STATE OF MICHIGAN

IN THE SUPREME COURT

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

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

Supreme Court No.: 146478

Court of Appeals No.: 307758

v

Circuit Court No.: 06-001700-FC

RAYMOND CURTIS CARP,

Defendant-Appellant

ST. CLAIR COUNTY PROSECUTOR
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DEFENDANT-APPELLANT'S MOTION FOR LEAVE TO SUPPLEMENT AUTHORITY AND FILE A SUPPLEMENTAL BRIEF

NOW COMES Defendant-Appellant RAYMOND CURTIS CARP, through his attorney, PATRICIA L. SELBY, and asks this Honorable Court to permit him to supplement authority and file a supplemental brief, stating in support:

1. Since oral argument was held in this matter on March 6, 2014, two state courts of last resort, the Illinois Supreme Court and the Texas Court of Criminal Appeals, addressed

Miller v Alabama, 132 S Ct 2455 (2012). Both courts found the *Miller* decision to be retroactive. These decisions are offered for the Court's consideration. Ex. A, Ex. B.

2. As to the matter of a supplemental brief, at oral argument, Chief Justice Young inquired whether death penalty individualized sentencing cases, *Woodson v North Carolina*, 428 US 280 (1976), *Lockett v Ohio*, 438 US 586 (1978), and *Sumner v Shuman*, 483 US 66 (1987), were applied retroactively to petitioners other than those directly benefiting from those decisions. That discussion extended into the oral argument in the consolidated case *People v Davis (Cortez)*, Docket No. 146819. Mr. Bryan Stevenson, arguing pro hac vice for Defendant-Appellant Davis, responded to the Chief Justice's questions that those cases had indeed been applied retroactively.

3. The attached supplemental brief provides the case law demonstrating retroactive application of the United States Supreme Court's individualized sentencing decisions.

WHEREFORE, Defendant-Appellant respectfully requests that this Honorable Court permit the undersigned to supplement the authority by providing these recent decisions, and accept the attached supplemental brief.

Respectfully submitted,

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Dated: March 21, 2014

DEFENDANT-APPELLANT'S SUPPLEMENTAL AUTHORITY and BRIEF

Illinois and Texas have found *Miller* retroactive

1. On March 20, 2014, the Illinois Supreme Court unanimously held in *People v Davis*, Docket No. 115595 (Ex. A), that *Miller v Alabama*, 132 S Ct 2455 (2012), is substantive and thus retroactive, because the decision places juveniles constitutionally beyond the state's power to punish with a particular category of penalty, mandatory life without parole. *Slip op.*, 12.

2. On March 12, the Texas Court of Criminal Appeals, court of last resort for criminal matters,[1] decided *Ex Parte Maxwell*, Case No. AP 76,964. Ex. B. The court held *Miller* substantive and thus retroactive under *Schriro v Summerlin*, 542 US 348 (2004). *Slip op.*, 14.

Death penalty individualized sentencing decisions were held retroactive

3. At oral argument, members of this Court raised questions regarding the retroactive treatment of United States Supreme Court death penalty cases which established individualized sentencing and governed the consideration of mitigating evidence.

4. The Eleventh Circuit[2] held that *Lockett v Ohio*, 438 US 586 (1978), which required that all relevant mitigating evidence be introduced and given effect, was retroactive, finding "no doubt" about that status. *Songer v Wainwright*, 769 F2d 1488, 1489 (1985) (en banc), cert. denied, *Dugger v Songer*, 481 US 1041; 107 S Ct 1982 (1987).

5. Other jurisdictions acknowledging *Lockett*'s retroactivity include the Tenth Circuit, in *Dutton v Brown*, 812 F2d 593, 599 (CA10 1987); and the state of Florida, see *Riley v Wainwright*, 517 So 2d 656, 657 (Fla 1987).

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[1] See *In re Reece*, 341 SW3d 360, 371 (Tex 2011) (citing Tex. Const. art. V, § 5).

[2] The requirement that the U.S. Supreme Court must make new rules "retroactive to cases on collateral review" arises out of the the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See *Tyler v. Cain*, 533 US 656, 656 (2001) (citing 28 U.S.C. § 2244(b)(2) (A)). The requirement was thus inapplicable to the pre-AEDPA cases cited here.

6. *Sumner v Shuman*, 483 US 66 (1987), which established a new rule prohibiting mandatory death penalty sentences and requiring individualized sentencing for inmates who commit murder while serving life sentences, was also applied retroactively. See *Thigpen v. Thigpen*, 926 F2d 1003, 1005 (CA11 1991). Thigpen had exhausted all state remedies, and his conviction was final, when he filed a habeas petition in 1982. *Thigpen v Smith*, 792 F2d 1507, 1509-10 (CA11 1986). The Eleventh Circuit affirmed the district court's decisions upholding the murder conviction but setting aside the death sentence, "finding that [the state mandatory death penalty provision] was unconstitutional under *Sumner v Shuman*," *supra*. 926 F2d at 1005.

7. As for *Woodson v North Carolina*, 428 US 280 (1976), and its companion cases, the opportunity for retroactive application was limited to non-existent. The absence of case law expressly finding *Woodson* retroactive reflects the rapidly changing landscape of capital punishment case law in that time period, and not reluctance on the Court's part to apply such relief.

8. *Furman v Georgia*,[3] 408 US 238 (1972), invalidated death penalty sentencing statutes only four years previously. Supreme Court orders subsequent to *Furman* vacated over 100 capital sentences. See cases reported at 408 US 933-940, 92 S Ct 2845-2879 (1972). State and federal courts followed in kind, *State v Rhodes*, 164 Mont 455, 463; 524 P2d 1095 (1974); as did governors and parole boards. *State v Ragland*, 836 NW2d 107, 124 (Iowa 2013) (Mansfield, J., concurring) (listing states in which death sentences were commuted to life, post-*Furman*).

8. Between the *Furman* and *Woodson* decisions, new *Furman*-compliant capital sentencing schemes were promulgated in at least 35 states, only a portion of which elected a

[3] *Furman* itself was held retroactive. See *Michigan v Payne*, 412 US 47, 57 n 14 (1973); *Robinson v Neil*, 409 US 505, 508 (1973) (citing *Walker v Georgia*, 408 US 936 (1972)).

mandatory scheme to which *Woodson* would apply. *Gregg v. Georgia*, 428 US 153, 179-180 (1976).

9. Combining the invalidation or commutation of hundreds of death sentences following *Furman*, the limited period of time between decisions, and the changing status of sentencing statutes, post-*Furman* death sentences would not have achieved finality before *Woodson* was decided. Analysis of the retroactivity of the latter decision was thus not required.

10. Defendant-Appellant stands on the retroactive application of *Sumner v Shuman* and *Lockett v Ohio.* Those cases demonstrate that *Miller v Alabama*'s abolishment of mandatory sentencing and requirement for individualized sentencing should similarly be applied retroactively.

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Dated: March 21, 2014

A

2014 IL 115595

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

(Docket No. 115595)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. ADDOLFO DAVIS, Appellee.

Opinion filed March 20, 2014.

JUSTICE FREEMAN delivered the judgment of the court, with opinion.

Chief Justice Garman and Justices Thomas, Kilbride, Karmeier, Burke, and Theis concurred in the judgment and opinion.

OPINION

¶ 1 The circuit court of Cook County denied defendant, Addolfo Davis, leave to file a successive petition for relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)). The appellate court affirmed the order of the circuit court in part and vacated in part. Relying on *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012), the appellate court vacated defendant's sentence and remanded the cause to the circuit court for resentencing. 2012 IL App (1st) 112577-U. This court allowed the State's petition for leave to appeal (Ill. S. Ct. R. 315 (eff. Feb. 26, 2010)). We now affirm the judgment of the appellate court.

¶ 2 I. BACKGROUND

¶ 3 The appellate court has previously recited the details of defendant's convictions and sentences. See, *e.g.*, *People v. Davis*, 388 Ill. App. 3d 869 (2009); *People v. Davis*,

No. 1-93-1821 (1995) (unpublished order under Supreme Court Rule 23). We need not repeat those details here. Rather, we summarize the pertinent facts for purposes of the issues raised in this appeal.

¶ 4 On October 9, 1990, Bryant Johnson and Keith Whitfield were fatally shot. On October 11, defendant was arrested and questioned regarding his role in the shootings. Born on August 4, 1976, defendant was 14 years old when he was arrested. In January 1991, following a discretionary transfer hearing under the Juvenile Court Act of 1987 (Ill. Rev. Stat. 1989, ch. 37, ¶ 805-4(3)(a)), the juvenile division of the circuit court of Cook County entered an order permitting defendant to be prosecuted under the criminal laws.

¶ 5 In February 1991, defendant was charged in a 31-count indictment for crimes relating to the shootings.[1] In March 1993, defendant was convicted of the first degree murders of Johnson and Whitfield, the attempted first degree murders of Melvin Harvey and Keith McGee, and home invasion. Defendant was sentenced in April 1993. Because defendant was found guilty of murdering more than one victim, section 5-8-1(a)(1)(c) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c) (West 1992)) required the trial court to sentence defendant to a term of natural life imprisonment, for which parole is not available (730 ILCS 5/3-3-3(d) (West 1992)). Defendant was also sentenced to 30 years' imprisonment for each count of attempted first degree murder and home invasion, all sentences to run concurrently. On direct review, the appellate court affirmed defendant's convictions and sentences. *People v. Davis*, No. 1-93-1821 (1995) (unpublished order under Supreme Court Rule 23), *appeal denied*, 165 Ill. 2d 556 (1996) (table).

