STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee

v

EDWIN LAMAR LANGSTON **No. 163968**
Defendant-Appellant.

L.C. FC 76-2701-FC
COA No. 358537

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

J. DEE BROOKS
President
Prosecuting Attorneys
Association of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JON P. WOJTALA
Chief, Research, Training, and Appeals

TIMOTHY A. BAUGHMAN (P 24381)
Special Assistant Prosecuting Attorney
5301 Russell St. Fl. 2
Detroit, Michigan 48211
Phone: (313) 224-5792
tbaughma@waynecountymi.gov

Table of Contents

Index of Authorities

Cases **Page**

FEDERAL CASES

STATE CASES

STATE STATUTES

OTHER AUTHORITY

Statement of the Question

When the Legislature codifies a common-law crime without articulating its elements, a Court's task is to *discover* its meaning by looking to the common law for its definition, and the Court is bound by that common-law definition until the Legislature modifies it. *People v. Aaron*, however, judicially amended the Michigan 1st-degree murder statute by discovering and then altering the common-law meaning of a statutory term (murder). This inappropriate legislative act was, however, properly held applicable only to Aaron and to pending and future trials; indeed, this Court so held *in this very case*. Because the Court's prior decision in this case is the law of the case, its applicability ruling was correct, as well as under principles of stare decisis, should this 44-year-old precedent be overruled; further, is the Court's apparent assumption that there is no evidence that defendant here acted with malice true?

Amicus answers: NO

Statement of Facts

Amicus joins the statement of facts supplied by the People.

Argument

I.

When the Legislature codifies a common-law crime without articulating its elements, a Court's task is to *discover* its meaning by looking to the common law for its definition, and the Court is bound by that common-law definition until the Legislature modifies it. *People v. Aaron*, however, judicially amended the Michigan 1st-degree murder statute by discovering and then altering the common-law meaning of a statutory term (murder). This inappropriate legislative act was, however, properly held applicable only to Aaron and to pending and future trials; indeed, this Court so held *in this very case*. Because the Court's prior decision in this case is the law of the case, its applicability ruling was correct, as well as under principles of stare decisis, this 44-year-old precedent should not be overruled; further, the Court's apparent assumption that there is no evidence that defendant here acted with malice is untrue.

Introduction

This court has ordering supplemental briefing[1] on:

- whether *People v Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980), correctly limited its application to prospective-only relief;
- 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 U.S. Const., Am. VIII; and
- whether *People v Hall*, 396 Mich. 650, 242 N.W.2d 377 (1976), should be overruled.[2]

Amicus answers that, this Court having acted legislatively in *Aaron*, its amendment of the murder statutes was properly limited to prospective application, as new statutes

[1] The Court is considering whether to overrule a 44 year-old precedent without granting leave to appeal.

[2] *People v. Langston*, 6 N.W.3d 404 (Mich. 2024).

and statutory amendments ordinarily apply prospectively,[3] and that *People v. Hall* should not be overruled, as mandatory nonparolable life in prison for any form of 1st-degree murder is not cruel or unusual punishment, so that the punishment to be allocated for the offense is for the political branches of government; further, the Court's statement of the second question presumes that there is an "absence of evidence that the defendant acted with malice," which is not born out by the record,[4] defendant having participated in an armed robbery knowing a deadly weapon was to be employed to accomplish the crime. Finally, retroactive application of *Aaron* was before this Court *in this case* decades ago, so that on this issue, at least, this is essentially a decades-delayed motion for reconsideration, and the prior decision is the law of the case, with further consideration also barred by MCR 6.508(D)(2).

Discussion

A. The history of—and law of—this case should preclude review under the law of the case doctrine, as well as under MCR 6.508(D)(2)

Defendant Edwin Langston was convicted in the killing of Arretta Lou Ingraham in the robbery of a store, where defendant aided one Ronald Wilson in an armed robbery in which Wilson shot Ingraham to death. The majority of the Court of Appeals reversed for a new trial, finding that there must be an instruction on

---

[3] *Vartelas v. Holder*, 566 U.S. 257, 266, 132 S. Ct. 1479, 1486, 182 L. Ed. 2d 473 (2012) ("Courts read laws as prospective in application unless [the legislature] has unambiguously instructed retroactivity"); *People v. Kolanek*, 491 Mich. 382, 405 (2012) (the Court saying that "statutes are presumed to operate prospectively unless the contrary intent is clearly manifested" while statutes that "'neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively' absent a contrary legislative intent," and finding that Section 8 of the MMMA created a new substantive defense, and because "[a]bsent from the MMMA is any specific indication that the act is to be applied retrospectively" therefore "the presumption of prospective application controls").

[4] Defendant's presents the evidence in the light most favorable to the defendant, rather than the light most favorable to the verdict.

Also, "a jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. . . . Malice may also be inferred from the use of a deadly weapon." *People v. Carines*, 460 Mich. 750, 759 (1999).

malice, and that instructing the jury that "[t]he murder [and murder was defined in the instructions, including the requirements for a finding of malice] 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'" was insufficient.[5] The prosecution appealed.

The prosecutor's application was held in abeyance for the *Aaron* case, which then abrogated the common-law felony murder rule and required a malice instruction in 1st-degree felony-murder cases, but held also that "This decision shall apply to all trials in progress and those occurring after the date of this opinion."[6] After initially mistakenly denying the prosecutor's held-in-abeyance application by clerical error, this Court then, on reconsideration, said that "an order should have entered reinstating the defendant's conviction of first-degree murder"[7] and reversed the Court of Appeals, reinstating the 1st-degree murder conviction and citing the page reference in *Aaron* saying that "This decision shall apply to all trials in progress and those occurring after the date of this opinion."[8] Justices Levin, Kavanagh, and Ryan would have granted leave to consider more fully the question of retroactivity of *Aaron*.[9]

---

[5] *People v. Langston*, 86 Mich. App. 656, 660 (1982), following the view of *People v. Fountain*, 71 Mich. App. 491 (1976).

It is not at all clear that the instructions were erroneous even under *Aaron*, a point to which amicus will return.

[6] *People v. Aaron*, 409 Mich. 672, 734 (1980).

[7] Citing to *People v. Wilson*, 411 Mich. 990 (1981 where this Court said that "we REVERSE the Court of Appeals judgment . . . and REINSTATE the defendant's conviction of first degree murder and his sentence therefor. This matter was tried before our decision in *People v. Aaron*." Wilson was Langston's coperpetrator.

[8] *People v. Langston*, 413 Mich. 911 (1982).

[9] Id. (citing Justice Levin's dissent to the denial of leave in *People v. Lonchar*, 411 Mich. 923 (1981).

In *this very case*, then, this Court decided that *Aaron* was inapplicable because the case was tried before the decision of that case. That decision is the law of the case,[10] and to consider it now amounts to a decades-late motion for reconsideration. Further MCR 6.508(D)(2) precludes motions for relief from judgment on claims that "allege[] grounds for relief which were decided against the defendant in a prior appeal," which is the case here; this case reversed the Court of Appeals reversal of the 1st-degree murder conviction, citing *Aaron*'s prospectivity rule.[11] Defendant's argument is that it should not have done so, and so the issue is flatly barred by MCR 6.508(D)(2). This case, and others like it, should be final,[12] if

---

[10] "[I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *C. A. F. Inv. Co. v. Saginaw Twp.*, 410 Mich. 428, 454 (1981). And see *People v. Jackson*, 513 Mich. 876, 884 (2023) (Zahra, J., dissenting from remand to the Court of Appeals to consider as on leave granted).

