to statehood and eight under British or French colonial governance. *See* Death Penalty Information Center, *Michigan* (last visited Oct. 10, 2024), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/michigan; JOHN F. GALLIHER, ET AL., AMERICA WITHOUT THE DEATH PENALTY: STATES LEADING THE WAY at 11 (2002). By comparison, when Michigan attained statehood in 1837, there had been over 200 executions in each of five other states, including 686 in Virginia alone. M. Watt Espy and John Ortiz Smykla, Executions in the United States, 1608-2002: The ESPY File, Inter-university Consortium for Political and Social Research (July 20, 2016), https://doi.org/10.3886/ICPSR08451.v5 (conclusions calculated from data).

In 1846, Michigan became both the first U.S. state and the first English-speaking territory in the world to abolish the death penalty, which it did statutorily, leaving only a never-applied exception for treason. GALLIHER, *supra*, at 11. Again, Michigan's rehabilitative penal philosophy was central to this legislation. In the lead up to abolition, a house select committee on the abolishment of capital punishment issued a majority report condemning capital punishment because, among other reasons, it "destroys . . . life," whereas imprisonment "affords an opportunity for reformation." MICHIGAN LEGISLATURE OF 1844, MAJORITY REPORT OF THE SELECT COMMITTEE ON THE ABOLISHMENT OF CAPITAL PUNISHMENT (Detroit: State of Michigan, 1844).[5] The House ultimately sided with the minority and rejected abolition when that report was issued in 1844. But just two years later, the 1844

[5] Excerpted in HOWARD HILLMAN, MARK A. GRABER, KEITH E. WHITTINGTON, AMERICAN CONSTITUTIONALISM VOLUME II: RIGHTS AND LIBERTIES, SUPPLEMENTAL MATERIAL, MICHIGAN DEBATES CAPITAL PUNISHMENT (2013).

majority's view prevailed when the state abolished the death penalty. Wanger, *supra*, at 760-63.

Thus, when Delegate Hoxie introduced the constitutional provision abolishing capital punishment at the 1961 Convention, he described it as "fitting and opportune for Michigan to step forward in the tradition which we began over 115 years ago" as the "first American state and the first governmental jurisdiction in the English speaking world to legislate against capital punishment." 1961 Constitutional Convention Debates at 595. By constitutionalizing that prohibition, Hoxie argued, Michigan would make "a significant contribution to the concept of civilized justice which all of us seek to serve." 1961 Constitutional Convention Debates at 595. The delegates overwhelmingly passed the provision 108 to 3. Wanger, *supra*, at 15.

Again, delegates emphasized that the rehabilitative ideals fundamental to punishment in Michigan were a driving force behind death penalty abolition. As Hoxie argued, "taking a life is useless and demoralizing to the general public. It is also demoralizing to the public officials who, dedicated to rehabilitating individuals, must callously put a man to death." 1961 Constitutional Convention Debates at 596. Hoxie's concern even extended to other incarcerated people, as he acknowledged that "the effect upon fellow prisoners" of people on death row being executed "can be imagined." *Id.* Subsequent discussion of the provision was brief, but several other delegates similarly criticized the death penalty as an "act of vengeance on the part of the public" that lacked any deterrent value and was a punishment imposed on individuals who "[a]ll were poor and most of them friendless." *Id.* at 597.

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Thus, consistent with this Court's case law, all available ratification history—from the history of the cruel or unusual punishment clause, to the history of the disenfranchisement provision, the indeterminate sentencing provision, and the death penalty abolition provision—confirms that the framers of Michigan's Constitution have enduringly understood that a punishment is cruel if it abandons the ideal of rehabilitation.

3. Modern LWOP—that is mandating death by incarceration with no real chance of release—did not exist at the time Article 1, § 16 was drafted and is a 1980s innovation that is anathema to the rehabilitative ideals that predated it.

In both instances when Michigan rejected the death penalty—first by statute in 1846 and later by constitutional provision in 1961—legislators understood that capital punishment would be replaced by life imprisonment. But to them, life imprisonment did not resemble modern-day life without parole. Instead, up until the 1980s, the governor so routinely used the commutation power that a life sentence, even for previously death-eligible offenses, posed a greater prospect of release than even modern-day life *with* parole. *See infra* at 26-27 (discussing decades of statistical data from the 1900s that evidences this fact).

This practice of routine executive clemency was contemporaneous to the death penalty's abolition and predated the State's 1850 adoption of the cruel or unusual punishment clause. In 1846, the Michigan legislature replaced the death penalty with life imprisonment. *See* R.S. 1846, Ch. 153, Sec 1-2 (imposing life imprisonment for first-degree murder). At that time, parole did not yet exist in Michigan, but the governor systematically used his power to grant pardons and commutations to remit

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sentences, including for persons sentenced to life in prison. Bernstein & Shapiro, *supra*, at 7-10.

Data from this period is less comprehensive than from the 1900s, but nonetheless evidences Michigan's heavy reliance on executive pardons as a check on prison terms that—whether short or long—were excessive at their inception or became unnecessary over time. For example, in the decade preceding the 1850 Constitutional Convention, the governor issued on average 21 pardons for every 100 new sentences, and that rate dipped only slightly to 18 out of every 100 new sentences in the fifteen years that followed the convention. *Id.* at 9-10. As a result, between 1839, when Michigan's first prison was established, and 1851, 16.16% of the 619 people whom the prison had incarcerated during that period were released by pardon. *Id.* at 10. That amounted to over a quarter of the people released from prison during those years (including both pardons and releases by termination of sentence) and does not include people who were incarcerated in 1851 but may have been pardoned in the years that followed. *Id.* Less data exists for life-sentenced individuals, but what data does exist is even more stark: between 1852 and 1864, the number of life-pardons was, on average, nearly one-third the number of life sentences issued. *Id.* at 12.

