STATE OF MICHIGAN
IN THE SUPREME COURT

The People of the State of Michigan

Plaintiff-Appellee,

v.

Alex Jay Adamowicz

Defendant-Appellant.

MSC No. 162170

COA No. 330612

Oakland County Circuit Court
Case No. 2014-251162-FC

BRIEF OF RODERICK & SOLANGE MACARTHUR JUSTICE CENTER AND JELANI JEFFERSON EXUM AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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Table of Contents

Index of Authorities

Page(s)

Federal Cases

Michigan Cases

State Cases

Statutes

Other Authorities

Statement of Interest[1]

Amicus Curiae the Roderick & Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have participated in civil rights campaigns in areas that include police misconduct, compensation for the wrongfully convicted, extreme sentences, and the treatment of incarcerated people. RSMJC has served as amicus in courts in Michigan and elsewhere concerning sentencing matters and state constitutions.

Amicus Curiae Jelani Jefferson Exum is Dean and Philip J. McElroy Professor of Law at University of Detroit Mercy School of Law. She is a nationally recognized expert in sentencing law and procedure and is a member of the Editorial Board of the *Federal Sentencing Reporter*. During her 16 years in legal Academia, Ms. Jefferson Exum has taught Constitutional Law, Criminal Law, Criminal Procedure, Sentencing, Race and American Law, and Comparative Criminal Procedure. Ms. Jefferson Exum has published numerous scholarly papers and other writings focused on federal and state sentencing law and policy.

Introduction

In deciding last year that mandatory life-without-parole (LWOP) sentences for-18-year-olds violated the Michigan Constitution, this Court was guided by some key principles. *People v Parks* 510 Mich 225, 987 NW2d 161 (2022). First, "states have a wide latitude in providing greater *Miller* protections [than the Eighth Amendment does]." *Id.* at 247 (citing *Jones v Mississippi*, 141 S Ct 1307, 1323 (2021)). Indeed, Michigan *does* afford greater sentencing protections to young people Second, because scientific research on late-adolescent development shows that the region of the brain responsible for risk avoidance and comprehension of consequences continues developing past age 18 and until around age 25, mandatory LWOP sentences for 18-year-olds, which "forswear[] altogether the rehabilitative ideal," contravene the Michigan Constitution's prohibition on cruel or unusual punishment.

[1] Counsel for a party did not author this brief, in whole or in part, and did not make a monetary contribution intended to fund the preparation or submission of this brief.

Id. at 248-51, 265 (citation omitted). The very same principles apply to individuals through at least age 21[2], the age at issue in this case.

This Court has repeatedly recognized that the Michigan Constitution's prohibition on any punishment that is either "cruel *or* unusual," Const 1963, art 1, § 16 (emphasis added), rather than "cruel *and* unusual", has linguistic bite. Indeed, the Court has rejected punishments that it deemed only unusually excessive, expanding beyond the rights conveyed by the narrower Eighth Amendment. Similarly, a sentence may violate the Michigan Constitution based on cruelty alone, regardless of whether the penalty is usual or unusual. Although the text of the Michigan Constitution does not define "cruel," the debates at the 1850 Constitutional Convention make clear that the delegates believed that a punishment could be cruel if it disregarded the possibility of reformation. A mandatory LWOP sentence for a late adolescent is cruel in precisely this way: as this Court noted in *Parks*, it automatically disregards the possibility of reform, regardless of an individual's capacity for change.

Even if mandatory LWOP were not cruel, for youth the sentence is unusual as this Court has interpreted it: the punishment is unusually excessive, defying the principle of proportionality inherent in the Michigan Constitution. Furthermore, sound sentencing policy dictates that a punishment is excessive if it does not fulfill a legitimate purpose of punishment. It is especially unlikely that severe sentences imposed upon young people do so. Experts in developmental recognize ongoing development well into one's twenties. Ongoing research casts doubt on the deterrent, rehabilitative, or safety effects of severely long sentences on criminal behavior.

[2] "Late adolescence" has been defined by some researchers as ages 18 through 21. Insel, et al, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers*, Ctr for L, Brain & Behav at 1 n 2 (Jan 27, 2022) ("White Paper"), available at https://clbb.mgh.harvard.edu/wp-content/uploads/CLBB-White-Paper-on-the-Science-of-Late-Adolescence-3.pdf. But this Court correctly recognizes that "young adults have yet to reach full social and emotional maturity, given that the prefrontal cortex . . . is not fully developed until age 25." *Parks*, 510 Mich at 251 (citing *The Promise of Adolescence: Realizing Opportunity for All Youth*, p 51; Arain et al., *Maturation of the Adolescent Brain*, 9 Neuropsychiatric Disease & Treatment 449, 449-450, 453-454 (2013)). Accordingly, although Mr. Adamowicz was an emerging adult at the time of his offense, amici posit that mandatory life-without-parole is unconstitutional even for young adults past age 22.

