No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CORTEZ DAVIS, Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Miller v. Alabama, 132 S. Ct. 2455 (2012), apply retroactively to individuals sentenced to mandatory life without parole for juvenile offenses whose cases were no longer on direct review at the time Miller was announced?

2. In a concurring opinion in Miller, Justice Breyer reasoned that, without a finding that an offender killed or intended to kill, the Eighth Amendment forbids ever sentencing a child to life without parole, regardless of whether the application of this sentence is mandatory or discretionary under state law. Cortez Davis was convicted of aiding and abetting felony murder and sentenced to life without parole even though he neither killed nor possessed an intent to kill. Does the Eighth Amendment's ban on cruel and unusual punishment forbid sentencing a child to life without parole when that child has been convicted of felony murder despite not having killed or intended to kill?

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PETITION FOR WRIT OF CERTIORARI

Cortez Davis respectfully petitions for a writ of certiorari to review the judgment of the Michigan Supreme Court.

OPINIONS BELOW

The Wayne County circuit court's initial April 25, 2011, order denying postconviction relief is attached as Appendix A. The November 16, 2011, unreported order of the Michigan Court of Appeals, People v. Davis, No. 304075 (Mich. Ct. App. Nov. 16, 2011), denying Mr. Davis's application for leave to appeal is attached as Appendix B. The Michigan Supreme Court's September 7, 2012, order remanding the case to the circuit court for reconsideration in light of Miller v. Alabama, 132 S. Ct. 2455 (2012), reported at People v. Davis, 820 N.W.2d 167 (Mich. 2012) (mem.), is attached as Appendix C.

The circuit court's December 11, 2012, granting postconviction relief to Mr. Davis in light of Miller is attached as Appendix D. The unreported order of the Michigan Court of Appeals, People v. Davis, No. 314080 (Mich. Ct. App. Jan. 16, 2013), reversing the circuit court's grant of relief is attached as Appendix E. The opinion of the Michigan Supreme Court, People v. Carp, 852 N.W.2d 801 (Mich. 2014), affirming the denial of any postconviction relief to Mr. Davis, is attached as Appendix F. That court's October 22, 2014, order denying rehearing, People v. Davis, 854 N.W.2d 710 (Mich. 2014) (mem.), is attached as Appendix G.

JURISDICTION

The initial judgment of the Michigan Supreme Court was issued on July 8, 2014. People v. Carp, 852 N.W.2d 801 (Mich. 2014). That court denied rehearing on October 22, 2014. People v. Davis, 854 N.W.2d 710 (Mich. 2014) (mem.). Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In 1994, Cortez Davis was convicted of first degree felony murder pursuant to Mich. Comp. Laws § 750.316(1)(b) for an offense that occurred when Mr. Davis was only 16 years old. In sentencing Mr. Davis, the trial court found that the mandatory sentence of life imprisonment without parole required by statute "would be cruel and unusual punishment because [Mr. Davis] is not the shooter and can be rehabilitated." (Davis app. 815a.)[1] The court further found that "this young man was not the person

[1]References are to the appellant's appendix, a compilation of relevant portions of the record on appeal, filed by Mr. Davis at the Michigan Supreme Court below pursuant to Michigan Court Rule 7.307.

who pulled the trigger, he was an aider and abettor in an armed robbery," and stated, "[v]ery frankly, I think that if Mr. Davis had been running this [robbery], the deceased would still be with us." (Davis app. 804a, 809a.) Finding that "sentencing him as an adult and imposing a life sentence, mandatory life sentence, is cruel and unusual, when everyone agrees that he is capable of rehabilitation," the trial court stated, "I am not in this instant [sic] going to impose the mandatory life in prison, as I think it is cruel and unusual punishment," and instead imposed a lesser sentence of ten to forty years for the felony murder conviction. (Davis app. 804a, 809a-10a, 815a.) The State successfully appealed the trial court's decision to depart from this mandatory sentence. At Mr. Davis's second sentencing hearing, the court again stated, "I think he's salvageable. . . .He was not the shooter. . . .He didn't pull the trigger." (Davis app. 819a.) The court told Mr. Davis, "The only thing I can say to you is that it's my belief that they are going to change this. They're going to find out how unjust it is to do this. So, don't give up hope. You may not be in there for the rest of your life." (Davis. app. 822a.)

On May 17, 2010, this Court held in Graham v. Florida, 560 U.S. 48 (2010), that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." Id. at 82. This holding was premised on the recognition that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability" because "[t]he age of the offender and the nature of the crime each bear on the analysis." Id. at 69.

In light of Graham, Mr. Davis filed a state postconviction motion for relief from

judgment on April 15, 2011, arguing that his sentence of life without parole was unconstitutional because he lacked any intent to kill during the offense resulting in his felony murder conviction. This motion was denied by the circuit court on April 25, 2011. Mr. Davis timely filed an application for leave to appeal at the Michigan Court of Appeals, which was denied on November 16, 2011. Mr. Davis then filed an application for leave to appeal at the Michigan Supreme Court on January 7, 2012. While this application was still pending, this Court issued its opinion in Miller v. Alabama, 132 S. Ct. 2455 (2012), holding that "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment,"id. at 2464, on June 25, 2012. That same day, Mr. Davis supplemented his application for leave to appeal.

The Michigan Supreme Court then remanded the case to the circuit court for reconsideration in light of Miller. People v. Davis, 820 N.W.2d 167 (Mich. 2012) (mem.). Mr. Davis's postconviction motion was still pending for a second time in circuit court when the Michigan Court of Appeals held in People v. Carp, 828 N.W.2d 685, 723 (Mich. Ct. App. 2012), that Miller does not apply retroactively to cases on collateral review. Shortly thereafter, on December 11, 2012, the circuit court ruled in Mr. Davis's case that, despite the Court of Appeals's decision in Carp, Mr. Davis was entitled to resentencing under Miller. The court found that Mr. Davis "was not the shooter, but an aider and abettor," and that "we have locked [Mr. Davis] behind bars for over 18 years as a juvenile who did not pull the trigger, who told the victim that he held at gunpoint that everything will be alright, and who had the potential to be rehabilitated. We, the People of the State of Michigan have treated this juvenile, now man,

inhumanely." (Davis app. 1308a.)

On January 16, 2013, the Michigan Court of appeals reversed the circuit court. On November 6, 2013, the Michigan Supreme Court granted Mr. Davis leave to appeal this ruling and consolidated his case for oral argument with People v. Carp, No. 146478, and People v. Eliason, No. 147428. People v. Davis, 838 N.W.2d 876 (Mich. 2013) (mem.).

On July 8, 2014, in a divided 4-3 decision, the Michigan Supreme Court entered a joint opinion in Carp, Davis, and Eliason. The Court first held, *inter alia*, that " the United States Supreme Court's decision in [Miller] does not require retroactive application under Teague [v. Lane, 489 U.S. 288 (1989)]" because "Miller established a new procedural rule that does not categorically bar a penalty, but instead requires only that a sentencer follow a certain process." People v. Carp, 852 N.W.2d 801, 832 (Mich. 2014) (internal quotation marks omitted).

The Court also "reject[ed] Davis's . . . contention that the Eighth Amendment categorically bars the imposition of a life-without-parole sentence on a juvenile convicted of felony murder on an aiding-and-abetting theory," id. at 848, and held that "[t]o the extent that Graham and Miller might create a categorical rule prohibiting life-without-parole sentences for juveniles convicted of aiding and abetting a felony murder who do not kill, intend to kill, or foresee that life will be taken, Davis would not be entitled to relief under that rule" because "[t]o go back and attempt to make these findings now would entail engaging in the broader individualized sentencing procedures called for by Miller that we have already determined today need not be

engaged in retroactively," id. at 847 n.41 (internal quotation marks omitted).

Justice Kelly, in a dissent joined by Justices Cavanagh and McCormack, stated "we would hold that Miller applies retroactively under federal law," because "Miller struck down sentencing schemes that applied mandatory nonparolable life sentences to juvenile homicide offenders," thus "alter[ing] the range of sentences that may be imposed on a juvenile homicide offender and effect[ing] a substantive change in the law." Id. at 861, 865 (Kelly, J., dissenting). The court denied rehearing on October 22, 2014. People v. Davis, 854 N.W.2d 710 (Mich. 2014) (mem.). This petition follows.

REASONS FOR GRANTING THE WRIT

The retroactive application of Miller v. Alabama, 132 S. Ct. 2455 (2012), to cases on collateral review is a significant issue that has divided state and federal courts. Indeed, this Court has already granted one writ of certiorari to review the issue in Toca v. Louisiana, 135 S. Ct. 781 (2014) (mem.). Like the Louisiana Supreme Court in Toca, the Michigan Supreme Court is among the small minority of state courts of last resort which have held that Miller does not apply retroactively. This Court should grant a writ of certiorari to resolve the issue of whether Miller applies retroactively to cases on collateral review in Michigan and other states, or, at a minimum, should hold this case in abeyance until it reaches a decision in Toca, which may be dispositive of this first question presented.

The Court should also grant a writ of certiorari for the second question presented in this case to address whether the Eighth Amendment forbids sentencing a child to life without the possibility of parole when that child has been convicted of

felony murder despite not having killed or possessed an intent to kill. This categorical ban is compelled by this Court's own precedent recognizing that the unique characteristics and reduced culpability of children limit the imposition of life-without-parole sentences upon this class of defendants, and reinforced by this Court's precedent restricting the imposition of the death penalty upon adult defendants convicted of felony murder who neither killed nor intended to kill. Justice Breyer recognized this logic in his concurrence to Miller, and concluded that "[g]iven Graham's reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim." Id. at 2475-76.

Cortez Davis is serving a mandatory sentence of life without parole after being convicted as an aider and abettor to an armed robbery that resulted in a felony murder, even though he neither killed nor intended to kill during the events leading to this conviction. Both of the questions presented in this case raise significant issues that bear on Mr. Davis's sentence as well as the life-without-parole sentences of scores of individuals currently incarcerated for crimes committed as children. This Court should intervene to ensure that Mr. Davis and other similarly situated individuals secure the relief required by the Eighth and Fourteenth Amendments.

I. THE MICHIGAN SUPREME COURT ERRED IN HOLDING THAT MILLER DOES NOT APPLY RETROACTIVELY.

Most state and federal courts have correctly recognized that Miller v. Alabama, 132 S. Ct. 2455 (2012), created a new substantive rule that applies retroactively to

children whose sentences were final when it was announced. A handful of courts – including the supreme courts of Michigan, Louisiana, and Pennsylvania, which have large populations of juveniles automatically sentenced to die in prison – have strained to categorize Miller as a solely procedural, non-retroactive rule under Teague v. Lane, 489 U.S. 288 (1989). If this Court does not resolve this issue in Toca v. Louisiana, 135 S. Ct. 781 (2014) (mem.), it should resolve this conflict in the current case because Mr. Davis and others entitled to new sentencing hearings under Miller are now blocked from relief in Michigan and other states that have declined to apply Miller retroactively.

A. While Most Courts Have Correctly Recognized That Miller Is Retroactive, the Michigan Supreme Court Is Among the Few That Have Reached a Contrary Result, Creating a Conflict Calling for This Court's Review.

There is universal agreement that Miller announced a new rule, and most lower courts have recognized that the rule is substantive and therefore retroactive within the framework established in Teague v. Lane, 489 U.S. 288, 301-11 (1989), and Penry v. Lynaugh, 492 U.S. 302, 330 (1989), abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002). Understanding that "[r]ules that fall within . . . Teague's first exception 'are more accurately characterized as substantive rules not subject to [Teague's] bar,'" Beard v. Banks, 542 U.S. 406, 411 n.3 (2004), most courts have readily identified Miller as a new *substantive* rule that "appl[ies] retroactively because [it] 'necessarily carr[ies] 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." Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (emphasis added).

Indeed, the highest courts of nine states – Illinois, Iowa, Massachusetts, Mississippi, Nebraska, New Hampshire, South Carolina, Texas, and Wyoming – have easily concluded that Miller " alter[ed] the range of conduct or the class of persons that the law punishes" with a sentence of life without parole. Summerlin, 542 U.S. at 353. While acknowledging that the Miller rule has procedural components, these courts recognized it is primarily substantive because it requires states to modify their substantive sentencing laws. People v. Davis, 6 N.E.3d 709, 722 (Ill. 2014); State v. Ragland, 836 N.W.2d 107, 115 (Iowa 2013); Diatchenko v. Dist. Att'y Suffolk Cnty., 1 N.E.3d 270, 281 (Mass. 2013); Jones v. State, 122 So. 3d 698, 702 (Miss. 2013); State v. Mantich, 842 N.W.2d 716, 730-31 (Neb. 2014); Pet. of State, 103 A.3d 227, 235 (N.H. 2014); Aiken v. Byars, 765 S.E.2d 572, 575 (S.C. 2014); Ex parte Maxwell, 424 S.W.3d 66, 75 (Tex. 2014); State v. Mares, 335 P.3d 487, 507 (Wyo. 2014).

In federal court, the First, Second, Third, Fourth, Eighth, and D.C. Circuits and a panel of the Fifth Circuit have permitted second or successive habeas corpus petitions raising Miller claims because petitioners made a prima facie showing that this Court already has made Miller retroactive. In re Williams, 749 F.3d 66, 71-72 (D.C. Cir. 2014); Evans-Garcia v. United States, 744 F.3d 235, 238 (1st Cir. 2014); In re Simpson, 555 Fed. App'x 369 (5th Cir. 2014)[2]; In re Pendleton, 732 F.3d 280, 282 (3d

[2]A different panel of the Fifth Circuit reached the opposite conclusion in a case where the habeas petitioner sought a certificate of appealability on several guilt-phase claims and did not present a claim or argument that raised the retroactivity of Miller. Craig v. Cain, No. 12-30035, 2013 WL 69128, at *2 (5th Cir. Jan. 4, 2013).

Cir. 2013) (per curiam); Williams v. United States, No. 13-1731 (8th Cir. Aug. 29, 2013); Wang v. United States, No. 13-2426 (2d Cir. July 16, 2013); Johnson v. United States, 720 F.3d 720, 720-21 (8th Cir. 2013) (per curiam); Stone v. United States, No. 13-1486 (2d Cir. June 7, 2013); In re Landry, No. 13-247 (4th Cir. May 30, 2013); In re James, No. 12-287 (4th Cir. May 30, 2013); see also Songster v. Beard, No. 04-5916, 2014 WL 3731459, at *4 (E.D. Pa. July 29, 2014); Flowers v. Roy, No. 13–1508, 2014 WL 1757898, at *8 (D. Minn. May 1, 2014); Alejandro v. United States, No. 13 Civ. 4364(CM), 2013 WL 4574066, at *1 (S.D.N.Y. Aug. 22, 2013); Hill v. Snyder, No. 10-14568, 2013 WL 364198, at *2 n.2 (E.D. Mich. Jan. 30, 2013). These courts found it "relatively easy to demonstrate the required logical relationship [to permit a successive filing] with respect to the first exception articulated in Teague v. Lane." Tyler v. Cain, 533 U.S. 656, 669 (2001) (O'Connor, J., concurring). In addition, the Department of Justice has directed federal prosecutors nationwide to take the uniform position that Miller is a substantive rule that applies retroactively to cases on collateral review. See, e.g., Johnson, 720 F.3d at 721 ("The government here has conceded that Miller is retroactive . . .").

In conflict with these state and federal courts are the Supreme Courts of Louisiana, Michigan, Minnesota, and Pennsylvania, which have held in divided decisions that Miller is not retroactive because it is merely a procedural, not a substantive, rule. State v. Tate, 130 So. 3d 829, 831 (La. 2013) (Johnson, C.J., & Hughes, J., dissenting); People v. Carp, 852 N.W.2d 801, 832 (Mich. 2014) (4-3 decision); Chambers v. State, 831 N.W.2d 311, 331 (Minn. 2013) (two justices dissented

and two concurring justices called on this Court to resolve Miller's retroactivity); Commonwealth v. Cunningham, 81 A.3d 1, 10 (Pa. 2013) (4-3 decision).

The Eleventh Circuit similarly has held that Miller is not retroactive because it does not categorically bar all life-without-parole sentences for children and therefore cannot be a substantive rule. In re Morgan, 713 F.3d 1365, 1367-68 (11th Cir. 2013); see also Ware v. King, No. 5:12cv147–DCB–MTP, 2013 WL 4777322, at *3 (S.D. Miss. Sept. 5, 2013); Johnson v. Ponton, No. 3:13–CV–404, 2013 WL 5663068, at *6 (E.D. Va. Oct. 16, 2013); Martin v. Symmes, No. 10–cv–4753, 2013 WL 5653447, at *17 (D. Minn. Oct. 15, 2013).

Courts in the minority have employed labyrinthine reasoning to find Miller non-retroactive by turning its holding into a mere matter of the procedure necessary to support a life-without-parole sentence, while ignoring the substantive implications of Miller's holding. Under this Court's precedent, Miller is a new substantive rule that applies retroactively to Mr. Davis.

B. Miller Is a New Substantive Rule That Is Retroactively Applicable, and the Michigan Supreme Court's Minority View Is Wrong.

Under Teague v. Lane, 489 U.S. 288, 301-11 (1989), new substantive rules of constitutional law apply retroactively to cases on collateral review. See Bousley v. United States, 523 U.S. 614, 619-20 (1998). This Court's holding in Miller v. Alabama, 132 S. Ct. 2455 (2012), that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," id. at 2469, created such a new substantive rule that is retroactively applicable to cases on

collateral review.

In holding that Miller is not retroactive, the Michigan Supreme Court erroneously concluded that "Miller established a new procedural rule that does not categorically bar a penalty, but instead requires only that a sentencer follow a certain process." People v. Carp, 852 N.W.2d 801, 832 (Mich. 2014) (internal quotation marks omitted). The court mistakenly reasoned that "the category of punishment implicated by Miller is a sentence of 'life without parole.'" Id. at 482. However, the category of punishment implicated by Miller is a sentence of "mandatory life without parole," and Miller applies retroactively because it prohibits a particular punishment (mandatory life without parole) for a class of defendants (children) because of their status. See Penry v. Lynaugh, 492 U.S. 302, 330 (1989).

Of course, this Court has never held that only categorical rules are substantive. This Court's precedent clearly establishes that substantive rules are rules that "narrow the scope of a criminal statute" or "place particular conduct or persons . . . beyond the State's power to punish." Summerlin, 542 U.S. at 351-52; see also Teague, 489 U.S. at 307. This definition applies to rules that "deprive[] the State of the power to impose a certain penalty" as well as those that deprive the State of the power to punish at all. Penry, 492 U.S. at 330.

Miller narrows the State's power to punish children with a sentence of life imprisonment without parole by depriving the State of the power to mandate such sentences. This Court made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," and that such a sentence can only

be imposed after the sentencer has "take[n] 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. By altering the State's power to impose life without parole on a child from every case to only the uncommon case, Miller narrowed the scope of the State's power to impose that punishment and, in practice, placed the vast majority of children beyond the State's power to do so. Indeed, "[substantive] rules apply retroactively because they necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him." Summerlin, 542 U.S. at 352; the retroactive application of Miller addresses the significant risk that the vast majority of children already sentenced to mandatory life-without-parole are serving unconstitutional sentences under the Eighth Amendment.

Unlike procedural rules that "regulate only the *manner of determining* the defendant's culpability" but do not alter the scope of the culpability determination itself, Summerlin, 542 U.S. at 353, Miller – while it certainly has a procedural component – changes more than the way in which culpability or punishment is adjudicated. The rule of Miller invalidates mandatory sentencing regimes, like Michigan's, that permit only one sentencing outcome, and requires that the range of outcomes be changed to include a lesser sentence. By requiring that an alternative sentencing option be available to children convicted of homicide, Miller necessarily changed the range of permissible outcomes of the criminal proceeding. This is a substantive change in the law, and the Michigan Supreme Court was wrong to characterize it as a procedural rule.

Moreover, this Court has recognized that rules that have "made a certain fact essential" to the imposition of punishment are substantive rules that apply retroactively. Summerlin, 542 U.S. at 354. By "requir[ing] [the sentencer] 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, before imposing any sentence upon a child convicted of homicide, much less a sentence of life without parole, this Court made certain facts – an individual's youth and attendant characteristics – essential to the sentencing of all children convicted of homicide.

That Miller is retroactive is further made plain by its pedigree – it is the same type of rule as the fully retroactive decisions from which it is descended. See Tyler v. Cain, 533 U.S. 656, 668-69 (2001)(O'Connor, J., concurring) (explaining that "if we hold 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, then it necessarily follows that the given rule applies retroactively to cases on collateral review."). As this Court explained in Miller, 132 S. Ct. at 2463-67, the ban on mandatory life-without-parole sentences for children flows from two strands of precedent – 1) decisions banning death sentences for children, Roper v. Simmons, 543 U.S. 551 (2005), and life-without-parole sentences for children convicted of nonhomicide crimes, Graham v. Florida, 560 U.S. 48 (2010), and 2) decisions banning mandatory death sentences, Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion); Lockett v. Ohio, 438 U.S. 586 (1978); Sumner v. Shuman, 483 U.S. 66 (1987)

– both of which have been applied retroactively.[3] The Iowa Supreme Court put it plainly: because "a substantial portion of the authority used in Miller has been applied retroactively, Miller should logically receive the same treatment." State v. Ragland, 836 N.W.2d 107, 116 (Iowa 2013).

This Court should grant review to correct the Michigan Supreme Court's erroneous minority view that Miller does not apply retroactively.

C. The Retroactive Effect of Miller Is an Important Issue That This Court Should Resolve Now in This Case.

The retroactive application of Miller to the approximately 340 children in Michigan whose mandatory life-without-parole sentences became final prior to its announcement is exceptionally important for principled and practical reasons. This Court should resolve this question now because it is a threshold issue that state and federal courts must address in cases not only in Michigan but nationwide. While this issue remains unresolved, many individuals servings sentences of life without parole across the country continue to be denied access to rehabilitative and educational programming, as classification characteristics related to their young age and the length of their sentences combine to limit their access to opportunities for personal growth

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[3]See, e.g., LeCroy v. Sec'y, Fla. Dep't of Corr., 421 F.3d 1237, 1239-40 (11th Cir. 2005) (noting retroactive application of Roper); Horn v. Quarterman, 508 F.3d 306, 307-08 (5th Cir. 2007) (same); In re Moss, 703 F.3d 1301, 1302 (11th Cir. 2013) (holding Graham applies retroactively to cases on collateral review); In re Sparks, 657 F.3d 258, 262 (5th Cir. 2011) (holding Graham was made retroactive on collateral review); Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) ("There is no doubt today about this question. Lockett is retroactive."); Riley v. Wainwright, 517 So. 2d 656, 657 (Fla. 1987) ("Lockett clearly is retroactive"); Dutton v. Brown, 812 F.2d 593, 599 n.7 (10th Cir. 1987) (noting that law "require[s] the retroactive application of Lockett"); Campbell v. Blodgett, 978 F.2d 1502, 1512-13 (9th Cir. 1992) (per curiam) (determining merits of Shuman claim in case that became final two years before Shuman decided); Thigpen v. Thigpen, 926 F.2d 1003, 1005 (11th Cir. 1991) (noting death sentence set aside on Shuman grounds in federal habeas corpus case).

during the most crucial periods of their developmental lives. See Human Rights Watch, Against All Odds: Prison Conditions for Youth Offenders Serving Life without Parole Sentences in the United States 26-36 (2012), available at http://www.hrw.org/sites/default/files/reports/us0112ForUpload_1.pdf.

Moreover, this case is ideal for the Court to make clear that Miller applies retroactively under Teague v. Lane, 489 U.S. 288 (1989), because the question was well-presented and thoroughly briefed in the Michigan Supreme Court. People v. Carp, 852 N.W.2d 801, 818-32 (Mich. 2014). That court conducted an analysis under Teague and issued a reasoned opinion squarely addressing whether Miller applies retroactively as a matter of federal law, and rejecting the retroactive application of Miller to Cortez Davis. The Michigan Supreme Court's erroneous application of "Teague's federal retroactivity test so as to determine whether the rule in Miller is entitled to retroactive application under that test," Carp, 852 N.W.2d at 818, merits this Court's review.

The State has not contested that Mr. Davis is entitled to a new sentencing hearing where the sentencer must give full consideration to the factors articulated in Miller if it is retroactively applicable to his case. Twenty years ago, the trial judge presciently recognized that sentencing Mr. Davis to mandatory life without parole is cruel and unusual punishment because of his young age and attendant characteristics, and their relation to the circumstances of his offense. If Miller applies retroactively, it will afford Mr. Davis his first chance to present evidence that demonstrates his is not one of the uncommon cases in which sentencing a child to the harshest possible penalty is appropriate. See Miller, 132 S. Ct. at 2469.

II. A SENTENCE OF LIFE WITHOUT PAROLE IS UNCONSTITUTIONAL WHEN IMPOSED UPON A CHILD CONVICTED OF FELONY MURDER WHO DID NOT KILL OR INTEND TO KILL.

Cortez Davis was convicted of aiding and abetting felony murder and sentenced to life without parole as a juvenile, despite having neither killed nor possessed any intent to kill during the events underlying his conviction. First degree felony murder in Michigan requires no showing of any intent to kill, and the circuit court overseeing Mr. Davis's proceedings has repeatedly recognized that Mr. Davis acted only as an aider and abettor to an armed robbery.

This Court's precedent in Roper v. Simmons, 543 US. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); and Miller v. Alabama, 132 S. Ct. 2455 (2012), recognizing the unique characteristics and reduced culpability of children compel a categorical ban against life-without-parole sentences for individuals such as Mr. Davis who were convicted of felony murder but neither killed nor possessed any intent to kill. The justification for this ban is reinforced by the confluence of these cases with this Court's precedent limiting the imposition of the harshest sentence of death for adults convicted of felony murder due to the same concerns regarding the lack of any showing of specific intent to kill in such cases.

As Justice Breyer recognized in his concurrence in Miller, "[g]iven Graham's reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim" because "where the juvenile neither kills nor intends to kill, both features [of youth and a lack of any intent to kill] emphasized in Graham as

extenuating apply." Miller, 132 S Ct at 2475-76 (Breyer, J., concurring). Mr. Davis's sentence of life without parole is unconstitutional because, as an aider and abettor to felony murder, he is one of these children who neither killed nor intended to kill.

A. Mr. Davis Was Convicted as an Aider and Abettor to Felony Murder Without Any Showing That He Ever Possessed Any Intent to Kill.

Cortez Davis was sentenced to life without parole as an aider and abettor to felony murder absent any finding that he killed or possessed any intent to kill. First degree felony murder in Michigan requires no proof of any intent to kill, even with regards to the principal actor involved; while intentional first degree murder involves any "willful, deliberate, and premeditated killing," Mich. Comp. Laws § 750.316(1)(a), felony first degree murder encompasses "[m]urder committed in the perpetration of, or attempt to perpetrate . . . robbery," Mich. Comp. Laws § 750.316(1)(b). Mr. Davis was convicted under this latter felony murder provision. (Davis app. 653a.) The intent required to sustain a felony murder conviction under Section 750.316(1)(b) is only "malice," which includes not only "the intention to kill" but also the less culpable mental states, "the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm." People v. Aaron, 409 Mich. 672, 728 (Mich. 1980).

A conviction for felony murder under a theory that the defendant was an aider and abettor to the offense further distances the elements of the crime from any showing of an intent to kill. Aiding and abetting in Michigan is not a separate offense, but "simply a theory of prosecution that permits the imposition of vicarious liability for

accomplices." People v. Robinson, 715 N.W.2d 44, 47 (Mich. 2006) (internal quotation marks omitted). Although an aider and abettor in Michigan is "punished as if he had directly committed such offense," Mich. Comp. Laws § 767.39, a conviction for aiding and abetting felony murder only requires that the defendant intended to aid and abet the underlying felony, not any murder, and that this death was a "natural and probable consequence" of this underlying felony. Robinson, 715 N.W.2d at 53. Further, "one who aids and abets a felony murder must have the requisite malice to be convicted of felony murder, but need not have the same malice as the principal." Id. at 52.

