

**STATE OF MICHIGAN
IN THE SUPREME COURT**
Appeal from the Michigan Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN

Supreme Court No. 160034

Plaintiff-Appellee,
Vs.

Court of Appeals No. 345268

ROBIN RICK MANNING,

Circuit Court No. 84-000570-FC

Defendant-Appellant.

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**AMICUS CURIAE OF CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN FOR
DEFENDANT-APPELLANT ROBIN RICK MANNING**

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QUESTIONS PRESENTED

1. **Is a defendant's successive motion for relief from judgment is "based on a retroactive change in law," under MCR 6.502(G)(2), if the motion relies on the change in law?**

The Court of Appeals answered: No.
Defendant-Appellant Manning answers: Yes.
Plaintiff-Appellee answers: No.
Amicus CDAM answers: Yes.

2. **Do Our Federal and State Constitutions Bar the Imposition of Mandatory Life Without Parole for 18-Year Olds, Such as Manning, under the Eighth Amendment to the U.S. Constitution and Const 1963, art 1, § 16?**

The Court of Appeals did not answer this question.
Defendant-Appellant Manning answers: Yes.
Plaintiff-Appellee answers: No.
Amicus CDAM answers: Yes.

INTERESTS OF AMICUS CURIAE

The Criminal Defense Attorneys of Michigan (“CDAM”) is an organization consisting of hundreds of criminal defense attorneys licensed to practice in this state. CDAM was organized for the purposes of: promoting expertise in criminal and constitutional law; providing training for criminal defense attorneys to improve the quality of representation; educating the bench, bar, and public of the need for quality and integrity in defense services; promoting enlightened thought concerning alternatives to and improvements in the criminal justice system; and guarding against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws. *CDAM Constitution and By-laws*, Art 1, sec 2.

This Court permits CDAM to file an *amicus curiae* brief without motion for leave from the Court. MCR 7.312(H)(2).

ARGUMENT

- I. **A defendant’s successive motion for relief from judgment is “based on a retroactive change in law,” MCR 6.502(G)(2), as long as the motion relies on the change in law.**

The court rule at issue, MCR 6.502(G), provides a rule against filing successive motions for relief from judgment except if the petitioner meets one of two exceptions or if the court waives imposition of the rule based on a showing of innocence. See MCR 6.502(G)(1) (rule against successive motions); MCR 6.502(G)(2) (exceptions to this rule). If a petitioner meets one of the exceptions - a claim “based on” either “new evidence” or “a retroactive change in law” – he “may file a second or successive motion.” MCR 6.502(G)(2) establishes a procedural gateway for convicted prisoners seeking relief, which is distinct from the merits standard analyzed under MCR 6.508(D)(2). The plain language of the provision – “based on” a change in

law - also supports a reading where the change in law need not guarantee substantive relief but merely provide a basis to excuse the rule against successive petitions. Two other reasons support this reading. In the context of the new evidence exception, this Court has held that MCR 6.502(G)(2) establishes a procedural threshold, and that that procedural inquiry must not be conflated with analysis on the merits. *People v Swain*, 499 Mich 920, 920; 878 NW2d 476, 476 (2016). Further, our states' courts have tacitly acknowledged in a series of recent cases that a successive petition need not entitle a petitioner to relief on the merits. To hold otherwise would defeat the purpose of merits review, allowing only winning claims to be considered on the merits and potentially closing the courthouse doors on other meritorious claims. In the alternative, if this Court determines that in order to pass through the procedural gateway of 6.502(G)(2), a petitioner must demonstrate that the law automatically entitles him to relief, this Court must broaden the scope of its retroactivity doctrine in order to provide a forum to prevent cases of manifest injustice.

A. Under the plain language of the provision and read in context with other court rules, MCR 6.502(G)(2) does not require that the retroactive change in law automatically entitle a petitioner to relief.

Michigan court rules “are to be construed to secure simplicity in procedure, [and] fairness in administration.” MCR 6.002. They “are intended to promote a just determination of every criminal proceeding.” MCR 1.105.

The interpretation of a court rule is a question of law reviewed de novo. *People v Comer*, 500 Mich 278, 287; 901 NW2d 553 (2017). The words of a court rule should be given their plain and ordinary meaning. *People v Petit*, 466 Mich 624; 648 NW2d 193 (2002). Just as a statute is analyzed in the context of the entire legislative schema, a court rule should be analyzed in the context of our state's complete court rules. *Comer*, 500 Mich at 287 (explaining that the “same

legal principles” governing the interpretation of statutes govern the interpretation of court rules); see also *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) (“context matters, and thus statutory provisions are to be read as a whole.”)

The Michigan court rules provide that only one post-conviction motion for relief from judgment may be considered, MCR 6.502(G)(1), unless the provisions of MCR 6.502(G)(2) apply. MCR 6.502(G)(2) states that a “defendant may file a second or subsequent motion based on [1] a retroactive change in law that occurred after the first motion for relief from judgment or [2] a claim of new evidence that was not discovered before the first such motion.”¹ Before this court rule was promulgated in 1995, Staff Comment to 1995 Amendment of MCR 6.502, collateral review procedure in Michigan permitted defendants to “repeatedly seek relief without limitation.” *People v Reed*, 449 Mich 375, 388; 535 NW2d 496, 503 (1995). The rule was amended to “encourage raising legal issues on initial appeal rather than in postconviction review.” *Reed*, 449 Mich at 503 (explaining that MCR 6.500 et. seq. was “designed” to further the State’s preference for all issues to be raised on appeal). However, the exceptions in MCR 6.502(G)(2) are provided, as claims based on new evidence or new law could not have been raised earlier and, therefore, do not undermine the general rule that all claims should be raised in the first motion for relief from judgment. MCR 6.502(G)(2) (requiring that the relevant change in law have “occurred *after* the first motion for relief from judgment”) (emphasis added).

Examination of the language in MCR 6.502(G) and the language of the other relevant court rules shows that MCR 6.502(G)(2) addresses the circumstances under which a defendant

¹As of January 1, 2019, a court may also waive the bar on successive motions for postconviction relief “if it concludes that there is a significant possibility that the defendant is innocent.” MCR 6.502(G)(2); see also *Amendments of Rule 6.502 of the Michigan Court Rules and Rule 3.8 of the Michigan Rules of Professional Conduct*, ADM File No. 2013-05; ADM File No. 2014-46 (Sep 20, 2018).

may *file* a second or successive motion for relief from judgment, and MCR 6.508(D), the only other court rule that uses the phrase “retroactive change in law,” explains when courts may *grant* relief for such motions. See e.g., *Duffy v. Mich Dept of Nat Res*, 490 Mich 198, 206; 805 NW2d 399, 404 (2011) (“It is elementary that . . . courts will regard all statutes upon the same general subject matter as part of 1 system.”). More specifically, MCR 6.508(D)(2), which is in a section captioned “Entitlement to Relief,” provides that where a successive motion raises an issue that was presented in a prior appeal, the court can grant relief only if “the defendant establishes that a retroactive change in the law *has undermined* the prior decision.” MCR 6.508(D)(2) (emphasis added).² In contrast, MCR 6.502(G)(2), which describes when a successive motion for post-conviction relief may be filed, does not require that the change in law to have “undermined” the prior decision; it instead requires that the motion be “based on” the change in law.³ If the Court intended for MCR 6.502(G)(2) to require entitlement to relief, or a more specific standard (e.g., that the change in law have undermined the prior decision), it would have so specified and used the same language as the entitlement to relief provision. See *United States Fid Ins & Guar Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 14; 795 NW2d 101 (2009) (“[T]he use of different terms . . . generally implies that different meanings were intended.”). Instead, MCR 6.502(G)(2) is a *procedural* gateway requirement that, if met, permits the defendant to file a

² MCR 6.508(D)(2) states that “[t]he court may not grant relief to the defendant if the motion 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.*” (emphasis added).

³ MCR 6.502(G)(2) states 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 clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.” (emphasis added).

subsequent motion for relief from judgment based on an underlying *substantive* claim. *People v Swain*, 499 Mich 920, 920; 878 NW2d 476, 476 (2016) (describing “the procedural threshold of MCR 6.502(G)(2)”).

