IN THE MICHIGAN SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
Judges Kelly, Talbot and Murray

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORTEZ ROLAND DAVIS,

Defendant-Appellant.

SC: 146819
COA: 314080
Wayne CC: 94-002089-01-FC

BRIEF OF *AMICUS CURIAE* CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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QUESTIONS PRESENTED

(1) Does the prohibition against "cruel and unusual punishments" found in the Eighth Amendment to the United States Constitution categorically bar the imposition of a life without parole sentence on a defendant under the age of 18 convicted of first-degree murder for having aided and abetted the commission of a felony murder?

Defendant-Appellant answers Yes.

Plaintiff-Appellee answers No.

Amicus Curiae Criminal Defense Attorneys of Michigan answers Yes.

(2) Does the prohibition on "cruel or unusual punishment" found in Const 1963, art 1, § 16, categorically bar the imposition of life without parole on a juvenile defendant convicted of aiding and abetting a felony murder?

Defendant-Appellant answers Yes.

Plaintiff-Appellee answers No.

Amicus Curiae Criminal Defense Attorneys of Michigan answers Yes.

(3) Does the categorical bar on sentencing juveniles to life without parole for aiding and abetting a felony murder apply retroactively, under federal or state law, to cases that have become final after the expiration of the period for direct review?

Plaintiff-Appellee answers No.

Defendant-Appellant answers Yes.

Amicus Curiae Criminal Defense Attorneys of Michigan answers Yes.

INTERESTS OF AMICUS CURIAE

The Criminal Defense Attorneys of Michigan ("CDAM") is an organization consisting of hundreds of criminal defense attorneys licensed to practice in this state. CDAM was organized for the purposes of: promoting expertise in criminal and constitutional law; providing training for criminal defense attorneys to improve the quality of representation; educating the bench, bar, and public of the need for quality and integrity in defense services; promoting enlightened thought concerning alternatives to and improvements in the criminal justice system; and guarding against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws. *CDAM Constitution and By-laws,* Art 1, sec 2.

This Court permits CDAM to file an *amicus curiae* brief without motion for leave from the Court. MCR 7.306(D)(2).

SUMMARY OF ARGUMENT

The sentence of life without the possibility of parole for youth under 18 convicted of felony murder under an aiding and abetting theory—meaning that these youth have not been proven to have killed or intended to kill—violates both the U.S. and the Michigan Constitutions.

Three attributes of these defendants reduce their culpability: (1) their age at the time of the offense and age-related characteristics; (2) their conviction for felony murder, which does not require proof that the individual "intended to kill," and (3) their conviction under an aiding and abetting theory, which does not require proof that the individual personally caused the victim's death, or even that the youth knew his or her co-defendant's intentions.

The limited requirements of the felony murder and aiding and abetting doctrines do nothing to undermine the conviction of these youth, who remain convicted of first-degree murder. It does, however, affect the sentence to which they can be constitutionally subjected.

Under the U.S. Constitution, the confluence of the Court's cases on juvenile sentencing—*Graham*, *Miller*, and *Roper*—and the Court's jurisprudence on the limits of the imposition of the death penalty on adults convicted of felony murder lead to the conclusion that the maximum sentence available for juveniles is not constitutional for this category of youths.

Under the unique language, history and interpretation of our Constitution, the sentence of life without parole for this category of youths also violates our ban on "cruel or unusual punishments." This most severe sentence is disproportionate to the thrice-reduced culpability of these offenders; a comparison of other jurisdictions and within Michigan shows that the sentence is cruel or unusual; and the punishment fails to meet the goals of rehabilitation, deterrence or retribution.

Finally, a categorical rule banning the punishment would be applied retroactively.

ARGUMENT

I. Imposition of a Life Without Parole Sentence on a Youth Under 18 Convicted of Felony Murder Under An Aiding and Abetting Theory Violates the Eighth Amendment of the U.S. Constitution. These Youths, Constitutionally Distinct for Eighth Amendment Purposes, Have Not Been Proven to Have Either Killed Or Intended to Kill And Cannot Receive Michigan's Most Severe Punishment.

The United States Supreme Court's Eighth Amendment jurisprudence cements the relationship between culpability and exposure to the most severe punishment. The Constitutional prohibition of "cruel and unusual punishment," US Const, Am VIII, requires proportionality between a crime and its penalty. *See, e.g.*, *Weems v United States*, 217 US 349, 367; 30 S Ct 544, 549; 54 L Ed 793 (1910) (describing the "precept of justice that punishment for crime should be graduated and proportioned to offense."). When evaluating the proportionality of a criminal punishment under the Eighth Amendment, the Supreme Court looks to "evolving standards of decency that mark the progress of a maturing society." *Trop v Dulles*, 356 US 86, 101; 78 S Ct 590, 598; 2 L Ed 2d 630 (1958). The Court has not hesitated to prohibit punishments that inaccurately reflect the actual culpability of the crime itself and/or the individual characteristics of the defendant. See, e.g., *Atkins v Virginia*, 536 US 304; 122 S Ct 2242; 153 L Ed 2d 335 (2002) (abolishing the execution of "mentally retarded" defendants); *Coker v Georgia*, 433 US 584; 97 S Ct 2861; 53 L Ed 2d 982 (1977) (prohibiting the death penalty for the crime of rape of adult women).

More specifically, two strains of Eighth Amendment doctrine converge to show that life without the possibility of parole is an unconstitutional punishment for youths under the age of 18 who are convicted of felony murder and, through the choice to prosecute under an aiding and abetting theory, are not proven to have killed, intended to kill, or even to have played a significant role in the death of another.

The first line of cases reflects the lesser culpability of juveniles facing the punishment of life without parole. See *Miller v Alabama*, 132 S Ct 2455; 183 L Ed 2d 407 (2012); *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010). The Eighth Amendment prohibits sentencing juveniles to life without parole for all but the most culpable juvenile offenders. Specifically, *Graham* makes clear that juveniles "who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment" than those who harbor and act on an intent to kill. *Graham*, *supra* at 69. Coupling a lack of actual or intentional wrongdoing with the generally "diminished culpability of juveniles" relative to adults, *Roper v Simmons*, 543 US 551, 571; 125 S Ct 1183, 1196; 161 L Ed 2d 1 (2005), yields what the Court has called a juvenile's "twice diminished moral culpability." *Graham*, *supra* at 69. These less culpable children must at minimum be given a "meaningful opportunity" for release in order to demonstrate their potential for rehabilitation. *Id.* at 48. A sentence of life without parole cannot provide that opportunity. Notably, the Court explained that the "impetuousness and recklessness" of youth often disappears in adulthood. *Roper*, *supra*, at 570. As a result, the Court has been reluctant to impose the most severe punishments on children who have "difficulty . . . weighing long-term consequences" and "a corresponding impulsiveness" that likely reflects neither the potential for rehabilitation nor the likelihood of recidivism later in life. *Graham*, *supra* at 78. Indeed, the *Miller* court hinted that sentencing juveniles to life without parole will almost always be disproportionate, noting that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller*, *supra* at 2469.

