STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-v-

EDWIN LAMAR LANGSTON,
Defendant-Appellant.

Mich. Supreme Court No. 163968
Court of Appeals No. 358537
Trial Court No. FC 76-2701

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF ON GRANT OF ORAL ARGUMENT ON THE LEAVE APPLICATION

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Introduction

In 1980, this Court issued a groundbreaking decision in *People v. Aaron*, 409 Mich 672; 299 NW2d 304 (1980). The Court held that malice – the *mens rea* required to convict a person of murder – was an essential element of Michigan's felony murder statute. *Id.* at 728. The *Aaron* decision was widely cited for "eliminating" the common law felony murder rule, which until then had resulted in many felony murder convictions, and mandatory life without parole sentences, based only on an intent to commit the underlying felony. *Aaron* was viewed as correcting a historical injustice, and Michigan was celebrated as a forward-thinking jurisdiction.

Edwin Langston was among the people convicted under a common law felony murder instruction, where no jury found that he killed, intended to kill, or had any *mens rea* with respect to the death, but who was nonetheless sentenced to mandatory life without parole. The Michigan Court of Appeals had reversed his conviction because of the lack of a *mens rea* instruction, and his case was held in abeyance pending the arguments and decision in *Aaron*.

Yet, 44 years after *Aaron*, Mr. Langston remains in prison for a "felony murder" where no *mens rea* was ever shown, under a law the *Aaron* Court described as "fundamentally unfair" and "unjust in that it violates the basic premise of individual moral culpability upon which our criminal law is based." *Id.* at 731, 733.

Mr. Langston was convicted in 1976 of aiding and abetting Ronald Wilson in a robbery, during which Wilson shot and killed a store owner when Mr. Langston was not in the store. The government's theory was that Mr. Langston gave information about who was in the store to Wilson before Wilson went in, and that Langston helped Wilson after the robbery. The jury instructions required no *mens rea* for the death but only for the robbery. Mr. Langston is not alone; there are scores of elderly men and women still serving LWOP sentences for pre-*Aaron* felony murders

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where they were not the person who committed the killing, and where the jury never found *mens rea* for the killing.

This Court has ordered that "the parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing: (1) whether *People v Aaron*, 409 Mich 672 (1980), correctly limited its application to prospective-only relief; (2) whether, in the absence of evidence that the defendant acted with malice, mandatory life without parole for felony murder constitutes cruel and/or unusual punishment under Const 1963, art 1, § 16 or US Const, Am VIII; and (3) whether *People v Hall*, 396 Mich 650 (1976), should be overruled."

Judgment Appealed From, Jurisdiction of the Court, and Relief Sought

The Court of Appeals denied leave because Mr. Langston "failed to establish that the trial court erred in denying the motion for relief from judgment." Order, Doc No. 35837 (Dec 2, 2021), Exh. B. Mr. Langston appeals the Court of Appeals' denial of his application for leave from the Van Buren County Court's March 17, 2021, order, denying his non-successive motion for relief from judgment. The Court has jurisdiction over this application for leave pursuant to MCR 7.303(B)(1); *see also* MCR 7.205(G).

This Court should either grant his application for leave to appeal, or reverse and remand for a new trial and/or a new sentence for the reasons stated here and in Mr. Langston's application for leave to appeal.

Statement of Questions Presented

1. **Should the decision in P*eople v Aaron*, 409 Mich 672 (1980) be limited to prospective-only relief?**

   Appellant answers: No.

2. **In the absence of a finding that the defendant acted with malice, is mandatory life without parole for felony murder cruel and/or unusual punishment under Const 1963, art 1, § 16 or US Const, Am VIII?**

Appellant answers: Yes

3. **Should *People v Hall*, 396 Mich 650 (1976) be overruled to the extent that it condones a mandatory life without parole sentence for someone convicted of felony murder without any finding of malice with respect to the killing?**

Appellant answers: Yes.

Statement of Facts

In November 1975, Ronald Wilson drove from Indiana to visit his sister in South Haven, Michigan. Trial Transcript ("TT") 1998.[1] Throughout his visit, Wilson stayed with his sister Annette "Alta" Madry and her husband in their home at 422 Abell Street. TT 1250. The Madry house was a few houses away from 414 Abell Street, where defendant Edwin Langston's mother lived, and from 1008 Center Street, where his girlfriend lived. TT 1354, 1347.

At around noon on December 1, 1975, Wilson asked his sister for his handgun, which she had stored for him. Her husband retrieved the gun from his car and gave it to Wilson. TT 1251.

A few hours later, Wilson went to see Mr. Langston at 1008 Center Street. TT 1350–51. Wilson and Mr. Langston first became acquainted when Wilson broke into the house of a friend of Mr. Langston, TT 1842, but they also knew each other because the Langstons' residence was on the same block as the Madrys'. Wilson wanted to sell his gun and offered it to Mr. Langston for $40. TT 1351, 1844. Mr. Langston was not interested in buying the gun, but he inspected it, saw that the magazine was empty, and agreed to help Wilson sell it. TT 1352–53. Wilson then asked if Mr. Langston knew any place that Wilson could rob. TT 1844. Mr. Langston said that he did not want any part in that kind of activity and was only interested in "playing with women." TT

[1] The trial transcripts were created in separate volumes but numbered sequentially, so the references included are the sequential page numbers.

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1844–45. Soon after this conversation, the two men left the house in Wilson's car to visit some women who lived near the Maple Street Grocery. TT 1355, 1845.

Between 4 and 5 p.m., the two men arrived in the area of Maple Street Grocery. TT 1063. Mr. Langston went to the store to get a few grocery items, while Wilson stayed in the car. *Id.* While Langston was at the checkout counter, the customer next to him asked if she could cash a check. TT 1085. Arretta Ingraham, the store owner, replied that the store did not have enough cash on hand to cash a check. TT 1085. Mr. Langston was standing next to the customer, so was in a position to hear this exchange. TT 1088. He made his purchase and left the store. TT 1063, 1086.

When Mr. Langston got back to the car, Wilson asked him how many people were in the store. TT 1846. Mr. Langston again told Wilson that he did not want to get involved with anything like a robbery "because it carried too much time." TT 1846. To deter Wilson, Mr. Langston told Wilson the truth – that there were two women and two children in the store. TT 1846. Wilson left the car and went into the Maple Street store, TT 1846–47, while Langston drove up the street to visit some women he knew who lived on the block. TT 1385–86, 1847. Mr. Langston parked the car on the street between the grocery store and the house. TT 1860.

Meanwhile, Wilson entered the Maple Street store. TT 1063. When Wilson came in, there were two women and two children in the store. TT 1732. Wilson walked through the store, putting groceries on the front counter as he waited for the customers to leave. TT 1101. Wilson initiated the robbery when there were four people remaining in the store: Arretta and Wilbur Ingraham, the store owners; Barbara Sullivan, a store employee; and Gordon Hoag, a customer. Wilson grabbed Wilbur Ingraham, who was by the counter, from behind and wrapped his arm around Mr. Ingraham's neck. TT 1797–98. Wilson announced it was a holdup and instructed everyone to give him their money or he would shoot. TT 1798. Mr. Hoag engaged Wilson, ordering him to put the gun

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away, guessing that the gun was not loaded. *Id.* A scuffle ensued between Wilson and Mr. Hoag. TT 1102–03, 1798–99. Mr. Hoag wielded a wine bottle; Wilson held his gun. TT 1103. The wine bottle broke; Mr. Hoag slipped and fell on the wet floor and was momentarily knocked out. TT 1669, 1799.

Wilson then instructed Mr. Ingraham to sit on the ground, TT 1800, and Wilson returned to the counter. At some point, Mr. Hoag regained consciousness, crawled to the back door, and left the store. TT 1103, 1669. At the counter, Ms. Ingraham grabbed the store's phone. TT 1063–64. When Ms. Ingraham would not put down the phone, Wilson fired a single shot. TT 1063–64, 1108, 1734, 1800. The bullet struck Ms. Ingraham. TT 1063–64. Wilson then directed Ms. Sullivan to open the cash register, TT 1107, jumped up on the counter, and took the money from the register. TT 1064, 1800–01. Wilson threatened to shoot Mr. Ingraham, and took his wallet. R. at 1063, 1801. Ms. Ingraham died at the scene. TT 1116, 1129.

Wilson left the store and ran up Monroe Street. TT 1064. Mr. Langston, who was finishing a cigarette and leaving the "girls'" house, saw Wilson running away from the Maple Street store and up the street. TT 1850. Wilson looked like a "wild man," and Mr. Langston was afraid at first that Wilson might shoot him. TT 1861. They left in Wilson's car. TT 1064, 1068, 1133–35, 1141. Mr. Langston wanted to get away from Wilson and to go home where he felt his brothers could help him if Wilson tried to get rough with him. TT 1850–51.

Around dusk, Wilson gave the gun back to his sister. Her husband disassembled it and put it behind his bed; he then moved it back to his car, where he had kept it before. TT 1256. Not long after, Mr. Langston walked over to Wilson's sister's house, where Wilson was staying. TT 1856. Mr. Langston told Wilson that if any trouble came, Wilson had better clear him because he did not have anything to do with Wilson's robbery. TT 1856. Wilson told Langston that he was "big

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enough" to take responsibility should anything come of Wilson's actions. TT 1856. Wilson's sister, who had been given the gun, testified she heard them arguing about what Mr. Langston told Wilson about the number of people in the store. TT 1731–32. She also said that Wilson and Mr. Langston looked through the contents of Mr. Ingraham's wallet, which included a key, a license, and a AAA card. TT 1737–38, 1774–76. Wilson's sister further testified that Mr. Langston took the key and said he would keep it in case the owners ever go out of town. TT 1738. Mr. Langston then left the Madrys and went to his girlfriend's house. TT 1740.

Later that night, Mr. Langston came back to the Madrys' house and told Wilson he'd been stopped at a police roadblock. Wilson's sister testified that this was when Mr. Langston suggested getting rid of the wallet, and Wilson and Mr. Langston went outside to burn it. TT 1747. Wilson did not turn himself in and, at around 1:00 a.m., the police arrived at the Madrys' looking for him. TT 1397, 1400, 1427. Wilson tried to hide in the crawlspace under the house and refused to come out. TT 1819. After the police tear-gassed the crawlspace, Wilson surrendered. *Id.* The police recovered the contents of Mr. Ingraham's stolen wallet and the 9 mm Luger pistol (used in the robbery) at the Madrys' residence after Wilson was arrested. TT 1819–23.

Shortly thereafter, police arrested Mr. Langston at his residence. TT 1371–72, 1465. No money or other evidence from the robbery was found on Mr. Langston or at his residence. TT 1444–46, 1479–83, 1931.