These pardon and commutation practices were well-known at the time, as was their purpose in preventing the indignity of death in prison and the needless incarceration of people who could return to productive citizenship. For example, Judge Witherell, who introduced the "cruel or unusual" provision at the 1850 Convention, recommended six different people for pardons, some of them he had

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personally sentenced. *Id.* at 13. In one case, he recommended someone for pardon because the "end of justice had been answered" and a pardon was "justified by" the "good character" of the individual. *Id.* (quoting R. McClelland, Statement of Pardons Granted During the Year 1852, and the Reasons Therefor (Jan. 5, 1853), *in* JOINT DOCUMENTS OF THE STATE OF THE STATE OF MICHIGAN FOR THE YEAR 1852 63 (State of Mich. Legis., 1853)).

In 1852, the governor began informing the state legislature of the rationale for each pardon issued, and these reasons frequently included evidence of the individual's reform or rehabilitation, as well as the excessiveness of the sentence. *Id.* at 12-15. In their article discussing the history of founding-era understandings of cruelty and excessive punishment, Molly Bernstein and David Shapiro give numerous examples where the governor cited rehabilitation in issuing a pardon. *Id.* at 12-17. These include:

- Charles Baker: pardoned in 1858 from a forty-year sentence because he retained a "prospect of becoming a good citizen." *Id.* at 13 (quoting Kinsley S. Bingham, Special Message of the Governor Relative to Pardons (Jan. 1, 1859), *in* JOINT DOCUMENTS OF THE STATE OF THE STATE OF MICHIGAN FOR THE YEAR 1858 25 (State of Mich. Legis., 1859)).

- Frank Wettz: pardoned because he had "been punished enough for public justice, and more than enough for reformation." *Id.* (quoting Austin Blair, Pardons (Jan. 4, 1865), *in* JOINT DOCUMENTS OF THE STATE OF THE STATE OF MICHIGAN FOR THE YEAR 1864 41 (State of Mich. Legis., 1865)).

- Orlando D. Williams: pardoned in 1856 after showing that he was "penitent and reformed." *Id.* (quoting Kinsley S. Bingham, Communication from the Executive, Transmitting Names of Persons Pardoned, and the Reasons Therefor, up to the First of January, 1857 (February 12, 1857), *in* DOCUMENTS ACCOMPANYING THE JOURNAL OF THE SENATE OF THE STATE OF MICHIGAN, AT THE BIENNIAL SESSION OF 1857 169 (State of Mich. Legis., 1857)).

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In many other cases, governors stated that they were pardoning individuals because their sentences were cruel. For example:

- Nathan Moore and James Fairfax were pardoned in 1862 and 1861 respectively on the ground that Moore's fifteen-year sentence for burglary was "cruel in the extreme" and Fairfax's twelve-year sentence for breaking and entering was "most unreasonably severe." *Id.* at 13-14 (quoting Austin Blair, Special Message of the Governor Relative to Pardons (Mar. 9, 1863), *in* JOINT DOCUMENTS OF THE STATE OF THE STATE OF MICHIGAN FOR THE YEAR 1862 47 (State of Mich. Legis., 1863)).

- Governors pardoned three individuals who had been sentenced to life imprisonment on the grounds that their life sentences were, respectively, "out of all reason," "absurd," and "cruel." *Id.* at 14 (quoting Blair, 864 pardons *supra*).

- George Henry was pardoned with a note that Hersey was Black, "as any one might know by [his thirty-five year] sentence." *Id.* at 13 (quoting Blair, 1864 pardons, *supra*).

And these are but a few of the many cruelty-related reasons that governors gave for issuing pardons. Many others evidenced a general humanitarian effort to prevent the indignity of dying in prison. *See id.* at 12-15 (citing at least twenty-three other examples in which the Governor issued pardons, with reasons ranging from the "age" or "illness" of the person to the "motives of humanity").

This rehabilitative commitment was not limited to the governor's office, but was also embraced by Michigan legislators and other state leaders. During a brief period in the 1860s, for example, Governor Henry Crapo temporarily reversed course and restricted the use of pardons, prompting sharp pushback from state leaders who, in Governor Crapo's words, "urged upon me to adopt a different course." *See id.* at 11 (quoting T.F. Moore, Annual Report of the Inspectors of the State Prison, (Nov. 30,

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1868) at 34, *in* JOINT DOCUMENTS OF THE STATE OF THE STATE OF MICHIGAN FOR THE YEAR AT THE ANNUAL SESSION OF 1868 (State of Mich. Legis., 1868)).

Consistent with that mindset, between 1885 and 1895, the Michigan legislature passed a series of laws that "pioneered one of the first parole systems in the country." Yantus, *supra*, at 647.[6] Critically, however, the initiation of parole did not create the formal schism that exists today between life with and without parole sentences. Instead, parole was originally "more a system of conditional pardons and commutations" that developed as an outgrowth of the preexisting system of executive clemency. *Id.* at 688-89. The legislature enacted the 1885 law, which established a pardons advisory board, after Governor Josiah Begole argued that the pardon power "should not be placed upon the shoulders of one man" but should instead be delegated to such a board. Kryszak, *supra*, at 29-31 (quoting speeches given by Governor Josiah Begole). Ten years later, the Legislature formalized the state's official parole system. *See* P.A. 1895, No. 218, § 1. But while the law excluded lifers from parole, *id.*, it left in place the preexisting—and robust—system of executive clemency. Thus, the new

[6] Zigmund Kryszak identifies 1895 as the start of Michigan's first official parole law, as that was when the term "parole" was first formally used in Michigan. Kryszak, *A Historical Study of the Origin and Development of Parole in Michigan*, Thesis for the Degree of M.S., Michigan State University, MICH. STATE UNIV., 2 (1970) (unpublished M.S. thesis, Michigan State University) (on file with the Michigan State University Library system). Yantus, however, traces the start of parole in Michigan to an earlier, 1885 law that created an advisory board for recommending conditional pardons to the governor. *Id.* at 31-32. As Yantus explains, "regardless of the label of the new system," under the 1885 law, as with parole, "good behavior in prison was rewarded by early release." Yantus, *supra*, 688-89. The resemblance between parole and the 1885 system of conditional pardons can be seen in *People v. Moore*, 62 Mich. 496 (1886), where a defendant was arrested for violating the "condition of his pardon." *See id.* at 503.

