STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
[Talbot, P.J., and Fitzgerald and Whitbeck, JJ.]

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND CURTIS CARP,

Defendant-Appellant.
_____/

Supreme Court No. 146478

Court of Appeals No. 307758

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

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

BRIEF ON APPEAL OF ATTORNEY GENERAL BILL SCHUETTE AS INTERVENOR

ORAL ARGUMENT REQUESTED

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

B. Eric Restuccia (P49550)
Deputy Solicitor General
Attorneys for the Attorney General
Intervenor-Appellee
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Dated: February 20, 2014

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The Court granted leave limited to two questions:

1. Whether *Miller v Alabama,* 567 US ___; 132 S Ct 2455 (2012), applies retroactively under federal law, per *Teague v Lane,* 489 US 288 (1989), to cases that have become final after the expiration of the period for direct review.

   Appellant's answer: Yes.

   Appellee's answer: No.

   Attorney General's answer: No.

   Court of Appeals' answer: No.

2. Whether *Miller v Alabama,* 567 US ___; 132 S Ct 2455 (2012), applies retroactively under state law, per *People v Maxson,* 482 Mich 385 (2008), to cases that have become final after the expiration of the period for direct review.

   Appellant's answer: Yes.

   Appellee's answer: No.

   Attorney General's answer: No.

   Court of Appeals' answer: No.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

The Michigan sentencing scheme involves the interplay of three statutes. MCL 750.316, MCL 769.1, and MCL 791.234(6).

MCL 750.316:

(1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:

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

MCL 769.1:

(1) A judge of a court having jurisdiction may pronounce judgment against and pass sentence upon a person convicted of an offense in that court. The sentence shall not exceed the sentence prescribed by law. The court shall sentence a juvenile convicted of any of the following crimes in the same manner as an adult:

* * *

> (g) First degree murder in violation of section 316 of the Michigan penal code, 1931 PA 328, MCL 750.316.

MCL 791.234:

(6) A prisoner sentenced to imprisonment for life for any of the following is not eligible for parole and is instead subject to the provisions of section 44:

> (a) First degree murder in violation of section 316 of the Michigan penal code, 1931 PA 328, MCL 750.316.

INTRODUCTION

As a class of prisoners, the more than 300 offenders serving a mandatory life sentence for committing first-degree murder while teenagers are some of the most dangerous in Michigan. More than 80 of these offenders were sentenced to life without parole more than 25 years ago, with the oldest reaching back 50 years to 1962. The community's interest in finality weighs heavily here. The ability of a trial court to consider the factors listed in *Miller* for these cases is seriously limited.

Consider one of St. Clair County's oldest murder cases: James Porter brutally murdered a mother and her four children, including a ten-year boy, in 1982 when Porter was 16 years old; he was sentenced to life without parole in 1983. Now that Porter is almost 50 years old, the individual considerations of *Miller* for the crime committed 30 years ago – whether Porter's "immaturity, impetuosity, and failure to appreciate risks" along with his "family and home environment that surrounds him" might support a lesser sentence than non-parolable life – may be impossible to determine. These considerations of finality undergird the analysis of retroactivity. And they support the conclusion that *Miller* does not apply retroactively either under federal law or state law.

Under federal law, the *Miller* rule is a new one. It also is procedural in nature as the U.S. Supreme Court expressly recognized: "[our decision] mandates only that a sentence follow a certain *process* – considering an offender's youth and attendant characteristics – before imposing a particular penalty." 132 S Ct at 2471 (emphasis added). It "does not categorically bar a penalty for a class of offenders or type of crime[.]" *Id.* The *mandatory* nature of life imprisonment is not a part of the

punishment, but only a description of the manner by which it is determined. A teenage murderer may be sentenced to life without parole after *Miller*, but the sentencing court must now use a process that allows for individual considerations.

Carp's other arguments are also unavailing. The fact that the U.S. Supreme Court applied *Miller* to a case on collateral review – Kuntrell Jackson – is of no moment because the State of Arkansas did not argue that Jackson's sentence was already final, and retroactivity may be waived if not raised. Carp's reliance on the U.S. Supreme Court's death-penalty jurisprudence is equally unpersuasive for the same reason. Requiring individual consideration of a defendant before imposing the death penalty is a change in process, not substance. The fact that an individualized sentencing allows for consideration of mitigating factors does not make the change a substantive one, because *Miller* does not require any specific finding. It does not create a new "sentencing" element. The same conduct is subject to the same possible punishment of life without parole.

Under state law, the answer is the same. Under *Maxson*'s three-prong test, *Miller* is not retroactive. First, this issue does not involve the ascertainment of guilt or innocence. Second, there has been no adverse reliance by Carp. And third, regarding the administration of justice, the importance of finality supports the conclusion that *Miller* does not apply retroactively. The scores of cases that are more than 25 years old punctuate this point. In fact, an evaluation of the *Maxson* factors shows that the test – based on the overruled *Linkletter* case – is outmoded; this Court should adopt the *Teague* test.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The Attorney General adopts the statement of facts and proceedings as prepared by the St. Clair County Prosecutor's Office. As noted in the introduction, there are more than 350 offenders who are currently serving a life-without-parole sentence for committing murder while under the age of 18. For St. Clair County, there are five murderers within this group whose cases were final: Raymond Carp (sentenced in 2006), Michael Hills (sentenced in 2006), Justin Rose (sentenced in 1999), Terry Patterson (sentenced in 1996), and James Porter (sentenced in 1983). See Attachment A, List of Juvenile Offenders Serving Life Without Parole as of March 29, 2011. Given that there are some 80 offenders who were sentenced more than 25 years ago, the Attorney General wishes to highlight the facts of the Porter case to underscore the considerations of finality at issue in this appeal.[1]

In 1982, James Porter was the friend of Eric Giuliani, who had graduated from high school that Giuliani still attended. (Vol. II, pp 478-479). In the few months before the date of the crime, the Guiliani home had been subject to a couple of burglaries. (*Id.* at 488-491.) On April 7, 1982, Eric's sister, Cindy (thirteen years old) and the mother, Elizabeth Giuliani, were planning on going bowling. It had been a snow day. (*Id.* at 529). On that same day, Porter's younger brother Kent saw James Porter leaving the family home with a "gun case." (Vol. I, pp 394-396).

The evidence demonstrated that Porter arrived at the Giuliani home that morning and systematically executed the entire family, other than the father

[1] The page references to the Porter trial are appended as Attachment B.

Richard Giuliani, who was not at home. Mrs. Giuliani was found outside of her bathroom in the hallway; Porter had shot her twice in head with a .22 rifle, one above her right eye and the other above her left ear. (Vol. II, pp 616-617, 657). Her daughter, Kathy, who was sixteen years old, was found next to her mother, still dressed in her pajamas; Porter shot her once in the left temple. (*Id.* at 620, 660). Kathy's younger sister, Cindy, was found in the bathroom. (*Id.* at 661). She was already dressed, wearing a blue blouse, blue jeans, and socks. (*Id.*) Porter shot her three times, once in the left shoulder, and twice in the head. (*Id.* at 626). Eric Giuliani was found near his own bedroom; Porter shot him twice in the head. (*Id.* at 628, 665).

