STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No. 163968
Plaintiff-Appellee,	Court of Appeals No. 358537
v	Van Buren County Circuit Court No. 76-002701-FC
EDWIN LAMAR LANGSTON,	
Defendant-Appellant. /	

CORRECTED SUPPLEMENTAL BRIEF OF THE PEOPLE OF THE STATE OF MICHIGAN IN OPPOSITION TO LANGSTON'S APPLICATION FOR LEAVE

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COUNTER-STATEMENT OF JURISDICTION

This Court has jurisdiction over this case based on Michigan law. See MCR 7.305(A).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

On May 31, 2024, this Court issued an order granting argument on application and requesting the parties to file supplemental briefs addressing three questions:

1. Whether *People v Aaron*, 409 Mich 672 (1980), correctly limited its application to prospective-only relief.

   Langston's answer: No.

   The People's answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: Yes.

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.

   Langston's answer: Yes.

   The People's answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

3. Whether *People v Hall*, 396 Mich 650 (1976), should be overruled.

   Langston's answer: Yes.

   The People's answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

STATUTES INVOLVED

MCL 750.316 (1975) (First-Degree Murder):

> First Degree Murder—All murder which shall be Perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be Committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life.

MCL 750.529 (1975) (Armed Robbery):

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

INTRODUCTION

More than four decades ago, this Court decided one of the seminal cases of Michigan law, *People v Aaron,* in which this Court exercised its authority under the common law to change the requirement of proof for felony murder. Proof of the intent to commit the felony that served as the predicate to felony murder was no longer alone sufficient. The decision resolved a deep split in the Michigan Court of Appeals from the 1970s, a time before which one panel was required to follow a previous one. In so doing, this Court elected to apply this new common law rule prospectively, i.e., to the cases in which it announced the rule and to cases in trial, but not to pending appeals. Edwin Langston had one of the around 30 cases pending *Aaron*, and this Court in 1982 reversed the Court of Appeals' grant of relief.

Now, these many years later, Mr. Langston has returned, asking this Court to revisit that decision on retroactivity. It is as if he has filed a motion for rehearing, but he waited 40 years before filing. He does not rely on significant changes in law after *Aaron* to justify this request for changing the ruling. Thus, the doctrine of stare decisis governs. And if the doctrine does not apply here, it is hard to think of when it would apply. The People presented 40 witnesses at Edwin Langston's trial so many years ago, a trial that spanned more than three weeks in July and August of 1976. The transcripts have all the feel of reading a story from a bygone era of Michigan's history of South Haven. The considerations of finality weigh at their heaviest here. Any grant of relief based on retroactivity would essentially bar retrial. It would seem like a sharp break – not a development – in the law.

Langston seeks to bypass the ordinary rules of finality for collateral challenges by raising a due process claim that he argues requires retroactive relief. While true that the *Aaron* Court did not rule on due process grounds, the claim that the old felony murder rule violated due process fails because *Aaron* abrogated the old felony murder rule, striking the mental element that allowed proof of the intent to commit the underlying felony to constitute murder where death results. The old rule did not shift the burden, just as other courts have recognized. And this development of the common law was a reflection of policy, much like a legislative change. But just as there is no requirement to make such a statutory change retroactive, this Court had no duty to do so either. As a change to the common law, the decision to apply prospectively makes perfect sense. The same considerations of stare decisis also show why overturning *Aaron* to give its ruling retroactive application now, almost 50 years after the crime here, is untenable. Indeed, it would appear to be unprecedented in Michigan law.

On the question whether Langston's life without parole sentence violates the bar against cruel or unusual punishment, it is important to remember that the evidence presented would have allowed a jury to convict Langston of first-degree murder. In other words, the evidence supported a finding of malice. Langston plotted with Ronald Wilson to commit this armed robbery these decades ago, he scouted out the grocery store, and he helped hide the evidence after the crime. While the murder of Arretta Ingraham was not planned, a jury could well have believed that Langston acted with a depraved heart, one in which the natural tendency of his conduct was to cause death or great bodily harm, as Wilson shot Ingraham in the heart during the planned robbery.

The fact that Langston engaged in conduct that was sufficient to support a felony murder conviction strongly counsels against any finding of unconstitutionality here. Other offenders are currently serving life sentences in Michigan for engaging in the same kind of conduct. Notably, for Langston here, Wilson's sister even said that the night after the murder she overheard Langston say callously to Wilson that Arretta Ingraham's murder was "overdue." Granted, it is now almost 50 years later, and Langston in addition to as many as 100 other pre-*Aaron* felony murderers are spending the rest of their days in prison. And it may be that Edwin Langston, if released, would not pose a danger to the community. But considerations of justice are not only for incapacitation, but weigh the nature of the crime and harm. And the harm here – the murder of Mrs. Ingraham – was most profound, was final, and remains irrevocably unchanged. Langston's legal claim is that a life sentence for committing an armed robbery that results in death is unconstitutionally harsh. But that suggests that the armed robbery statute itself is unconstitutional, which authorizes a life sentence. When should punishment of a life sentence apply for an armed robbery, if not here.

The same kind of reasoning also counsels against the revisiting of this Court's decision in *People v Hall*. The Legislature and the Governor have had the opportunity to grant relief to these pre-*Aaron* offenders, and they have not. Other state legislatures have. The considerations of finality and stare decisis apply here too. And the wisdom of *Hall* that these are ultimately legislative decisions remains valid.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Almost 50 years ago, the People prosecuted Edwin Langston for felony murder for plotting with Ronald Wilson to hold up a grocery store in South Haven, where Wilson shot and killed the unarmed storeowner, Arretta Ingraham, in the heart while she was trying to call the police. The People presented 40 witnesses in July and August 1976 in a trial that spanned over three weeks on twelve different days. The trial court provided the jury instructions as was common before this Court's decision in *People v Aaron,* 409 Mich 672 (1980), which provided in part that if Langston was guilty of aiding and abetting the armed robbery of Wilson, he was guilty of first-degree felony murder. Notably, the trial court also specifically required the jury to find that "this murder . . . was fairly within the scope of a criminal enterprise and it might have been expected to happen in the course of committing this robbery with a pistol." (Vol XII, p 2063.) The People tried Wilson separately who also was convicted of felony murder.

On appeal, the Court of Appeals granted Langston relief in 1978, ruling that the instructions were improper because they failed to require the People to prove malice, rejecting the conclusion that the requisite intent of malice was established from the intent necessary to aid and abet armed robbery. This Court then held the People's application for leave pending *Aaron*, and once *Aaron* was issued in 1980, in 1982, this Court reversed the Court of Appeals and reinstated the first-degree murder conviction. It did not apply *Aaron* retroactively. The factual summary of the case below concentrates on the actions taken by Langston to assist Wilson's armed robbery and murder, the instructions given by the trial court, and the subsequent appeals that were taken by Langston in 1978 and again beginning 2020.

A. Edwin Langston is convicted of felony murder for planning an armed robbery with Ronald Wilson, who shot the store owner in the heart.

The robbery and shooting occurred on December 1, 1975, around 5 pm, at the corner grocery store in South Haven. The owners of the Maple Street grocery store were Wilbur and Arretta Ingraham, who had owned the store for 17 years. (Vol X, pp 1796–1797.) Sometime before 5 pm, Ronald Wilson grabbed Mr. Ingraham around the neck from behind and stated "it was a holdup." (Vol X, p 1798.) A store employee, Barbara Sullivan, saw Wilson with an "arm around [Mr.] Ingraham's neck," and the gun pointed at his head. (Vol VI, pp 1103–1104). Wilson shot Mrs. Ingraham, while she had a phone receiver in her hand. (Vol VI, pp 1106–1108.) He then told Sullivan to open the register, and after she did, Wilson took the money from the cash register tray. (Vol VI, p 1107.) Wilson also directed Mr. Ingraham to give him his billfold, or "I will shoot you"; the billfold also included credit cards and a family picture, in addition to money. (Vol X, p 1801–1804.) Mrs. Ingraham died from a single shot to her heart. (Vol VI, pp 1129–1130.) She told her husband, "I love you," as her last words. (Vol X, p 1801.)

Regarding the concert of action between Langston and Wilson, Dolores Shaver explained that she was the girlfriend of Langston's, and that she saw Langston and Wilson leave the house where Langston was living the day of the shooting at about 3:30 or 4:00 pm. (Vol VIII, p 1355.) Shaver said that Wilson brought a handgun to the house and asked whether Langston could "sell the gun for him." (Vol VIII, p 1351.) She said that "[Langston] picked the gun up," and then ultimately "[gave] the gun back to Ronnie [Wilson]." (Vol VIII, pp 1351–1352.)

