

**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.

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Supreme Court No. 160034

Court of Appeals No. 345268

Circuit Court No. 84-000570-FC

**DEFENDANT-APPELLANT'S  
SUPPLEMENTAL REPLY BRIEF**

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## ARGUMENT

### I. A Motion Is “Based on a Retroactive Change in Law” for Purposes of MCR 6.502(G)(2) Even if the Retroactive Change Does Not Automatically Entitle the Defendant to Relief.

#### A. Mr. Manning’s Motion Is “Based on a Retroactive Change in Law.”

MCR 6.502(G)(2) provides, in relevant part, that “[a] defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment[.]” The Government does not appear to dispute that the U.S. Supreme Court’s ruling in *Miller v Alabama* was a “change in law” or that *Miller* has “retroactive” effect. See 567 US 460, 479; 132 S Ct 2455; 183 L Ed 2d 407 (2012). Indeed, *Montgomery v Louisiana* held exactly that. 136 S Ct 718, 736; 193 L Ed 2d 599 (2016).<sup>1</sup> There is also no dispute that *Miller* and *Montgomery* were decided “after [Mr. Manning’s] first motion for relief from judgment.” MCR 6.502(G)(2); (App 5a). Accordingly, the only remaining question under MCR 6.502(G)(2) should be whether Mr. Manning’s motion is “based on” that “retroactive change in law.”

It clearly is. As Mr. Manning explained in his Supplemental Brief, the verb “base” means “[t]o place *on* (also *upon*) a foundation, fundamental principle, or underlying basis.” *Oxford English Dictionary* (3d ed) (App 40a); see Def’s Supp Br 10 (citing additional definitions). And Mr. Manning’s constitutional challenge to his life-without-parole sentence is “based on a retroactive change in law” announced in *Miller* “because *Miller* provides the foundational and fundamental principles upon which his motion rests.” Def’s Supp Br 10. That understanding of MCR 6.502(G)(2)’s “retroactive change in law” exception is consistent not only with the plain meaning

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<sup>1</sup> Consistent with *Danforth v Minnesota*, 552 US 264, 288; 128 S Ct 1029; 169 L Ed 2d 859 (2008), Michigan courts may take a broader view of retroactivity under state law, but not a narrower one.

of “based on,” but also with this Court’s interpretation of the “new evidence” exception, the structure and purpose of the Michigan Court Rules, and federal habeas law. *See id.* at 11–20.

There is no basis in the text, structure, or purpose of MCR 6.502(G)(2) for concluding that a successive motion is impermissible where, in this Court’s words, “the law relied upon does not automatically entitle [the defendant] to relief.” (App 35a.) Indeed, not even the Government is willing to defend that position. Quite the opposite: The Government *concedes* that “MCR 6.502(G)(2) does *not* require a defendant to ‘show an entitlement to relief on the merits at the filing stage.’” Gov’t’s Supp Br 23 (emphasis added) (quoting Mr. Manning’s Supplemental Brief and asserting that the quoted proposition “is true”). And it accepts Mr. Manning’s interpretation of “based on”—the only conceivable textual hook for such a requirement. *See* Gov’t’s Supp Br at 8 n 11 (“The People don’t express any particular qualms about defendant’s definitions of ‘based on[.]’”). That should be the end of the issue.

Instead, however, the Government undertakes a lengthy philosophical analysis of the difference between holdings and dicta. *See* Gov’t’s Supp Br 8–19. That undertaking—the effect of which would be to read an “automatic entitlement” requirement into MCR 6.502(G)(2), notwithstanding the Government’s disclaimer of that position—is misguided.

As an initial matter, even the Government appears to acknowledge that the Supreme Court’s *holding* in *Miller* constitutes “a retroactive change in law.” *See* Gov’t’s Supp Br 13–16. And because the Government does not dispute Mr. Manning’s analysis of the phrase “based on” or its applicability to this case, *see* Gov’t’s Supp Br at 8 n 11, the conclusion should follow directly: Mr. Manning’s motion is “based on” the “retroactive change in law” announced in *Miller* for purposes of MCR 6.502(G)(2).

