

NO. 87654-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Personal Restraint Petition of  
RUSSELL McNEIL,  
Petitioner,

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STATE OF WASHINGTON  
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PETITIONER'S SUPPLEMENTAL BRIEF

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**A. ISSUE FOR REVIEW**

Are there sufficient reasons for this Court to apply Miller v. Alabama, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), to Washington state cases on collateral review?

**B. SUMMARY OF ARGUMENT**

The United States Supreme Court held in Miller that a sentence of "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" Id. at 2460.

Federal constitutional law requires that new constitutional rules of substantive law apply retroactively. Except for "watershed" rules, federal courts may not apply new procedural rules to state court convictions on collateral review. But state courts may choose whether to apply new procedural rules retroactively to their own convictions.

Miller announced a new rule of substantive law. It prohibits a certain category of punishment for a class of defendants because of their status or offense. It renders RCW 10.95 unconstitutional as applied to juveniles; yet state statutes permit

no other sentence for aggravated first degree murder. Under federal law, because Miller announced a new substantive rule, this Court must apply it on collateral review, as the United States Supreme Court demonstrated by so applying it.

If this Court concludes Miller announced a new procedural rule, then it is a watershed rule of criminal procedure that must be applied retroactively.

And regardless of federal law, Washington's own jurisprudence warrants this Court applying Miller to Mr. McNeil and all persons currently serving this unconstitutional sentence.

**C. LEGAL AUTHORITY AND ARGUMENT**

**1. THE CONSTITUTION REQUIRES RETROACTIVE APPLICATION OF NEW SUBSTANTIVE RULES AND WATERSHED PROCEDURAL RULES, AND PERMITS THIS COURT TO APPLY NEW RULES MORE BROADLY THAN FEDERAL COURTS.**

Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), announced the rule for applying new constitutional rules to state court convictions on federal habeas review:

new constitutional rules of criminal procedure will not be applied to those cases which have become final before the new rules are announced.

Id. at 310 (emphasis added). With the exception of "watershed" rules, federal courts are **prohibited** from applying new procedural rules to state convictions on habeas review. The Court later clarified:

New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, ... as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish ... . **Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him.**

Schriro v. Summerlin.<sup>1</sup> Thus the Fourteenth Amendment **requires** federal courts to apply new substantive constitutional rules retroactively even to state court convictions on habeas review.

Teague's general rule, however, in no way restricts state courts from applying new constitutional rules, whether substantive or procedural, to their own cases in whatever way they deem appropriate.

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<sup>1</sup> 542 U.S. 348, 351-52, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) (Court's italics; bold added; citations omitted).

[T]he [Teague] rule was meant to apply only to federal courts considering habeas corpus petitions challenging state-court criminal convictions. . . . Federalism and comity considerations are unique to *federal* habeas review of state convictions. . . . [F]inality of state convictions is a *state* interest, not a federal one. It is a matter that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts.

Danforth v. Minnesota, 552 U.S. 264, 279-80, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008) (Court's emphases).

This Court has described an historical attempt to "maintain congruence in our retroactivity analysis with the standards articulated by the United States Supreme Court." In re PRP of Markel, 154 Wn.2d 262, 268, 111 P.3d 249 (2005) (holding Crawford's new rule of confrontation was not retroactive). Nonetheless:

There may be a case where our state statute would authorize or require retroactive application of a new rule of law when Teague would not. . . . Limiting a state statute on the basis of the federal court's caution in interfering with State's self-governance would be, at least, peculiar.

State v. Evans, 154 Wn.2d 438, 449, 114 P.3d 627, cert. denied, 546 U.S. 983 (2005).<sup>2</sup>

Thus if Miller's new rule is substantive or a watershed procedural rule, this Court **must** apply it to Mr. McNeil's case. Nothing in the law **prohibits** this Court from applying Miller retroactively to this case. This State's own jurisprudence supports or requires applying Miller retroactively.

2. **MILLER IS A NEW SUBSTANTIVE RULE THAT MUST BE APPLIED RETROACTIVELY.**

a. **By Its Own Terms, Miller's Rule is Substantive Under Federal Law.**

Substantive rules are those rules

that place an entire category of primary conduct beyond the reach of the criminal law, or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense.<sup>3</sup>

A rule is substantive "if it alters the range of conduct or the class of persons that the law punishes." Schriro, 542 U.S. at 353. "[R]ules that regulate only **the manner of determining** the

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<sup>2</sup> See RCW 10.73.100(6) (allows collateral relief after time bar based on a "material" change when the court finds "sufficient reasons" for retroactive application). Evans at 448.

<sup>3</sup> Sawyer v. Smith, 497 U.S. 227, 241, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990).

defendant's culpability are procedural." Id. (Court's emphasis). Thus a procedural rule affects only **how** a decision is made. A substantive rule changes **what** decision can be made.

The watershed procedural rule of Gideon v. Wainwright,<sup>4</sup> which applied retroactively, clearly was a new procedural or "how" rule: a trial must be conducted by means of counsel for the defense. The same "what" decisions are made as before: Did the defendant commit the crime? What sentence shall be imposed if he did?

Similarly, the rule announced in Ring v. Arizona<sup>5</sup> was procedural: a jury, not a judge, must find aggravating circumstances to impose death.

[Ring] did not alter the range of conduct [the] law subjected to the death penalty. It rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a state may criminalize. ... Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules.

Schriro, 542 U.S. at 353.

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<sup>4</sup> 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

<sup>5</sup> 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

Under a mandatory sentencing scheme of life without parole, the sentencing court had no questions to answer. After Miller, it is required to consider, and have available to apply, a sentence of less than life without parole. This is a substantive change.<sup>6</sup>

**b. Miller's Effect on Washington Law Demonstrates It is Substantive.**

When applied to the Washington statute on aggravated first degree murder, RCW 10.95, it is clear Miller has changed **what** decision can be made. Miller alters the class of persons (juveniles) who can receive a category of punishment (mandatory life without parole).

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<sup>6</sup> Other courts holding Miller is substantive include: Jones v. State, So.3d \_\_\_ (Miss., No. 2009-CT-02033-SCT, 7/18/2013); People v. Morfin, 367 Ill. Dec. 282, 294, 981 N.E.2d 1010, ¶ 56 (Ill. App. 11/30/2012); People v. Williams, 367 Ill. Dec. 503, 982 N.E.2d 181, 196-97 (Ill. App. 12/12/2012); People v. Luciano, 370 Ill. Dec. 587, 988 N.E.2d 943, 954-55 (Ill. App. 3/14/2013); Hill v. Snyder, No. 10-14568 (E.D. Mich., 1/30/2013); see also Chambers v. State, 831 N.W.2d 311, 335 (Minn. 3/31/2013) (Anderson, Paul H., J., dissenting); Geter v. State, 38 Fla. L. Weekly D 1405, 32 (Fla. App. No. 3D12-1736, 6/26/2013) (Emas, J., dissenting).

For this Court's reference, Appendix A lists each decision addressing Miller's retroactivity that counsel is aware of as of the date of this filing. Unpublished opinions are included in Appendix B, per GR 14.1.

[Unless sentenced to death,] any person convicted of the crime of aggravated first degree murder **shall** be sentenced to life imprisonment without possibility of release or parole. **A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer** and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation.

RCW 10.95.030 (emphases added). Thus the statute expressly prohibits Washington courts from doing exactly what Miller requires -- consider imposing a sentence of less than life without parole. Washington statutes provide for no other crime that requires or even permits a sentence of life without parole.<sup>7</sup> There is no such sentence as "discretionary" life without possibility of parole. The court was unable to impose any other penalty in this case; yet Miller requires the ability to impose a lesser sentence.

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<sup>7</sup> A "persistent offender" also faces a mandatory LWOPP sentence, but that depends on criminal history, not on the definition of the crime itself. RCW 9.94A.030(37), 9.94A.570. A juvenile offense cannot be a "strike," and so a juvenile cannot be a "persistent offender." State v. J.H., 96 Wn. App. 167, 178, 978 P.2d 1121, review denied, 139 Wn.2d 1014 (1999), cert. denied, 529 U.S. 1130 (2000).

The unanimous Supreme Court of Mississippi recently held that Miller's rule is substantive.

Prior to Miller, everyone convicted of murder in Mississippi was sentenced to life imprisonment and was ineligible for parole. Following Miller, Mississippi's current sentencing and parole statutes could not be followed in homicide cases involving juvenile defendants. Our sentencing scheme may be applied to juveniles only after applicable Miller characteristics and circumstances have been considered by the sentencing authority. As such, Miller modified our substantive law by narrowing its application for juveniles.

The Legislature is the branch of government responsible for enactment of substantive law, which includes both crime and punishment. . . . However, its enactments must comport with both the United States and Mississippi Constitutions. Miller explicitly prohibits states from imposing a **mandatory** sentence of life without parole on juveniles. Thus, Miller rendered our present sentencing scheme unconstitutional if, and only if, the sentencing authority fails to take into account characteristics and circumstances unique to juveniles. When the Miller Court announced a new obligation prohibiting the application of our existing substantive law, it modified Mississippi substantive law.

. . .  
We are of the opinion that Miller created a new, substantive rule which should be applied retroactively to cases on collateral review.

Jones v. State, supra, ¶¶ 11-12, 18 (citations omitted; court's emphasis).<sup>8</sup>

As in Mississippi, the Washington Legislature is responsible for enacting substantive laws, including both crimes and punishments.

[T]he Legislature, not the judiciary, has the authority to determine the sentencing process. This court has consistently held that the fixing of legal punishments for criminal offenses is a legislative function. . . . The spirit of the law is in keeping with the acknowledged power of the legislature to provide a minimum and maximum term within which the trial court may exercise its discretion in fixing sentence.

State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719 (1986).

As in Mississippi, "[w]hen the Miller Court announced a new obligation prohibiting the application of our existing substantive law, it modified [Washington] substantive law."<sup>9</sup>

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<sup>8</sup> Accord: Luciano, supra, at ¶ 57; see also Chambers, supra, at 336-37 (Anderson, J., dissenting).

<sup>9</sup> Although in responding to the dissent, Miller said it mandates "only that a sentence follow a certain process--considering an offender's youth and attendant characteristics--before imposing a particular penalty," id. at 2469, that statement does not render the rule procedural because under Washington law, there is no other "particular penalty" a court can impose.

c. **Miller and Alleyne Prohibit Applying the Aggravated Murder Statute to Juveniles.**

Applying Miller requires a substantive change in Washington's statute, RCW 10.95. The statute absolutely prohibits considering a juvenile's youth; the Eighth Amendment requires it.

The Supreme Court recently clarified, in another context, what must be considered an element of a crime. In Alleyne v. United States, \_\_\_ U.S. \_\_\_ (No. 11-9335, 6/17/2013), the Court held any fact that by law results in a mandatory minimum sentence must be considered an element of the crime to be proved beyond a reasonable doubt to a jury.<sup>10</sup>

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<sup>10</sup> Some courts concluded, prior to Alleyne, that Miller's rule is procedural rather than substantive. See, e.g.: Chambers, supra; People v. Carp, 298 Mich. App. 472, 828 N.W.2d 685 (2012) (petition for review pending), but see Hill v. Snyder, No. 10-14568 (E.D. Mich., 1/30/2013) (applying Miller retroactively to grant relief to Michigan state petitioners); Craig v. Cain, (5th Cir. No. 12-30035, 1/4/2013) (denying relief to Louisiana state petitioner), but see State v. Simmons, 99 S.3d 28 (La. 10/12/2012) and State v. Williams, 108 So.3d 255 (La. App. 1/7/2013) (applying Miller retroactively to state's inmates); In re Morgan, 713 F.3d 1365 (11th Cir. 4/12/2013). The Alleyne opinion calls into question these earlier decisions.

The Florida Supreme Court has granted review of the issue in Falcon v. State, 111 So.3d 973 (Fla. App. 4/30/13), review granted (No. SC13-865,

[T]he core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury.

...  
... When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact.

Alleyne, at 25, 27.<sup>11</sup>

Thus under the statutory scheme of RCW 10.95, aggravated first degree murder is a separate crime from any other homicide under RCW Ch. 9A.32.<sup>12</sup>

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Fla. 6/3/13), leaving in question decisions by its Court of Appeals: Geter v. State, 37 Fla. L. Weekly D 2283 (No. 3D12-1736, 9/27/12), reh'g, reh'g en banc, and cert. denied, 38 Fla. L. Weekly D 1405 (Fla. App. 6/26/13) (en banc); Gonzalez v. State, 101 So.3d 886 (Fla. App. 10/24/2012), petition for review pending (Fla. No. SC13-16, filed 1/8/2013); Smith v. State, 38 Fla. L. Weekly D 1247 (Fla. App. No. 1D11-3579, 6/5/13) (certifying same question as Falcon to Supreme Court).

<sup>11</sup> Petitioner does not suggest that Alleyne itself is retroactive. New rules under the Sixth Amendment typically are procedural, and not always watershed; but Miller was under the Eighth Amendment, which rules are commonly substantive.

<sup>12</sup> This Court has held that RCW 10.95 does not create a crime separate from premeditated first degree murder, RCW 9A.32.030, but merely provides for a different sentence. See, e.g., State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004). Alleyne refutes that reasoning.

Under Miller:

[T]he Eighth Amendment forbids a **sentencing scheme** that mandates life in prison without possibility of parole **for juvenile offenders**. By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.

132 S. Ct. at 2469 (emphases added).

The new rule announced in Miller requires finding an additional element for the mandatory imposition of a sentence of life without the possibility of parole under RCW 10.95: that the defendant was at least 18 at the time of the crime.<sup>13</sup> Requiring an additional element is a signal of a substantive rule. Schriro, 542 U.S. at 354.

This holding does not merely change how a court is to consider a sentence. It prohibits this crime, defined by its sentences, to be imposed on

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<sup>13</sup> Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), previously held juveniles could not be sentenced to death. Applied retroactively, it limited RCW 10.95 to one possible sentence for juveniles: mandatory life without parole. Miller conclusively held that the remaining mandatory minimum sentence cannot be applied to someone under age 18 when the crime was committed. Since neither statutory sentence can be imposed, the crime defined in RCW Ch. 10.95 cannot constitutionally be applied to juveniles.

juveniles. It requires another crime and sentence altogether be available. It is a substantive holding, and so must apply retroactively.

**d. Miller's Reliance on Eighth Amendment Death Penalty Cases Further Supports Retroactive Application.**

Miller is rooted in a line of death penalty cases which held the Eighth Amendment requires individualized sentencing when considering the maximum possible sentence, death, upon an adult offender.<sup>14</sup> After Roper v. Simmons, supra, the maximum possible sentence for a juvenile offender is life without parole.

Miller recalled Graham v. Florida<sup>15</sup>, holding life without parole is constitutionally impermissible for juveniles who do not commit homicide:

Graham makes plain these mandatory schemes' defects in another way: by likening life-without-parole sentences imposed on juveniles to the death penalty itself. Life-without-parole terms, the Court wrote, "share some characteristics with death sentences that are shared by

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<sup>14</sup> See Geter, supra, 38 Fla. L. Weekly D 1405 at 10-26 (Emas, J., dissenting); Chambers, supra at 64 (Anderson, J., dissenting).

<sup>15</sup> 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

no other sentences." Imprisoning an offender until he dies alters the remainder of his life "by a forfeiture that is irrevocable." And this lengthiest possible incarceration is an "especially harsh punishment for a juvenile," because he will almost inevitably serve "more years and a greater percentage of his life in prison than an adult offender." The penalty imposed on a teenager, as compared with an older person, is therefore "the same ...in name only." All of that suggested a distinctive set of legal rules: **In part because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment.**

Miller, 132 S. Ct. at 2466 (emphasis added; citations omitted, all quotes from Graham).

Graham's "[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment," ... makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty. In Woodson,<sup>16</sup> we held that a statute mandating a death sentence for first-degree murder violated the Eighth Amendment. We thought the mandatory scheme flawed because it gave no significance to "the character and record of the individual offender or the circumstances" of the offense, and "exclud[ed] from consideration ... the possibility of compassionate or mitigating factors." ... **Subsequent decisions have elaborated on the requirement that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any**

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<sup>16</sup> Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses.

Miller, 132 S. Ct. at 2467 (emphasis added, citations omitted).

The rule established by this line of cases has been applied retroactively to cases already final, vacating sentences and remanding for resentencing.

As in Woodson, Miller still permits the most severe punishment -- but only if the court has the ability to impose a lesser sentence and makes individualized findings after considering the defendant's youth. This additional requirement makes the rule substantive. It is not sufficient to distinguish it from the precedents for purposes of retroactivity.

e. **The United States Supreme Court Applied Miller's Rule Retroactively on Collateral Review; Teague's Principle of Even-Handed Justice and Eighth Amendment Precedent Support Further Application.**

As noted in Petitioner's Amended Reply Brief, Miller applied its holding to Jackson v. Hobbs on

collateral review from Arkansas. Miller, 132 S. Ct. at 2461-62, 2475. This act is significant.<sup>17</sup>

[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated. ...

...  
[T]he harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment "hardly comports with the ideal of 'administration of justice with an even hand.'"

...  
We therefore hold 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, 489 U.S. at 315-16 (Court's emphasis).

The clearest instance, of course, in which we can be said to have "made" a new rule retroactive is where we expressly have held the new rule to be retroactive **in a case on collateral review and applied the rule to that case.**

Tyler v. Cain, 533 U.S. 656, 668, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001) (O'Connor, J., concurring; emphasis added).

Albeit in a different context, Justice Alito in dissent described Miller

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<sup>17</sup> It is notable that the Court did not simply dispose of Jackson's case by dismissing it as improvidently granted.

and Jackson as "two (carefully selected) cases." [Miller, 132 S. Ct. at 2489.] Plainly they were carefully selected to make clear to the discerning reader that the rule laid down in Miller and Jackson applied whether or not the mandatorily life-without-parole-sentenced juvenile's case was still "in the pipeline."

Falcon v. State, 111 So.3d 973 (Fla. App. 2013) (4/30/13) (Benton, C.J., concurring), review granted, 111 So.3d at 975 (No. SC13-865, Fla. 6/3/13).<sup>18</sup>

This Court should honor Teague's concept of evenhanded justice and apply the holding here.

**3. IN THE ALTERNATIVE, MILLER IS A WATERSHED RULE OF CRIMINAL PROCEDURE.**

To the extent this Court concludes Miller is a procedural ruling, Teague's prohibition of retroactive application does not apply to a "watershed rule of criminal procedure." Teague, 489 U.S. at 311. Such a rule must meet two requirements. First it must be necessary to prevent an "impermissibly large risk" of an

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<sup>18</sup> Other courts have relied on application to Jackson as evidence the ruling is retroactive. See, e.g.: Hill v. Snyder; Morfin, supra, at ¶ 57; Williams, supra, at ¶ 54; Geter, 38 Fla. L. Weekly D 1405 at 6-8 (Emas, dissenting).

inaccurate "criminal proceeding."<sup>19</sup> "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.

The new rule of Miller meets the first requirement by announcing a "foundational principle" with respect to the sentencing of juveniles to mandatory life without parole.

By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.

132 S. Ct. at 2468-69. Thus the new rule prohibits such a scheme to avoid the constitutionally impermissible risk of imposing a disproportionate and so inaccurate sentence.

The change of this bedrock principle is seen in our own state's jurisprudence. In State v. Massey,<sup>20</sup> the court held the test for cruel and unusual punishment "does not embody an element or

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<sup>19</sup> Schriro, 542 U.S. at 355-56; Whorton v. Bockting, 549 U.S. 406, 418, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007); Saffle v. Parks, 494 U.S. 484, 495, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990).

<sup>20</sup> State v. Massey, 60 Wn. App. 131, 145-46, 803 P.2d 340, review denied, 115 Wn.2d 1021 (1990), cert. denied, 499 U.S. 960 (1991).

consideration of the defendant's age, only a balance between the crime and the sentence imposed." Miller clearly overrules this very foundational concept of Massey. Thus it alters a bedrock procedural element essential to the fairness of sentencing a juvenile tried as an adult.

Miller also meets the second component of a watershed rule by expressly overturning the sentencing schemes of 29 sovereign jurisdictions-- 28 States and the federal government--which made a "life-without-parole term mandatory for some juveniles convicted of murder in adult court." Id. at 2471. Such a ruling "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding" by striking down statutory schemes across the country. See Whorton, 549 U.S. at 418; Miller, 132 S. Ct. at 2471.

The impact of Miller is comparable to that of Gideon, supra, the only decision the Supreme Court has explicitly recognized as announcing a watershed rule of criminal procedure. Both Gideon and Miller "effected a profound and sweeping change," Whorton, 549 U.S. at 421, albeit in different ways: Gideon

by "establish[ing] an affirmative right to counsel in all felony cases,"<sup>21</sup> and Miller by establishing a right to individualized sentencing for juveniles previously unrecognized by a majority of the States and Congress.

The Illinois Court of Appeals held Miller is a watershed rule because it "requires the observance of those procedures that are implicit in the concept of ordered liberty." People v. Williams, supra, 982 N.E.2d at 196. This Court should join in finding Miller to be a watershed rule.

**4. THIS STATE'S JURISPRUDENCE FOR COLLATERAL RELIEF REQUIRES APPLYING MILLER RETROACTIVELY.**

This Court should consider this issue under Washington's state law and hold, in the alternative to federal law, that Miller applies on collateral review.<sup>22</sup>

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<sup>21</sup> O'Dell v. Netherland, 521 U.S. 151, 167, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997).

<sup>22</sup> Justice Paul H. Anderson, dissenting in Chambers, supra, 831 N.W.2d at 339, warned that by insisting on the federal Teague analysis for Minnesota, the majority reached its conclusion from an "overabundance of caution" that the United States Supreme Court would later decide the issue differently.

a. **This Court Should Hold as a Matter of Statutory Construction that RCW 10.95 Does Not Apply to Juveniles.**

Before addressing constitutional issues, this Court considers the meaning of our State's statutes. State v. Furman, 122 Wn.2d 440, 456, 858 P.2d 1092 (1993).