The final victim found in the house was Dean or "Deano" Giuliani, who was ten years old. He was in the small bathroom, fully dressed apparently hiding in the shower stall. (*Id.* at 666). Porter shot him in the left temple and the face with the bullet passing through his brain. (*Id.* at 632). There were casings throughout the house. (*Id.* at 604) (the responding officer explained that the casings were "everywhere I went").

Afterward, Porter withdrew some cash from Eric Giuliani's bank account and went shopping with his friend Rick DeBruycker at a car audio store, K-Mart, and Taco Bell before his arrest. (Vol. III, pp 879-880). Porter had argued with Eric Giuliani about the earlier burglaries before his killing spree. (Vol. III, pp 984-986).

James Porter was sentenced to life in prison for five counts of first-degree murder on March 14, 1983, more than 30 years ago.

ARGUMENT

I. The *Miller* decision does not apply retroactively under *Teague v Lane,* 489 US 288 (2012), to cases that were final on direct review.

In determining whether a decision of the United States Supreme Court applies retroactively to cases that were final on direct review, this Court employs a two-step process. See *Maxson,* 482 Mich at 388-393. First, the Court examines whether the rule must apply retroactively under federal law as defined by *Teague. Maxson,* 482 Mich at 388. Second, the Court determines whether the rule should apply retroactively under state law, relying on the three factors under *People v Sexton,* 458 Mich 43, 60-61; 580 NW2d 404 (1998). *Maxson,* 482 Mich at 393.

Under the *Teague* analysis, the *Miller* decision is a new rule that is procedural in nature, and is not a watershed rule. Thus, it does not apply retroactively. Carp relies on the fact that the U.S. Supreme Court applied *Miller* to Kuntrell Jackson, whose case appeared on collateral review. But this issue was not joined because the State of Arkansas waived any claim about retroactivity under *Teague* by failing to raise it. The *Miller* Court did not address the issue of retroactivity. Carp's other arguments are also unavailing.

A. *Miller* is a procedural rule that does not apply retroactively.

"Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague v Lane*, 489 US 288, 309 (1989) (plurality opinion). The retroactive application of new rules to cases on collateral

review impedes the effective operation of state criminal justice systems by "continually forc[ing] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Id.* at 310. By limiting the retroactive application of new rules in collateral review, "the *Teague* principle protects not only the reasonable judgments of state courts but also the States' interest in finality quite apart from their courts." *Beard v Banks*, 542 US 406, 413 (2004).

Based on these principles, the U.S. Supreme Court has held that new rules announced in its decisions apply to all cases that are pending on direct review or not yet final. *Schriro v Summerlin*, 542 US 348, 351 (2004). But for convictions that are already final, the new rule applies in only "limited circumstances." *Summerlin,* 542 US at 351-352. The exceptions to the rule of nonretroactivity have been placed into two categories. "The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe, or addresses a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Graham v Collins,* 506 US 461, 477 (1993) (internal quotes and citations omitted). The second exception, which applies to watershed rules, has not yet been fully defined but is "clearly meant to apply only to a small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty." *Id.* (internal quotes and citations omitted).

In this case, Carp's conviction and sentence for first-degree murder became final on September 21, 2009. Under *Teague*, *Miller* should not be applied retroactively because (1) the rule is new, (2) it is procedural and not substantive, and (3) it is not one of the few "watershed" rules that are required for ordered liberty. Carp concedes that the rule is a new one and does not argue that it is a watershed rule, effectively conceding that point as well. The Attorney General shall address all three points based on arguments that have been advanced by amici filings.

1. The rule in *Miller* is new.

The first step in the *Teague* analysis is determining whether the rule announced in *Miller* is new. To determine whether the *Miller* rule is, indeed, new, a court ascertains the "legal landscape" at the time the defendant's conviction became final and asks whether then-existing precedent "compels the rule." *Beard*, 542 US at 411. "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 US at 301 (plurality opinion). A new rule is defined as one that "was not dictated by precedent existing at the time the defendant's conviction became final." *Id*.

Here, it is not disputed that the *Miller* rule created a new obligation. At the time the opinion issued, three-quarters of the states and the federal government had life-without-parole sentencing for teenage murderers. Twenty-eight states had mandatory sentencing schemes. And the Supreme Court never before had held that these regimes were subject to an individualized sentencing hearing. Carp concedes the point. See Carp's Brief, p 17.

2. The new rule that the U.S. Supreme Court announced in *Miller* is procedural.

The second step in the *Teague* analysis is to determine whether the new rule announced in *Miller* is substantive or procedural. New substantive rules – which generally apply retroactively – include those that "narrow the scope of a criminal statute by interpreting its terms," as well as those that "place particular conduct or persons covered by the statute beyond the State's power to punish." *Summerlin*, 542 US at 351–352 (citations omitted). The U.S. Supreme Court has explained that "a decision that modifies the elements of an offense is normally substantive" while one that does not "alter the range of conduct the statute punishes" is procedural. *Summerlin,* 542 US at 354. Procedural rules are ones that "regulate only the *manner of determining* the defendant's culpability[.]" *Summerlin,* 542 US at 353, citing *Bousley v United States*, 523 US 614, 620 (1998) (emphasis in original).

The *Miller* decision regulates the manner of determining a defendant's sentence. The Court rejected the petitioners' request to categorically ban LWOP sentences for juvenile offenders. *Id.* at 2469 ("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"). Rather, the decision "mandates only that a sentencer follow a certain *process* – considering an offender's youth and attendant characteristics – before imposing a particular penalty." *Miller*, 132 S Ct at 2471 (emphasis added). A juvenile convicted of murder is subject to a life-without-parole sentence after *Miller,* just as before, but only the process by which the State may impose that sentence has been altered. The fact that the Court in *Miller* qualified

the point by noting that the occasions in which such a sentence is appropriate "will be uncommon" does not change the reality that LWOP remains a valid possible punishment. *Miller,* 132 S Ct at 2469. The obligation is for the sentencing court to engage in an individual sentencing procedure where there is discretion to consider a "lesser sentence," which the U.S. Supreme Court stated included "life *with* the possibility of parole." *Id.* at 2460 (emphasis in original). There is no dispute that the *Miller* decision does not narrow the scope of a criminal statute, see *Summerlin,* 542 US at 351-352, and does not place particular conduct outside the State's power to punish. *Id. Miller* also does not decriminalize any class of conduct, see *Graham v Collins,* 506 US at 477, and does not prohibit a certain category of punishment for a class of defendants – juvenile murderers may still be sentenced to life without parole. *Id.*

A comparison to the recent decisions of the U.S. Supreme Court that introduced a new substantive rule demonstrates the procedural nature of the change here. In *Graham v Florida,* 560 US 48 (2010), the U.S. Supreme Court concluded that it was unconstitutional for a state to impose a life sentence without the opportunity for parole on a juvenile offender for a non-homicide offense. As the Court described, the case implicated "a particular type of sentence as it applies to an entire class of offenders." *Id.* at 61. In all circumstances, the Court determined that this sentence – the death penalty – was unconstitutional for these offenders regardless of the process used. This is the paradigm of the exclusion of a category of punishment for a class of defendants.

For this reason, the *Graham* decision applies retroactively and governs all such prisoners. *In re Sparks,* 657 F3d 258, 262 (CA 5, 2011). The same is true for the death penalty as applied to juveniles, *Roper v Simmons,* 543 US 551, 568 (2005), as well as the mentally disabled, see *Atkins v Virginia,* 536 US 304, 321 (2002), and *Penry v Lynaugh,* 492 US 302, 329–330 (1989) (although overruled on other grounds, the Court stated that prohibiting the execution of the mentally retarded would be applied retroactively to cases on collateral review). These are likewise categorical exclusions.