According to Shaver, Langston and Wilson returned to the house sometime later that same day when it was dark. (Vol VIII, p 1355.) She said they were "laughing and talking." (Vol VIII, p 1356.) Later that evening, Dolores Shaver and Langston planned to go to a movie, but they had encountered a "roadblock" in which the police were investigating the murder from earlier that day. (Vol VIII, pp 1361–1363.) Shaver said that Langston and she traveled to her aunt's home where Langston met up with Wilson. (Vol VIII, p 1363.) At that house, Shaver testified that she overheard Langston tell Wilson "to lay low because he [Langston] was going to lay in the country." (Vol III, p 1364.) Wilson's girlfriend, L'Taska Courtney, also heard this exchange, saying that Langston told Wilson to "get out of town because the police had a description, a full description of him." (Vol X, p 1716.) According to Courtney, Langston "said he was going to lay low and get out of town for a couple of days." (Vol X, p 1717.)

With regard to Langston's conversation with Wilson at the home of Shaver's aunt after the shooting that night, Wilson's sister, Alta Madry, testified at some length about the statements back and forth she initially overheard between the two men about the robbery, and their conversation after occurred in her presence. (Vol X, pp 1728–1753). She explained that she heard the following exchanges between them:

> Ronald [Wilson] said, "I'm glad, Man, ***I didn't do it the way you wanted me to***. [Vol X, p 1728 (emphasis added).]

* * *

> Lamar [Langston] asked Ronald [Wilson] what took him so long. And that is when Ronald said, "Man, it didn't go like you told me." It was Lamar said, "What you mean, Man?" Ronnie say, "You told me it was only two ladies in there." He said, "When I got there, it was two ladies behind the counter, and it was two other ladies in the store, and about two or three kids." . . .
>
> Only thing [Lamar Langston] said was, "Man, when I went in there, like I told you, it was only the two ladies there that worked there." He said, "There wasn't nobody else in there when I went in there, Man."
>
> [Vol X, p 1732.]

At this point, Madry testified that Wilson explained after he said it was a "stick up" that he scuffled with a patron, ["]who threw a wine bottle at him." (Vol X, p 1733.) Wilson further told Langston that one of the woman who worked at the store, later identified as Arretta Ingraham, was on the phone with the police, refused to put the phone down, and "that he fired." (Vol X, p 1735.) Wilson told Langston that "I don't think" the shot hit her. (*Id.*) Shortly afterward, Langston left, but he returned five or ten minutes later. (Vol X, p 1737.)

They continued their conversation, and according to Madry, they were examining the items stolen from the robbery, and Langston laid claim to a stolen key, apparently from the store: "this is the key that probably opens the door to the store, and if they ever go out of town on a weekend, I am going to rip them off." (Vol X, p 1738.) At one point that same evening, Madry said that she traveled to the home of Dolores Shaver to deliver a message to Langston from Wilson about not mentioning the robbery, and she said that Langston told her that "I didn't know your brother had the heart." (Vol X, p 1742.)

Finally, in her retelling of the conversations between Langston and Wilson that occurred after the robbery, Madry confirmed that Dolores Shaver had come to her home that same evening after Langston had encountered the roadblock and the fact that the police were investigating not just a robbery but a murder. (Vol X, p 1743.) Madry described how later Langston told Wilson that they had better "burn" the wallet that Wilson stole, (*id.* at 1747), and that Wilson should "move" his car. (Vol X, p 1748.) After Langston pointed out the picture of Mrs. Ingraham from the stolen wallet and confirmed that this was the person Wilson shot, Madry testified that Langston said it was "overdue" in talking about the shooting:

> [Langston] made a reply after the – after we learned that the lady had been shot. He said, "Man –" this is exactly what Lamar said. . . . He said, "Man, *she was way* ***overdue****,* anyway," he said, "*because as we was kids coming up, she used to give us a hard time.*" [Vol X, p 1753 (emphasis added).]

Langston also provided a statement to the police after his arrest in the early morning hours of December 2, 1975, giving an explanation of events both before the robbery and afterward. In this statement, Langston admitted to specific actions that he had taken related to this robbery.

- "[Langston] went to the area of the Maple Street [g]rocery [store]";
- "I believe he said that Mr. Wilson drove";
- "[he] went in and bought a can of orange juice"; and
- "when he came out of the store, Mr. Wilson wanted to know who was in the store and how many" and Langston said "there was two women and two children in there." [Vol X, pp 1845–1846.]

Langston asserted that when Wilson "wanted to know if he knew of any place that he could stick up," he stated that "he did not participate in this type of activity." (Vol X, p 1844.) Langston also claimed that Wilson "set me up," that Wilson "wanted to know of any place that he could stick up," and that Wilson wanted to sell a handgun. (Vol X, p 1844.) After the robbery, according to his statement, Langston asserted that he "was afraid of Mr. Wilson, said he was like a wild man," and that he feared that "he might shoot him." (Vol X, pp 1851, 1861.) Despite these assertions, Langston also admitted that he left with Wilson after the robbery, (*id.* at 1848–1849), and that they met up later that evening (*id.* at 1852). Again, he asserted that he told Wilson that "he better clear him of it because he didn't have anything to do with it." (Vol X, p 1856.) Langston did not testify at trial. The jury evidently did not credit his assertions of a lack of knowledge of the armed robbery or his participation in it as it convicted him of felony murder.

As noted, Langston was charged with first-degree felony murder on an aiding and abetting theory. The jury was also instructed on second-degree murder and manslaughter as lesser alternatives. (Vol XII, p 2085.) The jury convicted him as charged, returning the verdict the same evening. (Vol XII, p 2096.)[1]

Given that the question at issue here relates to the instructions on intent, it is important to see the specific instructions that the trial court provided to the jury on the requisite intent for the jury to find Langston guilty of felony murder.

[1] Wilson was also convicted of first-degree felony murder from a separate trial. See *People v Wilson*, 84 Mich App 636, 637 (1978).

The trial court did note that for first-degree murder that "the killing occurred as a result of the crime of robbery." (Vol XII, p 2064.) But the trial court also outlined the elements that were essential for People to prove on Langston's intent:

> In connection with the alleged aiding and abetting in this case, the defendant is charged – the defendant Langston is charged with first degree murder in the course of the commission of this robbery. Before you can convict him, you must be convinced beyond a reasonable doubt of the following elements:
>
> First, that *the defendant intended to commit the crime of robbery* at the time that he allegedly aided and abetted or encouraged Ronald Wilson;
>
> Second, that the defendant performed acts or gave encouragement which in fact did aid, or abet, or assist in the commission of the crime of robbery;
>
> Third, that the crime of murder occurred as a result of this robbery;
>
> Fourth, *that this murder which occurred was fairly within the scope of a criminal enterprise and it might have been expected to happen in the course of committing this robbery with a pistol.* [Vol XII, pp 2063–2064 (emphasis added).]

The trial court also provided the instructions for the elements of second-degree murder and manslaughter. (Vol XII, pp 2065–2067.)[2] As noted, the jury convicted Langston of felony murder.

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[2] During deliberations, the jury twice asked for an instruction explaining the "difference between first-degree and second-degree murder." (Vol XII, pp 2080, 2089.) After the first request, the trial court provided an instruction in part as follows:

> For murder of the first degree there must be proof beyond a reasonable doubt that the killing occurred as a result of a crime of robbery and that the defendant was at the time engaged in aiding and abetting another in the commission of this crime at or before the time the crime was committed. [Vol XII, p 2083.]

The trial court did not reinstruct the jury a second time other than to provide a note to the jurors, saying "You have had the definition of the four possible verdicts given twice. Please continue to deliberate." (Vol XII, pp 2093–2094.)

B. The Court of Appeals in 1978 reverses his conviction, and this Court reinstates Langston's first-degree felony murder conviction on appeal in 1982.

On appeal, the Court of Appeals reversed Langston's conviction, holding that "to 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 (1978), citing *People v Fountain*, 71 Mich App 491 (1976). The court also ruled that the fourth element of the trial court's jury instructions quoted on the previous page "does not satisfy the test we have laid out in this opinion as it fails to inform the jury that malice entails a more than foreseeable risk of death and is based on defendant's subjective awareness of the risks and consequences of his act." *Id.* at 660–661. The court did, however, explain that the evidence against Langston was sufficient "from which an inference of malice might have been drawn" by a trier of fact, but that this question must be "put before the jury." *Id.* at 661.[3] Judge Vincent Brennan dissented. See *id.* at 660–661 ("the element of malice sufficient to elevate the killing to felony murder is established by finding that the killing occurred in the perpetration of one of the enumerated felonies"), citing *People v Till*, 80 Mich App 16, 28–29 (1977).

[3] Over a dissent, the Court of Appeals also reversed Wilson's conviction for first-degree felony murder on the same basis. See *Wilson*, 84 Mich App at 638. That court, however, provided a remedy in which either a manslaughter conviction could enter (which does not require proof of malice) or the People could retry him for first-degree murder with an instruction that "malice is a permissible inference that the jury may draw from the use of a deadly weapon, and not a presumption." *Id.* at 638–639.

