

STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner-Appellee,

No. 160034

v.

ROBIN RICK MANNING
Defendant-Appellant.

Circuit Court No. 84-005570-FC
Court of Appeals No. 345268

BRIEF OF THE PROSECUTING ATTORNEYS
ASSOCIATION OF MICHIGAN AS AMICUS CURIAE
IN SUPPORT OF THE PEOPLE
Filed under AO 2019-6

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Statement of the Questions

I.

Is defendant's successive motion for relief from judgment "based on a retroactive change in law" under MCR 6.502(G)(2) when the motion relies on the reasoning from *Miller v Alabama*, 567 US 460 (2012), but not the Supreme Court's announced holding or the ratio decidendi of the case?

Defendant answers: YES

The People answer: NO

Amicus answers: NO

II.

Does a mandatory sentence of life without the possibility of parole for a person who was 18 years old at the time of his or her crime violate the Eighth Amendment of the United States Constitution, Const 1963, art 1, § 16, or both?

Defendant answers: YES

The People answer: NO

Amicus answers: NO

Statement of Facts

Amicus joins in the statement of facts of the People.

Argument

I.

Defendant's successive motion for relief from judgment is not "based on a retroactive change in law" under MCR 6.502(G)(2) when the motion relies on the reasoning from *Miller v Alabama*, but not the Supreme Court's announced holding or the ratio decidendi of the case.

A. Introduction: the issues

This Court has directed that the following issues be briefed:

- (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 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and *Montgomery v. Louisiana*, — U.S. —, 136 S. Ct. 718, 193 L.Ed.2d 599 (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.¹

Amicus answers that:

- the change in the law—which must be retroactive on collateral attack—need not automatically entitle defendant to relief on a successive motion for relief from judgment to be appropriate under MCR 6.502(G)(2), though it may often do so, but it must be that retroactive new rule, and not a different rule

¹ *People v. Manning*, 505 Mich. 881 (2019).

that the defendant seeks the court to establish, that defendant seeks to apply to his or her factual circumstances; and

- on the merits, it is not unconstitutional under either the federal or Michigan constitutions to sentence an 18-year-old to life without parole for 1st-degree murder (and no decision, applied retroactively, so holds).

B. Under MCR 6.502(G)(2) it is a retroactive change in the law, not arguments to create a further new rule of law based on assertions concerning the reasoning underlying that change, that justifies a successive motion for relief from judgment

In *Miller v. Alabama*² the United States Supreme Court held 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.”³ That decision was found to be retroactive on collateral review in *Montgomery v. Louisiana*⁴—with the Court observing that in *Miller* it had held that “mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments’”⁵—the Court concluding that *Miller* had

² *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

³ *Id.*, 132 S. Ct. at 2460. The Court also said that “mandatory life without parole for juveniles violates the Eighth Amendment.” *Id.*, 132 S. Ct. at 2458.

⁴ *Montgomery v. Louisiana*, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).

⁵ *Id.*, 136 S. Ct. at 726.

announced a substantive rule of law, which, under the principles of *Teague v. Lane*,⁶ must be applicable on collateral review.⁷

MCR 6.502(G)(2) provides 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 or a claim of new evidence that was not discovered before the first such motion.” The “change in law” that has occurred since defendant’s prior motions for relief from judgment is that previously it did not constitute cruel and unusual punishment to sentence a defendant “under the age of 18 “ convicted of 1st-degree murder automatically to life without parole, and now such a sentence may not be imposed with a specific sentencing hearing inquiring into the “mitigating factors of youth.”⁸ Amicus joins the excellent discussion of the point by the People in their brief, and would note that the “the doctrine of stare decisis concerns the holdings of previous cases, not the rationales: ‘A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.’”⁹

⁶ *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

⁷ *Montgomery*, 136 S. Ct. at 736.

⁸ *Miller*, 132 S. Ct. 2475.

⁹ *In re Osborne*, 76 F.3d 306, 309 (CA 9, 1996).

