STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-v-

EDWIN LAMAR LANGSTON,
Defendant-Appellant.

Mich. Supreme Court No.
Court of Appeals No. 358537
Trial Court No. FC 76-2701

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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Introduction

In 1980, this Court issued a groundbreaking decision in *People v. Aaron*, 409 Mich 672; 299 NW2d 304 (1980). The Court held that malice – the *mens rea* required to convict a person of murder – was an essential element of Michigan's felony murder statute. *Id.* at 728. The *Aaron* decision was widely cited for "eliminating" the common law felony murder rule, which until then had resulted in many felony murder convictions, and mandatory life without parole sentences, based only on an intent to commit the underlying felony. *Aaron* was viewed as correcting a historical injustice, and Michigan was celebrated as a forward-thinking jurisdiction.

Edwin Langston was among the people convicted under a common law felony murder instruction, where no jury found that he killed, intended to kill, or had any *mens rea* with respect to the death, but who was nonetheless sentenced to mandatory life without parole. The Michigan Court of Appeals had reversed his conviction because of the lack of a *mens rea* instruction, and his case was held in abeyance pending the arguments and decision in *Aaron*.

Yet, 40 years after *Aaron*, Mr. Langston remains in prison for a "felony murder" where no *mens rea* was ever shown, under a law the *Aaron* Court described as "fundamentally unfair" and "unjust in that it violates the basic premise of individual moral culpability upon which our criminal law is based." *Id.* at 731, 733. The *Aaron* Court called its decision a statutory interpretation, yet it failed to apply cannons of statutory interpretation that would have made *Aaron* applicable to pending direct appeals. The *Aaron* Court also failed to address the obvious due process question – which was raised and litigated but left undecided by the Court – even though a favorable decision, under retroactivity law at the time (and today), would have required that it apply to Mr. Langston.

With the passage of time, common law felony murder has fallen into further disrepute and is dying out globally and nationally. But in Michigan pre-*Aaron* defendants like Mr. Langston are

still serving mandatory LWOP sentences for felony murder where no intent to murder was proven, and where no jury ever considered the defendant's role in the victim's death.

Mr. Langston was convicted in 1976 of aiding and abetting Ronald Wilson in a robbery, during which Wilson shot and killed a store owner when Mr. Langston was not in the store. The government's theory was that Mr. Langston gave information about who was in the store to Wilson before Wilson went in, and that Langston helped Wilson after the robbery. The jury instructions required no *mens rea* for the death but only for the robbery. Mr. Langston is not alone; there are scores of elderly men and women still serving LWOP sentences for pre-*Aaron* felony murders where they were not the killer, and where the jury never found *mens rea* for the killing.

The Van Buren County Circuit Court denied 6.500 relief in part "[b]ecause this court is constrained to follow established precedent," Order, at 2, "even if the *Aaron* opinion violates a defendant's constitutional rights." *Id*. at 8 (Mar 17, 2021) (Docket No. 76-2701), Exh. A. The court also noted at least one of Langston's claims was "ripe for review." *Id.* at 10 n.6.

Judgment Appealed From and Relief Sought

The Court of Appeals denied leave because Mr. Langston "failed to establish that the trial court erred in denying the motion for relief from judgment." Order, Doc No. 35837 (Dec 2, 2021), Exh. B. This Court should grant leave to address and resolve, once and for all, the unanswered questions of *Aaron*. Mr. Langston appeals the Court of Appeals' denial of his application for leave from the Van Buren County Court's March 17, 2021, order, denying his non-successive motion for relief from judgment. This Court should either grant his application for leave to appeal, or summarily reverse and remand for a new trial and/or a new sentence.

Statement of Jurisdiction

The Court has jurisdiction over this application for leave pursuant to MCR 7.303(B)(1);

see also MCR 7.205(G). This application is timely filed within 56 days of the Court of Appeals' order of December 2, 2021, denying leave to appeal. MCR 7.202(C)(2)(a).

Grounds for Relief

This application involves "a legal principle of major significance to the state's jurisprudence" and "involves a substantial question about the validity of a legislative act." MCR 7.305(B).

Statement of Questions Presented

1. Should this Court grant leave because the *Aaron* Court clarified that the felony murder statute has always required *mens rea*, which was not proven in Mr. Langston's case, making him "legally innocent" of that statutory offense?

2. Should this Court grant leave because Mr. Langston is entitled to relief due to the *Aaron* Court's impermissible use of "constitutional avoidance" to his detriment?

3. Should this Court grant leave to review whether the felony murder rule violates Mr. Langston's rights under the Due Process Clause?

4. Should this Court grant leave because mandatory minimum life without parole for pre-*Aaron* felony murder is cruel and unusual under both the Eighth Amendment and the Michigan Cruel or Unusual Punishment Clause?

5. Should this Court grant leave because, in the alternative, Mr. Langston was denied effective assistance of appellate counsel?

6. Do Mr. Langston's claims satisfy the requirements of MCR 6.508(D)?

Statement of Facts

In November 1975, Ronald Wilson drove from Indiana to visit his sister in South Haven, Michigan. Trial Transcript ("TT") 1998.[1] Throughout his visit, Wilson stayed with his sister Annette "Alta" Madry and her husband in their home at 422 Abell Street. TT 1250. The Madry house was a few houses away from 414 Abell Street, where defendant Edwin Langston's mother lived, and from 1008 Center Street, where his girlfriend lived. TT 1354, 1347.

[1] The trial transcripts were created in separate volumes but numbered sequentially, so the references included are the sequential page numbers.

At around noon on December 1, 1975, Wilson asked his sister for his handgun, which she had stored for him. Her husband retrieved the gun from his car and gave it to Wilson. TT 1251.

A few hours later, Wilson went to see Mr. Langston at 1008 Center Street. TT 1350–51. Wilson and Mr. Langston first became acquainted when Wilson broke into the house of a friend of Mr. Langston, TT 1842, but they also knew each other because the Langstons' residence was on the same block as the Madrys'. Wilson wanted to sell his gun and offered it to Mr. Langston for $40. TT 1351, 1844. Mr. Langston was not interested in buying the gun, but he inspected it, saw that the magazine was empty, and agreed to help Wilson sell it. TT 1352–53. Wilson then asked if Mr. Langston knew any place that Wilson could rob. TT 1844. Mr. Langston said that he did not want any part in that kind of activity and was only interested in "playing with women." TT 1844–45. Soon after this conversation, the two men left the house in Wilson's car to visit some women who lived near the Maple Street Grocery. TT 1355, 1845.

Between 4 and 5 p.m., the two men arrived in the area of Maple Street Grocery. TT 1063. Mr. Langston went to the store to get a few grocery items, while Wilson stayed in the car. *Id.* While Langston was at the checkout counter, the customer next to him asked if she could cash a check. TT 1085. Arretta Ingraham, the store owner, replied that the store did not have enough cash on hand to cash a check. TT 1085. Mr. Langston was standing next to the customer, so was in a position to hear this exchange. TT 1088. He made his purchase and left the store. TT 1063, 1086.

When Mr. Langston got back to the car, Wilson asked him how many people were in the store. TT 1846. Mr. Langston again told Wilson that he did not want to get involved with anything like a robbery "because it carried too much time." TT 1846. To deter Wilson, Mr. Langston told Wilson the truth – that there were two women and two children in the store. TT 1846. Wilson left the car and went into the Maple Street store, TT 1846–47, while Langston drove up the street to

visit some women he knew who lived on the block. TT 1385–86, 1847. Mr. Langston parked the car on the street between the grocery store and the house. TT 1860.

Meanwhile, Wilson entered the Maple Street store. TT 1063. When Wilson came in, there were two women and two children in the store. TT 1732. Wilson walked through the store, putting groceries on the front counter as he waited for the customers to leave. TT 1101. Wilson initiated the robbery when there were four people remaining in the store: Arretta and Wilbur Ingraham, the store owners; Barbara Sullivan, a store employee; and Gordon Hoag, a customer. Wilson grabbed Wilbur Ingraham, who was by the counter, from behind and wrapped his arm around Mr. Ingraham's neck. TT 1797–98. Wilson announced it was a holdup and instructed everyone to give him their money or he would shoot. TT 1798. Mr. Hoag engaged Wilson, ordering him to put the gun away, guessing that the gun was not loaded. *Id.* A scuffle ensued between Wilson and Mr. Hoag. TT 1102–03, 1798–99. Mr. Hoag wielded a wine bottle; Wilson held his gun. TT 1103. The wine bottle broke; Mr. Hoag slipped and fell on the wet floor and was momentarily knocked out. TT 1669, 1799.

Wilson then instructed Mr. Ingraham to sit on the ground, TT 1800, and Wilson returned to the counter. At some point, Mr. Hoag regained consciousness, crawled to the back door, and left the store. TT 1103, 1669. At the counter, Ms. Ingraham grabbed the store's phone. TT 1063–64. When Ms. Ingraham would not put down the phone, Wilson fired a single shot. TT 1063–64, 1108, 1734, 1800. The bullet struck Ms. Ingraham. TT 1063–64. Wilson then directed Ms. Sullivan to open the cash register, TT 1107, jumped up on the counter, and took the money from the register. TT 1064, 1800–01. Wilson threatened to shoot Mr. Ingraham, and took his wallet. R. at 1063, 1801. Ms. Ingraham died at the scene. TT 1116, 1129.

Wilson left the store and ran up Monroe Street. TT 1064. Mr. Langston, who was finishing

a cigarette and leaving the "girls'" house, saw Wilson running away from the Maple Street store and up the street. TT 1850. Wilson looked like a "wild man," and Mr. Langston was afraid at first that Wilson might shoot him. TT 1861. They left in Wilson's car. TT 1064, 1068, 1133–35, 1141. Mr. Langston wanted to get away from Wilson and to go home where he felt his brothers could help him if Wilson tried to get rough with him. TT 1850–51.

Around dusk, Wilson gave the gun back to his sister. Her husband disassembled it and put it behind his bed; he then moved it back to his car, where he had kept it before. TT 1256. Not long after, Mr. Langston walked over to Wilson's sister's house, where Wilson was staying. TT 1856. Mr. Langston told Wilson that if any trouble came, Wilson had better clear him because he did not have anything to do with Wilson's robbery. TT 1856. Wilson told Langston that he was "big enough" to take responsibility should anything come of Wilson's actions. TT 1856. Wilson's sister, who had been given the gun, testified she heard them arguing about what Mr. Langston told Wilson about the number of people in the store. TT 1731–32. She also said that Wilson and Mr. Langston looked through the contents of Mr. Ingraham's wallet, which included a key, a license, and a AAA card. TT 1737–38, 1774–76. Wilson's sister further testified that Mr. Langston took the key and said he would keep it in case the owners ever go out of town. TT 1738. Mr. Langston then left the Madrys and went to his girlfriend's house. TT 1740.

Later that night, Mr. Langston came back to the Madrys' house and told Wilson he'd been stopped at a police roadblock. Wilson's sister testified that this was when Mr. Langston suggested getting rid of the wallet, and Wilson and Mr. Langston went outside to burn it. TT 1747. Wilson did not turn himself in and, at around 1:00 a.m., the police arrived at the Madrys looking for him. TT 1397, 1400, 1427. Wilson tried to hide in the crawlspace under the house and refused to come out. TT 1819. After the police tear-gassed the crawlspace, Wilson surrendered. *Id.* The police

recovered the contents of Mr. Ingraham's stolen wallet and the 9 mm Luger pistol (used in the robbery) at the Madrys' residence after Wilson was arrested. TT 1819–23.

Shortly thereafter, police arrested Mr. Langston at his residence. TT 1371–72, 1465. No money or other evidence from the robbery was found on Mr. Langston or at his residence. TT 1444–46, 1479–83, 1931.