Consequently, to convict Mr. Davis of felony murder as an aider and abettor in Michigan, the jury only had to find that Mr. Davis intended to aid and abet the commission of a robbery; that Mr. Davis wantonly and willfully disregarded the risk that a natural and probable consequence of this robbery might be great bodily harm to another person; and that Mr. Davis's accomplice killed another human being with any degree of malice during this robbery. Hence, Mr. Davis has never been found to have possessed any intent to kill, but instead only found to possess an extremely loose form of the "type of 'transferred intent'" where "the defendant's intent to commit the felony satisfies the intent to kill required for murder," which Justice Breyer has recognized "is not sufficient to satisfy the intent to murder that could subject a juvenile to a sentence of life without parole." Miller, 132. S. Ct. at 2476 (Breyer, J., concurring).

B. Mr. Davis Was a Non-Shooter Who Neither Killed Nor Possessed Any Intent to Kill.

Indeed, the record establishes that Mr. Davis in fact lacked any intent to kill

during the events leading to his felony murder conviction. At Mr. Davis's initial sentencing hearing, the court refused to impose the mandatory sentence of life-without-parole because she found that "sentencing [Mr. Davis] as an adult would be cruel and unusual punishment because he is not the shooter and can be rehabilitated." (Davis app. 815a.) The Court stated, "[v]ery frankly, I think that if Mr. Davis had been running this [robbery], the deceased would still be with us." (Davis app. 809a.) The court further found that "this young man was not the person who pulled the trigger, he was an aider and abettor in an armed robbery" and "sentencing him as an adult and imposing a . . . mandatory life sentence is cruel and unusual, when everyone agrees that he is capable of rehabilitation." (Davis app. 804a, 809a.) At Mr. Davis's second sentencing hearing, after the court's first sentence had been reversed on appeal by the State, the trial court again stated, "I think he's salvageable. . . .He was not the shooter. . . .He didn't pull the trigger." (Davis app. 819a.) Most recently, at a hearing on Mr. Davis's motion for post-judgment relief in light of Miller, the same judge again stated that "[t]he defendant was not the shooter, but an aider and abettor" who "did not pull the trigger, [and] who told the victim that he held at gunpoint that everything will be alright." (Davis app. 1308a-09a.)

Consequently, it is difficult to distinguish Cortez Davis's level of personal culpability from that of Kuntrell Jackson, Miller, 132 S. Ct. at 2461, or Terrance Graham, Graham, 560 U.S. at 53. All three young men engaged in a robbery with other teens, and, in all three cases, an accomplice attacked a robbery victim. To this end, Graham observed that "a juvenile offender who did not kill or intend to kill has

a twice diminished moral culpability." 560 U.S. At 69. Granted, from the standpoint of the harm caused, even unintended felony murder is a more serious crime than the nonhomicide offenses on which it is predicated. This is undeniable and explains why it is traditionally and legitimately punished more severely. But the imposition of life without parole on Mr. Davis for a conviction premised on felony-murder liability is unjustifiable in light of the differences between children and adults recognized in Roper, Graham, and Miller.

C. This Court's Precedent Logically Dictates a Categorical Ban Against Sentences of Life Without Parole For Individuals Such as Mr. Davis Who Were Convicted of Felony Murder Despite Having Neither Killed Nor Possessed Any Intent to Kill.

Mr. Davis's incarceration for life with no possibility of parole cannot be reconciled with Graham's holding through any logic that considers the reasoning in Roper v. Simmons, 543 US. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); and Miller v. Alabama, 132 S. Ct. 2455 (2012). Together, Roper, Graham, and Miller dictate that children convicted of felony murder who neither killed nor possessed any intent to kill are categorically prohibited from being sentenced to life without parole under the Eighth Amendment's ban on cruel and unusual punishment.

In Roper, the Supreme Court found that, even in the most serious murder cases, "juvenile offenders cannot with reliability be classified among the worst offenders." 543 US at 569. This is because, as compared to adults, teenagers have "[a] lack of maturity and an underdeveloped sense of responsibility," they "are more vulnerable or susceptible to negative influences and outside pressures," and their character "is not

as well formed." Id. at 569-70. Because these differences make juveniles less culpable than adults, this Court concluded that "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." Id. at 573-74.

In Graham, this Court recognized that the same differences between children and adults are relevant to the constitutionality of sentences of life imprisonment without parole. 560 US at 68. The Court repeated Roper's reasoning "that because juveniles have lessened culpability they are less deserving of the most severe punishments," id., in concluding categorically that life without parole is excessive for juvenile non-homicide offenders. Id. at 74.

Two years later in Miller, this Court again recognized these same differences between children and adults when banning mandatory sentences of life without parole for juvenile homicide offenders. 132 S. Ct. at 2460. In extending Eighth Amendment protection to juvenile homicide offenders, this Court recognized that "none of what it said about children-about their distinctive (and transitory) mental traits and environmental vulnerabilities-is crime-specific." Id. at 2465. The Court acknowledged that, although Graham's categorical ban of life-without-parole sentences related only to non-homicide offenses, "Graham's reasoning implicates any life-without-parole sentence imposed on a juvenile." Id.

Together, these three cases prohibit sentencing any child to life without parole for felony murder when that child has not been shown to have killed or possessed an

intent to kill. Roper established that children are constitutionally different, and as a category less culpable, than adults. Graham reinforced these constitutional protections and recognized that children who did not possess any intent to kill should never be sentenced to life without parole. Miller recognized that the constitutional protections of Roper and Graham cover children convicted of homicide as well. The sum of Graham's recognition that children who have not killed should not be sentenced to life without parole and Miller's recognition that, even for those children convicted of homicide, life without parole should be imposed in only the rarest instances of severe culpability, is that the Eighth Amendment bans life without parole sentences for children convicted of felony murder who lacked any intent to kill.

Of course, this Court in Miller did not categorically bar a sentence of life without parole for all juveniles who have been convicted of homicide. However, the Court did recognize that appropriate cases for sentencing children to die in prison will be "uncommon." Miller, 130 S Ct at 2469. The clear directive is that such sentences should be reserved for only the most exceedingly culpable juvenile offenders, such as those who have committed deliberate, intentional killings *and* evince a lack of rehabilitative potential.

Unlike this exceeding culpability, a child's culpability for a felony murder involving a botched non-homicide crime that went horribly wrong when an accomplice's actions resulted in the death of the victim is no greater than the culpability of thousands of individuals now serving lesser sentences for similar felonies which, because of circumstances completely unrelated to the intent of the child or his co-

defendants, did not result in a death. The impetuousness, vulnerability, and malleability of youth apply equally to all of these children. This Court recognized as much in Miller, stating that the "features [of children] are evident in the same way, and to the same degree, when [] a botched robbery turns into a killing." Miller, 130 S Ct at 2465.

Both Graham and Miller also "liken[ed] life-without-parole sentences imposed on juveniles to the death penalty itself." See Miller, 132 S Ct at 2466. This correspondence implicates this Court's line of precedents limiting the imposition of the death penalty for felony murder cases to only the most culpable of offenders. See id. at 2467. In Enmund v Florida, 458 US 782 (1982), this Court held that the death penalty cannot be imposed an individual who "aids and abets a felony in the course of which a murder is committed," when the individual "did not commit and had no intention of committing or causing" murder. Id. at 797, 801; see also Cabana v. Bullock, 474 U.S. 376, 386 (1988) ("Enmund . . . imposes a categorical rule: a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death."). In Tison v. Arizona, 481 US 137 (1987); this Court reaffirmed Enmund's holding that the death penalty cannot be imposed upon a "minor actor in [a felony] . . . who neither intended to kill nor was found to have had any culpable mental state." Tison, 481 US at 158. Finally, in Kennedy v. Louisiana, 554 U.S. 407 (2008), this Court again relied on Enmund's "fundamental, moral distinction" between "homicide and other serious violent offenses" in striking down the death penalty for the crime of rape, id. at 438, and again

recognized that "the death penalty for the crime of vicarious felony murder is disproportionae to the offense" because "while 'robbery is a serious crime deserving serious punishment,' it is not like death in its 'severity and revocability.'" Id. (quoting Enmund, 458 U.S. at 797).

Akin to the reasoning in Miller recognizing the implications of this Court's precedent limiting the mandatory imposition of the death penalty for the mandatory imposition of life-without-parole upon children, the confluence of this Court's precedent limiting the imposition of the death penalty to only those persons who possessed an intent to commit murder with the holdings of Roper, Graham, and Miller, leads to the conclusion that the ultimate penalty for children – life without parole – is constitutionally prohibited for children such as Mr. Davis who have been convicted of felony murder but did not commit and had no intention of committing murder. The holdings of Roper, Graham, and Miller, when considered with the holdings of Enmund, Tison, and Kennedy, constitute "standards elaborated by controlling precedents," Graham, 560 US at 61 (internal quotation marks omitted), that compel a finding that the imposition of life without parole upon a child convicted of aiding and abetting felony murder violates the Eighth Amendment.

Indeed, Justice Breyer acknowledged the implications of this Court's precedents in his concurrence in Miller, and reasoned that "the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim" because "where the juvenile neither kills nor intends to kill, both features [of youth and a lack of any intent to kill]

emphasized in Graham as extenuating apply." Miller, 132 S Ct at 2475-76 (Breyer, J., concurring). Justice Breyer "recognize[d] that in the context of felony-murder cases, the question of intent is a complicated one," but concluded that "this type of 'transferred intent'" where "the defendant's intent to commit the felony satisfies the intent to kill required for murder," as suffices under Michigan law for a felony murder conviction, "is not sufficient to satisfy the intent to murder that could subject a juvenile to a sentence of life without parole" because "this artificially constructed kind of intent does not count as intent for purposes of the Eighth Amendment." Id. at 2476 (Breyer, J., concurring).

Justice Breyer concluded that "Graham dictates a clear rule: The only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who 'kill or intend to kill.'" Id. at 2476 (quoting Graham, 560 U.S. at 69). Because this rule applies to Mr. Davis, his current sentence of life without parole is unconstitutional. This court should grant certiorari to resolve this significant question so that Mr. Davis may receive relief from his unconstitutional sentence.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Supreme Court of Michigan.

Respectfully submitted,

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Index of Appendices

APPENDIX A

STATE OF MICHIGAN

THIRD CIRCUIT COURT CRIMINAL DIVISION
COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff.

CORTEZ ROLAND DAVIS

Case No. 94-2089
Hon. Vera Massey Jones

Defendant.

_____/

ORDER

At a session of said Court held in the Frank Murphy Hall of
Justice-Criminal Division of the City of Detroit, State of Michigan,
County of Wayne on: April 25, 2011
PRESENT: Honorable Vera Massey Jones

The defendant having filed a successive motion for relief from judgment claiming a retroactive change in the law based on Graham v. Florida cited by defendant as 560 U.S.____;130 S Ct 2011 (May 17, 2010). The court having read the motion and the opinion in Graham v. Florida.

IT IS HEREBY ORDERED that defendant's motion is **DENIED.** The reason for the denial is stated below.

People v Cortez Davis has a long appellate history. This court remembers the case because of granting new trials for defendants on several occasions. Each grant of a new trial was appealed and each action of this trial court was reversed. Thus, this court would hope that there was a retroactive change in the law that would allow this court to again grant the defendant a new trial. Unfortunately, the holding in Graham v. Florida that "The clause does not permit a juvenile offender to be sentenced to life in prison without parole for a non homicide crime." It does not apply to this defendant's case. Defendant was convicted of Felony Murder, a homicide

offense. Thus, Graham v. Florida does not apply. Under these circumstances the defendant is not entitled to the relief requested.

April 25, 2011
DATED

Honorable Vera Massey Jones
Wayne County 3rd Circuit Court Judge

APPENDIX B

Court of Appeals, State of Michigan

ORDER

People of MI v Cortez Roland Davis

Docket No. 304075

LC No. 94-002089

Michael J. Talbot
Presiding Judge

E. Thomas Fitzgerald

Christopher M. Murray
Judges

The Court orders that the application for leave to appeal is DENIED for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D). *Graham v Florida*, 560 US ___; 130 S Ct 2011; 176 L Ed 2d 825 (2010) is not applicable to defendant's life sentence for felony murder, a homicide offense.

Presiding Judge

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

NOV 16 2011
Date

Chief Clerk

APPENDIX C

492 Mich. 871
Supreme Court of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Cortez Roland DAVIS, Defendant–Appellant.

Docket No. 144384. | COA No. 304075. | Sept. 7, 2012.

Order

On order of the Court, the motions for immediate consideration and the motion to intervene are GRANTED. The application for leave to appeal the November 16, 2011 order of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Wayne Circuit Court for reconsideration of the defendant's successive motion for relief from judgment in light of *Miller v. Alabama,* 567 U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), including the question whether *Miller* applies retroactively to cases that have become final on direct review. The motion to withdraw the application, the motion to concur with the request for leave, and the motion for stay are DENIED as moot.

We do not retain jurisdiction.

Parallel Citations

820 N.W.2d 167 (Mem)

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APPENDIX D

STATE OF MICHIGAN

THIRD CIRCUIT COURT CRIMINAL DIVISION
COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff.

CORTEZ DAVIS

Case No. _____
Hon. Vera Massey Jones

Defendant.

_____/

OPINION AND ORDER

At a session of said Court held in the Frank Murphy Hall of
Justice-Criminal Division of the City of Detroit, State of Michigan,
County of Wayne on: December 11, 2012

PRESENT: Honorable Vera Massey Jones

Oral argument having been heard and the court being fully advised.

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

Defendant was convicted as a juvenile of First Degree Felony Murder in 1994. A sentencing hearing was held to determine whether to sentence defendant as a juvenile. The defendant was not the shooter, but an aider and abettor. This court found that although defendant could be rehabilitated, the time left under the juvenile sentencing option was not enough time to assure that defendant was rehabilitated. Further, this court held that to sentence this particular defendant to natural life in prison was cruel and unusual punishment. The Michigan Court of Appeals in 1994 ordered this court to sentence Mr. Davis pursuant to statute. Mr. Davis pursued every means of appeal in the Michigan Courts including several subsequent motions for relief from judgment. The United States Supreme Court in Miller v. Alabama, 132 S. Ct 2455, has finally held that to sentence juveniles to natural life in prison without the possibility of parole is

cruel and unusual punishment. This court uses the term "finally held" because Mr. Cortez Davis has been in prison for 18 years without a hearing before a parole board. This court is not aware if during these 18 years the defendant has had the opportunity for educational programs or any services that might prepare him to return to society. Thus, we have locked him behind bars for over 18 years as a juvenile who did not pull the trigger, who told the victim that he held at gunpoint that everything will be alright, and who had the potential to be rehabilitated. We, the People of the State of Michigan have treated this juvenile, now man, inhumanely.

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

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

December 11, 2012
DATED

Honorable Vera Massey Jones
Wayne County 3rd Circuit Court Judge

APPENDIX E

Court of Appeals, State of Michigan

ORDER

People of MI v Cortez Roland Davis

Docket No. 314080

LC No. 94-002089-01-FC

Kirsten Frank Kelly
Presiding Judge

Michael J. Talbot

Christopher M. Murray
Judges

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

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

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

COURT OF APPEALS OF THE STATE OF MICHIGAN
TUEBOR
CIRCUMSPICE
1965

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

JAN 16 2013
Date

Chief Clerk

APPENDIX F

496 Mich. 440
Supreme Court of Michigan.

PEOPLE
v.
CARP
People
v.
Davis
People
v.
Eliason

Docket Nos. 146478, 146819, 147428.
| Calendar Nos. 4, 5, 6. | Argued March 6, 2014. | Decided July 8, 2014.

Synopsis

Background: First juvenile defendant was convicted as an adult in a jury trial in the Circuit Court, Berrien County, Scott Schofield, J., of first-degree murder and was sentenced to life imprisonment without the possibility of parole. Defendant appealed. The Court of Appeals, 300 Mich.App. 293, 833 N.W.2d 357, affirmed in part and reversed in part. Defendant sought leave to appeal, which was granted. Second juvenile defendant was convicted as an adult in a jury trial in the Recorders Court, City of Detroit of first-degree murder and, following remand from the Court of Appeals, 492 Mich. 871, 820 N.W.2d 167, was sentenced to life imprisonment without the possibility of parole. Defendant sought leave to appeal, which was granted. Third juvenile defendant was convicted as an adult in a jury trial in the Circuit Court, St. Clair County, of first-degree murder and was sentenced to life imprisonment without possibility of parole. Defendant subsequently sought postconviction relief, which was denied. Defendant appealed. The Court of Appeals, 298 Mich.App. 472, 828 N.W.2d 685, affirmed. Defendant sought leave to appeal, which was granted. Cases were consolidated.

Holdings: The Supreme Court, Markman, J., held that:

[1] United States Supreme Court decision in *Miller v. Alabama* did not apply retroactively under federal retroactivity rules;

[2] rule announced in *Miller v. Alabama* constituted a new rule;

[3] new rule announced in *Miller v. Alabama* was procedural, rather than substantive rule;

[4] new rule announced in *Miller v. Alabama* did not apply retroactively under state retroactivity rules;

[5] federal constitutional prohibition on cruel and unusual punishment did not categorically bar imposition of life without parole sentence on juvenile homicide offenders;

[6] state constitutional prohibition on cruel or unusual punishment did not categorically bar imposition of life without parole sentence on juvenile homicide offenders;

[7] federal constitutional prohibition on cruel and unusual punishment did not categorically bars the imposition of a life-without-parole sentence on a juvenile convicted of felony murder on an aiding-and-abetting theory; and

[8] assertion that state constitutional prohibition on cruel or unusual punishment categorically barred imposition of a sentence of life without parole on a juvenile homicide offender who was 14 years of age at the time of the offense was not ripe for adjudication.

Affirmed and remanded.

Mary Beth Kelly, J., filed dissenting opinion in which Michael F. Cavanagh and McCormack, JJ., joined.

Attorneys and Law Firms

****807** Bill Schuette, Attorney General, Aaron D. Lindstrom, Solicitor General, Michael D. Wendling, Prosecuting Attorney, and Hilary B. Georgia, Assistant Prosecuting Attorney, for the people in Carp.

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Bill Schuette, Attorney General, Aaron D. Lindstrom, Solicitor General, Michael J. Sepic, Prosecuting Attorney, and Elizabeth A. Wild, Assistant Prosecuting Attorney, for the people in Eliason.

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Bill Schuette, Attorney General, Aaron D. Lindstrom, Solicitor General, and B. Eric Restuccia, Deputy Solicitor General, for the Attorney General in Carp.

Juvenile Law Center (by Marsha L. Levick) and Rhoades McKee PC (by Bruce W. Neckers) for the Juvenile Law Center and numerous organizations and individuals.

Stuart G. Friedman for the Criminal Defense Attorneys of Michigan in Carp.

Kimberly Thomas for the Criminal Defense Attorneys of Michigan in Davis.

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Opinion

MARKMAN, J.

***451** We granted leave to appeal to address (1) whether *Miller v. Alabama,* 567 U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), should be applied retroactively—pursuant to either the federal or state test for retroactivity—to cases in which the defendant's sentence became final for purposes of direct appellate review before *Miller* was decided and (2) whether the Eighth Amendment of the United States Constitution or Const. 1963, art. 1, § 16 categorically bars the imposition of a life-without-parole sentence on a juvenile homicide offender. After considering these matters, we hold that the rule announced in *Miller* does not satisfy either the federal test for retroactivity set forth in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), or Michigan's separate and independent test for retroactivity set forth in *People v. Sexton,* 458 Mich. 43, 580 N.W.2d 404 (1998), and *People v. Maxson,* 482 Mich. 385, 759 N.W.2d 817 (2008). We further hold that neither the Eighth Amendment nor Const. 1963, art. 1, § 16 categorically bars the imposition of a life-without-parole sentence on a juvenile homicide offender.

I. FACTS AND HISTORY

A. DEFENDANT CARP

Defendant Raymond Carp was 15 years of age when he participated in the 2006 bludgeoning and stabbing of Mary Ann McNeely in Casco Township. He was charged with first-degree murder in violation of MCL 750.316 and tried as an adult. On October 5, 2006, a St. Clair County jury convicted Carp of this offense, and in accordance with the

law he was sentenced to life imprisonment without parole. Carp's conviction was subsequently *452 affirmed by the Court of Appeals, *People v. Carp,* unpublished opinion per curiam of the Court of Appeals, issued December 30, 2008 (**809 Docket No. 275084), 2008 WL 5429890, and his application for leave to appeal in this Court was denied on June 23, 2009, *People v. Carp,* 483 Mich. 1111, 766 N.W.2d 839 (2009). Because Carp did not seek review in the United States Supreme Court, his conviction and sentence became final for the purposes of direct appellate review on June 23, 2009.

In September 2010, Carp sought to collaterally attack the constitutionality of his sentence by filing a motion for relief from judgment pursuant to MCR 6.501 *et seq.* The trial court denied this motion, concluding that the imposition of a mandatory sentence of life without parole on a juvenile first-degree-murder offender did not constitute cruel or unusual punishment, citing *People v. Launsburry,* 217 Mich.App. 358, 363–365, 551 N.W.2d 460 (1996), lv. den. 454 Mich. 883, 562 N.W.2d 203 (1997), and recon. den. 454 Mich. 883, 564 N.W.2d 900 (1997). Carp then sought leave to appeal in the Court of Appeals, which was denied on June 8, 2012. *People v. Carp,* unpublished order of the Court of Appeals, entered June 8, 2012 (Docket No. 307758). Seventeen days later, the United States Supreme Court issued its decision in *Miller,* leading Carp to move for reconsideration, and the Court of Appeals granted his motion. *People v. Carp,* unpublished order of the Court of Appeals, entered August 9, 2012 (Docket No. 307758). On reconsideration, the Court determined that *Miller* had created a "new rule" that was "procedural" in nature and therefore not subject to retroactive application under the rules set forth in *Teague. People v. Carp,* 298 Mich.App. 472, 511–515, 828 N.W.2d 685 (2012). The Court further held that *Miller* was not subject to retroactive application under Michigan's separate test for retroactivity set forth in *Sexton* and *453 *Maxson.*[1] *Id.* at 520–522, 828 N.W.2d 685. This Court subsequently granted Carp leave to appeal with respect to whether *Miller* should be applied retroactively under either federal or state law. *People v. Carp,* 495 Mich. 890, 838 N.W.2d 878 (2013).

1 The Court of Appeals also opined in dictum how *Miller* should be applied by trial courts in resentencing juvenile first-degree-murder offenders in cases that were not presented on collateral review. *Carp,* 298 Mich.App. at 523–537, 828 N.W.2d 685.

B. DEFENDANT DAVIS

Defendant Cortez Davis, age 16 at the time of his offense, and one of his cohorts, while both brandishing firearms, accosted two individuals in Detroit for the purpose of robbery.[2] Two witnesses testified that when one of the victims attempted to flee, Davis and his cohort fired five or six shots, killing the victim. Davis was charged with felony first-degree murder in violation of MCL 750.316(1)(b) and convicted by a jury in the former Recorders Court for the City of Detroit (now part of the Wayne Circuit Court) on this charge on May 10, 1994.

2 At trial, Davis testified that he had not participated in the robbery, but that a third cohort, "Shay-man," and the other cohort, had committed the offense without Davis's help or encouragement.

At sentencing, the trial court initially ruled that Michigan's statutory sentencing scheme for first-degree murder could not constitutionally be applied to juvenile homicide offenders because it was "cruel and unusual" to impose a sentence of life without parole on a juvenile who was "capable of rehabilitation." In concluding that Davis was such an individual, the court surmised that Davis's role in the commission of the offense was that of an aider and abettor, not an actual shooter. The court, however, did not make any finding concerning Davis's intentions with respect to the fleeing victim or whether **810 *454 he reasonably foresaw the possibility that a life might be taken when he initially engaged in the armed robbery. The trial court thereupon sentenced Davis to a term of imprisonment of 10 to 40 years.

On appeal, however, the Court of Appeals reversed and remanded for resentencing pursuant to Michigan's statutory sentencing scheme, *People v. Davis,* unpublished order of the Court of Appeals, entered November 23, 1994 (Docket No. 176985), and at resentencing, the trial court imposed the required sentence of life without parole. Direct appellate review of defendant's conviction and sentence concluded in 2000. *People v. Davis,* unpublished order of the Court of Appeals, entered June 15, 2000 (Docket No. 224046).[3]

3 A federal district court dismissed Davis's federal habeas petition, expressly rejecting his contention "that there was insufficient evidence to convict him of first-degree felony murder." *Davis v. Jackson,* unpublished opinion and order of the United States District Court

for the Eastern District of Michigan, issued April 30, 2008 (Docket No. 01–CV–72747), p. 9, 2008 WL 1902102. The court relied on the surviving victim's "testi[mony] that both [Davis] and his co-defendant fired their weapons at the decedent." *Id.* Davis challenged the credibility of this witness, but the court rejected this assertion because "[t]he testimony of a single, uncorroborated prosecuting witness or other eyewitness is generally sufficient to support a conviction, so long as the prosecution presents evidence which establishes the elements of the offense beyond a reasonable doubt." *Id.* at 11. The court later denied Davis's request for a certificate of appealability. *Davis v. Jackson,* unpublished order of the United States District Court for the Eastern District of Michigan, entered June 4, 2008 (Docket No. 01–CV–72747). The United States Court of Appeals for the Sixth Circuit affirmed this denial, stating that "[a]n eyewitness ... testified that both Davis and his co-perpetrator fired shots at the decedent." *Davis v. Jackson,* unpublished order of the United States Court of Appeals for the Sixth Circuit, entered July 14, 2009 (Docket No. 08–1717), p. 2.

In 2010, Davis filed his current motion for relief from judgment, contending that *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), constituted a "retroactive change in the law" in that it categorically ***455** barred life-without-parole sentences for juveniles convicted of nonhomicide offenses. Concluding, however, that felony murder is in fact a "homicide offense," even when the defendant is not the actual shooter but an aider and abettor, the trial court denied this motion. The Court of Appeals denied Davis's application for leave to appeal. *People v. Davis,* unpublished order of the Court of Appeals, entered November 16, 2011 (Docket No. 304075). While Davis's application for leave to appeal in this Court was pending, the United States Supreme Court issued its decision in *Miller.* In light of *Miller,* Davis's case was remanded to the trial court for a determination of whether *Miller* applied retroactively. *People v. Davis,* 492 Mich. 871, 820 N.W.2d 167 (2012). On remand, the trial court concluded that *Miller* did apply retroactively, entitling Davis to be resentenced. The prosecutor then appealed, and the Court of Appeals reversed. *People v. Davis,* unpublished order of the Court of Appeals, entered January 16, 2013 (Docket No. 314080), citing *Carp,* 298 Mich.App 472, 828 N.W.2d 685. Davis again sought leave to appeal in this Court, which we granted to address whether the Eighth Amendment of the United States Constitution or Const. 1963, art. 1, § 16 categorically bars imposing a sentence of life without parole on a juvenile convicted of felony murder on aiding-and-abetting grounds. *People v. Davis,* 495 Mich. 890, 838 N.W.2d 881 (2013).

C. DEFENDANT ELIASON

Unlike Carp and Davis, whose sentences became final for purposes of direct review ****811** before *Miller* was decided, at least 10 defendants were convicted and sentenced before *Miller,* but their cases were on direct appeal at the time *Miller* was decided. Dakotah Eliason is one of those defendants. At age 14, Eliason, without provocation and after hours of deliberation, fired a ***456** single deadly shot into the head of his stepgrandfather as he slept in his Niles Township home. Eliason was charged with first-degree murder in violation of MCL 750.316(1)(a) in the Berrien Circuit Court, convicted by a jury, and sentenced in October 2010 to life without parole.

While Eliason's appeal was pending before the Court of Appeals, *Miller* was decided. In assessing the effect of *Miller* on Michigan's sentencing scheme for juvenile first-degree-murder offenders, the Court of Appeals held that a trial court must as a result of *Miller* perform an individualized sentencing analysis based upon the factors identified in *Miller. People v. Eliason,* 300 Mich.App. 293, 309–311, 833 N.W.2d 357 (2013), citing *Carp,* 298 Mich.App. at 522–532, 828 N.W.2d 685. Using this analysis, the trial court must then choose between imposing a sentence of life with or without parole. *Eliason,* 300 Mich.App. at 310, 833 N.W.2d 357. Eliason sought leave to appeal in this Court, challenging the sentencing procedures and options defined by the Court of Appeals, contending that the trial court should have the further option of imposing a sentence of a term of years. Eliason additionally argued that Const. 1963, art. 1, § 16 categorically bars the imposition of a life-without-parole sentence on a juvenile. We granted leave to appeal on both issues. *People v. Eliason,* 495 Mich. 891, 839 N.W.2d 193 (2013).