¶ 6 In October 1996, defendant filed his first *pro se* postconviction petition, which the circuit court summarily dismissed in November 1996. In December 1996, defendant filed a second *pro se* postconviction petition with a motion for substitution of judge. In March 1997, the circuit court dismissed this petition. Defendant appealed from the dismissal of both the first and second postconviction petitions. The appellate court affirmed the circuit court's rulings. *People v. Davis*, No. 1-98-2277 (1999) (unpublished order under Supreme Court Rule 23), *appeal denied*, 185 Ill. 2d 639 (1999) (table). In November 1998, defendant filed his third *pro se* postconviction petition, which the circuit court dismissed. Defendant appealed and the appellate court

[1] Two codefendants were separately indicted for their roles in the shootings. Defendant and codefendant Aaron Caffey were tried simultaneously with separate juries; codefendant Eugene Bowman received a separate bench trial.

affirmed the dismissal. *People v. Davis*, 1-99-0159 (1999) (unpublished order under Supreme Court Rule 23), *appeal denied*, 187 Ill. 2d 576 (2000) (table).

¶ 7 In September 2002, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2002)). The circuit court treated this petition as another postconviction petition and appointed counsel, who filed a supplemental petition. Relying on *People v. Miller*, 202 Ill. 2d 328 (2002) (hereinafter in text *Leon Miller*), defendant argued that his natural life sentence was unconstitutional because he did not actually participate in the act of killing. Defendant obtained new counsel, who filed a second supplemental postconviction petition. Defendant argued that his sentence violated the eighth amendment to the United States Constitution and, further, that the statute requiring a mandatory life sentence violated the Illinois Constitution as applied to a 14-year-old defendant.

¶ 8 Following a hearing, the circuit court dismissed the petition in January 2007. The court found this case distinguishable from *Leon Miller*, where that defendant only acted as a lookout and did not enter the building where the actual murder occurred. In this case, the court found that defendant significantly participated in the murders: he actually went to the crime scene with his codefendants; he carried a weapon to the crime scene, which he perhaps dropped; and defendant actually entered the abode where the murders occurred. Defendant appealed, and the appellate court affirmed the dismissal. *People v. Davis*, 388 Ill. App. 3d 869 (2009), *appeal denied*, 233 Ill. 2d 571 (2009) (table), *cert. denied*, 130 S. Ct. 1707 (2010).

¶ 9 The instant appeal comes to us from defendant's "Motion For Leave To File A Verified Successive Post-Conviction Petition," which he filed in April 2011. Defendant made two claims: (1) his mandatory life sentence without parole violated the eighth amendment to the United States Constitution pursuant to *Graham v. Florida*, 560 U.S. 48 (2010); and (2) he received ineffective assistance of counsel at his juvenile transfer hearing because his counsel failed to interview an eyewitness prior to the hearing. In August 2011, the circuit court denied defendant leave to file the successive petition. First, the court noted *Graham*'s holding that a mandatory life sentence without parole could not be imposed on juvenile offenders who did not commit homicide. The court found that *Graham* did not apply to the instant case because defendant was convicted of two first degree murders, as well as two attempted murders and home invasion. Second, the court found that defendant received effective assistance of counsel at his juvenile transfer hearing.

¶ 10 While defendant's appeal was pending in the appellate court, the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012), in which the Court held 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.' " *Id.* at ___, 132 U.S. at 2460. Defendant filed a substitute brief in the appellate court incorporating *Miller*. The appellate court concluded that *Miller* applies retroactively on postconviction review. Consequently, the appellate court vacated in part the circuit court's order denying leave to file a successive petition, vacated defendant's sentence, and remanded for a new sentencing hearing. However, the appellate court upheld the circuit court's denial of defendant's claim of ineffective assistance of counsel. 2012 IL App (1st) 112577-U.

¶ 11 The State appeals to this court. We granted leave to the following groups to file *amici curiae* briefs in support of defendant: Retired Judges *et al.*; Law Professors; Illinois Coalition for the Fair Sentencing of Children *et al.*; American Correctional Chaplains Association *et al.*; Amnesty International *et al.*; and Former Youthful Offenders. Ill. S. Ct. R. 345 (eff. Sept. 20, 2010). Additional pertinent background will be discussed in the context of our analysis of the issues.

¶ 12 II. ANALYSIS

¶ 13 The Post-Conviction Hearing Act provides a procedural mechanism through which a criminal defendant can assert that his federal or state constitutional rights were substantially violated in his original trial or sentencing hearing. 725 ILCS 5/122-1(a) (West 2012); *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002). A postconviction proceeding is not a substitute for a direct appeal, but rather is a collateral attack on a prior conviction and sentence. *People v. Edwards*, 2012 IL 111711, ¶ 21; *People v. Tenner*, 206 Ill. 2d 381, 392 (2002). "The purpose of the post-conviction proceeding is to allow inquiry into constitutional issues involved in the original conviction and sentence that have not been, and could not have been, adjudicated previously on direct appeal." *People v. Towns*, 182 Ill. 2d 491, 502 (1998). Accordingly, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are considered forfeited. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009); *Pitsonbarger*, 205 Ill. 2d at 456, 458; see 725 ILCS 5/122-3 (West 2012) (stating that "[a]ny claim *** not raised in the original or an amended petition is waived").

¶ 14 Consistent with these principles, the Post-Conviction Hearing Act contemplates the filing of only one postconviction petition. 725 ILCS 5/122-1(f) (West 2012); *Ortiz*, 235 Ill. 2d at 328; *Pitsonbarger*, 205 Ill. 2d at 456. Consequently, a defendant faces immense procedural default hurdles when bringing a successive postconviction petition. Because successive petitions impede the finality of criminal litigation, these hurdles are lowered only in very limited circumstances. *Tenner*, 206 Ill. 2d at 392. One such basis for relaxing the bar against successive postconviction petitions is where a petitioner can establish "cause and prejudice" for the failure to raise the claim earlier. We observe that following *Pitsonbarger*, the General Assembly added section 122-1(f) to the Act, which codifies our cause-and-prejudice case law. *People v. Tidwell*, 236 Ill. 2d 150, 156 (2010); *Ortiz*, 235 Ill. 2d at 330. "Cause" refers to some objective factor external to the defense that impeded counsel's efforts to raise the claim in an earlier proceeding. "Prejudice" refers to a claimed constitutional error that so infected the entire trial that the resulting conviction or sentence violates due process. 725 ILCS 5/122-1(f) (West 2012); *Ortiz*, 235 Ill. 2d at 329; *Pitsonbarger*, 205 Ill. 2d at 460, 464. Both prongs must be satisfied for the defendant to prevail. *People v. Guerrero*, 2012 IL 112020, ¶ 15. It is within this procedural framework that we address the issues presented.

¶ 15 A. Constitutionality of Sentence

¶ 16 The appellate court vacated defendant's sentence and remanded defendant's case to the circuit court for resentencing pursuant to principles articulated in *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012). The analyses of the lower courts, as well as the arguments of counsel before this court, require a thorough discussion of the controlling principles.

¶ 17 1. Eighth Amendment Principles

¶ 18 The eighth amendment prohibits, *inter alia*, the imposition of "cruel and unusual punishments," and applies to the States through the fourteenth amendment. *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (collecting cases). "The concept of proportionality is central to the Eighth Amendment." *Graham v. Florida*, 560 U.S. 48, 59 (2010). The eighth amendment's ban on excessive sanctions flows from the basic principle that criminal punishment should be graduated and proportioned to both the offender and the

offense. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2463; *Roper*, 543 U.S. at 560. To determine whether a punishment is so disproportionate as to be "cruel and unusual," a court must look beyond history to "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality op.); see *Miller*, 567 U.S. at ___, 132 S. Ct. at 2463; *Graham*, 560 U.S. at 59; *Roper*, 543 U.S. at 561.

¶ 19 *Roper*, *Graham*, and *Miller* form a line of United States Supreme Court decisions that address how the eighth amendment's ban on "cruel and unusual punishments" applies to sentencing juveniles. The Court recognized three general differences between juveniles under 18 and adults. First, juveniles have a lack of maturity and an underdeveloped sense of responsibility. Second, juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. Third, the character of a juvenile is not as well formed as that of an adult. The Court concluded that these differences render the irresponsible conduct of juveniles not as morally reprehensible as that of an adult. *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569-70. In *Roper*, 543 U.S. at 578, the Court held: "The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." In *Graham*, 560 U.S. at 74, the Court held that the eighth amendment forbids the sentence of life without parole "for a juvenile offender who did not commit homicide." The Court further held that a "State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Id.* at 82.

¶ 20 In *Miller*, the Court considered appeals by "two 14-year-old offenders *** convicted of murder and sentenced to life imprisonment without the possibility of parole. In neither case did the sentencing authority have any discretion to impose a different punishment." *Miller*, 567 U.S. at ___, 132 S. Ct. at 2460. Relying on its earlier decisions in *Roper* and *Graham*, the Court in *Miller* recognized that "children are constitutionally different from adults for purposes of sentencing" (*id.* at ___, 132 S. Ct. at 2464), and that "in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." *Id.* at ___, 132 S.Ct. at 2468. The Court explained that a mandatory sentence precludes consideration of such mitigating circumstances as: the juvenile offender's age and its attendant characteristics; the juvenile's family and home environment and the circumstances of the offense, including the extent of the juvenile's participation therein and the effect of any familial or peer pressure; the juvenile's possible inability to interact with police officers or

prosecutors, or incapacity to assist his or her own attorneys; and "the possibility of rehabilitation even when the circumstances most suggest it." *Id.* at ___, 132 S. Ct. at 2468.

¶ 21 Based on the above, the Court held:

> "[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 sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment." *Id.* at ___, 132 S. Ct. at 2475.

Although the Court refused to declare categorically that a juvenile can *never* receive life imprisonment without parole for a homicide offense, the Court stated that "given all we have said in *Roper*, *Graham*, and this decision ***, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at ___, 132 S. Ct. at 2469.