Defendant's claim that as an 18-year-old he could not automatically be sentenced to life without parole is not based on Miller's holding that a juvenile 1st-degree murderer—one under the age of 18—cannot be sentenced to life without parole without a hearing considering the mitigating factors of youth, as the holding does not apply to him; rather, he wishes to base his claim on the reasoning of Miller, arguing it should be extended to 18 year olds (and, of course, the next claim will be 19 year olds, then 20 year olds—there is no real stopping point if the judiciary rather than the legislature is to make this policy decision). One may make such an argument—though it should be rejected¹⁰—but on direct appeal.

¹⁰ The petitioners in Miller were both 14 years old. The issue thus actually before the Court was whether the Eighth Amendment requires sentencing hearings before life without parole may be imposed on 14-year-old defendants. But the Court drew the line at 18-year-old defendants, when, if it was going to consider ages beyond those of the criminal defendants before it, it could have chosen another age, such as 21. The Court chose the age of majority for a reason—and it has repeatedly done so—and if it is to be extended that argument must be made on a direct appeal—and the matter is, as amicus has said, one for the legislature, not the Courts.

II.

A mandatory sentence of life without the possibility of parole for a person who was 18 years old at the time of his or her crime does not violate either the Eighth Amendment of the United States Constitution or Const 1963, art 1, § 16, or both.

- A. The 8th Amendment to the United States Constitution does not render automatic life without parole for 1st-degree murderers unconstitutional as to any class or subset of adults; the authority to set the sentence for the offense belongs to the legislature

[T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.¹¹

Amicus joins the fine argument of the People on this point. Amicus would note that with regard to the case of *Cruz v. United States*¹² the opinion of a federal district judge is, of course, binding precedent on no court—not another federal district judge, not a state court, not even the judge himself, should he reach a different conclusion later. And not only is the case on appeal in the 2nd Circuit Court of Appeals, but that circuit has rejected extension of *Miller* in another case—a case cited by the People in their brief—and that decision is now binding within the circuit, so that even the judge in *Cruz* would be required to follow it:

Each defendant was between 18 and 22 years old at the times of the murders in aid of racketeering of which they

¹¹ *United States v. Wiltberger*, 18 U.S. 76, 95, 5 L. Ed. 37, 5 Wheat. 76 (1820).

¹² *Cruz v United States*, No 11-CV-787, 2018 WL 1541898 (D Conn, 2018).

were convicted. . . . The defendants argue that Miller’s holding should be extended to apply to them, because scientific research purportedly shows that the biological factors that reduce children’s “moral culpability” likewise affect individuals through their early 20s.

The Supreme Court has acknowledged that “[d]rawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules,” such as that “[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18,” and that “[b]y the same token, some under 18 have already attained a level of maturity some adults will never reach.” . . . Nevertheless, “a line must be drawn,” and the Supreme Court has repeatedly chosen in the Eighth Amendment context to draw that line at the age of 18, which “is the point where society draws the line for many purposes between childhood and adulthood.” . . . Since the Supreme Court has chosen to draw the constitutional line at the age of 18 for mandatory minimum life sentences, *Miller*, 567 U.S. at 465, 132 S.Ct. 2455, the defendants’ age-based Eighth Amendment challenges to their sentences must fail.¹³

- B. Article I, § 16 of the Michigan Constitution does not render automatic life without parole for 1st-degree murderers unconstitutional as to any class or subset of adults; the authority to set the sentence for the offense belongs to the legislature

The Eighth Amendment does not, as amicus has argued, bar the denial of any parole consideration whatever to an adult—a person 18 years of age or older—sentenced to life in prison, nor does the Michigan Constitution. While a state court must, of course, apply the Eighth Amendment as construed by the United States Supreme Court, a state is not compelled to construe its own fundamental charter in the same

¹³ *United States v. Sierra*, 933 F.3d 95, 97 (CA 2, 2019), cert. denied sub nom. *Beltran v. United States*, 206 L. Ed. 2d 480 (2020), and cert. denied sub nom. *Lopez-Cabrera v. United States*, 206 L. Ed. 2d 480 (2020) (emphasis supplied).

