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**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee,

-vs-

**KEMO KNICOMBI PARKS**
Defendant-Appellant
_______________________________/

**Supreme Court No.:**

**Court of Appeals No.** 346587

**Lower Court No**. 17-40829 FC

**GENESEE COUNTY PROSECUTOR**
Attorney for Plaintiff-Appellee
_______________________________

**ANGELES R. MENESES (P80146)**
Attorney for Defendant-Appellant
_______________________________

# APPLICATION FOR LEAVE TO APPEAL

**STATE APPELLATE DEFENDER OFFICE**

**BY: Angeles R. Meneses (P80146)**
**Assistant Defender**
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

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## Judgment Appealed From and Relief Sought

Kemo Knicombi Parks appeals from the August 13, 2020 opinion in his case, which affirmed his convictions and sentences for first-degree premeditated murder, carrying a concealed weapon, and felony firearm. (Appendix A – August 13, 2020 Court of Appeals' Opinion).

First, Mr. Parks was denied his constitutional speedy trial right; therefore, his convictions and sentences should be vacated and the charges ordered dismissed with prejudice. The 22-month delay between Mr. Parks' arrest and the start of his trial was largely attributable to both court docket congestion and requests for adjournment by the prosecution. Trial counsel was prepared to commence trial throughout the period of delay, and emphasized more than once that these delays were no fault of their own or of Mr. Parks. Moreover, Mr. Parks filed two pre-trial motions asserting his speedy trial right; therefore, the Court of Appeals was incorrect in stating that "[t]his factor weighs against [Mr.] Parks." (Appendix A, p. 8). Moreover, Mr. Parks was greatly prejudiced by this 22-month delay. Most notably, this delay caused the unavailability of key eyewitness Malik Fordham, who was available to testify at the preliminary examination but was unable to be located by the time of trial.

Second, there was insufficient evidence to prove that Mr. Parks shared Mr. Dequavion Harris' intent to kill, and was thus insufficient to prove that first-degree murder under an aiding and abetting theory. Only one witness, Deantanea Ratliff, saw Mr. Parks allegedly pass Mr. Harris a gun while in her car. No other witnesses and occupants of the car saw a firearm in the car at any point. In fact, Ms. Ratcliff

had not always described the interaction between Mr. Harris and Mr. Parks as "passing a gun;" she had previously described it to police as "tussling." However, even if Mr. Parks indeed passed a gun to Mr. Harris while in Ms. Ratliff's car, the prosecution failed to present evidence for a jury to reasonably infer that Mr. Parks intended to kill Mr. Jones-Dickerson, or had knowledge that Mr. Harris intended to kill Mr. Jones-Dickerson at the time.

Third and finally, 18-year old Mr. Parks' life without parole sentence violates the Eighth Amendment to the Michigan and United States Constitutions because the mitigating properties of his youth should have been considered before the trial court imposed the harshest possible sentence. As an 18-year-old, Mr. Parks embodies the same youthful qualities the United States Supreme Court found relevant in *Miller*. Without a meaningful scientific difference between an 18-year-old and a 17-year-old, there can be no meaningful difference in the way each young person is treated under our state or federal constitutions. It is time for this Court to make that plain. This Court should either grant leave to appeal or hold Mr. Parks' case in abeyance pending the outcome of *People v Manning*, 505 Mich 881 (2019).

The Court of Appeals' opinion is clearly erroneous and will cause Mr. Parks material injustice.



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## Statement of Questions Presented

I. Must Mr. Parks' convictions and sentences should be vacated, and the charges ordered dismissed with prejudice, as he was denied his constitutional speedy trial right?

Court of Appeals answers, "No."

Kemo Knicombi Parks answers, "Yes."

II. Was the evidence insufficient to prove that Mr. Parks shared Mr. Harris' intent to kill, and was thus insufficient to prove first-degree murder under an aiding and abetting theory?

Court of Appeals answers, "No."

Kemo Knicombi Parks answers, "Yes."

III. Does eighteen-year-old Kemo Parks' life without parole sentence violate the Eighth Amendment to the Michigan and United States Constitutions because the mitigating properties of youth should be considered before a court imposes the harshest possible sentence?

Court of Appeals answers, "No."

Kemo Knicombi Parks answers, "Yes."

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## Statement of Facts

### Introduction and Summary of Issues

After an eight-day jury trial, Kemo Knicombi Parks was convicted of felony firearm, carrying a concealed weapon, and first-degree premeditated murder under an aiding and abetting theory. On October 5, 2016 Mr. Parks' co-defendant and cousin Dequavion Harris shot and killed Darnyreouc Jones-Dickerson in the parking lot of the Kingwater Market in Mt. Morris. The sole piece of evidence connecting Mr. Parks to the murder was the testimony of Deantanea Ratcliff, who allegedly witnessed Mr. Parks give a gun to Mr. Harris in the backseat of her car. Ms. Ratcliff had not always described the interaction between Mr. Harris and Mr. Parks as "passing a gun;" she had previously described it to police as "tussling." During his four interviews with police, Mr. Parks adamantly denied ever passing a gun to Mr. Harris. No other witnesses saw a firearm in the car at any point.

No witnesses heard any conversation between Mr. Parks and Mr. Harris regarding Mr. Jones-Dickerson, or any supposed plan to murder him. Witnesses at trial saw Mr. Parks inside of the store at the time of the shooting, and although Mr. Harris was seen fleeing the scene, Mr. Parks was not with him. Mr. Parks was only 18 years old at the time of the offense.

Mr. Parks argues: 1) that he was denied his constitutional right to a speedy trial; 2) that there was insufficient evidence to prove first-degree murder under an aiding and abetting theory because there is insufficient evidence to prove he shared Mr. Harris' intent to kill; 3) the admission of Mr. Fordham's preliminary examination

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testimony at trial was improper; and 4) that his life without parole sentence violates the Eighth Amendment because the mitigating properties of his youth should have been considered.

**Events of October 5, 2016**

On October 5, 2016, 14-year-old Laniya Sublett[1] and 19-year-old Deantanea Ratcliff[2] decided to go meet Dequavion Harris at the Villa[3] apartment complex in Mount Morris. III 19, 68[4]. It was Ms. Sublett's idea; Mr. Harris "inboxed" Ms. Ratcliff asking her to come and to bring Ms. Sublett to see him. III 68, 96, 158. Ms. Ratcliff and Ms. Sublett knew Mr. Harris from school for a couple of years.[5] III 94. At about 5 PM, Ms. Ratcliff drove herself and Ms. Sublett to the Villa in her red Pontiac Vibe. III 69.

Accounts differ as to what occurred once Ms. Sublett and Ms. Ratcliff arrived at the Villa. Ms. Ratcliff testified that they met up with Mr. Harris, who was the only one there at first, and that Malik Fordham[6] joined them later. III 70. Ms. Sublett testified at first that Mr. Harris, Mr. Fordham, and Kemo Parks[7] were all there when they first arrived at the Villa. III 160-161. She later testified that when Mr. Harris

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[1] Ms. Sublett was 16 years old at the time of trial. II 158.
[2] Ms. Ratcliff was 20 years old at the time of trial. III 19.
[3] At one point, the Villa was known as "the Amy Jo apartments," and is sometimes referred to that way in the trial transcripts. Throughout this brief, however, it will only be referred to as "the Villa."
[4] Mr. Parks' trial will be cited by volume number, then page number(s) (for example, III 19, 68. His preliminary examination will be cited by PE, followed by page number(s) (for example, PE 6). His sentencing transcript will be cited by S, followed by page number(s) (for example, S 5).
[5] Prior to this date, Mr. Harris and Ms. Sublett had not been in contact. III 160.
[6] Mr. Fordham did not know Mr. Harris, but knew Mr. Parks from school. PE 6, 15.
[7] Ms. Ratliff knew Mr. Parks "from [her] cousin[,]" and had known him for a couple of years. III 94. Prior to that date, she had no contact with him, via text or otherwise. III 114.

