

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal from the Michigan Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

ROBIN RICK MANNING,

Defendant-Appellant.

Supreme Court No. 160034

Court of Appeals No. 345268

Circuit Court No. 84-000570-FC

**DEFENDANT-APPELLANT'S
SUPPLEMENTAL BRIEF**

*****ORAL ARGUMENT REQUESTED*****

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Arnett, <i>Emerging Adulthood: A Theory of Development From the Late Teens Through the Twenties</i> , 55 <i>Am Psychol</i> 469 (2000)	27
Barnes, <i>Arrested Development: Rethinking the Contract Age of Majority for the Twenty-First Century Adolescent</i> , 76 <i>Md L Rev</i> 405 (2017)	28
Beaulieu & Lebel, <i>Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood</i> , 27 <i>J Neuroscience</i> 31 (2011)	26
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Federal Student Aid, < https://studentaid.ed.gov/sa/fafsa/filling-out/dependency > (accessed March 9, 2020)	29
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<i>Michigan Legal Milestones</i> , State Bar of Mich. (November 6, 2018), < http://www.michbar.org/programs/milestone/milestones_firsttoabolish > (accessed March 10, 2020)	24
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JURISDICTIONAL STATEMENT

Defendant-Appellant Robin Rick Manning appeals from the February 21, 2019 and June 7, 2019 Court of Appeals orders (Borello (dissenting), Krause, Swartzle, JJ.) denying his application for leave to appeal and his timely-filed motion for reconsideration. (App 33a–34a.) Mr. Manning filed a timely application for leave to appeal in this Court on August 2, 2019. On December 11, 2019, this Court directed the Clerk to schedule oral argument on the application under MCR 7.305(H)(1) and ordered the parties to submit supplemental briefing. (App 35a.) Jurisdiction is therefore proper under MCL 600.215 and MCR 7.303(B)(1).

QUESTIONS PRESENTED

1. Is Mr. Manning’s successive motion for relief from judgment “based on a retroactive change in law” under MCR 6.502(G), even if the law he relies upon does not automatically entitle him to relief?

The Saginaw County Circuit Court answered: No.

The Court of Appeals answered: No.

Defendant-Appellant answers: Yes.

2. Should the United States Supreme Court’s decisions in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *Montgomery v Louisiana*, 136 S Ct 718; 193 L Ed 2d 599 (2016), be applied to 18-year-old defendants, like Mr. Manning, who were convicted of murder and sentenced to mandatory life without parole, under the Eighth Amendment to the United States Constitution or Const 1963, art 1, § 16, or both?

The Saginaw County Circuit Court did not answer this question.

The Court of Appeals did not answer this question.

Defendant-Appellant answers: Yes.

INTRODUCTION

In 1985, Robin Rick Manning received a mandatory sentence of life without the possibility of parole for an offense he committed when he was just three months past his eighteenth birthday. As an immature teenager, Mr. Manning went along with two friends as backup in a teenage fight. One of his friends, Gilbert Morales, shot and killed the victim. His other friend and later co-defendant, William Luna, took a plea deal mid-trial, testified against him, and received a sentence of 10 to 20 years. Luna’s testimony confirmed that Mr. Manning was not the shooter but inculpated him as an aider and abettor in first-degree murder. Once the jury found Mr. Manning guilty, the court had no choice but to sentence him to life without the possibility of parole. *See* MCL 750.316. It had no authority or discretion to consider any number of mitigating factors that might have warranted a lower sentence—such as Mr. Manning’s immaturity, his family and home environment, his limited involvement in the offense, and his potential for rehabilitation.

Mr. Manning has been in prison for over 35 years—two-thirds of his life. During that time, the United States Supreme Court has made clear that “youth matters for purposes of meting out the law’s most serious punishments.” *Miller v Alabama*, 567 US 460, 483; 132 S Ct 2455; 183 L Ed 2d 407 (2012). Children cannot receive the death penalty, *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005); they cannot receive a life-without-parole sentence for a non-homicide offense, *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010); and they cannot receive a mandatory life-without-parole sentence, *Miller*, 567 US 460; *see also* *Montgomery v Louisiana*, 136 S Ct 718; 193 L Ed 2d 599 (2016) (holding that *Miller* announced a retroactive change in law). The growing scientific and societal consensus now confirms that the mitigating qualities of youth that led the Court to decide *Roper*, *Graham*, and *Miller*—“recklessness, impulsivity, and heedless risk-taking,” as well as a “heightened capacity for change,” *Miller*, 567 US at 471, 479—do not magically disappear when a child turns 18.

Against this backdrop, Mr. Manning filed a *pro se* motion for relief from judgment challenging the constitutionality of the mandatory life-without-parole sentence he received as an 18-year-old youth based on *Miller*. The circuit court determined that his successive motion was procedurally barred by MCR 6.502(G) and that he could not establish entitlement to relief under MCR 6.508(D). And the Court of Appeals denied leave to appeal, citing the general rule that a movant may not appeal the denial of a successive motion under MCR 6.502(G).

The circuit court and the Court of Appeals erred. *First*, Mr. Manning should have been permitted to file (and appeal the denial of) his successive motion because it is “based on” the retroactive change in law announced in *Miller* within the meaning of MCR 6.502(G)(2). The circuit court and Court of Appeals have effectively closed the courthouse door and refused to even consider Mr. Manning’s arguments, ostensibly because they do not believe he falls within the four corners of *Miller*. But even though Mr. Manning was 18 years old at the time of his offense, *Miller* serves as the foundation for his constitutional challenge. That is all that is needed for him to file his successive motion. Requiring him to demonstrate entitlement to relief on the merits at the outset would run counter to the plain language of MCR 6.502(G)(2) and the overall structure of the applicable court rules—not to mention create inconsistencies with federal law.

Second, Mr. Manning is entitled to relief on the merits. The mandatory life-without-parole sentence he received pursuant to MCL 750.316 is unconstitutional under both Const 1963, art 1, § 16 and the Eighth Amendment to the United States Constitution. The rationale of *Miller* applies equally to defendants, like Mr. Manning, who were 18 at the time of their crimes. Life without parole is the harshest sentence *anyone* can receive in this state. Imposing that harshest sentence on an 18-year-old—given all the U.S. Supreme Court has said about the mitigating qualities of youth and all that the science now tells us about how 18-year-olds are virtually indistinguishable from

younger adolescents—is grossly disproportionate as a matter of both state and federal constitutional law. At the very least, Mr. Manning’s sentence is unconstitutional as applied to him considering all the circumstances of his case. For these reasons, this Court should reverse the decisions below and remand this case to the circuit court for further proceedings.

STATEMENT OF FACTS

Mr. Manning was born on April 27, 1966. (App 1a.) He is now 53 years old. At the time of his offense, he was 18 years and 3 months old. (*Id.*)

On August 6, 1984, Gilbert Morales (age 18) and Thomas Newvine (age 20) got into an argument at a neighborhood house party in Saginaw, Michigan. *People v Manning*, 434 Mich 1, 4; 450 NW2d 534 (1990); *see also* App 39a. Morales left the party but returned later, shooting and killing Newvine from inside a car. *Manning*, 434 Mich at 4. Mr. Manning and William Luna went along with Morales in the car and were there when the shooting took place. *Id.*

Luna and Mr. Manning were charged and tried jointly for the murder. *Id.* On the fifth day of trial, Luna pled guilty to second-degree murder and agreed to testify against Mr. Manning. *Id.* Mr. Manning rejected a similar plea offer against the advice of counsel. *Id.* At trial, Luna testified that Mr. Manning never fired a shot at Newvine. *Id.* at 5. Indeed, there was “conflicting testimony” as to whether Mr. Manning was even “aware that Morales was in possession of the weapons at the time [Morales] entered” the car. *Id.* at 23 (Archer, J., dissenting). But Luna’s testimony “inculcated . . . Manning as an aider and abettor of first-degree murder.” *Id.* at 5. Ultimately, the jury found Mr. Manning guilty of first-degree murder, felony firearm, and carrying a weapon with unlawful intent. *Id.* at 7. The court therefore had no choice but to sentence him to an automatic prison term of life without the possibility of parole under MCL 750.316. Luna, on the other hand, received a sentence of 10 to 20 years. *Id.* at 24 n2.

After exhausting his direct appeals, Mr. Manning filed a delayed motion for a new trial on August 7, 1991, which the circuit court denied. (App 3a.) He filed his first motion for relief from judgment on August 4, 1997, and has filed a number of successive motions since then. (App 5a–10a.) In April 2012—before the U.S. Supreme Court decided *Miller*—Mr. Manning filed a motion for resentencing, arguing that his life-without-parole sentence violated both the Michigan and United States Constitutions. (App 11a–22a.) The circuit court denied the motion, and both the Court of Appeals and this Court denied leave to appeal. (App 9a–10a.)

