STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

RAYMOND CURTIS CARP,

Defendant-Appellant.
_____/

Supreme Court
Case No. 146478

Court of Appeals
Case No. 307758

St. Clair County Circuit Court
Case No. 06-001700-FC

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

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Dated: February 14, 2014

Pursuant to MCR 7.306 and 7.313, the American Civil Liberties Union ("ACLU") and the American Civil Liberties Union of Michigan ("ACLU of Michigan") hereby move for leave to file the attached amicus curiae brief. In support of this motion, proposed amici state as follows:

1. The ACLU is a nationwide nonpartisan organization of over 500,000 members dedicated to protecting constitutional rights, including the rights of children in our criminal justice system. The ACLU of Michigan is the Michigan affiliate of the ACLU.

2. The ACLU of Michigan frequently files amicus curiae briefs in Michigan courts on a wide range of civil liberties and civil rights issues. See, e.g., *People v Cole*, 491 Mich 325; 817 NW2d 497 (2012); *Harmon v Davis*, 489 Mich 986; 800 NW2d 63 (2011); *People v Redden*, 290 Mich App 65; 799 NW2d 184 (2010); *People v Dipiazza*, 286 Mich App 137; 778 NW2d 264 (2009).

3. The ACLU likewise files amicus curiae briefs in state and federal courts all over the country.

4. The ACLU and ACLU of Michigan seek to educate the public and contribute to the developing jurisprudence about the important subject addressed in this case. In 2004, for example, the ACLU of Michigan published *Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons*. Currently, the ACLU and ACLU of Michigan are pursuing a federal case challenging the constitutionality of the Michigan statute that deprives the parole board of jurisdiction over persons convicted of first-degree murder for offenses committed before they turned 18. See *Hill v Snyder*, Case No. 10-cv-14568, 2013 WL 364198 (ED Mich, January 30, 2013) (opinion and order granting in part plaintiffs' motion for summary judgment).

5. In this case, this Court previously granted the ACLU and the ACLU of Michigan leave to file an amicus curiae brief in support of Defendant's application for leave to appeal. The ACLU of the ACLU of Michigan also participated in this case as amici before the Court of Appeals.

6. In light of their interest and expertise in the issue, proposed amici believe that their brief in this case will be of assistance to this Court in determining whether the new rule established by *Miller v Alabama* should be applied retroactively as a matter of federal law, state law, or both.

Accordingly, the ACLU and the ACLU of Michigan seek leave file the amicus curiae brief that accompanies this motion.

Respectfully submitted,

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INTRODUCTION AND SUMMARY OF ARGUMENT

In *Miller v Alabama*, 567 US __; 132 S Ct 2455; 183 L Ed 2d 407 (2012), the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.*, 132 S Ct at 2469. Relying "not only on common sense—on what 'any parent knows'—but on science and social science as well," the Court recognized that "children are constitutionally different from adults for purposes of sentencing." *Id.* at 2464. Children are less culpable than adults, and they are more capable of rehabilitation as they mature. *Id.* "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence," the Court held that automatically sentencing youth to life imprisonment without parole "poses too great a risk of disproportionate punishment." *Id.* at 2469.

Miller unquestionably invalidates Michigan's sentencing scheme for juveniles, which mandates a life sentence for all first-degree murder convictions, makes prisoners serving such sentences ineligible for parole, and treats juveniles the same as adults. MCL 750.316(1), 769.1(1)(g), 791.234(6)(a). Raymond Carp, the defendant in this case, was convicted and sentenced under Michigan's unconstitutional scheme for an offense he committed when he was only 15 years old. He is serving a mandatory sentence of life in prison that carries no possibility of parole—precisely the type of punishment that *Miller* ruled unconstitutional.

Yet in its decision below, the Court of Appeals denied Carp any relief. Carp's conviction became final before *Miller*, and the Court of Appeals ruled that *Miller* applies only to judgments not yet final at the time it was decided. Under this rationale, a mere accident of timing would dictate that the vast majority of children with a mandatory life-without-parole sentence must continue to suffer this unconstitutional punishment for the rest of their lives. This includes

children as young as 14 at the time of the offense, see *People v Bentley*, unpublished opinion per curiam of the Court of Appeals, issued April 11, 2000 (Docket No. 214170), as well as children who did not actually commit a homicide but were convicted of felony murder and/or under an aiding-and-abetting theory, see *People v Maxey*, unpublished opinion per curiam of the Court of Appeals, issued May 6, 2010 (Docket No. 289023) (Shapiro, J., concurring). In Michigan, there are over 360 prisoners serving mandatory life-without-parole sentences for offenses committed before the age of 18—a punishment the Supreme Court has described as "akin to the death penalty." *Miller*, 132 S Ct at 2466. The question for this Court is whether nearly all of these individuals must die in prison serving an unconstitutional sentence, forever denied "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." See *id.* at 2469.

The answer is no. Under both federal- and state-law retroactivity principles, *Miller* applies to *all* juveniles who were given mandatory sentences of life in prison without parole. As a matter of federal law, the Supreme Court's decision in *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989), requires that new constitutional rules be applied retroactively to cases on collateral review if they are "substantive" or if they are "watershed" rules of criminal procedure. *Miller* is a "substantive" rule because 1) it categorically places juveniles as a class beyond the power of the state to punish with sentences of mandatory life imprisonment without parole, thereby requiring states to expand the range of possible sentencing outcomes for juveniles; 2) it requires sentencing courts to consider the mitigating fact of youth before they may validly condemn a child to die in prison, thereby narrowing the factual circumstances under which juveniles may receive that sentence; and 3) it does not regulate the procedures that state courts must use in considering youth during sentencing. Alternatively, even if viewed as

"procedural" rather than substantive, *Miller* must be applied retroactively under *Teague* as a watershed rule because the requirement of individualized sentencing is one without which juveniles stand too great a risk of being disproportionately sentenced. Lastly, irrespective of federal law, this Court should also give *Miller* retroactive effect as a matter of state law under *People v Maxson*, 482 Mich 385; 759 NW2d 817 (2008).

To deny *Miller* retroactive effect would permit the dark irony that those who have suffered the longest under Michigan's unconstitutional sentencing scheme have the least hope for relief. It would deny hundreds of youth any possibility of release from an irrevocable sentence the Supreme Court has declared should be "uncommon" and "rare." *Miller*, 132 S Ct at 2469.

ARGUMENT

I. *Miller v Alabama* is retroactive because it announced a new "substantive" rule.

In its landmark decision in the companion cases *Miller v Alabama* and *Jackson v Hobbs*, 567 US __; 132 S Ct 2455; 183 L Ed 2d 407 (2012), the United States Supreme Court held that imposing a sentence of mandatory life imprisonment without the possibility of parole on a juvenile constitutes cruel and unusual punishment under the Eighth Amendment. *Miller*, 132 S Ct at 2460. The Court's ruling voided the state's authority to impose this harshest of sentences on a juvenile who commits a homicide, unless the state's sentencing scheme provides for more lenient sentencing alternatives and requires meaningful consideration of the essential, mitigating fact of youth before imposing a sentence. *Id.* at 2467, 2469.

Miller's categorical prohibition on sentencing juveniles as a class to mandatory life imprisonment without the possibility of parole is fully retroactive to cases on collateral review under *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989). As a threshold matter, because the Court granted relief in the companion case of *Jackson v Hobbs*, a case on collateral (as opposed to direct) review, "evenhanded justice requires that [the rule in *Miller* and *Jackson*] be applied retroactively to all who are similarly situated." *Collins v Youngblood*, 497 US 37, 40-41; 110 S Ct 2715; 111 L Ed 2d 30 (1990) (quoting *Teague*, 489 US at 300). Raymond Carp is similarly situated to Kuntrell Jackson in that both their convictions became final before *Miller* was decided. Several other courts have acknowledged that faithful adherence to the principle of evenhanded justice demands applying the holding of *Miller* to all defendants who, like Jackson, challenge their sentence on collateral review.[1]

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[1] Recently, the Nebraska Supreme Court found that the Supreme Court's application of the *Miller* rule in *Jackson v Hobbs* counseled strongly in favor of applying it retroactively to all cases on collateral review. *State v Mantich*, 287 Neb 320, 342; __ NW2d __ (2013). The Nebraska court noted that the Supreme Court of Iowa, the Illinois Court of Appeals, and the

Additionally, as discussed below, *Miller* is retroactive because it announced a new "substantive" rule of criminal law. See *Penry v Lynaugh*, 492 US 302, 329-30; 109 S Ct 2934; 106 L Ed 2d 256 (1989), *abrogated on other grounds by Atkins v Virginia*, 536 US 304; 122 S Ct 2242; 153 L Ed 2d 335 (2002). Substantive sentencing rules automatically apply to cases on collateral review because they "necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him." *Schriro v Summerlin*, 542 US 348, 353; 124 S Ct 2519; 159 L Ed 2d 442 (2004) (quotations and citations omitted). Procedural rules, by contrast, "regulate only the *manner of determining* the defendant's culpability." *Id.;* see also *Shady Grove Orthopedic Associates, PA v Allstate Ins Co*, 559 US 393, 403; 130 S Ct 1431; 176 L Ed 2d 311 (2010) (rule regulates procedure where it "governs only the manner and means by which the litigants' rights are enforced" (quotations omitted)). New procedural rules apply on collateral review only if they are "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Summerlin*, 542 US at 351-52 (quotations omitted).

