
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Respondent-Appellee,

v

Trial Court No. 94-2089
Court of Appeals No. 314080

CORTEZ ROLAND DAVIS,
N/K/A CORTEZ DAVIS EL

Applicant-Appellant.

**APPLICATION FOR LEAVE
TO APPEAL**

Clinton J. Hubbell (P72321)
HUBBELL DUVALL PLLC
Attorneys for the Applicant
25140 Lahser Rd. Ste. 271
Southfield, MI 48033
(248) 595-8617 Phone
info@hubbellduvall.com

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STATEMENT OF JURISDICTION

This is an Application for Leave to Appeal a decision of the Michigan Court of Appeals. This Court has jurisdiction pursuant to Mich Const 1963, Art VI, § 4; MCL 600.212; MCL 600.215(3); and MCR 7.301(A)(2), to review by appeal a case after a decision by the Court of Appeals and the trial court.

On January 16, 2013, the Court of Appeals issued its order reversing the December 7, 2012 order of the trial court below. This application is being timely filed within 56 days of the Court of Appeals' final order. MCR 7.302(C)(2).

QUESTIONS PRESENTED FOR REVIEW

- I. DO *MILLER V ALABAMA* AND *JACKSON V HOBBS* TOGETHER ANNOUNCE A NEW RULE AND GUARANTEE A SUBSTANTIVE RIGHT REGARDING JUVENILE SENTENCING REQUIRING RETROACTIVE APPLICATION?**

Cortez Davis answers: Yes.

State of Michigan answers: No.

- II. IS THE UNITED STATES SUPREME COURT'S DECISION IN *MILLER/JACKSON*, RETROACTIVE TO ALL JUVENILES SENTENCED UNDER MCL 750.316 BECAUSE IT ANNOUNCES A WATERSHED RULE OF CRIMINAL PROCEDURE, MANDATING ITS RETROACTIVE APPLICATION?**

Cortez Davis answers: Yes.

State of Michigan answers: No.

- III. IS THE UNITED STATES SUPREME COURT'S DECISION IN *MILLER/JACKSON*, RETROACTIVE TO ALL JUVENILES SENTENCED UNDER MCL 750.316 BECAUSE THE SUPREME COURT GAVE RELIEF TO KUNTRELL JACKSON, AN INDIVIDUAL WHOSE SENTENCE WAS ON COLLATERAL REVIEW?**

Cortez Davis answers: Yes.

State of Michigan answers: No.

- IV. IS *MILLER/JACKSON* RETROACTIVE UNDER STATE LAW BECAUSE THIS CASE SATISFIES THE TEST SET FORTH IN *PEOPLE V MAXSON*?**

Cortez Davis answers: Yes.

State of Michigan answers: No.

- V. IS THERE A CATEGORICAL BAN ON THE SENTENCE OF LIFE WITHOUT PAROLE IN JUVENILE FELONY MURDER AND AIDING AND ABETTING ("NON-SHOOTER") CASES SUCH AS THIS ONE UNDER THE RULES IN *GRAHAM* AND *MILLER/JACKSON*?**

Cortez Davis answers: Yes.

State of Michigan answers: No.

ORDER APPEALED FROM, STATEMENT OF ERROR AND RELIEF SOUGHT

Appellant Cortez Davis applies for leave to appeal the decision of the Michigan Court of Appeals issued January 16, 2013.

The Hon. Vera Massey Jones of the Third Circuit Court issued an order dated December 11, 2012 following a hearing on Cortez Davis' Motion for Post-judgment Relief Requesting Resentencing pursuant to *Miller/Jackson*. The motion was granted by the trial court, which issued a written order stating:

IT IS HEREBY ORDERED that defendant is GRANTED a resentencing hearing pursuant to Miller v Alabama 132 S Ct 2455.

Defendant was convicted as a juvenile of First Degree Felony Murder in 1994. A sentencing hearing was held to determine whether to sentence defendant as a juvenile. The defendant was not the shooter, but an aider and abettor. This court found that although defendant could be rehabilitated, the time left under the juvenile sentencing Option was not enough time to assure that defendant was rehabilitated. Further, this court held that to sentence this particular defendant to natural life in prison was cruel and unusual punishment. The Michigan Court of Appeals in 1994 ordered this court to sentence Cortez pursuant to statute. Cortez pursued every means of appeal in the Michigan Courts including several subsequent motions for relief from judgment. The United States Supreme Court in *Miller v Alabama*, 132 S. Ct 2455, has finally held that to sentence juveniles to natural life in prison without the possibility of parole is cruel and unusual punishment. This court uses the term "finally held" because Mr. Cortez Davis has been in prison for 18 years without a hearing before a parole board. This court is not aware if during these 18 years the defendant has had the opportunity for educational programs or any services that might prepare him to return to society. Thus, we have locked him behind bars for over 18 years as a juvenile who did not pull the trigger, who told the victim that he held at gunpoint that everything will be alright, and who had the potential to be rehabilitated. We, the People of the State of Michigan have treated this juvenile, now man, inhumanely.

The People of the State of Michigan contend that the defendant should not be granted a (sic) relief because a Michigan Court of Appeals case holds that his relief is barred because retroactivity does not apply to a case on collateral review. The Michigan Court of Appeals was wrong when it ordered this court to impose a sentence pursuant to statute, which was cruel and unusual. The Supreme Court of the State of Michigan was wrong when it affirmed this defendant's conviction and sentence. To now hold that defendant is barred from relief because his case is

reviewable only under a motion from relief from justice would be wrong and injustice.

Based on the reasons stated above this court orders that defendant, Cortez Roland Davis, be GRANTED a resentencing (sic) hearing to be held on January 25, 2013.

App. 60, Order of the Third Circuit Court, dated December 11, 2012.

On January 16, 2013, on Application by the Wayne County Prosecutor, the Court of Appeals granted expedited consideration and summarily reversed the Third Circuit Court on a significant constitutional issue without a hearing, stating:

The Court Orders that the motion for immediate consideration is GRANTED.

In lieu of granting leave to appeal, pursuant to MCR 7.205(D)(2), the Court further orders that the December 11, 2012 order of the Wayne County Circuit Court, which granted defendants's motion for judgment relief and granted resentencing pursuant to *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), is REVERSED. In *People v Carp*, ___ Mich App ___; ___ NW2d ___ (Docket No. 307758, issued November 15, 2012), slip opinion, pp 24-31, this Court held that *Miller* is not to be applied retroactively to those cases on collateral review. The *Carp* decision has precedential effect under the rule of stare decisis, and the circuit court is required to follow published decisions from this Court. See MCR 7.215(C)(2); *People v Hunt*, 171 Mich App 174, 180; 429 NW2d 824 (1988).

Pursuant to MCR 7.215(F)(2), this order shall take immediate effect. The Court retains no further jurisdiction.