Additionally, public opinion nationwide is trending toward increasing opportunities for early release for those serving long sentences.

This Court should grant leave to appeal to address the constitutionality of LWOP sentences for young people through at least age 21. It should extend its holding in *Parks* to align with scientific findings that show that mandatory LWOP even for youth above age 18 like Alex Adamowicz constitutes cruel or unusual punishment under Article 1, § 16 of the Michigan Constitution.

Statement of Basis of Jurisdiction

The jurisdictional summary stated in the appellant's petition is complete and correct.

Statement of Questions Involved

The statement of questions involved stated in the appellant's petition is complete and correct.

Argument

I. The Text and History of Article 1, § 16 of the Michigan Constitution Suggest that Mandatory Life-Without-Parole (LWOP) Sentences for Late Adolescents are Both Cruel in Denying the Prospect of Reformation, and Unusual in Their Excessiveness.

The strict limitations on criminal punishment in Michigan begin with the text of its Constitution. Article 1, § 16 prohibits either "cruel or unusual" punishment. Const 1963, art 1, § 16. Support for these sweeping restrictions can be traced back to the framers of Michigan's 1850 Constitution, and to this State's longstanding guarantee of proportional criminal punishments. The text, drafting history, and judicial interpretations of Article 1, § 16 of the Michigan Constitution confirm the breadth of that clause's reach. This context makes plain that LWOP sentences for late adolescents, including those who had attained age 21 at the age of their crimes, constitute at least cruel, if not also unusual punishment.

A. This Court rightly interprets Article 1, § 16's prohibition on cruel *or* unusual punishment expansively, particularly for youth.

The plain language of the Michigan Constitution leaves no doubt that its limitation on criminal punishment sweeps broadly. Unlike the Eighth Amendment's ban on "cruel *and* unusual punishments," US Const, Am VIII, Article 1, § 16

prohibits "cruel *or* unusual punishment." Const 1963, art 1, § 16. This textual distinction has real bite, because "a cruel punishment violates the state constitution irrespective of whether it is also unusual; an unusual punishment violates the state constitution irrespective of whether it is also cruel." Berry, III, *Unusual State Capital Punishments*, 72 Fla L Rev 1, 18 (2020). In other words, criminal penalties that arguably pass muster under the U.S. Constitution might nevertheless run counter to Michigan's.

This Court has long highlighted the sweeping language of Article 1, § 16, beginning with the Court's pointed distinction between it and the Eighth Amendment half a century ago. This Court highlighted the contrast by capitalizing the conjunctions "and" and "or" when it recited the differing provisions: "The United States Constitution prohibits cruel And unusual punishments. The Michigan Constitution prohibits cruel Or unusual punishment." *People v Lorentzen*, 387 Mich 167, 171-72 (Mich 1972) (citations omitted). The Court continued, "[t]he prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition." *Id.* This Court ultimately held that a mandatory minimum sentence of 20 years in prison for the sale of marijuana violates both Article 1, § 16 and the Eighth Amendment. *Id.* at 181.

Two decades later, in *People v Bullock*, this Court specifically relied on the disjunctive text of the Michigan Constitution to surpass what the U.S. Supreme Court had recently proscribed in restricting harsh criminal punishments. 440 Mich 15 (Mich 1992). This Court decided *Bullock* against the backdrop of the U.S. Supreme Court's decision one year earlier in *Harmelin v Michigan*, which reviewed a sentencing judgment of the Michigan Court of Appeals. 501 US 957, 965 (1991). Writing for himself and Chief Justice Rehnquist in *Harmelin*, Justice Scalia flatly concluded: "[T]he Eighth Amendment contains no proportionality guarantee." *Id.* This Court, however, refused to apply Justice Scalia's understanding of the federal Eighth Amendment to Article 1, § 16 and instead held that the Michigan Constitution *does* recognize a proportionality constraint on criminal punishment. *Bullock*, 440 Mich at 37. Ultimately, this Court held that a mandatory sentence of life without parole for possession of 650 grams or more of cocaine constituted cruel or unusual punishment under the Michigan Constitution. *Id.* at 21, 37. In adopting a broader analysis under Michigan's "cruel or unusual" punishment clause, this Court again stated, "the set of punishments which are *either* 'cruel' or 'unusual' would seem

necessarily broader than the set of punishments which are *both* 'cruel' and 'unusual.'" *Id.* at 30 n 11.

Just last year, and two decades after *Bullock*, this Court again emphasized the broad text of Article 1, § 16 in a trio of cases addressing the constitutional limitations on criminal sentencing for young people. Each case referenced the U.S. Supreme Court's seminal Eighth Amendment youth sentencing cases, but then recognized protections under Article 1, § 16 that exceeded the limits of the Supreme Court's interpretations of the Eighth Amendment.