The People then filed an appeal, and this Court held the case in abeyance pending its decision in *People v Aaron*. After *Aaron* was decided, this Court originally denied leave based on a clerical error. See *People v Langston,* 421 Mich 903 (1982). On delayed reconsideration, this Court reinstated Langston's conviction for first-degree felony murder. *People v Langston,* 413 Mich 911 (1982).[4] Justices Levin and Kavanagh would have granted leave to consider the issue of the retroactivity of *Aaron,* and Justice Ryan dissented on that same ground. *Id.*

C. Langston files a motion for relief under MCR 6.500, the circuit court denies relief, and the Court of Appeals deny leave.

In 2020, Langston filed a motion for relief from judgment, arguing that his felony murder conviction violated due process and that his life sentence for this crime constituted cruel or unusual punishment because he was convicted without a finding of malice as currently defined. (See Ex A, Circuit Ct Op, p 4.) The circuit court denied relief, ruling that it was bound to following the decision in *Aaron* regarding the prospective effect of the decision and was bound to follow *Hall* that the sentence did not violate cruel or unusual punishment. (See Ex A, Circuit Ct Op, pp 7–10.)

On appeal, on December 2, 2021, the Court of Appeals denied leave. Langston appealed to this Court, which asked for briefing on three questions and ordered argument on application.

STANDARD OF REVIEW

This Court reviews questions of law de novo. *Johnson v VanderKooi*, 509 Mich 524, 534 (2022).

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[4] Likewise, this Court reinstated Wilson's conviction for first-degree felony murder. *People v Wilson*, 411 Mich 990 (1981).

ARGUMENT

I. This Court should not reconsider its decision to deny Langston relief under *Aaron*.

There are three distinct reasons why this Court should deny Langston's application, declining to revisit this Court's decision in *Aaron* on retroactivity and its 1982 decision to reinstate Langston's conviction.

First, and foremost, this Court is without authority to do so according to its own rules. This issue was resolved by this Court in 1982. Three justices specifically raised the question in objecting to the peremptory order reinstating his conviction. By court rule, Langston has to show cause and prejudice to be able to file now when he could have raised this claim in 1982. He cannot do so.

Second, this Court's doctrine of stare decisis also strongly counsels against a grant of relief. The reliance interests here at their zenith. Almost 50 years has passed since Langston's conviction. The obstacles to reprosecution are insurmountable.

Third, if this Court actually reaches the issue as framed in its order, it should find that this Court in *Aaron* correctly did not apply the new rule retroactively because it was created in its authority to develop the common law. As a change to the common law, this Court acted within its right to make the change prospective, much like a Legislature redefining the elements of felony murder.

Finally, if this Court does somehow bypass the ordinary standards of law and precedent, and it grants Langston a new trial, the correct resolution alternatively would be to allow an armed robbery conviction to enter, given that this was a necessarily lesser charge here based on the evidence.

A. The request to revisit this Court's decision not to apply *Aaron* retroactively in *Langston* in 1982 is effectively a motion for rehearing, and this Court should deny relief on that ground.

As noted in 1982, this Court was asked to apply the decision in *Aaron* retroactively to Langston, and it refused to do so. See *People v Langston,* 413 Mich 911 (1982). In claiming that this decision was erroneous, Langston presses a due process claim and relies on three central cases, all of which were in place at the time of the *Aaron* decision: *In re Winship,* 397 US 358 (1970); *Mullaney v Wilbur,* 421 US 684 (1975); and *Sandstrom v Montana,* 442 US 510 (1979). (See Langston's Supp, pp 22–25.) But nothing constrained his attorney from advancing these arguments on appeal then. Like the decision in *Aaron*, his original grant of relief in the Court of Appeals was grounded on the common law, not due process grounds. See, e.g., *Langston,* 86 Mich App at 659 ("The statutory and common law foundations for this ruling are well set out in the *Fountain* opinion."). The phrase "due process" does not appear in the *Langston* opinion.

Under the Michigan court rules, he would have had to establish cause and prejudice to raise this claim now, when the claim was available to him at the time of his original appeal. See MCR 6.508(D)(3). As the circuit court explained below, Langston cannot overcome this bar. (See Ex A, Circuit Ct Op, pp 6–7.) His counsel was not ineffective for raising claims that were not meritorious then or now.

Rather, the claims here have all the feel of a motion for rehearing, essentially asking this Court to rule differently now these scores of years later as Langston and others like him are serving their fifth decade in prison. But there is no legal basis to entertain this application.

B. The doctrine of stare decisis strongly counsels against second-guessing *Aaron*'s decision to apply its new rule prospectively.

Langston makes several arguments about why this Court in *Aaron* erred in making the relief prospective only, relying on the mistaken argument that "the *Aaron* decision purported to be, and was, a statutory interpretation decision," and that due process required the result that *Aaron* announced. (Langston Supp, pp 13–14.) But Langston is wrong on both counts, which is fatal to his claim that this Court may disregard the standards in stare decisis to revisit *Aaron*'s ruling that its holding applied prospective only.

The seminal case in Michigan regarding the duty to honor prior precedent is *Robinson v City of Detroit*, 462 Mich 439 (2000). Stare decisis is generally "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* at 463. But "stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions determining the meaning of statutes." *Id.*

The test from *Robinson* has been digested into four considerations that this Court reviews in making a decision about whether to revisit this Court's prior ruling:

> [1] whether it was wrongly decided,
>
> [2] whether it defies "practical workability,"
>
> [3] whether reliance interests would work an undue hardship, and
>
> [4] whether changes in the law or facts no longer justify the questioned decision.
>
> [*Kandil-Elsayed v F & E Oil, Inc*, 512 Mich 95, 132–133 (2023) (cleaned up; numbered brackets added), citing *Robinson*, 462 Mich at 464.]

The claim here fails on all fronts.

First, *Aaron* was not wrongly decided on the issue of retroactivity. Contrary to Langston's claim, the decision in *Aaron* was not a reflection of statutory construction, but the opinion was *expressly* a decision by this Court to abrogate the prior common law rule under its authority to develop the common law. *Aaron,* 409 Mich at 733 ("Today we exercise our role in the development of the common law by abrogating the common-law felony-murder rule.") The circuit court recognized that point too. (Ex A, Circuit Ct Op, p 8) ("the Court [in *Aaron*] viewed itself as modifying the common law definition of 'murder' in Michigan.") And the due process claim was not considered there, which the circuit court recognized, *id.* at 9 ("there is no indication that the *Aaron* Court believed it was engaged in constitutional avoidance"). Such a claim would have been without merit in any event, as evaluated below. See I.C.2.

Second, there is nothing in the prospective application of *Aaron* that "defies workability." The ruling that confirmed that this Court in *Aaron* meant what it said the following year, in *People v Lonchar,* when this Court denied leave in a case that had followed the *Till* line of precedent – rather than *Fountain* – and affirmed the criminal defendant's conviction. *People v Lonchar*, 411 Mich 923 (1981). See *id.* at 923–930 (Levin, J., dissenting). The appellate courts have not cited *Lonchar* in more than 30 years, and they have not apparently commented on *Aaron*'s prospectivity other than once during this time, in 2014, to reinstate a conviction in an unpublished opinion.[5] This issue has not been percolating in the appellate courts.

[5] *People v Terlisner*, 2014 WL 4214895, at *3 (2014).

Third, the reliance interests are overwhelmingly in favor of this Court's prior balancing of interests. As this Court in *Robinson* explained, this Court must ask "whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Id.* at 464. It is a matter of "prudential judgment." *Id.* The trial here was long ago. Any relief would in effect ensure that there was no retrial. And this is a circumstance in which the Court of Appeals in granting relief had expressly noted that "the record contains facts from which an inference of malice might have been drawn ([i]. e., aiding an armed robbery itself creates a risk of death)," but the court there ruled that "the issue must be retried and put before the jury." *Langston,* 86 Mich at 661. 40 years later this is no longer possible. In short, "overruling" this aspect of *Aaron* "would produce significant dislocations." *Robinson*, 462 Mich at 466.

Fourth and finally, there have been no changes in the law or facts to call into question the decision. The due process decisions on which Langston relies, *In re Winship*, 397 US 358 (1970), *Mullaney v Wilbur,* 421 US 684 (1975), and *Sandstrom v Montana,* 442 Mich 510 (1979), (see Langston's Supp, pp 22–25), were in place at the time of *Aaron*. This would be a classic instance of this Court just making a different discretionary decision. But the time for the revisiting the decision is long past. If stare decisis does not apply to this decision, under these circumstances, it is hard to see when the doctrine should apply. Even if this Court might have approached the matter differently, stare decisis bars it from going back now.

C. If it reaches the issue, this Court should rule that it properly applied the new rule announced in *Aaron* prospectively only.

As an initial matter, if examining the question of retroactivity, this Court should begin by reviewing the nature of the holding in *Aaron*, which abrogated the common law felony murder rule. *Aaron,* 409 Mich at 733. Once that is understood, it is clear that this Court properly cabined the application of the new rule to cases only prospectively.