Wilson and Mr. Langston were both charged with first-degree murder and tried separately. At his trial, Mr. Langston's jury was instructed on four possible verdicts: first-degree murder, second-degree murder, manslaughter, and not guilty. TT 2068. The jury instructions read, in part, "The law insofar as it applies to this case states that all murder which shall be committed during and as a result of committing or attempting to commit robbery shall be murder of the first degree."

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TT 2055. At no point did the jury get an instruction about the mental state required of Mr. Langston in order to find him guilty of murder. Instead, one element of the instructions for finding *Mr. Langston* guilty of murder was that the jury must find "at the time of the robbery . . . Ronald Wilson either intended to kill Arretta Lou Ingraham or that he consciously engaged in committing a serious crime, robbery, using a pistol which was naturally and inherently dangerous to human life in the manner of which that crime of robbery was committed." TT 2056–57.

Procedural History

Mr. Langston was found guilty of first-degree felony murder under an aiding and abetting theory for the December 1, 1975, armed robbery. MCL 750.316(1)(b). Van Buren Circuit Court Judge Meyer Warshawsky, who presided at trial, imposed the mandatory sentence of life in prison without parole on September 8, 1976. The PSI states in part: "Prosecutor Ward Hamlin states that a woman is dead partly because of the involvement of Edwin Lamar Langston. However, because the defendant was less involved in the murder than was Ronald Wilson, he would have no objection to a pardon by the governor somewhere in the future." That was more than 48 years ago.

Mr. Langston, whose only prior court case was for driving without a license, is now serving his life without parole sentence at Lakeland Correctional Facility. He is 72 years old.

Mr. Langston appealed his conviction as of right to the Michigan Court of Appeals, which reversed his conviction and granted a new trial on November 6, 1978, holding that, "[T]o be liable for murder an accomplice to robbery must have acted with the intent to kill or in reckless disregard of a known and high degree of risk that death or serious bodily harm might occur." *People v Langston*, 86 Mich App 656, 660; 273 NW2d 99 (1978). The prosecution filed leave to appeal, raising the question of whether it had to prove "malice" in Mr. Langston's accomplice liability felony murder case. The appeal was held in abeyance because this Court had granted leave in *People v*

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Aaron and two other similar cases. In the 1980 *Aaron* decision, in a footnote, the Court referenced Mr. Langston's case along with other similar pending cases.[2]

The *Aaron* Court held that a defendant cannot be convicted of felony murder *unless* malice is proven with respect to the killing. *Aaron*, at 728. But the Court also held that "[t]his decision shall apply to all trials in progress and those occurring after the date of this opinion." *Id*. at 734.

Following *Aaron,* this Court denied the prosecution's pending motion for leave to appeal in *Langston*, which had the effect of *affirming* the reversal of Langston's conviction and granting him a new trial. *People v Langston*, 412 Mich 903; 315 NW2d 408 (1982), Exh. C. After a motion for reconsideration, however, the Court reversed the Court of Appeals and reinstated Mr. Langston's conviction for first-degree murder based on *Aaron*, noting that the earlier order was a "clerical error." *People v Langston*, Docket No 62340 (Mich, May 26, 1982) Exh. D.

Mr. Langston then filed a federal habeas petition. The federal district court found that Mr. Langston's claims were not exhausted because the state court did not rule on all the issues raised in his direct appeal. The federal court further stated that "the Michigan Court of Appeals will consider delayed applications for leave to appeal without limitation as to whether there was a previous appeal by right." See *People v Langston*, Delayed App Leave (filed in Mich COA Aug 23, 1985) Exh. E (excerpts). Accordingly, Mr. Langston then duly filed his delayed appeal as to the remaining issues not previously decided by the Court of Appeals "in order that the Defendant may exhaust his state court remedies." *Id*. (p 2; TOC, listing claims). The Court of Appeals ultimately denied those remaining claims and affirmed his conviction in 1988. *People v Langston* (May 4, 1988) (Mich Ct App No. 95650), Exh. F.

[2] *Aaron*, 409 Mich at 686 n 1 ("Compare . . . *People v Langston*, 86 Mich App 656; 273 NW2d 99 (1978);, … with *People v Till*, 80 Mich App 16; 263 NW2d 586 (1977); . . .).

In 1992, Mr. Langston filed a motion for relief from judgment, which was denied. He attempted but failed to file a second MCR 6.500 motion in 2003. The court did not accept that petition and returned it without prejudice. Order Returning Def's Mot for Relief from J, Exh. G.

Mr. Langston filed the instant 6.500 motion in the Van Buren Circuit Court in 2020. The Hon. Kathleen Brickley ordered a response. After briefing, the court denied the motion for relief from judgment. *See* Op and Order (3/17/2021), Exh. A. In its decision, however, the court noted that the motion presented issues that appear to be ripe for appellate review. The court found the claims "were not decided against Mr. Langston in a previous appeal," and were not barred by MCR 6.502D(2). The court also stated that Mr. Langston could have raised them in his 1980s appeal and therefore must show cause and prejudice. *Id*. at 5-6.

Additionally, the court stated that, even if there were no procedural bar, it felt constrained as a trial court by state appellate precedent, but said that the appellate courts may wish to revisit their decisions based on the new claims in the petition. *Id*. at 8, quoting *Paige v City of Sterling Heights*, 476 Mich 495, 524; 720 NW2d 219 (2006) (stating that trial courts are bound by precedent "even if they believe that it was wrongly decided or has become obsolete."). This binding effect is true "even if the *Aaron* opinion violates a defendant's constitutional rights." *Id.* at 8. As noted, the Court of Appeals denied leave, and this Court granted oral argument on the leave application. Exh B.

<u>Standard of Review</u>

Questions of statutory or constitutional law are reviewed *de novo*. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). A trial court's ruling on a motion for relief from judgment is reviewed for abuse of discretion. *People v Johnson*, 502 Mich 541, 564, 918 NW2d 676 (2018) A trial court abuses its discretion when it chooses an outcome that "falls outside the

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range of reasonable and principled outcomes." *Johnson*, supra at 564. When a trial court rejects the correct legal standard, it commits a per se abuse of discretion. *See, e.g., People v Duncan*, 494 Mich 713, 723; 835 NW2d 399 (2013).

Argument

Introduction: Overview of *Aaron*

Mr. Langston's case was on direct appeal when this Court decided *Aaron* in 1980.[3] All defendants, including Mr. Langston – before and after *Aaron* – who are charged with felony murder are charged under Michigan's first-degree murder statute. MCL 750.316(1)(b). The *Aaron* Court addressed whether and to what extent that statute had meaning imputed to it by the common law. Because Michigan has had a murder statute since its existence as a territory, technically there has never been a "common law" offense of felony murder. That is, no defendant can be "charged" with common law felony murder; a defendant is charged under either MCL 750.316 (first-degree murder) or MCL 750.317 (second-degree murder). So the question that was percolating through the courts in 1980, and which led to *Aaron*, was whether the common law definition of felony murder – requiring *mens rea* only for the felony – was somehow incorporated into these statutes. See *Aaron* at 715 ("Under the common law, which we refer to in defining murder in this state….").

The *Aaron* Court framed the question in two parts: "The relevant inquiry is first whether Michigan has a statutory felony-murder doctrine. If it does not, it must then be determined whether Michigan has or should have a common-law felony-murder doctrine." *Id.* at 717.

[3] In *Aaron* the Court had granted leave in three companion cases, to resolve a split in the Court of Appeals as to (1) whether first-degree "felony murder" required the prosecution to prove the *mens rea* (malice) necessary for murder, or only had to prove the *mens rea* necessary for the underlying felony, and (2) whether a conviction reduced to second-degree murder could stand, also based on only the *mens rea* for the underlying felony. *Id.* at 678.

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As to whether Michigan has a "statutory felony murder doctrine" – meaning, does the first-degree murder statute, MCL 750.316, "designate as murder any death occurring in the course of a felony without regard to whether it was the result of accident, negligence, recklessness or willfulness," *id.* at 718, the Court answered no. *Id.* Rather, the statute functions to gradate into first degree or second degree murder an offense which is already "murder."

> Thus, we conclude that Michigan has not codified the common-law felony-murder rule. The use of the term "murder" in the first-degree statute requires that a murder must first be established before the statute is applied to elevate the degree.

People v Aaron, 409 Mich. at 721.[4] In other words, the Court interprets our statutes to require that a murder occur *and* that the murder have malice proven distinct from the "malice" that at common law was implied by the presence of a felony. Only after a murder is so proven may it be elevated to a first-degree murder, on account of the underlying felony.

This portion of the Court's opinion – and its central holding about what "murder" means for purposes of MCL 750.316 – is an *interpretation of the statute*, plain and simple. The Court in *Aaron* defined what "murder" means, and what it does not mean, in MCL 750.316.[5]

The *Aaron* Court separately looked at – even if MCL 750.316 writ large does not have a meaning imported directly from the common law, which the Court determined it did not – whether the term "murder" within this statute has meaning derived from the common law. In this "common law" section, as summarized by the Court, the prosecution had argued that, when proceeding under MCL 750.316(1)(b), the term "murder" is defined by the "common law definition of murder"

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[4] See also *id.* at 719 ("Michigan case law also makes it clear that the purpose of our first-degree murder statute is to graduate punishment and that the statute only serves to raise an already established murder to the first-degree level, not to transform a death, without more, into a murder. 'The statute does not undertake to define the crime of murder, but only to distinguish it into two degrees, for the purpose of graduating the punishment.'") (internal citations omitted).

[5] As a result of the Court's interpretation, the convictions of the three defendants were reversed, and the cases were remanded for retrial. *Id.* at 734.

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which "included a homicide in the course of a felony." *Aaron*, 409 Mich at 721-22 (citing *People v Scott*, 6 Mich 287, 292 (1859)). In other words, the government argued that there was no need to find a murder first, with the element of malice separate from the underlying felony, before murder could be elevated to felony murder. The prosecution argued instead that the word "murder" in the statute had all of the meanings that had been given to that word at common law, including that a homicide in the course of a felony is "murder."

The Court stated that this issue – whether the meaning of "murder" in the statute embraces any and all common law understandings, including common law felony murder – was a legal question that had never yet been answered by the state's highest court.[6] *Id*. at 722. The Court then cited the state constitutional provision: "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." Mich Const 1963, art 3, Sec 7.[7] *Id*. at 722. The Court read this provision to mean that the term "murder" in MCL 750.316 might retain some inherent common law meaning – because no case had yet decided otherwise.

> This Court has not been faced previously with a decision as to whether it should abolish the felony-murder doctrine. Thus, the common-law doctrine remains the law in Michigan. Moreover, the assumption by appellate decisions that the doctrine exists, combined with the fact that Michigan trial courts have applied the doctrine in numerous cases resulting in convictions of first-degree felony-murder, requires us to address the common-law felony-murder issue.