To put it another way, a convicted teenage murderer post *Miller* is still subject to the same possible punishment – life without the opportunity for parole – as before. In contrast, the Court noted in *Penry* that prohibiting the execution of those with mental infirmities would fall under the first exception to *Teague* because the prohibition would preclude a *category* of punishment "regardless of the procedures followed." *Penry,* 492 US at 330 ("[I]f we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review."). In contrast, the only change at issue here is the process by which this determination is made.

Carp raises a series of arguments about why this rule is substantive in nature – which may be digested into four separate claims – all of which this Court should reject.

First, Carp argues that *Miller* is substantive because it is "a categorical ban on mandatory life without parole." Carp's Brief, p 17. The Supreme Court expressly stated the contrary in *Miller,* explaining that there was no categorical exclusion of punishment for a class of offenders. 132 S Ct at 2471 ("Our decision does not categorically bar a penalty for a class of offenders or type of crime"). Moreover, Carp misunderstands of the nature of the punishment. "Mandatory" is not part of the punishment. The mandatory nature of the sentence only describes the process. That process does not exclude a category of punishment. The punishment here is a life sentence without parole.[2] And that punishment is the same whether arrived at through an individual sentencing or by a process that requires it mandatorily.

Several state Supreme Courts that have ruled that *Miller* is retroactive on this basis have likewise erred by ignoring the decision's plain language. See *Diatchenko v District Att'y,* 466 Mass 655, 666 (2013) ("The rule explicitly forecloses the imposition of a certain category of punishment—mandatory life in prison without the possibility of parole—on a specific class of defendants[.]"); *Jones v State,* 122 So3d 698, 702 (Miss 2013) ("By prohibiting the imposition of a mandatory sentence, the new obligation prevents a significant risk that a [juvenile] . . . faces a punishment that the law cannot impose on him."); and *State v Ragland,* 836 NW2d 107, 117 (Iowa 2013) ("As a substantive change in the law which puts matters outside the scope of the government's power, the holding should apply retroactively").

[2] This Court's analysis in *People v Bullock,* 440 Mich 15, 42; 485 NW2d (1992), which refers to the mandatory character of a punishment as an "aspect" of the penalty, does not gainsay this point.

Second, Carp argues that the U.S. Supreme Court's death penalty jurisprudence supports a finding that *Miller* is substantive and is retroactive. Carp's Brief, p 21. This argument is unavailing.

A triumvirate of Supreme Court cases established that the imposition of the death penalty as a mandatory matter, without individualized sentencing, was unconstitutional: *Woodson v North Carolina,* 428 US 280 (1976) (plurality opinion); *Lockett v Ohio,* 438 US 586 (1978) (plurality opinion); and *Eddings v Oklahoma,* 455 US 104 (1982). Carp argues that because this rule was applied to cases in collateral review, the U.S. Supreme Court necessarily determined that this was a substantive rule. *Sumner v Shuman,* 483 US 66 (1987); *Hitchcock v Dugger,* 481 US 393 (1987).

The problem with this claim is that the issue of retroactivity was never addressed in *Sumner* or in *Hitchcock*. Just as for Kuntrell Jackson, see pp 24-25, the issue of retroactivity was waived. Although one of the briefs noted that the lower court's decision balanced the state's interest in finality, the States argued that their death penalty statutes were distinguishable, and not governed by *Lockett*. Nevada's Brief in *Sumner*, 1987 WL 880296, *6; Florida's Brief in *Hitchcock,* 1986 WL 728192, *28-48. The States did not argue that *Lockett* should not apply because the cases were final on direct review when *Lockett* was decided.

Instead, for the death penalty cases, the U.S. Supreme Court cases that are most analogous that have addressed retroactivity – those involving new rules for death penalty sentencing – were all ones in which the changes were *not* applied retroactively. See, e.g., *Beard v Banks,* 542 US 406 (2004) (new rule that

invalidated capital sentencing schemes that required unanimity on mitigating factors was not retroactive); *Summerlin,* 542 US at 356 (new rule requiring fact-finding by jury for element necessary for the death penalty not retroactive); *Graham v Collins,* 506 US at 475 (new rule that state cannot "limit[ ] the manner in which [defendant's] mitigating evidence may be considered" during death penalty sentencing phase was not retroactive); *Saffle v Parks,* 494 US 484, 495 (1990) (new rule that would prohibit an instruction telling the jury to avoid the influence of sympathy during death-penalty sentencing phase was not retroactive). These cases directly relate to rules that enable the sentencing body to more fully consider mitigating circumstances before imposing the death penalty but the Supreme Court ruled that any change was not substantive. These cases provide the only guidance from the Supreme Court on the retroactivity of rules related to the death penalty.

In *Beard,* the U.S. Supreme Court examined the rule from *Mills v Maryland,* 486 US 367 (1988), addressing a death penalty sentencing scheme that required all mitigating factors necessary to avoid the penalty to be found unanimously by the jury. *Beard,* 542 US at 408. The Court held in *Mills* that the scheme was unconstitutional where the jurors may have believed that they must unanimously agree on a particular mitigating factor before relying on it to impose a lesser sentence. *Mills,* 486 US at 384. The mitigating factors advanced in *Mills* included the facts that the perpetrator was only 20 years old at the time of the crime, had only a 6th grade education, and had suffered some brain damage as a child. *Id.* at 370. On the issue of retroactivity, the Court in *Beard* stated that the first *Teague*

exception based on it being a substantive rule was not even argued: "There is no argument that th[e] [first *Teague*] exception applies here." *Beard,* 542 US at 416-417 (citations, quotes, brackets omitted).

And a case that may have the closest set of facts to this case is *Graham v Collins,* 506 US 461. There, the habeas petitioner was sentenced to death for a murder that he committed while he was 17 years old. *Id.* at 463. Graham contended that the three questions that the jury was required to answer in determining whether he should be sentenced to death did not enable the jury to "give effect" to the mitigating evidence of his "youth [and] family background":

> [W]e are asked to decide whether the jury that sentenced petitioner, Gary Graham, to death was able to give effect, consistent with the Eighth and Fourteenth Amendments, to mitigating evidence of Graham's youth, family background, and positive character traits. [*Id.*]

This same basic concern underlies the *Miller* decision in its analysis of mandatory sentencing, which prevents the sentencing court from considering the youth and other individual traits of a teenage murderer. *Miller,* 132 S Ct at 2466. Nevertheless, the Court in *Graham* determined that the proposed change, which would have enabled the jury to more fully consider the mitigating circumstances, would not be a substantive change in law. See *Graham,* 506 US at 475, 477 ("Plainly, [the first *Teague*] exception has no application here because the rule Graham seeks would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons.") (internal quotes omitted). Here too, a required change to the sentencing scheme that allows for considerations of youth as a mitigating factor is not a substantive change in law.

Third, Carp argues that *Miller* is substantive under *Summerlin* because *Miller* "requires [the sentencing court] to take into account how children are different." Carp's Brief, pp 18, 20, quoting *Miller,* 132 S Ct at 2469. The basic premise of Carp's argument on this point is wrong.