The second strain of precedent involves the Court's long-standing bar on imposing the most extreme punishment for those who, even though properly convicted of murder, are not shown to have a substantial role in the crime, do not kill, and do not intend to kill. *Tison v*

Arizona, 481 US 137; 107 S Ct 1676; 95 L Ed 2d 127 (1987); *Enmund v Florida*, 458 US 782; 102 S Ct 3368; 73 L Ed 2d 1140 (1982). The Court has long held that the defendant's mental state is crucial to determining his culpability. *See, e.g.*, *Lockett v Ohio*, 438 US 586; 98 S Ct 2954; 57 L Ed 2d 973 (1978); *Eddings v Oklahoma*, 455 US 104; 102 S Ct 869; 71 L Ed 2d 1 (1982). In *Lockett*, for example, the Court overturned a death sentence because the sentencing court did not consider "[t]he absence of direct proof that the defendant intended to cause the death of the victim." *Lockett*, *supra* at 608 (opinion of Burger, C.J.); *see also Eddings v Oklahoma*, 455 US 104; 102 S Ct 869; 71 L Ed 2d 1 (1982) (adopting position of *Lockett* plurality).

The Court has consistently reserved the death penalty in felony murder cases for only the most culpable offenders. In *Enmund*, the Court banned the most extreme punishment for an adult who "aids and abets a felony in the course of which a murder is committed," but where the adult "did not commit and had no intention of committing or causing" the murder. *Enmund*, *supra* at 797, 801. In *Tison*, the Court found that the death penalty could not be imposed on "the minor actor in [a felony] . . . who neither intended to kill nor was found to have had any culpable mental state." *Tison*, *supra* at 158 (affirming the death penalty for offender who had a major role and whose proven mens rea was reckless indifference to human life).

The Supreme Court's jurisprudence leads to the conclusion that imposing life without parole on juveniles who are convicted of aiding and abetting a felony murder but are not shown to have killed or intended to kill constitutes "cruel and unusual punishment" in violation of the Eighth Amendment. *See infra* II.A.2 & II.A.3 (discussing felony murder and aiding and abetting doctrine in Michigan). *Graham* and *Miller* establish not only that juveniles are less culpable than adults generally, but also that life without the possibility of parole disproportionately punishes a

juvenile who neither kills nor intends to kill. *See also Miller*, *supra* at 2475 (Breyer, J., concurring) (suggesting that the Eighth Amendment prohibits sentencing a juvenile defendant who did not "kill[] or intend[] to kill" to life without parole "regardless of whether its application is mandatory or discretionary under state law"). *Enmund* and *Tison* lend further support to that proposition: when a defendant is convicted of felony murder but neither intends to nor actually kills another, the most severe penalty is inappropriate. The same rule must extend to juveniles, especially given their "twice diminished moral culpability." *Graham*, *supra* at 69. Collectively, these cases show that sentencing a juvenile to life without parole is unconstitutional for the crime of aiding and abetting a felony murder without proof that the juvenile killed or intended to kill.

II. The Imposition of A Life Without Parole Sentence On a Juvenile Convicted of Felony Murder Under An Aiding And Abetting Theory Violates the Michigan Constitution.

Our constitution mandates that "cruel or unusual punishment shall not be inflicted." Const 1963, art 1, §16. For over 40 years, this Court has given independent meaning to this constitutional language and required that punishments be proportionate to the offense. *See People v Lorentzen*, 387 Mich 167; 194 NW2d 827 (1972) (surveying cases from 1879 onward before applying proportionality analysis). Our state's individual approach is tailored to the text of our constitution and the history of our sovereign. *People v Bullock*, 440 Mich 15, 30–34; 485 NW2d 866 (1992).

As such, this Court examines, first, the gravity of the offense, the offender, and the harshness of the punishment. *Lorentzen*, *supra* at 176; *Bullock*, *supra* at 33–34. In the context of this case, this analysis encompasses three distinct aspects of diminished culpability addressed by this Court's question presented: (1) youth under 18, (2) felony murder, and (3) aiding and abetting. Next, the Court compares the sentences imposed for similar offenses in other

jurisdictions and examines the sentences imposed on other offenders in Michigan. *Lorentzen*, *supra* at 176–79; *Bullock*, *supra* at 33. Finally, this Court addresses a "fourth criterion rooted in Michigan's legal traditions, and reflected in the provision for 'indeterminate sentences' of Const 1963, art 4, §45: the goal of rehabilitation." *Bullock*, *supra* at 34 (citing *Lorentzen*, *supra* at 179–81). In addition to failing to serve the goal of rehabilitation, the imposition of life without parole on a youth convicted of felony murder under an aiding and abetting theory also fails to serve penological goals of deterrence or retribution.

Appellee urges this Court to retreat from our state's unique constitutional scrutiny given to punishments. These arguments fail for a number of reasons. First, enforcing our constitutional text in the same manner as the Eighth Amendment text would ignore the Court's admonitions to first look at the usual meaning of a constructional text, *American Axle & Mfg v City of Hamtramck*, 461 Mich 352, 362; 604 NW2d 330 (2000) (When the constitutional language is clear, "reliance on extrinsic evidence [is] inappropriate . . . ."), as well as its requirement to give meaning to distinct textual provisions. *See, e.g.*, *Coblentz v City of Novi*, 475 Mich 558, 572; 719 NW2d 73 (2006) (citing *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931)) ("The words chosen by the Legislature are presumed intentional. We will not speculate that it used one word when it meant another."). As Justice Cooley advised, "[w]here a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." Cooley, Constitutional Limitations 55 (1868). Second, it would ignore the *stare decisis* of a line of this Court's cases, extending from shortly after the 1963 Constitution's adoption until today and consistently used by the Court of Appeals. *Lortenzen*, *supra* (1972 case); *Bullock*, *supra* (1992 case).

Further, the historical record from *our* constitution—as opposed to sources addressing the U.S. Constitution—does not support Appellee's view. As this Court has noted, our original constitution used the language "or", taken from the Northwest Ordinance 1787. *Lorentzen*, *supra* at 172, n3. The language was changed to "cruel and unjust punishment" in the 1835 Constitution. Const 1835, art 1, §18. Then, in 1850, the Constitutional assembly debated and adopted a change of the language to "cruel or unusual." Const 1850, art. 6, §31. It is undeniably true that we should not ignore, without some support, this explicit change of language. *See Journal of the Constitutional Convention of the State of Michigan*. 1850, at 65 (constitutional debate proceedings when language change occurred).[1] Additionally, at a minimum, there is some historical support for both a broader reading of the 1850 language and the proposition that the constitutional assembly intended this constitutional language to reflect current sentiments regarding what is cruel or unusual. See *Report of the Proceedings and Debate of the Convention to Revise the Constitution of the State of Michigan. 1850.* (Lansing, 1850), at 45. Specifically, an amendment to the constitution was proposed that would have eliminated language such as "unusual punishments" because this language is ill-defined and changes over time. This amendment was voted on and specifically rejected by the delegates to the 1850 constitutional convention.[2] These delegates understood the provision that they had adopted, knew that it would

[1] According to the proceedings of the 1850 constitution, the words "and unjust" were deleted, and the words "or unusual" were added to the provision of the Bill of Rights at issue (at that time, listed at Section 17). *See id*.

[2] During the debates on June 10, the following was recorded:

> Mr. HANSCOM was opposed to incorporating in the bill of rights, or any article of the Constitution, those undefinable terms, such as "excessive bail," "unusual punishments," &c. It seemed to him to involve absurdity on its face; it was a species of verbiage without any real or beneficial effect on the action of courts. All those terms which have no meaning, or vary from day to day, are unnecessary, and improper to be incorporated in the Constitution.
>
> The question was taken on the amendment and lost.

be defined based on societal standards of the time, and voted to retain our Constitution's language.

Our constitutional ban on "cruel or unusual punishment" has continued forward to today. This Court has consistently recognized the textual and historic differences of our unique sovereign in developing a Michigan-specific test for constitutionality that examines the proportionality of punishment. Under our Constitution, as described below, the sentence of life without parole for youth convicted of felony murder under an aiding and abetting theory is unconstitutional.