The key language of the rule – “based on” – has a meaning that, on its face and in other contexts in the rules, shows that the changed law must be the legal basis for the claim, but not inexorably demand relief. The use of the phrase “based on” in other court rules confirms that this phrase takes on a flexible meaning in the court rules, and must be construed in order to harmonize the reading of the court rules as a whole. See e.g., *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340, 345 (2010) (“When considering the correct interpretation, the statute must be read as a whole.”); *Tuscola Cty Bd Of Com’rs. v Tuscola Cty Apport Comm’n*, 262 Mich App 421, 427; 686 NW2d 495, 498(2004) (“we focus on the existing provisions, in context, in an attempt to construct a harmonious statute.”). The phrase “based on” is used 81 times in Michigan court rules, whereas the less flexible phrase “governed by” is used 118 times. Compare *Based on*, *Black’s Law Dictionary* (11th ed) (in copyright, “based on” means “Derived from, and therefore similar to, an earlier work.”) with *Govern*, *Black’s Law Dictionary* (11th ed) (“to control a point in issue”). The phrase “governed by” is consistently used before a specific legal authority that controls or regulates a particular issue, and it has a binding quality. See e.g., MCR 2.306(C)(3)(d) (video depositions “are governed by MCR 2.315.”); MCR 3.925(F)(1) (“The setting aside of juvenile adjudications is governed by MCL 712A.18e.”) In comparison, “based on” is used much more flexibly. For instance, a motion or stipulation for an adjournment must be “based on good cause.” MCR 2.503. For purposes of joinder, MCR 6.120(B)(1) provides that “offenses are related if they are based on,” inter alia, “(a) the same conduct or transaction.” MCR 2.116 provides that a motion for summary disposition “may be based on one or more . . .

grounds,” such as lack of jurisdiction, insufficient service of process, among others. Similarly, the requirement that initial disclosures in civil litigation be “based on the information then reasonably available to the party,” MCR 2.302(A)(6), does not require that the parties have “perfect knowledge of their case at the initial disclosure stage.” *State Bar of Michigan, The Guidebook to the New Civil Discovery Rules*, at 19 (updated Nov 1, 2019) (discussing *Brooks v Sciberras*, unpublished per curiam opinion of the Court of Appeals, issued July 28, 2000 (Docket Nos. 211227, 207743, and 212273), 2000 WL 33415202, p 5-6). If 6.502(G)(2) required automatic entitlement to relief on the merits under retroactive doctrine, the rule would use “governed by” or another phrase consistent with a stringent requirement.

Reading 6.502(G)(2) to require that the claim is derived from the retroactive change in law, or that the change in law provide the claim’s foundation, is consistent with the ordinary meaning of the phrase “based on.” *People v Williams*, 491 Mich 164, 174; 814 NW2d 270, 276 (2013) (terms in a statute should be afforded their “plain and ordinary meaning”). In legal writing, the phrase “based on” is commonly used to mean “derived from.” *Michigan Supreme Court, Michigan Appellate Opinion Manual*, Appendix 1 – Frequently Suggested Corrections, p 158 (“Use ‘based on’ (i.e., derived from) if the phrase is being used in relation to a noun”) (emphasis added). A motion that is “based on” a particular judicial decision “use[s] particular ideas or facts” from that decision to “develop a theory.” *Based, Macmillan Dictionary* (2020) (emphasis added); see e.g., *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281, 289 (2011) (“We may consult dictionary definitions to give words their common and ordinary meaning.”) A petition is “based on” a new rule of law if it uses a new rule “as its basis.” *Based, Collins Dictionary* (2020); see also *Based, Merriam-Webster* (2020) (“having a specified type of base or basis”). “[I]f one thing is based on another, it is *developed* from it,” but does not need to

indisputably follow from it. *Based*, *Cambridge Dictionary* (2020) (emphasis added). In brief, a legal theory “based on” a change in law need only be “developed” or “derived” from that change.⁴ If the court rule was meant to have a narrower meaning, such as “controlled by” or “required by,” the rule would have signaled that intent with less flexible language.

B. Requiring a gatekeeping inquiry to determine whether a petition is based on a retroactive change in law is necessary in order to harmonize the interpretation of MCR 6.502(G)’s “new evidence” exception and discretionary actual innocence waiver.

This Court has already recognized that the filing stage requirement under MCR 6.502(G)(2) does not require intensive merits analysis or automatic entitlement to relief. In *People v. Swain*, this Court found that it was reversible error to apply the standard for obtaining a new trial based on newly-discovered evidence, established in *People v. Cress*, 468 Mich 678; 664 NW2d 174 (2003), to the new evidence exception under MCR 6.502(G)(2). 499 Mich 920, 920; 878 NW2d 476, 476 (2016). In the case below, the Court of Appeals had concluded that Swain’s petition did not meet the MCR 6.502(G)(2) new evidence exception because she “ha[d] not shown *entitlement* to relief on the basis of newly discovered evidence.” *People v. Swain*, unpublished per curiam opinion of the Court of Appeals, issued Feb 5, 2015 (Docket No. 314564), 2015 WL 521623, p 2 (emphasis added). This Court held that the Court of Appeals had erroneously applied a merits standard to a procedural question, that is, by requiring the petitioner to demonstrate entitlement to relief at the filing stage. *Swain*, 499 Mich at 920. “*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.” *Id.* (emphasis added); see also

⁴ This is also consistent with the ordinary meaning of “basis,” which is simply “the bottom of something considered as its foundation.” *Basis*, *Merriam-Webster* (2020); *Basis*, *Cambridge Dictionary* (2020) (“the most important facts, ideas, etc. from which something is developed.”).

People v Swain, 288 Mich App 609, 631; 794 NW2d 92, 104 (2010) (“The court rules are silent on the procedure to be used by a trial court for determining whether a successive motion for relief from judgment falls within either of the two exceptions of MCR 6.502(G)(2).”) Since *Swain*, this Court has reaffirmed that a court commits reversible error if it applies *Cress* “to an analysis of whether the defendant's motion was improperly successive under MCR 6.502(G).” *People v Watkins*, 500 Mich 851, 851; 883 NW2d 758, 758 (2016).

In the new evidence context, this Court has clarified since *Swain* that the bar to satisfy the procedural threshold of MCR 6.502(G)(2) is low. A successive motion satisfies MCR 6.502(G)(2) where it is based on several statements that were not previously presented to the trial court. *People v Robinson*, 503 Mich 883, 883; 919 NW2d 59, 59 (2018). Even a successive motion that relies on a single piece of new evidence, such as an affidavit that was not previously presented to the trial court, satisfies the new evidence exception. *People v McClinton*, 501 Mich 944, 944; 904 NW2d 619, 619 (2017) (emphasis added).

The retroactivity provision of MCR 6.502(G)(2) should be read consistently with the new evidence provision of the same court rule. If they are read consonantly, the change in law exception in MCR 6.502(G)(2) cannot require that a defendant establish entitlement to relief on the merits. It can only require that the petitioner present a retroactive change in law that his successive motion relies upon, or that provides the foundation for his claim. Reading these two related parts of the same rule as having related meaning and function is a matter of fundamental construction. See e.g., *Griffith ex rel Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 533; 697 NW2d 895, 902 (2005) (“words and clauses will not be divorced from those which precede and those which follow”). Court rules *in pari materia*, which relate to the same subject, should be “*construed together* as one law, regardless of whether they contain any reference to one

another.” *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 312; 596 NW2d 591, 595 (1999) (emphasis added). The two exceptions in MCR 6.502(G)(2) are *in pari materia* and thus must be interpreted “without repugnancy, absurdity, or unreasonableness.” *Id.* Because this Court has rejected an entitlement to relief standard for MCR 6.502(G)(2)’s new evidence exception, *Swain*, 499 Mich at 920, it would be unreasonable and arbitrary to require that standard for MCR 6.502(G)(2)’s change in law exception. *State Treasurer v. Schuster*, 456 Mich 408, 417; 572 NW2d 628, 632 (1998) (“all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although . . . containing no reference one to the other.”). This principle is even stronger here because the two exceptions are in the same court rule. See *Griffith*, 472 Mich at 533 (“words grouped in a list should be given related meaning.”) Reading the change in law portion of the rule to require an automatic entitlement to relief, but reading the new evidence portion of the rule to not require an automatic entitlement to relief cannot be squared with this Court’s command that court rules “are to be construed to secure simplicity in procedure, [and] fairness in administration.” MCR 6.002.

Before *Swain*, the lower courts had conflated the new evidence exception under MCR 6.502(G)(2) and the merits standard under *Cress* in other cases. See Note, *Disentangling Michigan Court Rule 6.502(G)(2): The “New Evidence” Exception to the Ban on Successive Motions for Relief from Judgment Does Not Contain a Discoverability Requirement*, 113 Mich L Rev 1427 (2015) (discussing e.g., *People v Vinson*, unpublished per curiam opinion of the Court of Appeals, issued July 26, 2012 (Docket No. 303593) 2012 WL 3046236, p 7, and concluding that “if the court of appeals had not conflated section 6.502(G)(2)’s new evidence exception with *Cress*, Vinson would likely have prevailed.”) Without clarification from this Court, lower courts

may again conflate the filing and merits questions under the change in law exception, preventing prisoners from obtaining review who should receive it.

