

STATE OF MICHIGAN
IN THE THIRD CIRCUIT COURT FOR WAYNE COUNTY

PEOPLE OF THE STATE OF
MICHIGAN,

Plaintiff.

v.

CORTEZ ROLAND DAVIS,
MDOC #237818,

Defendant.

No. 94-002089

Hon. Shannon Walker

SENTENCING MEMORANDUM
FOR CORTEZ ROLAND DAVIS

ATTORNEYS FOR DEFENDANT

Clinton J. Hubbell (P72321)
Attorney for Petitioner, *pro bono*
HUBBELL DUVALL PLLC
26211 Central Park Blvd. Ste. 514
Southfield, MI 48076-4161
Phone: (248) 595-8617
Email: clint@hubbellduvall.com

SUMMARY OF DEFENDANT'S POSITION

On May 10, 1994, CORTEZ ROLAND DAVIS (“Cortez”) after a jury trial, was convicted of a crime 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. *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.). Therefore, the court is dealing with three remaining charges:

1. First-Degree Felony Murder, MCL 750.316;
2. Assault With Intent to Rob While Armed, MCL 750.89; and
3. Possession of a Firearm During the Commission of a Felony, MCL 750.227b.

Cortez requests the following at the re-sentencing hearing currently scheduled for Thursday, April 27, 2017.

1. Reinstitution of the September 26, 1994 sentence for First-Degree Felony Murder of 10-40 years, with proper credit for time served of 21 years as opposed to a sentence of 25-40 years (min) – 60 years (max) pursuant to MCL

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 June 24, 1997) (unpublished).

769.25a(4)(c), for the reason that MCL 769.25a(4)(c) is an unconstitutional *ex post facto* law as applied to Cortez; and

2. That Cortez be properly credited with concurrent time served of 21 years on the conviction for Assault With Intent to Rob While Armed; and
3. That Cortez be properly credited with time served of 2 years for the conviction of Possession of a Firearm During the Commission of a Felony; and
4. That Cortez be immediately released, or deemed immediately parole-eligible.

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 sentence 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 has served ever since. It is also noteworthy, and contrary to justice, that Cortez has been serving an unconstitutional life sentence since the 2012 decision in Miller became final—nearly five years ago.

As discussed, Cortez is a picture of what the Miller court discussed about the mistakes and crimes of youth being cured by adequate opportunity for growth, development and the ideal of rehabilitation. This case is a very clear candidate for imposition of the least harsh penalty allowed by the law.

PROCEDURAL HISTORY

1. 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.

2. Cortez was 16 years, 9 months, and 7 days old at the time of the offense.

3. 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.

4. A jury trial on the charges was held on May 5, 9 and 10, 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.

5. 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.² The court said:

But the court has also held that in this instance 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.

6. On September 26, 1994, the trial court issued a written Order regarding sentencing.³ 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.

7. After the State 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.⁴ 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

² Exhibit 1, Initial Sentencing Hearing, Transcript dated June 20, 1994.

³ Exhibit 2, Written Order Regarding Sentence, dated September 26, 1994.

⁴ Exhibit 3, Second Sentencing Hearing, Transcript dated December 22, 1994.

justice system is not going to be able to rehabilitate him within the time they've got left.

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. Appx. 15a, p. 4-6.

8. On January 5, 1996 a hearing on the defendant's Motion to determine probable cause to arrest him was held.
9. 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 N.W.2d 923 (Mich. 1998).
10. On March 12, 1999, the trial court held an evidentiary hearing on instructions from the Court of Appeals.
11. The trial court found there was probable cause to arrest Cortez so as to support the admissibility of his statement to the police.

12. 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 U.S. 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.

13. 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.

14. 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.⁵ 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.

⁵ Exhibit 4, Motion Hearing, Transcript dated October 11, 2002.

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

16. 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 N.W.2d 525 (2005) (Kelly, J. dissenting).