In Furman, this Court considered the effect of Supreme Court precedent on RCW 10.95. Thompson v. Oklahoma<sup>23</sup> held the death penalty could not be imposed against defendants age 15 or younger when the crime occurred; yet Stanford v. Kentucky<sup>24</sup> upheld the death penalty for defendants who were 16 or 17 at the time of the crime. Michael Furman was 17 years and 10 months when he raped, murdered and robbed an elderly woman in 1989. Thus the Constitution permitted his death sentence.

This Court observed that RCW 13.40.110 authorized juveniles to be tried as adults, but did not mention the death penalty. RCW 10.95 authorized the death penalty, but did not refer to

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<sup>23</sup> 487 U.S. 815, 101 L. Ed. 2d 702, 108 S. Ct. 2687 (1988).

<sup>24</sup> 492 U.S. 361, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (1989).

crimes committed by juveniles. Neither statute set a minimum age for imposition of the death penalty.

"Wherever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality." We cannot rewrite the juvenile court statutes or the death penalty statute to expressly preclude imposition of the death penalty for crimes committed by persons who are under age 16 and thus exempt from the death penalty under Thompson. Nor is there any provision in either statute that could be severed in order to achieve that result. The statutes therefore cannot be construed to authorize imposition of the death penalty for crimes committed by juveniles. Absent such authorization, appellant's death sentence cannot stand.

Furman, 122 Wn.2d at 458.

The same observation applies when considering the mandatory sentence of life without parole: the Legislature did not consider how the sentence of mandatory life without parole should apply to juveniles tried as adults.

This Court is charged with the final interpretation and application of Washington's Constitution and laws. As in Furman, it cannot rewrite RCW 10.95 to permit life without parole for juveniles if the court also considers a lesser sentence and the defendant's age, as Miller requires. It cannot sever a portion of the statute

to make it comply with Miller. It cannot construe this statute constitutionally to apply to juveniles.

Thus even if Miller permits the possibility of a life-without-parole sentence on a juvenile, there is no substantive law in Washington that this Court can construe to comply with Miller. As in Furman, this sentence of life without parole cannot stand.

**b. An Illegal Sentence Can Be Corrected At Any Time.**

Exercising its sovereign jurisdiction recognized in Danforth, supra, this Court regularly has agreed to correct an illegal sentence based on subsequent changes of law.

When a sentence has been imposed for which there is no authority in law, the trial court has the *power and duty to correct the erroneous sentence, when the error is discovered.*

In re PRP of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) (Court's emphasis). Thus this Court has rejected the State's argument that subsequent case law precludes "retroactive" application to earlier sentences, and indeed held it requires application:

When this court construes a statute, its *original* meaning is clarified. Our ruling is thus automatically "retroactive."

In re PRP of Greening, 141 Wn.2d 687, 693 n.7, 9 P.3d 206 (2000) (Court's emphasis).<sup>25</sup>

Other States that permit challenges to illegal sentences at any time apply new decisions, including Miller, retroactively.<sup>26</sup> This Court should do the same.

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<sup>25</sup> Greening vacated a sentence because of a later case reinterpreting the SRA. Accord: In re PRP of Moore, 116 Wn.2d 30, 37, 803 P.2d 300 (1991); State v. Darden, 99 Wn.2d 675, 679, 663 P.2d 1352 (1983); Carle, supra (firearm enhancement not applicable to robbery 1°); State v. Moen, 129 Wn.2d 535, 538, 919 P.2d 69 (1996); In re PRP of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002) (PRP granted because intervening SRA interpretation made offender score invalid; juvenile priors washed out); In re PRP of Vandervlugt, 120 Wn.2d 427, 842 P.3d 950 (1992) (vacating 1988 exceptional sentence based on 1991 case); In re PRP of Smith, 117 Wn. App. 846, 73 P.3d 386 (2003) (intervening case law changing required instruction on accomplice liability applied retroactively on collateral review).

<sup>26</sup> See, e.g., Simmons, supra; State v. Williams, supra; State v. Lockheart, 820 N.W.2d 769 (Iowa App. 2012) (1985 sentence); State v. Bennett, 820 N.W.2d 769 (Iowa App. 2012) (1998 sentence); Luciano, supra; Whiteside v. State, 2013 Ark. 176 (Slip Op. at 4, 4/25/2013) (even if not procedurally preserved, may raise Miller at any time to challenge illegal sentence); Veal v. State, 779 N.W.2d 63 (Iowa, 2010) (juvenile's 2008 challenge to 1995 mandatory LWOP as cruel and unusual held timely as challenge to illegal sentence); see also Chambers at 86-87 (Page, J., dissenting).

**c. The State has Less Interest in Finality for a Sentence Than for a Conviction.**

The State's interest in finality of a conviction is much greater than of a particular sentence. Danforth, supra. Retroactive application will not require a new trial or a redetermination of guilt. The convictions will remain undisturbed, lessening any concern regarding lost records, dead or unavailable witnesses, or similar issues which might be raised if a new trial were required. The victims' survivors would be permitted to participate and have their voices heard. Since the court will now have discretion to impose a sentence other than life without parole, the victims' participation can influence the ultimate decision.

**5. IF MILLER IS NOT APPLIED RETROACTIVELY, THIS STATE CONTINUES TO HOLD PEOPLE IN UNCONSTITUTIONAL PUNISHMENT.**

Miller held that a mandatory life-without-parole sentence for a juvenile is "cruel and unusual punishment." Washington's Constitution prohibits a "cruel" punishment, regardless whether it is unusual. Const., art. I, § 14. Obviously,

going forward, no juvenile offender will receive such a sentence.

Failing to apply Miller retroactively means this State will continue imprisoning 30 individuals in "cruel and unusual" punishment. Until they die, these young people will remain imprisoned without any court ever having had the ability to consider their youth and its attendant effects to determine the appropriate sentence.<sup>27</sup> Given their youth at the time of the offense, most of these sentences are in fact longer than those imposed on adults committing the same crime. Miller at 2466.

**6. THE ERROR HAS WORKED TO PETITIONER'S ACTUAL AND SUBSTANTIAL PREJUDICE.**

The State argued in its response at 8 that Russell McNeil cannot demonstrate he was "actually and substantially prejudiced" by the sentence imposed in this case. Washington statutes did not permit the sentencing court to consider any sentence other than life without parole. A record

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<sup>27</sup> See Chambers, supra, at 77-82 (Anderson, Paul H., J., dissenting) (would hold Court's "supervisory power to insure the fair administration of justice" warrants retroactive application of Miller under state law to avoid leaving petitioner serving cruel and unusual sentence for rest of his life).

in which the court could not even consider, much less the defense argue, for a lesser sentence will never permit review for prejudice. "[S]ome errors which result in per se prejudice on direct review will also be per se prejudicial on collateral attack ... ." In re PRP of St. Pierre, 118 Wn.2d 321, 329, 823 P.2d 492 (1992).<sup>28</sup>

Miller itself is sufficient to support remand for resentencing.<sup>29</sup> The Court cited scientific developments that alter what we know and how we think about juveniles, in ways the sentencing court here did not know and could not consider:

Roper and Graham establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, "they are less deserving of the most severe punishments." ... First, children have

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<sup>28</sup> Furthermore, this Court chose to address this issue by way of this pro se petition from an inmate who has been incarcerated since age 17, appointing counsel only for oral argument after all pleadings were submitted. It is unjust to deny recovery on an important constitutional issue because of procedural flaws in a pro se petition. Cf. Geter, supra, 38 Fla. L. Weekly D 1405 at 6 (Emas, J., dissenting) (expressing concern of making decision based on pro se petition).

<sup>29</sup> 132 S. Ct. at 2461-62, 2475 (remanding for resentencing in Jackson v. Hobbs); Jones v. State, supra, ¶ 18.

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]."

Miller, 132 S. Ct. at 2464. "[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Id. at 2469.<sup>30</sup>

Miller did not require Jackson to prove prejudice; nor did the Arkansas court on remand.<sup>31</sup> Every case that has applied Miller retroactively has remanded for resentencing without any showing

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<sup>30</sup> "Indeed, in the wake of Miller, a defendant in Morgan's position--who previously would have been statutorily mandated to be locked away for life without parole--would likely receive a different, and lesser, sentence." In re Morgan, 713 F.3d at 1368-69 (Wilson, J., concurring).

<sup>31</sup> Jackson v. Norris, 2013 Ark. 175, \_\_\_ S.W.3d \_\_\_ (4/25/13).

that the defendant would more likely receive a shorter sentence.<sup>32</sup>

Defendant can show prejudice if the Supreme Court's decision in Miller applies retroactively to his case.

Williams, 982 N.E.2d at 196. As this Court said:

Imposition of an unlawful sentence is a fundamental defect. ... And we have little trouble concluding that to allow Carrier to remain wrongly subject to a life sentence would constitute a complete miscarriage of justice. Carrier has met his burden of showing prejudice.

In re PRP of Carrier, 173 Wn.2d 791, 818, 272 P.3d 209 (2012).

When there is merely a procedural matter, sometimes an appellate court can predict whether the trial court would have decided things differently. For Mr. McNeil, the court had no decision to make: it had to impose a sentence of life without parole. After Miller, it would have to make a decision: What is the proper sentence in this case? No court can predict the result. No court has denied relief on this basis.

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<sup>32</sup> Morfin, supra; People v. Williams, supra; Luciano, supra; Lockheart, supra; Bennett, supra; Simmons, supra; State v. Williams, supra; Hill v. Snyder, supra (granted relief via parole).

D. CONCLUSION

Before condemning a juvenile to a sentence he can complete only upon his death, our society and our criminal justice system has a compelling interest in ensuring that the defendant have the opportunity to present, and the trial judge the discretion to consider, individual circumstances that might warrant some lesser sentence. In doing so, we provide an accurate and reliable sentencing process that gives substance to the Eighth Amendment's concept of proportionate punishment. By applying such a rule to all juvenile defendants, including those whose conviction and sentence are already final, we surely enhance society's confidence in a system that is not merely efficient or uniform, but is also fair, accurate and reliable.<sup>33</sup>

This Court should vacate Russell McNeil's sentence and remand for sentencing consistent with Miller v. Alabama.

DATED this 2d day of August, 2013.

  
LENELL NUSSBAUM, WSBA No. 11140  
Attorney for Petitioner

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<sup>33</sup> Geter, 38 Fla. L. Weekly D 1405 at 48 (Emas, J., dissenting).

## APPENDIX A

### OPINIONS FROM OTHER JURISDICTIONS

These decisions do not account for jurisdictions where the court accepts the prosecution's agreement that Miller applies retroactively, where the trial-level courts are granting relief,<sup>34</sup> or where the legislature has provided retroactive application.<sup>35</sup>

#### FLORIDA

Falcon v. State,  
111 So.3d 973 (Fla. App. 4/30/13),  
review granted, (No. SC13-865, Fla. 6/3/13)

Geter v. State,  
Panel opinion, 37 Fla. L. Weekly D 2283  
(No. 3D12-1736, 9/27/12)  
Rehearing, Rehearing En Banc and Certification  
Denied, 38 Fla. L. Weekly D 1405  
(No. 3D12-1736, Fla. App. 6/26/13) (en banc)

Gonzalez v. State,  
101 So.3d 886 (Fla. App. 10/24/2012),  
petition for review pending (Fla. No. SC13-16,  
filed 1/8/2013)

Smith v. State,  
38 Fla. L. Weekly D 1247 (No. 1D11-3579, Fla.  
App. 6/5/13) (certifying same question as  
Falcon to Fla. Supreme Court)

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<sup>34</sup> See, e.g., Tulloch v. Gerry, No. 12-CV-849 (Merrimack N.H. Super. Ct. 7/29/2013) (Order granting habeas relief in four consolidated cases, holding Miller is a retroactive substantive rule) (a copy is attached in App. C).

<sup>35</sup> See, e.g.: Calif. Sen. Bill No. 9 (9/30/2012); Louisiana Act No. 239 (2013); North Carolina Sess. L. 2012-148; Wyoming Enrolled Act No. 16 (2013). Copies are attached in Appendix C.

ILLINOIS

People v. Morfin,  
981 N.E.2d 1010, 367 Ill. Dec. 282  
(Ill. App. 11/30/2012)

People v. Luciano,  
988 N.E.2d 943, 370 Ill. Dec. 587  
(Ill. App. 3/14/2013)

People v. Williams,  
982 N.E.2d 181, 196-97, 367 Ill. Dec. 503  
(Ill. App. 12/12/2012)

IOWA

Veal v. Iowa,  
779 N.W.2d 63 (Iowa, 2010)  
(pre-Miller decision held mandatory life  
without parole cruel and unusual for a  
juvenile, applied it on collateral review,  
ordered resentencing for 1995 sentence)

State v. Lockheart,  
820 N.W.2d 769 (Iowa App. 2012) (1985  
sentence)

State v. Bennett,  
820 N.W.2d 769 (Iowa App. 2012) (1998  
sentence)

LOUISIANA

State v. Simmons, 99 So.3d 28 (La. 10/12/2012)

State v. Williams, 108 So.3d 255 (La. App.  
1/7/2013)

MICHIGAN

People v. Carp, 298 Mich. App. 472, 828 N.W.2d  
685 (2012) (petition for review pending)

MINNESOTA

Chambers v. State,  
831 N.W. 311 (Minn. 5/31/2013)

MISSISSIPPI

Jones v. State,  
So.3d \_\_\_\_ (No. 2009-CT-02033-SCT, Miss.  
7/8/2013)

PENNSYLVANIA

Commonwealth v. Cunningham,  
51 A.3d 178 (Penn. No. 447 EAL 2009, 8/6/2012)  
(Pennsylvania Supreme Court Order allowing  
appeal from superior court)

UNITED STATES DISTRICT COURTS

Hill v. Snyder,  
(No. 10-14568, E.D. Mich. 1/30/2013)

UNITED STATES COURTS OF APPEALS

Wang v. United States,  
(2d. Cir. No. 13-2426, Doc. 39, 7/16/2013)  
(Order granting motion to allow successive §  
2255 petition based on Miller)

In re Landry,  
(4th Cir. No. 13-247, Doc. 5, 5/30/2013)  
(Order authorizing district court to consider  
successive § 2254 petition based on Miller)

Craig v. Cain,  
(5th Cir. No. 12-30035, 1/4/2013)

Johnson v. United States,  
\_\_\_\_ F.3d \_\_\_\_ (8th Cir. No. 12-3744, 7/12/2013)

In re Morgan,  
713 F.3d 1365 (11th Cir., 4/12/2013)  
(rehearing en banc denied, 6/10/2013)

APPENDIX B

COPIES OF UNPUBLISHED OPINIONS  
per GR 14.1

State v. Lockheart,  
820 N.W.2d 769 (Iowa App. 2012)

State v. Bennett,  
820 N.W.2d 769 (Iowa App. 2012)

Commonwealth v. Cunningham,  
51 A.3d 178 (Penn. No. 447 EAL 2009, 8/6/2012)  
(Pennsylvania Supreme Court Order allowing appeal from superior  
court)

Hill v. Snyder,  
No. 10-14568 (E.D. Mich., 1/30/2013)

Wang v. United States,  
(2d. Cir. No. 13-2426, Doc. 39, 7/16/2013)  
(Order granting motion to allow successive § 2255 petition based on  
Miller)

In re Landry,  
(4th Cir. No. 13-247, 5/30/2013)  
(Doc. 5: Order authorizing district court to consider  
successive § 2254 petition; Doc. 2: Motion Pursuant to 28  
U.S.C. § 2244 for Authorization to File a Second or Successive  
Application for Habeas Corpus based on Miller)

Craig v. Cain,  
(5th Cir. No. 12-30035, 1/4/2013)

Johnson v. United States,  
\_\_\_ F.3d \_\_\_ (8th Cir. No. 12-3744, 7/12/2013)



STATE OF IOWA, Plaintiff-Appellee, vs. CHRISTINE MARIE LOCKHEART,  
Defendant-Appellant.

No. 1-576 / 10-1815

COURT OF APPEALS OF IOWA

820 N.W.2d 769; 2012 Iowa App. LEXIS 531

July 11, 2012, Filed

**NOTICE:**

NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNTIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION MAY BE CITED IN A BRIEF; HOWEVER, UNPUBLISHED OPINIONS SHALL NOT CONSTITUTE CONTROLLING LEGAL AUTHORITY. PUBLISHED IN TABLE FORMAT IN THE NORTH WESTERN REPORTER.

**PRIOR HISTORY:** [\*1]

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire, Judge. A defendant appeals her sentence of life without parole for first-degree murder and first-degree robbery, which she committed at age seventeen, as "cruel and unusual punishment" under the *Eighth Amendment of the United States Constitution*, and *Article 1, section 17 of the Iowa constitution*. *State v. Lockheart*, 410 N.W.2d 688, 1987 Iowa App. LEXIS 1579 (Iowa Ct. App., 1987)

**DISPOSITION:** SENTENCE VACATED, REMANDED FOR RESENTENCING.

**COUNSEL:** Gordon E. Allen of Drake Legal Clinic, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Michael J. Walton, County Attorney, for appellee.

**JUDGES:** Heard by Vogel, P.J., and Vaitheswaran, Potterfield, Doyle, and Danilson, JJ.

**OPINION BY:** VOGEL

**OPINION**

**VOGEL, P.J.**

Christine Lockheart appeals her sentence of life without parole for first-degree murder and first-degree robbery, which she committed at age seventeen, as "cruel and unusual punishment" under the *Eighth Amendment of the United States Constitution*, and *Article 1, section 17 of the Iowa constitution*. Under the principles articulated in *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407, 2012 U.S. LEXIS 4873, 2012 WL 2368659 (2012), we vacate Lockheart's sentence and remand for resentencing.

**I. Background Facts and Proceedings**

In June 1985, a jury [\*2] found Christine Lockheart guilty of first-degree murder, under a theory of aiding and abetting, and first-degree robbery, which Lockheart committed when she was seventeen years old.<sup>1</sup> She was sentenced to life in prison without the possibility of parole. Lockheart appealed from the resulting convictions, which were affirmed by this court in May 1987. *Lockheart*, 410 N.W.2d at 690. In April 2003, Lockheart applied for a commutation recommendation and in August 2005 appeared before the Iowa Board of Parole for an interview. The Board voted 5-0 against recommending Lockheart's sentence be commuted, based in large part on Lockheart's prison disciplinary problems.

<sup>1</sup> Under the 1983 code, a juvenile charged with committing a forcible felony was not automati-

cally excluded from the jurisdiction of the juvenile court. *Compare Iowa Code § 232.45(6)(a) (1983)* (stating the requisite procedure for the juvenile court to waive jurisdiction), *with Iowa Code § 232.8(1)(c) (2011)* (stating juveniles that commit forcible felonies are "excluded from the jurisdiction of the juvenile court and shall be prosecuted as otherwise provided by law unless the court transfers jurisdiction of the child to the juvenile [\*3] court upon motion and for good cause"). After a hearing, the juvenile court for Scott County waived its jurisdiction over Lockheart. *State v. Lockheart, 410 N.W.2d 688, 690 (Iowa Ct. App. 1987)*; *see also Iowa Code § 232.45(6) (1983)* (providing three factors that must be met for the juvenile court to waive its jurisdiction over a child).

On April 8, 2010, Lockheart filed a motion for correction of an illegal sentence in district court. She asserted that her sentence of life without the possibility of parole for a crime committed while she was under the age of eighteen constitutes cruel and unusual punishment, both on its face and as applied, in violation of the *Eighth Amendment of the United States Constitution*, and under *Article I, section 17 of the Iowa constitution*.<sup>2</sup> Lockheart also requested an evidentiary hearing.

2 As the Iowa Supreme Court has recognized, "the federal lexicon for *Eighth Amendment* analysis no longer includes the terms 'facial challenge' and 'as-applied challenge.' Instead, the defendant must challenge his sentence under the 'categorical' approach or make a 'gross proportionality challenge to [the] particular defendant's sentence.'" *State v. Oliver, 812 N.W.2d 636, 639-40 (Iowa 2012) [\*4]* (citing *Graham v. Florida, 130 S. Ct. 2011, 2022, 176 L. Ed. 2d 825 (2010)*).

A hearing was scheduled for August 26, 2010. On May 18, 2010, one day after the Supreme Court decided *Graham, 130 S. Ct. 2011, 176 L. Ed. 2d 825*, the district court canceled Lockheart's hearing, without notice to either Lockheart or the State. Lockheart filed a motion to reconsider the cancellation, which the court denied. Lockheart then filed a motion for a new trial and a motion in arrest of judgment, again requesting an evidentiary hearing to determine facts and circumstances particular to Lockheart and her sentence. Lockheart also filed a bill of exceptions, attaching the documents that she had intended to introduce at the previously scheduled evidentiary hearing. The State resisted, and on November 9, 2010, the district court denied both of Lockheart's motions.

On November 10, Lockheart filed with our supreme court a motion seeking an administrative and supervisory order to the district court mandating an evidentiary hearing, or in the alternative, the granting of an interlocutory appeal and an immediate remand for purposes of conducting an evidentiary hearing. The State filed a resistance. On November 18, Lockheart filed a motion for limited [\*5] remand for our supreme court to direct the district court to conduct an evidentiary hearing. The State resisted this motion, and Lockheart filed a reply. On December 20, 2010, a single justice of our supreme court denied the various motions made by Lockheart. On December 27, Lockheart moved our supreme court for review of its December 20 order, which was also denied. Lockheart's appeal was subsequently transferred to this court.