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parole system merely channeled sentencing relief for the lifer population through the clemency process. *See infra* at 24-27. It did not convert life imprisonment into modern day life without parole.

In subsequent years, the Michigan legislature continued to expand and formalize the state's clemency and parole systems as part of its commitment to rehabilitation. *See generally* Kryszak, *supra*, at 25-92 (discussing further legislative developments in the parole system). Two particularly significant developments occurred in the late 1930s and early 1940s. First, in 1937, the Michigan legislature consolidated several different agencies governing prisons, pardons, and parole into a single Michigan Department of Correction in the hope of establishing a "sound system of rehabilitation." *Id.* at 58. Then, in 1941, in response to a growth in the Michigan lifer population, the legislature enacted the Lifer Law, which made parole eligible anyone who had served ten calendar years for any offense except first-degree murder. *See* MICH. COMP. LAWS § 791.234(6)-(7); CITIZENS ALLIANCE ON PRISONS & PUBLIC SPENDING, WHEN "LIFE" DID NOT MEAN LIFE: A HISTORICAL ANALYSIS OF LIFE SENTENCING IMPOSED IN MICHIGAN SINCE 1990, at 6 (2006), https://static.prisonpolicy.org/scans/cappsmi/When%20life%20did%20not%20mean%20life%20for%20web.pdf [hereinafter CAPPS Report].

Statutorily, the Lifer Law's exception for first-degree murder meant that the offense effectively carried a life-without-parole sentence. In practice, however, state agencies had an express policy of not only routinely considering first-degree murder lifers for clemency—as had been the case since Michigan's founding—but of

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conducting this clemency review as part of the State's parole process. Indeed, in 1962, the State's Corrections Commission adopted a policy that "[a]ll lifers serving for first degree murder will be considered eligible for release" and that the Parole Board would be tasked with annually reviewing each first-degree murder case after ten years "rather than the present practice of review after 15 years." Exhibit 2 (Memorandum from Gus Harrison, Dir. Mich. Dep't of Corr. to Michigan Parole Board (Sept. 7, 1962)). However, while the Parole Board was the entity conducting these reviews, it was actually reviewing cases for commutation and not parole; and the Board itself did not grant release but instead recommended these first-degree murder lifers to the Governor's office for commutation. *See* Exhibit 1 (Harrison Ltr.) (describing this Parole Board review process).

Nonetheless, by the time that 1962 policy was adopted, the Parole Board's "murder first degree" program was already so robust that correspondence between the Parole Board and DOC Director Gus Harrison described these commutations as "paroles." *See* Exhibit 3 at 1-2 (Memorandum from Leonard R. McConnell to Gus Harrison, Dir. Mich. Dep't of Corr. (Oct. 1, 1964)). For example, a 1964 memo from the chair of the Parole Board to DOC Director Harrison states that they had issued 286 first-degree murder "paroles" since 1938, and "[o]ver the past 15 years the Executive Office has generally accepted our recommendations," having denied only four such recommendations before 1963. *See* Exhibit 3 at 1-2 (McConnell

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Memorandum).[7] By 1964, the Parole Board was routinely interviewing people serving life for first-degree murder for clemency after they had served 10 years of their sentence, and at that time, the Board had 244 such cases under annual review. *Id.* at 1. In effect, then, while the Lifer Law appeared on its face to create life without parole for first-degree murder in Michigan, in reality, agency practice was such that those sentenced to life for first-degree murder continued to enjoy a reasonable expectation of executive clemency based on rehabilitation.

Agency documents reaffirm that this policy was animated by Michigan's commitment to rehabilitation. In the 1964 memo, the Parole Board chair advocated the policy on the grounds that "men should be released while they are still productive and that it is more humane to do so." Exhibit 3 at 2 (McConnell Memorandum). He also touted that "[o]ur murder first degree program is most successful" because "[w]e have a far greater rate of success than is true of any other category of offenders." *Id.* at 1. Indeed, out of 286 such commutations, there had only been six "violators (mostly technical)." *Id.* Given these extremely low rates of re-offense after release, the Board chair concluded that "all murder first degree cases paroled represent excellent risks." *Id.* Director Harrison said the same in his own 1964 letter to the governor regarding the "murder first degree program": "[l]ifers not only make the best inmates, but also

[7] Despite the use of the term "parole" within the memo, it is clear that the Parole Board was referring to commutations because DOC Director Harrison later summarized for the governor the information the Parole Board chair had given to him, and in doing so, Director Harrison reported the same statistics but described these "paroles" as what they actually were—"commutation[s]." *See* Exhibit 1 (Harrison's Ltr.).

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the best prospects for rehabilitation and successful adjustment in the community." Exhibit 1 at 1 (Harrison Ltr.).

The effects of these polices are evidenced in clemency data from the 1900s. Indeed, nearly sixty percent of the people sentenced to life without parole for first-degree murder between 1900 and 1969 had their sentences commuted, with each serving an average of fewer than 24 years. CAPPS Report at 12. Moreover, as Table 1 reveals, these commutation grant rates were consistent and sustained throughout the period, thereby demonstrating the deeply-entrenched nature of these commutation practices.

Table 1: Commutations of Sentences for First-Degree Murder, 1900-1985

Sentencing Date	Total Sentenced	Total Commuted (as of Sept. 2006)	Average Years Served Before Commutation
1900-1909	69	48 (69.6%)	16.1
1910-1919	127	76 (59.8%)	16.9
1920-1929	289	167 (57.8%)	25.9
1930-1939	235	130 (55.3%)	31.0
1940-1949	143	102 (71.4%)	21.8
1950-1959	84	57 (67.9%)	19.1
1960-1969	112	21 (18.8%)	21.2
1970-1979	443	4 (0.9%)	20.5
1980-1985	373	0	--
1900-1969	1,059	601 (56.8%)	23.6
1970-1985	816	4 (0.5%)	20.5

Reproduced from CAPPS Report at 12.