1. This Court in *Aaron* developed the common law as a matter of Michigan law and abrogated the felony-murder rule.

This Court's decision in *Aaron* was a seminal one. As reflected in the decision by the Court of Appeals in *Langston,* the Court of Appeals had divided between two competing views of the common law, one as reflected by *Fountain,* 71 Mich App 491, and the other by *Till,* 80 Mich App 16. See *Aaron,* 409 Mich 686 n 1. This Court began with a long analysis of the felony murder doctrine under the common law, including its development in the United States, before evaluating it under Michigan jurisprudence. It finished its lengthy analysis of the general common law by concluding that "the felony-murder doctrine [] provid[es] a separate definition of malice," which had effectively "recognize[d] the intent to commit the underlying felony, in itself, as a sufficient mens rea for murder." *Id.* at 716–717.

The first question it then addressed was whether Michigan's statutory definition of first-degree murder, MCL 750.316, had codified the common law. This Court in *Aaron* ruled that the statute did not, *id.* at 721, which it found permitted it to develop the common law further if it wished to exercise that authority.

The next question this Court addressed was the status of the felony murder doctrine in Michigan's common law. Before reaching this question, this Court outlined the principles underlying criminal law in general, for which it identified as the touchstone "the concept of determination of guilt on the basis of individual misconduct," i.e., "individual culpability for criminal responsibility." *Id.* at 708. In noting the common law development that allowed the definition as a term of art not to include "intentional wrongdoing," this Court concluded that this "enlargement" of the concept of malice to be "unacceptable," as it was "incongruous" with the general principles of contemporary jurisprudence. *Id.* at 713.

In the section then addressing Michigan's common law, the Court explained that "Michigan has never specifically adopted" the common law doctrine that "defines malice to include the intent to commit the underlying felony." *Id.* at 722. But it then found that "the common-law doctrine remains the law in Michigan" since this Court had "not been faced previously with a decision as to whether it should abolish the felony-murder doctrine." *Aaron,* 409 Mich at 723. That is because "the general rule is that the common law prevails except as abrogated by the Constitution, the Legislature or this Court." *Id.* at 722. After reviewing its "continued existence" in Michigan, this Court ruled that it was "no longer acceptable":

> We believe that it is *no longer acceptable* to equate the intent to commit a felony with the intent to kill, intent to do great bodily harm, or wanton and willful disregard of the likelihood that the natural tendency of a person's behavior is to cause death or great bodily harm. [*Id.* at 727–728 (emphasis added).]

This Court expressly explained that it was exercising its authority in the "development of the common law" in abrogating the felony-murder rule. *Id.* at 733.

In changing the common law, this Court then decided to make this decision prospective alone, applying the new standard to "all trials in progress and those occurring after the date of this opinion." *Id.* at 734. This resolution excluded cases pending on direct review including those held in abeyance pending the decision, as confirmed by this Court's order in Langston's case, over the objections of three justices. See *Langston,* 413 Mich at 911 (Levin, J., concurring, joined by Kavanagh, J.) ("Justice Levin would grant leave to appeal to consider the retroactivity of *People v Aaron*, 409 Mich 672 [](1980), for the reasons set forth in his dissenting statement in *People v Lonchar*, 411 Mich 923 (1981)."); (Ryan, J., dissenting) ("I would grant leave to appeal, limited to consideration of the question of the retroactivity").

In Langston's supplemental brief, he makes a critical error in arguing that this Court "provided a definitive interpretation of what the statute means and always has meant." (Langston's Supp, p 15.) Not so. That is the reason this Court invoked its authority to develop the common law. This Court *changed Michigan law*.

Langston argues that this Court engaged in "statutory interpretation," reaching a conclusion about what "the statute means and has always meant." Langston Supp, p 16. But the analysis in *Aaron* of the statute was merely that the Legislature did not codify the common law; it ruled that MCL 750.316 only elevated a "murder" from second-degree to first-degree. *Id.* at 721. In that way, this Court examined the current status of the common law in Michigan, which it expressly acknowledged at the time allowed the intent necessary to commit the underlying felony to establish the necessary intent to prove murder:

> Our opinion today is limited to the question of *whether we should* ***continue to recognize the common-law rule*** *which allows the mental element of murder to be satisfied by proof of the intention to commit the underlying felony*. [*Aaron*, 409 Mich at 715, n 103 (emphasis added).]

Stated differently, this Court recognized that the rule up to the time of the decision was that for the element of a defendant's mental state, the intent to commit the underlying felony satisfied the definition of murder because it was a separate category of malice, which remained the law in Michigan as the common law had not been abrogated. In this way, the instructions for Langston were consistent with the law on murder in Michigan at the time they were given. And that is why this Court "develop[ed]" the common law and "abrogated," i.e., changed, the common law, see *id.* at 733, to eliminate the rule that would allow the mere intent to commit the underlying felony – even if identified as an inherently dangerous felony – to be sufficient alone to establish the requisite intent for murder.

This is not a small point, because it has a direct bearing on any retroactivity analysis. Justice Ryan concurred on this exact ground, making the same argument as Langston, and disagreeing with the majority opinion:

> The effect of this decision is not, as my brother suggests, *to redefine malice or murder*. *Those terms will mean what* ***they have always meant*** *in this state*: murder is a killing accompanied by malice; malice is the intent to kill, the intent to inflict great bodily harm, or wanton and willful disregard of the likelihood that the natural tendency of one's behavior is to cause death or great bodily harm. [*Id.* at 745 (emphasis added); *id.* at 42 ("I disagree with the following statement by my Brother Fitzgerald [authored majority]: 'We construe the felony-murder doctrine as providing a separate definition of malice' ").]

So, Justice Ryan concluded, like Langston, that Michigan law "always" required one of these three intents to prove malice. But that is not how the *Aaron* majority ruled.

To repeat, in its section on the felony murder doctrine in Michigan, while noting that "Michigan has never specifically adopted the doctrine," this Court ruled that "the common-law doctrine remains the law in Michigan. *Id.* at 723.[6]

The significance of this point bears directly on the question of retroactivity. In his dissent on the order from which this Court made clear that *Aaron* would not apply to the 30 cases being held for *Aaron*, Justice Levin noted that the issue of retroactivity would be as Langston argues if this Court ruled as Justice Ryan had:

> Justice Ryan declined to endorse the Court's statement that Michigan law previously recognized the felony-murder rule. *If Michigan had no felony-murder rule, all defendants convicted of first-degree felony-murder without a finding of malice by the factfinder were convicted* ***without a determination of an essential element of the crime*** *and arguably are entitled to new trials.* [*People v Lonchar*, 411 Mich 923, 930 (1981) (Levin, J., dissenting) (emphasis added).]

Langston advances the same argument as Justice Ryan contended in *Aaron*, i.e., that Langston was convicted without the jury making a determination of an essential element. But the *Aaron* Court did not reach that conclusion because it found that the law "previously recognized the felony-murder rule." See *Lonchar,* 411 Mich at 923. In short, Langston and the other defendants whose cases were held in abeyance before *Aaron* received the correct instructions for first-degree felony murder under the common-law definition as it existed at that time in Michigan.

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[6] For reference, the full quote of this Court on the status of the felony murder doctrine under the common law in Michigan at the time of the decision was as follows:

> 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.* [*Id.* at 723; *id.* ("The cases before us today squarely present us with the opportunity to review the doctrine *and to consider its* ***continued existence*** *in Michigan*.") (emphases added).]

Based on this same misunderstanding of law, Langston asserts that "[he] is legally innocent for lack of 'an essential element' submitted to the jury." (Langston Supp, p 21.) This argument is mistaken. It is based on the mistaken predicate that this Court in *Aaron* held that the common law in Michigan did not include the felony murder rule at the time of the ruling. But, in fact, it ruled to the contrary, determining that the common law definition was the law in Michigan because it had not been abrogated.

Langston also contends that this Court "left undecided the Due Process challenge litigated in *Aaron*." (Langston Supp, p 22.) The opinion does not state that. This Court in *Aaron* did not address the claim on due process grounds, but rather it examined the law on statutory and common law grounds. While this Court reviewed some case law related to due process, see *Aaron,* 409 Mich at 711, citing, e.g., *Mullaney v Wilbur*, 421 US 684, 697–698 (1975), there is nothing in *Aaron* that indicates the defendants' claim was raised as a due process challenge. In fact, the phrase "due process" only appears once in the opinion, in a footnote to Justice Ryan's concurrence in which he explains that under the felony murder rule, malice is not really an element of the crime. *Aaron,* 409 Mich at 742, n 15. As a related point, the phrase "due process" does not appear in either of the competing views from the two cases from the Court of Appeals on the same issue, *Fountain* and *Till*, nor in the lower court decision in *Langston*, 86 Mich App 656. This Court did not state it was reserving a due process challenge.