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first got into Ms. Ratcliff's car, Mr. Fordham and Mr. Parks were not there. III 162-163. Mr. Fordham testified that he was in the parking lot of the Villa, and didn't see anybody else until he got into "the car" with Mr. Parks and "two women[.]" PE 8-9. Mr. Fordham was sitting in the backseat with Mr. Parks and one of Mr. Parks' "friends."[8] PE 9-10. The group sat in Ms. Ratcliff's vehicle "talking" and "socializing" for "a while[.]" III 70, 97. Ms. Ratcliff was sitting in the driver's seat, Ms. Sublett was sitting in the passenger's seat, and Mr. Harris and Mr. Fordham were in the backseat. III 70-71.

According to Ms. Ratcliff, Mr. Parks then came along and asked if she could take him to the store. III 72. Ms. Ratcliff said no at first, but then Mr. Fordham said, "man, she'll take you to the store." III 72. Mr. Fordham wanted to go to the store to get a "Black and Mild." PE 9. Ms. Ratcliff agreed to take Mr. Parks to the store, and Mr. Parks got into the backseat of her vehicle. III 72-75. Mr. Harris was seated behind Ms. Sublett, Mr. Parks was seated in the middle, and Mr. Fordham was seated behind Ms. Ratliff. II 163-164. During the car ride, Mr. Fordham wanted to talk to Mr. Parks and his "friend[,]" but Mr. Parks talked to the "girls[.]" PE 9. So, Mr. Fordham also talked to the girls. PE 9. Mr. Fordham could not hear any conversation between Mr. Parks and his "friend[.]" PE 17. Ms. Ratliff did not see a gun at this point, and no one discussed guns at this time. III 97.

[8] At the time of preliminary examination, Mr. Harris could not identify this "friend" in the courtroom. PE 8-9.

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The group went to Kingwater Market.[9] III 164. There was a store closer to the Villa; although Ms. Ratliff and Ms. Sublett did not remember why they did not go there instead, Ms. Ratcliff heard Mr. Harris saying "no[.]" III 75, 164. When they first arrived, there were a "couple" of other cars in the parking lot; among them, a red truck parked next to them.[10] III 165. Ms. Ratcliff testified that the truck was "pulled backwards[,]" but Ms. Sublett testified that the truck was pulled in, not backed in.[11] III 76, 165. This truck belonged to Darnyreouc Jones-Dickerson, who had come to Kingwater Market with Danny and Dantana Gordon and Thomas Eugene Noel. VI 156. Once they arrived at the store, all of the occupants of the red truck except for Mr. Jones-Dickerson got out of the car and went into the store. VI 159. While Ms. Ratliff didn't see whether the red truck had any occupants inside, Ms. Sublett saw a male inside that she did not remember nor recognize, who had his head down "doing something" on his phone and was not paying attention. III 76, 166-167. Ms. Sublett did not remember if there were any people in the parking lot outside the store. III 165.

When they arrived at Kingwater Market, according to Ms. Ratcliff, Mr. Fordham got out of the car and Mr. Parks and Mr. Harris remained in the backseat. III 79. According to Ms. Sublett, Mr. Fordham got out of the car and then a couple of

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[9] Kingwater Market is sometimes referred to as "Monear's" in the trial transcripts but will only be referred to as "Kingwater Market" throughout this brief.

[10] Ms. Ratcliff and Ms. Sublett saw the truck; Mr. Fordham did not. PE 12-13; III 75, 165.

[11] Danny Gordon testified that Mr. Jones-Dickerson pulled into the parking spot "front first[.]" VI 159. Anthony Conway testified that the truck had been "backed in" the parking lot. II 144. Charles Weston testified that the truck was "pulled straight in." IV 186.

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minutes later, she was about to get out when Mr. Harris told her, "when we get out, you drive off." III 168. Ms. Sublett did not see where Mr. Parks went at this time. III 176. According to Mr. Fordham, he went into Kingwater Market and saw Mr. Parks come in behind him. PE 11-12. Mr. Fordham went to talk to his cousin in the store. PE 13. Danny Gordon, who also went inside the store, saw Mr. Parks come into the store after him but did not know how long after.[12] VI 161.

After Mr. Fordham got out of the car, while Mr. Harris and Mr. Parks were still in the backseat, Ms. Ratcliff turned the radio down because it was "up" on the way to the store. III 79-80. She then looked in the backseat and allegedly saw Mr. Parks give a gun to Mr. Harris. III 80. Ms. Ratcliff just saw the "handle" of the gun, but testified that it was a black handheld pistol. III 81, 99-100. Mr. Harris put the gun "up under his shirt[.]" III 99. At the time, Mr. Harris and Mr. Parks were speaking to one another in a "whisper" or "low voice[.]" III 124. According to Ms. Ratliff, after the gun was passed, Mr. Harris told her, "when we get out pull off[.]" III 82. At this time, Mr. Parks was getting out of the car. III 87.

Ms. Ratcliff had not always described the interaction between Mr. Harris and Mr. Parks as "passing a gun[.]" III 91. In a statement to Detective Clay Hite, she had previously described it as "tussling." III 92. Ms. Sublett testified that she did not see a firearm "of any kind" in the car. III 178.

[12] Danny Gordon also saw Mr. Harris come in after, wearing a "full Spiderman mask." VI 161-162. He knew it was Mr. Harris because he rolled the mask up to his hairline. VI 162. Mr. Harris poked his head in, looked around, and took a step back outside and pulled his head back out. VI 166.

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Ms. Ratcliff then left the parking lot of the Kingwater Market. III 82. At this time, Ms. Sublett was in the passenger's seat, and both Mr. Harris and Mr. Parks were in front of the car. III 85, 88. Ms. Ratcliff did not see Mr. Fordham come out of the Kingwater Market, so she guessed that he was still inside. III 122. Rather than drive away, Ms. Ratcliff and Ms. Sublett decided to pull into the parking lot of the Family Dollar next door to the Kingwater Market. III 82. They did so because it was raining that night and in case if Mr. Fordham, Mr. Harris, and Mr. Parks would need a ride back. III 85-86. Ms. Sublett testified that they were going to go back to Kingwater Market, but "didn't[.]" III 170. At first, Ms. Ratliff testified that she did not say anything to Ms. Sublett; later, she testified that she told Ms. Sublett to "inbox them" to make sure that they did not need a ride back. III 86, 104.

Ms. Ratcliff and Ms. Sublett's accounts of what happened next differ somewhat. According to Ms. Ratliff, a couple of minutes later, she heard gunshots. III 86. She then saw the red truck hit a tree. III 86. Ms. Ratcliff saw Mr. Harris run across the street; she testified that this happened after they heard the gunshots, but did not remember if it was before or after the red truck "passed" them. III 86-87. Then, Ms. Ratcliff and Ms. Sublett "took off[.]" III 86. Ms. Ratcliff was shocked that she "really just hear[d] some gunshots." III 89. At trial, Ms. Ratcliff testified that she did not see Mr. Harris shoot anyone, and did not recall whether she told police that she "thought" Mr. Harris shot anyone. III 100, 113.

