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

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Statement of the Question

I.

Should *People v. Aaron* be overruled regarding its limitation of its amendment of the 1st-degree murder statute to pending and future trials, and so defendant gain relief?

A. **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, was its applicability ruling correct, and further under principles of stare decisis, should this 45-year-old precedent not be overruled; also, is the Court's apparent assumption in its statement of the questions that there is no evidence that defendant here acted with malice and that juries before *Aaron* were not required to find malice untrue?**

Amicus answers: YES

B. **Should any pre-*Aaron* defendants obtain relief from their sentences on the ground that the sentence constitutes cruel or unusual punishment, and if so, by what standard and with what relief?**

Amicus answers: NO

Statement of Facts

Amicus joins the statement of facts supplied by the People.

Argument

I.

People v. Aaron should not be overruled regarding its limitation of its amendment of the 1st-degree murder statute to pending and future trials, and so defendant should gain no relief.

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, which has become part of the statute, 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. Also, under principles of stare decisis, this 45-year-old precedent should not be overruled; further, the Court's apparent assumption in its statement of the questions that there is no evidence that defendant here acted with malice and that juries before *Aaron* were not required to find malice is simply untrue.

A. The questions before the Court

The Court initially granted a MOAA as to whether 44 and 48-year-old precedents should be overruled, 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

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

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]

After argument, the Court directed supplemental briefing on:

- whether a mandatory sentence of life imprisonment without parole for felony murder is cruel and/or unusual punishment under Const 1963, art 1, § 16 or US Const, Am VIII, in all cases decided before *People v. Aaron*, 409 Mich. 672 (1980), where the jury was not required to make a finding of malice, or only in those pre-*Aaron* cases where overwhelming evidence of malice was not otherwise presented at trial;

- if the latter, the standard by which the courts should determine whether sufficient evidence of malice was presented and the means by which a defendant should present such an argument; and

- what remedy is required if any defendants' sentences of mandatory life imprisonment without parole are found invalid.[3]

The Court has now granted leave to appeal on essentially these same questions:

- whether *People v. Aaron*, 409 Mich.. 672 (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;

- whether *People v. Hall*, 396 Mich. 650 (1976), should be overruled;

- whether a mandatory sentence of life imprisonment without parole for felony murder is cruel and/or unusual punishment under Const. 1963, art. 1, § 16 or U.S. Const., Am. VIII, in all

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

[3] *People v. Langston*, 15 N.W.3d 820 (Mich., 2025).

cases decided before *Aaron*, supra, where the jury was not required to make a finding of malice, or only in those pre-*Aaron* cases where overwhelming evidence of malice was not otherwise presented at trial;

- if the latter, the standard by which the courts should determine whether sufficient evidence of malice was presented and the means by which a defendant should present such an argument; and

- what remedy is required if any defendants' sentences of mandatory life imprisonment without parole are found invalid.[4]

B. The Court's questions misstate the nature of pre-*Aaron* 1st-degree murder convictions on the theory of felony-murder, as in each and every one the jury was required to find malice as it was then understood before the amendment of the statute by *Aaron*

It is unfortunate, and perhaps telling, that the Court continues to misstate the nature of pre-*Aaron* convictions. In its second question the Court asks the parties to brief "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." In its fourth question, the Court asks the parties to brief "whether a mandatory sentence of life imprisonment without parole for felony murder is cruel and/or unusual punishment under Const. 1963, art. 1, § 16 or U.S. Const., Am. VIII, in all cases decided before *Aaron*, supra, *where the jury was not required to make a finding of malice*, or only in those pre-*Aaron* cases where overwhelming evidence of malice was not otherwise presented at trial." The question begged in these propositions—*were* pre-*Aaron* jurors "not required to make a finding of malice"[5]—is readily answered in the

[4] *People v. Langston*, 18 N.W.3d 296 (Mich., 2025).

[5] "Traditionally, this phrase [beg the question] means 'to base a conclusion on an assumption that is as much in need of proof or demonstration as the conclusion itself,'" See Bryan Garner, https://lawprose.org/lawprose-lesson-167-the-evolution-of-beg-the-question/ That is the case here.

negative. It is simply not true[6] that pre-*Aaron* jurors were not required to find malice,[7] as it is clear beyond peradventure that in these cases the juries *were* required to make a finding of malice and *were* properly instructed on malice as it was understood in the law before this Court amended the murder statute in *Aaron*. This Court *changed* the substantive law of murder in *Aaron* by eliminating one *alternative* definition of malice—a killing during the course of a felony (with the degree becoming 1st-degree if the felony was one of those enumerated in MCL 750.316). As

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[6] "This would be a powerful argument were it true, but it is not true." *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 169 F.3d 474, 480 (CA 7, 1999).