For instance, in *Graham v Florida,* 560 US 48 (2010), the Supreme Court barred LWOP sentences for defendants under 18 convicted of nonhomicide offense. But in *People v Stovall*, 510 Mich 301 (2022), this Court held that LWOP sentences even for second-degree murder violated Article 1, § 16 when imposed on youth under age 18. *Miller v Alabama*, 567 US 460 (2012), established that mandatory LWOP for youth under age 18 constitutes cruel and unusual punishment under the Eighth Amendment, and that sentencing courts must consider the mitigating qualities of youth before ordering discretionary LWOP sentences for this category of individuals. Yet in *People v Boykin,* 510 Mich 171 (2022), this Court held that the Michigan Constitution requires courts to consider youth before assigning *any* term of imprisonment to defendants under the age of 18, regardless of the charge. Additionally, harkening back to its long-held stance that "a bar on punishments that are either cruel *or* unusual is necessarily broader than a bar on punishments that are both cruel *and* unusual," this Court held that mandatory LWOP sentences for 18-year-olds violate Article 1, § 16. *People v Parks*, 510 Mich 225, 241-44 (2002).

This Court's interpretation of the breadth of Article 1, § 16 aligns with others' understandings of the term cruel "or" unusual. Constitutional scholars have noted that framers of the state constitutions who elected to use this disjunctive form when ratifying their own Eighth Amendment analogues assuredly were well aware of the option to ban cruel "and" unusual punishment, but they rejected that form in order to afford broader protections against harsh punishment. See, e.g., Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 Rutgers L J 929, 968 (2002) ("The Maryland drafters explicitly rejected the phrase 'cruel and unusual' in favor of the broader construction 'cruel or unusual.'"); Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 Wash U L Rev 567, 609 (2010) ("The existence of . . . various permutations of constitutional prohibitions on cruel and/or unusual

punishments suggests that the Framers and Ratifiers were likely aware of the significance of using the term 'and' instead of 'or' . . .").

Other state high courts, too, acknowledge that their own states' decisions to enact a ban on cruel "or" unusual punishment over a ban on cruel "and" unusual punishment signals an intent to afford sweeping protections against extreme criminal punishments. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and "Cruel and Unusual" Punishment*, 94 NC L Rev 817, 832 n 66 (2016) ("This difference [between 'cruel and unusual' and 'cruel or unusual'] is not insignificant, as many courts have noted."). This recognition has been particularly salient when applied to criminal punishment for young people. See, e.g., *In re Monschke,* 197 Wash 2d 305, 308 (Wash 2021) (holding that LWOP for persons under age 21 are "unconstitutionally cruel when applied to youthful defendants."); *People v Dillon*, 34 Cal3d 441, 488-89 (1983) (interpreting the California constitution to reject juvenile life sentences for felony murder, which it characterized as "cruel or unusual" punishment); *Diatchenko v Dist Att'y for Suffolk Dist*, 1 NE3d 270, 276 (Mass 2013) (holding that juvenile LWOP violates the Massachusetts' prohibition on "cruel or unusual punishments" "because it is an unconstitutionally disproportionate punishment when viewed in the context of the unique characteristics of juvenile offenders.").

These interpretations recognize that state constitutions are the proper mediums for expanding individual liberties. See generally Liu, *State Constitutions & the Protection of Individual Rights: A Reappraisal*, 92 NYU L Rev 1307 (2017). See also *State v Comer*, 249 NJ 359, 383, 398-99 (NJ 2022) (placing a 30-year cap on the parole eligibility period for youth under age 18, even though the New Jersey Constitution bans cruel *and* unusual punishment). Indeed, the U.S. Supreme Court, has passed the baton to the states to do just that in determining the limits of criminal sentences for youth. In *Jones v Mississippi*, 141 S Ct 1307 (2021), the U.S. Supreme Court recognized its own "limited role" in sentencing procedure, and flagged state courts as a more appropriate source of additional protections. *Id.* at 1322. The Court pointedly announced, "[o]ur decision [denying relief] allows Jones to present [his] arguments to the state officials authorized to act on them, such as the state legislature, state courts, or Governor." *Id.* at 1323. This State has appropriately protected young people facing extreme sentences. Extending the *Parks* decision to youth above age 18 would comport with the text, science, and law on which this Court has relied to perform its duty of enforcing Article 1, § 16.

B. A broad rule against cruel or unusual punishment aligns with Michigan's longstanding guarantee of proportionate punishments.

The text of the Michigan Constitution defines neither "cruel" nor "unusual." But scholars have explained that each term refers to some form of proportionality. Under this framework, the term "cruel" connotes absolute proportionality, asking "whether the sentence is commensurate with the state's purpose of punishment," whereas the term "unusual" refers to relative proportionality, leading courts to engage in an analysis of comparative law. Berry, III, *Practicing Proportionality*, 64 Fla L Rev 687, 689 (2012); see also Smith, Robinson, & Hughes, *State Constitutionalism and the Crisis of Excessive Punishment*, 108 Iowa L Rev 537, 588 (2023).