App. 64, Order of the Court of Appeals, dated January 16, 2013

While courts differ on whether *Miller/Jackson, supra*, has retroactive effect, on January 30, 2013, the United States District Court for the Eastern District of Michigan, sitting in a civil suit to determine certain prisoners' rights under 42 USC § 1983 and the Eighth Amendment to the United States Constitution, granted the requested relief and said it would hold that *Miller/Jackson* is retroactively applicable to cases that have become final on direct review, writing:

Moreover, this court would find *Miller* retroactive on collateral review, because it is a new substantive rule, which “generally apply retroactively.” *Schriro v Summerlin*, 542 US 348, 351-52 (2004). “A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law

punishes.” *Id.* at 353. “Such rules apply retroactively because they ‘necessarily carry a significant risk that a defendant . . . faces punishment that the law cannot impose upon him.’” *Id.* at 352. *Miller* alters the class of persons (juveniles) who can receive a category of punishment (mandatory life without parole). Further, the Supreme Court applied *Miller* to the companion case before it – on collateral review – and vacated the sentence of Kuntrell Jackson. “[O]nce 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.” *Teague v Lane*, 489 US 288, 300 (1989).

App. 65, *Hill, et al. v Snyder, et al.*, Order of the US District Court for the Eastern District of Michigan, dated January 30, 2013.

The Eighth Amendment has been incorporated and deemed to apply to the individual states through the Due Process Clause of the US Const. Amend XIV. *Robinson v California*, 370 US 660, 82 S Ct 1417, 8 L Ed 2d 758 (1962).

The Michigan Court of Appeals erred in its decision in *People v Carp, supra*, and in its January 16, 2013 Order in this case by denying the requested relief; relief to which Cortez Davis became entitled under *Miller/Jackson*.

This Court should GRANT leave to appeal, so Cortez may argue for reversal of the decision of the Michigan Court of Appeals, and that the Trial Court's December 11, 2012 order be reinstated allowing Cortez to be re-sentenced pursuant to the rule in *Miller/Jackson, supra*.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Cortez Davis was born March 7, 1977. App. 11, p. 1. His life circumstances at the time of the commission of the offense in this case were horrific according to both his personal account and the 1994 Presentence Investigation Report. Cortez' mother was 16 years old at the time of his birth, and she already had his two-year old sister. *Id.* Cortez' father passed away in 1986 from drug use when Cortez was just 9 years old, at which time his mother turned to drug dealing and use. *Id.* She began to neglect Cortez and his other siblings by failing to keep food in the house. *Id.* When he reported to Mason Elementary School counselor in 1987 what was happening in his home (of being hungry, living in a crack house, filth, inoperable plumbing, an infestation of cockroaches, and a leaking ceiling, which was in danger of imminent collapse), Child Protective Services intervened and took Cortez and his siblings from the home, citing neglect. *Id.* Protective Services also identified drug paraphernalia in the house as evidence of drug use. *Id.* The Protective Services file indicated that since 1981 there had been thirteen referrals made alleging abuse and neglect. *Id.* Cortez and his siblings were made wards of the court. *Id.* Davis and his siblings remained in the care of his grandmother until 1989, at which time they were returned to their mother—who lived in a drug-infested environment. *Id.* But after six months, due to her drug use, the children were again removed from the home. *Id.* During this return to his mother, there was frequently no food in the house. *Id.* The children were temporarily placed with their grandmother, until their maternal uncle was convicted of sexually assaulting Cortez' younger sister. *Id.* The two youngest children were placed in foster care in July of 1992. *Id.* Cortez escaped from placement in July of 1992 and the State could not locate him for a time. *Id.* He dropped out of school in 1993, in the 8th grade to support himself and his siblings. *Id.* At one

point, Cortez was homeless. *Id.* His maternal grandmother stated that his mother introduced Cortez to selling drugs from their home. *Id.*

This case began with the shooting death of Raymond Derrick Davis, Jr. on December 14, 1993, by Michael Scott MDOC No. 240464. Cortez was 16 years, 9 months, and 7 days old at the time of this offense. App. 11. Cortez was charged by information on February 22, 1994 with murder, assault, and armed robbery. App. 2. The charging document was literally rubber stamped with the words "Automatic Waiver," and in spite of being a 16-year-old ward of the state¹, Cortez was waived into the adult criminal process. App. 2, p. 1. At the time of his arrest for these offenses, Cortez' father had been dead for 6 years due to a drug overdose, his mother was in a drug rehabilitation center for crack cocaine use, two of his siblings were in foster care, and the remaining siblings' whereabouts were unknown. App. 11.

Cortez was arraigned and a final conference was held on March 8, 1994. App. 3. On May 4, 1994 the court held a hearing to hold and compel attendance of a "material witness," Edwin Castelow, at trial, since he was apparently unwilling to give testimony. App. 4. Moreover, Mr. Castelow was not a witness to the crime, but was apparently a overheard a conversation involving the crime later. *Id.* A jury trial on the charges was held on May 9, 1994, and the jury convicted Cortez of (1) felony murder, MCL 750.316(b); (2) Armed robbery, MCL 750.529; (3) Assault with intent to rob while armed, MCL 750.89, and (4) Possession of a firearm during the commission of a felony, MCL 750.227b. App. 9, p. 103-106. A substantial error occurred when an "aiding and abetting" instruction, which was allegedly marked "do not use" was read to the jury with respect to the murder charge, which formed the basis of Cortez's conviction. App. 9, p.

¹ The fact that Cortez was a ward of the State is taken from the 1994 Presentence Report. Counsel for Cortez Davis has been unable to procure original records from the Juvenile Court indicating his status as a "ward of the State."

85-87. The issue of Cortez being waived into the adult process in spite of being a ward of the state does not appear to have been raised in the Court of Appeals.

A hearing on whether to sentence the defendant as a juvenile and for disposition was held on June 10, 1994 and June 15, 1994. On June 20, 1994 the court sentenced Cortez, after finding that the juvenile system would not be sufficient to rehabilitate him. The court said:

But the court has also held that in this instance when this young man was not the person who pulled the trigger, he was an aider and abettor in an armed robbery, he was convicted of first degree murder by the jury, that the only other option of then sentencing him as an adult and imposing a life sentence, mandatory life sentence, is cruel and unusual punishment, when everyone agrees that he is capable of rehabilitation. And therefore, I am not in this instant [sic] going to impose mandatory life in prison, as I think it is cruel and unusual punishment.
Sentencing Hearing June 20, 1994. App. 13, p. 4.

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

[t]he court having come to the conclusion that sentencing the defendant as a juvenile would be dangerous to society and there would not be enough time to rehabilitate him as sentencing him as an adult would be cruel and unusual punishment because he is not the shooter and can be rehabilitated.
Written order dated Sept. 26, 1994. App. 14.