fashion; indeed, a state could in its constitution provide no protection against cruel and unusual, or cruel or unusual, sentences at all. The matter is one of consideration of the text, history, and structure of the state constitution, to ascertain its original public meaning. Where identical language is employed in the state constitution as in the federal, and nothing in the review of text, history, or structure suggests a different meaning, the meaning may—and often is—the same.¹⁴ But an examination of the text, history, and structure of the provision may on rare occasion lead to a different understanding¹⁵ of the state provision than the parallel federal constitutional provision as interpreted by the United States Supreme Court.¹⁶ This Court should conclude that Article 1, § 16 does not include judicial review of the proportionality of legislatively-mandated statutory sentences; that the United States Supreme Court has gone off course in construing the Eighth Amendment does not require this Court to do the same with regard to our state

¹⁴ Indeed, this Court has said, in construing several parallel provisions of the state constitution to federal provisions, that absent a compelling reason to conclude otherwise they should be construed the same. See e.g. *People v. Slaughter*, 489 Mich. 302, 311 (fn 14) (2011) (collecting cases regarding Mich. Const. 1963, Art. 1, § 11); *People v. Davis*, 472 Mich. 156, 167–68 (2005) (concerning Mich. Const. 1963, Art. 1, § 15).

¹⁵ And though the interpretation of the federal constitution by the United States Supreme Court must be applied by the state court, the state court may, in construing its own constitution, conclude that the federal construction is mistaken.

¹⁶ In *Sitz v. Dep't of State Police*, 443 Mich. 744, 758 (1993) the Court found such compelling reasons with regard to Art. 1, § 11 when applied to sobriety checklanes, noting that the compelling reason test for departure does not create a conclusive presumption which would completely bar State departure from interpretations of parallel federal constitutional provisions by the United States Supreme Court.

constitution. *People v Bullock*¹⁷ should be overruled, and the Court should find that the Michigan Constitution provides no basis for requiring case-specific sentencing hearings on the question of parole eligibility for any class of offenders convicted of 1st-degree murder, and certainly not for any class of adult offenders.

1. Interpreting the Michigan Constitution

Our state constitution, no less than our federal constitution, is a durable expression of the will of the people, both authorizing and limiting government, and standing outside of and superior to all agencies of government. Its source of authority is the people of the State.¹⁸ The judicial branch is as much an agent or servant of the sovereign people as are the legislative and executive branches. It does not stand outside of government, but is a part of it. The judge as servant of the people should search for the public meaning of a constitutional text as understood by the lawgiver. As Madison said, concerning our federal constitution:

I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be

¹⁷ *People v Bullock*, 440 Mich. 15 (1992).

¹⁸ See Mich. Const. 1963, Art. I, § 1: “All political power is inherent in the people. Government is instituted for their equal benefit, security and protection.” The same provision appears in Mich. Const. 1908, Art. II, § 1. In our first State Constitution, this language is divided between Article I, § 1 and § 2, § 1 providing that “First. All political power is inherent in the people” and Art. § 2 providing that “Government is instituted for the protection, security, and benefit of the people; and they have the right at all times to alter or reform the same, and to abolish one form of government and establish another, whenever the public good requires it.”

no security for a consistent and stable, more than for a faithful, exercise of its powers.¹⁹

It has been established since the early days of our State that our state constitution is law through the act of ratification by the people, and that the task of the judge is to determine what the provisions of the constitution meant to the ordinary people who made it law. A court interpreting a constitutional text should endeavor to place itself

in the position of the Framers of the Constitution, and ascertain what was meant at the time; for, if we are successful in doing this, we have solved the question of its meaning for all time. It could not mean one thing at the time of its adoption, and another thing today, when public sentiments have undergone a change.²⁰

Certainly new circumstances to which a provision must be applied may arise, but as Justice Campbell said long ago, “That the constitution means nothing now that it did not mean when it was adopted, I regard as true beyond doubt. But it must be regarded as meant to apply to the present state of things as well as to all other past or future circumstances.”²¹

¹⁹ Letter from Madison to Henry Lee (June 25, 1824), reprinted in 9 The Writings of James Madison 191-192 (G. Hunt ed., 1910).

