STATE OF MICHIGAN

IN THE SUPREME COURT

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

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

Supreme Court No. 146478

Court of Appeals No. 307758

v

Circuit Court No. 06-001700-FC

RAYMOND CURTIS CARP,

Defendant-Appellant

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DEFENDANT-APPELLANT'S BRIEF IN REPLY

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The case of James Porter, presented in the Attorney General's Brief, helps illustrate the unconstitutionally disproportionate sentencing *Miller v Alabama*, 132 S Ct 2455 (2012), redressed. Acting alone, Porter shot and killed five members of a single family in their home. He followed his killing spree by going shopping with a friend. AG Br., 3-4. By contrast, Defendant-Appellant Raymond Carp's participation in the murder of MaryAnn McNeely involved the influence of a much older brother, Brandon Gorecki, who had a history of violence (and who was convicted in this case of an additional charge of torture). Days later, remorse led Raymond to attempt suicide. Despite the dramatically different circumstances of these two offenses, the two teenagers received identical sentences: mandatory life without parole.

Finding that sentence a violation of the Eighth Amendment's ban on cruel and unusual punishment, the *Miller* Court mandated individualized sentencing to avoid the imposition of disproportionately harsh sentences which fail to take into account the lesser culpability of youth. The comparison of Porter's case with that of Raymond Carp directly invokes *Miller*'s concern that in the absence of individualized sentencing, "every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice"; even worse, the same sentence as the majority of adults convicted of similar crimes. *Id*. at 2467-68.

Raymond should have the opportunity to have his sentence evaluated for proportionality and his relative culpability, based upon the *Miller* factors. Without that opportunity, he will serve the same sentence as James Porter and Brandon Gorecki, and will die in prison.

For the reasons explained below in rebuttal,[1] *Miller* applies retroactively to Raymond Carp.

[1] This Reply Brief is filed pursuant to MCR 7.306(C) and 7.212(G).

ARGUMENT

I. The Michigan Legislature's modification of Michigan sentencing law demonstrates that *Miller* mandates substantive change, and should be found to apply retroactively.

At the time of this writing, two bills await Governor Snyder's signature: HB 4808[2] and SB 319. Ex. A, B. Together, they establish a new statutory scheme for juveniles convicted of first-degree murder (among other offenses). The new requirements include the following:

- If a non-parolable life sentence is sought, the juvenile will be sentenced at a hearing at which the *Miller* factors are considered and mitigating evidence is heard, and the sentencing court must specify on the record its reasons for the sentence imposed and the aggravating and mitigating circumstances considered.
- A life sentence is no longer automatic: A prosecutor must file a motion within specified time limits to seek a non-parolable life sentence.
- If the court decides against a life without parole sentence, it must sentence the defendant to a minimum term in prison between 25 and 40 years, and a maximum of no less than 60 years.

The sentencing hearing permitting mitigating evidence is a new provision for first-degree murder sentences, as is the availability of a sentence less than non-parolable life. Compliance with *Miller* has thus required a substantive change in Michigan sentence law.

The supreme courts of Mississippi and Nebraska have both found similar legislative changes support their conclusions that *Miller* is substantive. See *State v Mantich*,[3] 287 Neb 320,

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[2] HB 4808 contains a "retroactivity trigger:" If this Court or the United States Supreme Court determines that *Miller* must be applied to Raymond Carp and other inmates whose convictions are final, the legislation establishes how re-sentencing must be handled.

[3] *Mantich*, released after Defendant-Appellant's Brief on appeal, also found *Miller* substantive because while the decision has both procedural and substantive elements, it mandated consideration of new facts to impose non-parolable life (making them "essential" to that

--- NW2d ----, 2014 WL 503134, *11 (Feb. 7, 2014) (noting that the statutory change from mandatory life to a range of 40 years to life following *Miller* was a change in "substantive punishment" and demonstrated that *Miller*'s new rule "is a substantive change in the law"); *Jones v State*, 122 So3d 698, 702 (Miss 2013) ("When the *Miller* Court announced a new obligation prohibiting the application of our existing substantive law, it modified Mississippi substantive law").

II. *Miller* most parallels the United States Supreme Court cases that established individualized sentencing, and is thus substantive.

Contrary to the Attorney General's assertions, *Saffle v Parks*, 494 US 484 (1990), demonstrates how *Miller* is substantive. The *Saffle* Court distinguished rules establishing *what* evidence a sentencer must consider in reaching its decision from those "that govern *how* the State may guide the jury in considering and weighing those factors in reaching a decision." *Id*. at 490. The latter are equivalent to rules that *Schriro v Summerlin*, 542 US 348 (2004), found procedural: those that "regulate only the *manner of determining* the defendant's culpability." *Id*. at 353 (citation omitted). Thus, *Saffle*'s what/how distinction – despite its presence in the "new rule" analysis – is directly pertinent to the question of substantive versus procedural rules.

The Attorney General's argument that because several "new rules" related to individualized sentencing and the death penalty were found procedural, *Miller* should be found procedural as well, completely misses the distinction. Each case cited by opposing counsel to support its argument was decided after the substantive change – from mandatory to individualized sentencing – had occurred following *Woodson v North Carolina*, 428 US 280 (1976) (which was extended by *Lockett v Ohio*, 438 US 586 (1978), and *Eddings v Oklahoma*, 455 US 104 (1982)). The rules at issue in *Saffle*, *supra*, (affirming an anti-sympathy instruction)

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decision), invoking the substantive definition of *Schriro v Summerlin*. *Id.*at *10. Ex. C.

and *Beard v Banks*, 542 US 406 (2004) (against requiring unanimity for mitigating factors) serve only to "guide the jury" on how mitigating evidence should be considered. But in both cases, and all the others cited by the attorney general, defendants received individualized sentencing.

By contrast, *Miller* not only relied on the decisions in *Woodson* and *Lockett*, it *is Woodson* and *Lockett*. That is, *Miller*'s new rule orders the mandatory sentencing scheme be replaced with an individualized one. Unlike *Saffle* and *Beard*, *Miller* neither guides nor regulates. *Miller* mandates individualized sentencing, but does not tell states how they must go about it.

Future court decisions interpreting *Miller* may include procedural new rules, perhaps directing which decision-maker must perform the fact-finding, or ensuring that all relevant mitigating evidence is given effect. But until an individualized sentencing scheme is in place, there is no system or process to regulate. Hence, the nature of the change required by *Miller* demonstrates that its new rule is substantive, not procedural.

Graham v Collins, 506 US 461 (1993), requires individual distinction, because the Attorney General considers it "closest" to the facts at bar, AG Br., 14. Graham did seek a youth-specific instruction, but in all other respects, *Graham* is identical in posture to *Saffle* and *Beard.*

The *Graham* Court held that the requested instruction was unnecessary. The Texas death penalty system at issue already "permitted the sentencer to consider whatever mitigating circumstances the defendant could show." 506 US at 471 (1993) (citation omitted). Therefore, a jury heard and considered evidence of Graham's mother's "nervous condition" during his childhood, that he took good care of his children, and that he "loved the Lord." 506 US at 464.

The *Graham* Court contrasted the defendant's situation with *Lockett* and *Eddings*, "where the constitutional defect lay in the fact that relevant mitigating evidence was placed beyond the effective reach of the sentencer"; and *Penry v Lynaugh*, 492 US 302 (1989), where the evidence

was admitted, but the sentencer had no reliable means of giving it mitigating effect. *Graham* at 475 (citations omitted). Unlike those defendants, Graham was able to place all his evidence before the jury, and his attorneys were able to urge the jury to vote "no" on the special questions, based on that evidence. *Id*.

The new rule that Graham sought was not a substantive change in the law because the existing system permitted his mitigating evidence to be given effect. Despite the Attorney General's assertion, Raymond's and Graham's situations do not correspond: Unlike Graham, Raymond has never received individualized sentencing of any kind.

The Attorney General argues that "a required change to the sentencing scheme that allows for considerations of youth as a mitigating factor is not a substantive change in the law." AG Br., 14. But it is a substantive change when an automatic or mandatory sentencing scheme is transformed into an individualized sentencing scheme, in which a sentencer must consider and give effect to a newly pertinent body of mitigating evidence.

III. The pre-*Teague* retroactive treatment of death penalty cases supports retroactivity.

The Attorney General dismisses the applicability of *Sumner v Shuman*, 483 US 66 (1987), and *Hitchcock v Dugger*, 481 US 393 (1987), because the states "waived" a retroactivity claim. In fact, those cases pre-date *Teague v Lane*, 489 US 288 (1989), and therefore predate *Teague* waiver jurisprudence. The Court's application of *Lockett* and *Eddings* to those cases on collateral review is still pertinent guidance. Pre-*Teague* retroactivity principles recognized the procedural/substantive divide. *Robinson v Neil*, 409 US 505, 508 (1973). And in that era, raising retroactivity sua sponte was "not novel." *Teague*, 489 at 300 (citing *Allen v Hardy*, 478 US 255 (1986)[4]). Application of *Woodson* and *Lockett* to cases on collateral review speaks to the Court's

[4] *Allen* analyzed the retroactivity of *Batson v Kentucky*, 476 US 79 (1986), despite the lack of

perception of their rules as substantive and meriting retroactive application.

IV. A "mandatory penalty" is a form of punishment.

The Attorney General's brief erroneously asserts the mandatory nature of LWOP is not part of a punishment in part by noting that *People v Bullock*, 440 Mich 15, 42; 485 NW2d 866 (1992), characterized the mandatory nature as just one "aspect" of the severity of a sentence. AG Br. 11. The other two "aspects" in the same passage were the length of the sentence and the lack of eligibility for parole. It appears from that linkage that the *Bullock* Court actually considered the mandatory nature a core part of a sentence. This position is reinforced by the United States Supreme Court's treatment of mandatory punishments. See, e.g., *Woodson*, 428 US at 292-297 (reviewing the history of "mandatory death penalties," *id*. at 294).

V. State retroactivity precedents demonstrate *Miller* should be applied retroactively.

First, *Miller* clearly mandates for the first time the incorporation of fact-finding into juvenile sentencing, where none existed before. Fact-finding continues to be part of Michigan retroactivity case law; the "purpose" prong of Michigan's retroactivity analysis has never been limited to the simple ascertainment of guilt or innocence. *Linkletter v Walker*, 318 US 618 (1965) is the source of the phrase "the very integrity of the fact-finding process." State retroactivity law applying *Linkletter*'s three-prong test has connected purpose to "fact-finding" as recently as *People v Maxson*,482 Mich 385, 393; 759 NW2d 817 (2008). See also *People v Sexton*, 458 Mich 43, 62; 580 NW2d 404 (1998); *People v Young*, 410 Mich 363, 367; 301 NW2d 803 (1981).

United States Supreme Court precedent applying *Linkletter* explicitly connected sentencing to the integrity of the fact-finding process, as sentencing includes "marshaling the

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briefing on the issue. 478 US at 262 (Marshall, J., dissenting).

facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence. . .” *McConnell v Rhay*, 393 US 2, 3-4 (1968) (quoting *Mempa v Rhay*, 389 US 128, 135 (1967)) (alterations omitted).

Michigan recognizes that connection: *People v Hampton*, on which *Maxson* and *Sexton* rely, cited *McConnell* and *Mempa*, following its “guilt or innocence” analysis, again linking sentencing and the fact-finding process. 384 Mich 669, 677; 187 NW2d 404 (1971). *Miller*’s purpose of constitutionally-compliant sentencing implicates the integrity of the fact-finding process and thus counsels in favor of retroactivity.

Next, reliance, depending on the inquiry, counsels for retroactivity or is neutral. Cases prior to *Maxson* speak only of “general reliance,” not detrimental reliance. See *Sexton*, 485 Mich at 60 (citing *Hampton*, *supra*). However, if the test is the latter, Michigan juvenile offenders relied to their detriment under the mandatory life sentencing scheme by foregoing any introduction or consideration of mitigating evidence. Michigan juveniles were harmed by the old rule; under *Miller*’s projection that future non-parolable life sentences will be uncommon, 132 S Ct at 2469, it is *more likely than not* that these juveniles would received lesser sentences.

Alternatively, pre-*Maxson* case law evaluated reliance for its impact on the system or others besides the affected defendants. See *Sexton*, 458 Mich. at 58, n 29 (law-enforcement); *People v. Markham*, 397 Mich 530, 535; 245 NW2d 41, 43 (1976) (prosecutors). However, opposing counsel cited no particular reliance interest on their part to retain unconstitutional life sentences without parole for juveniles (besides finality). Hence, this factor is at least neutral, but if evaluated from the juvenile offenders’ perspective, counsels for retroactivity.

