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-Appellant,

-v-

RAYMOND CURTIS CARP,

Defendant-Appellee.
_____/

Supreme Court No. 146478

Court of Appeals No. 307758

Circuit Court No. 06-001700-FC

AMICUS CURIAE BRIEF
OF THE STATE APPELLATE DEFENDER OFFICE

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(ORAL ARGUMENT REQUESTED)

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Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

II. DO STATE RETROACTIVITY RULES REQUIRE APPLICATION OF *MILLER*?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

SUMMARY OF ARGUMENT

Miller must be applied to Mr. Carp and others similarly situated under federal retroactivity principles. Although it dictates that sentencers follow a certain process and, for now, allows the imposition with life without parole for juveniles, *Miller* primarily imposes several substantive requirements that qualify for retroactive application. The substantive aspects stem from the fact that *Miller*: (1) made new facts essential to the imposition of LWOP for juveniles and governs what sentencers must find; (2) gave juveniles a substantive, Eighth Amendment guarantee of a different sentence range and presumption against LWOP; (3) altered the class of offenders and the range of conduct subject to LWOP sentences; and (4) categorically barred mandatory LWOP for juveniles, which is recognized as a specific form of punishment under the Eighth Amendment.

That *Miller* should apply retroactively is reflected in the Supreme Court's decision itself, which applied the new rule to Kuntrell Jackson, who came before the Court on the same issue long after his conviction was final. Under *Teague v Lane,* even-handed justice requires that the new rule be applied to all who are similarly situated to the party whom the rule was originally applied to, which includes Mr. Carp and all others whose convictions are final.

Finally, even if it could be appropriately labelled as purely procedural, *Miller* represents a watershed change in the law that requires retroactive application under *Teague v Lane*. *Miller* recognized that most LWOP sentences are disproportionate and therefore grossly inaccurate when imposed without consideration of mitigating factors. Failure to apply *Miller* would seriously diminish the likelihood of obtaining accurate sentences for juveniles. Furthermore, *Miller* marks a sea-change in the law by applying, for the first time ever, the individualized capital-sentencing doctrine outside of the death penalty context. Doing so recognized for the

first time that LWOP for juveniles is the same as death for adults, mandating the same substantive and procedural rules be applied in both contexts.

Applying the three criterion for retroactivity under state rules also compels application of *Miller* to Mr. Carp and others who are similarly situated. *Miller* itself indicated that juveniles subject to mandatory LWOP received cruel and unusual, and inaccurate sentences; thus its purpose implicates the integrity of the fact-finding process of sentencing in Michigan. Additionally, all juvenile lifers relied on the pre-*Miller* rule because they were barred across the board from presenting mitigation at their sentencing hearings. Moreover, all those juveniles received sentences that violated the Eighth Amendment and the vast majority of those would have received lesser sentences had *Miller* been followed. Finally, applying *Miller* retroactively would mean resentencing for a number of individuals that comprise less than one percent of the felony cases handled in Michigan for *a single year,* and the state could reap long term financial benefits from the reduced incarceration costs *Miller* will likely provide. Accordingly, retroactive application of *Miller* is required under state law as well.

I. FEDERAL RETROACTIVITY RULES REQUIRE RETROACTIVE APPLICATION OF *MILLER.*

A. Miller has a fundamentally substantive impact on sentences; therefore it should apply retroactively.

All agree that if *Miller v Alabama* and *Jackson v Arkansas,* 132 S Ct 2455 (2012) impose a substantive rule, the case applies retroactively; if the rule is exclusively procedural, it does not unless it represents a "watershed" rule. *Teague v Lane*, 489 US 288, 311-313 (1989); *Schriro v Summerlin*, 542 US 348, 352 (2004). The specifics and intricacies of the *Teague* rule have been well-briefed by counsel for Mr. Carp and supporting amici, and SADO hereby adopts their excellent arguments. The following overview of retroactivity law further highlights the substantive nature of *Miller,* and exposes the flaws in arguments advanced by those attempting to label *Miller* a purely procedural rule.

In *Teague v Lane, Schriro v Summerlin,* and several cases in between, the United States Supreme Court has defined substantive rules that apply retroactively to include the following:

1. Rules "making a certain fact essential to" the sentencer's authority to impose a particular penalty, in contrast with procedural rules, which "regulate only the manner of determining the defendant's culpability," *Summerlin,* 542 US at 353-354, citing *Bousley v United States,* 523 US 614, 620 (1998);

2. Rules that create a "substantive categorical guarante[e] accorded by the Constitution," *Saffle v Parks*, 494 US 484, 494-495 (1990);

3. Rules that alter the "range of conduct or class of persons that the law punishes," or that narrow the scope of a criminal statute by interpreting its terms, *Summerlin*, 542 US at 351-353; citing *Bousley,* 523 US at 620-621.

4. "[R]ules prohibiting a certain category of punishment for a class of defendants because of their status or offense," *Penry v Lynaugh*, 492 US 302, 330 (1989);

5. Rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Teague,* 489 US at 311.

Substantive rules like these must apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Summerlin*, 542 US at 352, citing *Bousley,* 523 US at 620. In contrast, procedural rules, those that regulate only the manner of determining guilt or culpability, "merely raise the possibility that someone convicted with use of an invalidated procedure might have been acquitted otherwise." *Id*. at 352. Definitions 1 through 4 above describe precisely what *Miller* has done.

1. Miller declared that new facts are essential to impose LWOP, rather than just regulating how such sentences are determined.

One succinct way to sum up the substantive/procedural divide is to say that a rule changing only "how" a sentence must be determined is procedural; a rule that changes what must exist to impose a particular sentence is substantive. *Saffle*, 494 US at 490 ("There is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision."); *Summerlin*, 542 US at 353 (rules that "regulate only the *manner of determining* the defendant's culpability" are procedural), citing *Bousley*, 523 US at 620. Said differently, rules that make new facts essential to the imposition of a certain sentence are substantive in nature. *Id.* at 354.

Miller did not just outline how already-essential sentencing factors are to be determined to authorize LWOP. The new rule "imposed a new requirement as to what a sentence must

consider in order to constitutionally impose life imprisonment without parole on a juvenile." *State v Mantich*, 287 Neb 320, *10 (2014) (citations omitted). The first new essential fact is age. Before *Miller*, age was immaterial; now if the sentencer finds the offender was older than 17, it must impose LWOP without considering anything else. If, however, the defendant was younger than 18, additional facts must be found.

