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

REPLY BRIEF ON APPEAL – APPELLANT

ORAL ARGUMENT REQUESTED

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REPLY

Cortez Davis was convicted of aiding and abetting felony murder and sentenced to life without parole as a juvenile, despite the absence of any intent to kill on his part during the events underlying his conviction. The trial judge overseeing Mr. Davis's proceedings has recognized that he was "not the person who pulled the trigger," but only "an aider and abettor in an armed robbery." Appellant's Appx. 804a, and the elements underlying Mr. Davis's conviction never required any showing of an actual intent to kill. Considered as a whole, the United States Supreme Court's recent cases recognizing the unique characteristics and reduced culpability of children compel a categorical ban against life-without-parole sentences for such children convicted of aiding and abetting felony murder, as the lack of any intent to kill in these cases precludes a showing of the incorrigibility necessary to impose this harshest of sentences. *See Roper v. Simmons*, 543 US 551, 125 S Ct 1183, 161 L Ed 2d 1 (2005); *Graham v. Florida*, 560 US 48, 130 S Ct 2011, 176 L Ed 2d 825 (2010); *Miller v. Alabama*, 567 US ——, 132 S Ct 2455, 183 L Ed 2d 407 (2012). The restriction against death-in-prison sentences for this subset of children is reinforced by the Supreme Court's precedents which impose constitutional limits on adult death sentences when there is evidence of reduced culpability because the crime is felony murder rather than intentional murder or accused is not the principal. *See Enmund v Florida*, 458 US 782, 102 S Ct 3368, 73 L Ed.2d 1140 (1982); *Tison v. Arizona*, 481 US 137, 107 S Ct 1676, 95 L Ed.2d 127 (1987).

The categorical ban sought by the undersigned is also required by proportionality review of cruel or unusual sentences mandated by our own state constitution, which should not simply be set aside as urged by the People. Finally, the People properly acknowledge that if adopted this categorical ban will apply retroactively on collateral review.

I. MR. DAVIS DID NOT POSSESS AN INTENT TO KILL DURING THE EVENTS RESULTING IN HIS FIRST DEGREE MURDER CONVICTION.

The People secured its felony murder conviction against Cortez Davis under a theory of prosecution that only required that Mr. Davis intended to commit armed robbery, and that he wantonly and willfully disregarded that a natural and probable consequence of this felony was the death of the victim. As noted in Mr. Davis's initial brief, the trial court has repeatedly found that Mr. Davis did not possess any intent to kill. Davis. Br. vii, 4. At Mr. Davis's initial sentencing hearing, the judge stated that "this young man was not the person who pulled the trigger, he was an aider and abettor in an armed robbery." Appellant's Appx. 804a. Again, at his resentencing, the trial judge again stated that "[h]e was not the shooter . . . He didn't pull the trigger," but instead "he was an aider and abettor." *Id.* at 816a-818a. More recently, at a hearing on his motion for post-judgment relief, the same judge stated that "[t]he defendant was not the shooter, but an aider and abettor" who "did not pull the trigger, [and] who told the victim that he held at gunpoint that everything will be alright." *Id.* at 1308a-09a.

Mr. Davis's lack of intent to kill is also indicated by the fact that he was only convicted as an aider and abettor for felony murder. At trial, the State was free to pursue charges of premeditated, deliberate first degree murder under MCL 750.316(a), which would have required proof of intent to kill. Instead, the State chose to pursue a conviction under the felony murder provision of MCL 750.316(b), which required only proof of "malice" under Michigan law, defined as "the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm." *People v. Aaron*, 409 Mich 672, 728, 299 NW2d 304, 326 (Mich 1980). Compounding this lessened culpability requirement was the fact that the jury was instructed to consider whether he was an aider and abettor in the felony murder. A conviction for aiding and

abetting felony murder requires only a showing that the defendant intended to participate in the underlying felony, and that the victim's death was a "natural and probable consequence" of this felony. *People v. Robinson*, 475 Mich 1, 15, 715 NW2d 44, 53 (Mich 2006).