II. MICHIGAN STATUTES

Pending our resolution of this appeal, and in response to *Miller,* the Legislature enacted, and the Governor signed into law, 2014 PA 22, now codified as MCL 769.25 and MCL 769.25a. This law significantly altered Michigan's sentencing scheme for juvenile offenders convicted of crimes that had previously carried a sentence of life without parole.

*457 A. PRE–*MILLER*

To understand the full context of defendants' appeals and the relief each seeks in reliance on *Miller,* it is necessary first to delineate the pre-*Miller* statutes that controlled the trial and sentencing of juvenile first-degree-murder offenders in Michigan. Each defendant before this Court was charged with first-degree murder under MCL 750.316. When a juvenile defendant "14 years of age or older" is charged with a felony, the family division of the circuit court would typically possess initial jurisdiction. MCL 712A.4(1). However, when a juvenile is charged with a "specified juvenile violation," including first-degree murder in violation of MCL 750.316, "the prosecuting attorney may authorize the filing of a complaint and warrant on the charge...." MCL 764.1f. If the prosecutor does so, the circuit court itself, rather than the family division of the circuit court, acquires jurisdiction over the juvenile defendant's case and must try that person as an adult. See MCL 712A.2(a)(1).

This process has been termed the "automatic waiver process" because the Legislature has vested exclusively in the prosecutor the executive discretion to charge and try a juvenile as an adult when the juvenile stands accused of first-degree murder. *People v. Conat,* 238 Mich.App. 134, 141–142, 605 N.W.2d 49 (1999). The prosecutors in the instant three cases filed complaints and warrants placing the cases within the jurisdiction of the circuit court, where each defendant was then tried and convicted as an adult. When this occurs and the offense is included in an enumerated ****812** subset of specified juvenile violations (which includes first-degree murder), "[t]he court shall sentence a juvenile ... in the same manner as an adult[.]" MCL 769.1(1). Because an adult convicted of first-degree murder "shall be ***458** punished by imprisonment for life," MCL 750.316(1), and is not eligible for parole, MCL 791.234(6)(a), defendants were ultimately sentenced to terms of life without parole. Each defendant now seeks resentencing and, pursuant to the statutory response to *Miller,* would, if granted resentencing, be subject to the new sentencing rules established for juveniles by 2014 PA 22.

B. POST–*MILLER*

MCL 769.25, enacted in response to *Miller,* prescribes a new sentencing scheme for juveniles convicted of violating certain provisions of Michigan laws, such as MCL 750.316, that had previously carried with them a fixed sentence of life without parole. The effect of MCL 769.25 is that even juveniles who commit the most serious offenses against the laws of this state may no longer be sentenced under the same sentencing rules and procedures as those that apply to adults who commit the same offenses. Rather than imposing fixed sentences of life without parole on all defendants convicted of violating MCL 750.316, MCL 769.25 now establishes a default sentencing range for individuals who commit first-degree murder before turning 18 years of age. Pursuant to the new law, absent a motion by the prosecutor seeking a sentence of life without parole,

> the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years. [MCL 769.25(4) and (9).]

When, however, the prosecutor does file a motion seeking a life-without-parole sentence, the trial court "shall conduct a hearing on the motion as part of the sentencing process" and "shall consider the factors listed in *Miller v. Alabama*...." MCL 769.25(6). Accordingly, the ***459** sentencing of juvenile first-degree-murder offenders now provides for the so-called "individualized sentencing" procedures of *Miller.*

In adopting this new sentencing scheme, the Legislature was clearly cognizant of the issue surrounding whether *Miller* was to be applied retroactively. In defining the scope of the new scheme, the Legislature asserted that "the procedures set forth in [MCL 769.25] do not apply to any case that is final for purposes of appeal on or before June 24, 2012 [the day before the United States Supreme Court's decision in *Miller*]." MCL 769.25a(1). Instead, the Legislature specified:

> If the state supreme court or the United States supreme court finds that the decision of the United States supreme court in *Miller v. Alabama,* [567] U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), applies retroactively to all defendants who were under the age of 18 at the time of their crimes, and that decision is final for appellate purposes, the determination of whether a sentence of imprisonment for a violation set forth in [MCL 769.25(2)] shall be imprisonment for

> life without parole eligibility or a term of years as set forth in [MCL 769.25(9)] shall be made by the sentencing judge or his or her successor as provided in this section. [MCL 769.25a(2).] [4]

4 MCL 769.25a(3) contains a similar exception to the prospective application of MCL 769.25 in the event that this Court or the United States Supreme Court holds that *Miller* applies retroactively to juvenile first-degree-murder offenders convicted on a felony-murder theory under MCL 750.316(1)(b).

**813 We now take up the question identified in MCL 769.25a(2)—whether *Miller* must be applied retroactively.

III. STANDARD OF REVIEW

[1] [2] [3] [4] [5] Whether a decision of the United States Supreme Court applies retroactively under either federal or state *460 retroactivity rules poses a question of law that is reviewed de novo. *Maxson,* 482 Mich. at 387, 759 N.W.2d 817. Whether a statute is constitutional also poses a question of law that is reviewed de novo. *Hunter v. Hunter,* 484 Mich. 247, 257, 771 N.W.2d 694 (2009). When the constitutionality of a statute is brought into question, "[t]he party challenging [it] has the burden of proving its invalidity." *People v. Thomas,* 201 Mich.App. 111, 117, 505 N.W.2d 873 (1993). To sustain its burden, the party challenging the statute must overcome the presumption that a statute is constitutional, and the statute "will not be declared unconstitutional unless clearly so, or so beyond a reasonable doubt." *Cady v. Detroit,* 289 Mich. 499, 505, 286 N.W. 805 (1939). Furthermore, a "party challenging the facial constitutionality of a statute faces an extremely rigorous standard, and must show that no set of circumstances exists under which the [a]ct would be valid." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71,* 479 Mich. 1, 11, 740 N.W.2d 444 (2007) (citations and quotation marks omitted).

IV. ANALYSIS

To determine whether *Miller* must be applied retroactively, it is helpful to first identify exactly what *Miller* held by way of understanding what precedents were relied on in forming its rule. *Miller* is the product of "two strands of precedent," one requiring a particular form of individualized sentencing before capital punishment can be imposed and the other addressing the constitutionality of imposing specific punishments on juvenile offenders. *Miller,* 567 U.S. at ——, 132 S.Ct. at 2463–2464. We now consider both strands of precedent with the purpose of identifying what is required by the rules formed from each strand of precedent and then *461 comparing and contrasting what is required by each with what is required by the rule in *Miller* in order to determine whether the latter rule should be applied retroactively.

A. GENESIS OF *MILLER*

1. CAPITAL–PUNISHMENT STRAND

In *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the United States Supreme Court decided 5–4 in seven separate opinions that it constituted cruel and unusual punishment in violation of the Eighth Amendment to impose capital punishment pursuant to a sentencing scheme that, in its words, "vested the [sentencer] with complete and unguided discretion to impose the death penalty...." *Beck v. Alabama,* 447 U.S. 625, 639, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). In response, some states enacted sentencing schemes requiring the imposition of capital punishment for select crimes by way of the *mandatory* operation of law. *Woodson v. North Carolina,* 428 U.S. 280, 286–287, 298, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Those sentencing schemes were also challenged on Eighth Amendment grounds in *Woodson,* with the Court understanding the case as challenging not the state's ability to impose capital punishment but "the *procedure* employed by the State to select persons for the ... penalty of death." *Id.* at 287, 96 S.Ct. 2978 (emphasis added).

In *Woodson,* the Court, in another 5–4 decision, held that those schemes were unconstitutional. The plurality opinion **814 viewed as unconstitutional sentencing schemes that employed a process that did not permit for "the prevailing practice of individualizing sentencing determinations" as part of the process for imposing capital punishment. *Id.* at 303–304, 96 S.Ct. 2978 (opinion of Stewart, *462 Powell, and Stevens, JJ.). Accordingly, post-*Woodson,* capital punishment could only be constitutionally imposed after "consideration of the character and record of the individual offender and the circumstances of the particular offense...." *Id.* at 304, 96 S.Ct. 2978. Notably, however, on the same day that the United States Supreme Court decided

Woodson, it also declined to categorically bar the imposition of capital punishment. *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

Following *Woodson* and *Gregg,* the United States Supreme Court confronted two additional cases challenging whether the sentencing procedures employed to impose capital punishment complied with *Woodson's* requirement of individualized sentencing determinations. See *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Both *Lockett* and *Eddings* were cited in *Miller* as part of the capital-punishment strand of precedent that culminated in *Miller. Miller,* 567 U.S. at ——, 132 S.Ct. at 2467. The plurality opinion in *Lockett* stated that statutory schemes authorizing capital punishment must permit the sentencer to consider all forms of mitigating evidence relating to two measuring points for determining the propriety of the sentence—evidence relating to the defendant's "character or record and any of the circumstances of the offense...." *Lockett,* 438 U.S. at 604, 98 S.Ct. 2954 (opinion by Burger, C.J.). Relevantly listed as factors that the sentencer must be permitted to consider were the defendant's "role in the offense" and the defendant's "age." *Id.* at 608, 98 S.Ct. 2954.

[6] In *Eddings,* the Court, in a 5–4 decision, applied *Lockett* to a case in which the trial court, in considering mitigating factors before imposing capital punishment, declined to consider either the defendant's family background, ***463** including the physical abuse and neglect he had suffered, or the fact that he suffered from an alleged "personality disorder." *Eddings,* 455 U.S. at 112–113, 102 S.Ct. 869. The Court ruled that while a sentencer may "determine the weight to be given relevant mitigating evidence," the sentencer may not decide to give a piece of relevant mitigating evidence "no weight by [altogether] excluding such evidence from ... consideration." *Id.* at 114–115, 102 S.Ct. 869. Under *Lockett* and *Eddings,* in which individualized sentencing is required, not only must statutory procedures for imposing capital punishment permit the defendant to present all relevant mitigating evidence, but the sentencer must also consider and accord some weight to that evidence. *Id.* at 112–115, 102 S.Ct. 869.

2. JUVENILE–SENTENCING STRAND

[7] The second strand of precedent was developed in two cases, *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), and *Graham. Roper* and *Graham* were understood by the Court in *Miller* to have "establish[ed] that children are constitutionally different from adults for purposes of sentencing." *Miller,* 567 U.S. at ——, 132 S.Ct. at 2464. This constitutional distinction has resulted in downward alterations in *Roper* and *Graham* in the range of punishments that the state may constitutionally impose on juvenile offenders. When the rules from *Roper* ****815** and *Graham* are considered together, a state may only impose a sentence of life without parole on a juvenile for the commission of an offense that if committed by an adult would constitutionally permit the state to punish the adult by capital punishment.

In *Roper,* the Court held that the "Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Roper,* 543 U.S. at 578, 125 S.Ct. 1183. ***464** The Court characterized the rule it was adopting as a "categorical rule." *Id.* at 572, 125 S.Ct. 1183.[5] The subsequent decision in *Graham* adopted what the Court again characterized as a "categorical rule," i.e., that a sentence of life without parole could not be imposed on a juvenile nonhomicide offender. *Graham,* 560 U.S. at 79, 130 S.Ct. 2011. In reaching this conclusion, *Graham* drew comparisons between a capital sentence for an adult offender and a life-without-parole sentence for a juvenile offender. *Id.* at 69–70, 130 S.Ct. 2011. To justify this categorical rule, the Court relied on the factors identified in *Roper* that assertedly distinguished juvenile and adult offenders. *Id.* at 68, 130 S.Ct. 2011, citing *Roper,* 543 U.S. at 569–570, 125 S.Ct. 1183. The Court also supported its prohibition of life-without-parole sentences for juvenile nonhomicide offenders by concluding that the goals of punishment (retribution, deterrence, incapacitation, and rehabilitation) are not furthered when a nonparolable life sentence is imposed. *Id.* at 71–74, 125 S.Ct. 1183. Combining strands of precedent that were previously limited to capital sentences and juvenile nonhomicide offenders respectively, and holding for the first time that these separate strands were relevant to noncapital sentences for juvenile homicide offenders, the United States Supreme Court reached its holding in *Miller.*

5 The Court's basis for prescribing this rule, distinguishing between adult and juvenile offenders for purposes of constitutional analysis, rested on three factors: (1) juveniles, by way of their "lack of maturity," tend to engage in "impetuous and ill-considered actions," (2) "juveniles are more vulnerable or susceptible to negative

> influences and outside pressures" because they "have less control ... over their own environment," and (3) "the character of a juvenile is not as well formed as that of an adult." *Roper,* 543 U.S. at 569–570, 125 S.Ct. 1183 (citation and quotation marks omitted).

3. *Miller v. Alabama*

[8] *Miller v. Alabama* created the rule that Carp and Davis seek to have applied retroactively. Having identified ***465** what is required by the rules from each of the two strands of precedent that underlie *Miller,* we now identify what is required by the rule in *Miller* in order to determine whether *Miller* is more like the juvenile-sentencing strand whose rules have applied retroactively under *Teague* or more like the capital-punishment strand whose rules have not been applied retroactively under *Teague.* We compare and contrast the rule in *Miller* in this way because, as discussed later, the "form and effect" of a rule is essential in determining whether a rule is to be applied retroactively under *Teague.* One form of a rule will produce a single invariable result, or a single effect, when applied to *any* defendant in the class of defendants to whom the rule is pertinent. Another form of a rule will produce a range of results, or have multiple possible effects, when applied to *different* defendants in the class of defendants to whom the rule is pertinent. The form and effect of the rules derived from the capital-punishment strand of precedent varies considerably from the form and effect of the rules derived from the juvenile-sentencing strand of precedent, and this variance has markedly different consequences for the question of retroactivity. The capital-punishment ****816** strand of precedent prescribed rules that require a sentencer to perform an individualized sentencing analysis resulting in capital punishment being *either* imposed or not. By contrast, the juvenile-sentencing strand of precedent prescribed rules that categorically bar the imposition of a particular sentence, requiring the sentencer to impose a lesser sentence in every case. The former class of rules does not clearly satisfy the test for retroactivity, while the latter class of rules does. In assessing whether the form and effect of the rule in *Miller* is more akin to that of the capital-punishment strand of precedent, and therefore less clearly retroactive, or more akin to the ***466** juvenile-sentencing strand of precedent, and therefore more clearly retroactive, we find it important to examine what *Miller* itself stated about the form and effect of its own holding.

Miller held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller,* 567 U.S. at ——, 132 S.Ct. at 2469. Within the very same paragraph in which *Miller* announced this holding, the Court also stated that its decision "require[s] [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at ——, 132 S.Ct. at 2469. *Miller* then provides substantial details regarding what must be considered as part of the individualized sentencing process before a sentence of life without parole can be imposed on a juvenile:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him —and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that 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. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. [*Id.* at ——, 132 S.Ct. at 2468 (citation omitted).]

Miller's summarization of what the trial court must evaluate as part of the new individualized sentencing process tracks in large part the two measuring points ***467** about which a defendant must be allowed to present mitigating evidence within the capital-punishment context of *Lockett*—evidence relating to "the 'circumstances of the particular offense and [to] the character and propensities of the offender.' " *Id.* at —— n. 9, 132 S.Ct. at 2471 n. 9, quoting *Roberts v. Louisiana,* 428 U.S. 325, 333, 96 S.Ct. 3001, 49 L.Ed.2d

974 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), and citing *Sumner v. Shuman,* 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987). Although the focus of the rule in *Miller*—life-without-parole sentences for juvenile offenders—is, of course, distinct from the focus of the rules in capital-punishment cases, the form and effect of the rule in *Miller* is quite similar to that of the rules in capital-punishment cases. That is, the rule in *Miller* requires a sentencer to perform an individualized sentencing analysis resulting in a life-without-parole sentence being *either* imposed or not, very much like the capital-punishment cases ****817** require a sentencer to perform an individualized sentencing analysis resulting in capital punishment being *either* imposed or not.

It is considerably more difficult to draw the same comparison between the rule in *Miller* and the categorical rules in *Graham* and *Roper.* Indeed, the United States Supreme Court itself specifically distinguished the form and effect of these rules:

> 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. [*Miller,* 567 U.S. at ——, 132 S.Ct. at 2471.] [6]

6 This is but one of several statements from *Miller* highlighting the limited effect of its rule as it pertains to requiring "a certain process" rather than "categorically bar[ring] a penalty." In the paragraph in which it describes its holding and addresses the sentencer's obligations before imposing a life-without-parole sentence, the Court stated, "[W]e do not foreclose a sentencer's ability to make that judgment in homicide cases...." *Id.* at ——, 132 S.Ct. at 2469. Additionally, in discussing the breadth of its holding, the Court stated unequivocally that it has not placed any bar on imposing a life-without-parole sentence on juvenile homicide offenders because it had declined to even reach the question of whether the Eighth Amendment requires such a bar. See *id.* at ——, 132 S.Ct. at 2469 ("[W]e do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles...."). Indeed, the only opinion in *Miller* even to entertain the possibility that the Eighth Amendment imposes a categorical bar on life-without-parole sentences for juvenile homicide offenders was Justice Breyer's concurrence, joined in only by Justice Sotomayor, in which he stated,

> Given *Graham's* reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim. [*Id.* at ——, 132 S.Ct. at 2475–2476 (Breyer, J., concurring).]

Had the Court itself adopted Justice Breyer's proposed rule, then *Miller* might be said to have the same form and effect of the categorical rules adopted in *Graham* and *Roper,* but the Court did not. The dissent in this case further errs in its attempt to read the rule in *Miller* and the rule proposed by Justice Breyer as one and the same. See *post* at 851–53. Whereas the rule proposed by Justice Breyer draws a bright line, foreclosing the state's ability to impose a sentence of life without parole for a juvenile convicted of a homicide offense in which the juvenile offender did not kill or intend to kill, the rule in *Miller* does not foreclose imposing a life-without-parole sentence on such an offender. This is because the rule in *Miller,* unlike that proposed by Justice Breyer, requires a sentencer to look at not only the circumstances of the offense, but also at the characteristics of the defendant such that a juvenile homicide offender who did not kill or intend to kill could be sentenced to life without parole if the offender, for example, possessed a prior criminal record, showed no signs of amenability to rehabilitation, and exhibited mental faculties similar to those possessed by an adult offender.

***468** Thus, rather than relying on *Graham* and *Roper* to give form and effect to *Miller,* in the same manner as the capital-punishment decisions, the Court relied on *Graham* and *Roper* in *Miller* only for a generalized ***469** "principle" regarding juvenile offenders. *Id.* at ——, 132 S.Ct. at 2471, 2472 n. 11. That is, *Miller* relied on *Graham* and *Roper* for the general principle of law that juveniles possess different mental faculties than adults, so the United States Constitution requires that they be treated differently than adults for sentencing purposes with respect to the imposition of capital punishment and sentences of life without parole. Although this principle of law explains why the United States Supreme Court found it necessary to adopt the rule in *Miller,* it has no bearing on the actual form and effect of the rule adopted in *Miller.* Accordingly, because the form ****818** and effect of a rule rather than the principle underlying the rule's formation controls whether the rule must be applied retroactively under federal retroactivity rules, whether *Miller* must be applied retroactively will center on whether a rule with a form and

effect similar to the rules in *Woodson, Lockett*, and *Eddings* (rather than *Roper* and *Graham*) is the type of rule entitled to retroactive application under *Teague.* [7] With this in mind, we next define *Teague's* federal retroactivity test so as to determine whether the rule in *Miller* is entitled to retroactive application under that test.

7 The dissent does not appear to dispute that the rule in *Miller* has the form and effect of the rules from *Woodson, Lockett*, and *Eddings*, rather than those from *Roper* and *Graham*, when it describes the latter decisions as having "forbade" and "prohibited" specific types of punishments as applied to juveniles while describing *Miller* as having "struck down a sentencing scheme." *Post* at 851.

B. FEDERAL RETROACTIVITY

1. GENERAL OVERVIEW

[9] **[10]** **[11]** There is a "general rule of *nonretroactivity* for cases on collateral review" when it comes to applying new constitutional rules to cases that became final before ***470** the new rule was announced. [8] *Teague*, 489 U.S. at 307, 109 S.Ct. 1060 (opinion by O'Connor, J). This default rule is driven by "the principle of finality which is essential to the operation of our criminal justice system." *Id.* at 309, 109 S.Ct. 1060. Supporting this same principle are concerns arising from the burdens placed on the administration of justice when new rules are applied retroactively, in that "[t]he 'costs imposed upon the State[s] by retroactive application of new rules of constitutional law on [collateral review] generally far outweigh the benefits of this application.' " [9] *Id.* at 310, 109 S.Ct. 1060, quoting ***471** *Solem v. Stumes*, 465 U.S. 638, 654, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984) (second alteration in original).

8 This general rule of nonretroactivity stands in contrast to the general rule requiring the retroactive application of new rules to cases that have not become final for purposes of direct appellate review before the new rule is announced. *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).

9 By our count, Carp and Davis are 2 of 334 defendants currently serving life-without-parole sentences in Michigan for crimes committed before they turned 18 years of age whose sentences became final for purposes of direct review before the Supreme Court's decision in *Miller*. To fully understand the effect of applying *Miller* retroactively, it may be helpful to briefly consider the demographics and case histories of the defendants who would be entitled to resentencing if *Miller* is applied retroactively. There are at least two reasons why these factors are relevant to the *Miller* analysis: first, *Miller* focuses its individualized sentencing analysis on the defendant's circumstances and personal characteristics *at the time* of the offense, so any retroactive application of *Miller* necessarily requires an analysis specific to that time, however long ago it may have been. The older the case generally, the greater the state's interest in finality and, concomitantly, the more burdensome it is likely to be to accurately reconstruct what characterized the offense and the offender at that time. Second, because *Miller* identifies age and mental development as two consequential factors in determining whether a life-without-parole sentence is constitutionally permissible for a juvenile offender, that sentence is increasingly likely to be permissible the closer an offender was to 18 years of age at the time of the offense. See note 35 of this opinion.

Of the 334 affected defendants, 4 were 14 years of age when they committed their first-degree-murder offenses, 44 were 15 years of age, 105 were 16 years of age, and 181 were 17 years of age. Of the 181 defendants who were 17 years of age at the time of their offenses, 28 were within two months of turning 18 years of age, with several of those individuals within days of turning 18. As for *when* the defendants were initially sentenced, 172 of the defendants were sentenced at least 20 years ago, with several sentenced as early as the mid- to late 1970s. Another 83 defendants were sentenced between 15 and 20 years ago, 46 were sentenced between 10 and 15 years ago, 33 were sentenced between 5 and 10 years ago, and none were sentenced within the last 5 years.

[12] **[13]** **[14]** **[15]** For this reason, the first inquiry in which a court must engage when ****819** determining whether a rule applies retroactively to cases presented on collateral review concerns whether the rule constitutes a "new rule" as defined by *Teague*, 489 U.S. at 299–301, 109 S.Ct. 1060 (opinion by O'Connor, J.), and *Penry v. Lynaugh*, 492 U.S. 302, 329, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). *Saffle v. Parks*, 494 U.S. 484, 487, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). Generally speaking, a rule is "new" if the rule announces a principle of law not previously articulated or recognized by the courts and therefore "falls outside [the] universe of federal law" in place at the time defendant's conviction became final. *Williams v. Taylor*, 529 U.S. 362, 381, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (opinion by Stevens, J.). If a rule is not deemed a "new rule," then the

general rule of nonretroactivity is inapplicable and the rule will be applied retroactively even to cases that became final for purposes of direct appellate review before the case on which the defendant relies for the rule was decided. *Whorton v. Bockting,* 549 U.S. 406, 416, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007). If, however, a rule is deemed a "new rule," then the general rule of nonretroactivity does apply. See *Saffle,* 494 U.S. at 494, 110 S.Ct. 1257.

[16] When a rule is deemed a "new rule" and the general rule of nonretroactivity applies, a court must then ***472** engage in *Teague's* second inquiry, to wit, whether the "new rule" satisfies one of *Teague's* two exceptions to the general rule of nonretroactivity for new rules. See *id.* If the "new rule" satisfies either of *Teague's* two exceptions, then it will be applied retroactively. *Id.* If, however, the "new rule" fails to satisfy either of those exceptions, the rule will only be entitled to prospective application. *Id. Whorton* succinctly summarized *Teague's* two exceptions to the general rule of nonretroactivity as follows:

> A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a " 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." [*Whorton,* 549 U.S. at 416, 127 S.Ct. 1173, quoting *Saffle,* 494 U.S. at 495, 110 S.Ct. 1257, quoting *Teague,* 489 U.S. at 311, 109 S.Ct. 1060 (opinion by O'Connor, J.) (alteration in original).]

2. "NEW RULE"

[17] **[18]** **[19]** Turning to the first inquiry of the retroactivity analysis, whether the rule in *Miller* is "new," we note that the United States Supreme Court has defined a rule as "new" when the rule " 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.' " *Saffle,* 494 U.S. at 488, 110 S.Ct. 1257, quoting *Teague,* 489 U.S. at 301, 109 S.Ct. 1060 (opinion by O'Connor, J.) (emphasis omitted). Essential to any of these bases for finding that a rule is "new" is the question of whether "*all* reasonable jurists would have deemed themselves compelled to accept" the rule at the time defendant's conviction became final. *Graham v. Collins,* 506 U.S. 461, 477, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (emphasis added). The fact that a "decision is within the 'logical compass' of an earlier decision ... is not conclusive for purposes of deciding ***473** whether the current decision is a 'new rule' under *Teague.*" ****820** *Butler v. McKellar,* 494 U.S. 407, 415, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990). In determining whether the rule in *Miller* is "new," this Court inquires whether before *Miller* courts of this state, if presented with a constitutional challenge to our pre-*Miller* sentencing statutes, would have felt bound to declare those statutes unconstitutional for the reasons expressed in *Miller.*

It is apparent, in our judgment, that the rule in *Miller* constitutes a new rule. *Miller* imposed a hitherto-absent obligation on state and lower federal courts to conduct individualized sentencing hearings before imposing a sentence of life without parole on a juvenile homicide offender. As part of this process, a prosecutor seeking a life-without-parole sentence must now present evidence of aggravating factors relevant to the offender and the offense, juvenile defendants must be afforded the opportunity and the financial resources to present evidence of mitigating factors relevant to the offender and the offense, psychological and other evaluations relevant to the youthfulness and maturity of the defendants must be allowed, and courts must now embark upon the consideration of aggravating and mitigating evidence offered regarding juvenile defendants as a condition to imposing sentences that previously required no such consideration. It thus seems certain as a result of *Miller* that a considerable number of juvenile defendants who would previously have been sentenced to life without parole for the commission of homicide offenses will have a lesser sentence meted out. Under *Teague* and *Saffle,* these new obligations clearly render the rule in *Miller* a new rule. We are not aware of any statement of this Court by any justice before *Miller* that argued in support of, or anticipated, the constitutional requirements set forth in that decision. ***474** Unless every affirmation by this Court of a sentence of life without parole on a juvenile offender before *Miller,* including those that followed decisions such as *Roper, Graham, Eddings,* and *Lockett,* can be characterized as "unreasonable," there cannot be serious argument that *Miller* did not define a "new rule."

Although *Miller* may be "within the logical compass" of earlier decisions, and built upon their foundation, cases predating *Miller* can hardly be read as having "dictated" or "compelled" *Miller's* result. *Miller* undoubtedly broke new ground in that it set forth the first constitutional rule to mandate individualized sentencing before noncapital punishment can be imposed. In this respect, the capital-punishment cases, although providing a model for the form and effect of *Miller,* would not have required a reasonable

jurist to conclude that a life-without-parole sentence for a juvenile could only be constitutionally imposed following an individualized sentencing hearing.