2. This Court in *Aaron* did not err in applying its change to the common law for felony murder to new cases.

This Court plays a role akin to the Legislature where it exercises its role in the development of the common law. As noted, in Michigan "the common law prevails except as abrogated by the Constitution, the Legislature, or this Court." *People v Woolfolk*, 497 Mich 23, 25–26 (2014) (memorandum opinion), citing *People v Stevenson,* 416 Mich 383, 389 (1982). As in *Aaron,* this Court has the authority to examine the common law and "alter those doctrines where necessary." *Woolfolk,* 497 Mich at 26, citing *Adkins v Thomas Solvent Co,* 440 Mich 293, 317 (1992). Much like the Legislature, this Court may review "society's mores, institutions, and problems," and consider "prevailing customs and practices of the people" in this state in making changes. *Woolfolk,* 497 Mich at 25–26 (citations omitted). Where the common law was the source of the rules, such as in negligence, this Court has identified the role of developing the common law as a "responsibility" in the absence of legislative directive. *Moning v Alfono*, 400 Mich 425, 436 (1977) ("The law of negligence was created by common law judges and, therefore, it is unavoidably the Court's responsibility to continue to develop or limit the development of that body of law absent legislative directive.").[7]

[7] This Court has exercised this authority more recently in determining that duress is a defense to a charge of felony murder where it is a defense to the underlying felony that will elevate the crime from first to second-degree murder. See *People v Reichard*, 505 Mich 81, 96 (2020) ("we hold that duress may be asserted as an affirmative defense to felony murder if it is a defense to the underlying felony"). See also *People v Gafken,* 510 Mich 503 (2022) (holding that duress is an affirmative defense to depraved heart murder); *id.* at 516 (Welch, J., concurring) ("Michigan's Constitution gives this Court the final say as to the common law of Michigan, now and into the future.").

This Court in *Aaron* removed one of the mental states that was sufficient to prove felony murder under the common law, i.e., the intent to commit the underlying felony. *Aaron,* 409 Mich at 733.[8] Strictly speaking, as a change in policy this new rule does not even implicate the rules of retroactivity, which are generally predicated on changes to the breadth of a criminal statute or the sentence that may be imposed by law, as required by the Constitution or by the proper construction of the statute. See, e.g., *People v Barnes*, 502 Mich 265, 268 (2018) (ruling that this Court's decision in *People v Lockridge,* 498 Mich 358 (2015) on the constitutional requirement of fact finding that increases punishment under the Sixth Amendment would not have "retroactive effect for sentences [on] collateral review").

Rather, the change here was adopted by this Court, and the same rule should obtain even if the change based in policy had been enacted by the Legislature. For example, *Aaron* noted that the Pennsylvania Legislature amended its law in 1974, where Michigan had adopted the identical version, *id*. at 718, n 106, and the Legislature there did not make its change apply to offenses that arose before the effective date of the change. See 18 Pa Stat and Cons Stat Ann § 2502(a). The California Legislature's action in 2019 addressed the same basic issue, making its action retroactive. See Cal Penal Code § 1172.6(a).

[8] The People note, however, that later decisions call in to question the authority of this Court to modify the common law as it did here. See, e.g., *People v Perkins*, 468 Mich 448, 455 (2003) ("When the Legislature codifies a common-law crime without articulating its elements, we must look to the common law for the definition of the crime. *We are bound by the common-law definition until the Legislature modifies it*.") (Emphasis added; citations omitted.)

Indeed, as the eminent treatise by Professor LaFave recognizes, "most [legislative] changes made to substantive criminal law are *prospective in nature*[.]" 2 Substantive Crim Law § 14.5(h) (3d ed.), "The future of the felony-murder doctrine," (emphasis added) (citing the California law as the counterexample). That principle applies here because the elements and standards in Michigan reflected the traditional rules of felony murder before the change in law.

Citing LaFave & Scott, this Court in *Aaron* outlined what were the requirements to prove the necessary mental state to establish "malice aforethought." *Id.* at 714. This Court quoted the treatise, which noted that "malice aforethought" was a "misleading expression" and identified the "types of murder" arranged by "mental element":

> (1) intent-to-kill murder;
>
> (2) intent-to-do-serious-bodily-injury murder;
>
> (3) depraved-heart murder (wanton and willful disregard that the natural tendency of the defendant's behavior is to cause death or great bodily harm); and
>
> (4) *felony murder*. [*Aaron,* 409 Mich at 714–715 (emphasis added).]

In short, "each one, by itself, constitutes the element of malice aforethought." *Id.* This Court then removed this "fourth category" of proving murder. *Id.* at 727–728 ("Our review of Michigan case law persuades us that we should abolish the rule"). By making this change, this Court exercised its authority to develop the common law, which was neither required by statutory construction nor by the Constitution. As a result, there was nothing in law that required this change to be applied to prior cases. See *Shepard v Foltz*, 771 F2d 962, 966 (CA 6, 1985) ("we note that we have previously held that the Michigan Supreme Court's decision not to give retroactive effect to *Aaron* does not violate due process.").

Langston argues that the change to eliminate the felony murder rule was required by due process, arguing that it allowed an essential element to be conclusively presumed. (See Langston's Supp, pp 22–25, citing *In re Winship*, 397 US 358 (1970), *Mullaney v Wilbur,* 421 US 684 (1975), *Sandstrom v Montana,* 442 Mich 510 (1979).) But this argument is predicated on Langston's misunderstanding of the nature of the decision in *Aaron*. Because this Court in *Aaron* recognized that the intent to commit the underlying felony was sufficient alone to commit murder under the common law, *id.* at 717, the law did not create a conclusive presumption to satisfy one of the elements. See *id.* 715, n 103 ("we note that none of the juries in the instant cases was instructed that they must infer the intention to kill from the intention to commit the underlying felony.") Thus, Langston is incorrect in claiming that "[the jury] could presume malice from an intent to commit the underlying robbery." Langston Supp, p 24. For *Aaron,* the intent to commit the underlying crime was itself the "fourth category" of malice. *Id.* at 714–717. The intent to commit an armed robbery had to be proven here, and the instructions did not create a presumption to establish it.

Justice Ryan recognized as much in his concurrence in the only place that the justices address the issue of due process. 409 Mich at 743, n 15. He concluded that, strictly speaking, "malice" as he defined it, was not an element of the crime. On this ground, Justice Ryan rejected the idea that there was a "conclusive presumption" because it was "merely a roundabout way of saying the element is not part of the crime." *Id.* Otherwise, "when the presumed fact is truly an element of the crime, the presumption, especially if it is conclusive, may run afoul of [Due Process]." *Id.,* citing *In re Winship*, 397 US 358, *Mullaney*, 421 US 684.

The U.S. Supreme Court precedent in *Winship* held that due process required that the trier of fact must find each essential element proven beyond a reasonable doubt. *Winship*, 397 US at 361. In a similar vein, the U.S. Supreme Court in *Mullaney* ruled that a Maine rule that malice aforethought was "conclusively implied" unless the defendant proved he acted in heat of passion improperly shifted the burden of proof. *Mullaney*, 421 US at 686. Rather, "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Id.* at 704. The third case on which Langston relies, *Sandstrom*, falls within this same framework. The Supreme Court ruled that a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violates due process. 442 US at 512. It does so because it either shifted the burden of proof or created a "conclusive presumption." *Id.* at 524.

But the courts that encountered challenges to their felony murder statutes on this ground generally rejected such arguments based on the same reasoning as Justice Ryan's concurrence in *Aaron*, i.e., "malice" was not an element, and there was no conclusive presumption. See, e.g., *People v Dillon*, 34 Cal 3d 441, 475 (1983) ("In that event the 'conclusive presumption' is no more than a procedural fiction that masks a substantive reality, to wit, that as a matter of law malice is not an element of felony murder."); *id.* at 476, n 22 ("Because the felony-murder rule thus does not in fact raise a 'presumption' of the existence of an element of the crime, it does not violate the due process clause as construed in *Mullaney* or *Sandstrom*.

This is also the holding of each of our sister jurisdictions that has addressed the issue.") See also *State v Harrison*, 914 NW2d 178, 193–194, n 4 (Iowa 2018) ("Our ruling is supported by a number of other states, which have likewise considered and rejected claims that the felony-murder rule violates due process because it creates an unconstitutional presumption that the defendant committed the killing with malice aforethought.")[9] Langston's analytic error is mistaking malice to be an element distinct from one of the four mental states that *Aaron* found each independently constituted malice at common law. *Id.* at 714–717.

In this way, Langston's reliance on the cases that reviewed the retroactivity of *In re Winship* and *Mullaney* are inapposite. (See Langston's Supp, p 25, citing *Ivan v City of New York,* 407 US 203 (1972) (applying *Winship* errors retroactively), and *Hankerson v North Carolina,* 432 US 233 (1977) (applying *Mullaney* retroactively).) The former Michigan felony murder rule did not offend due process.

Ultimately, because this Court changed the common law, and did not reinterpret a statute, its decision to apply the rule prospectively was within its authority.

3. Even applying Michigan's rules of retroactivity, Langston is not entitled to relief.

Even if this Court attempted to analogize this case to *Sandstrom* and applied the standard rules of retroactivity, those rules do not support the revisiting of this Court's decision to apply the change to the common law prospectively alone.

