

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

v

Court of Appeals No. 338658
Wayne Circuit Court No. 94-002089

CORTEZ ROLAND DAVIS,

Defendant/Appellant.

**BRIEF OF APPELLANT
CORTEZ ROLAND DAVIS**

ORAL ARGUMENT REQUESTED

**THE APPEAL INVOLVES A RULING THAT A PROVISION OF
THE CONSTITUTION, A STATUTE, RULE OR REGULATION,
OR OTHER STATE GOVERNMENTAL ACTION IS INVALID**

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BASIS OF JURISDICTION OF THE COURT OF APPEALS

The final Judgment of Sentence and Commitment to the Department of Corrections was signed on May 30, 2017, and this appeal was filed on June 3, 2017. MCR 7.204(A)(2)(c).

The Michigan Legislature has conferred appellate jurisdiction to the Court of Appeals to review a final legal decision of the Circuit Court in a criminal matter. MCL 600.308(1).

QUESTIONS INVOLVED

1. Does MCL 769.25a(4)(c) unconstitutionally increase the available minimum punishment (25 years) upon Cortez in violation of the *ex post facto* clauses of the Michigan and United States Constitutions from his original sentence of (10 years) on his conviction for “felony murder”?

Appellant answers: “Yes.”

2. Does MCL 769.25a(6), unconstitutionally prevent Cortez from accruing disciplinary credits after the fact when other offenders are accruing disciplinary credits, and Cortez was at one time?

Appellant answers: “Yes.”

STATEMENT OF FACTS

On May 10, 1994, Cortez Roland Davis (“Cortez”) after a jury trial, was convicted of crimes committed when he was 16 years old: First-Degree Felony Murder, MCL 750.316; Armed Robbery, MCL 750.529; Assault With Intent to Rob While Armed, MCL 750.89; and Possession of a Firearm During the Commission of a Felony, MCL 750.227b. On June 24, 1997, The Michigan Court of Appeals vacated Cortez's conviction for Armed Robbery¹ because the conviction violated his constitutional protection against double jeopardy when he was convicted of both felony murder and the underlying offense of armed robbery.²

On September 26, 1994, Cortez was sentenced by Judge Vera Massey Jones to 10-40 years on the felony murder conviction, a deviation downward from the mandatory life sentence³ prescribed by law at that time for his felony murder conviction. Judge Jones did not believe the juvenile system could adequately rehabilitate Cortez, but she also believed that Cortez was not the “shooter,” in this case, or even guilty of the crime of felony murder at all and could be rehabilitated. Cortez served that sentence until December 22, 1994, when the Michigan Court of Appeals instructed the trial court to impose the unconstitutional mandatory life sentence—which he served until April 27, 2017.

¹ See *People v Davis*, Nos. 183428 and 192234 (Mich App. June 24, 1997) (unpublished).

² See *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996) (conviction of both first-degree felony murder and the underlying felony violate defendant's double jeopardy protections.).

³ The mandatory life sentence violated the 8th Amendment to the US Constitution as explained by Judge Massey Jones. See *Miller v Alabama*, 132 S Ct 2455 (2012).

This case has a long trial level and appellate history. Cortez was arrested on February 9, 1994 and interrogated by police that day for the December 14, 1993 robbery of Raymond Derrick Davis, Jr. ("Davis, Jr.") and Martin Arnold ("Arnold") near Fenkell and Lesure St. in Detroit, culminating in Michael Scott (MDOC No. 240464) ("Scott") shooting and killing Davis, Jr. Scott was the "shooter" in this case, but the two were tried separately. Cortez was 16 years, 9 months, and 7 days old at the time of the offense.

Cortez was charged by information on February 22, 1994 with murder, assault, and armed robbery. The charging document was stamped with the words "Automatic Waiver," and in spite of being a 16-year-old ward of the state, Cortez was waived into the adult criminal process.

A jury trial on the charges was held on May 5, 9 and 10, of 1994, and the jury convicted Cortez of (1) felony murder, MCL 750.316(1)(b); (2) Armed robbery, MCL 750.529; (3) Assault with intent to rob while armed, MCL 750.89, and (4) Possession of a firearm during the commission of a felony, MCL 750.227b, in spite of the Prosecutor's forensic expert indicating that of the five bullets recovered from Davis, Jr., only three could be identified as having come from Scott's weapon, and the other two being inconclusive. Cortez was represented by an appointed attorney, Joseph Johnson.