Turning to the juvenile cases, *Roper* also dealt exclusively with the imposition of capital sentences without discussing the constitutionality of life-without-parole sentences and the need for individualized sentencing hearings. While *Graham's* focus was on life-without-parole sentences, its constitutional rule was limited to nonhomicide offenses, and it did not make individualized sentencing the constitutional threshold for imposing a sentence of life without parole. Furthermore, while *Graham* drew a comparison between life-without-parole sentences for juvenile offenders and capital punishment, which was pivotal in deciding *Miller, Graham* also stopped well short of finding the two punishments equivalent. See *Graham,* 560 U.S. at 69, 130 S.Ct. 2011. This is evident by *Graham's* reference to life without parole as " 'the second most severe penalty permitted by law,' " *id.,* ***475** quoting *Harmelin v. Michigan,* 501 U.S. 957, 1001, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., ****821** concurring in part), and its description of capital punishment as " *'unique* in its severity and irrevocability,' " *id.,* quoting *Gregg,* 428 U.S. at 187, 96 S.Ct. 2909 (emphasis added). Accordingly, although *Roper* and *Graham* could certainly be argued as being part of a longer-term movement toward application of the individualized sentencing capital-punishment cases to life-without-parole sentences for juvenile homicide offenders, *Graham* itself nowhere compelled or dictated this application. Since before *Miller* a court of this state could have reasonably rejected a constitutional challenge to Michigan's pre-*Miller* sentencing scheme similar to that raised in *Miller, Miller* is clearly a "new rule."

3. PROCEDURE VERSUS SUBSTANCE

[20] **[21]** Concluding that *Miller* announced a new rule, we turn to the second inquiry, whether the rule in *Miller* fits within one of *Teague's* two "narrow exceptions" to the general rule of nonretroactivity. *Saffle,* 494 U.S. at 486, 110 S.Ct. 1257. At the outset, we note that neither Carp nor Davis advanced any argument before this Court suggesting that *Miller* should be applied retroactively under the second exception, the "watershed rule of criminal procedure" exception. Accordingly, we consider any argument regarding *Miller* identifying a "watershed rule of criminal procedure" unpreserved, and we will only consider whether the rule in *Miller* fits within the first exception to the general rule of nonretroactivity. [10]

10 Nonetheless, we observe that

> [i]n order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. [*Whorton,* 549 U.S. at 418, 127 S.Ct. 1173 (citations and quotation marks omitted).]

In applying this standard, the *only* rule that the United States Supreme Court has ever identified as a "watershed rule" for purpose of *Teague's* second exception is the rule drawn from *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), which established that the Sixth Amendment included the right to appointed counsel at trial for indigent defendants. See *Whorton,* 549 U.S. at 419, 127 S.Ct. 1173. Furthermore, the sentencing rule in *Miller* has no possible effect in preventing any "impermissibly large risk of an inaccurate conviction" and pertains to no "bedrock procedural elements essential to the fairness of a proceeding."

[22] **[23]** ***476** The first exception differentiates between new *substantive* rules and new *procedural* rules, allowing for the retroactive application of only the former. See *Whorton,* 549 U.S. at 417, 127 S.Ct. 1173; *Schriro v. Summerlin,* 542 U.S. 348, 351–352, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). The origin of the first exception predates *Teague,* as that decision drew the contours of this exception from Justice Harlan's partial concurrence and partial dissent in *Mackey v. United States,* 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971). *Teague,* 489 U.S. at 311, 109 S.Ct. 1060 (opinion by O'Connor, J.). In speaking of the "general" rule against retroactive application of new constitutional rules, Justice Harlan commented that the Court's

> discussion is written only with new 'procedural due process' rules in mind, that is, those applications of the Constitution that forbid the Government to utilize certain techniques or processes in enforcing concededly valid societal proscriptions on individual behavior. New 'substantive due process' rules, that is, those that place, as a matter of constitutional interpretation, certain

> kinds of **822 primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, must, in my view, be placed on a different footing [and afforded retroactive application]. [*Mackey*, 401 U.S. at 692, 91 S.Ct. 1160 (Harlan, J., concurring in the judgments in part and dissenting in part).]

*477 Justice Harlan supported this differentiation by emphasizing that retroactive application of a substantive rule "represents the clearest instance where finality interests should yield" because "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Id.* at 693, 109 S.Ct. 1060. Contrasting the retroactive application of a substantive rule with that of a procedural rule, Justice Harlan proceeded to offer the observation that the retroactive application of a substantive rule "entails none of the adverse collateral consequences of retrial" certain to follow the retroactive application of a procedural rule. *Id.* This is because a substantive rule precludes the possibility of retrial given that its application dictates a *single result* for the class of individuals or type of conduct formerly regulated by the old rule and now governed by the new rule. It is in this sense that categorical rules, such as those derived from the juvenile-sentencing strand of precedent, are substantive because they have a "form and effect" that *always* results in the imposed punishment being unconstitutional, i.e., they produce a "single result." Conversely, noncategorical rules, such as those derived from the capital-punishment strand of precedent—and *Miller*—are procedural because they have a "form and effect" that does *not* always result in the imposed punishment being unconstitutional, i.e., they do not produce a "single result." The latter rules merely require a court to perform a new or amended analysis before it can be determined whether a given punishment can be imposed on a particular defendant.

Teague subsequently adopted Justice Harlan's distinction between procedural and substantive rules, including the definition of when a rule is substantive. *Teague*, 489 U.S. at 310–311, 109 S.Ct. 1060 (opinion by O'Connor, J.). Since *Teague*, the United States Supreme Court has continued to recognize that the exceptions proposed by *478 Justice Harlan in his opinion in *Mackey* were adopted in *Teague*. See, e.g., *Danforth v. Minnesota*, 552 U.S. 264, 273–275, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008); *Penry*, 492 U.S. at 329–330, 109 S.Ct. 2934; see also *Schriro*, 542 U.S. at 362, 124 S.Ct. 2519 (Breyer, J., dissenting).

Although *Teague* addressed whether a new rule germane to the trial stage of a criminal case could be applied retroactively, later cases have addressed whether new rules pertaining only to punishments and the sentencing phase are substantive and fit into *Teague's* first exception to the general rule of nonretroactivity. In so doing, the United States Supreme Court has provided three descriptions of what makes a new rule "substantive" within the context of a new rule governing the sentencing stage of a criminal case. Each of these, however, can be boiled down to whether the punishment imposed is one that the state has the authority to, and may constitutionally, impose on an individual within the pertinent class of defendants.

First, a new rule has been described as "substantive" when the rule "prohibit [s] a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S. at 330, 109 S.Ct. 2934; see also *Saffle*, 494 U.S. at 494–495, 110 S.Ct. 1257. Put another way, the new rule is "substantive" when the punishment at issue is categorically barred. The requirement that the new rule be "categorical" in its prohibition is **823 the direct product of how Justice Harlan's first exception has been understood. That is, his first exception permits the retroactive application of "substantive categorical guarantees accorded by the Constitution, *regardless of the procedures followed.*" *Penry*, 492 U.S. at 329, 109 S.Ct. 2934 (emphasis added); see also *Saffle*, 494 U.S. at 494, 110 S.Ct. 1257.

[24] [25] Second, a new rule has been described as "substantive" if it "alters the range of conduct or the class of *479 persons that the law punishes." *Schriro*, 542 U.S. at 353, 124 S.Ct. 2519, citing *Bousley v. United States*, 523 U.S. 614, 620–621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). The dissent contends that when a new rule "expand[s] the range of punishments" available to the sentencer, the rule fits within this second description of a new rule as substantive. *Post* at 850. Although a new rule could potentially be viewed as altering the range of punishments available to the sentencer when the rule makes a previously unavailable lesser punishment available to the sentencer, the United States Supreme Court has adopted a different definition for when a new rule "alters the range" of available punishments. We are bound to abide by that definition when considering the rule in *Miller* for federal retroactivity purposes. Under that definition, a new rule alters the "range of conduct" that the

law can punish when it "place[s] particular conduct or persons covered by the statute *beyond the State's power to punish.*" *Schriro,* 542 U.S. at 352, 124 S.Ct. 2519 (emphasis added) (citations omitted). In this sense, the new rule transforms the conduct in which the defendant engaged, and which was previously within the state's power to regulate, into conduct that is no longer subject to criminal regulation. Applied in the context of rules governing sentencing and punishment, it must be the case that under the previous rule, the defendant "faces a punishment that the law cannot [any more] impose upon him" in light of the new rule. *Id.* In this sense, a new rule only "alters the range" of punishments available to the sentencer if it shifts the upper limits of the range of punishments downward so that the previously most severe punishment to which defendants have been sentenced is no longer a punishment that the sentencer may constitutionally impose. [11]

11 Although the dissent argues that *Schriro's* definition of a rule that alters the range of punishments is "inclusive and not exclusive," *post* at 859 n. 68, the dissent fails to identify a single Supreme Court decision that classifies a rule as "altering the range" of punishments when the rule requires the sentencer to *consider* a lesser punishment, but does not *exclude* any punishment from the range of punishments that may be considered. Despite no such decision, the dissent would make retroactive a type of rule that the Supreme Court has never before granted retroactive status under *Teague's* first exception to the general rule of nonretroactivity.

[26] ***480** Third, a new rule has been described as "substantive" when it "narrow[s] the scope of a criminal statute *by interpreting its terms....*" *Id.* at 351, 124 S.Ct. 2519, citing *Bousley,* 523 U.S. at 620–621, 118 S.Ct. 1604 (emphasis added). This third description addresses situations in which a criminal statute has previously been interpreted and applied beyond the statute's intended scope so that the "defendant stands convicted of 'an act that the law does not make criminal.' " *Bousley,* 523 U.S. at 620, 118 S.Ct. 1604, quoting *Davis v. United States,* 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974). [12] Put ****824** another way, this description is implicated when a court, rather than a legislature, has criminalized conduct, authorized punishment, or construed a statute to apply more broadly than it is later deemed to apply. See *id.* at 620–621, 118 S.Ct. 1604 ("For under our federal system it is only Congress, and not the courts, which can make conduct criminal."). In this sense, the state cannot constitutionally impose the punishment at issue because the new rule determines that no lawfully enacted statute has given the state the authority to impose such a punishment.

12 Notable to the scope and application of this third description, both *Bousley* and *Davis* involved collateral attacks to federal criminal convictions in which such attacks were dependent on the interpretation of federal law, rather than the development of a new constitutional rule.

[27] **[28]** In distinguishing what makes a new rule substantive, the United States Supreme Court has also afforded considerable direction regarding the qualities and contours of nonsubstantive, or procedural, rules. Simply ***481** put, "rules that regulate only the *manner of determining* the defendant's culpability are procedural." *Schriro,* 542 U.S. at 353, 124 S.Ct. 2519. This is because a rule that alters the "manner of determining" culpability "merely raise[s] the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 352, 124 S.Ct. 2519. Applying this understanding to new rules governing sentences and punishments, a new procedural rule creates the possibility that the defendant would have received a less severe punishment but does not necessitate such a result. Accordingly, a rule is procedural when it affects how and under what framework a punishment may be imposed but leaves intact the state's fundamental legal authority to seek the imposition of the punishment on a defendant currently subject to the punishment.

Turning to how the United States Supreme Court has applied this distinction between substantive and procedural rules, in *Schriro* the Court was confronted with whether the new rule from *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), was substantive or procedural. *Ring's* rule invalidated Arizona's capital-punishment sentencing scheme and required that a jury rather than a judge make the determination whether aggravating factors necessary for the imposition of capital punishment had been proved. *Id.* at 609, 122 S.Ct. 2428. Despite the fact that *Ring* invalidated Arizona's statutory sentencing scheme authorizing capital punishment, *its* rule was ultimately deemed "procedural" on the basis that it

> did not alter the range of conduct Arizona law subjected to the death penalty.... Instead, *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. Rules that allocate decisionmaking authority ***482** in this fashion are prototypical procedural rules, a conclusion we have reached in numerous other contexts. [*Schriro,* 542 U.S. at 353, 124 S.Ct. 2519.]

In *Saffle,* the Court similarly deemed a new rule "procedural" when it would have prohibited anti-sympathy instructions to juries performing the individualized sentencing process as a condition to imposing capital punishment. See *Saffle,* 494 U.S. at 486, 110 S.Ct. 1257. In doing so, *Saffle* stated that the rule "would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons." *Id.* at 495, 110 S.Ct. 1257. It is with *Schriro* and *Saffle* in mind that we turn to the question of whether the rule in *Miller* is properly viewed as substantive or procedural.

Although the new procedures required by *Miller* may be more elaborate and detailed than the new procedures at issue in ****825** *Schriro* and *Saffle,* the basic form and effect is the same. As discussed earlier, *Miller* requires that the trial court "follow a certain process" before it can impose a sentence of life without parole on a juvenile homicide offender. *Miller,* 567 U.S. at ——, 132 S.Ct. at 2471. *Miller,* however, specifically "does not categorically bar a penalty for a class of offenders or type of crime [.]" *Id.* at ——, 132 S.Ct. at 2471.

Considering *Miller's* self-description of its rule, it is clear that the rule is not substantive within the terms of the first description of when a rule is substantive, i.e., when the rule "prohibit[s] a certain category of punishment for a class of defendants because of their status or offense." *Penry,* 492 U.S. at 330, 109 S.Ct. 2934; see also *Saffle,* 494 U.S. at 494, 110 S.Ct. 1257. The *category* of punishment implicated by *Miller* is a sentence of "life without parole," [13] the *class* of ***483** defendants receiving the benefit of *Miller* are juvenile defendants who are under the age of 18 at the time they commit their offenses, and the *types* of offenses implicated by *Miller* are homicide offenses. Accordingly, for *Miller* to be considered "substantive" under the first description of when a rule is substantive, it must prohibit sentences of life without parole for juvenile offenders under the age of 18 who are convicted of homicide offenses, and clearly *Miller* does no such thing. Instead, as with the procedural rules in *Schriro* and *Saffle,* and the rules from the capital-punishment cases of *Woodson, Lockett,* and *Eddings, Miller* creates only the *possibility* that a defendant may have received a lesser punishment had the trial court employed the new process that is constitutionally required by *Miller.*

13 Carp and Davis argue that the sentence imposed on them was a sentence of "mandatory" life without parole. Regardless of the process by which a defendant is sentenced to life without parole, however, the term that the defendant serves is simply life without parole. Had, for instance, Carp and Davis received all the procedural protections afforded by *Miller* before being sentenced, the terms they would serve in prison would be identical. The specific *manner* in which a defendant is sentenced, i.e., by operation of law or as a result of individualized sentencing, does not alter the actual sentence rendered or the length of time the defendant must remain in prison.

The second description of when a rule is substantive is equally of no avail to Carp and Davis because a rule is substantive under that description only when it alters the range of punishments that a state is permitted to impose by foreclosing the state's ability to impose the punishment defendant is serving. See *Schriro,* 542 U.S. at 353, 124 S.Ct. 2519. In this sense, a rule is only substantive if it acts to ratchet down the previously most severe punishment possible. Conversely, and contrary to the dissent, a rule will be considered procedural if it merely *expands* the range of possible punishments that may be imposed on the defendant. Applied to Michigan's sentencing scheme, *Miller* now requires the sentencer to consider imposing a sentence of life with the possibility of parole, ***484** but it does not require the sentencer to exclude from consideration a sentence of life without parole. Accordingly, *Miller* does not remove the punishment imposed on Carp and Davis from within the range of punishments the state has the power to impose. Accordingly, the rule in *Miller* again cannot be viewed as substantive under the second United States Supreme Court description.

The third description of when a rule is substantive is altogether inapplicable to *Miller.* The decision did not rest on any principle of statutory interpretation, and it did not pertain to a situation in which life-without-parole sentences were being imposed on juvenile homicide offenders absent ****826** clear statutory authority to do so. Just as Carp and Davis were sentenced to life without parole in full accordance with Michigan's statutory sentencing scheme, Miller was

sentenced to life without parole in full accordance with Alabama's statutory sentencing scheme. See *Miller,* 567 U.S. at ——, 132 S.Ct. at 2462–2463.

Ultimately, the rule in *Miller* is procedural because, as with the rule in *Ring,* it merely shifts "decisionmaking authority" for the imposition of a life-without-parole sentence on a juvenile homicide offender.[14] ***485** *Schriro,* 542 U.S. at 353, 124 S.Ct. 2519. Whereas *Ring* shifted decision-making authority for imposing capital punishment from the judge to the jury, *Miller* shifted decision-making authority for imposing a sentence of life without parole on a juvenile homicide offender from the legislature to the judiciary, by way of its individualized sentencing requirements.[15] Although the process set forth in *Miller* is undoubtedly more favorable to juvenile homicide defendants as a class, the new process has no effect on Michigan's inherent authority to lawfully and constitutionally seek the imposition of a life-without-parole sentence on any and every given juvenile homicide offender. Just as no court may impose a sentence of life without parole without conducting an individualized consideration of certain factors, no court relying on *Miller* may categorically refuse to impose a sentence of life without parole if the individualized sentencing factors do not operate in a defendant's favor. Accordingly, in contrast to a substantive rule that avoids the adverse collateral consequences of retrial by dictating a singular result, *Mackey,* 401 U.S. at 693, 91 S.Ct. 1160 ***486** (Harlan, J., concurring in the judgments in part and dissenting in part), retroactive application of *Miller* necessarily requires this adverse collateral consequence. In this regard, the rule in *Miller* in no reasonable way can be said to "represent[ ] the *clearest* instance where finality interests should yield." *Id.* (emphasis added). Because *Miller* continues to permit Michigan to impose a life- ****827** without-parole sentence on any juvenile homicide offender (but only after individualized consideration), it must necessarily be viewed as procedural rather than substantive. Therefore, we hold that the rule in *Miller* does not satisfy the first exception to the general rule of nonretroactivity in *Teague.*

14 The dissent asserts that the rule in *Miller,* although having "procedural implications," is nonetheless substantive because it invalidated "*an entire 'sentencing scheme.*' " *Post* at 856. While the dissent is correct that *Miller* invalidated Michigan's sentencing scheme authorizing the imposition of a life-without-parole sentence for a juvenile homicide offender, *Ring* also invalidated Arizona's sentencing scheme authorizing the imposition of capital punishment on a homicide offender. As *Ring* was deemed procedural, it follows that the distinction between substantive and procedural rules does not turn on whether the new rule invalidates a sentencing scheme authorizing a punishment. Instead, the distinction turns on whether the punishment is one that the state may constitutionally impose under any conceivable sentencing scheme governing the class of defendants to which the defendant belongs.

15 The dissent argues that while a shift in decision-making authority from a judge to a jury is procedural, a shift in decision-making authority from the legislature to the judiciary is substantive because it vests new authority (the authority to impose a lesser sentence) in the judiciary. *Post* at 858. Although we acknowledge that there is a difference between these respective shifts in decision-making authority, we do not find the difference pivotal in determining whether a new rule is substantive or procedural. This is because the question at hand is not focused on whether the *judiciary's* or the *legislature's* or the *executive's* authority has changed as a function of the new rule, but inquires only whether the punishment imposed is one that is beyond the *state's* or the *law's* power to impose. *Schriro,* 542 U.S. at 352, 124 S.Ct. 2519 (defining a rule as substantive when it "place[s] particular conduct or persons covered by the statute beyond the *State's* power to punish" or means that the defendant "faces a punishment that the *law* cannot [any more] impose upon him") (emphasis added). Both before and after *Miller* the state of Michigan possessed the authority to constitutionally impose a sentence of life without parole on a juvenile homicide offender.

An additional consideration serves to strengthen this conclusion. In its description of the rule in *Miller,* the articulation employed by the United States Supreme Court is telling. *Teague's* retroactivity analysis distinguishing substantive and procedural rules is in no sense new or novel. Rather, the proposition that "substantive *categorical* guarantees" should receive retroactive application while "procedural *noncategorical* guarantees" should only receive prospective application predates *Teague.* See *Penry,* 492 U.S. at 329, 109 S.Ct. 2934. In the face of this reasonably well-defined and longstanding distinction, *Miller,* in describing the nature and scope of its rule, repeatedly employs language typically associated with nonretroactive procedural rules. Although fully recognizing that *Roper* and *Graham* announced "categorical" bars, *Miller* twice states that its rule does *not* create a "categorical" bar. *Miller,* 567 U.S. at ——, 132 S.Ct. at 2469, 2471. Furthermore, *Miller,* in straightforward terms, speaks of its rule as one that "mandates only that a sentencer follow a *certain process* [.]" *Id.* at ——,

132 S.Ct. at 2471 (emphasis added). It is hard to view these statements as anything other than expressions of continuity in the Court's understanding of the law of ***487** retroactivity, particularly in a circumstance in which the four justices of the Supreme Court who were presumably the *least* inclined to extend *Miller* to a broader range of cases—the dissenting justices who had rejected the new rule in the first place—were absent from the majority opinion. [16]

16 One of the critical divides between how this majority resolves the question of *Miller's* retroactivity and how the dissent resolves the same question centers on the significance each accords to the words the Supreme Court chose to use in describing the rule in *Miller.* Despite its many thoughtful arguments, the dissent is unable to explain why the Supreme Court, if it genuinely intended for the rule in *Miller* to be applied retroactively under *Teague,* specifically stated that the rule in *Miller* does not "categorically bar a penalty," *Miller,* 567 U.S. at ——, 132 S.Ct. at 2471, when the "categorical bar" versus "noncategorical bar" distinction defines the critical element of the retroactivity analysis in *Teague.* The dissent contends that by focusing on "categorical" versus "noncategorical" distinction, the majority "muddles" the *Teague* analysis. *Post* at 856. However, it is the dissent that misapprehends *Teague* by its conclusion that the rule in *Miller* is entitled to retroactive application despite its acknowledgement that *Miller* did not categorically bar life-without-parole sentences for juveniles. *Id.* Neither defendants nor the dissent has identified a single Supreme Court decision that has ever concluded that a noncategorical rule is entitled to retroactive application under the first of *Teague's* two exceptions to the general rule of nonretroactivity. From this, we can only reason that *Teague* does not merely stand for the proposition, as the dissent asserts, that a categorical rule is substantive, but also for the proposition that a rule is substantive only when it is categorical.

Carp advances three arguments in an effort to overcome our conclusion that *Miller* does not qualify for retroactive application under *Teague.* First, he argues that each of the strands of precedent that underlie *Miller* has been granted retroactive status. While there may be considerable force to the argument that categorical rules like those in *Roper* and *Graham* must be applied retroactively under *Teague,* the same cannot be said for the strand of cases requiring individualized sentencing before capital punishment can be imposed ***488** on an adult offender. Despite considerable effort by Carp, including ****828** post-oral-argument supplemental briefings, we remain unpersuaded that the United States Supreme Court, or even any federal court of appeals, [17] has declared any of the individualized sentencing capital-punishment cases retroactive under *Teague.*

17 We include federal courts of appeal in our discussion because Carp cites federal courts of appeal decisions for the proposition that the capital-punishment strand of precedent has been applied retroactively.

In an effort to demonstrate to the contrary, Carp principally cites *Sumner,* in which the United States Supreme Court held that individualized sentencing was required before capital punishment could be imposed on a defendant, Shuman, who was serving a life-without-parole sentence at the time he committed the capital offense. *Sumner,* 483 U.S. at 80–81, 107 S.Ct. 2716. Carp is correct that *Sumner* relied on *Woodson* in creating its rule, *id.* at 70–75, 107 S.Ct. 2716, and is also correct that *Sumner* involved the review of a state conviction on collateral habeas review, see *id.* at 68, 107 S.Ct. 2716. However, not all cases presenting themselves on collateral review are equivalent for retroactivity purposes. Some cases on collateral review assert that state courts failed to properly apply constitutional rules in effect before the defendant's conviction became final, while others seek the application or creation of a new rule that was not announced before the defendant's conviction became final.

If, with respect to the application of *Woodson, Sumner* fell into the latter category, then we might agree with Carp that *Woodson* had been applied retroactively. *Sumner,* as it relates to the application of *Woodson,* however, falls into the former category of cases presenting themselves on collateral review. *Woodson* was decided on July 2, 1976, and Shuman's conviction did not become final for direct review purposes until May 17, ***489** 1978, nearly two years after *Woodson* was decided. See *Shuman v. State,* 94 Nev. 265, 578 P.2d 1183 (1978). Accordingly, to the extent that *Woodson* was applied in *Sumner,* it was simply not applied retroactively to a case that had become final for direct review purposes before *Woodson* was issued. [18]

18 We further note that even if *Sumner* had applied *Woodson* retroactively to a case that had become final for direct review purposes before *Woodson* was announced, it still would not follow that *Woodson* qualified for retroactive application under *Teague.* This is because *Sumner* was decided in 1987 and *Teague,* in which a plurality of the United States Supreme Court announced the current federal retroactivity test, was not decided until 1989. It is for this same reason that we reject Carp's

> contention that the retroactive application of *Lockett's* rule in *Songer v. Wainwright,* 769 F.2d 1488, 1489 (C.A.11, 1985), and *Dutton v. Brown,* 812 F.2d 593, 599 n. 7 (C.A.10, 1987), carries any weight with regard to whether those courts applying *Lockett* retroactively would have done so under *Teague.* The same can also be said about the significance of the retroactive application of the rule from *Furman* as acknowledged in *Michigan v. Payne,* 412 U.S. 47, 57 n. 14, 93 S.Ct. 1966, 36 L.Ed.2d 736 (1973).

Apparently anticipating these flaws in the argument that *Woodson* has been applied retroactively, Carp contends that *Sumner* itself has been applied retroactively post-*Teague.* For this proposition, he cites *Thigpen v. Thigpen,* 926 F.2d 1003, 1005 (C.A.11, 1991). We, however, do not read *Thigpen* as addressing the question of *Sumner's* retroactivity. Although the district court below had applied *Sumner* retroactively to invalidate Thigpen's sentence, that portion of the district court's ruling was never appealed and the only issue before the United States Court of Appeals for the Eleventh Circuit was Thigpen's appeal concerning whether the ****829** district court had erred by upholding his conviction. See *id.* [19]

19 In framing the issue before the court, the Eleventh Circuit stated:

> On appeal, Thigpen raises only one issue: whether the admission of evidence that he was convicted in 1972 of another first-degree murder and received a death sentence ... rendered his trial so fundamentally unfair that he was convicted without the due process of law. For the reasons set forth below, we affirm the district court's conclusion that Thigpen's conviction was constitutional. [*Thigpen,* 926 F.2d at 1005.]

***490** Accordingly, Carp has not succeeded in demonstrating that any of the individualized sentencing capital-punishment cases, i.e., *Furman, Woodson, Lockett, Eddings,* or *Sumner,* have been applied retroactively under *Teague.* This failure is pivotal given our earlier conclusion that the rule in *Miller* is of the same form and effect as the rules in the individualized sentencing capital-punishment cases.

Second, Carp argues that *Miller* has added "age" and "incorrigibility" as elements of what must be assessed before a life-without-parole sentence can be imposed on a juvenile offender. Carp argues that it follows from this that age and the juvenile offender's incorrigibility are aggravating factors that raise the mandatory minimum sentence that a defendant could receive under Michigan's pre-*Miller* sentencing scheme because they must now be shown by the state before a juvenile offender can be sentenced pursuant to MCL 750.316(1) and MCL 791.234(6). Citing *Alleyne v. United States,* 570 U.S. ——, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013), Carp notes that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." Accordingly, he argues that the rule in *Miller* must be viewed as substantive and applied retroactively when it is considered in light of *Alleyne* because *Miller* combined with *Alleyne* substantively alters the way Michigan law defines and sentences juvenile homicide offenders.

Even assuming for the sake of argument that *Miller* made assessments of "age" and "incorrigibility" necessary elements for imposing a life-without-parole sentence on a juvenile homicide offender, Carp's argument ***491** still fails. [20] This is because his argument relies on the new rule adopted in *Alleyne* and therefore *Alleyne* itself would need to qualify for retroactive application to have any bearing on the instant case. Carp, however, has failed to even argue, much less persuade this Court, that *Alleyne* established a substantive rule entitled to retroactive application under *Teague.* Absent being so persuaded, we treat the rule in *Alleyne* as a procedural rule entitled only to prospective application. [21] ****830** Accordingly, to the extent that we view *Alleyne* as establishing a nonretroactive procedural rule, *Alleyne* may not be bootstrapped onto the rule in *Miller* to transform the ***492** latter from a nonretroactive procedural rule into a retroactive substantive rule.