Wilson and Mr. Langston were both charged with first-degree murder and tried separately. At his trial, Mr. Langston's jury was instructed on four possible verdicts: first-degree murder, second-degree murder, manslaughter, and not guilty. TT 2068. The jury instructions read, in part, "The law insofar as it applies to this case states that all murder which shall be committed during and as a result of committing or attempting to commit robbery shall be murder of the first degree." TT 2055. At no point did the jury get an instruction about the mental state required of Mr. Langston in order to find him guilty of murder. Instead, one element of the instructions for finding *Mr. Langston* guilty of murder was that the jury must find "at the time of the robbery . . . Ronald Wilson either intended to kill Arretta Lou Ingraham or that he consciously engaged in committing a serious crime, robbery, using a pistol which was naturally and inherently dangerous to human life in the manner of which that crime of robbery was committed." TT 2056–57.

Procedural History

Mr. Langston was found guilty of first-degree felony murder under an aiding and abetting theory for the December 1, 1975, armed robbery. MCL 750.316(1)(b). Van Buren Circuit Court Judge Meyer Warshawsky, who presided at trial, imposed the mandatory sentence of life in prison without parole on September 8, 1976. The PSI states in part: "Prosecutor Ward Hamlin states that a woman is dead partly because of the involvement of Edwin Lamar Langston. However, because the defendant was less involved in the murder than was Ronald Wilson, he would have no objection

to a pardon by the governor somewhere in the future." That was more than 45 years ago.

Mr. Langston, whose only prior court case was for driving without a license, is now serving his life without parole sentence at Lakeland Correctional Facility. He is 69 years old.

Mr. Langston appealed his conviction as of right to the Michigan Court of Appeals, which reversed his conviction and granted a new trial on November 6, 1978, holding that, "[T]o be liable for murder an accomplice to robbery must have acted with the intent to kill or in reckless disregard of a known and high degree of risk that death or serious bodily harm might occur." *People v Langston*, 86 Mich App 656, 660; 273 NW2d 99 (1978). The prosecution filed leave to appeal, raising the question of whether it had to prove "malice" in Mr. Langston's accomplice liability felony murder case. The appeal was held in abeyance because this Court had granted leave in *People v Aaron* and two other similar cases. In the 1980 *Aaron* decision, in a footnote, the Court referenced Mr. Langston's case along with other similar pending cases.[2]

The *Aaron* Court held that a defendant cannot be convicted of felony murder *unless* malice is proven with respect to the killing. *Aaron*, at 728. But the Court also held that "[t]his decision shall apply to all trials in progress and those occurring after the date of this opinion." *Id*. at 734.

Following *Aaron,* this Court denied the prosecution's pending motion for leave to appeal in *Langston*, which had the effect of *affirming* the reversal of Langston's conviction and granting him a new trial. *People v Langston*, 412 Mich 903; 315 NW2d 408 (1982), Exh. C. After a motion for reconsideration, however, the Court reversed the Court of Appeals and reinstated Mr. Langston's conviction for first-degree murder based on *Aaron*, noting that the earlier order was a "clerical error." *People v Langston*, Docket No 62340 (Mich, May 26, 1982) Exh. D.

[2] *Aaron*, 409 Mich at 686 n 1 ("Compare . . . *People v Langston*, 86 Mich App 656; 273 NW2d 99 (1978);, … with *People v Till*, 80 Mich App 16; 263 NW2d 586 (1977); . . .).

Mr. Langston then filed a federal habeas petition. The federal district court found that Mr. Langston's claims were not exhausted because the state court did not rule on all the issues raised in his direct appeal. The federal court further stated that "the Michigan Court of Appeals will consider delayed applications for leave to appeal without limitation as to whether there was a previous appeal by right." See *People v Langston*, Delayed App Leave (filed in Mich COA Aug 23, 1985) Exh. E (excerpts). Accordingly, Mr. Langston then duly filed his delayed appeal as to the remaining issues not previously decided by the Court of Appeals "in order that the Defendant may exhaust his state court remedies." *Id*. (p 2; TOC, listing claims). The Court of Appeals ultimately denied those remaining claims and affirmed his conviction in 1988. *People v Langston* (May 4, 1988) (Mich Ct App No. 95650), Exh. F.

In 1992, Mr. Langston filed a motion for relief from judgment, which was denied. He attempted but failed to file a second MCR 6.500 motion in 2003. The court did not accept that petition and returned it without prejudice. Order Returning Def's Mot for Relief from J, Exh. G.

Mr. Langston filed the instant 6.500 motion in the Van Buren Circuit Court in 2020. The Hon. Kathleen Brickley ordered a response. After briefing, the court denied the motion for relief from judgment. *See* Op and Order (3/17/2021), Exh. A. In its decision, however, the court noted that the motion presented issues that appear to be ripe for appellate review. The court found the claims "were not decided against Mr. Langston in a previous appeal," and were not barred by MCR 6.502D(2). The court also stated that Mr. Langston could have raised them in his 1980s appeal and therefore must show cause and prejudice. *Id*. at 5-6.

Additionally, the court stated that, even if there were no procedural bar, it felt constrained as a trial court by state appellate precedent, but said that the appellate courts may wish to revisit their decisions based on the new claims in the petition. *Id*. at 8, quoting *Paige v City of Sterling*

Heights, 476 Mich 495, 524; 720 NW2d 219 (2006) (stating that trial courts are bound by precedent "even if they believe that it was wrongly decided or has become obsolete."). This binding effect is true "even if the *Aaron* opinion violates a defendant's constitutional rights." *Id.* at 8. As noted, the Court of Appeals denied leave, leaving Mr. Langston with a direct route to the only Court that can reconsider *Aaron*.

Standard of Review

Questions of statutory or constitutional law are reviewed *de novo*. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). A trial court's ruling on a motion for relief from judgment is reviewed for abuse of discretion. *People v Johnson*, 502 Mich 541, 564, 918 NW2d 676 (2018). A trial court abuses its discretion when it chooses an outcome that "falls outside the range of reasonable and principled outcomes." *Johnson*, supra at 564. When a trial court rejects the correct legal standard, it commits a per se abuse of discretion. *See, e.g., People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013).

Argument

Introduction: Overview of *Aaron*

Mr. Langston's case was on direct appeal when this Court decided *Aaron* in 1980.[3] All defendants, including Mr. Langston – before and after *Aaron* – who are charged with felony murder are charged under Michigan's first-degree murder statute. MCL 750.316(1)(b). The *Aaron* Court addressed whether and to what extent that statute had meaning imputed to it by the common law. Because Michigan has had a murder statute since its existence as a territory, technically there

[3] In *Aaron* the Court had granted leave in three companion cases, to resolve a split in the Court of Appeals as to (1) whether first-degree "felony murder" required the prosecution to prove the *mens rea* (malice) necessary for murder, or only had to prove the *mens rea* necessary for the underlying felony, and (2) whether a conviction reduced to second-degree murder could stand, also based on only the *mens rea* for the underlying felony. *Id.* at 678.

has never been a "common law" offense of felony murder. That is, no defendant can be "charged" with common law felony murder; a defendant is charged under either MCL 750.316 (first-degree murder) or MCL 750.317 (second-degree murder). So the question that was percolating through the courts in 1980, and which led to *Aaron*, was whether the common law definition of felony murder – requiring *mens rea* only for the felony – was somehow incorporated into these statutes. See *Aaron* at 715 ("Under the common law, which we refer to in defining murder in this state….").

The *Aaron* Court framed the question in two parts: "The relevant inquiry is first whether Michigan has a statutory felony-murder doctrine. If it does not, it must then be determined whether Michigan has or should have a common-law felony-murder doctrine." *Id.* at 717.

As to whether Michigan has a "statutory felony murder doctrine" – meaning, does the first-degree murder statute, MCL 750.316, "designate as murder any death occurring in the course of a felony without regard to whether it was the result of accident, negligence, recklessness or willfulness," *id*. at 718, the Court answered no. *Id.* Rather, the statute functions to gradate into first degree or second degree murder an offense which is already "murder."

> Thus, we conclude that Michigan has not codified the common-law felony-murder rule. The use of the term "murder" in the first-degree statute requires that a murder must first be established before the statute is applied to elevate the degree.

People v Aaron, 409 Mich. at 721.[4] In other words, the Court interprets our statutes to require that a murder occur *and* that the murder have malice proven distinct from the "malice" that at common law was implied by the presence of a felony. Only after a murder is so proven may it be elevated to a first-degree murder, on account of the underlying felony.

[4] See also *id.* at 719 ("Michigan case law also makes it clear that the purpose of our first-degree murder statute is to graduate punishment and that the statute only serves to raise an already established murder to the first-degree level, not to transform a death, without more, into a murder. 'The statute does not undertake to define the crime of murder, but only to distinguish it into two degrees, for the purpose of graduating the punishment.'") (internal citations omitted).

This portion of the Court's opinion – and its central holding about what "murder" means for purposes of MCL 750.316 – is an *interpretation of the statute*, plain and simple. The Court in *Aaron* defined what "murder" means, and what it does not mean, in MCL 750.316.[5] See *infra*, Argument I (Mr. Langston must benefit from the *Aaron* Court's statutory interpretation).

The *Aaron* Court separately looked at – even if MCL 750.316 writ large does not have a meaning imported directly from the common law, which the Court determined it did not – whether the term "murder" within this statute has meaning derived from the common law. In this "common law" section, as summarized by the Court, the prosecution had argued that, when proceeding under MCL 750.316(1)(b), the term "murder" is defined by the "common law definition of murder" which "included a homicide in the course of a felony." *Aaron*, 409 Mich at 721-22 (citing *People v Scott*, 6 Mich 287, 292 (1859)). In other words, the government argued that there was no need to find a murder first, with the element of malice separate from the underlying felony, before murder could be elevated to felony murder. The prosecution argued instead that the word "murder" in the statute had all of the meanings that had been given to that word at common law, including that a homicide in the course of a felony is "murder."

The Court stated that this issue – whether the meaning of "murder" in the statute embraces any and all common law understandings, including common law felony murder – was a legal question that had never yet been answered by the state's highest court.[6] *Id*. at 722. The Court then cited

[5] As a result of the Court's interpretation, the convictions of the three defendants were reversed, and the cases were remanded for retrial. *Id.* at 734.

[6] *Id*. at 722 ("Our research has uncovered no Michigan cases, nor do the parties refer us to any, which have expressly considered whether Michigan has or should continue to have a common-law felony-murder doctrine. While there are some cases containing language which may be construed as assuming the existence of such a rule in Michigan, the language is clearly dictum . . . .") (internal quotation marks and citations omitted).

the state constitutional provision: "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." Mich Const 1963, art 3, Sec 7.[7] *Id*. at 722. The Court read this provision to mean that the term "murder" in MCL 750.316 could retain some inherent common law meaning – because no case had yet decided otherwise.

> This Court has not been faced previously with a decision as to whether it should abolish the felony-murder doctrine. Thus, the common-law doctrine remains the law in Michigan. Moreover, the assumption by appellate decisions that the doctrine exists, combined with the fact that Michigan trial courts have applied the doctrine in numerous cases resulting in convictions of first-degree felony-murder, requires us to address the common-law felony-murder issue. *Aaron*, supra at 723.

The Court then examined previous Michigan court decisions which, while not addressing specifically whether or not the term "murder" has a common law meaning, suggest or assume that it does. *Id*. at 723, and at 723–727. The Court's discussion makes plain that previous decisions of the Court had interpreted what the term "murder" means in ways that changed, interpreted, and limited importation of a "common law" meaning of "murder" (as including any homicide in the perpetration of a felony), *id*. at 727, even though in 1980 Michigan courts were still convicting defendants of classic "common law" felony murder under the statute, with no finding of separate malice for the murder. These prior decisions led the Court "to conclude that the rule should be abolished." Id. at 723.