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

18. On March 12, 2007 the U.S. 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).

19. The U.S. District Court subsequently denied Cortez's request for a Certificate of Appealability regarding its denial of habeas relief with prejudice. This Court also denied Cortez an appeal to that court on the habeas claims.

20. On May 17, 2010, the U.S. Supreme Court issued its opinion in *Graham v Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (Announcing a categorical ban on the sentence of life without the possibility of parole for juvenile non-homicide offenders.)

21. 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. The Hon. Vera 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."

22. Cortez timely requested leave to appeal to the Michigan Court of Appeals, and was denied leave to appeal on November 16, 2011.

23. On January 7, 2012, Cortez filed an Application for Leave to Appeal the disposition of his motion under *Graham* to the Michigan Supreme Court.

24. While awaiting a decision on the January 7, 2012 application in the Michigan Supreme Court, on June 25, 2012, the U.S. Supreme Court issued its opinion in *Miller v Alabama*, 567 U.S. ___, 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.

25. On August 22, 2012, the Department of Corrections prepared a Presentence Investigation Report.⁶

26. 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 N.W.2d 167 (2012). The trial court then scheduled a resentencing hearing for December 7, 2012.

⁶ Exhibit 5, Second Presentence Investigation Report, dated August 22, 2012.

27. 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 N.W.2d 685 (Mich. App. 2012) (holding, *inter alia*, that *Miller/Jackson* would not be retroactively applicable to cases that had become final on direct review.)

28. 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.⁷

29. 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.

30. After the Michigan Court of Appeals issued its January 16, 2013 order in Cortez's case, on January 30, 2013, the United States District Court for the Eastern District of Michigan decided the case of *Hill v. Snyder*, 2013 WL 364193 (E.D. Mich. Jan 30, 2013) (granting partial summary judgment to plaintiffs in a civil suit to determine certain juvenile prisoners' rights under 42 USC § 1983 and the Eighth Amendment to the United States Constitution.) The District Court said it would hold that *Miller/Jackson* is retroactively applicable to cases that have become final on direct review.

31. 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

⁷ Exhibit 6, Post-Conviction Motion Hearing Scheduling Resentencing, Transcript dated December 7, 2012.

Eliasons' Appeals—two other juveniles sentenced to life without parole under Michigan's mandatory sentencing scheme. *People v. Davis*, 838 N.W.2d 876 (Mich. 2013).

32. Shortly thereafter, on November 26, 2013, the U.S. District Court for the Eastern District of Michigan issued an Order requiring compliance with *Miller*, and setting forth the guidelines to be met for compliance by a date certain in *Hill*. *Hill v. Snyder*, Case No. 10-14568 (E.D. Mich. Nov. 26, 2013).

33. 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.

34. The Michigan Supreme Court heard combined oral argument in *Carp*, *Davis* and *Eliason* on March 6, 2014.

35. Petitioners Davis, Eliason and Carp drew briefs *amici curai* from multiple groups and individuals. These briefs contain relevant material and will be reproduced by the Cortez for the court's benefit.

36. 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 N.W.2d 801, 496 Mich. 440 (Mich. 2014).

37. 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 N.W.2d 710 (Mich. 2014).

38. 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.

39. 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 N.W.2d 801, 496 Mich. 440 (Mich. 2014)).

40. Cortez's case was remanded back to the Michigan Supreme Court on March 7, 2016 in light of *Montgomery*.⁸

41. The Michigan Supreme Court, in turn, remanded this matter to this court for resentencing proceedings.

⁸ Exhibit 7, US Supreme Court Order Granting Writ of Certiorari and Remanding to Michigan Supreme Court.