20 Because Carp's argument fails here, we find it unnecessary to address whether *Miller* adds the elements of age and incorrigibility to what must be found before a life-without-parole sentence may be imposed on a juvenile homicide offender. We do note that *Miller's* repeated statements that individualized sentencing hearings could occur before a "*judge* or jury," *Miller,* 567 U.S. at ——, 132 S.Ct. at 2460, 2470, 2475, tend to suggest that *Miller* did not make age or incorrigibility aggravating elements because under *Alleyne* aggravating elements that raise the mandatory minimum sentence "must be submitted to the *jury* and found beyond a reasonable doubt," *Alleyne,* 570 U.S. at ——, 133 S.Ct. at 2155. (Emphasis added.) However, because *Alleyne* was decided after *Miller, Miller's* reference to individualized sentencing being performed by a "*judge* or jury" might merely be instructive on the issue but not dispositive. As none of the defendants before this Court asserts that his sentence is deficient because it was not the product of a jury determination, we find it unnecessary to further opine on this issue and leave it to another

day to determine whether the individualized sentencing procedures required by *Miller* must be performed by a jury in light of *Alleyne*.

21 Treating *Alleyne* as a procedural rule is consistent with how multiple federal courts have resolved the issue of whether *Alleyne* is procedural or substantive for federal retroactivity purposes. See, e.g., *Simpson v. United States*, 721 F.3d 875, 876 (C.A.7, 2013) (comparing *Alleyne* to the rule from *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which has been held to be procedural); *United States v. Evans*, 2014 WL 710362 (W.D.Ark., February 25, 2014, Case Nos. 1:11–CR–10021 and 1:13–CV–1025), citing *United States v. Lara–Ruiz*, 721 F.3d 554, 557 (C.A.8, 2013); *Willoughby v. United States*, 2013 WL 5220774 (W.D.N.C., September 17, 2013, Case Nos. 3:13–CV–493–FDW and 3:99–CR–24–FDW–6).

[29] **[30]** Third, Carp cites *Miller's* companion case of *Jackson v. Hobbs* as evidence that *Miller* has *already* been accorded retroactive status, and therefore presumably that the present judicial exercise has been rendered unnecessary. In offering this argument, Carp is correct that *Jackson* presented itself on collateral review and that the case was remanded for resentencing pursuant to the rule announced in *Miller*. *Miller*, 567 U.S. at ——, 132 S.Ct. at 2475. Accordingly, Carp also correctly notes that Jackson received retroactive relief under *Miller*. *Id.* at ——, 132 S.Ct. at 2475. That being said, the fact that Jackson received the benefit of *Miller* being applied retroactively does not lead to the conclusion that *Miller* must be applied retroactively to any other defendant. This is because the assertion that a rule is nonretroactive is an "affirmative defense," available to a prosecutor in *objection* to collateral relief being sought by a defendant. *Thompson v. Runnels*, 705 F.3d 1089, 1099 (C.A.9, 2013) (noting that *Caspari v. Bohlen*, 510 U.S. 383, 389, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994) held that " 'a federal court may, but need not, decline to apply *Teague* if the State does not argue it,' but 'if the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court must apply *Teague* before considering the merits of the claim' "). As such, the nonretroactivity argument must be affirmatively raised by the state and when it is not raised, it is waived:

> Since a State can waive the *Teague* bar by not raising it, and since the propriety of reaching the merits of a dispute is an important consideration in deciding whether or not to grant certiorari, the State's omission of any *Teague* defense at the petition stage is significant. Although we undoubtedly have the discretion to reach the State's *Teague* argument, ***493** we will not do so in these circumstances. [*Schiro v. Farley*, 510 U.S. 222, 229, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994) (citation omitted).]

In this sense, a defense premised on the nonretroactivity of a new rule is "not 'jurisdictional' " in nature, and the court does not have any duty sua sponte to conduct a retroactivity analysis. *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). Rather, because the question of retroactivity is "grounded in important considerations of federal-state relations," a state is free to "[choose] not to rely on *Teague* " without the federal courts' invalidating that choice. *Id.* By opting not to raise the defense in *Jackson*, the defense was waived and the question whether *Miller* should be applied retroactively was never presented to the United States Supreme Court.[22]

22 Tellingly, with regard to the prosecutor's intentions in *Jackson*, we further note that on remand the prosecutor conceded the defense of retroactivity, but did so only on the basis "*that Jackson* is entitled to the benefit of the United [States] Supreme Court's opinion *in his own case*." See *Jackson v. Norris*, 2013 Ark. 175, p. 6, 426 S.W.3d 906 (2013) (emphasis added).

****831** Carp, however, contends that "principles of even-handed justice" dictate that the rule in *Miller* be applied retroactively in his case since it was applied retroactively in Jackson's case. He draws his argument from *Teague*, wherein the United States Supreme Court stated:

> We can simply refuse to 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.... We think this approach is a sound one. Not only does it eliminate any problems of rendering advisory opinions, it also avoids the inequity resulting from the uneven application of new rules to similarly situated defendants. We therefore hold that, *implicit in the retroactivity approach* ***494** *we adopt today*, is the principle that *habeas corpus cannot be used* as a vehicle to create

> new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review.... [*Teague,* 489 U.S. at 316, 109 S.Ct. 1060 (opinion by O'Connor, J.) (all but last emphasis added).]

As evidenced by the very quotation on which Carp relies, the application of the "principles of even-handed justice" only become relevant when the United States Supreme Court has actually *undertaken* a retroactivity analysis in the course of announcing a new rule. If no such analysis is necessary *because of the posture of the case,* as here, the Court will obviously not have the occasion to consider whether the new rule can be applied retroactively to all defendants who are situated similarly to the defendant before the Court.[23] Under those circumstances, the idiosyncrasies, strategies, or policies and practices of a single prosecutor, among more than 3,000 throughout the country, cannot possibly be allowed under our system of federalism to determine what "even-handed justice" requires (and what the law does or does not command) of all prosecutors in every jurisdiction throughout the country.[24]

23 The dissent similarly acknowledges that the Supreme Court's application of the rule in *Miller* to Jackson is "inconclusive" about whether the rule should be applied retroactively and that the relief Jackson received does not mandate the retroactive application of *Miller* to any other case. *Post* at 853 n. 31.

24 Although the issue was not raised in any way by any of the defendants, the dissent argues that *Miller* is similar to *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), because "considerable discretion" is left to the states by both rules, so that where *Atkins* has been applied retroactively, so too should *Miller. Post* at 860. While the dissent is not incorrect to suggest that *Miller* and *Atkins* both allow some discretion to the states, it fails to examine this issue with greater precision. *Atkins* held that the Eighth Amendment bars the imposition of capital punishment on a "mentally retarded offender." *Atkins,* 536 U.S. at 321, 122 S.Ct. 2242. *Atkins,* however, left it to the discretion of the states to establish criteria for whether a defendant qualifies as "mentally retarded." *Id.* at 317, 122 S.Ct. 2242. Accordingly, the discretion left to the states by *Atkins* pertains to when *Atkins* applies and which defendants fall within the universe of defendants governed by *Atkins.* Once a defendant is deemed to be mentally retarded, however, the state's discretion ceases and *Atkins* compels the *single* result that the state is constitutionally prohibited from imposing capital punishment on the defendant. Under *Miller,* by contrast, all juveniles are entitled to individualized sentencing hearings and accordingly the state has no discretion to determine when, and to which defendants, *Miller* applies. Instead, the discretionary element of *Miller* only comes into play in selecting a sentence for a defendant after it has been determined, per *Miller,* that the defendant is a juvenile by virtue of being under the age of 18 at the time of the offense. In this regard, the rules announced in *Atkins* and *Miller* have both different forms and different effects. That is, *Atkins* has the form of a categorical rule in that after a state has determined that a defendant is "mentally retarded," it applies to bar the imposition of capital punishment on that defendant, while *Miller* has the form of a noncategorical rule in that it requires individualized sentencing before a life-without-parole sentence may be imposed on a juvenile homicide offender but expressly does not bar the imposition of that sentence. Further, the effect of *Atkins* will always produce a *single* result in invalidating the capital sentence of every defendant who falls within the rule because the defendant is "mentally retarded," while the effect of *Miller* will necessarily result in the imposition of a variety of sentences for different offenders, creating only the potential that any given juvenile will receive a sentence other than life without parole.

****832** ***495** Having concluded that *Miller* established a new procedural rule that does not "categorically bar a penalty," but instead requires "only that a sentencer follow a certain process," *Miller,* 567 U.S. at ——, 132 S.Ct. at 2471, and having rejected the arguments in support of the retroactive application of *Miller,* we hold that the United States Supreme Court's decision in that case does not require retroactive application under *Teague.* In light of this holding, we now turn to whether *Miller* is entitled to retroactive application under Michigan's separate test for retroactivity.

C. STATE RETROACTIVITY

[31] **[32]** Although states must apply a new rule of criminal procedure retroactively when the new rule satisfies ***496** *Teague's* exceptions to the general rule of nonretroactivity, they are permitted to "give broader retroactive effect" to a new rule than is required by *Teague. Danforth,* 552 U.S. at 288–289, 128 S.Ct. 1029. In this sense, *Teague* provides a floor for when a new rule of criminal procedure must be

applied retroactively, with a state nonetheless free to adopt its own broader test for requiring the retroactive application of a new federal or state constitutional rule. See *id.* at 289–290, 109 S.Ct. 1060.

Michigan has adopted its own separate test for when a new rule of criminal procedure should be applied retroactively. See *Maxson,* 482 Mich. at 392–393, 759 N.W.2d 817. Michigan's test for retroactivity was originally derived from the pre-*Teague* federal test set forth in *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965). See *People v. Hampton,* 384 Mich. 669, 674, 187 N.W.2d 404 (1971).

Despite Michigan's having adopted its own retroactivity test that may give broader retroactive effect to some new rules than is mandated by the *Teague* test, Michigan nonetheless still adheres to the general principle of nonretroactivity for new rules of criminal procedure.[25] As a result, "Michigan law has regularly ***497** declined to apply new rules of criminal procedure to cases in which a defendant's conviction has become final." ****833** *Maxson,* 482 Mich. at 392–393, 759 N.W.2d 817 (citing several examples of new rules of criminal procedure that this Court declined to apply retroactively under its version of the *Linkletter* test). With Michigan's predisposition against the retroactive application of new rules of criminal procedure firmly in mind—in that only the extraordinary new rule of criminal procedure will be applied retroactively under Michigan's test when retroactivity is not already mandated under *Teague*—we proceed to evaluate whether the rule in *Miller* satisfies this state test.

25 Contrary to *Carp's* and *Davis's* assertions, and consistently with the general principle of nonretroactivity, this Court does not adhere to the doctrine that an unconstitutional statute is void *ab initio. People v. Smith,* 405 Mich. 418, 432–433, 275 N.W.2d 466 (1979). In rejecting this doctrine, this Court in *Smith,* 405 Mich. at 432, 275 N.W.2d 466, cited *Lemon v. Kurtzman,* 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973), which, for federal retroactivity purposes, departed from the view that an unconstitutional statute is a nullity *ab initio. Smith* also quoted *Chicot Co. Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940), for the proposition that a new constitutional rule does not always nullify past application of the old rule when the old rule was understood to have conformed with the Constitution at the time it was applied: " 'The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.' " *Smith,* 405 Mich. at 432, 275 N.W.2d 466, quoting *Chicot Co.,* 308 U.S. at 374, 60 S.Ct. 317.

[33] **[34]** **[35]** **[36]** **[37]** Michigan's test for retroactivity consists of three factors:

> "(1) the purpose of the new rule[ ]; (2) the general reliance on the old rule[;] and (3) the effect of retroactive application of the new rule on the administration of justice." [*Maxson,* 482 Mich. at 393 [759 N.W.2d 817], quoting *Sexton,* 458 Mich. at 60–61 [580 N.W.2d 404], citing *Hampton,* 384 Mich. at 674 [187 N.W.2d 404] (second alteration in original).]

The first factor, the purpose factor, assesses the nature and focus of the new rule and the effect the rule is designed to have on the implementation of justice. See *People v. Young,* 410 Mich. 363, 366–367, 301 N.W.2d 803 (1981). Under this first factor, when a new rule "concerns the ascertainment of *guilt* or *innocence,* retroactive application may be appropriate." *Id.* at 367, 301 N.W.2d 803, citing *Hampton,* 384 Mich. 669, 187 N.W.2d 404 (emphasis added). Conversely, "[w]hen the ascertainment of guilt or innocence is not at stake, prospective application is possible" because "the purposes of the rule can be effectuated by prospective application." ***498** *People v. Markham,* 397 Mich. 530, 535, 245 N.W.2d 41 (1976). Consistent with this standard for when a rule should be applied only prospectively, "a new rule of procedure ... which does not affect the integrity of the fact-finding process should be given [only] prospective effect." *Young,* 410 Mich. at 367, 301 N.W.2d 803.

Carp contends that *Miller,* although not implicating his guilt or innocence, nonetheless, goes to the "integrity of the fact-finding process" because it is essential to evaluating a defendant's level of culpability when imposing a sentence. In support of this contention, he cites *McConnell v. Rhay,* 393 U.S. 2, 3–4, 89 S.Ct. 32, 21 L.Ed.2d 2 (1968), in which pursuant to *Linkletter,* the United States Supreme Court retroactively applied a new rule of criminal procedure despite the new rule's being relevant only to the sentencing phase.[26] As Carp correctly observes, *McConnell,* in effecting its proretroactivity holding, stated that "the right being asserted relates to 'the very integrity of the fact-finding process.' " *Id.* at 3, 89 S.Ct. 32, quoting *Linkletter,* 381 U.S. at 639, 85 S.Ct. 1731.

26 The new rule made retroactive in *McConnell* was set forth in *Mempa v. Rhay,* 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), and held that the Sixth Amendment right to counsel, including the appointment of counsel for indigent defendants, extended to the sentencing phase of a criminal trial. *McConnell,* 393 U.S. at 2–3, 89 S.Ct. 32.

Two considerations, however, leave us unpersuaded that this remark necessitates the conclusion that the first factor of Michigan's test favors the retroactive application of *Miller.* First, the new rule applied retroactively in *McConnell* addressed the right to counsel, a right with unique significance both within the context of the criminal proceeding [27] and within the context of ****834** ***499** the United States Supreme Court's retroactivity jurisprudence. [28] Given this extraordinary footing of the right to counsel, we read *McConnell's* statement that "the *right* being asserted relates to 'the very integrity of the fact-finding process' " as concerning specifically the *right* to counsel rather than all new rules that may expand the fact-finding process at sentencing. For this reason, we do not understand *McConnell* as necessitating the view that, for retroactivity purposes under the *Linkletter* test, rules implicating the fact-finding process at sentencing must be placed on equal footing with rules implicating the fact-finding process for guilt or innocence.

27 The Sixth Amendment right to counsel has been described as a right "necessary to insure fundamental human rights of life and liberty" with "[t]he Sixth Amendment stand[ing] as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' " *Johnson v. Zerbst,* 304 U.S. 458, 462, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), citing *Palko v. Connecticut,* 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937). In *Gideon,* 372 U.S. at 344, 83 S.Ct. 792, the Sixth Amendment right to counsel was described as "fundamental and essential to fair trials," such that indigent criminal defendants facing felony charges are entitled to the appointment of counsel.

28 As *McConnell* noted, rules extending "a criminal defendant's right to counsel at trial, *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); at certain arraignments, *Hamilton v. Alabama,* 368 U.S. 52, [82 S.Ct. 157, 7 L.Ed.2d 114] (1961); and on appeal, *Douglas v. California,* 372 U.S. 353, [83 S.Ct. 814, 9 L.Ed.2d 811] (1963), have all been applied retroactively." *McConnell,* 393 U.S. at 3, 89 S.Ct. 32. In fact, the right to counsel is such a uniquely fundamental right that *Gideon* remains "the only case that [the United States Supreme Court has] identified as qualifying under the [watershed rule of criminal procedure exception to nonretroactivity from *Teague*]." *Whorton,* 549 U.S. at 419, 127 S.Ct. 1173.

Second, even if *McConnell* supported the expansive view that Carp attributes to it, that view is contrary to how Michigan law describes its *own* application of the *Linkletter* test. In every case to date in which this Court has applied the state retroactivity test, the "integrity of the fact-finding process" has always been referred to in the context of determining a defendant's "guilt or innocence." *Maxson,* 482 Mich. at 393–394, 759 N.W.2d 817; *Sexton,* 458 Mich. at 62, 580 N.W.2d 404; *Young,* 410 Mich. at 367, 301 N.W.2d 803. To the extent that *McConnell* may have viewed the "fact-finding process" ***500** as continuing throughout sentencing, we respectfully disagree and decline to adopt such an expansive view for purposes of our separate and independent test for retroactivity. It reflects an understanding of retroactivity that is no longer subscribed to by the United States Supreme Court and an understanding to which this Court has never subscribed. There is utterly no obligation on our part to forever maintain the *Linkletter* test in accordance with every past federal understanding when the test is now defunct for federal purposes and this Court, although initially relying on *Linkletter* to formulate our state test for retroactivity, has added its own interpretations to that test. Instead, the general principle of nonretroactivity for new rules of criminal procedure, to which Michigan adheres and which informs this state's retroactivity analysis, is properly served, in our judgment, by applying retroactively only those new rules of procedure that implicate the guilt or innocence of a defendant. We acknowledge that there are circumstances in which our state test may sometimes apply a new rule retroactively in circumstances in which *Teague* would not apply, but we are not prepared to extend our test beyond the federal test to the degree urged upon us by Carp.

In declining to expand the scope of the first factor of Michigan's state test for retroactivity, we note again that although our state test is derived from *Linkletter,* ****835** nothing requires this Court to adopt each and every articulation of that test—one that is no longer adhered to by the United States Supreme Court itself. Our state test for retroactivity is supplemental to the current federal test set forth in *Teague,* and it is separate and independent of the former federal test set forth in *Linkletter.* See *Danforth,* 552 U.S. at 289, 128 S.Ct. 1029. As the *Teague* test replaced the *Linkletter* test for federal purposes, doubtlessly contracting the universe of new constitutional ***501** rules that will be applied retroactively, [29] it should be unsurprising that this

Court would decline to grant retroactive status to a new rule of criminal procedure affecting only the sentencing phase of a criminal case when such a permutation of the defunct test has never before been so applied in this state. [30]

29 See *Sawyer v. Smith,* 497 U.S. 227, 257–258, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990) (Marshall, J., dissenting) ("The Court's refusal to allow Sawyer the benefit of *Caldwell* [*v Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)] reveals the extent to which *Teague* and its progeny unjustifiably limit the retroactive application of accuracy-enhancing criminal rules. Prior to *Teague,* our retroactivity jurisprudence always recognized a difference between rules aimed primarily at deterring police conduct and those designed to promote the accuracy of criminal proceedings.").

30 We recognize that the prosecutor in *Davis* and the Attorney General as an intervenor in *Carp* both assert that this Court should abandon Michigan's separate test for retroactivity and adopt *Teague* as our state test. We further recognize the anomalousness of this Court applying new federal rules retroactively pursuant to a standard that is more expansive than that which the United States Supreme Court has directed be applied by federal courts themselves. This anomalousness—at least as it applies to Michigan's retroactive application of new *federal* rules—is further heightened when, as in the instant case, (a) the federal rule contradicts the laws of our state as enacted by the Legislature in accordance with the will of the people of Michigan and (b) the Supreme Court has, for purposes of federal court application, specifically rejected the retroactivity test adopted by Michigan. See *Teague,* 489 U.S. 288, 109 S.Ct. 1060. This issue not having been the focal point of briefing or argument, we do not address it further in this case.

From our holding that the first factor of our state test for retroactivity focuses on whether a new rule of procedure implicates a defendant's guilt or innocence, it is apparent that the first factor clearly militates against the retroactive application of *Miller.* As *Miller* alters only the process by which a court must determine a defendant's level of moral culpability for purposes of *sentencing,* it has no bearing on the defendant's legal culpability for the offense of which the defendant has been duly convicted.

***502** In light then of our conclusion that the first state factor clearly counsels against the retroactive application of *Miller,* we find it relevant here to address the interplay between the three factors of the test and the weight that must be given to each before we determine the effect of the second and third factors on *Miller's* retroactive application. That a test consists of multiple factors does not logically signify that equal weight must be given to each. The United States Supreme Court, in applying the *Linkletter* test before it adopted the *Teague* test, observed that the second and third 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 U.S. 47, 55, 93 S.Ct. 1966, 36 L.Ed.2d 736 (1973), quoting *Desist v. United States,* 394 U.S. 244, 251, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). Deductively from this statement, if two of the three factors only control when the first factor does not "clearly favor" retroactivity or prospectivity, it follows ****836** that the first factor must be afforded more weight than either of the other two factors when the first factor *does* "clearly favor" retroactivity or prospectivity. We are persuaded by, and adhere to, *Payne's* and *Desist's* understanding regarding the heightened weight to be afforded the first factor when it strongly supports one side or the other of the retroactivity question.

Placing such an emphasis on the first factor is fully consistent with this Court's longstanding practice of dealing with the second and third factors "together." *Young,* 410 Mich. at 367, 301 N.W.2d 803; *Hampton,* 384 Mich. at 677, 187 N.W.2d 404. In this sense, the second and third factors will generally tend to produce a unified result that either favors or disfavors retroactivity. This is because the subject of the second factor (general reliance on the old rule) "will often have a profound effect on" the subject of the third ***503** factor (administration of justice), given that the greater the reliance by prosecutors of this state on a rule in pursuing justice, the more burdensome it will generally be for the judiciary to *undo* the administration of that rule. *Sexton,* 458 Mich. at 63–64, 580 N.W.2d 404; see also *Hampton,* 384 Mich. at 677–678, 187 N.W.2d 404. In light of the weight to be afforded the first factor when it clearly preponderates against retroactive application, our unified consideration of the second and third factors would need to favor retroactive application to a substantial degree in order for *Miller* to satisfy the requirements for retroactive application under our state test.

[38] **[39]** **[40]** **[41]** **[42]** **[43]** Turning to the inquiry required to evaluate the second and third factors "together," the second factor—the reliance on the old rule—must be considered both from the perspective of prosecutors across the state when prosecutors faithfully abided by the constitutional guarantees in place at the time of a defendant's conviction, see *Adams v. Illinois,* 405 U.S. 278, 283–284,

92 S.Ct. 916, 31 L.Ed.2d 202 (1972), and *Johnson v. New Jersey,* 384 U.S. 719, 731, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), as well as from the collective perspective of the 334 defendants who would be entitled to resentencing if the new rule were applied retroactively, see *Maxson,* 482 Mich. at 394, 759 N.W.2d 817. Inherent in the question of reliance by prosecutors across the state is the extent to which the old rule received constitutional approval from the judiciary before the adoption of the new rule. See *Tehan v. United States ex rel. Shott,* 382 U.S. 406, 417, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966). When the old rule is merely the result of a "negative implication" drawn by prosecutors, the prosecutors' good-faith reliance on the old rule is at its most minimal. *Brown v. Louisiana,* 447 U.S. 323, 335, 100 S.Ct. 2214, 65 L.Ed.2d 159 (1980) (opinion by Brennan, J.). Similarly, when the old rule was of "doubtful constitutionality," the ability of prosecutors across ***504** the state to rely on the old rule in good faith is diminished. *Id.* Conversely, when the old rule has been specifically approved by the courts as passing constitutional muster, prosecutors have their strongest argument for having relied on the old rule in good faith. *Tehan,* 382 U.S. at 417, 86 S.Ct. 459. Moreover, when prosecutors relied in good faith on the old rule and did so for a lengthier period of time, reliance can be viewed as more significant and the second factor will tend to counsel against retroactive application. *Id.* As for defendants' reliance on the old rule, they must demonstrate not only that they relied on the old rule by taking or not taking a specific action, but that they "*detrimentally* relied on the old rule." *Maxson,* 482 Mich. at 394, 759 N.W.2d 817 (emphasis added).

****837** The inquiry into reliance will significantly affect any inquiry into the burden placed on the administration of justice because when prosecutors have relied on the *old* rule, they have presumably taken few, if any, steps to comply with the *new* rule. The greater the extent of their reliance, and the greater the extent to which the new rule constitutes a departure from the old rule, the more burdensome it becomes for prosecutors to take the steps necessary to comply with the new rule. Similarly, the greater the extent of the departure, the more difficult it becomes for courts to look back and attempt to reconstruct what outcome would have resulted had the new rule governed at the time a given defendant was sentenced. A burden is placed on the administration of justice in the form of time and expense to the judiciary in retroactively accommodating the new rule. Far more importantly, when a new rule is likely to be difficult to apply retroactively, a burden is placed on the administration of justice in the form of compromising the accuracy with which the new rule can be applied and the confidence the public may have regarding ***505** judicial determinations in situations in which the new rule is applied to cases that became final many years or even decades earlier.

Applying these considerations in evaluating the second and third factors to *Miller,* it is apparent that these factors do not sufficiently favor the retroactive application of *Miller* so as to overcome the first factor's clear direction against its retroactive application. The old rule permitting life-without-parole sentences on the basis of the pre-*Miller* sentencing scheme established by the Legislature received in 1996 the specific approval of its constitutionality by our judiciary. *Launsburry,* 217 Mich.App. at 363–365, 551 N.W.2d 460. Further, nothing in United States Supreme Court caselaw called into any question life-without-parole sentences for any juvenile offenders until *Graham* was decided in 2010, and even then *Graham* was specifically limited in its breadth to juveniles who committed nonhomicide offenses.[31] *Graham,* 560 U.S. at 82, 130 S.Ct. 2011. Indeed, before *Roper* in 2005, United States Supreme Court precedent specifically held that it was constitutional to impose capital punishment on juveniles over the age of 16 convicted of homicide offenses. *Stanford v. Kentucky,* 492 U.S. 361, 380, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). Accordingly, at the time prosecutors across Michigan sought life-without-parole sentences for 302 of the 334 defendants who would gain a resentencing hearing if *Miller* were applied ***506** retroactively, the Eighth Amendment of the United States Constitution was affirmatively understood as permitting the imposition of not merely life without parole but also the imposition of capital punishment on juvenile first-degree-murder offenders.[32]

31 Interestingly, we note that *none* of the 334 defendants who would receive resentencing under *Miller* if it were applied retroactively to cases that had become final before *Miller* was issued was sentenced after *Graham* was decided. Therefore, to whatever extent it might be argued that *Graham* weakened the constitutional foundation of the old rule permitting life-without-parole sentences for juvenile homicide offenders, the argument is of little relevance to the retroactive application of *Miller* regarding any juvenile defendants currently serving life-without-parole sentences in Michigan.

32 Even with respect to the 34 defendants sentenced post-*Roper,* there was no cause for prosecutors to believe that the decision had any significant bearing on their ability, on behalf of the people of Michigan, to constitutionally seek a sentence of life without

parole or that it brought into question the decision in *Launsburry* upholding the imposition of life-without-parole sentences.

On the basis of this state of the law, prosecutors across Michigan entirely in ****838** good faith relied on the old rule whenever they sought life-without-parole sentences for juvenile homicide offenders. Considering the constitutional approval the old rule received from both our judiciary and the United States Supreme Court, as well as the length of time during which the old rule prevailed—dating back to our state's founding in 1837—the reliance on the old rule by Michigan prosecutors was significant and justified. [33]

33 Although *Maxson's* analysis of the second factor focused exclusively on whether the defendants in that case had detrimentally relied on the old rule without considering the extent to which prosecutors had detrimentally relied on the old rule, *Maxson's* approach to analyzing the second factor is not inconsistent with the approach we use today. When there are two relevant entities, concluding that one of these entities has or has not relied detrimentally on the old rule may be sufficient to reach a conclusion concerning the effect of the second factor on retroactivity. In *Maxson,* it was clear that the defendants' detrimental reliance on the old rule was insignificant so it was unnecessary to consider the extent to which prosecutors had relied on the old rule at issue in that case. Although the inverse is largely true here in that the detrimental reliance interests of prosecutors across this state are considerable, we have reviewed what is asserted to be Carp's and *Davis's* detrimental reliance on the old rule and see none. Once again, merely to act in accord with the old rule is not tantamount to detrimental reliance.