The People's attempt to reopen the facts of this case and argue that Mr. Davis did in fact possess an intent to kill, relying entirely on the testimony of a single witness, People's Br. 10-14., is unpersuasive given the repeated findings by the judge in this case that Mr. Davis did not possess any such intent, and the fact that Mr. Davis's conviction is not premised upon any finding of such intent.

II. THE LOGIC OF *ROPER*, *GRAHAM*, AND *MILLER* COMPEL THE CONCLUSION THAT THE EIGHTH AMENDENT TO THE UNITED STATES CONSITUTION CATEGORICALLY BARS THE IMPOSITION OF A LIFE WITHOUT PAROLE SENTENCE ON A JUVENILE CONVICTED OF FELONY MURDER AS AN AIDER AND ABETTER.

As Justice Breyer recognized in his concurrence in *Miller*, "[g]iven *Graham*'s reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim" because "where the juvenile neither kills nor intends to kill, both features [of youth and a lack of any intent to kill] emphasized in *Graham* as extenuating apply." *Miller*, 132 S Ct at 2475-76 (Breyer, J., concurring). Consequently, juveniles convicted of aiding and abetting felony murder are categorically protected from sentences of life without parole because "there is no basis for imposing a sentence of life without parole upon a juvenile who did not himself kill or intend to kill." *See id.* at 2476.

The People contend that the Eighth Amendment to the United States Constitution does not categorically bar the imposition of a life-without-parole sentence on a juvenile convicted of aiding and abetting felony murder in this state by focusing solely on the fact that *Miller* did not announce such a categorical ban. People's Br. 14-20. This view fails to consider the

implications of the case in light of other recent United States Supreme Court decisions recognizing the reduced culpability of juveniles. Notably absent from the State's brief is any recognition of *Miller*'s significance in light of the Supreme Court's previous rulings in *Roper* and *Graham*. Together, *Roper*, *Graham*, and *Miller* compel the conclusion that children convicted of aiding and abetting felony murder are categorically prohibited from being sentenced to life without parole.

In *Roper*, the Supreme Court found that, even in the most serious murder cases, "juvenile offenders cannot with reliability be classified among the worst offenders." 543 US at 569. This is because, as compared to adults, teenagers have "[a] lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures"; and their character "is not as well formed." *Id.* at 569–70. Because these differences make juveniles less culpable than adults, the court concluded that "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." *Id.* at 573–74.

In *Graham*, the Supreme Court recognized that the same differences between children and adults are relevant to the constitutionality of sentences of life imprisonment without parole. 560 US at 68. The Court repeated *Roper*'s reasoning "that because juveniles have lessened culpability they are less deserving of the most severe punishments," *id.*, in concluding categorically that life without parole is excessive for juvenile non-homicide offenders. *Id.* at 74.

Just two years later in *Miller*, the Court again recognized these same differences between children and adults when banning mandatory sentences of life without parole for juvenile homicide offenders. 132 S Ct at 2460. In extending Eighth Amendment protection to juvenile homicide offenders, the Court recognized that "none of what it said about children—about their

distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." *Id.* at 2465. The Court acknowledged that, although *Graham*'s categorical ban of life-without-parole sentences related only to non-homicide offenses, "Graham's reasoning implicates any life-without-parole sentence imposed on a juvenile." *Id.*

Together, these three cases prohibit sentencing any child to life without parole for aiding and abetting felony murder. *Roper* established that children are constitutionally different, and as a category less culpable, than adults. *Graham* reinforced these constitutional protections and recognized that children who did not possess any intent to kill should never be sentenced to life without parole. *Miller* recognized that the constitutional protections of *Roper* and *Graham* covered children convicted of homicide as well. The sum of *Graham*'s recognition that children who have not killed should not be sentenced to life without parole and *Miller*'s recognition that, even for those children convicted of homicide, life without parole should be imposed in only the rarest instances of severe culpability, is that the Eighth Amendment bans life without parole sentences for children convicted as aiders and abettors of felony murder because of their lack of any intent to kill, or because the state imposes an unreasonable foreseeability test in spite of their immaturity, impulsiveness and immaturity.