In 2012, the U.S. Supreme Court issued its landmark decision in *Miller*, holding that mandatory life-without-parole sentences for those under the age of 18 at the time of their crimes violate the Eighth Amendment to the U.S. Constitution. 567 US at 465. Four years later, the Court confirmed that *Miller* announced a substantive rule that applies retroactively. *Montgomery*, 136 S Ct at 736. After *Miller* and *Montgomery*, on April 25, 2018, Mr. Manning filed a *pro se* motion for relief from judgment in the circuit court under MCR 6.500 *et seq.* (App 23a–29a.) He argued that his mandatory life-without-parole sentence was unconstitutional under both the Michigan and United States Constitutions because the rationale of *Miller* applies to defendants, like him, who were 18 at the time of their offenses. (*See id.*)

The circuit court denied Mr. Manning’s motion. (App 30a–32a.) The circuit court determined that all of Mr. Manning’s arguments “could have been raised in [his] original appeal” and that “he does not even attempt to put forward good cause for his failure to do so.” (App 31a.) The court concluded that he had not established entitlement to relief by showing a retroactive change in law under MCR 6.508(D)(2) or good cause and actual prejudice under MCR 6.508(D)(3). (*Id.*) The court further found that Mr. Manning’s successive motion was

“procedurally barred” because he did not establish a retroactive change in law or newly-discovered evidence as required by MCR 6.502(G). (App 32a.)

On August 30, 2018, Mr. Manning filed a delayed application for leave to appeal under MCR 7.205(G). The Court of Appeals (Borello, J., dissenting) denied leave to appeal, noting that “Defendant has failed to demonstrate the entitlement to an application of any of the exceptions to the general rule that a movant may not appeal the denial of a successive motion for relief from judgment. MCR 6.502(G).” (App 33a.) The Court of Appeals (Borello, J., dissenting) also denied Mr. Manning’s motion for reconsideration. (App 34a.)

Mr. Manning sought leave to appeal to this Court on August 2, 2019. On December 11, 2019, this Court directed the Clerk to schedule oral argument on the application under MCR 7.305(H)(1) and ordered the parties to submit supplemental briefing on the following two questions:

(1) whether the defendant’s successive motion for relief from judgment is “based on a retroactive change in law,” MCR 6.502(G)(2), where the law relied upon does not automatically entitle him to relief; and

(2) if so, whether the United States Supreme Court’s decisions in *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 136 S Ct 718 (2016), should be applied to 18 year old defendants convicted of murder and sentenced to mandatory life without parole, under the Eighth Amendment to the United States Constitution or Const 1963, art 1, § 16, or both.

(App 35a.)

ARGUMENT

I. Mr. Manning’s Successive Motion Is “Based On A Retroactive Change In Law” Under MCR 6.502(G) Even If *Miller* Does Not Automatically Entitle Him To Relief.

The circuit court should have permitted Mr. Manning to file his successive motion and the Court of Appeals should have granted his application for leave to appeal because his motion is “based on a retroactive change in law” under MCR 6.502(G)(2). The interpretation of the Michigan Court Rules involves questions of law that this Court reviews *de novo*. *People v Hawkins*, 468 Mich 488, 497; 668 NW2d 602 (2003).

The Michigan Court Rules, MCR 6.500 *et seq.*, set forth the process for post-appeal review of a defendant’s judgment or sentence in criminal cases. MCR 6.501. A defendant is generally entitled to file only one motion for relief from judgment. MCR 6.502(G)(1). The court is to “return without filing any successive motions” and a defendant is prohibited from appealing the denial or rejection of a successive motion. *Id.* There are two exceptions to this rule, however—a defendant may file a successive motion if it is “based on a *retroactive change in law* that occurred after the first motion for relief from judgment or a *claim of new evidence* that was not discovered before the first such motion.” MCR 6.502(G)(2) (emphasis added).

Here, the circuit court ostensibly denied Mr. Manning’s successive motion as “procedurally barred” because he had not established one of the exceptions to MCR 6.502(G)(2)’s general bar on successive motions.¹ (App 32a.) The circuit court did not once refer to *Miller* or *Montgomery* or analyze whether either of those cases announced a “retroactive change in law” under MCR

¹ Oddly, though, the circuit court engaged in its analysis and discussion of MCR 6.502(G)(2)—the threshold question of whether to accept filing of the successive motion—*after* it had already summarily concluded that Mr. Manning had not established entitlement to relief under MCR 6.508(D). As explained below, this reflects a misunderstanding of the structure of the court rules and the purpose of MCR 6.502(G)(2).

6.502(G)(2). (*See id.*) And the Court of Appeals denied leave to appeal in the same summary fashion, noting that Mr. Manning “has failed to demonstrate the entitlement to an application of any of the exceptions to the general rule that a movant may not appeal the denial of a successive motion for relief from judgment. MCR 6.502(G).” (App 33a.)

The decisions of both lower courts conflict with the text of MCR 6.502(G)(2) and the structure of Chapter 6.500. Mr. Manning’s arguments for a good-faith extension of *Miller* to 18-year-olds like him are “based on” *Miller*’s “retroactive change in law” under MCR 6.502(G)(2). He does not need to be automatically entitled to relief (a merits question) in order to file and appeal the denial of his motion (a threshold procedural question).

A. Mr. Manning’s Successive Motion Is “Based On” *Miller* Under The Plain Language Of MCR 6.502(G)(2).

“The same broad legal principles governing the interpretation of statutes apply to interpretation of court rules; therefore, when interpreting a court rule, this Court begins with the text of the court rule and reads the individual words and phrases in their context within the Michigan Court Rules.” *People v Traver*, 502 Mich 23, 31; 917 NW2d 260 (2018). The Court must give effect to every word, phrase, and clause, and avoid an interpretation that would render any part of the rule surplusage or nugatory. *People v Comer*, 500 Mich 278, 287; 901 NW2d 553 (2017). “The Court may refer to dictionaries to aid in discerning the plain meaning of a rule.” *People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013). The text of MCR 6.502(G)(2) states:

A defendant may file a second or successive motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion.

MCR 6.502(G)(2). Here, it is undeniable that *Miller* constitutes a “retroactive change in law”—the U.S. Supreme Court has expressly said so. *See Montgomery*, 136 S Ct at 732. And *Miller* was

decided well after Mr. Manning filed his first motion for relief from judgment in 1997. Thus, the only issue is whether Mr. Manning’s successive motion is “based on” *Miller*.

As the term is commonly understood, a claim does not have to be identical to or controlled by a retroactive rule to be “based on” it. The Oxford English Dictionary defines the verb “base” as “[t]o place *on* (also *upon*) a foundation, fundamental principle, or underlying basis.” *Oxford English Dictionary* (3d ed) (App 40a). Similarly, the New Oxford American Dictionary defines it as to “have as the foundation for (something); use as a point from which (something) can develop.” *New Oxford American Dictionary* (2001) (App 44a). Black’s Law Dictionary defines the verb “base” as “[t]o make, form, or serve as a foundation for,” “to place on a foundation; to ground,” and “[t]o use (something) as the thing from which something else is developed.” *Black’s Law Dictionary* (11th ed) (App 47a). And it defines “based on” (albeit in the copyright context) as “[d]erived from, and therefore similar to, an earlier work.” (*Id.*)

Mr. Manning’s constitutional challenge to his mandatory life-without-parole sentence is “based on” *Miller* because *Miller* provides the foundational and fundamental principles upon which his motion rests. Mr. Manning argues that—given the rationale of *Miller* and the overwhelming scientific evidence showing that 18-year-olds possess the same mitigating qualities of youth as younger children—a mandatory life-without-parole sentence for an 18-year-old like him is unconstitutional under both the Michigan and U.S. Constitutions. He expressly cited *Miller*’s retroactive rule in his motion, stating that he was seeking “relief similar to that as ordered in *Miller v Alabama*.” (App 24a.) Thus, even if Mr. Manning does not fall squarely within the class of defendants entitled to relief under *Miller*, *Miller*’s holding and rationale are the logical starting point for his claims.

This is entirely consistent with how this Court has interpreted MCR 6.502(G)(2) for claims of new evidence, the other exception to the successive-motion bar. When a defendant files a successive motion claiming new evidence, the only question at the filing stage is whether the motion is “based on” new evidence—not whether the new evidence entitles the defendant to relief on the merits. Indeed, this Court has rejected such a substantive analysis at the filing stage. In *People v Swain*, 499 Mich 920; 878 NW2d 476 (2016), for example, this Court reversed the Court of Appeals’ decision applying the substantive standard of *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003), to determine whether a successive motion fell within the new-evidence exception. The Court explained that “*Cress* does not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test.” *Swain*, 499 Mich 920. Because the defendant provided “a claim of new evidence that was not discovered before the first motion for relief from judgment,” she had satisfied the procedural requirements of the rule and was permitted to file a successive motion. *Id.*; see also *People v Watkins*, 500 Mich 851; 883 NW2d 758 (2016) (noting that “*Cress* does not apply to the procedural threshold of MCR 6.502(G)(2)”; *People v Robinson*, 503 Mich 883; 919 NW2d 59 (2018) (remanding to Court of Appeals where successive motion alleged new evidence); *People v McClinton*, 501 Mich 944; 904 NW2d 619 (2017) (finding successive motion not procedurally barred under MCR 6.502(G)(2) because it was “based in part on an affidavit that was not previously presented to the trial court”).