²⁰ *Pfieffer v Board of Education of Detroit*, 118 Mich 560, 564 (1898). See also *Holland v Clerk of Garden City*, 299 Mich 465, 470-471 (1941) (“It is a fundamental principle of constitutional construction that we determine the intent of the framers of the Constitution and of the People adopting it”) and *Burdick v Secretary of State*, 373 Mich 578, 584 (1964) (“Courts on numerous occasions have gone to the constitutional convention debates and addresses to the people to decide the meaning of the Constitution”).

²¹ *People v Blodgett*, 13 Mich 127, 140 (1865)(Campbell, J.).

As tools to aid in the interpretation of our state constitution, this Court has consistently held that the Address to the People and the constitutional convention debates may be highly relevant in determining the public meaning to the ratifiers of particular constitutional provisions.²² The Address is particularly important in this regard because it represents what the ratifiers—the people—were told about the proposed constitution before they voted to adopt it.²³ This Court has emphasized that “the proper objective in consulting constitutional convention debates is not to discern the intent of the framers in proposing or supporting a specific provision, but to determine the intent of the ratifiers in adopting the provision,” and so “the primary focus ... should not [be] on the intentions of the delegates . . . but, rather, on any statements they may have made that would have shed light on why they chose to employ the particular terms they used in drafting the provision to aid in discerning what the common understanding of those terms would have been when the provision was ratified by the People.”²⁴

As Justice Cooley, perhaps our greatest justice, put the matter:

A constitution is made for the people and by the people. The interpretation that should be given it is that which

²² See e.g., *Studier v. Mich. Pub. Sch. Employees’ Retirement Bd.*, 472 Mich. 642, 655–656 (2005).

²³ See *People v. Nutt*, 469 Mich. 565, 590 n. 26 (2004) (“The Address to the People, widely distributed to the public prior to the ratification vote in order to explain the import of the ... proposals, ‘is a valuable tool...’”). And see *Mich. United Conservation Clubs v. Secretary of State (After Remand)*, 464 Mich. 359, 378 (2001) (Young, J., concurring), noting that the Address was “officially approved by the members of the constitutional convention.”

²⁴ *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich. 295, 309-310 (2011).

reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.²⁵

The task of the judge when confronting the meaning of a state constitutional text is, then, as a matter of long-established Michigan precedent, to ascertain what the ratifiers “understood themselves to be enacting.” As one commentator has said, the text “must be taken to be what the public of that time would have understood the words to mean. . . . In other words, the objective or publicly-accessible meaning of the terms is sought.”²⁶ Whether an interpretation of a provision of our state constitution is entitled to adherence under principles of *stare decisis* thus involves consideration of whether that decision was itself faithful to the task of the Court as established in the decisions of this Court described above.

²⁵ Cooley, *A Treatise on the Constitutional Limitations* (1886), p. 81. And see *People v. Smith*, 478 Mich. 292, 298-299 (2007); *Attorney General v. Renihan*, 184 Mich. 272, 281 (1915).

²⁶ See Randy Barnett, “An Originalism for Nonoriginalists,” 45 *Loy L Rev* 611, 636 (1999).

2. The law the People have made: judicial review of the “proportionality” of the legislative assignment of a particular sentence to a particular crime is not authorized by Article 1, § 16 of the Michigan Constitution
 - a. “The law the people have made,” article 1, § 16, and proportionality review: the “and” and the “or” of it

There is a textual difference between the Eighth Amendment and Article 1, § 16—the former uses the phrase “cruel and unusual punishment” while the latter refers to cruel or unusual punishment—and this Court in *People v. Bullock* said that the “difference does not appear to be accidental or inadvertent.”²⁷ But the only proof offered for this assertion was simply the very fact of the textual difference.²⁸ Is there anything in the history of the language used that suggests that the use of “or” rather than “and” was deliberate, and designed to accomplish some purpose? And if so, to what end was the choice made?