According to Ms. Sublett, Ms. Ratcliff "stopped" and when Ms. Sublett asked her why, she said, "I just heard gunshots." III 170. Although Ms. Sublett didn't hear

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the gunshots "at first[,]" there was a "second set" that she did hear. III 183. Then, Ms. Ratcliff said "something" and Ms. Sublett, who had been on her phone before that, looked towards Kingwater Market. III 170-171. Ms. Ratcliff then said, "let's see if they need a ride back." III 171. Ms. Sublett saw the truck reverse, trying to get out, and it was driving "fast" to get out of the parking lot. III 171-173. She saw Mr. Harris shooting at the red truck; she knew it was him because she had seen him get out of the car before and knew what he was wearing. III 176. While Ms. Sublett did not see Mr. Harris holding anything, she saw that his hand was "up" and "following" in the direction of the red truck. III 172-173. Then, Mr. Harris ran across the street. III 172. By this time, the red truck had crashed into a tree across the street from the Family Dollar. III 173. At this time, Ms. Sublett did not see anyone else in the parking lot, "not even" Mr. Parks. III 189.

Danny Gordon did not hear gunshots;[13] however, Mr. Fordham heard lots of "poppin[g]" and "firecracker" noises, like "shooting[.]" PE 12; VI 162. Anthony Conway, an employee of Kingwater Market, testified that he heard "gunfire" at about 8 or 9 PM that night. II 131-132. At the time, he was at the cash register closest[14] to the door of the market but was not looking out the door because his attention was on the register right in front of him. II 135, 143-144. Mr. Conway couldn't really say how many gunshots he heard, or whether it was a "large" or "small" gunshot. II 134. He

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[13] Mr. Noel notified Danny Gordon that there had been a shooting. VI 166.
[14] This register was about 10 feet from the door, and the door was "to the side" of Mr. Conway. II 132, 143. Furthermore, the windows were "somewhat" covered up. II 133.

did not see a gun or anyone shooting. II 149-150. Charles Weston,[15] another employee of Kingwater Market, was moving his vehicle closer to the market's entrance at about 7:45 PM when he saw someone who was about 5'7" with a "kind of slight" build and a bandana on their face shoot somebody in a red truck. IV 185, 187. Mr. Weston only saw the shooter's back. IV 187. He did not see a gun, just the shooter extending his arm, and heard several, about nine, shots. IV 180-181. Mr. Weston thought that the shooter might have walked over from the Family Dollar next door, but wasn't "for sure[.]" IV 188. He did not see the shooter come out of Kingwater Market or get out of a car, and testified that he was parked where he would have been able to see either one of those things happening. IV 188-189. Mr. Weston saw the red truck drive down Coldwater Road and then crash "down by the library[.]" IV 174. The shooter ran north across Coldwater, between an abandoned house. IV 174. Mr. Weston did not know Mr. Parks and Mr. Harris, and never saw Mr. Parks at the market. IV 191.

After the gunshots, Ms. Ratcliff took Ms. Sublett home, and then went home herself. III 89. On the drive home, Ms. Ratcliff and Ms. Sublett discussed what they had just seen, but did not speak that night after they got to their respective homes. III 191. While Ms. Ratcliff spoke with her mother about what had happened, Ms. Sublett did not speak to her mother or her grandmother about it. III 90, 173. Neither Ms. Ratcliff nor Ms. Sublett called 911 that night; both were "scared" and Ms. Ratcliff was kind of shocked. III 89, 173-174. The next day on their way to school, Ms. Ratcliff

[15] Mr. Weston originally testified on the third day of trial, but appeared for court that day under the influence of marijuana. III 215. He was recalled as a witness on the fourth day of trial, and testified that day without event.



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and Ms. Sublett discussed the matter again and decided to call 911. III 191-192. Ms. Sublett decided to do so because Ms. Ratcliff said they "should[.]" III 192. She felt that it was "the right thing to do[.]" III 126.

Miranda Arrand testified that "around" 8 PM, she heard "several gunshots" by her house, across the street from Kingwater Market. II 30-31. Nicholas Pendergraff heard a "loud noise" that sounded like "cars crashing together[,]" but later realized that it was a gunshot. II 42, 44. They both looked out of their windows. II 31, 47. Ms. Arrand saw a red pickup truck coming out of the Kingwater Market parking lot, going up on a curb, and "just going crazy[.]" II 31. The truck ended up crashing into a tree by Ms. Arrand's house. II 31. Mr. Pendergraff also saw the red truck coming from the party store cross the road and come towards the "library area[,]" hit the mailbox next door to his house, and ultimately swerve into the library next door. II 49. Both Ms. Arrand and Mr. Pendergraff's girlfriend called 911, while Mr. Pendergraff and Ms. Arrand's husband ran outside to see what was going on.[16] II 32, 43. Ms. Arrand came outside after she was on the phone with police. II 32. They saw Mr. Jones-Dickerson inside, not moving nor breathing, "kind of sitting upright[,]" but with his back "a little slouched." II 43-44, 50 Both the driver's and passenger's side windows were down.[17] II 50, 64.

After about 5-10 minutes, a crowd began to gather around the red truck; it "started off small" and eventually turned into a crowd of 30-40 people. II 36. Ms.

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[16] While running outside, Mr. Pendergraff and Ms. Arrand's husband also called 911. II 32, 43.

[17] Mr. Pendergraff didn't know whether the driver's side window was "down" or "broken[.]" II 50.

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Arrand took a group of young children in the crowd to pray with her, and at that point she noticed a group of males that "stuck out" to her. II 37-38. One of them started making "obscene comments" like "oh, can you say a prayer for me too, 'cause I need it." II 38. The men stayed around "the whole night . . . kind of watching[.]" II 40. Ms. Arrand did not see anyone with a firearm. II 33-34. She and Mr. Pendergraff also did not see anyone reach into the vehicle at any point. II 32-33, 45.

Officer Ralph Neva testified that he was the first to arrive at the library across the street from Kingwater Market, at approximately 7:54 PM that same night. II 62-63. He noticed that the back windshield of the red truck was "smashed out[.]" II 64. A cell phone was found inside of the truck, but police did not go through the phone. II 115, 122. Officer Tyler Dunklee, the first officer to arrive at Kingwater Market, took statements from Mr. Conway and Mr. Weston. III 84, 89. Abdulla Farah, the owner of Kingwater Market, provided police with the market's surveillance system DVR. II 140-142. There were six spent shell casings[18] at the scene, from a .23 ACP firearm. II 114.

Paramedics transferred Mr. Jones-Dickerson to the hospital, where he was ultimately pronounced dead. VI 93. An autopsy revealed that Mr. Jones-Dickerson died of "multiple gunshot wounds[.]"[19] IV 35.

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[18] Three of these were identified as having been fired from the same firearm. IV 57. The other three "showed some agreement in the markings" but it was inconclusive as to whether they also came from the same firearm. IV 57-58. Sometimes, firearms don't mark "identical" and even something as "simple" as tension on a fully loaded magazine could alter the physical mechanism in the firing of a bullet, affecting the markings. IV 58-59. DNA results obtained from the casings were "inconclusive[.]" IV 86.

[19] Mr. Jones-Dickerson's body had five gunshot wounds, and three bullets were recovered from his body. IV 32, 35-36.

