STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

v.

RAYMOND CURTIS CARP
Defendant-Appellee.
_____/

Supreme Court No. 146478

Court of Appeals No. 307758

Lower Court No. 06-1700-FC

HILARY B. GEORGIA (P-66226)
Attorney for Plaintiff-Appellee

PATRICIA SELBY (P-70163)
Attorney for Defendant-Appellant

ERIC RESTUCCIA (P-49550)
Attorney for Attorney General, Intervener _____/

**PLAINTIFF-APPELLEE'S BRIEF ON APPEAL**

*****ORAL ARGUMENT REQUESTED*****

**PROOF OF SERVICE**

Hilary B. Georgia (P66226)
Senior Assistant Prosecuting Attorney
201 McMorran Blvd., Ste. 3300
Port Huron, MI 48060
Direct Telephone: (810) 985-2414
Fax: (810) 985-2424
Email: hgeorgia@stclaircounty.org

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## STATEMENT OF JURISDICTION

The Plaintiff-Appellee agrees with the Jurisdictional Statement contained in the Defendant-Appellant's brief. The Michigan Supreme Court has jurisdiction to consider this matter.

## STATEMENT OF QUESTIONS PRESENTED

1. **SHOULD THE RULE OF LAW ANNOUNCED IN *MILLER V ALABAMA* BE APPLIED RETROACTIVELY UNDER *TEAGUE V LANE*?**

The trial court was not presented with this question.

The Court of Appeals answers: NO

The Defendant—Appellant answers: YES

The Plaintiff—Appellee answers: NO

2. **DOES THE RELIEF PROVIDED TO THE DEFENDANT ON COLLATERAL REVIEW IN *JACKSON V HOBBS* REQUIRE THAT *MILLER V ALABAMA* BE APPLIED RETROACTIVELY TO OTHER DEFENDANTS ON COLLATERAL REVIEW?**

The trial court was not presented with this question.

The Court of Appeals answers: NO

The Defendant—Appellant answers: YES

The Plaintiff—Appellee answers: NO

3. **SHOULD THE RULE OF LAW ANNOUNCED IN *MILLER V ALABAMA* BE APPLIED RETROACTIVELY UNDER *PEOPLE V MAXSON*?**

The trial court was not presented with this question.

The Court of Appeals answers: NO

The Defendant—Appellant answers: YES

The Plaintiff—Appellee answers: NO

## STATEMENT OF FACTS

Following a seven-day jury trial, the Appellant, Raymond Carp, was convicted of first degree murder, armed robbery, larceny in a building, and larceny of more than $1,000 but less than $20,000.[1] The trial court sentenced him to concurrent terms of life without parole on the first degree murder conviction, 15 to 30 years on the armed robbery conviction, 1 to 4 years on the larceny in a building conviction, and 1 to 5 years on the larceny of more than $1,000 but less than $20,000 conviction.[2]

### A. Evidence Introduced at Trial

In May of 2006, Brandon Gorecki, the co-defendant to Carp, was told to move out of his mother's (Margie Carp) New Baltimore home because of problems he had been having with her and Christian Yeatts, her boyfriend.[3] Gorecki is Carp's half-brother. As a result of his conflict with his mother, Gorecki moved in with the victim, Maryann McNeely, who was a friend of the family.[4] The night of May 30 - 31, 2006, Carp was to spend the night at McNeely's with Gorecki, Gorecki's girlfriend, Shavaun Fink, and their newborn daughter.[5]

The morning of May 31st, Carp and Gorecki arrived at the Carp-Yeatts home at about 6:30 a.m. They drove there in McNeely's truck.[6] Carp got ready for school and Yeatts drove him there at about 7:00 a.m.[7] Carp got out of school at 10:15 a.m., and Yeatts picked him up and took him home. Later that afternoon, Yeatts took Carp to his friend's house, also in the

