STATE OF MICHIGAN

IN THE

SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
MURRAY, C.J., AND CAVANAGH and SWARTZLE, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

KEMO KNICOMBI PARKS

Defendant-Appellant.

Supreme Court
No. 162086

Court of Appeals
No. 346587

Circuit Court
No. 17-040829-FC

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF ON APPEAL

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Kemo Parks has sought application for leave to appeal the Court of Appeals' decision issued August 13, 2020. See *People v Kemo Parks*, unpublished per curiam opinion of the Court of Appeals, issued August 13, 2020 (Docket No. 346587) [Appx 3b-16b].

Upon consideration of Defendant's application for leave to appeal, the Court has directed oral argument on the application, pursuant to MCR 7.305(H)(1). The Court has further directed the parties to file supplemental briefs addressing

> whether the United States Supreme Court's decisions in *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 577 US 190 (2016), should be applied to defendants who are over 17 years old at the time they commit a crime and who are convicted of murder and sentenced to mandatory life without parole, under the Eighth Amendment to the United States Constitution or Const 1963, art 1, § 16, or both. [*People v Kemo Parks*, ___ Mich ___; 964 NW2d 361 (Mem) (2021).]

For the reasons stated in this supplemental brief, the People contend that the mandatory sentence of life without parole for an adult—those over the age of 18—is constitutional under both the Eighth Amendment and Const 1963, art 1, § 16. The Court should let the Legislature make the policy decision where to set the age of majority for adult criminal sanctions. The Court should not mitigate the appropriate penalty of life without parole for those adults—historically established as persons who have reached the age of 18—who have committed the most serious of crimes, first-degree murder. It is not unconstitutional under either the federal or Michigan Constitutions to deny parole consideration to a first-degree murderer who was 18 years of age or older when he or she committed murder.

STATEMENT OF JURISDICTION

The People agree that pursuant to MCR 7.303(B)(1) this Court has jurisdiction for discretionary review of a timely filed application following decision of the Court of Appeals.

COUNTER-STATEMENT OF QUESTION PRESENTED

I. **Does a mandatory sentence of life without the possibility of parole for a person who was 18 years old at the time of their crime violate the Eighth Amendment of the United States Constitution, the Michigan Const 1963, art 1, § 16, or both?**

Plaintiff-Appellee answers: No.

Defendant-Appellant answers: Yes.

The Court of Appeals answered: No.

The trial court did not answer this question.

COUNTER-STATEMENT OF FACTS

Plaintiff-Appellee accepts Defendant-Appellant's statement of facts, with the exception of all argument, and facts not of record below. Additional pertinent facts may be discussed in the body of the Argument section of this Brief, *infra*, to the extent necessary to fully advise this Honorable Court as to the issues raised by Defendant on appeal.

A. *Introduction*

This is a case involving a revenge killing by co-defendant Dequavion Harris with the assistance of his cousin, Defendant Kemo Parks, who passed the gun to Harris that was used moments later to shoot and kill victim Darnyreouc "Kee-Kee" Jones-Dickerson. The defendants believed that Jones-Dickerson had something to do with the murder of their other cousin on a previous occasion. At the time of the murder, Defendant was 3 ½ months shy of his 19th birthday while his cousin Harris was 11 months older. [Appx 17b-20b].

Parks and Harris were tried together in a single trial with separate juries. Defendant was convicted as charged of all three counts: first degree murder on an aiding and abetting theory; carrying a concealed weapon; and felony firearm. On October 29, 2018 he was sentenced to the statutorily-mandated term of life without the possibility of parole.

ARGUMENT

I. Pursuant to binding United States Supreme Court precedent, Defendant's life without parole sentence for his first-degree murder conviction does not constitute cruel and unusual punishment under the Eighth Amendment of the United States Constitution because he was not a juvenile when he committed the offense. In addition, Defendant's sentence does not violate Const 1963, art 1, § 16 because the penalty imposed was not so grossly disproportionate considering his age of 18 years as to constitute cruel or unusual punishment.

A. *Issue Preservation and Standard of Review*

To preserve a sentencing issue for appeal, a defendant must raise the issue "at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals." MCR 6.429(C); *People v Clark*, 315 Mich App 219; 224; 888 NW2d 309, 311 (2016). To preserve a constitutional issue a defendant must object on the record in the trial court. *People v Hogan*, 225 Mich App 431, 438; 571 NW 2d 737 (1997). Defendant never raised an objection in any of his proceedings in the trial court that his sentence was unconstitutional. Defendant did, however, file a motion for remand which the Court of Appeals denied. Thus, the issue was preserved.

Defendant challenges the constitutionality of MCL 750.316(1) and MCL 791.234(6) as precluding the possibility of parole for a defendant over 17 years of age who is convicted of first-degree murder. Constitutional questions are reviewed by this Court de novo. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

B. *The rule from Miller does not (and should not) apply to persons over 17; so, defendant's sentence does not violate the Eighth Amendment.*