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[6] *Id*. at 722 ("Our research has uncovered no Michigan cases, nor do the parties refer us to any, which have expressly considered whether Michigan has or should continue to have a common-law felony-murder doctrine. While there are some cases containing language which may be construed as assuming the existence of such a rule in Michigan, the language is clearly dictum . . . .") (internal quotation marks and citations omitted).

[7] This provision was substantially the same in the 1908 Constitution and seems to have first appeared in the 1850 Constitution. See 1850 Schedule, Sec 1. The language of the Michigan first-degree murder statute predates the 1850 Constitution. *See* Act of Dec. 30, 1837, pt. 4, tit. I, ch. 3, § 1, 1837–38 Mich. Laws 621 ("Of Offences Against the Lives and Persons of Individuals.") (statute adopted defining murder).

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Aaron, supra at 723. The Court then examined previous Michigan court decisions. Id. at 723–727. The Court's discussion makes plain that previous decisions of the Court had interpreted what the term "murder" means in ways that changed, interpreted, and limited importation of a "common law" meaning of "murder" (as including any homicide in the perpetration of a felony), *id*. at 727, even though in 1980 Michigan courts were still convicting defendants of classic "common law" felony murder under the statute, with no finding of separate malice for the murder. These prior decisions led the Court "to conclude that the rule should be abolished." *Id*. at 723.

The Court then took the "logical extension" of these cases to read out any common law meaning from the word "murder" in MCL 750.316. *Id*. at 727. The Court rejected the idea that the term "murder" in the statute imports such a common law understanding. *Id*. at 727-28.

> Accordingly, we hold today that malice is the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm. We further hold that malice is an essential element of any murder, as that term is judicially defined, whether the murder occurs in the course of a felony or otherwise.

Id. at 728. The *Aaron* Court stated that it was determining the meaning of the words in the first-degree murder statute, and therefore it did not reach the constitutional question – which had been briefed and argued by the parties and presented to the Court – of whether the statute, as it had been applied before the interpretation in *Aaron*, violated the Due Process Clause. The Court granted relief to the three defendants before the Court and applied its decision to "all trials in progress and those occurring after the date of this opinion." *Id*. at 734.

I. <u>THE DECISION IN *AARON* SHOULD NOT HAVE BEEN LIMITED TO PROSPECTIVE-ONLY RELIEF.</u>

There are three reasons that relief should be granted to individuals, like Mr. Langston, who were on direct appeal at the time of the *Aaron* decision, and to individuals whose cases were final at the time of the *Aaron* decision. First, the *Aaron* decision purported to be, and was, a statutory

interpretation decision that provided a definitive meaning of the felony murder statute. Second, at the time of *Aaron* and now, the failure to require the state to bear the burden on every element of the offense violates the Due Process Clause.[8] Third, under retroactivity law, Aaron must be applied to Mr. Langston; at a minimum, *Aaron* must be applied to individuals, like Mr. Langston,

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[8] A good example of what Mr. Langston is asking this Court to do is what Maryland's High Court did in *Unger v State*, 427 Md 383, 48 A3d 242 (Ct App Md) (2012). Maryland, based on a state constitutional provision, long had standard jury instructions which told jurors that the instructions on, *inter alia*, "burden of proof" and "beyond a reasonable doubt," were only *advisory*. In a 1980 case (the same year as *Aaron*), Maryland's High Court held that such instructions had come to be viewed as "limited" and that therefore the court's "interpretation" of the provision (to no longer permit the use of such instructions) "did not announce new law," *Stevenson v. State*, 289 Md 167, 178, 423 A2d 558, 564 (1980), and did not on its face violate the U.S. Constitution. *Id.,* 289 Md at 181-188, 423 A2d at 566-570. *See also Montgomery v State*, 292 Md 84, 89, 437 A2d 654, 657 (1981) (same).

The effect, as in *Aaron*, was that the practice would cease prospectively while affording no relief to defendants convicted in the past. A decade later, in a habeas case, the Fourth Circuit held that such instructions violated a pre-1980 defendant's Fourteenth Amendment rights. *Jenkins v Hutchinson*, 221 F3d 679 (4th Cir 2000). Thereafter, an intermediate court of special appeals adopted the holding of *Jenkins*, finding that a defendant so convicted was denied due process in 1979, and that the High Court cases decided in 1980-81 *had* in fact "materially changed the law governing the constitutionality of the advisory instruction." *State v Adams*, 171 Md App 668, 682, 912 A2d 16, 24 (2006). But Maryland's High Court reversed, holding that *Stevenson* and *Montgomery* "did not announce new law." *State v Adams*, 406 Md 240, 256, 958 A2d 305 (2008), *cert. denied*, 556 US 1133, 129 SCt 1624, 173 LEd2d1005 (2009).

Three years later, in *Unger, supra,* the High Court adopted the dissenting opinion in *Adams* and held that "*Stevenson* and *Montgomery* … set forth a new interpretation of [the provision] and established a new state constitutional standard." 427 Md at 411, 48 A3d at 258 (2012). Just like the broad use of common law-style felony murder instructions in Michigan's courts before 1980, the court noted that even though some limits had been placed on the "advisory" instructions, Maryland's courts had routinely used them before 1980, including in "cases implicating constitutional rights." *Id*. at 414, 48 A3d at 260. Finally, the *Unger* court held "that a new interpretation of a constitutional provision or a statute is fully retroactive if that interpretation affects the integrity of the fact-finding process." *Id*. at 416, 48 A3d at 261. The court concluded, "It is undisputed that the trial judge's instructions at Unger's 1976 trial, telling the jury that all of the court's instructions on legal matters were 'merely advisory,' were clearly in error, at least as applied to matters implicating federal constitutional rights." *Id*. at 417, 48 A3d at 262. (The decision led to the review of some 250 similarly-situated defendants who were still in prison in 2012. *See, e.g.,* NPR (2016), https://www.npr.org/2016/02/18/467057603/from-a-life-term-to-life-on-the-outside-when-aging-felons-are-freed.) *Unger* is as close to on point with *Aaron* as a case can be; this Court should do the same thing that the *Unger* court did, for exactly the same reasons.

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on direct appeal, and also, *Aaron* is a substantive ruling that must be applied retroactively as a matter of retroactivity law and constitutional Due Process.

A. Under fundamental tenets of statutory interpretation, the decision in *Aaron*, as described by the *Aaron* Court, was an interpretation of the first-degree felony murder statute and provided a definitive interpretation of what the statute means and always has meant.

Aaron was – and never claimed to be anything other than – a case about the meaning of Michigan's first-degree murder statute and the term "murder" within that statute. This interpretation of what the statute means, under basic cannons of statutory interpretation, must be what the statute has always meant. Mr. Langston was convicted without a jury ever finding that he met all the elements of the state first-degree murder statute, which had the same text before and after *Aaron* – only the Court's interpretation of the statute had changed. He is therefore entitled to relief because a statute can have only one meaning unless or until it is altered by the legislature.

1. The *Aaron* decision was a decision interpreting the meaning of the statute, and that meaning is what the statute means and has always meant, both as a matter of the limited role of the judiciary vis-à-vis the legislature and as a matter of prior caselaw.

When a court of last resort so interprets a statute, it does not change the statute's content. Only the legislature can do that. *Aaron*'s interpretation of Michigan's first-degree murder statute is a binding proclamation of what the law means and has meant since its enactment because of "the rules that necessarily govern our hierarchical . . . court system." See *Rivers v Roadway Express*, 511 US 298, 312; 114 S Ct 1510; 128 L Ed 2d 274 (1994). This conclusion follows from the roles assigned to each branch of government under the United States and Michigan Constitutions. US Const, art I, § 1; Const 1963, art 4, § 1. First, since only the legislative branch can make law, the meaning of a statute must remain intact unless or until the statute is amended through further legislative action. Second, it follows from the unique role of the judiciary that when a court of last resort interprets the law, that interpretation is authoritative. As Justice Marshall

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famously declared in *Marbury v Madison*, "It is emphatically the province and duty of the judicial department to say what the law is." 5 US 137, 177; 2 L Ed 60 (1803).

The understanding of MCL 750. 316 announced in *Aaron* authoritatively determined that murder in Michigan has required malice since 1837. *Aaron*, 409 Mich at 733. Michigan's modern first-degree murder statute was codified in 1837. That statute, MCL 750.316, states that any murder committed in the perpetration or attempted perpetration of an enumerated felony constitutes murder in the first degree. But MCL 750.316 only tells us which *murders* count as first-degree; it is silent on the question of what must be proven to establish that a "murder" occurred. The statute before 1980 was ambiguous.[9] Only in *Aaron* did the Court finally provide an authoritative interpretation, declaring that an essential element of any murder is malice, which it defined as "the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm." *Id.* at 728.

When a court of last resort issues a statutory interpretation that is at odds with previous interpretations offered by lower courts, it is wrong to say that the law has changed. Rather, absent legislative amendment, the statute means and has always meant what the court of last resort now says it means, and previous statements to the contrary should be understood as mistaken.

The defendant in *Bousley* had pled guilty in 1990 to "using" a firearm in violation of a federal statute. *Bousley v US*, 523 US 614, 616; 118 S Ct 1604; 140 L Ed 2d 828 (1998). Five years later, however, the Court held in *Bailey v United States*, 516 US 137, 144; 116 S Ct 501, 133 L Ed 2d 472 (1995), that conviction under the statute required "active employment of the firearm"

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[9] See, e.g., Michigan Supreme Court Historical Society, *People v Aaron*, *Exorcising the Ghost of Felony Murder, 409 Mich. 672 (1980)*, available at http://www.micourthistory.org/wp-content/uploads/verdict_pdf/aaron/MSC_Mar_Aaron.pdf.

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in the commission of the crime. *Id*. at 144. That led Mr. Bousley to argue that his conviction should be vacated because his plea was not intelligently made: he was misinformed as to the true elements of the charged crime. *Bousley,* at 618.

The *Bousley* Court stated that people are "actually innocent" if their acts did not amount to the crime for which they were convicted. *Id*. at 623.[10] That is to say, if a court of last resort clarifies what a statute means, the court is ruling on what the statute has *always* meant (but for the erroneous misinterpretation); *Id*.; see also *People v Doyle*, 451 Mich 93, 109–11; 545 NW2d 627 (1996) (holding that this Court's own interpretation of a statute reversing a Court of Appeals decision previously understood to be settled law did not constitute a genuine change in law because the new interpretation gave effect to the original intent of the legislature); *US v Barnhardt*, 93 F3d 706 (CA 10, 1996) (quoting *Davis v US*, 417 US 333, 346; 94 S Ct 2298; 41 L Ed 2d 109 (1974)) (applying *Bailey* on collateral review because any defendant should get "the benefit of case law decided after his conviction when the conviction was 'for an act that the law does not make criminal.'").