For those under 18, the court must consider and weigh all the aggravating and mitigating factors about the defendant and the crime, including the various "mitigating qualities of youth" outlined in *Miller*, to determine whether he or she is "the juvenile offender whose crime reflects unfortunate yet transient immaturity," or "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 132 S Ct at 2469, quoting *Roper v Simmons*, 543 US 551, 573 (2005); and *Graham v Florida*, 560 US 48, 67-68 (2010). A finding that the juvenile falls into the former, presumptive category requires something less than LWOP. If, and only if, the court finds the defendant falls within the latter, much-smaller category it can impose the "uncommon" and "rare" LWOP sentence. *Miller*, 132 S Ct at 2469.

Attempts by the Court of Appeals and the State to label *Miller* as purely procedural elide this effect on sentencing. To be sure, *Miller* declined to consider the parties' alternative request to impose a categorical ban on LWOP sentences for all juveniles. *Miller*, 132 S Ct at 2469.[1] And, *Miller* did explicitly state that new procedures are needed to determine the appropriate punishment for juveniles where LWOP is the maximum. But the mere fact sentencers still have the authority to reach the ceiling of a new sentence range does not change the fundamental truth

[1] In this respect, those opposed to retroactivity mischaracterize *Miller* when they assert that the Court "rejected" a categorical bar on LWOP. To the contrary, the *Miller* Court expressly declined to address the issue because its holding that *mandatory* LWOP violated the Eighth Amendment was sufficient to resolve both cases. *Miller*, 132 S Ct at 2469.

that new facts must be found to reach that ceiling. *Summerlin*, 542 US at 354. Furthermore, *Miller's* procedural requirements are the direct result of the substantive change in the law that prohibits mandatory LWOP and makes new facts essential to the imposition of LWOP. *See State v Ragland*, 836 NW2d 107, 115-116 (Iowa 2013) (holding *Miller* retroactive and explaining that while *Miller* mandates new procedures, those procedures are "the result of a substantive change in the law"), citing *Summerlin,* 542 US at 354.

Schriro v Summerlin, the primary authority cited by those opposed to retroactive application, actually guts their argument and definitively shows *Miller* is substantive. *Summerlin* considered whether the Court established a substantive or a procedural rule when it held in *Ring v Arizona,* 536 US 584 (2002), that juries rather than judges must find aggravating factors necessary to authorize death sentences, and that those facts must be proved beyond a reasonable doubt rather than a preponderance. *Summerlin* held *Ring* affected only procedures and not the substance of Arizona's death penalty law. This is because the same range of sentences applied to the same offenders, the same crimes, and the same conduct before and after *Ring.* And, the same aggravating factors had to be found to authorize death after *Ring.* *Summerlin,* 542 US at 353-354:

> *Ring* altered [only] *the range of permissible methods* for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment. Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules, a conclusion we have reached in numerous other contexts.

Id. (emphasis added) (citations omitted). The Court explained the substantive/procedural divide in a way that is instructive here:

> This Court's holding [in *Ring*] that, because Arizona has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as

> this Court's *making a certain fact essential to the death penalty*. *The former was a procedural holding; the latter would be substantive.*

Id. at 354 (emphasis added).

Miller fits squarely within this latter example. The Court made "certain facts essential" to LWOP, including age and the absence of mitigating factors. It did more than address the "manner of determining" culpability, and it did not merely shift decision-making authority – just as before *Miller*, judges have the exclusive authority to sentence individuals, but now they must consider and find new facts. At its core, *Miller* addressed what needed to be proved to authorize LWOP, and is therefore, a substantive rule.

In an effort to paint *Miller* as purely procedural, retroactivity opponents argue that judges can somehow "consider" mitigating factors and impose LWOP without finding new facts to support such sentences. See Brief of Attorney General, pp. 14-16 (asserting that *Miller* merely "enables" judges to consider mitigating factors before imposing LWOP); *People v Carp*, 298 Mich App 472, 514-515 (2012). In other words, they assert that LWOP sentences are not cruel and unusual punishment so long as sentencing judges just "think about" the *Miller* factors before imposing LWOP.

This position is belied by *Miller's* admonishment that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole" and that "elision of all these differences" between juveniles and adults is "strictly forbidden when a juvenile confronts a sentence of life (and death) in prison." *Miller*, 132 S Ct at 2465, 2468; *see also Mantich*, 278 Neb at *10-11; *Ragland*, 836 NW2d at 115-116. How can a judge "consider" facts that *Miller* deemed "too much" to disregard, without weighing and determining whether they preponderate in favor of the "uncommon," "rare" sentence of LWOP? *Miller*, 132 S Ct at 2468,

2470. How can those factors be "nonessential" to the imposition of LWOP where ignoring them "poses too great a risk of disproportionate punishment"? *Id.* at 2470; *see also, Summerlin*, 542 US at 354 (explaining that rules that make new facts essential a certain punishment are substantive). Clearly, *Miller* intended consideration of mitigating factors to be more than just a pro-forma exercise fulfilled by a simple statement such as "I have considered mitigation." The judge too must weigh and resolve those facts in a manner that justifies a particular sentence.

The Legislature itself recognized this substantive shift in its recent attempt to implement *Miller*.[2] The new, imminent sentencing scheme that the Governor is expected to sign will require that in considering a prosecutor's request to impose LWOP for a juvenile, the judge "*shall consider* the factors listed in *Miller v Alabama*. . . and may consider any other criteria *relevant to its decision*, including the individual's record while incarcerated." SB 319, § (6) (emphasis added) (Attached hereto as Attachment A). By mandating consideration of facts and specifying those facts as "relevant," the Legislature acknowledged they are prerequisites that must be given substantive treatment rather than just a mention. Even more telling is the requirement that the judge:

> *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.

SB 319 § (7) (emphasis added). The mandate that the court cite its reasons for imposing a particular sentence, combined with *Miller's* admonishment that judges are forbidden from ignoring mitigation evidence, reveals the unambiguous recognition that more than just the

[2] Some states have found additional support for the conclusion that *Miller* is substantive based upon observations that as a direct result of the decision, states were forced to change their substantive laws, or their substantive laws could no longer be applied. *See Jones v State*, 122 So 3d 698, 702 (Miss 2013); *Mantich*, 278 Neb at *11.

"consideration" of mitigation evidence is required. Courts cannot impose LWOP without first considering and weighing mitigation factors and finding "irreparable corruption" and incorrigibility if a level that is inconsistent with youth. *Miller*, 132 S Ct at 2469. Thus, it is specious to claim that *Miller* does not make new facts essential to LWOP, and this case fits squarely within the substantive category envisioned by the *Summerlin* Court.

2. Under *Miller,* juveniles convicted of first degree murder have an Eighth Amendment right to a different sentence range, as well as a presumptive sentence of less than LWOP. This is fundamentally a substantive constitutional categorical guarantee afforded by the constitution.