So too here: under well-established principles of statutory interpretation, “based on” must mean the same for both exceptions within MCR 6.502(G)(2). See *Robinson v City of Lansing*, 486 Mich 1, 17; 782 NW2d 171 (2010) (noting that when a phrase is used “repeatedly” in a statute it “should be given the same meaning throughout”); see also *Paige v Sterling Hts*, 476 Mich 495,

520; 720 NW2d 219 (2006) (indicating that “absolutely identical phrases in our statutes” should have identical meanings). Just as a defendant is not required to show automatic entitlement to relief to file a successive motion based on newly-discovered evidence, he is not required to do so to file one based on a retroactive change in law.

Nowhere does the language of MCR 6.502(G)(2) require Mr. Manning to show any entitlement to relief on the merits at the filing stage. That omission was intentional. In cases where a court has already decided a claim against the defendant in a prior appeal, the rules require the defendant to show that a “retroactive change in law has undermined” the prior decision to be entitled to relief. MCR 6.508(D). The Court’s use of the different verb “undermine” requires a level of merits review that does not appear within MCR 6.502(G)(2). This presence and absence of merits language at different places within the rules—indeed, in the only two provisions discussing the effect of a “retroactive change in law”—confirms that the text of MCR 6.502(G)(2) does not impose the merits question of whether a retroactive rule controls Mr. Manning’s motion. *See United States Fid & Guar Co v Michigan Catastrophic Claims Ass’n*, 484 Mich 1, 14; 795 NW2d 101 (2009) (“When the Legislature uses different words, the words are generally intended to connote different meanings.”).

B. Reading MCR 6.502(G)(2) To Require Automatic Entitlement To Relief Would Be Inconsistent With The Structure And Purpose Of The Court Rules.

The procedural gatekeeping function of MCR 6.502(G)(2) is apparent from its context within the Michigan Court Rules. When interpreting a rule, this Court is “mindful of the surrounding body of law into which the provision must be integrated.” *Haliw v Sterling Hts*, 471 Mich 700, 706; 691 NW2d 753 (2005) (quotation marks omitted). Thus, in addition to the text of the rule, the Court examines “its place within the structure of the Michigan Court Rules as a whole.” *Id.*

As discussed above, Chapter 6.500 sets forth the procedural requirements for motions for relief from judgment. If a defendant seeks to file a successive motion, he must first establish one of the two exceptions in MCR 6.502(G)(2). Only then can the court address the requirements of MCR 6.508(D). *See People v Swain*, 288 Mich App 609, 632–33; 794 NW2d 92 (2010) (noting that MCR 6.508(D) is “not relevant until, and [is] only relevant if, the trial court determines that the successive motion falls within one of the two exceptions of MCR 6.502(G)(2)”). Under MCR 6.508(D), the court may not grant relief if the motion:

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief.

Read together, MCR 6.502(G)(2) and 6.508(D) ask two distinct questions. First, MCR 6.502(G)(2) presents a “gateway” question that effectively opens the door to a successive motion: *is the motion based on a retroactive change in law or newly-discovered evidence?* Once a successive motion is filed, MCR 6.508(D) goes on to ask a second question: *is the defendant entitled to relief?*

Given this structure, it would make no sense to require a defendant to show he is automatically entitled to relief on the merits at the initial filing stage under MCR 6.502(G)(2). If that were the case, any defendant permitted to file a successive motion would necessarily prevail under MCR 6.508(D). A defendant required to show that a retroactive rule applies to him at the filing stage, for example, will always be able to show that it “undermines” a prior decision under

MCR 6.508(D)(2) or serves as “good cause” and “actual prejudice” under MCR 6.508(D)(3). This would collapse one inquiry into another—a result entirely at odds with the structure contemplated by the rules. It also would leave MCR 6.508(D) to do no work whatsoever, rendering it pure surplusage. *See Comer*, 500 Mich at 287 (instructing that courts avoid interpreting the court rules so as to “render any part surplusage or nugatory”). And it would have the worrisome consequence of insulating substantive legal questions—such as whether the rationale of *Miller* applies to 18-year-old defendants like Mr. Manning—from appellate review. *See* MCR 6.502(G)(1) (providing that defendants are prohibited from appealing the rejection of a successive motion).

Under a proper reading, a defendant who establishes an exception to the successive-motion bar under MCR 6.502(G)(2) is not automatically entitled to relief; he merely proceeds past the filing stage and moves on to the next stage of review. This interpretation will not invite frivolous motions purporting to be “based on” some retroactive rule that clearly does not apply. For one thing, MCR 6.502(G)(2) can still be read to require some logical (i.e. non-frivolous) connection between the retroactive rule and the defendant’s claim for the motion to be “based on” a retroactive change in law. Second, even if the court permits a successive motion under MCR 6.502(G)(2), the rules provide a quick and easy path for dismissal on the merits if warranted—one that has the benefit of preserving appellate review. *See* MCR 6.504(B)(2) (providing that trial court may deny a motion for relief from judgment “without directing further proceedings” if “it plainly appears from the face of the materials . . . that the defendant is not entitled to relief”); *see also* MCR 6.509 (providing for appeals). For all of these reasons, requiring a defendant to show automatic entitlement to relief at the filing stage is inconsistent with the text, structure, and purpose of the court rules.

C. Requiring A Merits Review Under MCR 6.502(G)(2) Could Have Unintended Consequences For Federal Habeas Cases.

Reading a merits inquiry into MCR 6.502(G)(2) would also upend how federal habeas courts have consistently interpreted that rule. Where a federal habeas petitioner “has failed to fairly present federal claims to the state courts, and a state procedural rule now prohibits the state court from considering them, the claims are considered procedurally defaulted.” *Pudelski v Wilson*, 576 F3d 595, 605 (CA6, 2009). For the procedural-default doctrine to apply, a state rule must provide an “independent and adequate” basis on which the state court can deny relief. *Coleman v Thompson*, 501 US 722, 750; 111 S Ct 2546; 115 L Ed 2d 640 (1991). It cannot be “independent” if it is “interwoven with the federal law.” *Michigan v Long*, 463 US 1032, 1040; 103 S Ct 3469; 77 L Ed 2d 1201 (1983); *see also Harris v Reed*, 489 US 255, 266; 109 S Ct 1038; 103 L Ed 2d 308 (1989) (applying *Long* to federal habeas cases). A state rule is so interwoven with federal law if “application of the procedural bar depend[s] on an antecedent ruling on federal law” such as “the determination of whether federal constitutional error has been committed.” *Ake v Oklahoma*, 470 US 68, 75; 105 S Ct 1087; 84 L Ed 2d 53 (1985).

It is well-established that MCR 6.502(G) “acts as an adequate and independent state ground for denying review sufficient to procedurally default a claim.” *Maslonka v Hoffner*, 900 F3d 269, 276 (CA6, 2018), quoting *Ingram v Prelesnik*, 730 F App’x 304, 311 (CA6, 2018); *see also Morse v Trippett*, 37 F App’x 96, 106 (CA6, 2002). The Sixth Circuit has characterized the rule as “a condition to filing, as opposed to a condition on obtaining relief,” because it “prevents a second petition from even being considered by the court.” *Williams v Birkett*, 670 F3d 729, 733 (CA6, 2012). And federal district courts in Michigan regularly treat MCR 6.502(G)(2) as a state procedural rule that leads to procedural default. *See, e.g., Drain v Woods*, 902 F Supp 2d 1006,

1033 (ED Mich, 2012) (finding petitioner’s claims procedurally defaulted because he did not satisfy MCR 6.502(G)(2)).

Yet if MCR 6.502(G)(2) requires defendants to show entitlement to relief on the merits, that would upset the longstanding conception of the rule as a procedural “condition on filing.” *Williams*, 670 F3d at 733. In this case, for example, a court would need to determine whether *Miller* applies to defendants like Mr. Manning before permitting him to even file his successive motion. That would require an analysis of federal constitutional issues and the Eighth Amendment—an inquiry necessarily interwoven with federal law. As a result, MCR 6.502(G)(2) could no longer serve as an adequate or independent state law basis for denying relief under the procedural default doctrine. *See Park v California*, 202 F3d 1146, 1152–53 (CA9, 2000) (concluding that California’s “fundamental constitutional error” exception was not independent of federal law and therefore did not preclude habeas review of petitioner’s claims). This Court should avoid a reading of MCR 6.502(G)(2) that is not only at odds with the text and purpose of the rule, but is also inconsistent with how federal courts have understood and applied it.

D. Other Michigan Courts Have Confirmed The Gatekeeping Function Of MCR 6.502(G)(2).

Several courts in this state have already confirmed the practical understanding that MCR 6.502(G)(2) does not require a full merits review and have permitted defendants to file successive motions even if they were not automatically entitled to relief. For example, in *People v Miller*, unpublished per curiam opinion of the Court of Appeals, issued June 25, 2019 (Docket No. 341425) (App 48a), p 4 n4, the Court of Appeals considered the defendant’s challenge to his life *with* the possibility of parole sentence under *Miller*. Although the court observed that *Miller* did not squarely apply, it determined that it would “have been able to exercise [its] discretion to review defendant’s arguments even if they had been made through a motion for relief from judgment.”