[7] Amicus is unsure what the Court means in asking "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." If the Court is referring to defendant Langston, there *was* evidence of malice, even as re-defined by *Aaron*, as even the defendant has admitted. If the Court is referring more generically to pre-*Aaron* cases if the defendant can show that there was no evidence of malice as re-defined by *Aaron*, this is not such a case, and answering that question must await such a defendant, as it would amount to an advisory opinion here. See *League of Women Voters of Michigan v. Sec'y of State*, 506 Mich. 561, 581 (2020); *People v. Holland*, 2006 WL 3459068, at 3 (No. 271793, Mich. Ct. App. Nov. 30, 2006) (unreported) ("'The judicial power referred to is the authority to hear and decide controversies, and to make binding orders and judgments respecting them.' . . . Any holding from this Court as to the specific proffer letter in this case would constitute a mere advisory opinion, not binding precedent for future cases"). Cf. *Matter of Est. of Nohle*, 893 N.W.2d 755, 762 (N.D., 2017) ("We are not authorized to render an advisory opinion merely because the issue may arise in the future").

This Court is only authorized to issue an advisory opinion, on request of the governor or a house of the legislature, and then only regarding the constitutionality of legislation before it goes into effect: "Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date." Const. 1963, art. 3, § 8. And even these opinions do not constitute precedent. See *In re Request for Advisory Opinion Regarding Constitutionality of 2012 PA 348*, 493 Mich. 1016, 1016 (2013); *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich. 465, 477 (1976) ("An advisory opinion is not precedentially binding upon the Court and represents only the opinions of the parties signatory"). Opining on a future question is simply outside the judicial power, which is to say that the parties must present "a real controversy, rather than a hypothetical one. . . . This requirement, commonly known as the real-case-or-controversy requirement, prevents this Court from rendering advisory opinions that have no practical legal effect in a case." " *In re Smith*, 324 Mich. App. 28, 41 (2018).

put by Professor LaFave, "It may be useful to summarize briefly here the required elements of murder: (1) There must be some conduct (affirmative act, or omission to act where there is a duty to act) on the part of the defendant. (2) He must have an accompanying 'malicious' state of mind (intent to kill or do serious bodily injury; a depraved heart; *an intent to commit a felony*). (3) His conduct must 'legally cause' the death of a living-human-being victim. And (4), in some jurisdictions, this death must occur within a year and a day after the defendant's conduct thus caused the victim's fatal injury, although most have abrogated the rule judicially or legislatively."[8] This was the law in Michigan pre-*Aaron*.

This Court in *Aaron said* it was changing the law, not interpreting it, and has said so many times since; the Court of Appeals has said it so did, and federal courts have also said it so did, all as pointed out in the initial brief of amicus, to which amicus refers the Court. The convictions in these cases were and are *valid*, as are the sentences, *unless* the penalty for 1st-degree murder in a case where the jury was instructed on malice as it *then existed* in the statute (the legislature having embraced the common-law meaning by not changing it) before *Aaron* has been unconstitutional since 1837[9]—at least those in cases where the proof of malice by way of one of the *other* three alternatives of showing malice was not clear.

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[8] Lafave, 2 *Substantive Criminal Law.*(3d ed.) § 14.1(f) (emphasis supplied).

[9] The penalty for 1st-degree murder in the 1837 statute, including 1st-degree murder by felony-murder, was death. Revised Statutes of 1837, Chapter 3, section 1: All murder which shall be perpetrated by means of poison or lying in wait, or any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder in the first degree, and shall be punished by death." The penalty became life at hard labor in the Revised Statutes of 1846, Chapter 153, section 1: "All murder which shall be perpetrated by means of poison or lying in wait, or any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robber or burglary, shall be deemed murder in the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life."

