STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan,

Plaintiff-Appellee,

-vs-

ANDREW CZARNECKI,

Defendant-Appellant.

Supreme Court No. 166654
Court of Appeals: No. 348732
Circuit Court No. 19-004021-FC

Brief of Amici Curiae of Darryl J. Smith in Support of ANDREW M. CZARNECKI

Darryl J. Smith #179933
in pro per
Carson City Correctional Facility
10274 Boyer Rd.
Carson City, MI

Dated: _____, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitution

Appendix

A-Sentencing for Murder, Br J Criminol (1012) 52(1): 141-158 Barry Mitchell, Professor of Criminal Law and Criminal Justice, Coventry University Law School; aa9112@coventry.ac.uk.

B- Life Without Parole As A Conflicted Punishment, 48 Wake Forest L. Rev. 1101, Craig S. Lerner, Professor of Law and Associate Dean for Academic Affairs, George Mason University School of Law.

STATEMENT OF QUESTIONS PRESENTED

1. DOES THE MICHIGAN CONSTITUTION'S PROHIBITION AGAINST "CRUEL OR UNSUAL PUNISHMENT" BAR IMPOSING MANDATORY LIFE IMPROSONMENT WITHOUT THE POSSIBILITY OF PAROLE (LWOP) ON INDIVIDUALS 21 YEARS OF AGE?

    a) WHETHER MCL 750.316 IS VOID, IN PART, BECAUSE IT IS REPUGNANT TO THE MICHIGAN CONSTITUTION ART. 1 §16, WHERE PROPORTIONALITY IS REQUIRED TO BE APPLIED TO BOTH THE CRIME AND THE DEFENDANT, PEOPLE V. HALL AND 750.316'S SENTENCING SCHEME ONLY PROPORTIONS TO THE CRIME, AND NOT THE DEFENDANT;

    b) WHETHER A SENTENCE THAT IS NOT PROPORTIONED TO BOTH THE CRIME AND THE DEFENDANT IS UNCONSTITUTIONAL, AND A STATUTE THAT CONTAINS A MANDATORY LIFE SENTENCING SCHEME THAT DOES NOT ALLOW A JUDGE TO PROPORTION A SENTENCE TO THE DEFENDANT, MAKES THE STATUTE REPUGNANT TO THE BOTH CONSTITUTIONS, AND VOID;

    c) WHETHER APPLYING A VOID STATUTE TO SENTENCE DEFENDANT-APPELLANT TO A LIFETIME OF INCARCERATION, DEEMING HIM PERMANENTLY INCORRIGIBLE WITHOUT CONSIDERING THE SCIENTIFIC DATA, AS IT APPLIED TO HIM, IS CRUEL "OR" UNUSUAL UNDER THE MICHIGAN CONSTITUTION OF 1963, ART. 1 §16, AND 8TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

INTEREST AND IDENITY OF AMICI CURIAE

Amici is a similarly situated 21-year old. Mr. Smith's co-defendant Beden (D.O.B. 5/28/57) was the co-owner and partner of the victim in a Market in the City of Detroit. Beden and the victim experienced business disagreements and after several physical altercations Beden feared returning

to the Market, and wanted out of the partnership. Beden told Mr. Smith that he owned a business and that he wanted items from the store. After visiting the store, the day before, Mr. Smith accompanied by Hodge went to the market, a struggle took place between Mr. Smith and the victim, Hodge shot the victim, he and Mr. Smith left the market. Hodge was charged, but released at preliminary examination.