The Northwest Ordinance was passed on July 13, 1787 by the Confederation Congress, establishing the Northwest Territory, which included the territory that later became the State of Michigan, and principles for its governance. Included was a provision in Article 2 that “no cruel or unusual punishments shall be inflicted.” On August 6, 1789,

²⁷ *People v. Bullock*, 440 Mich. at 30-31.

²⁸ “While the historical record is not sufficiently complete to inform us of the precise rationale behind the original adoption of the present language by the Constitutional Convention of 1850, it seems self-evident that any adjectival phrase in the form ‘A or B’ necessarily encompasses a broader sweep than a phrase in the form ‘A and B.’ The set of punishments which are either ‘cruel’ or ‘unusual’ would seem necessarily broader than the set of punishments which are both ‘cruel’ and ‘unusual.’” *People v. Bullock*, 440 Mich. at 31 (emphasis in the original).

the Northwest Ordinance of 1789, which essentially continued the 1787 Ordinance, was signed into law under the new Constitution, and it too provided that “no cruel or unusual punishments shall be inflicted.” On September 25, 1789, by joint resolution, Congress Proposed the Bill of Rights Amendments to the States, the tenth of which was what came to be the Eighth Amendment: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” It would be far more than passing strange if Congress proposed to the States an amendment to the Constitution concerning punishments that it intended to be different than that it had enacted as to the Northwest Territory only six weeks earlier. And there is no evidence that it so intended.

Indeed, the founding-era evidence has been said to establish that no difference was intended when the disjunctive was used rather than the conjunctive in a particular constitution.

- As evidenced by the state constitutions they wrote, the Founders used the phrases “cruel and unusual,” “cruel or unusual,” and “cruel” interchangeably as referring to a unitary concept.

The state constitutions enacted during and shortly after the Bill of Rights’ ratification also counsel against a literal interpretation. Pennsylvania and South Carolina each enacted constitutions during 1790, while ratification of the Bill of Rights was still pending. In addition, Delaware and Kentucky enacted constitutions in 1792 during the year following the Bill of Rights’ ratification. All of these constitutions prohibited “cruel punishments,” omitting entirely any reference to the term “unusual.” Numerous state constitutions enacted

after the Founding period used this same language. There is no evidence that this formulation was understood to mean anything different from either the Eighth Amendment's proscription of "cruel and unusual punishments" or the ban of the many state constitutions enacted during the Revolutionary and post-Revolutionary periods against "cruel or unusual" punishments.²⁹

- [T]he phrases "cruel and unusual" and "cruel or unusual" were often used interchangeably, with early American state constitutions often employing "cruel or unusual" instead of the "cruel and unusual" verbiage.³⁰
- [N]either the Framers nor their English predecessors attributed much difference between the phrases cruel and unusual and cruel or unusual. . . . "the available evidence indicates that the Founders understood [both formulations] to capture the same meaning."³¹

And in the debate on ratification of the Constitution, where much concern was expressed regarding the absence of a Bill of Rights, the disjunctive and conjunctive were used interchangeably, and "cruel" and "unusual," however expressed, referred to a unitary concept. At the Massachusetts Ratifying Convention, Abraham Holmes complained that in the absence of a Bill of Rights Congress was not "restrained from inventing the most

²⁹ Stacy, Tom, "Cleaning Up the Eighth Amendment Mess," 14 Wm. & Mary Bill Rts. J. 475, 503-504 (December, 2005) (footnotes omitted).

³⁰ Bessler, John, "The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century," 2 Brit. J. Am. Legal Stud. 297, 313 (2013) (footnotes omitted) (emphasis supplied).

³¹ Casale, Robert, and Katz, Johanna, "Would Executing Death-sentenced Prisoners after the Repeal of the Death Penalty Be Unusually Cruel under the Eighth Amendment?," 86 Conn. B.J. 329, 336 (2012) (footnote omitted).

cruel and unheard of punishments . . . RACKS and GIBBETS, may be amongst the most mild instruments of their discipline.”³² The minority dissent of the Pennsylvania Ratifying Convention offered a series of suggested amendments to the proposed Constitution, including that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.”³³ The New York ratifying convention proposed amendments to the proposed Constitution constituting a Bill of Rights, and including that “excessive bail ought not to be required, nor excessive fines imposed; nor cruel or unusual punishments inflicted.”³⁴ The North Carolina ratifying convention resolved that there should be a Declaration of Rights added to the proposed Constitution, to include a provision that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”³⁵ The phrases were used interchangeably, and connoted no difference in meaning.