Those opposed to retroactive application simplistically argue that *Miller* is exclusively procedural because the Court stopped short of categorically barring LWOP for juveniles and permitted that sentence, for now, so long as mitigation is first considered. While *Miller* did do those things, it is misleading and myopic to assert that its effect is so limited. The fact is, *Miller* also mandates a completely different sentence range, as well as a presumption against LWOP for juveniles. This grant of a "substantive categorical guarantee" for juveniles places *Miller* within the second example of substantive rules listed above. *Saffle*, 494 US at 494-495; *see also Mantich,* 287 Neb at *11 ("*Miller* amounts to something close to a de facto substantive holding, 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 the juvenile cannot be distinguished from an adult based on diminished capacity or culpability.") (citations omitted).

Pre-*Miller* only one sentence was authorized and indeed, required for all offenders who committed certain crimes. After *Miller* the Eighth Amendment requires that a different sentence *range* apply to juveniles. Under impending legislation, that range is a minimum of 25-45 years

to a maximum of at least 60 years, or life without parole. See SB 318; SB 319 (Attachment A). Not only that, but in requiring LWOP sentences to be "uncommon," *Miller* confers upon juveniles a second substantive right in the form of a presumption against LWOP. *Miller*, 132 S Ct at 2469, 2481 (Roberts, C.J., dissenting) (noting that "uncommon" is a synonym for "unusual"). The effect of granting a completely different sentence range for juveniles is the very essence of a substantive law.

A hypothetical demonstrates this. Consider a Michigan law such as burglary with explosives, which requires imposition of a mandatory minimum 15-year prison sentence upon conviction. MCL 750.112. Now, suppose the Supreme Court imposed a constitutional ban on applying that mandatory minimum to juveniles. Instead, the guidelines grid for Class A offenses, the crime class for that offense, must be used. MCL 777.62. Furthermore, while a 15-year sentence is still available, the hypothetical ruling requires the grid to top out at something less than that, say 14 years, for juveniles. The court may exceed 14 years, but only if valid substantial and compelling reasons justifying a departure are found. MCL 769.34(3). Of course, the hypothetical ruling requires new procedures – guidelines scoring, departures, etc. But there can be little serious dispute that the effect of such a holding is, at its core, substantive. The sentence range is different and lower; and to impose a sentence equal to what an adult would receive requires a departure – something that is reserved for the "exceptional" case.

Every relevant aspect of this hypothetical is like our situation. Michigan essentially has a mandatory "minimum" of LWOP for crimes such as first degree murder – the only difference is that it also amounts to the maximum. Where the hypothetical ruling required use of the Class A sentencing grid, *Miller* drops the sentencing floor for juveniles so that a sentence range must apply, under pending legislation, of 25-40 years at the minimum and 60 years at the maximum.

SB 319. And under *Miller*, sentencing courts may only impose LWOP for juveniles in the "uncommon" (exceptional) case. *C.f. Miller*, 132 S Ct at 2469 (instructing that LWOP for juveniles must be "uncommon"), 2481 (Roberts, C.J., dissenting) (noting that a common synonym for uncommon is "unusual.") *with People v Babcock*, 469 Mich. 247, 264-65 (2003) (departures from the presumptive guideline range sentence may only be imposed in "exceptional" cases).

The establishment of a completely different set of sentencing options and a presumption against the maximum for juveniles marks this case as substantive for retroactivity purposes. *Miller* substantially altered the range of punishment certain categories of defendants face for certain crimes. A juvenile who does not qualify for LWOP after *Miller*, but who nonetheless remains subject to an LWOP sentence is subject to "a punishment that the law cannot impose upon him." *Summerlin*, 542 US at 352.

There is no doubt that *Miller* also mandates new procedures. Yet the new procedures are the result of a substantive change in the law that prohibits mandatory LWOP sentencing, and are necessary to implement this substantive change in the law. *Ragland*, 836 NW2d at 115. For these reasons, the requirement of new procedures does not alter *Miller's* fundamental substantive effect. Thus, *Miller's* statement that it was requiring "that a sentencer follow a certain process" must be read in context of its ultimate holding that grants juveniles new substantive rights to a different range and to new essential prerequisites to the authority to impose LWOP. *Miller*, 132 S Ct at 2459.

3. *Miller* altered the range of conduct and the class of persons punished, and narrowed the scope of Michigan's first degree murder law.

Miller altered the range of conduct and the class of persons subject to LWOP sentences. *Summerlin*, 542 US at 351, 353. It also mandated a change in Michigan's murder statute so as to exclude most juveniles from the maximum punishment authorized. *Id.*

Clearly, there is a different class of individuals that is now treated differently because of their status; "children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S Ct at 2464. And *Miller* required different punishment, different sentence schemes, and the existence of different facts to support an LWOP sentence for juveniles. *Id.* at 2469. The decision thus altered and narrowed the class of persons who can be punished with LWOP.

Miller also narrowed the range of conduct punishable by LWOP by winnowing out the majority of offenses committed by juveniles and reserving LWOP for the rare case. For instance, crimes committed by aiding and abetting, without the intent to kill, or without sophistication or planning, as well as those committed by particularly youthful, immature, and unsophisticated juveniles, juveniles with mental or emotional challenges, and juveniles with unstable dysfunctional familial backgrounds and upbringing, are sure to have been removed from the range of conduct subject to LWOP. *Miller*, 132 S Ct at 2468. By so narrowing the range and type of conduct punished by LWOP, *Miller* enacted a fundamentally substantive change in the law that must be applied retroactively. *See Jones*, 122 So 3d at 702.

Indeed, *Miller* itself said it was changing the class of offenders and reducing the range of conduct subject to LWOP when it declared that upon consideration of the various mitigating factors about the offender and the crime itself, "appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon*," and that it is only "the *rare* juvenile offender

whose crime reflects irreparable corruption" that should receive such a sentence. *Miller*, 132 S Ct at 2469 (emphasis added). A rule that by design reduces the number of persons subject to and actually punished with a certain sanction is quintessentially substantive in nature and must be retroactively applied. To do otherwise necessarily means that a substantial portion of juveniles, sentenced before *Miller*, if not the vast majority of them, are serving.... "a punishment that the law cannot impose upon them." *Summerlin*, 542 US at 352.

4. *Miller* bars a particular category of punishment for the class of juvenile offenders.

While it is true that *Miller* stopped short of barring *all* LWOP sentences for juveniles, its effect was to prohibit a category of punishment – *mandatory* LWOP —for the juvenile class of offenders because of juveniles' unique status. *Graham,* 506 US at 477.