Finally, the administration of justice is not significantly burdened by retroactive application of *Miller*. Permitting juvenile offenders a chance at parole gives effect to the state’s

interest in rehabilitation as a necessary component of the administration of justice. *Maxson*, 482 Mich at 398.

Opposing counsels' assertions of the excessive burden of resentencing are exaggerated, and do not justify permitting unconstitutional sentences to stand uncorrected. As noted by the Attorney General, the affected inmates represent only a "tiny number" of those convicted of first-degree murder. AG Br. 31. And the purported difficulty of retrieving the necessary records in older cases is undermined by the Attorney General's use of thirty-year-old transcripts to relate James Porter's crimes.[5]

However, if the original record is limited, who an offender is *now* – her record on incarceration – can serve as the basis for individualized re-sentencing. *People v Fields*, 448 Mich 58, 78; 528 NW2d 176 (1995). Prison records could qualify defendants for *Miller*'s required "meaningful opportunity to obtain release," predicated on "demonstrated maturity, and rehabilitation." 132 S Ct at 2469 (citation omitted).[6]

Furthermore, the onus is on defendants, not the State, to establish the mitigation record. In addition, the criminal defense bar has taken on pro bono representation of many of these inmates, which will aid the efficiency of those proceedings over pro per efforts. The defense bar stands ready to work in concert with prosecutors and courts to address the re-sentencings that may be requested.[7] And the demand on the courts can be further reduced by negotiated

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[5] In addition, the office of the Attorney General does not hesitate – laudably – to pursue cold cases going back many years. See, e.g., "Boothby Cold Case Retrial Results in Three First Degree Murder Convictions," at http://www.mi.gov/ag/0,1607,7-164--257661--,00.html; "Cox Brings Murder Charges in 22-Year-Old Flint Case," at http://www.michigan.gov/ag/0,1607,7-164-34739_34811-169223--,00.html.

[6] The same records could expose those individuals who represent "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 132 S Ct at 2469.

[7] Such a collaborative effort is not without precedent in the interest of justice: For instance, the FBI, DOJ, the Innocence Project, and the National Association of Criminal Defense Lawyers

sentencing agreements, a process with which the defense bar and the State are very familiar. See *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982).

VI. Plaintiff-Appellee's incorrect reliance-related statements require individual rebuttal.

The following statements are incorrect interpretations of *Miller*, or in error as to Michigan law or the facts of this case.

> The sentencing judges in local jurisdictions, who are faced with the facts of heinous, deliberate murders committed by juveniles, may not find an actual life without parole sentence to be so unusual when considered in the context of juvenile murders as opposed to the general population of criminal defendants. [Appellee Brief 27.]

The *Miller* Court *only* addressed juveniles convicted of homicide – not the general population – so that is exactly the population for whom life without parole will become uncommon. 132 S Ct at 2469. See also Br. Amici Curiae, Former Prosecutors, et al., 11-14 (presenting on the record statements by judges who would have sentenced juveniles to less than non-parolable life given the option).

> By the time a juvenile reaches the point where a life without parole sentence is imposed, some consideration has already been given to the decision to charge him or her as an adult as opposed to a juvenile. [Appellee Brief 27-28.]

Not so: Under Michigan's "automatic waiver" statute, MCL 712A.2, jurisdiction is in the circuit court, where juveniles are charged and prosecuted as adults for a list of specified offenses, including first-degree murder. Consideration need only be given if a prosecutor files a petition to have a juvenile's case heard in the family division of circuit court. *Id*. Raymond was prosecuted as an adult under the automatic waiver law. In fact, *Miller* calls out Michigan as one of the states

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have joined forces to revisit forensic hair analysis cases dating back near 30 years. See News Release, July 18, 2013, "Innocence Project and NACDL Announce Historic Partnership with the FBI and Department of Justice on Microscopic Hair Analysis Cases," available at http://www.innocenceproject.org/Content/Innocence_Project_and_NACDL_Announce_Historic_Partnership_with_the_FBI_and_Department_of_Justice_on_Microscopic_Hair_Analysis_Cases.php#

which try juveniles "in adult court, regardless of any individualized circumstances" and place them there "automatically." 132 S Ct at 2474 and n 15.

Even if a judicial determination of whether to prosecute a juvenile in adult court were available, *Miller* finds such a process inadequate because of an absence of standards or guidance, because only partial information is available at this early stage, and because juvenile systems' penalties may be inadequate. 132 S Ct at 2474. In any case, contrary to Plaintiff-Appellee's argument, Michigan's system in fact permitted no consideration at this point.

> Moreover, a determination has also been made that the sentence imposed should be within the realm of the adult court, not within the jurisdiction of the juvenile court. [Appellee Brief 28.]

Again, this is contrary to Michigan statutory law. No such "determination" can be made. Under MCL 769.1(1), "[t]he court shall sentence a juvenile convicted of any of the following crimes [including first degree murder] in the same manner as an adult. . ." See MCL 769.1(1)(g).

CONCLUSION

For all the above reasons, Defendant-Appellant Raymond Carp repeats his request for relief made in his Brief on Appeal, and prays this Court order retroactive application of *Miller v Alabama*.

Respectfully submitted,

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EXHIBITS

EXHIBIT A Enrolled House Bill 4808

EXHIBIT B Enrolled Senate Bill 0319

EXHIBIT C Unpublished case: *State v Mantich*, 287 Neb 320, --- NW2d ---- (Feb. 7, 2014)

STATE OF MICHIGAN
97TH LEGISLATURE
REGULAR SESSION OF 2014

Introduced by Reps. O'Brien, Pscholka, Haveman, Pettalia, Howrylak, Potvin, Heise, Robinson, Kesto, Walsh, Cavanagh, Schmidt, Tlaib, Shirkey, Irwin, Lipton, Lori, Price, Haines, Victory, Kandrevas, Foster, Lyons and Jacobsen

ENROLLED HOUSE BILL No. 4808

AN ACT to amend 1931 PA 328, entitled "An act to revise, consolidate, codify, and add to the statutes relating to crimes; to define crimes and prescribe the penalties and remedies; to provide for restitution under certain circumstances; to provide for the competency of evidence at the trial of persons accused of crime; to provide immunity from prosecution for certain witnesses appearing at criminal trials; to provide for liability for damages; and to repeal certain acts and parts of acts inconsistent with or contravening any of the provisions of this act," by amending sections 16, 18, 200i, 204, 207, 209, 210, 211a, 316, 436, 520b, and 543f (MCL 750.16, 750.18, 750.200i, 750.204, 750.207, 750.209, 750.210, 750.211a, 750.316, 750.436, 750.520b, and 750.543f), sections 16 and 18 as amended by 2004 PA 213, sections 200i, 204, 207, 209, and 210 as amended by 2003 PA 257, section 211a as amended by 2004 PA 523, section 316 as amended by 2013 PA 39, section 436 as amended by 2002 PA 135, section 520b as amended by 2012 PA 372, and section 543f as added by 2002 PA 113.

The People of the State of Michigan enact:

Sec. 16. (1) Except as otherwise provided in this section, a person who knowingly or recklessly commits any of the following actions is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $1,000.00, or both:

(a) Adulterates, misbrands, removes, or substitutes a drug or medicine so as to render that drug or medicine injurious to health.

(b) Sells, offers for sale, possesses for sale, causes to be sold, or manufactures for sale a drug or medicine that has been adulterated, misbranded, removed, or substituted so as to render it injurious to health.

(2) A person who commits a violation of subsection (1) that results in personal injury is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $4,000.00, or both.

(3) A person who commits a violation of subsection (1) that results in serious impairment of a body function is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000.00, or both.

(4) A person who commits a violation of subsection (1) that results in death is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $20,000.00, or both.

(5) Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, a person who commits a violation of subsection (1) with the intent to kill or to cause serious impairment of a body function of 2 or more individuals that results in death is guilty of a felony punishable by imprisonment for life without possibility of parole or life without possibility of parole and a fine of not more than $40,000.00. It is not a defense to a charge under this subsection that the person did not intend to kill a specific individual or did not intend to cause serious impairment of a body function of 2 or more specific individuals.

(6) As used in this section, "serious impairment of a body function" means that phrase as defined in section 58c of the Michigan vehicle code, 1949 PA 300, MCL 257.58c.

(7) This section does not prohibit an individual from being charged with, convicted of, or punished for any other violation of law that is committed by that individual while violating this section.

Sec. 18. (1) Except for the purpose of compounding in the necessary preparation of medicine, a person shall not knowingly or recklessly mix, color, stain, or powder, or order or permit another person to mix, color, stain, or powder, a drug or medicine with an ingredient or material so as to injuriously affect the quality or potency of the drug or medicine.

(2) A person shall not sell, offer for sale, possess for sale, cause to be sold, or manufacture for sale a drug or medicine mixed, colored, stained, or powdered in the manner proscribed in subsection (1).

(3) Except as otherwise provided in this section, a person who violates subsection (1) or (2) is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $1,000.00, or both.

(4) A person who commits a violation of subsection (1) or (2) that results in personal injury is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $4,000.00, or both.

(5) A person who commits a violation of subsection (1) or (2) that results in serious impairment of a body function is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000.00, or both.

(6) A person who commits a violation of subsection (1) or (2) that results in death is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $20,000.00, or both.

(7) Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, a person who commits a violation of subsection (1) or (2) with the intent to kill or to cause serious impairment of a body function of 2 or more individuals that results in death is guilty of a felony punishable by imprisonment for life without possibility of parole or life without possibility of parole and a fine of not more than $40,000.00. It is not a defense to a charge under this subsection that the person did not intend to kill a specific individual or did not intend to cause serious impairment of a body function of 2 or more specific individuals.

(8) As used in this section, "serious impairment of a body function" means that phrase as defined in section 58c of the Michigan vehicle code, 1949 PA 300, MCL 257.58c.

(9) This section does not prohibit an individual from being charged with, convicted of, or punished for any other violation of law that is committed by that individual while violating this section.

Sec. 200i. (1) A person shall not manufacture, deliver, possess, transport, place, use, or release any of the following for an unlawful purpose:

(a) A harmful biological substance or a harmful biological device.

(b) A harmful chemical substance or a harmful chemical device.

(c) A harmful radioactive material or a harmful radioactive device.

(d) A harmful electronic or electromagnetic device.

(2) A person who violates subsection (1) is guilty of a crime as follows:

(a) Except as provided in subdivisions (b) to (e), the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.

(b) If the violation directly or indirectly results in property damage, the person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $15,000.00, or both.

(c) If the violation directly or indirectly results in personal injury to another individual other than serious impairment of a body function or death, the person is guilty of a felony punishable by imprisonment for not more than 25 years or a fine of not more than $20,000.00, or both.

(d) If the violation directly or indirectly results in serious impairment of a body function to another individual, the person is guilty of a felony punishable by imprisonment for life or any term of years or a fine of not more than $25,000.00, or both.

(e) Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, if the violation directly or indirectly results in the death of another individual, the person is guilty of a felony and shall be punished by imprisonment for life without eligibility for parole and may be fined not more than $40,000.00, or both.

Sec. 204. (1) A person shall not send or deliver to another person or cause to be taken or received by any person any kind of explosive substance or any other dangerous thing with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property without the permission of the property owner or, if the property is public property, without the permission of the governmental agency having authority over that property.

(2) A person who violates this section is guilty of a crime as follows:

(a) Except as otherwise provided in subdivisions (b) to (e), the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.

(b) If the violation damages the property of another person, the person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $15,000.00, or both.

(c) If the violation causes physical injury to another individual, other than serious impairment of a body function, the person is guilty of a felony punishable by imprisonment for not more than 25 years or a fine of not more than $20,000.00, or both.

(d) If the violation causes serious impairment of a body function to another individual, the person is guilty of a felony punishable by imprisonment for life or any term of years or a fine of not more than $25,000.00, or both.

(e) Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, if the violation causes the death of another individual, the person is guilty of a felony and shall be imprisoned for life without eligibility for parole and may be fined not more than $40,000.00, or both.

Sec. 207. (1) A person shall not place an explosive substance in or near any real or personal property with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property without the permission of the property owner or, if the property is public property, without the permission of the governmental agency having authority over that property.

(2) A person who violates this section is guilty of a crime as follows:

(a) Except as otherwise provided in subdivisions (b) to (e), the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.

(b) If the violation damages the property of another person, the person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $15,000.00, or both.

(c) If the violation causes physical injury to another individual, other than serious impairment of a body function, the person is guilty of a felony punishable by imprisonment for not more than 25 years or a fine of not more than $20,000.00, or both.

(d) If the violation causes serious impairment of a body function to another individual, the person is guilty of a felony punishable by imprisonment for life or for any term of years or a fine of not more than $25,000.00, or both.