The key sentences from *Miller* that state the Court's holding underscore that the Eighth Amendment requires a change to the sentencing process, and does not require any specific findings. *Miller,* 132 S Ct 2469 ("We therefore hold that the Eighth Amendment *forbids a sentencing scheme* that mandates life in prison without possibility of parole for juvenile offenders") (emphasis added); 132 S Ct 2475 ("the mandatory sentencing schemes before us violate this principle of proportionality"). This change in process allows the sentencing court to consider mitigating factors is analogous to the one considered in *Beard* – which does not apply retroactively – that ensures that mitigating factors can be considered by individual jurors, and need not be found unanimously. *Beard,* 542 US at 416-417. The change in process is predicated on the need for the proper consideration of mitigating factors, but is nonetheless still a procedural change.

Carp conflates the change in process that enables the sentencing court to consider mitigating circumstances with the Court establishing a requirement that the sentencing court make a specific finding necessary to a particular sentence, the latter of which would be a substantive change. Rather, the point is that *Miller* requires a change to the sentencing scheme – the procedure of sentencing – to enable the sentencing court to consider mitigating factors. *Miller,* 132 S Ct at 2458

("But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations [of the offender's youth].")

The analysis from *Summerlin* demonstrates the point and confirms that the change here is not a substantive one. In *Summerlin*, the Court announced that *Ring v Arizona*, 536 US 584 (2002), established a procedural rule when *Ring* held that a jury – not a sentencing judge – must find aggravating circumstances necessary for the imposition of the death penalty. *Summerlin,* 542 US at 353. The Court in *Summerlin* evaluated a death penalty sentencing phase in which the finding of the presence or absence of specific aggravating factors were essential for the imposition of death and therefore were the equivalent of elements for federal constitutional purposes. *Summerlin,* 542 US at 354 ("those aggravators effectively were elements for federal constitutional purposes, and so were subject to the procedural requirements the Constitution attaches to trial of elements"). The U.S. Supreme Court noted that where it "made a certain fact essential to the death penalty," it would be a substantive change. *Id.* That is inapplicable here. There is no single controlling factor – no "certain fact" essential – under *Miller* that a sentencing court must find to justify its sentence. It does not create a sentencing "element." If Carp were right, *Miller* would require a jury determination, since any new sentencing elements would be prerequisites to the penalty. *Ring,* 536 US 584, 604 ("the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict."). But there are none here. The punishment of LWOP is available without any new required

finding. Instead, *Miller* sets out a different sentencing scheme – "individualized sentencing" – rather than a mandatory penalty scheme. That is process.

To be sure, *Miller* is replete with references about the importance of the sentencing court to consider the teenage murderer's youthful characteristics and requiring the sentence to "tak[e] account of an offender's age and the wealth of characteristics and circumstances attendant to it" *id.,* 132 S Ct at 2467, but nevertheless the Court was unambiguous that the cure to this ill was to provide an individualized sentence, i.e., to give the sentencing court "discretion to impose a different punishment." *Id.* at 2460. The *Miller* Court explained this point in distinguishing its holding from *Graham v Florida*:

> *Graham* established one rule (a flat ban) for nonhomicide offenses, *while we set out a different one* ***(individualized sentencing)*** *for homicide offenses.* [*Miller,* 132 S Ct at 2466 (emphasis added).]

It is a change in the process, not in the "elements" or findings a court must make. See *Miller,* 132 S Ct at 2471 ("it mandates only that a sentencer follow a certain *process*") (emphasis added). It is not a substantive one.

A review of the Supreme Court death penalty cases also confirms this point. All of these cases examined changes to process that related to the consideration of mitigating evidence. Obviously, the consideration of mitigating evidence relates to the substance, but all of the required changes related to the process by which such evidence was considered. See *Beard,* 542 US at 416-417 (unanimity on mitigating factor); *Summerlin,* 542 US at 356 (fact-finding by jury for death penalty); *Graham v Collins,* 506 US at 475 (limits on consideration of mitigating evidence); *Saffle,* 494 US at 495 (anti-sympathy instruction).

Fourth, in a similar point, Carp argues that the *Miller* decision evidences the distinction in *Saffle* between "what" and "how," because it mandates the presentation of mitigating evidence. Carp's Brief, p 24. But this argument misapprehends the decision in *Saffle*.

In *Saffle,* the U.S. Supreme Court evaluated whether the death penalty was unconstitutionally imposed on a perpetrator where the jury was instructed "to avoid any influence of sympathy." *Saffle,* 494 US at 486. In determining whether this standard should apply on collateral habeas review, the Court examined whether this limitation on anti-sympathy instructions would be a new rule or whether it was dictated by the decisions in *Lockett* and *Eddings*. *Saffle,* 494 US at 488-489. The Court determined that it would be a new rule that did not apply collaterally. *Id.*

Carp cites the language distinguishing between "what mitigating evidence the jury must be permitted to consider" and "how the State may guide the jury in considering" it. Carp's Brief, p 25, citing *Saffle,* 494 US at 490. But this analysis did not relate to whether the proposed rule was substantive or procedural but rather whether the rule was "new," i.e., whether it was "dictated" by existing precedent or not, at the time the state court issued it decision. *Saffle,* 494 US at 490. And the answer was "yes," the rule was a new one, and therefore subject to the *Teague* retroactivity analysis. The dichotomy between what/how was not employed to determine whether the rule was substantive or procedural.

The same is true in Carp's reliance on *Beard*. Carp's Brief, p 26. The analysis in *Beard* distinguishing between "how the sentencer considers evidence"

under the *Mills* rule" and "what evidence it considers" again was relied on to determine whether the rule in *Mills* was a new one or not. *Beard,* 542 US at 415. The Court concluded that "*Mills* announced a new rule" and therefore was subject to the general prohibition on retroactive application unless it could meet the *Teague* test. *Beard,* 542 US at 416. But the Court did not rely on the distinction between "what" and "how" to determine whether the change was substantive or procedural.

Instead, in *Beard,* the Court merely noted that the test for determining whether it was substantive or procedural was to examine if the rule "prohibit[ed] a certain category of punishment for a class of defendants because of their status or offense." *Id.* at 417. That was the same reasoning employed in *Summerlin*. Rejecting an argument that the *Ring* requirement that a jury make the determination of the aggravating circumstances warranting the death penalty created a substantive rule, the Court said that the holding "did not alter the range of conduct Arizona law subjected to the death penalty." *Summerlin,* 542 US at 353. Instead, the Court said, "*Ring* altered 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." *Id.* (emphasis added). In other words, "*the range of conduct punished . . . was the same* before [the controlling decision] as after." *Id.* at 354 (emphasis added). The same is true here.