A hearing on whether to sentence Cortez as a juvenile and for disposition was held on June 10, 1994 and June 15, 1994. On June 20, 1994 the court deviated from the mandatory sentence, and sentencing Cortez to 10 – 40 years, after finding that the juvenile system would not be sufficient to rehabilitate him but that the mandatory life

sentence was cruel and unusual.⁴ The court said:

But the court has also held that in this instant[ce] when this young man was not the person who pulled the trigger, he was an aider and abettor in an armed robbery, he was convicted of first degree murder by the jury, that the only other option of then sentencing him as an adult and imposing a life sentence, mandatory life sentence, is cruel and unusual punishment, when everyone agrees that he is capable of rehabilitation. And therefore, I am not in this instant [sic] going to impose mandatory life in prison, as I think it is cruel and unusual punishment.
Transcript of Sentencing Hearing, June 20, 1994, p.4.

On September 26, 1994, the trial court issued a written Order regarding sentencing.⁵ That order restated its earlier finding:

[t]he court having come to the conclusion that sentencing the defendant as a juvenile would be dangerous to society and there would not be enough time to rehabilitate him as sentencing him as an adult would be cruel and unusual punishment because he is not the shooter and can be rehabilitated.
Written order, dated Sept. 26, 1994.

After the people successfully appealed the initial sentence, the trial court had a re-sentencing hearing on December 22, 1994, wherein Defendant was sentenced to life in prison.⁶ At the re-sentencing hearing, the court said:

I thought about it, because, very frankly, I think he's salvageable. This was a case, I don't know if I said it before at the sentencing, I believe somebody's been throwing this young man away from the day he was born.

He was not the shooter. They printed in the paper that I had given him this second degree murder sentencing. And they talked about that he was a murderer. He didn't pull the trigger.

Now, he was convicted of first degree felony murder, and he was an aider and abettor. But, when I looked at his background, I know that the juvenile justice system is not going to be able to rehabilitate him within the time they've got left.

⁴ Appx. 1, Initial Sentencing Hearing, Transcript dated June 20, 1994.

⁵ Appx. 2, Written Order Regarding Sentence, dated September 26, 1994.

⁶ Appx. 3, Second Sentencing Hearing, Transcript dated December 22, 1994.

This man is a danger to society. And that's why I placed him in the adult system. But I still feel, and I continue to feel, that he could be rehabilitated. And maybe, when the legislator [sic], because they're beginning to take a look at it, that they may change it. Though it will be years from now, but they may change it.

...

Mandatorily, I must sentence you to natural life in prison on the murder one, and the mandatory two years on the felony firearm. And the other sentences will stand on the armed robbery and assault with intent to rob. I have no choice.

...

The only thing I can say to you is that it's my belief that they are going to change this. They're going to find out how unjust it is to do this. So, don't give up hope. You may not be in there for the rest of your life. Good luck to you, sir, and be sure to fill out your appeal papers.

Final Sentencing Hearing, Dec. 22, 1994.

On January 5, 1996 a hearing on the defendant's Motion to determine probable cause to arrest him was held. On June 24, 1997, the Court of Appeals remanded the issue of probable cause to the trial court for a determination on the admissibility of Cortez's statement to the police. *People v Davis*, Nos. 183428 and 192234 (Mich App. June 24, 1997) (unpublished); lv den 459 Mich 863; 584 NW2d 923 (Mich 1998).

On March 12, 1999, the trial court held an evidentiary hearing on instructions from the Court of Appeals. The trial court found there was probable cause to arrest Cortez supporting the admissibility of his statement to the police.

On July 23, 2001, Cortez filed a first post-conviction motion for relief from judgment and Petition for a Writ of Habeas Corpus with the US District Court. *Davis v Jackson*, No. 01-cv-72747-DPH. (E.D.Mich) (later re-styled *Davis v Cason*), raising claims of, *inter alia*, deficiency of evidence, prosecutorial misconduct, and violation of Cortez's constitutional due process rights.

While the petition for a writ of habeas corpus was pending, on July 18, 2002, the state trial court granted Cortez a new trial, finding error in the instructions to the jury regarding the theory of aiding and abetting. The trial court indicated that the aiding and abetting instruction should have been given with regard to the armed robbery and not the first degree murder charge. On September 18, 2002, the Court of Appeals remanded the case to the trial court regarding its ruling finding defendant could not satisfy the "cause" and "prejudice" requirements necessary in order to obtain post-judgment relief. *People v Davis*, No. 242997 (Mich App., Sept.18, 2002) (unpublished). The trial court then held a post-judgment motion hearing on October 11, 2002 on the Opinion and Order of the Court of Appeals.⁷ At this hearing, the judge said:

But I'm going to say – I'm going to waive the good cause because I concluded that there is a significant possibility that the defendant is innocent of the crime of felony murder. And but for the fact that this improper instruction was given, he might not have been convicted.
Hearing on Motion for New Trial, Oct. 11, 2002.

On March 18, 2003, the US District Court issued an Opinion and Judgment denying the defendant habeas relief without prejudice because Cortez had not yet exhausted his state court remedies.