(e) Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, if the violation causes the death of another individual, the person is guilty of a felony and shall be imprisoned for life without eligibility for parole and may be fined not more than $40,000.00, or both.

Sec. 209. (1) A person who places an offensive or injurious substance or compound in or near to any real or personal property with intent to wrongfully injure or coerce another person or to injure the property or business of another person, or to interfere with another person's use, management, conduct, or control of his or her business or property is guilty of a crime as follows:

(a) Except as otherwise provided in subdivisions (b) to (e), the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.

(b) If the violation damages the property of another person, the person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $15,000.00, or both.

(c) If the violation causes physical injury to another individual, other than serious impairment of a body function, the person is guilty of a felony punishable by imprisonment for not more than 25 years or a fine of not more than $20,000.00, or both.

(d) If the violation causes serious impairment of a body function to another individual, the person is guilty of a felony punishable by imprisonment for life or for any term of years or a fine of not more than $25,000.00, or both.

(e) Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, if the violation causes the death of another individual, the person is guilty of a felony and shall be imprisoned for life without eligibility for parole and may be fined not more than $40,000.00, or both.

(2) A person who places an offensive or injurious substance or compound in or near to any real or personal property with the intent to annoy or alarm any person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $3,000.00, or both.

Sec. 210. (1) A person shall not carry or possess an explosive or combustible substance or a substance or compound that when combined with another substance or compound will become explosive or combustible or an article containing an explosive or combustible substance or a substance or compound that when combined with another substance or compound will become explosive or combustible, with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property without the permission of the property owner or, if the property is public property, without the permission of the governmental agency having authority over that property.

(2) A person who violates subsection (1) is guilty of a crime as follows:

(a) Except as provided in subdivisions (b) to (e), the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.

(b) If the violation damages the property of another person, the person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $15,000.00, or both.

(c) If the violation causes physical injury to another individual, other than serious impairment of a body function, the person is guilty of a felony punishable by imprisonment for not more than 25 years or a fine of not more than $20,000.00, or both.

(d) If the violation causes serious impairment of a body function to another individual, the person is guilty of a felony punishable by imprisonment for life or for any term of years or a fine of not more than $25,000.00, or both.

(e) Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, if the violation causes the death of another individual, the person is guilty of a felony and shall be imprisoned for life without eligibility for parole and may be fined not more than $40,000.00, or both.

Sec. 211a. (1) A person shall not do either of the following:

(a) Except as provided in subdivision (b), manufacture, buy, sell, furnish, or possess a Molotov cocktail or any similar device.

(b) Manufacture, buy, sell, furnish, or possess any device that is designed to explode or that will explode upon impact or with the application of heat or a flame or that is highly incendiary, with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property without the permission of the property owner or, if the property is public property, without the permission of the governmental agency having authority over that property.

(2) A person who violates subsection (1) is guilty of a crime as follows:

(a) For a violation of subsection (1)(a), the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

(b) For a violation of subsection (1)(b) and except as provided in subdivisions (c) to (f), the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.

(c) If the violation damages the property of another person, the person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $15,000.00, or both.

(d) If the violation causes physical injury to another individual, other than serious impairment of a body function, the person is guilty of a felony punishable by imprisonment for not more than 25 years or a fine of not more than $20,000.00, or both.

(e) If the violation causes serious impairment of a body function to another individual, the person is guilty of a felony punishable by imprisonment for life or any term of years or a fine of not more than $25,000.00, or both.

(f) Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, if the violation causes the death of another individual, the person is guilty of a felony and shall be imprisoned for life without eligibility for parole and may be fined not more than $40,000.00, or both.

(3) As used in this section, "Molotov cocktail" means an improvised incendiary device that is constructed from a bottle or other container filled with a flammable or combustible material or substance and that has a wick, fuse, or other device designed or intended to ignite the contents of the device when it is thrown or placed near a target.

Sec. 316. (1) Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, a person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life without eligibility for parole:

(a) Murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing.

(b) Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, vulnerable adult abuse in the first or second degree under section 145n, torture under section 85, or aggravated stalking under section 411i.

(c) A murder of a peace officer or a corrections officer committed while the peace officer or corrections officer is lawfully engaged in the performance of any of his or her duties as a peace officer or corrections officer, knowing that the peace officer or corrections officer is a peace officer or corrections officer engaged in the performance of his or her duty as a peace officer or corrections officer.

(2) As used in this section:

(a) "Arson" means a felony violation of chapter X.

(b) "Corrections officer" means any of the following:

(*i*) A prison or jail guard or other prison or jail personnel.

(*ii*) Any of the personnel of a boot camp, special alternative incarceration unit, or other minimum security correctional facility.

(*iii*) A parole or probation officer.

(c) "Major controlled substance offense" means any of the following:

(*i*) A violation of section 7401(2)(a)(*i*) to (*iii*) of the public health code, 1978 PA 368, MCL 333.7401.

(*ii*) A violation of section 7403(2)(a)(*i*) to (*iii*) of the public health code, 1978 PA 368, MCL 333.7403.

(*iii*) A conspiracy to commit an offense listed in subparagraph (*i*) or (*ii*).

(d) "Peace officer" means any of the following:

(*i*) A police or conservation officer of this state or a political subdivision of this state.

(*ii*) A police or conservation officer of the United States.

(*iii*) A police or conservation officer of another state or a political subdivision of another state.

Sec. 436. (1) A person shall not do either of the following:

(a) Willfully mingle a poison or harmful substance with a food, drink, nonprescription medicine, or pharmaceutical product, or willfully place a poison or harmful substance in a spring, well, reservoir, or public water supply, knowing or having reason to know that the food, drink, nonprescription medicine, pharmaceutical product, or water may be ingested or used by a person to his or her injury.

(b) Maliciously inform another person that a poison or harmful substance has been or will be placed in a food, drink, nonprescription medicine, pharmaceutical product, spring, well, reservoir, or public water supply, knowing that the information is false and that it is likely that the information will be disseminated to the public.

(2) A person who violates subsection (1)(a) is guilty of a crime as follows:

(a) Except as provided in subdivisions (b) to (e), the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.

(b) If the violation damages the property of another person, the person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $15,000.00, or both.

(c) If the violation causes physical injury to another individual, other than serious impairment of a body function, the person is guilty of a felony punishable by imprisonment for not more than 25 years or a fine of not more than $20,000.00, or both.

(d) If the violation causes serious impairment of a body function to another individual, the person is guilty of a felony punishable by imprisonment for life or any term of years or a fine of not more than $25,000.00, or both. As used in this subdivision, "serious impairment of a body function" means that term as defined in section 58c of the Michigan vehicle code, 1949 PA 300, MCL 257.58c.

(e) Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, if the violation causes the death of another individual, the person is guilty of a felony and shall be imprisoned for life without eligibility for parole and may be fined not more than $40,000.00, or both.

(3) A person who violates subsection (1)(b) is guilty of a crime as follows:

(a) Except as provided in subdivision (b), the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

(b) If the person has previously been convicted of violating subsection (1)(b), the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $5,000.00, or both.

(4) The court may order a term of imprisonment imposed for a violation of this section to be served consecutively to a term of imprisonment imposed for any other violation of law arising out of the same transaction as the violation of this section.

(5) This section does not prohibit an individual from being charged with, convicted of, or punished for any other violation of law that is committed by that individual while violating this section.

Sec. 520b. (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

(b) That other person is at least 13 but less than 16 years of age and any of the following:

(*i*) The actor is a member of the same household as the victim.

(*ii*) The actor is related to the victim by blood or affinity to the fourth degree.

(*iii*) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(*iv*) The actor is a teacher, substitute teacher, or administrator of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled.

(*v*) The actor is an employee or a contractual service provider of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled, or is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public school, nonpublic school, school district, or intermediate school district, and the actor uses his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person.

(*vi*) The actor is an employee, contractual service provider, or volunteer of a child care organization, or a person licensed to operate a foster family home or a foster family group home in which that other person is a resident, and the sexual penetration occurs during the period of that other person's residency. As used in this subparagraph, "child care organization", "foster family home", and "foster family group home" mean those terms as defined in section 1 of 1973 PA 116, MCL 722.111.

(c) Sexual penetration occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(*i*) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(*ii*) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes, but is not limited to, any of the circumstances listed in subdivision (f).

(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, any of the following circumstances:

(*i*) When the actor overcomes the victim through the actual application of physical force or physical violence.

(*ii*) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(*iii*) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(*iv*) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.

(*v*) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

(g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:

(*i*) The actor is related to the victim by blood or affinity to the fourth degree.

(*ii*) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(2) Criminal sexual conduct in the first degree is a felony punishable as follows:

(a) Except as provided in subdivisions (b) and (c), by imprisonment for life or for any term of years.

(b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.

(c) For a violation that is committed by an individual 18 years of age or older against an individual less than 13 years of age, by imprisonment for life without the possibility of parole if the person was previously convicted of a violation of this section or section 520c, 520d, 520e, or 520g committed against an individual less than 13 years of age or a violation of law of the United States, another state or political subdivision substantially corresponding to a violation of this section or section 520c, 520d, 520e, or 520g committed against an individual less than 13 years of age.

(d) In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n.

(3) The court may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction.

Sec. 543f. (1) A person is guilty of terrorism when that person knowingly and with premeditation commits an act of terrorism.

(2) Terrorism is a felony punishable by imprisonment for life or any term of years or a fine of not more than $100,000.00, or both. However, except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, if death was caused by the terrorist act, the person shall be punished by imprisonment for life without eligibility for parole.

Enacting section 1. This amendatory act does not take effect unless Senate Bill No. 319 of the 97th Legislature is enacted into law.

This act is ordered to take immediate effect.

Clerk of the House of Representatives

Secretary of the Senate

Approved

Governor

STATE OF MICHIGAN
97TH LEGISLATURE
REGULAR SESSION OF 2014

Introduced by Senators Jones, Pappageorge and Schuitmaker

ENROLLED SENATE BILL No. 319

AN ACT to amend 1927 PA 175, entitled "An act to revise, consolidate, and codify the laws relating to criminal procedure and to define the jurisdiction, powers, and duties of courts, judges, and other officers of the court under the provisions of this act; to provide laws relative to the rights of persons accused of criminal offenses and ordinance violations; to provide for the arrest of persons charged with or suspected of criminal offenses and ordinance violations; to provide for bail of persons arrested for or accused of criminal offenses and ordinance violations; to provide for the examination of persons accused of criminal offenses; to regulate the procedure relative to grand juries, indictments, informations, and proceedings before trial; to provide for trials of persons complained of or indicted for criminal offenses and ordinance violations and to provide for the procedure in those trials; to provide for judgments and sentences of persons convicted of criminal offenses and ordinance violations; to establish a sentencing commission and to prescribe its powers and duties; to provide for procedure relating to new trials and appeals in criminal and ordinance violation cases; to provide a uniform system of probation throughout this state and the appointment of probation officers; to prescribe the powers, duties, and compensation of probation officers; to provide penalties for the violation of the duties of probation officers; to provide for procedure governing proceedings to prevent crime and proceedings for the discovery of crime; to provide for fees of officers, witnesses, and others in criminal and ordinance violation cases; to set forth miscellaneous provisions as to criminal procedure in certain cases; to provide penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with or contravening any of the provisions of this act," (MCL 760.1 to 777.69) by adding sections 25 and 25a to chapter IX.

The People of the State of Michigan enact:

CHAPTER IX

Sec. 25. (1) This section applies to a criminal defendant who was less than 18 years of age at the time he or she committed an offense described in subsection (2) if either of the following circumstances exists:

(a) The defendant is convicted of the offense on or after the effective date of the amendatory act that added this section.

(b) The defendant was convicted of the offense before the effective date of the amendatory act that added this section and either of the following applies:

(*i*) The case is still pending in the trial court or the applicable time periods for direct appellate review by state or federal courts have not expired.

(*ii*) On June 25, 2012 the case was pending in the trial court or the applicable time periods for direct appellate review by state or federal courts had not expired.

(2) The prosecuting attorney may file a motion under this section to sentence a defendant described in subsection (1) to imprisonment for life without the possibility of parole if the individual is or was convicted of any of the following violations:

(a) A violation of section 17764(7) of the public health code, 1978 PA 368, MCL 333.17764.

(b) A violation of section 16(5), 18(7), 316, 436(2)(e), or 543f of the Michigan penal code, 1931 PA 328, MCL 750.16, 750.18, 750.316, 750.436, and 750.543f.

(c) A violation of chapter XXXIII of the Michigan penal code, 1931 PA 328, MCL 750.200 to 750.212a.