It is wrong to consider that pre-*Aaron* convictions were not based on evidence of malice; they *were*—this Court simply amended the substantive law, and now appears perhaps to desire to apply that amendment of the substantive law to convictions obtained before that time, though even a legislative amendment to the statute would not ordinarily apply retroactively.[10] As amicus has argued previously, the Court acted legislatively in *Aaron*, and so its prospective application of the amended murder statute was entirely appropriate, *Aaron* and a few others getting essentially an unmerited benefit, else the opinion would have been (as the purely-prospective *Stevenson*[11] opinion abolishing the year-and-a-day causation rule for homicide is) an unconstitutional advisory opinion if wholly prospective. The Court should not consider the question based on the false proposition that the juries in pre-*Aaron* cases did not render verdicts based on evidence of malice as then defined by the substantive law.[12] And there is no basis on principles of stare decisis to upset *Aaron*'s retroactivity ruling by applying changed substantive law to proper convictions,[13] *even if* it were the case that for the Court now "everything is up for grabs as from scratch."[14]

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[10] "The repeal of any statute or part thereof *shall not have the effect to release or relinquish any penalty, forfeiture, or liability incurred under such statute or any part thereof*, unless the repealing act shall so expressly provide, and such statute and part thereof shall be treated as still remaining in force for the purpose of instituting or sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability." MCL § 8.4a.

[11] *People v. Stevenson*, 416 Mich. 383, 391 (1982).

[12] Indeed, there is evidence of malice in this case, where defendant participated in the armed robbery knowing a firearm was employed; as amicus pointed out in the initial brief, convictions have been had on this sort of evidence repeatedly in post-*Aaron* cases.

[13] Again, see MCL § 8.4a.

[14] "If stare decisis means anything, it means not every judicial decision is up for grabs from scratch." *People v. Stovall*, 510 Mich. 301, 331 (2022) (McCormack, C.J., concurring).

And so, unless the prior opinion is egregiously wrong, manifestly wrong, gravely mistaken, outside the range of permissible interpretation as beyond the range of

Further, 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 or rehearing, precluded by the rules of this Court, and the prior decision is the law of the case, with further consideration also barred by MCR 6.508(D)(2).

C. 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 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.[15] 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 "[t]his decision shall apply to all trials in progress and those occurring after the date of this opinion."[16] 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

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indeterminacy created by the source of law (as in a reading that is directly contrary to the text of a statute), the inquiry should end, as amicus argued in the initial brief.

[15] *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.

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

reinstating the defendant's conviction of first-degree murder"[17] and reversed the Court of Appeals, reinstating the 1st-degree murder conviction and citing the page reference in *Aaron* saying that "[t]his decision shall apply to all trials in progress and those occurring after the date of this opinion."[18]

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,[19] and to consider it now amounts to a decades-late motion for reconsideration, which is not permitted by the rules of this Court.[20] 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.[21] Defendant's argument is that

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[17] 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.

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

[19] "[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).

[20] MCR 7.316(B): "The Court will not accept for filing a motion to file a late application for leave to appeal under MCR 7.305(C), a late application for leave to cross-appeal under MCR 7.307(A), *a late motion for rehearing under MCR 7.311(F), or a late motion for reconsideration* under MCR 7.311(G)" (emphasis supplied).

[21] 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

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,[22] if finality still has any meaning at all.[23] This Court should follow its own rules on motions for relief from judgment, as well as the law-of-the-case doctrine.

D. *Aaron* did not say "what the law is" but rather was a law-changing decision *by its own terms*, as is universally 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

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tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation'").

[22] 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 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").

[23] "[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).

"[n]o jury found that Mr. Langston had the intent or even foresaw that his conduct would result in someone's death."[24] For a finding of malice no such finding by a jury is ever necessary,[25] even post-Aaron, 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 in 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*."[26] But this 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.[27] After Michigan became a state, it was recognized that "the common law [was in force] in Michigan,

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[24] Defendant's original supplemental brief, p. 42.

[25] 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.

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

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

except so far as repugnant to, or inconsistent with, [Michigan's] constitution and statutes."[28] In *In re Lamphere,*[29] 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.*[30]

The common law has continued in each successive Michigan Constitution since its adoption by the Northwest Ordinance of 1787.[31] If, then, murder is a common-law crime, then the Court may alter it[32] (though this would raise a different

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[28] *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").

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

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

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

[32] *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

problem—separation of powers[33]—as the power to define crimes and ordain their punishment is a legislative power[34]). But murder is not a common-law crime; *all* crimes in Michigan are statutory, though the legislature has left the definition of 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."[35] These principles are fully applicable to criminal statutes. In *People v. Schmitt,*[36] the trial court held that the statute prohibiting "the abominable and detestable crime against nature" was not

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> 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.