When applied to the death penalty, for instance, mandatory sentences have long been recognized as a unique, stand-alone form of punishment for Eighth Amendment purposes. *See Woodson v North Carolina,* 428 US 280, 304 (1976); *Harmelin v Michigan,* 501 US 957, 995 (1991); *Sumner v Shuman*, 483 US 66, 73 (1987) (recognizing the Eighth Amendment mandated "individualized capital-sentencing doctrine"); *see also People v Bullock*, 440 Mich 15, 42 (1992) (indicating that mandatory sentence of life without parole is a distinct form of punishment). Moreover, the Court has invariably held that this form of punishment violates the Eighth Amendment. *Woodson,* 428 US at 304*; Harmelin,* 501 US at 994 ("We have held that a capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that that punishment is 'appropriate.'").

Until *Miller* the bar against that form of punishment, mandatory sentencing, was limited to the death penalty. *Harmelin*, 501 US at 995 (holding that outside the death penalty, "a sentence which is not otherwise cruel and unusual" does not "becom[e] so simply because it is 'mandatory"). But *Miller* expanded the "individualized capital-sentencing doctrine," *Harmelin*, 501 US at 995, to the non-death context for juveniles. *Miller*, 132 S Ct at 2470 (holding that *Harmelin* "had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders."). Thus, mandatory LWOP is now recognized as a distinct form of punishment where juveniles are involved, and that form of punishment cannot apply to the juvenile class of offenders under the Eighth Amendment. *See Diatchenko v District Attorney for Suffolk Dist*, 466 Mass 655, 666 (2013); *Ragland*, 836 NW2d at 115-116; *Jones*, 122 So 3d at 702.

Retroactive application of *Miller* is also supported by the Supreme Court's treatment of earlier analogous decisions on the death penalty, a penalty the Court placed on the same plane as LWOP for juveniles. *Miller*, 132 S Ct at 2467*; Graham*, 560 US at 89-90 (Roberts, C.J. concurring). In the seminal case of *Furman v Georgia*, *4*08 US 238 (1972), the Court held that the system of imposing the death penalty nationwide was cruel and unusual because capital sentencing juries had nearly unbridled and unguided discretion, creating the specter that death was being imposed in a "wanto[n]" and "freakis[h]" manner. *Id.* at 310 (Stewart, J., concurring); *Johnson v Texas*, *5*09 US 350, 360 (1993). That decision undoubtedly had a "procedural" aspect: it was established guidelines – or the lack thereof – that led to widespread disproportionate death sentences. Subsequently, the Court made clear that the underlying Eighth Amendment basis for *Furman*, of preventing cruel and unusual punishment, was one of substance rather than procedure, and noted that "we have not hesitated to apply *[Furman]*

retrospectively." *Robinson v Neil*, 409 US 505, 507-508 (1973), citing *Walker v Georgia*, 408 US 936 (1972). Rooted in this conclusion also is the recognition that pre-*Furman* courts lacked the authority to impose death sentences, essentially rendering those judgments *void ab initio*. *See United States v Johnson*, 457 US 537, 551 (1982).

Here, similar to *Furman*, the pre-*Miller* mandatory LWOP for juveniles is so contrary to the Eighth Amendment, so fraught with problems of disproportionality, that courts essentially lacked authority to impose it. The fact that *Miller* announces the same type of categorical rule as those decisions striking down the mandatory death penalty counsels strongly in favor of retroactivity. *See Tyler v Cain*, 533 US 656, 668 (2001) (O'Connor, J., concurring) (observing that multiple holdings of the Court may logically dictate retroactivity where the Court "hold[s] in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type"). *Miller* thus applies retroactively.

5. *Miller's* comment that it was not imposing a categorical bar and that it was requiring that sentencers follow a certain process did not render its substantive new rule exclusively procedural.

Those opposing retroactivity rely almost exclusively on two isolated passages from *Miller* to argue it is purely procedural in nature. *Carp*, 298 Mich App at 513; Plaintiff-Appellee's Brief, p. 16; Brief of Attorney General at 8-9. The first is *Miller's* statement that, "Although we do not foreclose a sentencer's ability to [impose LWOP] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S Ct at 2469. Based upon this language, retroactivity opponents claim that the Court "refused" to categorically bar

LWOP sentences or somehow affirmatively endorsed LWOP on Eighth Amendment grounds, making the *Miller* decision exclusively procedural.

The express language of *Miller* shows the Court did not reject a categorical bar on the merits, but rather opted not to reach that issue because its holding that mandatory LWOP was unconstitutional was sufficient to resolve the cases before it. *Id.* When read in context, it is clear that this oft cited language does not represent the rule or holding of *Miller*, or affirmatively establish that the Eighth Amendment permits sentences of LWOP for juveniles. *See Carp*, 298 Mich App at 513; Plaintiff-Appellee's Brief at 16; Brief of Attorney General at 8-9. Rather, this statement is better understood as an exercise in judicial conservatism, clarifying the limited scope of its decision and the fact that it expressly did not consider whether the Eighth Amendment categorically bars LWOP for juveniles. *Miller*, 132 S Ct at 2469 ("Because [our] holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles...").

Even if this statement were intended as a rejection of a more general categorical bar on LWOP for juveniles, despite *Miller's* express statement to the contrary, a categorical bar is not the exclusive definition of a substantive rule. As discussed above, the Court has provided at least five different definitions of substantive rules, four of which encompass *Miller*.

A second passage from *Miller* that retroactivity opponents cite by rote as a catchphrase for their position is the following:

> Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty.

Id. at 2471. The State and the Court of Appeals suggest that this sentence definitively establishes *Miller*'s purely procedural nature. *Carp,* 298 Mich App at 513-515; Plaintiff-Appellee's Brief at 16; Brief of Attorney General at 8-9. This argument erroneously treats this statement as if it was the rule of *Miller*, wrongly equates the term "process" with procedure, ignores the underlying impetus for the Court's discussion of process, and disregards the context in which the Court made this statement.

The above language does not represent the holding of *Miller* and does not even appear in the second section of the opinion which consists of the Court's holding. *See Miller,* 132 S Ct at 2463-2470. Rather, the above language appears in the third section of the *Miller* decision and is part of a larger discussion explaining why the national consensus was immaterial to the Court's opinion, in response to arguments raised by the states and dissenting justices. *Id.* at 2470.

As discussed above, *Miller* does address procedural aspects of juvenile sentencing and explicitly mandates procedure. However, that requirement was only necessary because of the Court's underlying, substantive holding that mandatory LWOP as applied to juveniles violates the Eighth Amendment. *Id.* at 2469. It is unreasonable to treat this one statement, taken out of context, as dispositive of whether the rule of *Miller* is substantive or procedural. This overly simplistic application of *Teague*, disregards the "important" distinction between substance and procedure, a distinction that the United States Supreme Court and our state courts recognize is not always a "simple matter to divine." *Carp,* 298 Mich App at 512, citing *Bousley*, 523 US at 620 and *Robinson,* 409 US at 509.