(d) Any violation of law involving the death of another person for which parole eligibility is expressly denied under state law.

(3) If the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described in subsection (1)(a), the prosecuting attorney shall file the motion within 21 days after the defendant is convicted of that violation. If the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described under subsection (1)(b), the prosecuting attorney shall file the motion within 90 days after the effective date of the amendatory act that added this section. The motion shall specify the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole.

(4) If the prosecuting attorney does not file a motion under subsection (3) within the time periods provided for in that subsection, the court shall sentence the defendant to a term of years as provided in subsection (9).

(5) If the prosecuting attorney files a motion under subsection (2) requesting that the individual be sentenced to imprisonment for life without parole eligibility, the individual shall file a response to the prosecution's motion within 14 days after receiving notice of the motion.

(6) If the prosecuting attorney files a motion under subsection (2), the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in Miller v Alabama, 576 US _____; 183 L Ed 2d 407; 132 S Ct 2455 (2012), and may consider any other criteria relevant to its decision, including the individual's record while incarcerated.

(7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.

(8) Each victim shall be afforded the right under section 15 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.765, to appear before the court and make an oral impact statement at any sentencing or resentencing of the defendant under this section.

(9) If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years.

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

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

(a) The time for filing an appeal in the state court of appeals has expired.

(b) The application for leave to appeal is filed in the state supreme court and is denied or a timely filed motion for rehearing is denied.

(c) If the state supreme court has granted leave to appeal, after the court renders its decision or after a timely filed motion for rehearing is denied.

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

(3) If the state supreme court or the United States supreme court finds that the decision of the United States supreme court in Miller v Alabama, 576 US _____; 183 L Ed 2d 407; 132 S Ct 2455 (2012), applies retroactively to all defendants who were convicted of felony murder under section 316(1)(b) of the Michigan penal code, 1931 PA 328,

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

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

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

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

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

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

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

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

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

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

This act is ordered to take immediate effect.

Carol Morey Viventi

Secretary of the Senate

Gary E. Randall

Clerk of the House of Representatives

Approved _____

_____

Governor

--- N.W.2d ----, 287 Neb. 320, 2014 WL 503134 (Neb.)
(Cite as: 2014 WL 503134 (Neb.))

H

Supreme Court of Nebraska.
State of Nebraska, Appellee,
v.
Douglas M. Mantich, Appellant.

No. S–11–301
Filed February 7, 2014.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Sentence vacated, and cause remanded for resentencing.
Adam J. Sipple, of Johnson & Mock, Oakland, for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown, Lincoln, for appellee.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Syllabus by the Court

***1** 1. **Constitutional Law: Sentences.** Whether a sentence violates the Eighth Amendment's cruel and unusual punishment clause presents a question of law.

2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.

3. **Constitutional Law: Criminal Law: Statutes: Convictions: Sentences: Time.** When a decision of the U.S. Supreme Court results in a "new rule," that rule applies to all criminal cases still pending on direct review. As to convictions that are already final, however, the rule applies only in limited circumstances. New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish.

4. **Constitutional Law: Criminal Law: Time.** New rules of procedure generally do not apply retroactively. The only exception is those rules that are "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceedings.

5. **Constitutional Law: Criminal Law: Minors: Sentences: Time: Appeal and Error.** The holding of the U.S. Supreme Court in *Miller v. Alabama*, ––U.S. ––––, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), that the Eighth Amendment forbids a sentencing scheme which mandates life in prison without the possibility of parole for juvenile offenders, is a new substantive rule of constitutional law which applies retroactively to criminal cases on collateral review.

Stephan, J.

In 1994, Douglas M. Mantich was convicted of first degree murder and use of a firearm to commit a felony. He was sentenced to life imprisonment for the murder conviction and 5 to 20 years' imprisonment for the firearm conviction. The murder was committed when Mantich was 16 years old. On direct appeal, we affirmed his convictions and life imprisonment sentence and vacated and remanded his firearm sentence for resentencing. FN1

FN1. *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

In 2010, Mantich filed an amended postconviction motion alleging his life imprisonment sentence violated the Eighth Amendment's prohibition on cruel and unusual punishment because it was (1) categorically prohibited under the U.S. Supreme Court's holding in *Graham v. Florida* FN2 and (2) grossly disproportionate to the offense for which he was

convicted. Mantich also alleged that the attorney who represented him at his trial and on direct appeal was ineffective in not asserting these Eighth Amendment claims. The district court denied the postconviction motion without conducting an evidentiary hearing, and Mantich appealed from that order.

FN2. *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

We heard oral arguments in the appeal on October 7, 2011. On July 11, 2012, we set the case for reargument and ordered supplemental briefing after the U.S. Supreme Court held in *Miller v. Alabama* [FN3] that the Eighth Amendment forbids a state sentencing scheme that mandates life in prison without the possibility of parole for a juvenile offender convicted of homicide. We now hold that Mantich's life imprisonment sentence is unconstitutional under *Miller*.

FN3. *Miller v. Alabama*, ––– U.S. ––––, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

I. FACTS

***2** On December 5, 1993, a gathering was held to mourn the death of a "Lomas" gang member. Several members of the gang attended the party, including Mantich, Gary Brunzo, Daniel Eona, Juan Carrera, and Angel Huerta. At the gathering, Mantich consumed between 5 and 10 beers and smoked marijuana in a 2 1/ 2-hour period.

Sometime after 1 a.m., Carrera decided that he wanted to steal a car and commit a driveby shooting of a member of a rival gang. While holding a gun, Eona responded that he also wanted to steal a car and talked about "jackin' somebody" and "putting a gun to their head." Brunzo and Eona then walked toward Dodge Street to steal a vehicle. They returned about 20 minutes later in a stolen red minivan, and Carrera and Huerta got in. Over his girlfriend's objection and attempt to physically restrain him, Mantich also got into the van.

The van had no rear seats. Eona was in the driver's seat, and Brunzo was in the front passenger seat. Carrera sat behind the driver's seat; Huerta sat on the passenger side, close to the sliding side door; and Mantich sat behind Carrera and Huerta, toward the back of the van. After a short time, Mantich realized that a man, later identified as Henry Thompson, was in the van. Thompson was kneeling between the driver's seat and the front passenger seat with his hands over his head and his head facing the front of the van.

The gang members began chanting "Cuz" and "Blood." Mantich thought the purpose was to make Thompson believe they were affiliated with a different gang. Eona demanded Thompson's money, and Brunzo told Thompson they were going to shoot him. Mantich saw Brunzo and Eona poke Thompson in the head with their guns. Eventually, a shot was fired and Thompson was killed. Thompson's body was pulled out of the van and left on 13th Street.

The group then drove to Carrera's house so he could retrieve his gun. After this, they drove by a home and fired several shots at it from the vehicle. Later, they sank the van in the Missouri River and walked back to 13th Street. From there, Mantich and Huerta took all the guns and went to Huerta's house to hide them. Brunzo, Eona, and Carrera walked toward the area of Thompson's body.

After hiding the guns with Huerta, Mantich walked to Brian Dilly's house. While still intoxicated, Mantich told Dilly and Dilly's brothers about the events of the night. Mantich claimed he had pulled the trigger and killed Thompson. When the 6 o'clock news featured a story on the homicide, Mantich said, " 'I told you so,' " and " 'I told you I did it.' " About an hour after the newscast, Mantich told Dilly that Brunzo was actually the person who shot and killed Thompson. The police later learned about Mantich's conversations with Dilly, and arrest warrants were issued for Mantich, Brunzo, Eona, and Carrera. Mantich was arrested on January 4, 1994.

Mantich agreed to talk with Omaha police about what happened and initially claimed that Brunzo shot Thompson. The police told Mantich that statements were being obtained from Brunzo, Eona, and Carrera and that Mantich's statement was inconsistent with the information the police had acquired. The police also told Mantich that Dilly said Mantich confessed to shooting Thompson. Mantich admitted telling Dilly he shot Thompson, but explained that it was a lie and that he was only trying to look like "a bad ass." Mantich claimed that he had not shot anyone and that Brunzo was the shooter.

***3** The police then told Mantich they knew what happened and assured Mantich that his family and girlfriend "would not abandon him" if he told the truth. At this point, Mantich admitted that he had pulled the trigger. Mantich said, " 'I'm sorry it happened. I wished it wouldn't have happened.' " Mantich further stated, " 'They handed me the gun and said shoot him, so I did it.' " Mantich again confessed during a taped statement to shooting Thompson.

Mantich testified in his own behalf at trial. He acknowledged his statements to Dilly and the police that he had shot Thompson, but told the jury that he had not shot Thompson. On September 26, 1994, the jury returned a verdict of guilty on one charge of first degree murder and one charge of use of a firearm to commit a felony.

1. SENTENCING AND DIRECT APPEAL

In October 1994, the district court sentenced Mantich to a term of life imprisonment on the first degree murder conviction and to 5 to 20 years' imprisonment on the conviction of use of a firearm to commit a felony. Mantich's life imprisonment sentence carries no possibility of release on parole unless the Board of Pardons commutes his sentence to a term of years.[FN4] The court ordered the sentences to run consecutively.

FN4. See, Neb. Const. art. IV, § 13; Neb. Rev. Stat. § 83-1,126 (Reissue 2008); *Poindexter v. Houston*, 275 Neb. 863, 750 N.W.2d 688 (2008).

On direct appeal, Mantich assigned various errors, including that the evidence was insufficient to support his convictions. He did not assert an Eighth Amendment claim with respect to his life imprisonment sentence. We found no merit in any of his assignments of error, but concluded that there was plain error resulting from a failure to give credit for time served on his sentence for use of a firearm to commit a felony. We therefore affirmed his convictions but vacated the firearm sentence and remanded the cause with directions to resentence Mantich, giving him credit for time served.[FN5]

FN5. See *Mantich, supra* note 1.

2. POSTCONVICTION PROCEEDINGS

Mantich filed a pro se motion for postconviction relief on September 25, 2006. The court dismissed the first five grounds of the motion, reasoning they were the same grounds Mantich raised on direct appeal. The court did not dismiss Mantich's claim of ineffective assistance of counsel and appointed counsel to represent Mantich with respect to that claim. That attorney filed the operative amended motion for postconviction relief on August 31, 2010.

The amended motion asserted Mantich's sentence of life imprisonment without parole violated the Eighth Amendment because it was (1) categorically prohibited under *Graham v. Florida*[FN6] and (2) disproportionate to the offense for which he was convicted. In *Graham*,[FN7] the U.S. Supreme Court held that "the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender." The amended motion also alleged the attorney who represented Mantich during trial and on direct appeal was ineffective for not objecting to the life imprisonment without parole sentence on Eighth Amendment grounds.

6. *Graham, supra* note 2.

FN7. *Id.,* 560 U.S. at 75, 130 S.Ct. 2011.

The State moved to dismiss Mantich's amended motion, asserting *Graham* did not apply because Mantich was convicted of a homicide offense. The State further contended that Mantich's counsel was not ineffective.

On March 17, 2011, the district court denied Mantich's amended motion without an evidentiary hearing. The court concluded that Mantich's life imprisonment sentence was not categorically barred under *Graham* or any decision of this court. Mantich filed this timely appeal. While it was pending, the U.S. Supreme Court decided *Miller v. Alabama.*[FN8] *Miller* held that a sentence of mandatory life imprisonment without parole for a juvenile violated the Eighth Amendment's prohibition on cruel and unusual punishment. We ordered reargument and supplemental briefing on the effect of *Miller* on Mantich's postconviction motion.

FN8. *Miller, supra* note 3.

II. ASSIGNMENTS OF ERROR

***4** In the original appeal from the denial of postconviction relief, Mantich assigned, restated and summarized, that the district court erred in (1) failing to vacate his sentence pursuant to the holding of *Graham,* (2) failing to vacate his sentence as unconstitutionally disproportionate to the offense of felony murder, and (3) failing to hold an evidentiary hearing on the issues presented by his ineffective assistance of counsel and Eighth Amendment claims. After we ordered supplemental briefing in light of *Miller,* Mantich reasserted all of the assignments of error raised in his initial brief. He also assigned, restated and consolidated, that his life imprisonment sentence is a violation of the 8th and 14th Amendments based on the U.S. Supreme Court's decision in *Miller.*

III. STANDARD OF REVIEW

Whether a sentence violates the Eighth Amendment's cruel and unusual punishment clause presents a question of law.[FN9] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[FN10]

FN9. See *State v. Hurbenca,* 266 Neb. 853, 669 N.W.2d 668 (2003).

FN10. *State v. Sims,* 277 Neb. 192, 761 N.W.2d 527 (2009); *State v. Davis,* 276 Neb. 755, 757 N.W.2d 367 (2008).