On Aug 31, 2004, the Michigan Court of Appeals issued an opinion again reversing the trial court's decision to grant defendant a new trial, this time with dissent. *People v Davis*, No. 246847 (Mich App., August 31, 2004) (Cooper, J. dissenting), lv den, 472 Mich 927, 697 NW2d 525 (2005) (Kelly, J. dissenting).

On June 16, 2006, Cortez filed an Amended Petition for a Writ of Habeas Corpus.

⁷ Appx. 4, Motion Hearing, Transcript dated October 11, 2002.

On March 12, 2007 the US District Court granted defendant's motion to reopen the habeas proceedings, and after hearing the defendant's habeas claims, issued a final Opinion and Judgment on April 30, 2008, denying habeas relief with prejudice. *Davis v Jackson*, 01-cv-72747-DPH, ECF doc. 27 (E.D.Mich Apr. 30, 2008). The US District Court subsequently denied Cortez's request for a Certificate of Appealability regarding its denial of habeas relief with prejudice.

On May 17, 2010, the US Supreme Court issued its opinion in *Graham v Florida*, 560 US 48, 130 S Ct 2011, 176 L Ed2d 825 (2010) (Announcing a categorical ban on the sentence of life without the possibility of parole for juvenile non-homicide offenders.)

On April 15, 2011, Cortez filed a successive motion for relief from judgment in the Third Circuit Court Criminal Division for Wayne County claiming a retroactive change in the law based on the holding in *Graham*, asserting that felony murder, as that theory was used in his case, was not a homicide crime. Judge Massey Jones issued an order dated April 25, 2011 denying defendant's motion stating that the "Defendant was convicted of Felony Murder, a homicide offense. Thus *Graham v Florida* does not apply."

Cortez timely requested leave to appeal to the Michigan Court of Appeals, and was denied leave to appeal on November 16, 2011. On January 7, 2012, Cortez filed an Application for Leave to Appeal the disposition of his motion under *Graham* to the Michigan Supreme Court. While awaiting a decision on the January 7, 2012 application in the Michigan Supreme Court, on June 25, 2012, the US Supreme Court issued its opinion in *Miller v Alabama*, 567 US ___, 132 S Ct 2455; 183 L Ed 2d 407 (2012) (abolishing mandatory life without the possibility of parole for homicide crimes

committed by juveniles.) That same day, Cortez supplemented his application for leave to appeal in the Michigan Supreme Court with the *Miller* opinion.

On September 7, 2012, in lieu of granting leave to appeal, the Michigan Supreme Court remanded the issue of retroactivity to the Trial Court for its consideration in light of *Miller/Jackson*. *People v Davis*, 492 Mich 871, 820 NW2d 167 (2012). The trial court then scheduled a resentencing hearing for December 7, 2012.

While awaiting the resentencing hearing, on November 15, 2012, the Michigan Court of Appeals issued its opinion in *People v Carp*, 298 Mich App. 472, 828 NW2d 685 (Mich App. 2012) (holding, *inter alia*, that *Miller/Jackson* would not be retroactively applicable to cases that had become final on direct review.) With the *Carp* opinion in mind, the Wayne County Circuit Court (Hon. Vera Massey Jones) ordered a resentencing under *Miller/Jackson* nonetheless, believing that *Miller* controlled, and *Carp* did not. Indeed, the trial court had since the initial resentencing in 1994, stated on the record that it believed Cortez's life sentence to be unconstitutional, and Cortez to be innocent of the crime of felony murder.⁸

On January 16, 2013, the Michigan Court of Appeals, issued a preemptive order—without hearing—reversing the trial court and denying Cortez any form of relief.

On March 11, 2013, Cortez filed an application for leave to appeal to the Michigan Supreme Court. On November 6, 2013, the Michigan Supreme Court granted leave to appeal in Davis's case, to be heard simultaneously with Raymond Carp and Wolfgang Eliasons' Appeals—two other juveniles sentenced to life without parole under

⁸ Appx. 5, Post-Conviction Motion Hearing Scheduling Resentencing, Transcript dated December 7, 2012.

Michigan's mandatory sentencing scheme. *People v Davis*, 838 NW2d 876 (Mich 2013).

Two days before oral argument in the Michigan Supreme Court in Cortez's case, MCL 769.25 and MCL 769.25a were passed by the Michigan Legislature and were given immediate effect on March 4, 2014. The Michigan Supreme Court heard combined oral argument in *Carp*, *Davis* and *Eliason* on March 6, 2014. On July 8, 2014, the Michigan Supreme Court issued its decision affirming the Michigan Court of Appeals in the *Carp* and *Davis*' cases and remanding *Eliason*'s case for resentencing. *People v Carp*, 852 NW2d 801, 496 Mich 440 (Mich 2014). On July 29, 2014, Cortez filed a Motion for Rehearing in the Michigan Supreme Court, which was denied on October 22, 2014. *People v Davis*, 854 NW2d 710 (Mich 2014).