Finally, the recent amendments to MCR 6.502 demonstrate a willingness to not shut the courthouse doors on colorable claims, and to allow them to be reviewed on the merits. The 2018 amendment to MCR 6.502, inserting a discretionary waiver of the ban on successive petitions for those who are “actually innocent,” reflects a turn towards greater generosity in allowing the substance of claims to be reviewed instead of relying on procedural hurdles. *Amendments of Rule 6.502 of the Michigan Court Rules and Rule 3.8 of the Michigan Rules of Professional Conduct*, ADM File No. 2013-05; ADM File No. 2014-46 (Sep 20, 2018). Likewise, the addition of 6.502(G)(3), providing a non-exhaustive list of what type of evidence is “new evidence” for purposes of 6.502(G)(2) will allow more petitioners to have their new evidence claims considered on the merits. *Michigan Innocence Clinic, Re: Comments on Proposed Revisions to MCR 6.502(G) and MRPC 3.8* (Aug. 27, 2018). Heightening the procedural bar for the change in law exception alone, shortly after loosening the bar for the new evidence exception, would be inconsistent and confusing. See e.g., *Omne Financial*, 460 Mich at 312.

C. Whether a Petitioner Is Entitled to Relief Is a Merits Question That Is Distinct From the Question Of Whether a Petitioner Fits Within One of MCR 6.502(G)(2)’s Exceptions, Which Is a Threshold Procedural Question.

Whether a successive motion is “based on a retroactive change in law,” MCR 6.502(G)(2), that occurred after the first round of collateral review is a procedural question. See e.g., *People v Johnson*, 502 Mich 541, 566; 918 NW2d 676, 688 (2018). As this Court has explained, a successive petition may only be considered on the merits if it is not “procedurally barred” by MCR 6.502(G)(2). *Id* see also *People v Robinson*, unpublished per curiam opinion of the Court of Appeals, issued July 30, 2019 (Docket No. 337865), 2019 WL 3433078, p 5 (A

judge’s determination that a petition is “within one of the exceptions,” MCR 6.502(G)(2), is “only the initial qualifying step for defendant to receive a merits review of his motion for post-judgment relief.”). Once that procedural threshold is satisfied, a petitioner must establish entitlement to relief under caselaw and MCR 6.508(D). See *Johnson*, 502 Mich at 566.

Our court rules recognize a distinction between the gatekeeping function of MCR 6.502(G) and the merits determination subject to MCR 6.508(D) which would be substantially eroded by requiring automatic entitlement to relief under MCR 6.502(G)(2). Were the Court to do so, it would be effectively adding a new step of analysis prior to merits review, thereby collapsing the distinction between procedural and merits questions. See e.g., *Johnson*, 502 Mich at 566 (treating procedural analysis under MCR 6.502(G)(2) separately from analysis on the merits). If only winning claims could satisfy the change in law exception, there would be no purpose for the merits stage, because only winning claims would be considered on their merits. Reading a new step into the threshold procedural inquiry would controvert the plain text of the court rule, which does not contain the words “automatic,” “entitlement,” or similar language. MCR 6.502(G)(2). Requiring a merits-like screening before dismissing the claim on procedural grounds is inconsistent with the purpose of criminal procedural court rules, which are “to be construed to secure simplicity in procedure,” MCR 6.002, and should be administered in a manner that minimizes any “error[s] that . . . affect the substantial rights of the parties.” MCR 1.105.

The federal collateral review provision most analogous to MCR 6.502(G)(2) also performs a gatekeeping function, but can be read to be narrower than our state’s rule based on the plain text of the statute and the deference given to state courts when undertaking federal review. Whereas MCR 6.502(G)(2), requires only that the “change in law” is “retroactive,” the

federal habeas statute requires that a change in law have been “*made* retroactive to cases on collateral review by the Supreme Court.” 28 USC § 2254(b)(1) (governing federal review of state convictions); 28 USC § 2255(h)(2) (review of federal convictions). It follows that under the Michigan court rule, the relevant “change in law” need not have been specifically held retroactive before a successive petition is filed. MCR 6.502(G)(2) (“based on a retroactive change in law”).

Some federal courts have found that a successive petition fits within the retroactive change in law exception to the federal habeas statute—which on its face appears narrower than the Michigan rule—if that change in law simply *supports* the petitioner’s claim, reasoning that § 2255(h) merely performs a gatekeeping function. In *In re Hoffner*, the Third Circuit held that a motion “relies on a qualifying new rule” for purposes of 28 USC § 2255(h)(2) where “the rule substantiates the movant’s claim.” 870 F 3d 301, 309 (CA 3, 2017). “This is so even if the rule does not conclusively decide the claim or if the petitioner needs a non-frivolous extension of a qualifying rule.” *Id.* (“Section 2255(h)(2) does not require that qualifying new rule be the movant’s winning rule, but only that the movant rely on such a rule.”) The Third Circuit found that whether the new rule applies to a specific case is a merits question, and is not part of the preliminary, gatekeeping inquiry under section 2255(h). *Id.* at 308-09 (“we do not address the merits *at all* in our gatekeeping function”) (emphasis added). Likewise, the First Circuit took a permissive, case-by-case approach to whether a successive petition fit within the federal habeas statute’s change in law exception. *Moore v United States*, 871 F3d 72, 82 (CA 1, 2017). Noting that section 2255 uses words such as “rule” and “right,” rather than “holding,” the First Circuit reasoned that “Congress presumably used these broader terms because it recognizes that the Supreme Court guides the lower courts not just with technical holdings but with general rules

that are logically inherent in those holdings, thereby ensuring less arbitrariness and more consistency in our law.” *Id.*

Requiring automatic entitlement to relief to establish the court’s jurisdiction over a successive petition increases the risk that some meritorious claims will be erroneously dismissed at the procedural, pre-merits stage. If a petitioner may be entitled to relief based on that retroactive change, but where that is not made abundantly clear in the petition of a pro se prisoner, that petition should not be weeded out before a thorough examination. This would allow for some arbitrary dismissals, which would controvert the purpose of the court rule to achieve “fairness in administration.” MCR 6.002. If the court holds that the law relied upon must automatically entitle a petitioner to relief, then some prisoners who are entitled to relief under a retroactive change in law will not receive it. See e.g., Ruthanne M. Deutsch, *Federalizing Retroactivity Rules: The Unrealized Promise of Danforth v. Minnesota and the Unmet Obligation of State Courts to Vindicate Federal Constitutional Rights*, 44 Fl S L Rev 53, 75 (2016) (arguing that “state habeas courts must provide relief precisely because federal habeas courts will not” and “[o]therwise, litigants will lack any forum to vindicate their constitutional rights.”) The number of prisoners without an opportunity to seek redress and challenge their convictions will increase and public confidence in the courts as guarantors of liberty may decrease. See e.g., *Marbury v Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of *every individual* to claim the protection of the laws, whenever he receives an injury.”) (emphasis added); *Montgomery v. Louisiana*, 136 S Ct 718, 732; 193 L Ed 2d 599 (2016) (“There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose”), quoting *Mackey v. United States*, 401 US 667, 693; 91 S Ct 1171, 1180 (1971) (HARLAN, J., concurring). MCR 6.502(G)(2)’s

gatekeeping function can be preserved only if entitlement to relief on the merits is reserved for the merits stage, and not required at the filing stage.

D. There Is No Reason to Change Existing Practice; Our State Courts Have Not Previously Required, Under MCR 6.502(G)(2), That the Retroactive Change in Law Relied Upon in a Successive Petition Automatically Entitle the Petitioner to Relief.

The Michigan Court of Appeals have tacitly acknowledged that they have jurisdiction over successive petitions under MCR 6.502(G)(2) where the retroactive change in law relied on does not automatically entitle the petitioner to relief. See e.g., *People v Walter Miller*, unpublished per curiam opinion of the Court of Appeals, issued June 25, 2019 (Docket No. 341425), 2019 WL 2605760; *People v Michael Johnson*, unpublished per curiam opinion of the Court of Appeals, issued June 18, 2019 (Docket No. 344322), 2019 WL 2517815. The petitioners in these cases were not automatically entitled to relief under *Montgomery* because they were sentenced to life with the possibility of parole. *Miller*, 2019 WL 2605760; *Johnson*, 2019 WL 2517815. While they were each denied relief, the Court of Appeals recognized that their arguments based on *Montgomery*'s principles satisfied the MCR 6.502(G)(2) procedural hurdle. *Miller*, unpub op at 4 n 4; *Johnson*, unpub op at 2. For instance, in *People v Miller*, the Court denied relief on the merits but stated that if the petitioner had filed a "proper successive motion . . . under MCR 6.502(G)(2)," the court "would still have been able to exercise [its] discretion to review defendant's arguments." *Miller*, unpub op at 4 n 4. Similarly, in *People v Johnson*, the court found that the petitioner's successive motion under MCR 6.502(G)(2) "was arguably reviewable based on retroactive changes in the law." *Johnson*, unpub op at 2. The Court elaborated on this point, recognizing that MCR 6.502(G)(2) may be satisfied by a claim that relies on "*Miller* and related cases interpreting and *extending* its principles to juvenile offenders

sentenced to de facto life sentences.” *Id.* (emphasis added). This Court should read the rule consistent with prior practice.