The same logic appears in federal appellate law before and after *Rivers, supra,* and *Bousley*, particularly in criminal cases. For example, in *McNally v United States*, 483 US 350; 107 S Ct 2875; 97 L Ed 2d 292 (1987), the Court narrowed its reading of a federal mail fraud statute, reversing a Sixth Circuit decision that had upheld the conviction. On remand, the Sixth Circuit said that all defendants convicted under the old reading of the law must be given the benefit of the narrower *McNally* reading. Failing to extend that interpretation to all defendants would mean

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[10] The term "actual innocence" can be misleading because it is commonly used to refer to people who were falsely or mistakenly accused and convicted, as opposed to those who, like Mr. Langston, did not meet all the elements of an offense. Therefore, this brief uses the term "legal innocence" to refer to people like him, who were convicted of felony murder despite the fact that the prosecution never proved, and the jury never found, that they acted with the *mens rea* required for such a conviction. *Bousley* does not distinguish between the two terms. *Id.* at 623.

punishing them "for an act that the law does not [and never did] make criminal." *Callanan v United States*, 881 F2d 229, 231 (CA 6, 1989) (quoting *Davis*, 417 US at 346) (applying the law not only to defendants on direct appeal, but also to those who file post-conviction challenges).

The reasoning of *Bousley* and *Rivers* appears even more explicitly in *Brough v United States*, 454 F2d 370, 372 (CA 7, 1971). There the court held that to apply the Supreme Court's reinterpretation of the selective service registration statute only prospectively "would indicate that a federal statute duly enacted by Congress could mean one thing prior to the Supreme Court's interpretation and something entirely different afterwards." As the court explained, "a statute, under our system of separate powers of government, can have only one meaning," so any prior interpretation inconsistent with that unique meaning "is, and always was, invalid." *Id.* See also *Gates v United States*, 515 F2d 73, 78 (CA 7, 1975) (the decision, re-interpreting a federal drug law "was a declaration of what the law had meant from the date of its effectiveness onward.")

As another recent example, the U.S. Supreme Court in *McDonnell v United States* interpreted a federal statute, defining what constituted an "official act" in a federal bribery law. *McDonnell v United States*, 579 US 550; 136 S Ct 2355; 195 L Ed 2d 639 (2016). The Court's interpretation of the federal statute defines the conduct that that is barred by this law; conduct outside of the now-interpreted statute may not be criminalized under this provision. In setting the meaning of "official acts," the Court found that McDonnell's conviction had to be reversed because the jury instructions given were "over inclusive" given the Court's interpretation and "may have convicted …for conduct that is not unlawful." *Id*. at 579. Cases following *McDonnell* never question whether the construction of the statute applies to the post-conviction defendant, who was tried with an instruction similar to the one invalidated in *McDonnell*. For example, in 2020, the U.S. Court of Appeals for the Sixth Circuit stated, for the defendant convicted before *McDonnell*

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of the same offense as McDonnell, the defendant "argues that the trial court's instructions misstated the law by allowing the jury to 'convict [him] for conduct that was not unlawful.' We agree." *Dimora v United States*, 973 F.3d 496, 502 (6th Cir. 2020). The Court further adds, that while the trial court could not have anticipated the definitive statutory interpretation in *McDonnell*, the defendant was, nonetheless, entitled to relief from his conviction because of the now-erroneous instruction. *Id.* at 505 ("Although we do not fault the trial court for failing to anticipate *McDonnell*, we conclude that its instructions were erroneous in light of that decision."). See also *Dimora* at 504-05 (citing cases from other circuits that also invalidated convictions based on similarly now-erroneous jury instructions after *McDonnel*).

This same rule applies to state court interpretations of state statutory law. For example, in analyzing whether a state crime qualifies as a predicate violent felony under the Armed Career Criminal Act ("ACCA"), federal courts have applied a state court interpretation of a state statute that occurred after the crime. "When the Florida Supreme Court . . . interprets the robbery statute, it tells us what that statute always meant." *United States v Fritts*, 841 F3d 937, 943 (CA 11, 2016). See also *United States v Davis*, 875 F3d 592, 603 (CA 11, 2017)(quoting *United States v Seabrooks*, 839 F3d 1326, 1344 (CA 11, 2016)) (state high courts definitively announce what the law has always meant in their state when they engage in statutory interpretation). See also *Hicks v Stancil*, 642 F App'x 620, 622 (CA 7, 2016) (holding that case law decided after the defendant's conviction, clarifying that two of his predicate offenses were not violent felonies, meant that he was never an aggravated felon).

As this Court stated in *Hyde v Univ of Michigan Bd of Regents*, "the general rule is that judicial decisions are to be given complete retroactive effect." 426 Mich 223, 240; 393 NW2d 847 (1986); *Kuhn v Fairmont Coal Co*, 215 US 349, 372; 30 SCt 140; 54 LEd 228 (1910) (Holmes, J.,

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dissenting) ("I know of no authority in this [C]ourt to say that, in general, state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years."). This rule applies to the Court's interpretations of statutes: "Where the language used has been subject to judicial interpretation, the legislature is presumed to have used particular words in the sense in which they have been interpreted." *People v Powell*, 280 Mich 699, 703; 274 NW 372 (1937) (quoted in *McCormick v Carrier*, 487 Mich 180, 192; 795 NW2d 517 (2010)).

2. Application to Mr. Langston's case.

Aaron holds that under MCL 750.316, a conviction of first-degree murder in Michigan requires an explicit finding of malice. *Aaron*, 409 Mich at 728. Therefore, since a statute's interpretation by the Supreme Court determines what it has meant since enactment (in the absence of legislative amendment), Michigan's first-degree murder statute has always required an explicit finding of malice. But the jury that convicted Mr. Langston of first-degree murder did not make an explicit finding of malice, so the judgment entered pursuant to that conviction was in error and must be vacated. See also *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970) (holding that the Due Process Clause of the U.S. Constitution requires that each element of a crime must be proven beyond a reasonable doubt in order to support a conviction); see Part I.B., *infra*.

In Mr. Langston's case the trial court, citing MCL 750.316, instructed the jury that the only *mens rea* needed to find him guilty of felony murder on the prosecution's theory of aiding and abetting was that he "intended to commit the crime of robbery at the time that he allegedly aided and abetted or encouraged [the principal] . . ." TT 2063-64. But intent to commit robbery does not rise to the level of malice needed for murder. Therefore, because the jury, faithfully executing the court's instructions, found Mr. Langston guilty of first-degree murder *without finding that he acted*

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with malice. *Aaron*, 409 Mich at 728. The jury that heard Mr. Langston's case was never instructed on malice, so it convicted him of murder without ever finding the necessary *mens rea*.

Because the *Aaron* Court held that "malice is an essential element of any murder," *Aaron*, 409 Mich at 728, Mr. Langston is legally innocent for lack of "an essential element" submitted to the jury. *Id.* As a result, it can truly be said that he has been imprisoned for 48 years for a crime that was never proven at trial. *Bousley*, 523 US at 623 (describing the defendant as "actually innocent" of the crime charged). It is black-letter law that if the prosecution does not prove every element of a crime beyond a reasonable doubt, then the defendant is not guilty. If ever there were "exceptional circumstances that justify collateral relief," surely they are present in this case. See *Davis*, 417 US at 346. Mr. Langston's conviction must be vacated.

Finally, the Court's interpretation of the law decided in *Aaron* applies to Mr. Langston and need not implicate "retroactivity" law. Concurring and dissenting in *Bousley*, Justice Stevens explained that it would be wrong to understand the Court as holding that the new rule of law announced in *Bailey* should be applied "retroactively." *Bousley*, 523 US at 625. As Stevens said, *Bailey* did not *change* the elements for conviction under the statute; rather, it corrected a longstanding misinterpretation of those elements. *Id.* That the mistaken understanding of the statute was widely or even universally shared is of no importance. *Id.* Although some Michigan decisions have used the misleading language of "retroactivity" to describe the effects of this Court's statutory interpretations, the Court has recognized that in reality, these decisions clarify the law rather than change it. For example, in *People v Bewersdorf*, 438 Mich 55; 475 NW2d 231 (1991), this Court held that a third OUIL offense can support charging a defendant as a habitual offender. Based on its own interpretation of the statute, the *Bewersdorf* Court reversed two Court of Appeals panels. *Id.* In *Doyle*, this Court rebuffed arguments that the *Bewersdorf* interpretation

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of the law should not be used to assess conduct occurring before the release of that opinion. *Doyle*, 451 Mich at 96, 109–11 (discussing the impact of *Bewersdorf*). While *Doyle* involved a statute of first impression, the Court's rationale was the same: that rather than changing the law, the Court in *Bewersdorf* "fulfilled its judicial role" and had "g[iven] effect to valid laws that existed before [the date *Bewersdorf* was decided]." *Id.*

B. Mr. Langston is entitled to relief because the Court left undecided the Due Process challenge litigated in *Aaron*; that challenge is now ripe for this Court's review and foundational Due Process law requires vacating Mr. Langston's conviction.

1. Due Process establishes a right to have every element of a criminal offense proven beyond a reasonable doubt before conviction; a conclusive presumption of an essential element violated Due Process in this case.

The US Constitution's Due Process Clause and the Michigan Constitution's due process provision establish a coextensive right to have every element of a criminal offense proven beyond a reasonable doubt. US Const amend XIV, § 2; Mich Const 1963 Art 1, § 17; *People v Sierb,* 456 Mich 519, 528; 581 NW2d 219 (1998). The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970); U.S. Const. amend XIV; Mich Const 1963, Art 1, §17.

Courts cannot evade *Winship's* requirements by creating presumptions that circumvent any element of the crime. For example, jury instructions indicating that "the law presumes that a person intends the ordinary consequences of his voluntary acts" are unconstitutional. *Sandstrom v Montana*, 442 US 510, 99 S Ct 2450, 61 L Ed 2d 39 (1979) (Note that *Sandstrom* was decided June 18, 1979, which was before the *Aaron* ruling but after the submission of briefs and oral arguments on the Due Process question; the *Aaron* Court did not cite to *Sandstrom* in its analysis). Such conclusive presumptions "would effectively eliminate intent as an ingredient of the offense"

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and "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." *Id.* at 522 (internal citation omitted).

Where the requisite intent changes the degree of a murder conviction, the due process right to have that element explicitly proven beyond a reasonable doubt is unequivocal. *Mullaney v Wilbur*, 421 US 684, 697; 95 S Ct 1881; 44 L Ed 2d 508 (1975). In *Mullaney*, the jury was instructed that, if the prosecution established that the homicide was both unlawful and intentional, then malice aforethought was to be conclusively implied unless the defendant proved that he acted in the heat of passion on sudden provocation. *Id.* The Supreme Court held that this instruction violated due process, *id.* at 702, reasoning that the protection of the Clause is not limited to those facts which, "if not proven, would wholly exonerate the defendant." *Id.* at 697. To apply the law in that way would be to ignore the importance of the degrees of culpability. *Id.* at 697–98. *Mullaney* reiterates the centrality of *Winship*'s protection, especially as it relates to murder convictions in light of the stigma, community impact, and liberty interests at stake. *Id.* at 698 (stating that "the distinction…between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes").