[11] See *Teague v. Lane*, 489 U.S. 288, 309, 109 S. Ct. 1060, 1074–1075, 103 L. Ed. 2d 334 (1989) ("Without finality, the criminal law is deprived of much of its deterrent effect. . . . '[I]f a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to determine legality.' Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv.L.Rev. 441, 450–451 (1963) (emphasis omitted). . . ."No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation'").

[12] See e.g. *People v. Peterson*, 113 Mich. App. 537, 539 (1982) ("We will begin our analysis by rejecting the defendants' contention that the rule of law announced *in People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980), is applicable to the instant case. In *Aaron*, the Court stated that its decision would apply to all trials in progress and those occurring after its November 24, 1980, release date. Defendants' trial occurred prior to November 24, 1980. Thus, *Aaron* is not applicable"); *People v. Fuzi*, 116 Mich. App. 246, 254 (1982) ("In *Aaron*, the Supreme Court abrogated the common-law felony-murder doctrine and held that malice—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—is an essential element of any murder. . . .. The Court's holding, however, applies only to trials in progress on the date of the *Aaron* opinion (November 24, 1980) and to those trials occurring after that date. . . . When defendant's May, 1980, trial took place, the common-law felony-murder doctrine was still in effect in Michigan"); *People v. Brady Smith*, 108 Mich. App. 338(1981); *People v. Till*, 115 Mich. App. 788, 797–798 (1982) ("The decision in *Aaron* stated that the case was not to be given

finality still has any meaning at all.[13] This Court should follow its own rules on motions for relief from judgment, as well as the law-of-the-case doctrine.

B. *Aaron* did not say "what the law is," but was a law-changing decision by its terms, as is widely recognized

Defendant's argument is based on a revisionist view of the *Aaron* decision. He says that he is "legally innocent" of the crime of 1st-degree felony-murder because "[n]o jury found that Mr. Langston had the intent or even foresaw that his conduct would result in someone's death,"[14] though for a finding of malice no such finding by a jury is ever necessary,[15] and even the Court of Appeals opinion in this case did not find malice lacking but rather an improper instruction. Defendant views *Aaron* as having simply stated what the law of murder always was is Michigan: *Aaron* "was an interpretation of the first-degree felony murder statute and provided a definitive interpretation of what the statute means and *always has meant*."[16] "This would be

---

retroactive effect, but that it would apply only to trials in progress and those commencing after the release date of *Aaron*, which date was November 24, 1980. *Aaron*, therefore, does not apply to the case at bar"); *People v. Heard*, 103 Mich. App. 571, 574 (1981); *People v. Terlisner*, 2014 WL 4214895, at 3 (No. 315670, Mich. Ct. App. Aug. 26, 2014), lv. den.497 Mich. 1035 (2015) ("the *Aaron* Court expressly declined to make its holding retroactive, stating instead that the decision would only apply 'to all trials in progress and those occurring after the date of this opinion.'. . . Because defendant was convicted of murder in 1977—approximately three years before *Aaron* was decided—that decision had no effect on his case").

[13] "[T]he idea that at some point a criminal conviction reaches an end, a conclusion, a termination, is essential to the operation of our criminal justice system."*Edwards v. Vannoy*, 593 U.S. 255, 290, 141 S. Ct. 1547, 1571, 209 L. Ed. 2d 651 (2021) (Gorsuch, J., concurring) (cleaned up).

[14] Defendant's supplemental brief, p. 42.

[15] Malice is 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 defendant's behavior is to cause death or great bodily harm." *Aaron*, at 728.

[16] Defendant's supplemental brief, p. 15 (emphasis supplied).

a powerful argument were it true, but it is not true";[17] it is not what this Court said in *Aaron*, nor is it how *Aaron* has uniformly been understood since.

1. The common law

Michigan is a common-law jurisdiction. The common law was brought to this country by the English colonists in 1607. The Northwest Ordinance of 1787 created the Michigan territory as an entity and adopted the common law.[18] After Michigan became a state, it was recognized that "the common law [was in force] in Michigan, except so far as repugnant to, or inconsistent with, [Michigan's] constitution and statutes."[19] In *In re Lamphere,*[20] Justice Campbell said:

> In many of the states, statutes of parliament passed before or during the early days of the American colonies, as well as old colonial statutes and usages, have been recognized as part of the local common law, and have been construed and applied by the courts. But Michigan was never a common-law colony, and while we have recognized the common law as adopted into our jurisprudence, *it is the English common law, unaffected by statute.*[21]

---

[17] *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 169 F.3d 474, 480 (CA , 1999).

[18] *In re Sanderson*, 289 Mich. 165, 174 (1939). *See May v. Rumney*, 1 Mich. 1, 4 (1847).

[19] *Cranev. Reeder*, 21 Mich. 24, 32 (1870); see also *Stout v. Keyes*, 2 Doug. 183, 187-188 (1845) ("And so far as the constitution and the government established by it, or the provisions of statutes, are inconsistent with, or repugnant to the common law, they supersede it."); *May v. Rumney*, at 6 (The law of dower was adopted by the Northwest Ordinance of 1787 except as modified "[bly an act of the governor and judges of the territory of Michigan"); *Lorman v. Benson*, 8 Mich. 18, 24 (1860) ("Practically the common law continues in force in Michigan today, subject to constitutional, statutory and judicial modifications").

[20] *In re Lamphere*, 61 Mich. 105 (1886).

[21] Id., at 108 (emphasis supplied).

The common law has continued in each successive Michigan Constitution since its adoption by the Northwest Ordinance of 1787.[22] If, then, murder is a common-law crime, then the Court may alter it[23] (though this would raise a different problem—separation of powers[24]—as the power to define crimes and ordain their punishment is a legislative power[25]). But murder is not a common-law crime; *all* crimes in Michigan are statutory, though the legislature has left the definition of

---

[22] Mich. Const. 1835, Schedule, **§** 2; Mich. Const. 1850, Schedule, § 1; Mich. Const. 1908, Schedule, § 1; Mich. Const. 1963, Art. III, **§ 7.**

[23] *Placek v. Sterling Heights*, 405 Mich. 638, 656 (1979).

Though *Placek* holds otherwise, even the Court's authority to modify common-law causes of action is debatable, as involved are policy considerations that are quintessentially legislative. During the constitutional convention that drafted the 1908 Constitution, the Committee of the Whole proposed to simply reenact section 1 of the schedule from the 1850 Constitution in precisely the same language—"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 altered or repealed by the legislature." But a motion was made to amend by striking out the last three words—"by the legislature"—for a *particular reason*:

> I make this motion because it is presumed that a scheme of local self-government for cities and villages will be passed by this Convention, and the present charters of such cities and villages should be continued until they are repealed by action of the local municipality; so far as cities and villages are concerned such laws should be repealed by the municipality and not by the legislature. It seems to me that that being true these words should be stricken out, so that it could not be construed that the particular charters should be repealed by the legislature.

Williams v. City of Detroit, 364 Mich. 231, 241 (1961).