E. In the Alternative, If This Court Chooses Not to Follow the Plain Meaning Consistent With Existing Rules and Law, This Court Must Give Broader Meaning to Our State’s Retroactivity Analysis.

In the alternative, if this Court determines that in order to pass through the procedural gateway of 6.502(G)(2), a petitioner must demonstrate the law automatically entitles him to relief, this Court must give the robust meaning to our state retroactivity analysis that is permitted under *Danforth v Minnesota*, 552 US 264, 288; 128 S Ct 1029, 1046; 169 L Ed 2d 859 (2008), and consistent with our state’s rules for postconviction proceedings.

1. State law retroactivity standards may be broader than federal standards.

In *Danforth v. Minnesota*, the United States Supreme Court stated that “the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law.” 552 US at 288. The Court held that States may adopt their own retroactivity standard, which can be more protective than the *Teague* standard; federal law sets “certain minimum requirements that States must meet but may exceed.” *Id.* In *Montgomery v. Louisiana*, the Court elaborated on those minimum requirements, holding that “when a new substantive rule of constitutional law controls the outcome of a case, the Constitution *requires* state collateral review courts to give retroactive effect to that rule.” 136 S Ct at 729 (emphasis added). The Court emphasized that “[u]nder the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution.” *Id.* at 731. In short, while states are not required to adopt *Teague*’s federal retroactivity standard, *Teague* provides an

inflexible floor for when states must provide relief on collateral review of federal constitutional claims. *Danforth*, 552 US at 275.

This Court can and should provide broader relief to convicted prisoners asserting constitutional claims than those they are mandated to provide under federal law, even as a matter of retroactivity law. *Danforth*, 552 US at 275; see also *People v Carp*, 496 Mich 440, 500; 852 NW2d 801, 832 (2014), vacated on other grounds by *Davis v. Michigan*, 136 S Ct 1356; 194 L Ed 2d 339 (2016) (“*Teague* provides a floor . . . with a state nonetheless free to adopt its own broader test . . .”). Federal law “does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed ‘nonretroactive’ under *Teague*.” *Id.* at 282. *Teague* did not “constrain[] the authority of the States to provide remedies for a *broader* range of constitutional violations than are redressable on federal habeas.” *Danforth*, 552 US at 275 (emphasis added); see also *People v Maxson*, 482 Mich. 385, 393; 759 NW2d 817, 822 (2008) (“A state may accord broader effect to a new rule of criminal procedure than federal retroactivity jurisprudence accords.”)

2. The current Michigan retroactivity standard

The Michigan standard for determining when a new constitutional rule will apply retroactively on collateral review was set forth in *People v Hampton* 384 Mich 669; 187 NW2d 404 (1971), and it remains in effect. *People v Barnes*, 502 Mich 265, 273; 917 NW2d 577, 583 (2018) (per curiam). There, the Court adopted a three-factor test, modeled after the-existing federal retroactivity standard, which considers “(1) The purpose of the new rule; (2) The general reliance on the old rule; and (3) The effect [of the new rule] on the administration of justice.” *Id.*, see also *Hampton*, 384 Mich at 674 (same) (quoting *Linkletter v Walker*, 381 US 618; 85 S Ct 1731, 14 L Ed 2d 601(1965), overruled by *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed

2d 334 (1989)). Courts have treated a “change in law” within the meaning of the MCR 6.502(G)(2) as the same concept as a “new rule” within the meaning of the three-factor test. *Barnes*, 502 Mich at 271-72.

Our state’s retroactivity standard has been “attacked as being both difficult to apply and easy to manipulate to reach a desired result.” *People v Sexton*, 458 Mich 43, 75; 580 NW2d 404, 418-419 (1998) (BRICKLEY, J., dissenting), quoting Honorable Blair Moody, Jr., *Retroactive application of law-changing decisions in Michigan*, 28 Wayne L Rev 439, 455 (1982). The second and third factors have been criticized as placing too high an interest in the finality of state conviction, as they almost always weigh strongly in favor of prospective application only. *Retroactive application of law-changing decisions in Michigan*, 28 Wayne L Rev at 455. Where the second factor (reliance on the old rule) counsels against retroactivity, the same tends to be true of the third factor (effect of the new rule if given retroactive effect), because “the greater the reliance by prosecutors of this state on a rule in pursuing justice, the more burdensome it will generally be for the judiciary to undo the administration of that rule.” *Carp*, 496 Mich at 502. But that is true of any new rule, which necessarily has the potential to unsettle convictions previously deemed final. A less imbalanced reading of the test would take account of the “hardship and inequity borne by those who are denied the benefit of the new rule” or of the “basic values of liberty, equality, and the image of justice” to be balanced against the state’s interest in finality. *Retroactive application of law-changing decisions in Michigan*, 28 Wayne L Rev at 455-56 (arguing that while the courts and law enforcement “might be frustrated or offended by the implicit second-guessing of their actions brought about by retroactive application . . . they would not be truly injured . . . in the same sense” as a prisoner). Michigan’s past reliance on old rules “merits little protection when, as is the case where the retroactivity of

constitutional procedural rights is at issue, a criminal defendant's life or liberty is at stake.”

Sexton, 458 Mich at 75 (BRICKLEY, J., dissenting); see also *Federalizing Retroactivity Rules*, 44 Fl S L Rev at 77 (“Finality qua finality is an insufficient reason to deny retroactive relief when there are credible claims of constitutional error resulting in a punishment greater than that authorized by law.”) The United States Supreme Court has also recognized “the *inequity inherent* in the *Linkletter* approach,” which is the reading that our courts still largely give to the test, and clarified that this injustice was a motivating factor leading to its abandonment of that standard thirty years ago. *Danforth*, 552 US at 280 (emphasis added).

3. The restrictive approach under the *Teague* standard is rooted in concerns about comity and federal habeas which have no application in the state law context and thus pose no obstacle to adopting a broader standard in Michigan.

Under the current *Teague* federal retroactivity standard, new constitutional rules apply on direct review and do not have retroactive effect on collateral review with two exceptions: (1) substantive rules of constitutional law and (2) “watershed” procedural rules. 489 US at 311. Substantive rules include “rules forbidding criminal punishment of certain primary conduct as well as rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.” *Montgomery*, 136 S Ct at 728, quoting *Penry v Lynaugh*, 492 US 302, 330; 109 S Ct 2934; 106 L Ed 2d 256 (1989). In *Montgomery*, the United States Supreme Court held that *Miller*’s prohibition of mandatory life without parole sentences for juveniles is a new substantive rule of constitutional law. 136 S Ct at 729. Watershed procedural rules are those that are “central to an accurate determination of innocence or guilt” or which implicate the “components of basic due process.” *Teague*, 489 US at 313. What courts are “actually determining” when assessing whether a new rule will be applied retroactively is “not the

temporal scope of a newly announced right, but whether a violation of the right . . . will entitle a criminal defendant to the relief sought.” *Danforth*, 552 at 271.

Both the text and reasoning of *Teague* “illustrate that the rule was meant to apply only to federal courts considering habeas corpus petitions challenging state-court criminal convictions.” *Danforth*, 552 US at 288. *Teague*’s general rule of nonretroactivity on federal habeas review was justified “in part by reference to comity and respect for the finality of state convictions,” both of which are “unique to *federal* habeas review of state convictions.” *Id.* at 279 (emphasis in original). Because “finality of state convictions is a *state* interest, not a federal one,” states “should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts. *Id.* at 280 (emphasis in original). The “fundamental interest in federalism that allows individual States to” control their own criminal law and procedure within constitutional bounds “is not otherwise limited by any general, undefined federal interest in uniformity.” *Id.* “If anything, considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*.” *Id.* at 279-80 (emphasis added).