Conversely, we note that this is not a situation in which it can fairly be said that, as a group, the 334 ***507** defendants who would be entitled to resentencing if the rule in *Miller* were applied retroactively have "relied" on the old rule to their "detriment." First, we find it difficult to understand, and Carp and Davis themselves fail to identify, exactly what adverse action the 334 defendants have taken, or opted not to take, in "reliance" on the old rule (except perhaps to recognize and abide by the old rule as the then extant law of this state). [34] If such "reliance," in the sense of merely having to comply with the then extant law, is viewed as ***508** sufficiently "detrimental" to satisfy the second state ****839** retroactivity factor, then it would almost always be the case that this factor would weigh heavily in favor of retroactivity, since it must be assumed that criminal defendants, or at least their counsel, would almost always rely on existing law in formulating their trial and appellate strategies. There is nothing "detrimental" about that reliance except that the law is not as hospitable to the interests of such defendants as they might like it to be. That the law might have been destined to become more hospitable in the future is of little relevance since it is only because of that development that the issue of retroactivity has arisen in the first place.

34 The dissent similarly struggles to identify what action that would have benefited the 334 defendants was taken or not taken in "detrimental reliance" on the old rule. First, the dissent asserts that *trial courts* would have engaged in individualized sentencing hearings, but for the old rule. *Post* at 855. This, however, is an action that *courts,* not a defendant, would have taken, and essentially asserts nothing more than that *Miller* has altered the rules. Second, the dissent argues that defendants relied on the old rule by not seeking appellate review of their life-without-parole sentences. *Post* at 862–63. In making this argument, the dissent compares this case to *Maxson,* in which this Court suggested that a defendant's decision not to pursue an appeal could constitute an action that the defendant opted not to take in reliance on the old rule. *Maxson,* 482 Mich. at 394–395, 759 N.W.2d 817. However, *Maxson* was addressing the retroactivity of *Halbert v. Michigan,* 545 U.S. 605, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005), "which held that indigent defendants who plead guilty to criminal offenses are entitled to appointed appellate counsel on direct appeal." *Maxson,* 482 Mich. at 387, 759 N.W.2d 817. Accordingly, the old rule analyzed in *Maxson,* that indigent defendants who pleaded guilty to criminal offenses were not entitled to appointed appellate counsel on direct appeal, served as a direct impediment to a defendant's ability to file an appeal after pleading guilty. In these cases, the pre-*Miller* constitutionality of imposing life-without-parole sentences on juvenile homicide offenders by mandatory operation of law did nothing to hinder a defendant's ability to file an appeal challenging Michigan's then extant sentencing scheme or its personal application. Furthermore, as Michigan caselaw had specifically upheld the constitutionality of our pre-*Miller* sentencing scheme, *Launsburry,* 217 Mich.App. 358, 551 N.W.2d 460, it is unclear how defendants' failures to seek appellate review proved detrimental. While the dissent is obviously correct that their interests were not favored under the old rule to the extent they are under the new rule, that is not the equivalent of having "detrimentally relied" on the old rule.

Second, even to the extent that any defendants can be said to have taken or foregone some action to their detriment in

reliance on the old rule, they still can only be said to have "detrimentally" relied on the old rule if they can establish that they would have obtained a result more favorable to them under the new rule. *Maxson*, 482 Mich. at 394–396, 759 N.W.2d 817. In this sense, defendants can only be said to have " 'detrimentally relied' on the old rule" if they "*suffered actual harm* from [their] reliance...." *Id.* at 396, 759 N.W.2d 817. However, a majority of the 334 defendants who would receive resentencing hearings if the rule in *Miller* were applied retroactively were between 17 and 18 years of age when they committed their homicide offenses. Because *Miller* requires a sentencing court to give specific consideration to the age and the mental development of a juvenile offender before imposing a sentence of life without parole, when a juvenile most closely approaches the age of majority at the time the juvenile commits a homicide offense, *Miller* would seem least likely to counsel in favor of sentencing that juvenile with special leniency, given that in only as few as several months the juvenile would be ineligible ***509** for any leniency at all.[35] In this sense, it is speculative at best to presume that a majority of Michigan's juvenile offenders serving life-without-parole sentences would gain relief in the form of a lesser sentence if they received a resentencing hearing pursuant to the retroactive application of *Miller*. Accordingly, juvenile defendants, as a class, are unable to demonstrate with any certainty under the state test that they *detrimentally* relied on the old rule to such an extent as to outweigh the state's reliance on the old rule.

35 In focusing on the age of the defendants who would receive resentencing if *Miller* were applied retroactively, we nowhere suggest that age is the exclusive factor that the trial court should consider in imposing a sentence on a juvenile homicide offender, and we agree with the dissent that *Miller* calls for a "multifaceted" approach to sentencing. Compare page 839 of this opinion with *post* 863 n. 88. However, in light of the other factors that *Miller* instructs a trial court to consider, it seems apparent that a juvenile's age at the time of the offense will weigh relatively heavily at sentencing hearings. In most cases, a juvenile's age will reasonably correspond to his or her mental and emotional development as well as the ability to overcome a difficult family and home life. Additionally, as a juvenile approaches 18 years of age at the time of the offense, and may even turn 18 during the proceedings related to the offense, it follows that the "incompetencies associated with youth" will come to have increasingly less of an effect on the juvenile's ability to communicate with, and to assist, his or her attorneys in their legal preparations. Accordingly, while age is by no means the only factor to be considered in imposing a sentence pursuant to *Miller*, an offender's age is likely to be given significant weight in the court's deliberations and may well constitute the single best factor for ascertaining whether a *Miller*-benefited offender would actually gain relief if *Miller* were applied retroactively.

As between defendants and the prosecutors of this state, it is further apparent that the *latter* have relied far more heavily on the old rule, have done so in good faith, and would have relied "detrimentally" on ****840** behalf of the people were *Miller* to be applied retroactively. In particular, in relying on the old rule, prosecutors did not for the purpose of sentencing have any cause at the time ***510** to investigate or present evidence concerning the aggravating or mitigating factors now required to be considered by *Miller*. If *Miller* were to be applied retroactively, prosecutors would be abruptly required to bear the considerable expense of having to investigate the nature of the offense and the character of the 334 juvenile offenders subject to *Miller's* retroactive application. This task, if newly thrust upon prosecutors, would be all the more burdensome and complicated because a majority of the 334 defendants were sentenced more than 20 years ago and another 25% were sentenced between 15 and 20 years ago. And in many, if not most, of those instances, the prosecutor who initially tried the case would likely no longer be available for a resentencing hearing. That is, *Miller* makes many things relevant to the sentencing process that were simply not relevant at the time of the initial sentencing, and these things would have to be reconstructed, almost impossibly so in some cases, after many years, in order to sustain a criminal sentence that was viewed at the time as the culmination of a full and fair process by which justice was obtained in cases of first-degree murder. There would be considerable financial, logistical, and practical barriers placed on prosecutors to re-create or relocate evidence that had previously been viewed as irrelevant and unnecessary. This process would not, in our judgment, further the achievement of justice under the law because it would require in many instances that the impossible be done, and if it could not be, a heavy cost would be incurred by society in the form of the premature release of large numbers of persons who will not have fully paid their legal debt to society, many of whom as a result might well continue to pose a physical threat in particular to individuals living in our most vulnerable neighborhoods.

***511** *Miller* requires trial courts to determine a defendant's moral culpability for the murder the defendant has committed by examining the defendant's character and mental

development *at the time of the offense.* Even if the myriad evidence could somehow be obtained by the prosecutor, it is fanciful to believe that the backward-looking determination then required of the trial court could be undertaken with sufficient accuracy and trustworthiness so many years after the crime had been committed, the trial completed, and the defendant sentenced. Further, just as the prosecutor might no longer be available to represent the people's interest, neither might the sentencing judge. We are not confident that the justice achieved by a resentencing process taking place many years after the original trial and sentencing—many years after the victims of the homicide have become little more than historical footnotes to all but their immediate families—and presided over by a judge who can never entirely be situated like the judge who presided over the trial, can effectively replicate the justice achieved at the initial sentencing. Instead, we believe that the trial court's ability to travel back in time to assess a defendant's mental state of some 20 years earlier—evidence of which may not even have been gathered at the time—is limited; that the recollection of memories about aggravating and mitigating circumstances—evidence of which may again not even have been gathered at the time—is questionable; and that, as a result, public confidence in the integrity and accuracy of those proceedings will understandably be low.

For these reasons, we find that the second and third factors do not sufficiently favor the retroactive application of *Miller* ****841** so as to overcome the first factor counseling against the retroactive application of *Miller.* As a ***512** result of this analysis, *Miller* is not entitled to retroactive application under Michigan's test for retroactivity.

D. CONSTITUTIONAL ISSUES

Defendants raise a series of constitutional challenges arguing that the Eighth Amendment of the United States Constitution or Const. 1963, art. 1, § 16, or both, categorically bars the imposition of a life-without-parole sentence on a juvenile homicide offender. We consider each challenge in turn.

1. FEDERAL CATEGORICAL BAR

[44] Defendants assert that the Eighth Amendment of the United States Constitution[36] categorically bars the imposition of a sentence of life without parole on any juvenile homicide offender, regardless of whether the "individualization" of sentencing is performed before that sentence is imposed. The effect of the categorical rule sought by defendants would not only mandate resentencing for all juvenile defendants sentenced to life without parole under the pre-*Miller* sentencing scheme, but would also invalidate those portions of MCL 769.25 allowing the state to impose a life-without-parole sentence on particular juveniles following an individualized sentencing hearing in accordance with *Miller.* See MCL 769.25(2) through (7). Defendants ask this Court to read the United States Supreme Court's rulings in *Roper, Graham,* and *Miller* as necessarily foreshadowing the conclusion that the Eighth Amendment categorically bars life-without-parole sentences ***513** for all juvenile offenders. However, the limited nature of each of these rulings does not, in our judgment, necessitate that conclusion. Moreover, the proportionality review employed by the United States Supreme Court in fashioning the rules in *Roper, Graham,* and *Miller* also does not support the categorical rule sought by defendants.

36 The Eighth Amendment of the United States Constitution reads:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. [U.S. Const., Am. VIII.]

As noted earlier, the holding in *Roper* was specifically limited to capital punishment in that the "Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Roper,* 543 U.S. at 578, 125 S.Ct. 1183. Given that capital punishment was only "likened" to life without parole for a juvenile offender, *Miller,* 567 U.S. at ——, 132 S.Ct. at 2463–2464, rather than deemed equivalent to life without parole for a juvenile offender, neither *Roper* nor *Roper* in conjunction with *Graham* and *Miller* suggests in any way that the Eighth Amendment must be read as invalidating the state's ability to impose a life-without-parole sentence on a juvenile homicide offender. Likewise, *Graham's* holding was specifically limited so as to categorically bar only the imposition of life-without-parole sentences for juvenile offenders convicted of nonhomicide offenses. *Graham,* 560 U.S. at 79, 130 S.Ct. 2011. Accordingly, *Graham* also does not compel the invalidation of a state's ability to impose a sentence of life without parole on a juvenile homicide offender.

Turning lastly to *Miller,* its rule is specifically limited in that it counsels *against* the very categorical rule sought by defendants. As discussed earlier, *Miller* requires that an

individualized sentencing hearing occur before a life-without-parole **842 sentence may be imposed, but expressly "does not categorically bar a penalty" or "foreclose a sentencer's ability" to impose a life-without-parole sentence. *514 *Miller,* 567 U.S. at ——, 132 S.Ct. at 2469, 2471. Defendants' proposed categorical rule would therefore read the Eighth Amendment as categorically barring precisely the very punishment that *Miller* declined to categorically bar and, in so doing, asserted was not categorically barred by the Eighth Amendment.

Defendants alternatively contend that, in light of the manner in which state legislatures reacted to *Miller* by adjusting sentencing schemes governing juvenile homicide offenders, it is *now,* pursuant to the proportionality review employed in *Roper, Graham,* and *Miller,* cruel and unusual punishment to impose a life-without-parole sentence on a juvenile homicide offender. Within the context of the Eighth Amendment, the United States Supreme Court has used a multipart test to determine if a punishment imposed on a juvenile offender is disproportionate:

> A court must begin by comparing the gravity of the offense and the severity of the sentence. "[I]n the rare case in which [this] threshold comparison ... leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual. [*Graham,* 560 U.S. at 60, 130 S.Ct. 2011, quoting *Harmelin,* 501 U.S. at 1005, 111 S.Ct. 2680 (Kennedy, J., concurring in part).]

Starting with the preliminary question whether "the gravity of the offense" is commensurate with "the severity of the sentence," *Graham,* 560 U.S. at 60, 130 S.Ct. 2011, we note that first-degree murder is almost certainly the gravest and most serious offense that an individual can commit under the laws of Michigan—the premeditated taking of an innocent human life. It is, therefore, *515 unsurprising that the people of this state, through the Legislature, would have chosen to impose the most severe punishment authorized by the laws of Michigan for this offense. Although the individualized sentencing process now required by *Miller* (and as a necessary response to *Miller* by MCL 769.25) may perhaps indicate that some juvenile offenders lack the moral culpability and mental faculties to warrant a life-without-parole sentence pursuant to the premises of *Miller,* when the contrary conclusions are drawn, as they presumably will be in some cases, a sentence of life without parole for first-degree murder will not "lead[ ] to an inference of gross disproportionality." *Id.* Accordingly, defendants have failed to demonstrate that the imposition of a life-without-parole sentence will satisfy the first part of the United States Supreme Court's test for proportionality. As the first part of this federal test is a *necessary* requirement for finding that a punishment is "disproportionate," defendants' facial challenge fails as they are consequently unable to demonstrate that the Eighth Amendment categorically bars the imposition of a life-without-parole sentence on juvenile homicide offenders.

Even if defendants had satisfied the first part of the federal test for disproportionality, however, they have also failed to satisfy the second part of the test, which compares the life-without-parole sentence defendants seek to invalidate "with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same **843 crime in other jurisdictions." *Id.* As for other offenders within the state of Michigan, defendants are correct to note that life without parole is the most severe punishment imposed by this state. This fact alone, however, does not persuade us that imposing a life-without-parole sentence on a juvenile homicide offender is disproportionate.

*516 First, as noted in the first part of this test for proportionality, first-degree murder is almost certainly the gravest and most serious offense that can be committed under the laws of Michigan. As with juveniles, adult offenders who commit the offense of first-degree murder face the same sentence of life without parole. Because some juvenile offenders will possess the same mental faculties of an adult so that they are equally able to recognize the consequences of their crimes and form an unequivocal premeditated intent to kill in the face of the consequences, it is not categorically disproportionate to punish at least some juvenile offenders the same as adults.

Second, there are some nonhomicide offenses that may be viewed as less grave and less serious than first-degree murder and for which only adult offenders face a life-without-parole sentence in this state. For instance, an adult who commits successive first-degree criminal sexual conduct offenses against an individual under the age of 13 faces a sentence of life without parole. MCL 750.520b(2)(c). Accordingly, when the commission of a nonhomicide offense by an adult offender may result in the imposition of a life-without-parole sentence, it does not appear categorically

disproportionate to impose a life-without-parole sentence on a juvenile offender for committing the gravest and most serious homicide offense.

Third, although this Court is required by *Graham* to assess the proportionality of a sentence of life without parole imposed on juveniles who commit first-degree murder, we would be derelict if we did not observe that the people of this state, acting through their Legislature, have already exercised their judgment—to which we owe considerable deference —that the sanction they have selected for juvenile first-degree-murder offenders ***517** is, in fact, a proportionate sanction. We are not certain that there is a superior test for assessing a determination of proportionality than that a particular sanction is compatible with public opinion and sentiment. Nonetheless, because this Court is required to do so by *Graham,* we undertake to the best of our ability to exercise independent judgment in analyzing the criminal punishments authorized by our Legislature and assessing their propriety in the light of the crimes for which the Legislature has deemed them proportionate.

Turning to whether Michigan's sentencing scheme for juvenile first-degree-murder offenders is "disproportionate" to sentencing schemes used in other states, defendants have wholly failed to present relevant data demonstrating that Michigan is an outlier when it comes to permitting the imposition of life-without-parole sentences for juvenile first-degree-murder offenders, even on the assumption that being an "outlier" adversely affects our state's compliance with the United States Constitution. Defendants in their briefs cherry-pick six states in which sentencing schemes have been altered post-*Miller* to eliminate life-without-parole as a possible sentence for juvenile offenders. The fact that six states have eliminated life-without-parole sentences for juvenile offenders in response to *Miller* tells us next to nothing about how Michigan's choice to impose life-without-parole sentences on juveniles convicted of first-degree murder compares to ****844** sentencing schemes across the nation, and defendants have come nowhere close to satisfying their burdens in this regard.

What trend is demonstrated by the actions of these six states alone? How many states at the time of *Miller* imposed a sentence of life without parole on juvenile homicide offenders? How many of these states responded to *Miller* in a manner similar to that of ***518** Michigan? What *is* apparent is that at the time of *Miller,* "26 States ... [made] life without parole the mandatory (or mandatory minimum) punishment for some form of murder, and would apply the relevant provision to 14–year–olds...." *Miller,* 567 U.S. at —— n. 9, 132 S.Ct. at 2471 n. 9. Another 15 states allowed for the discretionary imposition of life-without-parole sentences on juvenile offenders. *Id.* at —— n. 10, 132 S.Ct. at 2472 n. 10. Combined therefore, 41 states exercised the authority under at least some circumstances to impose a life-without-parole sentence on a juvenile. If, as defendants assert, six of those states have departed from this practice by eliminating that sentence altogether, can it be concluded that life-without-parole sentences for juveniles are disproportionate when they remain an option of some kind in 35 states in total, or 70% of the states composing the Union?

In summary, we have no evidence that sustains defendants' burden of demonstrating that Michigan's statutory scheme is categorically disproportionate to those of other states. As defendants have failed to demonstrate that either part of the federal test for the constitutionality of punishments supports the conclusion that a life-without-parole sentence for juvenile homicide offenders is disproportionate, we decline to hold that the Eighth Amendment of the United States Constitution categorically bars that punishment.

2. STATE CATEGORICAL BAR

[45] Defendants next contend that even if the Eighth Amendment does not categorically bar the imposition of sentences of life without parole on juvenile homicide offenders, Const. 1963, art. 1, § 16 does mandate such a categorical bar. Whereas the Eighth Amendment proscribes ***519** the imposition of "cruel *and* unusual punishments," Const. 1963, art. 1, § 16 states:

> Excessive bail shall not be required; excessive fines shall not be imposed; cruel *or* unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained. [Emphasis added.]

The textual difference between the federal constitutional protection and the state constitutional protection is of consequence and has led this Court to conclude that Article 1, § 16 provides greater protection against certain punishments than its federal counterpart in that if a punishment must be both "cruel" *and* "unusual" for it to be proscribed by the Eighth Amendment, a "punishment that is unusual but not

necessarily cruel" is also proscribed by Article 1, § 16. *People v. Lorentzen,* 387 Mich. 167, 172, 194 N.W.2d 827 (1972).

[46] This broader protection under Article 1, § 16 against punishments that are merely "unusual" has led this Court to adopt a slightly different and broader test for proportionality than that employed in *Graham.* See *id.* at 171–172, 194 N.W.2d 827; see also *People v. Bullock,* 440 Mich. 15, 31, 485 N.W.2d 866 (1992).[37] As set ****845** forth in *Lorentzen* and ***520** *Bullock,* the state test for proportionality assesses (1) the severity of the sentence imposed compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed on other offenders in the same jurisdiction, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the penological goal of rehabilitation. *Bullock,* 440 Mich. at 33–34, 485 N.W.2d 866, citing *Lorentzen,* 387 Mich. at 176–181, 194 N.W.2d 827.

37 The inclusion of proportionality review under Article 1, § 16 has been the subject of significant disagreement. *Bullock,* 440 Mich. at 46, 485 N.W.2d 866 (RILEY, J., concurring in part and dissenting in part) ("I believe that *People v. Lorentzen*....., the principle case relied on by the majority to support its conclusion, was wrongly decided and that proportionality is not, and has never been, a component of the 'cruel or unusual punishment' clause of this state's constitution."); *People v. Correa,* 488 Mich. 989, 992, 791 N.W.2d 285 (2010) (MARKMAN, J., joined by CORRIGAN and YOUNG, JJ., concurring) ("[A]t some point, this Court should revisit *Bullock's* establishment of proportionality review of criminal sentences, and reconsider Justice RILEY'S dissenting opinion in that case."). However, because life without parole is not a categorically disproportionate sentence for a juvenile homicide offender, we find it unnecessary in this case to resolve whether proportionality review is rightly a part of the protection in Article 1, § 16 against "cruel or unusual punishment," instead assuming for the sake of argument that it has a place in an analysis under Article 1, § 16.

At the outset, we note that the *Lorentzen/Bullock* test bears a considerable resemblance to the federal test for proportionality because the first three factors combine to effect the same general inquiry as the two-part test employed in *Graham.* See *Bullock,* 440 Mich. at 33, 485 N.W.2d 866 ("Our analysis in *Lorentzen* foreshadowed in a striking manner the three-pronged test later adopted by the United States Supreme Court in *Solem v. Helm,* 463 U.S. 277, 290–291, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)."). Our conclusion that none of the first three factors supports the inference that a life-without-parole sentence for a juvenile offender is disproportionate under the Eighth Amendment also bears on the first three inquires of the proportionality analysis under the *Lorentzen/Bullock* test. Accordingly, only the fourth factor of the *Lorentzen/Bullock* test remains to be assessed before weighing these factors and reaching a conclusion about the proportionality of a life-without-parole sentence for a juvenile homicide offender under Article 1, § 16 of our state constitution.

Concerning the fourth factor, we concur with the United States Supreme Court's assessment that a life-without-parole sentence for a juvenile does not serve ***521** the penological goal of rehabilitation.[38] *Graham,* 560 U.S. at 74, 130 S.Ct. 2011. As stated in *Graham,* when life without parole is imposed on a juvenile, "[t]he penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society." *Id.* Accordingly, the fourth factor of the *Lorentzen/Bullock* test supports defendants' contention that a life-without-parole sentence for a juvenile offender is disproportionate. That said, with only one of the four factors supporting the conclusion that life-without-parole sentences are disproportionate ****846** when imposed on juvenile homicide offenders, defendants have failed to meet their burden of demonstrating that it is facially unconstitutional under Article 1, § 16 to impose that sentence on a juvenile homicide offender. While the language of the Michigan counterpart to the Eighth Amendment is at some variance from the latter, it is not so substantially at variance that it results in any different conclusion in its fundamental analysis of proportionality.

38 In accepting this conclusion, this Court, as did the United States Supreme Court, speaks of "rehabilitation" exclusively within the context of a defendant reforming himself or herself for the purpose of reintegration into society. See *Graham,* 560 U.S. at 74, 130 S.Ct. 2011. This, however, is not to foreclose the ability of a person, however long the person is to be incarcerated, to rehabilitate himself or herself in the sense of fully comprehending the nature of the wrong, achieving a greater awareness of and commitment to the elements of moral behavior, attaining a sincere adherence to religious faith, or contributing in positive ways to those with

> whom the person interacts in whatever environment he or she has been placed.

3. AIDING AND ABETTING

[47] Davis argues that even if the Eighth Amendment does not categorically bar imposing sentences of life without parole on juvenile homicide offenders, it at ***522** least categorically bars imposing life-without-parole sentences on juvenile homicide offenders, such as himself, convicted of felony murder ostensibly on the basis of an aiding-and-abetting theory. At the outset of our analysis, we note that our Legislature has chosen to treat offenders who aid and abet the commission of an offense in exactly the same manner as those offenders who more directly commit the offense:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense. [MCL 767.39.]

Moreover, the Legislature has enacted a felony-murder statute, which treats the commission of a murder during the course of a robbery as first-degree murder. See MCL 750.316(1)(b).[39] These choices by the Legislature must be afforded great weight in light of the fact that *Lockett,* one of the capital-punishment cases relied on by the United States Supreme Court in forming the rule in *Miller,* specifically instructs:

> That States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge. [*Lockett,* 438 U.S. at 602, 98 S.Ct. 2954.]

Davis attempts to overcome this constitutional pronouncement in light of his own proposed categorical rule mandating a lesser maximum penalty for aiders and abettors by asserting that *Miller* and *Graham* ***523** combine to necessitate such a rule. He advances a two-part argument to this effect: (1) the rule in *Miller* requires individualized sentencing for juvenile offenders in an effort to account for "their lesser culpability," *Miller,* 567 U.S. at ——, 132 S.Ct. at 2463, and (2) *Graham* has already determined that aiders and abettors are sufficiently less culpable that a sentence of life without parole is never constitutionally appropriate, see *Graham,* 560 U.S. at 69, 130 S.Ct. 2011.

Although the first part of this syllogism is undoubtedly accurate, the same cannot be said of the second part. *Graham* made two statements pertinent to the second part of Davis's argument:

> The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers....
>
> ****847** It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. [*Id.*]

In combination with *Miller's* requirement that individualized sentencing account for a juvenile's "lesser culpability," it has been argued that a juvenile offender cannot be sentenced to life without parole when the defendant did not kill, intend to kill, or foresee that life would be taken as a result of the offense, even when the offense of which the offender was convicted was felony murder. Just such a contention was advanced by Justice Breyer in his concurrence in *Miller,* in which, addressing specifically the constitutionality of life-without-parole sentences for juvenile offenders convicted of felony murder on an aiding-and-abetting theory, he stated, "*Graham* dictates a clear rule: The only juveniles who may constitutionally be sentenced to life without parole are ***524** those convicted of homicide offenses who 'kill or intend to kill.' " *Miller,* 567 U.S. at ——, 132 S.Ct. at 2476 (Breyer, J., concurring).

Assuming for the sake of argument that some categorical rule of this nature is the necessary product of *Graham* and *Miller,*[40] it still does not follow that the rule pertains to and encompasses all instances in which a juvenile aids and abets a felony murder. As recognized by Justice Breyer himself, a juvenile who aids and abets a felony murder *may* have intended the death of any victim of the offense. *Id.* at ——, 132 S.Ct. at 2477 (indicating that on remand, the trial court would need to determine if the defendant, who was convicted

39 We speak of the felony-murder statute in terms of the underlying felony being a robbery merely because the underlying felony in Davis's case was a robbery. The reasoning put forth in this part, however, would apply equally when the underlying felony is any one of the other felonies listed in MCL 750.316(1)(b).

of felony murder for aiding and abetting the commission of a robbery that resulted in a death, "did intend to cause the clerk's death"). Further, a juvenile who aids and abets a felony murder *may* have foreseen that a life might be taken as a result of his offense, but proceeded notwithstanding to engage in the underlying offense with indifference to this risk. Accordingly, when a juvenile can be convicted of felony murder on an aiding-and-abetting theory while either intending to kill or having foreseen the possibility that a life could be taken, any categorical rule gleaned from *Graham* pertaining to the limited situation in which a juvenile homicide offender lacked the intent to kill and did not foresee the possibility that a life could be taken will once again not *categorically* bar the imposition of a ***525** sentence of life without parole for that offense.[41]

40 Although we assume for the sake of argument that such a categorical rule may exist, nothing in this opinion should be understood as actually accepting or adopting such a rule. To the contrary, we note that a categorical rule mandating that a subclass of aiders and abettors be treated differently with respect to what punishments can be imposed would run directly contrary to both the aforementioned statement in *Lockett* and MCL 767.39. Further, Justice Breyer in his concurrence spoke only for himself and one other justice.

41 To the extent that *Graham* and *Miller* might create a categorical rule prohibiting life-without-parole sentences for juveniles convicted of aiding and abetting a felony murder "who do not kill, intend to kill, or foresee that life will be taken," *Graham,* 560 U.S. at 69, 130 S.Ct. 2011, Davis would not be entitled to relief under that rule. Although the trial court concluded at sentencing that Davis was not the shooter, it did not make an explicit finding regarding Davis's intentions about the victim's death, and it made no findings indicative of whether he foresaw the potential that life would be taken as a result of the armed robbery in which he engaged. To go back and attempt to make these findings now would entail engaging in the broader individualized sentencing procedures called for by *Miller* that we have already determined today need not be engaged in retroactively.