Michigan's murder statute required malice as an essential element long before Mr. Langston's trial. As early as 1858, this Court affirmed that malice was an essential element of murder. *People v Potter*, 5 Mich 1, 6; 71 Am Dec 763 (1858) ("Murder is where a person . . . unlawfully kills any reasonable creature in being, in the peace of the state, with malice prepense or aforethought, either express or implied."). The law at the time of Mr. Langston's conviction and today provides that all *murder*, not all killing, "committed in the perpetration, or attempt to perpetrate [any enumerated felony] shall be murder of the first degree." MCL 750.316. Michigan's murder statute has been tweaked since 1837, but this element has stayed the same. The perpetration

of a felony raises a "murder" from second to first degree, but the murder itself still requires proof of malice. Malice is the "grand criterion" that "elevates a homicide . . . to murder." *Aaron*, at 714.

Yet, the jury that convicted Mr. Langston was told that it could presume malice from an intent to commit the underlying robbery. The jury was instructed that for first-degree felony murder it must find that he "intended to commit the crime of **robbery** at the time that he allegedly aided and abetted or encouraged [his co-defendant]." TT 2063 (emphasis added). The instructions did not require the jury to find *mens rea*: "For murder in the first degree there must be proof beyond a reasonable doubt that the killing occurred as a result of the crime of robbery and that the defendant was at the time engaged in aiding or abetting another, to-wit, Mr. Wilson in the commission of that crime." TT 2064–65.[11]

The aiding and abetting jury instructions further reinforced this unconstitutional presumption of malice when it explained the elements of robbery and discussed Mr. Langston's potential involvement in the robbery. For example, the court instructed the jury that "if you find as a fact from the evidence that defendant Langston engaged in casing or preinvestigating the Maple Street store to determine the amount of occupants in the store and reported the results of his findings to [his co-defendant] with the intent to assist him in the robbery, then you may find aiding and abetting [the first degree murder]." *Id.* at 2061.

These instructions were important to the jury, as shown by their questions during deliberations. Twice over the span of about five hours, the jury asked for clarification on the difference

[11] By contrast, for second-degree murder, the court instructed: "Third, that at the time of the act *Ronald Wilson* was either intending to kill Arretta Lou Ingraham or that he consciously created a very high degree of risk of death to her by engaging in a robbery with a gun with the knowledge of its possible consequences." TT 2055.

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between first- and second-degree murder (the most important distinction being the malice instruction, of course), *id*. at 2081, 2089, but the court gave the jury no additional information. *Id.* at 2081-85; 2093. The jury asked no other questions. We can infer from the questions that the difference between the two degrees was integral to the outcome. This distinction – between a greater and lesser crime – is of "great[] importance" and thus should not be ignored. *Mullaney*, at 697.

This presumption that circumvents a jury finding on malice or intent violates Due Process. Where intent is an element of the crime charged, as it is in felony murder, the existence of that intent is a "question of fact which *must* be submitted to the jury." *Morissette v United States*, 342 US 246, 274; 72 SCt 240; 96 LEd 288 (1952) (emphasis added). Instructing the jury to presume intent for murder from the intent to commit the underlying felony skips this critical step and violates due process. *See Winship*, supra; *Sandstrom*, supra, and *Mullaney*, supra; see also *Commonwealth v Brown*, 477 Mass 805, 831; 81 NE3d 1173 (2017) (Gants, C.J., concurring).

2. The Due Process violation, at the time of *Aaron* and today, applies retroactively.

Under established law at both the time of Mr. Langston's appeal and today, a Due Process violation for failure to establish a necessary element of the offense or a presumption of a necessary element of the offense, would be applied to all cases retroactively. *See Ivan v City of New York*, 407 US 203; 92 S Ct 1951; 32 L Ed 2d 659 (1972) (holding that *Winship*-type due process errors must be applied retroactively to all pending cases); *Hankerson v. North Carolina*, 432 US 233, 242; 97 S Ct 2339; 53 L Ed2d 306 (1977) (requiring *Mullaney* retroactivity). As the *Ivan* Court stated, applying the retroactivity test used in Michigan, "Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." *Id*. at 204.

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C. Third, if analyzed under the lens of retroactivity law, *Aaron*'s decision must be applied to Mr. Langston and his conviction vacated; a failure to do so is a violation of Due Process.

If reviewed under the lens of retroactivity law, the outcome is the same. First, this Court has clarified that, even under the retroactivity law at the time of *Aaron*, decisions of the Court must be applied to cases pending at the time of the decision, as was Mr. Langston's. Second, under retroactivity law, the *Aaron* Court's decision was a substantive one that must be applied retroactively, and failure to do so has implications for constitutional Due Process.

1. At a bare minimum, *Aaron* must be applied to all cases pending on direct review at the time, including Mr. Langston's.

First, at a bare minimum, the *Aaron* rule applies to Mr. Langston and other individuals whose cases were pending on direct appeal at the time of the decision. Just last term, in *Schafer*, this unanimous Court noted that under the civil and criminal retroactivity rules: "A more precise reading of relevant caselaw is that the 'usual' retroactive application in Michigan applies to: (1) the case before the court, (2) **all cases that could have and did raise the issue that are pending at the time of the decision**, and (3) all cases timely filed after the decision." *Schafer v Kent County*, __ NW3d__; 2024 WL 2573500 at *11 (Zahra, J., writing for an unanimous Court) (emphasis added); see also *id.* (contrasting this rule with the more limited application of new decisions on collateral review). The Court noted that the retroactivity tests drawn from federal law –*Linkletter* in the criminal context – "produced confusion in Michigan law," but that the "standard method of retroactivity" applies new decisions to "cases arising from facts that occurred prior to the decision" not just cases filed after the decision. Under this clarification of the retroactivity law, at a minimum, the *Aaron* Court's decision must be applied to Mr. Langston and other cases that were pending at the time of the *Aaron*. See also *id.* (describing, in the civil context, the prior rule in *Stein* applied to "'pending cases where the issue had been raised and

preserved'"); *see also Stein v Southeastern Michigan Family Planning Project, Inc*, 432 Mich 198; 438 NW2d 76 (1989) (applying a statutory and caselaw defense of governmental immunity).[12] At a minimum, under these rules of retroactivity, the *Aaron* case would have applied to Mr. Langston and others similarly situated, whose case was pending in the Court and whose Court of Appeals decision addressed the issue.

2. **As the *Aaron* decision was a substantive rule – rather than a procedural rule – it must be applied retroactively; and the failure to do so has implications for constitutional Due Process.**

As recently noted in *Schafer*, the Court's retroactivity law has changed over time and has interacted with changes in federal retroactivity law.

At the time of the *Aaron* decision, Michigan had adopted to federal *Linkletter* standard. *See id*. Subsequently, the federal retroactivity standard was revised, to draw the distinction between substantive rules – which are applied on direct appeal and retroactively on collateral review – and new procedural rules – which are applied on direct appeal but are *not* applied retroactively to cases on collateral review. Michigan has not formally changed its rule for retroactivity, but the changing federal law has impacted how that test must be applied by our courts.

The start of modern federal retroactivity doctrine is seen typically to have begun with *Linkletter v Walker*, 381 US 618, 627; 85 SCt 1731 (1965). In *Linkletter*, and *Stovall v Denno* which followed it, the U.S. Supreme Court was faced with how to treat new rules of constitutional criminal procedure. *Linkletter*, 381 US at 628-630; *Stovall*, 388 US 293, 87 SCt 1967, 18 L Ed2d 1199 (1967) (explicitly addressing the retroactivity of "the constitutional rules of criminal

[12] *Aaron*, as applied to Mr. Langston's case, does not fall into a narrow category of cases where there is a clear overruling of settled precedent and where it would be appropriate to have full prospective relief. *See id*. at *12; see also id. at n.63 (collecting cases). The *Aaron* Court was explicit about the unsettled nature of the issue.

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procedure" at 296) (citing *Linkletter*). Neither *Linkletter* nor *Stovall* addressed a case involving substantive rules. *Linkletter*, for example, noted that under the Court's prior cases there was no distinction between civil and criminal litigation, *id.* at 627, and that the default rule for substantive statutory rules to retroactively apply – "the invalidity of statutes or the effect of a decision overturning long established common-law rules" *id.* at 628 – could be applied to constitutional rules as well. The Court ultimately determined, in the constitutional criminal procedure context however, to apply what is now known as the *Linkletter* test. See also *Stovall*, supra at 296 (stating the three-factor test and discussing "each constitutional rule of criminal procedure").

Michigan adopted the *Linkletter* test. *People v Hampton* 384 Mich 669; 187 NW2d 404 (1971); *People v Barnes*, 502 Mich 265, 273; 917 NW2d 577, 583 (2018) (per curiam). This Court's three-factor test, modeled after then-existing federal retroactivity standard, examines "(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." *Barnes, supra,* see also *Hampton*, 384 Mich at 674 (quoting *Linkletter v Walker*, 381 US 618; 85 S Ct 1731, 14 L Ed 2d 601(1965)).

At the time of *Aaron*, under *Stovall* and *Linkletter*, courts were not required to apply new rules of criminal procedure on direct appeal or retroactively.

In *Griffith v Kentucky*, the U.S. Supreme Court held that courts must apply all new federal constitutional criminal procedural rules to direct appeals of convictions, stating that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith*, 479 US 314, 322; 107 SCt 708; 93 L Ed 2d 649 (1987). To reach this conclusion, the *Griffith* Court looked, first, to the Article III's case and controversy requirement, which means that the Court will only hear specific cases but that "the integrity of judicial review" requires rules to be applied to all similar cases on direct appeal, and,

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second, to the need to treat similarly situated defendants the same. *Id.* at 322. The Court noted that "the problem with not applying new rules to cases pending on direct review is 'the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule." *Id.* at 323.

After *Griffith*, the U.S. Supreme Court decided *Teague*, which is widely cited for the current federal retroactivity standard. *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989). Under *Teague*'s federal retroactivity standard, new constitutional procedural rules apply on direct review and do not have retroactive effect on collateral review, while substantive rules apply on direct review and have retroactive effect on collateral review. 489 US at 311 (note that *Teague* also provided an exception for "watershed rules" of criminal procedure which was later eliminated by the Court). Substantive rules can either be viewed as an exception to the general ban on retroactive application of procedural rules or as not subject to the bar. See *Montgomery*, 136 S Ct at 728 (noting both views and citing *Schriro v. Summerlin*, 542 US 348, 352 n4 as stating that they are "more accurately characterized as … not subject to the bar.").