On appeal, Lockheart asserts that (i) both on its face and as applied, a sentence imposed on an adolescent of life in prison without the possibility of parole is cruel and unusual punishment under the *Eighth Amendment of the United States Constitution* and under *Article I, section 17 of the Iowa constitution*, and (ii) she was not afforded procedural due process when denied a hearing to demonstrate her individual circumstances to challenge her sentence of life without the possibility of parole.

## II. Standard of Review

Our court reviews constitutional claims de novo. *Bonilla v. State, 791 N.W.2d 697, 699 (Iowa 2010)*. We may correct an illegal sentence at any time. *Iowa R. Crim. P. 2.24(5)(a)*; *Veal v. State, 779 N.W.2d 63, 64-65 (Iowa 2010)*. "A claim that a sentence [\*6] is unconstitutional because it constitutes cruel and unusual punishment is a claim of an illegal sentence and may therefore be raised at any time." *Bonilla, 791 N.W.2d at 699*. Additionally, the ordinary rules of error preservation do not apply to claims regarding an illegal sentence. *Veal, 779 N.W.2d at 65*.

## III. Eighth Amendment Law

Lockheart contends that the mandatory imposition of life without parole is unconstitutional under the *Eighth Amendment* and that a denial of an opportunity to demonstrate her individual circumstances in an as-applied challenge denies her procedural due process under the federal and state constitutions.<sup>3</sup> While Lockheart's case was pending on appeal, the United States Supreme Court issued *Miller v. Alabama, 132 S. Ct. 2455, 183 L. Ed. 2d 407, 2012 U.S. LEXIS 4873, 2012 WL 2368659, at \*17*, which held that the mandatory imposition of a sentence of life without parole for juvenile offenders is unconstitutional under the *Eighth Amendment*.

3 While Lockheart sets forth an argument regarding why sentencing a juvenile to life without the possibility of parole is "constitutionally objectionable" under *Article I, section 17 of the Iowa constitution*, she does not advance a standard for interpreting the cruel and unusual punishment [\*7] provision under the Iowa constitution that differs from that of the federal constitutional analysis. For this reason, we will apply the same standards of interpretation as the United States Supreme Court. *See State v. Bruegger*, 773 N.W.2d 862, 883 (Iowa 2009) (noting where a defendant does not advance a standard for interpreting the cruel and unusual punishment provision under the Iowa constitution in a manner different from its federal constitutional counterpart, our State supreme court applies the same analysis employed by the United States Supreme Court).

As to her due process argument, Lockheart states that our court "should now recognize that in Iowa, under the Iowa and Federal Constitutions, there cannot be a categorical denial of any opportunity for this defendant to demonstrate under her particular facts and circumstances, the 'gross disproportionality' of a life sentence imposed on a [seventeen-year-old]." We note, however, that Lockheart is not advocating for independent treatment of this issue under the Iowa constitution.

The *Eighth Amendment of the United States Constitution* provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual [\*8] punishment inflicted." *Miller* is the third in a recent line of United States Supreme Court cases specifically addressing the interplay between the *Eighth Amendment* and juvenile sentencing practices. The first case, *Roper v. Simmons*, 543 U.S. 551, 578-79, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), prohibited the death penalty for defendants who committed their crimes while under the age of eighteen. The second case, *Graham*, 130 S. Ct. at 2034, prohibited the imposition of a sentence of life without parole for a juvenile offender who committed a non-homicide offense. Finally, *Miller* concluded that based on these two prior lines of precedent, the *mandatory* sentencing of a juvenile to life without parole violates the *Eighth Amendment*. 2012 U.S. LEXIS 4873, 2012 WL 2368659, \*7.

As in *Roper* and *Graham*, the Court in *Miller* focused on the relevancy of an offender's age and the circumstances of the offense in the context of Eighth Amendment jurisprudence. 2012 U.S. LEXIS 4873, [WL] at \*7-11. The Court explained,

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 [\*9] that surround 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.

2012 U.S. LEXIS 4873, [WL] at \*11 (internal citations omitted).

While *Miller* did not foreclose the sentencing court's option to impose life without parole on a juvenile convicted of a homicide, it required consideration of "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 2012 U.S. LEXIS 4873, [WL] at \*12. The Court concluded,

*Graham*, *Roper*, and our individual sentencing decisions make clear that the sentencing court must have the opportunity to consider mitigating circumstances [\*10] before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

2012 U.S. LEXIS 4873, [WL] at \*17.

#### IV. Analysis

Lockheart asked that we consider the unique characteristics of juveniles, the capacity for rehabilitation, and the diminished culpability of juvenile offenders to find that her sentence of life without parole constitutes cruel and unusual punishment under the *Eighth Amendment*. She also requested an evidentiary hearing, which the district court had denied.<sup>4</sup>

4 We find a *Bruegger* hearing unnecessary in this case because based on *Miller*, Lockheart's mandatory sentence to life without parole is unconstitutional, and therefore requires no further determination by the district court regarding whether the *mandatory* imposition of life without parole should be permitted. *See Bruegger*, 773 N.W.2d at 884- 85 (stating that an individualized hearing may be necessary [\*11] in some instances to determine whether the punishment imposed should be permitted); *see also Miller*, 2012 U.S. LEXIS 4873, 2012 WL 2368659, \*17 (holding mandatory life without parole sentences for juveniles unconstitutional).

Under *Miller*, mandatory imposition of the entirety of Lockheart's sentence under *section 902.1*--"life without the possibility of parole"--violates the United States Constitution. We note, however, that *Miller* does not impose a categorical ban on a sentence of life without parole for juvenile homicide offenders. Instead, it requires that prior to sentencing a juvenile to life without parole, the sentencing court take into consideration any mitigating circumstances--namely an offender's status as a juvenile and the numerous characteristics that accompany this status. 2012 U.S. LEXIS 4873, [WL] at \*17. Under the principles articulated in *Miller* we vacate Lockheart's sentence and remand for resentencing.

#### V. Remand Considerations

In *Bonilla v. State*, 791 N.W.2d 697, 703 (Iowa 2010), our supreme court applied *Graham* to set aside as unconstitutional juvenile offender Julio Bonilla's sentence of life without parole. This sentence was based on Bonilla's conviction for kidnapping in the first degree--a non-homicide crime--committed [\*12] when he was sixteen years old. *Bonilla*, 791 N.W.2d at 699. Bonilla was sentenced pursuant to *Iowa Code section 902.1*, which precluded the possibility of parole other than by commutation by the governor; the court found this violative of the federal constitution. *Id.* at 701. The remedy crafted by the court ordered that Bonilla continue to serve a life sentence, but the court struck the provision that had foreclosed the possibility of parole. *Id.* at 702. While that remedy was appropriate in accordance with the prevailing case law under *Graham* for non-homicide offenders, under the broader holding of *Miller*, severance of "without parole" is merely a suggested option. *Miller*, 2012 U.S. LEXIS 4873, 2012 WL 2368659, at \*4.

We therefore vacate Lockheart's sentence and remand for individualized resentencing in accordance with the process articulated in *Miller*, whereby the sentencing court shall "have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."<sup>5</sup> *See* 2012 U.S. LEXIS 4873, [WL] at \*17.

5 As in *Miller*, we need not reach the alternative argument Lockheart makes, that life without parole imposed on a juvenile is categorically a violation of the *Eighth Amendment*. *Miller*, 2012 U.S. LEXIS 4873, 2012 WL 2368659, at \*12.

**SENTENCE [\*13] VACATED, REMANDED FOR RESENTENCING.**



STATE OF IOWA, Plaintiff-Appellee, vs. THOMAS WILLIAM BENNETT, Defendant-Appellant.

No. 1-676 / 11-0061

COURT OF APPEALS OF IOWA

820 N.W.2d 769; 2012 Iowa App. LEXIS 542

July 11, 2012, Filed

**NOTICE:**

NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNTIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION MAY BE CITED IN A BRIEF; HOWEVER, UNPUBLISHED OPINIONS SHALL NOT CONSTITUTE CONTROLLING LEGAL AUTHORITY. PUBLISHED IN TABLE FORMAT IN THE NORTH WESTERN REPORTER.

**PRIOR HISTORY:** [\*1]

Appeal from the Iowa District Court for Polk County, Richard J. Blane II, Judge. Thomas Bennett contends the sentence imposed upon his conviction for first-degree murder--life without parole--constitutes cruel and unusual punishment because he was a minor when he committed the offense.

*Bennett v. State*, 2010 Iowa App. LEXIS 265 (Iowa Ct. App., Apr. 8, 2010)

**DISPOSITION:** SENTENCE VACATED, REMANDED FOR RESENTENCING.

**COUNSEL:** Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeffrey K. Noble, Assistant County Attorney, for appellee.

**JUDGES:** Heard by Vogel, P.J., and Vaitheswaran, Potterfield, Doyle, and Danilson, JJ. Eisenhauer, J. takes no part.

**OPINION BY:** POTTERFIELD

**OPINION**

**POTTERFIELD, J.**

Thomas Bennett contends the sentence imposed upon his conviction for first-degree murder--life without parole (LWOP)--constitutes cruel and unusual punishment because he was a minor when he committed the offense. Pursuant to *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407, 2012 U.S. LEXIS 4873, 2012 WL 2368659 (2012), we vacate Bennett's sentence, and remand for resentencing.

**I. Background Facts and Proceedings.**

When viewed in the light most favorable to the State, the evidence shows that in August 1998, [\*2] Thomas Bennett, then aged seventeen years and four months, was living with his friend John Molloy. Bennett and Molloy lived next door to a disabled man and Bennett knew when the man received his disability checks. Bennett, Molloy, and another friend, Tony Vang, planned to rob the neighbor knowing he had recently cashed his \$813 social security disability check. Bennett provided a black trench coat and bandana to Vang and helped tie a pool cue case inside Molloy's trench coat to function as a shoulder holster for a pump-action rifle. The three walked to the neighbor's house. Bennett told the other two to wait five minutes while he went into the victim's residence to act friendly and "set [the victim] up." He gave Molloy a pager that showed the time so Molloy could gauge when five minutes had elapsed.

Bennett entered the house. After the allotted five minutes, with rifle drawn and wearing a mask, Molloy entered the victim's house and shot the man as he sat on his couch. Bennett ordered Molloy to shoot the victim two or three times more, which Molloy did. Bennett then picked something up from near the victim's body and the three men ran through and away from the victim's house. Bennett [\*3] took the rifle from Molloy and threw it away in an alley.

Bennett, Molloy, and Vang were charged with murder as co-defendants. Their trials were severed. As part of a plea agreement with the State, Vang agreed to testify.<sup>1</sup>

1 Bennett's co-defendants were both eighteen at the time of the offense. The disposition of their cases is not part of the appellate record before us.

At trial, Vang, James Clark, and Randy Grimm (Molloy's stepfather) testified that Bennett and Molloy were friends, but Bennett was the leader of the two. A jury convicted Bennett of first-degree murder<sup>2</sup> and the court sentenced him to the mandatory sentence of life in prison without parole pursuant to *Iowa Code section 902.1 (1997)*. On direct appeal, this court affirmed the conviction and sentence. *State v. Bennett, No. 99-0726, 2000 Iowa App. LEXIS 45, 2000 WL 1675593 (Iowa Ct. App. Nov. 8, 2000)*.

2 The verdict did not specify whether the jury found Bennett guilty of felony murder under *Iowa Code section 707.2(2)* or as an aider and abettor of murder committed with specific intent under *section 707.2(1)*.

Bennett subsequently filed a postconviction relief application contending, among other things, that his counsel was ineffective. The application [\*4] was dismissed as untimely.

In August 2007, Bennett filed his second application for postconviction relief alleging his conviction and sentence violated his due process and equal protection rights under the United States and Iowa constitutions. The application was denied. On appeal, this court affirmed. *See Bennett v. State, No. 08-1157, 2010 Iowa App. LEXIS 265, 2010 WL 1375346 (Iowa Ct. App. April 8, 2010)*.

On June 21, 2010, Bennett filed a pro se motion to correct an illegal sentence<sup>3</sup> asserting for the first time that his sentence constituted cruel and unusual punishment as he was juvenile at the time of the offense. The district court appointed counsel and heard arguments on counsel's subsequently filed amended motion to correct an illegal sentence. No evidence was offered or received regarding Bennett's psychological or physiological brain

development at the time of the crime. The court denied relief.

3 In *Veal v. State, 779 N.W.2d 63, 65 (Iowa 2010)*, our supreme court held that a challenge to a sentence on cruel-and-unusual-punishment grounds is a claim of an illegal sentence, which may be raised at any time under *Iowa Rule of Criminal Procedure 2.24(5)(a)*.

Bennett appeals, contending the LWOP sentence is illegal [\*5] and constitutes cruel and unusual punishment under the United States and Iowa constitutions because he was a juvenile at the time of the offense.

## II. Scope and Standard of Review.

Illegal sentences are reviewed for corrections of errors at law. *State v. Oetken, 613 N.W.2d 679, 686 (Iowa 2000)*. However, we review constitutional claims de novo. *State v. Bruegger, 773 N.W.2d 862, 869 (Iowa 2009)*.

## III. Analysis.

Both the federal and state constitutions prohibit the imposition of cruel and unusual punishment. *U.S. Const. Amend. 8; Iowa Const. art. I, § 17*. "Punishment may be cruel and unusual because it inflicts torture, is otherwise barbaric, or is so excessively severe it is disproportionate to the offense charged." *State v. Cronkhite, 613 N.W.2d 664, 669 (Iowa 2000)*. If a punishment "falls within the parameters of a statutorily prescribed penalty," it generally "does not constitute cruel and unusual punishment." *Id.* "Only extreme sentences that are 'grossly disproportionate' to the crime conceivably violate the *Eighth Amendment*." *Id.* (citations omitted). While we provide the legislature substantial deference "in setting the penalty for crimes," it is within our power "to determine whether [\*6] the term of imprisonment imposed is grossly disproportionate to the crime charged." *Id.* "If it is not, no further analysis is necessary." *Id.*

*State v. Seering, 701 N.W.2d 655, 669-70 (Iowa 2005)*.

In *Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)*, the United States Supreme Court discussed the relevance of juvenile status in a cru-

el-and-unusual-punishment analysis where defendants are faced with the death penalty.

After noting that the *Eighth Amendment* applied to the death penalty with "special force," Justice Kennedy next turned to consideration of the mental abilities of juveniles. *Roper*, 543 U.S. at 568. Citing the common experience of parents, confirmed by scientific and sociological studies, Justice Kennedy noted that juveniles tend to have immature judgment and act impulsively and without a full appreciation of the consequences of their actions, were more susceptible to negative peer influences than adults, were dependent on parents and others, and had personalities that were less well developed and more transitory than adults. *Id.* at 569-72. Justice Kennedy noted that as a result of their immature judgment, impulsivity, dependence on others, and lack of responsibility, nearly all states prohibit [\*7] persons under eighteen years of age from voting, serving on juries, or marrying without parental consent. *Id.* at 569. Finally, Justice Kennedy surveyed international law, noting that various sources of international law condemn the death penalty for juveniles and that only a few countries continue the practice. *Id.* at 576-77.

Because of the psychosocial and neurological differences between juveniles and adults, Justice Kennedy wrote that the penological justifications for the death penalty--retribution and general deterrence--apply to juveniles "with lesser force than to adults." *Id.* at 571. Justice Kennedy noted that "punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." *Id.* at 572.

*Bruegger*, 773 N.W.2d at 877. Thus, because of the psychosocial, neurological, and penological differences between juveniles and adults, the *Roper* court determined the death penalty categorically could not be applied to juveniles. *Roper*, 543 U.S. at 573-74 ("When 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 [\*8] to attain a mature understanding of his own humanity.").

More recently, the Supreme Court held the *Eighth Amendment* prohibits the imposition of LWOP sentence upon a juvenile offender who did not commit a homicide. *Graham v. Florida*, 130 S. Ct. 2011, 2030, 176 L. Ed. 2d 825 (2010). The Court wrote,

In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the *Eighth Amendment* forbids the sentence of life without parole.

*Id.*

On June 25, 2012, the United States Supreme Court issued its decision in *Miller v. Alabama*, 2012 U.S. LEXIS 4873, 2012 WL 2368659, at \*17, holding that the mandatory imposition of a sentence of life without parole for juvenile offenders "violates th[e] principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment." As in *Roper* and *Graham*, the Court in *Miller* focused on the relevancy of an offender's age and the circumstances [\*9] of the offense in the context of Eighth Amendment jurisprudence. *See Miller*, 2012 U.S. LEXIS 4873, 2012 WL 2368659, at \*7-11. The Court explained,

To recap: 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 surround 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 fi-

nally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

2012 U.S. LEXIS 4873, [WL] at \*11.

While *Miller* did not foreclose the sentencing court's option to impose life without parole [\*10] on a juvenile convicted of a homicide, it required consideration of "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 2012 U.S. LEXIS 4873, [WL] at \*12. The Court concluded,

*Graham, Roper*, and our individual sentencing decisions make clear that the sentencing court must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

2012 U.S. LEXIS 4873, [WL] at \*17.

Under *Miller*, mandatory imposition of the entirety of Bennett's sentence under section 902.1--"life without the possibility of parole"--violates the principle of proportionality encompassed in the Eighth Amendment's ban on cruel and unusual punishment. *Id.* *Miller* does not

impose a categorical ban on a sentence of life without parole for juvenile homicide offenders. See 2012 U.S. LEXIS 4873, [WL] at \*12. Rather, it [\*11] requires that prior to sentencing a juvenile to life without parole, the sentencing court take into consideration all pertinent factors--namely an offender's status as a juvenile and the numerous characteristics that accompany this status. See 2012 U.S. LEXIS 4873, [WL] at \*11, 17. Under the principles articulated in *Miller* we vacate Bennett's sentence and remand for resentencing in accordance with the process articulated in *Miller*.<sup>4</sup>

4 In *Bonilla v. State*, 791 N.W.2d 697 (Iowa 2010), our supreme court applied *Graham* to set aside as unconstitutional juvenile offender Julio Bonilla's sentence to life without parole. This sentence was based on Bonilla's 2005 conviction for kidnapping in the first degree--a non-homicide crime--committed when he was sixteen years old. *Bonilla*, 791 N.W.2d at 699. Bonilla was sentenced pursuant to Iowa Code section 902.1, which precluded the possibility of parole other than by commutation by the governor; the court found this violative of the Federal Constitution. *Id.* at 701. The remedy crafted by the court ordered that Bonilla continue to serve a life sentence, but the court struck the provision that had foreclosed the possibility of parole. *Id.* at 702. While that remedy was appropriate [\*12] in accordance with the prevailing case law under *Graham* for non-homicide offenders, under the broader holding of *Miller*, severance of "without parole" is merely a suggested option. See *Miller*, 2012 U.S. LEXIS 4873, 2012 WL 2368659, at \*17 (requiring individualized sentencing for minors).

**SENTENCE VACATED, REMANDED FOR RESENTENCING.**



COMMONWEALTH OF PENNSYLVANIA, Respondent v. IAN CUNNINGHAM,  
Petitioner

No. 447 EAL 2009

SUPREME COURT OF PENNSYLVANIA

51 A.3d 178; 2012 Pa. LEXIS 1734

August 6, 2012, Decided

**NOTICE:** DECISION WITHOUT PUBLISHED  
OPINION

**PRIOR HISTORY:** [\*1]

Petition for Allowance of Appeal from the Order of  
the Superior Court.  
*Commonwealth v. Cunningham*, 981 A.2d 915, 2009 Pa.  
Super. LEXIS 3825 (Pa. Super. Ct., 2009)

**OPINION**

**ORDER**

**PER CURIAM**

**AND NOW**, this 6th day of August, 2012, the Peti-  
tion for Allowance of Appeal is **GRANTED, LIMITED**  
**TO** the following issue:

Did the trial court err in imposing a life  
sentence without parole for the crime of  
[second] [d]egree [m]urder

The parties are **DIRECTED** to ad-  
dress the following related issues:

1. Whether the holding in *Miller v.*  
*Alabama*, 132 S.Ct. 2455, 183 L. Ed. 2d  
407 (2012), that a juvenile convicted of a  
homicide offense cannot be sentenced to

life imprisonment without parole unless  
there is consideration of mitigating cir-  
cumstances by a judge or jury, retroac-  
tively applies to an inmate serving such  
sentence when the inmate has exhausted  
his direct appeal rights and is proceeding  
under the Post Conviction Relief Act.

2. if *Miller v. Alabama*, 132 S.Ct.  
2455, 183 L. Ed. 2d 407 (2012), is deter-  
mined to have retroactive effect, what is  
the appropriate remedy under the Penn-  
sylvania Post Conviction Relief Act for a  
defendant who was sentenced to a man-  
datory term of life imprisonment without  
the possibility of parole for a murder  
committed when the defendant was under  
the age of eighteen?

Allocatur is **DENIED** as to all remaining issues.

This [\*2] matter is to be listed for argument at the  
next scheduled session, with an expedited briefing  
schedule. Appellant's brief is due August 24, 2012; ap-  
pellee's brief is due September 7, 2012. No reply briefs  
will be accepted. Given the expedited schedule, no  
briefing extensions will be entertained.



HENRY HILL, et al., Plaintiffs, v. RICK SNYDER, et al., Defendants.

Case No. 10-14568

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
MICHIGAN, SOUTHERN DIVISION

2013 U.S. Dist. LEXIS 12160

January 30, 2013, Decided

January 30, 2013, Filed

**PRIOR HISTORY:** *Hill v. Snyder*, 2012 U.S. Dist. LEXIS 3778 (E.D. Mich., Jan. 12, 2012)

**COUNSEL:** [\*1] For Henry Hill, Keith Maxey, Matthew Bentley, Jennifer Pruitt, Bosie Smith, Kevin Boyd, Bobby Hines, Damion Todd, Jemal Tipton, Plaintiffs: Daniel S. Korobkin, American Civil Liberties Union of Michigan, Detroit, MI; Ezekiel R. Edwards - NOT SWORN, The American Civil Liberties Foundation, New York, NY; Michael J. Steinberg, American Civil Liberties Union Fund of Michigan, Detroit, MI; Steven M. Watt, American Civil Liberties Union, New York, NY; Deborah A. LaBelle, Ann Arbor, MI.