A. The Severity of the Punishment of Life Without Parole Is Disproportionate to the Offense of Felony Murder Under An Aiding and Abetting Theory; These Youth Have Not Been Proven to Have Killed or Intended to Kill.

Three attributes of the defendants in question reduce their culpability: (1) their age at the time of the offense and age-related characteristics; (2) their conviction for felony murder, which does not require the state to prove that the individual "intended to kill," and (3) their conviction under an aiding and abetting theory, which does not require the state to prove that the individual personally caused the victim's death, or even that the youth knew his or her co-defendant's intentions. Yet despite their diminished culpability, these youth are serving the most severe sentence available in our state, Const 1963, art 4, §46 (banning the death penalty), and the most severe penalty available for any person under 18 years old in the United States. *Roper*, *supra* at 578.

The combination of these three elements—youth, felony murder, and aiding and abetting—means that these offenders were under 18 at the time of their offense, were not proven

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to have "killed or intended to kill," and, yet, are serving the state's most extreme punishment. *Cf. Graham, supra,* at 69. This divergence between the severity of the penalty and the culpability of the offender strongly counsels that the sentence of life without the possibility of parole—whether imposed by mandate or discretionary decision—violates the Michigan Constitution.

1. The Chronological Age of These Youth Make a Sentence of Life Without Parole Disproportionately Severe.

Youth are different—biologically and as a matter of U.S. and Michigan constitutional and statutory law.[3]

The U.S. Supreme Court made the Eighth Amendment treatment of youth abundantly plain—"children are constitutionally different from adults for purposes of sentencing." *Miller*, *supra* at 2464. Due to their "diminished culpability and greater prospects for reform, . . . '[youth] are less deserving of the most severe punishments.'" *Id*. (citing *Graham*, *supra* at 68). The Court has consistent remarked that youth have a "lack of maturity and have an underdeveloped sense of responsibility," that they are "susceptible to negative influences" and pressures from peers, and that their character is not fixed or fully developed. *Roper*, *supra* at 569–70 (internal citations omitted). These characteristics show that youth cannot be considered the worst offenders for purposes of sentencing. *Id.*

Additionally, our precedents under the Michigan Constitution have given special attention to youthful offenders in constitutional sentencing analysis. *See, e.g., Bullock, supra,* at 38 (finding it "cruel or unusual" that "[t]he penalty would apply to a teenage first offender who

[3] This point is more fully developed by the parties and other amici, to which Amicus CDAM refers the Court. *See, e.g.*, Brief of Ad Hoc Committee Comprised of Former Officials of the Michigan Department of Corrections and Correctional, Penological, Public Safety and Mental Health Organizations Together with Individual Experts as *Amicus Curiae* in Support of Appellant.

acted merely as a courier."); *Lorentzen*, *supra*, at 176 (noting with concern that the punishment would apply to a marijuana sale by "a first offender high school student").

The disproportionate severity of imposing Michigan's harshest sentence on youth reflects both our societal recognition of the immaturity, lack of future-orientation and anticipation of the consequences of risky behavior of teens, and our current understanding of youth based on neuroscience and developmental psychology.[4]

In many other provisions of our state law, we recognize that youth lack the judgment and experience to make good choices for themselves and lack the ability to foresee and evaluate risk. For example, we do not permit unaccompanied young drivers on the road and do not allow them to drive their peers, because we recognize that these youth engage in risky behavior—behavior that is magnified when surrounded by the pressures of their peers. *See, e.g.*, MCL 257.310e(6) (restricting drivers who are 16 with a Level 2 permits from driving with more than one passenger under 21 in the car); MCL 257.602c (banning mobile phone use by teen drivers).[5] We place significant restrictions on the ability of youth to choose to engage in other risky behavior, such as smoking or drinking alcohol, because we recognize that teens do not engage in future-oriented decisionmaking and make ill-informed decisions. *See, e.g.*, MCL 722.642 (prohibiting person under 18 from possession or use of tobacco products); MCL 28.462(2) (banning sale of consumer fireworks to minors). More generally, youth are subject to innumerable restrictions on

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[4] *See supra* note 3; *see also infra* note 28 (listing a sampling of relevant scientific literature).

[5] The Secretary of State's webpage highlights the same issues raised before this Court. It states:

> **Facts About Teen Drivers** . . . .The human brain doesn't fully develop until an individual is in his or her 20s. The brain functions that affect judgment and risk-taking are among the last to mature.

See Department of State, Teen Driver, available at: http://www.michigan.gov/sos/0,4670,7-127-1627_60169---,00.html.

their choices—including mandatory school attendance,[6] restrictions on the ability to marry,[7] inability to be emancipated,[8] and so on—because our state recognizes that teens have poor judgment and take action without consideration of the future consequences. *See also* MCL 168.492 (must be 18 years old to register to vote); MCL 600.1307a (must be 18 to serve on a jury).

Our federal and state constitutional law, as well as our statutory provisions that seek to protect minors from the effects of their own ill-conceived and risky behavior, show that youth must be treated differently for purposes of sentencing. Youth are less culpable than adults, especially when convicted of an offense for which they are expected to foresee the implications of risky conduct and are engaged in that conduct with a peer. The sentence of life without the possibility of parole is disproportionate for these youth.

2. The Offense of Conviction, Felony Murder, Does Not Require Proof of an Intent to Kill and, as a Result, the State's Most Severe Punishment is Disproportionate.

Felony murder is unique – and heavily criticized – because it classifies a crimes that does not require proof of intent as the most serious offense—in Michigan, first-degree murder. That intent is usually thought of as the hallmark of the most culpable offenders. *See, e.g.*, Nelson E. Roth & Scott E. Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446, 490–91 (1985) (criticizing felony murder);[9] *see generally Tison*, *supra* at

[6] MCL 409.104; MCL 380.1561.
[7] MCL 551.51; MCL 551.201.
[8] MCL 722.4c (to be emancipated, minor must be at least 16 years old, has the burden to show that he or she can manage financial, personal and social affairs, and a court must determine that it is in the minor's best interest).
[9] Roth and Sundby colorfully note: "Criticism of the rule constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine: it has been described as 'astonishing' and 'monstrous,' an unsupportable 'legal fiction,' 'an unsightly wart on the skin of the criminal law,' and as an 'anachronistic remnant' that has 'no logical or practical basis for existence in modern law.'" *Id.* (internal citations omitted).

156 ("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."). In addition to general unease with the felony murder doctrine, states are reluctant to impose their most severe punishment for felony murder convictions without additional proof of an intent to kill or principal liability. *See infra* at II.C. (detailing states' laws barring imposition of the death penalty and lack of execution of those convicted of aiding and abetting felony murder).