The justification for *Danforth* and the need for our state to broaden its retroactivity doctrine are stronger than ever given the “collapse of [federal] habeas corpus as a remedy for even the most glaring constitutional violations” against state prisoners. See Judge Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 Mich L Rev 1219, 1219 (2015) (arguing that “habeas corpus has been transformed over the past two decades from a vital guarantor of liberty into an instrument for ratifying the power of state courts to disregard the protections of the Constitution.”) Given that our state’s collateral review proceedings have effectively “become the only real venue for relief” for our state’s prisoners, “it

is critically important that [we] provide that venue and ‘get it right.’” *Hughes v State*, 901 So2d 837, 863; 30 Fla LW S285 (Fla. 2005) (ANSTEAD, J., dissenting), overruled by *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

II. Our Federal and State Constitutions Bar the Imposition of Mandatory Life Without Parole for 18-Year Olds Such as Manning, under the Eighth Amendment to the U.S. Constitution and Const 1963, art 1, § 16.

A. Eighth Amendment Proportionality Analysis Prevents Teenagers From Being Punished with Mandatory Life Without Parole.

The Eighth Amendment limits states from imposing cruel and unusual punishments on its citizenry. *See* US Const amend VIII; *Robinson v California*, 370 US 660, 666; 82 S Ct 1417; 8 L Ed 2d 758 (1962); *La ex rel Francis v Resweber*, 329 US 459, 463; 67 S Ct 374; 91 L Ed 422 (1947). The Eighth Amendment embodies the founding ideal that, in a civilized society, punishments meted out by the state must be limited by a basic principle of human dignity. *Trop v Dulles*, 356 US 86, 100; 78 S Ct 590; 2 L Ed 2d 630 (1958). Limits on punishment are drawn by the “evolving standards of decency that mark the progress of a maturing society.” *Id.* at 100-101. A punishment need not threaten torture or death to violate the Eighth Amendment’s limitations on cruel and unusual punishment. *See id.* at 102 (holding that punishing a citizen deserter by revoking their citizenship is cruel and unusual punishment).

1. *Miller v Alabama* categorically banned mandatory life without parole for teenagers.

Miller v Alabama banned mandatory life without parole punishment for youths, as the punishment violated the Eighth Amendment considering the fundamental characteristics of young people and the inability, in a *mandatory* life without parole sentence, to consider a young

person's individual characteristics, life circumstances, and capacity to rehabilitate. *See* 567 US 460, 489; 132 S Ct 2455; 183 L Ed 2d 407 (2012).

Under the Eighth Amendment, the Court compares the culpability of the defendant against the severity of the punishment, which determines whether the punishment is cruel and unusual. If the punishment is too severe when considering characteristics relating to the defendant's culpability, the punishment does not serve a valid purpose, and is offensive to human dignity. *See e.g. Miller*, 567 US at 477, 79 (a punishment that "precludes consideration of . . . chronological age and its hallmark features" creates "too great a risk of disproportionate punishment"); *Graham v Florida* 560 US 48, 71-74; 130 S Ct 2011; 176 L Ed 2d 825 (2010) (retributive, deterrent, incapacitative, and rehabilitative goals of punishment are not fulfilled when sentencing youths who have not committed homicides to life without parole); *Roper v Simmons*, 543 US 551, 571-72; 125 S Ct 1183; 161 L Ed 2d 1 (2005) (finding neither retribution nor deterrence justifies sentencing teenagers to death as susceptibility to deterrence and "blameworthiness is diminished. . . by reason of youth and immaturity").

Necessary to evaluating proportionality of punishment under the Eighth Amendment is the often the ability to consider the individual defendant and his or her circumstances. For this reason, state statutes that require the *mandatory* imposition of the most severe legal punishments have been deemed categorically unconstitutional. *See, e.g. Miller*, 567 US at 474, 479; *Lockett v Ohio*, 438 US 586; 98 S Ct 2954; 57 L Ed 2d 973 (1978); *Woodson v North Carolina*, 428 US 280; 96 S Ct 2978; 49 L Ed 2d 944 (1976) (plurality opinion). For example, where the statute mandated a death sentence, circumstances surrounding the defendant's particular character, history, and the particular circumstances of the defendant's charged offense were not considered,

when in fact, “the fundamental respect for humanity underlying the Eighth Amendment . . . require[d] [it].” *Woodson*, 428 US at 304.

Following this vein, in *Graham v Florida*, the Court categorically barred life without parole sentences imposed on youths who did not commit homicide. 560 US at 82. *Graham* notes that life without parole is akin to the death penalty and “alters the [defendant’s] life. . . irrevocab[ly]. It deprives the [defendant] of the most basic liberties without giving hope of restoration . . .” *Id.* at 69-70. A youth sentenced to life without parole is condemned to die in prison. *See id.* at 53-58. Further, *Graham* noted that teenagers’ general immaturity, underdeveloped sense of responsibility, and malleable character prevented a life without parole sentence from fulfilling any rehabilitative, retributive, or deterrent purpose. *See id.* at 68-74. Imposing a severe punishment on a less culpable class—teenage defendants who did not commit murder—rendered the life without parole scheme in *Graham* disproportionate punishment, and unconstitutional. *See id.* at 84.

Miller applied *Graham*’s analysis and found that a *mandatory* life without parole sentencing regime for teenagers convicted of *any* crime did not fulfil retributive, deterrent, or rehabilitative purposes, and was therefore disproportionate and unconstitutional. *See id.* at 472-73. *Miller* affirms that the Eighth Amendment scrutinizes life without parole sentences, *id.* at 475, and, referencing *Lockett* and *Woodson*, *Miller* acknowledges the *mandatory* life without parole sentence prevents any consideration of the individual defendant’s characteristics and raises concerns about the constitutional proportionality of the sentence. *See id.* at 475-77.

As in *Graham*, *Miller* also examines characteristics of teenagers relevant to the proportionality of their punishment. Social science shows that teenagers do not have fully developed brains, leading to immaturity and irresponsibility, a vulnerability to negative

influences and outside pressures, and a potential for further development they age. *See id.* at 471, 472 n.5 (referencing Brief for The American Psychological Association et al. as Amici Curiae Supporting Petitioner, *Miller v Alabama*, 567 US 460 (2012) (No. 10-9646).). The Court in *Miller* understands punishing teenagers who lack appreciation of the severity of their crime does not adequately fulfil a retributive purpose for punishment. *See id.* at 472. A vulnerability to negative influence and outside pressure renders ineffective life without parole’s deterrent purpose. *Id.* Acknowledging that teenagers’ brains are still developing would encourage a proportional punishment with an eye toward rehabilitation. However, life without parole “forfeits altogether the rehabilitative ideal. . . [life without parole is] at odds with a child’s capacity for change.” *Id.* at 473 (quoting *Graham*, 560 US at 74.) (internal quotations omitted). Therefore, the Court required sentencing courts to consider these “distinctive attributes of youth” before imposing severe life without parole sentences. *Id.* at 472.

2. The Eighth Amendment also bans mandatory life without parole for 18-year-olds as disproportionately cruel and unusual.

Although *Miller*’s explicit holding categorically prohibits a mandatory life without parole sentencing scheme for teenagers under 18, it does not necessarily support the negative inference endorsing mandatory life without parole sentencing schemes for 18-year-olds. *See Cruz v United States*, No. 11-CV-787 (JCH), 2018 US Dist LEXIS 52924, *38 (D Conn Mar 29, 2018).

First, *mandatory* life without parole impermissibly prohibits a sentencer from considering mitigating factors related to the defendant’s culpability, contravening the Eighth Amendment. *See Miller*, 567 US at 474, (“[removing youth as a mitigating factor] contravenes *Graham*’s (and also *Roper*’s) foundational principle: that imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”) Mandatory punishments mean necessarily that no mitigating factors are considered. When imposing a sentence

“analogous to capital punishment,” this lack of consideration is impermissible and unconstitutional. *See id.* at 475 (quoting *Graham*, 560 US at 89.); *Lockett*, 438 US at 586; *Woodson*, 428 US at 280.

Second, the age at which the Eighth Amendment has examined punishments has changed over time with “evolving standards of decency” and is not static. For example, in *Thompson*, the Court first drew a categorical line at 16, prohibiting anyone younger to be sentenced to the death penalty in 1988. *See Thompson v Oklahoma*, 487 US 815, 833-38; 108 S Ct 2687; 101 L Ed 2d 702 (1988). Fifteen years later in 2005, the line was moved, based in part on an updated understanding of teenage social science and neuroscience, to ban the death penalty for those under 18. *See Roper*, 543 US at 578. In 2018, the American Bar Association argued that jurisdictions should move the line to 21, now with an updated understanding that the science considered in *Roper*—the lack of frontal lobe development, leading to a lack of maturity and delinquent conduct—applies as readily to 18 to 21-year-olds as it does to those under 18. Am. Bar Ass’n, Resolution 111, at 6-7 (adopted Feb. 5, 2018).