A substantive rule, which apply retroactively "includes decisions that narrow the scope of a criminal statute by interpreting its terms," *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) (citations omitted). More generally, substantive rules are "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. "[Substantive] rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Schriro*, 542 US at 352 (quoting *Bousley*, 523 US at 620-21).

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Until the late 1990s/2000s, there was a lack of clarity between state and federal retroactivity law and whether retroactivity was based in a constitutional protection. We now know that federal retroactivity is a floor, below which states cannot go, but that states can provide greater protections. We also now know that retroactivity protections, even those provided by the states, have a constitutional basis in Due Process.

In *Danforth v Minnesota*, 552 US 264; 128 S Ct 1029; 169 L Ed 2d 859 (2008), the U.S. Supreme Court held that States may adopt their own retroactivity standard, which can be more protective that the *Teague* standard; but that federal law sets "certain minimum requirements that States must meet but may exceed." *Id.* at 288. 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.

That retroactivity resounds in Due Process is also now clear. The first major indication that there are at least some cases where a failure to provide application of a new rule can violate Due Process was *Fiore v. White*, which was twice before the U.S. Supreme Court. *Fiore v White*, 528 US 23, 120 S Ct 469, 145 L Ed 2d 353 (1999); *Fiore v White*, 531 US 225, 227–28, 121 S Ct 712, 713–14, 148 L Ed 2d 629 (2001). Fiore and his co-defendant Scarpone, were convicted of the same crime. 528 US at 24. Scarpone's case was reviewed by the Pennsylvania Supreme Court, which

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interpreted the statute to narrow the conduct subject to conviction. *Id*. at 24-25. The Pennsylvania court refused to consider Fiore's challenge. *Id*. at 25. Fiore filed a federal habeas action, alleging that the federal constitution's due process clause protection required his release because the state had failed to produce evidence regarding a now-essential element of the offense. *Id*. at 25. The Court described its cert grant as addressing the question: "We granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." 531 US at 226. Before deciding the due process question, the U.S. Supreme Court certified a question to the Pennsylvania Supreme Court whether *Scarpone* changed the law or whether *Scarpone* stated what the statute had always meant. *Id*.; *see also* 528 US at 29.

The Fiore case made its way back to the U.S. Supreme Court in 2001. *Fiore v. White*, 531 US 225; 121 SCt 712; 148 L Ed 2d 629 (2001). The Pennsylvania Supreme Court responded to the certified question that "Scarpone did not announce a new rule of law. Our ruling merely clarified the plain language of the statute . . ." meaning that the interpretation was the proper statement of the law at the time of Fiore's conduct.

Under the statute, because the state failed to produce evidence of an essential element of the crime, Fiore's conviction violated Due Process. *Fiore*, 531 US at 226-27; Pa Stat Ann Tit. 35, §6018.401(a). And, because the Pennsylvania Court characterized its decision as clarifying the law at the time, instead of a new rule, the U.S. Supreme Court was not required to find whether Due Process is violated by a failure to apply a new statutory interpretation retroactively. Id. at 226 ("The Pennsylvania Supreme Court . . . has now made clear that retroactivity is not an issue."). However, the case suggests that the Due Process Clause may require state courts to retroactively apply new rules in state law cases in at least some circumstances.

If *Aaron* states the correct interpretation of the law of Michigan, as argued above, then there is no question regarding retroactivity. *See Fiore v. White*, 531 US at 238 (no question of retroactivity). Mr. Langston urges the Court to address the issue in his case under the prior framework, see Part I.A., *supra*, because the failure to do so creates these Due Process implications.

If *Aaron* was a new rule, then this case squarely resurfaces the question that the U.S. Supreme Court raised in *Fiore*: "when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." *Fiore v. White*, 531 U.S. at 226. If this Court views the decision in *Aaron* as the announcement of a new rule, the Due Process Clause is implicated and is violated by the failure to apply a new substantive rule retroactively.

However, determining that question also requires taking into account the law on retroactivity that followed the *Fiore* Court's decision. First, as stated above, *Danforth* and progeny, make clear that the states can exceed the federal standard, but that the federal standard is a floor below which they cannot sink.

Second, it is now clear that retroactivity law itself derives from constitutional due process. Until the U.S. Supreme Court's decision in *Montgomery*, it was often thought that the source of *Teague* and other federal retroactivity law was federal common law interpreting the scope of the writ of habeas corpus without a constitutional mandate. See *Montgomery*, 577 U.S at 198 (summarizing the rejected argument of amicus appointed to argue against U.S. Supreme Court jurisdiction). *Montgomery* clarified for the first time that there is, in fact, a constitutional basis for the requirement of applying new substantive federal constitutional rules retroactively.

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As *Montgomery* stated: "The Court now holds 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." The Court continued, "*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts. This holding is limited to *Teague*'s first exception for substantive rules…" *Id*. at 200.[13]

The Constitution requires state courts to give retroactive effect to substantive rules. As *Montgomery* explains, the nature of a substantive rule requires relief: "A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void. It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *Montgomery*, 136 S Ct at 731. Whether the substantive rule is about an independent offense, degrees of an offense, or an enhanced punishment does not matter. See *Welch v United States*, 578 US 120, 134, 136 S Ct 1257, 1268, 194 L Ed 2d 387 (2016) (applying retroactively the rule from *Johnson v United States*, 576 US 591; 135 S Ct 2551; 192 L Ed 2d 569 (2015)), which found the ACCA's residual clause invalid and noting that

[13] This overrules the suggestion of earlier cases relied on by this Court in analyzing our retroactivity doctrine that the federal law did not guide our state application or that retroactivity law, as applied by the states, does not have a constitutional basis. For example, in *Sexton*, 458 Mich 43; 580 NW2d 404 (1998), this Court found that *Griffith* was not controlling and cited *Great Northern Railroad's* statement that "the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." *Sexton*, 458 Mich at 411 (citing *Great Northern R. Co. v Sunburst Oil & Refining Co*, 287 US 358, 364; 53 SCt 145; 77 L Ed 360 (1932)). In *Sexton*, the Court relied on that, now upended logic, to look to the analysis in *Stovall*, instead of that in *Griffith*. *Id*. at 411-412.

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once the statutory provision was found invalid, "it can no longer mandate or authorize any sentence").

The *Aaron* decision, to the extent it is viewed as a "new" rule, is undoubtedly a substantive rule. A substantive rule "place[s] certain criminal laws or punishments altogether beyond the State's power to impose." *Montgomery* at 201; see also *id*. citing *Penry v Lynaugh*, 492 US 302, 330; 109 S Ct 2934; 106 L Ed 2d 256 (1989) (substantive rules under *Teague* "should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."). The *Aaron* Court's rule defines what is within the scope of the first-degree felony murder and what is not within its scope - killings in the course of enumerated felonies that occur without any proven mens rea whatsoever. *Aaron*, 409 Mich at 712-13; *see also Bousley*, 523 US at 620–621 ("[I]t is only Congress, and not the courts, which can make conduct criminal").

Therefore, *Aaron*'s ruling must be applied retroactively. Mr. Langston's case falls into the narrow category of cases potentially identified by the *Fiore* Court, where Due Process protections are implicated, even before *Montgomery*. And, after *Montgomery*, the Court has made clear that substantive new rules must be applied retroactivity and resound in constitutional Due Process.

II. MANDATORY LIFE WITHOUT PAROLE FOR PRE-AARON FELONY MURDER IS CRUEL AND UNUSUAL UNDER BOTH THE EIGHTH AMENDMENT AND MICHIGAN'S CRUEL OR UNUSUAL PUNISHMENT CLAUSE.

Mr. Langston was found guilty of first-degree felony murder without any finding of *mens rea* for the killing, yet he was sentenced to mandatory life without parole. MCL § 750.316. The automatic imposition of Michigan's most severe sentence to Mr. Langston, who did not kill or have any proven *mens rea* with respect to the killing, is in violation of the constitutional bans on excessive punishment. *Graham v Florida*, 560 US 48, 61; 130 S Ct 2011; 176 L Ed 2d 825 (2010); *People v Bullock*, 440 Mich 15, 40; 485 NW2d 866 (1992). Those who strike the killing blow in a

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second-degree murder case, where there is also proven *mens rea*, cannot receive the same punishment imposed on Mr. Langston. *Compare* MCL 750.316 with MCL 750.317. Yet Mr. Langston was sentenced to die in prison even though no jury has ascribed to him any of the moral culpability of a murderer. His sentence was disproportionate when imposed, serves no penological purpose 48 years later, and lags behind evolving standards in Michigan and elsewhere.

The Eighth Amendment's Cruel and Unusual Punishment Clause bars punishments that are disproportionally excessive in severity or length for the offense and that deviate from the "evolving standards of decency that mark the progress of a maturing society." *Trop v Dulles*, 356 US 86, 101; 78 S Ct 590; 2 L Ed2d 630 (1958); US Const, amend VIII Such penalties contradict the "precept of justice that punishment for crime should be graduated and proportioned" for both the offender and the offense. *Roper v Simmons*, 543 US 551, 560; 125 S Ct 1183; 161 L Ed 2d 1 (2005) (citing *Weems v United States*, 217 US 349, 367; 30 S Ct 544; 54 L Ed 793 (1910)); *see Miller v Alabama*, 567 US 460, 469; 132 S Ct 2455; 183 L Ed 2d 407 (2012).[14]

The relevant line of Eighth Amendment cases uses categorical rules to define constitutional standards relating to the "characteristics of the offender" or the type of offense. *Graham*, 560 US at 61. The Court has most often applied this categorical approach when assessing the death penalty, *id*. at 60, but has also extended its application to non-death penalty cases when the categorical challenge to sentencing "applies to an entire class of offenders" serving life without parole. *Id*. at 61. In assessing categorical Eighth Amendment rules, the Court first considers the "objective indicia of society's standards, as expressed in legislative enactments and state practice." *Graham*

[14] As described above, the U.S. Supreme Court found that substantive constitutional rules require retroactive effect. *Montgomery v Louisiana*, 136 S Ct 718, 732–736; 193 L Ed 2d 599 (2016). Any substantive Eighth Amendment rulings and Michigan Supreme Court cruel or unusual punishment rulings should therefore apply to Mr. Langston as well.

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at 61. Second, the Court, "guided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,'" must exercise "its own independent judgment" to determine if there is a constitutional violation. *Id.*

Michigan's Constitution commands that "cruel or unusual punishment shall not be inflicted." Const 1963, art 1, § 16. This Court has consistently read our constitutional provision more expansively than the federal Cruel *and* Unusual Punishment Clause based on the textual difference, historical interpretations, and longstanding Michigan precedent. *See Bullock*, 440 Mich at 31; *People v Stovall*, 510 Mich 301, 314; 987 NW2d 85 (2022). To determine whether a punishment is constitutional, Michigan courts apply a four-part test: "(1) the severity of the sentence imposed compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed on other offenders in Michigan, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the penological goal of rehabilitation." *Stovall*, 510 Mich at 314; see also *Bullock*, *supra* at 33–36 (citing *People v Lorentzen*, 387 Mich 167, 171-81; 194 NW2d 827 (1972)). Michigan's constitutional ban on cruel or unusual punishment is violated here, where Mr. Langston mandatorily received life without parole for an offense in which he did not kill and there was no proven *mens rea* with respect to the killing.