¶ 22 Before this court, the State challenges the appellate court's retroactive application of *Miller v. Alabama* to defendant's postconviction proceeding. Defendant not only defends the appellate court's judgment, but, seeking cross-relief, further contends that *Miller* renders the statutory scheme under which he was convicted facially unconstitutional. We address defendant's contention first.

¶ 23 2. Facial Unconstitutionality

¶ 24 Defendant contends that *Miller* "renders the statutory scheme under which he was sentenced void." Therefore, according to defendant: his resulting sentence is void; he can raise this claim in this collateral proceeding; and he is entitled to a new sentencing hearing under the applicable sentencing provision as it existed prior to its allegedly unconstitutional form.

¶ 25 If a new constitutional rule renders a statute facially unconstitutional, the statute is void *ab initio*. *Lucien v. Briley*, 213 Ill. 2d 340, 344 (2004). When a court declares a statute unconstitutional and void *ab initio*, the court means only that the statute was

constitutionally infirm from the moment of its enactment and, therefore, is unenforceable. *People v. Blair*, 2013 IL 114122, ¶ 30. A facial challenge to the constitutionality of a statute is the most difficult challenge to mount. *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305 (2008); *People v. Greco*, 204 Ill. 2d 400, 407 (2003). A statute is facially unconstitutional only if there are no circumstances in which the statute could be validly applied. *Napleton*, 229 Ill. 2d at 306; *Lucien*, 213 Ill. 2d at 344. The fact that the statute could be found unconstitutional under some set of circumstances does not establish the facial invalidity of the statute. *In re Parentage of John M.*, 212 Ill. 2d 253, 269 (2004). Thus, a facial challenge must fail if any situation exists where the statute could be validly applied. *In re M.T.*, 221 Ill. 2d 517, 533 (2006) (and cases cited therein).

¶ 26 Further, a sentence that violates the constitution is void from its inception (*People v. Brown*, 225 Ill. 2d 188, 203 (2007)), and may be attacked at any time and in any court, either directly or collaterally. *People v. Thompson*, 209 Ill. 2d 19, 27 (2004). Whether a statute is unconstitutional is a question of law, which is reviewed *de novo*. *People v. Kitch*, 239 Ill. 2d 452, 466 (2011).

¶ 27 As earlier recited, defendant was sentenced pursuant to section 5-8-1(a)(1)(c) of the Unified Code of Corrections. When defendant was sentenced in April 1993, that section was codified in the Illinois Compiled Statutes in pertinent part: "(1) for first degree murder, *** (c) if the defendant *** (ii) is found guilty of murdering more than one victim *** the court *shall* sentence the defendant to a term of natural life imprisonment." (Emphasis added.) 730 ILCS 5/5-8-1(a)(1)(c) (West 1992). We observe that at the time of his offenses, that section provided in pertinent part: "(1) for first degree murder *** (c) if the defendant has previously been convicted of first degree murder under any state or federal law or is found guilty of murdering more than one victim, the court *shall* sentence the defendant to a term of natural life imprisonment." (Emphasis added.) Ill. Rev. Stat. 1989, ch. 38, ¶ 1005-8-1(a)(1)(c). Subsection (c)'s provision of mandatory life imprisonment for multiple murders was added by Public Act 81-1118. Pub. Act 81-1118 (eff. July 1, 1980) (adding Ill. Rev. Stat. 1981, ch. 38, ¶ 1005-8-1(a)(1)(c)).

¶ 28 Defendant argues that subsection (c) is facially unconstitutional because under no circumstances does the statute permit a sentencer "to consider age and its relevant mitigating factors in compliance with *Miller*." According to defendant, he is entitled to be resentenced under section 5-8-1 as it existed prior to the addition of the mandatory life provision. See Ill. Rev. Stat. 1979, ch. 38, ¶ 1005-8-1. We disagree.

¶ 29 *Miller* itself expressly limited its prohibition of mandatory sentences of life without parole to juveniles. Explaining that "children are different" in terms of the eighth amendment, the Court observed that a sentencing rule that may be impermissible for children may be permissible for adults. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2470.

¶ 30 In the case at bar, the mandatory sentence of life without parole for defendants who commit multiple murders, as provided in section 5-8-1(a)(1)(c), can be validly applied to adults. Because there are situations where the statute can be validly applied, it is not facially unconstitutional. See, *e.g.*, *People v. Williams*, 2012 IL App (1st) 111145, ¶ 47.

¶ 31 However, defendant insists that this analysis fails to consider whether the applicable *statutory scheme*—which includes Illinois's juvenile transfer statute—is void *ab initio*. This argument lacks merit. As earlier recited, defendant received a juvenile transfer hearing pursuant to section 805-4(3) of the Juvenile Court Act of 1987, which provided in pertinent part:

> "(3)(a) If a petition alleges commission by a minor 13 years of age or over of an act which constitutes a crime under the laws of this State, and, on motion of the State's Attorney, a Juvenile Judge, designated by the Chief Judge of the Circuit to hear and determine such motions, after investigation and hearing but before commencement of the adjudicatory hearing, finds that it is not in the best interests of the minor or of the public to proceed under this Act, the court *may* enter an order permitting prosecution under the criminal laws.
>
> (b) In making its determination on a motion to permit prosecution under the criminal laws, the court *shall* consider *among other matters*: (1) whether there is sufficient evidence upon which a grand jury may be expected to return an indictment; (2) whether there is evidence that the alleged offense was committed in an aggressive and premeditated manner; (3) the age of the minor; (4) the previous history of the minor; (5) whether there are facilities particularly available to the Juvenile Court for the treatment and rehabilitation of the minor; (6) whether the best interest of the minor and the security of the public may require that the minor continue in custody or under supervision for a period extending beyond his minority; and (7) whether the minor possessed a deadly weapon when committing the alleged offense." (Emphases added.) Ill. Rev. Stat. 1989, ch. 37, ¶ 805-4.

¶ 32 This provision did not prohibit the circuit court from considering any and all relevant circumstances attendant to defendant's age, as required by *Miller*. Indeed, this

provision *requires* such consideration. We hold that *Miller* did not render the statutory scheme under which defendant was sentenced facially unconstitutional. Since defendant fails in his facial challenge to the statutory scheme under which he was sentenced, we next consider whether *Miller* applies to defendant's mandatory sentence of life imprisonment without parole.

¶ 33 3. Retroactivity of *Miller*

¶ 34 The State contends that *Miller* should not be retroactively applied to cases on collateral review. Employing the standards for such application as expressed in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality op.), the appellate court concluded that *Miller* must be applied retroactively to defendant's successive postconviction petition and ordered a new sentencing hearing. 2012 IL App (1st) 112577-U, ¶¶ 16-18. Indeed, we observe that several panels of our appellate court have concluded that *Miller* applies retroactively to cases on collateral review. See, *e.g.*, *People v. Williams*, 2012 IL App (1st) 111145; *People v. Morfin*, 2012 IL App (1st) 103568; *People v. Luciano*, 2013 IL App (2d) 110792; *People v. Johnson*, 2013 IL App (5th) 110112. We agree with this conclusion.

¶ 35 In *Teague*, the United States Supreme Court established standards for determining when a new constitutional rule would apply to federal *habeas corpus* actions pending in federal courts. In *People v. Flowers*, 138 Ill. 2d 218 (1990), this court acknowledged that *Teague* arose in the context of federal *habeas corpus*. However, this court considered the analysis enunciated therein "helpful and concise," and adopted it as a matter of state law for collateral proceedings pursuant to the Post-Conviction Hearing Act. *Id.* at 237-39.[2] The purpose of the *Teague* analysis is to promote the government's interest in finality of criminal convictions. " 'Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.' " *Id.* at 239 (quoting *Teague*, 489 U.S. at 309).

[2]We acknowledge that the United States Supreme Court has subsequently clarified *Teague*. First: "Since *Teague* is based on statutory authority that extends only to federal courts applying a federal statute, it cannot be read as imposing a binding obligation on state courts." *Danforth v. Minnesota*, 552 U.S. 264, 278-79 (2008). Second, the *Teague* analysis "was meant to apply only to federal courts considering habeas corpus petitions challenging state-court criminal convictions." *Id.* at 279.

¶ 36 A judicial decision that establishes a new constitutional rule applies to all criminal cases pending on direct review. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004); *People v. Erickson*, 117 Ill. 2d 271, 288 (1987). However, as to convictions that are already final, the new rule is not to be applied retroactively to cases on collateral review except in two instances. First:

> "New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms [citations], as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish [citations]. 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." (Emphasis in original.) *Schriro*, 542 U.S. at 351-52 (and cases cited therein).

Second:

> "New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." (Internal quotation marks omitted.) *Id.* at 352.

In other words, the watershed rule of criminal procedure is a rule that is implicit in the concept of ordered liberty, without which the likelihood of an accurate conviction is seriously diminished. *People v. Sanders*, 238 Ill. 2d 391, 401 (2010); *People v. Morris*, 236 Ill. 2d 345, 359 (2010); see *Teague*, 489 U.S. at 311-13.

¶ 37 As the Court explained in *Schriro*, courts sometimes refer to constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish as an *exception* to *Teague*'s bar on retroactive application of procedural rules. However, "they are more accurately characterized as *substantive rules not subject to the bar*." (Emphasis added.) *Schriro*, 542 U.S. at 352 n.4. As noted, several panels of our appellate court have concluded that *Miller* applies retroactively to postconviction proceedings. However, those panels have differed in their application of the *Teague* analysis to *Miller*.