In any event, the Government’s musings on the nature of precedent lack any discernable grounding in the traditional tools of statutory interpretation. MCR 6.502(G)(2), of course, does not use the words “precedent” or “holding”—much less *ratio decidendi*. That is unsurprising. MCR 6.502(G)(2) is a procedural prerequisite that must be satisfied before “[a] defendant may file” a successive motion. MCR 6.502(G)(2) (emphasis added). The merits question about when such a motion may be “grant[ed]” is governed by MCR 6.508(D) (emphasis added). Aside from having no basis in text, the Government’s attempt to collapse those two inquiries is irreconcilable with this Court’s ruling in *People v Swain* that MCR 6.502(G)(2)’s “new evidence” exception is a “procedural threshold” that “does not require that a defendant satisfy” the standard for relief on the merits. 499 Mich 920, 920; 878 NW2d 476 (2016). It is inconsistent with the background interpretative principles that Michigan’s rules of criminal procedure “are intended to promote a just determination of every criminal proceeding” and “are to be construed to secure simplicity in procedure, [and] fairness in administration.” MCR 6.002. And it would put courts in the unenviable position of having to answer “unique questions for the theory of precedent” *before* reaching the merits of a defendant’s claim. Gov’t’s Supp Br 17.<sup>2</sup>

\* \* \*

At the end of the day, Mr. Manning does not dispute that MCR 6.502(G)(2) requires some connection between the defendant’s successive motion and the “retroactive change in law.” Unlike the Government, however, he understands that requirement to follow from the language of the

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<sup>2</sup> Even on its own terms, the Government’s analysis of *Miller*’s precedential force is simply wrong. As Justice Gorsuch recently underscored, “[i]t is usually a judicial decision’s reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases.” *Ramos v Louisiana*, 140 S Ct 1390, 1404; 206 L Ed 2d 583 (2020) (plurality op); *see also* F. Schauer, *Precedent*, in *Routledge Companion to Philosophy of Law* 129 (A. Marmor ed. 2012) (“[T]he traditional answer to the question of what is a precedent is that subsequent cases falling within the *ratio decidendi*—or rationale—of the precedent case are controlled by that case.”).

Rule itself—*i.e.*, from the words “based on”—not from academic debates regarding the nature of precedent. And those words require only that the “retroactive change in law” (here, *Miller*) serve as the foundation of the defendant’s motion, not that the law “automatically entitle him to relief.” (App 35a.) The answer to the Court’s first question for supplemental briefing, accordingly, is a simple “yes.”

**B. The Procedural Question Is No Barrier to This Court’s Review.**

Contrary to the Government’s suggestion, the procedural posture of this case is no reason to deny leave to appeal. *See* Gov’t’s Supp Br 6–7.

As an initial matter, the scope of MCR 6.502(G)(2)’s “retroactive change in law” exception is independently worthy of this Court’s attention. The Court of Appeals’ interpretation of MCR 6.502(G)(2) was “clearly erroneous,” and it threatens to “cause material injustice” to defendants for whom MCR 6.502(G)(2) is the only available avenue for relief. MCR 7.305(B)(5)(a); *see supra* Part I.A.; Def’s Supp Br 8–20. The Court of Appeals’ application of MCR 6.502(G)(2) in this case “conflicts with” other “decision[s] of the Court of Appeals.” MCR 7.305(B)(5)(b); *see* Def’s Supp Br 16–17 (citing cases). And the scope of MCR 6.502(G)(2) is *both* an issue of “significant public interest” in a “case . . . by or against the state” *and* one “involv[ing] a legal principle of major significance to the state’s jurisprudence.” MCR 7.305(B)(2)–(3). For all of these reasons, this Court’s review would provide much-needed clarity regarding the scope of the “retroactive change in law” exception—just as this Court’s decision in *Swain* did for the “new evidence” exception. *See* 499 Mich at 920.