At the outset, statutes such as MCL 750.316 and MCL 791.234(6) "are presumed to be constitutional" and this Court has "a duty to construe a statute as

constitutional unless its unconstitutionality is clearly apparent." *People v Skinner*, 502 Mich 89, 110; 917 NW2d 292 (2018) (quotation marks and citation omitted). In the past decade-and-a-half, the United States Supreme Court has issued a series of opinions concerning the constitutional validity of punishments for offenders who were under the age of 18 at the time they committed their crimes. In *Roper v Simmons*, 543 US 551, 578; 125 S Ct 1183; 161 L Ed 2d 1 (2005), the Supreme Court held that the Eighth and Fourteenth Amendments barred the execution of juvenile offenders. Five years later in *Graham v Florida*, 560 US 48, 75; 130 S Ct 2011; 176 L Ed 2d 825 (2010), the Court held that the Eighth Amendment prohibits courts from sentencing juvenile offenders to life without parole for non-homicide offenses. In *Miller v Alabama*, 567 US 460, 465; 132 S Ct 2455; 183 L Ed 2d 407 (2012), the Court then held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishment.' " In *Montgomery v Louisiana*, 577 US 190, 206; 136 S Ct 718; 193 L Ed 2d 599 (2016), the Court held that *Miller* announced a new substantive rule of constitutional law that applies retroactively on collateral review for juvenile offenders sentenced to mandatory life without parole. And most recently, in *Jones v Mississippi*, ___ US ___; 141 S Ct 1307, 1316; 209 L Ed 2d 390 (2021), the Court reiterated that *in cases involving a person under the age of 18*, a sentencing court must " 'follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence." *Id.*, quoting *Miller*, 567 US at 483.

In *Roper*, 543 US at 569, the Supreme Court justified its holding by explaining that juveniles differ from adults in three general ways: (1) juveniles lack maturity and possess "an underdeveloped sense of responsibility," (2) "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and (3) the character of a juvenile is "more transitory, less fixed." *Id.* at 569-570. The *Roper* Court reasoned that these traits allowed for a "greater possibility . . . that a minor's character deficiencies will be reformed," and "as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Id.* Recognizing these traits, the *Roper* Court then defined "juvenile" as someone chronologically under the age of 18, noting the following:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. *The qualities that distinguish juveniles from adults do not disappear when an individual turns 18*. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest. [*Roper*, 543 US at 574 (emphasis added).]

In *Graham*, 560 US at 68, the Supreme Court acknowledged that "developments in psychological and brain science continue to show fundamental differences between juvenile and adult minds," including that "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." The *Graham* Court reiterated, however, that relief from a sentence of life without parole for a juvenile

non-homicide offender applies only to persons under the age of 18, citing *Roper*'s bright-line age cutoff. *Id.* at 74-75.

The Supreme Court in *Miller* doubled down, again expressly drawing the line at 18 years of age. 567 US at 465. The *Miller* Court further demonstrated its understanding of who qualified as a "juvenile" when it expressed concern that, under mandatory sentencing schemes, "every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old." *Id.* at 477. It is noteworthy that both defendants in *Miller* were 14 years old. *Id.* at 465. When announcing its holding, then, the Supreme Court in *Miller* did not consider itself bound to declare a constitutional rule only for the ages of the defendants actually before it—i.e., to decide only whether mandatory life imprisonment without the possibility of parole was unconstitutional for 14-year-olds. The Supreme Court thus declined to hold that mandatory life imprisonment without the possibility of parole for an 18-year-old offender—or older—constitutes disproportionate punishment under the Eighth Amendment.

Also notable is that, at the time the Supreme Court decided *Miller*, it had before it literature showing that brain development continues well after the age of 18; yet, the Court nonetheless refused to go beyond *Roper*'s bright-line age cutoff:

> It is clear that the science of adolescent brain development is more advanced today than it was when *Miller* was decided in 2012. That science is indeed undoubtedly advancing with each passing day. But the fact that adolescent brains are not fully developed until after age 18 was also a fact which was widely understood in the scientific community (and doubtless by the Supreme Court) at the time *Miller* was decided . . . . [*People v Sanchez*, 63 Misc 3d 938, 944-945; 98 NYS3d 719 (2019).]

The United States Supreme Court has not extended its holding from *Miller* to offenders who were 18 or older at the time of their crimes, and the federal courts of appeal having addressed this issue have soundly refused to apply the reasoning from *Miller, Roper*, and *Graham* to persons 18 and older at the time of their crimes. See, e.g., *United States v Sierra*, 933 F3d 95, 97 (CA 2, 2019), cert denied sub nom *Beltran v United States*, 140 S Ct 2540 (2020) ("Since the Supreme Court has chosen to draw the constitutional line at the age of 18 for mandatory minimum life sentences, the defendants' age-based Eighth Amendment challenges to their sentences must fail."); *In re Garcia*, No 13-2968; 2013 US App Lexis 26139 (CA 3, 2013) ("Petitioner's reliance [on *Miller*] is misplaced because he was not under the age of 18 when he committed his crime."); *United States v Dock*, 541 F Appx 242, 245 (CA 4, 2013) (because the defendant was older than 18 at the relevant time, "*Miller* is of no help to [the defendant]"); *Doyle v Stephens*, 535 F Appx 391, 395 (CA 5, 2013) ("Doyle was over eighteen, so he cannot use [*Roper*] as a shield."); *United States v Davis*, 531 F Appx 601, 608 (CA 6, 2013) ("Davis is not a juvenile, which precludes him from invoking *Miller* to ward off life imprisonment."); *Wright v United States*, 902 F3d 868, 871 (CA 8, 2018) ("Wright was sentenced for conspiratorial conduct that extended well into his adult years . . . . Thus, . . . the new substantive rule of constitutional law made retroactive in *Montgomery* does not apply[.]"); *Ong Vue v Henke*, 746 F Appx 780, 783 (CA 10, 2018) ("[B]ecause Vue was at least 18 years old at the time he

committed his crime, [his] argument is self-defeating.").[1] Several state courts, too, have held that *Miller's* rationale may not be applied to persons 18 or older at the time of their crimes. See, e.g., *Missouri v Barnett*, 598 SW3d 127 (Mo, 2020); *Burgie v Arkansas*, 2019 Ark 185; 575 SW3d 127, 128 (2019); *Sanchez*, 63 Misc 3d at 942-945; *Commonwealth v Owens*, No 1784 WDA 2012; 2013 WL 11264096 (Pa Sup, 2013). And panels of the Michigan Court of Appeals have consistently declined to apply the rationale from *Miller* to persons 18 or older at the time of their crimes.[2]