For Jennifer Granholm, Patricia Caruso, Defendants: Joseph T. Froehlich, Michigan Attorney General, Public Employem, Elections & Tort, Lansing, MI; Margaret A. Nelson, Michigan Department of Attorney General, Public Employment, Elections and Tort, Lansing, MI.

For Daniel H. Heyns, Thomas R Combs, Defendants: Ann M. Sherman, LEAD ATTORNEY, MI Dept of Attorney General, Lansing, MI; Margaret A. Nelson, LEAD ATTORNEY, Michigan Department of Attorney General, Public Employment, Elections and Tort, Lansing, MI.

**JUDGES:** Hon. John Corbett O'Meara, United States District Judge.

**OPINION BY:** John Corbett O'Meara

**OPINION**

**OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' CROSS-MOTION** [\*2] **FOR SUMMARY JUDGMENT**

Before the court are cross-motions for summary judgment, which have been fully briefed. The court heard oral argument on September 20, 2012, and took the matter under advisement. For the reasons discussed below, Plaintiffs' motion is granted in part and denied in part, and Defendants' motion is denied.

**BACKGROUND FACTS**

On November 17, 2010, Plaintiffs filed a complaint challenging the constitutionality of *M.C.L. § 791.234(6)(a)*, which prohibits the Michigan Parole Board from considering for parole those sentenced to life in prison for first-degree murder. Specifically, Plaintiffs seek a declaration the *M.C.L. § 791.234(6)(a)* is unconstitutional as applied to those who were convicted when they were under the age of eighteen. On July 15, 2011, the court granted Defendants' motion to dismiss, on statute of limitations grounds, as to all Plaintiffs except Keith Maxey. The court found that Maxey could state a claim for relief under the *Eighth Amendment*. On February 1, 2012, Plaintiffs filed an amended complaint, adding Plaintiffs whose claims are not barred by the statute of limitations.<sup>1</sup>

<sup>1</sup> The court dismissed Plaintiffs' due process and "customary international law" claims [\*3] for failure to state a claim on July 15, 2011. Plaintiffs' amended complaint contains the due process and customary international law claims

that were previously dismissed. These claims are no longer before the court.

The United States Supreme Court recently held that mandatory life without parole sentences for juveniles violate the *Eighth Amendment's* prohibition against cruel and unusual punishment. *Miller v. Alabama*, 132 S.Ct. 2455, 183 L. Ed. 2d 407 (2012). Based upon *Miller*, Plaintiffs seek summary judgment and equitable relief on their *Eighth Amendment* claim.

## LAW AND ANALYSIS

### I. Michigan's Parole Statute Is Unconstitutional as Applied to Juveniles

In *Miller*, the Court found mandatory life without parole sentencing schemes for juveniles convicted of homicide to be unconstitutional:

*Graham, Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory [\*4] sentencing schemes before us violate this principle of proportionality, and so the *Eighth Amendment's* ban on cruel and unusual punishment.

*Miller*, 132 S.Ct. at 2475. In this case, each of the Plaintiffs was tried as an adult and convicted of first-degree murder. As a result, they received mandatory life sentences. Pursuant to statute, the parole board lacks jurisdiction over anyone convicted of first-degree murder. *M.C.L. § 791.234(6)*. This statutory scheme combines to create life without parole sentences for those who committed their crimes as juveniles. This type of sentencing scheme is clearly unconstitutional under *Miller*.

### II. Miller Applies Retroactively

Defendants argue, however, that *Miller* does not apply retroactively. Courts have disagreed whether *Miller* applies retroactively to cases on collateral review. Compare *Craig v. Cain*, 2013 U.S. App. LEXIS 431, 2013 WL 69128 (5th Cir. Jan. 4, 2013) (not retroactive); *People v. Carp*, 298 Mich. App. 472, 828 N.W.2d 685, 2012 Mich. App. LEXIS 2270, 2012 WL 5846553 (Mich. App. Nov. 15, 2012) (not retroactive); *Geter v. State*, 2012 Fla.

*App. LEXIS 16051*, 2012 WL 4448860 (Fla. App. Sept. 27, 2012) (not retroactive); with *State v. Simmons*, 99 So.3d 28 (La. 2012) (allowing for resentencing on collateral review in light of *Miller*); *People v. Morfin*, 2012 IL App (1st) 103568, 981 N.E.2d 1010, 367 Ill. Dec. 282, 2012 WL 6028634 (Ill. App. 2012) [\*5] (*Miller* retroactive). This case is not, however, before the court on collateral review. Rather, Plaintiffs challenge the constitutionality of Michigan's parole statute under § 1983.

"[B]oth the common law and our own decisions" have "recognized a general rule of retrospective effect for the constitutional decisions of this Court." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 94, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Id.* at 97. Because *Miller* was decided while this case was pending, its rule applies to the parties before the court.<sup>2</sup> Indeed, if ever there was a legal rule that should - as a matter of law and morality - be given retroactive effect, it is the rule announced in *Miller*. To hold otherwise would allow the state to impose *unconstitutional* punishment on some persons but not others, an intolerable miscarriage of justice.

2 Moreover, this court would find *Miller* retroactive on collateral [\*6] review, because it is a new substantive rule, which "generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 351-52, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Id.* at 353. "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant . . . faces punishment that the law cannot impose upon him.'" *Id.* at 352. *Miller* alters the class of persons (juveniles) who can receive a category of punishment (mandatory life without parole). Further, the Supreme Court applied *Miller* to the companion case before it - on collateral review - and vacated the sentence of Kuntrell Jackson. "[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Teague v. Lane*, 489 U.S. 288, 300, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

### III. Relief Sought by Plaintiffs

The issue here is what type of relief this court can afford to Plaintiffs. In considering this, the court must be mindful of the procedural posture of this case. Plaintiffs have exhausted direct review of their convictions and sentences; [\*7] they are not seeking a writ of habeas corpus. Rather, they are asking that the court declare *M.C.L. § 791.234(6)* (the parole statute) unconstitutional under § 1983. The distinction is important because Plaintiffs cannot attack their sentences under § 1983; rather, such relief must be obtained in state court or through habeas corpus. Indeed, Plaintiffs were careful to circumscribe their request for relief, emphasizing that they were not attacking their sentences, in order to survive Defendants' motion to dismiss. See July 15, 2011 Order at 8-9.

For this reason, the court cannot announce a categorical ban on a sentence of life without parole for juveniles, as Plaintiffs now request. See *Wilkinson v. Dotson*, 544 U.S. 74, 78, 125 S. Ct. 1242, 161 L. Ed. 2d 253 (2005) ("[A] prisoner in state custody cannot use a § 1983 action to challenge 'the fact or duration of his confinement.' He must seek federal habeas corpus relief (or appropriate state relief) instead.").

Despite the fact that they cannot challenge their sentences here, Plaintiffs suggest in their brief that they are entitled to a "judicial hearing with full consideration of the mitigating circumstances attendant to their child status at the time they committed the [\*8] offense so that their punishment reflects their lesser culpability and inherent rehabilitation capabilities." Pls.' Br. at 1. In other words, Plaintiffs suggest that they are entitled to re-sentencing. This is not relief that this court can grant in this case. Plaintiffs must seek such relief in state court or, if necessary, through a writ of habeas corpus.

Plaintiffs are entitled to relief with respect to the parole statute itself, however. The court declares *M.C.L. 791.234(6)* unconstitutional as it applies to these Plaintiffs, who received mandatory life sentences as juveniles. As a result, Plaintiffs will be eligible and considered for parole. It remains to be determined how that process will work and what procedures should be in place to ensure that Plaintiffs are fairly considered for parole. In this respect, the court will need further input from the parties.

Plaintiffs argue that the current parole system in Michigan, where parole may be denied "for any reason or no reason at all," is not a constitutional mechanism for compliance with *Graham* and *Miller*. However, is not clear what Plaintiffs want the system to look like, other than to require "some meaningful opportunity to obtain [\*9] release based on demonstrated maturity and rehabilitation." *Graham*, 130 S.Ct. at 2030. The undefined nature of Plaintiffs' request regarding changes in the parole system does not satisfy Plaintiffs' burden of demonstrating that they are entitled to summary judgment here. Plaintiffs need to articulate more clearly what changes in the parole system they believe are required by *Eighth Amendment*.

It may be that Plaintiffs are granted new sentencing hearings in state court, which may obviate the need for changes in the parole system. It appears, however, that the State and state courts (see *Carp*) intend to resist granting such hearings. Under these circumstances, the court believes that compliance with *Miller* and *Graham* requires providing a fair and meaningful possibility of parole to each and every Michigan prisoner who was sentenced to life for a crime committed as a juvenile.

The court directs the parties to provide further briefing on the issue of the procedures that court may equitably put in place to ensure that Plaintiffs receive a fair and meaningful opportunity to demonstrate that they are appropriate candidates for parole. Plaintiffs shall submit their brief by **March 1, 2013**; Defendants [\*10] shall submit a response by **March 22, 2013**. Plaintiffs may submit a reply by **March 29, 2013**.

#### ORDER

IT IS HEREBY ORDERED that Plaintiffs' motion for summary judgment is GRANTED IN PART and DENIED IN PART, consistent with this opinion and order.

IT IS FURTHER ORDERED that Defendants' motion for summary judgment is DENIED.

/s/ John Corbett O'Meara

United States District Judge

Date: January 30, 2013

E.D.N.Y.- Bklyn  
96-cv-1453  
13-cv-3522  
Gershon, J.

United States Court of Appeals  
FOR THE  
SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16<sup>th</sup> day of July, two thousand thirteen.

Present:

Jose A. Cabranes,  
Richard C. Wesley,\*  
*Circuit Judges.*

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Joseph Wang,

*Petitioner,*

v.

13-2426

United States of America,

*Respondent,*

Juvenile Law Center,

*Amicus Curiae.*

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Petitioner, *pro se*, requests an order authorizing the United States District Court for the Eastern District of New York to consider a successive 28 U.S.C. § 2255 motion. Upon due consideration, it is hereby ORDERED that the motion is GRANTED to allow him to file a § 2255 motion raising his proposed claim based on *Miller v. Alabama*, 132 S. Ct. 2455 (2012). See *Stone v. United States*, U.S.C.A. Dkt. 13-1486 at doc. 25 (order finding that petitioner had made a *prima facie* showing that

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\* The Honorable Reena Raggi recused herself from consideration of this motion. Pursuant to Second Circuit Internal Operating Procedure E(b), the matter is being decided by the two remaining members of the panel.

*Miller* set forth a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable), and doc. 19 (Government's response agreeing that *Miller* qualifies under § 2255(h)); *see also Hill v. Snyder*, 2013 WL 364198, at \*2 n.2 (E.D. Mich. Jan. 30, 2013) (noting that the court would find *Miller* retroactive on collateral review). *But see In re Morgan*, 713 F.3d 1365, 1367-68 (11th Cir. 2013) (finding *Miller* not retroactive on collateral review); *Craig v. Cain*, 2013 WL 69128, at \*2 (5th Cir. Jan. 4, 2013) (same).

Since this Court has only determined that Petitioner has made a *prima facie* showing that he has satisfied the successive petition requirements, *see* 28 U.S.C. § 2244(b)(3)(C), the district court is directed to address, as a preliminary inquiry under § 2244(b)(4), whether the United States Supreme Court's decision in *Miller* announced a new rule of law made retroactive to cases on collateral review, and thus permits Petitioner's new § 2255 claim to proceed. *See Quezada v. Smith*, 624 F.3d 514, 521-22 (2d Cir. 2010); *Bell v. United States*, 296 F.3d 127, 128 (2d Cir. 2002) ("the *prima facie* standard [applies to] our consideration of successive habeas applications under § 2255 . . ."). Finally, it is further ORDERED that Respondent's motion for an extension of time to file its response in this proceeding is DENIED as moot given the response filed by Respondent on July 3, 2013.

FOR THE COURT:  
Catherine O'Hagan Wolfe, Clerk


FILED: May 30, 2013

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 13-247

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In re: HOLLY LANDRY,

Movant.

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O R D E R

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Movant has filed a motion under 28 U.S.C. § 2244 for an order authorizing the district court to consider a second or successive application for relief under 28 U.S.C. § 2254. The court grants authorization for the movant to file a second or successive habeas petition, thus permitting consideration of the petition by the district court in the first instance.

Entered at the direction of the panel: Judge Wilkinson, Judge Motz, and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk

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In The  
**United States Court of Appeals**  
For The Fourth Circuit

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*In re* HOLLY MICHELLE LANDRY,

*Movant.*

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MOTION PURSUANT TO 28 U.S.C. § 2244 FOR AUTHORIZATION TO FILE  
A SECOND OR SUCCESSIVE APPLICATION FOR HABEAS CORPUS

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May 15, 2013

*Counsel for Movant.*

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**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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*In re* Holly MICHELLE Landry,

Oral Argument Requested

*Movant.*

NO. \_\_\_\_\_

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**MOTION PURSUANT TO 28 U.S.C. § 2244 FOR AUTHORIZATION TO FILE A  
SECOND OR SUCCESSIVE APPLICATION FOR HABEAS CORPUS**

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Holly Michelle Landry respectfully files this motion pursuant to 28 U.S.C. § 2244(b)(3)(A) for an order authorizing the United States District Court for the Eastern District of Virginia to consider her second application for a writ of habeas corpus under 28 U.S.C. § 2254. In support of her motion, Ms. Landry states as follows:

**INTRODUCTION**

Ms. Landry, a Virginia inmate, is serving a sentence of life without parole, plus an additional 50 years, for a homicide and related offenses committed when she was 16 years old. The Circuit Court of the City of Norfolk imposed this punishment under a mandatory sentencing scheme that, despite the mitigating circumstances of her youth, dreadful home environment, vulnerability to influence, and capacity for change, left the court with no discretion to sentence her to less than a lifetime of incarceration with no opportunity for release.

On June 25, 2012, the Supreme Court issued its decision in *Miller v. Alabama*, 567 U.S. \_\_\_, 132 S. Ct. 2455, holding that sentences of “mandatory life without parole for those” who, like Ms. Landry, were “under the age of 18 at the time of their crimes,” violate “the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’” *Id.* at 2460. Because the *Miller* rule is a new one, unavailable at the time of Ms. Landry’s first federal habeas petition, and the Supreme Court has made this rule retroactive on collateral review, *see* 28 U.S.C. § 2244(b), this Court should grant Ms. Landry’s petition for permission to file a second habeas petition to seek relief from her unconstitutional sentence.<sup>1</sup>

### **FACTUAL AND PROCEDURAL HISTORY**

On July 31, 1996, when Ms. Landry was 16 years old, she and four male co-defendants, including adults aged 25 and 35, robbed two of their Norfolk, Virginia neighbors, killing one and injuring the other. Ms. Landry was the only of the five to face trial, where she was convicted of capital murder, conspiracy, abduction, malicious wounding, and robbery. Her 35-year-old co-defendant testified against her in exchange for a lesser sentence and is scheduled to be released in 15 years.

At that time, Virginia law imposed a mandatory minimum sentence of life in prison without the possibility of parole for anyone—including a juvenile—

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<sup>1</sup> Indeed, a panel of this Court recently issued just such an Order in a materially identical case to that offered here by Ms. Landry. *See In re James*, No. 12-287, DKT. 36 (4th Cir. May 10, 2013).

convicted of capital murder. *See* VA. CODE § 18.2-10(a). On February 11, 1998, the Circuit Court of the City of Norfolk sentenced Ms. Landry to life in prison without the possibility of parole, plus an additional 50 years for the non-homicide offenses. The court was not permitted to consider any mitigating evidence relevant to the degree of Ms. Landry's culpability—her age, the extreme poverty in which she was raised, her mother's heroin and prescription drug addictions, her mother's neglect and failure to enroll Ms. Landry in school after the eighth grade, her mother's and stepfathers' physical abuse, her repeated stays in foster care, her learning disabilities, the traumatic impact of witnessing her young brother's hanging death, or the possibility that her continued development would permit her to escape the grim circumstances of her youth and make positive contributions to her community. *See* Ex. 1 (Declaration of Holly Michelle Landry, hereinafter "Landry Decl."). Rather, Virginia law required the court to ignore these factors and to sentence Ms. Landry to life without parole.

Ms. Landry appealed her conviction and sentence to the Virginia Court of Appeals, which affirmed on August 4, 1998. *Landry v. Commonwealth*, No. 0420-98-1 (Va. Ct. App. 1998). The Virginia Supreme Court refused Ms. Landry's petition for appeal on October 29, 1998. *Landry v. Commonwealth*, No. 0420-98-1, SCV 981832 (Va. 1998). Ms. Landry did not learn of this denial for two years because her attorney either did not attempt to notify her of it, or mailed the

notification to the wrong prison and failed to confirm its receipt. Nor did he advise Ms. Landry of avenues and time limits for post-conviction relief. Landry Decl. ¶ 14. The Virginia State Bar Disciplinary Board has since admonished her attorney for his handling of criminal cases. *Id.*

Having received no communication from her counsel, Ms. Landry initiated state and federal habeas corpus proceedings *pro se*. Ms. Landry filed a habeas petition in the Circuit Court of the City of Norfolk on March 4, 2004, challenging the admissibility of a statement she had made to the police and the sufficiency of the evidence against her. The court dismissed the petition as time-barred on May 25, 2004, and the Virginia Supreme Court affirmed on November 16, 2004.

*Landry v. Commonwealth*, SCV 041769 (Va. 2004). On February 23, 2005, Ms. Landry filed a habeas petition in the United States District Court for the Eastern District of Virginia, alleging ineffective assistance of counsel, prosecutorial and judicial misconduct, and insufficient evidence. The district court dismissed her petition as time-barred on March 29, 2006. Ms. Landry appealed that decision to this Court on April 17, 2006. In an unpublished *per curiam* opinion dated August 8, 2006, the Court denied Ms. Landry a certificate of appealability and dismissed her petition. *Landry v. Wheeler*, 193 Fed. App'x 261, 2006 WL 2277818 (4th Cir. 2006). At no point during any of her post-conviction proceedings in state or federal court did Ms. Landry challenge the constitutionality of the mandatory life

without parole sentence imposed upon her as a 16-year-old, and no court has considered that issue.

### **ARGUMENT**

#### **I. STANDARD FOR PERMISSION TO FILE A SECOND APPLICATION FOR HABEAS CORPUS UNDER 28 U.S.C. § 2244(B)**

Prior to filing a second application for habeas corpus, Ms. Landry must “move in the appropriate court of appeals for an order authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A). Such an application is permitted if Ms. Landry makes a “prima facie showing” that her claim “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” *Id.* § 2244(b)(2)(A), (3)(C).

To obtain prefiling authorization, Ms. Landry need not prove that she meets the standard for habeas relief set forth in Section 2244. Rather, the “prima facie showing” she must make in this Court requires “simply a sufficient showing of possible merit to warrant a fuller exploration by the district court.” *In re Williams*, 330 F.3d 277, 281 (4th Cir. 2003). The “showing of possible merit” refers to “the possibility that the claims in a successive application” will meet the requirements for a second habeas petition, “not the possibility that the claims will ultimately warrant a decision in favor of the applicant.” *Id.* at 282; *accord United States v. MacDonald*, 641 F.3d 596, 604 (4th Cir. 2011).

**II. MS. LANDRY HAS MADE A *PRIMA FACIE* SHOWING THAT *MILLER* IS A NEW, PREVIOUSLY UNAVAILABLE RULE MADE RETROACTIVE BY THE SUPREME COURT**

After the Supreme Court's decision in *Miller*, there can be no doubt that the mandatory life without parole sentence imposed upon Ms. Landry as a 16-year-old violates the Eighth Amendment's prohibition on "cruel and unusual punishments." U.S. Const. amend. VIII. The question before this Court is whether Ms. Landry may challenge her unconstitutional sentence in a second habeas petition, which requires her to make a *prima facie* showing that (1) her petition "relies on a new rule of constitutional law" that was "previously unavailable" and (2) the Supreme Court has made that new rule retroactive on collateral review. *See* 28 U.S.C. § 2244(b)(2)(A), (3)(C). The standard for permission to file a second petition is not an onerous one, and Ms. Landry has at least shown that the question of whether her claim under *Miller* meets the requirements of Section 2244 "warrant[s] a fuller exploration by the district court." *In re Williams*, 330 F.3d at 281.

**A. Ms. Landry Has Made A *Prima Facie* Showing That Her Claim Under *Miller* Was Previously Unavailable**

*Miller* announced a new rule of constitutional law that was "previously unavailable" to Ms. Landry. This Court has stated that "[t]he word 'previously' refers to the last federal proceeding . . . in which the applicant challenged the same criminal judgment." *In re Williams*, 364 F.3d 235, 239 (2004). Accordingly, the relevant inquiry here is whether the rule announced in *Miller* is "new" as compared

to case law as it existed on February 23, 2005, when Ms. Landry initially filed for federal habeas corpus relief. Under that standard, the *Miller* rule is unquestionably “new,” and “previously unavailable” to Ms. Landry, for purposes of Section 2244.

The Supreme Court has explained that a “new” rule is one that is “not dictated by precedent.” *Teague v. Lane*, 489 U.S. 288, 301 (1989). To be “dictated by precedent,” existing case law must so clearly prescribe the rule that it is “apparent to all reasonable jurists,” *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013), and not “susceptible to debate among reasonable minds,” *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

Surely no “reasonable jurist” could have viewed existing precedent in February 2005 as “dictat[ing]” a rule barring mandatory sentencing of juveniles to life without parole when, at that time, Supreme Court precedent expressly permitted the execution of minors, like Ms. Landry, who had been convicted of capital murder. *See Stanford v. Kentucky*, 492 U.S. 361, 370-71 (1989), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005).