In Michigan, this unease led in part to this Court's decision in *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980). The *Aaron* Court surveyed the history of the felony murder doctrine, *id.* at 689–99, and its limitations in various jurisdictions around the country. *Id.* at 699–707. It highlighted the "primitive rationale" of the doctrine and focused extensively on the doctrine's "failure to account for a defendant's moral culpability." *Id.* at 709. The Court further noted that the rule's "most egregious violations of basic rules of culpability occur[] where felony murder is categorized as first-degree murder." *Id.* at 708.[10]

While this brief will not revisit the entire history of the rule, a few points merit attention. The doctrine has been statutorily or judicially limited in a range of ways—such as adding heightened mens rea requirements, limiting the underlying offenses, and other methods—in an attempt to align it more closely with our common understanding of criminal culpability. *See, e.g.*, *Aaron*, *supra*, at 699–708. As an example, in 1794 Pennsylvania passed what is largely seen as the first felony-murder statute, which provided that murder in the perpetration of

[10] It is worth noting that while the vast majority of juveniles sentenced to life without parole for felony murder were convicted after *Aaron*, approximately 30 persons who were under 18 at the time of the offense are still serving life without parole for offenses that occurred prior to *Aaron*. Counsel for Amicus CDAM estimates that approximately half of these cases involve felony murder offenses.

enumerated felonies constituted first-degree murder. Act of Apr. 22, 1794, ch. 1766, § 2, 1794 Pa. Laws 186, 187. The Michigan legislature adopted Pennsylvania's statute verbatim. *Aaron, supra* at 718. Pennsylvania itself later retreated from this position, reclassifying felony murder as second-degree murder. 18 Pa Cons Stat Ann § 2502(b). Additionally, the "usual" historical story of the common law source for a harsh felony murder rule has, upon careful inspection, been called into question. *See, e.g.*, Guyora Binder, *The Origins of American Felony Murder Rules,* 57 Stan. L. Rev. 59 (2004) ("[T]here is something suspicious about our received account of the origins of American felony murder rules. This Article vindicates such suspicion and exposes the harsh 'common law' felony murder rule as a myth.").[11]

After *Aaron,* Michigan requires that individuals convicted of felony murder be proven to have "an intent to kill, an intent to do great bodily harm or wanton and willful disregard of the likelihood that the natural tendency of a person's behavior is to cause death or great bodily harm." *Id.* at 727–28. The first-degree murder statute essentially elevates an offense which is already a murder, based on either intentional or reckless conduct, to a first-degree murder, based on its occurrence with an enumerated felony. *Id.* at 718–21.

Assigning this most severe culpability based on an assessment of risk that is used for a felony murder conviction is at odds with we know from common sense, science, and Eighth

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[11] At least some of the founders were not comfortable with holding individuals for felony murder or classifying unintentional killings as murder.

> And where persons, meaning to commit a trespass only, or larceny, or other unlawful deed, and doing an act from which involuntary homicide hath ensued, have heretofore been adjudged guilty of manslaughter, or of murder, by transferring such their unlawful intention to an act much more penal than they could have in probable contemplation; no such case shall hereafter be deemed manslaughter, unless manslaughter was intended, nor murder, unless murder was intended.

Thomas Jefferson, A Bill for Proportioning Crimes and Punishments, 1778, *in* 5 The Founders' Constitution 375 (Philip B. Kurland & Ralph Lerner ads. 1987).

Amendment caselaw about young people.[12] It is precisely because of their age and attendant circumstances that youth do not fully appreciate the risks of their actions, which an older, and thus more mature, person would not take. *See, e.g.*, *Miller*, *supra* at 2458 ("Their lack of maturity and underdeveloped sense of responsibility lead to recklessness, impulsivity, and heedless risk-taking." (internal quotations omitted)).

In sum, individuals convicted of felony murder are never proven to have an "intent to kill," or even an intent to do any harm to the victim. Instead, the factfinder need only find that that there was a risk, which was recklessly ignored by the defendant. Thus, the doctrine disproportionately punishes even youth who have been shown to have directly committed the felony murder.

3. The Fact That These Youth Were Convicted Under An Aiding and Abetting Theory Means That These Youth Were Not Proven to Have Killed Or Intended to Kill; The State's Most Severe Punishment Is Disproportionate.

A conviction obtained under an aiding and abetting theory further lessens the culpability that is proven against an offender: an individual convicted of felony murder under aiding and abetting has not been proven to have killed, or have intended to kill. Instead, that defendant is convicted of first-degree murder—our most serious offense—based on proof of probabilistic consequences of impetuous youthful action and assumptions about a youth's appreciation of risk that need not be subjectively held by that individual. The conviction of first-degree murder is not the problem. Rather, the problem is the sentence of life without the possibility of parole for young people who have not been proven to have killed or intended to kill.

[12] Amicus CDAM assumes that the factfinder is required to find a subjective appreciation of risk, but this may not, in fact, be true in all cases, as this Court has not ruled on whether the mens rea requirement is a subjective or objective test. *See People v Goecke*, 457 Mich 442; 579 NW2d 868 (1998). To the extent that these youth are convicted based on an objective assessment, and not their subjective understanding, the argument in this section is only magnified, as the factfinder could have convicted without proof of what the youth actually considered or intended.

In Michigan, aiding and abetting is not a separate offense; it is a theory of liability. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006); *People v Perry*, 460 Mich 55, 63 n20; 594 NW2d 477 (1999). This Court has remarked that, "like felony murder," aiding and abetting "allows the state to punish a person for the acts of another." *Robinson*, *supra* at 6. Under our law, the state must prove that "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." *Id*. at 6 (internal citations omitted). Michigan law prescribes the same punishment for someone convicted under an aiding and abetting theory as for someone convicted as a principal without an aiding and abetting instruction. MCL 767.39.[13]

Some jurisdictions, concerned by the implications of accomplice liability, require a heightened mens rea for aiding and abetting, especially when the offense at issue is one for which a lesser mens rea is sufficient. *See generally* Wayne R. LaFave, *Criminal Law* § 13.2 (5th ed. 2010). In Michigan, by contrast, "[c]onviction of a crime as an aider and abettor does not require a higher level of intent with regard to the commission of the crime than that required for conviction as a principal." *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001).

Further, under Michigan's law, as defined by this Court's cases, a defendant is guilty not only for the offense that he intends to aid and abet, but also for those offenses that are the "natural and probable consequences" of that offense. *Robinson*, *supra*. This Court looked to the

[13] MCL 767.39 states: "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." Amicus CDAM and Appellant believe that this statute, as applied to the narrow category of cases at issue in this appeal, is necessarily unconstitutional.

common law for its adoption of this doctrine. *See id*. at 7 (citing Perkins, Criminal Law (3d ed.), pp. 741–43). As a result of the natural and probable consequences doctrine, defendants are held liable not only if "(1) the defendant intends or is aware that the principal is going to commit a specific criminal act;" but also if "(2) the criminal act committed by the principal is an 'incidental consequence[] which might reasonably be expected to result from the intended wrong.'" *Robinson*, *supra* at 9 (internal citation omitted).[14] As the "broadest approach" to accomplice liability,[15] the natural and probable consequences doctrine is criticized by "[m]ost commentators . . . as both 'incongruous and unjust' because it imposes accomplice liability solely upon proof of foreseeability or negligence when typically a higher degree of mens rea is required of the principal." Audrey Rogers, *Accomplice Liability for Unintentional Crimes Remaining Within the Constraints of Intent*, 31 Loy. L.A. L. Rev. 1351, 1361 (1998); Wayne R. LaFave, *Criminal Law* § 13.3(b), at 726 (5th ed. 2010) (explaining that the natural and probable consequences doctrine permits criminal "liability to be predicated upon negligence even when the crime involved requires a different state of mind.").[16]

The import of our aiding and abetting law for juveniles sentenced for life without parole is that they were convicted of first-degree murder without the jury or judge finding that the youth

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[14] *See also* Baruch Weiss, What Were They Thinking?, *The Mental States of the Aider and Abettor and Causer Under Federal Law*, 70 Fordham L. Rev. 1341, 1424 (2002) (stating that the natural and probable consequences doctrine provides "that once the aider and abettor abets the principal's commission of an initial crime, he or she is also liable for any consequent crime committed by the principal, even if he or she did not abet the second crime, as long as the consequent crime is a natural and probable consequence of the first crime).