The United States Supreme Court has recognized that, like all categorical rules, drawing a bright line at the age of 18 may be over- and under-inclusive, but a bright line is nonetheless necessary. *Roper*, 543 US at 574. See also *United States v Marshall*, 736 F3d 492, 499 (CA 6, 2013) (drawing a bright line at the age of 18 "is a not-entirely desirable but nonetheless necessary approach"). Without such a rule, the mandatory minimum sentencing scheme would cease to exist in practice; the

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[1] Defendant's reliance on Dr. Steinberg's testimony in *Cruz v United States*, No 11-CV-787; 2018 WL 1541898 (D Conn, 2018), in which the court ruled that *Miller's* rationale should be applied to 18-year-olds, is not persuasive because the decision in *Cruz* is "a lone outlier," *Heard v Snyder*, 2018 WL 2560414 (ED Mich, June 4, 2018), and subsequently was vacated and remanded by the 2nd Circuit, *Cruz v United States*, 826 F Appx 49 (CA 2, 2020); See also *Sierra*, 933 F3d at 97.

[2] See, e.g., *People v Gelia*, unpublished per curiam opinion of the Court of Appeals, issued January 21, 2020 (Docket No. 344130) [Appx 21b-31b]; *People v Conner*, unpublished per curiam opinion of the Court of Appeals, issued December 17, 2019 (Docket No. 343286) [Appx 32b-38b]; *People v Stanton-Lipscomb*, unpublished per curiam opinion of the Court of Appeals, issued September 20, 2018 (Docket No. 337433) [Appx 39b-43b]; *People v Adamozwicz*, unpublished per curiam opinion of the Court of Appeals, issued June 22, 2017 (Docket No. 330612) [Appx 44b-53b]; *People v Jordan*, unpublished per curiam opinion of the Court of Appeals, issued March 7, 2017 (Docket No. 328474) [Appx 54b-60b].

sentences of defendants far older than 18—or even older than 25—would be open to challenge on claims that a defendant lacked maturity, brain development, control over their environment, etc. "Whatever the merits of such a sentencing regime might be as a matter of policy, the precedents in *Roper*, *Graham*, and *Miller* give . . . no charter to impose it, or to raise above age 18 the chronological line drawn in those cases." *United States v Lopez-Cabrera*, No S5 11CR 1032; 2015 WL 3880503 (SDNY, 2015), aff'd sub nom *United States v Sierra*, 933 F3d 95, 96 (CA 2, 2019), cert denied sub nom *Beltran v United States*, 140 S Ct 2540 (2020).

Defendant argues for a constitutional requirement of individualized sentencing of adults between 18 and 25 by focusing on the factors the Supreme Court considered in *Miller*—the "fundamental differences between juvenile and adult minds" and their susceptibility to environmental influences. 567 US at 471-472. But this rationale would effectively extend *Miller* to all defendants, well beyond the line drawn repeatedly by the Supreme Court. Defendant points to several state and federal laws, which he believes reveal that legislators recognize the characteristics of youth extend beyond age 18. Defendant's supp brief, pp 23-25. But these laws do not alter the line drawn in *Miller*. See *Endreson v Ryan*, No CV-18-1403-PHX-DGC; 2019 WL 1040960 (D Ariz, 2019) ("*Miller* placed a constitutional limitation on the states' authority to sentence offenders who committed their offenses when they were under the age of 18, not offenders who committed their offenses before they reached the age of majority as that may be defined by each individual state.") (citation omitted).

Unless or until the United States Supreme Court rules otherwise, it is not clearly apparent that defendant's sentence violates the federal Constitution. It is also worth noting that, although defendant argues his sentence is unconstitutional, he offers no aid in constructing a new line or rule—should the prohibition on mandatory life-without-parole sentences continue to be based on chronological age, only that age now be up to 25? Or should it be based on IQ? Or an individualized psychological evaluation of every adult defendant? Or something else entirely?[3] This Court should decline to wade into these murky waters. Because defendant by age was not a juvenile for federal constitutional purposes at the time he committed his crime, he does not qualify for the Eighth Amendment protections outlined in *Miller*.

C. *Defendant's sentence does not violate Const 1963, art 1, § 16.*

The Eighth Amendment proscribes the imposition of "cruel *and* unusual punishments." (Emphasis added.) Similarly, but not identically, Const 1963, art 1, § 16 states that "cruel *or* unusual punishment shall not be inflicted . . . ." (Emphasis added.) In *People v Lorentzen*, 387 Mich 167, 172; 194 NW2d 827 (1972), this Court concluded that the textual differences between the Eighth Amendment and Article 1, § 16 support that the latter may provide greater protection than its federal counterpart in that, if a punishment must be "cruel" *and* "unusual" to be barred by

[3] Of course, *Miller* noted that (except in the arena of juveniles) individualized sentencing is only constitutionally required in the death penalty context "because of the qualitative difference between death and all other penalties." *Miller,* 132 S Ct at 2470, citing *Hamelin v Michigan*, 501 US 957, 1006; 111 S Ct 2680; 115 L Ed 2d 836 (1991). *Miller* reiterated, "life without parole is permissible for nonhomicide offenses--except, once again, for children." 132 S Ct at 2470.

the Eighth Amendment, a "punishment that is unusual but not necessarily cruel" would also be barred by Article 1, § 16. In light of *Lorentzen*'s conclusion that our state Constitution provides greater protection than its federal counterpart, this Court has adopted a slightly broader test for assessing proportionality than that used by the Supreme Court. Compare *Lorentzen*, 387 Mich at 176-181, *People v Bullock*, 440 Mich 15, 33-34; 485 NW2d 866 (1992), with *Graham*, 560 US at 60-61.[4] Michigan's test assesses proportionality by considering the following factors: (1) the severity of the sentence imposed compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed on other offenders in the same jurisdiction, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the penological goal of rehabilitation. *Bullock*, 440 Mich at 33-34.