Not surprisingly, much of the case law underpinning the Court’s decision in *Miller* post-dated Ms. Landry’s 2005 application for federal habeas relief. For instance, the Court relied heavily on *Roper*, 543 U.S. 551, which—a month after Ms. Landry filed her previous federal habeas petition—banned capital punishment for juveniles, as well as *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010),

which struck down life without parole for minors convicted of non-homicide crimes five years later.

To be sure, the Court in *Miller* relied on older precedent as well, including jurisprudence requiring individualized sentencing for those facing capital punishment. *See, e.g., Miller*, 132 S. Ct. at 2463-64 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978)). That the Court drew on these Eighth Amendment precedents in an Eighth Amendment decision is to be expected; it does not mean the *Miller* decision was “dictated” by them. *See Sawyer v. Smith*, 497 U.S. 227, 236 (1990) (“We do not doubt that our earlier Eighth Amendment cases lent general support to the conclusion reached in *Caldwell*. But neither this fact, nor petitioner’s contention that state courts ‘would have found *Caldwell* to be a predictable development in Eighth Amendment law,’ . . . suffices to show that *Caldwell* was not a new rule.”). Mere reliance on preexisting precedent cannot defeat the “new-ness” of a rule—the standard for identifying a “new” rule “would be meaningless if applied at this level of generality.” *Id.* Existing case law may “inform” or “even govern or control” the analysis in a particular case without “compel[ling]” its conclusion. *Id.*

Significantly, in both *Roper* (decided in 2005) and *Graham* (decided in 2010), the Court intimated in dicta that juveniles convicted of murder could still be sentenced to life without parole. *See Graham*, 130 S. Ct. at 2027; *Roper*, 543 U.S.

at 572. And while the “mere existence of a dissent” in *Miller* does not “suffice[] to show that the rule is new,” forceful dissents in that decision do provide persuasive evidence that *Miller* is a new rule. See *Beard v. Banks*, 542 U.S. 406, 415-16 n.5 (2004) (concluding that *Mills v. Maryland*, 486 U.S. 367 (1988), was not compelled by precedent in part because of the existence of dissenting opinions).

Binding precedent that would have permitted Ms. Landry’s execution in February 2005, the *Miller* Court’s heavy reliance on post-February 2005 precedent, Supreme Court majorities’ endorsement of life without parole for juveniles as late as 2010, and a vigorous four-Justice *Miller* dissent provide compelling support for the argument that *Miller* established a new rule that was unavailable in February 2005. Under these circumstances, Ms. Landry has at the very least shown there is “possible merit” to her argument that *Miller* meets this component of the Section 2244 standard for a second habeas application. See *In re Williams*, 364 F.3d at 239.

**B. Ms. Landry Has Made A *Prima Facie* Showing That The Supreme Court Made The *Miller* Rule Retroactive On Collateral Review**

*Miller*’s ban on mandatory life without parole for juveniles is also retroactive, and the Supreme Court has made it so. The standard for a second habeas petition in Section 2244 is satisfied if the Supreme Court “has held that the new rule is retroactively applicable to cases on collateral review.” *Tyler v. Cain*, 533 U.S. 656, 662 (2001). Such a holding need not, however, emerge explicitly from a single case. Rather, the Court may make a rule retroactive over the course

of “[m]ultiple cases” if “those cases necessarily dictate retroactivity of the new rule.” *Id.* at 666. As Justice O’Connor—whose vote was necessary to the judgment in the five-to-four *Tyler* decision—explained in a separate concurrence, if the Court “hold[s] in Case One that a particular type of rule applies retroactively to cases on collateral review and hold[s] 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.” *Id.* at 668-69 (O’Connor, J., concurring).

The nature of the rule announced in *Miller* necessarily dictates that the Supreme Court has made it retroactive to cases on collateral review. In *Teague*, the Court held that a new rule is retroactive if it is either “substantive” or a “watershed rule” of criminal procedure. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007); *Teague*, 489 U.S. at 307, 311; *see generally Tyler*, 533 U.S. at 666-67 (stating that a petitioner may satisfy the requirements of § 2244(b) when a rule is made retroactive under *Teague*); *id.* at 669-70 (O’Connor, J., concurring). *Teague* described a new “substantive” rule as one which places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.” *Teague*, 489 U.S. at 307. The Court subsequently clarified that “substantive” rules include those that “prohibit a certain category of punishment for a class of defendants because of their status or offense.” *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S.

304 (2002). As discussed below, Ms. Landry has made a *prima facie* case that *Miller*'s constitutional rule barring mandatory life without parole for juveniles is such a substantive rule. Alternatively, she has made a *prima facie* showing that *Miller*'s rule is a “watershed rule” of criminal procedure because it prevents an “impermissibly large risk” of an inaccurate criminal proceeding and “alter[s] our understanding of the bedrock procedural elements essential” to the fairness of that proceeding. *Whorton*, 549 U.S. at 418 (quoting *Sawyer v. Smith*, 497 U.S. 227, 242 (1990)); *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004). Finally, the *Miller* Court itself applied its holding retroactively to a petitioner on collateral review, which alone amounts to a *prima facie* case for retroactivity warranting “further exploration” by the district court. See *In re Williams*, 364 F.3d at 239.

1. *Ms. Landry Has Made A Prime Facie Showing That The Rule In Miller Is A Substantive Rule Of Constitutional Law That Applies Retroactively To Cases On Collateral Review*

The *Teague* and *Penry* standard for substantive constitutional rules is met here because *Miller*, by its own terms, expressly “prohibit[s] imposing a certain category of punishment”—mandatory life without parole—on a particular “class of defendants”—juveniles—because of their “status”—age. See *Penry*, 492 U.S. at 330. At a minimum, there is “possible merit” to Ms. Landry’s argument that *Miller*'s ban on mandatory juvenile life without parole is such a rule. See *In re Williams*, 330 F.3d at 282.

In *Penry*, the Court considered whether the Eighth Amendment prohibits the execution of mentally retarded persons convicted of murder. The petitioner came before the Court on collateral review, and the Court concluded that, as a threshold matter, the “new rule” sought by the petitioner could be applied retroactively under *Teague* as substantive because it “plac[ed] a certain class of individuals beyond the State’s power to punish by death,” and was thus “analogous to a new rule placing certain conduct beyond the State’s power to punish at all.” *Penry*, 492 U.S. at 330. “In both cases,” the Court stated, “the Constitution itself deprives the States of the power to impose a certain penalty.” *Id.* Thus, “the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.” *Id.*

The Supreme Court’s holding in *Miller* is precisely such a rule. The Court in *Miller* treated *mandatory* life without parole sentences as a particular category of punishment distinct from a sentence of life without parole imposed after consideration of mitigating evidence. *Miller*, 132 S. Ct. at 2460 (“We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’”); *see also id.* at 2479 (Roberts, C.J., dissenting) (“The sentence at issue is statutorily mandated life without parole.”). This is consistent with the

Court's prior treatment of mandatory death sentences in its "individualized sentencing cases," *id.* at 2471, which held that a regime that *mandates* capital punishment for specific crimes—without regard to mitigating circumstances—is cruel and unusual punishment, *see, e.g., Woodson*, 428 U.S. at 303-05; *Roberts v. Louisiana*, 428 U.S. 325, 335-36 (1976). Like *Miller*, those cases focused on the mandatory nature of the sentence and the "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant." *Woodson*, 428 U.S. at 303. Indeed, the Supreme Court applied the holdings of those cases retroactively to cases on collateral review, stressing "the constitutional significance of individualized sentencing in capital cases." *See Sumner v. Shuman*, 483 U.S. 66, 85 (1987).

*Miller* also made clear that juveniles constitute a distinct class of offenders, explicitly recognizing that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464. And the Court repeatedly emphasized the "hallmark features" that make juveniles *as a class* ineligible for mandatory life without parole sentences—including their "immaturity, impetuosity, and failure to appreciate risks and consequences"; their susceptibility to influence; and their inability to extricate themselves from "crime-producing settings." *Id.* at 2458, 2468 (internal citations and quotations omitted). These characteristics imbue juveniles with "diminished culpability" that, paired with "heightened capacity" for

moral and intellectual growth, requires individualized and especially searching assessment before they may be sentenced to life without parole. *Id.* at 2469.

Because the Court likened mandatory life without parole for juveniles to the death penalty, focusing on its particular harshness as applied to juvenile defendants, *see id.* at 2466-67, prior decisions that categorically—and retroactively—bar imposition of capital punishment on specific classes of individuals are also instructive. The Supreme Court has explained that prohibitions on imposing the death penalty on particular classes of persons are substantive rules because the Eighth Amendment “places a *substantive* restriction on the State’s power to take the life of,” for example, “a mentally retarded offender,” *Atkins*, 536 U.S. at 321 (emphasis added); a juvenile, *Roper*, 543 U.S. at 578; an offender who is insane; or one charged with a non-homicide crime, *Penry*, 492 U.S. at 329-30. These rules are based on constitutional concerns regarding culpability and proportionality—the very concerns that animated the Court’s decision in *Miller*. *See, e.g., Atkins*, 536 U.S. at 321.

The import of this intersecting precedent is clear: The category of punishment at issue here (mandatory life without parole) cannot be imposed upon a particular class of offenders (juveniles) because their status (age) creates too great a risk of punishment unconstitutionally disproportionate to their culpability. The fact that a juvenile whose sentence is vacated for individualized consideration

theoretically could be resentenced to life without parole does not change this analysis. Under *Miller*, the substantive violation of Ms. Landry's constitutional rights is that her sentence was imposed *mandatorily*, without any individualized consideration. Ms. Landry, who remains subject to that sentence, is thus serving "a punishment that the law cannot impose." *Summerlin*, 542 U.S. at 352; *see also Sumner*, 483 U.S. at 85 (vacating a mandatory death sentence on collateral review and stating that the "sentencing authority may decide that a sanction less than death is not appropriate in a particular case, [but] the fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a lesser sentence").

By requiring consideration of mitigating evidence before imposing life without parole, *Miller* significantly narrowed the universe of juvenile defendants who constitutionally may receive that sentence: "[G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Miller*, 132 S. Ct. at 2469. A rule that has such an effect is "substantive" for retroactivity purposes. *See Summerlin*, 542 U.S. at 354 (rule that narrows the category of offenders eligible for capital punishment by first requiring the finding of "a certain fact essential to the death penalty" is substantive rather than procedural).

It makes no difference to the analysis that *Miller* may require courts to institute a new procedure (a sentencing hearing taking into account mitigating factors). While rules that “regulate only the *manner of determining* the defendant’s culpability” may be procedural, *id.* at 353 (emphasis in original), the rule in *Miller* does much more than that. *Summerlin* held that the rule requiring a jury rather than a judge to find the aggravating factors required for a death sentence did not apply retroactively because it did not change the class of persons punishable by death, or the substantive requirements necessary for imposition of the death penalty, but merely “allocate[d] decisionmaking authority” in sentencing. *Id.* By contrast, *Miller* “altered . . . the class of persons that the law [may] punish[.]” by the imposition of mandatory life without parole. And *Summerlin* itself makes clear that such a rule is substantive for purposes of a retroactivity analysis. *Id.* at 354.

Indeed, the U.S. Department of Justice has taken this position, stating before the Eighth Circuit that “*Miller* should be regarded as a substantive rule for *Teague* purposes under the analysis in Supreme Court cases.” *Johnson v. United States*, No. 12-3744 (8th Cir. filed Feb. 22, 2013) (supporting petitioner’s motion for authorization to file a successive habeas application under 28 U.S.C. § 2255 for a claim relying on *Miller*).<sup>2</sup> Although not dispositive, this position demonstrates that

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<sup>2</sup> A copy of this filing is appended to this motion as Exhibit 2.

Ms. Landry's *Miller* claim has a sufficient showing of "possible merit to warrant a fuller exploration by the district court." *In re Williams*, 330 F.3d at 281.

2. *Even If Miller Is A New Rule Of Criminal Procedure, Ms. Landry Has Made A Prima Facie Showing That It Is A Retroactive Watershed Rule*

Alternatively, Ms. Landry is entitled to file a second habeas application because *Miller* announced a "watershed rule[] of criminal procedure" that applies retroactively. *See Teague*, 489 U.S. at 311. "Watershed rules" (1) implicate "the fundamental fairness and accuracy of the criminal proceeding," *Saffle v. Parks*, 494 U.S. 484, 495 (1990), and (2) "alter our understanding of the bedrock procedural elements" of that proceeding's fairness, *Sawyer*, 497 U.S. at 242.

The new rule in *Miller* meets the first requirement by announcing a "foundational principle" of fair sentencing for juveniles—namely, "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 132 S. Ct. at 2466. Sentencing children to "that harshest prison sentence" without special and focused attention on their "youth (and all that accompanies it)" "poses too great a risk of disproportionate punishment." *Id.* at 2469. To avoid this constitutionally impermissible risk, sentencers must now take particularized account of the mitigating circumstances of youth prior to imposing life without parole on juveniles.

The rule in *Miller* also satisfies the second component of a watershed procedural rule by "alter[ing] our understanding" of fair criminal proceedings for

juveniles. *Sawyer*, 497 U.S. at 242. Like the quintessential “watershed rule” of criminal procedure, the right to counsel announced in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the rule in *Miller* has “effected a profound and sweeping change” in how juveniles may be sentenced by striking down sentencing schemes in 29 jurisdictions. See *Whorton*, 549 U.S. at 418, 421; *Miller*, 132 S. Ct. at 2471. Statutes enacted by the majority of the states as well as by Congress are now invalid, and sentencing of juveniles across the country must now include special focus on the mitigation inherent in youth to withstand constitutional scrutiny. To the extent it is not a substantive rule, then, this universal change in the nation’s approach to juvenile sentencing establishes, at the very least, a *prima facie* showing that *Miller*’s holding is a “watershed rule.”

3. *The Supreme Court Made The Rule In Miller Retroactive By Announcing And Applying It In A Case On Collateral Review*

Finally, the Supreme Court made *Miller*’s holding retroactive by applying it to petitioner Kuntrell Jackson, whose case (which the Court consolidated with Evan Miller’s) was on collateral review. See *Miller*, 132 S. Ct. at 2461. Under *Teague*, “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 through one of the two exceptions.” *Teague*, 489 U.S. at 316. This rule is one of fundamental fairness: “once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it

be applied retroactively to all who are similarly situated.” *Id.* at 300. For that reason, the Court in *Teague* declined to grant relief to the petitioner—who was on collateral review—because doing so would require applying it to him “even though it would not be applied retroactively to others similarly situated.” *Id.* at 315.

In contrast to *Teague*, the Court used *Jackson v. Hobbs*, a case it expressly acknowledged was on collateral review, together with *Miller v. Alabama*, both to announce and to apply its holding that a mandatory sentence of life without parole constitutes cruel and unusual punishment for juveniles. 132 S. Ct. at 2461, 2468-69. The Court’s invalidation of Jackson’s sentence plainly demonstrates *Miller*’s retroactive effect. *See Teague*, 489 U.S. at 316. The Court’s analysis in *Teague* forecloses characterization of the Court’s action with respect to petitioner Jackson as meting out individual justice to a particular litigant. As *Teague* makes plain, it would be inappropriate to give one habeas petitioner relief based on a new rule if the rule did not apply retroactively to *all* cases on collateral review.

That the Court did not simply dispose of petitioner Jackson’s case—either by dismissing it as improvidently granted or by addressing retroactivity explicitly as it has in other similar cases, *see Caspari v. Bohlen*, 510 U.S. 383, 389 (1994); *Horn v. Banks*, 536 U.S. 266, 271 (2002)—demonstrates that *Miller* applies retroactively under *Teague*’s exceptions. As a consequence, “evenhanded justice” requires this Court to apply that rule to Ms. Landry’s case as well. *Teague*, 489

U.S. at 300; *see also Collins v. Youngblood*, 497 U.S. 37, 40-41 (1990). At a minimum, the Court's actions establish a *prima facie* case that its holding applies retroactively to *all* defendants, whether on direct or collateral review.

\* \* \*

In sum: The only question before this Court is whether the district court may be permitted to hear Ms. Landry's case. The validity of Ms. Landry's underlying constitutional claim is not currently at issue. And this Court need not determine whether *Miller* announces a new retroactive rule of constitutional law or whether the Supreme Court has made it retroactive, but merely whether Ms. Landry has made a *prima facie* showing that she can meet the standard for relief applicable to a second habeas application. 28 U.S.C. § 2244(b)(2)(A), (3)(C). Because she has made the required *prima facie* showing, she should be permitted to seek relief from a sentence the Supreme Court unequivocally deemed "cruel and unusual."

#### **PRAYER FOR RELIEF**

For the above stated reasons, Holly Landry requests that this Court grant her the following relief:

- (1) An order authorizing the U.S. District Court for the Eastern District of Virginia to consider Ms. Landry's second or successive habeas petition under 28 U.S.C. § 2254; and
- (2) Any further relief that this Court deems appropriate.

Date: 05/15/2013

Respectfully submitted,

/s Danielle Spinelli

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**CERTIFICATE OF SERVICE**

I certify that on this 15th day of May, 2013, the foregoing document was filed through the CM/ECF system, and that it was served on all parties by serving a true and correct copy at the addresses listed below:

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**DALE DWAYNE CRAIG, Petitioner-Appellant v. BURL CAIN, WARDEN,  
LOUISIANA STATE PENITENTIARY, Respondent-Appellee**

No. 12-30035

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

*2013 U.S. App. LEXIS 431*

January 4, 2013, Decided

**PRIOR HISTORY:** [\*1]

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge. USDC No. 3:10-CV-766.

*Craig v. Cain*, 2011 U.S. Dist. LEXIS 141184 (M.D. La., Dec. 7, 2011)

**COUNSEL:** For DALE DWAYNE CRAIG, Petitioner - Appellant: John M. Landis, Esq., Stone Pigman Walther Wittmann, L.L.C., New Orleans, LA.

For BURL CAIN, WARDEN, LOUISIANA STATE PENITENTIARY, Respondent - Appellee: Colin Andrew Clark, Esq., Assistant Attorney General, Office of the Attorney General for the State of Louisiana, Baton Rouge, LA.

**JUDGES:** Before HIGGINBOTHAM, OWEN, and SOUTHWICK, Circuit Judges.

**OPINION**

## PER CURIAM:

A member of this panel previously denied Dale Dwayne Craig's request for a certificate of appealability ("COA") to appeal from the district court's denial of his 28 U.S.C. § 2254 application. Craig has filed a motion asking this court to reconsider the denial in light of the United States Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Additionally, Craig argues that his request for a COA was erroneously denied based on this court's application of the waiver doctrine.

In *Miller*, the Supreme Court held that "the *Eighth Amendment* forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 2469. Craig [\*2] was seventeen at the time of his offense. He was originally sentenced to death; however, his sentence was commuted to life without the possibility of parole following the Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). *Miller* was decided after 1997 when Craig's sentence became final, and Craig now seeks retroactive application of *Miller* in this collateral attack on his sentence.

A new rule is applied retroactively to cases on collateral review if it (1) "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or (2) "requires the observance of those procedures that are implicit in the concept of ordered liberty." *Teague v. Lane*, 489 U.S. 288, 307, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (internal quotations omitted).

A threshold inquiry is whether the rule in question constitutes a "new rule." *E.g.*, *Beard v. Banks*, 542 U.S. 406, 411, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004). "In general ... a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. A rule is thus new "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* [\*3] When Craig's conviction became final, *Miller* was not dictated by precedent. Instead, *Miller* established for the first time a requirement of individualized sentencing outside the death penalty context. *See* 132 S. Ct. at 2470.

To overcome the general bar to retroactivity of new rules on collateral review, Craig must meet one of the two *Teague* exceptions. *Teague*, 489 U.S. 307. The first exception extends to "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *O'Dell v. Netherland*, 521 U.S. 151, 157, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997). This exception appears to apply only when a new rule completely removes a particular punishment from the list of punishments that can be constitutionally imposed on a class of defendants, not when a rule addresses the considerations for determining a sentence. For example, we have used *Teague's* first exception in applying prohibitions on the execution of defendants who are mentally handicapped or juveniles, and sentences of life imprisonment without parole for juveniles convicted of nonhomicide offenses. *Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002) (retroactively applying *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)); *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) [\*4] (citing *Arroyo v. Dretke*, 362 F. Supp. 2d 859, 883 (W.D. Tex. 2005)) (*Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)); *Sparks*, 657 F.3d at 262 (*Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010))).

By contrast, the Supreme Court has denied retroactive application of prohibitions against weighing invalid aggravating circumstances in certain circumstances, imposition of a death sentence by a jury that has been led to believe responsibility for determining the appropriateness of a death sentence rests elsewhere, and capital-sentencing schemes that foreclose a jury from considering all mitigating evidence. *Lambrix v. Singletary*, 520 U.S. 518, 539, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997) (foreclosing retroactive application of *Espinosa v. Florida*, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992)); *Sawyer v. Smith*, 497 U.S. 227, 241, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990) (*Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985)); *Beard v. Banks*, 542 U.S. 406, 417, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004) (*Mills v. Maryland*, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988)); see also *Saffle v. Parks*, 494 U.S. 484, 495, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990) (holding that a new rule prohibiting an antisympathy jury instruction did not fall under *Teague's* first exception).

The *Miller* "decision does not categorically bar a penalty for a class of offenders or type of crime . . . ." *Miller*, 132 S. Ct. at 2471. *Miller* [\*5] does not satisfy the test for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles; *Miller* bars only those sentences made mandatory by a sentencing scheme. *Id.* at 2469. Therefore, the first *Teague* exception does not apply.