¶ 38 In the instant case, the appellate court relied on *Williams*, which concluded that *Miller* constitutes a watershed rule of criminal procedure, or requires the observance of those procedures that are implicit in the concept of ordered liberty. 2012 IL App (1st) 112577-U, ¶ 16 (quoting *People v. Williams*, 2012 IL App (1st) 111145, ¶¶ 51-52). In contrast, another panel of our appellate court concluded that *Miller* constituted a new substantive rule. See *People v. Morfin*, 2012 IL App (1st) 103568, ¶ 56. We observe that the special concurrence in *Morfin* opined that a new substantive rule is outside of the bar of *Teague* and concludes the analysis. *Id.* ¶¶ 62-68 (Sterba, J., specially concurring). We agree with the views expressed in *Morfin*.

¶ 39 In concluding that *Miller* constitutes a new substantive rule, the court in *Morfin* reasoned:

> "While [*Miller*] does not forbid a sentence of life imprisonment without parole for a minor, it does require Illinois 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." *Id.* ¶ 56.

As the Iowa Supreme Court recognized: "From a broad perspective, *Miller* does mandate a new procedure. Yet, the procedural rule for a hearing is the result of a substantive change in the law that prohibits mandatory life-without-parole sentencing." *State v. Ragland*, 836 N.W.2d 107, 115 (Iowa 2013). In other words, *Miller* places a particular class of persons covered by the statute—juveniles—constitutionally beyond the State's power to punish with a particular category of punishment—*mandatory* sentences of natural life without parole. See *Miller*, 567 U.S. at ___, ___, 132 S. Ct. at 2464, 2468; *Diatchenko v. District Attorney for the Suffolk District*, 1 N.E.3d 270, 277 (Mass. 2013). Since *Miller* declares a new substantive rule, it applies retroactively without resort to *Teague*. See *Schriro*, 542 U.S. at 351-52 & n.4.

¶ 40 Also, we find it instructive that the *Miller* companion case, *Jackson v. Hobbs*, arose on state collateral review. Notwithstanding its finality, the Court retroactively applied *Miller* and vacated Jackson's sentence. While our analysis is independent as a matter of Illinois law, the relief granted to Jackson under *Miller* tends to indicate that *Miller* should apply retroactively on collateral review. See *People v. Williams*, 2012 IL App (1st) 111145, ¶ 54; *People v. Morfin*, 2012 IL App (1st) 103568, ¶ 57.

¶ 41 We observe that defendant and several *amici* assert that this court should depart from *Teague* and adopt a different rule of retroactivity. However, we do not rely on *Teague* in our analysis because we view *Miller* as a new substantive rule, which is outside of *Teague* rather than an exception thereto. Accordingly, we need not and do not address this argument. See *People v. Campa*, 217 Ill. 2d 243, 269-70 (2005) (reviewing court will not decide nonessential issues or render advisory opinions).

¶ 42 In terms of the requisite cause and prejudice of the Post-Conviction Hearing Act, *Miller*'s new substantive rule constitutes "cause" because it was not available earlier to counsel (*Pitsonbarger*, 205 Ill. 2d at 460-61), and constitutes prejudice because it retroactively applies to defendant's sentencing hearing. See 725 ILCS 5/122-1(f) (West 2012).

¶ 43 *Miller* holds that a *mandatory* life sentence for a juvenile violates the eighth amendment prohibition against cruel and unusual punishment. In the case at bar, defendant, a juvenile, was sentenced to a mandatory term of natural life without parole. Therefore, his sentence is invalid, and we uphold the appellate court's vacatur thereof. We observe that *Miller* does not invalidate the penalty of natural life without parole for multiple murderers, only its *mandatory* imposition on juveniles. See *People v. Luciano*, 2013 IL App (2d) 110792, ¶¶ 62-63. A minor may still be sentenced to natural life imprisonment without parole so long as the sentence is at the trial court's discretion rather than mandatory. See *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469; *Miller*, 202 Ill. 2d at 341; *People v. Johnson*, 2013 IL App (5th) 110112, ¶ 24. We remand for a new sentencing hearing, where the trial court may consider all permissible sentences.

¶ 44 4. Illinois Constitution

¶ 45 Seeking cross-relief, defendant presents several additional contentions. Defendant contends that his mandatory sentence of life imprisonment without parole offends both the proportionate penalties clause and the due process clause of the Illinois Constitution. Ill. Const. 1970, art. I, §§ 2, 11. However, these contentions were raised and rejected previously. *People v. Davis*, No. 1-93-1821 (1995) (unpublished order under Supreme Court Rule 23); *People v. Davis*, 388 Ill. App. 3d 869 (2009). In support of these contentions, defendant relies on the Court's "reaffirmation of the special status of children" in *Graham* and *Miller*. However, in *Leon Miller*, this court expressly recognized the special status of juvenile offenders prior to *Roper*, *Graham*, and *Miller*. Nonetheless, this court concluded that such special status does not

necessarily prohibit a sentence of natural life without parole where a juvenile offender actively participates in the planning of a crime that results in multiple murders. *Miller*, 202 Ill. 2d at 341-42. Accordingly, the rejection of this contention is *res judicata* and cannot be relitigated here. See, *e.g.*, *People v. Pulliam*, 206 Ill. 2d 218, 246-47 (2002); *People v. Neal*, 142 Ill. 2d 140, 146-47 (1990).

¶ 46 5. Defendant Did Not Kill or Intend to Kill

¶ 47 Regardless of whether defendant is entitled to a new sentencing hearing pursuant to *Miller*, defendant contends that this court "should make clear that his sentence is unconstitutional in any event under *Graham* *** because he did not kill or intend to kill." We reject this contention.

¶ 48 In *Graham*, the Court observed generally that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers," and that homicide is distinguishable from other serious violent offenses against persons. *Graham*, 560 U.S. at 69. The Court reasoned: "It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis." *Id.* Therefore, the Court held that the eighth amendment forbids the sentence of life imprisonment without parole for a juvenile defendant who did not commit homicide. *Id.* at 74, 82.

¶ 49 By its own terms, *Graham* does not apply to the case at bar. Defendant was convicted of the first degree murder of two victims, and the attempted first degree murder of two additional victims. Thus, *Graham* does not categorically prohibit defendant from receiving a sentence of natural life when he is resentenced.

¶ 50 Defendant insists that, "even absent a categorical rule," his sentence of life imprisonment without parole is unconstitutional "in light of his young age and individual circumstances." However, defendant now will have the opportunity, for the first time, to present this exact argument at his new sentencing hearing. Therefore, we decline to address it.

¶ 51 B. Effective Assistance of Counsel

¶ 52 In addition to his claims pertaining to his sentence, defendant claims that he received ineffective assistance of counsel at his juvenile transfer hearing because his counsel failed to interview an eyewitness prior to the hearing. The circuit court denied leave to file this claim, and the appellate court upheld the denial. Our review is *de novo*. See *People v. Edwards*, 197 Ill. 2d 239, 247 (2001) (quoting *People v. Coleman*, 183 Ill. 2d 366, 388 (1998)).

¶ 53 Defendant attached the 2010 affidavit of Lamont Baxter to the instant successive postconviction petition. Prior to defendant's juvenile transfer hearing, Baxter testified before a grand jury regarding defendant's involvement in the crimes. The testimony was entered into evidence at defendant's juvenile transfer hearing. Baxter subsequently testified at defendant's trial. Before the grand jury, Baxter testified that defendant and his codefendants all possessed guns, and they all discussed whether they would kill everyone at the scene or allow one particular person to live. See *Davis*, 388 Ill. App. 3d at 872. However, in his affidavit, Baxter averred that he "did not see if [defendant] had a gun," and that "defendant was not part of that conversation, and he did not say a word." Baxter additionally averred that he "did not remember [defendant] saying anything during the incident. The whole time he looked like a scared kid being told what to do by [a codefendant, who] was the ringleader and was doing most of the talking." Also, Baxter "did not remember" being interviewed by defendant's lawyer prior to trial.

¶ 54 The appellate court correctly upheld the circuit court's denial of leave to file this claim. As this is defendant's fifth request for collateral review, the procedural default hurdles are "immense." See *Tenner*, 206 Ill. 2d at 392. In his first postconviction petition, defendant claimed that trial counsel was ineffective for not raising an insanity defense. In his second postconviction petition, defendant claimed that his trial and appellate counsel were ineffective. In his third postconviction petition, defendant claimed that trial counsel was ineffective for failing to produce exculpatory witnesses. *Davis*, 388 Ill. App. 3d at 875. The appellate court found that defendant "has failed to meet his burden of showing cause due to his failure to identify an objective factor that impeded his ability to raise his claim of ineffective assistance of juvenile court counsel during his three prior postconviction petitions which asserted ineffective assistance of counsel." 2012 IL App (1st) 112577-U, ¶ 22.

¶ 55 Before this court, defendant argues that juvenile court counsel's deficient representation was not discovered until his current postconviction counsel spoke with Baxter in December 2010. We reject this argument. Defendant fails to explain why he was unable to discover this allegedly *new* evidence earlier, or raise this or a similar claim in *any* of his earlier postconviction proceedings. A defendant is not permitted to develop the evidentiary basis for a claim in a piecemeal fashion in successive postconviction petitions, as defendant has attempted to do here. See *People v. Erickson*, 183 Ill. 2d 213, 226-27 (1998).

¶ 56 We hold that defendant has failed to establish "cause" for failing to raise this claim earlier. See 725 ILCS 5/122-1(f) (West 2012); *Pitsonbarger*, 205 Ill. 2d at 462-63. Baxter's affidavit testimony is not of such character that it could not have been discovered earlier by the exercise of due diligence. See *People v. Silagy*, 116 Ill. 2d 357, 368 (1987). As both prongs of the cause and prejudice test must be satisfied (*People v. Guerrero*, 2012 IL 112020, ¶ 15), defendant's claim is barred. We uphold the denial of leave to file this claim.

¶ 57 III. CONCLUSION

¶ 58 For the foregoing reasons, the judgment of the appellate court is affirmed.

¶ 59 Affirmed.