To be sure, the Court in *Miller* did not categorically bar a sentence of life without parole for all juveniles who have been convicted of homicide. However, the Court did recognize that appropriate cases for sentencing children to die in prison will be "uncommon." *Miller*, 130 S Ct at 2469. The clear directive is that such sentences should be reserved for only the most exceedingly culpable juvenile offenders, such as those who have committed deliberate, intentional killings *and* evince a lack of rehabilitative potential. Children who have only been convicted of aiding and abetting felony murder in Michigan certainly, as a category, fall outside these uncommon cases, because, as a matter of both law and fact, they are neither the principal

actors in the actual act of killing and have not been shown to have possessed any intent to kill or even cause great bodily harm, except to the extent that the law unreasonably imposes such knowledge upon them.

Many, if not most, of the children serving life without parole for aiding and abetting felony murder in Michigan were involved in botched non-homicide crimes that went horribly wrong when an accomplice's actions resulted in the death of the victim. An aiding and abetting child's culpability in such a situation is no greater than the culpability of thousands of individuals now serving lesser sentences for similar felonies which did not result in a death. The impetuousness, vulnerability, and malleability of youth apply equally to all of these children. The Supreme Court recognized as much in *Miller*, stating that the "features [of children] are evident in the same way, and to the same degree, when [] a botched robbery turns into a killing." *Miller*, 130 S Ct at 2465.

Indeed, it is difficult to distinguish Cortez's level of personal culpability from that of Kuntrell Jackson or Terrance Graham. All three young men engaged in a robbery with other teens, and, in all three cases, an accomplice attacked the robbery victim. To this end, *Graham* observed that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." 560 US. At 69. Granted, from the standpoint of the harm caused, even unintended felony murder is a more serious crime than the nonhomicide offenses on which it is predicated. This is undeniable and explains why it is traditionally and legitimately punished more severely. But the application of felony-murder liability to children is unjustifiable in light of the differences between children and adults recognized in *Roper*, *Graham*, and *Miller*. Cortez's sentence cannot be reconciled with *Graham*'s holding through any logic that takes the reasoning in *Roper*, *Graham*, and *Miller* seriously.

Both *Graham* and *Miller* also "liken[ed] life-without-parole sentences imposed on juveniles to the death penalty itself." *See Miller*, 132 S Ct at 2466. This correspondence implicates the Supreme Court's line of precedents limiting the imposition of the death penalty for felony murder cases to only the most culpable of offenders. *See id.* at 2467. In *Enmund v Florida*, 458 US 782, 102 S Ct 3368, 73 L Ed.2d 1140 (1982), the Supreme Court held that the death penalty cannot be imposed an individual who "aids and abets a felony in the course of which a murder is committed," when the individual "did not commit and had no intention of committing or causing" murder. 458 US at 797, 801. In *Tison v. Arizona*, 481 US 137, 107 S Ct 1676, 95 L Ed 2d 127 (1987); the Supreme Court reaffirmed *Enmund*'s holding that the death penalty cannot be imposed upon a "minor actor in [a felony] . . . who neither intended to kill nor was found to have had any culpable mental state." *Tison*, 481 US at 158. Akin to the Supreme Court's reasoning in *Miller*, the confluence of this line of precedent with the holdings of *Roper*, *Graham*, and *Miller*, leads to the conclusion that the ultimate penalty for children – life-without-parole – is constitutionally prohibited for those children who have been convicted of aiding and abetting felony murder in Michigan, because these individuals did not commit and had no intention of committing murder.

