STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Talbot, P.J., and Fitzgerald and Whitbeck, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

RAYMOND CURTIS CARP,

Defendant-Appellant

Supreme Court No. 146478

Court of Appeals No. 307758

Circuit Court No. 06-001700-FC

ST. CLAIR COUNTY PROSECUTOR
TIMOTHY K. MORRIS (P40584)
Attorney for Plaintiff-Appellee

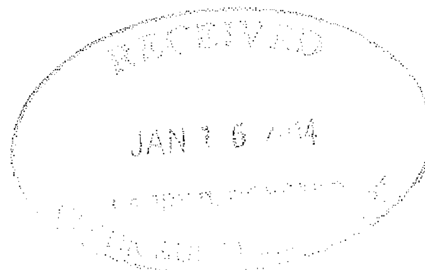
PATRICIA L. SELBY (P70163)
Attorney for Defendant-Appellant

ERIC B. RESTUCCIA (P49550)
Attorney for Attorney General, Intervener

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

BY: PATRICIA L. SELBY (P70163)
Attorney for Defendant-Appellant
Selby Law Firm, PLLC
PO Box 1077
Grosse Ile, Michigan 48138
(734) 624-4113



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JURISDICTIONAL STATEMENT

This Court's jurisdiction is specified in Michigan Court Rule 7.301, which states that "[t]he Supreme Court may: . . . review by appeal a case . . . after decision by the Court of Appeals[.]" MCR 7.301(A)(2). Following an application for leave to appeal to this Court, it "may grant or deny the application"; once leave is granted, "jurisdiction over the case is vested in the Supreme Court." MCR 7.302(H)(1), (3).

Defendant-Appellant Raymond Curtis Carp was convicted in the St. Clair County Circuit Court following a jury trial, on October 5, 2006, on charges of open murder (first-degree or felony-murder), armed robbery, larceny in a building, and larceny of property worth more than $1000 but less than $20,000. Mr. Carp received a sentence of life without parole for the murder conviction. Following unsuccessful direct appeals to the Michigan Court of Appeals and this Court, on September 27, 2010, Mr. Carp filed a motion for relief from judgment pursuant to Michigan Court Rules 6.500, *et seq.*

The trial court denied Mr. Carp's motion in an Order issued January 13, 2011. 14a. The Court of Appeals granted leave to appeal that denial, following a motion for reconsideration in view of the United States Supreme Court decision in *Miller v Alabama*, 567 US —; 132 S Ct 2455; 183 L Ed 2d (2012). 19a. The Court of Appeals denied Mr. Carp's appeal on November 15, 2012. *People v Carp*, 298 Mich App 472; 828 NW2d 685. 21a.

Mr. Carp filed a timely application for leave to appeal on January 9, 2013. This Court granted leave on November 6, 2013, on the limited question of the retroactivity of the *Miller* decision. 62a. It therefore has jurisdiction to consider Mr. Carp's appeal. MCR 7.301(A).

STATEMENT OF QUESTIONS PRESENTED

I. WHERE *MILLER V ALABAMA/JACKSON V HOBBS* CATEGORICALLY BANS MANDATORY LIFE WITHOUT PAROLE FOR JUVENILES CONVICTED OF HOMICIDE, AND WHERE THE DECISION MEETS OTHER CRITERIA TO BE FOUND SUBSTANTIVE, DOES *MILLER* APPLY RETROACTIVELY UNDER THE FIRST EXCEPTION IN *TEAGUE V LANE* ?

The trial court made no answer.
The Court of Appeals answers "No."
Defendant-Appellant answers "Yes."

II. DO THE PRINCIPLES OF "EVEN-HANDED JUSTICE" (*TEAGUE*) AND "LOGICAL RELATIONSHIP" (*TYLER V CAIN*) REQUIRE THAT *MILLER* APPLY RETROACTIVELY, IN VIEW OF THE RELIEF THE COURT PROVIDED KUNTRELL JACKSON, WHOSE CASE WAS ON COLLATERAL REVIEW IN *JACKSON V HOBBS*?

The trial court made no answer.
The Court of Appeals answers "No."
Defendant-Appellant answers "Yes."

III. DOES *MILLER*, *SUPRA*, APPLY RETROACTIVELY UNDER *PEOPLE V MAXSON*, AS THE PURPOSE OF ITS NEW RULE RELATES TO THE VERY INTEGRITY OF THE FACT-FINDING PROCESS, DEFENDANT-APPELLANT SUFFERED ACTUAL HARM IN RELIANCE ON THE OLD RULE, AND THE EFFECT ON THE ADMINISTRATION OF JUSTICE IS MINIMAL?

The trial court made no answer.
The Court of Appeals answers "No."
Defendant-Appellant answers "Yes."

IV. DOES *MILLER*'S PROHIBITION ON MANDATORY LIFE WITHOUT PAROLE FOR JUVENILES CONVICTED OF HOMICIDE REQUIRE DEFENDANT-APPELLANT BE RESENTENCED WITH INDIVIDUALIZED CONSIDERATION AND AN OPPORTUNITY FOR A SENTENCE LESS THAN LIFE WITHOUT PAROLE?

The trial court made no answer.
The Court of Appeals answers "No."
Defendant-Appellant answers "Yes."

STATEMENT OF FACTS

Background

The charges in this case arose from the May 31, 2006, murder of Mary Ann McNeely. Defendant-Appellant Raymond Carp was charged with four felonies: open murder (first-degree or felony-murder), MCL 750.316[1]; armed robbery, MCL 750.530; larceny in a building, MCL 750.360; and larceny of property worth more than $1000 but less than $20,000, MCL 750.356(3)(a). Fifteen years of age at the time of the offense, Raymond was charged as an adult under the automatic juvenile waiver provision. 245a-246a; MCL 712A.2(a)(1)(A). His half-brother, Brandon Gorecki, seven years older than Raymond, was convicted of first-degree murder and torture, among other crimes,[2] arising out of the same incident.

Raymond was tried before a jury, and convicted of all four counts on October 5, 2006, in St. Clair County Circuit Court, the Honorable James. P. Adair presiding. On November 20, 2006, the court sentenced him on the murder conviction to life without parole, with credit for 165 days served. 249a. As to the underlying felony convictions, Raymond received 15 to 30 years for the armed

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[1] As noted by the Court of Appeals on Raymond's direct appeal,

> Problematically, the prosecution presented alternative theories of first-degree murder, premeditated and felony-murder, and aiding and abetting first-degree murder, but the verdict form only reflects that the jury convicted defendant of "first-degree murder." Thus, as defense counsel notes on appeal, "one is left to speculate on [whether] the jury actually convicted [defendant of] premeditated or felony murder."

People v Carp, unpublished opinion per curiam of the Court of Appeals, issued Dec. 30, 2008 (Docket No. 275084). 330a. Therefore, references to Raymond's conviction will be to "first-degree murder."

[2] Gorecki was convicted at a separate jury trial of first-degree murder, MCL 750.316(1)(a); torture, MCL 750.85; armed robbery, MCL 750.529; larceny in a building, MCL 750.360; and larceny of more than $1,000, MCL 750.356(3)(a). His convictions were upheld by the Michigan Court of Appeals, *People v Gorecki*, unpublished opinion per curiam of the Michigan Court of Appeals, issued Oct. 8, 2008 (No. 277448). 324a. This Court denied Gorecki leave to appeal in an Order dated March 23, 2009 (No. 137739).

robbery count, one to four years for larceny in a building, and one to five years for larceny of $1,000 or more. *Id.* Raymond had no juvenile or adult criminal record before this incident. 245a, 247a.

The following recitation addresses those facts pertinent to his argument for relief pursuant to the United States Supreme Court's decision in *Miller v Alabama/Jackson v Hobbs*, and this Court's retroactivity-related questions in its Order of November 6, 2013.

Trial and Sentencing

Brandon Gorecki, Defendant-Appellant Raymond Carp's older half-brother, was staying with Mary Ann McNeely, after being kicked out of the home of Margie Carp, Gorecki and Raymond's mother. 124a; see also 81a, 82a, 99a.[3] Raymond visited Ms. McNeely's home on the evening of May 31, 2006, because Gorecki's girlfriend and baby daughter, Raymond's niece, were there. 98a. Raymond had a good relationship with Ms. McNeely, and referred to her as his aunt. 96a, 102a, 124a.

Gorecki had been kicked out of his mother's home over his drug use and violent history. 100a.[4] Gorecki was intimidating to the people who lived with him. Their mother and her boyfriend both testified that they actually moved out of their house, with Raymond, to get away from Gorecki, 83a-84a, 88a, 103a; and only returned on Gorecki's departure. 89a. They had called the police on Gorecki several times, and were advised to get a restraining order against him. 88a. Gorecki's girlfriend, Shavaun Fink, testified that she had been in previous fights with Gorecki, and was also afraid of him. 126a. She described Gorecki as a high school dropout with a heroin problem. 125a.

[3] Note that throughout the trial, Raymond Carp is referred to by his family nickname "Butchie," misspelled as "Butchy" in the transcripts.

[4] The full extent of Gorecki's history is not in the record, because it was ruled inadmissible once the trial court ruled that the defense theory of duress was unavailable as a defense to homicide. 330a. Accordingly, testimony relating to Gorecki's threats or influence on Raymond (for example) was consistently objected to and excluded. See, e.g., 86a-87a.

During the evening of May 31, a fight arose between Gorecki and Shavaun, when Gorecki attempted to take Shavaun's car keys. 117a-119a. Gorecki grabbed Shavaun by her throat twice. 120a. Ms. McNeely helped pull Gorecki off Shavaun. 121a, 129a. During the fight, Raymond stood there passively. 121a-122a. Shavaun left shortly thereafter with her daughter. 122a.

After Shavaun left, the fight between Gorecki and Ms. McNeely escalated, and Ms. McNeely was killed. The Medical Examiner for St. Clair and Macomb Counties, Dr. Spitz, testified as to the nature of Ms. McNeely's wounds. He described stab wounds to the hands, 106a, blunt injuries, 107a-108a, and 21 lacerations to the face and scalp. 110a-11a. Other stab wounds were found in the lower extremities. 105a. As to the cause of death, Dr. Spitz testified that it was multiple stab wounds, the perforation of the carotids and the right jugular vein, as well as a contributory cause of multiple blunt impacts resulting in cranial/cerebral injuries. 113a. In response to the prosecutor's question, he stated that the blunt injuries alone would have been sufficient to cause death. *Id.*

At issue in the trial was the degree of Raymond's participation in Ms. McNeely's murder. Witness Kelly Smith testified that he had told her that he had thrown a mug at Ms. McNeely, and had shut the windows or blinds at Gorecki's direction. 168a-170a. Smith testified Raymond told her that he held Ms. McNeely down while Gorecki beat her, 171a, and he handed Gorecki a knife. 172a. Trooper Tuckey testified about following up on a tip Smith gave the State Police, that they would find clothes near the school and trailer park. 164a-166a. Nothing was found. *Id.*

Witness Sarah Maddigan testified that Raymond was visibly upset and crying when he talked about the murder later. 114a-115a. Witness Smith said he told her he felt helpless and guilty as the attack happened. 175-178a. He was not bragging or excited about it, and was depressed. 175a, 177a. Another friend, Michael Hoffman, stated that Raymond said he couldn't sleep, and that

every time he closed his eyes, he saw Brandon stabbing Mary Ann. 346a.