[1] Trial Transcript, p. 1617-1618, Plaintiff-Appellee's Appendix p. 58.b-59.b
[2] Sentencing Transcript, p. 13-15, Defendant-Appellant's Appendix p. 248a-250.a
[3] Trial Transcript, p. 351-352, 398, Plaintiff-Appellee's Appendix p. 4.b
[4] Trial Transcript, p. 352, Plaintiff-Appellee's Appendix p. 4.b
[5] Trial Transcript, p. 400-401, Defendant-Appellant's Appendix p. 97.a-98.a
[6] Trial Transcript, p. 356, Plaintiff-Appellee's Appendix p. 5.b
[7] Trial Transcript, p. 357-358, Plaintiff-Appellee's Appendix p. 5.b-6.b

Americana Estates trailer park.[8] Later, Yeatts picked up Carp and two of his friends and took them back to his house where they stayed into the evening.[9] Yeatts observed that Carp was acting out of character and appeared angry all day.[10]

Gorecki's girlfriend, Shavaun Fink, had been at McNeely's home with Carp and Gorecki the night of May 30 - 31.[11] She also had her six month old daughter with her.[12] Carp left McNeely's for a while to visit a friend.[13] After he returned, sometime around 10:00 or 11:00 p.m., all three went to Elayna Tucker's house, leaving the baby with McNeely.[14] They stayed for half an hour to an hour, and then returned to McNeely's house.[15]

When they returned, McNeely had gone to bed.[16] After talking with Carp and Gorecki, Fink went to the spare bedroom where her daughter was sleeping to lay down.[17] At one point she got up to use the bathroom and, when she returned to the bedroom, she found Gorecki in the room and she felt that he was trying to get into her purse to get her car keys.[18] When she asked him what he was doing he told her he was just checking on the baby. Gorecki left the room and she fell back to sleep.[19] She woke up again and found Gorecki crawling toward her purse. When she asked him what he was doing, he told her he was just looking for a cigarette, even though he knew she did not have any. He again returned to the other room and she heard him talking about

[8] Trial Transcript, p. 358-359, Plaintiff-Appellee's Appendix p. 6.b
[9] Trial Transcript, p. 359, Plaintiff-Appellee's Appendix p. 6.b
[10] Trial Transcript, p. 360-362, Plaintiff-Appellee's Appendix p. 6.b-7.b
[11] Trial Transcript, p. 796-798, Plaintiff-Appellee's Appendix p. 34.b-35.b
[12] Trial Transcript, p. 798, Plaintiff-Appellee's Appendix p. 35.b
[13] Trial Transcript, p. 799, Plaintiff-Appellee's Appendix p. 35.b
[14] Trial Transcript, p. 800, Plaintiff-Appellee's Appendix p. 35.b
[15] Trial Transcript, p. 800-801, Plaintiff-Appellee's Appendix p. 35.b-36.b
[16] Trial Transcript, p. 801, Plaintiff-Appellee's Appendix p. 36.b
[17] Trial Transcript, p. 803, Plaintiff-Appellee's Appendix p. 36.b
[18] Trial Transcript, p. 804, Defendant-Appellant's Appendix p. 117.a
[19] Trial Transcript, p. 805, Defendant-Appellant's Appendix p. 118.a

her car in relation to an incident involving his sister and his father.[20] She got up and went into the other room and said something to Gorecki about a girl and they began to argue.[21] The confrontation became physical when Gorecki grabbed her by the throat in the kitchen. Fink picked up the baby and was leaving when Gorecki again grabbed her by the throat, preventing her from leaving the house.[22] By this time McNeely had awakened and emerged from her room. She pulled Gorecki off Fink and told him to stop.[23] Fink was then able to leave with the baby. This all transpired around 2:00 a.m. on May 31, 2006.[24]

At about 6:30 a.m., Gorecki called Fink and asked her to come see him because he really needed to talk to her. He eventually talked her into seeing him[25] when he became emotional with her, telling her he would never see her and their daughter again.[26] He told her to come over to his mom's house.[27] When she got there, at about 7:00 a.m., he told her he had gotten into an argument with McNeely and might have killed her.[28] Shortly after she arrived, Carp left for school with Yeatts.[29] Gorecki told her he was taking the truck to Detroit and asked her to follow him.[30] She followed him to the home of one of his friends in Detroit. While they were talking he told her he was going to burn the truck. This shocked her sufficiently that she left him there and returned to her home.[31] The next time she saw Gorecki was that evening at his friend's house in Roseville.[32] He told her, again, that he might have killed McNeely. She told him he needed to do