Article 1, § 16's text prohibiting a punishment that meets either one of these criteria firmly justifies this Court's interpretation of an inherent constitutional guarantee of proportionate punishments. *Bullock*, 440 Mich at 37. See also *Boykin*, 510 Mich at 192 ("[S]entences must follow the principle of proportionality[.]"). The proportionality guarantee "has a lengthy jurisprudential history" in this state. *People v Steanhouse*, 500 Mich 453, 472 (2017) (citing *People v Milbourn*, 435 Mich 630, 650 (1990)); *see also Bullock*, 440 Mich at 32 (explaining that, by the time the Constitution of 1963 was adopted, the prohibition on grossly disproportionate sentences had "more than half a century" of jurisprudential pedigree). This idea of proportionate punishment is so embedded in Michigan's criminal justice sphere that even a minimum penalty imposed by the legislature may be unconstitutionally excessive as applied to a particular individual. *Bullock*, 440 Mich at 43 (Mallet, J., concurring in part). And even further, this Court solidified an additional common-law "principle of proportionality," which requires judges to impose sentences that are proportionate to the nature of the offense and the mitigating circumstances in a defendant's background. *People v Milbourn*, 435 Mich 630, 650-51, 651 n 17 (1990).

Disregarding this unwavering guarantee of proportionate criminal punishments by any definition of the term, the appellate court in Mr. Adamowicz's case gave outsized weight to the comparative proportionality of LWOP to the offense, as measured by its analysis of the treatment of late adolescents in Michigan and elsewhere. *See People v Adamowicz*, ___Mich___ (2023) (Docket No 330612); slip op at 7. Even if that analysis was correct—and amici argue below that it was not—no jurisdiction counting is needed in this case because in Michigan a cruel sentence is unconstitutional regardless of its unusualness. Because research shows that late

adolescents are developmentally equivalent to their younger counterparts, see, e.g., *Parks*, 510 Mich at 265, mandatory LWOP sentences for late adolescents are still cruel, in that they contradict the framers' commitment to reform.

C. The framers of the Michigan Constitution of 1850 likely considered a penalty cruel if the penalty disregarded the possibility of reformation.

Michigan has always forbidden "cruel" punishments. The framers of its first Constitution in 1835 enacted a rule against "cruel and unjust punishments." Daily Journal of the Convention to Form a Constitution at 44, June 1, 1835.[3] The present text of Article 1, § 16, prohibiting "cruel or unusual" punishment" dates back to 1850. The amendment was proposed at the Constitutional Convention by Benjamin Witherell, an experienced judge who would later serve on this Court. See Report of the Proceedings and Debates in the Convention to Revise the Constitution of the State of Michigan 68 (1850) ("*Report of the Proceedings"*) [4] ("On motion of Mr. WITHERELL, [Article 1, § 17] was amended by striking 'and unjust' and inserting 'or unusual.'"). When this state adopted new constitutions in 1908 and 1963, it maintained and reenacted this broad formulation. See *Bullock*, 440 Mich at 31 (comparing Const 1908, art 2, § 15 with Const 1963, art 1, § 16).

If a given punishment is not justified by a state's principal purpose of punishment, then that punishment is cruel. Berry, III, *Cruel & Unusual Non-Capital Punishments*, 58 American Crim L Rev 1627, 1632 (2021)[5]. In Michigan, rehabilitation is a core goal of criminal punishment. *Parks*, 510 Mich at 265. In fact, it "is the only penological goal enshrined in [Michigan's] proportionality test as a 'criterion rooted in Michigan's legal traditions.'" *Id*. (quoting *Bullock*, 440 Mich at 34). The rehabilitative ideal is so germane to Michigan law that it was discussed

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[3] Available at https://babel.hathitrust.org/cgi/pt?id=mdp.39015071175163&view=1up&seq=67&q1=cruel

[4] Available at https://babel.hathitrust.org/cgi/pt?id=mdp.39015071175213&view=1up&seq=7. Delegates considered and rejected a narrower proposed amendment that would have banned cruel "and" unusual punishment. *Id.* at 27, 897.

[5] *Id.* at 1630-35 (explaining the evolution of Eighth Amendment jurisprudence and its proportionality analyses.). This consideration of punishment in terms of the purpose of punishment tracks the second half of the evolving standards of decency test utilized in the U.S. Supreme Court, from which this Court adapted its own proportionality analysis. *Lorentzen*, 387 Mich at 178-79.

repeatedly during the same 1850 convention that enacted the "cruel or unusual" amendment, and it has been an ongoing concern since then.