Michigan State Police Det. Sgt. Young testified that testing found no blood on the clothes Raymond wore that night, 179a, but it was present on Gorecki's clothes. 182a. (Similarly, Margie Carp's boyfriend testified that he saw no blood on Raymond's clothes when Raymond returned home from Ms. McNeely's. 94a-95a.) Young interviewed Raymond, and a video of that interview was played for the jury.

In the interview, Raymond described Gorecki as "mad as hell," grabbing Ms. McNeely by the hair and hitting her. 183a-184a. Raymond responded as passively as he had when Shavaun and Gorecki were fighting; he stated that he "just sat down and stared at the wall." 184a. Raymond did acknowledge hitting Ms. McNeely with the cup or "a heavy glass," 188a, 193a; and closing the blinds. 192a. Asked if he then stood back and watched, he answered "yeah." 194a.

Gorecki took the stand as the sole defense witness. He stated that Raymond threw a mug at Ms. McNeely, at his direction. However, he denied that Raymond held her down, or that he handed Gorecki a knife. 196a-197a. Asked if Raymond argued with him about closing the drapes, Gorecki answered that Raymond had never argued with him about anything. 198a. Asked if he held a gun to Raymond's head, he said, "Basically." 200a. Gorecki denied expressly threatening Raymond, but acknowledged that Raymond might have felt threatened. 202a-203a.

In addition to the open murder charge, Raymond was charged with armed robbery, larceny in a building, and larceny of property worth more than $1000 but less than $20,000, over the theft after the murder of Ms. McNeely's truck, VCR, and DVD player. No evidence was offered linking Raymond directly to those thefts, and defense counsel moved for a directed verdict on the non-homicide charges after the defense rested. 207a-210a. The Court denied the motion. 213a-215a.

On the fourth day of trial, a plea offer was reintroduced and entered into the record. Raymond was offered one count of second-degree murder, which the prosecutor stated "guideline[d] out in a range of 180 months, to 300, indicating that this Defendant could get as little as 15 years." 151a. The trial court also reviewed the additional charges against Raymond, in the context of the plea offer guidelines. 153a. The trial judge stated, with no apparent objection to the offer, that the sentence for "armed robbery is life or any term of years, and that would, therefore, be in the judgment of the Court, within the parameters of the guidelines." *Id.* The court also noted that if Raymond was "found guilty by the jury of homicide . . . , the Court would then be obligated to sentence this Defendant to a term in prison for his life without the possibility of parole." *Id.*

Recess was called, and Raymond spent approximately an hour and a half in conference with defense counsel and Raymond's aunt. 160a-161a. Raymond's defense attorney then reported to the court that Raymond "knows what's going on, he understands what's going on, and has instructed me to reject the People's plea offer of – as offered." 161a.

The jury was instructed on aiding and abetting, first-degree premeditated murder, first-degree felony murder, and second-degree murder. 224a-229a. It found Raymond guilty of first-degree murder, armed robbery, and the two larceny counts. The verdict form listed first-degree murder without noting or explaining the alternate theories of premeditation or felony-murder. 234a-235a; 63a. It also listed second-degree murder. *Id.*

Raymond was sentenced to "a period of life without parole in prison" by the trial court on November 20, 2006. 249a. At sentencing, the judge said

> The Court can't help but note that there were several opportunities that this Defendant had to, to escape, leave, get away, assist her in some way, and I – there's just – I can't find an explanation that I – for the fact that he didn't do that, from the testimony, the evidence that I heard during the course of this trial. There's nothing

> that I can muster or conjure up to explain to me why he didn't do that. I know there's strong discussion that he was under the influence of his stepbrother who was a bad actor to say the least, but this 15-year-old and then now 16-year-old, certainly had the sufficient faculties that he – there's no reason why he couldn't understand what was going on and what he, what he could have or should have done, and the unfortunate conclusion is that the victim is dead, and I believe that under the circumstances the, the conviction is proper, it's within the law, and is then for the Court obligated to follow the law.

248a-249a.

The post-conviction record: Raymond's suicide attempt

Raymond attempted suicide less than a week after Ms. McNeely's murder, but this evidence was not presented to the jury as part of his defense. Nor was it before the trial court prior to sentencing. This portion of the factual record was submitted with Defendant-Appellant's motion for relief from judgment.

Ms. McNeely was murdered on May 31, 2006. One week later, on June 6, 2006, Raymond was admitted to Harbor Oaks Hospital, having attempted suicide by slitting his wrists. 65a. In repeated statements to his physician, Dr. Kristyn Gregory, and nurses, Raymond stated that he saw his brother kill his mother's best friend, a woman he regarded as his aunt. 65a, 67a, 69a. Raymond reported nightmares, that every time he closed his eyes, he saw the murder again. 65a, 69a, 71a. (A witness at trial reported that Raymond had told him the same thing. 346a.) Raymond expressed guilt over not stopping his brother, 65a, 73a, but also for turning his brother in. 70a, 77a.

The initial assessment indicated a stay of five days for Raymond's treatment. 68a. However, less than 48 hours after his admission, he was removed from Harbor Oaks by state police officer. 65a, 76a.

Also submitted to the trial court with Raymond's motion for relief from judgment (and to the Court of Appeals in his application for leave to appeal) was Raymond's affidavit. 78a. In it,

Raymond acknowledged his suicide attempt. 79a. He also explained his fear of his brother, Gorecki, who threatened him during Ms. McNeely's murder. 78a-79a. Raymond stated that he has seen Gorecki choke their mother, and get in fights with their sister, stepfather, and Gorecki's girlfriend. *Id.*

Procedural History

Raymond was represented on direct appeal by appointed counsel, who raised six grounds for relief. Raymond's conviction and sentence were affirmed. *People v Carp* unpublished opinion per curiam of the Court of Appeals, issued December 30, 2008 (No. 275084); 327a. This Court denied his application for leave to appeal in a standard order. *People v Carp*, unpublished order of the Supreme Court issued June 23, 2009 (No. 138299).

In September 2010, Defendant-Appellant Carp filed a motion for relief from judgment pursuant to Michigan Court Rules 6.500, et seq., with the trial court. He raised four grounds, including that his sentence as a juvenile to life without parole violated constitutional protections against cruel and/or unusual punishment.[5] The trial court denied Raymond's motion on January 13, 2011. 14a.

On the issue of whether life without parole is cruel and/or unusual punishment for a juvenile, the trial court relied on *People v Launsburry*, 217 Mich App 358; 551 NW2d 460 (1996). The court said that *Launsburry* "held that trial courts have no discretion in life sentences for first degree murder convictions." 16a. The trial court further stated that Raymond had failed to convince it that such a sentence was "cruel and unusual" punishment. *Id.*

[5] The other grounds were that application of MCL 767.39, providing no distinction between the acts of an aider/abettor and those of a principal, violates due process and the principle of proportionality where the defense of duress has been barred; and the denial of substantial defenses for the failure of trial counsel to proffer evidence of duress, and for failure to investigate and present evidence of Raymond's suicide attempt as evidence of duress and Raymond's state of mind.

Raymond filed a timely application for leave to appeal in the Michigan Court of Appeals. That court originally denied leave. *People v Carp*, unpublished order of the Court of Appeals filed June 8, 2012 (No. 307758); 18a.

On June 25, 2012, the United States Supreme Court decided *Miller v Alabama/Jackson v Hobbs*. In *Miller v Alabama*, the Court held that the mandatory imposition of a life without parole sentence on a juvenile violates the Eighth Amendment. 567 US —; 132 S Ct 2455; 183 L Ed 2d (2012). *Miller* is immediately pertinent to Raymond's argument for sentencing relief, as Raymond was 15 years of age at the time of the offense for which he was convicted, and he was sentenced by operation of law to a mandatory sentence of life without parole.

Raymond filed a motion for reconsideration and to supplement authority, which the Court of Appeals granted, along with leave to appeal. *People v Carp*, unpublished order of the Court of Appeals filed August 9, 2012; 19a. However, following oral argument on October 16, 2012, the court denied Raymond's appeal. *People v. Carp*, 298 Mich App 472; 828 NW2d 685 (2012); 21a. It held that *Miller* was not retroactive, 49a, and therefore denied Raymond any relief. The court below also crafted a prospective remedy in response to *Miller* for juveniles convicted of first-degree homicide. 57a-60a.

Raymond filed a timely application for leave to appeal in this Court, which was granted on November 6, 2013. *People v Carp*, unpublished order of the Supreme Court filed November 6, 2013 (No. 146478); 62a. The grant of leave was limited to the question of "whether *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), applies retroactively under federal law, per *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989), and/or retroactively under state law, per *People v Maxson*, 482 Mich 385 (2008), to cases that have become final after the expiration of the period for direct review." *Id.*

INTRODUCTION

Miller v Alabama/Jackson v Hobbs

In *Miller v Alabama/Jackson v Hobbs*,[6] the United States Supreme Court struck down the life without parole sentences of two juveniles which were imposed under statutory schemes that mandated such sentences and precluded any individualized consideration. *Miller v Alabama*, 567 US —, 132 S Ct 2455 (2012). The Court found that the mandatory imposition of non-parolable life on a person under 18 years of age at the time of the offense violated the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 2460.

The *Miller* Court cited two "strands of precedent" involving concerns over proportionate punishment. *Id.* at 2463. The first drew on "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." 132 S Ct at 2463 (citing *Graham v Florida*, 560 US, at —; 130 S Ct 2011, 2022-23 (2010) [7]). Many of these "mismatch" cases involved juvenile offenders, "because of their lesser culpability." *Id.*

The Court equated life without parole as applied to juveniles to capital punishment, determining the former penalty should be treated similarly. *Id.* at 2464. It established that equivalence by observing that "this lengthiest possible incarceration is an especially harsh punishment for a juvenile, because he will almost inevitably serve more years and a greater percentage of his life in prison than an adult offender." *Id.* (quoting *Graham*, 130 S Ct at 2027-28) (quotation marks and internal citation omitted).

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[6] The Court granted relief to both Evan Miller and Kuntrell Jackson. 132 S Ct at 2463, 2475. Miller's was a direct appeal, *id.* at 2463; Jackson arrived the Court following denial of his state habeas petition. *Id.* at 2461.

[7] *Graham* held that life without parole for juvenile offenders convicted of non-homicide crimes was unconstitutional, and that the Eighth Amendment requires such offenders be provided "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 US at 75, 82.

Relating juvenile life without parole to capital punishment implicated the second strand of precedent: those cases prohibiting mandatory application of the death penalty, and requiring individualized sentencing. *Id.* at 2463-64 (citing *Woodson v North Carolina*, 428 US 280; 96 S Ct 2978 (1976) (plurality opinion); *Lockett v Ohio*, 438 US 586; 98 S Ct 2954 (1978) (plurality opinion).