As another example, in *Apprendi v New Jersey*, the U.S. Supreme Court held that any fact other than that of a prior conviction that increases a criminal penalty beyond the prescribed statutory maximum must be submitted to a jury and proved

beyond a reasonable doubt. 530 US 466, 490 (2000). The federal circuits have unanimously found that *Apprendi* is procedural and not retroactive. See, e.g., *Sepulveda v U.S.*, 330 F3d 55, 61 (CA 1, 2003). That is because the *Apprendi* rule did not "prohibit a certain category of punishment for a class of defendants." *McCoy v U.S.*, 266 F3d 1245, 1256 (CA 11, 2001). That is the test the Court has applied.[3]

The state courts have divided on the question with the better-reasoned decisions finding *Miller* to be procedural. Compare *State v Tate,* ___ So3d ___; 2013 WL 5912118 (La, Nov 5, 2013) (not retroactive); *Commonwealth v Cunningham*, 81 A3d 1 (Pa, 2013) (same); *Chambers v Minnesota,* 831 NW2d 311 (Minn, 2013) (same) and *Geter v State,* 115 So3d 375 (Fl, 2012) (same), with *State v Mantich*, 287 Neb 320 (2014) (retroactive), *Diatchenko,* 466 Mass at 666 (same); *Jones v State,* 122 So3d [Miss] at 702 (same); and *Ragland,* 836 NW2d [Iowa] at 117 (same). So have the federal circuits. The Fifth and Eleventh Circuits have found *Miller* not to be retroactive, while the Second, Third, Fourth, and Eighth Circuits have indicated that it is retroactive. See *In re Pendleton,* 732 F3d 280, 283 (CA 3, 2013) (listing cases). See also *Hill v Snyder,* 2013 WL 364198, *2 (January 30, 2013) (*Miller* applies to five plaintiffs because civil case under 42 USC §1983 pending when *Miller* was decided; in *obiter dictum* stating that *Miller* would apply retroactively). Yet, none of these decisions bind this Court.

[3] The American Civil Liberties Union amicus argues that the *Miller* rule is substantive because it increases the range of possible outcomes, by requiring the inclusion of life *with* the opportunity for parole. Amicus Br. at 9. But this is not the standard for retroactivity. Here, the same conduct is subject to the same possible punishment of life without parole. See *Miller,* 132 S Ct at 2471 ("Our decision does not categorically bar a penalty for a class of offenders"). The ACLU asks for a new test.

3. The new procedural rule that the U.S. Supreme Court announced in *Miller* is not a "watershed" change.

If a new rule is procedural, it has retroactive effect only if the rule constitutes a "watershed rule[ ] of criminal procedure" that "implicate[s] the fundamental fairness" of criminal proceedings. *Teague,* 489 US at 311, 312 (plurality opinion). The U.S. Supreme Court has stressed repeatedly the limited scope of this exception, noting that it is "clearly meant to apply only to a small core of rules" that "are implicit in the concept of ordered liberty." *Beard*, 542 US at 417. The Supreme Court often – and only – has used *Gideon v Wainwright*, 372 US 335 (1963), a landmark case involving the right to counsel, as an example of a rule that might fall under this exception because it is "fundamental and essential" to fair trials. *Beard*, 542 US at 417. Carp does not argue that the *Miller* rule is a watershed rule, effectively conceding the point, see Carp's Brief, pp 10-13, 49, but the Attorney General addresses it nonetheless because the amici address the point.

The U.S. Supreme Court has never found a procedural rule to meet this "watershed" standard. In rejecting the conclusion that the new procedural rule under *Crawford v Washington* applied retroactively, the Court said:

> This exception is "extremely narrow[.]" *Schriro v Summerlin*, 542 US 348, 352 (2004). We have observed that it is "'unlikely'" that any such rules "'ha[ve] yet to emerge,'" *ibid*. (quoting *Tyler v Cain*, 533 US 656, 667, n7 (2001); [ ]); see also *O'Dell v Netherland*, 521 US 151, 157 (1997); *Graham*, *supra*, at 478; *Teague*, *supra*, at 313 (plurality opinion). And in the years since *Teague*, we have rejected every claim that a new rule satisfied the requirements for watershed status. [*Whorton v Bockting,* 549 US 406, 417–418 (2007).]

Neither have there been any cases post *Whorton* that held a procedural rule to be retroactive in application.

Moreover, this conclusion is consistent with the requirement that a rule must be sweeping in nature to fall within the second exception. The sweep of the change in *Miller* is limited. It modifies only the process by which the sentencing court must reach its decision for first-degree murder cases, and only does so for certain offenders. Other, more global changes to the criminal process have not been applied retroactively. The most significant example of this point is the conclusion that the Court did not apply retroactively the case holding that the right to a jury trial under the Sixth Amendment applies to the states under *Duncan v Louisiana,* 391 US 145 (1968). *DeStefano v Woods,* 392 US 631, 635 (1968). The same is true for the *Crawford* decision about the Confrontation Clause, see *Whorton,* which may arise in any criminal trial. The Supreme Court provided a list of other rules in *Whorton* that were not given retroactive effect. *Whorton,* 549 US at 418, citing *Beard* , 542 US at 406 (rejecting retroactivity for *Mills*); *O'Dell*, 521 US at 157 (rejecting retroactivity for *Simmons v South Carolina*, 512 US 154 (1994)); *Gilmore v Taylor*, 508 US 333 (1993) (rejecting retroactivity for a new rule relating to jury instructions on homicide); *Sawyer v Smith*, 497 US 227 (1990) (rejecting retroactivity for *Caldwell v Mississippi*, 472 US 320 (1985)). The Sixth Circuit reached the same conclusion regarding *Halbert v Michigan,* 545 US 605 (2005), the case creating the constitutional requirement of the appointment of counsel for appeals from plea-based convictions. *Simmons v Kapture,* 516 F3d 450, 451 (CA 6, 2008). As did this Court in *Maxson.* 482 Mich at 402-403.

Furthermore, U.S. Supreme Court ruled that the decision in *Padilla v Kentucky*, 130 S Ct 1473 (2010), was not retroactive under *Teague*. *Chaidez v United States,* 133 S Ct 1103, 1107 (2013). In *Padilla,* the U.S. Supreme Court determined that counsel has an obligation to inform his client when a guilty plea will render the defendant subject to automatic deportation; otherwise the plea is constitutionally infirm. *Padilla,* 130 S Ct at 1478. The Supreme Court did not reach the two *Teague* exceptions after concluding that it was a new rule. *Chaidez,* 133 S Ct at 1107, n 3. The Michigan Court of Appeals had earlier reached the same decision, but examined the *Teague* exceptions and ruled that the decision is not "so implicit in the structure of the criminal proceedings that retroactivity is mandated." *People v Gomez,* 295 Mich App 411, 417; 820 NW2d 217 (2012). That is because the rule only applies to "a subset of criminal defendants who might wish to consider immigration consequences." *Id.* The same is true here: the procedural rule from *Miller* only applies to a subset of criminal defendants – juvenile murderers.

The *Miller* rule does not implicate the fundamental fairness of criminal proceedings. It is far more limited in scope than *Gideon*, and its relationship to the accuracy of the sentencing process is far less direct than the right to counsel is to ensuring fair trials. Although the new rule may reduce the number of teenage murderers sentenced to LWOP, such a result is not "implicit in the concept of ordered liberty." *Beard*, 542 US at 417. *Miller*, therefore, does not present a "watershed rule." *Id.*

B. The fact that Jackson's case in *Miller* was on collateral review is not controlling.

Carp argues that the *Miller* rule is retroactive based on the fact that the Supreme Court applied it in the companion case of *Jackson v Hobbs* to a habeas petitioner whose appeal was taken from state collateral review. Carp's Brief, pp 29-33. *Teague* suggests that if a new rule is applied retroactively to one defendant, it should be applied evenhandedly to other defendants retroactively. 489 US at 300.