The purpose of the change, then, had nothing to do with granting legislative authority to the judiciary, at least with regard to the substantive common law, but only with insuring that municipalities were free to repeal and reenact their own charters, given other provisions of the proposed constitution concerning municipal government.

[24] Mich. Const. 1963, Article III, § 2.

[25] *United States v. Wiltberger*, 18 U.S. 76, 95, 5 L. Ed. 37, 5 Wheat. 76 (1820) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment"); *People v. Turmon*, 417 Mich. 638, 650 (1983) ("the creation of crimes is an inherently legislative task")(citing *Wiltberger*); *People v. Hanrahan*, 75 Mich. 611, 619 (1889) ("To declare what shall constitute a crime, and how it shall be punished, is an exercise of the sovereign power of a state, and is inherent in the legislative department of the government"); *People v. Lugo*, 214 Mich. App. 699, 706 (1995) ("the power to define crime and fix punishment is wholly legislative").

some of them to the common law, and in some has employed common-law terms with an established meaning, "murder" among them.

It is "well understood" in Michigan that statutory interpretation includes the principle that the legislature intended no alteration or innovation of the common law not specifically expressed, and that "it is never to be presumed that the Legislature intended to make any innovation upon the common law any further than the case absolutely require[s] in order to carry the act into effect."[26] These principles are fully applicable to criminal statutes. In *People v. Schmitt,*[27] the trial court held that the statute prohibiting "the abominable and detestable crime against nature" was not limited to the common-law definition of sodomy but also included penetration *per os.* This Court disagreed, holding that its task was to discover the common-law meaning, and once the common-law definition was determined, then because "[the] legislature [showed] no disposition to depart from the common-law definition, *therefore it remain[ed].*"[28] Similarly, though finding it unnecessary to resolve the question of its authority, this Court in *People v. Couch*[29] said that "[t]o the extent that the Legislature intended to convey 'satisfaction with' the existing common-law definitions of murder and manslaughter and to adopt and embrace those definitions . . . it is debatable whether this Court still has the authority to change those definitions.. . . murder and manslaughter, arguably, are no longer common-law crimes in this state, but rather became statutory crimes as early as 1846, and we are no longer free to redefine what is not justifiable homicide by holding that a citizen is 'not privileged to use deadly force to prevent a fleeing felon's escape unless the

---

[26] *Wales v. Lyon*, 2 Mich. 276, 283 (1851). See also *Garwols v. Bankers Trust Co*., 251 Mich. 420, 422 (1930).

[27] *People v. Schmitt*, 275 Mich. 575 (1936).

[28] Id., at 577.

[29] *People v. Couch*, 436 Mich. 414 (1990).

arresting citizen reasonably believes that the felon poses a threat of serious physical harm to that citizen or to others.'"[30]

Then in *People v. Reeves*[31] this Court held that "[w]here the statutory provision describes by name, but does not clearly and explicitly state the definition of a criminal offense, courts will construe the statutory crime by resorting to the common-law definition." The Court spoke even more definitively in *People v. Riddle*:[32]

> Because Michigan's homicide statutes proscribe "murder" without providing a particularized definition of the elements of that offense or its recognized defenses, *we are required to look to the common law at the time of codification for guidance*. See Const. 1963, art. 3, § 7 . . . . Where a statute employs the general terms of the common law to describe an offense, courts will construe the statutory crime by looking to common-law definitions. See . . . *Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952):
>
> > [W]here [a legislature] borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.[33]

And in *People v. Perkins*[34] Justice Kelly wrote flatly for a *unanimous* Court that "[w]hen the Legislature codifies a common-law crime without articulating its

---

[30] Id., at 420-421.

[31] *People v. Reeves*, 448 Mich. 1, 8 (1995).

[32] *People v. Riddle*, 467 Mich. 116 (2002).

[33] Id., at 125-126.

[34] *People v. Perkins*, 468 Mich. 448 (2003).

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*."[35]

2. Murder is a statutory crime, the Legislature "importing the common law's definition of murder into our statutes"

Murder has always been a statutory crime in the state of Michigan. In 1837, 1st-degree and 2nd-degree murder were placed in Michigan's first statute books, employing the common-law term "murder."[36] Murder was not defined in territorial

---

[35] Id, at 455 (emphasis supplied). See also *People v. Reese*, 491 Mich. 127, 141 (2012) ("When the Legislature codifies a common law offense and thereby adopts the common law defenses to that offense, this Court is 'proscribed from expanding or contracting the defense as it existed at common law'"); *People v. Wafer*, 509 Mich. 31, 41 (2022) ("in leaving murder undefined, *the Legislature imported the common law's definition of murder into our statutes*") (emphasis supplied).

These cases mark the final repudiation of the notion that drove *Aaron* that Michigan has "common-law crimes" in those situations where the legislature uses a common-law term without definition, so that the judiciary is free to alter those definitions. An example is *People v. Stevenson*, 416 Mich. 383, 391 (1982):" If common-law crimes could only be contracted, not expanded, this would tend to slow needed development of the common law, since once the definition of a crime was narrowed, as in *Aaron*, the Court would lack the power to reverse itself and 'expand' liability by readopting, for example, the felony-murder doctrine. Such a 'one way' power would unduly and unnecessarily retard the development of the common law in both directions, and we therefore refuse to endorse it." But the Court now understands that it is for the legislature to modify the definition of a common-law term that the legislature has embraced by employing it in a statute without alteration.

See also *United States v. Thompson*, 119 F.4th 445, 450 (CA6, 2024) ("The Supreme Court has long told us to interpret a term of art that Congress incorporates into a statute consistently with its common-law meaning"); *United States v. Hansen*, 599 U.S. 762, 778, 143 S.Ct. 1932, 216 L.Ed.2d 692 (2023) ("[W]hen Congress transplants a common-law term, the old soil comes with it"); Antonin Scalia & Bryan A. Garner, *Reading Law: the Interpretation of Legal Texts* 320 (2012) ("A statute that uses a common-law term, without defining it, adopts its common law meaning").

[36] "All murder which shall be perpetrated by poison or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration of or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree, and shall be punished by death, and all other kinds of murder shall be deemed murder of the second degree, and shall be punished by confinement in the penitentiary for life, or any term of years, at the discretion of the court trying the case." Statutes of 1838, Chapter 3, section 1.

Territorial law provided that "Every person who shall commit murder, or aid, abet, counsel, hire, command, cause, or procure any person any person or persons to commit

law, nor has it ever been defined in Michigan statute. It is, then, a statutory crime, the definition of which is left to the common law,[37] but this hardly makes murder a common-law crime. As Justice Campbell stated in *In re Lamphere*:[38]

> In 1810 an act was passed putting an end to all the written law of England, France, Canada, and the Northwest and Indiana territories, as well as the French and Canadian customs, leaving no statute or code law in force except that of Michigan territory and the United States.... And while we have kept in our statute-books a general statute resorting to the common law for all non-enumerated crimes, there has always been a purpose in our legislation to have the whole ground of criminal law defined, as far as possible, by statute. *There is no crime whatever punishable by our laws except by virtue of a statutory provision.*[39]

Justice Campbell concluded that "[w]hatever elasticity there may be in civil matters, *it is a safe and necessary rule that criminal law should not be tampered with except by legislation*."[40]

This Court being "bound by the common-law definition until the Legislature modifies it,"[41] the process of determining the meaning of a common-law term used by the legislative in a statute is not one of policy, or creation or alteration, but *discovery*—and so, what *is* the common law of murder? The " term murder as used in the first-degree murder statute includes all types of murder at common law,"[42] and

---

murder, shall, on being thereof convicted, suffer death." Territorial laws of 1827, "An act for the punishment of crimes," section 1.