A. Objective Indicia of State and National Consensus, and Evolving Standards, Show That the Punishment Is Excessive.

Mr. Langston's LWOP sentence deviates from the national consensus, does not comport with evolving standards of decency, and is constitutionally excessive. When determining national consensus, the conclusion "should be informed by objective factors." *Enmund v Florida*, 458 US 782, 788; 102 S Ct 3368; 73 L Ed 2d 1140 (1982) (quotations omitted).

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1. Michigan Constitution factor 1 and 2: For pre-*Aaron* individuals who have no proven *mens rea* with respect to a killing, a mandatory life without parole sentence outweighs the proven culpability and Michigan has narrowed the lawful scope of the imposition of our harshest punishment.

Michigan was the first state to abolish the death penalty for murder in 1846, substituting life without parole. *People v Wilson*, 84 Mich App 636, 651 n2; 270 NW2d 473 (1978). Since then, Michigan has moved away from imposing life without parole by allowing most offenses to be parole-eligible, and by narrowing the offenses for which LWOP can be imposed. Today, the offenses that carry the potential for mandatory life without parole involve killing *with* malice proven or first-degree criminal sexual assault of a person under 13 years of age in only the most egregious and limited circumstances. See MCL 791.234(6)(e); MCL 750.520b(2)(c). In response to the U.S. Supreme Court's decision in *Miller v Alabama*, Michigan adopted MCL 769.25, giving judges sentencing discretion for young people convicted of murder. *Id.,* at (9); *Miller*, supra. Our constitution also bars mandatory life without parole for youth who were 18 at the time of their offense; instead requiring an individualized determination; *People v Parks*, 510 Mich 225; 987 NW2d 161 (2022), and bars life with parole for youth who commit second-degree murder. *Stovall*, supra.

Such revisions are consistent with the idea that the harshest punishment should be reserved solely for the worst possible offenders and crimes. Second-degree murder requires a showing of malice, but imposes a lesser punishment than Mr. Langston received without any finding of malice. *People v Simmons*, 134 Mich App 779, 785; 352 NW2d 275 (1984) (citing *People v Hawkins*, 80 Mich App 481, 486; 264 NW2d 33 (1987)); MCL 791.234(6)(a)–(f) (providing a list of offenses punishable by life without parole which does not include second degree murder or armed robbery).

Even if mandatory life without parole may be constitutional for some individuals or groups of individuals convicted of felony murder**,** it does not follow that it is *not* unconstitutional for a

subset of individuals, such as pre-*Aaron* cases. Recently, in *People v Lymon*, this Court found that a subset of cases cannot constitutionally receive a particular punishment, even if the Court does not address the overall constitutionality of that punishment. *People v Lymon*, 2024 Mich LEXIS 1439, (July 29, 2024).

In *Lymon*, the defendant was mandatorily required to register as a sex-offender under SORA, despite committing only non-sexual crimes. Applying the *Bullock* factors, this Court stated the defendant was "not personally or morally responsible for having committed" the type of offense for which he was punished which "weighs in favor of a conclusion of gross disproportionality." *Id*.

Similarly, a sentence of life without parole under a felony-murder charge for individuals such as Mr. Langston subjects him to a punishment for which he does not have proven "personal or moral responsibility."

Finally, to perhaps state the obvious, after *Aaron*, there have been no individuals convicted of felony murder and sentenced to mandatory life without parole without some finding of *mens rea* with respect to the killing. That the only people in Michigan serving this mandatory life without parole sentence were convicted at least 44 years ago strongly suggests that Michigan's standard has evolved away from such an imposition of punishment.

2. Evolving standards in other jurisdictions show that Mr. Langston's sentence is constitutionally disproportionate.

Michigan's mandatory life without parole sentence, imposed in pre-*Aaron* felony murder cases, applies regardless of offenders' relative culpability in the murder, their *mens rea*, or any other mitigating facts in the case, and is at odds with current sentencing practice in the majority of

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states. Only 12 states, including Michigan,[15] impose a mandatory sentence of life without parole for every felony murder. In other words, 38 states *do not*. Michigan is an outlier in its refusal to consider that different offenses and different offenders merit different punishments.

In some states without mandatory life sentences, judges have discretion to allow parole eligibility. In other states, defendants face a minimum more in the 15 to 20 year range, and a maximum that Mr. Langston, having served more than 48 years, would have completed long ago.[16]

The felony murder rule no longer exists in any other country.[17] In the United States, felony murder has been criticized for its harshness and for its inconsistency with prevailing notions of justice. *See, e.g.*, James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 Wash & Lee L Rev 1429, 1431 (1994).

[15] Ala Code § 13A-6-2; Del Code Ann. tit 11, § 636, § 4209; Iowa Code § 902.1; La Rev Stat Ann. § 14:30.1; Mich Comp Laws § 750.316; Miss Code Ann § 97-3-21; Neb Rev Stat Ann § 29-2520; NC Gen Stat § 14-17; 18 Pa Cons Stat Ann § 2502; RI Gen Laws Section 11-23-2.; SD Codified Laws § 22-16-4; W Va Code § 62-3-15.

[16] See 17-A Me Rev Stat § 1604 (Maine) (cannot serve more than 30 years); Minn Stat 609.19(2)(1) (cannot serve more than 40); Tex Penal Code 19.02 (can serve as little as 5 years); Va Code Ann 18.2-31–33 (same); Ark Code Ann 5-10-101 (minimum 10 year sentence); Ark Code Ann 5-10-102 (same); Mo Stat Ann 565.021 (same); Mont Code Ann 45-5-102 (same); Nev Rev Stat Ann 200.030 (same); Alaska Stat 12.55.125 (can serve minimum of 15 years); NY CLS Penal 125.25(3) (same); Ohio Rev Code Ann 2929.02(B)(1) (same); Utah Code Ann 76-5-203 (same); Wis Stat Ann 940.03 (cannot be imprisoned for more than 15 years in excess of the minimum term of imprisonment provided by law for the predicate offense); Cal Pen Code § 1172.5 (minimum of 15 year sentence for second degree felony); 20 ILCS 5/9-1 (minimum of 20 years); Kan Stat Ann 21-5402 (25 year minimum); Ky Rev Stat 507.020 (same); Ariz Rev Stat Ann 13-1105; Ariz Rev Stat Ann 13-751 (same); Conn Stat Ann 53a-54c (same); Or Stat Ann 163.115(b) (same); Colo Rev Stat 18-3-102-103, Colo Rev Stat 18-1.3-401(makes felony-murder a class 2 crime of violence felony with a sentencing range of 16-48 years); NJ Stat Ann 2C:11-3 (same); ND Cent Code 12.1-16-01 (same); DC Code 22-2104 (same); Vt Stat Ann, tit 13, § 2303 (35 year minimum); Okla Stat Ann, tit 21, § 701.7(B) (45 years is considered life, with parole eligibility after 85% of the sentence is served); Ind Code Ann 35-50-2-3 (minimum 45 years); Tenn Code Ann 39-13-204 (can be parole eligible); NH Rev Stat Ann 630:1-b (no mandatory minimum for second-degree felony murder); Wash Rev Code 9A.32.030 (same); Wash Code Rev 9A.32.050.

[17] See Abbie VanSickle, *If He Didn't Kill Anyone, Why Is It Murder?*, NYTimes (July 27, 2018) ("the United States remains the only country where the felony murder doctrine still exists").

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Changes in state laws and mental state requirements indicate a shift away from the severe punishment levied on Mr. Langston. In the years leading up to the *Aaron* decision, and in the years since, at least 12 states have narrowed or made other changes to their felony murder rules to move away from harsher applications.[18] For example, California recently amended its statute "to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony." Act of September 30, 2018, ch 1015, § 1, 2018 Cal Legis Serv (S. 1437) (West) (codified at Cal Penal Code 188). Colorado recently eliminated the possible sentence of mandatory life without parole for felony murder convictions. See Colo. Rev. Stat 18-3-102 (2021); *See also Sellers v Colorado*, Case No 22SC738, Sept. 30, 2024 (Colo S Ct 2024) (recent decision of the Colorado Supreme Court rejecting a categorical disproportionality challenge under the Eighth Amendment and the identical provision of the state constitution to the sentence for all felony murder convictions, in light of the legislature's elimination of the penalty for felony murder three years ago).

Nine states provide defendants with affirmative defenses or mitigating factors. Most of these states allow the defenses when the defendant did not have a weapon, did not do the killing, or did not believe other participants in the felony had a weapon.[19] When Hawaii dispensed with its felony murder rule in 1972, the comment on the statute noted "[t]here appears to be no logical base for the felony-murder rule which presumes, either conclusively or subject to rebuttal, culpability sufficient to establish murder." Haw Rev Stat § 707-701 cmt. (1972).

Earlier this year, the Pennsylvania Supreme Court granted Derek Lee's petition to appeal,

[18] See, e.g., 720 Ill Comp Stat 5/9-1(a)(3) (2002); Mass Gen Laws ch 265, § 1 (2020); Or Rev Stat 163.115(b) (1977).

[19] See, e.g., Conn Gen Stat 53a-54c (2015); M. Stat tit 17-A, § 202 (2019); ND Cent Code 12.1-16.01 (2019).

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on the issue of the constitutionality, under the U.S. Constitution's Eighth Amendment and Pennsylvania Constitution Art 1, Sec 13, of Lee's mandatory life without parole sentence imposed on Lee for a felony murder conviction "in which he did not kill or intend to kill." *Commonwealth v Lee*, 2023 WL 3961802 (Pa. Super. 2023) cert. granted, 313 A.3d 452 (Table) (Feb. 16, 2024) (180 WAL 2023).

Further, both *Enmund* and *Tison v Arizona*, 481 US 137; 107 S Ct 1676; 95 L Ed 2d 127 (1987), the U.S. Supreme Court cases addressing the limits of the death penalty in felony murder cases, were decided after 1980. That is, at the time of the *Aaron* decision, the death penalty was permissible for those who were convicted of murder and did not "kill, attempt to kill, or intend that killing take place." *Enmund*, 458 US at 801 (banning the death penalty for these aiders and abettors); *Tison*, *supra* (refining the *Enmund* limitations on the imposition of the death penalty on aiders and abettors). These developments in both state and federal laws show a movement away from imposing the harshest possible punishment on someone who did not kill and who was never found to have a *mens rea* required for murder.