The Court then took the "logical extension" of these cases to read out any common law meaning from the word "murder" in MCL 750.316. *Id*. at 727. The Court rejected the idea that the term "murder" in the statute imports such a common law understanding. *Id*. at 727-28.

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[7] This provision was substantially the same in the 1908 Constitution and seems to have first appeared in the 1850 Constitution. See 1850 Schedule, Sec 1. The language of the Michigan first-degree murder statute predates the 1850 Constitution. *See infra*, Due Process, Section III.

> Accordingly, we hold today that malice is the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm. We further hold that malice is an essential element of any murder, as that term is judicially defined, whether the murder occurs in the course of a felony or otherwise. *Id.* at 728.

The *Aaron* Court stated that it was determining the meaning of the words in the first-degree murder statute, and therefore it did not reach the constitutional question – which had been briefed and argued by the parties and presented to the Court – of whether the statute, as it had been applied before the interpretation in *Aaron*, violated the Due Process Clause. The Court granted relief to the three defendants before the Court and applied its decision only to "all trials in progress and those occurring after the date of this opinion." *Id*. at 734.

This understanding of the *Aaron* decision frames the three challenges to Mr. Langston's conviction. First, *Aaron* was – and never claimed to be anything other than – a case about the meaning of Michigan's first-degree murder statute and the term "murder" within that statute. As set forth in the "legal innocence" argument (Part I, below), this interpretation of what the statute means must, under cannons of statutory interpretation, be what the statute has always meant. Mr. Langston was convicted without a jury ever finding that he met all the elements of the state first-degree murder statute, which had the same text before and after *Aaron* – only the Court's interpretation of the statute had changed. He is therefore entitled to relief because a statute can have only one meaning unless or until it is altered by the legislature.

Second, alternatively, the *Aaron* Court's decision can be seen as a decision on the statute in the face of a constitutional challenge. As noted, the parties in *Aaron* litigated the due process question in the case, but the Court *avoided* deciding that constitutional issue. As shown in Part II below, courts can avoid constitutional questions, but only in certain circumstances. The Court's "constitutional avoidance" was improper for two reasons. First, a fair reading of the case law shows

that the word "murder" in the statute *had* a common law meaning, and the Court changed the meaning of the word to fix the law's due process problem, which the doctrine of "constitutional avoidance" does not permit. Second, regardless of the pre-existing meaning of the statute, the Court's choice to employ the doctrine of "constitutional avoidance" is not allowed where, as here, to do so would expand criminal liability to Mr. Langston (and others like him whose cases were pending on direct appeal, and some of whom had won in the Court of Appeals).

Third, Mr. Langston raises the due process claim presented in *Aaron*, but left undecided by the Court, once the Court decided *Aaron* exclusively on statutory grounds. See Part III.[8]

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[8] A good example of what Mr. Langston is asking this Court to do is what Maryland's High Court did in *Unger v State*, 427 Md 383, 48 A3d 242 (Ct App Md) (2012). Maryland, based on a state constitutional provision, long had standard jury instructions which told jurors that the instructions on, *inter alia*, "burden of proof" and "beyond a reasonable doubt," were only *advisory*. In a 1980 case (the same year as *Aaron*), Maryland's High Court held that such instructions had come to be viewed as "limited" and that therefore the court's "interpretation" of the provision (to no longer permit the use of such instructions) "did not announce new law," *Stevenson v. State*, 289 Md 167, 178, 423 A2d 558, 564 (1980), and did not on its face violate the U.S. Constitution. *Id.,* 289 Md at 181-188, 423 A2d at 566-570. *See also Montgomery v State*, 292 Md 84, 89, 437 A2d 654, 657 (1981) (same).

The effect, as in *Aaron*, was that the practice would cease prospectively while affording no relief to defendants convicted in the past. A decade later, in a habeas case, the Fourth Circuit held that such instructions violated a pre-1980 defendant's Fourteenth Amendment rights. *Jenkins v Hutchinson*, 221 F3d 679 (4th Cir 2000). Thereafter, an intermediate court of special appeals adopted the holding of *Jenkins*, finding that a defendant so convicted was denied due process in 1979, and that the High Court cases decided in 1980-81 *had* in fact "materially changed the law governing the constitutionality of the advisory instruction." *State v Adams*, 171 Md App 668, 682, 912 A2d 16, 24 (2006). But Maryland's High Court reversed, holding that *Stevenson* and *Montgomery* "did not announce new law." *State v Adams*, 406 Md 240, 256, 958 A2d 305 (2008), *cert. denied*, 556 US 1133, 129 SCt 1624, 173 LEd2d1005 (2009).

Three years later, in *Unger, supra,* the High Court adopted the dissenting opinion in *Adams* and held that "*Stevenson* and *Montgomery* … set forth a new interpretation of [the provision] and established a new state constitutional standard." 427 Md at 411, 48 A3d at 258 (2012). Just like the broad use of common law-style felony murder instructions in Michigan's courts before 1980, the court noted that even though some limits had been placed on the "advisory" instructions, Maryland's courts had routinely used them before 1980, including in "cases implicating constitutional rights." *Id*. at 414, 48 A3d at 260. Finally, the *Unger* court held "that a new interpretation of a constitutional provision or a statute is fully retroactive if that interpretation affects the integrity of the fact-finding process." *Id*. at 416, 48 A3d at 261. The court concluded, "It is undisputed that the

In addition to these claims challenging Mr. Langston's conviction, his sentence – mandatory life without the possibility of parole – for an offender who did not kill or attempt to kill, and for whom no *mens rea* was proven with respect to the death that occurred, violates both the Eighth Amendment of the U.S. Constitution and Article 1, § 16 of the Michigan Constitution. The Court should grant leave to appeal to address the legal claims summarized above.

I. THIS COURT SHOULD GRANT LEAVE TO APPEAL AS THE *AARON* COURT CLARIFIED THAT THE FELONY MURDER STATUTE HAS ALWAYS REQUIRED *MENS REA*, WHICH WAS NOT PROVEN IN MR. LANGSTON'S CASE; HE IS THEREFORE "LEGALLY INNOCENT" OF THAT OFFENSE.

Mr. Langston has served 46 years on a mandatory LWOP sentence for a "felony murder" in which no jury found that he intended or foresaw that anyone would die. But because the *Aaron* Court applied its holding prospectively only, Mr. Langston remains imprisoned even though he is "legally innocent" of the crime, as set forth below.

In *Bousley v US*, 523 US 614; 118 S Ct 1604; 140 L Ed 2d 828 (1998), the Court held that people are "actually innocent" if their acts did not amount to the crime for which they were convicted. *Id*. at 623.[9] That is to say, if a court of last resort clarifies what a statute means, the court is ruling on what the statute has *always* meant (but for the erroneous misinterpretation). Because

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trial judge's instructions at Unger's 1976 trial, telling the jury that all of the court's instructions on legal matters were 'merely advisory,' were clearly in error, at least as applied to matters implicating federal constitutional rights." *Id*. at 417, 48 A3d at 262. (The decision led to the review of some 250 similarly-situated defendants who were still in prison in 2012. *See, e.g.,* NPR (2016), https://www.npr.org/2016/02/18/467057603/from-a-life-term-to-life-on-the-outside-when-aging-felons-are-freed.) *Unger* is as close to on point with *Aaron* as a case can be; this Court should do the same thing that the *Unger* court did, for exactly the same reasons.

[9] The term "actual innocence" can be misleading because it is commonly used to refer to people who were falsely or mistakenly accused and convicted, as opposed to those who, like Mr. Langston, did not meet all the elements of an offense. Therefore, this brief uses the term "legal innocence" to refer to people like him, who were convicted of felony murder despite the fact that the prosecution never proved, and the jury never found, that they acted with the *mens rea* required for such a conviction. *Bousley* does not distinguish between the two terms. *Id.* at 623.

Aaron clarified what Michigan's first-degree murder law has always meant, Mr. Langston was at the time, and is today, "legally innocent" of first-degree murder under the *Aaron* Court's interpretation of the law, for the simple reason that his *mens rea* was never submitted to the jury, and thus was never decided in his trial.

Michigan's modern first-degree murder statute was codified in 1837. That statute, MCL 750.316, states that any murder committed in the perpetration or attempted perpetration of an enumerated felony constitutes murder in the first degree. But MCL 750.316 only tells us which *murders* count as first-degree; it is silent on the question of what must be proven to establish that a "murder" occurred. The statute before 1980 was ambiguous.[10] Only in *Aaron* did the Court finally provide an authoritative interpretation, declaring that an essential element of any murder is malice, which it defined as "the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm." *Id.* at 326.

When a court of last resort so interprets a statute, it does not change the statute's content. Only the legislature can do that. Rather, the court declares what the statute means and has always meant since its enactment (or most recent amendment). Therefore, the understanding of MCL 750.316 announced in *Aaron* authoritatively determined that murder in Michigan has required malice since 1837. But the jury that heard Mr. Langston's case was never instructed on malice, so it convicted him of murder without ever finding the necessary *mens rea*. Since the prosecution never proved an essential element of the crime for which Mr. Langston was convicted, he was and is

[10] See, e.g., Michigan Supreme Court Historical Society, *People v Aaron*, *Exorcising the Ghost of Felony Murder, 409 Mich. 672 (1980)*, available at http://www.micourthistory.org/wp-content/uploads/verdict_pdf/aaron/MSC_Mar_Aaron.pdf.

"legally innocent." To use the Supreme Court's term in *Bousley*, he is "actually innocent" of the crime charged. 523 US at 623. Therefore, Mr. Langston's conviction must be vacated.

The circuit court did not address the legal innocence argument because (it says) doing so would require *Aaron* to apply "retroactively," contrary to *Aaron* itself. Op at 8. But that is incorrect. As we show, it is legal error to describe the doctrine of legal innocence as having "retroactive effect" (in the sense that courts use that term in other legal contexts). The underlying point of legal innocence is that if a court of last resort interprets a statute to mean X, then the statute has *always* meant X (absent amendment or reinterpretation). As a result, people who were convicted under a statute before it was *correctly* interpreted are entitled to relief, not on the basis of "retroactivity" but because the statute has *always* had the meaning given to it by the court of last resort.

The circuit court therefore erred in holding that *Aaron* was binding on this issue, as this Court was not presented with a legal innocence claim in *Aaron*, and thus has never ruled on it. The Court of Appeals also erred by not granting leave to appeal. Accordingly, this Court should grant leave because, as the trial court below noted, "The current Supreme Court may wish to revisit the issue of *Aaron's* retroactivity" in light of Mr. Langston's legal innocence claim. Op at 8.

A. The *Aaron* Court's interpretation of the felony murder statute is the last word as to what the statute means and has always meant.

Aaron's interpretation of Michigan's first-degree murder statute is a binding proclamation of what the law means and has meant since its enactment because of "the rules that necessarily govern our hierarchical . . . court system." See *Rivers v Roadway Express*, 511 US 298, 312; 114 S Ct 1510; 128 L Ed 2d 274 (1994). This conclusion follows from the roles assigned to each branch of government under the United States and Michigan Constitutions. US Const, art I, § 1; Const 1963, art 4, § 1. First, since only the legislative branch can make law, the meaning of a statute must remain intact unless or until the statute is amended through further legislative action. Second,

it follows from the unique role of the judiciary that when a court of last resort interprets the law, that interpretation is authoritative. As Justice Marshall famously declared in *Marbury v Madison*, "It is emphatically the province and duty of the judicial department to say what the law is." 5 US 137, 177; 2 L Ed 60 (1803). Therefore, when a court of last resort interprets a statute, that court determines the unique, enduring meaning of the statute – what the statute means and has *always* meant since the moment it was enacted (or since the last time it was legislatively amended). See *Bousley* 523 US at 623 (1998); *Rivers,* 511 US at 312. See also *People v Doyle*, 451 Mich 93, 109–11; 545 NW2d 627 (1996) (holding that this Court's own interpretation of a statute reversing a Court of Appeals decision previously understood to be settled law did not constitute a genuine change in law because the new interpretation gave effect to the original intent of the legislature).