[15] John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. Rev. 237, 240 (2008) (describing the other two approaches, from greater to lesser burden, as requiring specific intent and requiring the same mens rea for the offense of conviction as the principal); see also Sam Kamin & Justin Marceau, *Vicious Aggravators*, 65 Fla. L. Rev. 769, 801 (2013) (calling natural and probable consequences doctrine the "apex of vicarious liability" in which "foreseeability is the only restraint on the defendant's culpability.")

[16] For another example of critical comments, *see, e.g.*, Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 Calif. L. Rev. 323, 351–52 (1985).

had either killed, or intended to kill. To obtain a conviction under current law, the state did not need to prove that the young defendant even knew that the co-defendant was going to commit the criminal act. Instead, the state had to prove merely that a death might "reasonably be expected to result" from the felony that the youth was proven to aid and abet. *See Robinson*, *supra*. Without having proven that they killed or intended to kill, or even that the youth had knowledge that the death would occur, punishing these individuals as if they were principals "would be inconsistent with the most basic norms of our system of justice." *Bullock*, *supra* at 38 n19 (declining to hold defendants for an offense perhaps could have been charged and proven, but was not).

Appellee's brief spends significant time and space debating Cortez Davis' factual role in the offense for which he was convicted of aiding and abetting felony murder. *People v Davis,* Appellee's Brief on Appeal, No. 146819, at 10–14. *Amicus* CDAM is not familiar with the factual record in Cortez Davis' case, but the fundamental fact remains that Davis was not proven to have killed or intended to kill. As all parties agree, aiding and abetting is a "theory of prosecution." *Perry*, *supra*. By choosing to pursue a conviction based on a theory of aiding and abetting, the state lessens its evidentiary burden at trial. Further, an aiding and abetting instruction is only proper if there is evidence to support it. *See, e.g*., *People v Parks,* 57 Mich App 738; 226 NW2d 710 (1975) (finding reversible error where the trial court gave an aiding and abetting instruction without evidence to support that another person, and not defendant, committed the offense). There may be a few cases in which youth were convicted of aiding and abetting felony murder where the state *might* have proven, had it chosen to, that the youth was guilty of felony murder without an aiding and abetting instruction. But in Mr. Davis' case and the others under consideration by the Court, the state chose to pursue a path of lesser proofs.

Nothing in this choice changes the fact that these youth before the Court were never proven to have killed or intended to kill, yet they are sentenced to the most severe punishment available.

One additional, though perhaps obvious, point is worth stating with respect to aiding and abetting. A case pursued under an aiding and abetting theory necessarily means that more than one person was alleged to be involved in the offense. The fact that each and every one of these cases involved a youth who was involved in the offense with a peer reminds us of the U.S. Supreme Court's admonitions regarding the negative influence of peers on juveniles, and juveniles' immature susceptibility to these pressures. *See, e.g.*, *Graham*, *supra* at 68.

In sum, the combination of our felony murder and our aiding and abetting rules means that persons convicted of aiding and abetting felony murder have been convicted on proofs that do not require that the individual either killed or intended to kill. Indeed, under the natural and probable consequences doctrine, these youth were not proven to have knowledge that their co-defendant would kill. For youth under 18, the imposition of the sentence of life without parole—whether discretionary or mandatory—for an offense in which they have not been proven to have killed or intended to kill is unconstitutional.

B. A Comparison With Other States Also Suggests That Sentencing Juveniles Convicted of Felony Murder Under An Aiding And Abetting Theory Is Cruel Or Unusual Punishment.

A comparison with other states shows that (1) there is a trend away from the imposition of life without parole on juveniles, either mandatorily or discretionarily; (2) in those states that have changed juvenile homicide sentencing after *Miller*, a few specifically target felony murder or aiding and abetting for more lenient treatment; and (3) when states are considering the imposition on adults of the most severe punishment available—the death penalty—states carve

out exceptions beyond what is constitutionally required for felony murder and aiding and abetting.

First, both before and after *Miller*, more and more states have completely banned the imposition of life without parole for juveniles or have changed their laws so that all juveniles have a meaningful opportunity for release. Eleven states and the District of Columbia prohibit by statute sentences of life without parole for juveniles convicted of any crime, including felony murder.[17] Of these states, nine have done so in the past eight years. Additionally, the Massachusetts Supreme Court recently ended the practice of life without parole in that state, holding that even the discretionary imposition of juvenile life without parole violates the Massachusetts constitution. *Diatchenko v Dist Attorney for Suffolk Dist*, 466 Mass 655, 660; 1 NE3d 270 (2013).

Other states have moved to require or allow sentence reconsideration for youth of convicted of homicide. For example, Delaware now allows sentencing courts to permit sentence modification for juveniles convicted of first-degree murder after they have served 35 years of their sentence. Del Code Ann tit 11, § 4217(f). California enacted the Fair Sentencing for Youth Act, which establishes periodic parole and resentencing opportunities for juveniles previously sentenced to life without parole. Cal Penal Code § 1170(d)(2)(A). The California law also specifically asks courts to consider whether the juvenile was convicted of either felony murder or aiding and abetting a murder when resentencing. *Id.* at § 1170(d)(2)(B)(i). Nebraska requires that any juvenile who is denied parole receive consideration by the state parole board each year

[17] See Alaska Stat § 12.55.125; Colo Rev State Ann § 18-1.3-401(4)(b)(I); DC Code § 22-2104; Kan Stat Ann § 21-6618; Ky Rev Stat Ann § 640.040 (for juveniles under the age of 16); Mont Code Ann § 46-18-222(1); NM Stat. Ann. §31-21-10; NY Penal Law § 70.05; Or Rev Stat § 161.620; Tex Penal Code Ann § 12.31; Wyo Stat Ann § 6-2-101(b); Utah Code Ann §§ 76-5-202(3)(e) & 3-207.7.

thereafter. Neb Rev Stat § 83-1,110.04(1). Similarly, some states that have acted post-*Miller* have enshrined in their legislation the diminished culpability of felony murder. For example, Pennsylvania, which classifies felony murder as second-degree murder, recently reduced sentences for juveniles convicted of that crime. 18 Pa Cons Stat Ann § 2502(b). These youth are now subject to discretionary 30-year minimums for 15- to 17- year-olds, or 20-year minimums for juveniles under 15. *Id*. at § 1102.1(c). In contrast, juveniles convicted of intentional first-degree murder receive discretionary minimums of 35 or 25 years, respectively. *Id.* at § 1102.1(a). Adult defendants convicted of felony murder must be sentenced to life imprisonment. *Id*. at § 1102(b). Thus, the state from which the felony murder doctrine originated now recognizes not only that the offense is less culpable than other homicides, but also that the juvenile defendant deserves a lesser penalty.

A comparison of death penalty states' treatment of felony murder and aiding and abetting is also instructive. A majority of states allowing capital punishment have extended the limitation on imposing the death sentence for aiding and abetting felony murder beyond the constitutional floor established in *Enmund* and *Tison*.

"The death penalty is the most severe punishment" in the American criminal justice system. *Roper v Simmons*, 543 US 551, 568; 125 S Ct 1183, 1194; 161 L Ed 2d 1 (2005). Eighteen states do not impose the death penalty for any crime. Death Penalty Information Center, *States With and Without the Death Penalty*, *available at* http://www.deathpenaltyinfo.org/states-and-without-death-penalty. Of the thirty-two states with the death penalty, six either do not execute defendants convicted of felony murder at all, or

require that the defendant be proven to have actually killed the victim.[18] Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 Am Crim L Rev 1371, 1412–22 (2011). Nine additional states do not impose the death penalty for felony murder absent a finding of intent to kill.[19] *Id.* Seven more require some showing of knowledge or aggravation beyond the mere felony murder conviction.[20] *Id.*; *see, e.g.*, Neb Rev Stat § 29-2523 (excluding the commission of a felony murder as an aggravator); Nev Rev Stat Ann § 200.033(4)(b) (requiring that, for felony murder to constitute an aggravator, the defendant must have killed or known that lethal force would be used); Wyo Stat Ann § 6-2-102(h)(xii) (requiring that, for felony murder to constitute an aggravator, the defendant must have killed "purposely and with premeditated malice").