Michigan achieved Statehood in 1837, and its first constitution, that of 1835, provided in Article 1, § 18 that “Excessive bail shall not be required; excessive fines shall not be imposed; and cruel and unjust punishments shall not be inflicted.” There is no historical evidence that the textual change from the Northwest Ordinance—from “cruel or

³² Bernard Bailyn, 1 *The Debate on the Constitution*, p. 912 (emphasis supplied, capitalization in the original).

³³ Bernard Bailyn, 1 *The Debate on the Constitution*, p. 532 (emphasis supplied).

³⁴ Bernard Bailyn, 2 *The Debate on the Constitution*, p. 536 (emphasis supplied).

³⁵ Bernard Bailyn, 2 *The Debate on the Constitution*, p. 567 (emphasis supplied).

unusual” to “cruel and unjust”—was meant to accomplish some change from the prohibition in the Northwest Ordinance. In the Constitution of 1850, Article 6, § 31, our constitution returned essentially to the language used in the Northwest Ordinance: “cruel or unusual punishment shall not be inflicted.” And the 1908 Constitution, in Article 2, § 15, continued that language, which also appears in our current constitution: “cruel or unusual punishment shall not be inflicted.” Nothing in any convention record or journal that amicus can find indicates that the text employed in the Northwest Ordinance, the text employed in the Constitution of 1835, or the text employed in the Constitutions of 1850, 1908, and 1963 were intended to mean anything different. Again, “the phrases ‘cruel and unusual,’ ‘cruel or unusual,’ and ‘cruel’” were employed “interchangeably as referring to a unitary concept” throughout the country.

And as to text itself, this Court said in *Bullock* that “it seems self-evident that any adjectival phrase in the form ‘A or B’ necessarily encompasses a broader sweep than a phrase in the form ‘A and B.’”³⁶ But this is not necessarily so. While “and” is generally taken to be “used to join words or groups of words; added to; plus,” “[o]r, on the other hand, while used as ‘expressing an alternative, contrast, or opposition,’ is also often used “to indicate ... (3) the synonymous, equivalent, or substitutive character of two words or phrases,’ as in ‘[the off [or] far side], [lessen [or] abate].”³⁷ In any event, here history gives context to the expression—no difference in meaning was intended by the use on occasion of “or” rather

³⁶ *People v. Bullock*, 440 Mich. at 30-31 (emphasis added).

³⁷ Webster’s Third New International Dictionary (1981).

than “and” to couple “cruel” and “unusual”; indeed, no difference in meaning was intended by the occasional use of “cruel” standing alone.

- b. “The law the people have made,” article 1, § 16, and proportionality review: how the words and phrases would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted³⁸

What would the ratifiers of the Michigan Constitutions have understood themselves to be enacting in 1835 when they ratified the language “Excessive bail shall not be required; excessive fines shall not be imposed; and cruel and unjust punishments shall not be inflicted”; and in 1850 when they ratified “Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted”; and in 1908 when they ratified a text almost identical to that of 1850; and finally in 1963, when that language was again continued? Because, as the People have argued, “or” and “and” were used interchangeably at the time of the Founding, one must return to the beginning. What was the understanding at the time of the Founding, and in 1835?

³⁸ See Vasan Kesavan & Michael Stokes Paulsen, “The Interpretive Force of the Constitution’s Secret Drafting History,” 91 *Geo. L.J.* 1113, 1132 (2003).