Not long ago, in *People v Carp*, 496 Mich 440, 521; 852 NW2d 801 (2014),[5] this Court addressed whether life-without-parole sentences imposed upon juvenile offenders, regardless of whether such sentences were individualized before being imposed, were facially unconstitutional under the Eighth Amendment, Const 1963,

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[4] "The constitutional concept of 'proportionality' under Const 1963, art 1 § 16 is distinct from the nonconstitutional 'principle of proportionality' discussed in" *People v Milbourn,* 435 Mich 630, 650; 461 NW2d 1 (1990). *People v Bullock,* 440 Mich 15, 34; 485 NW2d 866 (1992), n 17. The issue under art 1 §16 is whether the punishment "authorized by the Legislature is so grossly disproportionate as to be unconstitutionally 'cruel or unusual.'" *Bullock,* 440 Mich at 34-35, n 17. "*Milbourn* obviously has no applicability to a legislatively mandated sentence because the trial court, in that case, lacks any discretion to abuse." *Id.*

[5] Vacated on other grounds by *Davis v Michigan*, 577 US 1186; 136 S Ct 1356; 194 L Ed 2d 339 (2016).

art 1, § 16, or both. The Court held that such sentences were not categorically barred under either the Eighth Amendment's proportionality test from *Graham*, 560 US at 60, or Michigan's *Lorentzen* / *Bullock* test:

> [D]efendants have failed to meet their burden of demonstrating that it is facially unconstitutional under Article 1, § 16 to impose [a life-without-parole] sentence on a juvenile homicide offender. *While the language of the Michigan counterpart to the Eighth Amendment is at some variance from the latter, it is not so substantially at variance that it results in any different conclusion in its fundamental analysis of proportionality.* [*Carp*, 496 Mich at 521 (emphasis added).]

Despite that the United States Supreme Court vacated the judgment in *Carp* in light of *Montgomery*,[6] this Court's proportionality analysis in *Carp* remains, at the very least, highly relevant to the constitutional question presented here.

Against the backdrop of the *Carp's* rejection of the argument presented by Defendant in this appeal, application of the *Lorentzen / Bullock* factors would again counsel against prohibiting the punishment of those adults who commit the most serious of crimes of any age from serving the harshest of penalties.

In analyzing the first factor, the gravity of the offense is the death of the victim and the harshness of the penalty is a lifetime in prison for the offender. "The crime of first-degree murder is the most serious offense possible to commit and should be dealt with harshly." *People v Launsburry,* 217 Mich App 358, 364; 551 NW2d 460

[6] Also at issue in *Carp* was the question whether the rule from *Miller* applied retroactively to cases on collateral review; this Court held that it did not. *Id.* at 495, 512. The defendant appealed, and in 2016, the United States Supreme Court vacated this Court's judgment and remanded the case for further consideration in light of *Montgomery*. *Davis v Michigan*, 577 US 1186; 136 S Ct 1356; 194 L Ed 2d 339 (2016).

(1996). This Court has specifically held that a mandatory life sentence without the possibility of parole for an adult sentenced for felony murder is not cruel or unusual punishment. *People v Hall,* 396 Mich 650, 657; 242 NW2d 377 (1976). Moreover, the United States Supreme Court even allows a sentence of death for those individuals 18 years or older following a conviction of first-degree murder,[7] and state courts have also upheld a sentence of death for 18-year-olds convicted of first-degree murder.[8]

The second factor, comparing the punishment to the penalty imposed for other crimes in this State, also supports a finding that defendant's sentence was constitutional. The Michigan Court of Appeals has upheld nonparolable life sentences even for crimes in which a victim is not killed. See *Brown,* 294 Mich App at 390-392 (upholding nonparolable life for certain recidivist sex offenders); *People v Poole,* 218 Mich App 702, 716; 555 NW2d 485 (1996)(upholding nonparolable life sentence for certain recidivist controlled substances offenses); *People v O'Donnell,* 127 Mich App 749, 755; 339 NW2d 540 (1983)(upholding nonparolable life sentence for placing explosives with intent to destroy which causes injury to the person).[9] Defendant's

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[7] *Roper,* 543 US 551.

[8] See *Foster v State,* 258 So3d 1248 (Fla, 2018); *People v Powell*, 6 Cal 5th 136, 191-192; 425 P3d 1006, 1053; 237 Cal Rptr 3d 793 (2018)(a death judgment against an adult is not unconstitutional merely because that person may share certain qualities with some juveniles).