Cortez filed a Petition for a writ of *certiorari* and motion for leave to proceed *in forma pauperis* in the United States Supreme Court on January 20, 2015. It was assigned docket number 14-8106. On February 3, 2015, the State of Michigan filed a response. On February 9, 2015, Cortez filed a reply brief. The Petition was distributed for conference on March 6, 2015, and twice more on April 24, 2015 and May 1, 2015. On January 25, 2016, the United States Supreme Court decided *Montgomery v Louisiana*, 136 S. Ct. 718 (2016) (holding that *Miller v Alabama* would be retroactively applicable to cases on collateral review, thereby entitling final cases to resentencing pursuant to *Miller*, and abrogating *People v Carp*, 852 NW2d 801, 496 Mich 440 (Mich 2014)). MCL 769.25a(3) was activated after the Supreme Court's mandate date passed in *Montgomery*.

Cortez's case was remanded back to the Michigan Supreme Court by the United

States Supreme Court on March 7, 2016 in light of *Montgomery*.⁹ The Michigan Supreme Court, in turn, remanded this matter to the Wayne County Circuit court for resentencing proceedings.

On April 27, 2017, Cortez was resentenced to 25-60 years on the count for violation of MCL 750.316, by Judge Shannon Nicol Walker, who, by this time had replaced Judge Vera Massey Jones¹⁰ **An Amended Judgment was entered by Judge Walker on 05/30/2017, clarifying the sentence, but failing to acknowledge application of accrued disciplinary credits.**¹¹

STANDARD OF REVIEW

This appeal deals strictly with questions of constitutional law which are reviewed *de novo*. *Van Buren Twp v Garter Belt, Inc*, 258 Mich App 594, 602; 673 NW2d 111 (2003).

ARGUMENTS

Cortez is appealing the ruling of Judge Walker to sentence under MCL 769.25a as opposed to re-imposing his original sentence of 10-40 years, because MCL 769.25a is an unconstitutional *ex post facto* law as applied to Cortez. Additionally, the court's and the MDOC's failure to properly apply disciplinary credits was due to an *ex post facto* law, and both actions increased Cortez's punishment.

The Appellant requests that this Court reverse the finding of the Wayne County Circuit Court and hold that, **(1) the mandatory minimum of 25 years established by MCL**

⁹ Appx. 6, US Supreme Court Order Granting Writ of Certiorari and Remanding to Michigan Supreme Court.

¹⁰ Appx. 7, Resentencing, Transcript dated April 27, 2017, filed September 14, 2017.

¹¹ Appx. 8, Judgment of Sentence Commitment to Department of Corrections Amended, dated May 30, 2017.

769.25a(4)(c), as applied, unconstitutionally increased the available punishment upon Cortez in violation of the *ex post facto* clauses of the Michigan and United States Constitutions, and that Cortez’s original sentence of 10-40 years on his conviction for “felony murder” should be reinstated, and (2) hold that voiding Cortez’s accrued disciplinary credits was an unconstitutional *ex post facto* action, both of which were designed to retroactively, and unconstitutionally, increase the nature of Cortez’s punishment after the fact.

MCL 769.25a, which is section 25a of the Michigan Code of Criminal Procedure, states in its entirety:

769.25a. Case as final on or before June 24, 2012; effect of state supreme court or United States supreme court decision; procedures; resentencing hearings; priority; credit for time served.

Sec. 25a.

(1) Except as otherwise provided in subsections (2) and (3), the procedures set forth in section 25 of this chapter do not apply to any case that is final for purposes of appeal on or before June 24, 2012. A case is final for purposes of appeal under this section if any of the following apply:

- (a) The time for filing an appeal in the state court of appeals has expired.
- (b) The application for leave to appeal is filed in the state supreme court and is denied or a timely filed motion for rehearing is denied.
- (c) If the state supreme court has granted leave to appeal, after the court renders its decision or after a timely filed motion for rehearing is denied.

(2) If the state supreme court or the United States supreme court finds that the decision of the United States supreme court in *Miller v Alabama*, 576 US ___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), applies retroactively to all defendants who were under the age of 18 at the time of their crimes, and that decision is final for appellate purposes, the determination of whether a sentence of imprisonment for a violation set forth in section 25(2) of this chapter shall be imprisonment for life without parole eligibility or a term of years as set forth in section 25(9) of this chapter shall be made by the sentencing judge or his or her successor as provided

in this section. For purposes of this subsection, a decision of the state supreme court is final when either the United States supreme court denies a petition for certiorari challenging the decision or the time for filing that petition passes without a petition being filed.