The holdings of *Roper*, *Graham*, and *Miller*, coupled with the Supreme Court's line of precedent limiting the ultimate punishment of death for adults convicted of aiding and abetting felony murder, constitute "standards elaborated by controlling precedents," *Graham*, 560 US at 61 (quotation omitted), that compel a finding that the imposition of life without parole upon a juvenile for a conviction of aiding and abetting felony murder violates the Eighth Amendment.

III. THE MICHIGAN CONSTITUTION CATEGORICALLY BARS THE IMPOSITION OF LIFE WITHOUT PAROLE UPON A JUVENILE FOR AIDING AND ABETTING FELONY MURDER.

Rather than engaging with this Court's well-established standards of proportionality review of cruel or unusual punishments as expressed in *People v Bullock*, 440 Mich 15, 485 NW2d 866 (1992), the People encourage this Court to overturn *Bullock* and refuse to conduct any independent proportionality review of Cortez's sentence. People's Br. 22-37. The People ask for such by relying on references to the historical record concerning the implementation of similar clauses in other jurisdictions. People's Br. 22-37. But, as pointed out in detail in the amicus brief of the Criminal Defense Attorneys of Michigan, the People's argument ignores this Court's recognition that the plain meaning is the starting point for any analysis of a text's meaning, and begs this Court to ignore its own precedent. *See* Br. Amicus Curiae Crim. Def. Att'ys of Mich 8-10. Equally as telling, the historical record surrounding the ratification of our state constitution actually supports the view that our framers intended for the meaning of "cruel ***or*** unusual" to change over time with societal standards. *Id.* at 9-10.

The People likely encourage this Court to abandon *Bullock* because any proportionality analysis indicates that sentences of life-without-parole for juveniles who aid and abet felony murder are in fact unconstitutional under Michigan's well-established jurisprudence of reviewing sentences for unconstitutional disproportionality in violation of the prohibition against cruel or unusual punishment in our state constitution. based on the severity of the punishment, comparisons with practices in other states, comparisons with other offenders in Michigan, and Michigan's firmly rooted, sincere, goal of rehabilitation, such sentences are unconstitutional under article 1, section 16 of the Michigan Constitution. Davis Br. 27-35; Br. Amicus Curiae Crim. Def. Att'ys of Mich 10-33.

IV. A CATEGORICAL BAN ON LIFE-WITHOUT-PAROLE SENTENCES FOR JUVENILES CONVICTED OF AIDING AND ABETTING FELONY MURDER WILL APPLY RETROACTIVELY.

Finally, the People properly concede that a categorical ban on life-without-parole sentences for children who have not killed or had an intent to kill but have only been convicted of aiding and abetting felony murder would apply retroactively to cases on collateral review. People's Br. 41. The People's concession is followed by the argument that this Court should adopt the retroactivity test from *Teague v. Lane*, 489 US 288, 109 S Ct 1060, 103 L Ed 2d 334 (1989). People's Br. 40-41. But even under this Court's current retroactivity framework as expressed in *People v Sexton*, 458 Mich 43, 60–61, 580 NW2d 404, 412-13 (1998), the rule would also apply retroactively. *See* Br. Amicus Curiae Crim. Def. Att'ys of Mich 33-36.

REQUEST FOR RELIEF

The Defendant-Appellant, Cortez Roland Davis, reasserts his request that this Court REVERSE the Court of Appeals's decision *People v Davis*, No. 314080 (Mich App. January 16, 2013) and REMAND to the Wayne County Circuit Court for re-sentencing pursuant to *Miller*. Cortez further requests that this Court grant any other relief to which he is entitled.

RESPECTFULLY SUBMITTED

Date: February 28, 2014

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PROOF OF SERVICE OF APPELLANT'S REPLY

THE UNDERSIGNED HEREBY CERTIFIES, that the attached Reply Brief of Appellant Cortez Davis, was served by United States Mail, postage thereon fully prepaid, to the addresses stated below, from Southfield, Michigan on February 28, 2014.

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