[9] See also *People v Stanton-Lipscomb,* unpublished per curiam opinion of the Court of Appeals, issued September 20, 2018 (Docket No. 337433)(although the categorical distinctions set forth in *Roper* are imperfect, it reflects that the age of 18 "is widely accepted as the point at which adult privileges and responsibilities begin in a broad spectrum of activities" and the Eighth Amendment does not bar the State from imposing a mandatory sentence of life on persons 18 years and older who commit the

reference to the Holmes Youthful Trainee Act, MCL 762.11 simply does not support his argument because the legislature specifically recognized that it does not apply to a felony conviction in which the maximum penalty is imprisonment for life. MCL 762.11(2)(a). And comparison to the "Raise the Age" legislation, 2019 PA 109, is likewise misplaced, as the Legislature recognized the demarcation between the treatment of juvenile offenders—those under the age of 18—and adult offenders, 18 years of age and older, who are subject to the Code of Criminal Procedure.

The third factor, comparing the penalty imposed for the same crime in other states [first-degree murder committed by young adults, particularly 18-year-olds], does not support defendant's position. Viewing the converse of Defendant's argument,

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crime of first-degree murder)[Appx 39b-43b]; *People v Jordan*, unpublished per curiam opinion of the Court of Appeals, issued March 7, 2017 (Docket No. 328474)(trial court did not violate the constitutional prohibition of cruel and unusual punishment by imposing a mandatory nonparolable life sentence to an 18 year old convicted of first degree murder) [Appx 54b-60b].

In *People v Franklin,* unpublished per curiam opinion of the Court of Appeals, issued April 7, 2016 (Docket No. 325551) [Appx 61b-66b], the Michigan Court of Appeals recognized that the defendant was almost 21 years old at the time of the offense and did not fall within the protected class described in *Miller,* 132 S Ct at 2460. The court also noted the following:

> Defendant also cannot look to Michigan law for protection. Michigan codified *Miller's* individualized sentencing requirements in MCL 769.25, but the statute also only applies to those defendants who were under the age of 18 when they committed their crimes. And the Legislature mandated the sentence of life without the possibility for adult offenders who commit the crime of felony murder. MCL 750.316(1). "Legislatively mandated sentences are presumptively proportional and presumptively valid." *People v Brown,* 294 Mich App 377, 390; 811 NW2d 531 (2011). "A proportionate sentence does not constitute cruel or unusual punishment. *People v Drohan,* 264 Mich app 77, 92; 689 NW2d 750 (2004). [*Franklin,* slip op, pp 5-6.]

18 states and the federal government impose, at a minimum, mandatory sentences of life without parole for first-degree murder. See Defendant's Supplemental Brief, p 31. Six more states impose mandatory life-without-parole sentences in the face of aggravating circumstances. *Id.*, p 31, n 63. This data simply does not show that Michigan is an outlier in the nation. Compare *People v Benton*, 294 Mich App 191, 206-207; 817 NW2d 599 (2011), lv den 491 Mich 917 (2012) (the third factor supported the constitutionality of a sentence when 18 other states imposed the same mandatory-minimum sentence as Michigan for the offense), with *Lorentzen*, 387 Mich at 179 (the third factor supported that a sentence was unconstitutional when "[o]nly one state, Ohio, has as severe a minimum sentence for the sale of marijuana as Michigan") and *Bullock*, 440 Mich at 37 (adopting Justice WHITE's dissenting analysis from *Hamelin v Michigan*, 501 US 957, 1026; 111 S Ct 2680; 115 L Ed 2d 836 (1991) ("No other jurisdiction imposes a punishment nearly as severe as Michigan's for possession of the amount of drugs at issue here.")).

Neither *State v Norris,* unpublished opinion from the Superior Court of New Jersey Appellate Division, issued May 15, 2017 (2017 WL 2062145) nor *Sharp v State*, 16 NE3d 470, 479-480 (Ind, 2014), vacated on other grounds 42 NE3d 512 (2015), are

persuasive because neither the State of New Jersey[10] nor the State of Indiana[11] mandate a nonparolable life sentences even for adults convicted of first-degree murder.

One case that is directly on point that defendant does not cite is *Nicodemus v State,* 2017 Wy 34; 392 P3d 408 (2017), in which the Wyoming Supreme Court addressed a life-without-parole sentence for an 18-year-old offender. The court recognized that despite the clear holding by the United States Supreme Court that 18 is the cutoff age for imposing *Miller* protections, the defendant asked the court to hold that the cutoff age may vary. *Nicodemus,* 392 P3d at 413. The court agreed that a state has the authority to set its own age of majority and may announce a rule that is more protective than that announced by the Supreme Court, but when the Wyoming legislature enacted legislation "to bring its life imprisonment statutes into compliance with the *Miller* requirements, it did not choose a more protective line. It extended the sentencing protections only to those who were under the age of eighteen at the time of their offense." *Id.*[12] In Wyoming, like in Michigan, the state constitution

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[10] See NJ Stat § 2C:11-3 ("person convicted of murder shall be sentenced, except as provided in paragraphs (2), (3) and (4) of this subsection, by the court to a term of 30 years, during which the person shall not be eligible for parole, or be sentenced to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole").

[11]A defendant convicted of felony murder faces a sentencing range of forty-five years to sixty-five years, with an advisory sentence of fifty-five years. Ind Code § 35-50-2-3 (2007).

[12]Likewise, the Michigan Legislature could have prohibited the sentence of life in prison without parole for 18-year-olds that commit the crime of first-degree murder. But instead, the legislators codified *Miller's* individualized sentencing requirements

prohibited cruel *or* unusual punishment, Wyoming Constitution, art 1, § 14, and the court found no constitutional impediment in sentencing an 18-year-old convicted of murder to life in prison without parole. 392 P3d at 416-417.