Mr. Langston did not kill or intend to kill anyone. The jurors were told that a *mens rea* with respect to the felony alone was sufficient to convict on murder. This *mens rea* does not comport with state and national trends towards reserving the punishment of life without parole only for those who intentionally kill another, or demonstrate a similarly high level of moral culpability.

B. Mr. Langston's Mandatory Life Without Parole Sentence Is Disproportionate, Serves No Penological Purpose and Fails to Advance to Goal of Rehabilitation.

The purposes of punishment are not served – and the punishment is constitutionally disproportionate – when a person who does not kill, attempt to kill, and has no proven *mens rea* with respect to the death receives the maximum punishment under the law. Mr. Langston's mandatory LWOP sentence is grossly disproportionate to his culpability and serves no purpose.

Retributive justice hinges on the degree of culpability, which is determined by whether the harm was intentional. *Enmund*, 458 US at 783, 800. The goals of retributive punishment are not achieved where an individual has lesser culpability because he lacks the necessary *mens rea* or *actus reus*, but is still given the most severe punishment. *Bullock*, *supra,* at 877-78.

Deterrence is not served either. Deterrence can only function effectively when a mental state is present. *See* Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 Ariz St LJ 763, 774 (1999). "Unintended consequences and accidents are simply not deterrable." *Id.* at 780; see also *Morissette v United States*, supra at 254 n.14. No jury found that Mr. Langston had the intent or even foresaw that his conduct would result in someone's death. Absent a finding of *mens rea* for the murder, deterrence cannot be advanced.

Mr. Langston's LWOP sentence also contravenes rehabilitation. See *Miller*, *supra* at 473 ("Life without parole 'forswears altogether the rehabilitative ideal.'") (quoting *Graham v Florida*, 560 US 48, 74, 130 S Ct 2011, 176 L Ed 2d 825 (2010)); see also *Bullock*, *supra* at 40 n 23. Life without parole is only appropriate for "the rarest individual [who] is wholly bereft of the capacity for redemption." *Lorentzen*, *supra* at 179 (quoting *People v Schultz*, 435 Mich 517, 533–34; 460 NW2d 505 (1990)). After over four and a half decades, Mr. Langston does not need any further rehabilitation, nor is any offered by his life without parole sentence.

Rehabilitation and public safety go hand-in-hand, and the data show that people in Mr. Langston's age and situation are unlikely to reoffend, much less to commit violent crimes. *Lorentzen*, *supra* at 181 (looking to data to help determine whether tailored to the purpose of punishment). Mr. Langston is 72 years old and has served over 48 years in custody. Both government and academic examinations of crime have shown that older people are less likely to commit crime

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or reoffend. "Age is a consistent predictor of crime . . . . The most common finding across countries, groups, and historical periods shows that crime … tends to be a young persons' activity." *Social Variation, Social Explanations* 393–94, *in The Nurture Versus Biosocial Debate in Criminology: On the Origins of Criminal Behavior and Criminality* (Kevin M. Beaver et al. eds., 2014). Extensive data show that rates of crime, particularly violent crime, decrease with age, and that recidivism is low among the elderly. Ullmer & Steffensmeier, *supra*, at 377–78, 385; US Sentencing Comm'n, *The Effects of Aging on Recidivism Among Federal Offenders*, 11, 23 (2017). Mr. Langston's excellent prison record is strong evidence of his successful desistance from offending, and of his rehabilitation.

Langston's mandatory life without parole sentence does not serve his rehabilitation, protect the public, or deter others and is unconstitutionally disproportionate.

Finally, courts retain the power to exercise independent judgment in determining whether a sentence is cruel and unusual. *Roper* at 575*, Enmund*, *supra* at 788–9. In doing so, courts consider the culpability of the individual given the nature of the offense; whether penological goals are met, as described above; and the severity of the punishment in question. *Graham*, 560 US at 67.

For all of these reasons, the mandatory life without parole sentence imposed on Mr. Langston violates the Michigan's Constitution commands that "cruel or unusual punishment shall not be inflicted." Const 1963, art 1, § 16.

III. *PEOPLE V HALL*, 396 MICH 650 (1976), SHOULD BE OVERRULED TO THE EXTENT THAT IT CONDONES A MANDATORY LIFE WITHOUT PAROLE SENTENCE FOR SOMEONE CONVICTED OF FELONY MURDER WITHOUT ANY FINDING OF MALICE WITH RESPECT TO THE KILLING.

At issue in this case is a mandatory life without parole sentence for a pre-*Aaron* felony murder conviction. A finding that these pre-1980 mandatory LWOP sentences are unconstitutional would recognize the significant changes in law since *Hall* was decided in 1976 and narrow *Hall*

with respect to these pre-*Aaron* felony murder cases, but would not overrule *Hall* entirely. *People v Hall*, 396 Mich 650, 242 NW2d 377 (1976).

In *Hall*, the defendant and a co-conspirator were charged and convicted with felony murder for a robbery during which the defendants assaulted a man and took his wallet by force. *People v Hal*, 396 Mich 650, 652; 242 NW2d 377 (1976). Two witnesses heard one of the assailants say "If you move again we'll kill you," and "Get his watch and ring." *Id*.

The Court rejected his argument that his mandatory life without parole sentence violated the Michigan Constitution or the U.S. Constitution. Const 1963, art 1, § 16; US Const, Am XIV. The Court stated, without analysis, that the punishment was proportionate under the three-factor test in *Lorentzen*. *Hall*, supra at 657 (citing *People v Lorentzen*, 387 Mich 167, 171-81; 194 NW2d 827 (1972)). The Court then noted that, in that case, the "Defendant has not contended that Michigan's punishment for felony murder is widely divergent from any sister jurisdiction." *Id*. at 658. Finally, under the third *Lorentzen* prong, the Court concluded that rehabilitation was not the only allowable consideration for the Legislature to consider in setting punishment—they could also consider the need for deterrence and ensuring public safety. *Id*. Under the same prong, the court also held that the goal of rehabilitation was still served by a mandatory LWOP sentence, through the opportunities for executive commutation or pardon. *Id*. As described above, applying the *Parks*/*Lorentzen* test, in light of the changes in law since *Hall* was decided, Mr. Langston's mandatory sentence of life without parole is unconstitutional.

As described more fully above, the law on constitutionally permissible sentences has changed significantly since *Hall*. Michigan's "cruel or unusual punishment" provision bars our state's harshest punishment in some homicide cases. See *People v Parks*, 510 Mich. 225, 987 N.W.2d 161 (2022); *People v Taylor*, 510 Mich 112; 987 NW2d 132 (2022). In addition, the U.S.

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Supreme Court has narrowed the range of felony murder convictions for which the harshest punishment is permitted. See *Enmund v Florida*, 458 US 782, 788; 102 S Ct 3368; 73 L Ed 2d 1140 (1982) (banning the harshest penalty for aiders and abettors), and *Tison v Arizona*, 481 US 137; 107 S Ct 1676; 95 L Ed 2d 127 (1987) (refining the *Enmund* limitations on punishment for aiders and abettors).

In addition, see Part II., *supra*, the *Hall* conclusion with respect to cases like Mr. Langston's is at odds with the national consensus and the practice in Michigan on felony murder sentencing today. Mr. Langston's mandatory life sentence for a felony murder conviction in which no *mens rea* was ever proven with respect to the killing, contrasts with sentencing practice in the majority of states. In fact, 38 states do not impose a mandatory life without parole sentence for every felony murder conviction. See *supra* n15 and accompanying text.

Also, as more fully described above, neither rehabilitation nor the other goals of punishment are served by the mandatory life without parole sentence in this case.

A narrowing of *Hall* to bar mandatory life without parole sentences in felony murder cases with no finding of *mens rea* would be demonstrably in-step with "the evolving standards of decency that mark the progress of a maturing society." *Lorentzen*, supra at 179, citing *Trop v Dulles*, 356 US 86, 101; 78 S Ct 590; 2 L Ed 2d 630 (1958).

Finally, narrowing the holding in *Hall* to find that mandatory life without parole sentences for pre-1980 felony-murder offenders are violative of Michigan's constitutional ban on cruel or unusual punishment would not upend the jurisprudence of this Court and is consistent with *stare decisis*. Ten published Michigan Supreme Court opinions cite *Hall*. Two of the ten cases deal

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directly with offenses related to homicide and both can be distinguished from the rule requested here.[20]

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, this Court should either grant this application for leave to appeal, or reverse and remand for a new trial and/or sentencing.

Respectfully submitted

Date: October 4, 2024

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[20] First, *People v Parks* cites *Hall* for its holding on LWOP and felony murder, but distinguishes Hall because Parks involved a youth. 510 Mich 225, 255; 987 N.W.2d 161 (2022). Second, *People v Fernandez* cites *Hall* for the proposition that life is a proportional sentence for conspiracy to commit first-degree murder, where the defendant organized several attempts to kill his ex-wife after she left him. 427 Mich 321, 325, 336; 398 NW2d 311 (1986). *Fernandez* looks to *Hall*, and concludes that "Conspiracy can be as dangerous as a completed offense . . ." *Id.* at 336. If *Hall* is narrowed as requested, it will still be true that mandatory life without parole is constitutional for completed first-degree murder offenses, including felony-murder offenses in which there is a finding of *mens rea*. And it will still be true, as the *Fernandez* Court states, that conspiracy to commit first-degree murder, which includes both the *mens rea* for the underlying killing, as well as the mental state for the conspiracy, can be constitutionally punished with a life sentence.

Of the remaining published cases, four cite *Hall* for the proposition that improper remarks at trial are not reversible error if they went unobjected to, unless no curative instruction was possible. See *People v Uribe*, 508 Mich 898, 903 n. 15; 962 NW2d 644 (2021); *People v Duncan*, 402 Mich 1, 17; 260 NW2d 58 (1977); *People v Boucher*, 400 Mich 253, 258; 253 NW2d 626 (1977); and *People v Martin*, 393 Mich 303, 315; 247 NW2d 303 (1976).

One case cites *Hall* for the proposition that re-trial after mistrial caused by a hung jury does not violate the Double Jeopardy Clause of the Michigan Constitution. Const 1963, art 1, § 15. See *People v Thompson*, 424 Mich 118, 129; 279 NW2d 49 (1985).

Additional cases cited *Hall* in non-homicide matters. See *People v Lymon*, 2024 Mich LEXIS 1439 at 100 n. 147 (July 29, 2024); *People v Pulley*, 411 Mich 523, 528 n. 3; 309 NW2d 170 (1981); *People v Shafou*,416 Mich 113, 142 n. 39; 330 NW2d 647 (1982) (in a case about the offense committed, citing *Hall* generally for the proposition that sentences ought to be proportional).

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CERTIFICATE OF WORD COUNT

As required by Michigan Court Rule 7.212, I certify that the document contains 15,908 words, excluding the parts of the document that are exempted by Court Rules MCR 7.212(C)(6).

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted

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