Therefore, a defendant whose conviction is defective under this Court's (even new) interpretation of a criminal statute is *legally innocent* of the crime. *Bousley*, 523 US at 623-24. Such a form of "actual innocence" can entitle a defendant to relief even where procedural rules might otherwise bar it. *Id.* at 622.

The U.S. Supreme Court has clarified this understanding in a series of decisions. The defendant in *Bousley* itself had pled guilty in 1990 to "using" a firearm in violation of a federal statute. *Id.* at 616. Five years later, however, the Court held in *Bailey v United States*, 516 US 137, 144; 116 S Ct 501, 133 L Ed 2d 472 (1995), that conviction under the statute required "active employment of the firearm" in the commission of the crime. *Id*. at 144. That led Mr. Bousley to argue that his conviction should be vacated because his plea was not intelligently made: he was misinformed as to the true elements of the charged crime. *Bousley,* at 618. The Court agreed, remanding the case "to permit petitioner to make a showing of actual innocence" – that is, "legal innocence" of the offense codified under the statute as authoritatively interpreted in *Bailey.* See *Bousley*, at 623,

see also *US v Barnhardt*, 93 F3d 706 (CA 10, 1996) (quoting *Davis v US*, 417 US 333, 346; 94 S Ct 2298; 41 L Ed 2d 109 (1974)) (applying *Bailey* on collateral review because any defendant should get "the benefit of case law decided after his conviction when the conviction was 'for an act that the law does not make criminal.'").

Consequently, when a court of last resort issues a statutory interpretation that is at odds with previous interpretations offered by lower courts, it is wrong to say that the law has changed. Rather, absent legislative amendment, the statute means and has always meant what the court of last resort now says it means, and previous statements to the contrary should be understood as mistaken. Concurring and dissenting in *Bousley*, Justice Stevens explained that it would be wrong to understand the Court as holding that the new rule of law announced in *Bailey* should be applied "retroactively." *Bousley*, 523 US at 625. As Stevens said, *Bailey* did not *change* the elements for conviction under the statute; rather, it corrected a longstanding misinterpretation of those elements. *Id.* That the mistaken understanding of the statute was widely or even universally shared is of no importance. *Id.*

The same logic appears in federal appellate law before and after *Rivers, supra,* and *Bousley*, particularly in criminal cases. For example, in *McNally v United States*, 483 US 350; 107 S Ct 2875; 97 L Ed 2d 292 (1987), the Court narrowed its reading of a federal mail fraud statute, reversing a Sixth Circuit decision that had upheld the conviction. On remand, the Sixth Circuit said that all defendants convicted under the old reading of the law must be given the benefit of the narrower *McNally* reading. Failing to extend that interpretation to all defendants would mean punishing them "for an act that the law does not [and never did] make criminal." *Callanan v United States*, 881 F2d 229, 231 (CA 6, 1989) (quoting *Davis*, 417 US at 346) (applying the law not just to defendants on direct appeal, but also to those who file post-conviction challenges).

The reasoning of *Bousley* and *Rivers* appears even more explicitly in *Brough v United States*, 454 F2d 370, 372 (CA 7, 1971). There the court held that to apply the Supreme Court's reinterpretation of the selective service registration statute only prospectively "would indicate that a federal statute duly enacted by Congress could mean one thing prior to the Supreme Court's interpretation and something entirely different afterwards." As the court explained, "a statute, under our system of separate powers of government, can have only one meaning," so any prior interpretation inconsistent with that unique meaning "is, and always was, invalid." *Id.* See also *Gates v United States*, 515 F2d 73, 78 (CA 7, 1975) (the decision, re-interpreting a federal drug law "was a declaration of what the law had meant from the date of its effectiveness onward.")

In *United States v Travers*, the Second Circuit extended the holding of *United States v Maze*, 414 US 395; 94 S Ct 645; 38 L Ed 2d 603 (1974), to defendants convicted before *Maze* was decided. *Travers*, 514 F2d 1171 (CA 2, 1974). Judge Friendly explained that when the Supreme Court reinterprets a statute, it is "discharging its traditional role, as the final expounder of federal statutory law." *Id.* at 1174. Failing to apply *Maze* meant that "Travers was convicted and punished 'for an act the law does not make criminal.' It was simply Mr. Travers' bad luck that no conflict of decisions had yet developed" when his case was on direct appeal. *Id*. at 1176 (quoting *Davis*, 417 US at 346). "In light of the statute's true meaning, … applying *Maze*'s interpretation only to pending or future cases would clearly be anathema to any legal system claiming the mantle of equal justice for all." *Id.*

In sum, decisions of statutory interpretation are fully "retroactive" – in the sense of being applied to all cases that came before – not because they change the law, but rather because they explain what the law has always meant. A statute "can have only one meaning from the date of its effectiveness onward …. [W]here a court narrows the scope of a statute under which a … prisoner

was previously convicted, there exists the possibility that the prisoner now stands convicted of an act that the law never made criminal." *United States v Santos*, 342 F Supp 2d 781, 798 (ND Ind, 2004). Therefore, "it would be wholly contrary to our notions of justice and fairness to allow a defendant to serve a prison term for an act that is not, nor ever was a crime." *Id.*

This same principle applies to interpretations by state supreme courts. For example, in analyzing whether a state crime qualifies as a predicate violent felony under the federal Armed Career Criminal Act, federal courts have applied a state court interpretation that occurred after the crime. "When the Florida Supreme Court . . . interprets the robbery statute, it tells us what that statute always meant." *United States v Fritts*, 841 F3d 937, 943 (CA 11, 2016). See also *United States v Davis*, 875 F3d 592, 603 (CA 11, 2017) (quoting *United States v Seabrooks*, 839 F3d 1326, 1344 (CA 11, 2016)) (state high courts definitively announce what the law has always meant in their state when they engage in statutory interpretation). See also *Hicks v Stancil*, 642 F App'x 620, 622 (CA 7, 2016) (holding that case law decided after the defendant's conviction, clarifying that two of his predicate offenses were not violent felonies, meant that he was never an aggravated felon).

As this Court stated in *Hyde v Univ of Michigan Bd of Regents*, "the general rule is that judicial decisions are to be given complete retroactive effect." 426 Mich 223, 240; 393 NW2d 847 (1986); *Kuhn v. Fairmont Coal Co*, 215 US 349, 372; 30 SCt 140; 54 LEd 228 (1910) (Holmes, J., dissenting) ("I know of no authority in this [C]ourt to say that, in general, state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years."). This rule applies to the Court's interpretations of statutes: "Where the language used has been subject to judicial interpretation, the legislature is presumed to have used particular words in the sense in which they have been interpreted." *People v Powell*, 280 Mich 699, 703; 274 NW 372 (1937) (quoted in *McCormick v Carrier*, 487 Mich 180, 192; 795 NW2d 517 (2010)).

Although some Michigan decisions have used the misleading language of "retroactivity" to describe the effects of this Court's statutory interpretations, the Court has recognized that in reality these decisions clarify the law rather than change it. For example, in *People v Bewersdorf*, 438 Mich 55; 475 NW2d 231 (1991), this Court held that a third OUIL offense can support charging a defendant as a habitual offender. Based on its own interpretation of the statute, the *Bewersdorf* Court reversed two Court of Appeals panels. *Id.* In *Doyle*, this Court rebuffed arguments that the *Bewersdorf* interpretation of the law should not be used to assess conduct occurring before the release of that opinion. *Doyle*, 451 Mich at 96, 109–11 (discussing the impact of *Bewersdorf*). While *Doyle* involved a statute of first impression, the Court's rationale was the same: that rather than changing the law, the Court in *Bewersdorf* "fulfilled its judicial role" and had "g[iven] effect to valid laws that existed before [the date *Bewersdorf* was decided]." *Id*.

By virtue of the roles of the judiciary and the legislature, when this Court announces an interpretation of a statute, it is declaring what that statute means and has always meant from the time it was enacted or most recently amended. *Id.* at 109–11. Such a conclusion is required by the nature of our system of government, the role of the courts, and basic principles of justice.

B. Because the *Aaron* Court said what Michigan's first-degree murder statute has always meant, that holding should be applied to defendants convicted under the statute, before or after *Aaron*.

Aaron holds that under MCL 750.316, a conviction of first-degree murder in Michigan requires an explicit finding of malice. *Aaron*, 409 Mich at 728. Therefore, since a statute's interpretation by the Supreme Court determines what it has meant since enactment (in the absence of legislative amendment), Michigan's first-degree murder statute has always required an explicit finding of malice. But the jury that convicted Mr. Langston of first-degree murder did not make an explicit finding of malice, so the judgment entered pursuant to that conviction was in error and

must be vacated. See also *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970) (holding that the Due Process Clause of the U.S. Constitution requires that each element of a crime must be proven beyond a reasonable doubt in order to support a conviction; Part III, below).

In Mr. Langston's case the trial court, citing MCL 750.316, instructed the jury that the only *mens rea* needed to find him guilty of felony murder on the prosecution's theory of aiding and abetting was that he "intended to commit the crime of robbery at the time that he allegedly aided and abetted or encouraged [the principal] . . ." Tr. 2063-64. But intent to commit robbery does not rise to the level of malice needed for murder. Therefore, because the jury, faithfully executing the court's instructions, found Mr. Langston guilty of first-degree murder *without finding that he acted with malice*, is legally innocent for lack of "an essential element" submitted to the jury. *Aaron*, 409 Mich at 728.

Because the *mens rea* question was never presented to the jury, we cannot know what the jury might have done if it had known that malice for murder – and not the fact that the victim died during the commission of a robbery – was required to convict him of felony murder. Because the *Aaron* Court held that "malice is an essential element of any murder," *Aaron*, 409 Mich at 728, Mr. Langston is legally innocent for lack of an essential element submitted to the jury. As a result, it can truly be said that he has been imprisoned for 45 years for a crime that was never proven at trial. It is black-letter law that if the prosecution does not prove every element of a crime beyond a reasonable doubt, then the defendant is not guilty. If ever there were "exceptional circumstances that justify collateral relief," surely they are present in this case. See *Davis*, 417 US at 346.

As further stated below, this claim is ripe for review by this Court and procedurally proper. The claim could not have been raised on direct review, as the claim was not available until after the *Aaron* decision, giving cause for failure to raise it on direct appeal.

II. MR. LANGSTON IS ENTITLED TO RELIEF BECAUSE THE *AARON* COURT IMPERMISSIBLY USED CONSTITUTIONAL AVOIDANCE TO HARM HIM.

Justice Brandeis succinctly laid out the principle of constitutional avoidance in *Ashwander v Tennessee Valley Authority*: "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." 297 US 288, 347; 56 S Ct 466; 80 L Ed 688 (1936).

Yet, constitutional avoidance has limits. For example, the reviewing court's interpretation of the statute must still be a "plausible" reading – meaning that the court's adopted interpretation must still be grounded in the text of the statute itself or its legislative history. *US v Culbert*, 435 US 371, 379; 98 S Ct 1112; 55 L Ed 2d 349 (1978) (stating that for the purposes of constitutional avoidance, if the statutory interpretation has "no support in either the statute or its legislative history," then the court cannot "manufacture ambiguity where none exists"). Additionally, the court may not use the doctrine to "distort" the law or to "expand the scope of the criminal statute in order to save it." *United States v Davis*, 139 S Ct 2319, 2332; 204 L Ed 2d 757 (2019).