For instance, during that convention, delegates voted down a provision that would have permanently barred people convicted of infamous crimes from voting. *Report of the Proceedings* at 298. Multiple delegates criticized the broader (and ultimately rejected) provision, which would have allowed the legislature to permanently disenfranchise anyone convicted of an infamous crime, on the ground that such a punishment disregarded the capacity for rehabilitation. In these debates, then-Delegate Witherell "said there were two reasons for inflicting punishment—warning to the community and reformation of the offender." *Id.* at 298. Delegate Joseph H. Bagg noted, "I know several persons in Detroit who have been convicted of crimes . . . They are now good citizens, and are no doubt reformed of their sins, and vote at our elections." *Id.* at 476. Similarly, Delegate DeWitt C. Walker "believed the object of punishment to be the reformation of crime. If it does not produce that effect, we ought not to place odium upon him after he has had the wholesome lesson of instruction imparted to him." *Id.* at 352. And Delegate Alfred H. Hanscom declared: "There was no reason to suppose that an individual who underwent imprisonment may not be made a good and moral citizen by the operation of the reformatory training which had been adopted in our prison." *Id*. at 476.

One of the most ardent opponents of the defeated measure, Delegate Isaac E. Crary agreed that the purpose of punishment had turned to reform. See *id.* at 476 ("If a man go [*sic*] to prison, it is for the purpose of being reformed . . ."). Railing against the provision, Crary declared:

> The amendment said in effect that a man who had been guilty of a burglary, or larceny, because he had been guilty of that act, and had been punished by the law of the land, must be forever disqualified from being one of our citizens! By such a proposition in the fundamental law, we asserted that those individuals who had been sent to the penitentiary, and there reformed and made good citizens, should have a constitutional provision hanging over them during the remainder of their life, however well they might conduct themselves—however good citizens of the community they might become, yet we were to fix this stigma upon them . . . .

Id. at 475.

Later in the Convention, the import of rehabilitation arose yet again, in a discussion of an amendment that would have banned capital punishment. Delegate Nathan Pierce—an advocate for the death penalty—contemplated its use solely on one who "[would] not reform," i.e., those for whom "*every means* had been tried for his reformation, and *every means* had failed." *Report of Proceedings* at 744 (emphasis added). In other words, even an ardent supporter of the harshest possible punishment in Michigan at that time wished to reserve it for those who were incapable of rehabilitation. And as Justice Boyle penned over one century later, "only the rarest individual is wholly bereft of the capacity for redemption." *People v Schultz*, 435 Mich 517, 532 (1990) (Boyle, J, concurring).

Condemning young people with a heightened rehabilitative potential to die in prison, while rejecting any opportunity for release based on their reformation, is unquestionably cruel. See *Parks*, 510 Mich at 258 ("Because of the dynamic neurological changes that *late adolescents* undergo as their brains develop over time . . . automatic condemnation to die in prison at 18 is beyond severity—it is cruelty.") (emphasis added).

D. A criminal punishment is unusual when it disregards Article 1, § 16's inherent proportionality guarantee.

Setting aside the cruelty of mandatory LWOP for youth beyond age 19, it is also unusual as this Court has long interpreted the term. As this Court correctly recognizes, "[t]he prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition." *Lorentzen*, 387 Mich 172. Michigan courts determine excessiveness by considering "evolving standards of decency that mark the progress of a maturing society." *Id.* at 179. Societal markers throughout the nation indicate increasing legal protections for youth well past age 18, and a growing disdain for mandatory life sentences overall.

Mandatory LWOP for a young person is just that: unusually excessive. In *Parks*, this Court discussed Michigan courts' longstanding recognition of the principle of proportionality. *Parks*, 510 Mich at 242-43. Then the Court reviewed research on brain development, noting that its evaluation was "no different than the analysis the United States Supreme Court undertook" in *Miller*. *Parks,* 510 Mich at 248. Ultimately, the Court held that *Miller* protections extended to 18-year-olds, based largely on the scientific consensus that there is no meaningful neurological or psychological difference between 17-year-olds and 18-year-olds. *Id.* at 252-54.

Thus, an "automatically harsh punishment without consideration of mitigating factors is unconstitutionally excessive and cruel." *Id.* at 260. The scientific findings addressed in *Miller* and accepted by the *Parks* court extended even beyond age 21, *Id.* at 244, and they have continued developing since then. See *infra* part II.

The appellate court gave short shrift to this research, instead focusing on the fact that other state supreme courts have yet to rule that mandatory LWOP sentences for 21-year-olds violate their constitutions. *Adamowicz*, slip op at 5-6. True, Michigan would be the first to take this step, but this is one of the first state high courts to consider the question at issue in this case[6]. Such was the case when this Court recognized *Miller*-like state constitutional sentencing protections for 18-year-olds as well, as only two other states had done so before the *Parks* decision. See *supra* part I.A. If this Court strictly tethered its constitutional interpretations to other states without considering Michigan's distinct text and history, it would undermine the edict that "this Court alone is the ultimate authority with regard to the meaning and application of Michigan Law." *Bullock*, 440 Mich at 27.