The Court emphasized that "children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, . . . they are less deserving of the most severe punishments." *Miller*, 132 S Ct at 2464 (quoting *Graham*, 130 S Ct at 2026). The Court explained why the "harshest sentences" are less justifiable for juvenile offenders under the standard penological principles of retribution, deterrence, incapacitation, and rehabilitation:

> Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults – their immaturity, recklessness, and impetuosity – make them less likely to consider potential punishment. Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible – but incorrigibility is inconsistent with youth. And for the same reason, rehabilitation could not justify that sentence. Life without parole forswears altogether the rehabilitative ideal. It reflects an irrevocable judgment about an offender's value and place in society, at odds with a child's capacity for change.

Id. at 2465 (quotation marks, alterations, and citations omitted).

The *Miller* Court held that juveniles must be given an opportunity for individualized sentencing that includes consideration of mitigating facts about the offender and the offense. The Court explained that when it rejected the mandatory imposition of the death penalty, it did so because that sentence "gave no significance to 'the character and record of the individual offender or the circumstances' of the offense, and 'exclud[ed] from consideration . . . the

possibility of compassionate or mitigating factors.'" *Id.* at 2467 (quoting *Woodson*, 428 US at 304.

The Court connected that emphasis on individualized sentencing to juveniles by observing that it has long recognized the "mitigating qualities of youth." *Id.* at 2467 (quoting *Johnson v Texas*, 509 US 350, 367; 113 S Ct 2658 (1993)). The *Miller* Court explained the age-related factors critical to the juvenile sentencing decision:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Id. at 2468.

The *Miller* decision focused on sentencing, rejecting arguments that judicial discretion at other phases of the criminal justice process (such as the transfer stage when the decision is made between prosecution in adult court and treatment as a juvenile[8]) would satisfy the Eighth Amendment. The Court observed that the better alternative is "[d]iscretionary sentencing in adult court [which] would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term with the possibility of parole or a lengthy term of years." *Id.* at 2474-75.

The Court emphasized that "a judge or jury must have the opportunity to consider

[8] Note, however, that Michigan's system permits no such discretion. See MCL 712A.2.

mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 2475. The mandatory imposition of non-parolable life without consideration of offenders' "age and age-related characteristics," as well as the circumstances of their crimes, violates both the principle of proportionality and the Eighth Amendment prohibition of cruel and unusual punishment. *Id.* When individualized sentencing is implemented, the Court anticipated that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 2469. *Miller* thus broadened the range of sentences available to juveniles.

The *Miller* Court did observe that its decision was not a categorical bar of life without parole for juveniles. *Id.* at 2469, 2471. *But see id.* at 2477 ("Today, the Court invokes [the Eighth] Amendment to *ban a punishment*. . .") (Roberts, C.J., dissenting; joined by JJ. Scalia, Thomas, and Alito) (emphasis added). "Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* at 2471. Its reasoning for that mandate relied both on its youth-related decisions (*Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005) (holding unconstitutional the death penalty for offenders under 18); *Graham, supra*), as well its decisions requiring individualized sentencing (*Woodson, supra*; *Lockett, supra*; *Eddings v Oklahoma*, 455 US 104; 102 S Ct 869 (1982); *Sumner v Shuman*, 483 US 66, 107 S Ct 2716 (1987)).

Miller's companion case was *Jackson v Hobbs*. Kuntrell Jackson's case arrived at the Court following the Arkansas Supreme Court's denial of his state habeas petition. *Id.* at 2461. Jackson, whose conviction was final, received identical relief to Evan Miller, *id.* at 2475, whose case was on direct review. The orders granting the parties' petitions for writs of certiorari dictated that the two cases be argued in tandem. *Miller v Alabama*, 132 S Ct 548; *Jackson v Hobbs*, 132 S Ct 548.

Michigan's "Perfect Storm"[9]

State statutes combined to deny discretion in sentencing to Raymond Carp and other juveniles convicted of murder, in violation of *Miller*

Defendant-Appellant Carp's conviction and sentence arise out of a multi-statute scheme that precluded judicial discretion in several aspects. Raymond was tried at age 15 as an adult under a provision referred to as "automatic waiver." 245a-246a; MCL 712A.2. That statute divests the family division of the circuit court of jurisdiction once a juvenile is charged with a number of specified offenses, including murder. MCL 712A.2(a)(1)(A); see also MCL 600.606. Raymond was convicted of first-degree (premeditated) or felony-murder (the verdict form is not clear), either of which mandates a life sentence upon conviction. MCL 750.316.

A juvenile convicted of first-degree murder must be sentenced as an adult. MCL 769.1(1)(g). Anyone convicted of first-degree murder and sentenced to life is ineligible for parole. MCL 791.234(6)(a); MCL 750.316. Finally, an aider or abettor is subject to the same criminal liability as a principal offender.[10] MCL 767.39.

Under the combined operation of these statutes, Raymond received a mandatory sentence of life without parole. No sentencer, judge or jury, made that sentencing determination. The sentence was imposed by operation of law, following Raymond's conviction for first-degree murder, for an offense that occurred when he was 15 years of age.

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[9] Kimberly Thomas, "Juvenile Life Without Parole / Unconstitutional in Michigan?," Michigan Bar Journal, February, 2011, p 35, available at http://www.michbar.org/journal/pdf/pdf4article1811.pdf.

[10] See *People v Carp*, unpublished opinion per curiam of the Court of Appeals, issued Dec. 30, 2008 (Docket No. 275084) (noting that the prosecution presented aiding and abetting as one of alternative theories). 330a.

ARGUMENT

Summary

Defendant-Appellant Raymond Carp was convicted as the result of a jury trial on October 5, 2006, of a murder which occurred when he was 15 years old. The Court of Appeals denied his direct appeal, and this Court declined to grant his application for leave to appeal on June 23, 2009. (No. 138299). Raymond's conviction thus was final when *Miller v Alabama* was decided in June 2012.

This Brief answers in the affirmative the Court's limiting question of whether *Miller* should be found retroactive under federal case law, *Teague v Lane*, 489 US 288; 109 S Ct 1060 (1989), and/or that of the state of Michigan, *People v Maxson*, 482 Mich 385 (2008).

Under *Teague*, *Miller* is a substantive new rule, as a categorical ban on mandatory non-parolable life sentences for juveniles convicted of murder. The decision is also substantive because it narrows the scope and application of Michigan's sentencing scheme for first-degree murder, alters the class of persons subject to that scheme, and broadens the sentencing range available to juveniles. Further, the *Miller* decision is substantive and not procedural, because it imposes an entirely new requirement of individualized sentencing and consideration of mitigating factors on Michigan law. The United States Supreme Court's only prior prohibition on mandatory sentencing, in *Woodson v North Carolina*, further supports finding that *Miller* applies retroactively, as does *Teague*'s principle of "even-handed justice."

Miller is equally retroactive under state law. The purpose of *Miller*'s new rule of constitutionally-compliant sentencing relates to the very integrity of the fact-finding process. Raymond suffered actual harm in detrimental reliance on the old rule. And the effect of retroactive application on the administration of justice is minimal.

Standard of Review

"[W]hether a United States Supreme Court decision applies retroactively presents a question of law" that is reviewed de novo. *People v Gomez*, 295 Mich App 411, 414; 820 NW2d 217, 220 (2012) (citing *People v Maxson*, 482 Mich 385, 387; 759 NW2d 817 (2008)).

I. *MILLER V ALABAMA/JACKSON V HOBBS* IS A CATEGORICAL BAN OF MANDATORY LIFE WITHOUT PAROLE FOR JUVENILES CONVICTED OF HOMICIDE AND IT MEETS ADDITIONAL CRITERIA TO BE FOUND SUBSTANTIVE. THEREFORE *MILLER* APPLIES RETROACTIVELY UNDER THE FIRST EXCEPTION TO *TEAGUE V LANE.*

The *Miller* decision applies retroactively under federal case law, because it is a substantive new rule not subject to *Teague*'s bar to retroactivity. *Miller* categorically banned mandatory life without parole sentences as applied to juveniles convicted of homicide. It also altered the class of persons punished, narrowed the scope of Michigan's murder sentencing scheme, and broadened the sentencing range available to juveniles.

Supreme Court historical precedents on retroactivity support finding *Miller* substantive and therefore retroactive. So does the Court's retroactive treatment of the analogous individualized-sentencing death penalty decisions on which *Miller* relies.

Miller's new rule cannot be dismissed as simply procedural. The decision mandates the consideration of mitigating evidence, effecting a substantive change. The new rule does not limit or regulate the process wherein such evidence is considered. Nor is it procedural as an allocation of decision-making authority, because currently no decision is made by any entity or body, and thus no such authority exists to be allocated.

The *Miller* decision effected a substantive change on Michigan criminal sentencing law. Thus, it applies retroactively to Raymond Carp, entitling him to resentencing.

A. Following **Schriro v Summerlin***'s interpretation of* **Teague v Lane, Miller** *applies retroactively as a substantive new rule.*

The Court of Appeals correctly acknowledged that *Miller* presented a new rule. 45a. However it erred in finding that the rule did not apply retroactively to Raymond because the new rule is in fact a categorical ban, and because it is substantive, not procedural.

Teague v Lane held that a new constitutional rule applies retroactively if it meets one of two exceptions. 489 US 288, 310; 109 S Ct 1060 (1989). The first exception is for new rules that are considered substantive. This exception includes the placement of "a class of private conduct beyond the power of the State to proscribe." *Saffle v Parks*, 494 US 484, 494-95; 110 S Ct 1257, 1263 (1990) (citing *Teague*, 489 US at 311).

The substantive exception also includes those new rules that "address a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Id.* (quoting *Penry v Lynaugh*, 492 US 302, 329, 330; 109 S Ct 2934 (1989), rev'd on other grounds by *Atkins v Virginia,* 536 US 304; 122 S Ct 2242 (2002)) (alterations and quotation marks omitted).

Rules that are generally procedural in nature are applied prospectively. *Schriro v Summerlin*, 542 US 348, 352; 124 S Ct 2519 (2004). However, the second *Teague* exception provides for retroactive application of procedural rules considered to be "watershed."

1. *Miller* is a categorical ban on mandatory life without parole, based on offenders' status as juveniles.

Under *Penry, supra, Miller* does categorically ban a form of punishment for a class of defendants due to their status: *Miller* forbids mandatory life without parole for juveniles. The Chief Justice observed this fact in his dissent (joined by Justices Scalia, Thomas, and Alito), when he stated that "[t]he pertinent law here is the Eighth Amendment to the Constitution, which prohibits 'cruel and unusual punishments.' Today, the Court invokes that Amendment to *ban a*

punishment . . ." 132 S Ct at 2477 (Roberts, C.J., dissenting) (emphasis added).[11]

As a whole, as a class, juveniles convicted of homicide can no longer have imposed upon them the mandatory sentence of life without parole. That is a categorical ban based on status and offense.

2. *Miller* is substantive and thus retroactive under *Schriro v Summerlin*.