The fundamental reasoning behind limits on constitutional avoidance is based on well-established limitations on the judiciary's powers to infringe upon the legislature's authority. See *Albertini v United States*, 472 US 675, 680; 105 S Ct 2987; 86 L Ed 2d 536 (1985) (quoting *Heckler v Matthews*, 465 US 728, 741-42; 104 S Ct 1387; 79 L Ed 2d 646 (1984) ("Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature")); see also *id*. (citing *United States v Locke*, 471 US 84, 85; 105 S Ct 1785; 85 L Ed 2d 64 (1985) (stating that a court cannot "trench upon the legislative powers vested in Congress by Art I §1, of the Constitution")).

This Court has followed the U.S. Supreme Court's application of constitutional avoidance doctrine throughout its development. *Taylor v State*, 360 Mich 146, 153–54; 103 NW 2d 769

(1960) (rev'd on other grounds) (citing *Ashwander*, *supra* at 341). In the alternative to Argument I, Mr. Langston alleges that by manufacturing an interpretation of felony murder that was at odds with the legislative history of the statute, at odds with long-established judicial practice in felony murder cases, and by broadening the number of people exposed to criminal liability, the *Aaron* Court exceeded the limits of constitutional avoidance.[11]

A. Constitutional Avoidance Is Only Appropriate When the Statute Is Ambiguous

Constitutional avoidance may be used when there are two interpretations of a statute, and one of the interpretations does not raise constitutional questions. *Salinas v United States*, 522 US 52, 59-60; 118 S Ct 469; 139 L Ed 2d 352 (1997). Choosing the constitutional option does not intrude upon the power of the legislature. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, the Court's duty is to adopt the latter." *Jones v United States*, 529 US 848, 849; 120 S Ct 1904; 146 L Ed 2d 902 (2000). The court, when resolving the ambiguity, simply assumes that the legislature meant to pass the constitutional version. See *Clark v Martinez*, 543 US 371, 385; 125 S Ct 716; 160 L Ed 2d 734 (2005). Implicit, however, is the presumption that there are two plausible readings for the court to choose between. *Clark*, 543 US at 385.

Justice Thomas clarified the limits of the doctrine in his concurring opinion in *New Austin Municipal Utility District No. One v Holder*, 557 US 193, 205–06; 129 S Ct 2504; 174 L Ed 2d 140 (2009). He reaffirmed that where two plausible interpretations of a statute exist, the use of constitutional avoidance as a remedy to preserve the statute is proper. *Id* at 206 ("[I]t commanded

[11] We recognize that *some* of the arguments in Parts II and III can be read to conflict with Part I, which is why we highlight that these arguments (at least in part) are "alternative" arguments.

courts, when faced with two plausible constructions of a statute – one constitutional and the other unconstitutional – to choose the constitutional reading.").

1. There was a Due Process Clause question before the *Aaron* Court, which it impermissibly avoided, contrary to the analysis of the trial court.

In *Aaron*, the Court was asked to examine the felony-murder statute, which the defendant argued required a finding of malice. *Aaron*, 409 Mich. 672, 717–18. In fact, the one and only issue raised and argued by the defendant in *Aaron* was his due process right to a finding of malice in a murder conviction. Defendant-Appellant's Brief on Appeal at 6, *Aaron* 409 Mich. 672 (No. 57376) (stating "If proof of malice is unnecessary for a conviction of felony murder, defendant cannot properly be convicted of second degree murder as a lesser included offense . . . [M]alice is an element of second degree murder and must be proven beyond a reasonable doubt . . . if the defendant is to be accorded his due process right . . ."), Exh. H.

The *Aaron* Court agreed that an essential element of any murder is a finding of malice. *Id.* at 714. The Court expressed strong apprehension that under the felony-murder statute, defendants could be convicted of first-degree murder without a finding of malice. *Id.* at 733 ("The felony-murder doctrine is unnecessary and in many cases unjust in that it violates the basic premise of individual moral culpability upon which our criminal law is based."); *id.* ("Indeed, most states, including our own, have recognized the harshness and inequity of the rule as is evidenced by the numerous restrictions placed on it."). Yet the Court stated that its opinion was based on statutory interpretation, not the due process argument that had been presented to it. *Id.* at 717 -21.

Justice Ryan's concurrence clarified the apprehension that arose from the due process claim raised, especially the prosecution's position that the underlying felony created a presumption of malice. "[W]hen the presumed fact is truly an element of the crime, the presumption [that felony

murder creates], especially if it is conclusive, may run afoul of the . . . Due Process Clause." *Aaron*, 409 Mich at 742 n 15. He further stated that "such presumptions may unconstitutionally dilute the 'beyond a reasonable doubt' standard of criminal culpability." *Id.* (citing *In re Winship*, supra).

The trial court below denied Mr. Langston's constitutional avoidance claim because the *Aaron* Court never said that it was invoking constitutional avoidance when it did not address the due process claim that had been raised and briefed in *Aaron*. Op and Order at 8-9. But that, too, is legal error. Constitutional avoidance, like any other legal doctrine, is determined by looking at what the Court did, not by what the Court said that it was doing (or remained silent about).[12]

The trial court below suggested that *Aaron* effectively okayed felony murder convictions (like Langston's) before 1980, based not on the statutorily required "malice" for the murder itself, but rather based on the common law version of "malice" – which was satisfied just by the felony – and which *Aaron* abolished prospectively. Order at 9, citing *Aaron* at 727. That may be what *Aaron* did, but it is irrelevant to the constitutional avoidance question. Once the Court read the *statute* to require malice for the *murder*, those who were convicted under the statute without malice having been proven by the prosecution or found by the jury and whose cases were still on direct appeal, had a black-letter due process claim under *Winship.* As stated below, even in 1980 (and today) such a change in the elements required for conviction would have applied retroactively to everyone like Mr. Langston – that is, to all defendants whose cases were still on direct appeal.[13]

Moreover, courts cannot decide a case on state law grounds when a constitutional question

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[12] For example, if a court in a civil case said it was applying strict scrutiny, but then applied a different (improper) standard of review, the application of the wrong standard is still mistaken. And if the court gave no name to the standard it was using but still got the analysis wrong, the decision would be equally open to criticism, even though the error was "silent."

[13] Under legal innocence, on the other hand, the decision would have to be applied to everyone wrongly convicted, regardless of whether or not they were still on direct appeal.

is presented, if doing so will harm a class of defendants similarly situated to the defendants in the case. But that is exactly what the *Aaron* Court did. By ignoring the due process issue squarely presented, and focusing instead on reforming the common law, the Court denied relief to Mr. Langston that would otherwise have been granted but for the Court's refusal to reach the constitutional issue. All defendants whose trials had ended but whose cases were still on direct appeal were left without a remedy, even though they suffered exactly the same harm as the three defendants whose cases happened to reach this Court first.

Finally, the fact that the Court viewed common law felony murder as having infected Michigan law to such a degree that the Court needed to "abolish" the common law rule, undercuts the plausibility of the Court's reading of the statute. For decades Michigan courts had acted on the belief that common law felony murder was incorporated into the statute. Again the trial court below and the Court of Appeals erred, because constitutional avoidance is not permissible when a court chooses the less plausible reading of a statute to avoid a constitutional question. And this issue, too, was not addressed in *Aaron* (nor has it been addressed since).

2. Faced with a potential finding of unconstitutionality, the *Aaron* Court chose the less plausible reading of the statute.

Michigan adopted Pennsylvania's first-degree murder statute verbatim in 1837. *Aaron*, supra. In 1974, however, when Pennsylvania wanted to ameliorate its felony murder doctrine, it *amended* its first-degree murder statute. *Id*. To cure the defect, the *legislature* limited first-degree murder to an intentional killing (and moved felony murder to the second-degree murder section of the statute, which already required malice). *Aaron* at 718 n. 106. In short, Pennsylvania apparently viewed its statute as expressly allowing for convictions of first-degree murder with implied malice if the killing was done in the course of committing or attempting to commit a felony. Penn Statute 18 § 2502 (1974). Michigan's identical law had not been

changed when *Aaron* was decided, so Pennsylvania's action undercuts the reasoning of the *Aaron* Court.

In 1837, Michigan had also adopted Pennsylvania's historical interpretation of the statute. That interpretation incorporated the common law understanding that "[m]alice has nothing to do with common-law felony-murder; it is not an element of the crime, and is not properly considered by the jury." *Aaron*, 409 Mich. at 718 (J. Ryan, concurring). Indeed, the prosecutors in *Aaron* advocated for an interpretation of the statute that mirrored common-law felony murder.[14] And they did so because they thought that the *Aaron* Court would be bound to agree with that reading. *Id.* at 721-22 (citing *People v Scott*, 6 Mich. 287, 292 (1859). This was the most plausible interpretation for the *Aaron* Court to reach because that reading was grounded in the law's "legislative history" (that common law felony murder permitted a conviction of first-degree murder without an express finding of malice, see *Culbert*, 435 US at 379), and in the longstanding practice of Michigan's courts. Even if the law were ambiguous, Pennsylvania's amendment strongly buttressed the view that the law had always permitted a conviction of first-degree murder without a finding of malice.

But the *Aaron* Court rejected this plausible reading of the statute, finding that it had no common-law felony murder component, despite the Court having identified the original or early intent to incorporate that very interpretation into the law, and despite the prosecution having argued that its incorporation was the most plausible reading of the law, *Aaron*, 409 Mich. at 733 (and stating that if the common law was allowed, it was now abolishing it); see *Albertini*, 472 U.S. at

[14] "The prosecution argues that even if Michigan does not have a statutory codification of the felony-murder rule, the common-law definition of murder included a homicide in the course of a felony. Thus the argument continues, once a homicide in the course of a felony is proven, under the common-law felony-murder rule a murder has been established and the first degree murder statute becomes applicable. This Court has ruled that the term murder as used in the first-degree murder statute includes all types of murder at common law." *Id.* at 271-72.

680 ("[T]his interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature."). Instead, the Court imputed a less plausible alternate reading: that second-degree murder with the requisite finding of malice is elevated to first-degree if committed in the perpetration of one of the enumerated felonies. *Aaron*, supra at 719. We know that in practice, Michigan courts for years had interpreted Michigan's statute to allow convictions without *mens rea* for murder (as was true in Mr. Langston's case). Yet the *Aaron* Court adopted an interpretation that only a *murder* committed in the commission of a felony can be elevated. *Id*.

In short, rather than addressing the constitutional question, the Court engaged in constitutional avoidance by construing the statute to cure the potential due process defect. It did so impermissibly, however, because in light of the statutory history, and the jurisprudence that had allowed felony murder convictions without proof of malice for decades, it was not faced with two equally plausible constructions of the statute (one constitutional and one not). The *Aaron* Court instead imputed the less plausible meaning to avoid having to decide the due process issue.[15]

B. Alternatively, Even if the *Aaron* Court Engaged in Permissible Constitutional Avoidance, It Did so in an Impermissible Way that Expanded the Reach of the Criminal Statute.

Even if the *Aaron* Court *could* have chosen its reading of the statute as an interpretive matter, the constitutional avoidance doctrine would still not permit the holding, as the decision improperly expanded the scope of those who could be exposed to criminal liability. *United States v. Davis*, 139 S. Ct. 2319, 2332 (2019). The U.S. Supreme Court has stated that the canon of constitutional

[15] The tension in the *Aaron* decision is apparent. A likely explanation is that the Court could not get four votes to end the felony murder rule if it meant pending appeals would have to be reversed – which might have been the case if the Court decided the constitutional question in the defendants' favor. So the Court sought to find a path that changed the law without addressing the potential constitutional defect. But *that* it cannot do unless it chooses between equally plausible readings, and unless doing so does not harm defendants similarly situated to the parties, as we address next.

avoidance cannot be used to expand the scope of a criminal statute to the detriment of defendants. As recently expressed in *Davis*:

> We doubt, however, the canon could play a proper role in this case even if the government's reading were 'possible.' True, when presented with two 'fair alternatives,' this Court has sometimes adopted the narrower construction of a criminal statute to avoid having to hold it unconstitutional if it were construed more broadly. But no one before us has identified a case in which this Court has invoked the canon to expand the reach of a criminal statute in order to save it.