PRE-CONVICTION HISTORY OF THE DEFENDANT, CORTEZ DAVIS

Cortez was born March 7, 1977. His life circumstances at the time of the commission of the offense in this case were horrific according to both his personal account and the 1994 Pre-sentence Investigation Report.⁹ Cortez' mother was 16 years old at the time of his birth, and was already struggling to care for his two-year old sister. Cortez' father passed away in 1986 from drug use when Cortez was just 9 years old, at which time his mother turned to drug dealing and use. She began to neglect Cortez and his other siblings by failing to keep food in the house. When he reported to Mason Elementary School counselor in 1987 what was happening in his home (of being hungry, living in a crack house, filth, inoperable plumbing, an infestation of cockroaches, and a leaking ceiling, which was in danger of imminent collapse), Child Protective Services intervened and took Cortez and his siblings from the home, citing neglect. Protective Services also identified drug paraphernalia in the house as evidence of drug use.

The Protective Services file indicated that since 1981 there had been thirteen referrals made alleging abuse and neglect. Cortez and his siblings were made wards of the court. *Id.* Davis and his siblings remained in the care of his grandmother until 1989, at which time they were returned to their mother—who lived in a drug-infested environment. But after six months, due to her drug use and failure to provide nourishment, the children were again removed from the home. The children were temporarily placed with their grandmother, until their maternal uncle was convicted of sexually assaulting Cortez' younger sister. The two youngest children were placed in

⁹ Exhibit 8, 1994 Presentence Report, dated June 3, 1994.

foster care in July of 1992. Cortez escaped from placement in July of 1992 and the State could not locate him for a time. He dropped out of school in 1993, in the 8th grade to support himself and his siblings. At one point, Cortez was homeless. His maternal grandmother stated that his mother introduced Cortez to selling drugs from their home.

This case began on December 14, 1993 with the 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.¹⁰ The record indicates that Scott held Davis, Jr. at gunpoint while he robbed Davis, Jr. of his coat.¹¹ According to a contested written statement Cortez gave the police, he was with Arnold on the north side of Fenkell, and told him to "be cool and you [won't] get hurt." When Davis, Jr. attempted to run away, Scott shot him, and Cortez fled without harming Arnold.

Cortez was 16 years, 9 months, and 7 days old at the time of this offense. Appx. 1a. In spite of not shooting Davis, Jr., 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 state¹², Cortez was waived into the adult criminal process. At the time of his arrest for these offenses, Cortez's father had been dead for 6 years due to a drug overdose, his mother was in a drug rehabilitation center for crack cocaine use, two of his siblings were in foster care, and the remaining siblings' whereabouts were unknown.

INSTITUTIONAL RECORD OF CORTEZ DAVIS

¹⁰ Exhibit 9, Original Witness Statement of Michael Scott.

¹¹ The facts are unclear about whether there was a third participant called "Shay Man."

¹² The fact that Cortez was a ward of the State is taken from the 1994 Presentence Report.

On August 4, 1994, Cortez was transferred from RMI to DRF due to having a known enemy in the system at RMI. On August 23, 1994, Cortez Davis was granted a name change to Cortez Davis-El to reflect his commitment to the Moorish Science Temple. On October 12, 1994, Cortez was moved from level IV security to level II security in DRF due to not obtaining any misconduct tickets since his arrival. On October 29, 1994, at the age of 17, Cortez was given a major misconduct ticket for disobeying a direct order. He was told to stop running in the yard, but did not follow those orders. On November 18, 1994, Cortez was given 3 days in top lock in response to his major misconduct ticket. During his time at DRF, Cortez took advantage of opportunities such as working grounds maintenance and attending reading and math classes.