(3) If the state supreme court or the United States supreme court finds that the decision of the United States supreme court in *Miller v Alabama*, 576 US ___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), applies retroactively to all defendants who were convicted of felony murder under section 316(1)(b) of the Michigan penal code, 1931 PA 328, MCL 750.316, and who were under the age of 18 at the time of their crimes, and that the decision is final for appellate purposes, the determination of whether a sentence of imprisonment shall be imprisonment for life without parole eligibility or a term of years as set forth in section 25(9) of this chapter shall be made by the sentencing judge or his or her successor as provided in this section. For purposes of this subsection, a decision of the state supreme court is final when either the United States supreme court denies a petition for certiorari challenging the decision with regard to the retroactive application of *Miller v Alabama*, 576 US ___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), to defendants who committed felony murder and who were under the age of 18 at the time of their crimes, or when the time for filing that petition passes without a petition being filed.

(4) The following procedures apply to cases described in subsections (2) and (3):

(a) Within 30 days after the date the supreme court's decision becomes final, the prosecuting attorney shall provide a list of names to the chief circuit judge of that county of all defendants who are subject to the jurisdiction of that court and who must be resentenced under that decision.

(b) Within 180 days after the date the supreme court's decision becomes final, the prosecuting attorney shall file motions for resentencing in all cases in which the prosecuting attorney will be requesting the court to impose a sentence of imprisonment for life without the possibility of parole. A hearing on the motion shall be conducted as provided in section 25 of this chapter.

(c) If the prosecuting attorney does not file a motion under subdivision (b), the court shall sentence the individual to a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years. Each victim shall be afforded the right under section 15 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.765, to appear before the court and make an oral impact statement at any resentencing of the defendant under this subdivision.

(5) Resentencing hearings under subsection (4) shall be held in the following order of priority:

(a) Cases involving defendants who have served 20 or more years of imprisonment shall be held first.

(b) Cases in which the prosecuting attorney has filed a motion requesting a sentence of imprisonment for life without the possibility of parole shall be held after cases described in subdivision (a) are held.

(c) Cases other than those described in subdivisions (a) and (b) shall be held after the cases described in subdivisions (a) and (b) are held.

(6) A defendant who is resentenced under subsection (4) shall be given credit for time already served, but shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence.

I. THE MANDATORY MINIMUM OF 25 YEARS ESTABLISHED BY MCL 769.25A(4)(c), AS APPLIED, UNCONSTITUTIONALLY INCREASED THE AVAILABLE PUNISHMENT UPON CORTEZ IN VIOLATION OF THE *EX POST FACTO* CLAUSES OF THE MICHIGAN AND UNITED STATES CONSTITUTIONS.

A. The State of Michigan raised Cortez's mandatory minimum sentence from 10 to 25 years after the fact.

The Appellant argues that given the choice between the original, *constitutional but unprescribed* sentence, and the sentence Cortez is serving now after the 2014 law change, the former should prevail and the original sentence should, therefore, be reinstated. As applied to him, the mandatory minimum of 25 years, which was imposed upon him at resentencing pursuant to MCL 769.25a(4)(c), was an unconstitutional increase from his original, *constitutional but unprescribed* sentence of 10-40 years imposed by the Hon. Vera Massey Jones in 1994.

The US Constitution prohibits the *ex post facto* application of criminal laws. Article I, § 9, clause 3 provides that Congress shall not pass any "*ex post facto* Law." Another provision of the US Constitution, Article I, § 10, is directed to the States: "No State shall ... pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts."

Michigan's Constitution follows suit, stating that: "No bill of attainder, *ex post facto* law or law impairing the obligation of contract shall be enacted." Const. 1963, Art I, sec. 10. Both *ex post facto* clauses are designed to secure substantial personal rights against arbitrary and oppressive legislation. *People v Russo*, 439 Mich 584, 592, 487 NW2d 698 (1992); *Pennington, supra*, and to ensure fair notice that conduct is criminal, *People v Stevenson*, 416 Mich 383, 396, 331 NW2d 143 (1982); *People v Davis*, 181 Mich App 354, 357, 448 NW2d 842 (1989).

"Michigan does not interpret its constitutional provision more expansively than its federal counterpart." *People v Callon*, 256 Mich App 312, 317, 662 NW2d 501 (2003), citing *Attorney General v Pub. Service Comm.*, 249 Mich App 424, 434, 642 NW2d 691 (2002); *People v Pennington*, 240 Mich App 188, 191 n. 1, 610 NW2d 608 (2000).

Therefore, Michigan courts look to the federal courts' interpretations of the US Constitution when examining *ex post facto* claims.

In one of the earliest criminal procedure decisions of the US Supreme Court, *Calder v Bull*, 3 Dall. 386, 390 (1798), the Court defined the scope of the Ex Post Facto Clause.

After finding that the term "*ex post facto*" was a term of art with an established meaning, the Court set forth four ways a law could violate the prohibition:

"[1.] Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.