B

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-76,964

EX PARTE TERRELL MAXWELL, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. D-1-DC-08-300490
FROM TRAVIS COUNTY

COCHRAN, J., delivered the opinion of the Court in which MEYERS, PRICE, JOHNSON and ALCALA, JJ., joined. WOMACK, J., filed a dissenting opinion in which KELLER, P.J., joined. KEASLER, J., filed a dissenting opinion in which KELLER, P.J., and HERVEY, J., joined.

OPINION

In his application for a writ of habeas corpus, applicant claims that his mandatory sentence of life imprisonment without the possibility of parole, for a crime he committed as a juvenile, violates the Eighth and Fourteenth Amendments to the United States Constitution under *Miller v. Alabama*.[1] In that case, the Supreme Court held that a mandatory "life without parole" sentence for a defendant who was under the age of 18 at the time of his crime

[1] 132 S. Ct. 2455 (2012).

violates the Eighth Amendment's prohibition on cruel and unusual punishment. Applicant's sentence was imposed, and his conviction affirmed on direct appeal, before the Supreme Court announced its decision in *Miller*. We ordered that this application be filed and set to decide if *Miller v. Alabama* applies retroactively to a claim raised in a post-conviction proceeding, and, if so, what remedy is appropriate.[2] Because we find that the *Miller* court announced a new substantive rule under the first *Teague* exception, we hold that it applies retroactively. We will grant relief, and remand for further sentencing proceedings not inconsistent with *Miller v. Alabama*.

I.

A jury convicted applicant of the offense of capital murder. The jury heard evidence that, on the night of December 15, 2007, the 17-year-old applicant, along with Rashad Dukes and Michael Jamerson, were "smoking weed and watching movies" when applicant suggested robbing somebody. Applicant had a revolver that was "all black" except for a "pearl white handle"–"kind of a cowboy-looking gun." They drove Jamerson's car to an apartment complex chosen "because that is where the dope dealers and Mexicans were." When they arrived at the complex, they sat in the car for several minutes. Applicant announced that he would shoot the person they robbed if that person did not give them money.

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[2] *Ex parte Maxwell*, No. AP–76964, 2013 WL 458168, *1 (Tex. Crim. App. Feb. 6, 2013) (not designated for publication). Applicant raised several other issues in his writ application, including ineffective assistance of counsel and various evidentiary matters, but we summarily deny those claims.

The trio then got out of the car and approached Fernando Santander, who was sitting in a parked van. Applicant held his gun to Mr. Santander's cheek and demanded that he "give him his money." Visibly scared, Mr. Santander "put up his hands out of shock." According to Dukes, "[T]hat's when [applicant] shot him." Immediately thereafter, applicant and his accomplices "all took off running at the same time." They returned to Jamerson's car and drove away. Applicant told the others that "he didn't mean to do it" and that "it was an accident." Mr. Santander's body was discovered by friends early the next morning, slumped across the center console of the van. A .44 caliber jacket fragment was recovered from the parking lot near the van. A "tipster" led officers to the three suspects. Dukes and Jamerson confessed and testified against applicant in his capital murder trial.

Because applicant was 17 at the time he committed the murder, the State did not seek the death penalty, and punishment was automatically assessed at life imprisonment without the possibility of parole.[3] The Third Court of Appeals rejected applicant's claim that his automatic sentence violated the Eighth Amendment because he had never raised that claim

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[3] TEX. PENAL CODE §§ 19.03(a)(2) & 12.31(a) (2009). Until 2005, an individual adjudged guilty of a capital felony in a case in which the State did not seek the death penalty was punished by life. TEX. PENAL CODE § 12.31(a) (2003). From 2005 to 2009, such an individual was punished by life without parole. TEX. PENAL CODE § 12.31(a) (2005-2007). From 2009 to 2013, the sentence was (1) life, if the individual's case was transferred to the district court under Section 54.02, Family Code; or (2) life without parole. TEX. PENAL CODE § 12.31(a) (2009-2011). Section 12.31(a)–amended in response to *Miller*–now provides that "[a]n individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for: (1) life, if the individual committed the offense when younger than 18 years of age; or (2) life without parole, if the individual committed the offense when 18 years of age or older." TEX. PENAL CODE § 12.31(a) (2013).

in the trial court.[4] It affirmed his conviction and sentence in 2010.[5]

II.

A. ***Miller v. Alabama.***

On June 25, 2012, after applicant's conviction 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."[6] In deciding the issue, the Court consolidated two cases: *Miller*, an Alabama case on direct appeal, and *Jackson v. Hobbs*, an Arkansas case on collateral review. Both cases involved 14-year-old boys convicted of first-degree murder and sentenced to mandatory life in prison without parole.[7]

The Court held 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

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[4] *Maxwell v. State*, No. 03-09-00027-CR, 2010 WL 4595702, *9 (Tex.App.—Austin Nov. 12, 2010, pet. ref'd) (not designated for publication).

[5] *Id.*

[6] *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

[7] *See id.* at 2460. In the Arkansas case, Kuntrell Jackson and two other boys, one armed with a sawed-off shotgun in his coat sleeve, robbed a video store. When the clerk threatened to call the police, one of Jackson's accomplices shot and killed her. The three boys fled empty-handed. *Id.* at 2461. In the Alabama case, Evan Miller and his friend Colby Smith smoked marijuana and played drinking games with Cole Cannon, a neighbor, until Cannon passed out. Miller stole his wallet, splitting about $300 with his friend, but when he tried to put the wallet back in Cannon's pocket, Cannon woke up and grabbed Miller by the throat. Smith beat Cannon with a baseball bat to make him let go of Miller, who then grabbed the bat and repeatedly struck Cannon with it. The boys then retreated to Miller's trailer, but they soon returned to Cannon's trailer and lit two fires to cover up evidence of their crime. Cannon eventually died from his injuries and smoke inhalation. *Id.* at 2462.

disproportionate punishment."[8] It stated that those determining the sentence of a juvenile must take into account the offender's "age and the wealth of characteristics and circumstances attendant to it."[9] Under a mandatory "life without parole" sentencing scheme, the factfinder cannot consider 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.[10]

The Court did not foreclose the option of a "life without parole" sentence for juvenile murderers, but *Miller* requires the sentencer to consider "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[11] Therefore, the "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," because it is difficult to distinguish "between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile

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[8] *Id.* at 2469.

[9] *Id.* at 2467.

[10] *Id.* at 2468 (citations omitted).

[11] *Id.* at 2469.

offender whose crime reflects irreparable corruption."[12]

B. Retroactivity under *Teague v. Lane*.

In *Teague* and its progeny, the Supreme Court laid out the framework to decide whether a "new rule" announced in one of its opinions should be applied retroactively to criminal convictions that were already final on direct review. Under the *Teague* framework, a "new rule" applies retroactively in a collateral proceeding only if the rule (1) is substantive or (2) is a "watershed" rule of criminal procedure.[13]

New substantive 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*" because of his status or offense.[14] Watershed rules of criminal procedure also apply retroactively because those rules implicate "the fundamental fairness and accuracy of the criminal proceeding."[15] But a new "watershed" procedural rule "must be one 'without which the likelihood of an accurate conviction is seriously diminished.' This class of rules is extremely narrow," and it is unlikely that any more new ones will emerge.[16]

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[12] *Id.* (quotations marks omitted).

[13] *Whorton v. Bockting*, 549 U.S. 406, 416 (2007).

[14] *Schriro v. Summerlin*, 542 U.S. 348, 351, 352 (2004) (emphasis added) (quoting *Bousley v. United States,* 523 U.S. 614, 620 (1998)).

[15] *Saffle v. Parks*, 494 U.S. 484, 495 (1990).

[16] *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (quoting *Saffle*, 494 U.S. at 505). In *Summerlin*, the Court explained that new procedural rules

Although the United States Supreme Court held in *Danforth v. Minnesota*[17] that state courts need not utilize the *Teague* retroactivity rule, we follow *Teague* as a general matter of state habeas practice,[18] and we will not deviate from our precedent in this instance.

III.

Federal and state courts across the country have struggled with the issue of whether *Miller* applies retroactively to post-conviction proceedings.[19] For example, the Eleventh

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> do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."

Id. (citations omitted). As the Louisiana Supreme Court stated in *State v. Tate*, ___ So. 3d. __, 2013 WL 5912118 (La. 2013), the exception for "watershed" rules of criminal procedure

> "is extremely narrow," and since its decision in *Teague*, the Supreme Court has "rejected every claim that a new rule satisfied the requirements for watershed status." In fact, the Court has indicated "it is unlikely that any" watershed rules have "'yet to emerge.'" The only case ever to satisfy this high threshold is *Gideon v. Wainwright*, in which the Court "held that counsel must be appointed for any indigent defendant charged with a felony" because "[w]hen a defendant who wishes to be represented by counsel is denied representation, *Gideon* held, the risk of an unreliable verdict is intolerably high. The new rule announced in *Gideon* eliminated this risk." Therefore, it is not enough that a new rule is aimed at improving the accuracy of trial, or even that it promotes the objectives of fairness and accuracy; the rule must institute procedures implicit in the concept of ordered liberty to come within this exception.

Id. at *7 (citations omitted).

[17] 552 U.S. 264, 280–81 (2008).

[18] *Ex Parte De Los Reyes*, 392 S.W.3d 675, 679 (Tex. Crim. App. 2013).

[19] *See Miller*, 132 S. Ct. at 2471 ("By our count, 29 jurisdictions (28 States and the Federal Government) make a life-without-parole term mandatory for some juveniles convicted of murder in adult court."). A considerable number of those jurisdictions have weighed in on the retroactivity issue, but no consensus has emerged.