139 S Ct at 2332. The Court went on to justify the reason for this limitation by stating that "[e]mploying the avoidance canon to expand a criminal statute's scope would risk offending the very same due process and separation-of-powers principles on which the vagueness doctrine . . . rests." *Id.* at 2333. The Court was particularly concerned with the impact that statutory interpretation has on defendants when conducted under the guise of constitutional avoidance – meaning that a court should be especially cognizant of whether defendants are prejudiced by the court's proposed action. *Id.*

Mr. Langston was convicted of first-degree murder without any finding of malice. Despite his having won a Court of Appeals reversal on the very issue presented, the *Aaron* Court's improper use of constitutional avoidance barred his appellate claim from being adjudicated by this Court on direct appeal. If the *Aaron* Court *had* addressed the constitutionality of the felony-murder statute and decided it in the defendants' favor, then Mr. Langston would have been granted relief. See *Ivan v City of New York*, 407 US 203; 92 S Ct 1951; 32 L Ed 2d 659 (1972) (holding that *Winship*-type due process errors must be applied retroactively to all pending cases).

As a result of the *Aaron* Court's refusal to reach the constitutional question, the Court reversed and reinstated Mr. Langston's conviction of first-degree murder. His conviction and life

sentence rest on a since-denounced interpretation of the felony murder rule which this Court avoided finding unconstitutional, yet called a "violat[ion] of the basic premise of individual moral culpability upon which our criminal law is based." *Aaron*, *supra* at 733.

III. THIS COURT SHOULD GRANT LEAVE TO REVIEW WHETHER THE FELONY MURDER RULE VIOLATES MR. LANGSTON'S DUE PROCESS CLAUSE RIGHTS.

Due process requires that every element of a criminal offense be proven beyond a reasonable doubt. US Const amend XIV, § 2; *Winship*, *supra* at 364. This fundamental constitutional right is violated if a jury is required to presume that certain elements have been met. Because malice is an element of murder in Michigan, and because Mr. Langston's jury used a mandatory presumption to find malice, he suffered a due process violation and is entitled to a new trial.

The trial court denied Mr. Langston's Due Process Clause claim, saying that until *Aaron* was decided a person *could* be legally convicted of common law felony murder despite the fact that the felony murder statute requires a higher level of mens rea – namely malice for the murder itself. Op and Order at 7-8. But the trial court's reasoning cannot be squared with *Winship*, with canons of statutory interpretation, or with the law of retroactivity.

A. Due Process Establishes a Right to Have Every Element of a Criminal Offense Proven Beyond a Reasonable Doubt Before Conviction.

The US Constitution's Due Process Clause and the Michigan Constitution's due process provision establish a coextensive right to have every element of a criminal offense proven beyond a reasonable doubt. US Const amend XIV, § 2; Mich Const 1963 Art 1, § 17; *People v Sierb,* 456 Mich 519, 528; 581 NW2d 219 (1998).

The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of **every fact necessary to constitute the crime** with which he is charged." *Winship, supra* at 364 (emphasis added). The requirement that guilt be established by

proof beyond a reasonable doubt is a foundational principle of American law dating back to the earliest days of our democracy. *Id*. at 361. The *Winship* rule is, and was, fully retroactive. *Ivan v City of New York*, *supra*. "Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." *Id.* at 204.

B. Conclusive Presumptions of Essential Elements Violate Due Process.

Courts cannot evade *Winship*'s constitutional mandate by creating presumptions that circumvent any element of a crime. For example, jury instructions indicating that "the law presumes that a person intends the ordinary consequences of his voluntary acts" are unconstitutional. *Sandstrom v Montana,* 442 US 510, 99 S Ct 2450, 61 L Ed 2d 39 (1979).[16] Such conclusive presumptions "would effectively eliminate intent as an ingredient of the offense" and "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." *Id.* at 522 (internal citation omitted).

Even where the requisite intent merely changes the degree of a murder conviction, the due process right to have that element explicitly proven beyond a reasonable doubt is unequivocal. *Mullaney v Wilbur,* 421 US 684, 697; 95 S Ct 1881; 44 L Ed 2d 508 (1975). In *Mullaney*, the jury was instructed that, if the prosecution established that the homicide was both unlawful and intentional, then malice aforethought was to be conclusively implied unless the defendant proved that he acted in the heat of passion on sudden provocation. *Id.* The Supreme Court held that this instruction violated due process, *id.* at 702, reasoning that the protection of the Clause is not limited to those facts which, "if not proven, would wholly exonerate the defendant." *Id.* at 697. To apply

[16] *Sandstrom* was decided June 18, 1979, which was after the submission of briefs and oral arguments in *Aaron*. See *Aaron*, *supra,* at 672 (stating that oral argument date was March 6, 1979). The *Aaron* Court did not cite to *Sandstrom* in its analysis.

the law in that way would be to ignore the importance of the degrees of culpability. *Id.* at 697–98. *Mullaney* reiterates the centrality of *Winship*'s protection, especially as it relates to murder convictions in light of the stigma, community impact, and liberty interests at stake. *Id.* at 698 (stating that "the distinction …between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes").

Where intent is an element of the crime charged, as it is in felony murder, the existence of that intent is a "question of fact which *must* be submitted to the jury." *Morissette v United States*, 342 US 246, 274; 72 SCt 240; 96 LEd 288 (1952) (emphasis added). Instructing the jury to presume intent for murder from the intent to commit the underlying felony skips this critical step and violates due process.

C. In the Alternative, Malice Is and Always Has Been an Element of Felony Murder in Michigan.

Michigan has legislatively defined murder since its earliest existence as a jurisdiction. In 1808, three years after Michigan was officially incorporated as a territory by the U.S. Congress, Michigan defined murder as follows:

> And be it enacted, That if any person shall commit murder or the wilful killing of any person with ***malice prepense***, or such other detestable practices, such person, on conviction thereof before the Supreme Court, shall suffer death.

AN ACT for the punishment of crimes and misdemeanors, Sec. 3 Murder (No. 28, Dec. 9, 1808) (emphasis added), in Laws of the Territory of Michigan, vol. 4 Supplemental (1884) at 22. A few decades later, upon admission to the Union as a state, the following murder statute was adopted:

> All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree….

Act of Dec. 30, 1837, pt. 4, tit. I, ch. 3, § 1, 1837–38 Mich. Laws 621 ("Of Offences Against the Lives and Persons of Individuals.").

As early as 1858, this Court affirmed that malice was an essential element of murder. *People v Potter*, 5 Mich 1, 6; 71 Am Dec 763 (1858) ("Murder is where a person . . . unlawfully kills any reasonable creature in being, in the peace of the state, with malice prepense or afore-thought, either express or implied.").

The Pennsylvania-derived 1837 statute has persisted in more or less the same form over the past 185 years. The law at the time of Mr. Langston's conviction and today provides that all *murder*, not all killing, "committed in the perpetration, or attempt to perpetrate [any enumerated felony] shall be murder of the first degree." MCL 750.316. Michigan's murder statute has been tweaked since 1837, but this element has stayed the same. The perpetration of a felony raises a "murder" from second to first degree, but the murder itself still requires proof of malice.

D. The State Used an Impermissible Presumption of Malice to Convict Mr. Langston of First-Degree Murder.

Before Mr. Langston could properly be convicted of first-degree felony murder, the jury should have been required to find all elements of the crime, *including malice*, beyond a reasonable doubt. Malice is the "grand criterion" that "elevates a homicide . . . to murder." *Aaron*, at 714.

Yet, the jury that convicted Mr. Langston was told that it could presume malice from an intent to commit the underlying robbery. The jury was instructed that for first-degree felony murder it must find that he "intended to commit the crime of **robbery** at the time that he allegedly aided and abetted or encouraged [his co-defendant]." TT 2063 (emphasis added). The instructions did not require the jury to find *mens rea*: "For murder in the first degree there must be proof beyond a reasonable doubt that the killing occurred as a result of the crime of robbery and that the defendant was at the time engaged in aiding or abetting another, to-wit, Mr. Wilson in the commission

of that crime." TT 2064–65.[17]

The aiding and abetting jury instructions further reinforced this unconstitutional presumption of malice when it explained the elements of robbery and discussed Mr. Langston's potential involvement in the robbery. For example, the court instructed the jury that "if you find as a fact from the evidence that defendant Langston engaged in casing or preinvestigating the Maple Street store to determine the amount of occupants in the store and reported the results of his findings to [his co-defendant] with the intent to assist him in the robbery, then you may find aiding and abetting [the first degree murder]." *Id*. at 2061.

These instructions were important to the jury, as shown by their questions during deliberations. Twice over the span of about five hours, the jury asked for clarification on the difference between first- and second-degree murder (the most important distinction being the malice instruction, of course), *id*. at 2081, 2089. But the court gave the jury no additional information. *Id.* at 2081-85; 2093. The jury asked no other questions. We can infer from the questions that the difference between the two degrees was integral to the outcome. This distinction – between a greater and lesser crime – is of "great[] importance" and thus should not be ignored. *Mullaney*, at 697.

IV. MANDATORY LIFE WITHOUT PAROLE FOR PRE-AARON FELONY MURDER IS CRUEL AND UNUSUAL UNDER BOTH THE EIGHTH AMENDMENT AND MICHIGAN'S CRUEL OR UNUSUAL PUNISHMENT CLAUSE.

Mr. Langston was found guilty of first-degree felony murder without any finding of *mens rea* for the killing, yet he was sentenced to mandatory life without parole. MCL § 750.316. The automatic imposition of Michigan's most severe sentence is in violation of the constitutional bans

[17] By contrast, for second-degree murder, the court instructed: "Third, that at the time of the act *Ronald Wilson* was either intending to kill Arretta Lou Ingraham or that he consciously created a very high degree of risk of death to her by engaging in a robbery with a gun with the knowledge of its possible consequences." TT 2055.

on excessive punishment. *Graham*, *supra*; *Bullock*, *supra*. Those who strike the killing blow in a second-degree murder case cannot receive the same punishment imposed on Mr. Langston. Compare MCL 750.316 with MCL 750.317. Yet Mr. Langston was sentenced to die in prison even though no jury has ascribed to him any of the moral culpability of a murderer. His sentence was disproportionate when imposed, serves no penological purpose 46 years later, and lags behind evolving standards in Michigan and elsewhere.