[2.] Every law that aggravates a crime, or makes it greater than it was, when committed. [3.] Every law that changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed. [4.] Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

There are additional attributes of an unconstitutional ex post fact law. First, the law must be retroactive, "[t]hat is, it must apply to events occurring before its enactment," and the law "[m]ust disadvantage the offender affected by it." *Weaver v Graham*, 450 US 24, 29 (1981). Second, the Clause applies only to legislation, not judicial opinions. See *Marks v United States*, 430 US 188, 191-92 (1977) ("The Ex Post Facto Clause is a limitation upon the powers of the legislature, and does not of its own force apply to the judicial branch of government. But the principle on which the Clause is based - the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties - is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause. . .") Third, "[A]lthough the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them." *Collins v Youngblood*, 497 US 37, 41 (1990).

Although the most obvious way a legislature could run afoul of the *ex post facto* clause of either a state or the federal Constitution, would be to pass a law that criminalizes activity that was not criminal at the time it was taken (the first *Calder* definition), the next most obvious is a legislative act that increases the punishment available for a criminal act either after the act, or after an initial punishment is "annexed" (the third *Calder* definition).

This third Calder principle has been applied to many situations involving increased punishment by the Supreme Court.

The *ex post facto* clause has been invoked when examining statutory sentencing guidelines. In *Miller v Florida*, 482 US 423 (1987), the defendant was convicted of sexual battery. At the time the crime was committed, Florida's sentencing guidelines required a presumptive sentence of 3 to 4 years imprisonment. Revised guidelines in effect at the time of sentencing called for a presumptive sentence of 5 to 7 years imprisonment. The trial court applied the revised guidelines, imposing a seven-year sentence. The Supreme Court reversed, finding application of the revised sentencing guidelines constitutionally defective. The guidelines were imposed retrospectively, they disadvantaged the defendant by subjecting him to the possibility of increased punishment, and they could not be characterized as "procedural."

The *ex post facto* clause has been invoked when examining mandatory sentencing schemes. In *Lindsey v Washington*, 301 US 397, 401 (1937), the defendants were sentenced under a law requiring a sentence of 15 years, while the law in effect at the time of the offense gave the judge discretion to impose a lesser sentence. The Court struck down the conviction, commenting: [T]he *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. . . . Removal of the possibility of a sentence of less than fifteen years, at the end of which petitioners would be freed from further confinement and the tutelage of a parole revocable at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. Notably absent from *Lindsey*, however, is that there was not contention that the original sentence was unconstitutional, where there is in Cortez's

case, and therefore did not have the dimension of the doctrine that an unconstitutional law is no law at all, and is void *ab initio*.

The ex post facto clause has been invoked when examining the frequency of parole hearings. In *California Dept. of Corr. v Morales*, 514 US 499 (1995), the Court held that a statutory amendment that permitted the Board of Prison Terms to decrease the frequency of parole suitability hearings under certain conditions did not violate the ex post facto prohibition. The California statute in question was amended after Morales' conviction to allow parole boards to defer suitability hearings for three years for individuals convicted of more than one offense involving the taking of a life. Previously, prisoners were allowed annual suitability hearings. Morales argued that such a law made parole less accessible, thus making his sentence longer in violation of the Ex Post Facto Clause.

Justice Thomas wrote that the statute did nothing to affect Morales' indeterminate sentence (15 to life), and it did not alter the "substantive formula for securing any reductions to the sentencing range." *Id.* at 507. The statutory amendment simply altered the method for fixing a parole release date so that the parole board would not have to hold another hearing in the year or two after the initial hearing. The Court emphasized that it had long refused to articulate any particular formula for measuring when legislative adjustments are of "sufficient moment" to transgress the Ex Post Facto Clause. This case did not require such an articulation because the amended statute's chance for increasing the measure of punishment was far too "speculative and attenuated." *See also Garner v Jones*, 120 S Ct 1362 (2000) (Georgia's newer parole policy did not act to increase respondent's punishment for the crime he committed prior to the enactment of the new policy.)

The *ex post facto* clause has been invoked when examining early release provisions. *Lynce v Mathis*, 519 US 433 (1997). In *Lynce*, The Court considered an *ex post facto* claim arising from the retroactive cancellation of a prisoner's provisional early release credits, which had been awarded to alleviate prison overcrowding. In 1983, the Florida Legislature established the early release program, and Lynce was released in 1992. Subsequently, the state Attorney General interpreted a 1992 statute as canceling retroactively credits for those who had committed murder or attempted murder. Because Lynce fell into this category, he was rearrested and returned to prison. The Supreme Court held that this was an unconstitutional retroactive increase in punishment. "[R]etroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the Ex Post Facto Clause because such credits are 'one determinant of petitioner's prison term ... and ... [the petitioner's] effective sentence is altered once this determinant is changed.'" *Id.* at 445 (quoting *Weaver v Graham*, 450 US 24, 32 (1981)).