This conclusion is entirely consistent with, and arguably dictated by, the individualized ****848** sentencing process required by *Miller.* In seeking to assess a juvenile offender's moral culpability, *Miller* instructs trial courts to consider the " 'circumstances of the particular offense *and* the character and propensities of the offender.' " *Id.* at —— n. 9, 132 S.Ct. at 2471 n. 9, quoting *Roberts,* 428 U.S. at 333, 96 S.Ct. 3001, and citing *Sumner,* 483 U.S. 66, 107 S.Ct. 2716 (emphasis added). A categorical rule altogether foreclosing a trial court from imposing a life-without-parole sentence on a juvenile convicted of felony murder on an aiding-and-abetting theory obviates the necessity for any evaluation of either the circumstances of the individual defendant's offense or the individual defendant's character. Such a categorical rule would permit a defendant to avoid a life-without-parole sentence for aiding and abetting a felony murder even if the defendant was closely nearing the age of 18 at the time of the offense, intended the death of the victim by instructing a coconspirator to fire the fatal shot, and had had previous encounters with the criminal justice system that demonstrated a lack of amenability to rehabilitation. Because it is not difficult to imagine such a defendant, and because imposing a life-without-parole sentence on ***526** that defendant would be warranted and entirely constitutional under *Miller,* we reject Davis's facial challenge and his contention that the Eighth Amendment categorically bars the imposition of a life-without-parole sentence on a juvenile convicted of felony murder on an aiding-and-abetting theory.[42]

42 This holding carries with it the conclusion that some juveniles convicted of felony murder on an aiding-and-abetting theory might be as morally culpable for their crimes as juveniles who commit premeditated first-degree murder and not simply as legally culpable. A juvenile convicted of felony murder on an aiding-and-abetting theory can be said to have committed as grave an offense as a juvenile who commits premeditated first-degree murder. Accordingly, for the purpose of Davis's challenge under Const. 1963, art. 1, § 16, the first two factors of the *Lorentzen/ Bullock* proportionality test will be resolved in a fashion identical to how they were resolved for life-without-parole sentences generally. Concerning the third factor, Davis fails to present any data specific to how other jurisdictions sentence juveniles convicted of felony murder on an aiding-and-abetting theory, only putting forth a sampling of how a very few states now sentence juveniles convicted of first-degree murder generally. In the absence of evidence to the contrary, we are left to assume that a majority of other states hold aiders and abettors equally responsible for their offenses. Accordingly, the third factor also counsels against a finding of disproportionality. Because only the fourth factor of the *Lorentzen/Bullock* proportionality test, pertaining to rehabilitation, favors holding life-without-parole sentences for juveniles convicted of felony murder on an aiding-and-abetting theory unconstitutional, Davis's facial challenge under Article 1, § 16 fails as well.

4. RIPENESS

[48] **[49]** Eliason asserts that Const. 1963, art. 1, § 16 categorically bars the imposition of a sentence of life without parole on a juvenile homicide offender who is 14 years of age at the time of the offense. For Eliason's facial challenge to be ripe, there must be "a real and immediate threat ... as opposed to a hypothetical one" that a sentence of life without parole will be imposed on him. *Conat,* 238 Mich.App. at 145, 605 N.W.2d 49, citing ***527** *Los Angeles v. Lyons,* 461 U.S. 95, 101–101, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), and *Dep't of Social Servs. v. Emmanuel Baptist Preschool,* 434 Mich. 380, 410, 455 N.W.2d 1 (1990) (CAVANAGH, J.). Put differently, in determining whether an issue is justiciably "ripe," a court must assess " 'whether the harm asserted has matured sufficiently to warrant judicial intervention.' " *Emmanuel Baptist,* 434 Mich. at 412 n. 48, 455 N.W.2d 1 (citation omitted). ****849** Inherent in this assessment is the balancing of "any uncertainty as to whether defendant[ ] will actually suffer future injury, with the potential hardship of denying anticipatory relief." *Id.* at 412, 455 N.W.2d 1, citing *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148–149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

Eliason was 14 years of age at the time of his offense and was initially sentenced to life without parole. However, because Eliason's case is on direct review, he is entitled to resentencing pursuant to MCL 769.25(1)(b)(*ii*). Under MCL 769.25(9), the default sentence for a juvenile convicted of first-degree murder is a sentence of a term of years within specific limits rather than life without parole. A juvenile defendant will only face a life-without-parole sentence if the prosecutor files a motion seeking that sentence and the trial court concludes following an individualized sentencing hearing in accordance with *Miller* that such a sentence is appropriate. MCL 769.25(2) through (7).

Although the prosecutor has filed a motion seeking the imposition of a sentence of life without parole, it is no more than speculation whether the trial court will depart from the default sentence in response to the prosecutor's motion and impose a life-without-parole sentence, and it is not apparent that Eliason faces a "real and immediate" threat of receiving a life-without-parole sentence. Furthermore, because he will be facing a minimum sentence of "not less ***528** than 25 years," MCL 769.25(9), to deny on ripeness grounds the relief Eliason seeks will cause him no legally cognizable hardship or harm. If a life-without-parole sentence is imposed at resentencing, Eliason will have more than ample time to appeal and assert either an as-applied or a facial constitutional challenge to his sentence before he completes the minimum possible sentence for his offense. Accordingly, in light of Eliason's being entitled to resentencing under MCL 769.25, his facial constitutional challenge to life-without-parole sentences for juvenile homicide offenders who are 14 years of age at the time of their offense is no longer justiciable. [43]

43 As conceded by the parties at oral argument, Eliason's other issues on which this Court granted leave to appeal are moot as a result of the enactment of MCL 769.25.

V. CONCLUSION

For these reasons, we hold that the rule set forth in *Miller* should not be retroactively applied under either the federal retroactivity test set forth in *Teague* or Michigan's separate and independent retroactivity test set forth in *Sexton* and *Maxson.* In so doing, we affirm the judgments of the Court of Appeals in *Carp* and *Davis* that *Miller* should not be applied retroactively. We further hold that neither the Eighth Amendment nor Const. 1963, art. 1, § 16 categorically bars the imposition of a sentence of life without parole on a juvenile first-degree-murder offender or a juvenile convicted of felony murder on the basis of an aiding-and-abetting theory. Finally, we hold that Eliason's facial constitutional challenge is no longer ripe and therefore remand his case for resentencing pursuant to MCL 769.25.

YOUNG, C.J., and ZAHRA, and VIVIANO, JJ., concurred with MARKMAN, J.

KELLY, J. (dissenting).

***529** In a series of recent cases involving juvenile offenders, [1] the United States Supreme Court has established that "children are different" as a matter of constitutional ****850** law. [2] Specifically at issue here is the application of one of those recent cases, *Miller v. Alabama,* to incarcerated juvenile offenders whose direct appeals were complete when the Supreme Court decided *Miller.* In *Miller,* the Supreme Court determined that, because certain juvenile homicide offenders have "diminished culpability" when compared with adult offenders, states cannot subject juvenile homicide offenders to mandatory nonparolable life sentences. [3] By

doing so, the Court expanded the range of punishments that may be imposed on juvenile homicide offenders in states, like Michigan, that had previously mandated a nonparolable life sentence whenever a juvenile offender was convicted of first-degree murder in the circuit court. We conclude that *Miller* applies retroactively to cases appearing before us on collateral review, including in *People v. Carp* and *People v. Davis,* because it established a substantive rule of law. Alternatively, state law compels the retroactive application of *Miller.* Accordingly, we would reverse in *Carp* and *Davis* and remand those cases to the St. Clair Circuit Court and Wayne Circuit Court, respectively, for resentencing pursuant to MCL 769.25a. [4]

1 The phrase "juvenile offenders" throughout this opinion refers to the class of individuals who were convicted for crimes committed before reaching the age of 18.

2 *Miller v. Alabama,* 567 U.S. ——, 132 S.Ct. 2455, 2470, 183 L.Ed.2d 407 (2012). See also *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

3 *Miller,* 567 U.S. at ——, 132 S.Ct. at 2464

4 We would also remand *People v. Eliason* to the Berrien Circuit Court for resentencing pursuant to MCL 769.25, as the majority does.

*530 I. THE EIGHTH AMENDMENT APPLIED TO JUVENILE OFFENDERS

The Eighth Amendment of the United States Constitution prohibits the infliction of "cruel and unusual punishments" [5] and has a long history in American and English law predating the Bill of Rights. Similar protections were provided in various state constitutions, [6] and identical language appeared in the English Bill of Rights of 1689. [7] Even farther back in time, a prohibition of excessive punishments appeared in the Magna Carta. [8]

5 The Cruel and Unusual Punishments clause has been incorporated to the states through the Fourteenth Amendment. See *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Additionally, Article 1, § 16 of the 1963 Michigan Constitution provides that "cruel or unusual punishment shall not be inflicted...."

6 For instance, the Virginia Declaration of Rights stated "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." 5 Kurland & Lerner, The Founders' Constitution, p. 373, quoting Virginia Declaration of Rights, § 9 (June 12, 1776).

7 The English Bill of Rights of 1689 provided "[t]hat excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." 5 Kurland & Lerner, The Founders' Constitution, p. 369, quoting the English Bill of Rights, 1 W & M, 2d. sess., ch. 2, § 10 (December 16, 1689).

8 Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning,* 57 Cal. L. Rev. 839, 845–846 (1969) (The Magna Carta "clearly stipulated as fundamental law a prohibition of excessiveness in punishments [.]"). Caselaw further establishes "a common law prohibition against excessive punishments in any form," even if it remains unclear "[w]hether the principle was honored in practice...." *Id.* at 847.

" 'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.' " [9] For more than a **851 century, the Supreme Court has maintained *531 that the Clause does not have a fixed meaning, [10] but instead "may acquire meaning as public opinion becomes enlightened by a humane justice." [11] One meaning the Supreme Court has developed over the last decade is that "children are constitutionally different from adults for purposes of sentencing." [12] In *Roper v. Simmons,* the Court forbade imposition of the death penalty on juvenile offenders. [13] In *Graham v. Florida,* the Court prohibited "the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." [14] Most recently, in *Miller v. Alabama,* the Court struck down a sentencing scheme that provided a mandatory nonparolable life sentence for juvenile homicide offenders. [15]

9 *Atkins v. Virginia,* 536 U.S. 304, 311, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), quoting *Trop v. Dulles,* 356 U.S. 86, 100, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (opinion by Warren, C.J.).

10 See *Weems v. United States,* 217 U.S. 349, 373, 30 S.Ct. 544, 54 L.Ed. 793 (1910) ("[I]f we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of

history."); *id.* ("[O]ur contemplation cannot be only of what has been but of what may be.").

11 *Id.* at 378, 30 S.Ct. 544. More recently, the Court has explained that the clause " 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' " *Atkins,* 536 U.S. at 311–312, 122 S.Ct. 2242, quoting *Trop,* 356 U.S. at 101, 78 S.Ct. 590 (opinion by Warren, C.J.).

12 *Miller,* 567 U.S. at ——, 132 S.Ct. at 2464.

13 *Roper,* 543 U.S. at 578, 125 S.Ct. 1183.

14 *Graham,* 560 U.S. at 82, 130 S.Ct. 2011.

15 *Miller,* 567 U.S. at ——, 132 S.Ct. at 2460.

In these rulings, the Court relied on three significant differences between juveniles and adults to conclude that juveniles have "diminished culpability" for their crimes and "greater prospects for reform." [16]

16 *Id.* at ——, 132 S.Ct. at 2464. The Court cited research developments in science and social science that show " 'fundamental differences between juvenile and adult minds'-for example, in 'parts of the brain involved in behavior control.' " *Id.* at ——, 132 S.Ct. at 2464, quoting *Graham,* 560 U.S. at 68, 130 S.Ct. 2011. Specifically, the Court cited a paper by Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence,* which explains that there are two components to the diminished culpability of adolescents: the brain development that continues to occur during adolescence and psychosocial factors limiting adolescents' emotional maturity, such as "(a) susceptibility to peer influence, (b) attitudes toward and perception of risk, (c) future orientation, and (d) the capacity for self-management." Steinberg & Scott, *Less Guilty by Reason of Adolescence,* 58 Am Psychologist 1009, 1012 (2003).

***532** First, children have a " 'lack of maturity and an underdeveloped sense of responsibility,' " leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable ... to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav [ity]." [17]

17 *Miller,* 567 U.S. at ——, 132 S.Ct. at 2464, quoting *Roper,* 543 U.S. at 569–570, 125 S.Ct. 1183 (citations omitted; alterations in original).

These differences between juveniles and adults "diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit ****852** terrible crimes." [18] In this respect, *Miller* relied heavily on *Graham,* explaining that *Graham* "insist[ed] that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." [19] Because an offender's age " 'is relevant to the Eighth Amendment,' ... 'criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.' " [20]

18 *Miller,* 567 U.S. at ——, 132 S.Ct. at 2465.

19 *Id.* at ——, 132 S.Ct. at 2465.

20 *Id.* at ——, 132 S.Ct. at 2466, quoting *Graham,* 560 U.S. at 76, 130 S.Ct. 2011.

Not only is age relevant in establishing an offender's culpability for the crime, as already explained in this opinion, but it is also relevant in determining whether punishment for a crime is sufficiently comparable in ***533** severity to an identical sentence given to an adult offender. Sentencing a juvenile offender to a nonparolable life sentence is " 'especially harsh' " given that the offender "will almost inevitably serve 'more years and a greater percentage of his life in prison than an adult offender.' " [21] Indeed, it "cannot be ignored" that "[a] 16–year–old and a 75–year–old each sentenced to life without parole receive the same punishment in name only." [22] As a result, the Supreme Court compared this "ultimate penalty" for juvenile offenders to the death penalty, which is the ultimate penalty for adult offenders, rather than to nonparolable life sentences for adult offenders. [23]

21 *Miller,* 567 U.S. at ——, 132 S.Ct. at 2466, quoting *Graham,* 560 U.S. at 70, 130 S.Ct. 2011.

22 *Graham,* 560 U.S. at 70–71, 130 S.Ct. 2011.

23 *Miller,* 567 U.S. at ——, 132 S.Ct. at 2466.

In particular, the Supreme Court questioned the ability of mandatory penalties to take into account the unique circumstances of youth: "mandatory penalties, by their nature, preclude a sentencer from taking account of

an offender's age and the wealth of characteristics and circumstances attendant to it."[24] In imposing the harshest penalty available on a juvenile offender, then, "a sentencer misses too much if he treats every child as an adult."[25] As a result, the Supreme Court required "that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing"[26] a nonparolable life sentence:

24 *Id.* at ——, 132 S.Ct. at 2467.

25 *Id.* at ——, 132 S.Ct. at 2468.

26 *Id.* at ——, 132 S.Ct. at 2471.

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark ***534** features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that 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. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.[[[[[27]]]]]

27 *Id.* at ——, 132 S.Ct. at 2468 (citations omitted).

****853** The Supreme Court invalidated *any* "sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[28]

28 *Id.* at ——, 132 S.Ct. at 2469.

It is undisputed—and cannot be disputed—that *Miller* applies to all cases that were pending on direct appeal when the decision was issued on June 25, 2012, and that it applies to all juvenile offenders going forward.[29] What is in dispute in *Carp* and *Davis* is whether *Miller* applies to offenders whose direct appeals were ***535** completed before June 25, 2012. After having filed motions for relief from judgment in their respective cases, defendants Raymond Carp and Cortez Davis now appear before this Court, presenting that very issue.[30] On this question, to which we now turn, *Miller* was silent[31] and courts across the country are divided.[32]

29 "When a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review." *Schriro v. Summerlin,* 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). A case becomes final on direct review "for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v. Bohlen,* 510 U.S. 383, 390, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994). Moreover, the Legislature recognized this when it enacted new procedures for sentencing juvenile offenders in compliance with *Miller.* See MCL 769.25, added by 2014 PA 22. As a result, we would remand *Eliason* to the Berrien Circuit Court for resentencing pursuant to MCL 769.25, as the majority does, because that case was still pending on direct review when *Miller* was decided.

30 See MCR 6.501 *et seq.*

31 For the reasons explained later in this opinion, the fact that *Miller* failed to categorically bar imposition of a nonparolable life sentence for juvenile offenders does not require the conclusion that *Miller* is not retroactive. We similarly deem inconclusive as evidence of retroactivity the fact that the Supreme Court did not distinguish *Miller* from a companion case appearing before the Supreme Court on collateral review. See *Miller,* 567 U.S. at ——, 132 S.Ct. at 2461–2462, 2475; *Jackson v. Norris,* 2013 Ark. 175, 426 S.W.3d 906 (2013) (applying *Miller* in that companion case). Although the Supreme Court indicated in *Teague v. Lane* that "implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review," *Teague v. Lane,* 489 U.S. 288, 316, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (opinion by O'Connor, J.), it has only inconsistently followed that approach. See *Chaidez v. United States,* 568 U.S. ——, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013) (holding that *Padilla v. Kentucky,* 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), did not apply retroactively notwithstanding the fact that *Padilla* appeared before the Supreme Court on collateral review).

32 For example, state appellate courts in California, *In re Rainey,* 224 Cal.App.4th 280, 168 Cal.Rptr.3d 719

(2014); Illinois, *People v. Davis,* 2014 IL 115595, 379 Ill.Dec. 381, 6 N.E.3d 709 (2014); Iowa, *State v. Ragland,* 836 N.W.2d 107 (Iowa, 2013); Massachusetts, *Diatchenko v. Dist. Att'y,* 466 Mass. 655, 1 N.E.3d 270 (2013); Mississippi, *Jones v. State,* 122 So.3d 698 (Miss., 2013); Nebraska, *State v. Mantich,* 287 Neb. 320, 842 N.W.2d 716 (2014); and Texas, *Ex parte Maxwell,* 424 S.W.3d 66 (Tex.Crim.App., 2014), have all ruled in favor of *Miller's* retroactivity. In contrast, state appellate courts in Alabama, *Williams v. State,* —— So.3d —— (Ala.Crim.App., 2014); Louisiana, *State v. Tate,* La. 2012–2763, 130 So.3d 829 (November 5, 2013); Minnesota, *Chambers v. State,* 831 N.W.2d 311 (Minn., 2013); and Pennsylvania, *Commonwealth v. Cunningham,* 81 A3d 1 (Pa., 2013), have ruled that *Miller* is not retroactive. Additionally, the appellate courts in Florida have reached opposite conclusions on the question of retroactivity. *Falcon v. State,* 111 So.3d 973 (Fla.Dist.Ct.App., 2013) (concluding that *Miller* did not apply retroactively), lv. gtd. 137 So.3d 1019 (Fla., 2013); *Toye v. State,* 133 So.3d 540 (Fla.Dist.Ct.App., 2014) (concluding that *Miller* applied retroactively).

**854 *536 II. RETROACTIVITY UNDER FEDERAL LAW

A. ANALYSIS

In *Teague v. Lane* and its progeny, the United States Supreme Court has explained when its new rules are retroactive under federal law and thereby apply to cases on collateral review.[33] The threshold inquiry is whether the Supreme Court has, in fact, issued a new rule of law. A new rule has been issued and the *Teague* analysis proceeds if "the precise holding[s]" in the Supreme Court's previous cases did not "dictate the result" of the case being analyzed.[34]

33 *Teague,* 489 U.S. 288, 109 S.Ct. 1060. Although the lead opinion in *Teague* was not supported in whole by a majority of the court, the *Teague* retroactivity framework has subsequently been adopted by a majority of the Court. *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), overruled in part on other grounds by *Atkins,* 536 U.S. 304, 122 S.Ct. 2242. In *Penry,* the majority also determined that the *Teague* framework applied to capital punishment cases. Because sentencing a juvenile offender to a nonparolable life sentence is the "ultimate penalty for juveniles," *Miller,* 567 U.S. at ——, 132 S.Ct. at 2466, the *Teague* framework similarly applies to nonparolable life sentences for juvenile offenders.

34 *Saffle v. Parks,* 494 U.S. 484, 490, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990).

Once the reviewing court determines that the Supreme Court issued a new rule of law in the case being analyzed, the reviewing court must then determine whether the new rule is a substantive rule or a procedural rule:

> New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or ***537** persons covered by the statute beyond the State's power to punish. Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' " or faces a punishment that the law cannot impose upon him. *Bousley* [*v. United States,* 523 U.S. 614, 620, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), quoting *Davis v. United States,* 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974)].
>
> New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.[35]

35 *Summerlin,* 542 U.S. at 351–352, 124 S.Ct. 2519 (most citations omitted).

A rule is procedural if it "regulate[s] only the manner of determining the defendant's culpability" or if it "allocate[s] decisionmaking authority."[36] On the other hand, "[a] decision that modifies the elements of an offense is normally substantive rather than procedural," including, for example, a decision stating that "a certain fact [is] essential to the death penalty...."[37] Finally, if the new rule is determined to be procedural, then it applies retroactively only if it satisfies the two requirements of a watershed rule of criminal procedure: (1) it must be necessary to ****855** prevent an impermissibly large risk of an inaccurate conviction, and (2) it must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.[38] One such watershed rule of criminal procedure was articulated in *Gideon v.*

Wainwright,[39] ***538** which requires the appointment of counsel for any indigent defendant charged with a felony.[40]

36 *Id.* at 353, 124 S.Ct. 2519 (emphasis omitted).

37 *Id.* at 354, 124 S.Ct. 2519.

38 *Whorton v. Bockting,* 549 U.S. 406, 417–418, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007), citing *Summerlin,* 542 U.S. at 356, 124 S.Ct. 2519.

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

40 *Whorton,* 549 U.S. at 419, 127 S.Ct. 1173 (stating that *Gideon* was a watershed rule of constitutional procedure within the meaning of *Teague*).

B. APPLICATION

It is uncontested that *Miller* is a new rule, and we agree with the majority's conclusion that "*Miller* imposed a hitherto-absent obligation on state and lower federal courts to conduct individualized sentencing hearings before imposing a sentence of life without parole on a juvenile homicide offender."[41]

41 *Ante* at 820. While *Miller* applied principles contained in several of the Court's Eighth Amendment precedents, the "precise holding [s]" of those precedents did not "dictate the result" of *Miller.* See *Saffle,* 494 U.S. at 490, 110 S.Ct. 1257.

We disagree, however, with the majority's conclusion that *Miller* is best characterized as a procedural ruling such that it applies retroactively to cases on collateral review only if it is a watershed rule of constitutional procedure. Admittedly, the distinction between rules of procedure and rules of substance "is not necessarily always a simple matter to divine."[42] Generally, a substantive rule "place[s] particular conduct or persons covered by the statute beyond the State's power to punish,"[43] while a procedural rule "regulate[s] only the manner of determining the defendant's culpability...."[44]

42 *People v. Carp,* 298 Mich.App. 472, 512, 828 N.W.2d 685 (2012), citing *Robinson v. Neil,* 409 U.S. 505, 509, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973).

43 *Summerlin,* 542 U.S. at 352, 124 S.Ct. 2519.

44 *Id.* at 353, 124 S.Ct. 2519 (emphasis omitted).

State legislatures have the "substantive power to define crimes and prescribe punishments,"[45] subject to ***539** constitutional limitations. The Supreme Court articulated one such limitation in *Miller:* after *Miller,* state legislatures no longer can *mandate,* like the Michigan Legislature did,[46] that a juvenile offender convicted of first-degree murder in the circuit court receive a nonparolable life sentence.[47] In *Graham,* the Supreme Court "recognized the severity of sentences that deny convicts the possibility of parole"[48] when it categorically barred a state from imposing ****856** a nonparolable life sentence (whether discretionary or mandatory) on a juvenile nonhomicide offender. While *Miller* does not prohibit a sentencer from imposing a nonparolable life sentence on a juvenile homicide offender in the appropriate case, the Supreme Court categorically barred mandatory nonparolable life sentences for such offenders.

45 *Jones v. Thomas,* 491 U.S. 376, 381, 109 S.Ct. 2522, 105 L.Ed.2d 322 (1989).

46 See MCL 750.316 (stating that first-degree murder shall be punished by imprisonment for life); MCL 769.1(1) (stating that a juvenile convicted of first-degree murder shall be sentenced "in the same manner as an adult"); MCL 791.234(6)(a) (stating that someone sentenced to life imprisonment for first-degree murder "is not eligible for parole").

47 Indeed, the majority acknowledges that "[i]t thus seems certain as a result of *Miller* that a considerable number of juvenile defendants who would previously have been sentenced to life without parole for the commission of homicide offenses will have a lesser sentence meted out." *Ante* at 820.

48 *Graham,* 560 U.S. at 70, 130 S.Ct. 2011.

After *Miller,* if a state chooses to permit the sentencing of juveniles to nonparolable life,[49] then the state must provide some procedure that requires the sentencer to consider the particular facts and circumstances of the crime and the offender. The Court of Appeals and, to some extent, the majority have placed particular importance on a single line in *Miller:* that the decision "mandates only that a sentencer follow a certain process ... before imposing a particular penalty." ***540** [50] However, the mere fact that *Miller* mandates "a certain process," or has procedural implications, does not transform the decision itself into a procedural decision. To the contrary, *Miller* invalidated *an entire*

"sentencing scheme" that "mandate[d] life in prison without possibility of parole for juvenile offenders."[51]

49 Michigan has recently done so. 2014 PA 22.

50 *Miller,* 567 U.S. at ——, 132 S.Ct. at 2471.

51 *Id.* at ——, 132 S.Ct. at 2469 (emphasis added).

The majority claims that the distinction between the "categorical bar" of a penalty and the "noncategorical bar" of a penalty "defines the critical element of the retroactivity analysis in *Teague.*"[52] This distinction, however, is not dispositive to the *Teague* analysis, which focuses on whether the decision is substantive or procedural, not on whether it is categorical or noncategorical. By elevating the categorical/noncategorical distinction in the way it does, the majority muddles the *Teague* analysis to state that noncategorical bars *must* be procedural in nature. Even if all categorical bars are substantive, it does not logically follow that all noncategorical bars must be procedural.[53] Rather, for the reasons stated later in this opinion, the fact that *Miller* did not categorically bar nonparolable life sentences for juvenile offenders does not negate the substantive import of its decision to invalidate mandatory nonparolable life sentences as applied to juvenile offenders.

52 *Ante* at 827 n. 16.

53 The division among our nation's courts with regard to whether this proposition is correct or incorrect suggests that our nation's jurisprudence would benefit from a clarification of the substantive/procedural distinction.

The substantive nature of *Miller's* holding becomes clearer upon considering that it did not invalidate mandatory sentencing schemes as applied to adult ***541** offenders.[54] Rather, in *Miller,* the Supreme Court made one fact—the age of the offender at the time of the offense—determinative regarding whether a state or the federal government can *mandate* the imposition of a nonparolable life sentence.[55] As a result, *Miller* did not alter "*only* the manner of determining the defendant's culpability,"[56] but instead also altered the range of punishments ****857** that *must* be available to impose on a juvenile offender.

54 In Michigan, for instance, first-degree murder remains punishable by life in prison without the possibility of parole. MCL 750.316; MCL 791.234(6).

55 In *Summerlin,* the Supreme Court explained that a decision making "a certain fact essential to the death penalty" is a substantive rule of law within the *Teague* framework. *Summerlin,* 542 U.S. at 354, 124 S.Ct. 2519.

56 *Summerlin,* 542 U.S. at 353, 124 S.Ct. 2519 (emphasis altered).

After *Miller,* the offender's age at the time of the offense determines which of two sentencing schemes applies to the offender—that is, whether the offender is subject to a mandatory nonparolable life sentence (because the offender is an adult) or whether the sentence must take into account the offender's age and characteristics of youth, as well as the circumstances of the offense (because the offender is a juvenile).[57] While previously, in Michigan, juvenile offenders convicted of first-degree murder in the circuit court were subject to only one possible punishment-life imprisonment without the possibility of parole—after *Miller,* the prosecution must specifically request a nonparolable life sentence, rather than a term of years, after which the court must hold a hearing to consider the offender's characteristics and the circumstances of the offense before ***542** deciding whether to impose a nonparolable life sentence or a term of years.[58] As a result, age affects the range of sentences that can be imposed on someone convicted of first-degree murder in Michigan. It produces a class of persons subject to a different range of sentences than was previously mandated and thus reflects a substantive rule of law that applies retroactively under the *Teague* framework.