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**Interactions Between Mr. Parks and Police**

Mr. Parks spoke with police on four separate occasions before trial. First, he spoke with Special Agent David Dwyre on September 26, 2017. V 44. Mr. Parks told Agent Dwyre that Mr. Jones-Dickerson had been in the parking lot of the Kingwater Market that day, and "somebody" thought he had something to do with killing Mr. Parks and Mr. Harris' cousin Dominique. V 48. Mr. Harris showed Mr. Parks "part" of the gun and told him that he was going to kill Mr. Jones-Dickerson. V 48. Mr. Parks told Agent Dwyre that he knew that Mr. Harris had a "silver gun" and that he had "touched" it a "couple" of times.[20] V 47. Mr. Parks then went into the Kingwater Market and later heard gunshots. V 48. Agent Dwyre asked Mr. Parks "several times" whether he passed a gun to Mr. Harris, and Mr. Parks did not tell him that he did so. V 47.

Next, Mr. Parks spoke with Detective Clay Hite on October 7 and 8, 2016. V 10, 55. He then spoke with Lieutenant Matthew Lasky on November 2016, for "on and off two hours[.]" V 33. Mr. Parks' statement to Lieutenant Lasky was "somewhat similar" to the one he gave Detective Hite. V 32. The only difference was that Mr. Parks admitted for the first time that there was "some sort of hand to hand exchange" between he and Mr. Harris; Mr. Harris gave Mr. Parks "a dollar or something or some sort of currency" for some cigarettes. V 32. In both interviews, Mr. Parks denied passing a gun to Mr. Harris, and "adamantly" denied possessing a weapon at all on the date in question. V 34-35. Mr. Harris "knew that something was up" on that date

[20] When Mr. Parks touched this gun was not put into context during the interview. V 48-49.

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with Mr. Harris, but did not say that he knew Mr. Harris was going to get out of the car and shoot Mr. Jones-Dickerson or the red truck. V 34-35.

**Testimony of Major Harris and Availability of Prospective Trial Witnesses**

On the fourth day of trial, Major Harris testified that he had been incarcerated in the Genesee County Jail with Dequavion Harris. IV 144-145. According to Major Harris, around December 2016 or January 2017, Dequavion Harris told him that he had murdered Mr. Jones-Dickerson with his cousin. IV 148. He then reached out to members of law enforcement about this information. IV 144-145. At the time of his testimony, Major Harris was incarcerated for two counts of "[i]nterference with interstate commerce by way of an armed robbery[,]" as well as "brandishing a firearm in relation to interference with interstate commerce." IV 143. He testified that he did not "have any standing deals" in relation to his testimony that day, but was hoping this would "help [him] out]" with his current prison sentence. IV 160.

On the sixth day of trial, the prosecution announced that Malik Fordham had been served with a subpoena and, subsequently a bench warrant when he failed to appear. VI 58-59. They were "having a problem producing him[,]" but hoped that his probation agent would produce him that afternoon. VI 59. The prosecution also stated that they had "no service" and "no info" on witness Dantana Gordon. VI 59. Trial counsel reminded the court that Mr. Fordham testified at the preliminary examination, and that both he and Dantana Gordon had given recorded interview to police that could be admitted under MRE 804(3) if they were not available to testify at trial. VI 63.

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Later that day, the prosecution informed the court that their efforts to serve Dantana Gordon had been unsuccessful. VI 76. His child's mother did not know his whereabouts, Detective Hite had run a LEIN on him, and hospitals were called. VI 76. The prosecution's subpoenas had been out for more than two weeks. VI 77. The prosecution also noted that they had "[e]ven less information on finding" witness Alvin Hicks, and that the same methods had been used to try and locate him. VI 77.

That afternoon, the prosecution stated that Mr. Fordham's grandmother and his probation officer told them that Mr. Fordham was "running" and "in the wind[.]" VI 145. He had been on a bench warrant since last Tuesday. VI 147. So, the prosecution made a motion to introduce Mr. Fordham's preliminary examination testimony based on his unavailability as a witness. VI 146. Trial counsel stated that he was in "full agreement." VI 146. Mr. Fordham's preliminary examination testimony was read into the record for the jury. VI 153.

**Verdict, Sentencing, and Post-Conviction Proceedings**

After an 8-day jury trial, Mr. Parks was convicted of first-degree premeditated murder, carrying a concealed weapon, and felony firearm, and he was sentenced to mandatory life in prison without parole for first-degree murder, to be served consecutively to two years for felony firearm and concurrently to 24-60 months for carrying a concealed weapon. VIII 4-5; S 12-14. Mr. Parks was assessed, in part, $4,170 in restitution, which included $1,500 for a truck that Mr. Jones-Dickerson's mother purchased for him "not long before" his death. S 5, 13.

Mr. Parks appealed his case by right to the Court of Appeals. In an unpublished per curiam opinion, the Court of Appeals affirmed Mr. Parks' convictions and sentences. Mr. Parks now files this application for leave to appeal the Court of Appeals' opinion.



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## I. Mr. Parks' convictions and sentences should be vacated, and the charges ordered dismissed with prejudice, as he was denied his constitutional speedy trial right.

**Issue Preservation and Standard of Review**

Mr. Parks made two motions for speedy trial – on March 7 and June 18, 2018. Register of Actions. Whether a defendant has been denied his right to a speedy trial presents a constitutional question this Court reviews de novo. *People v McLaughlin*, 258 Mich App 635, 643 (2003).

**Discussion**

The offenses at issue occurred on October 5, 2016. Mr. Parks was arrested[21] for these offenses on November 9, 2016. (Presentence Investigation Report (PSIR), p. 2, filed under separate cover). The trial in this matter commenced on September 19, 2018, over two years after Mr. Parks' arrest. This Court should vacate Mr. Parks' convictions and order all of the charges dismissed with prejudice.

The Sixth Amendment to the United States Constitution states, in pertinent part, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . . " US Const Amend VI. The United States Supreme Court has established a four-part test for violation of this fundamental constitutional right. In *Barker v Wingo*, 407 US 514, 530 (1972), the Court wrote:

> A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been

[21] Mr. Parks was originally arrested on October 7, 2016 and held for four days, but released pending further investigation until November 9, 2016. (PSIR, p. 2).

> deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

Where a court finds that the accused has been denied the right to a speedy trial based on this balancing test, the remedy is reversal of the convictions and sentences, and dismissal of the charges with prejudice, as the error cannot be remedied by a new trial or further litigation. *Strunk v United States*, 412 US 434, 439-440 (1973). In the case at bar, analysis of these four factors militates in favor of a finding that Mr. Parks was denied his Sixth Amendment right, and that the convictions and sentences from the trial should be vacated.

*Length of Delay*

The length of delay for speedy trial purposes is calculated from the date of arrest to the date of trial. Here, the *People v Hill* preconditions of "detention of [a] defendant in a local facility to await [state] incarceration where there is an untried … complaint pending against such defendant" and "the prosecutor knows or should know that the defendant is so incarcerated when the … complaint is issued" were satisfied upon Mr. Parks' November 9, 2016 arrest. 402 Mich 272, 281 (1978).

The *Barker* Court stated that the length of delay is a "triggering mechanism," and where that length is sufficiently long to be presumptively prejudicial, the other factors of the balancing test must be evaluated. 407 US at 530. Numerous Michigan opinions have held that prejudice is presumed where the pre-trial delay is more than 18 months. See, eg, *People v Grimmett,* 388 Mich 590, 606 (1972); *People v Johnson,* 115 Mich App 630, 636 (1982). The Sixth Circuit Court of Appeals has agreed with a



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lesser standard, finding that a "a delay approaching one year is presumptively prejudicial." *Maples v Stegall*, 427 F 3d 1020, 1026 (holding twenty-five months between arrest and trial sufficient to meet the length of delay threshold). Accordingly, the 22-month delay between the arrest and the start of this trial was presumptively prejudicial to Mr. Parks, and warrants analysis under the remaining *Barker* factors.