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[20] Trial Transcript, p. 805, Defendant-Appellant's Appendix p. 118.a
[21] Trial Transcript, p. 806, Defendant-Appellant's Appendix p. 119.a
[22] Trial Transcript, p. 807, Defendant-Appellant's Appendix p. 120.a
[23] Trial Transcript, p. 808, Defendant-Appellant's Appendix p.121.a
[24] Trial Transcript, p. 809, Defendant-Appellant's Appendix p.122.a
[25] Trial Transcript, p. 811, Plaintiff-Appellee's Appendix p. 38.b
[26] Trial Transcript, p. 811-812, Plaintiff-Appellee's Appendix p. 38.b
[27] Trial Transcript, p. 812, Plaintiff-Appellee's Appendix p. 38.b
[28] Trial Transcript, p. 812, Plaintiff-Appellee's Appendix p. 38.b
[29] Trial Transcript, p. 813-814, Plaintiff-Appellee's Appendix p. 39.b
[30] Trial Transcript, p. 814-815, Plaintiff-Appellee's Appendix p. 39.b
[31] Trial Transcript, p. 815-816, Plaintiff-Appellee's Appendix p. 39.b
[32] Trial Transcript, p. 845-846, Plaintiff-Appellee's Appendix p. 40.b

something about it.[33] She stayed at the Roseville house for about an hour, and then went home. The next morning, June 1, 2006, Gorecki called her and told her he was going to turn himself in.[34]

In the early morning hours of June 1, 2006, about 2:00 a.m., Margie Carp received a call from Gorecki that upset her.[35] About 7:00 a.m., she called her friend, Loren Wassmann, and told him about it. She and Yeatts met with Wassmann and it was decided that she and Wassmann would go to McNeely's home in the Americana Estates trailer park and Yeatts would return to their house to try and talk to Carp.[36] When he got home, Yeatts woke Carp up and asked him if something had happened at McNeely's. Carp did not tell him anything.[37]

When Margie Carp and Wassmann arrived at McNeely's home, the front door was locked. When they went to the back sliding door, they noticed bloody footprints and called 911.[38] Trooper Brian Pauly of the Michigan State Police was the first officer on the scene.[39] He spoke with Margie Carp and Wassmann, who expressed their concern for McNeely's well-being.[40] At this point Trooper John Robe arrived,[41] and they forced entry through the front door.[42] As soon as they made entry, they saw a body, laying face-down on the kitchen floor,

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[33] Trial Transcript, p.846, Plaintiff-Appellee's Appendix p. 40.b
[34] Trial Transcript, p. 848-849, Plaintiff-Appellee's Appendix p. 41.b
[35] Trial Transcript, p. 400, 403-404, Plaintiff-Appellee's Appendix p. 9.b
[36] Trial Transcript, p. 348, 353, Plaintiff-Appellee's Appendix p. 3.b-4.b
[37] Trial Transcript, p. 355-356, Plaintiff-Appellee's Appendix p. 5.b
[38] Trial Transcript, p. 349, Plaintiff-Appellee's Appendix p. 3.b
[39] Trial Transcript, p. 460-461, Plaintiff-Appellee's Appendix p. 10.b
[40] Trial Transcript, p. 461, Plaintiff-Appellee's Appendix p. 10.b
[41] Trial Transcript, p. 931, Plaintiff-Appellee's Appendix p. 42.b
[42] Trial Transcript, p. 463, 932, Plaintiff-Appellee's Appendix p. 11.b, 42.b

covered with blood.[43] Trooper Pauly called EMS to the scene and it was determined that there was nothing they could do.[44] The scene was secured, awaiting the State Police crime lab team.[45]

During his initial survey of the crime scene, Trooper Pauly observed that the area around the television in the living room appeared to be disturbed.[46] He did not observe either a stereo system or a DVD/VCR player in the room.[47] Erica Turner, McNeely's daughter, testified that McNeely had owned a red Dodge pickup truck at the time of her death.[48] Turner also testified that McNeely had owned a stereo system and a combination DVD/VCR, and that she had seen them at McNeely's home in the month prior to her death.[49]