57 Someone who is convicted of first-degree murder committed as an adult in Michigan is still subject to the mandatory penalty of life in prison without the possibility of parole, MCL 750.316; MCL 791.234(6)(a), while a juvenile offender is no longer subject to the same mandatory sentence. MCL 769.25.

58 It is particularly relevant that *Miller* left considerable discretion for states to craft procedural mechanisms for ensuring the protection of a juvenile defendant's Eighth Amendment rights. The Legislature exercised such discretion in response to *Miller,* 2014 PA 22, adding MCL 769.25.

The majority analyzes what it deems the "form and effect" of *Miller* and concludes differently. Under its rationale, *Miller* is not retroactive in large part because the Supreme Court did not categorically bar a sentence as applied to a class of individuals, which it did in *Roper* and *Graham.* Rather, juvenile offenders sentenced to nonparolable life have been

given a punishment that is within the power of the state to impose. The majority thus determines that *Miller* is more similar to cases involving the individualized imposition of the death penalty, which, the majority asserts, are cases involving new procedural rules.

The majority is insightful, to a point, by comparing *Miller* with *Woodson v. North Carolina,* which struck down a sentencing scheme that mandated the death penalty upon conviction of certain offenses.[59] Indeed, after *Woodson,* the Supreme Court requires an individualized sentencing procedure if a state chooses to impose the ***543** death penalty.[60] *Woodson* also illustrates the problem with the majority's method of distinguishing procedural from substantive holdings. The majority claims that substantive holdings "produce a single invariable result, or a single effect, when applied to *any* defendant in the class of defendants to whom the rule is pertinent," ****858** while procedural holdings "produce a range of results, or have multiple possible effects, when applied to *different* defendants in the class of defendants to whom the rule is pertinent."[61] In requiring an individualized procedure before a state can impose the death penalty, however, *Woodson* placed a particular punishment beyond the power of the state to *mandate.* So too did *Miller* place a particular punishment beyond the power of the state to mandate. The majority's distinction fails to give appropriate import to these decisions that involve more than simply the creation of particular procedural rights.

59 *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). See also *Sumner v. Shuman,* 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987), which similarly struck down a sentencing scheme that mandated the death penalty upon conviction of certain offenses committed while serving a nonparolable life sentence.

60 If the Supreme Court had definitively held *Woodson* to be a procedural ruling, then it would be difficult to distinguish *Miller.* However, if the Supreme Court has not ruled that *Woodson* is retroactive, as the majority posits, then neither has it ruled that *Woodson* is *only prospective.*

61 *Ante* at 815.

While *Woodson* required a state to provide *some* sort of procedural mechanism before it could impose capital punishment, it only offered minimal guidance on what procedures are required and, specifically, on who should decide whether an individual was eligible to receive the death penalty. After *Woodson,* some states listed aggravating factors that rendered an offense eligible for the death penalty. The Supreme Court subsequently held, in *Ring v. Arizona,* that the Sixth Amendment right to a jury trial requires a jury to determine the presence or absence of the aggravating factors that qualify an offender as death-eligible.[62]

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

***544** In *Schriro v. Summerlin,* the Supreme Court determined that *Ring* was procedural, and therefore not retroactive, because the aggravating factors at issue there remained "subject to the procedural requirements the Constitution attaches to trial of elements."[63] The prototypical procedural decision merely "allocate[s] decisionmaking authority."[64] Unlike *Ring, Miller* does more than merely allocate decision-making authority. While *Ring* only "altered the range of *permissible methods* for determining whether a defendant's conduct is punishable by death,"[65] *Miller* went beyond that and altered the range of *punishments* available to a juvenile homicide offender by requiring that a state's mandatory minimum punishment be something less than nonparolable life. Indeed, it does not simply allocate decision-making authority but *establishes that authority in the first instance.* The majority implicitly recognizes this by observing that, as *Ring* shifted the decision-making authority for imposing capital punishment from the judge to the jury, *Miller* shifted the decision-making authority from one branch of government (the legislative) to another (the judiciary).[66] Put simply, *Miller* involved not just who exercises the decision-making authority for imposing a punishment, but *what* punishments must be considered.

63 *Summerlin,* 542 U.S. at 354, 124 S.Ct. 2519.

64 *Id.* at 353, 124 S.Ct. 2519.

65 *Id.* (emphasis added). Contrary to the majority's claim, *ante* at 826 n. 14, *Ring* did not invalidate Arizona's entire capital punishment sentencing scheme because both before and after *Ring* the same substantive punishments were available for offenders in Arizona. Rather, it shifted decision-making authority *within* that sentencing scheme from the judge to the jury. By contrast, in *Miller,* the Supreme Court invalidated *any* sentencing scheme that mandated a nonparolable life sentence by requiring the sentencer to consider some additional sentence-

whether parolable life, a term of years (as the Michigan Legislature chose), or both.

66 *Ante* at 826.

***545** The majority glosses over the substantive import of this distinction, and in doing so ignores the fact that, both before and after *Ring,* there existed the possibility for a punishment less than death, while only after *Miller* does there exist the possibility ****859** for a juvenile homicide offender to receive a punishment less than nonparolable life.[67] While *Miller* indisputably contains a procedural component, its decision to expand the range of punishments that may be imposed on juvenile offenders convicted of homicide squarely places *Miller* in the category of substantive decisions.[68] No longer can Congress ***546** or a state legislature constitutionally choose to adopt a sentencing scheme that mandates the imposition of a nonparolable life sentence on juvenile homicide offenders.[69]

67 Interestingly, the majority suggests that Justice Breyer's concurring opinion in *Miller,* had it received majority support, would be deemed a substantive rule and thus would apply retroactively. *Ante* at 817 n. 6. Justice Breyer would have conditioned the state's ability to impose a nonparolable life sentence on whether the individual homicide offender " 'kill[ed] or intend[ed] to kill' " the victim. *Miller,* 567 U.S. at ——, 132 S.Ct. at 2475 (Breyer, J., concurring), quoting *Graham,* 560 U.S. at 69, 130 S.Ct. 2011 (alterations in original). But both Justice Breyer's concurrence and Justice Kagan's majority opinion condition the imposition of a nonparolable life sentence on an assessment of a particular defendant's culpability for a homicide offense and allow only a subset of individuals convicted of first-degree murder to be eligible for a nonparolable life sentence. Accordingly, the distinction that the majority creates between the majority and concurring opinions in *Miller* is without a difference and counsels in favor of applying *Miller* retroactively: while previously no limitation existed before a state could impose a nonparolable life sentence as punishment for a homicide offense, now an offender's individual culpability in the homicide must be assessed. The *Miller* majority's individualized procedure contains additional factors that govern whether a defendant may be punished with nonparolable life, and Justice Breyer's proposed individualized procedure would work in the same manner. Each invalidates the substantive, mandatory punishment that certain states imposed for juvenile offenders convicted of homicide.

68 The majority claims that "[w]e are bound to abide by" the Supreme Court's understanding of "when a new rule 'alters the range' of available punishments," and suggests that this applies *only* when the rule " 'place[s] particular conduct or persons covered by the statute *beyond the State's power to punish.*' " *Ante* at 823, quoting *Summerlin,* 542 U.S. at 352, 124 S.Ct. 2519 (alteration in original). However, *Summerlin's* description of a substantive rule is inclusive and not exclusive, and the majority overstates the Supreme Court's position when it forecloses, on the basis of that statement in *Summerlin,* the possibility that a substantive decision is one that "makes a previously unavailable lesser punishment available to the sentencer...." *Ante* at 823.

69 To the majority, a rule that "merely expands the range of possible punishments that may be imposed on the defendant" is procedural because, in theory, the state still has the power to punish a juvenile offender with a nonparolable life sentence. *Ante* at 825 (emphasis omitted). However, this distinction is misplaced because the Supreme Court nevertheless placed a substantive limitation on a state's policy decisions: after *Miller* the state no longer has the power to mandate a nonparolable life sentence as punishment for a crime committed by a juvenile offender.

Indeed, if *Miller* were merely a procedural decision, the Supreme Court would not have examined—and found wanting—the penological aims of a state legislature's substantive policy choice to impose a mandatory nonparolable life sentence on juvenile homicide offenders. In fact, in *Miller,* the Court explained that *none* of the permissible penological aims—retribution, deterrence, incapacitation, and rehabilitation—warrant mandatory nonparolable sentences for juvenile offenders.[70] Similarly, in *Atkins v. Virginia,* the Supreme ****860** Court ***547** examined the penological justifications for imposing the death penalty on mentally handicapped individuals and found those justifications lacking.[71]

70 For instance, retribution as a penological rationale "relates to an offender's blameworthiness" and, accordingly, " 'the case for retribution is not as strong with a minor as with an adult.' " *Miller,* 567 U.S. at ——, 132 S.Ct. at 2465, quoting *Graham,* 560 U.S. at 71, 130 S.Ct. 2011 (citation and quotation marks omitted). Deterrence is similarly limited because " 'the same characteristics that render juveniles less culpable than adults'—their immaturity, recklessness, and impetuosity—make them less likely to consider

potential punishment" before committing a crime. *Miller,* 567 U.S. at ——, 132 S.Ct. at 2465, quoting *Graham,* 560 U.S. at 72, 130 S.Ct. 2011 (citation and quotation marks omitted). Incapacitation "would require 'mak[ing] a judgment that [the offender] is incorrigible'—but 'incorrigibility is inconsistent with youth.' " *Miller,* 567 U.S. at ——, 132 S.Ct. at 2465, quoting *Graham,* 560 U.S. at 72–73, 130 S.Ct. 2011 (citation and quotation marks omitted) (first alteration in original). See also Steinberg & Scott, *Less Guilty by Reason of Adolescence,* 58 Am Psychologist at 1014 ("Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood...."). Nor can a nonparolable life sentence "be justified by the goal of rehabilitation" because it "forswears altogether the rehabilitative ideal" and "makes an irrevocable judgment about that person's value and place in society." *Graham,* 560 U.S. at 74, 130 S.Ct. 2011. See also Steinberg & Scott, *Less Guilty by Reason of Adolescence,* 58 Am Psychologist at 1015 (stating that because the criminal behavior of juvenile offenders, "is quite different from that of typical adult criminals," the diagnosis of antisocial personality disorder is not made before the age of 18).

71 *Atkins,* 536 U.S. at 321, 122 S.Ct. 2242 ("We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty.").

Nevertheless, *Atkins* acknowledged that states are provided with considerable discretion to fashion procedures to determine whether an offender must be excluded from consideration of the death penalty:

> Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright* with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." [72]

72 *Id.* at 317, 122 S.Ct. 2242, quoting *Ford v. Wainwright,* 477 U.S. 399, 405, 416–417, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (citation omitted) (alterations in original).

Miller likewise provided states with considerable discretion to determine how a juvenile offender is to be adjudged sufficiently culpable as an individual to warrant imposition of a nonparolable life sentence.[73] In ***548** other words, after *Atkins,* a court must make an individual determination of whether an offender's mental capacity precludes consideration of the death penalty.[74] After *Miller,* so too must a court make an individual determination of whether a juvenile offender's youth and attendant characteristics preclude consideration of a nonparolable life sentence.[75] ****861** That *Atkins* required states to provide additional procedural safeguards to ensure that they complied with the substantive limitations of the Eighth Amendment does not negate its substantive nature,[76] just as *Miller's* requirement of new procedural safeguards does not negate its substantive nature. In other words, neither *Atkins* nor *Miller* defined precisely the class of offenders precluded from a particular punishment; rather, fact-finders must examine *individual* culpability to determine whether a particular offender is eligible ***549** for that punishment. The broad deference thus afforded to states in the adjudication of the individualized hearings required under *Atkins* and *Miller* only reinforces the substantive nature of those holdings.

73 If, for instance, the Supreme Court were to hold in a subsequent decision that the Sixth Amendment right to a jury trial requires a jury to determine a juvenile offender's culpability for purposes of imposing a nonparolable life sentence, then that hypothetical future holding would be considered procedural rather than substantive. See *Summerlin,* 542 U.S. 348, 124 S.Ct. 2519.

74 This individual determination, made under state law, also shows the weakness of the majority's "form and effect" interpretation of *Teague,* which requires a substantive decision to have uniform effect. Because *Atkins* left states with considerable discretion to define mental retardation, a person whose mental capacity precludes consideration of the death penalty in one state could nevertheless be subject to the death penalty in a different state. The majority struggles to fit *Atkins* within its "form and effect" interpretation-particularly given that the state's exercise of its discretion both in *Miller* and *Atkins* is to ensure that only culpable offenders are subject to the ultimate punishment available to juvenile offenders and adults, respectively.

75 Furthermore, just as "some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards," *Atkins,* 536 U.S. at 317, 122 S.Ct. 2242, some characteristics of youth likewise undermine the existing procedural protections in our justice system, including the right to the effective assistance of counsel, *Miller,* 567 U.S. at ——, 132 S.Ct. at 2468 (suggesting that

a juvenile offender may be prejudiced because of "his incapacity to assist his own attorneys").

76 *In re Holladay*, 331 F.3d 1169, 1172 (C.A.11, 2003) (holding that *Atkins* applies retroactively).

In the end, the majority strains to place *Miller* in a procedural box into which it will not comfortably fit. *Miller* is based on the substantive differences between juveniles and adults and the potentially reduced culpability of juveniles for the crimes that they commit. While there are procedural implications to the decision—as *Miller* itself acknowledged—the "form and effect" of the opinion, to use the majority's phrase, is that the Eighth Amendment places a substantive limitation on how states can punish juvenile offenders. Accordingly, we would hold that *Miller* applies retroactively under federal law.

Even if we were to agree with the majority that *Miller* announced a new rule of criminal procedure, which we do not, an alternative basis supports our conclusion that *Miller* should apply retroactively. That is, as a separate and independent matter, we would hold that *Miller* applies retroactively under state law. It is to that analysis that we now turn.

III. RETROACTIVITY UNDER MICHIGAN LAW

A. ANALYSIS

This Court has consistently asserted that three factors are relevant in determining whether a new rule of criminal procedure should be applied retroactively under state law, even if such a new rule of criminal procedure does not apply retroactively under federal law:

> (1) the purpose of the new rules; (2) the general reliance on the old rule [;] and (3) the effect of retroactive application of the new rule on the administration of justice. [77]

77 *People v. Sexton*, 458 Mich. 43, 60–61, 580 N.W.2d 404 (1998).

***550** The county prosecutors involved in these cases and the Attorney General argue that this Court should reverse this existing caselaw and rule that the retroactivity analysis under Michigan law is identical to the retroactivity analysis under federal law as articulated in *Teague* and its progeny. They claim that our caselaw is outdated because it applies the test for retroactivity that the Supreme Court abandoned in *Teague*.[78] The Supreme Court, however, has explicitly recognized that *Teague's* approach to retroactivity incorporates federalism and comity concerns that "are unique to *federal* habeas review of ****862** state convictions."[79] Therefore, "[i]f anything, considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals than is required by *Teague*."[80] To this end, we duly concluded only six years ago that "a state court may use a different test to give broader effect to a new rule of criminal procedure established by the United States Supreme Court."[81] There is no reason to abandon that approach now.

78 See *Linkletter v. Walker*, 381 U.S. 618, 626, 85 S.Ct. 1731, 14 L.Ed.2d 601(1965).

79 *Danforth v. Minnesota*, 552 U.S. 264, 279, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008).

80 *Id.* at 279–280, 128 S.Ct. 1029.

81 *People v. Maxson*, 482 Mich. 385, 392 n. 3, 759 N.W.2d 817 (2008). See also *id.* at 404–405, 759 N.W.2d 817 (CAVANAGH, J., dissenting).

B. APPLICATION

As stated, the first factor that a reviewing court must consider in assessing a new rule's retroactivity under state law is the purpose of the new rule. "Under the 'purpose' prong, a law may be applied retroactively when it 'concerns the ascertainment of guilt or innocence[,]' however, 'a new rule of procedure ... which ***551** does not affect the integrity of the fact-finding process should be given prospective effect.' "[82] While sentencing procedures do not concern the ascertainment of guilt or innocence for the underlying offense, sentencing is a fact-finding process that allows the sentencer to ascertain an offender's culpability for the offense.[83] Indeed, *Miller* mandates a *new* fact-finding process to determine whether a nonparolable life sentence is appropriate in a particular case. As a result, this factor supports the retroactive application of *Miller*.

82 *Maxson*, 482 Mich. at 393, 759 N.W.2d 817, quoting *Sexton*, 458 Mich. at 63, 580 N.W.2d 404 (citation and quotation marks omitted).

83 See *McConnell v. Rhay*, 393 U.S. 2, 3–4, 89 S.Ct. 32, 21 L.Ed.2d 2 (1968) (stating that sentencing relates to the integrity of the fact-finding process under *Linkletter*). The majority reads *McConnell* narrowly on the ground that *McConnell* implicated the right to counsel during the sentencing process. However, it did so precisely because the sentencing process *is* part of the fact-finding process. Indeed, this Court's own jurisprudence involving sentencing describes the sentencing process as requiring the sentencing court to make "factual determination [s]." See, e.g., *People v. Babcock*, 469 Mich. 247, 264, 666 N.W.2d 231 (2003) (citations and quotation marks omitted). The fact that this Court has not yet had the opportunity to analyze the sentencing process in the context of retroactivity does not prevent the principles that we have articulated from applying in this context.

> Contrary to the majority's claim, it is irrelevant that the Supreme Court has abandoned the pre-*Teague* framework in determining the application of this state's independent retroactivity jurisprudence. Indeed, saying that this Court has "no obligation ... to forever maintain the *Linkletter* test in accordance with every past federal understanding," *ante* at 834, classifying the foundational caselaw of Michigan's retroactivity test as "defunct," *ante* at 834, and stating that "only the extraordinary new rule of criminal procedure," whatever that may mean, "will be applied retroactively under Michigan's test when retroactivity is not already mandated under *Teague*," *ante* at 833 comes perilously close to deciding to maintain the principles underlying this state's traditional retroactivity framework *only* when *Teague* and its progeny militate in favor of retroactivity. We would not turn Michigan's retroactivity framework into such a parchment barrier. See Federalist No. 48 (James Madison) (Wright ed., 2002), p. 343.

***552** The second factor "examines whether individual persons or entities have been 'adversely positioned ... in reliance' on the old rule."[84] Detrimental reliance on the old rule can apply to defendants who have "suffered harm as a result of that ****863** reliance" when they would have pursued an appeal that "would have resulted in some form of relief."[85] In these cases, defendants were adversely positioned in reliance on the old rule because the sentencing judges did not have discretion to provide a sentence other than nonparolable life and because, until *Miller*, there was no basis in existing caselaw to appeal this lack of discretion.[86] Moreover, because the Supreme Court stated that imposition of nonparolable life sentences would be "uncommon"[87] after *Miller*, it is likely that many of the juvenile offenders already serving nonparolable life sentences would have, in fact, been sentenced to a term of years if they had received a sentencing hearing pursuant to *Miller*. As a result, this ***553** factor also supports the retroactive application of *Miller*.[88] Nevertheless, this prong is not dispositive: a reviewing court must balance the detrimental reliance on ****864** the old rule "against the other ... factors, as well as against the fact that each defendant ... has received all the rights under the law to which he or she was entitled at the time."[89]

84 *Maxson*, 482 Mich. at 394, 759 N.W.2d 817 (citation omitted).

85 *Id.* at 394, 396, 759 N.W.2d 817 (emphasis omitted).

86 Indeed, Davis's sentencing judge sought to sentence him to a term of years instead of a nonparolable life term and was overturned on the prosecution's appeal. This fact alone illustrates how defendants as a class were adversely positioned in reliance on the old rule —after *Miller*, every defendant is entitled to "some form of relief," i.e., an individualized sentencing hearing that allows the sentencer to consider a punishment less than nonparolable life. *Maxson*, 482 Mich. at 396, 759 N.W.2d 817 (emphasis omitted). Unlike in *Maxson*, we cannot assume that juvenile offenders did not appeal their nonparolable life sentences "because of factors unrelated to, and existing before, the old rule." *Id.* Instead, we must assume that any failure to appeal occurred simply because the old rule provided no judge with discretion to deviate from a nonparolable life sentence. That Michigan caselaw upheld the constitutionality of our pre-*Miller* sentencing scheme, see *People v. Launsburry*, 217 Mich.App. 358, 551 N.W.2d 460 (1996), further supports defendants' detrimental reliance on the old rule because it reduced the likelihood that a mandatory nonparolable life sentence would have been overturned on appeal.

87 *Miller*, 567 U.S. at ——, 132 S.Ct. at 2469.

88 It bears repeating *Miller's* statements that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon* " and that only the "*rare* juvenile offender" will commit a crime that "reflects irreparable corruption." *Id.* at ——, 132 S.Ct. at 2469 (emphasis added) (citations and quotation marks omitted). As a result, the majority's claim that it is "speculative at best" to presume that juvenile offenders will gain relief under *Miller*, is indeed questionable. *Ante* at 839.

> Furthermore, contrary to the majority's assertion that chronological age at the time of the offense "will

weigh relatively heavily at sentencing hearings," *ante* at 839 n. 35, a juvenile offender's chronological age is only one relevant consideration in determining whether the offender deserves a "sentence of life (and death) in prison." *Miller,* 567 U.S. at ——, 132 S.Ct. at 2468. Indeed, under *Miller,* a sentencer must consider the offender's chronological age, mental and emotional development, family and home environment, and potential for rehabilitation, along with the circumstances of the offense, which include the individual offender's role in the crime and whether familial and peer pressures may have affected the juvenile. *Id.* at ——, 132 S.Ct. at 2468. Simply stated, under *Miller,* a sentencer must "examine *all* these circumstances *before* concluding that life without any possibility of parole [is] the appropriate penalty." *Id.* at ——, 132 S.Ct. at 2469 (emphasis added). The majority, however, places "significant weight" on a juvenile's chronological age at the time of the offense. *Ante* at 839 n. 35. By stating that a juvenile who nears the age of majority at the time of the offense is "least likely" to be afforded "special leniency," *ante* at 839, that a juvenile "may even turn 18 during the proceedings related to the offense," *ante* at 839 n. 35, that a nonparolable life sentence is "increasingly likely to be permissible" to the extent the offender's age nears the age of majority, *ante* at 818 n. 9, and that age "may well constitute the single best factor" for determining culpability, *ante* at 839 n. 35, the majority makes generalizations that ignore *Miller's* multifaceted and holistic examination of the offender's individual characteristics.

89 *Maxson,* 482 Mich. at 397, 759 N.W.2d 817. The majority concludes that this second factor "must be considered both from the perspective of prosecutors across the state when prosecutors faithfully abided by the constitutional guarantees in place at the time of a defendant's conviction," and "from the collective perspective of the 334 defendants who would be entitled to resentencing if the new rule were applied retroactively." *Ante* at 836. However, that principle is not found in this Court's traditional caselaw regarding retroactivity, and the authoring justice's own examination of retroactivity in *People v. Maxson* did not engage in such an additional inquiry. See *Maxson,* 482 Mich. at 394–397, 759 N.W.2d 817. Indeed, as *Maxson* acknowledged, our traditional caselaw regarding retroactivity requires us to balance the other factors "against the fact that each defendant ... has received all the rights under the law to which he or she was entitled at the time." *Id.* at 397, 759 N.W.2d 817. The majority's application of our retroactivity caselaw gives the state's reliance interests undue weight by factoring those interests twice-once as part of the second factor and again as part of the third factor. The majority has not pointed to any reasons that would support revisiting the authoring justice's examination of retroactivity in *Maxson* in the six years since it was decided.

***554** Indeed, applying the third factor takes into account this reliance on the old rule by examining whether applying the new rule retroactively would undermine the state's "strong interest in finality of the criminal justice process...."[90] Nevertheless, this factor does not counsel against retroactivity in the way the majority asserts it does. Simply put, applying *Miller* retroactively would not affect the finality of convictions in this state. Rather, it would only require an individualized resentencing process for the relatively small class of prisoners sentenced to nonparolable life for homicides that they committed while juveniles.[91]

90 *Maxson,* 482 Mich. at 397, 759 N.W.2d 817.

91 If *Miller* resentencing hearings were to be evenly divided among the circuit court bench, each circuit judge would receive, on average, two additional sentencing hearings. That is hardly a strain on the state's judicial resources. This is in stark contrast to the potential of "guilty-pleading defendants whose convictions [had] become final [to] inundate the appellate process with new appeals" that, in part, prompted a majority of this Court to reject the retroactivity of *Halbert v. Michigan,* 545 U.S. 605, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005). *Maxson,* 482 Mich. at 398, 759 N.W.2d 817.

The majority concludes that requiring a sentencing hearing for offenders whose direct appeals are complete would be "burdensome and complicated," if not "almost ***555** impossibl[e]...."[92] Setting aside the majority's doubt regarding the possibility of reconstructing the evidence required to conduct such a hearing, *Miller* 's goal is to determine, as best as possible, a juvenile offender's ability to reform.[93] A sentencing hearing under *Miller*—particularly one conducted many years or even decades after the original offense—will assist in determining whether an offender "pose[s] ****865** a physical threat ... to individuals living in our most vulnerable neighborhoods"[94] and, consequently, is irreparably corrupt.[95] This is particularly true in Michigan, where the Legislature has decided that a hearing conducted pursuant to *Miller* may take into account changed circumstances, including post-arrest conduct.[96]

Accordingly, the majority errs by asserting that it is "fanciful" to believe that *Miller* can effectively be applied retroactively or that applying *Miller* retroactively will inevitably result in the "premature release of large numbers of persons" who "continue to pose a physical threat...."[97]

92 *Ante* at 840. The law, and particularly judicial proceedings, are frequently burdensome and complicated. That the Constitution sometimes *requires* burdensome and complicated proceedings should not impede our duty to ensure that constitutional rights are enforced.

93 The majority's emphasis on reconstructing the circumstances of the crime and the impulsiveness of the juvenile offender's activity is misplaced. As a result, the majority misinterprets the hearing called for under *Miller* as entirely backward-looking. *Miller's* goal is to ensure that the sentencing court considers the evidence that it has available to it in deciding whether an individual offender has the ability to reform.

94 *Ante* at 840.

95 See *Miller*, 567 U.S. at ——, 132 S.Ct. at 2469.

96 See MCL 769.25(6) (allowing the sentencing court to consider at the sentencing hearing under *Miller* "any other criteria relevant to its [sentencing] decision, including the individual's record while incarcerated").

97 *Ante* at 840.

Because each of these factors supports retroactive application of *Miller* under state law, we would hold that ***556** independent state law grounds exist to apply *Miller* retroactively.

IV. CONCLUSION

For the reasons stated in this opinion, we respectfully dissent from the majority's decision not to apply *Miller v. Alabama* retroactively under either federal or state law. Instead, we would reverse the Court of Appeals in *Carp* and *Davis* and remand to the St. Clair Circuit Court and Wayne Circuit Court, respectively, for resentencing pursuant to MCL 769.25a.[98] Because *Miller* struck down sentencing schemes that applied mandatory nonparolable life sentences to juvenile homicide offenders, it altered the range of sentences that may be imposed on a juvenile homicide offender and effected a substantive change in the law. The majority has ruled that not all juvenile offenders will receive the benefit of *Miller's* decision to foreclose a state from mandating a nonparolable life sentence, notwithstanding the Supreme Court's assertion that only the "*rare* juvenile offender" will commit a crime that "reflects irreparable corruption" punishable by a nonparolable life sentence.[99] As a result, although *Miller* held that "children are different" as a matter of constitutional law,[100] today's decision ensures that, merely because of the timing of a conviction and appeal, some children are more different than others.

98 As previously indicated, we would also remand *Eliason* to the Berrien Circuit Court for resentencing pursuant to MCL 769.25, as the majority does.

99 *Miller*, 567 U.S. at ——, 132 S.Ct. at 2469 (emphasis added) (citations and quotation marks omitted).

100 *Id.* at ——, 132 S.Ct. at 2470.

MICHAEL F. CAVANAGH and McCORMACK, JJ., concurred with MARY BETH KELLY, J.

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APPENDIX G

497 Mich. 882
Supreme Court of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Cortez Roland DAVIS, Defendant–Appellant.

Docket No. 146819. | COA No. 314080. | Oct. 22, 2014.

Order

On order of the Court, the motion for rehearing is considered, and it is DENIED.

Parallel Citations

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