Thus, the requirements *Miller* imposes on states and the substantive guarantees it affords juveniles reveal that it is primarily substantive in nature and its implementation requires new procedures. The substantive aspects of this new rule mandate retroactive application.

B. The United States Supreme Court made its decision retroactive by applying the new rule to Kuntrell Jackson, whose conviction was final at the time of its decision.

In *Teague*, the Supreme Court declared that, as a threshold matter, it would not announce a new rule in a given case "unless the rule would be applied retroactively to the defendant in the case *and to all others similarly situated*." *Teague*, 489 US at 316 (emphasis added); *see also Penry*, 492 at 313 (noting Supreme Court will not apply a new rule to a case on collateral review unless that rule applies retroactively to all cases on collateral review), *abrogated on other grounds by Atkins v Virginia*, 536 US 304 (2002). Furthermore, once a new rule is applied to the defendant in the case announcing that rule, "evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Teague*, 489 US at 300, 315, *citing Fuller v Alaska*, 393 US 80, 82 (1968) (Douglas, J., dissenting) (if a rule is applied to the defendant in the case announcing the rule, it should be applied to all others similarly situated).

The result is that when the Supreme Court announces a new rule and applies it to a defendant whose conviction is already final, that rule is retroactive. *See also, Tyler*, 533 US at 663. ("The new rule becomes retroactive, not by the decision of the lower court, or by the combined action of the Supreme Court and lower courts, but simply by the action of the Supreme Court.") In *Miller*, the Supreme Court applied its new rule to Kuntrell Jackson. Jackson's conviction became final in 2004, *Jackson v State*, 194 SW3d 757 (Ark 2004), and his case reached the Supreme Court after the state courts affirmed the dismissal of his state habeas corpus petition. *Jackson v Norris*, 2011 Ark 49 (Ark 2011), *cert granted sub nom Jackson v Hobbs*, 132 S Ct 548 (2011). By granting relief in *Jackson*, the Court made its rule fully retroactive to all defendants whose cases are final. *Teague*, 489 US at 300, 309, 316; *see also Tyler*, 533 US at

668 (O'Connor J. concurring) (explaining that Supreme Court need not expressly hold new rule to be retroactive, but retroactivity may be "logically dictate[d]").

If the Court did not intend for its new rule to apply retroactively, it would have announced and applied it only in *Miller*, *Jackson's* companion case that was before the Court on direct review. *C.f. Graham v Collins*, 506 U.S. 461, 466-67 (1993) (refusing to address merits of underlying claim in a collateral case because granting defendant relief would require announcement of new rule), *with Johnson v Texas*, 509 U.S. 350, 352-53 (1993) (noting that defendant raising same issue as petitioner in *Graham* would be entitled to ruling on merits because his case was not final). It did not so limit its holding. And the fact that certiorari was granted on both a final and non-final case signals a deliberate approach. The Court could easily have denied certiorari to Mr. Jackson and required him to litigate the retroactivity of its new rule in the lower court. It did not and instead addressed "two (carefully selected) cases" that were in completely different procedural postures. *Miller,* 132 S Ct at 2489 (Alito, J. dissenting).

Thus, *Teague's* threshold question of retroactivity has been answered. Michigan defendants whose convictions became final before *Miller/Jackson* are "similarly situated" with Kuntrell Jackson. *Teague,* 489 US at 316. Accordingly, the question of retroactivity has initially been answered by the Supreme Court itself in *Miller* and *Jackson*, when it applied its new rule to Kuntrell Jackson.

C. In the alternative, if *Miller* is exclusively procedural, it is a watershed rule of criminal procedure without which the likelihood of an accurate sentence is seriously diminished.

A procedural rule applies retroactively on collateral review under *Teague*, so long as it is a "watershed rule" of criminal procedure, meaning a procedure "without which the likelihood of

an accurate conviction is seriously diminished." *Teague*, 489 US at 311. The so-called watershed exception has since been framed as consisting of two requirements: (1) violation of the new rule must "seriously diminish the likelihood of obtaining an accurate conviction," and (2) the rule must "'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." *Tyler*, 533 US at 665, citing *Sawyer v Smith*, 497 US 227, 242 (1990) (emphasis in original). To be a watershed rule, a new rule must be "essential to the accuracy and fairness of the criminal process" rather than just aimed at improving results. *Sawyer*, 497 US at 242-243. *Gideon v Wainwright*, 372 US 335 (1963), is the archetypal watershed rule by which nearly all new rules are judged. *See e.g., Saffle*, 494 US at 495 (new rule had "none of the primacy and centrality of the rule adopted in *Gideon*"); *Whorton v Bockting*, 549 US 406, 418-421 (2007) (as compared to *Gideon*, *Crawford* was much more limited in scope and its relationship to the accuracy of the factfinding process was far less direct and profound).

Miller's new rule satisfies both requirements of *Teague's* watershed exception. Non-compliance with *Miller* seriously diminishes the likelihood of obtaining an accurate sentence. *Tyler*, 533 US at 665 (citation omitted). *Miller* is specifically designed to ensure proportionate sentences for juvenile homicide offenders, meaning sentences that accurately reflect the circumstances of the offense and the offender. *Miller*, 132 S Ct at 2469 (automatic LWOP for juveniles "poses too great a risk of disproportionate punishment"). *Miller* establishes two fundamental protections for juveniles convicted of homicide offenses: the right to individualized sentencing involving the consideration of the mitigating characteristics of youth, and a presumption against a sentence of life without parole. *Miller*, 132 S Ct at 2469. These protections are necessary because without them, the risk of inaccurate sentencing is "too great." *Id.*

Not only is *Miller's* requirement of individualized sentencing essential to ensure accurate, proportionate, and Eighth Amendment-compliant sentences, *Miller* fundamentally altered our understanding of the bedrock elements of sentencing. *Tyler*, 533 US at 665 (citation omitted). While *Miller* applies only to a subset of criminal defendants, the shift is dramatic; procedures formerly required only for death penalty sentencing because "death is different" must now be applied when considering non-death sentences for juveniles because children are also "different." *See Gregg v Georgia*, 428 US 153, 188 (1976) ("death is different" and so it cannot "be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner"); *Miller*, 132 S Ct at 2470 ("So if (as *Harmelin* recognized) 'death is different,' children are different too," and applying death penalty analysis to juvenile LWOP). This shift represents a fundamental change in both the procedures required to subject juveniles to the harshest sentences available and the circumstances under which the Constitution requires individualized sentencing. *C.f. Harmelin*, 501 US at 957 (refusing to extend individualized sentencing requirement outside of the death sentence context), with *Miller*, 132 S Ct at 2469.