On these claims, the trial court below correctly stated that this Court found in *People v Hall*, 396 Mich 650, 242 NW2d 377 (1976), that mandatory life without parole for felony murder does not violate the Eighth Amendment or Article 1, Section 16 – and that the lower courts are bound to follow *Hall*. Order at 10 n. 6. That only means that this Court should grant leave. Both Eighth Amendment law and Michigan's law have changed significantly since 1976, and it is no longer clear that adults convicted of felony murder without proof of the malice required for murder (as opposed to for the underlying felony) are serving constitutional sentences under current law. As the trial court noted, "Mr. Langston's case seems ripe for review in this regard." *Id.*

The Eighth Amendment's Cruel and Unusual Punishment Clause" bars punishments that are disproportionally excessive in severity or length for the offense and that deviate from the "evolving standards of decency that mark the progress of a maturing society." *Trop v Dulles*, 356 US 86, 101; 78 S Ct 590; 2 L Ed2d 630 (1958); US Const, amend VIII. Such penalties contradict the "precept of justice that punishment for crime should be graduated and proportioned" for both the offender and the offense. *Roper v Simmons*, 543 US 551, 560; 125 S Ct 1183; 161 L Ed 2d 1 (2005) (citing *Weems v United States*, 217 US 349, 367; 30 S Ct 544; 54 L Ed 793 (1910)); *see*

Miller v Alabama, 567 US 460, 469; 132 S Ct 2455; 183 L Ed 2d 407 (2012).[18]

The relevant line of Eighth Amendment cases uses categorical rules to define constitutional standards relating to the "characteristics of the offender" or the type of offense. *Graham v Florida*, 560 US 48, 61; 130 S Ct 2011; 176 L Ed 2d 825 (2010). The Court has most often applied this categorical approach when assessing the death penalty, *id*. at 60, but has also extended its application to non-death penalty cases when the categorical challenge to sentencing "applies to an entire class of offenders" serving life without parole. *Id*. at 61. In assessing categorical Eighth Amendment rules, the Court first considers the "objective indicia of society's standards, as expressed in legislative enactments and state practice." *Graham.* at 61. Second, the Court, "guided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,'" must exercise "its own independent judgment" to determine if there is a constitutional violation. *Id.*

Michigan's Constitution commands that "cruel or unusual punishment shall not be inflicted." Const 1963, art 1, § 16. This Court has consistently read our constitutional provision more expansively than the federal Cruel *and* Unusual Punishment Clause based on the textual difference, historical interpretations, and longstanding Michigan precedent. *See People v Bullock*, 440 Mich 15, 31; 485 NW2d 866 (1992). To determine whether a punishment is constitutional, Michigan courts examine four factors: (1) proportionality; (2) evolving standards in Michigan; (3) evolving standards in other jurisdictions, and; (4) the purposes of punishment. *Bullock*, *supra* at 33–36 (citing *People v Lorentzen*, 387 Mich 167, 171-81; 194 NW2d 827 (1972)). The fourth

[18] The U.S. Supreme Court found that substantive constitutional rules require retroactive effect. *Montgomery v Louisiana*, 136 S Ct 718, 732–736; 193 L Ed 2d 599 (2016). Any substantive Eighth Amendment rulings and Michigan Supreme Court cases should therefore apply to Mr. Langston as well.

prong "considers whether the punishment comports with the policy factors behind criminal penalties[:] rehabilitation of the offender, deterrence of similar behavior on the part of others, and prevention of further harm to society." *Id.*

A. As an Initial Matter, Trial Courts Have Authority to Decide Constitutional Issues That Are Factually and Legally Presented to Them

The trial court correctly states that it was bound by precedent, Order at 2, 7, but to the extent the court determined that it did not have authority to decide constitutional questions – even ones that pose different facts and legal authorities from those previously decided, as the court below seems to suggest, *id.* at 10, n6 – the court makes an error of law. This Court has explicitly and frequently acknowledged circuit courts' entrusted ability to answer constitutional questions. *See, e.g., Wolney v Sec'y of State,* 77 Mich App 61, 63, 257 NW2d 754, 755 (1977); *Council of Orgs. & Others for Educ. About Parochiaid, Inc. v. Engler*, 455 Mich. 557 (1997). To the extent that the court suggested it did not have authority to decide this constitutional question, it erred.

B. Objective Indicia of National Consensus, and Evolving Standards, Show That the Punishment Is Excessive.

Mr. Langston's LWOP sentence deviates from the national consensus, does not comport with evolving standards of decency, and is constitutionally excessive. When determining national consensus, the conclusion "should be informed by objective factors." *Enmund v Florida*, 458 US 782, 788; 102 S Ct 3368; 73 L Ed 2d 1140 (1982) (quotations omitted). These objective factors should include "the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made . . ." *Id.*

Michigan's mandatory life without parole sentence, imposed in pre-*Aaron* felony murder cases, applies regardless of offenders' relative culpability in the murder, their *mens rea*, or any other mitigating facts in the case, and is at odds with current sentencing practice in the majority of

states. Only 12 states, including Michigan,[19] impose a mandatory sentence of life without parole for every felony murder. In other words, 38 states *do not*. Michigan is an outlier in its refusal to consider that different offenses and different offenders merit different punishments.

In some states without mandatory life sentences, judges have discretion to allow parole eligibility. In other states, defendants face a minimum more in the 15 to 20 year range, and a maximum that Mr. Langston, having served more than 45 years, would have completed long ago.[20]

The felony murder rule no longer exists in any other country.[21] In the United States, felony murder has been criticized for its harshness and for its inconsistency with prevailing notions of justice. *See, e.g.*, James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 Wash & Lee L Rev 1429, 1431 (1994).

Changes in state laws and mental state requirements indicate a shift away from the severe

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[19] Ala Code § 13A-6-2; Del Code Ann. tit 11, § 636, § 4209; Iowa Code § 902.1; La Rev Stat Ann. § 14:30.1; Mich Comp Laws § 750.316; Miss Code Ann § 97-3-21; Neb Rev Stat Ann § 29-2520; NC Gen Stat § 14-17; 18 Pa Cons Stat Ann § 2502; RI Gen Laws Section 11-23-2.; SD Codified Laws § 22-16-4; W Va Code § 62-3-15.

[20] See 17-A MRS 1252 (Maine) (cannot serve more than 30 years); Minn Stat 609.19(2)(1) (cannot serve more than 40); Tex Penal Code 19.02 (can serve as little as 5 years); Va Code Ann 18.2-31–33 (same); Ark Code Ann 5-10-101 (minimum 10 year sentence); Ark Code Ann 5-10-102 (same); Mo Stat Ann 565.021 (same); Mont Code Ann 45-5-102 (same); Nev Rev Stat Ann 200.030 (same); Alaska Stat 12.55.125 (can serve minimum of 15 years); NY CLS Penal 125.25(3) (same); Ohio Rev Code Ann 2929.02(B)(1) (same); Utah Code Ann 76-5-203 (same); Wis Stat Ann 940.03 (adding 15 years to the underlying felony sentence); 20 ILCS 5/9-1 (minimum of 20 years); Kan Stat Ann 21-5402 (25 year minimum); Ky Rev Stat 507.020 (25 year minimum); Ariz Rev Stat Ann 13-1105; Ariz Rev Stat Ann 13-751 (same); Cal Code Ann 1170.95 (same); Conn Stat Ann 53a-54c (same); Or Stat Ann 163.115(b) (same); Colo Rev Stat Ann 18-1.3-401 (30 year minimum); NJ Stat Ann 2C:11-3 (same); ND Cent Code 12.1-16-01 (same); DC Code 22-2104 (same); Vt Stat Ann, tit 13, § 2303 (35 year minimum); Okla Stat Ann, tit 21, § 701.7(B) (45 years is considered life, with parole eligibility after 85% of the sentence is served); Ind Code Ann 35-50-2-3 (minimum 45 years); Tenn Code Ann 39-13-204 (can be parole eligible); NH Rev Stat Ann 630:1-b (no mandatory minimum for second-degree felony murder); Wash Rev Code 9A.32.030 (same); Wash Code Rev 9A.32.050.

[21] See Abbie VanSickle, *If He Didn't Kill Anyone, Why Is It Murder?*, NYTimes (July 27, 2018) ("the United States remains the only country where the felony murder doctrine still exists").

punishment levied on Mr. Langston. In the years leading up to the *Aaron* decision, and in the years since, 12 states have narrowed or made other changes to their felony murder rules to move away from harsher applications.[22] For example, California recently amended its statute "to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony." Act of September 30, 2018, ch 1015, § 1, 2018 Cal Legis Serv (S. 1437) (West) (codified at Cal Penal Code 188).

Nine states provide defendants with affirmative defenses or mitigating factors. Most of these states allow the defenses when the defendant did not have a weapon, did not do the killing, or did not believe other participants in the felony had a weapon.[23] When Hawaii dispensed with its felony murder rule in 1972, the comment on the statute noted "[t]here appears to be no logical base for the felony-murder rule which presumes, either conclusively or subject to rebuttal, culpability sufficient to establish murder." Haw Rev Stat § 707-701 cmt. (1972).

Further, both *Enmund* and *Tison v Arizona*, 481 US 137; 107 S Ct 1676; 95 L Ed 2d 127 (1987), were decided after 1980. That is, at the time of the *Aaron* decision, the death penalty was permissible for those who were convicted of murder and did not "kill, attempt to kill, or intend that killing take place." *Enmund*, 458 US at 801 (banning the death penalty for these aiders and abetters); *Tison*, *supra* (refining the *Enmund* limitations on the imposition of the death penalty on aiders and abetters). These developments in both state and federal laws show a movement away from imposing the harshest possible punishment on someone who did not kill and who was never found to have the *mens rea* required for murder.

[22] See, e.g., 720 Ill Comp Stat 5/9-1(a)(3) (2002); Mass Gen Laws ch 265, § 1 (2020); Or Rev Stat 163.115(b) (1977).
[23] See, e.g., Colo. Rev. Stat. 18-3-102 (2019); Conn Gen Stat 53a-54c (2015); M. Stat tit 17-A, § 202 (2019); ND Cent Code 12.1-16.01 (2019).

Michigan was the first state to abolish the death penalty for murder in 1846, substituting life without parole. *People v Wilson*, 84 Mich App 636, 651 n2; 270 NW2d 473 (1978). Since then, Michigan has moved away from imposing life without parole by allowing most offenses to be parole-eligible, and by narrowing the offenses for which LWOP can be imposed. Today, the offenses that carry the potential for mandatory life without parole involve killing *with* malice proven or first-degree criminal sexual assault of a person under 13 years of age in only the most egregious and limited circumstances. See MCL 791.234(6)(e); MCL 750.520b(2)(c). In response to the U.S. Supreme Court's decision in *Miller v Alabama*, Michigan adopted MCL 769.25, giving judges sentencing discretion for young people convicted of murder. *Id.,* at (9); *Miller*, supra.

Such revisions are consistent with the idea that the harshest punishment should be reserved solely for the worst possible offenders and crimes. Second-degree murder requires a showing of malice, but imposes a lesser punishment than Mr. Langston received without any finding of malice. *People v Simmons*, 134 Mich App 779, 785; 352 NW2d 275 (1984) (citing *People v Hawkins*, 80 Mich App 481, 486; 264 NW2d 33 (1987)); MCL 791.234(6)(a)–(f) (providing a list of offenses punishable by life without parole which does not include second degree murder or armed robbery).

Mr. Langston did not kill or intend to kill anyone. The jurors were told that a *mens rea* with respect to the felony alone was sufficient to convict on murder. This *mens rea* does not comport with state and national trends towards reserving the punishment of life without parole only for those who intentionally kill another, or demonstrate a similarly high level of moral culpability.

C. Mr. Langston's Mandatory Life Without Parole Sentence Is Disproportionate and Serves No Penological Purpose.

The purposes of punishment are not served – and the punishment is constitutionally disproportionate – when a person who does not kill, attempt to kill, and has no proven *mens rea* with

respect to the death receives the maximum punishment under the law. Mr. Langston's mandatory LWOP sentence is grossly disproportionate to his culpability and serves no purpose.

Retributive justice hinges on the degree of culpability, which is determined by whether the harm was intentional. *Enmund*, 458 US at 783, 800. The goals of retributive punishment are not achieved where an individual has lesser culpability because he lacks the necessary *mens rea* or *actus reus*, but is still given the most severe punishment. *Bullock*, *supra,* at 877-78.

Deterrence is not served either. Deterrence can only function effectively when a mental state is present. *See* Rudolph J. Gerber, *The Felony Murder Rule:Conundrum Without Principle*, 31 Ariz St LJ 763, 774 (1999). "Unintended consequences and accidents are simply not deterrable." *Id.* at 780; see also *Morissette v United States*, supra at 254 n.14. No jury found that Mr. Langston had the intent or foresaw that his conduct would result in someone's death. Absent a finding of *mens rea* for the murder, deterrence cannot be furthered.