In *People v Harris,* 2018 Ill 121932 (2018), the Illinois Supreme Court found that the defendant's Eighth Amendment challenge was a facial challenge because he sought a categorical ruling extending *Miller* to all young adults under the age of 21. It recognized that claims for extending *Miller* to offenders 18 years of age or older have been repeatedly rejected. *Id.* at 121932, citing *United States v Williston,* 862 F3d 1023, 1039-1040 (CA 10, 2017);[13] *United States v Marshall,* 736 F3d 492, 500 (CA 6, 2013);[14] *People v Argeta*, 210 Cal App 4th 1478; 149 Cal Rptr 3d 243, 245-246 (Ct App, 2012).[15] The *Harris* court found that the age of 18 marked the present line

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in MCL 769.25 to only those individuals under the under the age of 18. See *Franklin,* sl op, pp 5-6 [Appx 65b-66b].

[13] In *Williston*, 862 F3d at 1040, the federal court recognized:

> The Supreme Court's decision to separate juvenile and adult offenders using the crude, but practicable, tool of an age cutoff, as opposed to a more painstaking case-by-case analysis, necessitates some element of arbitrariness in Eighth Amendment jurisprudence in this area. But such is the law.

[14] In *Marshall,* 736 F3d at 500, the federal court recognized that "considerations of efficiency and certainty require a bright line separating adults from juveniles. For purposes of the Eighth Amendment, an individual's eighteenth birthday marks that bright line."

[15] In *Argeta,* 210 Cal App 4th at 1482, the court indicated:

> Making an exception for a defendant who committed a crime just five months past his 18th birthday opens the door for the next defendant who is only six months into adulthood. Such arguments would have no

between juveniles and adults; therefore, the facial challenge under the Eighth Amendment failed.

In *Zebroski v State,* 179 A3d 855, 860 (Delaware 2017), the defendant argued that imposing a mandatory life without parole sentence on him for first-degree murder, when he was 18 at the time of the murder, violated the Eighth Amendment because "major advances in neuroscience have demonstrated that the brain of a teenager, even at the age of 18, is profoundly different from that of a mature adult." The Delaware Supreme Court recognized that the choice of the United States Supreme Court of 18 as the "constitutional age-of-majority" was not based on a lack of understanding of adolescent development, but simply on the fact that it rejected drawing the line any later. *Id.* at 861. The choice was not based on the developmental boundary between childhood and adulthood but on the societal markers of adulthood. *Id.* at 862.[16]

> logical end, and so a line must be drawn at some point. We respect the line our society has drawn and which the United States Supreme Court has relied on for sentencing purposes, and conclude Argeta's sentence is not cruel and/or unusual.

[16] See also *State v Vinson*, 73 NE3d 1025, 1042-1043 (Ohio App, 2016) ("the United States Supreme Court has explicitly identified age 18 as the 'bright-line' divide between juveniles and adults when considering developmental differences for purposes of the Eighth Amendment. 'Juvenile offenders' are those who were younger than 18 at the time they committed their offenses; offenders who were 18 or older at the time the committed their offenses are adult offenders." Because the defendant was 18 at the time he committed the crimes at issue, he was an adult and he was not entitled to the special sentencing considerations afforded juvenile offenders under the Eighth Amendment); *Commonwealth v Furgess*, 149 A3d 90, 94 (PA Super, 2016) (petitioners who were older than 18 at the time they committed murder are not within the ambit of *Miller*).

The fourth factor considers the penological goal of rehabilitation. The goal of rehabilitation, however must be weighed against society's efforts to deter others from engaging in similar prohibited behavior. *People v Dipiazza,* 286 Mich App 137, 153-154; 778 NW2d 264 (2009); *People v Coles,* 417 Mich 523, 530; 339 NW2d 440 (1983), overruled in part on other grounds *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990).[17] A sentence of mandatory life without parole admittedly does not serve the penological goal of rehabilitation, if by rehabilitation the Court means successful reintegration into society. See *Carp*, 496 Mich at 521 n 38, citing *Graham*, 560 US at 74. But when the fourth factor alone suggests that a sentence is disproportionate, this Court has concluded that such a sentence may nonetheless be constitutional under Article 1, § 16. *Carp*, 496 Mich at 521.[18] Applying the *Lorentzen* /*Bullock*

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[17] In *People v Hall,* 396 Mich 650, 658; 242 NW2d 377 (1976) this Court recognized that rehabilitation was not the only allowable consideration for the Legislature to consider in setting punishment because "society's need to deter similar proscribed behavior in others, and the need to prevent the individual offender from causing further injury to society" were also recognized. Moreover, rehabilitation and release are still possible even if a defendant is sentenced to nonparolable life since a defendant still has available to him commutation of sentence or an outright pardon. *Id.*

[18] As Justice Markman opined in his concurring statement in *Manning*, 951 NW2d at 907 (Markman, J, concurring):

> With regard to the fourth factor, a life-without-parole sentence for an 18-year-old may not serve the penological goal of rehabilitation, but it may serve other critical penological goals, such as securing a just and proper punishment as determined by a self-governing people and their representatives; the general deterrence of other potential criminal offenders; and the individual deterrence, and incapacitation, of the individual offender himself. In *Carp*, this Court concluded that "with only one of the four factors supporting the conclusion that life-without-

factors, this Court should conclude that defendant has failed to show that his sentence is unconstitutional under Article 1, § 16.