The rule in *Miller* is "substantive," and thus retroactive, for three reasons.[2] First, by categorically prohibiting sentences of mandatory life imprisonment without parole for all juveniles, the decision expands the available sentencing outcomes for this class. Second, by requiring the individualized consideration of youth as a mitigating factor before a state may impose its harshest permissible sentence on a child, *Miller* narrows the factual circumstances

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Supreme Judicial Court of Massachusetts all reached the same conclusion. *Id.* at 337-38 (citing cases).

[2] The highest courts of Iowa, Massachusetts, Mississippi and Nebraska, and the Illinois Court of Appeals, have all held that *Miller* is a substantive rule requiring retroactive application to cases on collateral review. See *State v Ragland*, 836 NW2d 107 (Iowa, 2013); *Diatchenko v District Attorney for Suffolk*, 466 Mass 655; 1 NE3d 270 (2013); *Jones v State*, 122 So3d 698 (Miss, 2003); *State v Mantich*, 287 Neb 320, 342; __ NW2d __ (2013); *People v Morfin*, 981 NE2d 1010 (Ill App, 2012).

under which the punishment can be imposed, limiting it to "rare" and "uncommon" cases where the child is beyond redemption. Third, *Miller* is completely silent regarding what procedures state courts must actually use in order to give fair consideration to youth during sentencing.

A. *Miller* is substantive because it prohibits a type of sentence for a class of defendants, thereby requiring states to expand the range of possible sentencing outcomes.

The prototypical example of a substantive rule of criminal sentencing is one "prohibiting a certain category of punishment of a class of defendants because of their status or offense." *Graham v Collins*, 506 US 461, 477; 113 S Ct 892; 122 L Ed 2d 260 (1993) (quotations and citations omitted). Under this formulation, *Miller* articulates a substantive rule. The Court in *Miller* prohibited a certain category of punishment—mandatory life imprisonment without the possibility of parole—of a class of offenders because of their status as juveniles. And as a result of this new rule, Michigan must change its substantive law to allow for new sentencing outcomes.

1. *Miller* bars the punishment of mandatory life without parole for juveniles as a class.

Miller unequivocally addresses the proper punishment for a "class of defendants because of their status." *Graham v Collins*, *supra*. The decision explicitly and repeatedly states that, because of the unique features of juveniles as a class, weighing the fact of youth is essential to determining whether a juvenile may receive life imprisonment without parole consistent with the Eighth Amendment.[3] See, e.g., *Miller*, 132 S Ct at 2465 ("*Graham*[4] insists that youth matters in

[3] To carve out juveniles as a class for Eighth Amendment purposes, *Miller* drew extensively from the Supreme Court's holdings in *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005), and *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010), which respectively placed absolute bars on sentencing juveniles to death for any crime and on sentencing juveniles to life imprisonment without the possibility of parole for nonhomicides. *Miller*, 132 S Ct at 2463-64. Both *Roper*—which, like *Jackson v Hobbs*, was a state postconviction case—and *Graham* are fully retroactive substantive rules. See *Loggins v*

determining the appropriateness of a lifetime of incarceration without the possibility of parole."); *id.* at 2460 (striking down scheme of mandatory life without parole for juveniles in part because "[s]uch a scheme prevents those meting out punishment from considering a juvenile's lessened culpability and greater capacity for change" (quotations omitted)).

Additionally, the mandatory sentence barred in *Miller* constitutes a "category of punishment" for retroactivity purposes. The Court expressly held "that mandatory life without parole for those under the age of 18 at the time of their crime violates the Eighth Amendment's prohibition on 'cruel and unusual punishment.'" *Miller*, 132 S Ct at 2460; cf. *id.* at 2479 (Roberts, C.J. dissenting) ("The sentence at issue is statutorily mandated life-without-parole."). By its terms, "[t]he Eighth Amendment categorically prohibits the infliction of cruel and unusual *punishments*," *Penry*, 492 US at 330 (emphasis added). Directly constraining the state's sovereign authority to punish is inherently substantive. *Woodson v North Carolina*, 428 US 280, 288; 96 S Ct 2978; 49 L Ed 2d 944 (1976) ("The Eighth Amendment stands to assure that the State's power to punish is exercised within the limits of civilized standards."). Applied to the Supreme Court's retroactivity jurisprudence, relief under the Eighth Amendment remedies "a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him." *Summerlin*, 542 US at 353.

The Supreme Court's treatment of mandatory sentences under the Eighth Amendment confirms that mandatory life imprisonment without parole is a category of punishment for retroactivity purposes. The Court has held that mandatory death sentences are cruel and unusual

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Thomas, 654 F3d 1204, 1206 (CA 11, 2011) (noting *Roper* applied retroactively to case on collateral review); *In re Sparks*, 657 F3d 258, 262 (CA 5, 2011) (holding *Graham* was made retroactive on collateral review).

[4] *Graham v Florida,* 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010) (prohibiting life without parole sentences for non-homicide crimes committed by juveniles).

under the Eighth Amendment because they are uniquely punitive. *Woodson*, 428 US at 293 (citing consensus of jurisdictions rejecting mandatory death sentences as "unduly harsh and unworkably rigid"); *Roberts v Louisiana*, 428 US 325, 332; 96 S Ct 3001; 49 L Ed 2d 974 (1976) (noting "unacceptable severity of the common-law rule of automatic death sentences"). In *Miller* the Court relied heavily on these mandatory death penalty cases, ruling that because juvenile life without parole is "akin to the death penalty," mandatory life without parole for a juvenile is likewise cruel and unusual. See *Miller*, 132 S Ct at 2463-66. Significantly, the decisions striking down mandatory death penalty laws have uniformly been applied retroactively to cases on collateral review. See *Sumner v Shuman*, 483 US 66; 107 S Ct 2716; 97 L Ed 2d 56 (1987) (extending *Woodson* ban on mandatory death sentences to federal habeas corpus case); *McDougall v Dixon*, 921 F2d 518, 530-31 (CA 4, 1990) (deciding merits of *Shuman* claim in federal habeas case). The fact that *Miller* announces the same type of categorical rule as those decisions striking down the mandatory death penalty counsels strongly in favor of retroactivity. See *Tyler v Cain*, 533 US 656, 668; 121 S Ct 2478; 150 L Ed 2d 632 (2001) (O'Connor, J., concurring) (observing that multiple holdings of the Court may logically dictate retroactivity where Court "hold[s] 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").

The Supreme Court has also recognized that the mandatory nature of a life without parole sentence is an integral part of that sentence. See *Harmelin v Michigan*, 501 US 957, 994-55; 111 S Ct 2680; 115 L Ed 2d 836 (1991) (treating a mandatory sentence as type of penalty for Eighth Amendment purposes). In distinguishing *Harmelin*'s holding that the mandatory nature of a sentence does not render it cruel and unusual, the *Miller* Court reiterated "that a sentencing rule permissible for adults may not be so for children." *Miller*, 132 S Ct at 2470. The *Miller* Court's

treatment of *Harmelin* affirms *Miller*'s substantive effect of exempting juveniles as a class from the category of punishment known as mandatory life imprisonment without parole.

2. *Miller* requires states to expand sentencing outcomes to provide the possibility of release.