The second *Teague* exception is limited in scope. *Beard*, 542 U.S. at 417. This exception applies to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" or "implicit in the concept of ordered liberty." *Id.*; *Teague*, 489 U.S. at 307 (quotation omitted). "In providing guidance as to what might fall within this exception, [the Court has] repeatedly referred to the rule of *Gideon v. Wainwright* [] and only to this rule." *Beard*, 542 U.S. at 417 (citations omitted). The Court has noted that "it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception." *Id.*

The Supreme Court's decision in *Miller* is an outgrowth of the Court's prior decisions that pertain to individualized-sentencing determinations. The holding in *Miller* does not qualify as a "watershed rule[]" of criminal procedure implicating the fundamental fairness [\*6] and accuracy of the criminal proceeding." *Beard*, 542 U.S. at 417.

Craig also contends that this court erred in denying his COA based on waiver. At the outset, we note that Craig's COA was not denied based solely on his waiver of certain claims. Instead, it was denied based on his failure to make the requisite showing of "the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Nonetheless, the order denying Craig's COA stated: "To the extent that he has not raised his underlying claims that his defense counsel rendered ineffective assistance and that defense counsel's admission of guilt constituted a guilty plea, he has abandoned those unraised issues." Craig failed to brief these issues in his COA motion; therefore, they were appropriately considered waived.

Craig's motion for reconsideration is DENIED.



1 of 1 DOCUMENT

Kamil Hakeem Johnson, Petitioner v. United States of America, Respondent

No. 12-3744

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

2013 U.S. App. LEXIS 14105

May 23, 2013, Submitted

July 12, 2013, Filed

**PRIOR HISTORY:** [\*1]

Appeal from United States District Court for the District of Minnesota - Minneapolis.

*United States v. Crenshaw*, 359 F.3d 977, 2004 U.S. App. LEXIS 3963 (8th Cir. Minn., 2004)

**COUNSEL:** Kamil Hakeem Johnson, Petitioner, Pro se, Coleman, FL.

For United States of America, Respondent: James Lackner, U.S. ATTORNEY'S OFFICE, Saint Paul, MN; Jeffrey S. Paulsen, Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, Minneapolis, MN.

**JUDGES:** Before SMITH, ARNOLD, and COLLOTON, Circuit Judges. COLLOTON, Circuit Judge, dissenting.

**OPINION**

PER CURIAM.

Kamil Hakeem Johnson seeks authorization to file a successive 28 U.S.C. § 2255 motion, asserting that *Miller v. Alabama*, 132 S. Ct. 2455, 2460, 183 L. Ed. 2d 407 (2012), which held that a sentencing scheme that requires a sentence of life imprisonment without parole for certain crimes committed by defendants who were under the age of 18 violates the *Eighth Amendment*, announced a new rule that applies retroactively, see 28 U.S.C. § 2255(h)(2). We conclude that Mr. Johnson has made a *prima facie* showing, see 28 U.S.C. §§ 2255(h), 2244(b)(3)(C), that his motion contains "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C. § 2255(h)(2), and we therefore grant

him authorization to file a successive § 2255 [\*2] motion.

In granting authorization we join most other circuits in adopting the proposition that a *prima facie* showing in this context is "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court," see *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997). See *Case v. Hatch*, F.3d. , 2013 U.S. App. LEXIS 7742, 13 WL 1501521, at \*1, 10-12 (10th Cir. April 12, 2013); *Goldblum v. Klem*, 510 F.3d 204, 219 (3rd Cir. 2007); *In re Williams*, 330 F.3d 277, 281 (4th Cir. 2003); *In re Holladay*, 331 F.3d 1169, 1173-74 (11th Cir. 2003); *Bell v. United States*, 296 F.3d 127, 128 (2d Cir. 2002); *Reyes-Requena v. United States*, 243 F.3d 893, 898-99 (5th Cir. 2001); *Thompson v. Calderon*, 151 F.3d 918, 925 (9th Cir. 1998); *Rodriguez v. Superintendent, Bay State Corr. Ctr.*, 139 F.3d 270, 273 (1st Cir. 1998), abrogated on other grounds by *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). We emphasize that the "district court must not defer" to our "preliminary determination" in granting the authorization, *Case*, 2013 U.S. App. LEXIS 7742, 13 WL 1501521, \*11, as our "grant is... tentative in the following sense: the district court must dismiss the motion that we have allowed the applicant to file, without [\*3] reaching the merits of the motion, if the court finds that the movant has not satisfied the requirements for the filing of such a motion," *Bennett*, 119 F.3d at 469-70 (citing 28 U.S.C. § 2244(b)(4)). The government here has conceded that *Miller* is retroactive and that Mr. Johnson may be entitled to relief under that case, and we therefore conclude that there is a sufficient showing here to warrant the district court's further exploration of the matter.

**DISSENT BY:** COLLOTON

**DISSENT**

COLLTON, Circuit Judge, dissenting.

Like the Eleventh Circuit in *In re Morgan*, 713 F.3d 1365 (11th Cir.), reh'g denied, 2013 U.S. App. LEXIS 11756, 13 WL 2476318 (11th Cir. June 10, 2013), I would deny the motion for authorization to file a second or successive motion under 28 U.S.C. § 2255, because the movant has not made a *prima facie* showing that *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), announced a new rule of constitutional law that has been "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255(h)(2). A new rule is not "made retroactive" unless the Supreme Court holds it to be retroactive. *Tyler v. Cain*, 533 U.S. 656, 663, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001). Although movant Kamil Hakeem Johnson and the government suggest reasons why reasonable [\*4] jurists could believe that the Court in the future might conclude that *Miller* announced a "substantive" rule, and therefore should apply retroactively, see *Schriro v. Summerlin*, 542 U.S. 348, 351, 352 n.4, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004), the motion for authorization has merit only if

the Court's *holdings to date* "necessarily dictate retroactivity of the new rule." *Tyler*, 533 U.S. at 663 n.5, 666. As the government acknowledges in its response to the pending motion, "[t]o date, the new rules the Court has treated as substantive have categorically prohibited a particular outcome for a particular class of defendants, regardless of the procedure employed." Gov't Resp. at 12. *Miller* does not fit within that class of new rules; it creates the possibility of a different result through individualized sentencing, *Miller*, 132 S. Ct. at 2460, but it does not prohibit an outcome of life imprisonment for a juvenile like Johnson, who shot a .38 caliber pistol in the direction of gang members at a gas station and killed a four-year-old girl returning home from a day at a neighborhood festival. See *id.* at 2469 ("[W]e do not foreclose a sentencer's ability to make that judgment in homicide cases"); see also *United States v. Crenshaw*, 359 F.3d 977, 981-83 (8th Cir. 2004) [\*5] (recounting the evidence against Johnson). To rule that *Miller* announced a "substantive" rule would require an extension of the Supreme Court's holdings, and the motion for authorization should therefore be denied.

**APPENDIX C**

Tulloch v. Gerry, No. 12-CV-849

(Merrimack N.H. Super. Ct. 7/29/2013)

(Order granting habeas relief in four consolidated cases, holding Miller is a retroactive substantive rule)

Calif. Sen. Bill No. 9 (9/30/2012)

Louisiana Act No. 239 (2013)

North Carolina Sess. L. 2012-148

Wyoming Enrolled Act No. 16 (2013)

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Robert Tulloch

v.

Richard Gerry, Warden

No. 12-CV-849

\*\*\*

Robert Dingman

v.

Richard Gerry, Warden

No. 13-CV-050

\*\*\*

Eduardo Lopez, Jr.

v.

Richard Gerry, Warden

No. 13-CV-085

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

SUPERIOR COURT

The State of New Hampshire

v.

Michael Soto

No. 08-CR-1235

ORDER

In these four cases, petitioners Robert Tulloch, Robert Dingman, and Eduardo Lopez (jointly, the "petitioners") each seek a writ of *habeas corpus* holding that the mandatory sentences imposed

on them of life without parole violate the Eighth and Fourteenth Amendments to the United States Constitution and part 1, articles 18 and 33 of the New Hampshire Constitution. *See Miller v. Alabama*, 132 S.Ct. 2455 (2012). Defendant Michael Soto<sup>1</sup> asks the court to vacate the mandatory sentence of life without parole imposed on him under the same rationale. *Miller* holds that mandatory sentences of life without parole cannot be imposed on juvenile offenders after a homicide conviction without a sentencing hearing that takes into consideration mitigating factors directly related to their age at the time of their crime. Citing *Miller*, the petitioners seek new sentencing hearings. Because each of the petitioners' sentences was imposed before the United States Supreme Court handed down the holding in *Miller*, the petitioners assert that the rule announced therein must be applied to them retroactively. Although the respondents<sup>2</sup> agree to the petitioners' construction of *Miller*, they object to the petitioners' contention that the rule from *Miller* applies retroactively. These cases have been consolidated to address this threshold legal issue. *See Order, State's Assented to Motion to Consolidate*, February 10, 2013. The court heard argument on May 14, 2013. Because *Miller v. Alabama* announced a new substantive rule, it applies to the petitioners' cases retroactively. Therefore, their petitions for a writ of *habeas corpus* and Mr. Soto's motion to vacate his sentence are GRANTED. The cases are remanded for sentencing hearings consistent with *Miller v. Alabama*.

On March 23, 1991, petitioner Lopez approached a vehicle and demanded money of the occupants—Robbie Goyette and another individual. When Goyette refused and attempted to drive away, Lopez ran after the car, pulled out a gun, and shot Goyette in the neck, killing him. Later, Lopez resisted arrest and assaulted a police officer. Lopez was 17 years old at the time of the murder. Before trial, the superior court did not accept certification of Lopez as an adult; however, the New Hampshire Supreme Court reversed and directed the trial court to accept certification of Lopez as an adult offender. *In re Eduardo L.*, 136 N.H. 678 (1993). Lopez was tried and convicted in 1993 of,

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<sup>1</sup> The court will include Mr. Soto when it jointly refers to all moving parties as the "petitioners."

<sup>2</sup> The court will include the State of New Hampshire in all references to "respondents."

*inter alia*, first-degree murder. See RSA 630:1-a (1986). After his convictions, Lopez was sentenced to mandatory life in prison without parole. RSA 630:1-a, III. The Supreme Court affirmed. *State v. Lopez*, 139 N.H. 209 (1994).

In 1997, petitioner Dingman was convicted of two counts of first-degree murder and one count of conspiracy to commit first-degree murder, See RSA 630:1-a (1996) and RSA 629:3 (1996). The jury found petitioner guilty of acting in concert with his younger brother in the murder of their parents. At the time of the murders, the petitioner was 17-years-old. The court sentenced the petitioner to mandatory life in prison without parole pursuant to RSA 630:1-a, III. The Supreme Court affirmed. *State v. Dingman*, 144 N.H. 113 (1999).

Petitioner Tulloch was one of two teenagers involved in the murders of two Dartmouth college professors in 2002. Tulloch pled guilty to two counts of first-degree murder and one count of conspiracy to commit murder. The court imposed a mandatory sentence pursuant to RSA 630:1-a, III. Tulloch was 17 years of age at the time of his crimes.

In 2007, defendant Soto traveled from Nashua to Manchester to bring a friend his gun to settle a dispute. When the men tracked down the man they were looking for, Soto cocked the gun and handed it to his friend, who ultimately pulled the trigger. At the time, Soto was 17 years of age. Soto was convicted of accomplice to first-degree murder. Immediately after the jury verdict, the court imposed a mandatory sentence of life without parole pursuant to RSA 630:1-a, III. The Supreme Court affirmed. *State v. Soto*, 162 N.H. 708 (2011).

On June 25, 2012, after each of the petitioners' convictions became final, the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller v. Alabama*, 132 S.Ct. at 2469. In deciding the constitutional issue, the court consolidated two cases: *Miller*, on direct appeal, and *Jackson v. Hobbs*, a case before the court on collateral review. Both cases involved 14-year-old boys charged and convicted of first-degree murder and sentenced to mandatory life without parole. Con-

sistent with the holding, the cases were reversed and remanded for further sentencing proceedings.

*Id.* at 2475.

The court reasoned that “[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.” *Id.* The court provided that those charged with sentencing juveniles must take into account “[a]n offender’s age and the wealth of characteristics attendant to it.” *Id.* at 2467. Under a mandatory life without parole sentencing scheme, a sentencing court is precluded from considering:

[a juvenile’s] 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 2468 (citations omitted). The court did not foreclose the option of a life without parole sentence for juvenile homicide offenders; rather, the holding “require[s] [sentencing courts] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 2469. Therefore, pursuant to this holding, a juvenile homicide offender is entitled to a sentencing hearing so that the court may consider these mitigating circumstances. The court stated that “appropriate occasions for sentencing juveniles to this harshest penalty will be uncommon. This is especially so because of the great difficulty ... of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Id.* (citations and quotations omitted).

Based on *Miller*, the petitioners now contend that their sentences are unlawful and unconstitutional. The petitioners request that their sentences be vacated and move for a sentencing hearing

consistent with *Miller*, the Eighth Amendment of the United States Constitution, and part 1, articles 18 and 33 of the New Hampshire Constitution. Part 1, articles 18 and 33 of the New Hampshire Constitution provide at least as much protection against disproportionate punishment and excessive fines as the Eighth Amendment to the United States Constitution. *State v. Enderson*, 148 N.H. 252, 258 (2002). For this reason, the court will base its analysis on the state Constitution, relying on federal cases only to guide the court's analysis. *State v. Pliskaner*, 128 N.H. 486, 488 (1986). On the issue of the retroactivity of *Miller*, however, federal law governs. *State v. Tallard*, 149 N.H. 183 (2003).

As discussed above, *Miller* was decided after each of the petitioners' convictions became final. Thus, the petitioners argue first, as they must, that *Miller* is retroactive. *See Horn v. Banks*, 536 U.S. 266, 269 (2002) (per curiam) (recognizing that retroactivity is a threshold issue). The petitioners argue that *Miller* announced a new substantive rule, giving it retroactive effect pursuant to *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion). In support, the petitioners argue that, within the decision, the Supreme Court implied the decision's retroactive effect. Thus, it is a substantive rule. The petitioners also cite cases decided after *Miller*, which have held that *Miller* may be applied retroactively. The respondents object. They cite to language in *Miller* and cases decided thereafter to support their position that *Miller* announced a new procedural rule that should not be applied retroactively.

As indicated above, "[t]he determination whether a constitutional decision of the United States Supreme Court is retroactive ... is a matter of federal law." *State v. Tallard*, 149 N.H. at 185 (brackets omitted), citing *Am. Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 177-78 (1990) (plurality opinion). This is so because "[t]he retroactive applicability of a constitutional decision of the Supreme Court ... is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Id.* (brackets omitted). As a result, *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion) governs this court's retroactivity determination. *Id.* at 186.

With only two exceptions, decisions announcing “new rules” are not given retroactive effect when a case involves a collateral attack. *Teague*, 489 U.S. at 300-01. “[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.” *Id.* at 301. “To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final.” *Id.* The retroactivity determination under *Teague* is made objectively. *Id.*

“The *Teague* inquiry is conducted in three steps.” *O’Dell v. Netherland*, 521 U.S. 151, 156 (1997). First, the court must determine whether the constitutional decision was issued after the date that the petitioners’ convictions became final. *Id.* Next, the court must consider whether a “court considering the defendant’s claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution.” *Id.* (brackets and quotations omitted). “If not, then the rule is new.” *Id.* If the rule is new, the final step is to “determine whether the rule nonetheless falls within one of the two narrow exceptions to the *Teague* doctrine.” *Id.* at 157.

Under the first narrow exception, “a new rule should be applied retroactively if it places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.’” *Teague*, 489 U.S. at 311, quoting *Mackey v. United States*, 401 U.S. 667, 692 (Harlan, J. concurring in judgments in part and dissenting in part.). This has been interpreted to mean that new **substantive** rules should apply retroactively on collateral review. “This includes decisions that narrow the scope of a criminal statute by interpreting its terms as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the state’s power to punish.” *Schriro v. Summerlin*, 542 U.S. 348, 351–352 (2004) (citations omitted).

Under the second narrow exception, “a new rule should be applied retroactively if it requires the observance of ‘those procedures that ... are implicit in the concept of ordered liberty.’” *Teague*, 489 U.S. at 311, citing *Mackey*, 401 U.S. at 693. This is “reserved for watershed rules of criminal

procedure.” *Id.* In other words, new rules that reflect the judiciary’s changed perception of “the bed-rock procedural elements that must be found to vitiate the fairness of a particular conviction” must be applied retroactively. *Id.*, quoting *Mackey*, 401 U.S. at 693–694. “For example, such ... is the case with the right to counsel at trial now held a necessary condition precedent to any conviction for a serious crime.” *Id.*; see *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The parties agree that *Miller* announced a new rule. Therefore, to determine whether the *Miller* decision applies retroactively, the court need only decide whether the rule is procedural or substantive. If the rule is procedural, it is not retroactive. If the rule is properly categorized as a substantive or a watershed rule of criminal procedure, it fits into one of the two *Teague* exceptions and applies retroactively.

In support of their argument that the *Miller* rule is substantive, the petitioners’ first point to the *Miller* court’s choice of deciding a companion case, *Jackson v. Hobbs*, at the same time, despite the fact that *Jackson* was on collateral review. The petitioners argue that this was a retroactive application of the rule to a collateral review and, thus, implies an intent of applying the rule retroactively. The court agrees.

Implicit in the *Teague* ruling that new rules are not given retroactive effect on collateral review “is the principle that *habeas corpus* cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules will be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated.” 489 U.S. at 316. In making this secondary holding, the court recognized that “the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment hardly comports with the ideal of administration of justice with an even hand.” *Id.* at 315, citing *Fuller v. Alaska*, 393 U.S. 80, 82 (1968) (if a rule is applied to the defendant in the case announcing the rule, it should be applied to all others similarly situated). To solve this problem, the court stated that it would “simply refuse to an-

nounce 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.” *Id.* at 316.

In *Miller*, the court decided two cases: the title case and *Jackson v. Hobbs*. Both cases involved 14-year-old boys convicted of first-degree murder and sentenced to mandatory life without the possibility of parole. Both petitioners asserted that these sentences were unconstitutional under the Eighth Amendment’s protection against cruel and unusual punishment. Procedurally, though, the cases were different. In *Miller*, the defendant’s case was on direct review to the Supreme Court after the Alabama state court denied review. 132 S.Ct. at 2463. In contrast, the *Jackson* case was on collateral review after the Arkansas state court affirmed the defendant’s convictions and later denied state *habeas* review. *Id.* at 2461. Nevertheless, the Supreme Court accepted the petition for writ of *certiorari* in both cases on the same day, the cases were argued in tandem, and they were decided simultaneously as companion cases. See *Jackson v. Hobbs*, 132 S.Ct. 548 (Nov. 7, 2011); *Miller v. Alabama*, 132 S.Ct. 548 (Nov. 7, 2011). After holding that the imposition of mandatory life sentences without the possibility of parole on juvenile homicide offenders violates the Eighth Amendment, the Supreme Court reversed the judgments of both the Alabama Court of Criminal Appeals and the Arkansas Supreme Court and remanded both cases for further proceedings consistent with such holding. *Miller*, 132 S.Ct. at 2475.

Based on the secondary holding in *Teague*, the court infers that the *Miller* court intended that its holding would be applied retroactively. The petitioner in *Jackson* could not have used his collateral attack on his sentence as a vehicle to create a constitutional rule unless that rule would then be applied to all defendants similarly situated; *i.e.*, those launching collateral attacks to seek the benefit of the new rule. While it is true that the *Jackson* petitioner had his case heard simultaneously with defendant *Miller*, the inequitable treatment that the *Teague* court cautioned against would result if petitioners were able to sidestep the rule against using a collateral attack as a vehicle to create a new constitutional rule by riding the coattails of a defendant requesting the same new constitutional rule

on direct review. Because *habeas corpus* cannot be used to create new constitutional rules unless the new rule will apply to all defendants similarly situated—*i.e.*, those raising the same issue on collateral review—the *Miller* court implied that its holding was a new substantive rule when it applied the rule in *Jackson*. See *People v. Morfin*, 981 N.E.2d 1010, 1022–23 (Ill. App. 1 Dist. 2012) (holding that *Miller* applies retroactively and stating “the relief granted to Jackson in *Miller* tends to indicate that *Miller* should apply retroactively on collateral review.”).

The respondents disagree. To support their position, the respondents cite *Tyler v. Cain*, 533 U.S. 656, 663 (2001), which provides “that a new rule is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive.” The court is not convinced.

First, *Tyler* involved an interpretation of 28 U.S.C. §2244(b)(2)(A), which allows federal prisoners to file successive *habeas* motions where the petition relies “on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” *Id.* at 660-61 (quoting statute) (court’s emphasis removed). The court interpreted the statutory phrase “made retroactive” to mean that the Supreme Court must hold that a case is retroactive in order for a petitioner to meet that exception. *Id.* at 663. Plainly, this statutory interpretation is not relevant to this court’s analysis of whether or not *Miller* implied a certain result by the court’s actions.

Second, *Tyler* also recognized that the Supreme Court “can make a rule retroactive over the course of two cases.... Multiple cases can render a new rule retroactive only if the holdings in those cases necessarily dictate retroactivity of the new rule.” *Tyler*, 533 U.S. at 666. Where the Supreme Court creates a new constitutional rule and then gives the benefit of the new rule to a defendant on direct review and to a petitioner in a separate case on collateral review, as it did in *Miller* and *Jackson*, the necessary conclusion is that the new rule is intended to have retroactive effect.

The respondents also suggest that the court’s action in applying the new rule to *Jackson* does not support an inference of retroactive intent because the *Jackson* petitioner waived his retroactivity argument. The respondents point to language stating that “[t]he *Teague* bar to the retroactive applica-

tion of new rules is not ... jurisdictional,” *Schiro v. Farley*, 510 U.S. 222, 228 (1994), and, therefore, “because [the government] has not argued that [the petitioner’s] *habeas* claims were barred as requiring announcement of a new rule, we do not apply the rule of [*Teague*] to this case.” *Bradshaw v. Stumpf*, 545 U.S. 175, 182 (2005). From this, the respondents argue that the state never raised the issue of retroactivity in *Jackson* and, therefore, waived the argument. The respondents’ suggestion, though, does not reflect the reality that counsel would have had to file pleadings in *Jackson* before the decision in *Miller* was issued. An argument for retroactive application of a new rule cannot be made or waived where the new rule does not exist. For all of these reasons, the court agrees with petitioners that the application of the *Miller* holding to petitioner Jackson suggests that the court intended that the new rule would be applied retroactively. This also suggests that the *Miller* rule is substantive.