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

[34] *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").

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

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

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]*."[37] Similarly, though finding it unnecessary to resolve the question of its authority, this Court in *People v. Couch*[38] 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 arresting citizen reasonably believes that the felon poses a threat of serious physical harm to that citizen or to others.'"[39]

Then in *People v. Reeves*[40] 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*:[41]

> Because Michigan's homicide statutes proscribe "murder" without providing a particularized definition of the elements of that offense

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[37] Id., at 577.

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

[39] Id., at 420-421.

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

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

> 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.[42]

And in *People v. Perkins*[43] Justice Kelly wrote flatly for a *unanimous* Court that "[w]hen 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*

[42] Id., at 125-126.

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

are bound by the common-law definition until the Legislature modifies it."[44] This amounts to an explicit repudiation of the approach taken by the Court in *Aaron*.

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."[45] Murder was not defined in territorial

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[44] 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").

[45] "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,[46] but this hardly makes murder a common-law crime. As Justice Campbell stated in *In re Lamphere*:[47]

> 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.*[48]

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*."[49]

This Court being "bound by the common-law definition until the Legislature modifies it,"[50] 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,"[51] and

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

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

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

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

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

[50] *Perkins*, supra.

[51] *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.'"[52] It was thus murder "when death was caused during the commission of, or attempt to commit, some other felony."[53] 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."[54] 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,"[55] the Court "constru[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."[56]

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,"[57] concluding that because it had "not been faced

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

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

[54] *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.

[55] *Aaron*, at 714.

[56] Id, at 716-717.

[57] 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."[58] *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."[59] 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."[60] 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."[61] The Court was not "developing the common law," but amending a statute.

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

[59] Id., at 727.

[60] Id., at 729-730.

[61] 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; amicus will not repeat at length that which it said on this point in the initial brief, but refer the Court to that brief, noting here only the *Duma*s decision as representative of the many decisions on the point: "[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."[62] And prospective application of this altered meaning has been held constitutional.[63] The Court having acted legislatively in *Aaron*, its prospectivity ruling was correct.

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

> *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*[64]

As defendant seeks to overturn a rule of going on 45-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

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

[63] *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).

[64] Bator, supra, note 21.

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."[65] After all, the whole point of stare decisis is to protect previous decisions where members of a current 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."[66] 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."[67] 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."[68]

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

[66] Id.

See *Tate v. Showboat Marina Casino P'ship*, 431 F.3d 580, 582–583 (CA 7, 2005) ("if the fact that a court considers one of its previous decisions to be incorrect is a sufficient ground for overruling it, then stare decisis is out the window, because no doctrine of deference to precedent is needed to induce a court to follow the precedents that it agrees with; a court has no incentive to overrule them even if it is completely free to do so. The doctrine of stare decisis 'imparts authority to a decision, depending on the court that rendered it, merely by virtue of the authority of the rendering court and independently of the quality of its reasoning. The essence of stare decisis is that the mere existence of certain decisions becomes a reason for adhering to their holdings in subsequent cases.'").

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

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

Robinson v. City of Detroit[69] 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"[70]; nonetheless, "stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions."[71] 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.[72]

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

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[69] *Robinson v. City of Detroit*, 462 Mich. 439 (2000). And see *People v. Wilson*, 500 Mich. 521, 528 (2017); *People v. McKinley*, 496 Mich. 410, 422 (2014).

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

[71] *Id.*

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

stare decisis weight than other cases."[73] 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 amendment or by overruling our prior decisions,"[74] 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.*[75]

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.

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[73] *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)..

[74] *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)).

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

"[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.'"[76] Various adjectives are employed to describe just how wrong a prior decision must be before proceeding further, such as "manifestly erroneous," "demonstrably wrong," "egregious," "gravely mistaken."[77] "[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*."[78] The Supreme Court's *Ramos* opinion, overruling its prior precedent that non-unanimous juries are permissible in criminal cases,[79] 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

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

[77] 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, 913 N.W.2d 638, 647 (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).