Miller's invalidation of mandatory life-without-parole sentences demonstrates its primary concern with the sentencing outcomes available for juveniles, as opposed to the procedural fairness of the sentencing hearing. Irrespective of the specific procedures followed to convict or sentence a juvenile, states must allow at least one substantive sentencing outcome more lenient than life imprisonment without parole for all juveniles. *Miller* is thus firmly in the "substantive sphere." *County of Sacramento v Lewis*, 523 US 833, 840; 118 S Ct 1708; 140 L Ed 2d 1043 (1998) (substantive constitutional decisions are those "barring certain government actions regardless of the fairness of the procedures used to implement them").

In opposing retroactive application of *Miller*, the state has argued that eliminating the "mandatory" element of a life-without-parole sentence is solely procedural since defendants can still receive the same sentence, so long as states follow a different process. What this argument obscures is that prohibiting a mandatory sentence by definition requires the state to enact different sentencing outcomes, not simply different sentencing procedures. Altering the potential outcomes of a given proceeding is a classic function of substantive rules. See *Gasperini v Ctr for Humanities, Inc*, 518 US 415, 428; 116 S Ct 2211; 135 L Ed 2d 659 (1996).

Comparing *Miller* to *Roper v Simmons,* 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005), illustrates this principle. *Roper* undeniably announced a substantive rule that narrowed the range of permissible punishments for juveniles to exclude the death penalty. *Little v Dretke*, 407 F Supp 2d 819, 824 (WD Tex, 2005) ("[T]he new rule announced in *Roper* is clearly substantive in nature and, therefore, applies retroactively."). *Miller*, by comparison, announced a

substantive rule that requires states to expand the range of permissible punishments for juveniles to always include a sentence with the possibility of release. Logic simply cannot support the proposition that a constitutional rule narrowing the range of allowable punishments is substantive, but a constitutional rule expanding the range of punishments is not.[5]

The Supreme Court's recent decision in *Alleyne v United States*, 570 US __; 133 S Ct 2151; 186 L Ed 2d 314 (2013), is also instructive on this point. Overruling prior precedent, the Court held facts that increase the mandatory minimum sentence are elements of the offense, just as facts that increase the statutory maximum sentence are elements of the offense. Identical treatment as a matter of substantive law is necessary because "[b]oth kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment." *Alleyne*, 133 S Ct at 2158. *Miller* and *Roper* present a reciprocal

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[5] For this reason, the United States Government has conceded that the *Miller* rule is substantive. (See Exhibit A, *Johnson v United States*, Government's Response to Petitioner's Application, 8th Cir. Case No. 12-3744, filed February 22, 2013, at 10-17.) As the government explained in a brief it filed with the Eighth Circuit:

> *Miller* is not solely about the procedures that must be employed in considering the range of sentencing options. Rather, *Miller* changes the range of outcomes that a juvenile defendant faces for a homicide offense. A jurisdiction that mandates life without parole for juveniles convicted of homicide permits only one sentencing outcome. *Miller* invalidates such regimes and requires a range of outcomes that includes the possibility of a lesser sentence than life. That is a substantive change in the law, not solely a procedural one. The *Miller* rule does not "regulate only the manner of determining the defendant's culpability." *Summerlin*, 542 US at 353. Instead, the *Miller* rule gives juvenile defendants the opportunity to obtain a different and more favorable outcome than was possible before *Miller*. [*Id.* at 13.]

The same reasoning was used by the Illinois Court of Appeals in holding that *Miller* is substantive because it "mandates a sentencing range broader than that provided by statute," *People v Morfin*, 981 NE2d 1010, 1022 (2012), and by the Nebraska Supreme Court in holding that "the fact that *Miller* required Nebraska to change its substantive punishment for the crime of first degree murder when committed by a juvenile . . . demonstrates the rule announced in *Miller* is a substantive change in the law," *State v Mantich*, 287 Neb 320, 341; __ NW2d __ (2013).

scenario: lowering either the constitutionally permissible maximum (*Roper*) or minimum (*Miller*) for an offense "alter[s] the prescribed range of sentences to which a defendant is exposed," but in a manner that *mitigates* the punishment. Both types of decisions categorically cabin a state's traditional "substantive power to define crimes and prescribe punishments" for juveniles as a class. *Jones v Thomas*, 491 US 376, 381; 109 S Ct 2522; 105 L Ed 2d 322 (1989). Both types of decisions must therefore apply retroactively as new substantive rules.

B. *Miller* is substantive because it requires sentencing courts to consider the mitigating fact of youth, thereby narrowing the factual circumstances under which juveniles may be punished with a life-without-parole sentence.

The means by which *Miller* achieves its categorical prohibition on sentencing juveniles to mandatory life imprisonment without parole also requires finding that the decision is substantive for retroactivity purposes. Specifically, the Court made consideration of the mitigating effects of youth a prerequisite to the imposition on a juvenile of life imprisonment without the possibility of parole. *Miller*, 132 S Ct at 2469 (holding that before state may sentence juvenile to life without parole "we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison"). To borrow from the civil context, *Miller*'s individualized sentencing imperative alters the "rules of decision" and places a "substantive condition" on state sentencing in order to vindicate the federal right against cruel and unusual punishment. *Felder v Casey*, 487 US 131, 152; 108 S Ct 2302; 101 L Ed 2d 123 (1988) (classifying rules of decisions as substantive for federal preemption purposes); see also *Shady Grove Orthopedic Associates,* 559 US at 407 (classifying rules of decision by which courts adjudicate rights as substantive under the *Erie* doctrine). The Court thus voided the sentencing schemes of 29 states that unconstitutionally subjected juveniles to automatic life imprisonment without parole, as those schemes did not allow for an individualized assessment of youth and its impact on critical sentencing determinations such as

culpability, capacity for change, susceptibility to peer pressure, and the environment in which the child was raised.

Supreme Court precedent establishes that new rules are substantive, and thus retroactive, when they narrow the factual circumstances under which a sentence may be imposed. *Summerlin*, 542 US at 353. New rules of criminal law accomplish this narrowing function when they make consideration of certain facts necessary before a state may impose a particular sentence. In *Summerlin*, for example, the Court explained that one of its holdings would qualify as substantive if it made certain facts essential to imposing the death penalty, stating:

> 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 is a procedural holding; the latter would be substantive. [*Id.* at 354.]

See also *Connecticut Dep't of Pub Safety v Doe*, 538 US 1, 7; 123 S Ct 1160; 155 L Ed 2d 98 (2003) (classifying as substantive a plaintiff's asserted constitutional rule that a finding of "current dangerousness" was essential to individuals being included on sexual offense registry). The *Summerlin* Court held that its prior ruling in *Ring v Arizona*, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002), that a jury rather than a judge must find beyond a reasonable doubt the existence of an aggravating factor necessary to the imposition of the death penalty, was procedural. State law already made certain aggravating factors essential to the death penalty, and *Ring* merely regulated "the procedural requirements the Constitution attaches to the trial" of those factors. *Summerlin*, 542 US at 354. By contrast, had Court required the states to take into consideration new aggravating factors, its ruling would be substantive. *Id.*

Applying *Summerlin*, the *Miller* rule is substantive. Prior to *Miller*, Michigan's mandatory scheme gave no consideration to juvenile status. *Miller* now makes juvenile status essential to the sentencing scheme. It does so by requiring states like Michigan to consider

juvenile status and its attendant circumstances before a child may permissibly receive a sentence of life imprisonment without parole. See *Miller*, 132 S Ct at 2469. Cf. *Foucha v Louisiana*, 504 US 71, 83; 112 S Ct 1780; 118 L Ed 2d 437 (1992) (imposing substantive requirement that finding of current mental illness or dangerousness was essential to authorizing involuntary commitment). Moreover, *Miller* explicitly states its narrowing intent. The decision requires sentencers not simply "to take into account how children are different," but also "how those differences *counsel against* irrevocably sentencing them to a lifetime in prison." *Id.* (emphasis added). *Miller* thus makes new, mitigating facts essential to the punishment, limiting the circumstances under which a state may deny the possibility of release to a juvenile.

The Court emphasized the narrowing effect of its ruling by declaring: "[G]iven all we have said in *Roper, Graham*, and this decision about children's diminished culpability and heightened capacity for change, appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon*." *Miller*, 132 S Ct at 2469 (emphasis added); see also *id.* (noting that it is "'the *rare* juvenile offender whose crime reflects irreparable corruption'" (quoting *Roper*, 543 US at 573) (emphasis added)). This numeric restriction is the very essence of a substantive rule. When a new rule of constitutional law decrees that a punishment heretofore imposed on all may now be imposed on only a few, it is the substantive law of punishment—not just procedure—that has changed.