Id., citing MCR 6.502(G)(2). In other words, regardless of whether the defendant was entitled to relief on the merits—a question that was premature at that stage—his reliance on *Miller* authorized the filing of his successive petition under MCR 6.502(G)(2).

A number of courts have reached similar conclusions. See *People v Robinson*, unpublished per curiam opinion of the Court of Appeals, issued July 30, 2019 (Docket No. 337865) (App 58a), p 7 (noting that satisfying the threshold for successive motions “was only the initial qualifying step for defendant to receive a merits review of his motion for post-judgment relief”); *People v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued June 18, 2019 (Docket No. 344322) (App 67a), p 3 (finding that “successive motion was arguably reviewable based on retroactive changes in the law” where defendant claimed *Miller* invalidated his *de facto* life sentence); *People v Jones*, unpublished opinion of the Kalamazoo County Circuit Court, issued December 21, 2011 (Docket No. 1979-1104-FC) (App 80a) (noting that both parties did not dispute successive motion was permissible where “*Graham* is a retroactive change in the law which occurred after Defendant’s first motion for relief from judgment” even though prosecution maintained that *Graham* did not apply to defendant).

E. Federal Courts Have Interpreted MCR 6.502(G)(2)’s Federal Counterpart In The Exact Same Way.

Although “Michigan courts are not bound by” federal courts’ interpretations of the federal court rules, when the Michigan Court Rules “are nearly identical to the federal requirements,” it is reasonable to conclude that similar purposes, goals, and cautions are applicable to both.” *Henry v Dow Chem Co*, 484 Mich 483, 499; 772 NW2d 301 (2009). Here, MCR 6.502(G)(2)’s federal counterpart provides that a federal prisoner may file a second or successive habeas petition if it “contain[s] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 USC 2255(h)(2). This prerequisite to

filing a successive federal habeas petition does not require a petitioner to show that he falls squarely within a retroactive rule.

A line of cases following the U.S. Supreme Court’s decision in *Johnson v United States*, 135 S Ct 2551; 192 L Ed 2d 569 (2015), illustrates the point. In *Johnson*, the Supreme Court held that the residual clause of the Armed Career Criminal Act (“ACCA”) was unconstitutionally vague, *id.* at 2557, and soon after applied its holding retroactively on collateral review, *Welch v United States*, 136 S Ct 1257, 1265; 194 L Ed 2d 387 (2016). Federal prisoners then sought to file successive habeas petitions challenging their sentences under the residual clause of the U.S. Sentencing Guidelines’ career offender guideline—a different yet identical clause to the ACCA provision struck down in *Johnson*. The government opposed these motions, arguing that the prisoners’ claims did not rely on *Johnson*’s retroactive rule under § 2255(h)(2).

The Third Circuit rejected the government’s argument and authorized a successive habeas petition seeking to extend *Johnson* to the career offender guideline’s residual clause. *In re Hoffner*, 870 F3d 301, 312 (CA3, 2017). The court reasoned that the § 2255(h)(2) inquiry “cannot be whether the claim has merit, because we do not address the merits at all in our gatekeeping function.” *Id.* at 308. Rather, “[i]t is for the district court to evaluate the merits of the second or successive habeas petition in the first instance,” including “whether the invoked new rule should ultimately be extended in the way that the movant proposes’ or whether his ‘reliance is misplaced.’” *Id.* at 309; *see also In re Hubbard*, 825 F3d 225, 231 (CA4, 2016) (authorizing successive petition challenging career offender guideline and reasoning that “it is for the district court to determine whether the new rule extends to the movant’s case”).

Federal courts have reached similar conclusions in the Eighth Amendment context. For example, in *In re Williams*, 411 US App DC 257, 260–61; 759 F3d 66 (2014), the petitioner sought

authorization to file a successive habeas petition under § 2255(h)(2), claiming that his life-without-parole sentence under the Racketeer Influenced and Corrupt Organization Act was unconstitutional because he was a juvenile during the early years of the conspiracy. The government argued that the petitioner was not entitled to relief under *Graham* or *Miller* because those holdings did “not extend to conspiracies straddling the age of majority.” *Id.* at 261. But the D.C. Circuit authorized the successive petition, finding that it relied on the retroactive rules announced in *Graham* and *Miller*. *Id.* The court confirmed that “a review of the merits at this stage is not required”—rather, whether *Graham* and *Miller* extended to the petitioner, “who entered a conspiracy in his juvenile years and exited it in adulthood, goes to the merits of the motion.” *Id.* at 261, 263.

Moreover, the federal district court in *Cruz v United States*, unpublished opinion of the United States District Court for the District of Connecticut, issued March 29, 2018 (Case No. 11-CV-787 (JCH)) (App 87a), p 14—considering an argument nearly identical to the one raised by Mr. Manning here—authorized a federal prisoner’s successive habeas petition challenging the mandatory life-without-parole sentence he received for a crime he committed at the age of 18. In that case, the court considered whether the petition “contain[ed]” the new rule announced in *Miller* under § 2255(h)(2) even if Cruz’s petition did not allege the specific set of facts addressed by *Miller*. *Id.* It concluded that “the meaning of ‘contain’ requires the petition to rely on the new rule to substantiate its claim, but does not require the new rule to conclusively decide the claim on its facts.” *Id.* at 13. “Even if Cruz’s claim may require a ‘non-frivolous extension of [*Miller*’s] qualifying rule’ to a set of facts not considered by the *Miller* Court,” the court reasoned, “his claim, nonetheless, depends on the rule announced in *Miller*.” *Id.* at 14. The court went on to note that the “principle underlying the holding [in *Miller*] is more general: ‘[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile

offenders.” *Id.*, quoting *Miller*, 567 US at 479. “Thus, who counts as a ‘juvenile’ and whether *Miller* applies to Cruz as an 18-year-old are better characterized as questions on the merits, not as preliminary gate-keeping questions under section 2255(h).” *Id.*

The Sixth Circuit, too, has authorized the filing of successive habeas petitions by 18-year-old offenders based on *Miller*. See *In re Smith*, unpublished order of the United States Court of Appeals for the Sixth Circuit, issued April 25, 2019 (Case No. 18-2418) (App 148a), p 3 (concluding that petitioner “made a prima facie showing that his proposed claim relies on *Miller* to warrant authorization of a second or successive habeas petition” and leaving “the merits of that habeas petition to the district court”); *In re Lambert*, unpublished order of the United States Court of Appeals for the Sixth Circuit, issued September 5, 2018 (Case No. 18-1726) (App 151a), p 2–3 (concluding that petitioner, who sought “to extend the new rule announced in *Miller* to offenders who were 18 years old at the time of their crimes,” had “made a prima facie showing that his proposed claim relies on *Miller* to warrant authorization of a second or successive habeas petition” and leaving the “merits of that habeas petition to the district court”).

While not controlling, these federal cases provide further support for Mr. Manning’s interpretation of MCR 6.502(G)(2), especially when considered alongside the text and structure of the Michigan Court Rules. Mr. Manning has presented a logical, good-faith argument regarding the constitutionality of his sentence under the retroactive rule announced in *Miller*. Regardless of the ultimate merits of that claim, his successive motion is undoubtedly “based on a retroactive change in law” and he should not be prevented from filing or appealing it. Any other reading of MCR 6.502(G)(2) would not only be inconsistent with the plain language of the rule, it would deprive Mr. Manning of an opportunity to be heard on his constitutional claims.

II. The Mandatory Life-Without-Parole Sentence Mr. Manning Received For An Offense He Committed As An 18-Year-Old Youth Is Unconstitutional Under Both Michigan’s 1963 Constitution And The United States Constitution.

Mr. Manning is also entitled to relief on the merits of his claims. The statute that mandated life without the possibility of parole for Mr. Manning, MCL 750.316, is unconstitutional both categorically and as applied to him under Article 1, § 16, of Michigan’s 1963 Constitution and the Eighth Amendment to the United States Constitution.² This Court reviews questions of constitutional law *de novo*. *People v Kennedy*, 502 Mich 206, 213; 917 NW2d 355 (2018). Because 18-year-olds exhibit the same “distinctive attributes of youth” as younger children, including lessened culpability and increased capacity for change, *Miller*, 567 US at 472, imposing the harshest possible sentence of mandatory life without parole on an 18-year-old like Mr. Manning is disproportionately severe.

A. *Miller* Reaffirmed That Children Are Categorically Less Culpable Than Adults For Purposes Of Sentencing.

The United States Supreme Court has made clear time and again that children are “constitutionally different from adults for purposes of sentencing” and are categorically “less deserving of the most severe punishments.” *Miller*, 567 US at 471. In *Roper v Simmons*, the Court held that imposing the death penalty on children violates the Eighth Amendment’s prohibition on cruel and unusual punishments. 543 US at 568. A few years later, in *Graham v Florida*, it held that the Eighth Amendment categorically “prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.” 560 US at 82. And in *Miller*, it held that “the

² For this reason, as explained in Mr. Manning’s application for leave to appeal, he has established that a retroactive change in law has undermined the circuit’s court’s prior denial of his April 2012 motion for resentencing under MCR 6.508(D)(2). Alternatively, even if he did not previously raise these exact grounds for relief in a prior motion, he has established “good cause” and “actual prejudice” under MCR 6.508(D)(3).

Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.” 567 US at 479.

Each of these cases adopted “categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty.” *Id.* at 470. The Court grounded its conclusions on scientific research establishing “three significant gaps between juveniles and adults.” *Id.* at 471; *see also Graham*, 560 US at 68 (noting that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”). First, children lack maturity and have an “underdeveloped sense of responsibility,” which leads to “recklessness, impulsivity, and heedless risk-taking.” *Miller*, 567 US at 471. Second, they are “more vulnerable . . . to negative influences and outside pressures,” including from their family and peers, and “lack the ability to extricate themselves from horrific, crime-producing settings.” *Id.* Finally, they are “less fixed” in their character and more capable of change than adults. *Id.* These “distinctive attributes of youth” make children less culpable, more capable of reform, and “diminish the penological justifications for imposing the harshest sentences” on them, “even when they commit terrible crimes.” *Id.* at 472.

In invalidating mandatory life-without-parole sentences for children, *Miller* reaffirmed that “youth matters” for purposes of sentencing. *Id.* at 473. Specifically, these mandatory sentences “preclude a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it,” including the following “mitigating qualities of youth”:

Mandatory life without parole for a juvenile precludes consideration of his *chronological age and its hallmark features*—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the *family and home environment that surrounds him*—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the *circumstances of the homicide offense*, including the extent of his participation in the conduct and the way familial and peer

pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for *incompetencies associated with youth*—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the *possibility of rehabilitation* even when the circumstances most suggest it.

Id. at 476–77 (emphasis added; citations omitted). “By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence,” the Court explained, mandatory life-without-parole sentences for children “pose[] too great a risk of disproportionate punishment” and violate the Eighth Amendment. *Id.* at 479.

Unlike *Graham* and *Roper*, *Miller* did not impose a categorical ban on life without parole for juvenile homicide offenders. Instead, it requires sentencing courts to consider “the distinctive attributes of youth” before imposing the harshest punishments on children. *Id.* at 472. *Miller* announced a substantive rule barring life without parole “for all but the rarest juvenile offenders, those whose crimes reflect permanent incorrigibility,” which must be applied retroactively. *Montgomery*, 136 S Ct at 734. In the wake of *Miller*, Michigan law now provides a process for sentencing juvenile defendants when a prosecutor seeks life without parole and resentencing defendants whose mandatory life-without-parole sentences were rendered unconstitutional by *Miller*. See MCL 769.25; MCL 769.25a.

B. Mr. Manning’s Mandatory Life-Without-Parole Sentence Violates The 1963 Michigan Constitution’s Ban On Cruel Or Unusual Punishment.

Given all the U.S. Supreme Court has said about youth, imposing a mandatory life-without-parole sentence on an 18-year-old like Mr. Manning is disproportionately severe under Const 1963, art 1, § 16. Michigan has a long history of leading the nation when it comes to proportionate sentencing. In 1846, we became the first state to abolish the death penalty for all crimes except treason. *Thompson v Oklahoma*, 487 US 815, 854; 108 S Ct 2687; 101 L Ed 2d 702 (1988)

(O'Connor, J., concurring). We are the only state whose constitution bans the death penalty altogether. *See* Const 1963, art 4, § 46; *see also Michigan Legal Milestones*, State Bar of Mich. (November 6, 2018), <http://www.michbar.org/programs/milestone/milestones_firsttoabolish> (accessed March 10, 2020). And our state constitution contains a broad prohibition on “cruel or unusual punishment,” providing in full: “Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained.” Const 1963, art 1, § 16.

This Court has confirmed that our constitution is “worded differently from, and was ratified more than 171 years after,” the Eighth Amendment to the U.S. Constitution. *People v Bullock*, 440 Mich 15, 27; 485 NW2d 866 (1992). Whereas the Eighth Amendment prohibits “cruel and unusual punishments,” our constitution bans “cruel *or* unusual punishment.” *Id.* at 30. This textual difference is neither “accidental” nor “inadvertent.” *Id.* Thus, this Court has held that our state constitution “provides greater protection against certain punishments than its federal counterpart” and has adopted a “broader test for proportionality” than the U.S. Supreme Court employs when interpreting the Eighth Amendment. *People v Carp*, 496 Mich 440, 519; 852 NW2d 801 (2016), cert granted, judgment vacated by *Carp v Michigan*, 136 S Ct 1355; 194 L Ed 2d 339 (2016); *see also Bullock*, 440 Mich at 30. As set forth in *Bullock*, this test considers the following factors: (1) the severity of the sentence imposed compared to the gravity of the offense; (2) the penalty imposed for the offense compared to penalties imposed on other offenders in the same jurisdiction; (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states; and (4) whether the penalty imposed advances the penological goal of rehabilitation. *Bullock*, 440 Mich at 33–34; *see also Carp*, 496 Mich at 520. Under the *Bullock*

test, a mandatory life-without-parole sentence for an 18-year-old is so disproportionate as to be “cruel or unusual.” Const 1963, art 1, § 16.

- 1. Because they share the same qualities of youth as younger children, the severity of mandatory life-without-parole sentences for 18-year-olds outweighs the gravity of their offenses.**

The first *Bullock* factor is the severity of the sentence imposed compared to the gravity of the offense. There is no question that Mr. Manning received the harshest penalty available to *anyone* in this state—juvenile or adult. No sentence is more severe. As the *Miller* Court observed, “[i]mprisoning an offender until he dies alters the remainder of his life ‘by a forfeiture that is irrevocable.’” *Miller*, 567 US at 475, quoting *Graham*, 560 US at 69. And mandatory life without parole is an “especially harsh punishment” for an 18-year-old, just as it is for someone younger. *Id.* In both cases, the sentence necessarily requires the defendant to serve “more years and a greater percentage of his life in prison than an adult offender.” *Id.*, quoting *Graham*, 560 US at 70. “The penalty when imposed on a teenager, as compared with an older person, is therefore ‘the same . . . in name only.’” *Id.*, quoting *Graham*, 560 US at 70.

Moreover, although first-degree murder is one of the most serious offenses a person can commit in this state, it cannot justify such a severe sentence for an 18-year-old without any individualized consideration of youth. As this Court has explained, “[t]o be constitutionally proportionate, punishment must be tailored to a defendant’s personal responsibility and moral guilt.” *Bullock*, 440 Mich at 39, quoting *Harmelin v Michigan*, 501 US 957, 1023; 111 S Ct 2680; 115 L Ed 2d 836 (1991) (White, J., dissenting). In *Miller*, the U.S. Supreme Court recognized that the fundamental differences between children and adults—“transient rashness, proclivity for risk, and inability to assess consequences”—lessen a child’s “moral culpability” and enhance the prospect that, “as the years go by and neurological development occurs, his deficiencies will be reformed.” *Miller*, 567 US at 472 (quotation marks omitted). The same underlying rationale

applies here: based on an emerging scientific and societal consensus, 18-year-olds share these same qualities of youth and therefore have the same “diminished culpability and greater prospects for reform.” *Id.* at 471. Thus, just as a mandatory life-without-parole sentence for a 17-year-old cannot be constitutionally tailored to his “personal responsibility and moral guilt,” *Bullock*, 440 Mich at 39, the same is true for an 18-year-old.

a. *There is no meaningful scientific difference between 18-year-olds and younger adolescents.*

The *Miller* Court rested its decision not only on “common sense—on what ‘any parent knows’—but on science and social science as well.” *Miller*, 567 US at 471, quoting *Roper*, 543 US at 569. There is now a growing scientific consensus confirming what any parent also knows: youth does not magically end at 18.

In recent years, empirical research in neurobiology and developmental psychology has shown that the “hallmark features of youth” continue beyond the age of 18 and into a person’s mid-twenties. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Ford L Rev 641, 653 (2016) (“It is clear that the psychological and neurobiological development that characterizes adolescence continues into the midtwenties.”); see also Beaulieu & Lebel, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 27 J Neuroscience 31 (2011). One widely cited study tracked the brain development of 5,000 children and found that their brains were not fully mature until they were at least 25 years old. Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 Sci 1358, 1358–59 (2010). In particular, the development of the prefrontal cortex—which plays a key role in “higher-order cognitive functions” such as “planning ahead, weighing risks and rewards, and making complicated decisions”—continues into a person’s early twenties. Monahan et al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 Crime J 557, 582 (2015).