IV. ANALYSIS

1. *MILLER V. ALABAMA* APPLIES TO MANTICH

In *Miller v. Alabama,*[FN11] the Court held that the "Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." The Court reached its conclusion by applying two lines of precedent. First, the Court recognized two previous juvenile cases, *Graham v. Florida*[FN12] and *Roper v. Simmons.*[FN13] *Graham* held that a juvenile could not be sentenced to life imprisonment without parole for a nonhomicide offense. *Roper* held that a juvenile could not be sentenced to death. Both thus announced categorical bans on sentencing practices as they apply to juveniles. The Court in *Miller* reasoned that *Graham* and *Roper* established that "children are constitutionally different from adults for purposes of sentencing."[FN14] Specifically, the Court in *Miller* noted that compared to adults, children lack maturity and have an underdeveloped sense of responsibility, are more vulnerable to outside influences and pressures, and have yet to fully develop their character. Because of these differences, the Court reasoned juveniles have "diminished culpability and greater prospects for reform."[FN15]

FN11. *Miller,* 132 S.Ct. at 2469.

FN12. *Graham, supra* note 2.

FN13. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

FN14. *Miller*, 132 S.Ct. at 2464.

FN15. *Id.*

Second, the *Miller* Court recognized prior Court jurisprudence requiring individualized decisionmaking in capital punishment cases.[FN16] It then applied this jurisprudence to the imposition of life imprisonment on juveniles by reasoning that a life imprisonment without parole sentence for a juvenile is tantamount to a death sentence for an adult.[FN17] According to the Court, because the Eighth Amendment when applied to adults requires individualized sentencing prior to the imposition of a death sentence, the Eighth Amendment when applied to juveniles requires individualized sentencing prior to the imposition of a sentence of life imprisonment without parole.[FN18]

FN16. *Miller*, *supra* note 3. See, *Sumner v. Shuman*, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

FN17. *Miller*, *supra* note 3.

FN18. *Id.*

The threshold question presented to us in this appeal is whether the holding in *Miller* applies to Mantich so that his sentence must be vacated and this cause remanded for a new sentencing hearing. We held in *State v. Castaneda*[FN19] that life imprisonment sentences imposed on juveniles in Nebraska prior to *Miller* were mandatory sentences and were equivalent to life imprisonment without parole. But Mantich's life imprisonment sentence was imposed and his first degree murder conviction became final years before *Miller* was decided. He is entitled to be resentenced only if the rule announced in *Miller* applies retroactively to cases that became final prior to its pronouncement, i.e., cases on collateral review.

FN19. *State v. Castaneda*, 287 Neb. 289, —— N.W.2d —— (2014).

(a) Retroactivity Test

***5** In its 1989 decision in *Teague v. Lane*,[FN20] the U.S. Supreme Court set forth a test for determining when a new rule of constitutional law will be applied to cases on collateral review. Before announcing the test, however, the Court emphasized that "the question 'whether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision.' "[FN21] The Court explained that "[r]etroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[FN22]

FN20. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

FN21. *Id.*, 489 U.S. at 300, 109 S.Ct. 1060, quoting Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L.Rev. 56 (1965).

FN22. *Teague*, 489 U.S. at 300, 109 S.Ct. 1060.

According to *Teague*, "new rules should always be applied retroactively to cases on direct review, but ... generally they should not be applied retroactively to criminal cases on collateral review."[FN23] The rationale for the distinction is that collateral review is not designed as a substitute for direct review and that the government has a legitimate interest in having judgments become and remain final.[FN24]

FN23. *Id.*, 489 U.S. at 303, 109 S.Ct. 1060.

FN24. See *Teague*, *supra* note 20.

Teague articulated two exceptions to the general rule of nonretroactivity for cases on collateral review. First, a new rule should be applied retroactively if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' " FN25 Second, a new rule should be applied retroactively if it "requires the observance of 'those procedures that ... are "implicit in the concept of ordered liberty." ' " FN26 The ultimate holding in Teague was this: "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." FN27

FN25. *Id.*, 489 U.S. at 307, 109 S.Ct. 1060, quoting *Mackey v. United States*, 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in part, and in part dissenting).

FN26. *Id.* quoting *Mackey*, *supra* note 25 (quoting *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)).

FN27. *Teague*, 489 U.S. at 310, 109 S.Ct. 1060.

Since *Teague*, the Court has refined the retroactivity analysis. The most significant refinement occurred in *Schriro v. Summerlin*. FN28 The issue in *Schriro* was whether the Court's decision in *Ring v. Arizona* FN29 applied retroactively to a death penalty case on federal habeas review. In deciding this, the Court stated:

> When a decision of this Court results in a "new rule," that rule applies to all criminal cases still pending on direct review.... As to convictions that are already final, however, the rule applies only in limited circumstances. New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, ... as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish.... 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. FN30

The Court explained that although it had sometimes referred to rules of this type as "falling under an exception to *Teague'* s bar on retroactive application of procedural rules, ... they are more accurately characterized as substantive rules not subject to the bar." FN31

FN28. *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).

FN29. *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

FN30. *Schriro*, 542 U.S. at 351–52, 124 S.Ct. 2519 (citations omitted).

FN31. *Id.*, 542 U.S. at 352 n. 4, 124 S.Ct. 2519 (citations omitted).

***6** *Schriro* further explained that new "rules of procedure" generally do not apply retroactively. FN32 The only exception is those rules that are " 'watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.' " FN33 This class of rules is extremely narrow. FN34

FN32. *Id.*, 542 U.S. at 352, 124 S.Ct. 2519.

FN33. *Id.*

FN34. *Id.*

In 2008, the U.S. Supreme Court ruled that the

Teague/*Schriro* retroactivity analysis it applies in federal habeas actions is not binding upon state courts when deciding issues of retroactivity under state law.[FN35] In doing so, the Court noted that a state court is " 'free to choose the degree of retroactivity or prospectivity which [it] believe[s] appropriate to the particular rule under consideration, so long as [it] give[s] federal constitutional rights at least as broad a scope as the United States Supreme Court requires.' "[FN36] In other words, states can give broader effect to new rules than is required by the *Teague*/*Schriro*test.[FN37]

FN35. *Danforth v. Minnesota*, 552 U.S. 264, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008).

FN36. *Id.*, 552 U.S. at 276, 128 S.Ct. 1029, quoting *State v. Fair*, 263 Or. 383, 502 P.2d 1150 (1972).

FN37. *Danforth*, *supra* note 35.

We have adhered to the *Teague*/*Schriro* test in the two cases in which we have addressed the retroactivity of a new rule announced by the U.S. Supreme Court to cases on state postconviction review,[FN38] and we see no reason to depart from that analysis.

FN38. *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003); *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), *cert. granted and judgment vacated*498 U.S. 964, 111 S.Ct. 425, 112 L.Ed.2d 409 (1990).

(b) Court Precedent

It is very clear that *Miller* announced a new rule. This is so because the rule announced in *Miller* was not dictated by precedent existing at the time Mantich's first degree murder conviction became final.[FN39] The new rule can apply to Mantich, who is before this court on collateral review, if it is either a substantive rule or a watershed rule of criminal procedure.[FN40]

FN39. See *Whorton v. Bockting*, 549 U.S. 406, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007).

FN40. *Id.; Schriro*, *supra* note 28.

According to *Schriro*, the key distinction in the retroactivity analysis is whether the new rule is substantive or procedural.[FN41] *Schriro* held that substantive rules *include* those that (1) narrow the scope of a criminal statute by interpreting its terms or (2) place particular conduct or persons covered by the statute beyond the State's power to punish. The second category encompasses "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[FN42] Substantive rules apply retroactively because they 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."[FN43]

FN41. *Schriro*, *supra* note 28.

FN42. *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *abrogated on other grounds*, *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

FN43. *Schriro*, 542 U.S. at 352, 124 S.Ct. 2519, quoting *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998).

It is clear that categorical bans on sentences are substantive rules.[FN44] Rules forbidding imposition of the death sentence on persons with mental retardation[FN45] or on juveniles[FN46] and a rule forbidding life imprisonment for a juvenile convicted of a nonhomicide offense[FN47] have been considered substantive rules.[FN48]

FN44. See *Penry*, *supra* note 42.

FN45. *Atkins*, *supra* note 42.

FN46. *Roper*, *supra* note 13.

FN47. *Graham*, *supra* note 2.

FN48. See, e.g., *Allen v. Buss*, 558 F.3d 657 (7th Cir.2009) *(Atkins); Nixon v. State*, 2 So.3d 137 (Fla.2009)*(Atkins); McStoots v. Com.*, 245 S.W.3d 790 (Ky.App.2007) *(Roper); Duncan v. State*, 925 So.2d 245 (Ala.Crim.App.2005)*(Roper); People v. Rainer*, No. 10CA2414, 2013 WL 1490107 (Colo.App. Apr. 11, 2013)*(Graham); Bonilla v. State*, 791 N.W.2d 697 (Iowa 2010)*(Graham).*

***7** In comparison, rules that "regulate only the *manner of determining* the defendant's culpability are procedural." FN49 They 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. FN50

FN49. *Schriro*, 542 U.S. at 353, 124 S.Ct. 2519.

FN50. *Schriro*, *supra* note 28.

In the sentencing context, the Court has found a number of rules to be procedural. In *Schriro v. Summerlin*, FN51 the Court addressed whether the rule announced in *Ring v. Arizona* FN52 applied retroactively to cases on collateral review. *Ring* held that a jury, and not a judge, had to find an aggravating circumstance necessary for imposition of the death penalty. *Schriro* held this rule was procedural, noting it merely "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death." FN53 It noted that rules that "allocate decisionmaking authority in this fashion are prototypical procedural rules." FN54 Notably, however, the Court stated:

> This Court's holding that, *because* [a state] 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. FN55

FN51. *Id.*

FN52. *Ring*, *supra* note 29.

FN53. *Schriro*, 542 U.S. at 353, 124 S.Ct. 2519.

FN54. *Id.*

FN55. *Id.*, 542 U.S. at 354, 124 S.Ct. 2519.

In *Lambrix v. Singletary*, FN56 the Court addressed whether the rule announced in *Espinosa v. Florida* FN57 applied retroactively to cases on collateral review. *Espinosa* held that if a sentencing judge in a state that requires specified aggravating circumstances to be weighed against any mitigating circumstances at the sentencing phase of a capital trial is required to give deference to a jury's advisory sentencing recommendation, then neither the jury nor the judge is constitutionally permitted to weigh invalid aggravating circumstances. Without extensive analysis, the *Lambrix* Court concluded this rule did not prohibit the imposition of capital punishment on a particular class of persons.

FN56. *Lambrix v. Singletary*, 520 U.S. 518, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997).

FN57. *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992).

In *Sawyer v. Smith*, FN58 the Court addressed whether the rule announced in *Caldwell v. Mississippi* FN59 applied retroactively to cases on collateral review. *Caldwell* held that the Eighth Amendment prohibits imposition of the death penalty by a sentencer that has been led to the false

belief that the responsibility for determining the appropriateness of the sentence rests elsewhere. The *Sawyer* Court concluded the rule was not retroactive, because it was simply a procedural rule "designed as an enhancement of the accuracy of capital sentencing."[FN60]

FN58. *Sawyer v. Smith*, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990).

FN59. *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

FN60. *Sawyer*, 497 U.S. at 244, 110 S.Ct. 2822.

(c) *Miller* and Other Jurisdictions

A number of jurisdictions have considered whether *Miller* announced a rule that is to be applied retroactively. The results are varied. The primary point of dissension is whether the rule announced in *Miller* is substantive.

***8** The Louisiana Supreme Court held in *State v. Tate* [FN61] that the rule announced in *Miller* was a procedural one, largely because the Court in *Miller* specifically stated that " '[o]ur decision does not categorically bar a penalty for a class of offenders or type of crime.' " Louisiana reasoned that *Miller* simply "altered the range of **permissible methods"** for determining whether a juvenile could be sentenced to life imprisonment without parole.[FN62] In *Com. v. Cunningham* [FN63] the Pennsylvania Supreme Court adopted similar reasoning, holding that "by its own terms, the *Miller* holding 'does not categorically bar a penalty for a class of offenders.' " A U.S. district court in Virginia has also adopted this rationale.[FN64]

FN61. *State v. Tate*, No.2012–OK–2763, —— So.3d ——, ——, 2013 WL 5912118 at *6 (La. Nov. 5, 2013), quoting *Miller*, *supra* note 3.

FN62. *Id.*

FN63. *Com. v. Cunningham*, 81 A.3d 1, 10 (Pa.2013), quoting *Miller*, *supra* note 3.