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

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

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

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

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

...

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

...

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

Final Sentencing Hearing Dec. 22, 1994. App. 15, p. 4-6.

On January 5, 1996 a hearing on the defendant's Motion to determine probable cause to arrest him was held. App. 17. On June 24, 1997, the Court of Appeals remanded the issue of probable cause to the trial court for a determination on the admissibility of Cortez's statement to the police. *People v Davis*, No. 183428 and 192234 (Mich App June 24, 1997); *lv den* 459 Mich 863; 584 NW2d 923 (1998).² On March 12, 1999, the trial court held an evidentiary hearing on instructions from the Court of Appeals. App. 19. The trial court found there was probable cause

² In addition to adopting the now abrogated holding in *People v Launsbury*, 217 Mich App 358, 551 NW2d 460 (Mich App 1996), that the mandatory life sentence was constitutionally permissible, the June 24, 1997 Court of Appeals decision ruled on a number of procedural and substantive issues, including: I) whether the Trial Court's findings of fact relating to its decision to sentence defendant as an adult were clearly erroneous. The Court of Appeals held they were not; II) Whether the Trial court erred in sentencing Cortez as an adult. The Court of Appeals held it did not. III) Whether imposition of a mandatory life sentence for juveniles convicted of first-degree murder is cruel or unusual punishment pursuant to *Launsbury, supra*, which it said was not; IV) In what is on face an illogical statement, the Court of Appeals concluded that since the Legislature did not leave sentencing discretion to the court that the mandatory life sentence was not disproportionate to the crime; V) holding that the trial court abused its discretion when it granted Cortez a new trial; VI) holding that there was sufficient evidence to support the jury verdict; VII) Vacating the conviction of armed robbery, because a conviction on both the theory of felony murder and the underlying offense, in this case armed robbery, violated Cortez's right to against double jeopardy. *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996); VIII) Holding that Cortez's right to a fair trial was not tainted by prosecutorial misconduct; IX) finding trial court abuse of discretion in permitting the prosecutor to question the defendant about a statement made by trial counsel during opening argument; X) The issue of whether the confession obtained by police was the result of an unlawful arrest; finally, XI) The Court of Appeals declined to answer whether defense counsel failing to move to suppress the confession constituted ineffective assistance of counsel.

to arrest Cortez so as to support the admissibility of his statement to the police. App. 19, p. 49. On July 23, 2001, Cortez filed a post-conviction motion for relief from judgment and Petition for a Writ of Habeas Corpus with the US District Court. App. 21; App. 22. On July 18, 2002, The trial court granted Cortez a new trial, finding error in the instructions to the jury regarding the theory of aiding and abetting. *See Generally People v Kelly*, 423 Mich 261, 378 NW2d 365 (Mich 1985); *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (Mich App 1996). App. 21, p. 15-17. The trial court indicated that the aiding and abetting instruction should have been given with regard to the armed robbery and not the first degree murder charge. App. 21, p. 15. On September 19, 2002, the Court of Appeals remanded the case to the trial court regarding its ruling finding defendant could not satisfy the "cause" and "prejudice" requirements necessary in order to obtain post-judgment relief. *People v Davis*, No. 242997 (Mich App, September 18, 2002) (unpublished) App. 20. The trial court then held a hearing on the Opinion and Order of the Court of Appeals on October 11, 2002. At this hearing, the judge again granted a new trial. During this hearing, the judge specifically found that:

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

Hearing on Motion for New Trial Oct. 11, 2002. App. 21, p. 16 ¶ 3.

The error was apparent, the trial court recognized it, and this issue was not addressed by the Court of Appeals. On March 18, 2003, the US District Court issued an Opinion and Judgment denying the defendant habeas relief without prejudice because Cortez had not yet exhausted his state court remedies. App. 22. On Aug 31, 2004, the Michigan Court of Appeals issued an opinion again reversing the trial court's decision to grant defendant a new trial, this

time with dissent. *People v Davis*, No. 246847 (Mich App, August 31, 2004) (Cooper, J. dissenting), *lv den*, 472 Mich 927, 697 NW2d 525 (2005) (Kelly, J. dissenting).

On March 12, 2007 the US District Court granted defendant's motion to reopen the habeas proceedings, and after hearing the defendant's habeas claims, issued a final Opinion and Judgment on April 30, 2008, denying habeas relief with prejudice. *Davis v Jackson*, 01-cv-72747-DPH, ECF doc. 27, filed April 30, 2008. App. 26. The US District Court subsequently denied Cortez's request for a Certificate of Appealability regarding its denial of habeas relief with prejudice. App. 27. The Sixth Circuit Court of Appeals also denied Cortez an appeal to that court on the habeas claims. App. 30. On May 17, 2010, the US Supreme Court issued its opinion in *Graham v Florida*, 130 S Ct 2011, 176 L Ed 2d 825 (2010) (Announcing a categorical ban on the sentence of life without the possibility of parole for juvenile non-homicide offenders).

On April 15, 2011, by his attorneys, Cortez filed a successive motion for relief from judgment in the Third Circuit Court Criminal Division for Wayne County claiming a retroactive change in the law based on the holding in *Graham*, asserting that felony murder is not a homicide crime. The Hon. Vera Massey Jones issued an order dated April 25, 2011 denying defendant's motion stating that the "Defendant was convicted of Felony Murder, a homicide offense. Thus *Graham v Florida* does not apply." App. 40. Cortez timely requested leave to appeal to the Michigan Court of Appeals, and was denied leave to appeal on November 16, 2011. App. 42. On January 7, 2012, Cortez filed an Application for Leave to Appeal the disposition of his motion under *Graham* to this Court. App. 43. On June 25, 2012, the US Supreme Court issued its opinion in *Miller/Jackson*. That same day, Cortez supplemented his application for leave to appeal in this Court with the *Miller/Jackson* ruling. App. 44. On September 7, 2012, in lieu of granting leave to appeal, this Court remanded the issue of retroactivity to the Trial Court

for its consideration in light of *Miller/Jackson*. App. 57. On November 15, 2012, the Michigan Court of Appeals issued its opinion in *People v Carp, supra*, holding, *inter alia*, that *Miller/Jackson* would not be retroactively applicable to cases that had become final on direct review. With this ruling in mind, the trial court gave Cortez relief under *Miller/Jackson*, believing that the US Supreme Court's ruling controlled, and *Carp* did not. App. 59, 60.

On January 16, 2013, the Michigan Court of Appeals issued the Order that is the subject of this Application. App. 64. Since the Court of Appeals issued its January 16, 2013 Order in this case, the United States District Court for the Eastern District of Michigan decided the case of *Hill, et al. v Snyder, et al., supra*. App. 65.