Mr. Smith was charged with felony murder as an aider and abettor, and convicted of first degree murder in 1985, at the age of 21 (born April 17, 1963), He was sentenced to a mandatory Life sentence pursuant to MCL 750.316, A-Prefix, by jury trial. At sentencing, Judge Leonard Townsend acknowledging his lack of discretion and reluctantly sentenced Mr. Smith to a *mandatory life sentence* pursuant to MCL 750.316. (Sent. Trans, 5 pages)[1]

---

[1] The trial Judge Leonard Townsend, at sentencing, expressed his lack of authority to proportion the sentence to Mr. Smith's level of culpability, when he stated:

"***THE COURT***: I agree with you and I told Mr. Smith and I told the other man repeatedly over and over that this would have been an armed robbery. I told him that and I don't particularly like to sentence in this case because I know that Mr. Smith and the other man didn't do the shooting. So all I can do is what I did and I really don't enjoy sentencing people especially on something like this when I know that they aren't the shooters. They didn't listen to your advice. Both of these gentlemen decided that they would do what they wanted to do and they took it out of my hands and I have no discretion.

MR. GREENWOOD (Defense Attorney): There is no negative factor other than this conviction and there's a lot of positive things.

THE COURT: Would you like to say anything Mr. Smith?

THE DEFENDANT: No sir.

THE COURT: You told him, and Mr. Evelyn advised his client that this would have been an armed robbery case and that was it. So the sentence is life and that's all I can give him. The sentence is life. You have a right to appeal. If you wish to appeal, you must notify the Court within fifty-six days and if you have no funds for an attorney, the Court will appoint one at no cost to you.

I'm very sorry about this, but all you can do is give him your advice and thats all you can do. ***Now the killer didn't even come to court. He gets his case dismissed."*** (Exhibit-A, Sent. Trans. p.3-4)

INTRODUCTION AND SUMMARY OF ARGUMENT

The focus has been on whether to move the age from 18 to 25, Amici says Yes! Because MCL 750.316 is void, in part, and therefore it doesn't matter what the age is, because it is repugnant to the Michigan Constitution art. 1 §16, where proportionality is required to be applied to [b]oth the crime and the defendant. *People v. Hall*, 396 Mich 650 and 750.316's sentencing scheme only proportions to the crime, and not the defendant. A sentence that is not proportioned to both the crime and the defendant is unconstitutional, and a statute that contains a mandatory life sentencing scheme that does not allow a judge to proportion a sentence to the defendant, makes the statute repugnant to the both constitutions, and void. Applying a void statute to sentence defendant-appellant to a lifetime of incarceration, deeming him permanently incorrigible without considering the scientific data, as it applied to him, is cruel "or" unusual under the Michigan Constitution of 1963, art. 1 §16, and 8th amendment of the United States Constitution.

ARGUMENT

Amici avers that a mandatory life sentence for one convicted under MCL 750.316, [e]specially for those defendants charged under the theory of an aider and abettor pursuant to MCL 767.39, MSA 28.979, violates the Michigan's Constitution Art 1, §16, cruel 'or' unusual clause. It is unconstitutional, in-part, because it contains a mandatory life sentencing scheme that does not allow consideration of mitigating factors for those who did not kill, and can never be a penalty that advances the penalogical goal of rehabilitation under these circumstances.

In *People v. Parks*, 2022 Mich LEXIS 1483, the Michigan Supreme Court stated: "Further, we have held that our Constitution requires that sentencing decisions be proportional. Our seminal opinion on the principle of proportionality is *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992).

In that case, we held that a life-without-parole sentence for possession of 650 grams or more of a mixture containing cocaine was unconstitutional under the state Constitution because of a lack of proportionality. *Id.* at 27, 30."

The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subject to excessive sanctions." *Roper v. Simmons*, 543 U.S. 551, at 560, 125 S. Ct. 1183, 161 L. Ed 2d 1. That right, the court explained, "flows from the basic 'precept of justice that punishment for the crime should be graduated and proportioned" to *'both'* the *'offender'* and the offense. *Ibid.* (quoting *Weems v. United States*, 217 U.S. 349, 367; 30 S. Ct. 544; 54 L. Ed 2d 793 (1910)

"The concept of proportionality is central to the Eighth Amendment." *Graham*, 560 U.S. at 59. And we view that concept less through a historical prism than according to 'the evolving standard of decency that mark the progress of a maturing society.' *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed 2d 251 (1976) (quoting *Trop v. Dulles*, 356 U.S 86, 101; 78 S. Ct. 590; 2 L. Ed 2d 630 (1958) (plurality opinion).