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[9] Accord *State v Patterson*, 311 Kan 59, 67 (2020) ("By codifying participation in the felony as a statutory alternative for the intent and premeditation otherwise required for a first-degree murder conviction, the statute imposes a rule of law. It does not remove from the jury's consideration an intent element required by a criminal statute."). See also *Murray v State*, 776 P2d 206, 209 (Wyo 1989) ("No jurisdiction has held that a felony murder statute violates . . . . *Sandstrom*"). But see *State v Ortega*, 112 NM 554, 563 (1991) (construing its felony murder statute to avoid "threat of unconstitutionality" under *Sandstrom*.)

The considerations of finality are at their highest here. For any defendant like Langston who claims entitlement to relief, as the Court of Appeals ruled in 1978 for Langston, it would be virtually impossible to reprosecute 50 years later.

Last term, this Court clarified the nature of Michigan's rules of retroactivity for both civil and criminal cases by digesting them into two categories: (1) "full retroactivity;" and (2) "prospective effect" or "full prospective effect." *Schafer v Kent County*, ___ Mich ___; 2024 WL 3573500, at *11–12 (2024). The full retroactive application, which this Court termed the "usual" retroactive application would apply 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." *Id.* at *11. The prospective effect would apply to "cases arising from facts occurring after the relevant decision, with the possible exception of the parties involved in the rulemaking decision itself." *Id.* This Court identified a third category of application, i.e., "retroactive on collateral review" or cases that are final on direct review, but this Court noted that it was not addressing that category. *Id.* at *10.

In *Schafer*, this Court also explained that it derived its rule on retroactivity from federal case law, both for civil and criminal rules, and that the standard may be digested into the following three-part standard:

> (1) the purpose to be served by the new rule,
>
> (2) the extent of reliance on the old rule, and
>
> (3) the effect of retroactivity on the administration of justice.
>
> [*Id.* at *9. See also *Barnes,* 502 Mich at 273, citing *People v Hampton*, 384 Mich 669 (1971); *People v Sexton*, 458 Mich 43, 60–61 (1998).]

Before applying this standard, it is important to note that the Michigan courts have examined the issue both under the federal rules of retroactivity and the state rules of retroactivity. See, e.g., *People v Maxson*, 482 Mich 385, 387–392, 392–399 (2008) (applying the federal rules and states rules separately in finding no retroactivity to cases final on direct review for right to counsel for plea-based convictions). That is because the federal rules only create "minimum requirements" for relief for constitutional violations and that the states may provide for a greater retroactive application. *Danforth v Minnesota*, 552 US 264, 288 (2008). See also *Barnes*, 502 Mich at 273 (2018) ("[T]he remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law."), quoting *Danforth*, 552 US at 288. On this point, this Court in *Sexton* explained that "a new rule for the conduct of criminal prosecutions applies retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break with the past." *Sexton*, 458 Mich at 54 (cleaned up), citing *Griffith v Kentucky,* 479 US 314, 328 (1987).

Generally, "a new constitutional rule of criminal procedure" would not apply to convictions "that were final when the new rule was announced." *Barnes*, 502 Mich at 269, quoting *Montgomery v Louisiana*, 577 US 190, 198 (2016). See also *Teague v Lane*, 489 US 288, 311–313 (1989) (plurality opinion). This point relates to the third category of retroactivity, which this Court did not address in *Schafer,* i.e., "retroactive on collateral review." *Id.* at *10. There are two exceptions to this rule:

(1) "courts must give retroactive effect to new substantive rules of constitutional law"; and (2) "courts must give retroactive effect to new watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Barnes*, 502 Mich at 269 (cleaned up and citations omitted), quoting *Montgomery*, 577 US at 198 (2016). See also *Welch v United States*, 578 US 120, 128 (2016). But the decision in *Aaron* was not based the Due Process Clause, thus neither of these exceptions is applicable here. Rather, this Court exercised its authority to develop the common law. *Aaron,* 409 Mich at 733. Thus, as this Court explained in *Sexton,* "*Griffith* is not applicable to the cases at bar because it applies only to rules of criminal procedure that are grounded on the United States Constitution." *Sexton,* 458 Mich at 54. See also *Schafer,* *11 ("the Court can apply a criminal law decision purely prospectively, like any other decision.")

Consequently, if this Court examines the three-factor test from *Hampton* in revisiting this Court's prior decision, the answer remains the same, prospective application alone.[10] Each factor weighs heavily in favor of the original decision.

First, the purpose of the new rule supports its prospective application. As this Court explained in *Schafer,* "prospective application is reserved primarily for situations where the Court overturns clearly established caselaw." *Id.* at *12. The decision represented a significant change in Michigan law.

[10] In his dissent in *Lonchar,* Justice Levin indicated that the three factors were developed from new constitutional rules, they "can be of assistance in evaluating the retroactivity of nonconstitutional doctrine." *Lonchar*, 411 Mich at 929.

This Court in *Aaron* cited the numerous cases from prior decisions "containing language which may be construed as assuming the existence of such a rule in Michigan," i.e., the common law felony murder rule, but it determined that "the language is clearly dictum." *Id.* at 722, n 110, citing among other cases, *Wellar v People*, 30 Mich 16, 19 (1874) ("It is not necessary in all cases that one held for murder must have intended to take the life of the person he slays by his wrongful act. It is not always necessary that he must have intended a personal injury to such person. But it is necessary that the intent with which he acted shall be equivalent in legal character to a criminal purpose aimed against life. Generally, *the intent must have been to commit either a specific felony*, or at least an act involving all the wickedness of a felony.") (emphasis added). See also *People v Hearn*, 354 Mich 468, 470–471 (1958) ("the jury was completely and properly instructed and defendant fully protected, as shown by the following instruction: . . . 'You cannot convict unless you find intent to commit the crime of robbery. You don't have to find intent to kill, but you do have to find intent to commit the crime of robbery. If you don't find that intent, of course the respondents are not guilty. *If you do find it, then there is another question for you to pass on. You must find intent to commit the crime of robbery, felonious intent, before you can convict of first-degree murder.*' ") (emphasis added). While this Court ruled that abrogating the felony murder rule was not "drastic" and was a "logical extension" of past decisions, *id.* at 727, it nonetheless was an important change.

Second, there was widespread reliance on the former definition of felony murder in Michigan. As an illustration of the point, there were approximately 30 cases held in abeyance pending the resolution of *Aaron*. See *Lonchar*, 411 Mich at 925.

Third, any retrospective application to other cases that were final on direct review ("retroactive on collateral review") or to cases that were pending on direct review ("full retroactivity") would be deeply damaging to the sense of orderly justice and finality. Langston's case was tried almost 50 years ago, and the prosecution presented almost 40 witnesses. There appear to be as many as 100 other criminal defendants who were convicted before *Aaron,* who remain in the Department of Corrections, who may seek to attempt to bring a claim for relief. Any relief granted for Langston, or for the shooter of Arretta Ingraham, Ronald Wilson, as they had been granted new trials by the Court of Appeals, would effectively immunize them from reprosecution. There is no historical antecedent for this Court to revisit a decision on retroactivity from more than 40 years ago. It would mark a substantial departure in this Court's jurisprudence, and it would undermine the rule of law.

Langston relies on the Supreme Court precedent holding that a substantive change in law required by the Constitution applies retroactively, (Langston's Supp, pp 28–34), but those cases are inapposite. The decision here was not issued as a matter of constitutional jurisprudence, but in this Court's authority in developing the common law. *Aaron*, 409 Mich at 733.

D. If this Court somehow rules *Aaron* applies retroactively and that Langston is entitled to relief, the proper remedy would be to enter a conviction for armed robbery.

If this Court determines that *Aaron* applies retroactively even to just matters pending on direct review in which this matter was raised, then this Court will reach the issue whether Langston is entitled to relief and, if so, what that remedy should be. On the issue whether the instruction was improper under *Aaron*, the Court of Appeals had previously ruled that the instructions were infirm:

> [T]he only instruction that indicated a need to find some mens rea beyond the intent to aid and abet robbery was the judge's charge that the murder must have been found to be "fairly within the scope of a criminal enterprise and it might have been expected to happen in the course of committing this robbery with a pistol." That charge does not satisfy the test we have laid out in this opinion as *it fails to inform the jury that malice entails a more than foreseeable risk of death* and is based on defendant's subjective awareness of the risks and consequences of his acts.
>
> [*Langston*, 86 Mich App at 660–661 (emphasis added).][11]

The Court of Appeals ruled then that he was entitled to a new trial. *Id.* at 661.

But if the instructions were inadequate to reflect depraved heart murder as outlined by *Aaron*, 409 Mich at 773, the proper relief would be to enter a conviction for armed robbery and to order resentencing. At the time of this Court's decision granting relief for Langston in 1982, the crime of felony murder and the underlying predicate for it were found to be the "same offense" for double jeopardy purposes.

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[11] There is a substantial argument that the instruction quoted here is very similar to the proper instruction on depraved heart murder, i.e., the defendant acted "with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm." *Aaron*, 409 Mich at 733.