More broadly, the procedural posture of this case should not prevent this Court from reaching the merits of Mr. Manning’s constitutional claim. Collateral challenges serve as a “precious safeguard of personal liberty.” *Bowen v Johnston*, 306 US 19, 26; 59 S Ct 442; 83 L Ed 455 (1939)

(addressing federal habeas); *People v Casey*, 411 Mich 179, 181–82; 305 NW2d 247 (1981) (quoting *Bowen*). And the whole point of the “retroactive change in law” exception in MCR 6.502(G)(2)—like similar provisions in federal law and the laws of other states—is to ensure that that defendants like Mr. Manning can benefit from jurisprudential change. Indeed, *Roper* itself arose in a collateral posture:

After [initial] proceedings in [the] case had run their course, [the U.S. Supreme] Court held that the Eighth and Fourteenth Amendments prohibit the execution of a mentally retarded person. *Atkins v. Virginia*, 536 U.S. 304 (2002). Simmons filed a new petition for state postconviction relief, 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. The Missouri Supreme Court agreed[.]

*Roper v Simmons*, 543 US 551, 559; 125 S Ct 1183; 161 L Ed 2d 1 (2005). The same logic applies here. Because Mr. Manning’s motion clears MCR 6.502(G)(2)’s “procedural threshold,” *Swain*, 499 Mich at 920, he is entitled to judicial review of his constitutional claim.<sup>3</sup>

## **II. Both the Michigan Constitution and the U.S. Constitution Prohibit Mandatory Life-Without-Parole Sentences for 18-Year-Olds.**

### **A. Mandatory Life-With-Out-Parole Sentences for 18-Year-Olds Violate Article I, § 16 of the Michigan Constitution.**

The *Lorentzen-Bullock* proportionality test has governed this Court’s interpretation of Article I, § 16’s “cruel *or* unusual punishment” clause for nearly fifty years, and reflects a proportionality analysis that dates back more than a century. See *People v Lorentzen*, 387 Mich 167, 176; 194 NW2d 827 (1972) (citing, *inter alia*, *People v Huntley*, 112 Mich 569; 71 NW 178 (1897); *People v Dumas*, 161 Mich 45; 125 NW 766 (1910); *People v Mire*, 173 Mich 357, 138 NW 1066 (1912)). The Government notes that some Justices of this Court have expressed disagreement with

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<sup>3</sup> In the alternative, Mr. Manning respectfully requests that this Court consolidate this case with *People v Conner*, No. 160940, which presents the merits question on direct review.

those precedents, but does not even attempt to offer a principled basis for overruling them. *See* Gov't's Supp Br 42–44.<sup>4</sup> None exists.

Application of the *Lorentzen-Bullock* factors confirms that mandatory life-without-parole sentences are unconstitutional for 18-year-olds. The Government concedes the fourth factor, acknowledging that “[a] sentence of mandatory life without parole admittedly does not serve the penological goal of rehabilitation[.]” *Id.* at 41. And with respect to the remaining three, the Government relies almost exclusively on this Court’s vacated decision in *People v Carp*, 496 Mich 440; 852 NW2d 801 (2014), *vacated on other grounds*, *Davis v Michigan*, 136 S Ct 1356; 194 L Ed 2d 339 (2016); *see* Gov’t’s Supp Br 39–42. But that vacated decision addressed the possibility of “[a] categorical rule *altogether foreclosing* a trial court from imposing a life-without-parole sentence on a juvenile convicted of felony murder on an aiding-and-abetting theory.” *Carp*, 496 Mich at 525 (emphasis added). This case involves a narrower challenge (only to *mandatory* life without parole sentences) and seeks narrower relief (an opportunity to present mitigating factors at a resentencing hearing). That difference should be dispositive.

With respect to the first factor, a sentence of mandatory life-without-parole is, by its nature, not “tailored to a defendant’s personal responsibility and moral guilt.” *People v Bullock*, 440 Mich 15, 39; 485 NW2d 866 (1992); *see also id.* at 38 n 22. With respect to the second factor, mandatory life-without-parole is the harshest sentence available in Michigan—one that is currently permissible only for a handful of offenses for defendants over 18, and not at all for defendants under 18.