FN64. *Johnson v. Ponton*, No. 3:13–CV–404, 2013 WL 5663068 (E.D.Va. Oct. 16, 2013) (memorandum opinion).

The Minnesota Supreme Court held in *Chambers v. State* [FN65] that the rule announced in *Miller* was procedural and not substantive because it did not "eliminate the power of the State to impose the punishment of life imprisonment without the possibility of release upon a juvenile offender who has committed a homicide offense." Instead, it reasoned that *Miller* simply requires " 'that a sentencer follow *a certain process* —considering an offender's youth and attendant characteristics—before imposing' " a sentence of life imprisonment without parole.[FN66] The U.S. Court of Appeals for the 11th and 5th Circuits and the Michigan Court of Appeals have all adopted similar reasoning.[FN67] The 11th Circuit placed particular reliance on *Penry v. Lynaugh*.[FN68] In *Penry*, the Court held that a new rule "prohibiting a certain category of punishment for a class of defendants because of their status or offense" is retroactive, but only where a class cannot be subjected to the punishment "regardless of the procedures followed."[FN69] The 11th Circuit reasoned that *Miller* is not substantive, because it merely altered the range of permissible methods for determining whether a juvenile's conduct is punishable by life imprisonment without parole and did not completely forbid a jurisdiction from imposing a sentence of life imprisonment without parole.[FN70]

FN65. *Chambers v. State*, 831 N.W.2d 311, 328 (Minn.2013).

FN66. *Id.* quoting *Miller*, *supra* note 3.

FN67. See *In re Morgan*, 717 F.3d 1186 (11th Cir.2013) (en banc); *Craig v. Cain*, No. 12–30035, 2013 WL 69128 (5th Cir.

Jan. 4, 2013) (unpublished opinion); and *People v. Carp*, 298 Mich.App. 472, 828 N.W.2d 685 (2012).

FN68. *Penry*, *supra* note 42.

FN69. *Id.*, 492 U.S. at 330, 109 S.Ct. 2934.

FN70. *In re Morgan*, *supra* note 67.

But at least four jurisdictions have reasoned that the rule announced in *Miller* is a substantive one, largely because it fits into the second category of substantive rules announced in *Schriro*. The Illinois Court of Appeals held in *People v. Morfin* FN71 that *Miller* was a substantive rule because it "mandates a sentencing range broader than that provided by statute for minors convicted of first degree murder." A concurring opinion emphasized that the rule was substantive because *Miller* forbids an entire category of sentence—a mandatory sentence of life imprisonment for juveniles. FN72 The concurrence also reasoned that a new rule that did not prohibit a certain sentence in every case but prohibited the mandatory imposition of that sentence was a substantive rule and not a procedural one. FN73 Similarly, in *Jones v. Mississippi*, FN74 the Supreme Court of Mississippi reasoned that *Miller* was a substantive rule because it "explicitly foreclosed imposition of a *mandatory* sentence of life without parole on juvenile offenders." It further reasoned that *Miller* required a substantive change in Mississippi law, because it required legislative modification of the existing law that had no provision for following the dictates of *Miller*. Very recently, the Supreme Judicial Court of Massachusetts held the *Miller* rule was substantive because it "forecloses the imposition of a certain category of punishment—mandatory life in prison without the possibility of parole—on a specific class of defendants." FN75 And the Supreme Court of Iowa in *State v. Ragland* FN76 recently held:

> ***9** From a broad perspective, *Miller* does mandate a new procedure. Yet, the procedural rule for [an individualized sentencing] hearing is the result of a substantive change in the law that prohibits mandatory life-without-parole sentencing. Thus, the case bars states from imposing a certain type of punishment on certain people.... "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant' ... faces a punishment that the law cannot impose upon him."

The Iowa Supreme Court also emphasized an article written by constitutional scholar Erwin Chemerinsky in which he stated:

> "There is a strong argument that *Miller* should apply retroactively: It says that it is beyond the authority of the criminal law to impose a mandatory sentence of life without parole. It would be terribly unfair to have individuals imprisoned for life without any chance of parole based on the accident of the timing of the trial.
>
> "....
>
> "... [T]he *Miller* Court did more than change procedures; it held that the government cannot constitutionally impose a punishment. As a substantive change in the law which puts matters outside the scope of the government's power, the holding should apply retroactively." FN77

FN71. *People v. Morfin*, 2012 IL App (1st) 103568, ¶ 56, 981 N.E.2d 1010, 1022, 367 Ill.Dec. 282, 294.

FN72. *Morfin*, *supra* note 71 (Sterba, J., specially concurring).

FN73. *Id.*

FN74. *Jones v. Mississippi*, 122 So.3d 698, 702 (Miss.2013).

FN75. *Diatchenko v. District Attorney for Suffolk Dist.*, 466 Mass. 655, 666 (2013).

FN76. *State v. Ragland*, 836 N.W.2d 107,

115–16 (Iowa 2013), quoting *Schriro, supra* note 28.

FN77. *Ragland*, 836 N.W.2d at 117, quoting Erwin Chemerinsky, *Chemerinsky: Juvenile Life–Without–Parole Case Means Courts Must Look at Mandatory Sentences*, A.B.A. J. Law News Now (posted Aug. 8, 2012), http://www.abajournal.com/news/article/chemerinsky_juvenile_life-without-parole_case_means_courts_must_look_at_sen/.

Courts have also reached differing conclusions as to how the procedural posture of *Miller* affects the retroactivity analysis. *Miller* involved two defendants who were before the Court in separate but consolidated cases. Defendant Evan Miller was before the Court after his direct appeal from his criminal conviction was denied.[FN78] But the other defendant, Kuntrell Jackson, was before the Court on collateral review; he sought relief after a state court dismissed his application for a writ of state habeas corpus.[FN79] In announcing the new rule in *Miller*, the Court made no distinction between the procedural postures of the two defendants. Instead, it simply reversed both of the lower court judgments and remanded the causes "for further proceedings not inconsistent with this opinion."[FN80]

FN78. See *Miller, supra* note 3.

FN79. *Id.*

FN80. *Miller*, 132 S.Ct. at 2475.

At least three jurisdictions have reasoned that the Court's equal treatment of the two defendants is a factor that must be considered in the retroactivity analysis. In *Ragland*, the Iowa Supreme Court noted that Jackson's case was remanded so that Jackson could be given an individualized sentencing hearing and reasoned that "[t]here would have been no reason for the Court to direct such an outcome if it did not view the *Miller* rule as applying retroactively to cases on collateral review."[FN81] *Ragland* also noted that the dissent in *Miller* suggested the majority's decision would invalidate other cases across the nation and reasoned that the dissent would not have raised such a concern if the Court did not intend its holding to apply to cases on collateral review. In *People v. Williams*,[FN82] an Illinois appellate court found it "instructive" that the Court applied the *Miller* rule to Jackson when he was before the Court on collateral review. And another Illinois appellate court noted the "relief granted to Jackson in *Miller* tends to indicate that *Miller* should apply retroactively on collateral review."[FN83] Most recently, in *Diatchenko v. District Attorney for Suffolk Dist.*[FN84] the highest court in Massachusetts reasoned that because the Court applied the rule to Jackson, "evenhanded justice requires that it be applied retroactively to all who are similarly situated."

FN81. *Ragland*, 836 N.W.2d at 116.

FN82. *People v. Williams*, 2012 IL App (1st) 111145, ¶ 54, 982 N.E.2d 181, 197, 367 Ill.Dec. 503, 519.

FN83. *Morfin, supra* note 71,367 Ill.Dec. at 295, 981 N.E.2d at 1023.

FN84. *Diatchenko*, 466 Mass. at 667.

***10** Other jurisdictions, however, conclude the Court's treatment of Jackson is not a relevant factor in the retroactivity analysis. In *Com. v. Cunningham*,[FN85] the Pennsylvania Supreme Court noted that it was not clear the retroactivity issue was before the Court with respect to Jackson and that in the absence of a "specific, principled retroactivity analysis" by the Court, it would not deem the Court to have held the *Miller* rule applied retroactively just because the Court applied it to Jackson. Similarly, in *People v. Carp*,[FN86] the Michigan Court of Appeals reasoned that the "mere fact that the Court remanded Jackson for resentencing does not constitute a ruling or

determination on retroactivity." *Carp* further reasoned that the issue of retroactivity was not raised as to Jackson and that thus, the Court had no reason to address it.

FN85. *Cunningham*, 81 A.3d at 9.

FN86. *Carp*, 298 Mich.App. at 518, 828 N.W.2d at 712.

A federal district court in Virginia has taken a slightly different approach. In *Johnson v. Ponton*,[FN87] the court reasoned that although the U.S. Supreme Court stated in *Teague v. Lane*[FN88] that the retroactivity analysis is a threshold question and a prerequisite for announcement of a new constitutional rule, it has forgone this analysis in at least one recent case. Specifically, in *Padilla v. Kentucky*,[FN89] a petitioner brought a collateral challenge to his conviction. In deciding *Padilla*, the Court announced a new constitutional rule and applied it to the defendant before it, but did not engage in a retroactivity analysis. Later, in *Chaidez v. U.S.*,[FN90] the Court expressly held that the rule it announced in *Padilla* did not apply retroactively to other cases on collateral review. Based on the Court's actions in *Padilla* and *Chaidez*, the court in *Johnson* reasoned that the Court's application of the *Miller* rule to Jackson was not dispositive of its intent to apply the *Miller* rule to all cases on collateral review.

FN87. *Johnson*, *supra* note 64.

FN88. *Teague*, *supra* note 20.

FN89. *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010).

FN90. *Chaidez v. U.S.*, —— U.S. ——, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013).

(d) Resolution

Under the *Teague*/*Schriro* retroactivity analysis, the distinction between substance and procedure is important. But how the rule announced in *Miller* should be categorized is difficult, because it does not neatly fall into the existing definitions of either a procedural rule or a substantive rule.

As other courts have noted, the *Miller* rule certainly contains a procedural component, because it specifically requires that a sentencer follow a certain process before imposing the sentence of life imprisonment on a juvenile.[FN91] And unlike the holdings in *Graham v. Florida*[FN92] and *Roper v. Simmons*,[FN93] the *Miller* rule does not categorically bar a specific punishment; a State may still constitutionally sentence a juvenile to life imprisonment without parole under *Miller*.

FN91. See, *In re Morgan*, *supra* note 67; *Tate*, *supra* note 61; *Chambers*, *supra* note 65; *Cunningham*, *supra* note 63.

FN92. *Graham*, *supra* note 2.

FN93. *Roper*, *supra* note 13.

But at the same time, the *Miller* rule includes a substantive component. *Miller* did not simply change what entity considered the same facts.[FN94] And *Miller* did not simply announce a rule that was designed to enhance accuracy in sentencing.[FN95] Instead, *Miller* held that a sentencer must consider specific, individualized factors before handing down a sentence of life imprisonment without parole for a juvenile. Effectively, then, *Miller* required a sentencer of a juvenile to consider new facts, i.e., mitigation evidence, before imposing a life imprisonment sentence with no possibility of parole. In our view, this approaches what the Court itself held in *Schriro* would amount to a new substantive rule: The Court made a certain fact (consideration of mitigating evidence) essential to imposition of a sentence of life imprisonment without parole.[FN96] In other words, it imposed a new requirement as to what a sentencer must consider in order to constitutionally impose life imprisonment without parole on a juvenile.

FN94. Compare *Ring*, *supra* note 29.

FN95. Compare *Caldwell*, *supra* note 59.

FN96. *Schriro, supra* note 28.

***11** And *Miller* itself recognized that when mitigating evidence is considered, a sentence of life imprisonment without parole for a juvenile should be rare. This is consistent with the underlying logic of *Miller,* based on *Graham,* that " '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' "[FN97] In essence, *Miller* "amounts to something close to a de facto substantive holding,"[FN98] because it sets forth the general rule that life imprisonment without parole should not be imposed upon a juvenile except in the rarest of cases where that juvenile cannot be distinguished from an adult based on diminished capacity or culpability.

FN97. *Graham,* 560 U.S. at 73, 130 S.Ct. 2011, quoting *Roper, supra* note 13.

FN98. *The Supreme Court, 2011 Term—Leading Cases,* 126 Harv. L.Rev. 276, 286 (2012).