ARGUMENT

STANDARD OF REVIEW

This Application requests that the Supreme Court grant leave to consider a ruling on a legal issue only, which necessarily involves a question of constitutional import and statutory construction. These issues are reviewed *de novo*. *Wayne Co v Hathcock*, 471 Mich 445, 455, 684 NW2d 765 (2004). Whether to grant leave to appeal is within the discretion of the Supreme Court. MCR 7.301(A)(2). The issue presented by this appeal is of constitutional import, and a decision on the law as it was modified in 2010 and 2012 is vital to achieving justice in this case, especially when the outcome adjudicates the constitutionality of a mandatory life sentence of a juvenile—a sentence that the United States Supreme Court has treated with disfavor.

Imprisonment of juveniles for life without the possibility of parole implicates legal principles of major significance to the state's jurisprudence. MCR 7.302(B)(3). The appeal also implicates the validity of multiple legislative acts, including, but not necessarily limited to: MCL 750.316(b) and MCL 791.234(6)(a), because they are a mandatory sentencing scheme that has been declared unconstitutional as applied to juveniles by the US Supreme Court and MCL 777.1(c), insofar as the definition of "homicide crime" fails to except juveniles who are not culpable for a killing. MCR 7.302(B)(1).

PRESERVATION OF ERROR

The error of the Court of Appeals occurred in its Order of January 16, 2013, which reversed the trial court. The trial court below attempted to follow the U.S. Supreme Court's opinion in *Miller/Jackson*, but the Court of Appeals blocked that effort. The issue is preserved by claiming an appeal from the January 16, 2013 Court of Appeals order. No hearing was held in connection with the January 16, 2013 Court of Appeals order. The balance of the issues are also

preserved but were not reached by the Court of Appeals because it incorrectly determined that *Carp, supra*, precluded relief for Cortez in this case.

I. MILLER AND JACKSON TOGETHER ANNOUNCE A NEW RULE AND GUARANTEE A SUBSTANTIVE RIGHT REGARDING JUVENILE SENTENCING REQUIRING RETROACTIVE APPLICATION.

Applying the analysis of *Teague* and its progeny leads to the conclusion that *Miller/Jackson* is retroactive. A new constitutional rule applies to cases on collateral review if it is a substantive rule of criminal law or a “watershed” rule of procedure. *Schriro v Summerlin*, 542 US 348, 350-52 (2004); *Bousley v United States*, 523 US 614, 620 (1998); *Teague, supra*. A rule is substantive if it narrows the scope of a criminal statute, places particular conduct beyond the State's power to punish, or establishes a “substantive categorical guarante[e] accorded by the Constitution,” that “prohibit[s] a certain category of punishment of a class of defendants because of their status or offense.” *Graham, supra* at 477 (internal quotations and citations omitted); *O’Dell v Netherland*, 521 US 151, 156-57 (1997); *Saffle v Parks*, 494 US 484, 495 (1990); *Summerlin, supra* at 352-53. Such 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.*” *Summerlin, supra* at 353 (emphasis added) (internal quotations and citations omitted); *see also Bousley, supra*, at 620.

In contrast, “rules that regulate only the *manner of determining* the defendant's culpability are procedural” and will not be applied retroactively unless they represent a watershed rule. *Summerlin, supra* at 353, (emphasis in original), *citing Bousley supra* at 620. *Miller/Jackson* is substantive. At its core, it makes facts that were not previously required to be considered now necessary prerequisites to punishment. *Cf Bousley, supra* at 620. Where the mere

fact of conviction was previously sufficient to impose juvenile LWOP, *Miller/Jackson* now requires proof that, among other things, a juvenile does not possess sufficient “mitigating qualities of youth” and the “possibilities for rehabilitation” to justify a mandatory life term. *Miller/Jackson, supra* at 2468-2470. And, the Court admonished, “we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon*” when such mitigators are considered. *Id.* (emphasis added) By adding these necessary prerequisites and making juvenile JLWOP the exception rather than the rule, *Miller/Jackson* drastically “narrows the scope of” Michigan’s JLWOP laws, thereby creating a significant risk that juvenile defendants “face[] a punishment that the law cannot impose upon [them].” *Summerlin, supra* at 353.

Miller/Jackson is substantive because it dictates *what* must be considered to impose juvenile JLWOP rather than *how* such sentences are found. *Cf Saffle, supra* at 490 ([t]here is a simple and logical difference between rules that govern *what* . . . and rules that govern *how*. . . .”) To contrast this case with *Summerlin* is instructive. In *Summerlin*, the Supreme Court held that *Ring v Arizona*, 536 US 584 (2002), which required that juries rather than judges find statutory aggravating factors necessary to impose death sentences, was a procedural rather than substantive rule. *Summerlin, supra* at 354-55. Key to this conclusion was that the factual prerequisites for the death penalty remained “the same before *Ring* as after.” *Id.* *Ring* merely shifted *how* those factors were found, from judges to juries. *Id.* The Court explained:

This Court's holding that, because Arizona has made a certain fact essential to the death penalty, that fact must be found by a jury, 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. *Id.* at 354.

Unlike *Ring*, the necessary requisites for imposing juvenile JLWOP were not the same before *Miller/Jackson* as after. This new rule made “certain facts essential” to such sentences. *Id.*

It primarily expanded what judges must consider before applying JLWOP, from nothing to all to the “mitigating qualities of youth.” It is thus substantive rather than procedural.

To be sure, *Miller/Jackson* impacts sentencing procedure. But rather than prescribing additional or different procedures, the new rule mandates procedures where none previously existed. *Compare Ring, supra* (transferring finding of death penalty factors from judge to jury). Under *Miller/Jackson*, JLWOP is disproportionate unless the juvenile offender’s “youth (and all that accompanies it)” are shown to be so tangential to the offender and his crime that he is nearly indistinguishable from an adult. *Miller/Jackson, supra* at 2469. Drawing on decisions holding that mandatory death penalty laws violated the Eighth Amendment because they prevented consideration of mitigating factors, the Supreme Court similarly demanded that sentencers first be presented with, and consider evidence relevant to, the “mitigating qualities of youth” before they can impose LWOP. *Miller/Jackson, supra* at 2467-2478, *quoting Johnson v Texas*, 509 US 350, 367 (1993); *see also Woodson v North Carolina*, 428 US 280 (1976) (holding mandatory death penalty violated Eighth Amendment); *Sumner v Shuman*, 483 US 66, 74-76 (1987) (failure to allow death penalty sentencer to consider mitigating factors violated Eighth Amendment). Any new procedures flowing from *Miller/Jackson* represent merely the means to an end of preventing the wholesale imposition of disproportionate sentences that have for years resulted from mandatory LWOP statutes.