The *Miller* court drew a categorical line at 18 because *Roper* and *Graham* drew categorical lines at 18, without any scientific justification for a difference between 17 and 18-year-old defendants. *See Roper*, 543 US at 578; *Graham*, 560 US at 82; Brief for The American Psychological Association *supra* at 6 n.3. To the contrary, social and cognitive science reveal that the “distinctive attributes of youth” defendants in *Miller* are the same in defendants under 18 as well as 18-year-olds. The modern understanding of adolescent development is fully explicated in the Brief of Amicus Curiae Juvenile Law Center and American Civil Liberties Union of Michigan; *see also* Defendant-Appellant’s Supplemental Brief at 26-28, *People v Manning*, __ Mich __ (No. 160034) (describing studies produced around and after *Miller*

reinforce that young people are not fully developed at 18, and still exhibit the same immature and impulsive behaviors seen in younger teens).

In prohibiting a “scheme [that] poses too great a risk of disproportionate punishment,” requiring sentencers to “take into account how children are different,” the Court drew a line at teenagers below 18. *See Miller*, 567 US at 479-80. Mandatory life without parole punishments do not fulfil retributive, deterrent, or rehabilitative purposes for 18-year-olds, and are unconstitutionally disproportional in the same way mandatory life without parole punishments are disproportional when inflicted on 17-year-olds.

B. Michigan’s Unique Constitutional Text and Application of the *Bullock* Factors Bars Mandatory Life Without Parole Sentences for 18 Year-Olds.

1. Michigan’s Constitutional protections are broader than the Eighth Amendment’s protections as a matter of text, history and stare decisis.

The Michigan Constitution prohibits cruel *or* unusual punishments from being inflicted on those within the criminal justice system, in contrast to the Eighth Amendment prohibiting cruel *and* unusual punishments. Const 1963, art 1, § 16 (emphasis added); US Const amend VIII (emphasis added). This textual difference means that the Michigan Constitution provides additional protection for those within Michigan’s criminal justice system. *See People v Bullock*, 440 Mich 15, 31, 35; 485 NW2d 866 (1992).

Defining the scope of Michigan’s protection against cruel *or* unusual punishment is a principle of proportionality, first explored in Michigan in 1888, where this Court determined that a fifty-year prison sentence was too excessive to be imposed on a twenty-three year-old defendant accused of raping a ten year-old girl. *See People v Lorentzen*, 387 Mich 167, 174-75; 194 NW2d 827 (1972) (referencing *People v Murray*, 72 Mich 10, 11; 40 NW 29 (1888)). One hundred and thirty-two years of jurisprudence on the issue of whether a punishment is

proportional to the crime charged led to the four-factor test used in *Bullock*, which is “firmly and sufficiently rooted in Const 1963, art 1, § 16.” *Bullock*, 440 Mich at 34. The Prosecuting Attorneys Association brief asks this Court to ignore the long and deep history of this constitutional provision and interpretation, instead asking this Court to ignore the actual language of our constitution in favor of its own results-oriented interpretation. Brief of the Prosecuting Attorneys Association of Michigan as Amicus Curiae at 10-19.

The *Bullock* factors derive from the Const 1963, art 1, § 16 proportionality inquiry, asking respectively: Whether the penalty is tailored or tailorable to the offender’s personal culpability, whether the punishment is inconsistent with the way the Michigan legislature views the offense or offender, whether the penalty comports with evolving standards of decency by looking at punishments outside the jurisdiction, and whether the penalty is effective in either rehabilitating, deterring, or holding the offender accountable. *See Bullock*, 440 Mich at 37-42. Under this analysis, this Court created a categorical rule banning mandatory sentences for first-time drug offenses as cruel *or* unusual under the Michigan Constitution. *See Bullock*, 440 Mich at 42-43; *Lorentzen*, 387 Mich at 181.

2. Sentencing 18 year-olds to mandatory life without parole is not tailored or tailorable to the offense punished and is disproportionate.

The first factor in the *Bullock* analysis looks at the gravity of the offense compared to the severity of the penalty, asking whether the penalty is tailored or tailorable to the offender’s personal culpability.

Our constitutional case law has given particular scrutiny to extreme and mandatory sentences that do not allow tailoring to the individual defendant. In *Lorentzen* and *Bullock*, the Court rejected *mandatory* sentencing schemes. *See Lorentzen*, 387 Mich at 181; *Bullock*, 440 Mich at 41. *Bullock*, 440 Mich at 37 n.22 (holding the sentence was disproportionate when it was

imposed on defendants with “markedly different backgrounds” without regard for either’s particular record or individual circumstances). Even a trial court’s sentence of fifty to eighty years is proportional when they are able to consider characteristics of the defendant and underlying offense and given discretion in sentencing. *See People v Burton*, 396 Mich 238, 243 n.10; 240 NW2d 239 (1976) (distinguishing the proportional fifty to eighty year sentence from a disproportional *mandatory* minimum sentence of twenty years). When unable to consider these factors, when a sentence is under a mandatory sentencing scheme, this Court is more likely to find the punishment disproportionate, and therefore barred as cruel or unusual.

This Court has also given particular scrutiny to mandatory sentences imposed without regard for age, or where the offender was youthful. “Youth” has been considered among the relevant character traits when sentences are evaluated for disproportionality. *See Lorentzen*, 387 Mich at 170, 176 (noting that defendant was twenty-three and holding that the sentence was disproportionate when it could be equally applicable to “a first offender high school student” and a “wholesaling racketeer” and there is no difference in sentencing for different quantities of the drug).

The imposition of mandatory life without parole robs the trial court of its ability to determine whether life without parole is proportionate to Manning’s offense. Robin Rick Manning was found guilty of first-degree murder, carrying a weapon with unlawful intent, and felony-firearm for an offense he committed as a teenager. *People v Manning*, 434 Mich 1, 7; 450 NW2d 534 (1990). For the first-degree murder charge, trial evidence did not indicate Manning fired the fatal shot, but he was convicted under a theory of aiding and abetting the person who fired. *Id.* at 5-7. Mandatory life without parole renders meaningless factors like Manning’s age, his level of involvement in the offense, his history of previous offenses, and other considerations

that mitigate his culpability. Additionally, under a mandatory life without parole sentencing regime, a repeat offender and a first-time offender are subject to the same penalty. This amounts to cruel or unusual punishment, prohibited under Const 1963, art 1, § 16. *See Lorentzen*, 387 Mich at 176; *Bullock*, 440 Mich at 37 n.22.

3. Sentencing 18 year-olds to mandatory life without parole is disproportionate compared to other Michigan statutes' treatment of 18 year-olds.

The second factor to determine whether the penalty at issue is disproportionate to the crime, and therefore cruel or unusual, involves comparing whether the penalty is inconsistent with the way the Michigan legislature views the offense or offender. *See Lorentzen*, 387 Mich at 176-79; *Bullock*, 440 Mich at 40. The Court in both *Lorentzen* and *Bullock* examined mandatory sentencing schemes for drug-related crimes. 387 Mich at 171; 440 Mich at 22.

As the sentence before this Court is a mandatory life without parole penalty inflicted upon 18-year-olds, this Court should look to the way the Michigan legislature views 18-year-olds. A key provision of our criminal law is the Holmes Youthful Trainee Act (“HYTA”), adopted in 1967 by the Michigan legislature to create an alternative sentencing regime for youthful offenders where a judgment of conviction is not entered and conditions of employment or monitoring are imposed. *See* MCL § 762.11(1). Originally open to teenagers under 20 years old, the HYTA age limit was broadened in 1993 to 21, and again in 2015 to protect youths under 24 years old. *See* H.B. No. 4587, 87th Leg., Reg. Sess. (Mi. 1993); H.B. No. 4069, 98th Leg., Reg. Sess. (Mi. 2015). In establish HYTA for youthful offenders, the Michigan legislature indicated 18-year-olds and other young adults are “unreflective and immature;” as a result, they are less culpable than offenders over twenty, and should not be subject to the stigma of a criminal record. *See People v Perkins*, 107 Mich App 440, 444; 309 NW2d 634 (1981).

Although those under 17 (at the time) were under juvenile court’s jurisdiction, the legislature “apparently wanted to provide an alternative procedure for teenagers over 17.” *Id.*

HYTA also reflects the Michigan legislature’s belief in the greater potential for 18-year-olds’ rehabilitation, as compared to older offenders. For a qualifying 18-year-old, the maximum term of imprisonment that can be imposed is two years. *See* MCL § 762.13(1). While imprisoned, youthful trainees are reviewed at least annually to evaluate whether the trainee can be recommended for early release. Mich. Dep’t of Corrections, Policy Directive No. 03.02.120, Youthful Trainees 2 (Sep. 1, 2018), https://www.michigan.gov/documents/corrections/03_02_120631433_7.pdf.