This research confirms that 18-year-olds are more akin to children than they are to fully mature adults. They “are more likely than somewhat older adults to be impulsive, sensation seeking, and sensitive to peer influence in ways that influence their criminal conduct.” Icenogle et al., *Adolescents’ Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a “Maturity Gap” in a Multinational, Cross-Sectional Sample*, 43 L & Hum Beh 69, 83 (2019); see also, e.g., Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death Penalty*, 40 NYU Rev L & Soc Change 139, 163 (2016) (noting that “peer pressure towards antisocial behaviors continue[s] to have an important influence” in emerging adults ages 18 to 25). They show “diminished cognitive capacity, similar to that of adolescents, under brief and prolonged negative emotional arousal.” Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 Temple L Rev 769, 786 (2016). And the period of “emerging adulthood” is a time of peak risk behavior. Arnett, *Emerging Adulthood: A Theory of Development From the Late Teens Through the Twenties*, 55 Am Psychol 469, 475 (2000); see also, e.g., Gardner & Steinberg, *Peer Influence and Risk Taking, Risk Preference, and Risky Decision Making*, 41 Dev Psychol 625, 631–32 (2005) (finding that adolescents (ages 13–16) and youths (ages 18–22) “were more oriented toward risk than were adults” and that “peer pressure had a greater impact on risk orientation” among both groups as compared to adults).

The very same kind of scientific research that led the *Miller* Court to conclude that children are categorically less culpable for their crimes likewise applies to 18-year-olds like Mr. Manning. See, e.g., *Young Adulthood as a Transitional Legal Category*, 85 Ford L Rev at 662 (noting that developmental scientific research supports “a presumption that mandatory minimum adult sentencing regimes should exclude young adult offenders”); *Adolescents’ Cognitive Capacity*, 43 L & Hum Beh at 83 (noting that “teens—and young adults—are relatively less likely to have the

self-restraint necessary to deserve the privileges and penalties we reserve for people we judge to be fully responsible for their behavior”). Indeed, the American Bar Association has recognized in the death penalty context that drawing the constitutional line at 18 “no longer fully reflects the state of the science on adolescent development.” American Bar Association, *ABA Resolution 111: Death Penalty Due Process Review Project Section of Civil Rights and Social Justice Report to the House of Delegates* (February 2018), p 6.

b. *There is an emerging national consensus that 18-year-olds should not be treated as fully mature adults.*

State and federal legislators have increasingly recognized that the unique characteristics of youth extend beyond age 18. In fact, the age of majority at common law was always 21, and “it was not until the 1970s that States enacted legislation to lower [it] to 18.” *Nat’l Rifle Ass’n of Am v Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F3d 185, 201 (CA5, 2012). This was prompted not by an evolving societal consensus on adolescent maturity, but “largely as a result of the Vietnam War,” the military draft for men age 18 and up, and the subsequent decrease in the voting age from 21 to 18. Barnes, *Arrested Development: Rethinking the Contract Age of Majority for the Twenty-First Century Adolescent*, 76 Md L Rev 405, 406–07 (2017). The law continues to recognize—especially in light of the developing scientific evidence—that 18-year-olds should not be treated the same as fully mature adults in many contexts. Among other things:

- All fifty states require a person to be 21 years old to purchase alcohol. *See* 23 USC 158 (National Minimum Drinking Age Act); *see also* MCL 436.1109(6) (defining “minor” for purposes of Michigan Liquor Control Code as “an individual less than 21 years of age”).
- As of December 2019, the federal minimum age for sale of tobacco is now 21 instead of 18. Prior to the federal increase, 19 states and Washington, D.C., as well as at least 540 localities, had already raised the legal age to purchase tobacco to 21. *See* Campaign for Tobacco Free Kids, *States and Localities That Have Raised the Minimum Legal Sale Age for Tobacco Products to 21*, <https://www.tobaccofreekids.org/assets/content/what_we_do/state_local_issues/sales_21/states_localities_MLSA_21.pdf> (accessed March 9, 2020).

- Federal law prohibits federal firearms licensees from selling any firearm or ammunition, other than a shotgun or rifle, to anyone who is under 21. 18 USC 922(b)(1). In enacting this law, Congress cited the “causal relationship between the easy availability of firearms” and “juvenile and youthful criminal behavior” and noted that firearms had been widely sold to “emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior.” Omnibus Crime Control and Safe Streets Act of 1968, Pub L No 90-351, § 901, 82 Stat 197, 225–26 (1968). Similarly, Michigan law prohibits a person under 21 from obtaining a concealed carry permit. *See* MCL 28.425b(7)(a).
- For purposes of federal student aid, the federal government considers those under age 23 to be legal dependents of their parents. Federal Student Aid, <<https://studentaid.ed.gov/sa/fafsa/filling-out/dependency>> (accessed March 9, 2020).
- The Affordable Care Act allows dependent children to remain on their parents’ health insurance until age 26. 42 USC 300gg-14.
- Approximately 25 states, including Michigan, have extended foster care beyond the age of 18. *See* National Conference of State Legislatures, *Extending Foster Care Beyond 18*, <<http://www.ncsl.org/research/human-services/extending-foster-care-to-18.aspx>> (accessed March 9, 2020); *see also* MCL 400.647 (providing that “[a] youth who exited foster care after reaching 18 years of age but before reaching 21 years of age may reenter foster care and receive extended foster care services”).

Importantly, Michigan’s legislature recently relied upon scientific research to amend the Holmes Youthful Trainee Act—which allows young adults convicted of certain offenses to avoid a criminal record—to include 21-, 22-, and 23-year-olds. *See* MCL 762.11. This change was made specifically “to recognize recent research indicating that the human brain doesn’t fully mature until closer to the mid-20s.” House Legislative Analysis, HB 4069 (July 20, 2016). This decision—made by a representative body of our own state government—confirms that young adolescents are less culpable for their crimes.

c. *At a minimum, mandatory life without parole is disproportionate for 18-year-olds who did not kill or intend to kill.*

At the very least, mandatory life without parole is a disproportionate sentence for 18-year-olds, like Mr. Manning, who were convicted of first-degree murder under an aiding and abetting theory but who neither killed nor intended to kill. In *Bullock*, for example, this Court found an

“inference of gross disproportionality” for a mandatory life-without-parole sentence for possessing 650 grams or more of cocaine. Considering the gravity of the offense, the Court observed that “[t]he penalty would apply to a teenage first offender who acted merely as a courier.” *Bullock*, 440 Mich at 37–38. The Court reasoned that “it would be profoundly unfair to impute full personal responsibility and moral guilt to defendants for any and all collateral acts, unintended by them, which might have been later committed by others in connection with the seized cocaine.” *Id.* at 39.

It would be equally unfair “to impute full personal responsibility and moral guilt” to youthful defendants who did not kill or intend to kill, but are held responsible under the law for acts committed by others. Like children, 18-year-olds who do not kill or intend to kill have “a *twice diminished* moral culpability.” *Graham*, 560 US at 69 (emphasis added); *see also Miller*, 567 US at 490 (Breyer, J., concurring) (concluding that the Eighth Amendment forbids life without parole for a juvenile homicide offender who did not kill or intend to kill). Given this lessened culpability, a mandatory sentence of life without the possibility of parole is too severe.³

2. Sentencing 18-year-olds to mandatory life without parole is disproportionate compared to other sentences under Michigan law.

The second *Bullock* factor is a comparison of the punishment at issue to penalties for other crimes under Michigan law. As discussed above, Mr. Manning received the harshest penalty available to anyone under Michigan law for a crime he committed at the age of 18. There are only

³ This conclusion is not foreclosed by this Court’s decision in *Carp*, where the Court considered and rejected a categorical challenge to life without parole for juveniles convicted of felony murder on an aiding and abetting theory. Here, Mr. Manning challenges an even more severe sentence—*mandatory* life without parole—and is simply asking for the opportunity to present mitigating factors to the court at a resentencing hearing. Nor does this Court’s decision in *People v Hall*, 396 Mich 650; 242 NW2d 377 (1976)—which found mandatory life without parole for felony murder constitutional—control here. *Hall*, of course, was decided decades before the U.S. Supreme Court’s decisions in *Roper*, *Graham*, and *Miller*, and all of the scientific evidence regarding the mitigating qualities of youth. It also involved an entirely different and much broader class of defendants—*all* adults, as opposed to 18-year-olds.

a handful of offenses in Michigan that mandate such an extreme sentence without any discretion or individualized consideration by the sentencing court. *See* MCL 791.234(6) (providing that defendants sentenced to mandatory life for first-degree murder, a few other serious felonies resulting in death, and first-degree criminal sexual conduct are not eligible for parole). For any other offense in Michigan, an 18-year-old would have the opportunity to present mitigating evidence—including evidence relating to the mitigating factors of youth—before the court imposed a sentence. Indeed, defendants ages 17 through 23 have the opportunity to keep many offenses off their records entirely under Michigan’s Holmes Youthful Trainee Act. MCL 762.11.

In addition, defendants who are a matter of months, days, or even hours younger than 18 at the time of their crimes cannot constitutionally face mandatory life without parole in this state for the very same conviction Mr. Manning received. Instead, a defendant who commits first-degree murder one day shy of his 18th birthday must receive consideration of the *Miller* factors—including his youth and capability for rehabilitation—before the court can impose a sentence. Yet a defendant who commits the same offense just a day later, on his 18th birthday, automatically receives mandatory life without parole—the same sentence that a 70-year-old defendant would receive for committing the same offense. Given that the mitigating factors of youth do not disappear at the stroke of midnight on a person’s 18th birthday, such a disparity is profoundly unfair. But it is exactly what happened here.