Miller/Jackson features a second substantive component in that it prohibits a category of punishment (mandatory LWOP) for a class of individuals (juveniles) because of their status. *Collins, supra* at 477. The *Miller/Jackson* Court recognized the well-established rule, recently reaffirmed in *Roper, supra*, and *Graham, supra*, that juveniles must as a class be treated differently to prevent “mismatches between the culpability of [this] class of offenders and the severity of a

penalty.” *Miller/Jackson, supra* at 2463-64. The Court then carved out a categorical exception for juveniles to the general rule that non-death sentences do not violate the Eighth Amendment simply because they are mandatory. *Id. and see Harmelin v Michigan*, 501 US 957 (1991). Since LWOP is the harshest penalty available for juveniles, as the death penalty is for adults, *Miller/Jackson* held that prior decisions barring mandatory death penalty imposition and requiring individualized sentencing applied to juveniles in the non-death context. *Id. See Woodson, supra; Lockett v Ohio*, 438 US 586 (1978); *Eddings v Oklahoma*, 455 US 104 (1982). *Miller/Jackson* therefore established a “substantive categorical guarantee accorded by the Constitution,” for all juveniles, and therefore applies retroactively. *Collins, supra* at 477.

It is true that the Court stopped short of declaring a “categorical” bar on the imposition of LWOP for juveniles who commit homicide crimes. *Miller/Jackson, supra* at 2469-71. But while this penalty was not ruled out across the board, the Court made clear that mandatory LWOP violated the Eighth Amendment and that categorically juveniles must be treated differently in process and substance. *Id.* Indeed, the Court drew heavily from the line of its decisions adopting “categorical bans on sentencing practices” with regard to classes of offenders to make its sweeping rule. *See Graham, supra* at 2022–23 (listing cases); *Miller/Jackson, supra* at 2463-64. The categorical approach of *Miller/Jackson* makes it substantive and retroactive.

That *Miller/Jackson* applies retroactively also is supported by the Supreme Court’s treatment of earlier analogous decisions on the death penalty, a penalty the Court placed on the same plane as LWOP for juveniles. *Miller/Jackson, supra* at 2467; *Graham, supra* at 2038-39 (Roberts concurring). In the seminal case of *Furman v Georgia*, 408 US 238 (1972), the Court held that the system of imposing the death penalty nationwide was cruel and unusual because capital sentencing juries had nearly unbridled and unguided discretion, creating the spectre that

death was being imposed in a “wanto[n]” and “freakis[h]” manner. *Id.*, at 310 (Stewart, J., concurring); *Johnson v Texas*, 509 US 350, 360 (1993). That decision undoubtedly had a “procedural” aspect: it was established guidelines – or lack thereof – that led to the widespread imposition of disproportionate death sentences. Subsequently, the Court made clear that the underlying Eighth Amendment basis for *Furman*, of preventing cruel and unusual punishment, was one of substance rather than procedure, and noted that “we have not hesitated to apply [Furman] retrospectively.” *Robinson v Neil*, 409 US 505, 507-508 (1973). Rooted in this conclusion also is the recognition that pre-*Furman* courts lacked the authority to impose death sentences, essentially rendering those judgments void *ab initio*. See *United States v Johnson*, 457 US 537, 551 (1982). Here, similar to *Furman*, the pre-*Miller/Jackson* mandatory LWOP for juveniles is so contrary to the Eighth Amendment, so fraught with problems of disproportionality, that courts essentially lacked authority to impose it.

Courts recently agreed that the *Miller/Jackson* rule is substantive in nature, and that it satisfies the *Teague* retroactivity analysis. *People v Morfin*, 2012 WL 6028634 (Ill App Nov 30, 2012) (held The mandatory life sentence imposed on defendant for two counts of first degree murder committed when he was a minor was vacated and the cause was remanded for a new sentencing hearing on the ground that pursuant to *Teague*, *Miller* is retroactively applicable to defendant’s case on collateral review, and under *Miller*, a new sentencing hearing was required for defendant, and at the hearing, possible sentences include natural life, 20 to 60 years, or up to 100 years if an extended-term finding is made.) In sum, *Miller/Jackson* is retroactive under federal law, and this court should consider and act upon this question.

II. THE UNITED STATES SUPREME COURT’S DECISION IN *MILLER/JACKSON* ANNOUNCES A WATERSHED RULE OF CRIMINAL PROCEDURE, REQUIRING ITS RETROACTIVE APPLICATION.

If the Court finds that the *Miller/Jackson* rule is strictly procedural, then it is a new watershed rule of criminal procedure, making it retroactively applicable.

As one federal Court recently noted, "[i]ndeed, if ever there was a legal rule that should – as a matter of law and morality – be given retroactive effect, it is the rule announced in *Miller*. To hold otherwise would allow the state to impose *unconstitutional* punishment on some persons but not others, an intolerable miscarriage of justice." *Hill, supra* at 3. The *Hill* case is the most recent to find *Miller* retroactive. *See also State v Simmons*, 99 So.3d 28 (La 2012) (allowing for resentencing on collateral review in light of *Miller*); *People v Morfin*, 2012 WL 6028634 (Ill App Nov 30, 2012).

Watershed rules of criminal procedure are rare. In fact, only once has the U.S. Supreme Court indicated that such rule would qualify as a watershed rule. *Beard v Banks*, 542 US 406, 417 (2004) (Identifying *Gideon v Wainwright*, 372 U.S. 335 (1963) as the only case that possibly qualifies as formulating a watershed rule of criminal procedure.) However, many of the cases claiming to present a watershed rule of criminal procedure were limited to pretrial and trial procedure—not sentencing juveniles *See, e.g. Whorton v Bockting*, 127 S Ct 1173 (2007) (held, the new rule from *Crawford v Washington* prohibiting the admission of testimonial hearsay statements without a prior opportunity for the defendant to cross-examine the declarant, would not be applied retroactively to cases on collateral appeal under the standard set forth in *Teague v Lane*.); *Schiro v Summerlin*, 542 US 348 (2004) (held no retroactivity for *Ring v Arizona*, 546 US 584 (2002)); *Beard v Banks*, 542 US 406 (2004) (held no retroactivity for *Mills v Maryland*, 486 US 367 (1988)); *O'Dell v Netherland*, 521 US 151 (1997) (held no retroactivity for *Simmons v South Carolina*, 512 US 154 (1994)); *Gilmore v Taylor*, 508 US 333 (1993) (held no retroactivity for a new rule relating to jury instructions on homicide); and *Sawyer v Smith*, 497

US 227 (1990) (held no retroactivity for *Caldwell v Mississippi*, 472 US 320 (1985)). However, none of the cases presented called into question imposing upon a juvenile offender the most severe punishment allowed by law for adults in a state such as Michigan.