"A sentence is invalid when it is beyond statutory limits, when it is based upon *constitutionally impermissible grounds*, improper assumptions of guilt, a misconception of law, or when it conforms to local sentencing policy rather than individualized facts." *People v. Miles*, 454 Mich at 96; 559 NW2d 299 (1997) [emphasis mine]

The mandatory life sentence scheme in MCL 750.316 extricates the sentencer's discretion to use mitigating factors to fashion a sentence proportionate to the convicted defendant, and this is what violates Art 1, sec 16 of the Michigan Constitution and the Eighth Amendment of the United

States Constitution. Courts normally focus on tailoring a sentence to the crime and less so to the Defendant. Focusing on the crime is static and fits with a mandatory life sentence, but focusing on the Defendant requires consideration of mitigating factors. However, the Michigan Supreme Court has already stated a defendant's "sentence should be tailored to the particular circumstances of the case [a]nd the offender in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential." *People v. McFarlin*, 389 Mich. 557, 574; 208 NW2d 504; 1973 Mich LEXIS 118.

In *People v. Milbourn*, 435 Mich. 630; 461 N.W.2d 1; 1990 Mich. LEXIS 2546, the Michigan Supreme Court stated:

> "Turning from the legislative felony sentencing scheme in general to the prescribed punishment for individual felonies, we note that the Legislature has, with only a few exceptions, provided a range of punishment for each felony. Because the Legislature in addressing criminal punishment in general has subscribed to the *principle of proportionality* and because the commission of a given crime by a given offender may also vary considerably in seriousness, we believe it reasonable to conclude that the Legislature, in setting a range of allowable punishments for a single felony, intended persons whose conduct is more harmful and who have more serious prior criminal records to receive greater punishment than those whose criminal behavior and prior record are less threatening to society.
>
> The Legislature then left to the judiciary, with regard to most crimes, the task of determining the sentence to be imposed upon each offender within given bounds. We believe that judicial sentencing discretion should be exercised, within the legislatively prescribed range, according to the same principle of proportionality that guides the Legislature in its allocation of punishment over the full spectrum of criminal behavior. Thus, a judge helps to fulfill the overall legislative scheme of criminal punishment by taking care to assure that the sentences imposed across the discretionary range are proportionate to the seriousness of the matters that come before the court for sentencing. In making this assessment, the judge, of course, must take into account the nature of the offense and the background of the offender." (emphasis mine)

Mandatory life sentences thus violate the proportionality in sentencing; the Legislature can't subscribe to the principle of proportionality and at the same time impose mandatory life sentences, this is *constitutionally impermissible*. *People v. Bullock*, 440 Mich. 15, 485 NW 2d 866 (1992), citing *People v. Lorentzen*, 387 Mich. 167; 194 NW. 2d 828 (1972)

In the Federalist Papers Written by Alexander Hamilton (Independent Journal, Saturday, June 14, 1788, Federalist No. 78 - The Judiciary Department), Hamilton recognized that legislative act is void if it be contrary to the Constitution:

> "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. *Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.* [emphasis mine]
>
> Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.
>
> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. *No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid."* [emphasis mine]

Chief Justice Marshall wrote long ago in *Marbury v Madison*, 5 US 137, 177; 2 L. Ed. 60 (1803), "It is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each."

Chief Justice Marshall expounded on this in further detail:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?
> The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.
> It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.
> Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.
> If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.
> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.
> This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.
> If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. [*Marbury*, 5 U.S. at 176-177.]

While Chief Justice Marshall was addressing a case in which Congress exceeded the limits of its powers in enacting legislation. The legislative body cannot legitimately enact a statute that is repugnant to the Constitution.

Courts have held that it's a violation of the Eighth Amendment for the sentencer not to consider mitigating circumstances, and if Death Penalty and Second Degree Murder requires consideration of mitigating factors, what makes first degree's mandatory life sentence so distinguishable that it warrants not considering mitigating factors?