[37] *People v. Stevenson*, 416 Mich. 383, 391 (1982); *Aaron*, at 715.

[38] *In re Lamphere*, 61 Mich. 105 (1886).

[39] Id., at 108 (emphasis supplied). See MCL § 750.505 for the "general statute resorting to the common law for all non-enumerated crimes."

[40] Id., at 109-110 (emphasis supplied).

[41] *Perkins*, supra.

[42] *Aaron*, at 722.

"[a]t common law, the felony-murder doctrine 'recognize[d] the intent to commit the underlying felony, in itself, as a sufficient mens rea for murder.'"[43] It was thus murder "when death was caused during the commission of, or attempt to commit, some other felony."[44] As Justice, then Judge, Levin put it a half century ago, "[t]he common-law felony-murder rule is an example of implied intent or implied malice aforethought."[45] And in *Aaron* this Court agreed with LaFave & Scott that at common law there were four kinds of murder: "(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,"[46] the Court "construe[ing] the felony-murder doctrine as providing a separate definition of malice, thereby establishing a fourth category of murder. The effect of the doctrine is to recognize the intent to commit the underlying felony, in itself, as a sufficient mens rea for murder. This analysis of the felony-murder doctrine is consistent with the historical development of the doctrine."[47]

This Court recognized in *Aaron* that simply because "Michigan has never specifically adopted the doctrine which defines malice to include the intent to commit the underlying felony is not the end of our inquiry," for "[i]n Michigan, the general rule is that the common law prevails except as abrogated by the Constitution, the Legislature or this Court,"[48] concluding that because it had "not been faced

---

[43] *People v. Reichard*, 505 Mich. 81, 86–87 (2020) (quoting *Aaron*).

[44] *Lindsay v. State*, 258 A.2d 760, 764 (Md. App., 1969).

[45] *People v. Morrin*, 31 Mich. App. 301, 311 (1971) (citing Perkins on *Criminal Law* (2d ed.), p. 37; Moreland, *Law of Homicide*, pp. 14, 42; Clark and Marshall *Crimes* (6th ed.), s 10.07.

[46] *Aaron*, at 714.

[47] Id, at 716-717.

[48] Id., at 722.

previously with a decision as to whether it should abolish the felony-murder doctrine" the ""common-law doctrine remains the law in Michigan," and so "before the Court" was "its *continued existence* in Michigan."[49] *Aaron*, then, *changed* the law; it *said* it was doing so.

3. *Aaron* worked a legislative change in the law of murder

Defendant says that this Court in *Aaron* simply declared what murder in Michigan has always meant. That is not what this Court said in *Aaron*, nor how the decision has uniformly been understood.

Was this Court changing the law of murder in *Aaron? Aaron* itself so says. "Our review of Michigan case law persuades us that we should abolish the rule which defines malice as the intent to commit the underlying felony," and so the Court said it was "[a]brogati[ng] . . . the felony-murder rule."[50] The Court repeatedly spoke of its "abrogation" or "abolition" of the rule: "the abolition of the category of malice arising from the intent to commit the underlying felony should have little effect on the result of the majority of cases"; "[a]brogation of this rule does not make irrelevant the fact that a death occurred in the course of a felony."[51] The Court viewed its action—mistakenly—as "exercis[ing] our role in the development of the common law by abrogating the common-law felony-murder rule."[52] The Court was not "developing the common law," but amending a statute.

---

[49] Id., at 723 (emphasis added).

[50] Id., at 727.

[51] Id., at 729-730.

[52] Id., at 733-734.

As amicus has noted, the Court was not altering the common law, but, by altering the meaning of a common-law term that the legislature had employed without alteration, was altering a statute. See e.g. *People v. Perkins*, supra ("We are bound by the common-law definition until the Legislature modifies it").

Aaron has uniformly been recognized as altering the law of murder.

- The fourth recognized type of murder at common law was felony murder predicated on the felony-murder doctrine. Id. However, *Aaron* abrogated the common-law felony-murder doctrine.[53]

- [I]n *Aaron*, this Court abolished the common-law felony-murder rule, which had previously established that a defendant was guilty of murder for a homicide that occurred during the course of a felony if he had the intent to commit the underlying felony, insofar as this rule equated malice with the intent to commit the underlying felony.[54]

- In *Aaron* . . . this Court struck down the common-law felony-murder rule.[55]

- In *People v. Aaron* . . . this Court abrogated the common-law felony-murder rule.[56]

- In 1980, our Supreme Court abrogated the common-law concept of felony-murder when it determined that the intent to commit the underlying felony could no longer be equated with the intent to murder.[57]

- The opinion of the Court in *Aaro*n acknowledged that the common-law felony-murder doctrine had remained the law of Michigan until it was there abrogated.[58]

---

[53] *People v. Fyda*, 288 Mich. App. 446, 452 (2010).

[54] *People v. Dumas*, 454 Mich. 390, 397 (1997).

[55] *People v. Lardie*, 452 Mich. 231, 262–63, (1996), overruled on other grounds by *People v. Schaefer*, 473 Mich. 418 (2005).

[56] *People v. Lonchar*, 447 Mich. 980 (1994) (Levin, J., dissenting from denial of leave).

[57] *People v. Flowers*, 191 Mich. App. 169, 175 (1991).

[58] *People v. Lonchar*, 411 Mich. 923, 926 (1981) (Levin, J., dissenting from denial of leave).

- *Aaron* was notable then because it marked Michigan's abrogation of the common law felony-murder doctrine.[59]
- In 1980, Michigan abrogated the felony murder rule.[60]
- In *People v. Aaron*. . . the Michigan Supreme Court prospectively abrogated the longstanding felony-murder rule in Michigan.[61]

And prospective application of this altered meaning has been held constitutional.[62] The Court having acted legislatively in *Aaron*, its prospectivity ruling was correct.

C. *Aaron's* prospectivity rule is entitled to the rule of stare decisis

As defendant seeks to overturn a rule of over 40-years vintage, discussion of stare decisis is appropriate (though the prospectivity holding is correct in any event).

Chief Justice McCormack observed that because "stare decisis is an important commitment for courts," the Court "normally require[s] more than a majority of a court thinking that precedent was incorrectly decided" in order to overrule existing authority, for "[i]f stare decisis means anything," the Chief Justice continued, "it means not every judicial decision is up for grabs from scratch."[63] After all, the whole point of stare decisis is to protect previous decisions where members of a current

---

[59] *Stewart v. Wolfenbarger*, 595 F.3d 647, 661 (CA 6, 2010).

[60] *Ashley v. Koehler*, 840 F.2d 16 (CA 6, 1988).

[61] *Bowen v. Foltz*, 763 F.2d 191, 192–93 (CA 6, 1985).