Jennifer Smiatacz of the Michigan State Police Forensic Laboratory was part of the forensics team that processed the crime scene on June 1, 2006.[50] Among her other duties, she photographed the scene.[51] She took the photograph that showed the stereo system and the DVD/VCR to be missing from their usual locations in the living room.[52]

On June 1, 2006, Sergeant Michael Waite of the Michigan State Police Fire Investigation Unit was asked to investigate a vehicle fire involving Maryann McNeely's pickup truck.[53] The truck had been located in Detroit and was transported to St. Clair County for storage, where

[43] Trial Transcript, p. 464, Plaintiff-Appellee's Appendix p. 11.b
[44] Trial Transcript, p. 464-465, Plaintiff-Appellee's Appendix p. 11.b
[45] Trial Transcript, p. 465, Plaintiff-Appellee's Appendix p. 11.b
[46] Trial Transcript, p. 466, Plaintiff-Appellee's Appendix p. 12.b
[47] Trial Transcript, p. 468, Plaintiff-Appellee's Appendix p. 12.b
[48] Trial Transcript, p. 340, Plaintiff-Appellee's Appendix p. 1.b
[49] Trial Transcript, p. 341-342, Plaintiff-Appellee's Appendix p. 2.b
[50] Trial Transcript, p. 471-472, Plaintiff-Appellee's Appendix p. 13.b
[51] Trial Transcript, p. 483, Plaintiff-Appellee's Appendix p. 14.b
[52] Trial Transcript, p. 468, 491-492, Plaintiff-Appellee's Appendix p. 12.b, 16.b
[53] Trial Transcript, p. 684-686, Plaintiff-Appellee's Appendix p. 26.b

Waite examined it.[54] His investigation determined that the fire had originated in the cab, in the area of the driver's side seat and that it had been set as an intentional act of arson.[55]

Doctor Daniel Spitz, M.D., the St. Clair County Medical Examiner, conducted the autopsy of Maryann McNeely.[56] There had been so much blood loss that it was difficult to obtain blood samples for the toxicology screen.[57] His initial examination of the body revealed numerous sharp force injuries, both stab wounds and incised wounds, and numerous blunt force injuries including lacerations and bruises to the skin and fractures of the skull and injuries to the brain. "These injuries involved the head and face, torso, upper and lower extremities."[58]

Dr. Spitz documented 23 stab wounds to McNeely's face and neck.[59] He documented an additional nine stab wounds to the torso.[60] He also documented a number of incised sharp force wounds to McNeely's extremities.[61] Dr. Spitz characterized these as being typical of defensive wounds.[62]

Dr. Spitz was unable to place a precise number on the blunt force injuries he observed.[63] He explained:[64]

> The reason that is, is because the injuries are so extensive that the bruising of the head and face is essentially confluent. Meaning that it involves virtually all areas of the head and face. Therefore, to try and separate out individual impacts becomes very difficult because the bruising basically overlaps.

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[54]Trial Transcript, p. 686, Plaintiff-Appellee's Appendix p. 26.b
[55] Trial Transcript, p. 690, Plaintiff-Appellee's Appendix p. 27.b
[56] Trial Transcript, p. 618, 620-621, Plaintiff-Appellee's Appendix p. 17.b-18.b
[57] Trial Transcript, p. 628-629, Plaintiff-Appellee's Appendix p. 20.b
[58] Trial Transcript, p. 626, Plaintiff-Appellee's Appendix p. 19.b
[59] Trial Transcript, p.629, Plaintiff-Appellee's Appendix p. 20.b
[60] Trial Transcript, p.634-636, Plaintiff-Appellee's Appendix p. 21.b-22.b
[61] Trial Transcript, p. 636, Plaintiff-Appellee's Appendix p. 21.b
[62] Trial Transcript, p. 646, Defendant-Appellant's Appendix p. 106.a
[63] Trial Transcript, p. 649-650, Defendant-Appellant's Appendix p. 109.a-110.a
[64] Trial Transcript, p. 650, Defendant-Appellant's Appendix p. 110.a