Other aspects of our criminal state law show that our legislature has not consistently demarcated 17 as the end of youth, but instead has drawn different lines based on an understanding of adolescence at the time and placed an emphasis on an individualized assessment. Although 18-years is considered the age of majority in Michigan, for years, Michigan’s juvenile code did not draw the same line. *See* MCL § 712A.1(1)(i) (2018); 2019 Mich. Pub. Acts 108 (October 31, 2019) (only in 2019 did Michigan establish 18 as the age of adult criminal culpability as part of “Raise the Age” legislation, which does not take effect until 2021). Even with “Raise the Age,” enacted, the Michigan legislature exempts certain 18-year-olds from adult criminal culpability. At the other extreme, Michigan has no minority age for criminal liability, and Michigan permits, on a case-by-case basis, those as young as fourteen to be tried in adult court for equivalent felony offenses, even though fourteen-year-olds are below the age of majority, and cannot vote, have a driver’s license, or drink. *Compare e.g.* US Const amend XXVI; MCL §§ 257.303(1)(a); 436.1701(1); *with* 712A.3(1); 712A.4(1) (2018). The Michigan legislature views the line between adolescence and adulthood as context-specific and,

often, individualized; and has based that decision on the current understanding of adolescent decision making and development.

Our state also takes a paternalistic view of 18-year-olds in other aspect of juvenile and criminal law and policy. Although juvenile court has “exclusive original jurisdiction” over individuals under (for now) 17, jurisdiction may be continued until the individual is 20 or 21. MCL §§ 712A.2(a); 712A.2a(1), (5). Accordingly, the definition of the term, “child,” “minor,” or “youth,” used to refer to the juvenile court’s authority over a sentenced individual, is expanded to reference those between 18 and 21. MCL § 712A.2a(6). A youth between 18 and 21 may also receive “extended guardianship assistance” in which case the juvenile court retains authority over the youth. MCL § 400.665; 712A.2a(4). Further, the Young Adult Voluntary Foster Care Act provides that a youth who is at least 18 but under 21 can still receive “extended foster care services” if the court determines that continuing in foster care is in the “youth’s best interests” and they meet a pre-employment requirement MCL §§ 400.643; 400.657; 712A.2a(2). During their incarceration, the Michigan Department of Corrections (“MDOC”) provides special education instruction or related transition services to eligible youths under 22. These incarcerated youths under 22 receive the highest priority for placement in academic classes, receiving priority over incarcerated people who are “fast track GED” students and people with life or long indeterminate sentences. Mich Dep’t of Corrections, Policy Directive No 05.02.112, Education Programs for Prisoners 4 (Mar. 1, 2016),

https://www.michigan.gov/documents/corrections/05_02_112_515776_7.pdf.

This belief in an 18-year-old’s underdeveloped maturity and their ability to grow and rehabilitate is also borne out in Michigan’s parole guidelines, with “age category” as part of parole review. Mich. Dep’t of Corrections, Policy Directive No. 06.05.100, Parole Guidelines 3

(Nov. 1, 2008), https://www.michigan.gov/documents/corrections/06_05_100_330065_7.pdf. A higher point value in the “age category” contributing to the overall score reflects a higher probability of parole. *See id.* at 2. For those serving “medium” and “long” terms, being under 22 and 23 years old at the time of your parole review give you negative point values, indicating 18-year-olds who are under 22 and 23 years of age are less likely to be paroled. *See id.* at 10. However, as one ages past 30, the parole point value becomes a greater positive number. *Id.* The parole scheme holds 18-year-old accountable for their “unreflective and immature” acts while acknowledging an increased capacity to gain skills of reflection and maturity, making them more eligible for parole as they grow older.

Imposing mandatory life without parole on 18-year-olds is inconsistent with both the Michigan legislature’s and MDOC’s prevailing view of 18-year-olds as less culpable and more open to rehabilitation. *Miller* barred mandatory life without parole sentencing schemes for 17-year-olds as less culpable teen offenders, as they “preclude consideration of [their] chronological age and [their] hallmark features. . . immaturity, impetuosity, and failure to appreciate risks and consequences.” *Miller*, 567 US at 477. Following *Miller*, Michigan’s legislature required a hearing to evaluate those “hallmark features” as mitigating circumstances that determine whether life without parole would be imposed on a teenage defendant. *See* MCL § 769.25(6)-(7). However, Manning was 18 and 3 months old at the time of his offense. Defendant-Appellant’s Supplemental Brief at 5. So defendants like Manning are robbed of this hearing by dint of being born 3 months too early, despite the Michigan legislature recognizing these same “hallmark features” in 18-year-olds in the HYTA sentencing regime, the jurisdiction of juvenile courts, and the imposition of parole. Mandatory life without parole schemes additionally “forswear altogether the rehabilitative ideal” for both 17-year-olds and 18-year-olds alike, by mandating

they spend their whole lives incarcerated without a chance to demonstrate rehabilitation and re-enter society. *Miller*, 567 US at 473. Mandatory life without parole sentencing schemes contradict the Michigan legislature’s understanding of 18-year-olds as less culpable, and more open to rehabilitation. Mandatory life without parole schemes are therefore disproportionate and barred as cruel or unusual punishment under the Michigan Constitution.

4. Different jurisdictions’ sentencing regimes applying to 18 year-old offenders similarly urges barring mandatory life without parole under the Michigan Constitution.

The third factor to determine whether the penalty at issue is disproportionate to the crime, and therefore cruel or unusual, involves interrogating whether the penalty at issue is also imposed in other jurisdictions for the same offender or offense. *See Lorentzen*, 387 Mich at 178-79. In conducting this analysis in *Lorentzen*, this Court looked to “clearly discernible trends” to evaluate whether a mandatory minimum sentence for a first-time drug offense was appropriate. *Id.* The mere existence of a comparable penalty does not itself mean the penalty at issue is neither cruel nor unusual. *See id.*; *Bullock* 440 Mich at 40.

Since *Montgomery* was decided in 2016, retroactively applying the individualized sentencing mandate in *Miller* against youths already sentenced to life without parole, the number of individuals serving life without parole sentences for crimes committed as children was reduced by nearly 75%. *See Montgomery v Louisiana*, 136 S Ct 718; 193 L Ed 2d 599 (2016); The Campaign for the Fair Sentencing of Youth, *Montgomery v. Louisiana Anniversary*, (Jan. 25, 2020), available at <http://www.fairsentencingofyouth.org/wp-content/uploads/Montgomery-Anniversary-1.24.pdf>. While Michigan prosecutors have aggressively continued to seek life without parole sentences on children after *Miller*, even under a non-mandatory regime, the national landscape shows a clear trend of sentencing to less than life without parole. As of

January 2020, fewer than 100 life without parole prisoners incarcerated as youths were resentenced to life without parole nationally. *See* The Campaign for the Fair Sentencing of Youth, *supra*. Michigan prosecutors have recommended nearly 70% of people sentenced to life without parole as juveniles for the same life sentence.⁵ Although Michigan’s resentencing process has been slow, with more than half of the cases waiting to go before a judge, at least some people have been resentenced to life without parole for crimes committed as children.⁶

“Discernible trends” show that other jurisdictions see 18-year olds as more immature and less culpable than adults; and that this trend is only increasing. For example, similar to HYTA, in Alabama, Florida, Hawaii, and Virginia, certain offenders under the age of twenty-one are eligible for an alternative sentencing scheme.⁷ These schemes allow the judge discretion when sentencing 18-year-olds, in some cases choosing from probation, enrollment in community programs, and limited sentences of incarceration. *See* Juvenile Sentencing Project, *Consideration of Youth for Young Adults*, Quinnipiac U Sch of L (Jan. 2020),

⁵ Allie Gross, *More Than Half of Michigan Juvenile Lifers Still Waiting for Resentencing*, Detroit Free Press, (Aug. 16, 2019, 10:15PM), <https://www.freep.com/in-depth/news/local/michigan/2019/08/15/juvenile-lifers-michigan/1370127001/>.