Miller is distinguishable from other new rules determined to fall short of the watershed exception. Unlike many new rules, *Miller* is not merely a new rule aimed at providing an *additional* measure of protection against error by enhancing already existing authorities guaranteeing due process protection against fundamental unfairness. *C.f., e.g. Gilmore v Taylor*, 508 US 333, 340, 345 (1993); *Graham*, 506 US at 478; *Gray v Netherland*, 518 US 152, 155, 170 (1996); *Beard v Banks*, 542 US 406, 419-420 (2004). Rather, *Miller* itself is the authority guaranteeing protection against fundamental unfairness. Similarly, *Miller* is not a rule that merely allocates decision-making authority because, prior to *Miller*, there was no sentencing

discretion to be exercised or allocated. *C.f. Summerlin*, 542 US at 355-357. Finally, *Miller* is certainly distinguishable from new rules where the Court has concluded they are not watershed largely because it was unclear whether the new rule would actually enhance the accuracy of the proceeding. *See Teague*, 492 US at 315; *Saffle*, 494 US at 495; *Goeke v Branch*, 514 US 115, 120-121 (1995); *Whorton*, 549 US at 418-421. The very impetus for *Miller* was that without its new rule the risk of a disproportionate sentence was "too great." *Miller*, 132 S Ct at 2469. Further, the *Miller* Court declared the process it mandated would render LWOP sentences for juveniles "uncommon." *Id.* Prior to *Miller*, 100% of juvenile homicide offenders received a sentence of life without parole, regardless of its proportionality or accuracy. Now, under *Miller*, such sentences will be uncommon, meaning it is certain that the *Miller* decision will actually affect a tremendous improvement in the accuracy of the factfinding process with respect to juvenile sentencing.

For the above reasons, should this Court conclude that *Miller* announced a rule that is exclusively procedural, it must still find that *Miller* applies retroactively because it is a watershed rule of criminal procedure.

II. STATE RETROACTIVITY RULES REQUIRE APPLICATION OF *MILLER.*

Miller also must be applied to cases that are final under state retroactivity rules, which remain in place in Michigan after *Teague.* *See People v Maxson*, 482 Mich 385 (2008), citing *Danforth v Minnesota*, 552 US 264 (2008) (*Teague* "does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a [retroactive] remedy for a violation" of new constitutional rule.).

Judicial decisions have traditionally been given full retroactive effect in this state, but additional considerations arise when the new decision overturns clear precedent. *People v Doyle*, 451 Mich 93 (1996). Michigan courts employ the pre-*Teague*, three-part test of *Linkletter v Walker*, 381 US 618 (1965), for determining retroactivity, which considers: (1) the purpose of the new rule; (2) the general reliance on the old rule, and (3) the effect of retroactive application on the administration of justice. *People v Sexton*, 458 Mich 43, 60-61 (1998); *Maxson*, 482 Mich at 392-393.

The last two *Linkletter* factors "have been regarded as having controlling significance 'only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity.'" *Michigan v Payne*, 412 US 47, 55 (1973), citing *Desist v United States*, 394 US 244, 251 (1969). Furthermore, these factors are dispensed with when the new rule deals with a fundamental right designed to ensure the accuracy of the truth-finding process. *People v Woods*, 416 Mich 581, 618 (1983); *Williams v United States*, 401 US 646, 653 (1971). "Neither good-faith reliance by state or federal authorities on prior constitutional law nor significant impact on the administration of justice has sufficed to require prospective application in these circumstances." *Woods*, 416 Mich at 618.

A. The purpose of Miller was to enhance the accuracy of the juvenile sentencing process, which weighs in favor of retroactivity.

The purpose prong weighs in favor of retroactivity in a case like this, where the purpose of the new rule "implicate[s] the integrity of the fact-finding process." *Sexton*, 458 Mich at 62. Accurate sentences based on individualized, fact-based ascertainment of juveniles' culpability, capacity for change, and prospects for rehabilitation, is the central purpose of *Miller*. With mandatory LWOP, the sentencer "misses too much," about these relevant aspects of the offender and the crime, which "poses too great a risk of disproportionate punishment." *Miller*, 132 S Ct at 2468-2469 (2012); *see also Graham v Florida*, 560 US 48, 90 (2010) (Roberts, J. concurring). The result is that pre-*Miller* sentences are presumptively inaccurate, as only the "uncommon" and "rare" juvenile is an appropriate candidate for LWOP under the Eighth Amendment. *Id.* It is thus abundantly clear that enhancing the accuracy of the fact-finding process was central to the *Miller* rule.

The Court of Appeals and the State short-shrift the *Linkletter* purpose prong by claiming that it is limited to rules pertaining to determining guilt, not culpability. See Brief of Attorney General, pp 27-28; *Carp*, 298 Mich App at 521. This is incorrect. Although caselaw has placed significant emphasis on the guilt phase of criminal proceedings, it has not defined the "fact-finding process" to exclude proceedings that determine culpability. *See Sexton*, 458 Mich at 62. To the contrary, the United States Supreme Court itself established sentencing is an integral part of the "factfinding process." *McConnell v Rhay*, 393 US 2, 3-4 (1968); *Payne*, 412 US at 52-53 (explaining that the sentencing phase is an appropriate subject for considering *Linkletter's*

purpose prong, noting that a sentencing rule "does, however, involve questions touching on the 'integrity' of one aspect of the judicial process.").

In related contexts, the Court has placed sentencing and trial on similar footing for purposes of rules that affect the integrity of both. *See Mitchell v United States*, 526 US 314, 325 (1999) (Where a sentence has yet to be imposed, this Court has rejected the proposition that "incrimination is complete once guilt has been adjudicated."); *see also Estelle v Smith*, 451 US 454, 463 (1981) ("We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial. . .Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees."); *Presnell v Georgia*, 439 US 14, 16-17 (1978) (emphasizing that "fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial"). Michigan shares this view. Though it may not be central to the "conviction" itself, "a sentence following a conviction is as much a part of the final judgment of the trial court as is the conviction itself." *People v Coles*, 417 Mich 523, 535 (1983), *overruled in part on other grounds by People v Milbourn*, 435 Mich 630 (1990). Thus, "to maintain that sentencing proceedings are not part of any criminal case' is contrary to the law and to common sense." *Mitchell*, 526 US at 325-326, citing *Mempa v Rhay*, 389 US 128, 134 (1967).