When a State exercises power wholly within the domain of State interest, it is insulated from federal review. [B]ut such insulation is [n]ot carried over when state power is used as an instrument for circumventing a federally protected right. *Gomillion v. Lightfoot*, 364 US 339, at 347; 81 S. Ct. 125; 5 L. Ed 2d 110; 1960 US LEXIS 189

In *Thomas v. Dir., Tex. Dep't of Crim. Justice-Corr. Insts. Div.*, 2016 U.S. Dist. LEXIS 127040; 2016 WL 4988257, the court stated: "The use of mitigation evidence is the product of the requirement of individualized sentencing." *Kansas v. Marsh*, 548 U.S. 163, 174, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006) (citations omitted). In *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), a plurality of the Supreme Court held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (emphasis in original).

The Court held that the sentencer must have full access to "highly relevant" information. *Id.* at 603. A majority of the Court adopted the *Lockett* ruling in *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). The *Lockett* and *Eddings* decisions were revisited in *Johnson v. Texas*, 509 U.S. 350, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993). The Court read these cases narrowly:

> *Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all.

This is what Michigan has done with the mandatory life sentence for aiders and abettors to felony murder; made the determination of incorrigibility absolute without use of any mitigating factors.

The United States Supreme Court in *Williams v. New York*, 337 U.S. 241; 69 S. Ct. 1079; 93 L. Ed. 1337; 1949 U.S. LEXIS 2308, the court opined:

> Undoubtedly the *New York* statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. *People v. Johnson*, 252 *N. Y.* 387, 392, 169 N. E. 619, 621. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions -- even for offenses today deemed trivial.[2] Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders.[3] Indeterminate sentences the ultimate

---

[2] 2 Blackstone, Commentaries on the Laws of England (Lewis' ed. 1897) 1756-1757.

[3] With respect to this policy in the administration of the Probation Act this Court has said: "It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion." *Burns v. United States*, 287 U.S. 216, 220. In *Pennsylvania v. Ashe*, 302 U.S. 51, 55, this Court further stated: "For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that

> termination of which are sometimes decided by non-judicial agencies have to a large extent taken the place of the old rigidly fixed punishments.[4] The practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy.[5] Execution of the United States parole system rests on the discretion of an administrative parole board. 36 Stat. 819, 18 U. S. C. §§ 714, 716, now §§ 4202, 4203. Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.[6]

Therefore, for the reasons mentioned above, the government cannot prove that life without parole for Mr. Czarnecki serves an "important, substantial or significant governmental interest and that there is a reasonable fit between the interest and the burden" on Mr. Czarnecki's rights, without the use of the scientific data. *People v Wilder*, 307 Mich App 546, 557 (2014). Justice was not served by sentencing Mr. Czarnecki to life without parole without a mitigation hearing.

---

there be taken into account the circumstances of the offense together with the character and propensities of the offender." And see Wood and Waite, Crime and Its Treatment 438-442 (1941).

[4] Wood and Waite, Crime and Its Treatment 437 (1941); Orfield, Criminal Procedure from Arrest to Appeal 556-565 (1947). See, *e. g.*, Ill. Rev. Stat. c. 38, § 802 (1939); Cal. Pen. Code (Deering, 1941) § 1168.

[5] Glueck, Probation and Criminal Justice 232 (1933); National Probation Assn., Directory of Probation and Parole Officers 275 (1947); Cooley, Probation and Delinquency (1927).

[6] Judge Ulman writing on The Trial Judge's Dilemma discusses the problems that confront the sentencing judge and quotes from one of his court opinions as to the factors that a judge should consider in imposing sentence:

"1st. The protection of society against wrong-doers.

"2nd. The punishment -- or much better -- the discipline of the wrong-doer.

"3rd. The reformation and rehabilitation of the wrong-doer.

"4th. The deterrence of others from the commission of like offenses.