On January 17, 1995, Cortez received a major misconduct ticket for being out of place and talking to other prisoners, for which he received 3 days in top lock. On January 18, 1995, Cortez received another misconduct ticket for being out of place on the basketball court, where he was not permitted to be, for which he received 7 days in top lock. On February 7, 1995, Cortez received a major misconduct ticket for not showing up for his assigned detail, for which he received 3 days in top lock. On February 16, 1995, Cortez received a major misconduct ticket for disobeying a direct order and not showing an officer what was in a paper bag that he was carrying, for which he received 7 days in top lock. On the same day, Cortez received another major misconduct ticket for being out of place and disobeying direct orders when he left top lock to go to the bathroom and would not return when ordered, for which he received 14 days in top lock. On February 27, 1995, Cortez received a major misconduct ticket for not attending his detail for class,

for which he received 7 days in top lock. Of these six misconduct tickets which occurred within 2 months while Cortez was 17 years old, 3 of them were for disobeying orders and 3 were for being out of place. None of the offenses were violent.

On April 7, 1995, Cortez received a major misconduct ticket for a small bag of marijuana found in a shoe in Cortez's locker. A pen with a tack melted into it was also found to be in possession of Cortez, for which he received a second misconduct ticket with the indication that there was zero intent to harm. Cortez received 30 days in detention for the possession of contraband and 7 days in top lock for possessing marijuana. On April 16, 1995, Cortez received a major misconduct ticket for disobeying orders and causing a disturbance, for which he received 7 days in top lock. On the following day, he was given a major misconduct ticket for insolence after calling an officer a "bitch," for which he received 7 days in top lock.

On May 11, 1995, Cortez received a misconduct ticket for destruction or misuse of property after pictures, writing, and symbols scratched and written on the walls, door, and floor of his cell, for which he received 7 days in top lock. On June 20, 1995, Cortez Davis-El was denied a name change to King Davis-El based on the policy of one name change being allowed per incarceration. On August 8, 1995, Cortez was given 2 days in top lock for being out of place. On November 29, 1995, Cortez was given a major misconduct ticket for interference with administration of rules, for which he received 3 days in top lock.

On December 15, 1995, a transfer order for a prisoner swap was passed for Cortez to be transferred from SRF to LRF. On March 5, 1996, Cortez was transferred from LRF

level IV to RMI level IV because it was more fitting for his age and level of maturity. On June 14, 1996, Cortez was given a major misconduct ticket for disobeying a direct order, for which he was given 3 days in top lock. On June 20, 1996, Cortez was given a major misconduct ticket for possession of books that he checked out with a number that was not his own, for which he received 7 days in top lock. On August 25, 1996, Cortez was given a major misconduct ticket for disobeying a direct order, for which he received 6 days in top lock. On September 27, 1996, Cortez was given a major misconduct ticket for disobeying a direct order and causing a disturbance. He was given 7 days in top lock for disobeying an order, but was found not guilty of causing a disturbance.

During the year of 1996, Cortez was involved with positive work assignments such as working in the dish room and dining room. He received positive tickets from his supervisors that noticed his hard work and ability to get along with other workers. He consistently received above average marks and received bonus pay for being a food service worker. Cortez also continued taking GED classes and completed the GED portion of the writing skills program on September 27, 1996. On May 8, 1997, Cortez was given a major misconduct ticket for disobeying a direct order, for which he received 3 days in top lock. On July 1, 1997, Cortez took the GED exam and was awaiting results. On November 18, 1997, Cortez was transferred from LRF to RMI as a result of a trade of prisoners.

On May 5, 1998, Cortez received a major misconduct ticket for possession of stolen property and destruction of state property over \$10. Davis was to be assessed restitution up to \$399.95 for the replacement of his roommate's locker, which he pried

open, took a bag, and gave to another prisoner. On December 7, 1998, a work assignment evaluation for Cortez noted that he was working as a school tutor and was a positive role model for the students. On November 9, 2000, a major misconduct ticket was given to Cortez after finding papers with the names of football teams, deadlines, and odds. Cortez was found guilty of gambling and was given 2 days in top lock.

Cortez continued to work as a school tutor and consistently received positive reports stating that he communicates well and assists students as needed. On March 3, 2004, Cortez received a major misconduct ticket for sexual misconduct during a visit with Jamailla Parks-El, although they both claim there was no misconduct. For this, Cortez received 3 days in top lock and Jamailla Parks-El was restricted from visiting. On March 7, 2005, a lifer review report was conducted on Cortez. While it notes that he has 22 major misconducts for his active sentences, they are not violent and he is not a problem in the unit and works as a teacher's aid.