Mr. Langston's LWOP sentence also contravenes rehabilitation. See *Miller*, *supra* at 473 ("Life without parole 'forswears altogether the rehabilitative ideal.'") (quoting *Graham v Florida*, 560 US 48, 74, 130 S Ct 2011, 176 L Ed 2d 825 (2010)); see also *Bullock*, *supra* at 40 n 23. Life without parole is only appropriate for "the rarest individual [who] is wholly bereft of the capacity for redemption." *Lorentzen*, *supra* at 179. (quoting *People v Schultz*, 435 Mich 517, 533–34; 460 NW2d 505 (1990)). After four and a half decades, Mr. Langston does not need any further rehabilitation, nor is any offered by his LWOP sentence.

Rehabilitation and public safety go hand-in-hand, and the data show that people in Mr. Langston's age and situation are unlikely to reoffend, much less to commit violent crimes. *Lorentzen*, *supra* at 181 (looking to data to help determine whether tailored to the purpose of punishment). Mr. Langston is 69 years old and has served over 45 years in custody. Both government

and academic examinations of crime have shown that older people are less likely to commit crime or reoffend. "Age is a consistent predictor of crime . . . . The most common finding across countries, groups, and historical periods shows that crime … tends to be a young persons' activity." *Social Variation, Social Explanations* 393–94, *in The Nurture Versus Biosocial Debate in Criminology: On the Origins of Criminal Behavior and Criminality* (Kevin M. Beaver et al. eds., 2014). Extensive data show that rates of crime, particularly violent crime, decrease with age, and that recidivism is low among the elderly. Ullmer & Steffensmeier, *supra*, at 377–78, 385; US Sentencing Comm'n, *The Effects of Aging on Recidivism Among Federal Offenders*, 11, 23 (2017).

Mr. Langston's prison record is strong evidence of his successful desistance from offending, and of his rehabilitation. His mandatory life without parole sentence does not serve his rehabilitation, protect the public, or deter others and is unconstitutionally disproportionate.

Finally, courts retain the power to exercise independent judgment in determining whether a sentence is cruel and unusual. *Roper* at 575*, Enmund*, *supra* at 788–9. In doing so, courts consider the culpability of the individual given the nature of the offense; whether penological goals are met, as described above; and the severity of the punishment in question. *Graham*, 560 US at 67.

D. This Court Should Hold that the Law on LWOP Sentencing Has Evolved Over Time, and Should Revisit *People v Hall* as It Relates to this Case.

The trial court denied Mr. Langston's cruel and/or unusual punishment claims solely because the court believed it was precluded from reviewing those claims by *People v. Hall*, 396 Mich 650; 242 NW2d 377 (1976) (holding that LWOP sentences for adult felony murder convictions are not cruel and/or unusual punishment). Order, Exh. A, at 10 n. 6. The trial court also acknowledged the importance of Mr. Langston's case, stating that "in the nearly fifty years since *Hall* was decided, jurisprudence has evolved in Michigan and outside of Michigan;" "Mr. Langston's case seems **ripe for review**." *Id.* at 10 n. 6 (emphasis added).

The need for review is evident from *Hall*'s reliance on an older line of jurisprudence. First, *Hall* could not have anticipated the subsequent U.S. Supreme Court case law that examined the constitutionality of the death penalty for felony murder, *see Tison*, *supra*; *Edmund*, *supra*; or the Eighth Amendment scrutiny of mandatory LWOP sentences, *see Miller*, *supra*. *Hall* also relies on *Lorentzen*, which was subsequently clarified in *People v. Bullock*, supra (explicitly rejecting parallel interpretation of state and federal provisions). Second, the factual and legal circumstances since *Hall* have changed. In *Hall,* the petitioner did not contend "that Michigan's punishment for felony murder is widely divergent from any sister jurisdiction." *Id.* But Mr. Langston *does* so contend, as outlined above. The Court should reexamine *Hall* as part of its review of Mr. Langston's cruel and/or unusual punishment claims.

The pertinent question now is whether an LWOP sentence for a pre-*Aaron* felony murder conviction constitutes cruel and/or unusual punishment for a defendant who was convicted with no proven *mens rea* with respect to the death. *This* is the question that the trial court viewed as timely because "our Supreme Court **repeatedly recognizes** the need to eliminate mandatory life without parole sentences in various scenarios as violative of the Eighth Amendment or [Michigan Constitution]." Order, Exh. A, at 10 n. 6 (emphasis added).

V. In the Alternative, Mr. Langston Was Denied Effective Assistance of Appellate Counsel

In the alternative, Mr. Langston was denied his Sixth Amendment right to effective assistance of appellate counsel under the U.S. Constitution's Sixth and Fourteenth Amendments, *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), *Evitts v Lucey*, 469 US 387, 395–97; 105 S Ct 830; 83 L Ed 2d 821 (1985) and the Michigan Constitution, Art I, Sec. 20. Specifically, if reasonable counsel should have perceived the legal issues raised in this pleading, then counsel's failure to do so was both unreasonable and prejudiced Mr. Langston, as he

suffered the affirmance of his first-degree murder conviction and his mandatory LWOP sentence even after *Aaron*. *See Strickland*, supra.

VI. MR. LANGSTON'S CLAIMS SATISFY THE REQUIREMENTS OF MCR 6.508(D).

All of Mr. Langston's claims satisfy the requirements of MCR 6.508(D) because: (1) these are new claims; (2) he is permitted to file one 6.500 petition, which is this matter; (3) the claims raised in this motion could not have been raised on direct appeal, and (4) in the alternative, to the extent any of his claims could have been raised on direct appeal, the failure to do so is a result of the ineffective assistance of appellate counsel. The prejudice standard set forth in MCR 6.508 (D)(3) – that "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal" – is demonstrated independently within the legal argument for each issue raised above.

Mr. Langston's current 6.500 motion is not successive. Under MCR 6.502(G) regardless of whether a defendant previously filed a 6.500 petition, he has one opportunity after August 1, 1995, to file a motion for relief from judgment. *Id.* The instant pleading was the first one submitted for filing after August 1, 1995. *See* MCR 6.502.

A. Mr. Langston Is Not Procedurally Barred from Raising the Arguments in this 6.500 Motion by his Post-Aaron Direct Appeal Proceeding in the Court of Appeals, and the Trial Court's Decision to the Contrary Is Erroneous.

Mr. Langston's post-*Aaron* appeal history is not a procedural bar to his raising the issues in this 6.500 motion. The trial court stated that Mr. Langston could have raised the current issues before the Court of Appeals in his post-*Aaron* appeal in the 1980s. Order at 6. Upon closer examination of the procedural history, however, it becomes clear that Mr. Langston's post-*Aaron* appeal was permitted *only* to exhaust issues initially raised on his direct appeal that, because his conviction had initially been reversed, had never been decided.

After his conviction, Mr. Langston filed his direct appeal in November 1977, raising five issues: (1) a Sixth Amendment claim for failure to excuse jurors who would not swear to apply the court's instructions; (2) a constitutional claim that the jury was racially prejudicial in violation of his right to a fair and impartial jury; (3) a claim for abuse of discretion for not investigating, nor granting a new trial, after inadmissible newspaper stories contaminated the jury; (4) a claim of failure to prove malice/*mens rea*; and (5) a claim for the failure to instruct the jury on lesser included offenses in violation of the Fourteenth Amendment right to due process.

In November 1978, the Court of Appeals held that felony murder convictions required proof of malice with respect to homicide, reversed Mr. Langston's conviction, and granted him a new trial. *People v. Langston*, 86 Mich App 656; 273 NW2d 99 (Mich Ct App 1978), Exh. I. The Court of Appeals did not decide his remaining claims. *Id*. at 100 ("By our disposition of this issue, we eliminate the need to discuss other alleged grounds for reversal."). The prosecution sought leave to appeal, and this Court held the application in abeyance pending *Aaron*, which (after affirming the Court of Appeals by mistake) reinstated Mr. Langston's conviction in 1982.

Mr. Langston filed for federal habeas and, upon the order of the federal district court on habeas review, Mr. Langston returned to the Court of Appeals for the purpose of having the appellate court decide the remaining *unresolved claims in his direct appeal*, and to exhaust those direct appeal claims for federal habeas purposes. His failure to attempt to add wholly *new* claims to his partially decided appeal is not a bar to the claims in his current 6.500 motion.

Nor does the *Aaron* decision itself bar this 6.500 motion. The issues raised here are a *result* of the *Aaron* decision and are distinct from the issues raised in the direct appeal. These issues were not and could not have been raised in Mr. Langston's post-*Aaron* 1980s appeal, because that pleading served only to exhaust the issues previously raised and left undecided in his direct appeal.

In the alternative, if it were possible that Mr. Langston could have added new arguments in his direct appeal, but was not required to, he should not face the same kind of bar to relief as a mandatory requirement – especially given his goal in seeking habeas relief. Finally, a failure to raise any issues that were required to be raised at that procedural posture is a result of ineffective assistance of counsel and should not bar Mr. Langston's current arguments.

B. Mr. Langston's Claims Are Meritorious and He Should Be Granted Relief under MCR 6.508(D); He Has also Shown Good Cause and Prejudice.

Under MCR 6.508(D), a petitioner bears the burden of establishing entitlement to the relief requested. As described above, Mr. Langston is entitled to relief. Additionally, Mr. Langston's claims here are not barred by MCR 6.508(D) or by MCR 6.508(D)(2). His legal innocence, constitutional avoidance, due process, and sentencing claims are all claims that the *Aaron* Court did not have before it, or did not reach.

Further, to the extent that this Court deems that his petition fits under MCR 6.508(D)(3) – "grounds for relief … which could have been raised on appeal . . . or in a prior motion" – Mr. Langston is not procedurally barred. As an initial matter, any good cause requirement should be waived pursuant to MCR 6.508(D)(3) because of the "significant possibility" that Mr. Langston is legally innocent, *see* Part I; see also MCR 5.08(D)(3) (allowing waiver of good cause).

Additionally, Mr. Langston can show cause and prejudice. This Court in *People v Reed* defined good cause as either ineffective assistance of counsel or "some external factor [that] prevented counsel from previously raising the issue." 449 Mich at 375, 385, 535 N.W.2d 496 (1995) (citing to *Murray v Carrier*, where the U.S. Supreme Court defined good cause and outlined some examples of what constitutes an external factor, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L Ed 2d 397 (1986)). External factors include "a showing that the factual or legal basis for a claim was

not reasonably available to counsel." See *Reed*, 449 Mich 385 at n 8 (quoting *Murray*); see also *Reed v. Ross*, 468 US 1, 16; 104 SCt 2901, 82 L Ed2d 1 (1984).

Mr. Langston's challenges to his trial based on the actions of the *Aaron* Court were not ripe until after the Court decided *People v. Aaron*, supra. A due process challenge, as described above, was presented to the *Aaron* Court but was not decided in his case. Prejudice to his case is described above, under each individual claim.

Mr. Langston has good cause to raise his sentencing challenges because the case law that it is based upon was decided after his direct appeal and retroactively applied. *See, e.g., Miller*, supra; *Montgomery*, supra. There is *prejudice* because his mandatory LWOP sentence – issued without an individualized consideration of his role in the offense or his lack of established *mens rea* – is invalid. See MCR 6.508(D)(3)(b)(iv) ("in the case of a challenge to the sentence, the sentence is invalid"). *Compare People v Owens* 2021 Mich App Lexis 4222 at 25, 2021 WL 2877828 (2021) (where the court held that a sentence could be found invalid if "the party could not have produced the evidence at sentencing and that the evidence would make a different result probable on resentencing."). Finally, to the extent Mr. Langston should have raised these claims previously, he raises the ineffectiveness of his appellate counsel as the cause for any failure to raise these meritorious claims at the appropriate procedural posture. *See* supra.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, this Court should either grant this application for leave to appeal, or summarily reverse and remand for a new trial and/or sentencing.

Respectfully submitted

Date: January 20, 2022

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