He was able to count 21 blunt force injuries to the face and scalp that caused distinct lacerations of the skin.[65] He also observed indications of blunt force injury in the form of abrasions and lacerations to the chest, breasts, back, and upper and lower extremities.[66] Based on his complete examination, Spitz determined:[67]

> The cause of this woman's death was multiple stab wounds with perforation of the carotid arteries and right jugular vein, with contributory cause being multiple blunt impacts with cranial/cerebral injuries, which are, in fact, injuries to the skull, which include fractures and injuries to the brain as well.

Even without the stab wounds, Dr. Spitz believed that the injuries to the skull and brain would have been fatal.[68] The manner of death was determined to be homicide.[69]

A number of Carp's friends testified about statements he made to them in the days immediately following the murder. Sarah Maddigan heard him say he had thrown a mug at McNeely's head and the co-defendant had stabbed her after that.[70] Michael Hoffman was present when Defendant said he could not sleep, that every time he closed his eyes he saw Gorecki stabbing McNeely.[71] Hofmann heard Carp say he threw a coffee mug at McNeely, but he closed his eyes and did not see if it hit her.[72] He repeatedly denied ever telling the State

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[65] Trial Transcript, p. 651, Defendant-Appellant's Appendix p. 111.a
[66] Trial Transcript, p. 653, Plaintiff-Appellee's Appendix p. 24.b
[67] Trial Transcript, p. 663, Defendant-Appellant's Appendix p. 113.a
[68] Trial Transcript, p. 663, Defendant-Appellant's Appendix p. 113.a
[69] Trial Transcript, p. 663, Defendant-Appellant's Appendix p. 113.a
[70] Trial Transcript, p. 740, 743, Plaintiff-Appellee's Appendix p. 28.b-29.b
[71] Trial Transcript, p. 751, Plaintiff-Appellee's Appendix p. 31.b
[72] Trial Transcript, p. 751-752, Plaintiff-Appellee's Appendix p. 31.b

Police or the trial prosecutor that Carp said he threw the mug at her head.[73] Heaven Snowden overheard Carp saying McNeely was a horrible person and deserved to die.[74]

Over the course of several days, Carp told Kelly Smith a number of details about the murder: that he hit McNeely in the back of the head with a mug he got out of the freezer;[75] that at Gorecki's direction he shut either the windows or the blinds;[76] that Gorecki both hit and stabbed McNeely;[77] that he held McNeely down while co-defendant kneed her in the face;[78] that McNeely told them if they stopped she would tell people that someone else did it to her;[79] and that McNeely asked him for help and co-defendant told him blood was thicker than water.[80] Further, Carp stated that Gorecki asked McNeely for her purse and she did not give it to him.[81] Gorecki eventually retrieved the purse from under the McNeely's bed, but they did not stop the attack because Gorecki said they had gone too far.[82] Gorecki said a prayer over McNeely and asked Carp to hand him a knife. When he did, Gorecki stabbed the McNeely in the neck with it.[83] After McNeely died, they left with her truck.[84]

Over the course of several interviews with State Police Detective Patrick Young, Carp made several statements about the events and his part in them. He started out by admitting as little as he could. In the first interview, conducted on June 1, 2006, he told Det. Young that

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[73] Trial Transcript, p. 752-756, 758, Plaintiff-Appellee's Appendix p. 31.b-32.b
[74] Trial Transcript, p. 762, Plaintiff-Appellee's Appendix p. 33.b
[75] Trial Transcript, p. 964,-966, Defendant-Appellant's Appendix p. 168.a-170.a; Trial Transcript, p. 975-976, 983, Plaintiff-Appellee's Appendix, p. 43.b, 45.b
[76] Trial Transcript, p.964-965, Defendant-Appellant's Appendix p. 168.a-169.a
[77] Trial Transcript, p. 967, Defendant-Appellant's Appendix p. 171.a
[78] Trial Transcript, p. 967, Defendant-Appellant's Appendix p. 171.a
[79] Trial Transcript, p. 969, Defendant-Appellant's Appendix p. 171.a
[80] Trial Transcript, p. 975-976, Plaintiff-Appellee's Appendix p. 43.b
[81] Trial Transcript, p. 976, Plaintiff-Appellee's Appendix p. 43.b
[82] Trial Transcript, p. 979-980, Plaintiff-Appellee's Appendix p. 44.b
[83] Trial Transcript, p. 980-982, Plaintiff-Appellee's Appendix p. 45.b
[84] Trial Transcript, p. 983, Defendant-Appellant's Appendix p. 174.a