On March 14, 2005, Cortez received a major misconduct ticket for being in possession of marijuana that was hidden in macaroni and cheese boxes, for which he received 30 days in detention. On November 2, 2005, Cortez submitted a petition of support for the commutation of sentence. He is remorseful for his actions, Judge Jones supported Cortez and believed he was capable of being rehabilitated, he has maintained good behavior and completed all of his expected requirements, he has a positive release plan, and he had no previous criminal record. On November 11, 2005, Jamailla Parks, Cortez's wife, submitted an application for pardon or commutation of sentence. She explained that he would live with his wife and kids and have a recommendation for

employment at Phoenix Company and would also be looking for employment in the field of sign language. Although the Governor denied this application for a commuted sentence, Cortez demonstrated his dedication to being rehabilitated and engaging in positive activities. On January 23, 2006, a case summary report for a lifer review of Cortez was submitted. It explains that Cortez expresses remorse, showed remorse to the victims family, accepts responsibility for misconducts in prison, has shown adequate work involvement, has maintained family support, and has engaged in extensive programming such as American Sign Language training, emotions anonymous, national lifers of America Inc. certificate of appreciation, parenting class, and being a member of the Moorish Temple of America.

On November 15, 2007, Cortez was charged with 15 days in detention for being found with a small bag of marijuana in his shirt pocket during a pat down after a visit. On December 18, 2007, Cortez received a major misconduct ticket for occupying a room without authorization, for which he received 30 days of lost privileges. On December 11, 2005, a transfer order from JCS to KCF was completed in order to make room for incoming prisoners. This transfer troubled both Cortez and Jamailla Parks due to its distance from home. This prevented his family from being able to easily visit Cortez.

On August 18, 2008, Judge Jones submitted a recommendation for commutation of Cortez's sentence upon request by the parole board. During his time at KCF, Cortez received consistently positive work evaluations for his work as part of the food service and yard crew. On April 1, 2009, Tawauana Parks submitted a letter to the parole board in support of a commuted sentence for Davis, saying that he is a man of vision and good

will and wants to give back by trying to prevent other juveniles from entering into the justice system. On April 27, 2009, Mr. Clint Hubbell submitted a request for a transfer to a closer facility, but the request was denied on the premise that it cannot be granted for the purpose of accommodating visitations or for the ease of attorney visits. On July 14, 2010, a transfer order from KCF to IBC was submitted to accommodate an incoming OPT prisoner from IBC. KCF offered Cortez for exchange due to his positive adjustment.

On October 12, 2010, Denise Bolton conducted a lifer review report for Cortez. He has had 26 major misconducts for his active sentences, but only 1 since the last report was prepared. Cortez works as a law library clerk and has completed all reception facility recommended programs at an above average level. On December 28, 2010, Steinberg and Gilbert submitted a letter to the Governor in support of Cortez asking for a commutation of sentence to reverse a miscarriage of justice. On February 23, 2011, a transfer order from IBC to MTU was placed to accommodate an incoming Learning Site prisoner. On October 17, 2011, a transfer order from MTU to TCF was placed. During his time at TCF, Cortez received no major misconduct tickets and showed positive programming and work involvement. He worked as a school tutor and works well with students, is patient and approachable, and was even selected to speak to at risk youth through a crime prevention program at TCF.

On October 22, 2014, a transfer order was placed from TCF to URF. On August 4, 2015, a lifer review report was conducted. Cortez has very good program and work assignment evaluations, works as a GED tutor, and has received no misconducts in the last 5+ years. On August 16, 2015, Thelma Clark submitted a letter to the Michigan

Parole Board stating that through continuing to correspond with and visit Cortez, she has seen him transform from a boy to a productive man despite the negative influences that he grew up around due to his mother and life situation. Cortez has many supporters that will help with any necessities if he were to be released. On September 17, 2015, a transfer order was placed from URF to MTU due to Cortez's positive behavior at URF.