Amicus will not belabor the point, but direct the Court to Justice Scalia's lead opinion in *Harmelin v Michigan*,³⁹ joined by Chief Justice Rehnquist as to the proportionality discussion.⁴⁰ Amicus agrees that:

- [T]he Clause disables the Legislature from authorizing particular forms or “modes” of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed.⁴¹
- [T]o use the phrase “cruel and unusual punishment” to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly. The notion of “proportionality” was not a novelty. . . . There is little doubt that those who framed, proposed, and ratified the Bill of Rights were aware of such provisions, yet chose not to replicate them.⁴²
- We think it enough that those who framed and approved the Federal Constitution chose, for whatever reason, not to include within it the guarantee against disproportionate sentences that some State Constitutions contained. It is worth noting, however, that there was good reason for that choice While there are relatively clear historical guidelines and accepted practices that enable judges to determine which modes of punishment are “cruel

³⁹ *Harmelin v. Michigan* 501 U.S. 957, 976, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991).

⁴⁰ And Justice Thomas has also made essentially the same points. See e.g. *Graham v Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2011)(Thomas, J., dissenting).

⁴¹ *Harmelin*, 111 S.Ct. at 2691 - 2692.

⁴² *Harmelin*, 111 S.Ct. at 2692.

and unusual,” proportionality does not lend itself to such analysis.⁴³

- The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that some assemblage of men and women has considered proportionate—and to say that it is not. For that real-world enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.⁴⁴

This was the understanding, amicus submits, which informed the punishment provision of the Northwest Ordinance, and the Michigan Constitution of 1835, with subsequent constitutions ratified with no understood change to that understanding.

- c. “The law the people have made,” article 1, § 16, and proportionality review: the jurisprudential history of the provision

For the sake of economy, amicus here discusses only the Bullock decision. The United States Supreme Court, in *Harmelin v. Michigan* rejected a challenge brought under the “cruel and unusual punishments”

⁴³ *Harmelin*, 111 S.Ct. at 2692. And see John F. Stinneford, “The Original Meaning of ‘Unusual’: the Eighth Amendment as a Bar to Cruel Innovation,” 102 *NW. U. L. Rev.* 1739, 1757 (Fall 2008): “The Roper majority wanted to strike down the death penalty for seventeen-year-olds, despite the fact that the evidence did not demonstrate that such executions violated any societal moral consensus, at least within the United States, and so it simply pretended that the evidence supported the desired result. One may like the results of *Roper* and still find the case profoundly troubling. If evolving standards of decency is merely window-dressing for judicial will, then it is not merely an incorrect standard; it is not a standard at all. In the long run, a standardless standard will cause more harm than good to those criminal defendants who seek the protection of the Eighth Amendment.”

⁴⁴ *Harmelin*, 111 S.Ct. at 2697.

clause of the Eighth Amendment to Michigan’s mandatory penalty of life in prison without possibility of parole for possession of 650 grams or more of a mixture containing cocaine. This Court in *Bullock* reached a different conclusion based on Art. 1, § 16, applying proportionality review to the legislative sentencing determination, and finding the sentence unconstitutional as disproportionate. The Court based its conclusion on three points: 1) the textual difference, which the People have discussed; 2) its determination that the punishment clause had been determined by the Court for “more than half a century to include a prohibition on grossly disproportionate sentences” and that jurisprudence informed the framing and ratification of Article 1, § 16⁴⁵; and 3) “longstanding” Michigan precedent supported proportionality review.⁴⁶

Amicus has remarked on the textual analysis and history; as to Michigan’s jurisprudence, space precludes little other than observing that several justices have expressed the view that *Bullock* was wrongly decided,⁴⁷ and directing the Court’s attention to Justice Riley’s partial dissent in *Bullock*, rejecting proportionality after reviewing Michigan’s jurisprudential history on the point, with which the People agree.

⁴⁵ *People v. Bullock*, 440 Mich. at 32.

⁴⁶ *People v. Bullock*, 440 Mich. at 33.

⁴⁷ See *People v. Correa*, 488 Mich. 989, 992 (2010) (Markman, J., concurring in the denial of leave, joined by Justice Corrigan and Justice Young): “. . . at some point, this Court should revisit *Bullock*’s establishment of proportionality review of criminal sentences, and reconsider Justice Riley’s dissenting opinion in that case.”