*Reason for the Delay*

Reasons for the delay between Mr. Parks' November 9, 2016 arrest and September 19, 2018 trial date were entirely attributable to the court and the prosecutor. On August 1, 2017, the court initially set trial for October 24, 2017. Register of Actions. On October 31, 2017, trial was adjourned to February 6, 2018. Register of Actions. On January 8, 2018, it was adjourned once again to February 27, 2018, and on February 12, 2018, the case was reassigned from Judge Archie Hayman to Judge Celeste Bell. Register of Actions.

At a February 22, 2018 pretrial, the prosecution informed the court that while the parties were discussing "possible resolutions," but also "trying to sort out all the issues . . . [and] when and if we should try this case. So, basically, housekeeping at this juncture." 2/22/18 Pretrial, p. 3. The prosecution asked for another pretrial date, and trial was "tentative[ly]" scheduled for April 10, 2018. 2/22/18 Pretrial, p. 3-4. On April 6, 2018, trial was once again rescheduled to June 19, 2018. Register of Actions. On June 8, 2018, trial was yet again rescheduled for September 11, 2018. Register of Actions. Finally, on September 10, 2018, both parties agreed to move trial to September 19, 2018. Register of Actions. Trial ultimately commenced on that date,

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almost two years after Mr. Parks' arrest.

This Court should weigh the two-year delay in bringing Mr. Parks' case to trial in his favor when looking at the reason for delay prong of the speedy trial analysis. Aside from agreeing to a nine-day trial adjournment, from September 10, 2018 to September 19, 2018, at no point in the record did trial counsel or Mr. Parks ask to continue the case. In fact, as discussed below, Mr. Parks filed motions for bond and asserted his right to speedy trial. Trial counsel was prepared to commence trial throughout the period of delay, and emphasized more than once that these delays were no fault of their own or Mr. Parks.

In weighing the reason for the delay, the reviewing court assesses "whether the government or the criminal defendant is more to blame for [the] delay." *Doggett v United States*, 505 US 647, 651 (1992). It is indisputable that the blame for delay falls upon the prosecution and the court. And, it is of no consequence that some of these delays are attributable to the court's docket congestion, as "[t]his is an inadequate excuse for violating the 180-day rule." *People v Harris*, 132 Mich App 427, 428 (1984).

*Assertion of the Right*

Mr. Parks was held without bond throughout his entire pretrial incarceration period. On March 7, 2018, trial counsel filed a "Motion for Bond Under Michigan Court Rules Speedy Trial." Register of Actions. After two adjournments, this motion was scheduled to be heard on March 26, 2018; but, the court adjourned the hearing

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date once more because "no one can find a copy of this motion . . . it's missing."[22] 3/26/18 Motion, p. 3. The motion was finally heard on March 29, 2018. At this motion hearing, stand-in trial counsel cited the various trial date adjournments. They stated "that there was an issue with the prosecution being able to proceed at least on one instance, and then other adjournments were docket problems that [Mr. Parks] by and through his counsel did not consent to." 3/29/18 Motion Hearing, p. 4.

The court conceded that 180 days had passed, under MCR 6.004(C), but denied the motion, stating that Mr. Parks "present[ed] a danger to other people in the community[.]"[23] 3/29/18 Motion Hearing, p. 6-7. It also acknowledged that trial was scheduled for April 10, 2018, and that although "a year and [a] half" had passed, there were "inmates that have been [in the jail] for close to two years." 3/29/18 Motion Hearing, p. 7. But, on April 6, 2018, trial was once again rescheduled to June 19, 2018. Register of Actions.

On June 18, 2018, trial counsel once again filed a "Motion for Bond Under Michigan Court Rules Speedy Trial MCR 6.004(C)[,]" essentially a "reconsideration" of the previous bond motion. Register of Actions; 7/23/18 Pretrial, p. 3. This motion was heard on July 23, 2018. Trial counsel reminded the court that the previous motion had been denied due to "something to the effect that trial was within the next

[22] Attorney Jessica Mainprize-Hajek, who was filling in for trial counsel of record Robin Wheaton for purposes of this hearing, could not find a copy of the motion in Mr. Wheaton's file. 3/26/18 Motion Hearing, p. 3-4. It was also not in the court file or in the prosecution's case file. 3/26/18 Motion Hearing, p. 3-5.

[23] The court stated on the record that it had received Mr. Parks "brief . . . written motion" a couple of hours prior to the hearing. 3/29/18 Motion Hearing, 6. It is not clear if this is the motion filed by trial counsel or a pro per motion. 3/29/18 Motion Hearing, 6.

two weeks[,]" but that it was now months later and trial had been adjourned to September 11, 2018. 7/23/18 Motion Hearing, p. 3-4. Trial counsel stated that, "There have been many reasons why trial couldn't go, however, none were caused by defense nor were they stipulated to." 7/23/18 Pretrial, p. 4. The court stated that September 11th was "a for sure date" for trial, and that "good faith efforts [were] being made to make progress in this [case.]" 7/23/18 Pretrial, p. 4, 8. It therefore denied the motion. 7/23/18 Pretrial, p. 9.

These motions by trial counsel constitute assertions of Mr. Parks' speedy trial right. But, even if this Court simply considers them requests for bond, the Sixth Circuit considers this to be the functional equivalent of assertion of the speedy trial right. *Maples v Stegall*, 427 F3d 1020, 1029 (2005). Such requests prove that Mr. Parks and trial counsel were not engaging in the type of conduct the *Barker* court warned of, where trial counsel acquiesces in a long delay. 407 US at 529.

Because Mr. Parks asserted his right to a speedy trial, or its functional equivalent, under the Sixth Amendment, this Court should construe the assertion factor in favor of Mr. Parks.

*Prejudice*

Appellate courts have recognized that several types of personal prejudice to defendants are created by lengthy pre-trial delays. Those include prejudice to the ability to defend at trial due to loss of witnesses; loss of memories or loss of documentation; the stress of extended incarceration; and "the anxiety and concern accompanying public accusation." See *United States v Loud Hawk*, 474 US 302, 312



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(1986). In this matter, Mr. Parks has been incarcerated since his arrest in 2016. At the sentencing on October 29, 2018, he received 724 days of jail credit against his sentences – just six days short of the amount necessary to cover his entire felony firearm sentence. S 12-13.

That excessive amount of pre-trial incarceration was highly prejudicial to Mr. Parks in terms of the stress, loss of contact with family and friends, loss of work and income opportunities, and the clear limitations on everyday life that accompany incarceration. Given that the entirety of the delay after Mr. Parks' arrest was caused by the court and prosecution's own complications, the stress inherent for Mr. Parks, in facing the uncertainty of trial on charges carrying mandatory life in prison without parole was considerable:

> We have discussed previously the societal disadvantages of lengthy pretrial incarceration, but obviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.

*Barker*, 407 US at 532-533 (footnotes omitted).

Mr. Parks endured over two years of anxiety and concern which accompanied the public accusation that he committed first-degree premediated murder, among other felonies. This anxiety was compounded by the fact that Mr. Parks was 18-20

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years old during this process, and a relative stranger to the criminal justice process and dealing with charges of the magnitude he faced at trial.