On October 8, 2015, a case summary report was filed and despite its final vote of deferral, it outlines Cortez's positive adjustment. His misconducts have greatly diminished with time, with his last one coming on October of 2007, he has maintained satisfactory block reports, maintained family support and has a support system in the community, has suitable arrangements for work and a proposed placement with Hubbell Duval PLLC (sic) in the case of release. The report states "the prisoner has served approximately 21 years of his life sentence and he has earned on average, one class one misconduct ticket a year. However, he has been ticket free for the last eight years. This inmate has a good programming record and he receives good work evals. At this point, his institutional record justify an early release from prison, high school graduate, routine work assignments have been adequate, has completed vocational training/counseling/education, completion of self-help programming." Cortez also completed Blackstone institute on 8/17/10, received a Quest for authentic manhood certificate on 7/8/13, completed 8 modules in the core book of building trades, and spoke with at risk youths through the youth crime prevention program at TCF on 6/26/14. Cortez earned his GED, completed self-help programming, maintained adequate work

assignments, completed vocational training, counseling, and education, and his criminal history only includes the present sentences and offenses.¹³

In an undated, handwritten letter, Cortez outlined his plans for a possible release and the advantageous steps he has taken to better himself as a person while in prison. Cortez plans to report to Hubbell Duval PLLC (sic), enroll in OCC classes, and continue education as a paralegal and ASL interpreter for the deaf. Cortez realizes that his actions will determine whether or not he relapses, but states that he has taken measures to put himself in the best possible scenario such as living in a new community with no ties to pre-incarceration negative influences, living with his fiancée, securing employment to support and motivate himself, and educating himself. While incarcerated, Cortez has participated in self-help programs as well as religious services. He has served as Chaplain assistant, warden advisor, has certificates in ASL, building trades, master gardening, and men's fraternity. Cortez developed tools for controlling himself, avoiding bad situations and removing himself from negative environments, and how to understand and empathize with others. He vows to show that he is not the same 16 year old that entered prison in 1994. He ensures that he will make use of support groups and do everything possible to continue bettering his self. He concludes by saying "While I realize I can't undo what I've done in the past, I've made great use of this time to prepare myself for a successful life as a trustworthy member of society. I ask that you please give me that chance."

Cortez has been ticket-free for ten years, and considering the nature of his most recent violations, has been ticket free for even longer, showing his advancement, capacity

¹³ Exhibit 10, Certificates of Achievement and Completion.

for change and rehabilitation, and character, having grown and matured positively in the face of the threat of permanent incarceration.

CURRENT EVALUATION AND RISK ASSESSMENT

In advance of this resentencing, a private risk assessment was conducted by Sylvie Bourget, MA, LLP, of the Center for Assessment, Inc. 26711 Woodward Avenue, Suite 301 Huntington Woods, MI 48070 on March 11, 2017. Ms. Bourget issued a Psychological Evaluation Report and Risk Assessment on April 7, 2017.¹⁴ Of note in the report, are the following pertinent facts:

1. Judge Jones was very much of the opinion that Mr. Cortez's life circumstances as a child and adolescent had served to promote criminogenic factors/behaviors he hardly had any control over at such a young age.
2. Records indicate that over the course of his incarceration, Mr. Cortez has diligently taken advantage of all available programming. He has been in contact with Deborah Labelle, the attorney who directed the Juvenile Life Without Parole initiative for the American Civil Liberties of Michigan. He has taken classes to become a paralegal. He is fluent in American Sign Language and hopes to continue improving his skills. He has worked as a G.E.D. tutor for thirteen years while incarcerated, and has also been involved as a mentor for the GOALS program, Guiding Adolescents to Live Successfully for at risk youth from the outside community. He also has been working as a referee for the Recreation Department.