The rule’s parameters and an examination of other cases also support a conclusion that *Miller* establishes a substantive rule fitting into the first *Teague* exception to the general principle that new rules are not given retroactive effect when a case involves collateral review. As stated above, the first *Teague* exception “includes ... constitutional determinations that place particular conduct or persons covered by the statute beyond the state’s power to punish.” *Schiro*, 542 U.S. at 351–352 (2004) (citations omitted). Put another way, substantive rules are those rules “that place an entire category of primary conduct beyond the reach of the criminal law, or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense.” *Sawyer v. Smith*, 497 U.S. 227, 241 (1990) (citations omitted). Moreover, a rule is considered substantive “if it alters the range of conduct or the class of persons that the law punishes.” *Schiro*, 542 U.S. at 353. Substantive rules have retroactive effect on collateral review “because they necessarily carry a significant risk that a defendant ... faces a punishment that the law cannot impose upon him.” *Id.* at 352, citing *Bousley v. United States*, 523 U.S. 614, 620 (1998).

Conversely, new rules of procedure “merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.” *Id.* “[R]ules that regulate only the manner of determining the defendant’s culpability are procedural.” *Id.* at 353 (emphasis in original). Because procedural rules have a “more speculative connection to innocence,” they are only given retroactive effect if they are of a small subset of “watershed rules of criminal procedure.” *Id.* at 352.

Although the *Miller* rule has elements of substance in that it affects a particular class of persons—juveniles—and elements of procedure in that it mandates a process that may lead to the same outcome—a sentence of life without the possibility of parole—the center of gravity favors a conclusion that the new rule is substantive. It is true that *Miller* does not categorically ban life sentences without parole for a minor. Nevertheless, “[*Miller*] does require [courts] to hold a sentencing hearing for every minor convicted of first-degree murder at which a sentence other than natural life imprisonment must be available for consideration. *Miller* mandates a sentencing range broader than that provided by statute for minors convicted of first degree murder who could otherwise receive only natural life imprisonment.” *Morfin*, 981 N.E.2d at 1022. In this way, the *Miller* rule is substantive because it alters the range of outcomes of a criminal proceeding—or the punishments that may be imposed on juvenile homicide offenders.

On this point, the discussion in procedural rule decisions is instructive. Those cases highlight the difference between those procedural rules that regulate “the manner of determining the defendant’s culpability” and substantive rules that alter the “range of conduct” a law punishes or the range of outcomes available. *Schriro*, 542 U.S. at 353 (emphasis in original). For example, in *Schriro*, the court determined that the rule announced in *Ring v. Arizona*, 536 U.S. 584 (2002) was procedural and, therefore, not retroactive. *Ring* held that “a sentencing judge, sitting without a jury, may not find an aggravating circumstance necessary for the imposition of the death penalty.” *Schriro*, 542 U.S. at 353, quoting *Ring*, 536 U.S. at 609. The *Schriro* court stated:

[*Ring*] did not alter the range of conduct [the] law subjected to the death penalty. It could not have; it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a state may criminalize. 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 in this fashion are prototypical procedural rules....

*Id.*

This reasoning does not apply to *Miller*. First, unlike the rule in *Ring*, *Miller* does not alter the manner of determining culpability. Instead, *Miller* alters the range of outcomes available for certain criminal conduct. The respondents suggest that *Miller* is a procedural rule because it alters the range of permissible methods for determining whether a juvenile's conduct is punishable by life in prison without parole. The court disagrees. Before *Miller*, there was no method to determine whether a juvenile's conduct was punishable by life in prison without parole—it was automatic and mandatory. After *Miller*, there is a range of new outcomes—discretionary sentences that can extend up to life without the possibility of parole but also include the more lenient alternatives. Thus, *Miller* is distinguishable from *Ring* because it does not simply reallocate decision making authority from judge to jury; instead, it provides a sentencing court with decision making authority where there once was none—banning mandatory life sentences without parole and requiring discretionary sentences. Under *Miller*, a juvenile defendant is required to have the opportunity to establish that life without parole is not an appropriate sentence. For these reasons, the *Miller* rule is substantive.

By way of further example, in *Crawford v. Washington*, 541 U.S. 36 (2004), the court held that “testimonial statements of witnesses absent from trial are admissible only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine the witness.” *Whorton v. Bockting*, 549 U.S. 406, 413 (2007) (quotations and brackets omitted). Although it was “clear and undisputed” that *Crawford* announced a procedural rule and not a substantive one, it is plain that the rule announced involved exclusively the manner of determining a defendant's guilt or innocence. The rule in *Crawford*, unlike *Miller*, did not alter the range of outcomes available at a

criminal proceeding. *See also Saffle v. Parks*, 494 U.S. 484, 486, 495 (proposed rule on instructing a jury to avoid any influence of sympathy and whether such an instruction violates the Eighth Amendment was procedural—the outcome of the trial and sentencing remained the same); *Graham v. Collins*, 506 U.S. 461, 477 (1993) (a proposed rule regarding how a sentencing jury could consider mitigating circumstances was procedural—the outcome of the sentencing remained the same).<sup>3</sup> Because *Miller* alters the range of outcomes available, it is not a procedural rule; the rule is better classified as substantive. *See In re Morgan*, 713 F.3d 1365, 1369 (11th Cir. 2013) (Wilson J., concurring) (“[B]y expanding the range of possible outcomes for an individual ... rather than simply the process by which those outcomes are reached, the rule announced in *Miller* arguably includes a substantive component...”).

*Miller* also fits into the category of a substantive rule because it prohibits “a sentencing scheme that mandates life in prison without possibility of parole,” *Miller*, 132 S.Ct. at 2469, which is a type of punishment, for a class of defendants—juveniles—because juveniles “have diminished culpability and greater prospects for reform,” ... a “lack of maturity and an underdeveloped sense of responsibility,” and “are more vulnerable to negative influences and outside pressures.” *Id.* at 2464 (quotation and ellipsis omitted); *see also Chambers v. State*, 831 N.W.2d 311, 342–43 (Minn. 2013) (Page, J., dissenting). Thus, it is a rule narrowly directed at the status of a particular type of defendants. Based on the status of the defendant only, *Miller* “categorically bar[s] the mandatory imposition of life imprisonment without the possibility of release.” *Chambers*, 831 N.W.2d at 343 (Page, J., dissenting).

The *Miller* rule’s alteration of the class of persons that the law punishes is a critical factor. By invalidating mandatory life without parole sentencing schemes for juvenile offenders, *Miller* neces-

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<sup>3</sup> Both *Saffle* and *Graham* are cited for the same proposition in a brief filed by the government with the Eighth Circuit Court of Appeals. In that brief, the government argued that *Miller* is a substantive rule. Petitioner Soto’s Second Supplement to Motion to Vacate Sentence and for Resentencing, Exh. 1. Although the brief cannot be considered as authority, the court agrees with its reasoning.

sarily changes the class of people that these sentencing statutes punish. Before *Miller*, any person convicted of first-degree murder would be sentenced to mandatory life without the possibility of parole. After *Miller*, the mandatory sentence cannot be imposed on juveniles—the only class of people subject to such mandatory sentences is adult offenders. Without retroactive application of the *Miller* rule, there is a significant risk that defendants will face a punishment—mandatory life without parole—that the state cannot constitutionally impose. This suggests that the rule is substantive and, thus, retroactive.

In support of their argument that *Miller* is not retroactive, the respondents assert it announced a new procedural rule because “the supreme court changed the procedure used to determine certain juvenile murderer’s sentences from one where there was no sentencing hearing to one where there is a sentencing hearing.” State’s Response to Petitioner’s Supplement to Petition for Writ of *Habeas Corpus*, ¶12. The respondents point to the following *Miller* language:

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 sentence follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.

*Miller*, 132 S.Ct. at 2471, citing *Graham v. Florida*, 130 S.Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005). The respondents, though, take this language out of context. The court was addressing the government’s argument that “because many states impose mandatory life-without-parole sentences on juveniles, [the court] may not hold the practice unconstitutional.” *Id.* at 2470. The court went on to explain that: “[i]n considering categorical bars to the death penalty and life without parole, we ask as part of the analysis whether objective indicia of society’s standards, as expressed in legislative enactments and state practice, show a national consensus against a sentence for a particular class of offenders.” *Id.*, citing *Graham v. Florida*, 130 S.Ct. 2011, 2022 (2010). Therefore, the language stating that the decision does not “categorically bar a penalty,” was distinguishing the *Miller* issue from the issue in those cases where the court tallied legislative enactments to determine

whether a punishment is cruel and unusual. *Id.* at 2471. For this reason, the language the respondents' highlight does not necessarily support their general position that the court intended the *Miller* rule to be procedural and not substantive.

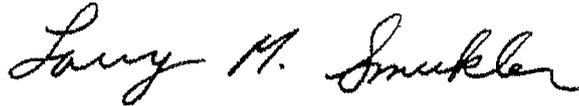
As indicated above, the court acknowledges that the *Miller* rule certainly involves elements of both substance and procedure. Indeed, "nearly all aspects of the law contain an element of procedure." *Chambers*, 831 N.W.2d at 337 (Anderson, J., dissenting). Noticeably, though, while *Miller* requires "a sentencing authority [to assess] whether the law's harshest term of imprisonment proportionately punishes a juvenile offender" and "take into account how children are different," the decision is silent on how such a sentencing hearing should be conducted. 132 S.Ct. at 2466, 2469. Instead, the court focuses on the reasons why a sentencing scheme mandating life without parole should be barred. The court explained that its decision would "implicate two strands of precedent reflecting [the court's] concern with proportionate punishment." *Id.* at 2463. The first strand of cases relates to categorical bans of sentences based on the limited culpability of the class of defendants and the severity of the penalty. See *Atkins v. Virginia*, 536 U.S. 304 (2002) (banning capital punishment for mentally retarded defendants); *Graham*, 130 S.Ct. at 2034 (banning life without parole for non-homicide juvenile offenders); *Roper*, 543 U.S. at 568 (banning imposition of the death penalty on all juvenile offenders). To be sure, these cases have been held unanimously to announce new substantive rules requiring retroactive application. See *Chambers*, 831 N.W.2d at 338 (Anderson, J., dissenting) (collecting cases). This "counsels in favor of concluding that the rule in *Miller* is substantive in nature and, thus is retroactive...." *Id.*

The Supreme Court's focus on this prior precedent in conjunction with the foregoing reasoning strongly favors the designation of the new rule announced in *Miller* as substantive, which necessitates retroactive application in accordance with *Teague*. For this reason, the rule must be applied to the petitioners' cases. Consequently, the court concludes that the petitioners' mandatory sentences violate their rights under the Eighth Amendment to the United States Constitution and part 1, articles

18 and 33 of the New Hampshire Constitution. Accordingly, the petitioners' request for *habeas* relief and Mr. Soto's motion to vacate his sentence are GRANTED. The petitioners' cases are remanded for sentencing hearings consistent with *Miller v. Alabama*.

So ORDERED.

Date: July 29, 2013

A handwritten signature in cursive script that reads "Larry M. Smukler".

LARRY M. SMUKLER  
PRESIDING JUSTICE



*California*  
LEGISLATIVE INFORMATION

SB-9 Sentencing. (2011-2012)

**Senate Bill No. 9**

**CHAPTER 828**

**An act to amend Section 1170 of the Penal Code, relating to sentencing.**

[ Approved by Governor September 30, 2012. Filed Secretary of State  
September 30, 2012. ]

LEGISLATIVE COUNSEL'S DIGEST

SB 9, Yee. Sentencing.

Existing law provides that the Secretary of the Department of Corrections and Rehabilitation or the Board of Parole Hearings, or both, may, for specified reasons, recommend to the court that a prisoner's sentence be recalled, and that a court may recall a prisoner's sentence.

This bill would authorize a prisoner who was under 18 years of age at the time of committing an offense for which the prisoner was sentenced to life without parole to submit a petition for recall and resentencing to the sentencing court, and to the prosecuting agency, as specified. The bill would prohibit a prisoner who tortured his or her victim or whose victim was a public safety official, as defined, from filing a petition for recall and resentencing. The bill would require the petition to include a statement from the defendant that includes, among other things, his or her remorse and work towards rehabilitation. The bill would establish certain criteria, at least one of which shall be asserted in the petition, to be considered when a court decides whether to conduct a hearing on the petition for recall and resentencing and additional criteria to be considered by the court when deciding whether to grant the petition. The bill would require the court to hold a hearing if the court finds that the statements in the defendant's petition are true, as specified. The bill would apply retroactively, as specified.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

**SECTION 1.** Section 1170 of the Penal Code, as amended by Section 27 of Chapter 43 of the Statutes of 2012, is amended to read:

**1170. (a) (1)** The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.

(2) Notwithstanding paragraph (1), the Legislature further finds and declares that programs should be available for inmates, including, but not limited to, educational programs, that are designed to prepare nonviolent felony offenders for successful reentry into the community. The Legislature encourages the development of policies and programs designed to educate and rehabilitate nonviolent felony offenders. In implementing this section, the Department of Corrections and Rehabilitation is encouraged to give priority enrollment in programs to

promote successful return to the community to an inmate with a short remaining term of commitment and a release date that would allow him or her adequate time to complete the program.

(3) In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified unless the convicted person is given any other disposition provided by law, including a fine, jail, probation, or the suspension of imposition or execution of sentence or is sentenced pursuant to subdivision (b) of Section 1168 because he or she had committed his or her crime prior to July 1, 1977. In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council. The court, unless it determines that there are circumstances in mitigation of the punishment prescribed, shall also impose any other term that it is required by law to impose as an additional term. Nothing in this article shall affect any provision of law that imposes the death penalty, that authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly provides for imprisonment in the state prison for life, except as provided in paragraph (2) of subdivision (d). In any case in which the amount of preimprisonment credit under Section 2900.5 or any other provision of law is equal to or exceeds any sentence imposed pursuant to this chapter, the entire sentence shall be deemed to have been served and the defendant shall not be actually delivered to the custody of the secretary. The court shall advise the defendant that he or she shall serve a period of parole and order the defendant to report to the parole office closest to the defendant's last legal residence, unless the in-custody credits equal the total sentence, including both confinement time and the period of parole. The sentence shall be deemed a separate prior prison term under Section 667.5, and a copy of the judgment and other necessary documentation shall be forwarded to the secretary.

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation. In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

(c) The court shall state the reasons for its sentence choice on the record at the time of sentencing. The court shall also inform the defendant that as part of the sentence after expiration of the term he or she may be on parole for a period as provided in Section 3000.

(d) (1) When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison and has been committed to the custody of the secretary, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served.

(2) (A) (i) When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing.

(ii) Notwithstanding clause (i), this paragraph shall not apply to defendants sentenced to life without parole for an offense where the defendant tortured, as described in Section 206, his or her victim or the victim was a public safety official, including any law enforcement personnel mentioned in Chapter 4.5 (commencing with Section 830) of Title 3, or any firefighter as described in Section 245.1, as well as any other officer in any segment of law enforcement who is employed by the federal government, the state, or any of its political subdivisions.

(B) The defendant shall file the original petition with the sentencing court. A copy of the petition shall be served on the agency that prosecuted the case. The petition shall include the defendant's statement that he or she was

under 18 years of age at the time of the crime and was sentenced to life in prison without the possibility of parole, the defendant's statement describing his or her remorse and work towards rehabilitation, and the defendant's statement that one of the following is true:

(I) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

(II) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.

(iii) The defendant committed the offense with at least one adult codefendant.

(iv) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

(C) If any of the information required in subparagraph (B) is missing from the petition, or if proof of service on the prosecuting agency is not provided, the court shall return the petition to the defendant and advise the defendant that the matter cannot be considered without the missing information.

(D) A reply to the petition, if any, shall be filed with the court within 60 days of the date on which the prosecuting agency was served with the petition, unless a continuance is granted for good cause.

(E) If the court finds by a preponderance of the evidence that the statements in the petition are true, the court shall hold a hearing to consider whether to recall the sentence and commitment previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. Victims, or victim family members if the victim is deceased, shall retain the rights to participate in the hearing.

(F) The factors that the court may consider when determining whether to recall and resentence include, but are not limited to, the following:

(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

(ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.

(iii) The defendant committed the offense with at least one adult codefendant.

(iv) Prior to the offense for which the sentence is being considered for recall, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress.

(v) The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement in the offense.

(vi) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

(vii) The defendant has maintained family ties or connections with others through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved with crime.

(viii) The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor.

(G) The court shall have the discretion to recall the sentence and commitment previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. The discretion of the court shall be exercised in consideration of the criteria in subparagraph (B). Victims, or victim family members if the victim is deceased, shall be notified of the resentencing hearing and shall retain their rights to participate in the hearing.

(H) If the sentence is not recalled, the defendant may submit another petition for recall and resentencing to the sentencing court when the defendant has been committed to the custody of the department for at least 20

years. If recall and resentencing is not granted under that petition, the defendant may file another petition after having served 24 years. The final petition may be submitted, and the response to that petition shall be determined, during the 25th year of the defendant's sentence.

(I) In addition to the criteria in subparagraph (F), the court may consider any other criteria that the court deems relevant to its decision, so long as the court identifies them on the record, provides a statement of reasons for adopting them, and states why the defendant does or does not satisfy the criteria.

(J) This subdivision shall have retroactive application.

(e) (1) Notwithstanding any other law and consistent with paragraph (1) of subdivision (a), if the secretary or the Board of Parole Hearings or both determine that a prisoner satisfies the criteria set forth in paragraph (2), the secretary or the board may recommend to the court that the prisoner's sentence be recalled.

(2) The court shall have the discretion to resentence or recall if the court finds that the facts described in subparagraphs (A) and (B) or subparagraphs (B) and (C) exist:

(A) The prisoner is terminally ill with an incurable condition caused by an illness or disease that would produce death within six months, as determined by a physician employed by the department.

(B) The conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety.

(C) The prisoner is permanently medically incapacitated with a medical condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour total care, including, but not limited to, coma, persistent vegetative state, brain death, ventilator-dependency, loss of control of muscular or neurological function, and that incapacitation did not exist at the time of the original sentencing.

The Board of Parole Hearings shall make findings pursuant to this subdivision before making a recommendation for resentence or recall to the court. This subdivision does not apply to a prisoner sentenced to death or a term of life without the possibility of parole.

(3) Within 10 days of receipt of a positive recommendation by the secretary or the board, the court shall hold a hearing to consider whether the prisoner's sentence should be recalled.

(4) Any physician employed by the department who determines that a prisoner has six months or less to live shall notify the chief medical officer of the prognosis. If the chief medical officer concurs with the prognosis, he or she shall notify the warden. Within 48 hours of receiving notification, the warden or the warden's representative shall notify the prisoner of the recall and resentencing procedures, and shall arrange for the prisoner to designate a family member or other outside agent to be notified as to the prisoner's medical condition and prognosis, and as to the recall and resentencing procedures. If the inmate is deemed mentally unfit, the warden or the warden's representative shall contact the inmate's emergency contact and provide the information described in paragraph (2).

(5) The warden or the warden's representative shall provide the prisoner and his or her family member, agent, or emergency contact, as described in paragraph (4), updated information throughout the recall and resentencing process with regard to the prisoner's medical condition and the status of the prisoner's recall and resentencing proceedings.

(6) Notwithstanding any other provisions of this section, the prisoner or his or her family member or designee may independently request consideration for recall and resentencing by contacting the chief medical officer at the prison or the secretary. Upon receipt of the request, the chief medical officer and the warden or the warden's representative shall follow the procedures described in paragraph (4). If the secretary determines that the prisoner satisfies the criteria set forth in paragraph (2), the secretary or board may recommend to the court that the prisoner's sentence be recalled. The secretary shall submit a recommendation for release within 30 days in the case of inmates sentenced to determinate terms and, in the case of inmates sentenced to indeterminate terms, the secretary shall make a recommendation to the Board of Parole Hearings with respect to the inmates who have applied under this section. The board shall consider this information and make an independent judgment pursuant to paragraph (2) and make findings related thereto before rejecting the request or making a recommendation to the court. This action shall be taken at the next lawfully noticed board meeting.

(7) Any recommendation for recall submitted to the court by the secretary or the Board of Parole Hearings shall include one or more medical evaluations, a postrelease plan, and findings pursuant to paragraph (2).