"It should be obvious that a proper dealing with these factors involves a study of each case upon an individual basis. Was the crime a crime against property only, or did it involve danger to human life? Was it a crime of sudden passion or was it studied and deliberate? Is the criminal a man so constituted and so habituated to war upon society that there is little or no real hope that he ever can be anything other than a menace to society -- or is he obviously amenable to reformation?" Glueck, Probation and Criminal Justice 113 (1933). See also 12 Encyc. of Soc. Science, Penal Institutions 57-64 (1934).

In truth, the States have authority to make aiders and abettors equally responsible, as a matter of law with principle, or to enact felony-murder statutes is beyond constitutional challenge. *Lockett v. Ohio*, 438 U.S. at 602. The aider and abettor statute MCLA 767.39 provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense. [MCL 767.39 (emphasis added)]. [7]

The Court has noted that "Michigan's aiding and abetting statute has been in force and substantively unchanged since the mid-1800s." *People v Robinson*, 475 Mich 1, 7-8; 715 NW2d 44 (2006). The Legislature amended the statute in 1927 to its current form, "which substitutes 'procures, counsels, aids, or abets' for 'aid and abet.'" *Id.* at n 17.

There is no statutory definition of murder in Michigan, so the definition evolved from common law. A homicide is the killing of a human being by another human being. *People v. Austin*, 221 Mich. 635, 644 (1923); *People v. Allen*, 390 Mich. 383 (1973). First degree murder statute, MCL 750.316; MSA 28.548 encompassing both premeditated and felony murder provides:

> "Murder which is perpetrated by means of poison, lying in wait, or other willful, deliberate, and premeditate killing, or which is committed in the perpetration, or attempt to perpetrate arson, criminal sexual conduct in the first or third degree, robbery, breaking and entering of a dwelling, larceny of any kind, extortion, or kidnapping, in murder of the first degree, and shall be punished by imprisonment for life."

---

[7] Violation of MCL 767.39 is not a "separate substantive offense," but rather a "'theory of prosecution' that permits the imposition of vicarious liability for accomplices. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006), quoting *People v Perry*, 460 Mich 55, 63 n 20; 594 NW2d 477 (1999). In addition, the statute "neither expressly nor impliedly limits the persons or crimes encompassed by its terms. The language of the statute applies to 'every person' who commits 'an offense.'" *People v Moore*, 470 Mich 56, 68; 679 NW2d 41 (2004).

This statute was intended and directed towards the person who actually committed the murder, not the coconspirator, accessory, or aider and abettor. To be found guilty of murder, all the elements must be present, this includes actus reus.

It is contrary to every rule of law to hold a person criminally responsible for an act which he has taken no part. He can only be punished for what is his own wrong. *People v. Parks*, 49 Mich 333; 13 NW 618; 1882 Mich LEXIS 567. It is a violation of the U.S. and Michigan Constitutions to find anyone guilty who did not commit the crime charged. MCL 767.39, the aiding and abetting statute is a theory[8] and tacit overt proclamation that the prosecutor knows [b]eforehand, that the defendant he chose to prosecute using this theory, did not commit the crime of murder. Therefore, under no circumstances should one convicted under the theory of an aider and abettor to MCL 750.316 receive a mandatory life sentence without consideration of mitigating factors. Michigan cannot violate their own statute by forgoing proof and proving the act of killing by a defendant; forgoing a proportionate sentencing, and sentence the aider and abettor excessively to a mandatory life sentence, especially in light of the fact that the statute MCL 750.316 sentencing scheme is contrary to the manifest tenor of the Michigan Constitution Art 1, §16. The Prosecutor's decision to use the aider and abettor theory is a confession the defendant did not kill and this alone should negate a mandatory life sentence, and first degree murder conviction.

Justice Breyer's statements in his concurring opinion concerning aider and abettors, has to in some manner apply equally to felony murder:

> "As an initial matter, this Court has made clear that this artificially constructed kind of intent does not count as intent for purposes of the Eighth Amendment. We do not rely on transferred intent in determining if an adult may receive the death penalty.