But Carp fails to consider that the defense of retroactivity must be raised by the state or otherwise the issue is waived. The Supreme Court has no obligation to raise *sua sponte* a retroactivity issue the state has not addressed:

> Generally speaking, "[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." *Teague*, *supra*, 489 US, at 300.
>
> The State of Texas, however, did not address retroactivity in its petition for certiorari or its briefs on the merits, and when asked about the issue at oral argument, counsel answered that the State had chosen not to rely on *Teague*. Tr. of Oral Arg. 4–5. Although the *Teague* rule is grounded in important considerations of federal-state relations, we think it is not "jurisdictional" in the sense that this Court, despite a limited grant of certiorari, must raise and decide the issue *sua sponte*. [*Collins v Youngblood,* 497 US 37, 40–41 (1990) (paragraph break added; parallel cites omitted).]

In other words, where the state fails to raise the retroactivity issue, the argument is waived. See also *United States v Tosh,* 330 F3d 836, 840 n 3 (CA 6, 2003) ("Because the government failed to raise the retroactivity issue on appeal, we deem the issue waived.").

And in the case that Carp relies on, *Jackson v Hobbs,* the State of Arkansas did not raise the retroactivity issue in its brief in opposition to the petition for certiorari. It did not cite *Teague* or provide any analysis of retroactivity. Arkansas' Br in Opp, filed June 1, 2011.[4] Arkansas' merits brief likewise did not address *Teague*, retroactivity, or the fact that this was a new rule that should not apply retroactively to a case that was final on direct review. Arkansas' Merits Br, filed on February 14, 2012, 2012 WL 523347 (2012). Consequently, Arkansas waived any claim regarding retroactivity. Unsurprisingly, the Court's opinions in *Miller* and *Jackson* never discuss *Teague* or retroactivity. Thus, contrary to Carp's brief, the fact that the Court applied the new procedural rule to the teenage murderer in *Jackson* does not prohibit state courts from considering the retroactivity issue. To the contrary, in the absence of any controlling statement from the Supreme Court regarding retroactivity, state courts are duty bound to address and resolve the issue.

Carp argues that this result would allow Jackson to obtain the benefit of relief while others who are similarly situated would not. Carp's Brief, p 29. But this is always the case when the government waives an argument that otherwise is available to the prosecution of its appeal. That is the nature of waiver. It is particular to the party.

---

[4] This brief may be found at the following web address: http://sblog.s3.amazonaws.com/wp-content/uploads/2011/10/Jackson-USSC-States-BIO-6-1-11.pdf (accessed on February 14, 2014).

II. *Miller* does not apply retroactively under *People v Maxson,* 482 Mich 385 (2008), to cases that were final on direct review.

Under Michigan law, the fact that there is no retroactivity under *Teague* does not end the inquiry. *Maxson*, 482 Mich at 392. That is because a state may give broader effect to a new procedural rule than federal law requires. *Danforth v Minnesota*, 552 US 264, 289 (2008). "Federal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.'" *Id.*, quoting *American Trucking Assns., Inc. v Smith*, 496 US 167, 178–179 (1990) (plurality opinion).

Like the Supreme Court in *Teague*, Michigan generally has declined to apply new criminal procedural rules to final convictions. *Maxson*, 482 Mich at 382–383. This Court has articulated a three-part analysis to make that decision. *People v Sexton*, 458 Mich 43, 60–61, 580 NW2d 404 (1998). This Court considers: (1) the purpose of the new rule, (2) the general reliance on the old rule, and (3) the effect of retroactive application of the new rule on the administration of justice. *Id.*, citing *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971). Under all of these factors, this Court should find that *Miller* does not apply retroactively.

Moreover, these factors are ultimately predicated on the outdated decision in *Linkletter v Walker,* 381 US 618 (1965), which has since been overruled. This Court should take this opportunity to update Michigan law, and adopt the *Teague* test as the Michigan test for determining whether a decision applies retroactively to cases that are final on direct review.

A. The three prongs of *Maxson* all support the conclusion that *Miller* should not be applied retroactively.

1. The first prong of *Maxson* on the "purpose of the rule" is inapplicable to *Miller* because the new rule is irrelevant to a defendant's "guilt or innocence."

Under the first *Maxson* prong, a law may be applied retroactively when it "concerns the ascertainment of guilt or innocence." *Maxson,* 482 Mich at 393, citing *Sexton,* 458 Mich at 63. A new rule of procedure that "does not affect the integrity of the fact-finding process," on the other hand, only should be applied prospectively. *Id*. Here, the *Miller* rule mandates a certain process before a court may sentence a juvenile murderer to LWOP. The procedure does not implicate the fact-finding process and does not concern guilt or innocence in any way. Therefore, the first *Maxson* prong counsels against *Miller's* retroactivity.

Carp argues that this Court has found that this "fact-finding" may be detached from considerations of guilt or innocence and applies to the sentencing phase, which only determines punishment. Carp's Brief, p 35, citing *People v Holcomb,* 395 Mich 326; 235 NW2d 343 (1975). This Court should reject this argument for two reasons.

First, the *Holcomb* case does not address the claim that the first prong of the retroactivity analysis extends to sentencing proceedings, where guilt or innocence is no longer at issue. *Holcomb* addressed the circumstance in which a criminal defendant sought to represent himself at trial, but was denied in violation of *Faretta v California,* 422 US 806 (1975) (right to self-representation under the Sixth Amendment). This Court ruled that the denial was a Sixth Amendment violation

and remanded for new trial. *Holcomb,* 395 Mich at 330. In its analysis, it noted that this right to represent oneself is "not qualitatively different" from the right to counsel, and therefore accorded its decision "full retroactive effect." *Id.* at 336, n 7. This Court noted in passing that the U.S. Supreme Court had in *Mempa v Ray,* 389 US 128 (1968), and *McConnell v Rhay,* 393 US 2 (1968), recognized the right to counsel at sentencing, among others, and then stated that "these cases . . . found that the right to counsel related to 'the very integrity of the fact-finding process.'" *Holcomb,* 395 Mich at 336, n 7. But this citation does not answer the question whether a sentencing process affects the integrity of the fact-finding process for retroactivity purposes for a rule that does not affect a finding of guilt or innocence. And such an answer would be obiter dictum in any event given the posture of the case.

Second, this Court need not attempt to tease out this principle from *Holcomb* where the issue was squarely presented in *Maxson* and resolved exclusively on the grounds that the rule would not affect determinations of "guilt or innocence." In *Maxson,* this Court was addressing the U.S. Supreme Court decision in *Halbert*, which determined that Michigan had an obligation to appoint counsel for plea-based convictions for indigent defendants. *Halbert,* 545 US at 610. In determining that the first prong weighed against retroactive application, this Court noted that the appeal from a plea does not affect the integrity of the fact-finding process because it does not affect guilt or innocence. *Maxson,* 482 Mich at 394 ("It is hard to imagine a more dispositive process by which guilt can be accurately determined, and in which

the appellate process becomes less central to an accurate determination of guilt, than that in which a full admission to criminal conduct has come from the mouth of the defendant himself under oath"). The Court stated this point even though the claim was front and center that the percentages of appellate relief expressly included claims of "reducing a sentence." *Maxson,* 482 Mich at 397, n 11.[5]

2. The second prong also supports the conclusion that *Miller* does not apply retroactively.

In examining the second *Maxson* prong, a court determines whether individuals or entities have been "adversely positioned . . . in reliance" on the old rule. *Maxson,* 482 Mich at 394, citing *Rowland v Washtenaw County Road Commission,* 477 Mich 197, 221; 731 NW2d 41 (2007). Given the mandatory nature of the sentencing scheme in place for many years, it is difficult to conceive how any defendant could have detrimentally and reasonably relied on the *Miller* rule. While some number of juvenile murderers serving LWOP sentences would receive relief if *Miller* is given retroactive effect, "this would be true of extending any new rule retroactively." *Maxson*, 482 Mich at 397. Thus, the second prong also counsels against retroactivity.