[62] *O'Guin v. Foltz*, 715 F.2d 397, 400 (CA 6, 1983); *Bowen v. Foltz*, 763 F.2d 191 (CA 6, 1985) ("The Michigan Supreme Court has since ruled that such an instruction is inadequate, but gave that ruling prospective application. *People v. Aaron* . . . . *No constitutional rights are implicated by the prospective application of Aaron*" (emphasis supplied); *Shepard v. Foltz*, 771 F.2d 962, 966 (CA 6, 1985) ("Finally, 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"); *Dye v. Jabe*, 37 F.3d 1498 (CA 6, 1994); *Fondren v. Lecureux*, 36 F.3d 1097 (CA 6, 1994).

[63] *People v. Stovall*, 510 Mich. 301, 331 (2022) (McCormack, C.J., concurring).

court, if addressing the matter as in the first instance, would reach a different conclusion; "[w]e hardly need stare decisis to adhere to precedents that we regard as correct; we would do that anyway."[64] As Justice Scalia put it, "The whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability."[65] In the words of the United States Supreme Court,"[r]especting stare decisis means sticking to some wrong decisions.. . . stare decisis has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that we got something wrong—*even a good argument to that effect*—cannot by itself justify scrapping settled precedent."[66]

Robinson v. City of Detroit[67] states the Michigan understanding of stare decisis, an understanding consistent in its main features with the common statements of the doctrine by the United States Supreme Court. 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"[68]; nonetheless, "stare decisis is not to be applied mechanically to forever prevent the Court from overruling

---

[64] Id.

[65] Antonin Scalia, A *Matter of Interpretation: Federal Courts and the Law* 139 (1997)

[66] *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455, 135 S.Ct. 2401, 2409, 192 L.Ed.2d 463 (2015) (emphasis supplied).

[67] *Robinson v. City of Detroit*, 462 Mich. 439 (2000). And see *People v. Davis*, —Mich.—, 2022 WL 779132, at 16 (2022); *People v. Wilson*, 500 Mich. 521, 528 (2017); *People v. McKinley*, 496 Mich. 410, 422 (2014).

[68] *Robinson.* at 463, quoting *Hohn v. United States*, 524 U.S. 236, 251,, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

earlier erroneous decisions."[69] The approach is essentially three-pronged, with an occasional fourth prong:

- the first question should be whether the earlier decision was wrongly decided;
- if so, considered is whether the prior decision defied "practical workability"; also considered is
- whether reliance interests would work an undue hardship if the authority were overturned; and finally, the court sometimes has occasion to consider
- whether changes in the law made the decision no longer justified.[70]

And this Court has recently cited and applied *Robinson* in the case to which the Court directed the parties in its MOAA order, *City of Coldwater v. Consumers Energy Company.*[71] With regard to stare decisis concerning statutory decisions, the Court has been somewhat schizophrenic. On the one hand, the Court has said that it has "rejected any notion that cases involving statutory interpretation are to be afforded any greater stare decisis weight than other cases."[72] On the other hand, the Court has said that "the policy of stare decisis is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional

---

[69] *Id.*

[70] *See, e.g.*, People v. Smith, 478 Mich. 292, 340 (2007), summarizing the *Robinson* factors.

[71] *City of Coldwater v. Consumers Energy Co*., 500 Mich. 158 (2017).

[72] *People v. Wilson*, 500 Mich. 521, 531 (2017), citing *Robinson* at 467, and *Nawrocki v. Macomb Co. Rd. Comm*., 463 Mich. 143, 181 (2000) (which do not seem to stand precisely for that proposition)..

amendment or by overruling our prior decisions,"[73] which would necessarily mean that the policy of stare decisis is stronger with statutory decisions.

1. *Aaron*'s prospectivity holding was not wrongly decided because within the realm of permissible interpretation: how wrong is wrong?

> There *are* degrees of wrong, as a character in a popular sitcom makes clear:
>
> Stuart: Oh, Sheldon, I'm afraid you couldn't be more wrong.
>
> Sheldon: More wrong? Wrong is an absolute state and not subject to gradation.
>
> Stuart: Of course it is. It's a little wrong to say a tomato is a vegetable, it's very wrong to say it's a suspension bridge.[74]

A necessary *prerequisite* under stare decisis principles to overruling a precedent—the first required step— is a determination that the precedent was "wrongly decided"; that first step must be established before proceeding further. But what does this mean? How wrong is wrong? It does *not* simply mean that the current Court would reason the matter differently than did the prior Court, or would have joined a dissent from that decision if a member of that Court.

"[N]ot all wrong precedents are created equal. Rather, while some incorrect precedents are at least debatable, others are flat-out wrong—or, in the lexicon of the Court, 'manifestly erroneous.'"[75] Various adjectives are employed to describe just how wrong a prior decision must be before proceeding further, such as "manifestly

---

[73] *People v. Tanner*, 496 Mich. 199, 251 (2014) (citing *Kyser v. 682 Kasson Twp.*, 486 Mich. 514, 534, n. 15 (2010), which quotes *Agostini v. Felton*, 521 U.S. 203, 235, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)).

[74] Episdoe "The Hofstadter Isotope," Season 2, Episode 20, *The Big Bang Theory*, aired April 13, 2009/

[75] Randy J. Kozel, "Stare Decisis As Judicial Doctrine," 67 Wash. & Lee L. Rev. 411, 418 (2010).

erroneous," "demonstrably wrong," "egregious," "gravely mistaken."[76] "[W]hen a court says that a past decision is demonstrably erroneous, it is saying not only that it would have reached a different decision as an original matter, but also that the prior court went beyond the range of indeterminacy created by the relevant source of law."[77] The Supreme Court's *Ramos* opinion, overruling its prior precedent that non-unanimous juries are permissible in criminal cases,[78] provides a good example.

The Court there said that "[w[hether we look to the plurality opinion or Justice Powell's separate concurrence, *Apodaca* was gravely mistaken," as it was simply "an implacable fact that the plurality spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right, this Court's long-repeated statements that it demands unanimity, or the racist origins of Louisiana's and Oregon's laws," with instead "the plurality subject[ing] the Constitution's jury trial right to an incomplete functionalist analysis of its own creation for which it spared one paragraph," not to mention that "five Justices expressly rejected the plurality's conclusion that the Sixth Amendment does not require unanimity."[79] Moreover, *Apodaca* sat "uneasily with 120 years of preceding case law,"[80] so that "calling *Apodaca* an outlier would be perhaps too suggestive of

---

[76] See e.g. *United States v. Gaudin*, 515 U.S. 506, 521, 115 S. Ct. 2310, 2319, 132 L. Ed. 2d 444 (1995); *N. Am. Brokers, LLC v. Howell Pub. Sch*., 502 Mich. 882 (2018) (Zahra, J., dissenting); *Gamble v. United States*, 587 U.S. 678, 139 S.Ct. 1960, 1980-1989, 204 L.Ed.2d 322 (2019); *Ramos v. Louisiana*, 590 U.S. 83, 106, 140 S. Ct. 1390, 1405, 206 L. Ed. 2d 583 (2020); *Karaczewski v. Farbman Stein & Co.*, 478 Mich. 28, 39 (2007), overruled on other grounds, *Bezeau v. Palace Sports & Ent., Inc*., 487 Mich. 455 (2010).

[77] Caleb Nelson, "Stare Decisis and Demonstrably Erroneous Precedents," 87 Va. L. Rev. 1, 8 (2001).