- (8) If possible, the matter shall be heard before the same judge of the court who sentenced the prisoner.
- (9) If the court grants the recall and resentencing application, the prisoner shall be released by the department within 48 hours of receipt of the court's order, unless a longer time period is agreed to by the inmate. At the time of release, the warden or the warden's representative shall ensure that the prisoner has each of the following in his or her possession: a discharge medical summary, full medical records, state identification, parole medications, and all property belonging to the prisoner. After discharge, any additional records shall be sent to the prisoner's forwarding address.
- (10) The secretary shall issue a directive to medical and correctional staff employed by the department that details the guidelines and procedures for initiating a recall and resentencing procedure. The directive shall clearly state that any prisoner who is given a prognosis of six months or less to live is eligible for recall and resentencing consideration, and that recall and resentencing procedures shall be initiated upon that prognosis.
- (f) Notwithstanding any other provision of this section, for purposes of paragraph (3) of subdivision (h), any allegation that a defendant is eligible for state prison due to a prior or current conviction, sentence enhancement, or because he or she is required to register as a sex offender shall not be subject to dismissal pursuant to Section 1385.
- (g) A sentence to state prison for a determinate term for which only one term is specified, is a sentence to state prison under this section.
- (h) (1) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years.
- (2) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision shall be punishable by imprisonment in a county jail for the term described in the underlying offense.
- (3) Notwithstanding paragraphs (1) and (2), where the defendant (A) has a prior or current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 or a prior or current conviction for a violent felony described in subdivision (c) of Section 667.5, (B) has a prior felony conviction in another jurisdiction for an offense that has all the elements of a serious felony described in subdivision (c) of Section 1192.7 or a violent felony described in subdivision (c) of Section 667.5, (C) is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime and as part of the sentence an enhancement pursuant to Section 186.11 is imposed, an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison.
- (4) Nothing in this subdivision shall be construed to prevent other dispositions authorized by law, including pretrial diversion, deferred entry of judgment, or an order granting probation pursuant to Section 1203.1.
- (5) The court, when imposing a sentence pursuant to paragraph (1) or (2) of this subdivision, may commit the defendant to county jail as follows:
- (A) For a full term in custody as determined in accordance with the applicable sentencing law.
- (B) (I) For a term as determined in accordance with the applicable sentencing law, but suspend execution of a concluding portion of the term selected in the court's discretion, during which time the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court. The period of supervision shall be mandatory, and may not be earlier terminated except by court order. Any proceeding to revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of Section 1203.2 or Section 1203.3. During the period when the defendant is under such supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court. Any time period which is suspended because a person has absconded shall not be credited toward the period of supervision.
- (II) The portion of a defendant's sentenced term during which time he or she is supervised by the county probation officer pursuant to this subparagraph shall be known as mandatory supervision.
- (6) The sentencing changes made by the act that added this subdivision shall be applied prospectively to any person sentenced on or after October 1, 2011.

(i) This section shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before that date, deletes or extends that date.

**SEC. 2.** Section 1170 of the Penal Code, as amended by Section 28 of Chapter 43 of the Statutes of 2012, is amended to read:

**1170.** (a) (1) The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.

(2) Notwithstanding paragraph (1), the Legislature further finds and declares that programs should be available for inmates, including, but not limited to, educational programs, that are designed to prepare nonviolent felony offenders for successful reentry into the community. The Legislature encourages the development of policies and programs designed to educate and rehabilitate nonviolent felony offenders. In implementing this section, the Department of Corrections and Rehabilitation is encouraged to give priority enrollment in programs to promote successful return to the community to an inmate with a short remaining term of commitment and a release date that would allow him or her adequate time to complete the program.

(3) In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified unless the convicted person is given any other disposition provided by law, including a fine, jail, probation, or the suspension of imposition or execution of sentence or is sentenced pursuant to subdivision (b) of Section 1168 because he or she had committed his or her crime prior to July 1, 1977. In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council. The court, unless it determines that there are circumstances in mitigation of the punishment prescribed, shall also impose any other term that it is required by law to impose as an additional term. Nothing in this article shall affect any provision of law that imposes the death penalty, that authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly provides for imprisonment in the state prison for life, except as provided in paragraph (2) of subdivision (d). In any case in which the amount of preimprisonment credit under Section 2900.5 or any other provision of law is equal to or exceeds any sentence imposed pursuant to this chapter, the entire sentence shall be deemed to have been served and the defendant shall not be actually delivered to the custody of the secretary. The court shall advise the defendant that he or she shall serve a period of parole and order the defendant to report to the parole office closest to the defendant's last legal residence, unless the in-custody credits equal the total sentence, including both confinement time and the period of parole. The sentence shall be deemed a separate prior prison term under Section 667.5, and a copy of the judgment and other necessary documentation shall be forwarded to the secretary.

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

(c) The court shall state the reasons for its sentence choice on the record at the time of sentencing. The court shall also inform the defendant that as part of the sentence after expiration of the term he or she may be on parole for a period as provided in Section 3000.

(d) (1) When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison and has been committed to the custody of the secretary, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings, recall the sentence and commitment previously ordered and

resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served.

(2) (A) (i) When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing.

(ii) Notwithstanding clause (i), this paragraph shall not apply to defendants sentenced to life without parole for an offense where the defendant tortured, as described in Section 206, his or her victim or the victim was a public safety official, including any law enforcement personnel mentioned in Chapter 4.5 (commencing with Section 830) of Title 3, or any firefighter as described in Section 245.1, as well as any other officer in any segment of law enforcement who is employed by the federal government, the state, or any of its political subdivisions.

(B) The defendant shall file the original petition with the sentencing court. A copy of the petition shall be served on the agency that prosecuted the case. The petition shall include the defendant's statement that he or she was under 18 years of age at the time of the crime and was sentenced to life in prison without the possibility of parole, the defendant's statement describing his or her remorse and work towards rehabilitation, and the defendant's statement that one of the following is true:

(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

(ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.

(iii) The defendant committed the offense with at least one adult codefendant.

(iv) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

(C) If any of the information required in subparagraph (B) is missing from the petition, or if proof of service on the prosecuting agency is not provided, the court shall return the petition to the defendant and advise the defendant that the matter cannot be considered without the missing information.

(D) A reply to the petition, if any, shall be filed with the court within 60 days of the date on which the prosecuting agency was served with the petition, unless a continuance is granted for good cause.

(E) If the court finds by a preponderance of the evidence that the statements in the petition are true, the court shall hold a hearing to consider whether to recall the sentence and commitment previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. Victims, or victim family members if the victim is deceased, shall retain the rights to participate in the hearing.

(F) The factors that the court may consider when determining whether to recall and resentence include, but are not limited to, the following:

(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

(ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.

(iii) The defendant committed the offense with at least one adult codefendant.

(iv) Prior to the offense for which the sentence is being considered for recall, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress.

(v) The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement in the offense.

(vi) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

(vii) The defendant has maintained family ties or connections with others through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved with crime.

(viii) The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor.

(G) The court shall have the discretion to recall the sentence and commitment previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. The discretion of the court shall be exercised in consideration of the criteria in subparagraph (B). Victims, or victim family members if the victim is deceased, shall be notified of the resentencing hearing and shall retain their rights to participate in the hearing.

(H) If the sentence is not recalled, the defendant may submit another petition for recall and resentencing to the sentencing court when the defendant has been committed to the custody of the department for at least 20 years. If recall and resentencing is not granted under that petition, the defendant may file another petition after having served 24 years. The final petition may be submitted, and the response to that petition shall be determined, during the 25th year of the defendant's sentence.

(I) In addition to the criteria in subparagraph (F), the court may consider any other criteria that the court deems relevant to its decision, so long as the court identifies them on the record, provides a statement of reasons for adopting them, and states why the defendant does or does not satisfy the criteria.

(J) This subdivision shall have retroactive application.

(e) (1) Notwithstanding any other law and consistent with paragraph (1) of subdivision (a), if the secretary or the Board of Parole Hearings or both determine that a prisoner satisfies the criteria set forth in paragraph (2), the secretary or the board may recommend to the court that the prisoner's sentence be recalled.

(2) The court shall have the discretion to resentence or recall if the court finds that the facts described in subparagraphs (A) and (B) or subparagraphs (B) and (C) exist:

(A) The prisoner is terminally ill with an incurable condition caused by an illness or disease that would produce death within six months, as determined by a physician employed by the department.

(B) The conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety.

(C) The prisoner is permanently medically incapacitated with a medical condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour total care, including, but not limited to, coma, persistent vegetative state, brain death, ventilator-dependency, loss of control of muscular or neurological function, and that incapacitation did not exist at the time of the original sentencing.

The Board of Parole Hearings shall make findings pursuant to this subdivision before making a recommendation for resentence or recall to the court. This subdivision does not apply to a prisoner sentenced to death or a term of life without the possibility of parole.

(3) Within 10 days of receipt of a positive recommendation by the secretary or the board, the court shall hold a hearing to consider whether the prisoner's sentence should be recalled.

(4) Any physician employed by the department who determines that a prisoner has six months or less to live shall notify the chief medical officer of the prognosis. If the chief medical officer concurs with the prognosis, he or she shall notify the warden. Within 48 hours of receiving notification, the warden or the warden's representative shall notify the prisoner of the recall and resentencing procedures, and shall arrange for the prisoner to designate a family member or other outside agent to be notified as to the prisoner's medical condition and prognosis, and as to the recall and resentencing procedures. If the inmate is deemed mentally unfit, the warden or the warden's representative shall contact the inmate's emergency contact and provide the information described in paragraph (2).

(5) The warden or the warden's representative shall provide the prisoner and his or her family member, agent, or emergency contact, as described in paragraph (4), updated information throughout the recall and resentencing process with regard to the prisoner's medical condition and the status of the prisoner's recall and resentencing proceedings.

(6) Notwithstanding any other provisions of this section, the prisoner or his or her family member or designee may independently request consideration for recall and resentencing by contacting the chief medical officer at the prison or the secretary. Upon receipt of the request, the chief medical officer and the warden or the warden's representative shall follow the procedures described in paragraph (4). If the secretary determines that the prisoner satisfies the criteria set forth in paragraph (2), the secretary or board may recommend to the court that the prisoner's sentence be recalled. The secretary shall submit a recommendation for release within 30 days in the case of inmates sentenced to determinate terms and, in the case of inmates sentenced to indeterminate terms, the secretary shall make a recommendation to the Board of Parole Hearings with respect to the inmates who have applied under this section. The board shall consider this information and make an independent judgment pursuant to paragraph (2) and make findings related thereto before rejecting the request or making a recommendation to the court. This action shall be taken at the next lawfully noticed board meeting.

(7) Any recommendation for recall submitted to the court by the secretary or the Board of Parole Hearings shall include one or more medical evaluations, a postrelease plan, and findings pursuant to paragraph (2).

(8) If possible, the matter shall be heard before the same judge of the court who sentenced the prisoner.

(9) If the court grants the recall and resentencing application, the prisoner shall be released by the department within 48 hours of receipt of the court's order, unless a longer time period is agreed to by the inmate. At the time of release, the warden or the warden's representative shall ensure that the prisoner has each of the following in his or her possession: a discharge medical summary, full medical records, state identification, parole medications, and all property belonging to the prisoner. After discharge, any additional records shall be sent to the prisoner's forwarding address.

(10) The secretary shall issue a directive to medical and correctional staff employed by the department that details the guidelines and procedures for initiating a recall and resentencing procedure. The directive shall clearly state that any prisoner who is given a prognosis of six months or less to live is eligible for recall and resentencing consideration, and that recall and resentencing procedures shall be initiated upon that prognosis.

(f) Notwithstanding any other provision of this section, for purposes of paragraph (3) of subdivision (h), any allegation that a defendant is eligible for state prison due to a prior or current conviction, sentence enhancement, or because he or she is required to register as a sex offender shall not be subject to dismissal pursuant to Section 1385.

(g) A sentence to state prison for a determinate term for which only one term is specified, is a sentence to state prison under this section.

(h) (1) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years.

(2) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision shall be punishable by imprisonment in a county jail for the term described in the underlying offense.

(3) Notwithstanding paragraphs (1) and (2), where the defendant (A) has a prior or current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 or a prior or current conviction for a violent felony described in subdivision (c) of Section 667.5, (B) has a prior felony conviction in another jurisdiction for an offense that has all the elements of a serious felony described in subdivision (c) of Section 1192.7 or a violent felony described in subdivision (c) of Section 667.5, (C) is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime and as part of the sentence an enhancement pursuant to Section 186.11 is imposed, an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison.

(4) Nothing in this subdivision shall be construed to prevent other dispositions authorized by law, including pretrial diversion, deferred entry of judgment, or an order granting probation pursuant to Section 1203.1.

(5) The court, when imposing a sentence pursuant to paragraph (1) or (2) of this subdivision, may commit the defendant to county jail as follows:

(A) For a full term in custody as determined in accordance with the applicable sentencing law.

(B) (i) For a term as determined in accordance with the applicable sentencing law, but suspend execution of a concluding portion of the term selected in the court's discretion, during which time the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court. The period of supervision shall be mandatory, and may not be earlier terminated except by court order. Any proceeding to revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of Section 1203.2 or Section 1203.3. During the period when the defendant is under such supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court. Any time period which is suspended because a person has absconded shall not be credited toward the period of supervision.

(ii) The portion of a defendant's sentenced term during which time he or she is supervised by the county probation officer pursuant to this subparagraph shall be known as mandatory supervision.

(6) The sentencing changes made by the act that added this subdivision shall be applied prospectively to any person sentenced on or after October 1, 2011.

(l) This section shall become operative on January 1, 2014.

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2011

SESSION LAW 2012-148  
SENATE BILL 635

AN ACT TO AMEND THE STATE SENTENCING LAWS TO COMPLY WITH THE UNITED STATES SUPREME COURT DECISION IN MILLER V. ALABAMA.

The General Assembly of North Carolina enacts:

**SECTION 1.** Chapter 15A of the General Statutes is amended by adding a new Article to read:

"Article 93.

"Sentencing for Minors Subject to Life Imprisonment Without Parole.

**"§ 15A-1476. Applicability.**

Notwithstanding the provisions of G.S. 14-17, a defendant who is convicted of first degree murder, and who was under the age of 18 at the time of the offense, shall be sentenced in accordance with this Article. For the purposes of this Article, "life imprisonment with parole" shall mean that the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole.

**"§ 15A-1477. Penalty determination.**

(a) In determining a sentence under this Article, the court shall do one of the following:

- (1) If the sole basis for conviction of a count or each count of first degree murder was the felony murder rule, then the court shall sentence the defendant to life imprisonment with parole.
- (2) If the court does not sentence the defendant pursuant to subdivision (1) of this subsection, then the court shall conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole, as set forth in G.S. 14-17, or a lesser sentence of life imprisonment with parole.

(b) The hearing under subdivision (2) of subsection (a) of this section shall be conducted by the trial judge as soon as practicable after the guilty verdict is returned. The State and the defendant shall not be required to resubmit evidence presented during the guilt determination phase of the case. Evidence, including evidence in rebuttal, may be presented as to any matter that the court deems relevant to sentencing, and any evidence which the court deems to have probative value may be received.

(c) The defendant or the defendant's counsel may submit mitigating circumstances to the court, including, but not limited to, the following factors:

- (1) Age at the time of the offense.
- (2) Immaturity.
- (3) Ability to appreciate the risks and consequences of the conduct.
- (4) Intellectual capacity.
- (5) Prior record.
- (6) Mental health.
- (7) Familial or peer pressure exerted upon the defendant.
- (8) Likelihood that the defendant would benefit from rehabilitation in confinement.
- (9) Any other mitigating factor or circumstance.

(d) The State and the defendant or the defendant's counsel shall be permitted to present argument for or against the sentence of life imprisonment with parole. The defendant or the defendant's counsel shall have the right to the last argument.

(e) The provisions of Article 58 of Chapter 15A of the General Statutes apply to proceedings under this Article.

**"§ 15A-1478. Sentencing; assignment for resentencing.**



(a) The court shall consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole. The order adjudging the sentence shall include findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate to include in the order.

(b) All motions for appropriate relief filed in superior court seeking resentencing under the provisions of this Article may be heard and determined in the trial division by any judge (i) who is empowered to act in criminal matters in the superior court district or set of districts as defined in G.S. 7A-41.1, in which the judgment was entered and (ii) who is assigned pursuant to this section to review the motion for appropriate relief and take the appropriate administrative action to dispense with the motion.

(c) The judge who presided at the trial of the defendant is empowered to act upon the motion for appropriate relief even though the judge is in another district or even though the judge's commission has expired; however, if the judge who presided at the trial is still unavailable to act, the senior resident superior court judge shall assign a judge who is empowered to act under subsection (b) of this section.

(d) All motions for appropriate relief filed in superior court seeking resentencing under the provisions of this Article shall, when filed, be referred to the senior resident superior court judge, who shall assign the motion as provided by this section for review and administrative action, including, as may be appropriate, dismissal, calendaring for hearing, entry of a scheduling order for subsequent events in the case, or other appropriate actions.

**"§ 15A-1479. Incidents of parole.**

(a) Except as otherwise provided in this section, a defendant sentenced to life imprisonment with parole shall be subject to the conditions and procedures set forth in Article 85 of Chapter 15A of the General Statutes, including the notification requirement in G.S. 15A-1371(b)(3).

(b) The term of parole for a person released from imprisonment from a sentence of life imprisonment with parole shall be five years and may not be terminated earlier by the Post-Release Supervision and Parole Commission.

(c) A defendant sentenced to life imprisonment with parole who is paroled, and then violates a condition of parole and is returned to prison to serve the life sentence, shall not be eligible for parole for five years from the date of the return to confinement.

(d) Life imprisonment with parole under this Article means that unless the defendant receives parole, the defendant shall remain imprisoned for the defendant's natural life."

**SECTION 2.** The North Carolina Sentencing and Policy Advisory Commission, in consultation with the Office of the Juvenile Defender, the Conference of District Attorneys, and other organizations and agencies it deems appropriate, shall study the provisions in this act, United States Supreme Court precedent relevant to sentencing a minor for first degree murder, sentencing policies in other jurisdictions, and any other matter relating to the sentencing of minors convicted of first degree murder. The Commission shall report its findings and recommendations to the General Assembly no later than January 31, 2013.

**SECTION 3.** This act is effective when it becomes law and is applicable to any sentencing hearings held on or after that date. This act also applies to any resentencing hearings required by law for a defendant who was under the age of 18 years at the time of the offense, was sentenced to life imprisonment without parole prior to the effective date of this act, and for whom a resentencing hearing has been ordered.

In the General Assembly read three times and ratified this the 3rd day of July, 2012.

s/ Walter H. Dalton  
President of the Senate

s/ Thom Tillis  
Speaker of the House of Representatives

s/ Beverly E. Perdue  
Governor

Approved 3:59 p.m. this 12<sup>th</sup> day of July, 2012

ORIGINAL HOUSE  
BILL NO. 0023

ENROLLED ACT NO. 16, HOUSE OF REPRESENTATIVES

SIXTY-SECOND LEGISLATURE OF THE STATE OF WYOMING  
2013 GENERAL SESSION

AN ACT relating to crimes and offenses; modifying provisions relating to life sentences for juvenile offenders generally; eliminating life sentences without parole for juvenile offenders; and providing for an effective date.

*Be It Enacted by the Legislature of the State of Wyoming:*

**Section 1.** W.S. 6-2-101(b), 6-2-306(d) (intro) and (e), 6-10-201(b) (ii), 6-10-301(c) and 7-13-402(a) are amended to read:

**6-2-101. Murder in the first degree; penalty.**

(b) A person convicted of murder in the first degree shall be punished by death, life imprisonment without parole or life imprisonment according to law, except that ~~no person shall be subject to the penalty of death for any murder committed before the defendant attained the age of eighteen (18) years~~ a person convicted of murder in the first degree who was under the age of eighteen (18) years at the time of the offense shall be punished by life imprisonment.

**6-2-306. Penalties for sexual assault.**

(d) An actor who is convicted of sexual assault under W.S. 6-2-302 through 6-2-304, or sexual abuse of a minor under W.S. 6-2-316 through 6-2-317, shall be punished by life imprisonment without parole if the actor has two (2) or more previous convictions for any of the following designated offenses, which convictions resulted from charges separately brought and which arose out of separate occurrences in this state or elsewhere and which

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convictions were for offenses committed after the actor reached the age of eighteen (18) years of age:

(e) An actor who is convicted of sexual abuse of a minor under W.S. 6-2-314 or 6-2-315 shall be punished by life imprisonment without parole if the actor has one (1) or more previous convictions for a violation of W.S. 6-2-302 through 6-2-304, 6-2-314 or 6-2-315, or a criminal statute containing the same or similar elements as the crimes defined by W.S. 6-2-302 through 6-2-304, 6-2-314 or 6-2-315, which convictions resulted from charges separately brought and which arose out of separate occurrences in this state or elsewhere and which convictions were for offenses committed after the actor reached the age of eighteen (18) years of age.

**6-10-201. "Habitual criminal" defined; penalties.**

(b) An habitual criminal shall be punished by imprisonment for:

(ii) Life, if he has three (3) or more previous convictions for offenses committed after the person reached the age of eighteen (18) years of age.

**6-10-301. Life imprisonment without parole; life imprisonment.**

(c) Any sentence other than a sentence specifically designated as a sentence of life imprisonment without parole is not subject to commutation by the governor. A sentence of life or life imprisonment which is not specifically designated as a sentence of life imprisonment without parole is subject to commutation by the governor. A person sentenced to life or life imprisonment for an offense committed after the person reached the age of

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eighteen (18) years is not eligible for parole unless the governor has commuted the person's sentence to a term of years. A person sentenced to life imprisonment for an offense committed before the person reached the age of eighteen (18) years shall be eligible for parole after commutation of his sentence to a term of years or after having served twenty-five (25) years of incarceration, except that if the person committed any of the acts specified in W.S. 7-13-402(b) after having reached the age of eighteen (18) years the person shall not be eligible for parole.

**7-13-402. General powers and duties of board; eligibility for parole; immunity.**

(a) The board may grant a parole to any person imprisoned in any institution under sentence, except a sentence of life imprisonment without parole or a life sentence, ordered by any district court of this state, provided the person has served the minimum term pronounced by the trial court less good time, if any, granted under rules promulgated pursuant to W.S. 7-13-420. The board may also grant parole to a person serving a sentence for an offense committed before the person reached the age of eighteen (18) years of age as provided in W.S. 6-10-301(c).

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**Section 2.** This act is effective July 1, 2013.

(END)

\_\_\_\_\_  
Speaker of the House

\_\_\_\_\_  
President of the Senate

\_\_\_\_\_  
Governor

TIME APPROVED: \_\_\_\_\_

DATE APPROVED: \_\_\_\_\_

I hereby certify that this act originated in the House.

\_\_\_\_\_  
Chief Clerk