In Michigan, the "proportionality principle inherent in Const. 1963, art. 1, § 16, is not a simple, 'bright-line' test." *Bullock*, 440 Mich at 40. Rather, it "may acquire meaning as public opinion becomes enlightened by a humane justice." *Lorentzen*, 387 Mich at 178[7]. In *Parks*, this Court relied on markers of proportionality that apply equally to youth under and over age 19. *Parks*, 510 Mich at 262-64. The Court reviewed research findings that relevant stages of adolescent development continue

[6] The wide majority of states have yet to address this issue. The appellate court erred in assuming that the one case it cites, *State v Hassan*, 977 NW 2d 633 (Minn 2022), drives the result in this case. *Adamowicz*, slip op at 6. First, the *Hassan* court refused to engage with well-accepted, contemporary developmental research that was germane to this and other states' constitutional interpretations. Instead it relied on an amicus brief from a case decided more than three decades ago, and a law review article that referenced literature from the 1980s and 90s. *Hassan*, 977 NW 2d at 643 n 8. Second, both the Hassan court's proportionality test and its historical treatment of criminal sentencing differ from that of Michigan. *Hassan*, 977 NW 2d at 642 (citing *State v Vang*, 847 NW2d 248, 263 (Minn 2014)).

[7] Although this Court typically looks to the *Lorentzen* factors to decide proportionality, the language of *Lorentzen* suggests that the court did not intend to create a rigid four-part test. Rather, the Court explained that "dominant test of cruel and unusual punishment [was] that the punishment is in excess of any that would be suitable to fit the crime," but "other standards or tests [were] also applicable to the case at bar. *Lorentzen*, 387 Mich at 176. Although the Court applied each test to that case, it did not order that other courts strictly apply all of them.

past age 21. *Id.* at 244. It also noted that Michigan is in a minority of states that mandates life sentences even for adults. *Id.* These facts alone render an extension of the *Parks* holding to this case a logical result.

But ongoing legislative measures across the nation also signal a shift towards limiting criminal punishments for young people past their 21st birthdays. New Jersey requires courts to extend *Miller* protections to defendants whose offense occurred before age 26.[8] California extends youth parole eligibility to individuals up to age 26[9]. Hawaii defines "young adult defendant[]" as a person under age 22 with no prior felony convictions[10]. Washington, D.C. provides sentencing alternatives for "youth offenders"—defined as individuals under age 24 at the time of the offense—convicted of certain crimes[11]. And beginning July 1, 2023, Vermont will extend the jurisdiction of the juvenile court to youth to age 21 years and 6 months if certain conditions are met.[12] This too shows that a mandatory sentence for a 21-year-old that fails to account for the mitigating factors of youth is unconstitutionally excessive.

II. Mandatory Life-Without-Parole (LWOP) for Late Adolescents is Inconsistent with Policy Surrounding the Purposes of Sentencing.

Although rehabilitation is the most salient goal of punishment in Michigan, it is but one of several to consider. Both the Constitution itself and sound sentencing policy require that punishment fulfills these other penological goals as well, whether deterrence, retribution, incapacitation, or a combination of each. Indeed, the *Miller* decision, which provided a model for the factors that Michigan courts consider when sentencing young people, accounted for all of the permissible penological purposes of punishment. *Miller* 567 US 460, 472-73. Furthermore, the United States Supreme Court has confirmed that "a punishment is 'excessive' and unconstitutional if it makes no measurable contribution to acceptable goals of punishment, and hence is nothing more than the purposeless and needless imposition of pain and suffering."

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[8] NJSA 2C:44-1b(14).

[9] Cal Pen Code § 3051.

[10] Haw Rev Stat § 706-667.

[11] DC Code § 24-903 (2).

[12] Vt Stat Ann tit 33, § 5103.Vermont also defines a "child" as an individual who commits a delinquent act between the ages of 10 and 22. Vt Stat Ann tit 33, § 5102(2)(C).

Coker v Georgia, 433 US 584, 592 (1977) (citing *Gregg v Georgia*, 428 US 153 (1976)). Because Article 1, § 16 surpasses the Eighth Amendment bar, this Court too must ensure that all permissible sentencing purposes are accounted for in legislative punishment schemes so that sentencing laws adhere to the proportionality requirement. An examination of the remaining sentencing purposes also supports the conclusion that mandatory LWOP for late adolescents is an excessive punishment.