[78] *Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972), abrogated by *Ramos v. Louisiana*, 590 U.S. 83, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020).

[79] Id., 140 S. Ct. at 1405.

[80] Id.

the possibility of company."[81] As Justice Kavanaugh put it, concurring, to overrule the first question is "is the prior decision not just wrong, but grievously or egregiously wrong? A garden-variety error or disagreement does not suffice to overrule. In the view of the Court that is considering whether to overrule, the precedent must be egregiously wrong as a matter of law in order for the Court to overrule it,"[82] a test which he found met with *Apodoca*.[83]

Justice Thomas supplies an appropriate measure of "wrongness" in his concurring opinions in *Ramos* and in *Gamble v. United States*.[84] Justice Thomas said that when, after looking to the tools of construction, principally text, history, and context, if a decision is "outside the realm of permissible interpretation" it was wrongly decided.[85] This is consistent with Professor Nelson's statement that to overrule a Court must determine that "not only that it would have reached a different decision as an original matter, but also that the prior court went beyond the range of indeterminacy created by the relevant source of law."[86] And so, unless the prior opinion is egregiously wrong, manifestly wrong, gravely mistaken, outside the range of permissible interpretation as beyond the range of indeterminacy created by the

---

[81] Id., 140 S. Ct. at 1406.

[82] Id, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part).

[83] "*Apodaca* is egregiously wrong." 140 S. Ct. at 1416 (Kavanaugh, J., concurring in part).

[84] *Gamble v. United States*, 587 U.S. 678, 711, 139 S. Ct. 1960, 1981, 204 L. Ed. 2d 322 (2019).

[85]140 S. Ct. at 1421 (Thomas, J., concurring); 139 S. Ct. at 1981 (Thomas, J., concurring) . For Justice Thomas, this along is enough to justify overruling. Amicus would this Court to consider that position. (this Court's decision in the *City of Coldwater* case overruled a precedent that"was wrongly decided because it conflict[ed] with the plain language of" the operative statute.).

[86] See FN 35 (emphasis added).

source of law[87] (as in a reading that is directly contrary to the text of a statute), the inquiry ends. For example, this Court's decision in the *City of Coldwater*[88] case overruled a precedent that "was wrongly decided because it conflict[ed] with the plain language of" the operative statute.[89]

2. *Aaron*'s prospectivity rule was correct

Here, *Aaron's* prospectivity rule with regard to its modification of the murder statutes is not outside the realm of reasonable interpretation, gravely mistaken, or in conflict with the plain language of any statute. Defendant's argument is based entirely on a premise that is mistaken—that *Aaron* did not act legislatively, but only interpreted the statute. As argued previously, *Aaron*, and cases since that time, all state to the contrary. The stare decisis analysis ends here, then, on the first step—the matter is not "up for grabs as from scratch," and the long-delayed motion for reconsideration (barred in any event by MCR 6.508(D)(2)) should be denied.

D. Even under *Aaron* the instructions here were proper[90]

---

[87] That is, if the prior interpretation viewed the appropriate materials for construction of the statute and reached a plausible result, one which is worthy of belief by a reasonable jurist.

[88] *City of Coldwater v Consumers Energy Co*, supra.

[89] Id, at 171, overruling *Great Wolf Lodge of Traverse City, LLC v. Pub. Serv. Comm*., 489 Mich. 27 (2011) as conflicting with the plain language of MCL§ 460.6(1).

[90] It is likely this argument was made in the original appeal, as Judge Brennan dissented on this ground: "I would hold the instructions in the present case not to be erroneous." *Langston*, at 662 (Brennan, J., dissenting).

Further, though this argument is not precisely pressed in this fashion by the appellee, appellee has pointed to these instructions as requiring more than participation in the armed robbery; further, this Court has decided cases based on an argument made by an amicus—though a new *issue* may not be interjected.

> We recognize that this argument was offered only by amici--specifically, the Michigan Press Association and other related press organizations--on behalf of plaintiff. Nonetheless, we exercise our judgment to take cognizance of this argument because the instant case implicates a pure question of statutory interpretation and may correctly be resolved, in our

The Court of Appeals said the instructions here were inadequate because they failed to require the jury to find that defendant had a "subjective awareness of the risks and consequences of his acts."[91] But "[t]he natural and probable consequences doctrine is usually applied as an objective test, in the sense that it asks the jury to determine whether a reasonable person in the situation would have considered the crime that actually occurred a natural and probable consequence of the crime that the

---

> judgment, on the basis of this argument. See, for example, *Council of the Village of Allen Park v. Allen Park Village Clerk*, 309 Mich. 361, 363 (1944) (affirming an earlier case that was decided on the basis of an argument "not argued by counsel representing the parties," but instead "argued in the brief amicus curiae"). See also *Mapp v. Ohio*, 367 U.S. 643, 646 n. 3, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949), in a case in which, "[a]lthough appellant chose to urge what may have appeared to be the surer ground for favorable disposition and did not insist that Wolf be overruled, the amicus curiae, who was also permitted to participate in the oral argument, did urge the Court to overrule Wolf") (emphasis added). Furthermore, we note that plaintiff has consistently argued throughout this case that the documents at issue constitute "public records" because, among other reasons, the city attorney holds an "office" within defendant and therefore the documents were retained "in the performance of an official function." See MCL 15.232(I). In this regard, our decision to address the argument offered by the amici is similar to the circumstances in *Teague v. Lane*, 489 U.S. 288, 300, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), in which the United States Supreme Court explained that "[t]he question of retroactivity with regard to petitioner's fair cross section claim has been raised only in an amicus brief.... Nevertheless, that question is not foreign to the parties, who have addressed retroactivity with respect to petitioner's *Batson* claim." And *Teague* favorably cited *Mapp* as another instance of the Court reaching a decision "even although such a course of action was urged only by amicus curiae."

Bisio v. City of Vill. of Clarkston, 506 Mich. 37, 49 (2020). The instructions here are of-record and may be examined in light of the rule in *Aaron*, though, as amicus has argued, the Court should not find it necessary to do so.

Further, the argument is made in support of a judgment, not to attack it, and "it is well settled law that 'the appellee may, without taking a cross-appeal, urge in support of a [judgment] any matter appearing in the record,' even if his argument involves 'an attack upon the reasoning of the lower court.'" Timothy A. Baughman, "Appellate Decision Making in Michigan: Preservation, Party Presentation, and the Duty to 'Say What the Law Is'," 97 U. Det. Mercy L. Rev. 223, 231 (2020), citing *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 96 S. Ct. 2158, 48 L. Ed. 2d 784 (1976).

[91] *Langston*, supra, 86 Mich. App. at 661.

defendant sought to facilitate."[92] As Professor LaFave puts it, "]t]he established rule, as it is usually stated by courts and commentators, is that accomplice liability extends to acts of the principal in the first degree which were a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided."[93] The instruction here did not "impute" or "imply" malice from the aiding and abetting in the underlying felony,[94] but allowed the jury to infer it. As to the crime of 1st-degree murder the jury was instructed that the codefendant must have "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 in which that crime of robbery was committed*."[95] And as to defendant as an aider and abettor, *that* murder—*as so defined*—had 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*."[96] Under the law of aiding and

---

[92] 1 *Wharton's Criminal Law* (16th ed) § 10:10.