In other words, only ten of the fifty states impose the most severe punishment available for felony murder where the defendant neither intended to kill nor actually killed the victim.

Even in those ten states, the death penalty is almost never imposed on individuals who were not proven to have killed or have intended to kill. Of 591 executions between 1987, when the Supreme Court decided *Tison v Arizona*, and 2010, only three unintentional accomplice felony murder defendants were put to death. *Id.* (citing Criminal Justice Project of the NAACP Legal Defense and Educational Fund, Inc., Death Row U.S.A. 10–31 (Fall 2010), *available at* http://naacpldf.org/death-row-usa). Thus, even where the letter of the law permits the most extreme punishment for adults, the most severe penalty is not imposed. The other forty states recognize implicitly that felony murder and prosecution under an aiding and abetting theory are

[18] Missouri, Pennsylvania, and Washington bar executing defendants convicted of felony murder. Georgia, Oregon, and Virginia do not impose the death penalty on non-triggerpersons.

[19] Alabama, Indiana, Kansas, Louisiana, Mississippi, Montana, Ohio, Utah, and Wyoming require an intent to kill to be death-eligible.

[20] Nebraska, Nevada, New Hampshire, North Carolina, Oklahoma, South Dakota, and Tennessee require knowledge or additional aggravators.

less blameworthy than other types of homicide, precisely because they lack individual culpability and intentionality of other homicide offenses.

In this vast majority of states, state courts have echoed the concerns raised by this Court in *Aaron*. For example, the Alabama Supreme Court held that "[n]o defendant can be found guilty of a capital offense unless he had an intent to kill, and that intent to kill cannot be supplied by the felony-murder doctrine." *Ex parte Woodall*, 730 So 2d 652, 657 (Ala 1998). Similarly, the Louisiana Supreme Court held that a defendant who neither killed nor intended to kill was properly convicted of second-degree murder, rather than capital murder. *State v Bridgewater*, 823 So 2d 877, 890–91 (La 2002). The Mississippi Supreme Court reached a similar conclusion. *Randall v State*, 806 So 2d 185, 233–34 (Miss 2001) (overturning a death sentence for felony murder absent intent to kill, even though the defendant carried a firearm when the crime was committed).

In sum, forty states do not impose the death penalty—the most severe punishment available for adults—for aiding and abetting a felony murder without killing or intending to kill. Neither should juveniles convicted of the same crime face life without parole—the most severe punishment available for children. The Supreme Court explicitly drew this parallel between the death penalty for adults and life without parole for juveniles, in that both are "irrevocable" and "deprive [the defendant] of the most basic liberties without giving hope of restoration." *Graham*, *supra* at 69–70. More and more states have responded to these truths, either by prohibiting juvenile life without parole sentences generally, or by decreasing the penalty for juveniles convicted of felony murder specifically. Accordingly, a survey of state laws counsels against a sentence of life without parole for aiding and abetting a felony murder.

C. Compared to Other Offenders In Michigan, And Even to Their Own Co-Defendants, the Sentence of Life Without Parole Is "Cruel Or Unusual."

Within Michigan, the punishment of life without parole for a juvenile offender convicted of felony murder under an aiding and abetting theory is disproportionate in two ways. First, it is disproportionate because our legislature has clearly signaled that with greater *mens rea* comes increased culpability and, specifically, that other offenses eligible for life without parole largely require proof of purpose or knowledge. Second, when compared to their co-defendants in the same offense, the most severe sentence of life without parole is disproportionate for the juvenile co-defendant who was only proven to have aided and assisted in the felony murder.

1. Mens rea matters.

In Michigan, *mens rea* matters: it serves to distinguish more culpable from less culpable offenders. In section after section of our code, the legislature has distinguished more culpable from less culpable offenders through differentiation by the mental state required. *Compare, e.g.*, MCL 324.8216a (careless or negligent operation of a snowmobile punished by civil infraction) *with* MCL 324.2126b (operation of snowmobile in "willful or wanton disregard" for safety punished by misdemeanor); MCL 257.626 (reckless driving statute with punishment of misdemeanor) *with* MCL 257.626b (careless driving statute with punishment of civil infraction).

Further, the Michigan legislature consistently prescribes that intentional and willful conduct is more culpable than reckless, careless or negligent conduct. *Compare, e.g.*, MCL 750.90b(b) (intentional conduct against a pregnant individual with GBH to fetus, 10 year felony) *with* MCL 750.90c(b) (grossly negligent conduct against a pregnant individual with GBH to fetus 5 year felony).

Because of the severity of a sentence of life without parole, Michigan authorizes it for only a handful of serious offenses, including terrorism, first degree murder, first degree criminal

sexual conduct under certain conditions, and a series of offenses related to deaths caused by explosives, poisons, and the like. MCL 791.234(6).

Nearly all of these offenses require purpose or knowledge on the part of the defendant. Of course, the other primary first-degree murder offense is a premeditated, intentional killing. MCL 750.316(1)(a) ("[m]urder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing"). As an additional example, a terrorist who "*knowingly and with premeditation*" causes death through a terrorist act may be subject to life without parole. MCL 750.543f. A person is subject to life without parole for the offenses related to selling misbranded or adulterated drugs only if there is "*intent to kill or to cause serious impairment* of a body function of 2 or more individuals, which violation results in death." MCL 333.17764; MCL 750.16(5); MCL 750.18(7). One who "*[w]illfully*" poisons food or drugs, or who "*willfully* place[s] a poison or harmful substance in a spring, well, reservoir, or public water supply, *knowing or having reason to know* that [it] may be ingested or used by a person to his injury" is subject to life without parole if his violation causes death. MCL 750.436(a), *but see* MCL 750.520b (first-degree criminal sexual conduct that does not specify a specific *mens rea* requirement and, in some circumstances, provides for life without parole sentence).

By contrast, felony murder under MCL 750.316(1)(b), requires only that "the likelihood or the natural tendency of defendant's behavior is to cause death or great bodily harm." *Aaron, supra*, at 728; *see also supra,* Section II.A.2 (describing in detail the law of felony murder in Michigan). And conviction under an aiding and abetting theory only requires proof that the youth assisted a primary actor—not that the youth committed the killing. And, under the natural and probable consequences doctrine, it does not require proof that the youth knew that the co-defendant would kill. *See supra,* Section II.A.3.

This is a distinction that matters. One can view the "legally significant mental states as lying on a continuum: criminal intention anchors one end of the spectrum and negligence anchors the other." *People v Datema*, 448 Mich 585, 604; 533 NW2d 272 (1995). This spectrum is linked to culpability, and "subjective criminal intent is the most culpable mental state a defendant can possess . . . ." *Id.* While nearly all of the offenses for which a Michigan defendant can be sentenced to life without parole fall at this more culpable end of the spectrum, felony murder—which is unintended[21]—is an outlier.

2. Disparities With Co-Defendants on the Same Case.

It is useful to compare not only the disparity among different offenses within Michigan, but also the disparity in punishments for co-defendants in the same crime. There are at least three ways in which juveniles convicted of felony murder under an aiding and abetting theory may be serving a more severe punishment than their co-defendants in the same offense.