3. Less than half of states allow mandatory life-without-parole sentences for 18-year-olds.

The third *Bullock* factor is the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states. Only 19 states and the federal government impose a mandatory sentence of life without parole on defendants age 18 and over, with another six requiring such a sentence under aggravating circumstances. (*Cruz v United States*, Excerpt

from Brief of United States, App 123a–141a.) In contrast, in *Graham*, the U.S. Supreme Court prohibited life-without-parole sentences for juvenile nonhomicide offenders despite the fact that 39 jurisdictions permitted that sentence. 560 US at 62. Similarly, in *Miller*, the Court banned mandatory life-without-parole sentences for juvenile homicide offenders even though 29 jurisdictions permitted that sentence. *Miller*, 567 US at 482. In addition, several states have enacted laws providing greater protections to adolescent and young-adult offenders. At least 16 states, including Michigan, recognize an intermediate classification of “youthful offenders” between juveniles and adults, who are entitled to special protections within the criminal justice system. (*Cruz v United States*, Excerpts from Appellant’s Appendix, App 142a–147a.)

4. Mandatory life without parole will never advance the penological goal of rehabilitation.

The fourth and final factor in the state constitutional analysis is whether imposing mandatory life without parole on 18-year-olds advances the penological goal of rehabilitation. “Michigan has long recognized rehabilitative considerations in criminal punishment.” *People v Lorentzen*, 387 Mich 167, 179; 194 NW2d 827 (1972). Yet mandatory life without parole “forfeits altogether the rehabilitative ideal.” *Miller*, 567 US at 473, quoting *Graham*, 550 US at 74; see also *Carp*, 496 Mich at 520–21 (agreeing that life without parole “does not serve the penological goal of rehabilitation”). “It reflects ‘an irrevocable judgment about [a defendant’s] value and place in society,’ at odds with a child’s capacity for change.” *Miller*, 567 US at 473, quoting *Graham*, 560 US at 74. Because 18-year-olds share the same qualities of youth as younger children, they have a similar capacity for change. Accordingly, the fourth factor of the *Bullock* test supports a finding that a mandatory life-without-parole sentence for an 18-year-old is disproportionate.

For all of these reasons, 18-year-olds are categorically less culpable than adults. This reduced culpability mitigates the gravity of their offenses—even when they commit the most terrible crimes. And considering the profound severity of the punishment, mandatory life-without-parole sentences for 18-year-olds are disproportionately harsh. This is not to say that 18-year-olds cannot be sentenced to life without parole under any circumstance; *Miller* itself did not go that far. As with children under 18, though, courts must consider the “mitigating qualities of youth” before imposing this state’s harshest sentence on an 18-year-old. Nothing the U.S. Supreme Court said in *Roper*, *Graham*, or *Miller* forecloses such an interpretation of Michigan law. As this Court well knows, it “alone is the ultimate authority with regard to the meaning and application of Michigan law.” *Bullock*, 440 Mich at 27. Ultimately, this Court is free to draw its own line between childhood and adulthood under our own constitution—one that is even broader than federal law.

C. Alternatively, Mr. Manning’s Mandatory Life-Without-Parole Sentence Violates The Eighth Amendment To The U.S. Constitution.

Because the Michigan Constitution provides “greater protection” than the Eighth Amendment, this Court need rely only on state law to find that Mr. Manning is entitled to relief. Even if the Court chooses to evaluate the merits of Mr. Manning’s claim under the Eighth Amendment, however, *Miller*’s rationale applies equally to 18-year-olds like him as a matter of federal constitutional law. Just as there is no meaningful scientific difference between an 18-year-old youth and one under 18, there is no meaningful constitutional difference between them.

The Eighth Amendment’s prohibition on cruel and unusual punishment “guarantees individuals the right not to be subjected to excessive sanctions.” *Roper*, 543 US at 560. This right “flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense.” *Miller*, 567 US at 469 (internal quotation marks omitted). The U.S. Supreme Court has made clear that the “concept of proportionality is central to

the Eighth Amendment.” *Id.* To determine whether a sentencing practice is cruel and unusual, the Court looks to “the evolving standards of decency that mark the progress of a maturing society.” *Graham*, 560 US at 58. It considers “objective indicia of society’s standards, as expressed in legislative enactments and state practice,” but ultimately “must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.” *Id.* at 61. This “requires consideration of the culpability of the offenders at issue,” “the severity of the punishment,” and “whether the challenged sentencing practice serves legitimate penological goals.” *Id.* at 67. A “sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.” *Id.* at 71.

In light of the evolving scientific and societal consensus that 18-year-olds are just as immature, reckless, and impulsive as younger adolescents, the reasoning of *Miller* applies equally to them. Like younger adolescents, 18-year-olds have “diminished culpability and greater prospects for reform.” *Miller*, 567 US at 471. Their “distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences” on them, “even when they commit terrible crimes.” *Id.* at 472. “Because [t]he heart of the retribution rationale relates to an offender’s blameworthiness, the case for retribution is not as strong with a minor as an adult.” *Id.*, quoting *Graham*, 560 US at 71 (quotation marks omitted; alterations in original). 18-year-olds, who share the same qualities of youth as younger children, likewise have diminished culpability and blameworthiness. Nor does deterrence justify a mandatory life-without-parole sentence for an 18-year-old, because “the same characteristics that render [them] less culpable than [older] adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment.” *Id.*, quoting *Graham*, 560 US at 72 (quotation marks omitted). Similarly, incapacitation requires a determination of incorrigibility, which “is inconsistent with youth.” *Id.*

at 473, quoting *Graham*, 560 US at 72–73. And a life-without-parole sentence “forfeits altogether the rehabilitative ideal.” *Id.*, quoting *Graham*, 550 US at 74. Finally, because life-without-parole sentences “share some characteristics with death sentences that are shared by no other sentences,” *Graham*, 560 US at 69, individualized consideration of a defendant’s “age and the wealth of characteristics and circumstances attendant to it,” *Miller*, 567 US at 476, is just as important for an 18-year-old as it was in *Miller*.

The Eighth Amendment requires courts to consider the scientific consensus on adolescent development in determining the constitutionality of mandatory life without parole for 18-year-olds. As the U.S. Supreme Court has instructed, the Eighth Amendment “acquire[s] meaning as public opinion becomes enlightened by a humane justice.” *Hall v Florida*, 572 US 701, 708; 134 S Ct 1986; 188 L Ed 2d 1007 (2014). In *Atkins v Virginia*, the U.S. Supreme Court held that the Eighth Amendment prohibits imposition of the death penalty on intellectually disabled individuals. 536 US at 321. In *Hall v Florida*, 572 US 701, the U.S. Supreme Court invalidated a Florida statute requiring an IQ score of 70 or lower before permitting a capital defendant to present evidence of an intellectual disability to avoid the death penalty. The Court noted that the Florida statute was inconsistent with “established medical practice” because it took an IQ score as conclusive evidence of intellectual disability “when experts in the field would consider other evidence.” *Id.* at 712. The Court further noted that “[i]n determining who qualifies as intellectually disabled, it is proper to consult the medical community’s opinions.” *Id.* at 710; *see also Moore v Texas*, 137 S Ct 1039, 1050, 1053; 197 L Ed 2d 416 (2017) (holding that in determining whether an offender has an intellectual disability for purposes of the Eighth Amendment, states must defer to the “medical community’s current standards” that reflect “improved understanding over time” and that the Texas court’s consideration of the issue “deviated from prevailing clinical standards”). Similarly,

here, the law must follow the science and recognize that 18-year-olds are entitled to the constitutional protections afforded to youth. Just as “[i]ntellectual disability is a condition, not a number,” *Hall*, 572 US at 723, “youth is more than a chronological fact,” *Miller*, 567 US at 476, quoting *Eddings v Oklahoma*, 455 US 104, 115; 102 S Ct 869; 71 L Ed 2d 1 (1982).

Given the current scientific and societal consensus, the U.S. Supreme Court’s observation fifteen years ago that “[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,” *Roper*, 543 US at 574, is outdated. Although the Eighth Amendment standard remains the same, “its applicability must change as the basic mores of society change.” *Graham*, 560 US at 58. *Roper* itself is proof that the line between childhood and adulthood is not etched in stone. In 1988, the U.S. Supreme Court held that the death penalty was unconstitutional for children under the age of 16 at the time of their crimes. *Thompson v Oklahoma*, 487 US at 838 (plurality opinion). The Court reasoned that “[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.” *Id.* at 835. Seventeen years later, the *Roper* Court concluded that “[t]he logic of *Thompson* extends to those who are under 18.” 543 US at 574.