It is difficult to imagine that a rule of such constitutional importance does not constitute a watershed rule that would apply to "all individuals similarly situated," effectively allowing some juveniles to serve unconstitutional sentences while protecting others. Not applying *Miller* to all juveniles seems, wholesale, to violate the principles of proportionality and equal protection. In sum, *Miller/Jackson* is retroactive under federal law, and this court should consider and act upon this question.

III. THE UNITED STATES SUPREME COURT MADE ITS DECISION RETROACTIVE BY APPLYING THE NEW RULE TO KUNTRELL JACKSON, AN INDIVIDUAL WHOSE SENTENCE WAS ON COLLATERAL REVIEW.

In *Teague*, the Supreme Court declared that as a threshold matter, it would not 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*." *Teague*, *supra* at 316 (emphasis added); *see also Penry v Lynaugh*, 492 US 302, 313 (1989) (noting Supreme Court will not apply a new rule to a case on collateral review unless that rule applies retroactively to all cases on collateral review), *abrogated on other grounds by Atkins v Virginia*, 536 US 304 (2002). Furthermore, once a new rule is applied to the defendant in the case announcing that rule, "evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Teague*, *supra* at 300, 315, *citing Fuller v Alaska*, 393 US 80, 82 (1968) (Douglas, J., dissenting) (if a rule is applied to the defendant in the case announcing the rule, it should be applied to all others similarly situated).

The result is that when the Supreme Court announces a new rule and applies it to a defendant whose conviction is already final, that rule is retroactive. *See also, Tyler v Cain*, 533 US 656, 663 (2001). (“The new rule becomes retroactive, not by the decision of the lower court, or by the combined action of the Supreme Court and lower courts, but simply by the action of the Supreme Court.”) In *Miller/Jackson*, the Supreme Court applied its new rule to Kuntrell Jackson. Jackson’s conviction became final in 2004, *Jackson v State*, 194 SW3d 757 (Ark 2004), and his case reached the Supreme Court after the state courts affirmed the dismissal of his state habeas corpus petition. *Jackson v Norris*, 2011 Ark 49 (Ark 2011), *cert. granted sub nom Jackson v Hobbs*, 132 S Ct 548 (2011). By granting relief in Jackson, the Court made its rule fully retroactive to all defendants whose cases are final. *Teague, supra* at 300, 309, 316; *see also Tyler, supra* at 668 (O’Connor J. concurring) (explaining that Supreme Court need not expressly hold new rule to be retroactive, but retroactivity may be “logically dictate[d]”).

If the Court did not intend for its new rule to apply retroactively, it would have announced and applied it only in *Miller*, Jackson’s companion case that was before the Court on direct review. *Compare Graham v Collins*, 506 US 461, 466-67 (1993) (refusing to address merits of underlying claim in a collateral case because granting defendant relief would require announcement of new rule), *with Johnson v Texas*, 509 US 350, 352-53 (1993) (noting that defendant raising same issue as petitioner in *Graham* would be entitled to ruling on merits because his case was not final). It did not so limit its holding, and *Teague’s* threshold question of retroactivity has been answered. Michigan defendants whose convictions became final before *Miller/Jackson* are “similarly situated” with Kuntrell Jackson. *Teague, supra* at 316. Accordingly, the question of retroactivity has initially been answered by the Supreme Court itself

in *Miller* and *Jackson*, when it applied its new rule to Kuntrell Jackson. In sum, *Miller/Jackson* is retroactive under federal law, and this court should consider and act upon this question.

VI. MILLER/JACKSON IS RETROACTIVE UNDER STATE LAW BECAUSE CORTEZ'S CASE SATISFIES THE TEST SET FORTH IN *PEOPLE V MAXSON*.

Cortez never admitted guilt for murder, and has challenged his conviction of felony murder for eighteen years. The sentencing judge in his case announced that his life sentence was cruel and unusual, and indicated several times on the record that she believed him to be innocent of felony murder.

The most recent case to apply this court's rule in *People v Maxson*, 482 Mich 385; 759 NW2d 817 (2008) is *Carp, supra*. In *Carp*, the Court of Appeals outlined the test for determining retroactivity under state law, but incorrectly applied the test. The three factors to consider under *Maxson* are (1) the purpose of the new rule; (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* at 398, citing *People v Sexton*, 458 Mich 43; 580 NW2d 404 (Mich 1998).

Carp incorrectly applied all three factors. In response to the first *Maxson* factor—the purpose of the new rule factor—the Court of Appeals dismissively concluded that "[b]ecause Miller is not concerned with 'the ascertainment of guilt or innocence' and 'does not affect the integrity of the fact-finding process,' the first prong militates against retroactivity." *Carp* at 29-30. One reason this conclusion fails is that constitutional rules which are otherwise retroactively applicable are not made non-retroactive simply because they apply to the sentencing phase of criminal proceedings as opposed to the trial phase. To hold otherwise would be to allow ongoing constitutional violations, as long as they occur in the sentencing phase and not the trial phase. Another reason is that in Michigan, when sentencing a juvenile to life in prison without parole, a

trial court is, in fact, prior to trial required to engage in fact finding and those determinations are made in the context of dispositional hearings to sentence juveniles as such or as adults. *See* App. 10 – Dispositional hearing, June 10, 1994. The Court of Appeals provides no legal authority for its conclusions on *Maxson* factor one, and it is erroneous.

The second factor was incorrectly and not completely applied. In response to the second *Maxson* factor—the general reliance on the old rule—the Court of Appeals applied circular logic, reasoning that:

[w]hile undoubtedly some defendants could receive sentencing relief should we apply *Miller* retroactively, 'this would be true of extending any new rule retroactively, yet this is generally not done. In this instance, there is no guarantee that Carp or any defendant would receive relief as *Miller* is not a categorical ban of life without parole sentences." *Id.* at 30.

Put another way, the Court of Appeals thinks that since there is no guarantee of favorable resentencing for any defendant, it will not apply *Miller* retroactively. The facts of this case fly in the face of that reasoning. The trial court in this case has *repeatedly and vocally* announced its intention to resentence Cortez in light of *Miller*, having concluded on several occasions that the mandatory sentence imposed upon him is cruel and unusual.

The Court of Appeals wavered in its analysis of the second prong, writing that even if the second factor is favorable to a defendant, it is not dispositive of the issue of retroactivity. *Id.* It acknowledged that "[w]e must consider, as best as possible, the extent of the detrimental reliance on the old rule, and then balance this against the other *Sexton* factors, as well as against the fact that each defendant . . . has received all the rights under the law to which he or she was entitled at the time." *Id.* (emphasis added) The Court of Appeals then, curiously, failed to consider the extent of the detrimental reliance at all, let alone as best as possible, and moved on to the third factor without another word on the second factor. In this case, Cortez has

detrimentally relied on the trial Judge indicating in 1994 that his mandatory sentence for felony murder—a crime of which HE is innocent—was cruel and unusual. Cortez did not plead guilty to felony murder and contested liability for felony murder at every stage of the proceeding below.