Because of these high commutation grant rates, CAPPS—now known as Safe and Just Michigan—estimated that people convicted of first-degree murder and sentenced to life without possibility of parole in the first seven decades of the twentieth century were released at about three-quarters of the rate of parolable lifers

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after serving only around 50% more time. CAPPS Report at 12. That all changed in the 1980s and 90s.[8] According to their research, only 8.2% of *parole-eligible* lifers sentenced between 1970 and 1985 had been released as of 2006, *id.* at 9-10, so first-degree murder lifers sentenced before 1970 had an even greater chance of release than parolable lifers have under modern-day life *with* parole.

In sum, for most of Michigan's history, life imprisonment did not entirely foreclose the hope and reasonable expectation of release upon rehabilitation that modern life without parole does. And critically, when delegates reaffirmed Michigan's cruel or unusual punishment clause at the 1961 Constitutional Convention, they did so with the backdrop of these longstanding clemency practices.

Consequently, although Delegate Hoxie, in arguing for the death penalty's abolition, stated that "[s]ociety is amply protected by a sentence of life imprisonment," 1961 Constitutional Convention Debates at 595, he could not have been referring to the form of modern-day life without parole that mandates death by incarceration. Instead, sentiments at the time were better captured by DOC Director Harrison who, just three years earlier, wrote that "[w]e"—the Department of Corrections—"also believe that during the mandatory life sentence [for first-degree murder] a point is reached beyond which the passage of time ceases to be punishment and becomes only

[8] As Table 1 shows, first-degree murder lifers sentenced to life without parole in the 1960s were the first class of first-degree murder lifers to experience lower commutation grant rates. First-degree murder commutations then almost entirely evaporated for people sentenced in the 1970s and 80s. Because the average time until commutation was around twenty years for these individuals, this would have placed the effective end of Michigan DOC's murder first-degree program in the 1980s or 90s.

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stultifying isolation—a twentieth century form of banishment." *See* Gus Harrison, *Why Michigan's Penal Code Needs Revision*, 4 CRIME & DELINQUENCY 122, 125 (1958). After all, it was this belief that drove the State's century-long practice of granting executive sentencing relief to individuals sentenced to life for first-degree murder.

B. Mandatory LWOP is "cruel" because it abandons the concept of rehabilitation and wrongly treats people as categorically irredeemable.

As demonstrated above, whatever the term "cruel" might mean at the margins, a punishment that forecloses altogether the possibility of someone's rehabilitation falls squarely within its definition under Article 1, § 16. Under this standard, mandatory life without parole violates Article 1, § 16's ban on cruel punishments because, like the death penalty, it is permanent, irrevocable, and renders irrelevant a person's potential or actual rehabilitation.

Both this Court and other state and federal courts have recognized that life without parole "forswears altogether the rehabilitative ideal." *Parks*, 510 Mich. at 265 (quoting *Miller v. Alabama*, 567 U.S. 460, 473 (2012)). Instead of allowing the opportunity for people to return as productive, law-abiding members of society, life without parole "means denial of hope"—that "good behavior and character improvement are immaterial" and that "whatever the future might hold in store for the mind and spirit of [the convicted person], he will remain in prison for the rest of his days." *Graham*, 560 U.S. at 70 (quoting *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989)). Thus, "it cannot be disputed that the goal of rehabilitation is not accomplished by mandatorily sentencing an individual to life behind prison walls

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without any hope of release." *Parks*, 510 Mich. at 264-65. "A punishment which consigns an offender to spend his or her entire life in prison is plainly unconcerned with reforming the offender." *State v. Kelliher*, 873 S.E.2d 366, 386 (N.C. 2022) (internal quotation marks omitted).

Indeed, life-without-parole sentences "share[] some characteristics with," *Parks*, 510 Mich. at 257, and are thus "strikingly similar" to death sentences, *Diatchenko v. District Attorney*, 1 N.E.3d 270, 284 (Mass. 2013). "[U]nlike any other sentence" besides death, "imprisonment without hope of release for the whole of a person's natural life is a forfeiture that is irrevocable." *Parks*, 510 Mich. at 257 (internal quotation marks omitted).

And yet, while the Michigan Constitution declares that "[n]o law shall be enacted providing for the penalty of death," MICH. CONST. 1963, Article 4, § 46, Michigan operates a life-without-parole sentencing scheme that is, in some ways, even more at odds with the goal of rehabilitation than is capital punishment. For example, whereas death sentences in the United States require an individualized sentencing hearing and the weighing of mitigating and aggravating factors, *see Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), life without parole in Michigan is, for the vast majority of those currently serving it, a mandatory sentence imposed without regard to a particular person's culpability or capacity to change.[9] As a result,

[9] For particular categories of persons, the Court has conducted a fact-intensive interrogation of the fit of sentencing that category of persons to life without parole. That analysis accounts for a wide range of factors, including any mitigating circumstances surrounding the offense, the mitigating or vulnerable characteristics of the offender, and contemporary empirical evidence—including social and cognitive

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even though, as this Court has said, "only the rarest individual is wholly bereft of the capacity for redemption," *Bullock*, 440 Mich. at 39 n.23 (cleaned up), Michigan's lifer population has ballooned without the safeguards of individualized sentencing and specific findings that those sent to die in prison are irredeemable. *See Parks*, 510 Mich. at 260 (holding that at least for some categories of people, "automatically harsh punishment without consideration of mitigating factors is unconstitutionally excessive and cruel.").