The substantive aspect of the *Miller* rule is also evident when considered in light of the effect of *Miller* on existing Nebraska law. In response to *Miller,* the Nebraska Legislature amended the sentencing laws for juveniles convicted of first degree murder.[FN99] The amendments changed the possible penalty for a juvenile convicted of first degree murder from a mandatory sentence of life imprisonment to a "maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment."[FN100] The Legislature also mandated that in determining the sentence for a juvenile convicted of first degree murder, the sentencing judge "shall consider mitigating factors which led to the commission of the offense."[FN101] A juvenile may submit any mitigating factors to the sentencer, including, but not limited to, age at the time of the offense, degree of impetuosity, family and community environment, ability to appreciate the risks and consequences of the conduct, intellectual capacity, and the results of a mental health evaluation.[FN102] We view these as substantive changes to Nebraska law and requirements that sentencers consider new facts prior to sentencing a juvenile convicted of first degree murder. Most specifically, the fact that *Miller* required Nebraska to change its substantive punishment for the crime of first degree murder when committed by a juvenile from a mandatory sentence of life imprisonment to a sentence of 40 years' to life imprisonment demonstrates the rule announced in *Miller* is a substantive change in the law.

FN99. 2013 Neb. Laws, L.B. 44 (codified at Neb.Rev.Stat. § 28–105.02 (Supp.2013)).

FN100. § 28–105.02(1).

FN101. § 28–105.02(2).

FN102. *Id.*

Moreover, the entire rationale of *Miller* is that when a sentencing scheme fails to give a sentencer a choice between life imprisonment without parole and something lesser, the scheme is necessarily cruel and unusual. Here, it is undisputed that Mantich's sentencer was denied that choice, and it is the absence of that choice that makes the *Miller* rule more substantive than procedural. Further, we agree that the *Miller* rule is entirely substantive when viewed as Massachusetts, Mississippi, and Illinois have—as a categorical ban on the imposition of a mandatory sentence of life imprisonment without parole for juveniles.[FN103]

FN103. See, *Diatchenko, supra* note 75; *Jones, supra*note 74; *Morfin, supra* note 71.

We also find it noteworthy that the Court applied the rule announced in *Miller* to Jackson, who was before the Court on collateral review. Years ago, the Court stated that it would not

announce or apply a new constitutional rule in a case before it on collateral review unless that rule would apply to all defendants on collateral review.[FN104] The Court specifically adopted this policy in order to ensure that justice is administered evenhandedly.[FN105] Although we recognize that the Court has strayed from this policy on one recent occasion,[FN106] we are not inclined to refuse to apply the rule announced in *Miller* to a defendant before us on collateral review when the Court has already applied the rule to a defendant before it on collateral review. Evenhanded administration of justice is carried out only if Mantich, like Jackson, is entitled to the benefit of the new rule announced in *Miller*.[FN107] As noted by the Supreme Court of Iowa, any other result would be " 'terribly unfair.' "[FN108]

FN104. *Penry, supra* note 42; *Teague, supra* note 20.

FN105. *Id.*

FN106. See *Padilla, supra* note 89.

FN107. See *Diatchenko, supra* note 75.

FN108. *Ragland*, 836 N.W.2d at 117, quoting Chemerinsky, *supra* note 77.

***12** Because the rule announced in *Miller* is more substantive than procedural and because the Court has already applied that rule to a case on collateral review, we conclude that the rule announced in *Miller* applies retroactively to Mantich. Mantich's life imprisonment sentence must be vacated, and the cause remanded for resentencing under § 28–105.02.

In Mantich's original appeal, he argued that his sentence of life imprisonment without parole was categorically invalid under *Graham v. Florida*.[FN109] *Graham* held that a juvenile convicted of a nonhomicide offense cannot be sentenced to life imprisonment without parole. Mantich invites us to extend this holding to a juvenile convicted of felony murder.

FN109. *Graham, supra* note 2.

Because we find Mantich is entitled to be resentenced under the dictates of *Miller*, we do not reach this argument in this appeal. If Mantich, on remand, is resentenced to life imprisonment with no minimum term which permits parole eligibility, he may raise the *Graham* argument in an appeal from that sentence.

Likewise, in view of our disposition, we need not reach Mantich's claim that his counsel was ineffective in failing to assert an Eighth Amendment challenge at his original sentencing and on direct appeal.

V. CONCLUSION

The rule announced in *Miller* applies retroactively to Mantich. We remand the cause with directions to grant post-conviction relief by vacating his life imprisonment sentence and resentencing him pursuant to § 28–105.02.[FN110]

FN110. See *Castaneda, supra*note 19.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

Cassel, J., dissenting.

I respectfully dissent. First, I believe the rule from *Miller v. Alabama*[FN1] is a procedural rule that should not be applied retroactively on collateral review. Second, I would find Mantich's other claimed errors to be without merit. Thus, I would affirm the decision of the district court.

FN1. *Miller v. Alabama*, ––– U.S. ––––, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

RETROACTIVITY OF *MILLER V. ALABAMA*

As the majority observed, the rule announced in *Miller* does not fall conveniently into the existing definitions of either a procedural rule or a substantive rule. But I believe the better approach would be to join the majority of jurisdictions that have ruled on this issue and conclude that the rule announced in *Miller* is a procedural one.[FN2]

FN2. See, *In re Morgan,* 717 F.3d 1186 (11th Cir.2013) (en banc); *Holland v. Hobbs,* No. 5:12CV00463–SWW–JJV, 2013 WL 6332731 (E.D.Ark. Dec. 5, 2013); *Johnson v. Ponton,* No. 3:13–CV–404, 2013 WL 5663068 (E.D.Va. Oct. 16, 2013) (memorandum opinion); *Geter v. State,* 115 So.3d 375 (Fla.App.2012); *State v. Tate,* No.2012–OK–2763, —— So.3d ——, 2013 WL 5912118 (La. Nov. 5, 2013); *People v. Carp,* 298 Mich.App. 472, 828 N.W.2d 685 (2012); *Chambers v. State,* 831 N.W.2d 311 (Minn.2013); *Com. v. Cunningham,* 81 A.3d 1 (Pa.2013); *Craig v. Cain,* No. 12–30035, 2013 WL 69128 (5th Cir. Jan. 4, 2013) (unpublished opinion).

Unlike the rules announced in *Graham v. Florida* [FN3] and *Roper v. Simmons,* [FN4] *Miller* did not categorically bar a specific punishment. The *Miller* Court specifically noted that its decision "mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." [FN5] *Miller* simply does not fall into the narrow category of a substantive rule, because no juvenile sentenced to life imprisonment without parole in Nebraska "faces a punishment that the law cannot impose upon him." [FN6] Although the process by which a juvenile may be sentenced to life imprisonment without parole now changes based upon *Miller,* the ultimate sentence of life imprisonment without parole for a juvenile is still a legitimate sentence. The U.S. Supreme Court has never indicated that anything less than a full categorical ban on a sentence may be a new substantive rule, and in my view, we should decline to do so in the first instance.

FN3. *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

FN4. *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

FN5. *Miller,* 132 S.Ct. at 2471.

FN6. *Schriro v. Summerlin,* 542 U.S. 348, 352, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).

***13** I am not persuaded that the U.S. Supreme Court established a precedent of retroactive application of the *Miller* rule simply by applying the rule to a defendant before it on collateral review. A new rule is not made retroactive to cases on collateral review unless the Court holds it to be retroactive. [FN7] And a state can waive the *Teague v. Lane* [FN8] retroactivity bar by not raising it. [FN9] The Court likely did not address the retroactivity issue in *Miller* because the State of Arkansas did not argue that any new rule announced would not apply to Jackson, who was before the Court on collateral review. I do not believe that we should interpret silence as an affirmative holding that the *Miller* rule is to apply retroactively to defendants on collateral review. Further, I find it persuasive that the Court has recently demonstrated in *Padilla v. Kentucky* [FN10] and *Chaidez v. U.S.* [FN11] that its announcement of a new constitutional rule in a case before it on collateral review is not a determination of whether that rule should apply to all cases on collateral review.

FN7. *Tyler v. Cain,* 533 U.S. 656, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001).

FN8. *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

FN9. [9]*Schiro v. Farley,* 510 U.S. 222, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994).

FN10. *Padilla v. Kentucky,* 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010).

FN11. *Chaidez v. U.S.,* —— U.S. ——, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013).

In my view, the rule announced in *Miller* is not a " ' "watershed rule[ ] of criminal procedure" implicating the fundamental fairness and accuracy

of the criminal proceeding.' "[FN12] To qualify as a watershed rule, a new rule must both be necessary to prevent an impermissibly large risk of an inaccurate conviction and alter our understanding of the bedrock procedural principles essential to the fairness of a proceeding.[FN13] The Court has repeatedly emphasized that the watershed exception is extremely narrow and, since *Teague,* has yet to find a new rule that fits within the exception.[FN14] The only case that has ever satisfied this high threshold is *Gideon v. Wainwright,*[FN15] in which the Court held that counsel must be appointed for any indigent defendant charged with a felony.

FN12. *Schriro*, 542 U.S. at 355, 124 S.Ct. 2519.

FN13. *Whorton v. Bockting,* 549 U.S. 406, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007).

The rule announced in *Miller* relates only to the sentencing stage of a criminal proceeding and, thus, cannot be said to be necessary to prevent an impermissibly large risk of an inaccurate conviction. In addition, it is not a rule announcing a "previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding."[FN16] While the rule announced in *Miller* was important, it did not effect a sweeping change comparable to *Gideon.* These reasons further support not applying the rule announced in *Miller* retroactively to Mantich on collateral review.

Our judicial process favors the finality of judgments. As noted by the majority, Mantich's life imprisonment sentence was imposed and became final long before the decision in *Miller* was announced. There is an important interest in the finality of judgments that must be respected. I agree with the assessment of another court that "applying *Miller* retroactively 'would undermine the perceived and actual finality of criminal judgments and would consume immense judicial resources without any corresponding benefit to the accuracy or reliability of the [underlying criminal case].' "[FN17]

At least to a certain degree, some of the minority of courts addressing whether the *Miller* decision was substantive or procedural have relied upon perceptions of fairness between those whose direct appeals were still pending and those whose cases had already been finally determined. This is a dangerous expansion of the power of judges, because it places no principled limit upon the scope of judicial power. While the distinction between procedural and substantive may be difficult to apply, it affords a principled basis for decision. If a judge allows his or her perceptions of fairness to intrude, the decision ceases to be an application of law and becomes an application of the judge's personal biases and preferences. In my view, the existing legal framework drives the answer to the question before this court and dictates that the change is procedural. As a judge, my role goes no further.

FN14. *Id.* (citing cases).

FN15. *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

FN16. *Whorton*, 549 U.S. at 421, 127 S.Ct. 1173.

FN17. *Geter*, 115 So.3d at 383–84.

OTHER CLAIMS

GRAHAM V. FLORIDA ARGUMENT

***14** In his original appeal, Mantich argued that his sentence of life imprisonment without parole was categorically invalid under *Graham v. Florida.*[FN18] *Graham* held that a juvenile convicted of a nonhomicide offense cannot be sentenced to life imprisonment without parole. Mantich asked us to extend this holding to a juvenile convicted of felony murder. I would find that Mantich's postconviction claim based on *Graham* is not procedurally barred.

FN18. *Graham, supra* note 3.

A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.[FN19] *Graham* was decided in 2010, long after this court affirmed Mantich's conviction and life imprisonment sentence for first degree murder. *Graham* was the first case in which the U.S. Supreme Court imposed a categorical bar on life imprisonment sentences for a specific class of offenders. Mantich could not have asserted his *Graham* claim at trial or on direct appeal, because the Eighth Amendment jurisprudence at that time did not support a categorical bar on life imprisonment sentences.[FN20] Therefore, it is not procedurally barred and its merits can be addressed.

FN19. *State v. Boppre,* 280 Neb. 774, 790 N.W.2d 417 (2010).

FN20. See *State v. El–Tabech,* 259 Neb. 509, 610 N.W.2d 737 (2000).

The issue decided by the U.S. Supreme Court in *Graham* was "whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime."[FN21] The defendant was sentenced to life imprisonment, which carried no possibility of release except through executive clemency.[FN22] The Court held, as a matter of first impression, that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole."[FN23] The Court specifically limited its holding to "only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense."[FN24] The Court distinguished homicide cases, noting:

> There is a line "between homicide and other serious violent offenses against the individual." ... Serious non-homicide crimes "may be devastating in their harm ... but 'in terms of moral depravity and of the injury to the person and to the public,' ... they cannot be compared to murder in their 'severity and irrevocability.' " ... This is because "[l]ife is over for the victim of the murderer," but for the victim of even a very serious nonhomicide crime, "life ... is not over and normally is not beyond repair." ... Although an offense like robbery or rape is "a serious crime deserving serious punishment," ... those crimes differ from homicide crimes in a moral sense.
>
> It 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. The age of the offender and the nature of the crime each bear on the analysis.[FN25]

FN21. *Graham,* 560 U.S. at 52–53, 130 S.Ct. 2011.