First, these young offenders—with twice diminished culpability—may be serving sentences that are equal to or greater than those being served by their more culpable adult co-defendants. For example, Cory Donald and four co-defendants were charged in the murder of Mohamed Maki in the course of a drug house robbery. *Donald v Rapelje*, No. 2:09-cv-11751-AC-MJH, 2012 WL 6047130, at *1 (E.D. Mich. 2012). One adult co-defendant, 31 years old, agreed to cooperate, pled guilty to second-degree murder, testified, and was sentenced to 10-20 years.[22] A second co-defendant, 29 years old, who was alleged to be the mastermind of the robbery plan, fled the jurisdiction, pled guilty to second-degree murder when he was found, and

[21] This is doubly true when the felony murder conviction relies on an aiding and abetting theory.
[22] Michigan Department of Corrections, Offender Information Page, *available at* http://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=586443

was sentenced to 13-30 years.[23] A third adult co-defendant had his case reversed on appeal and later pled to second-degree murder for a 10-15 year sentence.[24] Cory was convicted of aiding and abetting felony murder, and was sentenced to mandatory life without parole.[25] The fourth co-defendant, 26 years old and the undisputed actual shooter in the case, was the only other defendant who is convicted of first-degree murder and serving life without parole.[26]

Second, youth—due to their immaturity and inability to think about future consequences—may receive more severe sentences when they do not, unlike their adult co-defendants, take plea offers or cooperate with the government. In *Graham*, the Supreme Court noted that "[j]uveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense." *Graham*, *supra* at 78–79. This can create disparities between juveniles and their adult codefendants, particularly when plea negotiations and charging decisions make the difference between a term of years and life without parole.

For example, Keith Maxey rejected a plea offer, was convicted at trial, and was sentenced to life without parole for the shooting death of Brian McClendon during the course of a robbery. *People v Maxey*, No. 289023, 2010 WL 1818913, at *1–2. He was 16 years old at the time of the crime, did not shoot the victim, and did not possess a weapon himself. *Id.* at *3. His codefendant, Tyrell Antwan Adams, who was the shooter and was an adult at the time of the

[23] Michigan Department of Corrections, Offender Information Page, *available at* http://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=261182
[24] Michigan Department of Corrections, Offender Information Page, *available at* http://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=622480
[25] Offender Information page, available at http://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=598119
[26] Michigan Department of Corrections, Offender Information Page, *available at* http://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=395442

offense, pled to second-degree murder and was sentenced to 23–40 years.[27] For other examples of these disparities between juveniles and their adult codefendants, see American Civil Liberties Union of Michigan, Basic Decency: Protecting the Human Rights of Children 8–14 (2012).

Finally, even if the youth before this Court were equally culpable to adult offenders, and even if those adult offenders are also serving life without the possibility of parole, these sentences are equivalent only on paper. "[T]his lengthiest possible incarceration is an especially harsh punishment for a juvenile, because he will almost inevitably serve more years and a greater percentage of his life in prison than an adult offender. The penalty when imposed on a teenager, as compared with an older person, is therefore the same . . . in name only." *Miller*, *supra* at 2466 (internal quotations and citations omitted).

D. The Purposes of Punishment, Including Rehabilitation, But Also Deterrence And Retribution, Do Not Support The Imposition of a Life Without Parole Sentence on a Youth Who Has Not Been Proven to Have Killed or Intended to Kill.

1. Rehabilitation

This Court addresses a "fourth criterion rooted in Michigan's legal traditions, and reflected in the provision for 'indeterminate sentences' of Const 1963, art 4, §45: the goal of rehabilitation." *Bullock*, *supra* at 34 (citing *Lorentzen*, *supra* at 179–81). A sentence of life without the possibility of parole for these youth gives up on the penological justification of rehabilitation. As the U.S. Supreme Court succinctly stated: "The penalty forswears altogether the rehabilitative ideal." *Graham*, *supra* at 74. The failure to strive for the goal of rehabilitation is particularly stark when discussing youth, who will change and mature.

2. Deterrence

[27] Michigan Department of Corrections, Offender Information Page, *available at* http://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=669125

Further, deterrence does not justify sentencing juveniles to life without parole for felony murder or aiding and abetting felony murder.

"General" deterrence, the idea that a punishment is justified by its putative deterrent effect on a class of potential offenders, s*ee, e.g.*, Johannes Andenaes, Punishment and Deterrence 34–83 (1974), assumes that people make rational decisions. Deterrence assumes that, before a person contemplating criminal activity commits a crime, he considers the possible range of punishments and the likelihood that he will be caught and convicted. Stiffer punishments increase the expected cost of committing crime, dissuading people from offending.

This is a deeply flawed assumption with respect to juveniles convicted of aiding and abetting felony murder—an offense for which it was not required to prove that they either killed or intended to kill. Put simply, as the United States Supreme Court noted in *Atkins v Virginia*, "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation." 546 US 304, 319; 122 S Ct 2242; 153 L Ed 2d 335 (2002) (quoting *Enmund v Florida*, 458 US 782; 102 S Ct 3368; 73 L Ed 2d 1140 (1982)). The same logic applies to life without the possibility of parole, Michigan's harshest punishment.

A large body of scientific literature confirms that juveniles are more likely than adults to disregard risks and to fail to consider the long-term consequences of their actions.[28] *See Miller*,

[28] *See, e.g.*, Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 Developmental Psychol. 193, 204 (2010); Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 39 (2009); Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 47, 55–56 (2008); Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1012 (2003); Bonnie Halpern-Felsher & Elizbeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Developmental Psychol. 257, 265, 268 (2001); Susan Millstein & Bonnie Halpern-Felsher, *Perceptions of Risk and Vulnerability*, in *Adolescent Risk*

supra at 2464–64 (recognizing the importance of neuroscience and developmental psychology); *Graham*, *supra*, at 2026 (same); *Roper*, *supra*, at 561–62 (same). Much of the science simply confirms common sense: "as any parent knows . . . [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . . . These qualities often result in impetuous and ill-considered actions and decisions." *Roper*, *supra* at 569 ("[T]he absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.").

For life without parole to be an effective deterrent, a potential offender must recognize and evaluate a series of factors: the likelihood that a person will be killed in the course of committing a crime, the probability that the offender will be caught and punished, the fact that he will be liable for deaths caused by his co-offenders, the likely actions of his co-defendants, and so on. Yet juveniles are less capable of accurately weighing these considerations because their susceptibility to peer pressure, appetite for risk, and lack of future orientation—in sum, all of the well-documented biological and psychological differences between juveniles and adults—place a heavy thumb on the scale. These characteristics are likely to make juvenile offenders less capable than adults of appreciating the potential consequences of even a planned killing. *See* MCL 750.316(1)(a).

This problem is amplified by the reduced mens rea requirements of felony murder, MCL 750.316(1)(b), and aiding and abetting, MCL 767.39. In order to meet the mens rea requirement

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and Vulnerability 15, 34–35 (Baruch Fischoff et al. eds., 2001); Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339, 344 (1992); Jari-Erik Nurmi, *How do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 Developmental Rev. 1, 28–29 (1991).

for murder committed in the perpetration of an enumerated felony, MCL 750.316(1)(b), the state need only prove that a defendant acted "with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm." *Aaron*, *supra* at 329. And for aiding and abetting liability, the state need only show the defendant's "knowledge that the principal intended [the crime's] commission at the time the [defendant] gave aid and encouragement" or that the death was a "natural and probable consequence." *Robinson*, *supra* at 6, 9. For these theories of liability, therefore, Michigan essentially asks juveniles to do precisely those things that neuroscience, developmental psychology, and parental common sense suggest they cannot do: to foresee and appreciate the unintended consequences of their own actions or, even worse, the actions of others.