In denying Mr. Adamowicz's challenge, the Court of Appeals treated the issue of the constitutionality of his mandatory LWOP sentence as one that was clearly settled by *Hall* and *Lorentzen*. *Adamowicz*, slip op at 1. However, as this Court explained in *Lorentzen* and confirmed in *Parks*, sentencing standards should be progressive, not static, because the concept of proportionality is shaped by an increasingly humane society. *Parks*, 510 Mich at 241 (citing *Lorentzen*, 387 Mich at 178). Similarly, criminologists' understanding of whether certain sentencing approaches fulfill sentencing purposes continually evolves to reflect advances in biological, behavioral, and social sciences. Today's research tells us that the effect of youth on behavior is an important factor in the effectiveness of sentences, even for late adolescents. See *Id*. at 249-250 (recognizing this research and noting that "the inherent malleability and plasticity of late-adolescent brains are features that are similar to those that the *Miller* Court found relevant to its culpability analysis, which, in turn, formed the basis of *Miller*'s prohibition on mandatory life-without-parole sentences for adolescent defendants."). When this research is explored more fully, it is apparent that mandatory LWOP-sentences for late adolescents, whether age 18 or beyond, do not appropriately fulfill *any* sentencing purpose, and therefore are unlawful.

A. Long sentences are unlikely to deter adolescents.

The Court of Appeals read this Court's decision in *People v Hall* as foreclosing Mr. Adamowicz's argument. *Adamowicz*, slip op at 4. Addressing *Lorentzen*, *Hall* states, "rehabilitation[] was not the only allowable consideration for the legislature to consider in setting punishment. '(S)ociety'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." *People v Hall*, 396 Mich 650, 658 (1976). (citing *Lorentzen*, 387 Mich at 180). The assumption in this passage is that a sentence as severe as mandatory life without the possibility of parole for individuals past age 18, is justified (at least in part) by its deterrent effect. Both the appellate court and the *Hall* court were mistaken.

Certainly, during the 1970's when *Hall* was decided, severity of punishment was considered a key aspect of deterring crime. *See* Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, 80 Fed Probation 33, 33-38 (Dec 2016)[13]. Therefore, lawmakers during that era relied on the use of severe sanctions for crime control. *See* Antunes and Hunt, *The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis*, 64 J Crim L & Criminology 486 (1973)[14]. However, understandings of long sentences as deterrents of criminal behavior have evolved significantly over the last four decades.

As the Vera Institute of Justice reported in February 2023, "Study after study [] has shown that people do not order their unlawful behavior around the harshness of sentences they may face, but around their perceived likelihood of being caught and facing any sentence." Nelson, Feineh, & Mapolski, *A New Paradigm for Sentencing in the United States*, Vera Institute of Justice (Feb 2023).[15] Therefore, few researchers continue to believe that life sentences deter crime. *See* Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Just in Am: 1975-2025 (Aug 2013)[16] (noting "lengthy prison sentences and mandatory minimum sentencing cannot be justified on deterrence."); Nat'l Institute of Justice, *Five Things to Know about Deterrence*, US Dep't of Just Office of Just Programs (May 2016) (adopting Nagin's research on the ineffectiveness of long sentences on deterring crime)[17].

Deterrence is especially weak as a goal justifying a life sentence without parole for defendants still within adolescence. A particular sentence can only be a deterrent to criminal behavior before it occurs if the actor thinks about that criminal sentence and makes a rational choice that the costs associated with the serving that sentence outweigh the present benefit of committing the crime. However, it is clear that youth – even up to age 25 – inhibits decision-making. Research shows that "[a]dolescence is a developmental period often characterized as a time of impulsive and risky choices leading to increased incidence of unintentional injuries and violence[.]". Casey, Jones, Somerville, *Braking and Accelerating of the Adolescent Brain*, 1 J Res

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[13] https://www.uscourts.gov/sites/default/files/80_3_4_0.pdf

[14]https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=5880&context=jclc

[15] https://www.vera.org/downloads/publications/Vera-Sentencing-Report-2023.pdf

[16]https://www.jstor.org/stable/pdf/10.1086/670398.pdf?refreqid=excelsior%3Ad8b53701afeca7d46c50a375d818ecf1&ab_segments=&origin=&initiator=&acceptTC=1

[17] https://www.ojp.gov/pdffiles1/nij/247350.pdf

Adolesc 2, 21-33 (2011). [18] Furthermore, "middle adolescents and late adolescents are more likely than adults to change how they make decisions when they are faced with emotional contexts," as they "experience a hyper-sensitivity to emotional content while still developing the purposeful problem-solving that comes with adulthood." *White Paper* at 13. In other words, it is exactly the type of emotionally-charged situation surrounding the offense in this case about which the Court should be the most skeptical. Mandatory life without parole is unlikely to have any deterrent effect on an adolescent.

B. Youth matters when considering the efficacy of incapacitation.

Similarly, the theory of incapacitation is less justified when sentencing adolescents. A LWOP sentence is designed to remove the convicted individual from society permanently. However, current research teaches that for adolescents, this permanent removal is unnecessary because people tend to age out of crime following late adolescence.