D. *Alternatively, this Court should reconsider Lorentzen and Bullock.*

If this Court concludes that a mandatory sentence of life without parole for an adult convicted of first-degree murder is disproportionate under the *Lorentzen* /*Bullock* test, it should reexamine whether *Lorentzen* and *Bullock* were rightly decided. In *Carp*, 496 Mich at 519 n 37, this Court explained:

> The inclusion of proportionality review under Article 1, § 16 has been the subject of significant disagreement. *Bullock*, 440 Mich at 46 (RILEY, J., concurring in part and dissenting in part) ("I believe that *People v Lorentzen* . . . , the principle case relied on by the majority to support its conclusion, was wrongly decided and that proportionality is not, and has never been, a component of the 'cruel or unusual punishment' clause of this state's constitution."); *People v Correa*, 488 Mich 989, 992; 791 NW2d 285 (2010) (MARKMAN, J., joined by CORRIGAN and YOUNG, JJ., concurring) ("[A]t some point, this Court should revisit *Bullock*'s establishment of proportionality review of criminal sentences, and reconsider Justice RILEY's dissenting opinion in that case."). However, because life without parole is not a categorically disproportionate sentence for a juvenile homicide offender, we find it unnecessary in this case to resolve whether proportionality review is rightly a part of the protection in Article 1, § 16 against "cruel or unusual punishment,"

> parole sentences are disproportionate when imposed on juvenile homicide offenders, defendants have failed to meet their burden of demonstrating that it is facially unconstitutional under Article 1, § 16 to impose that sentence on a juvenile homicide offender." *Id.* at 521, 852 N.W.2d 801. Similarly, the defendant here has failed to meet his burden of demonstrating that it is unconstitutional under Article 1, § 16 to mandatorily impose that sentence upon an 18-year-old homicide offender.

> instead assuming for the sake of argument that it has a place in an analysis under Article 1, § 16.

In her opinion in *Bullock*, Justice RILEY opined that the concept of proportionality "is not, and has never been, a component of the 'cruel or unusual punishment' clause of this state's constitution." *Bullock*, 440 Mich at 46 (RILEY, J., concurring in part and dissenting in part). Secondly, Justice RILEY opined that the majority had failed to articulate a sufficient "compelling reason" to interpret Const 1963, art 1, § 16 differently than its federal counterpart. *Id.*[19] Lastly, Justice RILEY concluded that the *Bullock* majority violated the separation-of-powers doctrine mandated by our Constitution:

> Our role is limited; we must make a principled neutral decision with regard to whether the legislative choice of punishment violates Const 1963, art 1, § 16 prescriptions against cruel or unusual punishments. If the question is whether punishment meets the 'evolving standards of decency,' the answer must come from the democratically elected representatives of the people: the Legislature. [*Id.* at 66.]

Several years later, in *People v Correa*, 488 Mich 989, 989; 791 NW2d 285 (2010) (MARKMAN, J., concurring), Justice MARKMAN, joined by Justices YOUNG and CORRIGAN, wrote an opinion concurring in the denial of leave to appeal for the purpose of criticizing the opinion in *Bullock*. "*Bullock* held that proportionality is a

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[19] "The majority . . . contends that there is a 'significant' textual difference in the Eighth Amendment (cruel *and* unusual punishment), from that in Const 1963, art 1, § 16 (cruel *or* unusual punishment), which enables the Court to give 'broader' interpretation of our constitutional prohibition against 'cruel or unusual punishment.' History, and this Court's use of the text of the clause, does not support its conclusion." *Id.* at 58-59.

component of 'cruel or unusual' punishment even though as early as 1890, this Court had rejected such an understanding of the Constitution." *Id.*, citing *People v Morris*, 80 Mich 634; 45 NW 591 (1890). In *Morris*, 80 Mich at 638-639, this Court opined that the state's prohibition against cruel or unusual punishment referred to the "mode" or "method" of punishment, not its degree. The *Morris* Court held that because "[i]mprisonment . . . is, and always has been, in this country and in all civilized countries, one of the *methods* of punishment," it does not violate the cruel or unusual punishment clause. *Id.* at 639 (emphasis added). In *Correa*, Justice MARKMAN likewise opined that "[b]ecause imprisonment is not a cruel or unusual method of punishment, the Court of Appeals did not err in holding that [the] defendant's minimum sentence of 25 years in prison does not violate the cruel or unusual punishment clause." *Correa*, 488 Mich at 992 (MARKMAN, J., concurring).

Assuming defendant can demonstrate that his sentence is disproportionate under the *Lorentzen / Bullock* test, this Court should reconsider whether *Lorentzen* and *Bullock* were rightly decided in light of the reasons given by Justice RILEY in her opinion in *Bullock* and by Justice MARKMAN, joined by Justices YOUNG and CORRIGAN, in his opinion in *Correa*.[20] "Stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions . . . ." *Robinson v City of Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000). And

[20] Justice Markman repeated his criticism of *Bullock* in his concurring statement in *People v Manning*, 506 Mich 1033; 951 NW2d 905, 905-907 (2020) (Markman, J, concurring), this time joined by Justice Zahra.

Lorentzen and *Bullock* are not so engrained in Michigan law that overruling them "would work an undue hardship because of that reliance." *Id.* at 466. See *Michigan Sentencing Law: Past, Present, and Future*, 30 Fed Sent R 146, 149 (2017) ("The Michigan Supreme Court has exhibited a . . . lack of mercy vis-à-vis cruel or unusual punishment challenges, last reversing on this ground in 1992.").[21]

E. *Defendant's sentence of life without the possibility for parole is not unconstitutional under the Michigan Constitution*

Defendant contends that his sentence is disproportionate to him and, therefore, unconstitutional as applied under the Michigan Constitution. He addresses the various factors considered by *Miller*, 567 US at 477-478, and argues that this Court should not only hold that various mitigating factors and an individualized sentencing apply to him, but also he urges this Court to make findings and determine as if conducting a hearing under MCL 769.25(6) that a sentence of life without the possibility of parole is disproportionate and unconstitutional. Should this Court expand the Supreme Court's ruling in *Miller* and hold that it applies to adult first-degree murderers, either under the United States Constitution, the Michigan Constitution, or both, the proper remedy would be to remand the matter for the trial court to make such factual determinations.