Maxson, upon which the State and the Court of Appeals rely, does not compel the opposite conclusion. In *Maxson,* this Court found that the purpose prong weighed against retroactively applying the rule in *Halbert v Michigan*, 545 US 605 (2008), which required appointment of counsel on appeal of plea-based convictions, because the new rule did not pertain to the ascertainment of guilt or innocence. *Maxson*, 482 Mich at 393-94. But the Court did not

explicitly foreclose retroactive application of new sentencing rules, nor did it repudiate the line of *Linkletter* cases it previously relied upon that specifically made sentencing a key aspect of criminal proceedings, with which the purpose prong is concerned. *Id.* Furthermore, *Maxson* also indicated the new rule's minimal effect on sentencing when it outlined the low percentage of sentencing reductions defendants could be expected to obtain if given counsel after their convictions became final. *Id.* at 396-397. Thus, upon "balancing the probabilities," the impact and purpose of *Halbert's* new rule was minimal on the reliability and fairness of this aspect of the criminal proceeding. *Payne*, 412 US at 55 (noting that "of course, the question of the impact of particular decisions on the reliability and fairness of any aspect of a criminal proceeding is inherently a matter of balancing 'probabilities'").

When applied to the juvenile LWOP sentences as it should under *Sexton* and *Linkletter*, the purpose of the new rule in *Miller* weighs in favor of retroactivity.

B. Most juvenile lifers have relied upon the old sentencing scheme by foregoing the presentation of mitigation evidence and were harmed because at least half of them would get relief under *Miller*. This weighs in favor of retroactivity.

The second prong of the *Sexton/Linkletter* test also favors retroactivity. This prong considers whether "persons have been adversely positioned in reliance on the old rule," and is not limited to looking at the reliance by the State or victims. *Maxson*, 482 Mich at 394; *see also Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 221 (2007). Relevant to this inquiry is whether a sufficient number of defendants relied on the old rule and suffered harm as a result. *Maxson*, 482 Mich at 395.

Here, the issue is whether a sufficient number of juveniles relied on Michigan's mandatory LWOP scheme by foregoing the presentation of mitigation evidence to the sentencing

court—evidence that, properly considered under *Miller*, would likely weigh heavily against LWOP sentences. In fact, most, if not all, juveniles sentenced pre-*Miller* relied to their detriment on the old scheme – they did not present the mitigation evidence addressed in *Miller* because they could not do anything to mitigate their sentence. Moreover, all of those juveniles received sentences that violated the Eighth Amendment. *Miller*, 132 S Ct at 2464 (noting that all "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment"). Not only that, but *Miller* makes clear that only the "rare" and "uncommon" juvenile would be subject to LWOP if the proper factors were considered and sentencers were permitted to exercise discretion; thus the vast majority of those offenders sentenced under the pre-*Miller* scheme received longer sentences than is acceptable under the Eighth Amendment. *Id.* at 2469; *C.f. Maxson*, 482 Mich at 397-98 (finding that the reliance prong did not weigh strongly one way or the other where only about 10% of defendants likely relied on the old rule and where less than 3% of criminal defendants would have received relief under the new rule).

The second *Sexton* prong also considers whether the state's past reliance on the old rule counsels against retroactivity, but "[b]ecause the amount of past reliance [by the state] will often have a profound affect [*sic*] on the administration of justice, the second and third factors are often dealt with together." *Sexton*, 458 Mich at 63. Where a new rule calls into question the technical validity of prior convictions that will likely burden the criminal justice system by requiring numerous retrials, the effect on the orderly administration of justice weighs against retroactive application. *Id.* at 67. But where a new rule merely affects the sentences that can be constitutionally imposed, the prejudice and effect on the administration of justice is far less significant. *Robinson v Neil*, 409 US 505, 510 (1973). In that instance, "[t]hat which was constitutionally invalid could be isolated and excised without requiring the State to begin the

entire factfinding process anew." *Id.* at 510; *accord, Payne*, 412 US at 57 n 14 (noting lesser prejudice and impact on the administration of justice from retroactive application of *Furman's* death penalty bar). Here, sentences can be "isolated" from the other components of the convictions, and the unconstitutional features of those sentences "excised." *Id.* Rather than re-starting the entire factfinding process, retroactively applying *Miller* would only require judges to examine for the first time the propriety of a limited class of juvenile sentences. Such application of *Miller* will *enhance* the administration of justice by ensuring accurate sentences for juveniles, and that LWOP for juveniles will be "uncommon" as the Eighth Amendment requires. *Miller*, 132 S Ct at 2469.

The Attorney General's effort to defeat the reliance prong distorts the numbers and obfuscates the true level of detrimental reliance on the old rule. Contrary to their contention, the correct matric is not the ratio of juveniles serving LWOP sentences to the total number of all prisoners ever sentenced in Michigan. Brief of Attorney General at 34. Rather, the correct percentage is those who were subject to and affected by the old rule, and those who detrimentally relied on the old rule. As shown above, most, if not all 353 juveniles relied on the old rule – they failed to present mitigation evidence or do anything about sentencing once they were found guilty.

Attempts by the Appellees and the Court of Appeals to brush off the detriment of the old rule to those juveniles by labelling as "speculative" the chances of any particular defendant receiving shorter sentences are specious as well. *See Carp*, 298 Mich App at 522. As noted above, *all* juveniles suffered the detriment of cruel and unusual punishment and *Miller* makes clear that the majority of them would have received something short of LWOP if their sentencers properly applied the mandatory *Miller* factors.

C. The State misframes the numbers to overstate the impact on the administration of justice of retroactively applying *Miller*. The impact is, at worst, neutral when the correct statistics are viewed and compared to the potential benefits to the system.

The impact on the administration of justice that applying *Miller* retroactively is, at worst, in a state of equipoise when one works through the cloud of fuzzy math presented by the State to support its alarmist position. Moreover, the State and Court of Appeals fail to consider the State's goal of rehabilitation, a necessary consideration under state law would be advanced through retroactive application of *Miller*.

1. The real impact of Miller on the administration of justice in Michigan.

Like the State, the Court of Appeals invoked *Maxson* to conclude the impact on the administration of justice weighed against retroactive application. *Carp,* 298 Mich App at 521-22. Importantly, *Maxson* addressed a rule that, if applied retroactively, would potentially impact every indigent defendant who pled guilty to any felony for the 11-year period between 1994 and 2005, presumably a significant number. In contrast, *Miller* retroactivity would impact only the sentencing phase of approximately 363 juvenile lifers. While there no-doubt will be an impact, this is far from the deluge the Court of Appeals implies would result from retroactive application of *Miller*.