See *United States v. Carr*, 107 F.4th 636, 659 (CA 7, 2024) ("Foreseeability, of course, entails an objective rather than a subjective assessment; a court asks not what the individual defendant anticipated, but rather what a reasonable person in his position reasonably could have foreseen. . . . *it is worth noting that courts deem all sorts of grave consequences to be foreseeable once a defendant has agreed to engage in a forcible target offense like robbery*") (emphasis supplied); *State v. Ivy*, 350 N.W.2d 622, 626 (Wis., 1984) ("an aider and abettor may be guilty not only of the particular crime that to his knowledge his confederates intend to commit, but also for different crimes committed that are a natural and probable consequence of the particular act that the defendant knowingly aided or encouraged. . . . .proof of intent is not required for conviction of the different offense if the offense was the natural and probable consequence of the intended crime to which the defendant was a party");

[93] LaFave, *2 Substantive Criminal Law* § 13.3(b).

[94] Cf. *People v. Cismadija*, 167 Mich. 210, 214 (1911) (an instruction that "if, intending to do another felony, [the defendant] undesignedly kill a man, . . . the law implies malice, and the offense is murder" was "no doubt a correct exposition of the law in a case in which it could properly be applied, but its pertinence in the case at bar [an assault with intent to murder] is not apprehended").

[95] T 2056-2057.

[96] T 2056, 2063-2064.

abetting, "a defendant is liable for the crime the defendant intends to aid or abet as well as the natural and probable consequences of that crime,"[97] and the model instructions provide "Third, at that time the defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission *or that the crime alleged was a natural and probable consequence of the commission of the crime intended*."[98]

Here, then, the jury was not told that a murder could be found simply from the commission of the felony, with that supplying malice, but that the crime committed must have been "naturally and inherently dangerous to human life in the manner in which" it was committed, and that as to defendant it must have been "fairly within the scope of the criminal enterprise" and "might have been expected to happen." The question is whether the defendant "could have reasonably foreseen that the victim would be murdered" where a gun was used in a robbery, ""not whether the defendant accurately predicted the murder," and in "making this determination, the jury may make reasonable inferences based on experience and common sense."[99] Even under *Aaron* these instructions should not cause reversal, if the Court deigns to ignore the law-of-the-case doctrine and MCR 6.508(D)(2)and consider this long-delayed motion for reconsideration.

E. Defendant's presumption argument mistakenly views malice as an element distinct from one of the four mental states that each individually constitute malice at the common law and became part of our statute

Defendant appears to argue that the establishment of malice by proof of a homicide committed during the course of a felony involves some sort of presumption; that is, murder requires malice, and under the felony-murder rule malice is presumed by proof of a homicide during the course of a felony. This is not

---

[97] *People v. Robinson*, 475 Mich. 1, 14–15 (2006).

[98] M Crim JI 8.1(3)(c) (emphasis supplied).

[99] *State v. McAllister*, 862 N.W.2d 49, 56–57 (Minn. 2015) (cleaned up).

true. Malice may fairly be said to be an *umbrella term*;[100] put broadly, it refers to a "man-endangering" (or person-endangering) state of mind.[101] The "malice" or "man-endangering" state of mind could be shown in *any* of the four ways mentioned previously (homicide committed with the intent to kill, the intent to do great bodily harm, with a "depraved-heart, which is wanton and willful disregard of the likely consequence of death or great bodily harm, or during the commission of a felony.[102] As the inestimable Judge Moylan of the Maryland Court of Special Appeals put it in his masterful opinion in *Evans v. State*, "[i]t is not the case that these mental states imply malice; it is rather the case they are malice by definition," and so "[e]ach is an alternative substantive element of the crime of murder. These elements, just as any element of any crime, may be proved by any available and acceptable method of proof."[103] There is no presumption involved, and the jury was not given any sort of presumption instruction in this case. There is no due-process issue here.

F. The penalty for 1st-degree murder on a theory of felony-murder is for the legislature to determine

This Court has asked "whether, in the absence of evidence that the defendant acted with malice, mandatory life without parole for felony murder constitutes cruel

---

[100] See Moylan, "A Brief History of Criminal Homicide and its Exponential Proliferation," Ch. IX, CHL MD-CLE 17 (2002).

[101] Rollin M. Perkins, "A Re-Examination of Malice Aforethought," 43 Yale L.J. 537, 557 (1934).

[102] See e.g. *United States v. Pineda-Doval*, 614 F.3d 1019, 1038 (CA 9, 2010) ("malice aforethought covers four different kinds of mental states: (1) intent to kill; (2) intent to do serious bodily injury; (3) depraved heart (i.e., reckless indifference); and (4) intent to commit a felony"); 2 LaFave *Substantive Criminal Law* (3d ed.) § 14.1(a) describing the four types of murder as "(1) intent-to-kill murder; (2) intent-to-do-serious-bodily-injury murder; (3) felony murder; (4) depraved-heart murder"); (1) intent-to-kill murder; (2) intent-to-do-serious-bodily-injury murder; (3) felony murder; (4) depraved-heart murder."

[103] *Evans v. State*, 349 A.2d 300, 338 (Md. Ct. Spec. App.,1975), aff'd, 362 A.2d 629 (Md. App. Ct.1976).

and/or unusual punishment," and also whether *People v. Hall* should be overruled. Amicus is not entirely certain if the Court is asking whether overruling *Hall* is necessary to finding cruel or unusual punishment in this case, or whether it is asking whether mandatory life without parole is *always* cruel or unusual punishment for 1st-degree murder under the theory of felony-murder under the Michigan Constitution. The latter seems particularly remarkable, and so amicus will focus on the former.

This Court assumes that there is an "absence of evidence that defendant acted with malice." Defendant participated in an armed robbery, which may well result in death or great bodily harm, particularly if the intended victim does not cooperate or resists. In *Aaron* itself this Court said that "the abolition of the category of malice arising from the intent to commit the underlying felony should have little effect on the result of the majority of cases. . . . Abrogation of this rule does not make irrelevant the fact that a death occurred in the course of a felony. A jury can properly infer malice from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm. . . . Thus, whenever a killing occurs in the perpetration or attempted perpetration of an inherently dangerous felony . . . in order to establish malice the jury may consider the 'nature of the underlying felony and the circumstances surrounding its commission.'"[104] Post-*Aaron* decisions have regularly found malice proven from participation in an armed robbery.

> - Bunting insists that he had no knowledge of Marcum's intent to shoot Hershberger. And while Bunting concedes that murder is a "possible" consequence of an armed robbery, Bunting argues that he could not have acted with the requisite malice because murder is not a "natural and probable consequence" of an armed robbery. We disagree. It is clear that one natural and probable consequence of a plan to commit armed robbery is that one of the individuals involved

[104] *Aaron*, at 729-730.

will use his weapon, thereby escalating the robbery into a murder.[105]

- Harris's participation in the offense, knowing that his co-perpetrators were carrying firearms, was sufficient to enable the jury to find the requisite malice for felony murder, because a shooting is a natural and probable consequence that may arise from the armed robbery of a drug house.[106]

- Defendant argues that the prosecution failed to establish malice where the victim's death was not an intended consequence of the criminal conspiracy because the victim was not supposed to be injured or killed. Defendant fails to recognize, however, that as established by the Court in *Robinson*, malice can also be inferred from the natural and probable consequences of the underlying crime. Further, malice may be inferred where the evidence demonstrates the use of a deadly weapon.[107]

- Evidence of a defendant's knowledge that an accomplice was armed during the commission of an armed robbery is sufficient for an inference of malice.[108]

Because an accomplice is equally as responsible for an offense as the principal, and because there *was* evidence of malice here, the penalty is not unconstitutional as applied.[109]

---

[105] *People v. Marcum*, 2017 WL 2491807, at 13 (No. 330279, Mich. Ct. App. June 8, 2017), lv. den. 501 Mich. 952 (2018).