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<sup>4</sup> Indeed, it is difficult to discern even a pragmatic reason for the Government’s attempt to overrule precedent, given its position that the federal and state standards yield the same result in this case and its acknowledgment that the *Lorentzen-Bullock* test has rarely resulted in successful challenges under Article I, § 16. *See* Gov’t’s Supp Br 44 (quoting an article for the proposition that, even under that test, “[t]he Michigan Supreme Court has exhibited a . . . lack of mercy vis-à-vis cruel or unusual punishment challenges, last reversing on this ground in 1992”).

See Def’s Supp Br 30–31. Moreover, many Michigan laws recognize that 18-year-olds should be treated like younger adolescents. See *id.* at 28–29. With respect to the third factor, the Government acknowledges that the majority of U.S. jurisdictions (all but 19 States and the federal government) do not permit mandatory life-without-parole sentences for defendants over 18, see Gov’t’s Supp Br 41—a clearer consensus than existed in *Miller* or *Graham*.

All four *Lorentzen-Bullock* factors thus confirm that mandatory life-without-parole sentences for 18-year-olds violate Article I, § 16.

**B. Mandatory Life-With-Out-Parole Sentences for 18-Year-Olds Violate the Eighth Amendment of the U.S. Constitution.**

The Government’s argument that mandatory life-without-parole sentences for 18-year-olds comport with the Eighth Amendment boils down to the proposition that *Miller* itself spoke only to defendants under 18. See Gov’t’s Supp Br 34–38. That is of course true. See *Miller*, 567 US at 465 (“We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’”). But *Miller*’s holding with respect to defendants under 18 does *not* support the “negative implication that . . . mandatory life without parole is necessarily constitutional as long as it is applied to those over the age of 18.” *Cruz v United States*, unpublished opinion of the U.S. District Court for the District of Connecticut, issued March 29, 2018 (Case No. 11-CV-787 (JCH)) (App 87a), p 14.

To the contrary, Eighth Amendment jurisprudence is (and has always been) incremental—with each successive decision leading to, rather than foreclosing, the next. See *Graham v Florida*, 560 US 48, 58; 130 S Ct 2011; 176 L Ed 2d 825 (2010) (“To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society.” (quotations omitted)). The run up to *Roper*

is, again, illustrative. In *Thompson v Oklahoma*, the U.S. Supreme Court held that the death penalty was unconstitutional for defendants under age 16. 487 US 815, 838; 108 S Ct 2687; 101 L Ed 2d 702 (1988) (plurality op). Nevertheless, in *State ex rel. Simmons v Roper (Roper I)*, the Missouri Supreme Court—considering the question in a collateral posture—extended that rule to 16- and 17-year-old defendants. 112 SW3d 397, 413 (Mo. 2003). And the U.S. Supreme Court affirmed, finding that *Thompson*’s “reasoning” extends “to all juvenile offenders under 18.” *Roper*, 543 US at 578.<sup>5</sup> The only meaningful difference between the Missouri Supreme Court’s extension of *Thompson* to 16- and 17-year olds and the extension of *Miller* Mr. Manning seeks here is that, prior to *Roper*, the U.S. Supreme Court had *expressly rejected* the holding *Roper* later endorsed. *See id.* at 575 (overruling *Stanford v Kentucky*, 492 US 361; 109 S Ct 2969; 106 L Ed 2d 306 (1989)). This case is more straightforward than the one the Missouri Supreme Court took on in *Roper I*, because no contrary U.S. Supreme Court precedent exists here.

Instead, as Mr. Manning’s Supplemental Brief explains, the very social science on which *Miller* relied supports the conclusion that mandatory life-without-parole sentences are unconstitutional for 18-year-olds, too. *See* Def’s Supp Br 26–29, 33–39. In particular, the three distinguishing characteristics of youth on which *Miller* focused—(1) “‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking”; (2) “‘vulnerab[ility] . . . to negative influences and outside pressures,’ including from their family and peers”; and (3) the tendency of “‘traits [to be] ‘less fixed’”—apply to 18-year-olds just as they do to younger adolescents. *Miller*, 567 US at 471 (quoting *Roper*, 543 US at 569–70). Indeed, there

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<sup>5</sup> A further extension of *Roper* may well be on the horizon. *See, e.g.*, Am Bar Ass’n, Resolution 111, at 6–7 (adopted Feb. 5, 2018), *available at* <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf> (finding that the same science considered in *Roper* supports abolition of the death penalty for defendants between 18 and 21).

is an emerging national consensus that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18,” *Roper*, 543 US at 574, but rather continue into his early 20s. In particular, nowhere in the country can an 18-year-old purchase tobacco, alcohol, and most firearms; laws regarding student aid, health insurance, and foster care generally include 18-year-olds with younger adolescents; and in Michigan, 18-year-olds have the opportunity to keep many offenses off their records entirely. *See* Def’s Supp Br 28–29.