Summerlin, supra, provides guidance on the distinctions between substantive and procedural new rules under *Teague, supra.* The *Summerlin* Court denied retroactive effect for *Ring v Arizona*, 536 US 584 (2002), because it found *Ring*'s new rule – that a jury, rather than a judge, must find the aggravating factors necessary to impose the death penalty – to be procedural, not substantive. *Summerlin,* 542 US at 353 (citing *Ring*, 536 US at 609), 358.

The Court explained that "substantive rules. . . include[ ] decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* at 351–52 (citing *Bousley v United States,* 523 US 614, 620–621; 118 S Ct 1604 (1998)). It observed that "[s]uch rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* at 352 (quotation marks and citations omitted).

Here, before *Miller*, Michigan's mandatory life-without-parole sentencing scheme for

[11] That the Chief Justice perceived *Miller* would apply retroactively is also evident from another portion of his dissent. After referring to the over 2,000 prisoners in the United States currently serving such sentences, Chief Justice Roberts noted that "the Court's gratuitous prediction appears to be nothing other than an invitation to overturn life without parole sentences imposed by juries and trial judges." 132 S Ct at 2477, 2480, 2481 (Roberts, C.J., dissenting). The possibility of overturning those sentences would not exist without retroactive application to the vast majority of those prisoners.

first-degree murder applied to everyone convicted under MCL 750.316. After *Miller*, the penalty can no longer be applied to juvenile defendants. As a result, the scope and application of Michigan sentencing law has been narrowed. Retroactive application of *Miller* is essential to prevent the significant risk of juveniles facing continuing punishment "that the law cannot impose on [them]."

Moreover, a substantive rule "alters the range of conduct or the class of persons that the law punishes." *Summerlin*, 542 US at 353 (citing *Bousley*, 523 US at 620-21; *Saffle*, 494 US at 495). By removing juveniles from Michigan's mandatory life without parole sentencing scheme for those convicted of first-degree murder, *Miller* "alter[ed] the class of persons that the law punishes." Adult offenders will still be subject to a mandatory life sentence, but it can no longer be imposed on juveniles. In fact, the range of sentences available for juveniles has been broadened by *Miller* – but adults are not entitled to anything but non-parolable life.

In finding *Ring* to be a procedural rule, the *Summerlin* Court observed that "the range of conduct punished by death in Arizona was the same before *Ring* as after." 542 US at 354. By contrast, after *Miller*, the same conduct (first-degree murder) is not subject to the same punishment as before that decision, because the scheme of *mandatory* life without parole is no longer available for juvenile offenders at all. *Miller*, 132 S Ct at 2460. Moreover, as applied to this class, *Miller* projected that "appropriate occasions for sentencing juveniles to this harshest possible penalty [of life without parole] will be uncommon." See *Miller*, 132 S Ct at 2469. In Michigan, prior to the *Miller* decision, one hundred percent of juveniles convicted of first-degree murder were sentenced to life without parole; now, because of the *Miller* mandate, such sentences will be "uncommon." This demonstrates *Summerlin*'s narrowing of application and altering of the class of persons to whom life without parole sentences will apply post-*Miller*.

In yet another distinction, *Summerlin* explained that *Ring*'s determination of "who" must find a certain fact "is not the same as this Court's making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive."[12] 542 US at 354.

Unlike *Ring, Miller* did not hold that the Constitution prefers one decision-maker (e.g., the jury) over another (e.g., a judge).[13] Regardless of "who" the sentencer is, *Miller* held that it must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469. That "tak[ing] into account" reflects *Summerlin*'s definition of substantive: where the Court has identified certain facts as essential to the imposition of a certain sentence. *Miller* made an entire body of facts – the mitigating aspects of youth, the individual characteristics of the juvenile offender, and the circumstances of the offense – essential to the constitutionally proper sentencing of this class of offenders. *Miller*, 132 S Ct at 2475. Disregard of these facts is what renders the imposition of life without parole a violation of the Eighth Amendment. *Id.*

Finally, the *Miller* Court stated repeatedly that a sentencing scheme that mandates life without parole for juvenile offenders violates the Eighth Amendment prohibitions against cruel

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[12] This is so because "[a] decision that modifies the elements of an offense is normally substantive rather than procedural." *Summerlin*, 542 US at 354. Last year, in *Alleyne v United States*, 133 S Ct 2151 (2013), the United States Supreme Court held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Id.* at 2155. After *Miller*, the mandatory penalty of life without parole can only be imposed where the offender is at least 18 years of age. As a result, offender age has been converted into an element which triggers the application of the mandatory penalty. Under *Summerlin*, this new element also renders *Miller* substantive.

[13] To clarify the distinction between the procedural *Ring* and the substantive *Miller*, "*Apprendi* [*v New Jersey*, 530 US 466; 120 S Ct 2348 (2000), the primary case on which *Ring* relied] simply invalidated an old rule which utilized the incorrect factfinder. *Miller* invalidated a rule that prohibited altogether *any* factfinding process and determination of an appropriate, individualized sentence." *Geter v State*, 115 So 3d 385, 395 (Fla App 3 Dist 2013) (Emas, J., dissenting) (emphasis added).

and unusual punishment, 132 S Ct at 2460, 2469, 2475; which it characterizes as "the right not to be subjected to excessive sanctions." *Id.* at 2463. The right to be free from cruel and unusual punishment invokes a substantive constitutional guarantee, unlike, for instance, the Sixth Amendment guarantee of a jury trial. *Summerlin*, 542 US at 353. *Summerlin* observed that *Ring* "rested entirely on the Sixth Amendment's jury-trial guarantee," *id.*, a procedural protection.

3. Historical treatment of substantive constitutional guarantees, as well as death penalty jurisprudence, supports a finding that *Miller* is substantive and therefore retroactive.

Pre-*Teague* retroactivity cases illustrating the same procedural-substantive distinction incorporated into *Teague* also require finding that *Miller* applies to cases on collateral review. In addition, the reasoning of the *Miller* decision relies in significant part on death penalty individualized sentencing decisions. 132 S Ct at 2464, 2467. The United States Supreme Court's application of those cases on collateral review is thus instructive.

Linkletter v Walker, 318 US 618; 85 S Ct 1731 (1965), was *Teague*'s precursor in which the Court reversed the common law "general rule of retrospective effect." *Robinson v Neil*, 409 US 505, 507; 93 S Ct 876 (1973) (citations omitted). However, *Linkletter* and its progeny did not necessarily require "that all rules and constitutional interpretations arising under the first eight Amendments must be subjected to the analysis there enunciated." *Id.* Instead, *Linkletter* "dealt with those constitutional interpretations bearing on the use of evidence or on a particular mode of trial. Those procedural rights and methods of conducting trials, however, do not encompass all of the rights found in the first eight Amendments." *Id.* The Supreme Court characterized the *Linkletter* test, which limited retroactive application, as "simply not appropriate" for "some nonprocedural guarantees." *Id.* at 508 (citing *Furman v Georgia*, 408 US 238 (1972) (striking the death penalty); *Walker v Georgia*, 408 US 936 (1973) (applying *Furman* retroactively)).

The death penalty cases on which *Miller*'s reasoning relies reflect *Robinson*'s

reservations, and further illustrate that this decision dictates substantive change. In *Woodson v North Carolina*, 428 US 280 (1976), the Court prohibited mandatory capital sentencing. *Woodson* instituted individualized sentencing, requiring evaluation of an offender's characteristics and the circumstances of his crime before the death penalty could be imposed. *Id.* In *Lockett v Ohio*, 438 US 586 (1978), and *Eddings v Oklahoma*, 455 US 104; S Ct 869 (1982), the Court applied *Woodson* to hold that a sentencer must consider all relevant mitigating evidence. These cases all reflected substantive changes in capital sentencing law, and were applied to cases on collateral review. See *Sumner v Shuman*, 483 US 66; 107 S Ct 2716 (1987); *Hitchcock v Dugger*, 481 US 393 (1987).

A rule that says the state may not mandate the death penalty is not about the *procedure* of individualized consideration that must be followed, but about the violation of the Constitution's substantive guarantee against cruel and unusual punishment. *Sumner*, *supra*. The *Sumner* Court observed that requiring individualized sentencing in the death penalty context reflected a "constitutional imperative." 483 US at 75 (quoting *Woodson*, 428 US at 304). It continued:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Id. at 74-75 (quoting *Woodson*, 428 at 304).

The Court opined that "the mandatory capital-sentencing procedure pursuant to which Shuman's death sentence was imposed 'create[d] the risk that the death penalty w[ould] be imposed in spite of factors which may call for a less severe penalty.'" *Id.* at 82 (quoting *Lockett*, 438 US at 605). This concern is directly echoed in *Summerlin*'s post-*Teague* insistence that

substantive rules must apply retroactively, to avoid the "significant risk that a defendant . . . faces a punishment that the law cannot impose upon him." 542 US at 352.

In applying *Woodson*, as well as *Lockett* and *Eddings*, the *Sumner* Court relied on the same cases on which *Miller* based its reasoning. *Miller*'s striking of a mandatory sentence and replacing it with an individualized sentencing scheme is no less a constitutional imperative in *Miller* than it was in *Sumner*, *Woodson*, and their progeny.

The *Robinson* Court observed that *Linkletter* analysis is simply inappropriate to non-procedural (or substantive) constitutional guarantees. That likely explains why the latter case is nowhere to be found in *Sumner*. Only the year before, the Supreme Court applied *Linkletter* in *Allen v Hardy*, 478 US 255, 258; 106 S Ct 2878, 2880 (1986) (holding that the rule of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712 (1986), against unconstitutional peremptory challenges was non-retroactive). The *Linkletter* three-pronged test was not abandoned until the *Teague* plurality decision in 1989,[14] so it was available for application to *Sumner*. Thus, the Supreme Court's omission of a *Linkletter* analysis in *Sumner* corresponds to *Robinson*'s conclusion – that *Linkletter* could be used to deny retroactivity to procedural rules (like *Batson*), but not substantive ones (like *Woodson*).

Miller equated mandatory life without parole for juveniles to the death penalty. 132 S Ct at 2466. The fact that in Michigan, life without parole is the most severe sentence available for any offender adds weight to that equivalency. *Miller*'s holding confers the same constitutional significance on individualized sentencing of juveniles to life without parole as *Sumner* did. Pre-

[14] See *Harper v Virginia Dept. of Taxation*, 509 US 86, 103; 113 S Ct 2510 (1993) (Scalia, J., concurring). *Linkletter*'s prohibition on retroactivity for cases on direct review was overruled two years earlier by *Griffith v Kentucky*, 479 US 314; 107 S Ct 708; 93 L Ed 2d 649 (1987). *Harper*, 509 US at 95 (majority opinion).

Teague death penalty decisions – including their application on collateral review – are directly on point, and further demonstrate the substantive nature of *Miller*'s new rule.

B. Miller *is substantive, not procedural, despite process- and procedure-related language in the decision.*

The *Miller* Court's holding is that imposing non-parolable life sentences for juveniles under an automatic, mandatory sentencing scheme violates the Eighth Amendment, and that other sentences must be made available. *Miller*'s admonition that the sentencer must "follow a certain process" does not render its rule procedural.