⁶ *See, e.g.*, Allie Gross, *More Than Half of Michigan Juvenile Lifers Still Waiting for Resentencing*, Detroit Free Press, (Aug. 16, 2019, 10:15PM), <https://www.freep.com/in-depth/news/local/michigan/2019/08/15/juvenile-lifers-michigan/1370127001/>; *People v Skinner*, 312 Mich App 15, 21-22; 877 NW2d 482 (2015), *People v Hyatt*, 316 Mich App 368, 378; 891 NW2d 549 (2016); *People v Masalmani*, 943 NW2d 359 (mem) (No. 154773, May 29, 2020)); Alicia Smith, *Metro Detroit Teen Gets Life Without Parole for Stabbing her Disabled Mom* 120 Times, *Killing her*, WXYZ Detroit, (Apr. 5, 2018, 5:18PM), <https://www.wxyz.com/news/clinton-township-teen-convicted-of-fatally-stabbing-her-mother-120-times-gets-life-without-parole>.

⁷ *See, e.g.*, Ala. Code §§ 15-19-1, 26-1-1 (2020) (any defendant under 19, subject to court determination); Fla. Stat. § 958.04 (2020) (non-capital or life defendants between 18 and 21 who have not had “youthful offender” status before); Haw. Rev. Stat. § 706-667 (2020) (non-homicide defendants under 22 who have not been convicted of felony offenses before); Va. Code § 19.2-311 (2020) (for certain crimes, first-time convicted defendants under 21).

https://juvilenesentencingproject.org/wp-content/uploads/model_reforms_consideration_of_youth_for_young_adults.pdf.

As of 2018, all states also allow for juvenile court jurisdiction to be extended to 18-years old and beyond. Forty-five states extend juvenile court jurisdiction until age 21, as Michigan does. Office of Juvenile Justice and Delinquency Prevention, *Extended Age of Juvenile Court Jurisdiction*, 2018, https://www.ojjdp.gov/ojstatbb/structure_process/qa04106.asp (last accessed Apr. 26, 2020). Vermont passed a law in 2018 to place certain 18-year-olds in the juvenile court’s jurisdiction in 2020, expanding to nineteen year-olds in 2022. *See* S. 234, 2018 Leg., Gen. Assemb. (Vt. 2018). The Vermont legislature was motivated by the greater likelihood of success in putting 18-year-olds through “combined juvenile and adult system” rather than “the adult” system in rehabilitating criminal behavior.⁸ California, Connecticut, Massachusetts, and Illinois have proposed similar bills. *See* Sen. Nancy Skinner, *Sen. Nancy Skinner Announces Bill to Raise the Age to be Tried as an Adult* (Jan. 28, 2020), <https://sd09.senate.ca.gov/news/20200128-sen-nancy-skinner-announces-bill-raise-age-be-tried-adult>; Juvenile Sentencing Project, *supra*.

Federal statutes treat 18-year-olds as in need of education and protection, even when within the criminal system. For incarcerated 18-year-olds, federal programs like IDEA provide grants to states to provide special education to youth under twenty-one years old. *See* 20 USC §§ 1411; 1412. This includes 18-year-olds convicted in adult prisons. *See generally* 20 USC § 1412(a)(1)(A), (a)(11)(c). Another federal program, the Neglected and Delinquent State Agency and Local Educational Agency Program (“Title I Part D”) provides educational grants to youth

⁸ *See* David Jordan, *Vermont rolls out a new idea to rehabilitate young offenders*, Christian Science Monitor (July 6, 2018), <https://www.csmonitor.com/USA/Justice/2018/0706/Vermont-rolls-out-a-new-idea-to-rehabilitate-young-offenders>.

under twenty-one years as well, including 18-year-olds in juvenile and adult facilities. *See* Elementary and Secondary Education Act, Pub. L. No. 107-110 § 1416, 115 Stat. 1425, 1585 (2002) (amended 2015). Title I Part D specifically includes incarcerated youths up to twenty-one in order to ensure those youths can make “a successful transition from institutionalization to further schooling or employment” once they are released from state institutions. *See* Elementary and Secondary Education Act, Pub. L. No. 107-110 § 1401, 115 Stat. 1425, 1580 (2002) (amended 2015). In the 2016-17 school year, over 18,000 incarcerated students aged 19 to 21 took advantage of Title I Part D’s educational services mandate. *See generally*, National Technical Assistance Center for the Education of Neglected or Delinquent Children and Youth, Fast Facts, <https://neglected-delinquent.ed.gov/fast-facts/united-states> (last visited Apr. 22, 2020). Programs like these indicate a national belief in capacity of 18-year-olds—even those serving in adult prisons—for growth, rehabilitation and re-entry into society.

Mandatory life without parole sentences for 18 year olds contravene these national trends that see 18-year-olds with a great potential for rehabilitation. And as mandatory life without parole schemes “forswear altogether the rehabilitative ideal,” they are therefore cruel or unusual under the third *Bullock* factor.

5. Sentencing 18 year-olds to mandatory life without parole is disproportionate as it does not fulfil a rehabilitative, deterrent, or retributive purpose.

The fourth *Bullock* factor analysis concludes that if the penalty imposed does not fulfil the purposes of sentencing, that is, if it does not rehabilitate, deter, or hold the offender accountable, then it is disproportionate and cruel or unusual under Const 1963, art 1, § 16. *See Lorentzen*, 387 Mich at 179-81. The “modern view” of sentencing is that the sentence should balance society’s immediate need for protection—thereby fulfilling deterrent and incapacitate purposes—against maximizing the offender’s rehabilitative potential. *See People v McFarlin*,

389 Mich 557, 574; 208 NW2d 504 (1973). Michigan has recognized that protecting society through effective rehabilitation, rather than vengeance, is the “ultimate goal” of sentencing in Michigan. *See People v Schultz*, 435 Mich 517, 532; 460 NW2d 505 (1990); *Lorentzen*, 387 Mich at 180. To achieve this sentencing goal, “the sentence should be tailored to the particular circumstances of the case and the offender,” as a “judge needs complete information to set a proper individualized sentence.” *McFarlin*, 389 Mich at 574. The government agrees that sentencing 18 year olds to life without parole fails this prong and counsels toward a finding of constitutional disproportionality. Plaintiff-Appellee’s Supplemental Brief at 41-42 (“A sentence of mandatory life without parole admittedly does not serve the penological goal of rehabilitation . . .”).

Michigan incorporated an individualized sentencing mandate after *Miller* was decided in order to decide whether life without parole was appropriate for a given case. *See* MCL § 769.25. Michigan *Miller* hearings must consider the “mitigating qualities of youth,” among them, the transient “immaturity, irresponsibility, impetuosity, and recklessness,” as well as “particularly relevant” factors like the offender’s family background or emotional disturbance. *See* MCL § 769.25(6); *Miller*, 567 US at 476. At *Miller* hearings in Michigan, courts allow the additional presentation of evidence for these factors and have heard recognized experts testifying generally on cognitive neuroscience and on the offender’s present mental state to contextualize whether life without parole is appropriate for a given case, to “set a proper individualized sentence.” *See* MCL § 769.25(7); *see generally People v Hyatt*, No 325741, 2018 Mich App LEXIS 3608, *3-*6 (Ct App Dec 4, 2018) (discussing what the trial court reviewed in the *Miller* hearing) *remanded from People v Skinner*, 502 Mich 89; 917 NW2d 292 (2018).

Miller hearings are available to those who are convicted of first-degree murder, subject to a life without parole sentence and whose offense occurred when they were under 18-years-old. See MCL §§ 769.25, 769.25a. However, the rationale that animates the need for *Miller* hearings also animates the need for similar hearings for 18-year-olds who face life without parole for felony murder or premeditated murder. See MCL 750.316. Mandatory minimum life without parole sentences for 18-year-olds make it impossible to arrive at a “tailored sentence” that achieves Michigan’s sentencing goals. Nothing changes in the year between 17 and 18 that renders the need for the individualized review in *McFarlin*, achieving the goals of sentencing in *Lorentzen*, moot. Setting aside whether 17-year-olds and 18-year-olds vary enough developmentally to warrant different treatment, (and they do *not*) that should not overwhelm “the equally important belief that only the rarest individual is wholly bereft of the capacity for redemption.” See *Bullock*, 440 Mich at 39 n.5 (quoting *Schultz*, 435 Mich at 533-534 (1990)). Without an opportunity for individualized sentencing and the possibility to earn review by the parole board, 18-year-olds are subjected to cruel or unusual punishment under Const 1963, art 1, § 16.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated in this brief, as well as the supplemental brief of Mr. Manning and the briefs of other amici for Mr. Manning, Amici requests that this Court grant leave to appeal, reverse the decision below, and remand for further proceedings.

Respectfully submitted,

s/ Kimberly A. Thomas

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CERTIFICATE OF SERVICE

The *Amicus Curiae* of Criminal Defense Attorneys of Michigan For Defendant-Appellant Robin Rick Manning was filed electronically using the Court's TrueFiling system on July 14, 2020, which send copies by e-mail to all counsel of records.

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