Conveniently, the State shifts focus from the ratio of juvenile lifers to all Michigan prisoners in the previous section, Brief of Attorney General at 31, to now highlight the raw number of cases subject to resentencing under a retroactive *Miller* in an attempt to show an adverse impact on the administration of justice, Brief of Attorney General at 32-33. But it is more appropriate to view those numbers from a macro perspective to properly assess the system-

wide impact of retroactive application. When viewed this way, even the State must concede that the relative number of cases affected by the new rule within the system would be "tiny." Brief of Attorney General at 31. The approximately 363 juveniles sentenced in violation of *Miller* comprise about .6 percent of the nearly 52,841 felony cases that were filed in Michigan circuit courts, just in 2012 alone. *See* Michigan Supreme Court Annual Report 2012, p. 30-31, http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Statistics/2012/2012MSCAnnualReport.pdf. Even in the busiest counties that would be hit the hardest by retroactive application, the number is relatively small. For instance, in 2012 alone, Wayne County carried a total felony caseload of approximately 13,606 cases, and it disposed of about 11,696 felonies that year via trial, plea, dismissal, and other miscellaneous actions. *See* SCAO 2012 Court Caseload Report, found at http://courts.mi.gov/education/stats/Caseload/Documents/Caseload/2012/Wayne.pdf, (relevant section attached hereto at Attachment B). The approximately 153 juvenile lifers that potentially would be resentenced in Wayne County amounts to merely 1.12 percent of the total felony caseload and 1.3 percent of the felony cases disposed of, just for one year. *See* Table of Juvenile Lifers by County (attached hereto at Attachment C). A relatively small number that, when compared to the other *Linkletter* factors, does little to tip the scale against retroactivity.

And these numbers represent the *maximum* statistical impact on the system. Contrary to what the State and others imply, there is nothing in the law or the prosecutors' ethical mandates requiring them to push for LWOP sentences in every single one of these 363 cases. *See e.g.*, *People v Jones*, 468 Mich 345, 354 (2003) (prosecutor's role and responsibility is to seek justice and not merely to win cases). Thus, it is reasonable to assume that a number of cases would be resolved by sentence agreement, or that lesser sentences would be imposed where local

prosecutors opt not to seek LWOP and accept the statutory default of a term of years sentence that SB 319 requires. In such cases, strict adherence with *Miller* would not be mandated and the sentencing hearings would be less involved and thus less taxing on the system.

Furthermore, those opposed to retroactivity ignore the fact that applying *Miller* to existing cases could in fact *reduce* the financial burden on the State. Considering the nearly $35,000 annual per-inmate cost of incarceration (which does not account for medical expenses), the prospect of release of some juveniles who would otherwise grow old and die in the system portends at least some saving to the State that could very well mitigate the costs of resentencing. *See* Michigan Public Safety Dashboard, found at https://www.michigan.gov/midashboard/0,4624,7-256-60564---,00.html; *see also,* 2013 SB 318-319 Senate Fiscal Analysis, Floor Summary, pp. 2-3 (9-13-13) (noting the "opportunity for savings" that implementing *Miller* would provide in reduced incarceration costs). Thus, contrary to the claims of the Court of Appeals and other retroactivity opponents, applying *Miller* retroactively would hardly bring the system down.[3]

[3] The State further opposes retroactivity because it would be hard to gather evidence and apply *Miller* to LWOP sentences that are older, "cold" cases. Brief of Attorney General at 32-33. Of course, the older cases represent only a portion of the total number of juvenile lifers, as nearly 2/3 of the total juvenile lifers were sentenced within the past 20 years, the post-computer era. (Attachment C). Moreover, considerations of how "hard" it would be to pursue older cases has hardly deterred the Attorney General's Office from its admirable quest to minister justice by investigating and prosecuting numerous "cold cases" throughout the state. See: http://michigan.gov/ag/0,1607,7-164--252403--,00.html; http://www.mi.gov/ag/0,1607,7-164--257661--,00.html; http://www.michigan.gov/ag/0,1607,7-164-34739_34811-169223--,00.html

2. The State's interest in rehabilitation -- a necessary consideration under the administration of justice prong -- weighs in favor of retroactivity.

The Court of Appeals and the State repeatedly stress the State's interest in finality of its criminal decisions. *Carp*, 298 Mich App at 30; Brief of Attorney General at 31-32. No doubt finality is an important consideration, but retroactive application here would not undermine that interest to the degree that they claim. Lost in their discussion is the strong state interest that actually would be served by applying *Miller* to all -- rehabilitation. As this Court explained prospective application of new rule advances the state's interest in finality,

> and also "serves the State's goal of rehabilitating those who commit crimes because '[rehabilitation] demands that the convicted defendant realize that he is justly subject to sanction, that he stands in need of rehabilitation.' " *Kuhlmann v. Wilson*, 477 U.S. 436, 453, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), *quoting Engle v. Isaac*, 456 U.S. 107, 128 n. 32, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

Maxson, 482 Mich at 398 (citation and quotation marks omitted).

The State's goal of rehabilitation is not served by allowing previously-imposed juvenile LWOP sentences to stand because those sentences were imposed without any thought of rehabilitation. *Miller*, 132 S Ct at 2465 (LWOP "'forswears altogether the rehabilitative ideal.'"), quoting *Graham v Florida*, 560 US 48, 74 (2010). Those sentences were based on the premise that juveniles who committed first degree murder were incapable or unworthy of rehabilitation, a premise that *Miller* rejects as false for all but the worst offenders. *Id.* at 2468 (Mandatory LWOP wrongly "disregards the possibility of rehabilitation even when the circumstances most suggest it."), 2469 (LWOP for juveniles should be "uncommon" due to their "diminished culpability and heightened capacity for change."). *Miller* therefore places the rehabilitative goal front and center for the imposition and carrying out of sentences for those who committed crimes as juveniles. *Id.* at 2468-2469 (requiring juveniles' "capacity for change" to

be evaluated); *see also Graham*, 560 US at 75 ("A State is not required to guarantee eventual freedom [for juveniles]" but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."). Because of this, it is the *failure* to make *Miller* retroactive that will most undermine Michigan's goal of rehabilitation.

For the reasons explained above, the first and second *Sexton* prongs clearly weigh in favor of retroactivity. Once one considers the full scope of the third prong, including the State's interest in rehabilitation, and the actual impact of *Miller* in Michigan, the third prong also weighs in favor of retroactivity. Thus, *Miller* is retroactive under state law.

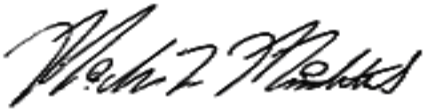
SUMMARY AND RELIEF AND REQUEST FOR ORAL ARGUMENT

WHEREFORE, for the foregoing reasons, the State Appellate Defender Office requests resentencing pursuant to *Miller v Alabama* for Defendant-Appellant Raymond Carp and all others similarly situated.

Furthermore, pursuant to this Court's November 6, 2013 order and with the agreement of Defendant-Appellant Raymond Carp, amicus requests leave to participate in oral argument in this case.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE



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