Summerlin held that "rules that regulate only the *manner of determining* the defendant's culpability are procedural." *Id.* at 353 (citing *Bousley, supra,* at 620) (emphasis in original). *Miller* does not "regulate the manner" of sentencing. It mandates the presenting and consideration of mitigating factors. In so doing, *Miller* – like *Lockett* and *Eddings* before it – established a new substantive rule. The reasoning of *Saffle v Parks*, 494 US 484 (1990), demonstrates why *Miller* is not procedural, as does an examination of the precedents on which *Summerlin, supra,* relies.

1. *Saffle*'s distinction between "what" and "how" demonstrates that *Miller* is not procedural.

In *Saffle v Parks*, the Court declined to find that a jury instruction to avoid the influence of sympathy violated the Eighth Amendment. 494 US at 489. The petitioner was permitted to introduce mitigating evidence, but argued that the anti-sympathy instruction prevented its proper consideration. *Id.* at 492.

In determining whether the relief petitioner sought would establish a new rule, *Saffle* discussed *Lockett, supra,* and *Eddings, supra.* Together, those cases hold "that the State cannot bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial." *Saffle*, 494 US at 490. *Saffle* concluded that *Lockett* and *Eddings* did not

compel the rule petitioner sought.

> Parks asks us to create a rule relating, not to *what* mitigating evidence the jury must be permitted to consider in making its sentencing decision, but to *how* it must consider the mitigating evidence. There is a simple and logical difference between rules that govern *what factors the jury must be permitted to consider* in making its sentencing decision and rules that govern *how the State may guide the jury in considering and weighing those factors* in reaching a decision.

Id. at 490 (emphasis added). It continued:

> [T]here is no contention that the State altogether prevented Parks' jury from considering, weighing, and giving effect to all of the mitigating evidence that Parks put before them; rather, Parks' contention is that the State has unconstitutionally *limited the manner* in which his mitigating evidence may be considered. As we have concluded above, the former contention would come under the rule of *Lockett* and *Eddings*; the latter does not.

Id. at 491.

The rule of *Lockett* and *Eddings* is the same as *Miller*: a sentencer must be able to treat the defendant as an individual, and be able to consider and give effect to all relevant mitigating evidence. Applying *Saffle*'s guidance, *Miller* has now established "what factors [the sentencer] must be permitted to consider." Before *Miller*, the sentencing judge was entirely precluded from considering and giving effect to *any* mitigating factors. Under *Saffle*, the demand for individualized sentencing and the introduction of mitigating evidence is the substantive "what," not the procedural "how."

Furthermore, this is not about "limiting" (*Saffle*) or "regulating" (*Summerlin*) the manner of sentencing. Instead, *Miller*'s new rule goes to the substance of the basis for the sentence. *Miller* does not guide how the mitigating factors are to be applied or who should apply them. *Miller* established the "what" – that individualized sentencing is now required, and that youth-related mitigating factors must now be given effect.

Beard v Banks, 542 US 406; 124 S Ct 2504 (2004), provides a more recent application of

Saffle's "what" and "how" distinction. The *Beard* Court declined to find retroactive *Mills v Maryland*, 486 US 367; 108 S Ct 1860 (1988), and *McKoy v North Carolina*, 494 US 433; 110 S Ct 1227 (1990); both invalidated capital sentencing schemes that required mitigating factors be found unanimously to have effect.

Beard held those decisions to be procedural. The Court observed that the "*Mills* rule governs *how* the sentencer considers evidence, not *what* evidence it considers." 542 US at 415 (citing *McKoy*, 494 US at 465-466 (Scalia, J., dissenting)) (emphasis added). Applying *Beard* (and *Saffle*), whether a mitigating factor must be considered without sympathy, or found unanimously to be given effect, would be a "how" – and thus procedural. Whether a factor must be considered at all is a "what" – and substantive.

Miller mandates that whatever sentencing process exists, the Eighth Amendment requires individualized sentencing. This includes the consideration of youth-related mitigating factors. *Id.* at 2469, 2475. *Miller* establishes the "what" (the mitigating evidence a sentencer must be permitted to consider) and invokes a substantive categorical guarantee of the constitution. *Saffle*, *supra*; *Penry*, *supra.* It thus effects a substantive change on Michigan's statutory sentencing scheme for first-degree murder.

2. *Miller* is not one of *Summerlin*'s procedural "permissible methods" for sentencing determinations.

Summerlin has been mis-applied in two out-of-state cases to support finding *Miller*'s new rule procedural. Those courts cited *Summerlin*'s "range of permissible methods" for making a sentencing determination. See *State v Tate*, 2013 WL 5912118, 6 (La. 2013) (citing *Summerlin*, 542 at 353), 281a; accord, *Chambers v State*, 831 NW2d 311, 328 (Minn. 2013). This interpretation of *Summerlin* is incorrect.

Summerlin linked the "permissible methods for determining whether a defendant's

conduct is punishable by death" to "[r]ules that allocate decisionmaking authority." 542 US at 353. It described these as "prototypical procedural rules, a conclusion we have reached in numerous other contexts." *Id.* at 353-54 (citing *Gasperini v Center for Humanities, Inc.*, 518 US 415, 426; 116 S Ct 2211 (1996); *Landgraf v USI Film Products*, 511 US 244, 280-281; 114 S Ct 1483 (1994); *Dobbert v Florida*, 432 US 282, 293-294; 97 S Ct 2290 (1977).

These examples of "allocation of decisionmaking authority" are inapposite to the new rule established in *Miller*. The allocations in *Summerlin*'s precedents are between decision-making entities – in *Gasperini*, between trial court and appellate court; in *Landgraf* and *Dobbert*, between judge and jury. Thus, *Summerlin*'s examples of "allocat[ing] decisionmaking authority" distribute such authority from one body or entity to another.

By contrast, under Michigan's current mandatory sentencing scheme, there is no decision to make, therefore no such decision-maker exists. No entity or individual is vested with the authority to make a sentencing determination for juvenile offenders convicted of first-degree murder. There are no decisions to make because the current sentencing scheme mandates the imposition of a life without parole sentence upon such a conviction. MCL 750.316; MCL 791.234(6)(a); MCL 769.1(1)(g). The statutes do not envision or permit any application of discretion or other decision-making.

Miller is not about re-allocating sentencing authority from one decision-maker to another; thus, this is not a one of *Summerlin*'s "permissible methods." So this aspect of *Summerlin* is not relevant to this Court's retroactivity analysis of the *Miller* decision. *Miller* imposes a systemic, substantive change on Michigan law, wherein the state must establish an entirely new statutory scheme for juveniles convicted of first-degree murder. The new scheme will for the first time permit a sentencing decision to be made, one which must incorporate *Miller*'s mitigating factors

of youth.

Miller does far more than simply "regulate the manner" of setting a defendant's sentence. It changes juvenile sentencing from a statutory discretionless mandate to individualized sentencing, requiring the introduction and consideration of mitigating evidence. It also makes clear that sentencing options less than life without parole must be available.

As there is no current "manner of determining" the appropriate sentence for juvenile offenders, there is nothing to regulate. *Miller* mandates an entirely new sentencing scheme. That Michigan must determine who will administer the new requirement of individualized sentencing does not render this significant change a "procedural" one.

Are there procedural aspects to *Miller*? Yes, and this has been acknowledged even by courts which ultimately held the decision to be substantive. See, e.g., *State v Ragland*, 836 NW2d 107, 115-16 (Iowa 2013) ("From a broad perspective, *Miller* does mandate a new procedure. Yet, the procedural rule for a hearing is *the result of a substantive change in the law* that prohibits mandatory life-without-parole sentencing.") (emphasis added).

For all the reasons explained above – narrowing the application of mandatory non-parolable life to exclude juveniles, altering the range of the affected class, establishing the "what" in requiring individualized sentencing and the introduction of mitigating evidence, as well as broadening the range of possible sentences available to this category of offender – under *Summerlin*, *Miller* is clearly substantive, and therefore retroactive under *Teague*.

II. THE PRINCIPLES OF "EVEN-HANDED JUSTICE" (*TEAGUE*) AND "LOGICAL RELATIONSHIP" (*TYLER V CAIN*) REQUIRE THAT *MILLER* APPLY RETROACTIVELY, IN VIEW OF THE RELIEF THE COURT PROVIDED KUNTRELL JACKSON, WHOSE CASE WAS ON COLLATERAL REVIEW IN *JACKSON V HOBBS.*

Miller *is retroactive based on both "even-handed justice" and "logical dictate" principles, because the Court purposefully granted certiorari and then relief to Kuntrell Jackson.*

In the *Miller* companion case *Jackson v Hobbs,* the Supreme Court itself established the retroactivity of its decision by granting relief to Kuntrell Jackson. *Teague, supra,* and subsequent decisions make clear that the Court will only issue new rules pertaining to petitioners on collateral appeal if it intended the rule to apply all those similarly situated.

The *Miller* Court vacated the sentences of both its defendants. 132 S Ct at 2475. But unlike Evan Miller's direct appeal, Jackson arrived at the Court on collateral appeal, following the Arkansas Supreme Court's dismissal of his state habeas petition. *Id.* at 2461. Even though Jackson's case was on collateral appeal, the Court granted certiorari, decided his case, and ordered his resentencing. This announcement of a new rule in Jackson's case and application to Jackson means that the same rule applies retroactively to all similarly-situated defendants.

As the *Teague* Court explained,

> [w]e . . . refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated. . . . [This approach] avoids the inequity resulting from the uneven application of new rules to similarly situated defendants. We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review . . .

489 US at 316.

More succinctly, "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Id.* at 300; see also *id.* at 315 ("the harm caused by the failure to treat similarly situated

defendants alike *cannot be exaggerated*") (emphasis added); *Penry v Lynaugh*, 492 US at 313) (affirming this rule of retroactive application).

Had the Supreme Court not intended for its rule to apply retroactively, it would have granted relief to Evan Miller, but not to Kuntrell Jackson. The Court has expressly drawn that distinction in past cases, abiding by *Teague*'s refusal to announce a new rule unless it would apply retroactively to cases on collateral appeal. Compare *Graham v Collins*, 506 US 461, 466-467; 113 S Ct 892, 897 (1993) (declining to grant a habeas petition to a defendant because the requested relief required announcement of a new rule) with *Johnson v Texas*, 509 US 350, 352; 113 S Ct 2658, 2661 (1993) (acknowledging that the relief requested was the same as *Graham*, *supra*, but "consider[ing] it without the constraints of *Teague*," because it arose on direct review.)

The dissent in *Miller* also recognized that the new rule would apply to those defendants convicted and sentenced as juveniles to life without parole, regardless of whether their convictions were final. After referring to the over 2,000 prisoners in the United States currently serving such sentences, Chief Justice Roberts noted that "the Court's gratuitous prediction appears to be nothing other than an invitation to overturn life without parole sentences imposed by juries and trial judges." 132 S Ct at 2477, 2480, 2481 (Roberts, C.J., dissenting). The possibility of overturning those sentences would not exist without retroactive application to the vast majority of those prisoners.