This substantive feature of the *Miller* rule is also reinforced by the Supreme Court's recent decision in *Alleyne v United States*, 570 US __; 133 S Ct 2151; 186 L Ed 2d 314 (2013). As noted previously, *Alleyne* held that if a fact increases the mandatory minimum sentence, it must be considered an element of the offense. Recall also that *Summerlin* held that if a new rule made a certain fact essential to the death penalty, the holding would be substantive for

retroactivity purposes. *Summerlin*, 542 US at 354. Reading *Alleyne* and *Summerlin* together, *Miller* is substantive because it effectively makes adulthood an essential element of any offense that carries a "mandatory minimum" sentence of life without parole.[6] *Miller*'s conversion of age into an offense element is substantive in that defining the elements of an offense also defines what "primary, private individual conduct" the state may proscribe. *Teague*, 489 US at 307.

C. *Miller* does not set any new requirements for the procedures state courts must adopt to consider juvenile status.

There is still further confirmation that *Miller* sets forth a substantive rule and does not regulate procedure. Although *Miller* prohibits a state from exposing juveniles to life imprisonment without parole unless there is consideration of youth, it in no way addresses "the procedural requirements the Constitution attaches" to the consideration of youth. See *Summerlin*, 542 US at 354. States remain free to determine "the manner and means" for the consideration of youth in accordance with *Miller*'s substantive rule of decision. *Shady Grove Orthopedic Associates*, 559 US at 407 (quotations omitted); see also *Summerlin*, 542 US at 351-52.

This Court therefore should not conflate the Supreme Court's statement in dicta that its decision "requires only that a sentencer follow a certain process," *Miller*, 132 S Ct at 2471, with the question of whether *Miller* announced a substantive or procedural rule. The Court was not addressing whether its ruling was retroactive, but merely explaining why the Court's traditional exploration of national indicia against sentencing practices was not controlling for its Eighth Amendment analysis. *Id.* Critically, this dicta does not account for the fact that although *Miller* does, in some sense, require a change in the sentencing process, it more importantly effects a monumental change in the *substance* of 29 states' laws. These states are now required to expand

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[6] See Colgan, Alleyne v. United States, *Age as an Element, and the Retroactivity of* Miller v. Alabama, 61 UCLA L R Disc 262 (2013), available at http://www.uclalawreview.org/pdf/discourse/61-17.pdf.

the range of juvenile sentences to always include the possibility of release. They must also consider youth and its attendant circumstances as mitigating factors at sentencing, thus narrowing the factual circumstances in which juvenile defendants can receive the harshest possible sentence and ensuring that the sentence is uncommon and rare.[7] *Miller*'s limit on state sovereign authority therefore has little to do with sentencing procedure and much more to do with sentencing outcomes.

Further, reflexively grafting the Court's inapposite aside onto a retroactivity analysis would prove too much. Every new substantive rule potentially requires states to follow "a certain process" to enforce the new right. This simply expresses the necessary interplay between substances and process. *See Guaranty Trust Co of New York v York*, 326 US 99, 109; 65 S Ct 1464; 89 L Ed 2079 (1945). Relying on the Court's "certain process" language here would eviscerate the very idea of substantive rules.

It is noteworthy that just after mentioning its decision requires sentencers to follow "a certain process," the Court cites as support its substantive ruling in *Sumner v Shuman*, 483 US 66, which extended *Woodson* to a case on collateral review and is fully retroactive. In fact, *Woodson* and *Sumner* demonstrate why *Miller*, despite requiring states to follow "a certain process," in fact announced a substantive rule. In the wake of *Woodson*, states maintained vastly different procedures for implementing the Court's substantive requirement of individualized sentencing in death penalty cases. Compare *Jurek v Texas*, 428 US 262; 96 S Ct 2950; 49 L Ed 2d 929 (1976) (upholding Texas capital scheme of posing to sentencing jury three questions because nature of one question allowed defendant to submit any mitigating circumstances) with

[7] See *State v Ragland*, 836 NW2d 107, 115 (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.").

Proffitt v Florida, 428 US 242; 96 S Ct 2960; 49 L Ed 2d 913 (1976) (upholding Florida capital scheme of directing judge and advisory jury to consider enumerated mitigating circumstances). A contrast may therefore be drawn between, on the one hand, the Court's substantive rulings outlawing the mandatory death penalty and, on the other hand, the Court's rulings regulating the "manner and means" by which states implemented individualized capital sentencing schemes. While *Woodson* received full retroactive effect, the Court held that these latter cases setting forth *Woodson*-compliant processes were nonretroactive procedural rules. See, e.g., *Beard v Banks*, 542 US 406; 124 S Ct 2504; 159 L Ed 2d 494 (2004) (holding that the rule of *Mills v Maryland*, 486 US 367; 108 S Ct 1860; 100 L Ed 2d 384 (1988), that a capital sentencing scheme could not require jury to disregard mitigating element not found unanimously, was procedural); *Sawyer v Smith*, 497 US 227; 110 S Ct 2822; 111 L Ed 2d 193 (1990) (holding that the rule of *Caldwell v Mississippi*, 472 US 320; 105 S Ct 2633; 86 L Ed 2d 231 (1985), that a sentencer cannot be led to false belief that responsibility for imposing death rests elsewhere, was procedural). *Miller*, as was the case with *Woodson* and *Sumner*, recognized the right to individualized sentencing for a class of defendants without dictating procedures for vindication of that right. *Miller* articulates a substantive rule.

II. <u>If this Court decides that *Miller* is procedural, the decision is fully retroactive as a watershed rule.</u>

If this Court ultimately finds that *Miller* announced a procedural rule, the decision's requirement of individualized sentencing for certain juvenile offenders qualifies as a watershed rule of criminal procedure entitled to retroactive effect. *Saffle v Parks*, 494 US 484, 495; 110 S Ct 1257; 108 L Ed 2d 415 (1990). Watershed rules are those "without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 US at 313. Applied to a case where a new rule of sentencing has been announced, the central question is whether sentencing schemes

mandating life imprisonment without the possibility of parole for juveniles "so seriously diminish[] accuracy that there is an impermissibly large risk" of subjecting the child to an unconstitutional punishment. See *Summerlin*, 542 US at 355-56 (quotations omitted). *Miller* resoundingly answers this question in the affirmative: "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Miller*, 132 S Ct at 2469.

In addition to being necessary "to prevent an impermissibly large risk" of a constitutionally disproportionate sentence, the *Miller* rule "alters our understanding of the bedrock procedural elements essential to the fairness" of juvenile sentencing. *Whorton v Bockting*, 549 US 406, 418; 127 S Ct 1173; 167 LE2d 1 (2007) (quotations omitted). *Miller* establishes the bedrock constitutional principle that, just as "death is different," children are also categorically different. As a class, they should only rarely, if ever, be condemned to spend the rest of their lives in prison. *Miller*, 132 S Ct at 2458, 2471. The Court in *Miller* "emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* at 2466. Children differ from adults in three fundamental respects:

> **First**, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. **Second**, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And **third**, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity. [*Id.* at 2464 (citations and quotations omitted) (emphasis added).]

By precluding any consideration of these inherent differences, mandatory sentencing for juveniles severely undermines the capacity of criminal justice systems to assess accurately

whether a juvenile demonstrates the sort of "irretrievable depravity" to warrant a sentence of life imprisonment without the possibility of parole. Reinforcing the inherent inability of mandatory sentencing schemes to reliably and accurately sentence juveniles to this harshest sentence, the Court painstakingly outlined myriad, relevant factors this type of scheme necessarily omits:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features . . . . 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 or peer pressure may have affected him. Indeed, it ignores that he might have charged and convicted of a lesser offense if not for incompetencies associated with youth . . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. [*Id.* at 2468.]

Due to these omissions, juveniles sentenced without individualized consideration undoubtedly face "an impermissibly large risk" that their punishments are disproportionate to their child status. *Id.* at 2469 ("By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.").