This delay also affected the evidence presented against Mr. Parks at trial - in particular, the witnesses who were available to testify – and therefore his ability to defend himself at trial. The most significant example is witness Malik Fordham – a key eyewitness who rode with Mr. Parks to Kingwater Market. (see Issue III). Mr. Fordham testified at preliminary examination, but was "unavailable" to testify at trial. The prosecution informed the trial court that Mr. Fordham had been served with a subpoena two and a half weeks prior to trial, and then with a bench warrant "last Tuesday" when he didn't appear. VI 59, 146-147. They had hoped that Mr. Fordham's probation agent would produce him to testify, but ultimately this did not happen. VI 146. Mr. Fordham's grandmother also informed the prosecution that Mr. Fordham was "running[.]" VI 145. Without this two-year delay in trial, it is more likely that Mr. Fordham would have been available to testify at trial.[24]

This Court, in weighing the four *Barker* factors, should conclude that Mr. Parks speedy trial right was violated. The delay was excessive and prejudicial; cause for the delay was attributable to the prosecution and the court; Mr. Parks asserted his right to a speedy trial and its functional equivalent; and he suffered actual prejudice due to his uninterrupted incarceration and loss of crucial witnesses. The remedy is to vacate Mr. Parks' convictions and dismiss the charges with prejudice.

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[24] Witnesses Dantana Gordon and Alvin Hicks were also unavailable to testify at trial, but they did not testify at preliminary examination and it is not clear whether the two-year delay here impacted their availability.

### II. The evidence was insufficient to prove that Mr. Parks shared Mr. Harris' intent to kill, and was thus insufficient to prove first-degree murder under an aiding and abetting theory.

**Issue Preservation and Standard of Review**

There is no preservation requirement for a sufficiency challenge. *People v Patterson*, 428 Mich 502, 514 (1987). Sufficiency of evidence at trial is a question of law and is reviewed on appeal under the de novo standard of review. *People v Hawkins*, 245 Mich App 439, 457 (2001).

**Discussion**

Due process requires a verdict to be supported by legally sufficient evidence for each element of the crime. US Const Am XIV; Const 1963, art 1, § 17; *In re Winship*, 397 US 358 (1970); *Jackson v Virginia*, 443 US 307, 307. "[T]he Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" Patterson, 428 Mich at 525 (quoting *Winship*, supra).

Mr. Parks was convicted of first-degree premeditated murder under an aiding and abetting theory. First-degree premeditated murder is "murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, or premediated killing." MCL 750.316(a). To find someone guilty under an aiding and abetting theory, the following elements must be proven: "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant



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intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." *People v. Robinson*, 475 Mich 1, 5 (2006); see M Crim JI 8.1, MCL 767.39.

Here, the first element of aiding and abetting is satisfied because Mr. Jones-Dickerson was shot and killed by Mr. Harris. The second element is disputed. In accordance with Ms. Ratcliff's testimony, the prosecution argued that Mr. Parks passed a gun to Mr. Harris in Ms. Ratcliff's car – therefore performing an act that assisted the commission of first-degree premeditated murder. III 80. Ms. Ratcliff was the only witness who claimed to have observed such an exchange. During his four interviews with police, Mr. Parks adamantly denied ever passing a gun to Mr. Harris. No other witnesses saw a firearm in the car at any point. In fact, Ms. Ratcliff had not always described the interaction between Mr. Harris and Mr. Parks as "passing a gun;" she had previously described it to police as "tussling." III 92. However, even if we assume that Mr. Parks indeed passed a firearm to Mr. Harris, the prosecution failed to present evidence for a jury to reasonably infer that Mr. Parks intended to kill Mr. Jones-Dickerson, or had knowledge that Mr. Harris intended to kill Mr. Jones-Dickerson at the time he allegedly passed him a gun.

In order to reasonably infer accomplice liability from the act of passing a firearm, there should be something more than the simple passing act. For example, if the defendant who passes the firearm knows that his co-defendant intends to discharge said firearm or intends for him to do so. See *People v Blevins*, 314 Mich App 339, 359 (2016). In *Blevins*, Mr. Blevins' second-degree murder conviction was upheld

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because there was an "overwhelmingly likely inference" that he either knew his co-defendant Mr. King would fire the gun or intended for him to do so. *Id.* Mr. King and Mr. Blevins were involved in a brief physical struggle with another group of people when Mr. King said, ". . .  got something for you." *Id.* at 346. Mr. Blevins flashed a gun at the other group and told them to back up. *Id.* Mr. King told Mr. Blevins to "[g]ive [him] the Mag" and Mr. Blevins did so. *Id.* Mr. King then fired the gun into the ground. *Id.* Ten shots were fired, and one person died while fleeing to safety. *Id.* As such, the totality of the aggravating factors led the court to believe that a showing of malice required to prove second-degree murder was satisfied. *Id.*

The evidence in Mr. Parks' case falls short of that presented in *Blevins*. Of the 29 witnesses who testified at trial, only one witness, Ms. Ratcliff, saw Mr. Parks pass a gun to Mr. Harris. III 80. There was no evidence of any conversation or planning of any sort between Mr. Parks and Mr. Harris regarding this exchange, or Mr. Jones-Dickerson. There was also no evidence that Mr. Harris was at all angry, aggravated, or agitated when Mr. Parks allegedly passed him the gun. No physical altercation was taking place at the time of the passing of the gun. While the trier of fact can draw reasonable inferences from the evidence presented, mere suspicion and "meager circumstantial evidence" cannot sustain a verdict of guilt beyond a reasonable doubt. *Newman v Metrish*, 492 F Supp 2d 721, 729 (ED Mich 2007).

Mere presence during the commission of a crime, even if there is knowledge that a crime will be committed, is not enough to make someone an aider and abettor. *People v. Casper*, 25 Mich App 1, 5 (1970). In *Casper*, Mr. Casper and co-defendant

Mr. Bunker were convicted of first-degree murder. *Id.* at 2. The pair were at a gas station when Mr. Bunker shot the station attendant. *Id.* at 3. During the police chase, the murder weapon was wiped and tossed. *Id.* at 7. The court found that it was reasonable for the jury to conclude that Mr. Casper handled the gun because the chase was nearly 100 mph, the gun was found on the right shoulder of the road, and Mr. Bunker had been driving. *Id.* Moreover, multiple witness testified that Mr. Casper was at Mr. Bunker's home with an automatic pistol, later identified as the murder weapon, and Mr. Bunker and Mr. Casper had been together all day before the murder. *Id.* Ultimately, there was enough record evidence for the court to properly conclude that Mr. Casper's role in the murder surpassed mere presence and that a reasonable jury could find that he assisted in planning and executing the murder. *Id.*

Unlike in *Casper*, there is insufficient evidence here to establish anything more than mere presence. Mr. Parks was inside Kingwater Market when Mr. Harris shot Mr. Jones-Dickerson. The murder weapon was never found. There is no evidence that Mr. Parks and Mr. Harris had been together all day, or of any sort of planning or discussion of the impending shooting, even in the moments preceding it.

The prosecution failed to prove that Mr. Parks intended to kill Mr. Jones-Dickerson, or had knowledge that Mr. Harris intended to kill Mr. Jones-Dickerson at the time he allegedly passed him a gun. Therefore, there was insufficient evidence to prove that Mr. Parks was guilty of first-degree premeditated murder. The remedy is to vacate this conviction. Mere conjecture camouflaged as hard evidence cannot



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sustain a conviction of first-degree murder, which carries the harshest penalty possible in Michigan – life in prison without the possibility of parole.



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## III. Eighteen-year-old Kemo Parks' life without parole sentence violates the Eighth Amendment to the Michigan and United States Constitutions because the mitigating properties of youth should be considered before a court imposes the harshest possible sentence.