At sentencing in the matter, Cortez made the following statement to the court.

I would like to say to the family of the deceased that I'm sorry for what happened. And I'm sorry that their son -- or, their relative had to lose their life over a coat. And I would say that I'm sorry for shooting their son, but I did not do that. And I would like to just let everyone know that if and when I get out, that nothing like this will happen on my behalf again. App. 13, p. 7.

The court then deviated from the mandatory sentence and imposed a term of years. *Id.* at 8. Later the Court of Appeals approved the practice of mandatory life sentences for juveniles in *Launsbury, supra*. That case is now abrogated. *See Miller, supra*. Cortez has challenged his conviction and sentence for felony murder at every stage of the criminal process, but since the Courts have discovered rights that he had all along, he now seeks relief having relied on—and asserted—the right to be free of punishments that are cruel and unusual.

The reasoning employed by the Court of Appeals in analyzing the third factor defies central notions of civil rights and liberty in the United States. In response to the third *Maxson* factor—the effect of retroactive application of the new rule on the administration of justice—the Court of Appeals reasoned that giving Michigan juveniles the retroactive right to be free from punishments that are cruel and unusual, and the litigation that will follow, will strain already "limited judicial resources." *Carp* at 30. Invoking *Maxson*, it concluded, "it is our judgment that those resources would be better preserved for defendants currently charged [or pending on direct review]—some of whom may be . . . entitled to relief. *Id.* In spite of the distinct lack of legal authority for this pronouncement, it defies the foundations of liberty to bifurcate juveniles into two groups, where the first group will be free from constitutionally impermissible sentences

because they were fortunate enough to have committed their crime recently. The second group, however, will continue to serve a sentence that violates the Eighth Amendment, because it would be too difficult for the judiciary to guarantee those rights. The Court of Appeals' conclusion is legally and morally erroneous and should be reversed.

In response to the first *Maxson* factor, the purpose of the new rule, the Court of Appeals dismissively concluded, without any meaningful analysis, that "[b]ecause Miller is not concerned with 'the ascertainment of guilt or innocence' and 'does not affect the integrity of the fact-finding process,' the first prong militates against retroactivity." *Carp* at 29-30. In response to the second *Maxson* factor—the general reliance on the old rule—the Court of Appeals applied circular logic. Finally, the reasoning employed by the Court of Appeals in analyzing the third factor defies central notions of civil rights and liberty in the United States. In conclusion, considering the facts of Cortez's case and considering all three *Maxson* factors, *Miller/Jackson* is retroactive under state law, and this court should consider and act upon this question.

V. THERE IS A CATEGORICAL BAN ON THE SENTENCE OF LIFE WITHOUT PAROLE IN JUVENILE FELONY MURDER OR "NON-SHOOTER" CASES SUCH AS THIS ONE UNDER *GRAHAM* AND *MILLER/JACKSON*.

The United States Supreme Court decided that juvenile offenders cannot be sentenced to life in prison without parole at the outset of sentencing for non-homicide crimes. *Graham v Florida*, 130 S Ct 2011, 176 L Ed 2d 825 (2010). The *Miller/Jackson* ruling has much more in common with categorical bans on certain conduct than it does with procedural requirements during trial. When taken together with Michigan's definition of "homicide crime," it is clear that non-shooters are often treated as harshly as shooters and often even more so because of the felony murder rule.

"The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Graham* at 2027, citing, *Kennedy; Edmund v Florida*, 458 US 782, 102 S Ct 3368, 73 L Ed 2d 1140 (1982); *Tison v Arizona*, 481 US 137, 107 S Ct 1676, 95 L Ed 2d 127 (1987); *Coker v Georgia*, 433 US 584, 97 S Ct 2861, 53 L Ed 2d 982 (1977). The Court continued, "[i]t follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Id.* In Michigan, however, a sentencing judge lacks discretion to make the determination of a measured, proportionate sentence that reflects the juvenile's culpability. The Michigan judge has two choices: a juvenile system that is too lenient on one hand, and Michigan's most severe penalty on the other. *See Miller* at 2475 (discussing the lack of discretion in the context of juvenile transfer hearings.) *See also* App. 13, p. 7-8 (trial court in this case discussing its lack of leeway to impose a measured sentence.)

The majority of the *Graham* Court held: "[f]or a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." *Id.* at 2030. The Court clarified this holding in its opinion, that "[a] State need not guarantee the offender eventual release, but if it imposes a sentence of life, it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Id.* at 2034. The court restated the thrust of *Graham's* sentence. Concisely summarized, "[t]he State has denied [Graham] any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law," concluding, "[t]his the Eighth Amendment does not permit." *Id.* at 2033.

The 1927 Michigan Code of Criminal Procedure defines a "homicide" as "any crime in which the death of a human being is an element of that crime." MCL 777.1(c). This definition, however, fails in the case of juveniles convicted of felony murder without proving the necessary *mens rea* beyond a reasonable doubt. The *Graham* and *Miller* courts focused on the requirement of culpability, discussing it throughout those opinions. State law regarding what constitutes homicide is therefore at odds with constitutional protections for juveniles at the time of sentencing.³

Cortez was sentenced to life without parole mandatorily for felony murder. But felony murder in Michigan, as it is in most states, is a legal vehicle delivering both culpable and non-culpable defendants to the most severe forms of punishment for murder, often without the burden of demonstrating the highest level of culpability for murder. Felony murder nonsensically punishes those merely present at a killing more severely than second degree murderers, who may be culpable for a killing. *See generally People v Aaron*, 409 Mich 672, 299 NW2d 304 (Mich 1980). In Michigan, a culpable state of mind (malice) must support a felony murder conviction. *Id.*

The question in *Aaron*, was whether Michigan has a felony murder rule which allows the element of malice required for murder to be satisfied by the intent to commit the underlying felony or whether malice must be otherwise found by the trier of fact and also determine the *mens rea* required to support a conviction under Michigan's first-degree murder statute. The court decided that intent cannot transfer, and malice supporting a murder conviction must be

³ Justice Breyer discussed this issue in his Concurring Opinion in *Miller*. He noted that in Kuntrell Jackson's case, intent to kill had not been established before the State imposed the sentence of life in prison without the possibility of parole. "The upshot is that Jackson, who did not kill the clerk, might not have intended to do so either. . . In that case, the Eighth Amendment simply forbids imposition of a life term without the possibility of parole. If, on remand, however, there is a finding that Jackson did intend to cause the clerk's death, the question remains open whether the Eighth Amendment prohibits the imposition of life without parole upon a juvenile in those circumstances as well." *Miller* at 2476-77 (Breyer, J. Concurring) (internal citations omitted)

found by the trier of fact. Thirty years ago, this Court understood that the purpose of having degrees of murder is to punish the more culpable forms of murder more severely. It noted that:

the felony-murder rule's most egregious violation of basic rules of culpability occurs where felony murder is categorized as first-degree murder. All other murders carrying equal punishment require a showing of premeditation, deliberation and willfulness while felony murder only requires a showing of intent to do the underlying felony. Although the purpose of our degree statutes is to punish more severely the more culpable forms of murder, an accidental killing occurring during the perpetration of a felony would be punished more severely than a second-degree murder requiring intent to kill, intent to cause great bodily harm or wantonness and willfulness.