Critically, Michigan's life-without-parole sentencing scheme automatically extinguishes the possibility of rehabilitation for many people who are otherwise potentially capable of achieving it. For example, central to this case, of the 3,593 total people serving life without parole in Michigan, 876 were under the age of 21 at the time of their offense (a number that goes up to 1,757 if you include people who were under age 25).[10] In addition, Michigan's LWOP population includes people convicted of felony murder in cases where they neither caused nor intended a death. *See* MICH. COMP. LAWS § 750.316; *People v. Aaron*, 409 Mich. 672 (1980). Both of these (partially overlapping) groups have inherently reduced culpability that is inconsistent with

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science, advancements in criminology, and other relevant data showing how punishments are applied and the outcomes they produce. *See, e.g.*, *Parks*, 510 Mich. at 248-49 ("[I]n the punishment context, science has always informed what constitutes 'cruel' or 'unusual' punishment in regards to certain classes of defendants."). But while this Court has thus impliedly recognized that these factors are relevant when considering the cruelty of a particular life-without-parole sentence, it has not imposed a requirement that *each* person be given an individualized sentencing hearing before being sentenced to life without parole.

[10] Michigan Department of Corrections (June 2024) (data compiled from the Offender Tracking Information System (OTIS) at https://mdocweb.state.mi.us/OTIS2/otis2.aspx, and can be provided upon request).

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assuming irredeemability—the former because modern cognitive science, repeatedly embraced by both this and the U.S. Supreme Court, teaches that youth and emerging adults under age 25 have a greater capacity than fully-developed adults to grow and change; and the latter because of the nature of felony murder. *See Parks*, 510 Mich. at 251 ("[Y]oung adults have yet to reach full social and emotional maturity, given that the prefrontal cortex—the last region of the brain to develop, and the region responsible for risk-weighing and understanding consequences—is not fully developed until age 25" (citing Mariam Arain, et al., *Maturation of the Adolescent Brain*, 9 Neuropsychiatric Disease & Treatment, 449, 449-50, 453-54 (2013))); *Graham*, 560 U.S. at 69 ("[D]efendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are [premeditated] murderers.") (citing, *inter alia*, *Enmund v. Florida*, 458 U.S. 782, 787 (1982) (holding the death penalty categorically unconstitutional for felony murder defendants "who neither took life, attempted to take life, nor intended to take life"))).

Indeed, in both Michigan and across the country, people released from life prison terms have shown extraordinary success. Deemed irredeemable and beyond rehabilitation, people sentenced to life in prison have consistently proven those findings—whether made by legislatures or sentencing courts—to be completely wrong. In Michigan, 648 people serving life without parole for first degree murder had their sentences commuted and were released between 1900 and 2003. Of them, only 15 (or 2.3%) had their parole revoked, and just one (or 0.2%) received a new

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criminal conviction—and that was for a drug offense. CAPPS Report at 13. The data is similar when you add people with parolable life terms who were released during that same period. Of the 1,336 people with life terms (both with and without the possibility of parole) who were released, only 16 (or 1.2%) had their parole revoked because of a new conviction. *Id.*

Elsewhere, one recent study looked at youth previously serving life without parole who were resentenced and released after the U.S. Supreme Court banned mandatory life without parole for youth in *Miller v. Alabama*. According to that study, only 5.2% of people received new criminal charges within seven years post-release, and a majority of those were for nonviolent offenses.[11] Another report examined people released from life-without-parole sentences in California. The California Department of Corrections and Rehabilitation provided records on 125 people released between 2011 and 2019, and of them only four, or about 3%, were convicted of any crime within three years of release: "one felony, one drug/alcohol misdemeanor, and two 'other' (e.g., non-person/non-property/non-drug) misdemeanors."[12] Combined, studies of released lifers in Michigan, Pennsylvania, Maryland, New York, and California "find recidivism rates less than 5% among people who previously

[11] Sbeglia et al., *Life after Life, Recidivism among individuals formerly sentenced to mandatory juvenile life without parole*, J. RES. ADOLESC. (June 6, 2024) (forthcoming), https://onlinelibrary.wiley.com/doi/10.1111/jora.12989.

[12] Human Rights Watch, *"I Just Want To Give Back," The Reintegration of People Sentenced to Life Without Parole* (June 2023), https://www.hrw.org/report/2023/06/28/i-just-want-to-give-back/reintegration-of-people-sentenced-to-life-without-parole.

committed violence and were sentenced to life," and that "people released from prison who were originally convicted of homicide are less likely than other released prisoners to be arrested for a violent crime."[13] These data undermine any claim that, at the time of a particular offense or at sentencing, a particular person is beyond the possibility of redemption—especially in the absence of any individualized assessment. Accordingly, it was once the Michigan DOC's express position that "[l]ifers not only make the best inmates, but also the best prospects for rehabilitation and successful adjustment in community." Exhibit 1 at 1 (Harrison Ltr.); *see supra* at 25-26 (discussing in depth the DOC's 1960s era position that lifers represented good candidates for release).

Given how successful lifers have historically been in re-integrating into society post-release—both within and outside Michigan—it is beyond dispute that mandatory life without parole treats as irredeemable and beyond rehabilitation many people who are, in fact, fully capable of safely returning to society. In part due to its mandatory nature, Michigan's life-without-parole statute captures various categories of inherently reformable people, including those convicted of felony murder without evidence of malice and those convicted as young adults before their brains fully developed.

[13] ASHLEY NELLIS, THE SENTENCING PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 28 (2021), https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf; *see also* J.J. Prescott, et al., *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643 (2020).

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Thus, as a statutory scheme, mandatory life without parole defies Michigan's constitutional commitment to rehabilitation and is therefore "cruel" under Article 1, § 16. At the very least, this Court should recognize that mandatory life without parole for persons convicted of crimes committed when they were nineteen or twenty years old is unconstitutionally cruel.

C. This Court alone has the ability and constitutional duty to enforce Article 1, § 16's prohibition on punishments that are, like modern-day LWOP, unconstitutionally cruel.