Gorecki and Fink got in an argument and she left about midnight.[85] Then, McNeely and Gorecki were arguing and McNeely told Gorecki to leave and was slapping him. They left and walked around for a while, but McNeely left the door open, so they came back. McNeely told Gorecki that she was not kicking him out. They started arguing and she began hitting Gorecki again. Carp told Det. Young that McNeely was drunk and Gorecki was "buzzed."[86] He described that Gorecki just "tripped out" and started hitting McNeely.[87] Eventually, Gorecki grabbed a knife from the kitchen drawer, but Carp claimed he didn't see what he did with it.[88] When the murder was over, Gorecki took McNeely's keys and they left in her truck and Gorecki dropped Carp off at school.[89] Carp initially denied trying to clean anything up.[90]

An hour or two later, Det. Young returned to speak with Carp a second time. Carp then related how Gorecki tried to clean things up with water and a broom for about 20 minutes.[91] Gorecki wanted him to help clean up, but when he tried, and saw all the blood, he began to get sick and could not go on.[92] Carp continued to deny helping Gorecki by holding or hitting McNeely himself.[93] As part of his clean-up efforts, Gorecki made him take off his shoes (he had other shoes at the victim's house) and put them in a bag. Gorecki put the bag in the victim's truck and also took off his own shoes and put them in the same bag. Gorecki had a pair of boots at the victim's house because he was living there as well as a change of clothes.[94] He put his

[85] Trial Transcript, p.1087, Defendant-Appellant's Appendix p. 184.a
[86] Trial Transcript, p. 1085-1086, Defendant-Appellant's Appendix p. 183.a
[87] Trial Transcript, p. 1076, 1087, Defendant-Appellant's Appendix p. 184.a
[88] Trial Transcript, p. 1090-1091, Plaintiff-Appellee's Appendix p. 46.b
[89] Trial Transcript, p. 1092-1093, Plaintiff-Appellee's Appendix p. 47.b
[90] Trial Transcript, p. 1093, Plaintiff-Appellee's Appendix p. 47.b
[91] Trial Transcript, p. 1155-1157, Plaintiff-Appellee's Appendix p. 48.b-49.b
[92] Trial Transcript, p. 1157, Plaintiff-Appellee's Appendix p. 49.b
[93] Trial Transcript, p. 1158-1159, Plaintiff-Appellee's Appendix p. 49.b
[94] Trial Transcript, p. 1159-1160, Plaintiff-Appellee's Appendix p. 49.b

bloody clothes in the bag with the shoes.[95] Carp recalled that Gorecki told McNeely he was going to kill her.[96]

A week later, on June 1, 2006, after Kelly Smith came forward with what Defendant had told her, Young brought Defendant in for a third interview. Confronted with Kelly Smith's statements, Carp admitted that he hit McNeely with a cup because Gorecki was struggling with her and needed help. Gorecki instructed him to "just bust her in the head."[97] Carp described the cup as "a heavy glass."[98] He admitted that McNeely asked him for help after he threw the cup.[99] He also admitted to closing the blinds so no one would see in. Most of the blinds were already closed so he thought he closed two.[100]

At trial, Gorecki testified on his brother's behalf. He denied there was any plan or scheme between himself and Carp to steal McNeely's truck, money, or other property. There was no plan to commit armed robbery.[101] Carp never expressed any desire to steal any of the missing items and did not take any of the missing items.[102] He admitted telling Carp to close the drapes during the fight with McNeely and to telling him to bust her with a mug.[103] He recalled that Carp did throw a mug at her, but he did not think it hit her. He denied that Carp ever held McNeely down or touched her, or handed him anything during the fight.[104] According to Gorecki, Carp had nothing to do with taking McNeely's truck or burning it.[105] He admitted taking the stereo and