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

[79] *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).

expressly rejected the plurality's conclusion that the Sixth Amendment does not require unanimity."[80] Moreover, *Apodaca* sat "uneasily with 120 years of preceding case law,"[81] so that "calling *Apodaca* an outlier would be perhaps too suggestive of the possibility of company."[82] 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,"[83] a test which he found met with *Apodoca*.[84]

Justice Thomas supplies an appropriate measure of "wrongness" in his concurring opinions in *Ramos* and in *Gamble v. United States*.[85] 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.[86] 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

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

[81] Id.

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

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

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

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

[86]140 S. Ct. at 1421 (Thomas, J., concurring); 139 S. Ct. at 1981 (Thomas, J., concurring) . For Justice Thomas, this alone is enough to justify overruling. Amicus would request that 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.).

indeterminacy created by the relevant source of law."[87] 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 source of law[88] (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*[89] case overruled a precedent that "was wrongly decided because it conflict[ed] with the plain language of" the operative statute.[90]

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; in fact, it was correct, given the incorrect amendment of the 1st-degree murder statute by the Court. Defendant's argument is based entirely on a premise that is mistaken—that *Aaron* did not act legislatively, but only interpreted the statute. As amicus has laid out, *Aaron*, and cases since that time, all state to the contrary.[91] The stare decisis analysis ends here, then, on the first step—the matter is not "up for grabs as from scratch," and the long-

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[87] See note 85 (emphasis added).

[88] 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.

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

[90] 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).

[91] Amicus is content to leave *Aaron* as it is, but if the Court is of the mind that its prospectivity ruling was so wrong as not to survive the first stop of a stare decisis analysis, then the Court should not do so apart from considering whether *Aaron*'s amendment of the 1st-degree murder statute was appropriate—which it was not ("[w]hen 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*").

delayed motion for reconsideration (barred in any event by MCR 6.508(D)(2)) should be denied.

F. Even under *Aaron* the instructions here were proper[92]

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."[93] 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 defendant sought to facilitate."[94] 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."[95] The

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[92] 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.

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

[94] 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");

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

instruction here did not "impute" or "imply" malice from the aiding and abetting in the underlying felony,[96] but allowed the jury to infer it. As to the crime of 1st-degree murder the jury was instructed that codefendant Wilson 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*."[97] 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*."[98] Under the law of aiding and 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,"[99] 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*."[100]

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

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[96] 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").

[97] T 2056-2057.

[98] T 2056, 2063-2064.

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

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

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."[101] 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.

G. 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 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—a pre-*Aaron* trial—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 even now. 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

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

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.'"[102] 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 will use his weapon, thereby escalating the robbery into a murder.[103]

- 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.[104]

- 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.[105]

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

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

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

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

- 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.[106]

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.[107]

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[108] 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 as now defined by *Aaron*, 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,"[109] 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."[110] Properly understood, 1) the use of the phrase "cruel or unusual" provides no leeway for a decision different than

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

[107] And see section E., infra.

[108] 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. Bouie*, 7 N.W.3d 557 (Mich., 2024) with regard to 20-year olds.

[109] *Hall*, at 658.

[110] *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).

when the phrase "cruel and unusual" is employed in a constitution[111]; 2) the phrase in either case means at most a punishment unjustly harsh in light of longstanding prior punishment[112]; 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 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*,[113] "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."[114]

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

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[111] [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*, 2025 WL 1085247 (Mich. Apr. 10, 2025).

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

[113] 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).

[114] 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).

so that elected officials would decide trivia, while all great questions would be decided by the judiciary."[115]

H. If the Court finds the statutory penalty in pre-*Aaron* cases could somehow have become unconstitutional in certain cases, the remedy should be limited to those cases where the evidence of malice under one or more of the other three malice alternatives is not clear, and should be removal of the no parole restriction

Amicus believes that it likely in all the pre-*Aaron* convictions there is evidence that would take the case to the jury in a post-*Aaron* trial. The issue is an instructional one, not an evidentiary one—juries were permitted to convict based on a fourth alternative definition of malice (death during a felony) that was then the substantive law—and would, after *Aaron,* not be so instructed.

Amicus can find no perfect analogy to the decidedly odd situation if the Court declares that some pre-*Aaron* convictions may have resulted in sentences that have become cruel or unusual punishments. Federally, the law had been that in a perjury case the jury did not have to find materiality of the false statements, that being a question of law for the trial court. The United States Supreme Court reversed this understanding of the statute in *United States v. Gaudin*,[116] and so federal appellate courts were left with review of convictions for perjury where no instruction on materiality had been given the jury. In *Neder v. United States*[117] the Court held that a failure to instruct on an element can be harmless beyond a reasonable doubt on direct review of a preserved claim where there is a finding by the reviewing court that there was overwhelming evidence such that the jury verdict would have been the

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[115] *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).