**Issue Preservation and Standard of Review**

Mr. Parks has preserved this issue by concurrently filing a motion to remand with his brief on appeal in the Court of Appeals under MCR 7.211(C). Questions of constitutional law are reviewed de novo. *People v Babcock*, 469 Mich 247, 268 (2003).

**Discussion**

The Eighth Amendment prohibits mandatory life without parole sentences for young persons aged 18 at the time of their offense. The characteristics that make children a unique class, those characteristics that protected the class of persons under 18 at the time *Miller* was decided, apply equally to 18-year-olds:

> First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]."

Berry, William. *Eighth Amendment Differentness*, 78 Mo L Rev 1053, 1073 (citing *Graham v Florida*, 130 S Ct 2011, 2027-2028 (2010) and *Miller v Alabama*, 132 S Ct at 2463-2464).

The same can be said for 18-year-olds. In fact, in the same law review article, Michael M O'Hear concluded that "*Graham* and *Miller* represent an important breakthrough…the Court's approach leaves room for lower courts to begin the process of extending *Graham* and *Miller* and developing principled limitations on the imposition of LWOP on adult offenders." 78 Mo L Rev 1087, 1138 (2013). This Court should begin this extension process by banning mandatory life without parole sentences for 18-year-olds.

***

Where a statutory mandatory minimum is in place, the sentencing court cannot consider any mitigating factors. The statute mandating life without parole, MCL 750.316(1), with no consideration for youthfulness or analysis of mental culpability violates the Eighth Amendment of the Michigan and Federal constitutions. US Const, Am VIII (prohibits cruel and unusual punishments); Const 1963, art 1, §16 (prohibits cruel or unusual punishments). "Because of its broader language, the Michigan prohibition potentially covers a larger group of punishments." *People v Hallack,* 310 Mich App 555, 568 (2015).

MCL 750.316(1) is unconstitutional both categorically and as applied.

For a facial challenge to be successful, "defendant has the onerous burden to prove that there is no set of circumstances under which the statute is valid." *People v*



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*Hallack*, 310 Mich App 555, 567 (2015). [25] This Court should consider the four factors highlighted in *People v Bullock*, 440 Mich 15, 33–34 (1992):

(1) The severity of the sentence imposed
(2) Compare the penalty to those imposed for numerous other crimes in Michigan.
(3) Compare Michigan's penalty to the penalties imposed for that offense by other states.
(4) The goal of rehabilitation.

The fourth factor, notably absent from the Court of Appeals adaptation of the *Bullock* test in *People v Benton*, 294 Mich App 191, CITE (2011). Also, it is completely ignored where an individual is automatically sentenced to life without parole. "Life without parole 'forswears altogether the rehabilitative ideal.' It reflects 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change." *Miller v Alabama*, 567 US 460, 473 (2012) (citing *Graham,* 560 US at 74).

The remaining factors, like rehabilitation, also weigh in favor of this Court's finding that life without the possibility of parole for an 18-year-old is cruel or unusual punishment.

**i. Factor One: the severity of the sentence imposed and the gravity of the offense**

It is without debate that the offense Mr. Parks is convicted of is very grave. Serious non-homicide offenses "cannot be compared to murder in their severity and

[25] This is an "onerous burden" the Court of Appeals has at least twice found the defendant failed to meet. See, for example, *People v Stanton*, unpublished opinion from the Court of Appeals issued September 20, 2018, p 4-5 ("a line must be drawn…The age of 18 is the point where society draws the line for many purposes between childhood and adulthood.") (Appendix B).



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irrevocability." *Graham v Florida*, 560 US 48, 50 (2010). However, the first factor still overall weighs in Mr. Parks' favor because this mandatory minimum is too severe as applied to him.

United States Supreme Court law and scientific findings, such as current research on brain development, suggest that penal consequences for young people should be approached differently. *Miller* at 479-480; *Graham*, *supra*. The United States Supreme Court acknowledged that "the qualities that distinguish juveniles from adults do not disappear when the individual turns 18." *Roper v Simmons,* 543 US 551, 574 (2005). "[A] growing body of research has shown that the adolescent brain is not fully developed until a person is about twenty-five, and that as it's developing, many things can go wrong that lead to psychiatric and behavioral disorders." Davis, *The Brain Defense* (New York: Penguin Press, 2017), p 97. While *Miller* addressed the constitutionality of mandatory sentences of life without the possibility of parole for juvenile homicide offenders, its focus on the sentencing factors of a young person's chronological age, family and home environment, and greater capacity for rehabilitation are directly relevant here.

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



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

Dr. Ruben C. Gur, Director of the Brain Behavior Laboratory at the Neuropsychiatry Section of the University of Pennsylvania School of Medicine, has stated that "[t]he evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable." Ruben C. Gur, *Declaration of Ruben C. Gur, Ph.D., Patterson v. Texas, Petition for Writ of Certiorari to the United States Supreme Court* (2002). The



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scientific research on which *Graham* relied reveals that the frontal lobe, the locus of executive functions such as reasoning, advanced thought, and impulse control, is the last part of the brain to develop. See, *Adolescence, Brain Development and Legal Culpability*, American Bar Association, Juvenile Justice Center 1-3 (Jan. 2004). In fact, "researchers have found that eighteen – to twenty-one-year-old adults are more like younger adolescents than older adults in their impulsivity under conditions of emotional arousal." Scott, *Young Adulthood as a Transitional Legal Category*, 85 Fordham L Rev 641, 642 (2016). This age range has also shown to be a time frame of peak risk behavior. Arnett, *Emerging Adulthood,* Am Psych (2000) p 475. Despite the heterogeneity of the class of individuals immediately following juveniles, "emerging adulthood has become a distinct period of the life course for young people in industrialized societies." *Id.* at 479. As there is evidence that one's brain continues to mature past the age of twenty, it is unconscionable to apply the same mandatory minimum sentence to all offenders, regardless of other mitigating factors.

Mr. Parks was 18 years old at the time of the offense, and had a ninth grade education level. (See PSIR, p. 1, 12). Therefore, his brain was, and still is, continuing to mature. Young offenders, particularly those like Mr. Parks who have not shown a propensity to commit unlawful acts, cannot fairly be expected to be capable of the same level of control over, or responsibility for, their own behavior as adult offenders, and should be viewed as having more rehabilitative potential than adult offenders. At the very least, "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Graham*, 560 US at 76.



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Put differently, if youth, among other things, matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole, "then the youthfulness of a marginally older offender for whom the sentence would be equally harsh must also be considered." *Extending Sentencing Mitigation for Deserving Young Adults*, 104 J Crim Law & Criminology at 692; *See also,* Lenahan, *A New Era in Juvenile Justice: Expanding the Scope of Juvenile Protections Through Neuropsychology*, 20 Suffolk J Trial & App Advocacy 92 (2015). Although Mr. Parks was convicted of one of the worst offenses, the severity of the sentence is nevertheless disproportionate and unjust.

**ii. Factor Two: Intra-state comparison of penalties**

The second factor the *Benton* court considered was a comparison of the penalty to penalties for other crimes under Michigan law. Under Michigan law, defendants who are a mere matter of months younger than Mr. Parks do not face automatic life without parole for first-degree murder convictions. MCL 769.25. They are constitutionally entitled to an extensive sentencing hearing to consider the *Miller* factors. The *Miller* factors include: "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences . . . family and home environment that surrounds him—and from which he cannot usually extricate himself—not matter how brutal or dysfunctional . . . circumstances of the homicide offense . . . the way familial and peer pressures may have affected him . . . . he might have been charged and convicted of a lesser offense, if not for the incompetencies associated with youth – for example, his inability to deal

with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys . . . the possibility of rehabilitation." *Miller*, 567 US at 477-478. But, because Mr. Parks was 18 as opposed to 17, he was not entitled to these same constitutional protections.