The Court of Appeals disagreed that relief to Kuntrell Jackson provides any guidance regarding the retroactivity of the *Miller* decision. 49a. It cited *Caspari v Bohlen*, 510 US 383; 114 S Ct 948, 953 (1994), which held that *Teague* analysis is a threshold question for every

habeas case; as well as *Schiro v Farley*, 510 US 222; 114 S Ct 783; 127 L Ed 2d 47 (1994), which acknowledges that a state can waive a *Teague* defense.

Despite the apparent *Teague* waiver by the state in Jackson's case, other state supreme courts which have found *Miller* retroactive have found the *Miller* Court's grant of post-conviction relief to be persuasive, and additional support for finding *Miller* retroactive. See, e.g., *Diatchenko v District Attorney*, --- N.E.2d ----, 466 Mass. 655, 2013 WL 6726856, 7 (2013); 265a ("Our conclusion [that *Miller* is substantive and therefore retroactive] is supported by the fact that in *Miller*, 132 S Ct at 2469, 2475, the Supreme Court retroactively applied the rule that it was announcing in that case to the defendant in the companion case who was before the Court on collateral review."); *State v Ragland*, 836 NW2d 107, 116 (Iowa 2013) ("There would have been no reason for the Court to direct such an outcome [an individualized hearing for Jackson] if it did not view the *Miller* rule as applying retroactively to cases on collateral review[,]" and noting that the dissent would not have raised its concerns about invalidating "other cases across the nation" (citing *Miller*, 132 S Ct at 2479–80 (Roberts, C.J., dissenting)), absent a perception of retroactivity); *Jones v State*, 122 So 3d 698, 703 (Miss 2013) (finding that "Miller created a new, substantive rule which should be applied retroactively to cases on collateral review," and determining that finding was supported by the Court's grant of relief to Jackson on collateral review, *id.* at n 5).

"Evenhanded justice" and clear United States Supreme Court case law requires that the rule that provided relief to Kuntrell Jackson apply to those defendants similar situated, those whose convictions are final. This includes Raymond Carp.

Tyler v Cain, 533 US 656 (2001), explained another basis to find a new rule retroactive: "through multiple holdings that logically dictate the retroactivity of the new rule." *Id.* at 668 (O'Connor, J., concurring) (citing *id.* at 666) (majority opinion). Justice O'Connor explained:

> [I]f we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review. In such circumstances, we can be said to have "made" the given rule retroactive to cases on collateral review.

Id. at 668-69 (O'Connor, J., concurring).[15]

The precedents on which the *Miller* Court relied for its mandate of individualized sentencing included *Woodson v North Carolina*, 428 US 280 (1976); *Lockett v Ohio*, 438 US 586 (1978); *Eddings v Oklahoma*, 455 US 104 (1982); and *Sumner v Shuman*, 483 US 66 (1987). *Woodson* banned mandatory applications of the death penalty, but permitted the sentence if imposed through an individualized sentencing, guided-discretion scheme. *Lockett* and *Eddings* required the defendant to be able to introduce, and the sentencer to evaluate "any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses." *Miller*, 132 S Ct at 2467.

Sumner is *Tyler*'s "Case One" that applied such cases retroactively to a habeas petitioner. As discussed in section I.A.3., *Sumner* applied the collective ban of *Woodson*, *Lockett*, and *Eddings* on mandatory capital punishment and their requirement of individualized sentencing, to a habeas petitioner. Accord, *Hitchcock v Dugger*, 481 US 393, 398-99 (1987) (applying *Eddings*, *supra*, on collateral review). *Miller* is Case Two. It banned mandatory non-parolable life for

[15] Note, however, that *Tyler* was called upon to interpret a narrower question of retroactivity than presented here. That is, whether a new constitutional rule was "made retroactive to cases on collateral review by the Supreme Court," a limitation on an inmate's ability to file a second or successive habeas petition, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 USC 2244(b)(2)(A). Raymond Carp is of course before this Court on the denial of a motion for relief from judgment brought pursuant to MCR 6.501, *et seq.*

juveniles convicted of murder, and established a corresponding requirement of individualized sentencing. *Miller* is thus the same type of rule as that of *Woodson* and *Eddings.* It "necessarily follows" that *Miller* must be applied retroactively to Raymond's case.

Miller's companion case, *Jackson v Hobbs*, also demonstrates *Tyler*'s "logical dictate." The *Miller* Court granted identical relief to Kuntrell Jackson, 132 S Ct at 2475, who was before the Court on collateral review. *Id.* at 2461. As a result, *Jackson* may be taken as *Tyler*'s Case One (the rule applies retroactively), and *Miller* itself as Case Two (the rule and relief are identical).

Read together, *Teague*'s "evenhanded justice" and *Tyler*'s "logical dictate" demonstrate that relief to Kuntrell Jackson should also mean retroactive relief for Raymond Carp.

III. *MILLER* APPLIES RETROACTIVELY UNDER *PEOPLE V MAXSON*, AS THE PURPOSE OF ITS NEW RULE RELATES TO THE VERY INTEGRITY OF THE FACT-FINDING PROCESS, DEFENDANT-APPELLANT SUFFERED ACTUAL HARM IN RELIANCE ON THE OLD RULE, AND THE EFFECT ON THE ADMINISTRATION OF JUSTICE IS MINIMAL

In addition to being retroactive under federal case law, state precedents dictate that *Miller* be applied retroactively. All three prongs of the retroactivity test of *People v Maxson, infra*, support finding that *Miller* should apply to Raymond Carp. That is, (1), the purpose of *Miller*'s new rule relates to the very integrity of the fact-finding process, (2), Raymond suffered actual harm in detrimental reliance on the old rule, and (3), the effect of retroactive application on the administration of justice is minimal. This conclusion is supported by this Court's precedent, providing retroactive relief to defendants sentenced to life without parole in *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992).

A state may make its own determination on the retroactivity of a new rule, and may give it broader effect than that available under federal retroactivity analysis. *People v Maxson,* 482

Mich 385, 392; 759 NW2d 817, 822 (2008) (citing *Danforth v Minnesota*, 552 US 264; 128 S Ct 1029, 1045 (2008)). *Danforth* expressly observed that *Teague*, *supra*, "was tailored to the unique context of federal habeas and therefore had no bearing on whether States could provide broader relief in their own postconviction proceedings," and that Justice O'Connor's opinion in *Teague* "clearly indicate[d]" that limitation. 522 US at 277, 278. Here, Raymond Carp's case is before this Court under such a state post-conviction proceeding.

For state-based retroactivity analysis, Michigan courts apply a three-pronged test, evaluating "(1) the purpose of the new rules; (2) the general reliance on the old rule[;] and (3) the effect of retroactive application of the new rule on the administration of justice." *Maxson*, 482 Mich at 393. (This inquiry is identical to that of *Linkletter v Walker*, 318 US 618, discussed in section I.A.3.)

The first prong, purpose, favors retroactivity. Rules addressing the question of guilt or innocence should be found retroactive; those which "do[] not affect the integrity of the fact-finding process should be given prospective effect." *Maxson*, 482 Mich at 393 (quoting *People v Sexton*, 458 Mich 43, 63; 580 NW2d 404 (1998)). United States Supreme Court precedents and those of this Court have expressly held that sentencing implicates the fact-finding process.

In *McConnell v Rhay*, 393 US 2; 89 S Ct 32 (1968), the United States Supreme Court connected sentencing directly to *'the very integrity of the fact-finding process.'*" *Id* 3-4 (citing *Linkletter*, *supra*) (emphasis added). It explained: "[T]he necessity for the aid of counsel in marshaling the facts, *introducing evidence of mitigating circumstances* and in general aiding and assisting the defendant to present his case as to sentence is apparent." *McConnell*, 393 US at 4 (quoting *Mempa v Rhay*, 389 US 128, 135; 88 S Ct 254 (1967)) (emphasis added). The *Mempa* Court affirmed a defendant's right to counsel at sentencing; *McConnell* held that *Mempa* applied

retroactively.

This Court's decision in *People v Holcomb*, 395 Mich 326; 235 NW2d 343 (1975) is in accord. In that case, this Court cited *Mempa, supra*, and *McConnell, supra*, in acknowledging that the right to counsel cases link different phases of the criminal justice process, including sentencing, to *Linkletter*'s "very integrity of the fact-finding process." *Id.* at 336, n 7.

The *Maxson* decision relied upon *People v Sexton, supra,* which provides an additional example to aid analysis of the "purpose" prong. The *Sexton* decision analyzed the potential retroactivity of *People v Bender*, 452 Mich 594; 551 NW2d 71 (1996) (holding that police must inform a suspect that "a retained attorney is immediately available to consult with him," and that failure to do so before confession "precludes a knowing and intelligent waiver of his rights to remain silent and to counsel." *Id.* at 597). The *Sexton* Court reasoned that *Bender*'s purpose did not support a finding of retroactivity:

> Because the doctrinal foundation for the *Bender* rule is prophylactic and aimed at preventing police misconduct that does not affect the truth-finding process, it is amenable to prospective application. Because the police acted in full compliance with the law as it existed at the time, the purpose of preventing police misconduct will in no way be served by retroactive application. The rule, by its nature, can only have a prospective effect on police conduct.

458 Mich at 63.

By comparison, the purpose of *Miller*'s rule is not prophylactic, nor directed at preventing future misconduct. It redresses the unconstitutional, disproportionate sentences currently being served by juveniles convicted of first-degree murder. These excessively harsh sentences were imposed as a matter of law, in violation of the Eighth Amendment's requirement of individualized sentencing for the most severe punishment Michigan imposes. Such sentences should be "uncommon," applying to the "rare juvenile [evidencing] irreparable corruption." *Miller*, 132 S Ct at 2469. Thus the sentences of the vast majority of those juveniles serving

mandatory non-parolable life are in violation of the Eighth Amendment now, not at some future date.

In sum, *Miller*'s purposes demand retroactive treatment. The individualized sentencing *Miller* requires directly invokes *Mempa* and *McConnell*'s fact-finding process — marshaling facts, introducing mitigating evidence, and presenting the defendant's case. Applying *Sexton*, and holding that under *Miller*, Michigan's sentencing scheme is unconstitutional is not future-oriented or prophylactic. It redresses sentences currently being served in violation of the constitution.

The second prong, reliance, also calls for retroactive application. Detrimental reliance requires a demonstration of actual harm, that relying on the old rule precluded relief. *Maxson*, 482 Mich at 396. The *Maxson* Court evaluated the retroactivity of *Halbert v Michigan*, 545 US 605; 125 S Ct 2582 (2005), which required the appointment of appellate counsel on first-tier review for defendants who were convicted by plea. The Court characterized the extent of detrimental reliance among its class of defendants "remarkably minimal," because 97% to 99% of those affected would not have received relief under the new rule. *Id.* at 397. By contrast, Raymond's case demonstrates detrimental reliance and the high likelihood of relief.

Again, the *Miller* decision envisions that life without parole sentences – when the mitigating aspects of youth are considered – will be "uncommon." 132 S Ct at 2469. This indicates that courts that consider *Miller*'s youth-related factors for sentencing will, more often than not, arrive at a lesser sentence.