[116] *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).

[117] *Neder v. United States*, 527 U.S. 1, 21, 119 S. Ct. 1827, 1840, 144 L. Ed. 2d 35 (1999).

same absent the error. And this was for preserved claims, and amicus doubts any of the existing cases involve contemporaneous objections to the instructions, which were, in any event, proper under the then-existing substantive law. On plain error review of *Gaudin* error, the Supreme Court held that the error in the trial court deciding materiality of a false statement rather than submitting the question to jury was "plain," but that it did not seriously affect the fairness, integrity or public reputation of judicial proceedings, as required before an appellate court may exercise its discretion to correct the error, as the evidence supporting materiality was overwhelming, and materiality was essentially uncontroverted at trial and on appeal.[118] Again, the situation here differs as the juries *were* instructed on the then-existing substantive law.

Finally, *Gaudin* error has been found *not* to be retroactive on collateral review after the direct appeal is over,[119] and all of these cases involve collateral review by way of a motion for relief from judgment, the case before the Court involving one where the issue was previously decided by the Court.

Though no relief should be granted to proper convictions, should the Court find that instructing the jury on the fourth alternative of malice in pre-*Aaron* cases may in some cases have resulted in punishment that *may* have become unconstitutional, depending on the strength of the evidence on one or more of the other three alternative definitions of malice (and the actual instructions given), and that some pre-*Aaron* defendants may be entitled to review of that question, then review would be by way of a motion for relief from judgment—there are no class actions in criminal cases—by the trial court for whether the evidence of malice under

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[118] *Johnson v. United States*, 520 U.S. 461, 117 S. Ct. 1544, 137 L. Ed. 2d 718, (1997).

[119] See e.g., *United States v. Brown*, 305 F.3d 304 (CA 5, 2002); *United States v. Mandanici*, 205 F.3d 519, 531 (CA 2, 2000); *United States v. Swindall*, 107 F.3d 831, 836 (CA 11, 1997).

one or more of the other malice alternatives is not "clear,"[120] the defendant bearing the burden, as the People argue. The trial court would be required to review the record to determine what sort of instructions were given as regards possible harmless error,[121] and the nature of the evidence under this standard. If there are any defendants entitled to relief, the remedy would be to strike the "no parole" prohibition., as was done in *Bullock*.[122] Clear evidence of "depraved heart" ("wanton and wilful disregard") malice would be sufficient, and the burden should be on the movant to show otherwise (amicus doubts any of the deaths occurred during the course of the enumerated felony by accident or misadventure of some sort, or a heart attack or similar physical response of the victim). And it must be remembered that "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."[123]

I. 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

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[120] See *People v. Lonchar*, 411 Mich. 923, 929 (1981) (Levin, J., dissenting from the denial of leave).

[121] Look at the instructions here: the jury was instructed that for murder, codefendant Wilson 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*," and that 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*."

[122] *People v. Bullock*, 440 Mich. at 42.

[123] MCL § 767.39.

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.[124] 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.[125]

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 *unless* the Court revisits the prospectivity portion of the decision, and then the Court should address its improper amendment of the statute; otherwise, 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, the penalty imposed by the legislature does not in any sense constitute cruel or unusual punishment.[126]

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[124] 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."

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

[126] "In a democracy, the people (through the political branches of government) may resolve hard questions as well as easy ones." *Mays v. City of E. St. Louis, Ill.*, 123 F.3d 999, 1003 (CA 7, 1997), abrogated on other grounds by *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

"Difficult issues of social policy are difficult, not because of a failure to discern a resolving principle, but because they involve conflicting principles, or conflicting interests that are recognized as legitimate. . . . republican government provides that public policy issues are to be determined by the people through elected representatives. Further, to the extent, if any, that policy issues can be decided on the basis of principle, there is little reason to think that judges . . . are more likely than legislators to discern the relevant principle. There is even less reason to think, in any event, that judges are likely to decide such issues on any basis other than personal preference." Lino A. Graglia, "Do Judges Have A Policy-Making Role in the American System of Government?," 17 Harv. J.L. & Pub. Pol'y 119, 125 (1994).

Relief

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing contains 12,919 countable words.

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