Other areas of criminal law in Michigan have gone further, without a mandate from the United States Supreme Court, and have recognized the exact line of argument discussed above. The Michigan legislature's recent change to MCL 762.11-.13 (HYTA) is an example. The act was updated to include persons 21, 22, and 23 years-old in HYTA, explaining:

> The bill package makes several significant changes to HYTA in keeping with the original intent of the act – to provide a second chance for deserving youthful offenders by keeping a criminal conviction off their records. First, House Bill 4069 meets this goal by expanding the pool of youthful offenders eligible for HYTA assignment to include young adults ages 21, 22, and 23. This expansion acknowledges and incorporates recent research as to how the human brain matures. This represents a compromise as some, including advocates and judges, believe that 24 and 25 year olds should be eligible, as well, in keeping with the conclusions of scientists regarding the development of the brain and ability to make good decisions and judgments being reached closer to 25 or 26 years of age. [House Legislative Analysis, HB 4069, March 14, 2015]

This issue does not need to be left to the Legislature, nor should it. In light of *Graham* and *Miller*, where the United States Supreme Court determined that the "fundamental differences between juvenile and adult minds" require additional *constitutional* protections for youthful offenders, it is imperative that this Court resolve this constitutionally infirm sentencing scheme. *Miller*, 567 US at 471-472;



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*Roper,* 543 US at 573-73; *Graham*, 130 S Ct at 2026. Several states have already taken this step.

**iii. Factor Three: Inter-state comparison of penalties**

There is no doubt that finding life without parole cruel and unusual for youthful offenders would be considered by some to be revolutionary.[26] But, "[n]othing in *Miller* [] states or even suggests that courts are prevented from finding that the Eighth Amendment prohibits mandatory life without parole for those [18 and] over the age of 18." *Cruz v United States*, 2018 WL 1541898 (Slip Op, 5); *compare*, *Heard v Snyder* 2018 WL 2560414 (relying on *US v Marshall*, 736 F3d 492, 498 (6th Cir, 2013); see also, *Nicodemus v Wyoming*, 392 P 3d 408, 413; 2017 Wy 34 (2017) (Following *Miller*, albeit declining to do so, the court acknowledged that a "state may announce a rule that is more protective than that announced by the Supreme Court."). Michigan would not be alone in finding that mandatory life without parole is a cruel and unusual punishment for a youthful offender.

**New Jersey**

In *State v Norris*, unpublished opinion from the Superior Court of New Jersey Appellate Division, issued May 15, 2017 (2017 WL 2062145), the court remanded for resentencing, citing *Miller*, a case where the defendant, who was 21 at the time of the crime, was sentenced to 75 years in prison. The court instructed the trial court to "consider at sentencing a youthful offender's failure to appreciate risks and consequences as well as other factors often peculiar to young offenders." *Id.* at 5.

[26] *See generally*, Drinan, *The Miller Revolution*, 101 Iowa L Rev 1787 (July 2016).

Although New Jersey is not a state that mandates life without parole for offenders 18 and over, it recognized that the relative youth of the offender and functional equivalent of a life sentence was potentially constitutionally infirm.

**Connecticut – United States District Court**

In *Cruz v United States*, 2018 WL 1541898 (March 29, 2018) (Appendix C), the United States District Court for the District of Connecticut engaged in an extensive analysis of national trends and scientific evidence in holding that "*Miller* applies to 18-year-olds and . . . 'the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole' for offenders who were 18 years old at the time of their crimes." *Id.* at 25, quoting *Miller*, 567 US at 479.

**Washington**

In *State v O'Dell*, 183 Wash 2d 680; 358 P3d 359 (Wash, 2015), in reviewing the sentence of a defendant who was 18 at the time of the offense, the Supreme Court of Washington instructed trial courts "that a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant." *Id.* at 368; *Id.* at 698-699. Although Mr. O'Dell was convicted of second-degree rape and not first-degree murder, the 18-year-old's "youthfulness" was the relevant consideration for the court.

**Indiana**

In *Sharp v State*, 16 NE3d 470 (Ind App, 2014), transfer granted, opinion vacated on other grounds, 37 NE2d 961 (Ind, 2015), and vacated on other grounds, 42 NE2d 512 (Ind, 2015), the Indiana Court of Appeals deemed an 18-year old



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defendant a youthful offender and applied the reasoning of *Graham* and *Miller* to his sentence. The court remanded for resentencing. *Sharp*, 16 NE3d at 481.

The rationale from *Graham* and *Miller*, where the United States Supreme Court determined that the "fundamental differences between juvenile and adult minds," require additional constitutional protections for youthful offenders is equally applicable to 18-year olds. *Miller*, 132 S Ct at 2464-2466; *Roper,* 543 US at 573-73; *Graham*, 130 S Ct at 2026. Kemo Parks is one such youthful offender and is entitled to resentencing.

In addition to these judgments from state and federal courts, national policy trends honor the consensus in the scientific community that 18-year-olds are different. Of recent note is the state and federal movement, spurred by recent deaths from vaping, to increase the age for buying tobacco and e-cigarettes to 21.[27] That is, of course, already the standard for purchasing alcohol. Mr. Manning's application highlights several other examples. *See,* p. 25-26 (that the Affordable Care Act allows children to be legal dependents of their parents until age 26, Federal Student Aid until age 23; and that 25 states including Michigan have extended foster care to ages beyond 18.). The Sixth Circuit has referred to these trends as indicative of "evolving standards of decency" that, at the very least, "likely do not permit the execution of individuals who were under 21 at the time of their offense." *Pike v Gross,* 936 F3d 372, 385 (CA6, 2019) (Stranch, J, concurring).

[27] https://www.nytimes.com/2019/12/19/health/cigarette-sales-age-21.html



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These evolving standards of decency demand more. This Court should rule that mandatory life without parole is unconstitutional *categorically* for 18-year-olds for all the reasons supplied in *Graham* and *Miller*.

**iv. This punishment as applied to Mr. Parks is particularly egregious.**

A mandatory life without parole sentence for Mr. Parks is "grossly disproportionate." *Hallack*. Like the defendants in all of the above cases, Mr. Parks is young; he missed the constitutional protections of *Miller* by less than one year. He has no adult criminal history and his juvenile history is limited to two property offenses. (PSIR, p. 8-9). He had familial support at sentencing. S 12. Mr. Parks also had a ninth grade education at the time of sentencing. (PSIR, p. 12). Mr. Parks has displayed to undersigned appellate counsel a desire to obtain his high school diploma while incarcerated. This displays his willingness to rehabilitate and progress.

Justice was not served sentencing Mr. Parks to life without parole. He is entitled to a *Miller* hearing where all the factors of youth noted by the United States Supreme Court can be considered.



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## Summary and Relief

**WHEREFORE**, for the foregoing reasons, **Kemo Knicombi Parks** asks that this Honorable Court reverse and remand his case for a new trial, remand for resentencing, grant leave to appeal, hold his case in abeyance pending *People v Manning*, 505 Mich 881 (2019), or grant whatever relief it deems necessary and just.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

/s/ Angeles R. Meneses
BY:______________________________________
**Angeles R. Meneses (P80146)**
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

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