Initially, Michigan's embrace of mandatory life without parole may be "perplexing given Michigan's early history of progressive sentencing practices." Yantus, *supra*, at 647 (discussing long-term incarceration generally). However, in abandoning its own constitutional commitment to rehabilitation, the State has followed a national trend of imprisoning more people for longer periods of time. As recounted in volumes of legal and historical scholarship, that trend was largely born of fear and panic (much of it race-based) about crime.[14] And while these moments of fear-driven policy "do not last forever, their residue are frozen into law." Smith, Robinson, & Hughes, *supra*, at 550. Put another way, "when moral panic meets unrestrained political majoritarianism, the result is a 'one-way ratchet' to more

[14] See Robert J. Smith & Zoë Robinson, *Constitutional Liberty and the Progression of Punishment*, 102 CORNELL L. REV. 413, 426-27 (2017); Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 1020-26 (2016); NAT'L RES. COUNCIL OF THE NAT'L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 33 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

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severity." *Id.* (quoting Robert J. Smith & Zoë Robinson, Co*nstitutional Liberty and the Progression of Punishment*, 102 CORNELL L. REV. 413, 427 (2017)).

In her 2014 article on "steadily increasing [criminal] penalties" in Michigan, law professor Anne Yantus describes how this "one-way ratchet that leads to ever-increasing penalties" has historically operated in Michigan. Yantus, *supra*, at 667. As she explains, "it is much easier to increase a penalty than to decrease it," in part because sentencing changes often reflect "current public thought (or fears)" rather than "sound research." *Id.* at 645, 651. Moreover, once sentences grow more severe, "there may be no institutional memory" of pre-existing sentencing practices. *Id.* at 696. This phenomenon is why "the very purpose of a constitution"—and therefore the cruel or unusual punishment clause—is to constrain the "passing judgments of temporary legislative or political majorities." *See Bullock*, 440 Mich. at 41.

Indeed, the 1961 Constitutional Convention abolished the death penalty in part for that very reason: to end repeated legislative attempts to reinstate the death penalty. According to Delegate Hoxie, delegates feared the "potential danger, particularly after a sensational crime, of such legislation being adopted." 1961 Constitutional Convention Debates at 595. Ironically, that is exactly what happened, except instead of capital punishment, Michigan created modern life without parole: with the death penalty off the table, sensational tough on crime rhetoric in the 1980s ushered in steep cuts to clemency grant rates, which in turn transformed pre-1980s life sentences, which carried a chance of release, into modern death-in-prison

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sentences. *See supra* at 26-27; Bernstein & Shapiro, *supra*, at 17-21 (discussing the history of Michigan's abandonment of rehabilitative sentencing).[15]

Ultimately, Michigan's constitutional text, original meaning, and history protect against precisely the sort of impulsive criminal justice policy that transformed life with a meaningful chance of release into death-in-prison. After all, the State's constitutional commitment to rehabilitation remains unchanged, and it is this Court's obligation to enforce it. As this Court explained in *Parks*, "[w]e are duty-bound to interpret the Constitution, no matter the outcome," and "[w]e 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 255-56. Mandating death in prison for people who are capable of rehabilitation is cruel and offensive to Article 1, § 16, and at a minimum, this Court should hold that mandatory LWOP is unconstitutional for persons convicted of crimes committed at the age of nineteen or twenty.

[15] At the same time that that clemency grants plummeted in Michigan, the Parole Board—which had been the actor spearheading the State's "murder first degree" program—adopted more stringent release policies. For example, in 1992, the Parole Board adopted a policy of "life means life," Yantus, *supra*, at 690, dramatically departing from the 1964 policy that individuals sentenced to life for first degree murder "should be released while they are still productive [as] that is more humane." Exhibit 3 at 2 (McConnell Memorandum). Likewise, that same year, the Michigan Legislature revamped the Parole Board's membership by replacing civil service employees with political appointees, thereby subjecting the board to the majoritarian impulses that were undercutting rehabilitative sentencing. *See* 1992 Mich. Pub. Acts 1123, 1124 (codified at MICH. COMP. LAWS § 791.231a).

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III. Michigan's Life-Without-Parole Sentencing Scheme Is Also "Cruel" Because It Fails To Serve Other Purposes of Punishment.

Finally, even assuming that a punishment that completely abandons any consideration of rehabilitation could pass constitutional muster based on other generally accepted goals of punishment, Michigan's mandatory life-without-parole scheme would still be unconstitutionally cruel. A growing body of empirical evidence and data on how life without parole is used in Michigan shows how this draconian sanction bears no meaningful connection to the goals of deterrence, incapacitating the most dangerous, or punishing the most culpable and deserving.

First, over forty years of experience and empirical study have thoroughly discredited the theory—which originally drove policymakers in Michigan and around the country to impose increasingly long prison terms—that severe punishments deter criminal conduct. If anything, it is *certainty* of punishment, not *severity*, that deters. As the Vera Institute of Justice reported in February 2023, "study after study [] has shown that people do not order their unlawful behavior around the harshness of sentences they may face, but around their perceived likelihood of being caught and facing any sentence." Marta Nelson, Sam Feineh, & Maris Mapolski, *A New Paradigm for Sentencing in the United States*, Vera Institute of Justice (Feb. 2023); *see also* Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. IN AM.: 1975-2025 199, 199 (2013) (noting "lengthy prison sentences and mandatory minimum sentencing cannot be justified on deterrence")

Second, the extraordinarily low recidivism rates discussed above prove that life without parole does not imprison the most dangerous, and therefore does not serve

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the goal of incapacitating people who pose the greatest risk to public safety. This is partly explained by the fact that people age out of crime, which is particularly relevant here given this Court's acknowledgment that, as the brain develops, emerging adults are "likely to begin to take fewer risks . . . and have decreased aggressive tendencies." *Parks*, 510 Mich. at 258. It should be unsurprising, then, that even accounting for violent offenses, studies consistently show that "the peak age for murder is 20, a rate that is more than halved by one's 30s and is less than one quarter of its peak by one's 40s." ASHLEY NELLIS, THE SENTENCING PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 25 (2021). Yet more than 30% of people serving life in Michigan (with or without parole eligibility) are over 60 years old and nearly 60% of Michigan's LWOP population is over age 50. The Sentencing Project, *A Second Look at Long-Term Imprisonment in Michigan* (Feb. 23, 2023), at https://www.sentencingproject.org/fact-sheet/a-second-look-at-long-term-imprisonment-in-michigan/.[16] Michigan's aging prison population, rather than comprising the most dangerous, presents an extraordinarily low public safety threat.