[106] *People v. Harris*, 2016 WL 1533552, at 7 (No. 324987, Mich. Ct. App. Apr. 14, 2016), lv. den. 500 Mich. 999 (2017).

[107] *People v. Matthews*, 2012 WL 5233615, at 3 (No. 304215, Mich. Ct. App. Oct. 23, 2012), lv. den.493 Mich. 969 (2013).

[108] *People v. Page*, 2006 WL 119290, at 1 (No. 253185, Mich. Ct. App. Jan. 17, 2006), lv. den. 475 Mich. 873 (2006).

[109] And see section E., infra.

If the Court's question concerning the possible overruling of *People v. Hall* is meant to suggest that this almost 50-year old precedent should be overruled[110] and mandatory life without parole be declared unconstitutional for *any* 1st-degree murder committed on the theory of felony-murder, even if there exists evidence of malice, then amicus refers the Court to the previous stare decisis discussion. Noting that "[t]he power to establish sentences historically has resided in the legislature,"[111] this Court in *Hall* found that mandatory life without parole for a conviction of 1st-degree murder based on a theory of felony-murder is not cruel or unusual punishment. There is no basis in the text or history of the provision for the Court to find otherwise, other than by a decision based on preferences, the Court functioning as a "committee of philosopher-kings."[112] Properly understood, 1) the use of the phrase "cruel or unusual" provides no leeway for a decision different than when the phrase "cruel and unusual" is employed in a constitution[113]; 2) the phrase in either case means at most a punishment unjustly harsh in light of longstanding prior punishment[114]; 3) there is no showing here that the penalty meets that standard. Arretta Lou Ingraham has been dead since 1975, and her husband, who passed away

---

[110] In another case, this Court has asked whether it is necessary to overrule *Hall* so as to hold that persons convicted of 1st-degree murder who are 19 years of age cannot be sentenced to life without parole without a *"Miller"* sentencing hearing. *People v. Czarnecki*, 7 N.W.2d 556 (Mich., 2024). And see similarly *People v. Taylor*, 12 N.W.3d 444 (Mich., 2024) with regard to 20-year olds.

[111] *Hall*, at 658.

[112] *Stanford v. Kentucky*, 492 U.S. 361, 379, 109 S. Ct. 2969, 2980, 106 L. Ed. 2d 306 (1989), abrogated by *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

[113] [T]he phrases 'cruel and unusual,' 'cruel or unusual,' and 'cruel' [were used] interchangeably as referring to a unitary concept" in various constitutions. Stacy, Tom, "Cleaning Up the Eighth Amendment Mess," 14 Wm. & Mary Bill Rts. J. 475, 503-504 (December, 2005). Amicus refers the Court to the amicus brief filed by PAAM in *People v Czarnecki*, No. 166654.

[114] John F. Stinneford, "The Original Meaning of 'Cruel'," 105 Geo. L. J. 441, 464 (2016).

in 1999, as well as her other loved ones, were deprived of her companionship and love since that time. If defendant's sentence is to be modified, it is, under our constitutional system, for the Governor to do so by pardon or commutation. To paraphrase Justice Boyle as she so well put the matter in discussing a proportionality argument under *Milbourn*,[115] "elaborate rationalizations for lowering sentences distance the appellate judiciary from meaningful connection with reality." As the tragedy of the murder victim here and her survivors is "mediated through the processes of proportionality," "the focus of the reviewing court shifts from the horror" of the murder of the victim "to the image of . . . [a] sympathetic defendant, incarcerated at great cost to the state."[116]

This Court should not permit itself to be used as a legislative committee; "[t]he Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary."[117]

G. Remedy

Should this Court overrule *Aaron*'s prospectivity rule, amicus concurs fully with the remedy discussion of the People—but the rule should not be overruled.

---

[115] Where "defendant himself described how he terrorized, tortured, burned, and sodomized eighty-four-year-old Marie Green; then left her for dead" *People v. Merriweather*, 447 Mich. 799, 802 (1994).

[116] Id., at 805.

Further, "[b]ecause the absolute magnitude of the crime is grave [here, the gravest possible] and the principle of proportionality does not permit the judiciary to impose on the Legislature its subjective view of appropriate responses to perceived evils, the statutory scheme passes constitutional muster." *People v. Bullock*, 440 Mich. 15, 72-73 (1992) (Boyle, J., concurring and dissenting).

[117] *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 858 (CA9, 1996)(en banc)(Kleinfeld, J., dissenting), rev'd sub nom. *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

H. Conclusion

Whether *Aaron* constitutes good policy or not is not the question; rather, the question is whether the Court was actually "exercising its role in the development of the common law." It was not, because the legislature, by use of a common-law term without alteration, *enacted* the common-law meaning, and by altering it, something this Court, as noted previously, has since recognized it should not do, the Court amended a statute. The Court treated the legislature as having enacted a statute proscribing murder "as defined at the common law or whatever the Court, in its wisdom, thinks murder should mean" as time goes on. But if the legislature actually enacted such a statute it would be engaging in a standardless delegation of legislative authority to the judiciary, something prohibited specifically in our Constitution.[118] The doctrine of separation of powers is violated when the legislature creates a statutory offense and allows the statute's content to be left to the judiciary's discretion.[119]

In *Aaron* this Court erred by exercising legislative authority to alter the meaning of a common-law term that the legislature had not altered when employing it in a statute, but amicus, unlike defendant, does not seek to have this Court set that decision aside or modify it; that ship has sailed, and it is unknowable what the legislature might have done regarding the statute if left to exercise the legislative power—though if the Court does the one (revisits the retroactivity holding), it should do the other (consider that *Aaron* improperly amended the statute). But the Court should recognize that it altered the law—it did not "clarify" it to announce what it had always been—and so its rule of prospectivity was entirely appropriate. Further,

---

[118] Mich. Const. 1963, Art. 3, § 2: "No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

[119] See e.g. *People v. Turmon*, 417 Mich. 638 (1983).

the penalty imposed by the legislature does not in any sense constitute cruel or unusual punishment.

Relief

Wherefore, amicus requests that this Court reaffirm *Aaron*'s prospectivity rule, or deny leave to appeal.

Respectfully submitted,

J. DEE BROOKS
President
Prosecuting Attorneys
Association of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JON P. WOJTALA
Chief, Research, Training, and Appeals

/S/
TIMOTHY A. BAUGHMAN
Special Assistant Prosecuting Attorney
5301 Russell St. Fl. 2
Detroit, Michigan 48211

CERTIFICATE OF COMPLIANCE

I certify that the foregoing contains 10862 countable words.

/s/ Timothy A. Baughman

TIMOTHY A. BAUGHMAN (P24381)
Special Assistant Prosecuting Attorney