Circuit and the Louisiana, Pennsylvania, and Minnesota Supreme Courts, and some lower federal and state courts have all held that *Miller* is not retroactive.[20] However, the First, Second, Third, Fourth, and Eighth Circuits have held that habeas applicants successfully made out a *prima facie* case that *Miller* is retroactive, and they have granted motions to file successive habeas corpus petitions raising *Miller* claims.[21] The Fifth Circuit has so far split the baby: One panel has found a *prima facie* showing that *Miller* satisfies the test for retroactivity; another has not.[22] The Nebraska, Massachusetts, Iowa, and Mississippi high courts, as well as several lower state and federal courts, have also held that *Miller* is retroactive.[23]

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[20] *In re Morgan*, 713 F. 3d 1365 (11th Cir. 2013); *Martin v. Symmes*, ___ F. Supp. ___, 2013 WL 5653447, *16 (D. Minn. 2013); *State v. Tate*, ___ So.3d ___, 2013 WL 5912118, *6-9 (La. 2013); *Commonwealth v. Cunningham*, 81 A.3d 1, 11 (Pa. 2013); *Chambers v. State*, 831 N.W.2d 311, 331 (Minn. 2013); *People v. Carp*, 828 N.W.2d 685, 711-14 (Mich. Ct. App. 2012, pet. granted); *Geter v. State*, 115 So. 3d 375, 385 (Fla. Dist. Ct. App. 2012).

[21] *In re Pendleton*, 732 F.3d 280, 282-83 (3d Cir. 2013) (per curium) ("After extensive briefing and oral argument, we conclude that Petitioners have made a prima facie showing that *Miller* is retroactive. In doing so, we join several of our sister courts of appeals. *See, e.g.*, *Wang v. United States,* No. 13–2426 (2nd Cir. July 16, 2013) (granting motion to file a successive habeas corpus petition raising a *Miller* claim); *In re James*, No. 12–287 (4th Cir. May 10, 2013) (same); *Johnson v. United States*, 720 F.3d 720 (8th Cir. 2013) (per curiam) (same).").

[22] *In re Simpson*, No. 13–40718, 2014 WL 494816 (5th Cir. Feb. 7, 2014) (per curiam) ("[W]e find that the Supreme Court's actions in *Miller* and the procedural posture of *Miller* itself satisfy Simpson's burden to make a prima facie showing that his petition rests on a new rule of law made retroactive by the Supreme Court on collateral review.") (not designated for publication); *Craig v. Cain*, No. 12–30035, 2013 WL 69128 (5th Cir. Jan. 4, 2013) (per curiam) ("*Miller* does not satisfy the test for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles") (not designated for publication).

[23] *State v. Mantich*, ___ N.W.2d ___, 2014 WL 503134 (Neb. 2014); *Diatchenko v. District Attorney for Suffolk Dist.*, 1 N.E. 3d 270 (Mass. 2013); *State v. Ragland,* 836 N.W.2d 107, 114-17 (Iowa 2013); *Jones v. State*, 122 So.3d 698, 703 (Miss. 2013); *Alejandro v. United States*, ___ F.

The competing arguments over the retroactivity issue focus largely on whether the *Miller* decision–which virtually everyone agrees announces a "new rule"–falls under the first *Teague* exception: Is the new rule announced in *Miller* a "substantive" one prohibiting a certain category of punishment for a class of defendants because of their status or offense?[24]

Those courts holding that *Miller* is not retroactive strictly construe that first *Teague* exception–a new substantive rule of law–to apply only when the new rule entirely removes a particular punishment from the list of punishments that may be constitutionally imposed on a class of defendants,[25] not when a rule addresses the considerations for determining a

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Supp. ___, 2013 WL 4574066, *1 (S.D.N.Y. 2013) ("Because *Miller* announced a new rule of constitutional law that is substantive rather than procedural, that new rule must be applied retroactively on collateral review."; "Having been authorized by the Second Circuit to adjudicate Alejandro's latest § 2255 motion, the Court must apply the new rule announced in *Miller* to his case. Since Alejandro was under 18 years old at the time of the commission of his crimes, *Miller* clearly applies to Alejandro's sentence and compels this Court to set aside his sentence and to resentence him in conformity with the new law."); *Toye v. State*, ___ So.3d ___, 2014 WL 228639, *6 (Fla. Dist. Ct. App. 2014) ("*Miller* applies retroactively to provide postconviction relief for juvenile homicide offenders sentenced to mandatory terms of life in prison without the possibility of parole"; rejecting *Geter, supra* n. 20); *In re Rainey*, ___ Cal. Rptr. 3d ___, 2014 WL 794354 (Cal. Ct. App. 2014); *People v. Williams*, 982 N.E.2d 181, 196 (Ill. Ct. App. 2012). *See also Tulloch v. Gerry,* Nos. 12-CV-849, 13-CV-050, 13-CV-085, 08-CR-1235, 2013 WL 4011621 (N.H. Super. Jul. 29, 2013).

[24] *Ragland*, 836 N.W.2d at 114 ("The competing arguments over the retroactivity of *Miller* essentially narrow the inquiry to whether the decision merely established a new penalty phase procedure for courts to follow before imposing a life sentence without parole for crimes committed by juveniles or whether the decision established either a substantive rule of law or one that implicates fundamental fairness and accuracy of the criminal proceeding.").

[25] For example, the Supreme Court entirely removed the option of a death sentence as a possible punishment in a capital-murder case when the defendant is mentally retarded. *Atkins v. Virginia*, 536 U.S. 304 (2002). Lower courts have uniformly held that *Atkins* applies retroactively to collateral proceedings as well as cases on direct appeal. *See Ex parte Briseno*, 135 S.W.3d 1, 3 (Tex. Crim. App. 2004) (applying *Atkins* retroactively to applicant seeking habeas corpus relief); *Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002) (retroactively applying *Atkins* in federal habeas proceedings); *Hill v. Anderson*, 300 F.3d 679, 681 (6th Cir. 2002) (stating that *Atkins* applies

particular sentence.[26] These courts conclude that *Miller* does not satisfy the test for retroactivity because it does not categorically bar all sentences of life without parole for juveniles; *Miller* bars only those sentences made mandatory by an explicit sentencing scheme.[27] It changed the permissible method–the procedure–by which the State could exercise its continuing power to punish juvenile homicide offenders by life without parole.[28] Those courts state that *Miller*, though informed by the "categorical ban" cases like *Graham, Roper,* and *Atkins*,[29] is more like *Ring*, *Apprendi*, or *Padilla*,[30] because it is

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retroactively).

[26] *In re Morgan*, 713 F.3d 1365, 1368 (11th Cir. 2013) ("A new rule is substantive when that rule places an entire class beyond the power of the government to impose a certain punishment regardless of the procedure followed, not when the rule expands the range of possible sentences."); *People v. Carp*, 828 N.W.2d 685, 711 (Mich. Ct. App. 2012) ("*Miller* does not alter the elements necessary for a homicide conviction. Rather it simply necessitates the consideration of certain factors, when juveniles are involved, in sentencing.").

[27] *See Martin v. Symmes*, ___ F. Supp. ___, 2013 WL 5653447, *16 (D.Minn. 2013) ("*Miller* does not satisfy the first *Teague* exception because it does not place a class of conduct (homicide by a juvenile) beyond the power of the state to proscribe, nor does it prohibit a category of punishment (life in prison without parole) for a class of defendants (juveniles) based on their offense (homicide). Rather, *Miller* prohibits a sentencing *scheme* in which a particular sentence is mandatory rather than the result of a process in which the offender's youth and attendant circumstances are considered.").

[28] *Carp*, 828 N.W.2d at 711 ("Our determination that *Miller* does not comprise a substantive new rule and, therefore, is not subject to retroactive application for cases on collateral review is supported by the fact that the ruling does not place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.") (quotation marks omitted).

[29] *Graham v. Florida*, 560 U.S. 48, 82 (2010) ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such

procedural–simply requiring an additional sentencing procedure for juvenile offenders.[31] These courts also downplay the importance of the Court's remand of *Miller's* companion case, *Jackson v. Hobbs*–which came to the Court through Arkansas's state collateral-review process–as constituting a ruling or determination on retroactivity because the Court did not specifically hold that *Miller* is retroactive on collateral review.[32]

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punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender.").

[30] *State v. Tate*, ___ So.3d ___, 2013 WL 5912118, *7 (La. 2013) ("[B]ecause the *Miller* Court, like the Court in [*Ring v. Arizona*, 536 U.S. 584 (2002) (Capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment)], merely altered the *permissible methods* by which the State could exercise its continuing power, in this case to punish juvenile homicide offenders by life imprisonment without the possibility of parole, we find its ruling is procedural, not substantive in nature.") (relying on *Schriro v. Summerlin*, 542 U.S. 348 (2004), which held that *Ring v. Arizona* was properly classified as procedural rather than substantive, and thus did not apply retroactively to death-penalty case already final on direct review); *Geter v. State*, 115 So. 3d 375, 382 (Fla. Ct. App. 2012) (holding that, like *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which requires that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, and *Padilla v. Kentucky*, 559 U.S. 356 (2010), which requires that counsel inform a client whether his plea carries a risk of deportation, the *Miller* "decision constitutes an evolutionary refinement designed to correspond to new developments in an ever-changing area of law.") (quotation marks omitted).

[31] *In re Morgan*, 713 F.3d 1365, 1368 (11th Cir. 2013) ("*Miller* changed the procedure by which a sentencer may impose a sentence of life without parole on a minor by requiring the sentencer to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. And the Court declined to consider a categorical bar on life without parole for juveniles, or at least those 14 and younger.") (quotation and alteration marks omitted).

[32] *Id.* at 1367 ("The requirement that a new rule be made retroactive on collateral review by the Supreme Court 'is satisfied only if th[e] [Supreme] Court has held that the new rule is retroactively applicable to cases on collateral review.' And the Supreme Court has not held that *Miller* is retroactively applicable to cases on collateral review.") (quoting *Tyler v. Cain*, 533 U.S. 656, 662 (2001)).