Miller's rule of individualized sentencing is specifically tailored to drastically improve the accuracy and proportionality of state schemes seeking to impose sentences of life imprisonment without parole on juveniles. At the time of the decision, roughly 2,000 children in 29 states had been automatically sentenced to life imprisonment without parole for homicide offenses. *Id.* at 2477 (Roberts, C.J., dissenting). Because of the requirement that these states now consider child status, the Court pointedly warned that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 2469. The natural conclusion from the Court's opinion is that the sentences of most of these 2,000 children are

constitutionally disproportionate since it is the "rare juvenile offender whose crime reflects irreparable corruption." *Id.* In the interests of "fundamental fairness and accuracy of criminal [sentencing]" that characterize a watershed rule, *Saffle*, 494 US at 495, those among the 2,000 children on collateral review must retroactively receive the benefit of *Miller*.

III. *Miller* is also retroactive under state law.

State courts may, and often do, give retroactive effect to new rules of constitutional law under state law even when *Teague* does not compel retroactivity as a matter of federal law. *Danforth v Minnesota*, 552 US 264; 128 S Ct 1029; 169 L Ed 2d 859 (2008). Michigan has a well-established tradition of providing greater constitutional protections than what is minimally required under federal law. See, e.g., *People v Antkoviak*, 242 Mich App 424; 619 NW2d 18 (2000); *Sitz v Dep't of State Police*, 443 Mich 744; 506 NW2d 209 (1993); *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992). To that end, this Court considers three factors to determine whether a new rule is retroactive: (1) the purpose of the new rule; (2) reliance on the old rule; and (3) the effect of retroactivity on the administration of justice. *People v Maxson*, 482 Mich 385, 393; 759 NW2d 817 (2008). Those factors counsel in favor of retroactivity here.

The first factor weighs in favor of retroactivity. The main purpose of *Miller*'s new rule is to eliminate the "great . . . risk of disproportionate punishment" that results from a mandatory sentencing scheme in which less-culpable juveniles must receive the same punishment as more-culpable adults. *Miller*, 132 S Ct at 2469. In noting that "appropriate occasions for sentencing juveniles to [life without parole] will be uncommon," *id.*, the *Miller* Court recognized that the majority of juveniles who received this sentence under a mandatory sentencing scheme would have been punished less harshly had their sentencers been required to give appropriate consideration to their youth and its attendant characteristics. When the purpose of a new rule is

to eliminate the unconstitutionally harsh punishments that usually result from the absence of that rule, the corrective rule should be applied retroactively.

The second factor, reliance, also counsels in favor of retroactivity. In considering this factor, courts must examine "whether individual persons or entities have been adversely positioned in reliance on the old rule" and "suffered actual harm from that reliance." *Maxson*, 482 Mich at 394, 396. In *People v Maxson*, for example, defendants under the old rule had no right to appointed counsel on an appeal from a guilty plea, whereas they did under the new rule. See *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005). Discussing the reliance factor, this Court examined (1) how many defendants would have actually appealed from a guilty plea had the new rule been in effect, and (2) how many of those defendants would have actually obtained relief on appeal. *Maxson*, *supra* at 394-97. The Court ultimately decided against retroactivity because relatively few defendants would have appealed even had the new rule been in effect, and even fewer would have obtained relief on appeal as a result of the new rule. See *id.*

But in this case, the opposite is true. Reliance on the pre-*Miller* rule "adversely positioned" *all* juveniles who were convicted of first-degree murder. They could not argue for a sentence other than life without parole based on their youth and its attendant characteristics. Further, most juveniles sentenced under the pre-*Miller* rule "suffered actual harm" from reliance on it, *id.* at 396, because had the new rule been in effect "appropriate occasions for sentencing juveniles to this harshest penalty [would have been] uncommon," *Miller*, 132 S Ct at 2469. Since the new rule requires sentencers "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," *id.*,

reliance on the old rule was detrimental to the vast majority of juveniles who were sentenced to life without parole under a mandatory law that did not allow for consideration of youth.[8]

The third factor, the effect of retroactivity on the administration of justice, strongly favors the retroactive application of *Miller*. Although the state has an interest in finality, see *Maxson*, 482 Mich at 397, in this case only the length of defendants' sentences will be called into question—not the validity of their underlying convictions. Further, the state does *not* have a legitimate interest in punishing children more harshly than the Constitution allows. As emphasized above, the *Miller* Court recognized that only the "rare juvenile offender" is so irredeemably depraved that a life-without-parole sentence would be constitutional. *Miller*, 132 S Ct at 2469. Finally, this is not a situation in which the courts would be "inundated" with requests for relief. *Maxson*, *supra* at 398. There are a finite, known number of prisoners who were sentenced to mandatory life for offenses committed before age 18, and they would be entitled to limited relief only as to the length of their sentences. The fair administration of justice would be served, not undermined, by mitigating punishments that are unconstitutionally harsh.

Regarding this third factor, this Court in *Maxson* also reasoned that the "state's interest in finality . . . serves [its] 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." *Maxson*, 482 Mich at 398 (quotations and brackets omitted). In this

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[8] Although it is impossible to know with certainty how often Michigan judges would have chosen not to impose life without parole on a juvenile had that punishment not been mandatory, state-by-state comparison data suggests that such sentences would have been rare. Prior to *Miller*, only about 15% of all juvenile life sentences were imposed in jurisdictions where the sentence was discretionary, while about 85% resulted from a mandatory sentencing scheme. Miller, 132 S Ct at 2471 n 10. "That figure indicates that when given the choice, sentencers impose life without parole on children relatively rarely." *Id.* It therefore also indicates that the vast majority of Michigan youth serving life without parole would not have received that harshest sentence had the *Miller* rule been in effect at the time of their sentencing.

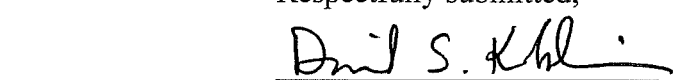
case, however, the goal of rehabilitation is not served by denying retroactive effect to *Miller*. Life without parole "'forswears altogether the rehabilitative ideal.'" *Miller*, 132 S Ct at 2465 (quoting *Graham v Florida*, 560 US at 74). In fact, allowing defendants to petition for postconviction relief under *Miller* would serve the state's interest in rehabilitation because "[a] young person who knows that he or she has [a] chance to leave prison before life's end has [an] incentive to become a responsible individual," *Graham*, *supra* at 79, and may even gain "access to vocational training and other rehabilitative services" that are otherwise unavailable to prisoners who are condemned to "die in prison without any meaningful opportunity to obtain release," *id.* at 74, 79.

In sum, *Miller* should be applied retroactively under state law, regardless of whether it is retroactive under *Teague*.

CONCLUSION

For the foregoing reasons, this Court should hold that *Miller v Alabama* is fully retroactive to all cases on collateral review. The judgment of the Court of Appeals should therefore be reversed and this case remanded to the trial court for a new sentencing hearing that provides for an individualized, proportional sentence in accordance with *Miller*.

Respectfully submitted,



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Dated: February 14, 2014

Exhibit A

No. 12-3744

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KAMIL HAKEEM JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

GOVERNMENT'S RESPONSE TO PETITIONER'S APPLICATION FOR AUTHORIZATION TO FILE A SECOND OR SUCCESSIVE MOTION UNDER 28 U.S.C. § 2255

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The United States of America, by and through its attorneys, B. Todd Jones, United States Attorney for the District of Minnesota, and Jeffrey S. Paulsen, Assistant United States Attorney, submits this memorandum in response to petitioner Kamil Hakeem Johnson's November 16, 2012, Motion Pursuant to Title 28 U.S.C. § 2244, Requesting Authorization To File a Second or Successive 28 U.S.C. § 2255 To The District Court ("Application").

Johnson, who was a juvenile at the time of his 1996 offense, seeks authorization to file a second motion under Section 2255 to challenge the constitutionality of his mandatory life-without-parole sentence. In *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012), the Supreme 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.'" Although the Court had earlier held that a life-without-parole sentence for a non-homicide offense committed by a juvenile is always unconstitutional, see *Graham v. Florida*, 130 S. Ct. 2011 (2010), *Miller* did not bar such a sentence for a homicide committed before the age of 18. 132 S. Ct. at 2469. But under *Miller*, the sentencer for such a juvenile offense must have "discretion to impose a different punishment." *Id.* at 2460.

Johnson's mandatory life sentence is therefore constitutionally flawed. This Court may certify a second or successive Section 2255 motion where, as relevant here, the application makes a prima facie showing that it relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme

Court," 28 U.S.C. § 2255(h)(2). Because the United States agrees that Johnson's reliance on *Miller* makes such a prima facie showing, his motion should be granted and the case certified for filing in the district court.