C. Conclusion

Proportionality review should be rejected as a matter of Michigan law. It inevitably involves the court in matters that are legislative. For example, sociological and psychological treatises and articles are presented to the Court reviewing a penalty for proportionality, which are not part of the record of the case, and which are not put to any rigorous examination or testing. They are appropriate, rather, to a legislative hearing on the wisdom of a particular sentence, and Courts are neither equipped for such hearings nor authorized to conduct them. As Justice Scalia pointed out in the *Roper*⁴⁸ case:

the American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In . . . *Hodgson v. Minnesota* . . . the APA found a “rich body of research” showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement. Brief for APA as Amicus Curiae, . . . The APA brief, citing psychology treatises and studies too numerous to list here, asserted: “[B]y middle adolescence (age 14–15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems.” . . . courts—which can only consider the limited evidence on the record before them—are ill equipped to determine which view of science is the right one. Legislatures “are better qualified to weigh and ‘evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.’ “

⁴⁸ *Roper v. Simmons*, 543 U.S. 551, 617-618, 125 S.Ct. 1183, 1223, 161 L.Ed.2d 1 (2005)(Scalia, J., dissenting).

Further, if the constitutional proportionality of a sentence “is an ever-changing reflection of the evolving standards of decency’ of our society, it makes no sense for the Justices then to prescribe those standards rather than discern them from the practices of our people. On the evolving-standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?”⁴⁹

To conclude, Justice Riley quoted the Prosecuting Attorneys Association amicus brief:

I believe that the amicus curiae supplemental brief of the Prosecuting Attorneys Association correctly identifies the problems with an evolving standards test. . . . “if ‘evolving standards of decency’ as to the appropriate (proportionate) sentence for a crime are to be the measure of the constitutionality of a legislatively set penalty, how is such an inquiry to be carried out? What is the measure? What informs the judgment? What tools does a court have to make it? What enables a court to overrule society’s expression of its ‘standard of decency,’ communicated through statute, imposing a different standard, which is also supposed to be society’s standard and not the court’s? Would not the court’s role be to discover or identify society’s ‘standard of decency’- not what it should be, but what it is, and how better could society express its standard of decency than through its elected lawmakers? The alternative for the judiciary is that

“it is for us (the judiciary) to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society through

⁴⁹ Roper v. Simmons, 125 S.Ct. at 1222 (Scalia, J., dissenting) (2nd emphasis added).

its democratic processes now overwhelmingly disapproves, but on the basis of what we think “proportionate” and “measurably contributory to acceptable goals of punishment”-to say and mean that, is to replace judges of the law with a committee of philosopher kings.’ . . . ⁵⁰

This Court should not permit itself to be used as a legislative committee. The United States Supreme Court has decided that life without parole cannot be imposed on juvenile 1st-degree murderers without a case-specific consideration of the “mitigating factors of youth.” If parole consideration is to be granted to classes of adult 1st-degree murderers, that is a decision for the legislature to make.⁵¹ There is no federal constitutional rule requiring it, and this Court should not require it under the state constitution; the matter is for the legislature.

⁵⁰ People v. Bullock, 440 Mich. at 63-64 (Riley, J. dissenting).

⁵¹ And even if proportionality review is applied, for reasons similar to those expressed by Justice Boyle in her concurring and dissenting opinion in Bullock, sentencing an adult 18-year-old 1st-degree murderer to life without parole is not grossly disproportionate. See Bullock, at 72-73 (Boyle, J., concurring and dissenting): “Because the absolute magnitude of the crime is grave and the principle of proportionality does not permit the judiciary to impose on the Legislature its subjective view of appropriate responses to perceived evils, the statutory scheme passes constitutional muster.”

Relief

WHEREFORE, the amicus requests that this Honorable Court affirm defendant-appellant's sentence, or deny leave to appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with AO 2019-6. The body-text font is 12 point Century Schoolbook set to 150% line spacing. This document contains 6396 countable words.

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