8 See *People v. Saine*, 2012 Mich App LEXIS 604

> Thus, the Constitution forbids imposing capital punishment upon an aider and abettor in a robbery, where that individual did not intend to kill and simply was "in the car by the side of the road . . ., waiting to help the robbers escape." *Enmund, supra,* at 788, 102 S. Ct. 3368, 73 L. Ed. 2d 1140. Cf. *Tison, supra,* at 157-158, 107 S. Ct. 1676, 95 L. Ed. 2d 127

There are no set of circumstances that exist which the Michigan Legislature's [a]ct of sentencing aider and abettors to a mandatory life sentence would be valid because, in every case the aider and abettor's culpability can be evaluated by the sentencer, and it presumes the one who doesn't kill is automatically without the ability to be rehabilitated. It's too sever; in *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991), the Court classified life without parole as "the second most severe penalty permitted by law." It reasoned that life without parole sentences, are akin to death sentences not only because they "shares some characteristics with death sentences that are shared by no other sentences," but also because "the sentence alters the offender's life by a forfeiture that is irrevocable." *Graham v. Florida*, 560 US 48, 69-70 (2010), it deprives the convict of the most basic liberties without giving hope of restoration except perhaps by executive clemency-the remote possibility of which does not mitigate the harshness of the sentence. . . . [The sentence] means the denial of hope; It means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." (quoting *Naovarah v. State*, 104 Nov 525, 526 (1989))[9]

[9] See, Sentencing for Murder, Br J Criminol (1012) 52(1): 141-158 Barry Mitchell, Professor of Criminal Law and Criminal Justice, Coventry University Law School; aa9112@consentry.ac.uk., and Life Without Parole As A Conflicted Punishment, 48 Wake Forest L. Rev. 1101, Craig S. Lerner, Professor of Law and Associate Dean for Academic Affairs, George Mason University School of Law.

The brain science is [t]he evidence that mitigating factors exist that would aid the court in proportioning a sentence to *Mr. Rush*, and but-fore the state applying a statute that should be declared void.

A true missing mitigating factor in Czarnecki *'s* case is the United States Supreme Court's and Michigan's Supreme Court's acceptance and use of the scientific findings on brain development instruct that penal consequences for young people should be approached differently. *Miller v Alabama*, 567 US 460, 479-480; 132 S Ct 2455 (2012); *Graham*, *supra*. See *People v. Parks*, 2022 Mich. LEXIS 1483 The Court also acknowledged that "the qualities that distinguish juveniles from adults do not disappear when the individual turns 18." *Roper v Simmons,* 543 US 551, 574; 125 S Ct 1183 (2005). "[A] growing body of research has shown that the ***adolescent brain is not fully developed until a person is about twenty-five***, and that as it's developing, many things can go wrong that lead to psychiatric and behavioral disorders." Davis, *The Brain Defense* (New York: Penguin Press, 2017), p 97. While *Miller* addressed the constitutionality of mandatory sentences of life without the possibility of parole for juvenile homicide offenders, its focus on the sentencing factors of a young person's chronological age, family and home environment, and greater capacity for rehabilitation are directly relevant here.

The *Miller* Court drew an age boundary despite citing to research and amici that acknowledge the brain continues to develop into an individual's twenties. See Pimentel, *The Widening Maturity Gap: Trying and Punishing Juveniles as Adults in an Era of Extended Adolescence*, 46 Tex Tech L Rev 71, 83-84 (2013) ("Neuroscience tells us that we should expect some irrational, emotion-driven behavior from emerging adults, those aged eighteen to twenty-five, and that it is not until their late twenties that it is reasonable to expect them to have the brain