Conversely, those courts holding that *Miller* is retroactive have reasoned that it announced a substantive rule that prevents a "significant risk that a juvenile faces a punishment that the law cannot impose on him."[33] They point to the Supreme Court's explanation of a "new substantive rule" in *Schriro v. Summerlin*: New substantive rules include "constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish."[34] *Miller* places juveniles subject to mandatory "life without parole" statutes beyond the State's power to punish.[35] It alters the range of outcomes of a criminal proceeding by prohibiting a mandatory sentence of life without parole for a juvenile murderer.[36] *Miller* is categorical because it completely removes a particular punishment from the list of punishments that can be constitutionally imposed, that of mandatory life without parole.[37]

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[33] *Jones v. State*, 122 So.3d 698, 702 (Miss. 2013) (quotation and alteration marks omitted).

[34] *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004).

[35] *State v. Ragland*, 836 N.W.2d 107, 115 (Iowa 2013) ("From a broad perspective, *Miller* does mandate a new procedure. Yet, the procedural rule for a hearing is the result of a substantive change in the law that prohibits mandatory life-without-parole sentencing. Thus, the case bars states from imposing a certain type of punishment on certain people.").

[36] *See Tulloch v. Gerry*, Nos. 12-CV-849, 13-CV-050, 13-CV-085, 08-CR-1235, 2013 WL 4011621, *6 (N.H. Super. Jul. 29, 2013).

[37] *Diatchenko v. District Attorney for Suffolk Dist.*, 1 N.E.3d 270 (Mass. 2013) ("The rule explicitly forecloses the imposition of a certain category of punishment—mandatory life in prison without the possibility of parole—on a specific class of defendants: those individuals under the age of eighteen when they commit the crime of murder. Its retroactive application ensures that juvenile homicide offenders do not face a punishment that our criminal law cannot constitutionally impose on them.").

These courts note that the Supreme Court's reliance on the categorical and individual sentencing lines of cases represents its intent that *Miller* apply retroactively–because *Graham*, *Roper*, and *Atkins* were applied retroactively.[38] These courts also say that the Supreme Court implicitly made *Miller* retroactive by applying the rule to *Miller's* companion case, *Jackson v. Hobbs*–a post-conviction case on collateral review.[39]

Courts are split on the retroactivity question because it is a close call, and it is one that ultimately must be resolved by the Supreme Court. But *Miller* is driven, first and foremost, by the conclusion that "children are constitutionally different from adults for purposes of

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[38] *State v. Ragland*, 836 N.W.2d 107, 116 (Iowa 2013) ("[T]he cases used by the Court in *Miller* to support its holding have been applied retroactively on both direct and collateral review. *See In re Sparks*, 657 F.3d 258, 261–62 (5th Cir. 2011) (indicating *Graham* was made retroactive on collateral review by the Supreme Court as a matter of logical necessity under *Tyler*); *see also Tyler*, 533 U.S. [656, 669 (2001)] (O'Connor, J., concurring) (describing the syllogistic relationship between *Teague's* exception to nonretroactivity for rules placing certain conduct beyond the power of the state to proscribe and subsequent cases that fit into *Teague's* exception); *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) ("[T]he 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."), *abrogated on other grounds by Atkins*, 536 U.S. at 321. We joined this discourse three years ago when we held *Graham* applied retroactively. *Bonilla v. State*, 791 N.W.2d 697, 700–01 (Iowa 2010). This practical observation of the treatment of the underlying authority of *Miller* is instructive. If a substantial portion of the authority used in *Miller* has been applied retroactively, *Miller* should logically receive the same treatment.").

[39] *See Diatchenko*, 1 N.E.3d at 281 ("Our conclusion is supported by the fact that in *Miller*, the Supreme Court retroactively applied the rule that it was announcing in that case to the defendant in the companion case who was before the Court on collateral review.") (citation omitted); *People v. Williams*, 982 N.E.2d 181, 197 (Ill. Ct. App. 2012) ("It is instructive that the *Miller* companion case, *Jackson v. Hobbs*, arising on collateral review, involved a life-without-parole-sentence heretofore final. Notwithstanding its finality, the Supreme Court of the United States in effect retroactively applied *Miller* and vacated Jackson's sentence. '[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.'") (quoting *Teague*, 489 U.S. at 300).

sentencing."[40] Looking into the crystal ball, we think that the Supreme Court will hold that *Miller* falls under the first *Teague* exception. We conclude that it is a "new substantive rule" that puts a juvenile's *mandatory* "life without parole" sentence outside the ambit of the State's power.

In distinguishing *Ring*,[41] which "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death," one judge quoted a post-*Ring* Supreme Court case that stated that "'[r]ules that allocate decision-making authority in this fashion are prototypical procedural rules[.]'"[42]

> 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

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[40] *Miller*, 132 S. Ct. at 2464.

[41] *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that a sentencing judge, sitting without a jury, may not make a finding of an aggravating circumstance that is necessary for the imposition of the death penalty).

[42] *Tulloch v. Gerry*, Nos. 12-CV-849, 13-CV-050, 13-CV-085, 08-CR-1235, 2013 WL 4011621, *6 (N.H.Super. Jul. 29, 2013) (granting four petitioners' request for habeas relief and remanding for sentencing hearings consistent with *Miller v. Alabama*) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

> 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.[43]

We agree.

In *Miller*, the Supreme Court predicted that "appropriate occasions for sentencing juveniles to the harshest possible penalty will be uncommon" because of the "great difficulty we noted in *Roper* and *Graham* 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."[44] This may be one of those uncommon cases. But, under *Miller v. Alabama*, that must be a discretionary decision made by the sentencing factfinder, based upon all of the evidence, not an automatic mandatory "life without parole" sentence. Accordingly, the petitioner's request for habeas relief and motion to vacate his sentence are granted. We remand this case for further sentencing proceedings to permit the factfinder to assess applicant's sentence at (1) life with the possibility of parole (as both pre-2005 and post-2013 Texas law permits) or (2) life without parole after

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[43] *Id.* at *7.

[44] *Miller*, 132 S. Ct. at 2469 (some quotation marks omitted). Chief Justice Roberts suggested an ulterior motive for the prediction:

> [T]he Court's gratuitous prediction appears to be nothing other than an invitation to overturn life without parole sentences imposed by juries and trial judges. If that invitation is widely accepted and such sentences for juvenile offenders do in fact become "uncommon," the Court will have bootstrapped its way to declaring that the Eighth Amendment absolutely prohibits them.
>
> This process has no discernible end point—or at least none consistent with our Nation's legal traditions.

Id. at 2481 (Roberts, C.J., dissenting).

consideration of applicant's individual conduct, circumstances, and character.[45]

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[45] In its Brief, the Travis County District Attorney opposes the retroactive application of *Miller*, but states that it has or will be submitting a request to the Texas Board of Pardons and Paroles that Terrell Maxwell's sentence of life without parole be commuted to a sentence of life with the possibility of parole. State's Brief at 18 n. 9. This matter is best addressed in the trial court.

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-76,964

EX PARTE TERRELL MAXWELL, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. D-1-DC-08-300490
FROM TRAVIS COUNTY

Womack, J., filed a dissenting opinion in which Keller, P.J., joined.

I respectfully disagree with the Court's holding that *Miller v. Alabama*[1] announced a new substantive rule.

In *Miller*, the Supreme Court of the United States held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[2]

The Supreme Court previously invalidated the death penalty for all offenders under the

[1] *Miller v. Alabama*, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

[2] *Id.* at 2469.

age of 18.[3] In 2013, after this applicant's conviction and in response to *Miller*, the Texas Legislature amended the Texas Penal Code to allow for a life sentence *with* the possibility of parole for a capital felony "if the individual committed the offense when younger than 18 years of age."[4]

The Supreme Court has not ruled on the retroactive applicability of its decision in *Miller*. This Court uses the analysis provided in *Teague v. Lane*[5] to decide questions of retroactivity.[6] In *Teague*, the Supreme Court held that, generally, new constitutional rules of criminal procedure "will not be applicable to those cases which have become final before the new rules are announced."[7]

There is a threshold question of whether the rule in question is a "new" rule. A new rule is one that "breaks new ground or imposes a new obligation" on the government.[8] To put it another way, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[9] The rule that the Supreme Court announced in *Miller* was new because it required, for the first time, individualized sentencing in a context

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

[4] TEX. PENAL CODE § 12.31(a) & (b) (effective July 22, 2013).

[5] 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

[6] *See, e.g., Ex parte Lave*, 257 S.W.3d 235 (Tex. Cr. App. 2008); *Ex parte Keith*, 202 S.W.3d 767 (Tex. Cr. App. 2006).

[7] *Teague*, 489 U.S. at 310.

[8] *Id.* at 301.

[9] *Ibid.*

outside the death penalty.[10] This requirement was not dictated by precedent when the applicant's conviction became final.

The next issue is whether either of the two *Teague* exceptions applies to overcome the general bar to retroactive application of new rules on collateral review. A new rule will be applied to cases retroactively on collateral review if it either (1) "places certain kinds of primary, private individual conduct beyond the power of [the law] to proscribe" or (2) "requires the observance of those procedures that are implicit in the concept of ordered liberty."[11]

The first limited exception allows retroactive application of new rules that "prohibit a certain category of punishment for a class of defendants because of their status or offense."[12] However, the holding in *Miller* explicitly states that it "does not categorically bar a penalty for a class of offenders or type of crime–as, for example, [the Court] did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process–considering an offender's youth and attendant characteristics–before imposing a particular penalty."[13] *Miller* does not bar all sentences of life imprisonment for juveniles; it bars only those made mandatory by a sentencing scheme. The first *Teague* exception does not apply.