Aaron at 708-09 (internal citations omitted)

The problem noted by the *Aaron* Court is revisited by the United States Supreme Court in *Roeper*, *Graham* and *Miller*. The Court was clearly concerned about the issue of culpability as it pertained to juveniles, as it has been in its jurisprudence for some time. In *Graham*, the court discussed, at length, the requirement that a showing of culpability be made to support the most extreme punishments. "The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Graham* at 2026.

The trial court in this case asserted clearly on the record no fewer than five times—some of them in writing—that it did not believe defendant to be the shooter. This is indisputably consideration of the culpability of the offender through the judicial exercise of independent judgment, but the court was given no discretion in applying that independent judgment at the time of sentencing, violating both State and Federal laws.

The shooter in this Cortez's case, Michael Scott, MDOC # 240464, is currently serving a life sentence for first degree murder for killing the victim, Raymond Derrick Davis, Jr., and was the person who acted in furtherance of the killing, he "pulled the trigger." The evidence reflects that Cortez Davis was standing on the other side of the street, and told the robbery victim to "be

cool and nothing is going to happen to you." App. 17, p. 5. Both Cortez Davis and Michael Scott were juveniles at the time of the offense, but the principle distinction between them in this case is that Cortez is being punished as severely as Michael Scott, yet killed no one. Cortez' culpability for murder is distinctly absent, or at least twice diminished. As the *Aaron* court noted, quoting the US Supreme Court "(T)he criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability." *Mullaney v Wilbur*, 421 US 684, 697-98, 95 S Ct 1881, 44 L Ed 2d 508 (1975). The concept of culpability is not some distant and elusive concept, but the state's obligation to prove this element marks the distinction between a murderer and not. Dispensing with the requirement to prove this level of culpability is also more egregious in the juvenile context because the penalties are disproportionately severe for juveniles, in spite of juveniles' inherently diminished incorrigibility and ability to appreciate their actions.

In sum, felony murder is not a "homicide crime," and is not even a crime in the conventional sense. By law, a complete crime requires an act and a culpable state of mind, and proof of each element of the crime beyond a reasonable doubt for a conviction. *In re Winship*, 397 US 358, 90 S Ct 1068, 25 L Ed 2d 368 (1970). Felony murder is a vehicle to deliver less-culpable offenders to the most serious punishments for principle actor, culpable murder, which when acting in concert with the mandatory sentencing scheme leads to life sentences for juveniles with diminished culpability that are necessarily disproportionate. There is a categorical ban on mandatory life without parole for non-homicide offenders, and this court should consider and act upon this question.

REQUEST FOR RELIEF

WHEREFORE, The Applicant requests the court to grant the following relief:

1. GRANT leave to appeal on the questions presented herein; or
2. REVERSE the Court of Appeals' decision *People v Davis*, No. 314080 (Mich App, January 16, 2013); and REVERSE the Court of Appeals' decision in *People v Carp*, 2012 WL 5846553 (Mich App November 15, 2012), and
3. REMAND to the trial court for re-sentencing pursuant to *Miller*.

RESPECTFULLY SUBMITTED

Date: March 2, 2013

Clinton J. Hubbell (P72321)
HUBBELL DUVALL PLLC
Attorneys for the Applicant
25140 Lahser Rd. Ste. 271
Southfield, MI 48033
(248) 595-8617 ph
(248) 247-1668 fax
info@hubbellduvall.com

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In the interests of limiting the volume of this Appendix, only those items cited in this Application are included with the Application. The balance of the Appendix will be submitted upon the Court's request or upon granting leave to appeal with the Applicant's full briefing.

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Respondent-Appellee,

v

Trial Court No. 94-2089
Court of Appeals No. 314080

CORTEZ ROLAND DAVIS,
N/K/A CORTEZ DAVIS EL

Applicant-Appellant.

NOTICE OF HEARING ON APPLICATION FOR LEAVE TO APPEAL

PURSUANT TO MCR 7.302(A)(2), PLEASE TAKE NOTICE, that the Application for Leave to Appeal hereto attached will be submitted to the court for consideration on [DATE], or a date which is on a Tuesday at least 21 days after the filing of the Application.

RESPECTFULLY SUBMITTED

Date: March 2, 2013

Clinton J. Hubbell (P72321)
HUBBELL DUVALL PLLC
Attorneys for the Applicant
25140 Lahser Rd. Ste. 271
Southfield, MI 48033
(248) 595-8617 ph
(248) 247-1668 fax
info@hubbellduvall.com

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Respondent-Appellee,

v

Trial Court No. 94-2089
Court of Appeals No. 314080

CORTEZ ROLAND DAVIS,
N/K/A CORTEZ DAVIS EL

Applicant-Appellant.

**PROOF OF SERVICE OF APPLICATION FOR LEAVE TO
APPEAL AND NOTICE OF HEARING**

THE UNDERSIGNED HEREBY CERTIFIES, that the attached Application for Leave to Appeal and Notice of for hearing on the Application were served by First Class United States Mail, postage thereon fully prepaid, to the addresses stated below, from Southfield, Michigan on March 2, 2013.

Criminal Division Clerk
Wayne County Circuit Court
Frank Murphy Hall of Justice
1441 Saint Antoine St
Detroit, MI 48226

Jerome W. Zimmer Jr., Clerk of the Court
The Michigan Court of Appeals
District I—Detroit, Cadillac Place
3020 West Grand Boulevard Suite 14-300
Detroit, MI 48202-6020

Kym L. Worthy
Wayne County Prosecutor
Frank Murphy Hall of Justice
1441 Saint Antoine St
Detroit, MI 48226

Bill Schuette, Intervenor
Michigan Attorney General
525 W Ottawa St
Lansing, MI 48933

RESPECTFULLY SUBMITTED

Date: March 2, 2013

Clinton J. Hubbell (P72321)
HUBBELL DUVALL PLLC
Attorneys for the Applicant
25140 Lahser Rd. Ste. 271
Southfield, MI 48033
(248) 595-8617 ph
(248) 247-1668 fax
info@hubbellduvall.com