Carp suggests that detrimental reliance can be established through "a demonstration of actual harm." Carp's Brief, p 36. The argument relies exclusively on the possible change in sentencing outcomes for juvenile murderers without any analysis of reliance. This is a misreading of *Maxson*.

---

[5] This Court examined the effect on outcomes under the second prong of *Maxson*. 482 Mich at 397.

The *Maxson* decision demonstrates that the requirement of proof of reliance is distinct from the proof of actual harm:

> To be considered to have detrimentally relied on the old rule, a defendant must have relied on the rule in not pursuing an appeal *and* have suffered harm as a result of that reliance. [*Id.* at 394 (emphasis added).]

This proof requires two steps: reliance and detrimental harm. *Id.* at 396 ("Second, a defendant who relied on the old rule in not filing an appeal must also have suffered actual harm from that reliance in order to have 'detrimentally relied' on the old rule."). Raymond Carp cannot demonstrate any reliance on the mandatory nature of his sentence to life imprisonment without parole. Rather, only criminal defendants who pled guilty – and decided not go to trial to avoid this sentencing outcome – might be said to have "detrimentally relied" on this old rule.

Evaluating exclusively the possible detrimental harm to the class of offenders affected by the new rule reads out the reliance component of the second prong. The clear import of the citation in *Maxson* that there must be detrimental reliance is that the defendant must have taken some action that he might not otherwise have done in the absence of the rule. See *Maxson,* 482 Mich at 394 (examining whether the criminal defendant relied on the old rule). Carp's analysis would make the question of reliance irrelevant for the second factor.

Insofar as Carp argues that the relevant consideration of reliance is the State's reliance because a criminal defendant need not "adversely" rely on the rule, but see *Linkletter,* 381 US at 636 (evaluating the reliance of the "accused" on the old rule), such an analysis effectively collapses the second prong into the third prong on

the administration of justice. Whether the State's reliance on the old rule should weigh against retroactivity is on all fours on the importance of finality as examined in the third prong.

In fact, in *Sexton,* this Court joined its analysis of the second and third prongs of *Hampton* together to examine whether the rule was "unexpected." *Sexton,* 458 Mich at 64 ("Judicial decisions are generally given complete retroactive effect unless the decisions are unexpected or indefensible."). But of course this analysis merely tracks whether the rule is a new one or not. *Id.* at 67 ("Because *Bender* is a new rule of law, it is uniquely susceptible to prospective application."). This is just a *Teague* analysis. And there is no dispute that the rule here is a new one, which would likewise make it amenable to prospective application alone.

And even on the extent of the harm to Carp, there is some question about whether the proper metric is to examine the likelihood outcome on the tiny number of juvenile murderers sentenced to life without parole each year in comparison to the total number of felony convictions, or even murder convictions.[6] In any event, this factor also weighs against retroactivity.

---

[6] According to the list from the Department of Corrections, there are currently 368 such prisoners (committed while under the age of 18) who were sentenced to life without parole in the prison. See Attachment A. On average, there have been approximately 10 teenage murderers sentenced each year to life without parole since 1975. There are more than 3,000 offenders in the MDOC who were convicted of first-degree murder under MCL 750.316. See 2010 MDOC Annual Report, p C1c, 4 of 11. This report may be found at the following web address:

http://www.michigan.gov/documents/corrections/2011-08-31_-_MDOC_Annual_Stat_Report_-_Vers_1_0_362197_7.pdf (accessed on February 14, 2014).

3. The third prong weighs against retroactivity as well.

Under the third and final *Maxson* prong, the retroactive application of the *Miller* rule would have a markedly adverse effect on the administration of justice. The retroactive application of *Miller* would "*continually* force[ ] the State[ ] to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Teague*, 489 US at 310 (emphasis in original). The offense to the administration of justice is two-fold.

As an initial matter, it will require the criminal justice system to reevaluate the sentences of more than 350 prisoners who committed the most heinous of crimes under Michigan law. In the most populous county – Wayne County – this will require more than 100 resentencings for cases that span a forty-year or fifty-year history. In real terms, these sentences relate to cold cases, cold in that all of the relevant witnesses have moved on, which will require a huge investment of resources to properly research and investigate by tracking down surviving police officers, possible medical professionals for the perpetrator's mental status at the time of the murder, and family members of the victim and perpetrator so that they may participate at the resentencing. This would be a difficult undertaking in all cases and may be impossible in some.

Moreover, for many of the cases, the sentencing court will be unable to accomplish the specific task required under *Miller*. *Miller* lists the different possible factors for the sentencing court's consideration, which may be digested into six categories:

> [1] [*the] immaturity, impetuosity, and failure to appreciate risks and consequences*[;]
>
> [2] [ ] the family and home environment that surrounds [the defendant]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional[;]
>
> [3] [ ] the circumstances of the homicide offense[;]
>
> [4] including the extent of his participation in the conduct[;]
>
> [5] *the way familial and peer pressures may have affected him*[;]
>
> [6] [how] he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [*Miller,* 132 S Ct at 2468 (brackets inserted; emphasis added).]

Several of these factors are dependent on the psychological profile of the perpetrator *at the time of the crime*, not the time of (re)sentencing. And these are facts that would have been unnecessary to prove at trial, so there will be no existing factual record on which to draw. The question whether a specific juvenile murderer was "immature" or "impetuous," and whether that person was affected by familial or peer pressure at the time of the murder, may be impossible to determine.

Significantly, more than 80 of these men were sentenced to life without parole more than 25 years ago, some reaching back more than 50 years to 1962. See Attachment A.[7] The necessary medical witnesses to answer these questions will not have conducted the research when these crimes occurred, so these questions will be

[7] In an updated Corrections list, there are another twelve lifers sentenced between 1962 and 1974 for murder committed while they were juveniles not listed in Attachment A, the oldest of whom is Sheldry Topp, who was sentenced to life imprisonment on December 17, 1962 for a murder he committed when he was 17 years old. See the Corrections website for his entry (accessed on February 14, 2014): http://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=108969

unanswerable. That, of course, is the point of finality. At some point, a decision that was constitutionally proper at the time of its entrance must stand, and cannot be subject to a radical revisiting 40 or 50 years later.

Consider the case of James Porter, another St. Clair County murder case that would be subject to *Miller* if applied retroactively. His brutal murder of a mother and her four children occurred on April 7, 1982, more than 30 years ago. He was 16 years old at the time of the murder and is 48 years old today. Porter systematically murdered his teenage friend Eric Guliani, and Eric's mother, and Eric's three younger siblings, 16-year old Kathy, 13-year old Cindy, and 10-year old Deano, who had been hiding in the bathroom. Whether Porter was impetuous or immature in 1982, or whether he was under family or peer pressure, when he committed this mass murder is now hard to determine. The St. Clair Prosecutor's Office may not be able to explore these matters in a significant way at a resentencing. The State's strong interest in finality – an essential concept in the American criminal justice system – will be significantly undermined if *Miller* is applied retroactively. For the Porter case, and scores like it, the *Miller* test cannot even be meaningfully applied. Consistent with the administration of justice, the courts should not have to. The third *Maxson* prong weighs heavily against retroactivity.