Finally, a mandatory punishment imposed without any individualized sentencing determination, and that completely disregards mitigating factors, does not punish the most deserving or culpable. As noted above, this Court has made clear that "the same features that characterize the late-adolescent brain also diminish the culpability" of "youthful offenders, rendering them less culpable than older adults."

[16] Michigan Department of Corrections (June 2024) (data compiled from the Offender Tracking Information System (OTIS) at https://mdocweb.state.mi.us/OTIS2/otis2.aspx, and can be provided upon request).

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Parks, 510 Mich. at 249-50, 258-59. Like with eighteen-year-olds, the neuroplasticity of the nineteen- and twenty-year-old brain causes a "general deficiency in the ability to comprehend the full scope of [one's] decisions as compared with older adults" and contributes to a "lack [of] impulse control." *See id.* at 250-51, 259 & n.12; NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, THE PROMISE OF ADOLESCENCE: REALIZING OPPORTUNITY FOR ALL YOUTH 51 (2019) (stating that the brain does not fully develop until the "second decade of life"); Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 449-50, 453-54 (2013) (brain does not fully develop until age twenty-five). And yet, Michigan's scheme automatically treats all nineteen- and twenty-year-olds convicted of murder as equivalent to "the most culpable defendants committing the most serious offenses," *Miller*, 576 U.S. at 476, regardless of critical factors bearing on their actual or moral culpability, such as their age, role in the offense, history of childhood trauma, or mental state.

That mandatory life-without-parole sentencing does not punish the most deserving is also evident in the massive racial disparities it produces. Punishments that produce marked racial disparities are unconstitutionally cruel because such "disparities . . . raise[] the inference that the punishment is not meaningfully serving a purpose of punishment that a less harsh sanction could not adequately fulfill." Smith, Robinson, & Hughes, *supra*, at 586. After all, "[i]f a punishment served a real purpose, prosecutors, judges, and juries would use it regularly and evenly." *Id.*; *see also* William W. Berry III, *Unlocking State Punishment Clauses*, 76 RUTGERS L. REV.

__ (at 37 of 47) (2025) (forthcoming) ("[A] systemic application of punishments leading to distinctions based on improper factors is cruel.").[17] In Michigan, 68% of people serving life without parole are Black, while Black people comprise only 12.4% of the total state population.[18] *See Kelliher*, 873 S.E.2d at 387 (holding that youth life without parole is cruel under the state constitution in part based on "empirical data demonstrating that an individual juvenile offender's chances of receiving a sentence of life without parole may be at least partially attributable to factors that are not salient in assessing the penological appropriateness of a sentence, such as race," with data showing that such sentences "are more likely . . . in North Carolina counties with a [B]lack population that is above average").

Thus, not only is sentencing a person to die in prison without any hope of release contrary to Michigan's rehabilitative commitment, but it also offends each of the other purported purposes of punishment. Under any measure, then, mandatory life without parole without any individualized assessment of culpability is "cruel" under Article 1, § 16.

[17] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5017494.

[18] Michigan Department of Corrections (June 2024) (data compiled from the Offender Tracking Information System (OTIS) at https://mdocweb.state.mi.us/OTIS2/otis2.aspx, and can be provided upon request); U.S. Census Bureau, *Michigan's Population Topped 10 Million in 2020* (Aug. 25, 2021), https://www.census.gov/library/stories/state-by-state/michigan-population-change-between-census-decade.html.

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CONCLUSION

For the foregoing reasons, this Court should hold that mandatory life without parole for emerging adults convicted of crimes they committed when they were nineteen or twenty violates Michigan's constitutional ban on "cruel or unusual punishment."

Respectfully submitted,

/s/ Allison L. Kriger
Allison L. Kriger (P76364)
LARENE & KRIGER, P.L.C.
500 Griswold Street, Suite 2400
Detroit, MI 48226
(313) 967-0100
akriger@larenekriger.com

Kyle C. Barry*
THE STATE LAW RESEARCH INITIATIVE
303 Wyman Street, Suite 300
Waltham, MA 02451
(802) 318-3433
kylecbarry@gmail.com

Christine A. Monta*
Jonathan Gibson*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3308
christine.monta@macarthurjustice.org

**Motion for temporary admission pending*

Counsel for Amici Curiae *The State Law Research Initiative and Roderick & Solange MacArthur Justice Center*

Dated: December 23, 2024

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CERTIFICATE OF COMPLIANCE

As required by Michigan Court Rule 7.212, I certify that the document contains 10,752 words, excluding the parts of this document that are exempted by Court Rules MCR 7.212(C)(6). I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

/s/ Allison L. Kriger
Allison L. Kriger (P76364)
LARENE & KRIGER, P.L.C.
500 Griswold Street, Suite 2400
Detroit, MI 48226
(313) 967-0100
akriger@larenekriger.com

Dated: December 23, 2024

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Exhibit 1

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hold

October 5, 1964

Personal

Honorable George Romney
Governor of Michigan
Executive Office
Lansing, Michigan

Dear Governor Romney:

Recently I discussed the murder first degree program with Walt DeVries. I expressed some concern about its present state. Walt thought I should forward my comments to you; so at his suggestion, I make certain observations about this program.

As you know, the Parole Board carefully screens murder first degree cases. All cases are reviewed annually, and the Board will devote almost two weeks to the thorough review of these. Every murder first degree case is interviewed after service of ten calendar years, but cases are not considered for processing until fifteen calendar years has been served. Presently, there are 244 cases given this annual review.

The program has been extremely successful. Lifers not only make the best inmates, but also the best prospects for rehabilitation and successful adjustment in the community. Since 1938 we have had only six parole violators out of 286 paroles. Michigan's high rate of success is not unique, but comparable to the experience of other jurisdictions.