In addition, due to the harshness of a life without parole sentence – the most severe sanction Michigan imposes on any offender – "relief" has a very low bar. Relief could be found in the form of a life sentence with the possibility of parole consideration, or a lengthy – even

several decades long – term of years sentence. Either would constitute relief against the current guarantee that Raymond will die in prison.

Against that low bar, the application of the *Miller* factors to the facts of Raymond's case demonstrates the likelihood of potential relief and the actual harm incurred by reliance on the previous scheme. *Miller* said,

> Mandatory life without parole for a juvenile . . . . prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

132 S Ct at 2468. So many of these factors are demonstrated by the record in Raymond's case:

- "The [brutal, dysfunctional] family and home environment" for Raymond included a half-brother – Gorecki, his co-defendant – with a history of violence and drug use. 100a, 125a. Their mother and stepfather moved out of their own home, with Raymond, to avoid Gorecki. 83a-84a, 88a, 103a. Gorecki's drug use led to him being kicked out of the family home. 100a. Family members had called the police on Gorecki, and were advised to get a restraining order against him. 88a.
- "The way familial and peer pressures may have affected him": Raymond's participation in Ms. McNeely's murder was undoubtedly influenced by his relationship with Gorecki, seven years his senior, as well as by Raymond's likely fear of him. 79a.
- "The extent of his participation." Trial testimony demonstrated the disparate levels of responsibility between Raymond and the much older Gorecki, who, the night of Mary Ann

McNeely's murder, attacked his own girlfriend, initiated the fight with Ms. McNeely, stole her purse but proceeded to murder her anyway, and ordered Raymond's involvement in the crime. The trial record also reflects the absence of blood on the clothes Raymond wore the night of the murder, 179a; and his pattern of passivity in the face of Gorecki's violence. 121a-122a, 184a.

The relative extent of Raymond's participation is further illustrated by comparing Raymond's and Gorecki's prosecutions. The prosecutor advanced an aiding and abetting theory for Raymond. 337a. Gorecki was charged and convicted of a torture count, MCL 750.85. 324a. Raymond was not so charged.

- "The possibility of rehabilitation." Raymond had no prior record. 245a, 247a.[16] Moreover, his suicide attempt a week after Ms. McNeely's murder demonstrates his remorse, 65a, 73a; as does the trial testimony about Raymond being upset, crying, and expressing guilt after the murder. 114a-115a, 175a-178a.
- "His inability to deal with police officers or prosecutors (including on a plea agreement)" is demonstrated by Raymond's rejection of a favorable plea offer. On the fourth day of trial, the prosecutor extended a plea offer of one count of second-degree murder. 151a. The prosecutor stated that the sentencing guidelines were "a range of 180 months, to 300, indicating that this Defendant could get as little as 15 years." *Id.* The trial court reviewed the sentence of the next worst charge, armed robbery, and determined that its sentence "would be within the parameters of the guidelines." 153a. It expressed no objection to the

[16] Compare the record in Evan Miller's case, where the Court characterized his criminal history as "limited —two instances of truancy and one of 'second-degree criminal mischief.'"*Miller*, 132 S Ct at 2469. The record also included abuse, neglect, foster care, and multiple suicide attempts. *Id.* The Court observed that "a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty." *Id.*

offer of second-degree murder. The court did make clear its obligation to sentence Raymond to life without parole if he was found guilty of first-degree murder. *Id.*

After an hour and a half recess to discuss the offer, Raymond's defense attorney reported to the court that Raymond (at 15 years of age) "knows what's going on, he understands what's going on, and has instructed me to reject the People's plea offer of – as offered." 161a.

Miller's guidance is pertinent to the trial court's comments at sentencing, when the judge expressed his incomprehension over Raymond's failure to "escape" and seek assistance for Ms. McNeely. 248a-249a. The *Miller* decision responds to those concerns directly, observing that "children are more vulnerable to negative influences and outside pressures, including from their family and peers; they . . . *lack the ability to extricate themselves from horrific, crime-producing settings*." 132 S Ct at 2464 (citations, internal quotation marks and alterations omitted) (emphasis added). Perhaps even more on point is *Miller*'s grant of relief to Evan Miller, who the Court acknowledges "committed a vicious murder" – yet still merited relief. 132 S Ct at 2469.

The facts and circumstances related above support a finding that a sentencing court informed by *Miller* and considering its mitigating factors would very likely not have sentenced Raymond to non-parolable life. *Miller* explains what the sentencing court found incomprehensible – Raymond's failure to extricate himself from the murder scene. Coupled with the same judge's apparent lack of objection to the second degree murder plea offer, four days into trial, it is reasonable to conclude that Raymond would not be found to be that "rare juvenile offender whose crime reflects irreparable corruption," most deserving of life without parole, that "harshest possible penalty." *Miller*, 132 S Ct at 2469.

This likelihood of relief under the new rule demonstrates actual harm from reliance on

the prior sentencing scheme. Had *Miller* been in effect, had his sentencer been required to consider and give effect to the mitigating aspects of the record above, Raymond might *still* have received a long term-of-years sentence. He might have been sentenced to parolable life. Either – measured against life without parole – represents relief that proves detrimental reliance.

Finally, *Maxson*'s third prong, which assesses the impact of a new rule on the administration of justice, also supports retroactivity. A comparison to the facts underlying the *Maxson* decision demonstrates that the impact of retroactive application of *Miller* will be relatively minimal, and well within the capabilities and resources of Michigan courts.

The population of defendants to whom *Miller* applies is known and has been identified as approximately 360 individuals in the Michigan Department of Corrections (MDOC).[17] In St. Clair County, where Raymond was convicted, four individuals (on information and belief) would be candidates for re-sentencing if *Miller* is applies retroactively. Otherwise, the 360 individuals are distributed across the state. Again on information and belief, the counties with the largest populations of affected defendants are also those with the largest numbers of circuit court judges and volunteer attorneys.

By contrast, the *Maxson* decision characterized the potential impact of the *Halbert* decision on the criminal justice system as "markedly adverse . . . as presumably significant numbers of the incarcerated population would be entitled to avail themselves of appointed counsel and new appeals, despite having knowingly and intelligently pleaded guilty to criminal

[17] See, e.g., Dec. 2, 2013, Press Release from the Office of the Michigan Attorney General, "Schuette Announces He Will Appeal Federal Court Ruling Opening Door for Parole for Teenage Murderers," ("Michigan Attorney General Bill Schuette today announced he will appeal a ruling by a federal court opening the door for parole for approximately 360 teenage murderers currently serving life sentence without the possibility of parole."); available at http://www.michigan.gov/ag/0,4534,7-164-46849_47203-317347--,00.html (last accessed Jan. 12, 2014.)

conduct while represented by counsel." 482 Mich at 397-98. Those "significant numbers" could have been as much as half the prison population or more. See *Kowalski v Tesmer*, 543 US 125, 140; 125 S Ct 564, 574 (2004) (Ginsburg, J., dissenting) (citation omitted) (noting that nationally, approximately 80% of state felony defendants use appointed attorneys, and of those defendants, approximately 70% plead guilty). Retroactive application of *Halbert* could have distributed thousands of cases across a Court of Appeals bench of only 28 judges. By contrast, applying *Miller* retroactively would distribute approximately 360 cases over a state-wide circuit court bench that is considerably larger.

Furthermore, the *Miller* remedy is re-sentencing, not the greater burden of re-trial. The United States Supreme Court's decision in *Robinson v Neil* minimized similar resource concerns under the reliance factor (applying *Linkletter*) when it observed that *Furman v Georgia* only denied the states the authority to impose an unconstitutional sentence, but did not require the "redetermination of the factual question" (in other words, a trial). *Robinson*, 409 US at 509 (citing *Furman*, 408 US 238 (1972)). As here, the unconstitutionally imposed sentence "could be isolated and excised without requiring the State to begin the entire factfinding process anew." *Id.* at 510.

Granted, applying *Miller* to resentencing will require the opportunity to offer and have considered mitigating evidence corresponding with the decision's guidance. But the demand on the criminal justice system will likely be lessened by the potential offering of sentencing agreements for appropriate cases (perhaps corresponding with plea offers previously made, as those represent a contemporaneous determination of appropriate alternative sentences).

Further, justice is best served by the mitigation of excessively harsh sentences, and not by perpetuating those imposed in violation of the Eighth Amendment. Justice is not served when

individuals continue to be incarcerated long beyond any penological justification. See *Miller*, 132 S Ct at 2465. The annual cost to house an inmate in the MDOC is over $34,000.[18] A single year removed from Raymond's sentence and the sentences of the other 360 juvenile inmates represents over $12 million in costs to the state.

And that figure is potentially quite conservative. Consider *Miller*'s observation that life without parole sentences will be "uncommon" and imposed on the "rare juvenile offender." 132 S Ct at 2469. With retroactive application, the sentences of this population could be revised and reduced for appropriate individuals as a result of *Miller* and *Graham*'s "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* If only half of those juveniles currently in the MDOC obtain release in their last ten years of life by demonstrating that they qualify for such relief, the savings to the state of Michigan would be over $60 million, not even accounting for the avoided increased costs of end-of-life medical care.

The *Maxson* Court justified its finding *against* retroactivity for *Halbert* by observing that finality "serves the State's goal of rehabilitating those who commit crimes because rehabilitation demands that the convicted defendant realize that he is justly subject to sanction, that he stands in need of rehabilitation." 482 Mich at 398 (citation and alterations omitted). Here, a decision of non-retroactivity would be paradoxical, because it would undermine that aspect of the state's interests. Indeed, *Miller*'s (and *Graham*'s) objections to sending juveniles away for life include the loss of the opportunity for rehabilitation: "A sentence of life imprisonment without parole . . . . forswears altogether the rehabilitative ideal." *Graham*, 560 US at 74.

Finally, the conclusion of the *Maxson* analysis is supported by this Court's interpretation

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[18] Michigan Department of Corrections, 2011 Annual Report, *available at* http://michigan.gov/documents/corrections/2011_Annual_Report_425826_7.pdf (most recent report available).

of the Michigan Constitution. Mandatory juvenile life without parole violates the state constitution, which provides that "cruel *or* unusual punishment shall not be inflicted." Mich Const. Art. I § 16 (emphasis added). Though the language of this provision is similar to the Eighth Amendment to the United States Constitution, it is not identical and the two clauses are not coextensive. Michigan courts "have the authority to interpret the Michigan Constitution more expansively than the United States Constitution" and have "afforded greater protection under the Michigan Constitution, or Michigan case law, in many areas," including the area of disproportionate punishment. *People v Bullock*, 440 Mich 15, 29 n 9, 40-41; 485 NW2d 866 (1992).

The *Miller* Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on "cruel and unusual punishments." 132 S Ct at 2460. However, the dissents in *Miller* found the mandatory imposition of life without parole not to be unusual. See, e.g., *id.* at 2477 (Roberts, C.J., dissenting) ("Today, the Court invokes that Amendment to ban a punishment that the Court does not itself characterize as unusual[.]"); see also *Harmelin v Michigan*, 501 US 957, 994-995; 111 S Ct 2680 (1991) ("Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense . . ."). But Michigan's Constitution is violated if a punishment is found to be *either* cruel or unusual. Mich Const. Art. I § 16; *Bullock*, 440 Mich at 41 ("[T]he people of Michigan, speaking through their constitution, have forbidden the imposition of cruel or unusual punishments[.]").