I. Factual and Procedural Background

A. Offense Conduct

In 1996, Johnson, who was then 17 years old, was a member of the St. Paul, Minnesota, branch of the Rolling 60s Crips street gang. On the evening of July 20, 1996, Johnson and two other members of the Rolling 60s Crips, Keith Crenshaw and Timothy McGruder, spotted members of a rival gang at a gas station. All Rolling Crips had been ordered to shoot members of that gang on sight. Johnson and the others ran to an alley next to the gas station and began firing. Their fire was concentrated on a Cadillac parked about 30 feet in front of them, and a four-year-old child in the car was shot and killed. Ballistic evidence suggested that Johnson fired the shot that killed the child. *United States v. Crenshaw*, 359 F.3d 977, 981-983 (8th Cir. 2004); Gov't C.A. Br. (No. 02-4084) 1-4.

B. Conviction and Appeal

After a jury trial, Johnson and the two other shooters were each convicted of murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1). The district court sentenced Johnson to a mandatory term of life imprisonment. *Crenshaw*, 359 F.3d at 981; see 18 U.S.C. § 1959(a)(1).

On appeal, Johnson argued that Section 1959 was not a valid exercise of Congress's power under the Commerce Clause, that the evidence at trial was insufficient to support his conviction, and that the verdict was against the weight of the evidence. This Court rejected those claims and affirmed Johnson's conviction and sentence. *Crenshaw*, 359 F.3d at 981, 983-997, 1005.

C. First Section 2255 Motion

On April 28, 2005, Johnson filed a pro se motion to vacate his sentence under 28 U.S.C. § 2255. He argued that 18 U.S.C. § 1959 was invalid because it was not published in the Federal Register or enacted into "positive law" and that his conviction was unlawful because the indictment failed to name the "United States Federal Corporation" as the prosecuting authority. The district court denied the Section 2255 motion, finding that Johnson's claims had "no support in law," and declined to issue a certificate of appealability (COA). Order, *Johnson v. United States*, No. 05-cv-848 (D. Minn. Aug. 3, 2005). This Court also denied Johnson's application for a COA. *Johnson v. United States*, No. 05-3995 (8th Cir. Jan. 25, 2006).

D. Application to File a Second Section 2255 Motion

On November 16, 2012, Johnson filed a pro se application in this Court for authorization to file a second or successive Section 2255 motion based on *Miller v.*

Alabama, 132 S. Ct. 2455 (2012). In *Miller*, the Supreme Court held that a sentencing scheme that mandates imposition of life imprisonment without possibility of parole for juvenile offenders violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 2469. Johnson argues that his claim satisfies the statutory requirements for filing a second or successive Section 2255 motion because *Miller* announced "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Application 1-2 (quoting 28 U.S.C. § 2255(h)(2)). He contends that *Miller* applies retroactively because it is a substantive rule that "removes a particular class of persons, specifically juveniles," from the reach of "statutes that impose mandatory life sentences for a homicide conviction without the possibility of parole." Application 4-5. He also argues that *Miller* should be applied retroactively because the Supreme Court granted relief to a second petitioner, Jackson, whose case arose on collateral review in the state system. Application 6-7; see *Miller*, 132 S. Ct. at 2461-2462, 2475. In addition, Johnson argues that *Miller* relied on prior decisions that have been applied retroactively on collateral review, see *id.* at 2463-2468, and that, like those decisions, *Miller* should be regarded as substantive and therefore retroactive. Application 7-8.

II. Legal Standards

Before a federal prisoner may file a second or successive motion under Section 2255, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No.

104-132, 110 Stat. 1214, requires that he seek certification from a court of appeals panel that his motion satisfies one of the "gatekeeping" conditions in 28 U.S.C. § 2255(h). A court of appeals should authorize a second or successive Section 2255 motion when the prisoner makes a "prima facie showing," 28 U.S.C. § 2244(b)(3)(C), that his application satisfies one of the substantive grounds for a successive Section 2255 motion. See 28 U.S.C. § 2255(h) (incorporating the standards from Section 2244 into Section 2255). Courts of appeals have defined the "prima facie showing" required by the gatekeeping provision as "'simply a sufficient showing of possible merit to warrant a fuller exploration by the district court.'" *Reyes-Requena v. United States*, 243 F.3d 893, 898-899 (5th Cir. 2001) (quoting *Bennett v. United States*, 119 F.3d 468, 469-470 (7th Cir. 1997)). "[I]f from the application and its supporting documents, 'it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition,'" the application should be granted. *Id.* at 899; see also, *e.g.*, *In re Holladay*, 331 F.3d 1169, 1173-1174 (11th Cir. 2003); *In re Williams*, 330 F.3d 277, 281 (4th Cir. 2003); *Bell v. United States*, 296 F.3d 127, 128 (2d Cir. 2002).

Section 2255(h)(2) permits a prisoner to apply for leave to file a second or successive Section 2255 motion based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). The Supreme Court may make a new

constitutional rule retroactive to cases on collateral review by explicitly so stating in the decision announcing the new rule, or it may "make a rule retroactive over the course of two cases * * * with the right combination of holdings." *Tyler v. Cain*, 533 U.S. 656, 666 (2001) (construing materially identical language of 28 U.S.C. § 2244(b)(2)(A)); see *id.* at 668 (O'Connor, J., concurring) (same) (brackets in original); *id.* at 670-673 (Breyer, J., dissenting) (agreeing that if a decision holding that a particular type of rule applies retroactively to cases on collateral review is followed by a second decision holding that a given rule is of that particular type, then the given rule has necessarily been made retroactive to cases on collateral review).

III. The Application Makes a Prima Facie Showing that *Miller*'s Holding Has Been Made Retroactive to Cases on Collateral Review by the Supreme Court

Miller's rule of constitutional law—that the Constitution forbids a mandatory life-without-parole sentence for a juvenile offender—is "new," in that no prior Supreme Court decisions dictated that holding. Whether it has been "made retroactive to cases on collateral review by the Supreme Court," 28 U.S.C. § 2255(h)(2), turns on the nature of *Miller*'s rule. Under the retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989), new *procedural* rules are not retroactive to cases on collateral review. But new *substantive* rules, the Supreme Court has established, are retroactively applicable on collateral review. *Bousley v. United States*, 523 U .S. 614, 620 (1998). *Miller*'s holding that juvenile defendants cannot be subjected to a mandatory

life-without-parole sentence is properly regarded as a substantive rule. *Miller* does not simply alter sentencing procedures; rather, it expands the range of possible sentencing outcomes for a category of defendants by requiring that the sentencer have the option of imposing a lesser sentence. Because *Miller*'s rule should be treated as substantive and the Supreme Court has already established that substantive rules apply retroactively, Johnson has made at least a prima facie showing that the *Miller* rule has been "made retroactive to cases on collateral review by the Supreme Court," as required by Section 2255(h)(2). See *Tyler*, 533 U.S. at 666 (stating that a decision holding that a new rule constituted structural error, and a decision holding that all structural errors were retroactive under *Teague*, would combine to render the new rule one that has been "made retroactive" by the Supreme Court).

A. *Miller* Announced a New Rule

Johnson correctly argues that *Miller* announced a "new" rule under *Teague*. See Application 2, 4 (discussing the "New Rule announced in Miller"). A rule is "new" if it was not "*dictated* by precedent existing at the time the defendant's conviction became final." *Chaidez v. United States*, No. 11-820 (Feb. 20, 2013), slip op. 4 (quoting *Teague*, 489 U.S. at 301); *Graham v. Collins*, 506 U.S. 461, 467 (1993).

Miller's holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," 132 S. Ct.

at 2469, was not "dictated" by existing precedent, *Graham v. Collins*, 506 U.S. at 467. The *Miller* Court reached its holding by extending and combining "two strands of precedent." 132 S. Ct. at 2463. As *Miller* explained, the first line of precedent "adopted categorical bans" on sentences that were excessively severe for a class of offenders. *Ibid.*; see, *e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Atkins v. Virginia*, 536 U.S. 304 (2002). Two such cases, the Court noted, involved juvenile offenders. *Roper v. Simmons*, 543 U.S. 551 (2005) (categorical ban on capital punishment); *Graham v. Florida*, 130 S. Ct. 2011 (2010) (*Graham*) (categorical ban on life-without-parole sentence for a non-homicide offense). The *Graham* Court had limited its holding to non-homicide offenses, reasoning that offenders who were both juvenile and who lacked intent to kill had "twice diminished moral culpability," *id.* at 2027. Observing that *Graham* had compared a juvenile life-without-parole sentence to the death penalty, however, *Miller* turned to a second line of precedent: decisions "prohibit[ing] mandatory imposition of capital punishment" without consideration of the characteristics of the defendant and his offense. *Miller*, 132 S. Ct. at 2463-2464 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion)). The *Woodson* line of decisions rested on the premise that "death is a punishment different from all other sanctions in kind rather than degree," and, therefore, "in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the

individual offender and the circumstances of the particular offense." 428 U.S. at 303-304.