The Parole Board has expressed to me its concern over the reaction to their recommendations. This does not mean that the Board feels that the Executive Office must always agree, but prior to 1963 only four cases were denied by the Governor, but during the past 20 months nine have been turned down. Further, there is a considerable backlog of these cases in the Executive Office. I share the concern since the commutation process has considerable impact on the inmate body. Denial has a negative effect on inmate morale and also on the employees from the custodial officer up through the Parole Board - all responsible for a favorable recommendation for commutation to you. A long delay in processing commutation cases

creates much anxiety on the part of the offender and his family. Quite often, community programs which have been tentatively arranged disappear if too much time elapses during the processing of the case.

The Board feels that it is quite conservative and careful in screening cases. Of course, they point to their success rate to justify their decisions. The Board has discussed with me the possibility of further guidance from the Executive Office. The Board's function is, of course, advisory to you, but it would rather not submit cases which have no chance of going. Is it possible to work out more specific guidelines for the Board so that there would be a closer agreement on what type of case would receive favorable action?

I respectfully submit this matter for your consideration.

Respectfully yours,

DEPARTMENT OF CORRECTIONS

Gus Harrison, Director

GH:jm

cc: Mr. Walter DeVries

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Exhibit 2

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STATE OF MICHIGAN
DEPARTMENT OF CORRECTIONS

STEVENS T. MASON BUILDING
LANSING 26, MICHIGAN

CORRECTIONS COMMISSION
EARNEST C. BROOKS, CHAIRMAN
MAX BIBER
C. J. FARLEY
ELEONORE HUTZEL
JOHN W. RICE
JAMES E. WADSWORTH, JR.
GUS HARRISON, DIRECTOR

JOHN B. SWAINSON
GOVERNOR

September 7, 1962

MEMORANDUM TO: Parole Board

RE: Lifers Serving for First Degree Murder

At its August meeting, the Corrections Commission adopted the following policy:

"All lifers serving for first degree murder will be considered eligible for release processing after service of ten calendar years. The Parole Board is asked to review annually each lifer case after service of ten years rather than the present practice of review after 15 years."

Will you be guided accordingly?

Sincerely,

DEPARTMENT OF CORRECTIONS

Gus Harrison

Gus Harrison, Director

GH:jm a m PB — Please read & initial —

J.J.S.
J.J.S.
Lowe
J.F.
F.G.B.

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Exhibit 3

October 1, 1964

MEMORANDUM

To: Director Gus Harrison

From: Leonard R. McConnell

Subject: Pertinent facts about the Murder First Degree Program, with particular reference to the current administration

Purpose: This is prepared at Director Harrison's request to serve as a basis for writing a letter to the Governor explaining our Murder First Degree Program.

I - Procedure

The Michigan Parole Board employs a very careful screening procedure as applied to murder first degree cases. We have an annual review procedure whereby all five Board members sit down once a year and devote about two weeks exclusively to the review of murder first degree cases. We do not consider for processing such cases until after their 15th year. However, under our current program we do interview them in their 10th year and receive annual reports every year thereafter. This means then that generally we have reviewed many times on an annual basis all cases before they are set up for the public hearing and recommendation to the Governor. As a rule we require unanimous Board approval for favorable action. There are currently 244 cases under our annual review program (31 of these are at Ionia State Hospital).

II - Success of the Program

Our murder first degree program is most successful. We have a far greater rate of success than is true of any other category of offenders. Since 1938 we have had six violators (mostly technical) out of about 286 paroles. Our experience and the high rate of success in Michigan is not unique, since other jurisdictions report similar success. In brief, this means that all murder first degree cases paroled represent excellent risks.

III - Time Served

The average period of time served by our murder first degree cases is about 25 years. More recently the Board has

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released somewhat sooner. Our feeling has been that men should be released while they are still productive and that it is more humane to do so. However, it is still our feeling that we should not consider murder first degree cases prior to the service of 15 years, and generally we require something beyond that.

IV - Executive Response to Parole Board Recommendations

Over the past 15 years the Executive Office has generally accepted our recommendations and acted favorably. There were two denials during the Williams' administration and two during Governor Swainson's administration. Governor Romney has denied the following:

1963

John Lewis, A-46140-J
John Abbatoy, A-57205-J
Gordon N. Rolland, A-44428-M

1964

Sanford Callier, A-75022-J
Isaiah Perry, A-67015-J
Al. J. Meyers, A-64503-J
Wallace A. Wilson, A-64796-J
Richard H. Gorman, 67278-C
LeRoy Reynolds, B-43137-J

V - Number of Commutations

During the early years of the Board's participation in the commutation program a very conservative number were processed. However, since 1959 about 25 cases have been commuted annually. In 1963 Governor Romney commuted 24 - thus far this year there have been 10 commuted. There are 11 cases pending in the Governor's office and four being typed up to send over.

VI - Significance of the Commutation Program to the Total Corrections Program

Since murderers serve long periods of time in prison, they become quite well-known by all of the personnel and the inmates. Also they generally compile very good records. Because this is true, they wield tremendous influence on other inmates and on Corrections generally. Therefore, any action taken regarding their commutation has considerable impact on the rest of the inmate body. A denial generally has a very negative effect on inmate morale and the image of Corrections. Also, frequent denials make it rather difficult for the Parole Board to proceed in an orderly fashion. In the past, a public hearing and recommendation from the Board has generally meant favorable action. Further, a reasonably quick response to a Parole Board's recommendation is helpful, since a long delay creates much anxiety on the part of the offender involved and all other interested parties.

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SUMMARY: The Board employs a very conservative and careful screening policy regarding murder first degree cases and our success rate, we feel, justifies and supports our decisions. The trend in dealing with offenders is more humanitarian; accordingly, we feel our handling of murder first degree cases is consistent with the public interest. If more guidance from the Governor's Office is possible, the Parole Board would welcome it, since more danger results from denials than if such cases were not even submitted. Since the Board views its function in Executive Clemency as largely advisory, we are eager for a closer liaison in such matters. Anything we can do to work toward this is desirable.

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