In *Bullock*, this Court determined that state constitution's cruel or unusual punishment protection was broader than the analogous federal provision; it struck down the "no parole" provision of a drug sentencing statute found constitutional by the United States Supreme Court in *Harmelin, supra*. *Bullock*, 440 Mich at 37, 42. The Court then extended relief retroactively to

"all others who have been sentenced under the same penalty and for the same offense. . ." *Id.* at 42. This Court's decision in *Bullock* supports the *Maxson* analysis above, in its conclusion that relief from Michigan's disproportionately severe punishment as applied to juveniles should extend retroactively to Raymond Carp.

IV. WHERE FEDERAL AND OTHER STATE COURT DECISIONS PROVIDE NO CLEAR DIRECTION, THIS COURT MUST DECIDE THE QUESTION OF *MILLER* RETROACTIVITY FOR THE STATE OF MICHIGAN.

Both federal circuit courts and state appellate courts have addressed the question of *Miller* retroactivity, but no clear consensus has emerged.

Jurisdictions which have found *Miller* retroactive include the following:

- The Supreme Judicial Court of Massachusetts: *Diatchenko v. District Attorney for Dist.*, --- N.E.2d ----, 466 Mass. 655, 2013 WL 6726856 (2013), 253a (*Miller*'s new rule is substantive, as a categorical bar on mandatory life without parole on a specific class, juveniles convicted of murder; also finding relief to Kuntrell Jackson requires retroactive treatment under *Teague*'s principle of even-handed justice.)
- The Supreme Court of Iowa: *State v. Ragland*, 836 NW2d 107 (2013) (acknowledging that "*Miller* does mandate a new procedure," but finding that "the procedural rule for a hearing is *the result of a substantive change in the law* that prohibits mandatory life-without-parole sentencing. Thus, the case bars states from imposing a certain type of punishment on certain people." *Id.* at 115-16. Also noting that *Miller* should be treated retroactively because a "substantial portion of the authority" on which it relied was so treated, *id.* at 116; and finding persuasive collateral relief to Jackson in *Jackson v Hobbs*, as well as the dissenting Chief Justice's concern about case invalidation "across the nation." *Id.*)

- The Supreme Court of Mississippi: *Jones v. State*, 122 So 3d 698 (Miss 2013) (finding *Miller* retroactive because it "modified our substantive law by narrowing its application for juveniles," and because by "prohibiting the imposition of a mandatory sentence, [*Miller*] prevents [*Summerlin*'s] significant risk that a [juvenile] . . . faces a punishment that the law cannot impose on him." *Id.* at 702.)

Other pro-retroactivity decisions include *People v Morfin*, 367 Ill Dec 282; 981 NE2d 1010 (Ill App Ct 2012) (finding *Miller* substantive, and finding the Court's relief to Kuntrell Jackson further support for retroactivity); *People v Williams*, 367 Ill Dec 503; 982 NE2d 181 (Ill App Ct 2012) (finding *Miller* a procedural new rule, but meeting *Teague*'s "watershed" exception, and also recognizing collateral relief to Jackson); *Hill v Snyder*, 2013 WL 364198, 2 n 2 (ED Mich Jan 30, 2013), 318a (though the question was not before the court, observing that it "would find" *Miller* retroactive, because it was a substantive new rule, and that relief to Jackson invoked *Teague*'s principle of "evenhanded justice.")

In addition, the United States Department of Justice appears to have taken the position that a prima facie case exists for *Miller* retroactivity, for the purposes of a second or successive habeas petition pursuant to 28 USC 2244(2),[19] and a number of the circuit courts of appeal have agreed.[20] See *In re Pendleton*, 732 F3d 280, 282 (CA3 2013) (addressing three consolidated cases, and observing that "in Grant's case, the United States asserts that *Miller* is retroactive,"

[19] To obtain leave to file a successive petition, applicants must demonstrate a prima facie case "that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable[.]" 28 USC 2244(b)(2)(A), (b)(3).

[20] *In re Pendleton* also noted that it "join[ed] several of our sister courts of appeals [in finding the prima facie case for retroactivity.] See, e.g., *Wang v. United States*, No. 13–2426 (2d Cir. July 16, 2013) (granting motion to file a successive habeas corpus petition raising a *Miller* claim); *In re James*, No. 12–287 (4th Cir. May 10, 2013) (same)." It also cited *Johnson, supra*; and for the opposing view, *Craig v Cain, infra*, and *In re Morgan, infra*.

and finding that petitioners had made a prima facie case for *Miller* retroactivity, *id.* at 283); *Johnson v United States*, 720 F3d 720, 721 (CA8 2013) ("The government here has conceded that Miller is retroactive and that Mr. Johnson may be entitled to relief under that case."); see also *In re Morgan*, 717 F3d 1186, 1197 (CA11 2013) (Wilson, J., dissenting from order denying rehearing en banc) ("The United States Department of Justice has decided upon a uniform policy—its United States Attorneys will advocate in favor of *Miller*'s retroactivity in cases on collateral review all across the country;" and quoting the Government's briefing in *Johnson*, *supra*: "*Miller*'s holding that juvenile defendants cannot be subjected to a mandatory life-without-parole sentence is properly regarded as a substantive rule"; "Because the issue has nationwide application, the Department of Justice is formulating the government's position on retroactivity rather than individual U.S. Attorney's Offices." *Id.* (internal citations omitted)).

But the federal circuit courts are not monolithic: See *In re Morgan*, 713 F3d 1365 (CA11 2013) (denying an applicant's certification for a successive habeas filing, finding that *Miller* has not been found by the Supreme Court to be "retroactively applicable to cases on collateral review" as required by *Tyler, supra* [and 28 USC 2244(3)], *id.* at 1367; and that it is not a categorical bar as described in *Penry, supra*: "where a class cannot be subjected to a punishment 'regardless of the procedures followed,'" *id.*); *Craig v. Cain*, 2013 WL 69128, 2 (CA5 Jan. 4, 2013) (unpublished), 321a (finding *Miller* not substantive under *Teague*, because not a categorical bar; and finding it not to be "watershed.").

Other jurisdictions which found against *Miller* retroactivity (besides the preceding circuits and the Court of Appeals below) include the following:

- The Supreme Court of Pennsylvania: *Com. v Cunningham*, — A.3d ----, 2013 WL 5814388 (Pa. Oct. 30, 2013), 295a (finding *Miller* procedural and not substantive because

it "does not categorically bar a penalty for a class of offenders"; and finding "watershed" status unlikely. *Id.* at 6.).

- The Supreme Court of Louisiana: *State v Tate*, --- So 3d ----, 2013 WL 5912118 (La, Nov. 5, 2013), No. 2012-2763, 274a (finding *Miller* "properly classified as procedural," and a simple alteration of "the range of permissible methods for determining whether a juvenile could be sentenced to life imprisonment without parole," *id.* at 6; also finding *Miller* not to be "watershed." *Id.* at 7-8.).
- The Supreme Court of Minnesota: *Chambers v State*, 831 NW2d 311 (Minn 2013) (finding *Miller* procedural, not substantive, for *Teague* purposes, because "[f]irst, the *Miller* rule does not eliminate the power of the State to impose the punishment of life imprisonment without the possibility of release upon a juvenile offender who has committed a homicide offense. Second, our analysis is consistent with relevant federal decisions [though citing only *Craig v Cain, infra*]. Third, the *Miller* rule did not announce a new element." *Id.* at 329-30. The court also declined to find *Miller* met *Teague*'s "watershed" exception, because, *inter alia*, the decision only pertained to sentencing, not general guilt or innocence; it affected only a "small subset of defendants," and individualized sentencing has been long established. *Id.* at 330.).

For additional findings of non-retroactivity, see also *State v Geter*, 115 So3d 375, 378 (Fla App 3 Dist. 2012) (not applying *Teague*, but a state-based test analogous to *Maxson, supra*, and *Linkletter, supra*), reh den, 115 So 3d 385 (Fla App 3 Dist 2013), but see *id.* at 386 (Emas, J., dissenting) (noting that the petitioner was not represented by counsel, and that "the merits portion of his pro se brief was merely two pages."); accord, *Gonzalez v State*, 101 So 3d 886 (Fla App 1st Dist 2012). However, in *Falcon v State*, 111 So 3d 973, 974 (Fla App 1 Dist. 2013), a

panel from the same district as *Gonzalez* denied retroactive application, but then certified the question of *Miller* retroactivity to the Florida Supreme Court, "[b]ecause the question is one of great public importance. . ."

SUMMARY AND REQUEST FOR RELIEF

Defendant-Appellant Raymond Carp's conviction was final when *Miller v Alabama* was decided in June 2012. The *Miller* decision applies retroactively to Raymond's case, under both federal and state law.

Miller is a substantive new rule, as it presents a categorical ban on the imposition of mandatory non-parolable life sentences for a class of offenders, that is, juveniles convicted of murder. The decision is also substantive because it narrows the scope and application of Michigan's sentencing scheme for first-degree murder, broadens the range of sentences available to juveniles, and alters the class of persons subject to mandatory life sentences. Further, the *Miller* decision is substantive and not procedural, because it does not "regulate a manner" of sentencing, but rather effects substantive change by imposing an entirely new requirement of individualized sentencing on Michigan law. Finally, the United States Supreme Court's only prior prohibition on mandatory sentencing, *Woodson v North Carolina*, dictates finding that *Miller* applies retroactively.

Miller is equally retroactive under the three-pronged test of Michigan case law. In requiring the marshaling, introduction, and consideration of mitigating factors at sentencing, the purpose of *Miller*'s new rule relates to the very integrity of the fact-finding process. Raymond suffered actual harm in detrimental reliance on the old rule, because of the presence of many mitigating factors in his record, and the low bar to relief as measured against a sentence of non-parolable life. Finally, the effect of retroactive application to approximately 360 cases across the State of Michigan, limited to resentencing, will have a minimal impact upon the administration of justice.

WHEREFORE, for the foregoing reasons, Defendant-Appellant Raymond Carp prays

that this Honorable Court find *Miller v Alabama, supra,* retroactive for cases that were final when that decision was reached; prays this Court reverse the January 13, 2011, Order of the trial court denying his motion for relief from judgment, and provide him the following further relief:

- Vacate Raymond's unconstitutional life-without-parole sentence;
- Order him be re-sentenced in a proceeding compliant with the requirements of *Miller v Alabama*, *supra*, including
    - a re-sentencing hearing that permits judicial discretion to consider the mitigating features of youth and its attendant circumstances, including Raymond's individual characteristics and the circumstances of his offense, and provides for the presentation of lay and expert evidence by Raymond on these factors; and
    - eligibility for a sentence of term of years;
- Remand to the Court of Appeals for consideration of other grounds not addressed below; and
- Grant any other relief to which Raymond is entitled.

Respectfully submitted,

Patricia L. Selby (P70163)
Selby Law Firm, PLLC
PO Box 1077
Grosse Ile, MI 48138
(734) 624-4113
plselby@gmail.com

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