Miller extended the first line of precedent—the *Roper-Graham* line of decisions—to conclude that juveniles are "constitutionally different" for sentencing purposes, even when, unlike in *Graham*, they commit homicide. 132 S. Ct. at 2464 (stating that *Graham*'s reasoning "implicates" all life-without-parole sentences imposed on juveniles, even though *Graham* "relate[d] only to non-homicide offenses"). *Miller* then extended the second line of precedent—the *Woodson* line of decisions—beyond its death-penalty context to hold that juveniles may not be subject to mandatory life-without-parole sentences, and the sentencer must consider the characteristics of juvenile defendants before imposing such a sentence. *Id.* at 2467. Rather than being dictated by precedent, then, *Miller*'s holding rested on the Supreme Court's extension of existing decisions beyond the limits expressed in those decisions. *Id.* at 2464 (noting that "confluence" of lines of precedent "leads to" the Court's conclusion, not that the conclusion was dictated by prior decisions). Because reasonable jurists considering petitioner's conviction at the time it became final could have concluded that then-existing precedent, including *Woodson,* did not establish the unconstitutionality of mandatory life-without-parole sentences for juveniles who committed homicide, *Miller* announced a new rule that was not dictated by precedent.

See *O'Dell*, 521 U.S. at 156. Indeed, that conclusion is particularly clear for Johnson, whose conviction became final in 2004—before either *Roper* or *Graham* was decided.

B. The New Rule Announced in *Miller* Is Substantive

Under *Teague*, new rules of criminal *procedure* do not apply retroactively on collateral review of already-final convictions, unless they constitute "watershed rules of criminal procedure." *Teague*, 489 U.S. at 311. The Supreme Court has held, however, that *substantive* rules are not subject to *Teague* at all, and they necessarily apply retroactively on collateral review. See *Beard v. Banks*, 542 U.S. 406, 411 n.3 (2004) ("Rules that fall within what we have referred to as *Teague*'s first exception 'are more accurately characterized as substantive rules not subject to [*Teague*'s] bar.'"). As the Court has explained, "*Teague* by its terms applies only to procedural rules." *Bousley*, 523 U.S. at 620. Because the rule announced in *Miller* is not solely about procedure, but alters the range of sentencing options for a juvenile homicide defendant, it is properly regarded as "substantive" for *Teague* purposes and applies retroactively to petitioner's conviction.

1. The divide between substantive and procedural rules, as it has evolved in the Supreme Court's decisions, reflects the fundamental difference between the way a case is adjudicated (procedure) and the possible outcomes of the case (substance). Originally, *Teague* borrowed from Justice Harlan's formulation to describe "substantive rules," which should be applied retroactively, as those that placed certain

primary conduct beyond the reach of the criminal law. 489 U.S. at 307 (citing *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring)). The Court subsequently expanded the category to include decisions categorically precluding a particular type of punishment or protecting a particular class of persons from such punishment. *Penry v. Lynaugh,* 492 U.S. 302, 329-330 (1989) ("[A] new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all."). The Court thus summarized that *Teague*'s bar on retroactive application does not extend to "a substantive categorical guarante[e] 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." *Saffle v. Parks*, 494 U.S. 484, 494 (1990) (citation and internal quotation marks omitted; brackets in original). The Court again expanded the class of substantive rules in *Bousley*, 523 U.S. at 620-621, holding that *Teague* does not apply to changes in the substantive scope of a criminal statute that have the effect of placing certain conduct outside of the reach of the law. Thus, "[n]ew *substantive* rules * * * include[] decisions that narrow the scope of a criminal statute by interpreting its terms," as well as decisions "that place particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 351-352 (2004).

Under this analysis, substantive rules affect the range of permissible outcomes of the criminal process, and procedural rules govern the *manner* of determining those outcomes. To date, the new rules the Court has treated as substantive have categorically prohibited a particular outcome for a particular class of defendants, regardless of the procedure employed. See *Summerlin,* 542 U.S. at 352 (citing *Bousley*, *supra*; *Saffle*, *supra*). But the category of substantive rules "includes" such rules, 542 U.S. at 351; it is not limited to them. See also *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008) (*Teague* is grounded in the authority of the courts "to adjust the scope of the writ in accordance with equitable and prudential considerations"). And the category of rules treated as "procedural," and thus not retroactive, has "regulate[d] only the *manner of determining* the defendant's culpability." *Summerlin*, 542 U.S. at 353; see, *e.g.*, *Hodge v. United States*, 602 F.3d 935, 937-938 (8th Cir.), cert denied, 131 S. Ct. 334 (2010); *Never Misses A Shot v. United States*, 413 F.3d 781, 783 (8th Cir. 2005). Such rules "do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise," which, the Court stated, is a possibility too "speculative" to warrant retroactivity. *Summerlin,* 542 U.S. at 352. Taken together, the Court's descriptions of "substantive" and "procedural" rules under *Teague* produce the conclusion that rules that go beyond

regulating only the "manner" of determining culpability—and instead categorically change the range of outcomes—should be treated as substantive rules.

2. The *Miller* rule, which holds that a juvenile defendant may not be subject to mandatory life without parole, but instead must be given the opportunity to demonstrate that a lesser sentence is appropriate, 132 S. Ct. at 2469, categorically expands the range of permissible outcomes of the criminal proceeding. It is therefore a substantive rule.

Miller is not solely about the procedures that must be employed in considering the range of sentencing options. Rather, *Miller* changes the range of outcomes that a juvenile defendant faces for a homicide offense. A jurisdiction that mandates life without parole for juveniles convicted of homicide permits only one sentencing outcome. *Miller* invalidates such regimes and requires a range of outcomes that includes the possibility of a lesser sentence than life. That is a substantive change in the law, not solely a procedural one. The *Miller* rule does not "regulate only the *manner of determining* the defendant's culpability." *Summerlin,* 542 U.S. at 353. Instead, the *Miller* rule gives juvenile defendants the opportunity to obtain a different and more favorable outcome than was possible before *Miller*.

By contrast, the decisions that the Supreme Court has classified as procedural have altered only the process used to determine a defendant's culpability without expanding or narrowing the range of possible outcomes of the criminal process. In

Summerlin, for instance, the Court emphasized that its holding in *Ring v. Arizona*, 536 U.S. 584 (2002), that a sentencing judge may not make the aggravating findings that subject a defendant to the death penalty, did not "alter the range of conduct Arizona law subjected to the death penalty." *Summerlin*, 542 U.S. at 353. "Instead, *Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable by death." *Ibid.*; see also *Saffle*, 494 U.S. at 486, 495 (rule concerning the permissibility of instructing the jury not to rely on sympathy for the defendant was procedural; range of outcomes continued to include death or a less severe sentence); *Graham v. Collins*, 506 U.S. at 477 (rule concerning the manner in which a sentencing jury considered mitigating evidence was procedural; range of outcomes continued to include death or a less severe sentence). Unlike these decisions, *Miller* does not simply address the "manner of determining" a defendant's culpability; instead, it expands the range of outcomes of the criminal proceeding beyond that permitted by mandatory life-without-parole statutes. It requires that juvenile defendants must have the opportunity to establish that life without parole is not an appropriate sentence. It is therefore a substantive rule.

Miller does differ from previous decisions announcing substantive rules, all of which narrowed, rather than expanded, the range of permissible outcomes of the criminal process by prohibiting a particular outcome for a category of defendants. See, *e.g.*, *Graham*, 130 S. Ct. at 2031; *Roper*, 543 U.S. at 568-575. *Miller* does not

categorically hold that juvenile defendants may never be sentenced to life without parole for a homicide offense; instead, it requires the sentencer take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," before such a sentence may be imposed. 132 S. Ct. at 2469. Thus, *Miller* stated that its holding "does not categorically bar a penalty for a class of offenders or type of crime," but instead "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. In that respect, *Miller* has a procedural component.