The Government appears to dispute neither the state of the science nor the existence of many laws that treat 18-year-olds like younger children. *See* Gov’t’s Supp Br 37. It merely reiterates that “a bright line is nonetheless necessary,” *id.* at 36, and suggests that “[t]his Court should decline to wade into . . . murky waters,” *id.* at 38, to determine *where* “our society’s evolving standards of decency” now require that line be set, *Roper*, 543 US at 563. But these are “objections always raised against categorical rules,” *id.* at 574, and refining the relevant categories is exactly the task the Eighth Amendment asks courts to undertake. This Court, Mr. Manning respectfully submits, is up for the challenge. At the merits stage, it can review the “ever-growing body of research in developmental psychology and neuroscience,” *Miller*, 567 US at 472 n.5 (quotations omitted), and determine whether that work now supports applying the *Miller* rule to 18-year-olds—or extending it, like laws regarding dangerous substances and weapons, to all defendants under 21. Because the logic of *Miller* extends to 18-year-olds, Mr. Manning’s mandatory life-without-parole sentence violates the Eighth Amendment.<sup>6</sup>

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<sup>6</sup> Contrary to the Government’s assertion, *see* Gov’t’s Supp Br 29–31, Mr. Manning has satisfied MCR 6.508(D)(2) and (D)(3). Courts must liberally construe pleadings filed by parties acting *pro se*. *See Estelle v Gamble*, 429 US 97, 106; 97 S Ct 285; 50 L Ed 251 (1976). Liberally construed, Mr. Manning’s Motion for Resentencing raised the grounds for relief asserted here. *See* App 11a–22a. And the denial of that motion was later undermined by *Miller*’s retroactive change in law. Mr. Manning therefore satisfies MCR 6.508(D)(2). Mr. Manning has also satisfied the “good cause” and “actual prejudice” requirements of MCR 6.508(D)(3). *See* App 23a–29a.

**C. At a Minimum, Mandatory Life-With-Out-Parole Sentences Are Unconstitutional As Applied to 18-Year-Olds Like Mr. Manning Who Did Not Kill or Intend to Kill.**

The Government offers two primary responses to Mr. Manning’s argument that mandatory life-without-parole sentences are unconstitutional, at least as applied to 18-year-olds who, like Mr. Manning, did not kill or intend to kill—one based on facts, one based on law. Both are mistaken. On the facts, the Government is wrong to suggest that the case against Mr. Manning included evidence sufficient to support a finding that he intended to kill. *Compare* Gov’t’s Supp Br 45 (supporting that bare assertion with nothing more than a general citation to its counterstatement of background facts), *with People v Manning*, 434 Mich 1, 5; 450 NW2d 534 (1990) (noting Luna’s testimony that Mr. Manning never fired a shot at the victim); *id.* at 22 n 1 (Archer, J., dissenting) (identifying “conflicting testimony” as to whether Mr. Manning was even “aware that [the killer] was in possession of the weapons”). On the law, the Government again overstates the relevance of this Court’s vacated ruling in *Carp*, which, as explained above, involved a broader challenge to life-without-parole sentences. *See supra* p. 6.

Like younger adolescents, 18-year-olds who do not kill or intend to kill have “a twice diminished moral culpability.” *Graham*, 560 US at 69. Accordingly, Article I, § 16 and the Eighth Amendment prohibit mandatory life-without-parole sentences for those individuals.

**CONCLUSION**

Mr. Manning respectfully requests that this Court grant his application for leave to appeal, reverse the decisions below, and remand for further proceedings.

Dated: July 2, 2020

Respectfully submitted,

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