See, e.g., *People v Wilder*, 411 Mich 328, 347 (1981), overruled by *People v Ream*, 481 Mich 223 (2008). This Court later overturned *Wilder* because the felony murder and the predicate crime each contained elements that the other did not in reviewing the "abstract legal elements" under the *Blockburger* test. *Ream,* 481 Mich at 235. But the point remained that as instructed, the elements of the predicate crime contained all of the elements of the felony murder charge. See *Ream,* 481 Mich 250 (Cavanagh, J., dissenting) ("the reality that proof of [the predicate felony] was necessarily included in defendant's felony-murder conviction").

That is the case here. The jury was instructed that it could only convict Langston if he were guilty of aiding and abetting Ronald Wilson and that it must find Wilson was guilty of causing Ingraham's death during an armed robbery:

> In order to convict the defendant as an aider and abettor, you must find the guilt of Ronald Wilson of felony murder beyond a reasonable doubt.
>
> To establish this charge the People must provide of the following elements beyond a reasonable doubt.
>
> * * *
>
> Second, that *her death was caused by Ronald Wilson or that it occurred as a direct result of the commission of the crime of* ***armed robbery*** *perpetrated by said Ronald Wilson with a pistol.*
>
> [Vol XII, p 2056 (emphasis added).]

In this circumstance, where this Court vacates the higher conviction but there was no error with respect to the lesser charge the ordinary practice is to enter a conviction for the lesser charge or allow the prosecution the opportunity to pursue retrial on the higher charge. See, e.g., *People v Dates*, 396 Mich 820, 820 (1976)

(ordering either retrial on felony murder or entry of second-degree murder as a lesser for felony murder where the trial court failed to instruct on either second-degree murder or manslaughter as lesser included offenses).[12] Under the law at the time, the armed robbery was a necessarily lesser included offense of the felony murder charge and the jury determined that Langston was guilty of that crime. See *Wilder,* 411 Mich at 347.

While armed robbery was not charged, any decision by this Court that vacates the felony murder conviction would be predicated on the claim, as here, that the jury only determined that Langston aided and abetted an armed robbery that resulted in a death. If this Court so rules, then the correct remedy would be to conform the charge to the proofs and enter a conviction for armed robbery, which carried up to a life sentence, see MCL 750.529 (1975), and to order resentencing. Cf. MCR 6.112(H) (allowing an amendment the information before, during, or after trial to permit the prosecutor to amend information unless it would cause "unfair[] surprise or prejudice"). Such a remedy, of course, would allow the prosecution to retry Langston on the original charge, but given the passage of almost 50 years, that would be an almost impossible task.

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[12] This Court had held that second-degree murder and manslaughter were lesser included offenses of felony murder. See *People v Paul*, 395 Mich 444, 449 (1975). But the later development of law calls that into question. See *People v Cornell,* 466 Mich 335, 357 (2002) ("we hold that a requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.").

Otherwise, the proper remedy would be to enter a conviction of manslaughter, which is the relief the Court of Appeals originally ordered for Langston's codefendant, Ronald Wilson, because it concluded that malice was not found. See *People v Wilson*, 84 Mich App 636, 638 (1978) ("even if the jury here convicted the defendant without a finding of malice, their verdict, on these instructions, is tantamount to a conviction of manslaughter"), reversed 411 Mich 990 (1981).[13] Again, such a remedy would also allow the reprosecution of Langston. But manslaughter then, as now, carried only a maximum punishment of 15 years in prison, see MCL 750.318, if the People did not retry the case, which is a practical impossibility so many years after the crime.

Even so, the true remedy in this case is not judicial intervention more than 40 years after this Court elected to develop the common law and apply its new rule to cases prospectively. Rather, the proper remedy is either clemency from the Governor, see MCL 791.244, Const 1963, art 5, § 14, or legislative in nature. The revisiting of long settled matters would be jarring to the development of Michigan's jurisprudence.

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[13] The People note that not all of those prisoners who were convicted of felony murder before *Aaron* under the common law definition are similarly situated. In particular, assuming that the evidence presented as Wilson's trial was the same as presented at Langston's (they were tried separately), the evidence of Wilson's malice was overwhelming and any deficiency of the instructions on malice would have been harmless. Wilson is currently serving a life sentence for his conviction of felony murder of Mrs. Ingraham. See https://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=145837 (last accessed November 22, 2024.)

For Langston, while there was sufficient evidence of malice for the jury to convict him of felony murder, see *Langston,* 86 Mich App at 661 ("[a]lthough the record contains facts from which an inference of malice might have been drawn (i.e., aiding an armed robbery itself creates a risk of death), the issue must be retried and put before the jury"), the evidence of malice was not overwhelming.

II. The sentence of life without parole is not cruel or unusual for someone as Langston who aids and abets an armed robbery that results in death where the evidence was sufficient to find that he was guilty of malice as currently defined.

The question whether a person who is guilty of aiding and abetting armed robbery – where the evidence was insufficient to make a finding of malice for murder – should be facing a life-without parole sentence presents a thorny issue. See May 31, 2024 order. But that is not the posture of this case.

As recognized by the Court of Appeals in 1978, the evidence presented at Langston's trial would have supported a verdict of guilt of first-degree felony murder as the law is currently construed if he had received a traditional malice instruction under the law now. This is not a case in which Langston was convicted in the absence of evidence of malice. Once the proper posture of the case is understood, this Court should deny leave here and leave for another day the question whether armed robbery alone – without malice – may support a life-without-parole sentence.

Under Michigan's Constitution, this Court has applied a four-part test in determining whether a sentence is cruel or unusual. It is composed of four factors:

> (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. [*People v Stovall*, 510 Mich 301, 313–314 (2022), citing *People v Bullock*, 440 Mich 15, 33–34 (1992). See also *People v Lorentzen*, 387 Mich 167, 176–181 (1972).]

As noted, once the factors are applied here to the evidence presented of Langston's crime, which would have allowed a jury to convict him of first-degree felony murder, the application of these factors confirms that he is not entitled to relief.

A. The evidence presented here would have supported a first-degree murder conviction under a felony murder theory.

There were two key pieces of evidence presented at Langston's trial regarding his plotting with Ronald Wilson to commit the armed robbery, providing assistance in advance of the crime that involved the pistol, scouting out the scene, and then assisting in the destruction of evidence of the crime afterward. First, the People presented evidence of those associated with Wilson and him, most significantly his girlfriend (Dolores Shaver), Wilson's sister (Alta Madry), and Wilson's girlfriend (L'Taska Courtney). Second, the People presented evidence of Langston's statement in which he unpersuasively claimed not to participate in the robbery, but then admitted to essential facts about his participation. From this evidence, the Court of Appeals ruled that a jury if given an instruction as envisioned by *Aaron* would have been able to return a verdict of guilty of first-degree murder:

> Although the record contains facts from which an inference of malice might have been drawn ([i]. e., aiding an armed robbery itself creates a risk of death), the issue must be retried and put before the jury. [*Langston,* 86 Mich App at 661.]

To begin, Langston's girlfriend confirmed that Wilson brought over the pistol the afternoon before the robbery, and that Langston both handled the pistol and gave it back to Ronald Wilson. (See Vol VIII, pp 1351–1352) ("[Langston] picked the gun up," and then Langston ultimately "[gave] the gun back to Ronnie [Wilson].").

Wilson's sister, Alta Madry, explained that Langston and Wilson were meeting the evening after the robbery and murder, and Wilson said "I didn't do it the way you wanted me to," complained to Langston that "You told me it was only two ladies in there," and that Langston later told Wilson that they had better "burn" the wallet that Wilson stole. (Vol X, pp 1728, 1732, 1747). And Wilson's girlfriend, L'Taska Courtney, explained that she heard Langston told Wilson to "get out of town because the police had a description, a full description of him." (Vol X, p 1716.) Perhaps the most damning evidence with respect to malice was Madry's statement that Langston essentially said that Arretta Ingraham deserved to be murdered, i.e., it was "overdue," as she had given them a "hard time" when they were children. (Vol X, p 1753.) Langston's statement helped fill out the events of the crime, i.e., that he traveled to the grocery store with Wilson, went in and purchased some items, and then told Wilson who was in the store. (Vol X, 1845–1846.)

In short, the evidence was sufficient to support an inference of malice under a depraved heart theory. See *Langston,* 86 Mich App at 661. Langston insists that "there was no *proven* mens rea with respect to the killing" because the jury did not have a proper malice instruction. Langston's Supp, p 36. But assuming that the instruction that "might have expected" this death to result was insufficient to convey malice (see Vol XII, p 2063), that distinction is without moment for the purposes of this analysis. The question is whether a person who did what Langston did may be fairly punished with life without parole. The answer is yes. Right now, under *Aaron,* the law provides for that very thing, for aiders and abettors as here.