[21] "The last sentences reversed by the Michigan Supreme Court for cruel or unusual punishment were drug sentences [in *Lorentzen* and *Bullock*]. The Court of Appeals last reversed a sentence in response to a cruel or unusual punishment challenge in [1988]. . . ." *Id.* at 149 n 81, citing *People v Shultz*, 172 Mich App 674, 687; 432 NW2d 742 (1988), aff'd 435 Mich 517 (1990).

To the extent Defendant relies on the factual circumstances of his offense conduct, however, the fact that he is punishable as a principle as a result of his aiding and abetting the offense should not enable him to avoid life without parole. The jury properly considered the evidence admitted at trial, including that Defendant was seen to pass the murder weapon to Harris shortly before he fatally shot the victim, and rationally inferred that Defendant possessed the intent to aid and abet Harris in first-degree murder. As this Court held in *Carp*, the Legislature has authority to hold aiders and abettors equally responsible as the principals they assist:

> [W]e note that our Legislature has chosen to treat offenders who aid and abet the commission of an offense in exactly the same manner as those offenders who more directly commit the offense:
>
> > 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 tis commission he may hereafter be prosecuted, indicted, tried, and on conviction shall be punished as if he had directly committed the offense. [MCL 767.39.]
>
> . . . These choices by the Legislature must be afforded great weight in light of the fact that *Lockett*, one of the capital-punishment cases relied on by the United States Supreme Court in forming the rule in *Miller*, specifically instructs:
>
> > That States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge. [*Carp*, 496 Mich at 522, quoting *Lockett v Ohio*, 438 US 586, 602; 98 S Ct 2954; 57 L Ed 2d 973 (1978).]

Defendant has not shown that he lacked an intent to kill or did not foresee that a life would be taken as a result of his crime, nor has he shown that his conviction under

an aiding-and-abetting theory rendered his sentence unconstitutional. Indeed, Defendant admitted that Harris had told him he was going to kill Mr. Jones-Dickerson and Defendant was seen passing the murder weapon to Harris as they were parked next to the victim's vehicle and only moments before Harris shot him dead.

Regardless of Defendant's experience as a juvenile, as an adult he aided and abetted in the murder of another human being. A life sentence without parole is exactly proportionate to his crime. Mr. Jones-Dickerson will get no parole from death. Defendant should not be granted such consideration either.

CONCLUSION

Defendant's facial challenge to MCL 750.316 must fail because life in prison without parole for an 18-year-old who commits first-degree murder is not so excessive or grossly disproportionate as to be completely unsuitable to the crime,[22] especially when other jurisdictions allow for death sentences for individuals 18 years and older who commit first-degree murder. As applied to defendant's particular circumstances, which includes his age[23] and criminal record,[24] defendant likewise cannot find that the sentence imposed is constitutionally disproportionate[25] Defendant has failed to rebut the presumption of constitutionality accorded Michigan's statutory penalty. As such, his cruel and/or unusual challenge should be rejected.

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[22] See *People v Hallack,* 310 Mich App 555, 571-572; 873 NW2d 811 (2015) rev'd in part on other grounds, 499 Mich 879 (2016); *Bullock,* 440 Mich 34-35, n 17.

[23] Defendant was 18 years and 9 months old when he and Harris committed the murder.

[24] Defendant had a juvenile record for one count of home invasion in 2011 that was reduced to trespassing, an adjudication for breaking and entering and malicious destruction of property in 2011, and a ppossession of marijuana charge in 2012. (See PSIR, pp 8-9).

[25] Under Michigan's nonconstitutional proportionality review, an offender's young age, by itself, does not render a particular sentence disproportionate, *People v Lemons,* 454 Mich 234, 258-259; 562 NW2d 447 (1997), nor does the lack of an adult criminal record. See *People v Daniel,* 207 Mich App 47, 54; 523 NW2d 830 (1994)(the defendant's employment, lack of criminal history, and minimal culpability were not unusual circumstances that would overcome the presumption of proportionality). See *Bullock*, 440 Mich at 34-35.

RELIEF

Defendant has not demonstrated that his sentence violates the Eighth Amendment or Const 1963, art 1, § 16. The Legislature has chosen—as have most jurisdictions within the United States—a dividing line at the age of 18 between juvenile offenders and adults facing consequences under the Penal Code and the Code of Criminal Procedure. The behavioral and scientific studies presented to this Court should be presented to the Legislature if the goal is to amend the statutory penalties and make policy decisions as to the structure of the criminal justice system in Michigan. The harshest penalty should be reserved for the most serious crimes, as constitutionally proportionate. In this case Defendant's role in the first-degree murder of Darnyreouc "Kee-Kee" Jones-Dickerson merits a sentence of life without the possibility of parole.

WHEREFORE, David S. Leyton, Prosecuting Attorney in and for the County of Genesee, by Michael A. Tesner, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court deny Defendant-Appellant's application for leave to appeal.

Respectfully Submitted,

DAVID S. LEYTON
Genesee County Prosecuting Attorney

BY:

/s/ Michael A. Tesner
Michael A. Tesner (P45599)
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Appeals, Research, & Training Division

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