The conclusion that this rule should not apply retroactively fits squarely within this Court's jurisprudence, which has been reluctant to apply change in procedural rules retroactively. See *Maxson,* 482 Mich at 393, citing *Sexton*, 458 Mich at 60-61 (requirement that the police inform a suspect when retained counsel

is available for consultation); *People v Stevenson*, 416 Mich 383; 331 NW2d 143 (1982) (abrogation of common-law "year and a day" rule); *People v Young*, 410 Mich 363; 301 NW2d 803 (1981) (pre-conviction filing of habitual offender notice); *People v Smith*, 405 Mich 418, 433; 275 NW2d 466 (1979) (repeal of criminal sexual psychopath statute barring criminal action against those adjudicated criminal sexual psychopaths); *People v Markham*, 397 Mich 530; 245 NW2d 41 (1976) (double jeopardy "same transaction" test); *People v Rich*, 397 Mich 399; 245 NW2d 24 (1976) (erroneous "capacity standard" jury instruction); *People v Butler*, 387 Mich 1; 195 NW2d 268 (1972) (waiver of a defendant's constitutional rights in taking a guilty plea); *Jensen v Menominee Circuit Judge*, 382 Mich 535; 170 NW2d 836 (1969) (constitutional right to appeal in criminal cases); *People v Woods*, 382 Mich 128; 169 NW2d 473 (1969) (custodial interrogation procedures); *People v Fordyce*, 378 Mich 208; 144 NW2d 340 (1966) (custodial interrogation procedures). Given the focus the *Maxson* test places on "ascertainment of guilt or innocence" as the first factor, the conclusion that *Miller* should not apply retroactively also fits within the broader arc of Michigan's jurisprudence in this area.

Carp also relies on this Court's decision in *People v Bullock,* 440 Mich 15; 485 NW2d 866 (1992). Carp's Brief, p 43. But Carp's reliance is misplaced and, in fact, demonstrates the need for this Court to adopt the *Teague* test.

In *Bullock,* this Court found that Michigan's mandatory sentence of life imprisonment without the possibility of parole violated the state constitutional prohibition against "cruel or unusual" punishment. *Id.* at 42. The Court then

applied its decision to "these defendants and all others who have been sentenced under the same penalty." *Id.* The Court provided no retroactivity analysis, and did not cite the controlling three-prong test that originated in *People v Hampton,* 384 Mich 669, 674; 187 NW2d 404 (1971). Thus, it provides no guidance on the application of the three factors to this case. Rather, the best guidance comes in this Court's most recent application of *Maxson,* which demonstrates that *Miller* should not be applied retroactively. Moreover, the *Bullock* case is distinguishable because the Court ordered that all of the offenders were eligible for parole. *Bullock,* 440 Mich at 42. Thus, the decision enacted a substantive change in law because in contrast to *Miller,* it effectively created a categorical exclusion for all the defendants, changing their sentence from LWOP to life *with the opportunity for parole.*[8]

B. The *Maxson* test based on the overruled decision of *Linkletter* is outdated and should be replaced with the *Teague* test.

The seminal case for the Michigan retroactivity standard is *Linkletter v Walker,* 381 US 618 (1965). This Court adopted it in 1971 in *Hampton,* identifying the familiar three-prong test. *Id.* at 674 ("There are three key factors which the court has taken into account: (1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice"). The U.S. Supreme Court overruled *Linkletter* in two cases, *Griffith v Kentucky,* 479 US 314 (1987) and *Teague,* ultimately creating the system of analysis evaluated in the first issue. *Danforth v Minnesota,* 552 US 264, 299 (2008). The State is bound to

[8] Although the Court indicated that it was not resolving the constitutionality of the life-without-parole penalty when imposed after an individualized sentence, *Bullock,* 440 Mich at 42, nevertheless it provided the relief to all prisoners, categorically.

follow *Griffith* and *Teague,* but where they do not apply, it is at liberty to provide greater protection under its own constitution. *Danforth,* 552 US at 288-289.

The primary inadequacy of the old *Linkletter* test as reflected in Michigan law is the inapplicability of two of its factors to rules that change sentencing process or the change in possible punishments: (1) the purpose of the new rule insofar as it relates to the "ascertainment of guilt or innocence," *Hampton,* 384 Mich at 677; and (2) the reliance on the old rule. Carp's effort to find support in Michigan that the *Linkletter* standard applies to sentencing cases under *Holcomb* substantiates the point.

With respect to the ascertainment of guilt or innocence, it is black letter law in Michigan that the conviction arises from the trial or plea, and that the sentencing is just a reflection of the consequences of the conviction. *People v Funk*, 321 Mich 617, 621; 33 NW2d 95 (1948) ("The conviction is the finding of guilt. Sentence is not an element of the conviction but rather a declaration of its consequences."). As a result, the sentencing is irrelevant to the issue. Yet, it is clear that the ascertainment of guilt or innocence is a necessary element of the Michigan test's first prong. See, e.g., *Maxson,* 482 Mich at 393; *Sexton,* 458 Mich at 60-61.

With respect to reliance, the point is the same. A defendant does not generally rely on sentencing processes. To the contrary. The mandatory nature of the sentence would only encourage a defendant to avoid such a conviction. The U.S. Supreme Court noted that the accused in *Linkletter* as well as the State had relied on the prior rule that was invalidated. *Id.* at 636 ("It is true that both the accused

and the States relied upon *Wolf*.”). This Court has also examined the extent of the defendant’s reliance. See, e.g., *Maxson,* 482 Mich at 824 (“a defendant who relied on the old rule in not filing an appeal must also have suffered actual harm from that reliance in order to have ‘detrimentally relied’ on the old rule”). The only changes to sentencing that a defendant might seek to apply would be one that would have beneficial consequences for that defendant’s sentencing. It is hard to conceive of a circumstance in which a criminal defendant can complain about detrimental reliance on an old rule for sentencing.

The other significant defect in the *Linkletter* test is the inconsistency of application. Even if this Court expanded the Michigan retroactivity test to encompass changes to sentencing rules, the rule would still be subject to this infirmity. The plurality opinion in *Teague* examined at length the failings of *Linkletter,* noting its failure to produce “consistent results”:

> Not surprisingly, commentators have “had a veritable field day” with the *Linkletter* standard, with much of the discussion being “more than mildly negative.” Beytagh, Ten Years of Non–Retroactivity: A Critique and a Proposal, 61 Va.L.Rev. 1557, 1558, and n. 3 (1975) (citing sources). [*Teague,* 489 US at 302-303 (plurality).]

Thus, the *Linkletter* standard has been discarded for more than 20 years.

Of course, the Attorney General notes that regardless of the standard that is applied here – either *Teague* or *Maxson* – the *Miller* decision does not apply retroactively. Because the *Miller* rule is a procedural one, that does not exclude a category of punishment, but only changes the process of sentencing to an individualized one, the considerations of finality govern. The sentences for the more than 350 murderers over the past 40 years are valid and should not be set aside.

CONCLUSION AND RELIEF REQUESTED

This Court should affirm the decision of the Michigan Court of Appeals.

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

B. Eric Restuccia
Deputy Solicitor General
Attorneys for the Attorney General
Intervenor-Appellees
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Dated: February 20, 2014