There is nothing in *Roper*, *Graham*, or *Miller* that prohibits this Court from holding mandatory life without parole unconstitutional for 18-year-olds. Indeed, *Roper* involved a state supreme court’s exercise of its own independent judgment in extending the holding of *Thompson* to those under 18. The case began as a successive habeas petition filed in Missouri state court, arguing that the “reasoning of *Atkins*, established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed.” *Roper*, 543 US at 559. The Supreme Court of Missouri agreed, holding that, in the fifteen years since the U.S. Supreme Court had last

addressed the question, “a national consensus ha[d] developed against the execution of juvenile offenders.” *Id.* at 559–60, quoting *State ex rel Simmons v Roper*, 112 SW3d 397, 399 (Mo 2003) (en banc). Notwithstanding that it had previously drawn the line at age 16 in *Thompson*, the U.S. Supreme Court affirmed the Missouri Supreme Court’s decision. *Id.* at 560.

Ultimately, it would be cruel and unusual to cling to an arbitrary line at age 18 for purposes of imposing the harshest possible prison sentence when scientific and societal mores have shifted toward the recognition that 18-year-olds are not truly adults. Imposing a mandatory life-without-parole sentence on an 18-year-old “poses too great a risk of disproportionate punishment” and violates the Eighth Amendment. *Miller*, 567 US at 479.

D. Several Other State And Federal Courts Have Applied *Miller* To 18-Year-Olds Like Mr. Manning.

A number of state and federal courts have already applied *Miller* to 18-year-olds like Mr. Manning. In *Cruz v United States*, unpub op at 14, a federal district court granted habeas relief and held that *Miller* renders mandatory life-without-parole sentences for 18-year-olds unconstitutional. The court relied upon testimony from Dr. Laurence Steinberg, a prominent expert in adolescence and the lead scientist on the *amicus curiae* briefs filed by the American Psychological Association in *Roper*, *Graham*, and *Miller*. Dr. Steinberg testified that “we didn’t know a great deal about brain development during late adolescence until much more recently.” *Cruz v United States*, Steinberg Transcript Excerpts, at 14:20–25 (App 113a). He testified that those in late adolescence “still show problems with impulse control and self-regulation and heightened sensation seeking which would make them in those respects more similar to somewhat younger people than to older people.” *Id.* at 19:20–25 (App 118a). In addition, “[s]usceptibility to peers is higher during late adolescence than it is in adulthood.” *Id.* at 20:24–25 (App 119a). Late adolescents also are “more capable of change” than adults. *Id.* at 21:7–9 (App 120a). Finally, Dr. Steinberg testified that he was

“[a]bsolutely certain” that the science underpinning the U.S. Supreme Court’s decisions applies equally to 18-year-olds. *Id.* at 71:5–6 (App 121a). After considering this scientific evidence and the “emerging trend that 18-year-olds should be treated differently from fully mature adults,” the *Cruz* court held that the Eighth Amendment prohibits mandatory life-without-parole sentences for 18-year-olds. *Cruz*, unpub op at 22, 25.

A Kentucky court considering similar scientific evidence held that the death penalty is unconstitutional for 18- to 21-year olds. *Commonwealth v Bredhold*, unpublished opinion of the Circuit Court of Kentucky, issued August 1, 2017 (Case No. 14-CR-161) (App 154a). The court noted that “[f]urther study of brain development conducted in the past ten (10) years has shown that these key brain systems and structures actually continue to mature well into the mid-twenties (20s); this notion is now widely accepted among neuroscientists.” *Id.* at 7; *see also Pike v Gross*, 936 F3d 372, 383–86 (CA6, 2019) (Stranch, J., concurring) (concluding that “society’s evolving standards of decency likely do not permit the execution of individuals who were under 21 at the time of their offense”).

Other courts have applied the principles announced in *Miller* to late adolescents and considered youth as a mitigating factor in sentencing. *See, e.g., State v Norris*, unpublished opinion of the Superior Court of New Jersey, Appellate Division, issued May 15, 2017 (Case No. A-3008-15T4) (App 168a), p 5 (remanding for resentencing in light of *Miller* where 21-year-old was sentenced to *de facto* life in prison); *United States v Walters*, unpublished opinion of the United States District Court for the Eastern District of Wisconsin, issued May 30, 2017 (Case No. 16-CF-198) (App 173a), p 3 (imposing below-guidelines sentence of time served on 19-year-old in part because “[c]ourts and researchers have recognized that given their immaturity and undeveloped sense of responsibility, teens are prone to doing foolish and impetuous things”); *State v O’Dell*,

183 Wash 2d 680, 696; 358 P3d 359 (2015) (holding that “a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender . . . who committed his offense just a few days after he turned 18”); *Sharp v State*, 16 NE3d 470 (Ind Ct App 2014), vacated on other grounds by *Sharp v State*, 42 NE3d 512 (Ind 2015) (finding 55-year sentence for felony murder inappropriate where defendant was “just three months past turning eighteen years of age at the time of the crime”); *United States v Howard*, 773 F3d 519, 532 (CA4, 2014) (finding district court’s upward-departure life sentence substantively unreasonable because it “failed to appreciate” that the three predicate convictions occurred when the defendant was between 16 and 18 years old, and that “youth is a mitigating factor derive[d] from the fact that the signature qualities of youth are transient”).

To be sure, the caselaw is not one-sided. In unpublished opinions, several panels of the Court of Appeals have declined to apply *Miller* to 18-year-olds. See *People v Gelia*, unpublished per curiam opinion of the Court of Appeals, issued January 21, 2020 (Docket No. 344130) (App 176a), p 7 (rejecting application of *Miller* to 19-year-old on plain-error review); *People v Conner*, unpublished per curiam opinion of the Court of Appeals, issued December 17, 2019 (Docket No. 343286) (App 187a), p 4 (holding that mandatory life without parole for 18-year-old did not violate Eighth Amendment); *People v Stanton-Lipscomb*, unpublished per curiam opinion of the Court of Appeals, issued September 20, 2018 (Docket No. 337433) (App 194a), p 4 (concluding, on plain-error review, that Eighth Amendment does not bar mandatory life without parole for 18-year-old); *People v Adamowicz*, unpublished per curiam opinion of the Court of Appeals, issued June 22, 2007 (Docket No. 330612) (App 199a), p 8 (same); *People v Jordan*, unpublished per curiam opinion of the Court of Appeals, issued March 7, 2017 (Docket No. 328474) (App 209a), p 3 (same). Of course, these unpublished opinions have no precedential effect and are not binding on

this Court, *see* MCR 7.215(C)(1), and several apply only plain-error review. For all of the reasons discussed above, this Court should reach a different conclusion.

E. At A Minimum, Mr. Manning’s Mandatory Life-Without-Parole Sentence Is Unconstitutional As Applied To Him.

Given all the circumstances of Mr. Manning’s case, a mandatory life-without-parole sentence is unconstitutionally excessive as applied to him under Michigan’s 1963 Constitution and the United States Constitution. Although there is no denying that he committed a serious offense, the weight of the evidence at trial established that Mr. Manning was not the shooter and instead aided and abetted his friend, Gilbert Morales, who actually shot and killed the victim. *Manning*, 434 Mich at 5. And the Court does not have to look far to see the “distinctive attributes of youth” at play in Mr. Manning’s offense. Just three months past his eighteenth birthday, Mr. Manning went along with his friends as backup in a teenage fight. These facts reflect the same kind of classic adolescent immaturity, impulsivity, poor judgment, risk-taking, and susceptibility to peer pressure that led the U.S. Supreme Court to decide *Miller*. Mr. Manning also rejected a plea offer against the advice of counsel—one that resulted in his co-defendant receiving a sentence of 10 to 20 years. Plea bargaining is a particularly problematic stage for young defendants: *Miller* specifically requires sentencers to consider the possibility that the defendant might have been “charged and convicted of a lesser offense, if not for the incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement).” *Miller*, 567 US at 478.

All of these facts are apparent on the face of his motion. Of course, Mr. Manning has not been given the opportunity to develop additional evidence regarding his immaturity at the time of his offense, his family and home environment, and other *Miller* factors that would support the conclusion that his sentence is unconstitutional. *See* MCR 6.507(A) (permitting court to expand

the record to include any “additional materials it deems relevant to the decision on the merits of the motion”). The trial court was expressly prohibited from taking any of these relevant facts into account in sentencing Mr. Manning. Yet a defendant who was just *three months younger* at the time of his offense would now be entitled to a resentencing hearing where the court would be required to consider the defendant’s individual circumstances and the mitigating factors of youth. Given all the circumstances of his case, depriving Mr. Manning of that individualized consideration is grossly disproportionate under both Article 1, § 16 of the Michigan Constitution and the Eighth Amendment.

CONCLUSION

After *Miller* and *Montgomery*, Mr. Manning should be given the opportunity to explain why sentencers must take into account how 18-year-olds like him “are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Miller*, 567 US at 480. This Court should reverse the decisions of the lower courts and remand for further proceedings, including a resentencing hearing.

Dated: March 16, 2020

Respectfully submitted,

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PROOF OF SERVICE

I certify that on March 16, 2020, I electronically filed the foregoing document with the Clerk of the Court using the MiFILE system, which will send notification of such filing to the following counsel of record:

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