See *Aaron,* 409 Mich at 728–729 ("The facts and circumstances involved in the perpetration of a felony may evidence an intent to kill, an intent to cause great bodily harm, or a wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm."). See also *People v Turner*, 213 Mich App 558, 572 (1995) ("Turner's knowledge that [the shooter] was armed during the commission of the armed robbery is enough for a rational trier of fact to find that Turner, as an aider and abettor, participated in the crime with knowledge of [the shooter's] intent to cause great bodily harm."), overruled in part on other grounds by *People v Mass*, 464 Mich 615 (2001).

B. In applying the *Bullock* factors for cruel or unusual punishment, Langston is not entitled to relief.

The factors weigh in finding the life-without-parole sentence not to be cruel or unusual where the evidence supported a finding of malice.

With respect to the severity of the sentence, as noted Michigan law currently permits the facts and circumstances as provided here to allow a jury to find a defendant guilty of felony murder. See *Aaron,* 409 Mich at 728–729. Thus, unless Michigan's felony murder law is infirm or that this Court needs to further revisit *Aaron,* Michigan law imposes a life-without-parole sentence for this kind of conduct.

With respect to the penalties imposed on other offenders, the same answer resolves this point as well. The law on felony murder imposes a life-without-parole sentence on those offenders, if convicted, where the evidence permitted a jury to find the defendant guilty of murder on a depraved-heart theory. See *id.*

With respect to other states, a significant number of them continue to impose a life without parole sentence for those convicted of felony murder in some circumstances. In particular, it appears that eighteen states continue to require or permit life-without-parole sentences for some felony murder convictions. See, e.g., Cal Penal Code § 189(a), § 189(e)(3), § 190.2(a)(17), § 190.2(d); Conn Gen Stat § 53a–54d, § 53a–54b(5), § 53a–54b(6), § 53a–35a(1)(B); Del Code title 11 § 636(a)(2), § 4209(a); Idaho Code § 18-4003(d), § 18-4004, § 19-2515(1), § 19-2515(7)(b), § 19-2515(9)(g), § 19-2515(9)(h); 720 Ill Cons Stat § 5/9-1(a)(3), § 5/5-8-1(c); Iowa Code § 707.2, § 902.1; La Rev Stat § 14:30.1(A)(2), § 14:30.1(B).4; Mass Gen Law, ch 265, § 1, § 2; Minn Stat § 609.185(a)(2), § 609-106 subd. 2(1); Miss Code § 97-3-19(2)(e), § 47-7-3(1)(c); NH Rev Stat § 630:1-a(I)(b), § 630:1-a(III); NM § 30-2-1(A)(2), § 31-20A-2, § 31-20A 5(A); NC Gen Stat § 14–17(a); 18 Pa Const Stat Ann § 2502; SC Code § 16-3-20(A), § 16-3-20(C)(a)(1); SD Codified Laws § 22-16-4, § 24-15-4.5; Tenn Code § 39-13-202(a)(5), § 39-13-202(c)(2); and Wyo Stat § 6-2-101(a), § 6-2-101(b), § 6-10-301(c).[14] Some articles suggest that the rule is more widespread, explaining that the rule is retained in some form by a majority of states. See, e.g., LaFave 2 Substantive Criminal Law § 14.5(h) (3d ed), "The future of the felony-murder doctrine" ("most jurisdictions accept the felony-murder doctrine, generally with one or more of the limitations discussed above"); Cynthia Ward, "Criminal Justice Reform and the Centrality of Intent," 68 Vill Law Review 51, 57 (2023) ("the [felony murder rule] exists in all but a few states").

[14] Cf. Langston's Supp, p 39, listing 12 states that have it for "every felony murder."

Regardless, the point is that the felony murder rule continues in some form in a significant number of jurisdictions.

With respect to whether the penalty advances the penological goal of rehabilitation, the manner in which this factor has been applied by this Court, a life-without-parole sentence will invariably fail on this ground. See, e.g., *People v Parks*, 510 Mich 225, 265 (2022) ("Without hope of release, 18-year-old defendants, who are otherwise at a stage of their cognitive development where rehabilitative potential is quite probable, are denied the opportunity to reform while imprisoned."). The justification of the sentence may not be derived from rehabilitation, or even on incapacitation, but rather it reflects the community's view that some actions, ones committed with malice, which result in death may properly be subject to a life without parole sentence, even if that person could be later safely released into the community. See MCL 750.316 (sentence of life without parole). Even this Court's more recent jurisprudence involving juveniles recognizes that even for juveniles and 18-year-olds, there are some circumstances that merit such a sentence. See *Parks*, 510 Mich at 265–266 (ruling that the "mandatory" nature of the LWOP for 18-year-olds rendered the sentence unconstitutional). And Edwin Langston (born June 8, 1952) was 23 years old at the time of this robbery and murder. His sentence is not unconstitutionally harsh. Any relief for him should come from the Governor or the Legislature. See *People v Hall,* 396 Mich 650, 658 (1976). For adults like Langston for which there is sufficient evidence of malice, the requirement that they serve a life sentence without parole remains valid today.

III. This Court should not overrule *People v Hall,* but it should leave any remedy for Edwin Langston and the other pre-*Aaron* offenders to the Governor and the Legislature.

This Court in 1976 addressed the question whether mandatory life without parole for those convicted of felony murder ran afoul of the protection against cruel or unusual punishment under Michigan's Constitution. See *People v Hall,* 396 Mich 650 (1976). This Court ruled that this punishment is not unconstitutional, and its reasoning remains valid today.

As an initial matter, this Court applied the factors from *Lorentzen*, and it determined that the punishment "is proportionate to the crime," that Michigan's punishment was not shown to be "widely divergent" from its sister jurisdictions, and that rehabilitation was not the only relevant consideration for the punishment prescribed, because it included deterrence and incapacitation as well. *Id.* at 658. This Court then went on to explain that the defendant "still has available to him commutation of his sentence by the Governor to a parolable offense or outright pardon." *Id.* at 658. Finally, this Court invoked the separation of powers and noted that historically the power to establish sentences "resided in the Legislature." *Id.*

Before turning to this analysis and its continuing vitality, the first question is one of stare decisis, which Langston does not meaningfully address. For the first two factors, there is no serious contention that it was wrongly decided at the time, and the rule is one that may be easily applied. *Robinson,* 462 Mich at 464. And for the third factor, the specter of resentencings for as many as 100 felony murder offenders, whose crimes occurred almost 50 years ago is the very kind of disruptive change in law that *Robinson* and the factor weighing reliance interests seeks to forestall. *Id.* at 463.

("[stare decisis is] the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."). The resentencings of these aged prisoners, so long after their crimes, would offend principles of finality in the strongest way.

For the fourth factor, i.e., the development in law since the decision, this is where Langston places his emphasis. Langston's Brief, pp 43–46. But even on these points, this factor presents a mixed picture. While it is true that many state jurisdictions have moved away from the old felony murder rule and away from life-without parole sentences, the number of jurisdictions that continue to impose this sentence for felony murder by Langston's count is 12, Langston's Supp, p 45, and if it is expanded to include some felony murder convictions, that number would appear to be 18. See p 43 (listing states). And while it is true that the law on constitutionally permissible sentencings has developed in the last few years by this Court, see, e.g., *Parks,* 510 Mich at 265, in Michigan this development has been generally for juveniles, not for 23-year-old offenders like Langston. The law remains unchanged for those convicted post-*Aaron*, i.e., that they face a life-without-parole sentence. Of course, Langston advances a narrow request for relief, and that is the relief be given "to these pre-*Aaron* felony murder cases" but not overrule *Hall* entirely. Langston Supp, pp 43–44. But as a matter of justice those offenders who were convicted of felony murder post-*Aaron* are really not that significantly differently postured from Langston, where the evidence here would have been sufficient to convict him of felony murder.

In the end, this is something this Court should leave to the Governor and the Legislature, as this Court in *Hall* ruled. Not all of these pre-*Aaron* offenders are similarly postured, as this case confirms. While the People have pressed the prior ruling of the Court of Appeals that "the record contains facts from which an inference of malice might have been drawn" against Langston here, see *People v Langston*, 86 Mich App at 661, the People acknowledge that the evidence was not overwhelming. But assuming that the case against Wilson presented the same testimony so many years ago, the evidence of malice against him was overwhelming. He shot Arretta Ingraham in the heart. Yet, a ruling here that overturns *Hall,* as requested by Langston, grants relief to Mr. Wilson as well. And how many felony murder convictions that arose before *Aaron* were predicated on the underlying charge of rape. In other words, if Langston prevails, these offenders are entitled to resentencing, some for particularly vicious murders, committed almost 50 years ago and the surviving families will have to relive these horrible crimes from decades ago. It is hard to see how this "promotes the evenhanded, predictable, and consistent development of legal principles." *Robinson,* 464 Mich at 463. Perhaps this Court could limit even further that relief where the evidence of malice, as here, was not overwhelming. But such an action is essentially a legislative function. This Court should deny leave.

CONCLUSION AND RELIEF REQUESTED

This Court should deny leave and allow Langston's conviction, obtained almost 50 years ago, to remain in place.

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