By contrast, there is no *ex post facto* violation where the criminal act itself was taken after enactment of the law, *see, e.g., People v Harvey*, 174 Mich App 58, 435 NW2d 456 (1989), or where the legal consequences attach to the defendant only as a result of acts committed by defendant after the effective date of the statute, *see, e.g., People v Callon*, 256 Mich App 312, 662 NW2d 501 (2003). Neither of these exceptions applies in this case.

The current rule of law in Michigan is: "[t]he Ex Post Facto Clauses of the United States and Michigan Constitutions bar the retroactive application of a law "if, among other reasons, the law "increases the punishment for a crime." *People v Earl*, 495 Mich 33, 37; 845 NW2d 721 (2014).

The State of Michigan legislatively set Cortez's mandatory minimum sentence at 25 years after the fact. There is no merit to the claim that the minimum of the original sentence was life, and the minimum of the second sentence was 25 years when the original law was unconstitutional. That is nothing less than hamstringing the defendant. If this court does anything but reimpose the original sentence set by Judge Massey Jones, the message it is sending (and worse, the rule it is establishing) allows the state to increase the gross amount of time served by following the same sentencing procedure as in this case:

1. Impose a constitutional, but unprescribed sentence (10-40 years),
2. Then, forcibly reverse that decision, and impose an unconstitutional but prescribed sentence (mandatory life),
3. Then, legislatively reduce the minimum sentence to 25 years,
4. Avoid an ex post facto challenge by comparing the reduced sentence of 25 years to the unconstitutional sentence instead of the constitutional one.

In Michigan, a statute declared unconstitutional is void *ab initio*. *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135, 144; 253 NW2d 114 (1977). *See also Norton v Shelby Co*, 118 US 425, 442; 6 S Ct 1121; 30 L Ed 178 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."). Mandatory life sentences imposed on Juveniles in Michigan pursuant MCL 750.316 unconstitutionally violate the 8th Amendment to the US Constitution, and is void *ab initio* as applied to Juveniles. *Miller, supra*.

Cortez's mandatory life sentence must be disregarded from this calculus as a defunct vestige of an unconstitutional sentencing scheme, and therefore, the only remaining

sentences to examine are the original May, 1994 sentence and the April, 2017 sentence. It is plain to see that the minimum sentence imposed on Cortez was increased from 10 years in May of 1994 to 25 years, in April of 2017, after the legislature enacted MCL 769.25a in 2014.

MCL 769.25a is, therefore, an unconstitutional, ex post facto, law as applied to Cortez, and his original sentence should be reimposed.

II. MCL 769.25a(6) VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION AND THE MICHIGAN CONSTITUTION AS WELL AS THE 14TH AMENDMENT'S EQUAL PROTECTION CLAUSE BECAUSE IT PROHIBITS GOOD TIME DISCIPLINARY CREDITS FROM BEING OBTAINED BY DEFENDANTS WHO WERE UNCONSTITUTIONALLY SENTENCED.

A. MCL 769.25a(6) strips juvenile offenders who have been resentenced of the opportunity to accrue disciplinary credits.

The ex post facto clause has been invoked when examining “good-time credit.” *Weaver v Graham*, 450 US 24 (1981), involved inmates whose good-time credit was legislatively reduced across the board, even if they had not violated any prison regulation.

The Court ruled that the elimination of good time-credit constituted an increase in punishment because "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Weaver v Graham*, 450 US at 32.

In response to the *Miller v Alabama* decision, the legislature enacted MCL 769.25a(6), which says:

A defendant who is resentenced under subsection (4) shall be given credit for time already served, but shall not receive any good time credits, special

good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence.

Cortez was originally convicted and sentenced during the era when Michigan law required the application of disciplinary credits. MCL 769.25a(6) targets only juvenile offenders, a cognizable class under the 14th Amendment's equal protection clause; no other class of individuals suffers from this provision of the statute if they are ever resentenced, thereby denying Cortez equal protection of the law.

The Supreme Court held in *Weaver* that "in accord[s] these purposes, our decisions prescribe that two critical elements must be present for a criminal or penal law to be ex post facto; it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender by it[.]" citing *Lindsey v Washington*, 301 US 397 (1937).

MCL 769.25a was enacted in March of 2014—nearly 20 years after Cortez's original sentence in May of 1994. When the mandatory sentencing provision of MCL 750.316 was determined to violate the 8th Amendment as applied to juvenile offenders by the US Supreme Court in *Miller* in 2012, it was, as previously argued by Appellant, unconstitutional for all time. As the US Supreme Court explained in *Danforth v Minnesota*, once the high court rules a law unconstitutional, it is also true that the law or rule of criminal procedure has always been unconstitutional. The Supreme Court said:

Our decision today must also be understood against the backdrop of our somewhat confused and confusing "retroactivity" cases decided in the years between 1965 and 1987. Indeed, we note at the outset that the very word "retroactivity" is misleading because it speaks in temporal terms. "Retroactivity" suggests that when we declare that a new constitutional rule of criminal procedure is "nonretroactive," we are implying that the right at issue was not in existence prior to the date the "new rule" was announced. But this is incorrect. As we have already explained, the source of a "new rule" is the Constitution itself, not any judicial power to create

new rules of law. **Accordingly, the underlying right necessarily pre-exists our articulation of the new rule.** What we are actually determining when we assess the "retroactivity" of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.