3. Retributivism Is Not Served by A Sentence of Life Without Parole for Youth Who Have Not Been Proven to Have Killed or Intended to Kill.

Sentencing juvenile defendants to life without parole for aiding and abetting the commission of a felony murder does not advance the retributivist goals of the Michigan's justice system. One aim of criminal sentencing is to punish the offender in proportion to the severity of her conduct. Wayne LaFave, 1 Substantive Criminal Law § 1.5 (2d ed); *see also* 1 Wharton's Criminal Law § 2 (15th ed) (explaining that the retributivist model demands that "the measure of punishment . . . never exceed that which the gravity of the offense deserves"). The Michigan Criminal Code is structured to that end, "graduat[ing] punishment" based on the severity of the offense. *Aaron*, *supra* at 719. In other words, the code imposes a less severe punishment on a less culpable defendant.

Given the diminished culpability of juvenile defendants and the limited role played in aiding and abetting a felony murder, society's interest in retribution is sufficiently advanced by imposing a sentence less than life without parole. As the Supreme Court noted in *Graham* and

Roper, "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." *Graham, supra* at 71; *Roper, supra* at 571. Moreover, aiding and abetting a felony murder—where the juvenile has not been shown to have intended to kill or to have actually killed—further reduces the juvenile's culpability. Imposing life without parole under these circumstances advances the sort of "barbarous and unreasonable" doctrine this Court has long prohibited. *Wellar v People*, 30 Mich 16, 20 (1874). As a result, the retributivist goals of the criminal law counsel against a sentence of life without parole.

III. A Categorical Finding That Imposing A Sentence of Life Without Parole on Youth Who Have Not Been Proven to Have Killed Or Intended to Kill Violates the Constitution Would Be Applied Retroactively.

A holding that a sentence of life without the possibility of parole is categorically unconstitutional for a class of juveniles—those convicted of aiding and abetting felony murder—would apply retroactively.[29]

Under federal retroactivity law, substantive rules of criminal law and "watershed" rules of criminal procedure require retroactive application, while other rules of procedure do not. *See, e.g., Schriro v Summerlin*, 542 US 348, 350–52; 124 S Ct 2519; 159 L Ed 2d 442 (2004); *Teague v Lane*, 489 US 288, 310; 109 S Ct 1060; 103 L Ed 2d 334 (1989) ("[N]ew constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

[29] Appellee does not contest that a categorical rule should be applied retroactively. Appellee's Brief, *supra* 40–41.
In this brief, Amicus CDAM does not address the retroactive application of *Miller v Alabama* to all juveniles; instead referring the Court to the Appellant brief in *People v Carp*, No. 307758, and amicus briefs in support.

A categorical prohibition on juvenile life without parole for aiding and abetting felony murder is a paradigmatic example of substantive rule requiring retroactivity. When a rule "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense," that rule is necessarily substantive. *Saffle v Parks*, 494 US 484, 494; 110 S Ct 1257; 108 L Ed 2d 415 (1990) (internal quotations omitted). Such a rule applies retroactively because of the "risk that a defendant . . . faces a punishment that the law cannot impose upon him." *Summerlin*, *supra*, at 353.

Juveniles are a "class of defendants" distinct from adults. "*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on [them], even when they commit terrible crimes. . . . Imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, *supra* at 2465–66. Life without the possibility of parole—the harshest possible sentence in Michigan—is a "certain category of punishment." And this case, by focusing on felony murder, addresses the unconstitutionality of imposing life without parole on juveniles "because of their status or offense."

Moreover, Michigan law provides independent support for the conclusion that the rule should apply retroactively. States are free to make a rule apply retroactively even where federal law would not. *People v Maxson*, 482 Mich 385, 392; 759 NW2d 817 (2008); *Danforth v Minnesota*, 552 US 264; 128 S Ct 1029; 169 L Ed 2d 859 (2008). In Michigan, there is a presumption in favor of retroactivity. *People v Neal*, 459 Mich 72, 80; 586 NW2d 716 (1998); *People v Doyle*, 451 Mich 93, 104; 545 NW2d 627 (1996). Retroactivity depends on (1) the purpose of the new rule, (2) the general reliance on the old rule, and (3) the effect of retroactive

application on the administration of justice. *People v Sexton*, 458 Mich 43, 60–61; 580 NW2d 404 (1998). All three of these factors favor retroactivity.

First, the purpose of this rule is to prevent the unconstitutional punishment of a category of less culpable offenders. This Court has previously given retroactive effect to new constitutional rules invalidating sentence of life without parole. *People v Bullock*, 440 Mich 15, 42; 485 NW2d 866 (1991). It should therefore be applied retroactively to juvenile offenders who are currently serving unconstitutional sentences. Further, as noted above, a categorical bar on a particular punishment is a substantive result. This is in contrast with *Maxson*, *supra*, which declined to give retroactive effect the United States Supreme Court's holding in *Halbert v Michigan*, 545 US 605, 125 S Ct 2582, 162 L Ed 2d 552 (2005), as the *Halbert* rule "concerns only the procedures of the plea process." *Id.* at 387, 93-94.

The second prong considers whether "persons have been adversely positioned in reliance on the old rule," *id*. at 394, such as whether defendants "relied on the [old] rule in not pursuing an appeal and . . . suffered harm as a result of that reliance." *Id.* at 395. Put simply, if life without parole for juveniles convicted of aiding and abetting felony murder is unconstitutional, *every* juvenile who committed this offense and is currently serving life without parole suffered harm in reliance on the old rule, which allowed such a punishment. Compare this to *Maxson*, where "97% to 99% of the defendants who pleaded guilty under the old rule would not have received relief under the new rule." *Id.* at 397–98.

The third prong, which considers the effect of retroactivity on the "administration of justice," favors retroactivity. In *Maxson*, the Court's analysis under the third prong focused on the state's interest in finality. *Id.* at 398. But unlike the rule at issue in *Maxson*, a ban on life without parole for juvenile felony-murder offenders would not call into question the validity of

the underlying determination of guilt, so "[t]hat which was constitutionally invalid could be isolated and excised without requiring the State to begin the entire factfinding process anew." *Robinson v Neil*, 409 US 505, 510; 93 S Ct 876; 35 L Ed 2d 29 (1973). Moreover, finality is not the only relevant consideration. As this Court noted in *People v Hampton*, "the effect on the administration of justice is, of course, a matter of degree to be determined based partially on the goal to be accomplished in formulating a new rule." 384 Mich 669, 678; 187 NW2d 404 (1971). The goal to be accomplished here, as explained above, is to prevent the unconstitutional punishment of youth. To limit the rule to prospective application would frustrate this goal by ignoring the juvenile offenders who have already been subjected to unconstitutional punishment.

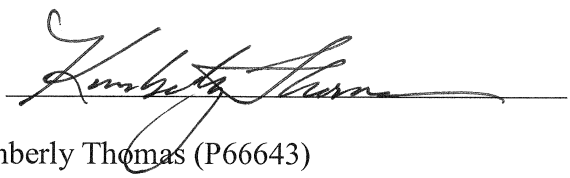
This rule should therefore apply retroactively.

CONCLUSION

For the above reasons, *Amicus Curiae*, the Criminal Defense Attorneys of Michigan, respectfully request that this Court find the sentence of life without parole unconstitutional for juveniles convicted of aiding and abetting felony murder.

Respectfully submitted,

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

By: 

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