FN22. *Graham, supra* note 3.

FN23. *Id.,* 560 U.S. at 74, 130 S.Ct. 2011.

FN24. *Id.,* 560 U.S. at 63, 130 S.Ct. 2011.

FN25. *Id.,* 560 U.S. at 69, 130 S.Ct. 2011 (citations omitted).

We have considered the scope of *Graham* in one prior case. *State v. Golka*[FN26] involved a postconviction appeal by an offender who had been sentenced to two consecutive terms of life imprisonment for two first degree murders committed when he was 17 years old. His postconviction motion alleged that the sentences constituted cruel and unusual punishment in violation of the 8th and 14th Amendments to the U.S. Constitution and article I, § 9, of the Nebraska Constitution. That claim was rejected by the district court, and *Graham* was decided during the pendency of the appeal. In affirming the denial of postconviction relief, we agreed with two other state courts which had held that *Graham* does not preclude life imprisonment sentences for juvenile offenders convicted of murder.[FN27]

FN26. *State v. Golka,* 281 Neb. 360, 796

N.W.2d 198 (2011).

FN27. *Id.* (citing *Jackson v. Norris,* 2011 Ark. 49, 378 S.W.3d 103 (2011), *reversed, Miller, supra* note 1; *State v. Andrews,* 329 S.W.3d 369 (Mo.2010)).

***15** Mantich argues that his crime must be considered a " 'non-homicide' " offense under *Graham* because there was no finding at trial or sentencing that he killed or intended to kill Thompson.[FN28] He argues that he was at most a "minor participant" in the murder.[FN29] He bases this argument primarily upon *Enmund v. Florida*[FN30] and *Tison v. Arizona,*[FN31] both of which were appeals from death sentences. In *Enmund,* the U.S. Supreme Court held that the Eighth Amendment did not permit imposing "the death penalty on [a person] who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."[FN32] In *Tison,* the Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement" for imposition of the death penalty.[FN33] Both *Enmund* and *Tison* addressed the issue of when a murderer's conduct was sufficiently culpable to warrant imposition of the maximum penalty of death. Although the Court in *Graham* cited *Enmund* in support of its reasoning with respect to relative culpability, I do not interpret that citation as permitting a homicide to be considered a "nonhomicide" offense for purposes of sentencing, as Mantich urges.

FN28. Brief for appellant at 22.

FN29. *Id.* at 21.

FN30. *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

FN31. *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

FN32. *Enmund,* 458 U.S. at 797, 102 S.Ct. 3368.

FN33. *Tison,* 481 U.S. at 158, 107 S.Ct. 1676.

Admittedly, the reasoning in *Miller v. Alabama*[FN34] offers some support for Mantich's argument. As noted, in *Miller,* the Court reasoned that because individualized sentencing was required for adults in cases involving imposition of the death penalty, the greatest possible penalty imposed upon an adult, individualized sentencing was also required for juveniles in cases involving imposition of the penalty of life imprisonment without parole, the greatest possible penalty imposed upon a juvenile. Mantich argues that because the Court equated death for adults with life imprisonment for juveniles in one context, all of the Court's previous requirements for constitutional imposition of the death penalty on adults now apply to constitutional imposition of life imprisonment without parole on juveniles. Particularly, he contends that the *Enmund* /*Tison* rationale is now directly applicable to him and that he cannot be sentenced to the greatest possible punishment available because there has been no showing that he killed or intended to kill.

FN34. *Miller, supra* note 1.

The record contains some evidence concerning intent to kill. During Mantich's sentencing hearing, the court addressed the question of who pulled the trigger and stated:

> You admitted on two separate occasions separated by a month that you in fact fired the shot which killed ... Thompson.
>
> The admission you made directly after the incident and particularly coupled with the admission to law enforcement personnel a month later with thoughts, feelings, and corroboration which would go along with the murder of someone certainly strongly suggests that you in fact pulled the trigger. The murder of ...

> Thompson at pointblank range by putting a gun against his head and firing it is brutal beyond description and cold....
>
> You murdered a blameless person ... Mantich. One who had every right and expectation to lead his life without being subjected to a mindless, violent death carried out by you.

And on direct appeal, with regard to the insufficient evidence claim, we wrote:

> The facts taken in the light most favorable to the State are such that a finder of fact could conclude beyond a reasonable doubt that Mantich committed murder while aiding and abetting in the kidnapping and robbery of Thompson and used a firearm to commit a felony. There is sufficient evidence to demonstrate that Mantich aided and abetted the kidnapping and robbery perpetrated against Thompson. When Eona and Brunzo left the party and returned with the stolen van, Mantich joined them over the strong objections and physical restraint of his girl friend. Mantich testified that he heard Eona and Brunzo tell Thompson they were going to kill him, and Mantich watched as Eona and Brunzo repeatedly jabbed Thompson in the head with the barrels of their guns. Mantich's statement to police was sufficient to establish that he was handed a gun, placed the gun against the back of Thompson's head, and pulled the trigger.
>
> ***16** Even if the jury was uncertain as to whether Mantich actually shot Thompson, the evidence supports the jury's finding that Mantich aided and abetted in the kidnapping and robbery of Thompson. It was undisputed that Thompson was killed by someone in the van while the group was kidnapping, robbing, and terrorizing him. The group forcibly restrained Thompson with the express intent of robbing and terrorizing him. The evidence shows that Mantich encouraged these activities and participated in the verbal terrorization of Thompson. This evidence is sufficient to convict Mantich of felony murder and use of a weapon to commit a felony.[FN35]

FN35. *State v. Mantich*, 249 Neb. 311, 328–29, 543 N.W.2d 181, 193–94 (1996).

Even if the record did not demonstrate that Mantich either killed or intended to kill, I would not extend the Court's holding in *Graham* to a juvenile convicted of felony murder. At the time Mantich committed his crime, the sentence in Nebraska for first degree murder was either mandatory life imprisonment or death.[FN36] *Graham* held that the Eighth Amendment prohibited sentencing a juvenile to the maximum penalty of life imprisonment without parole for the nonhomicide offense which the juvenile committed. That is a far different issue than whether the Eighth Amendment prohibits imposing the minimum sentence of life imprisonment without parole on a juvenile who committed first degree murder. As the Court noted in *Graham*, nonhomicide crimes "differ from homicide crimes in a moral sense."[FN37] I would urge that we join the other jurisdictions which have held that *Graham* has no application to a juvenile convicted of a homicide offense under a felony murder theory.[FN38]

FN36. See Neb.Rev.Stat. §§ 28–105 (Reissue 1989) and 28–303 (Reissue 1995).

FN37. *Graham*, 560 U.S. at 69, 130 S.Ct. 2011.

FN38. See, *Arrington v. State*, 113 So.3d 20 (Fla.App.2012); *Jackson*, *supra* note 27; *Bell v. State*, 2011 Ark. 379, 2011 WL 4396975 (2011) (unpublished opinion).

UNCONSTITUTIONALLY DISPROPORTIONATE CLAIM

Unlike Mantich's argument based on *Graham*, his claim that his life imprisonment sentence was unconstitutionally disproportionate to his crime could have been raised at the time of sentencing and on direct appeal. The constitutional principle of proportionality was well established at the time of Mantich's first degree murder conviction.[FN39]

Because the issue was not raised at sentencing or on direct appeal, it is procedurally barred in this postconviction proceeding. However, I will address the merits of the issue in the context of Mantich's claim that his trial and appellate counsel was ineffective in failing to raise it.

FN39. See, *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983); *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910).

INEFFECTIVENESS OF TRIAL AND APPELLATE COUNSEL

When a defendant was represented both at trial and on direct appeal by the same lawyers, generally speaking, the defendant's first opportunity to assert an ineffective assistance of trial counsel claim is in a motion for postconviction relief.[FN40] That is the circumstance here. The record shows that Mantich was represented at trial and on direct appeal by the same attorney. He alleged in his postconviction motion that his counsel was ineffective in failing to argue at sentencing and on direct appeal that a life imprisonment sentence would constitute cruel and unusual punishment.

FN40. *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*,[FN41] to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense.[FN42] In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[FN43] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[FN44] The entire ineffectiveness analysis is viewed with the strong presumption that counsel's actions were reasonable.[FN45] Defense counsel is not ineffective for failing to raise an argument that has no merit.[FN46] Accordingly, I will examine the merit of Mantich's claim that his life imprisonment sentence is unconstitutionally disproportionate to his crime.

FN41. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

FN42. *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

FN43. *Id.*

FN44. *Id.*

FN45. *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008).

FN46. *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010).

***17** The Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."[FN47] The U.S. Supreme Court has characterized this as a " 'narrow proportionality principle' "[FN48] which " 'does not require strict proportionality between crime and sentence,' "[FN49] but, rather, " 'forbids only extreme sentences that are "grossly disproportionate" to the crime.' "[FN50] The Court has identified objective criteria which should guide an Eighth Amendment proportionality analysis, including "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[FN51]

FN47. *Solem*, 463 U.S. at 284, 103 S.Ct. 3001.

FN48. *Ewing v. California*, 538 U.S. 11, 20, 24, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003), quoting *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring in part and

concurring in judgment). See, also, *Solem, supra* note 39.

FN49. *Ewing*, 538 U.S. at 23, 123 S.Ct. 1179, quoting *Harmelin, supra* note 48 (Kennedy, J., concurring in part and concurring in judgment).

FN50. *Id.*

FN51. *Solem*, 463 U.S. at 292, 103 S.Ct. 3001.

But "intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." FN52 Courts must give " 'substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes,' " bearing in mind that the Eighth Amendment "does not mandate adoption of any one penological theory" and "marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure." FN53 The "culpability of the offender" is also a factor in the analysis. FN54 In its most recent application of these principles to a sentence of imprisonment, the U.S. Supreme Court in *Ewing v. California* FN55 upheld a sentence of 25 years' to life imprisonment for grand theft under California's "three strikes law," concluding that it was not " 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.' " FN56

FN52. *Harmelin*, 501 U.S. at 1005, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in judgment). See, also, *Ewing, supra* note 48.

FN53. *Harmelin*, 501 U.S. at 999, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in judgment).

FN54. *Solem*, 463 U.S. at 292, 103 S.Ct. 3001.

FN55. *Ewing, supra* note 48.

FN56. *Id.*, 538 U.S. at 30, 123 S.Ct. 1179, quoting *Harmelin, supra* note 48 (Kennedy, J., concurring in part and concurring in judgment).

The same conclusion is inescapable here. First degree murder is the most serious criminal offense defined by Nebraska law. "[I]n terms of moral depravity and of the injury to the person and to the public," other serious crimes do "not compare with murder." FN57 Mantich received the minimum sentence which can be given to one convicted of first degree murder. Although he seeks to minimize his personal involvement in the events which led to the death of Thompson, we noted on direct appeal that "Mantich's statement to police was sufficient to establish that he was handed a gun, placed the gun against the back of Thompson's head, and pulled the trigger." FN58 We further noted that the group robbed, terrorized, and forcibly restrained Thompson and that "Mantich encouraged these activities and participated in the verbal terrorization." FN59

FN57. *Coker v. Georgia*, 433 U.S. 584, 598, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). See, also, *Graham, supra* note 3.

FN58. *Mantich*, 249 Neb. at 328, 543 N.W.2d at 194.

FN59. *Id.* at 329, 543 N.W.2d at 194.

***18** Mantich cites several state court decisions from other jurisdictions in support of his Eighth Amendment argument. But those cases are either distinguishable on the facts or otherwise unpersuasive. Considering the gravity of the offense and all of the relevant facts and circumstances, notwithstanding Mantich's youth, there is no basis for a "threshold inference" FN60 that his sentence was grossly disproportionate to his

crime. Because Mantich's Eighth Amendment claim is without merit under either alternative formulation, his counsel was not ineffective in not asserting it at sentencing or on direct appeal.

> FN60. See *Graham*, 560 U.S. at 93, 130 S.Ct. 2011 (Roberts, J., concurring in judgment).

CONCLUSION

To summarize, in my view, the rule announced in *Miller* is procedural and does not apply to Mantich on collateral review. I would find that *Graham* has no application to Mantich's sentence of life imprisonment for first degree felony murder, a homicide, and that Mantich's alternative claim that his sentence was grossly disproportionate to his crime is procedurally barred. Because these claims are without merit, Mantich's trial and appellate counsel was not ineffective in failing to assert them. And because the files and records conclusively show that Mantich's motion for postconviction relief is without merit, the district court did not err in denying the requested relief without conducting an evidentiary hearing. I would affirm the decision of the district court.

Heavican, C.J., joins in this dissent.

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