¹⁴ Exhibit 11, Psychological Evaluation and Risk Assessment.

3. Mr. Cortez expressed himself clearly and coherently and there was no indication of a thought disturbance. He appeared capable of adequate judgement and insight, and records as to his behavior in incarceration do not indicate ongoing problems with impulse control nor anger management. His has never had a misconduct for assaultive/aggressive behaviors, and as noted previously, he has not received any major misconducts for over a decade.

4. In regards to treatment and management needs, his scores indicate a low level of recidivism risk as well, and coupled with his score on the overall levels of protective influence against criminal behavior he would be at very low risk of re-offending. Mr. Cortez scored very high on the subscales associated with personal resources, with strengths attributed to cognitive/behavioral self-regulation, anger regulation/management, and education and training, all strengths that significantly contribute to positive adjustment.

5. Based on the gathered information and the overall clinical impression of this examiner, it is this examiner's opinion that Mr. Cortez has shown that with maturing he has used his incarceration as an opportunity to develop and focus on specific goals for continued rehabilitation, and has developed an understanding of the need to develop skills, positive relationships, and a plan should he be released. He has shown and continues to show that he has benefited from programming and education. Through his maturing years, his coping skills have improved, and for over a decade now he has not exhibited any maladaptive behaviors. He has demonstrated the ability to learn and benefit

from intervention, and has been a facilitator/teacher and mentor to numerous other inmates.

The full Report is provided herewith, along with a request to seal the information therein, for the benefit of the court. The Defendant does not yet have the benefit of the Current Presentence Report.

CONCLUSION AND REQUEST FOR LEAVE TO
PROVIDE ADDITIONAL BRIEFING ON LEGAL ISSUES

In conclusion, Cortez has materially demonstrated his capacity for growth and change since the tragedy of this case in 1993. He has, in the face of many obstacles, persevered by learning all he could through whatever opportunities presented themselves, even though mainline rehabilitative programming and services are not available to “lifers.” While not binding on this court, the message of Judge Massey Jones, who heard this entire case from 1994 – 2015, is clear: Cortez is a person who has been thrown away, but in whom she saw the potential for rehabilitation and reentry. She saw the injustice and unconstitutionality of his life sentence, believing that 10 years was an adequate amount of time for Cortez to develop and prove to the parole board that he was fit to reenter society. Ten years turned into twenty, and Cortez has now served 23 years of an unconstitutional sentence. This court is now in a position to correct this through a sentence that reflects his maturity, development, and willingness to grow in the face of the prospect of dying in prison. Cortez requests the opportunity to provide the court will full legal briefing on the legal issues of sentencing if the court should require same.

REQUEST FOR RELIEF

WHEREFORE, Cortez respectfully requests that the Court resentence him to 10 – 40 years, reflecting the only constitutional sentence Davis has ever served for his felony murder conviction since the statutorily prescribed sentence of 25-40 – 60 years under MCL 769.25a(4)(c) is an unconstitutional *ex post facto* law as applied to Cortez, increasing his original constitutional sentence after the fact.

Cortez further requests appropriate credits for time served for his remaining convictions.

Cortez requests all relief available to him at law, including a full juvenile resentencing hearing pursuant to *Miller v. Alabama*, and any other relief which has been denied to him, which he has currently, and which may become entitled during this case, and successively, waiving no argument about the constitutionality, proportionality, legality, or other aspects of this proceeding., or other proceedings which may have legally binding effect on this proceeding.

Date: April 13, 2017

RESPECTFULLY SUBMITTED



Clinton J. Hubbell (P72321)
Attorney for Defendant, *pro bono*

HUBBELL DUVALL PLLC
26211 Central Park Blvd. Ste. 514
Southfield, MI 48076-4161
(248) 595-8617
clint@hubbellduvall.com