The second *Teague* exception applies to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[14] This is a very

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[10] *Miller*, 132 S.Ct. at 2470.

[11] *Teague*, 489 U.S. at 307 (internal quotation marks omitted).

[12] *O'Dell v. Netherland*, 521 U.S. 151, 157, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997).

[13] *Miller*, 132 S.Ct. at 2471.

[14] *O'Dell*, 521 U.S. at 157.

limited exception, and the applicant stated he would not discuss it in his brief.[15] In light of the extremely limited nature of this exception,[16] and the applicant's choice not to argue for its applicability, I shall not address it in detail. The second *Teague* exception does not apply.

I would hold that the new rule announced in *Miller* does not satisfy the requirements for retroactive application.

I recognize that we could accord retroactive effect to *Miller* as a matter of state habeas law.[17] However, I would not do so. This Court follows *Teague* as a general matter of state habeas practice,[18] and this case does not present a reason for us to deviate from that practice.

I would deny the application for the writ of habeas corpus.

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[15] Applicant's Brief at 23.

[16] *See, e.g., Beard v. Banks*, 542 U.S. 406, 417, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (" . . . it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception."); *Keith*, 202 S.W.3d at 770 ("It is worth noting that, since *Teague*, no new rule of criminal procedure has been found to meet that high standard [required for the second exception to apply].").

[17] *See Danforth v. Minnesota*, 552 U.S. 264, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008) (holding that *Teague* does not constrain "the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion").

[18] *See, e.g., Lave*, 257 S.W.3d at 237.

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-76,964

EX PARTE TERRELL MAXWELL, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. D-1-DC-08-300490
FROM TRAVIS COUNTY

KEASLER, J., filed a dissenting opinion in which KELLER, P.J., and HERVEY, J., joined.

DISSENTING OPINION

The majority correctly recounts what the Supreme Court held in *Miller v. Alabama*,[1] but I dissent from its characterization of the *Miller* rule and what that portends for the issue of its retroactivity. In my mind, the *Miller* rule is clearly procedural and therefore should not be applied retroactively. Because Terrell Maxwell's writ application alleges only that *Miller* is a new substantive rule, I begin with the following assumptions: (1) like the majority, that

[1] 132 S.Ct. 2455 (2012).

Miller is a new rule;[2] and (2) *Miller* is not a "watershed" rule of procedure subject to retroactivity.

The *Miller* Court held that statutory sentencing schemes that automatically impose a life-without-parole sentence on juvenile defendants violate the Eighth Amendment's prohibition of cruel and unusual punishment.[3] The Court's holding was informed by two lines of precedent—the categorical ban on sentencing practices imposed on a class of offenders and the mandatory imposition of capital punishment.[4] In *Roper v. Simmons*,[5] in which it concluded that the death penalty for juvenile offenders under 18 years of age was unconstitutional, and in *Graham v. Florida*,[6] in which it held that a life-without-parole sentence could not be imposed on juveniles for a nonhomicide offense, the Court "establish[ed] that children are constitutionally different from adults for purposes of sentencing" because "juveniles have diminished culpability and greater prospect for

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[2] *See id.* at 2464, 2472 (concluding that *Roper* and *Graham* "leads to," as opposed to "compels" its decision and stating "we are breaking no new ground in these cases); *see also id.* at 2480 (Roberts, C.J., dissenting) ("If the Court is unwilling to say that precedent compels today's decision, perhaps it should reconsider that decision."). *But see id.* at 2466 (majority opinion) ("'An offender's age,' we made clear in *Graham*, 'is relevant to the Eighth Amendment,' and so 'criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.'") (quoting *Graham v. Florida*, 560 U.S. 48, 76 (2010)).

[3] *Id.* at 2464.

[4] *Id.* at 2463–64.

[5] 543 U.S. 551 (2005).

[6] 560 U.S. 48 (2010).

reform."[7] *Miller* was also influenced by *Woodson v. North Carolina*,[8] which held that mandatory imposition of the death penalty is unconstitutional because it failed to allow for individualized sentencing decisions.

What the *Miller* Court found unconstitutional in these sentencing schemes is how a life-without-parole sentence for juveniles is imposed. In holding that these statutes unconstitutionally fail to give a factfinder the opportunity to consider the unique characteristics of a defendant's youth, the Court essentially removed the term "mandatory" from the statutory language. The punishment Miller received was life without parole, not "mandatory life without parole." Pursuant to Alabama law, Miller's life-without-parole sentence was imposed mandatorily—in other words, without discretion from the sentencing authority. I am unaware of any defendant being sentenced to "mandatory life without parole," at least not in Texas. The sentence is life without parole. This is an obvious observation, but it is a distinction I believe the majority misses when it claims that "a juvenile's *mandatory* 'life without parole' sentence is outside the ambit of the State's power."[9] *Miller* did not prohibit life-without-parole sentences for juveniles; it prohibited imposing them mandatorily.

This is not merely semantic. Describing *Miller*'s holding this way recognizes

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[7] *Miller*, 132 S.Ct. at 2464.

[8] 428 U.S. 280 (1976).

[9] *Ante*, op. at 13 (emphasis in original).

precisely how the Court has drawn the line between substantive rules that are retroactive and procedural rules that are not. The Court's opinion in *Schriro v. Summerlin*,[10] which defined these terms, indicates that the holding in *Miller* did not announce a substantive rule. In *Summerlin*, the issue before the Court was whether or not *Ring v. Arizona*,[11] which found unconstitutional Arizona's statute permitting the finding of necessary aggravating factors to impose the death penalty by a judge instead of a jury,[12] applies retroactively to cases already final on direct review.[13] The Court began by repeating its familiar retroactivity analysis:

> When a decision of this Court results in a "new rule," that rule applies to all criminal cases still pending on direct review. As to convictions that are already final, however, the rule applies only in limited circumstances. New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, . . . as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish . . . . Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him. [14]

Procedural rules, on the other hand, are generally not applied retroactively because "[t]hey do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure

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[10] 542 U.S. 348 (2004).

[11] 536 U.S. 584 (2002).

[12] *Summerlin*, 542 U.S. at 350–51.

[13] *Id.* at 349.

[14] *Id.* at 351–52 (citations omitted).

might have been acquitted otherwise."[15] "[O]nly a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of criminal proceedings" are given retroactive effect.[16] Substantive rules "alter[] the range of conduct or the class of persons that the law punishes"; procedural rules "regulate only *the manner of determining* the defendant's culpability."[17]

By these definitions, the *Miller* rule is procedural—it regulates the manner of imposing a life-without-parole sentence for juveniles. *Miller* did not conclude that a life-without-parole sentence imposed on a juvenile is unconstitutional and therefore did not change in any way the "class of person that the law punishes." On this issue, the *Miller* Court's language could hardly be clearer: "we do not consider [petitioners'] alternative arguments that the Eighth Amendment requires a categorical bar on life without parole for juveniles";[18] "Although we do not foreclose a sentencer's ability to make [a life-without-parole] judgment in homicide cases, we require it to take into account how children are different . . .";[19] and "Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* and *Graham*."[20]

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[15] *Id.* at 352.

[16] *Id.* (internal quotations omitted).

[17] *Id.* at 353 (emphasis in original).

[18] *Miller*, 132 S.Ct. at 2469.

[19] *Id.*

[20] *Id.* at 2471.

From the number of decisions from other jurisdictions taking a position on *Miller*'s retroactivity identified in the majority's research, the Court adopts, without explanation, the unpublished reasoning of a New Hampshire trial judge in holding that *Miller* is a substantive rule.[21] I find that reasoning unpersuasive. The portion of the judge's ruling the majority adopts and reproduces in its opinion is the judge's attempt to distinguish *Summerlin*'s treatment of *Ring*, which the Court held to be non-retroactive, from the question of *Miller*'s retroactivity. The judge began by stating that "unlike *Ring*, *Miller* does not alter the manner of determining culpability. Instead *Miller* alters the range of outcomes available for certain criminal conduct."[22] These statements miss the direct correlation between the manner of determining culpability and the resulting punishment outcome. It is *Miller*'s alteration of the manner—or procedure—of making punishment decisions that makes a wider range of potential punishment outcomes possible.

In rejecting the argument that *Miller* announced a procedural rule, the judge concluded that, "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."[23] Even if we dismiss

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[21] *Ante*, op. at 14.

[22] *Tulloch v. Gerry*, Trial Order, Nos. 12-CV-849, 13-CV-050, 13-CV-085, 08-CR-1235, 2013 WL 4011621, *7 (N.H. Sup. Ct. Jul. 29, 2013).

[23] *Id.*

the judge's implicit acknowledgment that *Miller* created a new, constitutional procedure for punishment decisions of a juvenile, the possibility of lesser sentences being imposed after *Miller* is not evidence of a substantive rule. Despite the attempts, the judge's reasoning cannot avoid *Summerlin*'s instruction that substantive rules are those that alter the range of conduct or the class of persons that the law punishes.[24] The range of punishable conduct and the class of juveniles eligible to receive a life-without-parole sentence are no smaller after *Miller*. It is not "a punishment that the law cannot impose on him."[25] After considering the defendant's youth, a factfinder is still able to impose a life-without-parole sentence. Indeed, the Court's opinion today states that Maxwell may still be sentenced to life-without-parole upon further sentencing proceedings.[26] The mere possibility that a factfinder may in certain cases impose a lesser sentence is irrelevant for purposes of determining *Miller*'s retroactivity.

For these reasons, I would hold that *Miller* is not retroactive and cannot support Maxwell's request for relief. Accordingly, I would deny his application for a writ of habeas corpus.

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[24] *See Summerlin*, 542 U.S. at 353.

[25] *Ante*, op. at 11 (citing *Jones v. State*, 122 So.3d 698, 702 (Miss. 2013).

[26] *Id.* at 15.