development necessary to behave like fully rational adults."); Shust, *Extending Sentencing Mitigation for Deserving Young Adults*, 104 J Crim Law & Criminology, 667, 686 (2014). These very authors relied upon by the Supreme Court in *Miller who* have authored a law review article encouraging courts to create a "transitional legal category" of "young adulthood" for individuals aged 18-years-old to 21-years-old. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L Rev 641 (2016). Mr. Czarnecki and Mr. Smith would fall within that category; a group of young people whose brain maturation is still continuing such that science would support "a presumption that mandatory minimum adult sentencing regimes should exclude young adult offenders...." *Id.* at 662. Also relied on by the United States Supreme Court was the research of neuroscientist B.J. Casey. Her work has shown that the control exercised by eighteen-to-twenty-year olds in emotionally-charged situations was "not much better than that of the thirteen-to-seventeen-year-olds." *The Brain Defense*, p 112.

Dr. Ruben C. Gur, Director of the Brain Behavior Laboratory at the Neuropsychiatry Section of the University of Pennsylvania School of Medicine, has stated that "[t]he evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable." Ruben C. Gur, *Declaration of Ruben C. Gur, Ph.D., Patterson v. Texas, Petition for Writ of Certiorari to the United States Supreme Court* (2002). The scientific research on which ***Graham*** relied reveals that the frontal lobe, the locus of executive functions such as reasoning, advanced thought, and impulse control, is the last part of the brain to develop. See, *Adolescence, Brain Development and Legal Culpability*, American Bar Association, Juvenile Justice Center 1-3 (Jan. 2004). In fact, "researchers have found that eighteen – to twenty-one-year-

old adults are more like younger adolescents than older adults in their impulsivity under conditions of emotional arousal." Scott, *Young Adulthood as a Transitional Legal Category*, 85 Fordham L Rev 641, 642 (2016). This age range has also shown to be a time frame of peak risk behavior. Arnett, *Emerging Adulthood,* Am Psych (2000) p 475. "[E]merging adulthood has become a distinct period of the life course for young people in industrialized societies." *Id.* at 479. As there is evidence that one's brain continues to mature past the age of twenty, it is unconstitutional to apply the same mandatory minimum sentence to all offenders, regardless of other mitigating factors.

An aider and abettor can receive a non-mandatory life sentence, [i]f the level of culpability existed that warrants such an extreme sentence after a mitigation hearing; this does not violate either constitution because, the sentencer would be allowed to exercise their discretion to proportion a sentence to the defendant and the crime in conjunction with the eighth amendment. *Weems, Ibid, infra.*

The Michigan Supreme Court stated in *People v. Barber*, 14 Mich. App. 395; 165 N.W.2d 608; 1968 Mich. App. LEXIS 934:

> "we bear in mind the norms governing the review of legislative enactments, norms expressed well by Justice Butzel in *Township of Dearborn* v. *Dearborn Township Clerk* (1952), 334 Mich 673: "We are mindful of the restrictions upon the power of this Court to declare a challenged statute in conflict with our Constitution. It is too well settled to require citation that a statute must be treated with the deference due to a deliberate action of a co-ordinate branch of our State government. If the legislature enacted a statute which does not violate the provisions of the Constitution, this Court may not inquire into the wisdom of the legislation or substitute its judgment for that of the legislature. The conflict between the statute and constitutional provisions must be clear and inevitable before we strike down a statute as unconstitutional." 334 Mich 673, 680.

There is a clear and inevitable conflict between the statutory (MCL 750.316) and the constitutional provisions Mich Const. art 1, §16, and the 8th Amend, U.S, Const). The Court's authority to declare a statute partially unconstitutional has been well established since *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed 60 (1803), when the Court severed an unconstitutional provision from the Judiciary Act of 1789. *Nat'l Fed'n of Indep. Bus v. Sebelius*, 567 U.S. 519; 132 S. Ct. 2566; 2012 U.S. LEXIS 4876.

CONCLUSION

For the above reasons this Court should hold that a mandatory life sentences without parole for 21 year olds is unconstitutional under *People v. Parks*, 2022 Mich LEXIS 14383.

Dated: March 1, 2024

Respectfully submitted,

Darryl J. Smith #179933
in pro per
Amici Curiae