Danforth v Minnesota, 552 US 264, 271, 128 S Ct 1028, 169 L Ed 2d (2008) (emphasis added).

Cortez's sentence must be viewed in a different light. The mandatory life without parole sentence Cortez received in 1994 has always been unconstitutional. When the Wayne County Prosecutor decided not to seek life against Cortez and seek a term-of-years sentence, the prosecutor made a determination with which the sentencing court agreed: that Cortez was not only reformable, but that his significant transformation made him eligible to re-enter civil society. As a component of that term-of-years sentence, Cortez likewise should receive the benefit of accrual of disciplinary credits ordinarily awarded to a defendant receiving a term of years sentence.¹²

Although Cortez received the statutorily prescribed sentence of 25-60 years mandated by MCL 769.25a, he is not currently accruing disciplinary credit time toward his sentence by operation of MCL 769.25a(6). Absent this section of the statute, the disciplinary credits would be automatically awarded.

In *Michigan ex rel. Oakland County Prosecutor v Department of Corrections*, 199 Mich App 681, 503 NW2d 465 (1993), Harold Anderson was convicted of AWIM in 1979m and sentenced to "life in prison." *Id.* at 684. Anderson was remanded for resentencing two years later, and received a 10-30 year sentence. The Court of Appeals

¹² See, MDOC Policy Directive 03.01.101, parag. M. https://www.michigan.gov/documents/corrections/0301105_disciplinary_time_FINAL_236592_7.pdf. Site last visited 11/8/2017.

stated, “While Anderson was in prison, he earned all the regular good-time and special good-time credits possible under the formula used by the DOC. As a result, Anderson was discharged from prison on August 12, 1992, after having served thirteen years and four months of his maximum sentence of thirty years.” *Id.* The court applied Anderson’s good time credits to the entire period of time Anderson served and not just to the time he served after resentencing. See also, e.g., *Wayne County Pros. Atty. v Dept. of Corr.*, 1997 Mich App LEXIS 1051, (Darol Holbrook earning good time credits during the time he was serving a life without parole sentence.).

These cases help explain how the MDOC automatically applies good time (later termed disciplinary credits) to a prisoner’s sentence, pursuant to MDOC Policy Directives, and MCL 800.33, for those sentences imposed prior to 1998. This “automatic” application is used to determine when a prisoner initially becomes subject to the Michigan Parole Board’s Jurisdiction. MCL 791.234(1).

Cortez too is entitled to obtain accrual of disciplinary credits¹³ during the time that he has already served—more than 23 years—as well as for the time remaining because he is similarly situated to Anderson and Holbrook, and is entitled to equal protection under the law. US Const. Amend. XIV

Cortez shows that MCL 769.25a(6) is unconstitutional and should not apply in this case. Additionally, when MDOC began issuing Cortez disciplinary credits in 1994, 20 years prior to the enactment of MCL 769.25a(6), showing that Cortez has always been

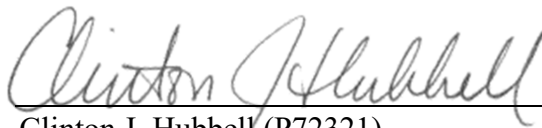
¹³ Cortez’s conviction and sentence occurred during the time that prisoners could only receive disciplinary credits rather than “good time” credits.

entitled to receive the benefit of the law that was in place at the time of the crime. MCL 800.33 affords those whose crimes were committed in 1994 to obtain disciplinary credits on both their minimum and maximum sentences. MCL 769.25a(6) post-dates and directly contradicts this and therefore violates the *ex post facto* clauses of the US and Michigan Constitutions. This Court should therefore hold that Cortez must receive disciplinary credits for the balance of his sentence.

CONCLUSION AND REQUEST FOR RELIEF

Wherefore, the Appellant requests that this Court reverse the finding of the Wayne County Circuit Court and hold that, (1) the mandatory minimum of 25 years established by MCL 769.25a(4)(c) unconstitutionally increased the available punishment upon Cortez in violation of the *ex post facto* clauses of the Michigan and United States Constitutions, and that Cortez’s original sentence of 10-40 years on his conviction for “felony murder” should be reinstated, and (2) hold that denying Cortez disciplinary credits after the fact, MCL 769.25a(6), was an unconstitutional *ex post facto* action, both of which were designed to retroactively, and unconstitutionally, increase the nature of Cortez’s punishment after the fact.

**RESPECTFULLY SUBMITTED
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