The age-crime curve has been considered "[o]ne of the most consistent findings to emerge from criminological research." Bekbolatkyzy, et al, *Aging Out of Adolescent Delinquency: Results From a Longitudinal Sample of Youth and Young Adults*, 60 J Crim Just 108 (2019)[19]. Even accounting for violent offenses, studies consistently show that "the peak age for murder is 20, a rate that is more than halved by one's 30s and is less than one quarter of its peak by one's 40s." Nellis, PhD, *No End in Sight: America's Enduring Reliance on Life Imprisonment*, The Sentencing Project (2021)[20]. Therefore, to avoid excessive punishment, an opportunity for release from prison is essential, especially for individuals who were sentenced as adolescents.

Furthermore, as this Court recognized in *Parks*, a life sentence without parole for a young person necessarily means that they will serve a longer sentence than those sentenced to life as older adults. *Parks,* 510 Mich at 260-61. The Court of Appeals acknowledged this disparity but simply deemed it "an unfortunate fact that the defendant was 21" when he committed the crime "while others may have been a few years older." *Adamowicz*, slip op at 9. However, as the research on aging out of

[18] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3070306/

[19] https://www.sciencedirect.com/science/article/abs/pii/S0047235218302344

[20]https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf

crime suggests, the addition of a few years may just be the time to mature that would make a difference both in the likelihood of a person committing an offense in the first place, and in probability of committing such an offense in the future. Mandating a sentence of LWOP forecloses an opportunity for a person incarcerated during their adolescence to be released once they no longer pose a public safety risk—precisely the result that the framers of Michigan's 1850 Constitution intended to avoid. See *supra* part I.B.

C. Public opinion is moving away from prioritizing retribution and toward supporting opportunities for release from prison.

Today's research on deterrence, rehabilitation, and incapacitation casts doubt on the efficacy of LWOP sentences, leaving retribution as the only purpose undergirding the imposition of severe punishment on adolescents. The concept of retribution relies on the belief that "those who commit certain kinds of wrongful acts, paradigmatically serious crimes, morally deserve to suffer a proportionate punishment." Walen, *Retributive Justice*, The Stanford Encyclopedia of Philosophy (June 2021). The Court of Appeals in this case focused on the gravity of first-degree murder in a vacuum. *See Adamowicz*, slip op at 5. However, in light of the diminished culpability of youth over age 18 and the disproportionate effect of mandatory LWOP on them compared to older adults, this Court should question the position that an LWOP sentence for a person sentenced as an adolescent is permanently morally justified.

Indeed, surveys of Michigan residents reflect significant public support for numerous sentencing reforms that would offer opportunities for release of even adults serving long sentences. See Mahar & Ordway, *Changing The Narrative on Criminal Justice: Michiganders Ready for Reform*, Safe & Just Michigan (Jan 18, 2022)[21] ("Sixty-eight percent of respondents support the idea of a Second Look policy, which would allow people who have served a long time in prison the opportunity to be considered for early release."). The phenomenon of mass incarceration has been the subject of criminal justice reform measures for some time. From the Federal First Step Act and expansion of compassionate release guidelines to current reform proposals to reduce sentence lengths in Michigan, public opinion and legislative action is trending toward increasing opportunities for release from prison in circumstances indicating decreased threats to public safety. A mandatory

[21]https://www.safeandjustmi.org/wp-content/uploads/2022/01/Changing_the_narrative_on_criminal_justice.pdf

life without parole sentence for an adolescent who is likely to mature, reform, and age out of crime during their time in prison is counter to the moral judgment about sentencing that is being reflected in today's criminal justice reform trends in Michigan and throughout the country.

In *Parks,* this Court fairly recognized that youth matters in sentencing as a constitutional matter. 510 Mich at 234-41. Furthermore, "the fact that the United States Supreme Court has decided to draw the line at 17 does not preclude us from drawing a different line pursuant to the broader protections provided by the Michigan Constitution." *Id*. at 247. The Court did just that when the appellants in the case were age 18. The present case offers the opportunity to fully bring constitutional sentencing protections into line with research on adolescent development, and to adhere to Michigan's commitment to prioritize reformation of individuals convicted of crimes.

Conclusion and Relief Requested

For these reasons, this Court should grant leave to appeal, and articulate that Article 1, § 16 of the Michigan Constitution prohibits mandatory life-without parole sentences for *all* late adolescents, including for Mr. Adamowicz who was 21 at the time of his offense.

Respectfully submitted,

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**Admitted to the bar of this Court and that of Illinois. Admission pending to the bar of DC.*

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Date: June 8, 2023

Certificate of Compliance

I hereby certify that this document contains 6,564 countable words. The document is set in Times New Roman, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

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