But nothing in *Miller* implies that the Court viewed its decision as purely procedural—and its holding makes clear that it is not. By mandating that a juvenile defendant's characteristics must be taken into account at sentencing, the Court also mandated that new and more favorable potential outcomes be made available to defendants who previously had faced only one possible outcome—life without parole. *Miller*, 132 S. Ct. at 2469. This is not akin to a procedural rule that simply requires admission of a class of evidence or changing the factfinder from judge to jury. It requires that new sentencing options be available. And the Court did not suggest that its alteration of the range of options available for a sentencer would have only the "speculative" effect on outcomes of most procedural rules. *Summerlin,* 542 U.S. at 352. Rather, the *Miller* Court stated that "we think appropriate occasions for

sentencing juveniles to this harshest possible penalty will be uncommon." 132 S. Ct. at 2469. Certainly, the government may still contend that a life-without-parole sentence should be imposed on a juvenile convicted of a homicide offense. But *Miller* categorically mandated that the sentencer be able to consider a lesser sentence as well.

In only one prior context has the Supreme Court invalidated a particular severe sentence as unconstitutional because of its mandatory character: the imposition of mandatory capital punishment. See *Woodson*, *supra*; *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Sumner v. Shuman*, 483 U.S. 66 (1987). In conclusively ending mandatory death sentences, the Court refused to countenance "a departure from the individualized capital-sentencing doctrine" it had adopted, even for murder by life-term inmates. *Sumner*, 483 U.S. at 78. The Court never had the opportunity to consider whether the *Woodson* principle was retroactive under *Teague* because it amounted to a substantive rule. When the Court granted habeas relief in *Sumner,* only three individuals in the United States appear to have been under mandatory death sentences, *id.* at 72 n.2, and *Teague* lay 20 months in the future.[1/] But it seems unlikely that non-retroactivity grounds would have been used to deny habeas relief for

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[1/] Until *Miller*, no other case had extended *Woodson*. And in light of the Supreme Court's holdings in *Harmelin v. Michigan*, 501 U.S. 957 (1991) (rejecting Eighth Amendment challenge to mandatory life-without-parole sentence for possession of 650 grams or more of cocaine), and *Chapman v. United States*, 500 U.S. 453, 467 (1991) ("Congress has the power to define criminal punishments without giving the courts any sentencing discretion."), it seems highly unlikely that *Woodson* will be extended further.

a capital defendant who never had *any* opportunity to ask a sentencer to impose a lesser sentence.

Like *Miller*, *Woodson* has a procedural component. See *Woodson*, 428 U.S. at 305 n.40 (plurality opinion) ("[T]he death sentences in this case were imposed under procedures that violated constitutional standards."). But *Woodson*, like *Miller*, also does much more. By requiring individualized consideration before imposing the harshest penalty available by law, each decision expanded the sentencing options that must be made available to the sentencer, *i.e.*, each case changed the substance of the sentencing decision by requiring that a less-harsh sentence be available. And the execution of an individual who had no opportunity to seek a lesser sentence would completely violate the principle of "individualized sentencing" (*Sumner*, 483 U.S. at 75) that lay at the heart of *Woodson*. *Miller* rests on the same principle of "individualized sentencing" as *Woodson*: a court may not impose the "harshest possible penalty for juveniles" without the juvenile having an opportunity to ask for a lesser sentence. *Miller*, 132 S. Ct. at 2460, 2464 n.4, 2466 n.6, 2475. Just as *Woodson* changed the substance of capital sentencing, *Miller*'s fundamental change in the law should similarly be regarded as substantive under *Teague*.

C. Johnson Is Entitled to Certification Under Section 2255(h)(2)

Johnson has made a"prima facie showing," 28 U.S.C. § 2244(b)(3)(C), that his application satisfies Section 2255(h)(2), because he has made "'a sufficient showing

of possible merit to warrant a fuller exploration by the district court.'" *Reyes-Requena*, 243 F.3d at 898-899. Under Section 2255(h)(2), a second or successive motion may rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. " 28 U.S.C. § 2255(h)(2). Johnson has a claim of "possible merit" that the Supreme Court has, through "a combination of holdings," made *Miller* retroactive to cases on collateral review. See *Tyler*, 533 U.S. at 666. And *Miller* was clearly "unavailable" to Johnson both when his sentence became final in 2004 and when he filed his first motion under Section 2255 in 2005. He had no opportunity to argue that a 2012 Supreme Court decision established that his mandatory life sentence is constitutionally flawed.

The Supreme Court has held that substantive rules are retroactively applicable on collateral review. See *Banks*, 542 U.S. at 411 n.3; *Bousley*, 523 U.S. at 620. As discussed above, *Miller* should be regarded as a substantive rule for *Teague* purposes under the analysis in Supreme Court cases. At the very least, the argument is substantial. Although *Teague* itself does not apply to state courts, see *Danforth*, *supra*, one state appellate court has concluded that *Miller* is retroactively applicable as a substantive rule. In *People v. Morfin*, 2012 WL 6028634, at *11 (Ill. App. Ct. Nov. 30, 2012), the Illinois intermediate appellate court, applying *Teague*'s framework, held that "*Miller* constitutes a new substantive rule" because it "mandates a sentencing range broader than that provided by statute for minors convicted of first

degree murder who could otherwise receive only natural life imprisonment." The *Morfin* court noted that Florida and Michigan appellate courts have concluded that *Miller* is procedural. See *id.* at *10-*11; *People v. Carp*, 2012 WL 5846553 (Mich. Ct. App. Nov. 15, 2012) (*Miller* is procedural under Michigan's application of *Teague* principles because it does not categorically bar life without parole); *Geter v. State*, 2012 WL 4448860 (Fla. Dist. Ct. App. Sept. 27, 2012) (*Miller* is procedural under state retroactivity law). But the argument that *Miller* is substantive remains of sufficient force at least to be worthy of further consideration by the district court.

Johnson also has a claim of "possible merit" that the Supreme Court has made *Miller* retroactive through a combination of holdings. *Banks* establishes that substantive rules are retroactive, and *Bousley* establishes that *Teague* is concerned only with rules of procedure. Johnson can therefore present a prima facie claim that the requirements of Section 2255(h)(2) are satisfied. Johnson should therefore be permitted to present his argument that *Miller* announced a substantive rule that applies retroactively to his conviction to the district court.[2/]

[2/] Johnson also argues that *Miller* should be applied retroactively even if it is a procedural rule, because the *Miller* Court granted relief to a second petitioner, Jackson, whose case arose on collateral review in the state system. Application 6-7; see *Miller*, 132 S. Ct. at 2461-2462, 2475. But *Teague* had no application to Jackson's case because it was on review from a state collateral proceeding. The Supreme Court has held that "the *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under

CONCLUSION

The application for authorization to file a second or successive Section 2255 motion should be granted.

Dated: February 22, 2013

Respectfully submitted,

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Teague." *Danforth*, 552 U.S. at 282. No federal *Teague* issue was before the Court in *Miller*. Furthermore, the *Teague* defense "is not 'jurisdictional.'" *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). When a State forfeits the *Teague* bar, the Court may announce a new rule even though the case might otherwise have presented *Teague* issues. The State in *Miller* did not raise *Teague* as a defense.

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

RAYMOND CURTIS CARP,

Defendant-Appellant.
_____/

Supreme Court
Case No. 146478

Court of Appeals
Case No. 307758

St. Clair County Circuit Court
Case No. 06-001700-FC

NOTICE OF HEARING

Please take notice that the motion of the American Civil Liberties Union and the American Civil Liberties Union of Michigan for leave to file an amicus curiae brief will be heard on a Tuesday at least seven days after the motion is filed—that is, on February 25, 2014, or at a later date to be set by the Court.

Respectfully submitted,

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Dated: February 14, 2014

STATE OF MICHIGAN

IN THE SUPREME COURT

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Defendant-Appellant.
_____/

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Case No. 06-001700-FC

PROOF OF SERVICE

I hereby certify that on February 14, 2014, I served a copy of the motion of the American Civil Liberties Union and the American Civil Liberties Union of Michigan for leave to file an amicus curiae brief, two copies of said brief, and notice of hearing, on the following counsel by first-class mail, with postage prepaid, addressed as follows:

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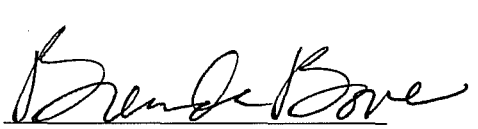

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