[95] Trial Transcript, p. 1174-1175, Plaintiff-Appellee's Appendix p. 50.b
[96] Trial Transcript, p. 1220-1222, Plaintiff-Appellee's Appendix p. 51.b-52.b
[97] Trial Transcript, p. 1288, Defendant-Appellant's Appendix p. 188.a
[98] Trial Transcript, p. 1295-1296, Plaintiff-Appellee's Appendix p. 53.b-54.b
[99] Trial Transcript, p. 1289-1290, Defendant-Appellant's Appendix p. 189.a-190.a
[100] Trial Transcript, p. 1292, Defendant-Appellant's Appendix p. 192.a
[101] Trial Transcript, p. 1396-1397, Plaintiff-Appellee's Appendix p. 55.b
[102] Trial Transcript, p. 1397, Plaintiff-Appellee's Appendix p. 55.b
[103] Trial Transcript, p. 1399, Defendant-Appellant's Appendix p. 196.a
[104] Trial Transcript, p. 1399-1400, Defendant-Appellant's Appendix p. 196.a-197.a
[105] Trial Transcript, p. 1400, Defendant-Appellant's Appendix p. 197.a

the DVD/VCR and to leaving them in the truck when he burned it.[106] Following Gorecki's testimony, Carp's trial attorney moved for a directed verdict of acquittal which the trial court denied.[107]

Following closing argument and instruction, the jury deliberated for about half an hour before asking for exhibits and a copy of the trial court's instructions.[108] The trial court provided the exhibits and copies of the jury charge.[109] The jury deliberated for an additional hour and a half before returning a verdict of guilty as charged of all counts.[110]

Carp was subsequently sentenced to concurrent terms of life without parole on the first degree murder conviction, 15 to 30 years on the armed robbery conviction, one to four years on the larceny in a building conviction, and one to five years on the larceny of more than $1,000 but less than $20, 000 conviction.[111]

## B. Post-Conviction Proceedings

Carp appealed as of right. In an unpublished opinion, the Court of Appeals affirmed his convictions and sentences.[112] He applied for leave to appeal the decision to the Supreme Court, and the application was denied.

Defendant, now represented by retained counsel, next filed a motion for relief from judgment on September 17, 2010. The trial court ordered a response from the prosecutor and subsequently issued an opinion denying the motion on January 13, 2011. Carp filed an

[106] Trial Transcript, p. 1458-1459, Plaintiff-Appellee's Appendix p. 56.b
[107] Trial Transcript, p. 1468-1476, Defendant-Appellant's Appendix p. 207.a-215.a
[108] Trial Transcript, p. 1611-1615, Plaintiff-Appellee's Appendix p. 57.b-58.b
[109] Trial Transcript, p. 1615, Plaintiff-Appellee's Appendix p. 58.b
[110] Trial Transcript, p. 1615-1618, Plaintiff-Appellee's Appendix p. 58.b
[111] Sentencing Transcript, p. 13-15, Defendant-Appellant's Appendix p. 248.a-250.a
[112] *People v Carp*, unpublished opinion per curiam of the Court of Appeals issued December 30, 2008 (Docket No. 275084), Defendant-Appellant's Appendix p. 327.a

application for leave to appeal to the Court of Appeals, which was initially denied.[113] He later filed a motion for reconsideration in light *Miller v Alabama*, __ US __; 132 S Ct 2455 (2012). The appeals court granted the motion for reconsideration and granted his application for leave to appeal. The parties were directed to address specific issues, with an expedited briefing schedule.[114] In a published opinion, the Court of Appeals denied Carp's requested relief, holding that *Miller* did not apply retroactively to his case because it was not on direct appeal. *People v Carp*, 298 Mich App 471; 828 NW 2d 685 (2012).

Carp filed an application for leave to appeal in this Court, which was granted on November 6, 2013. Pursuant to the Order granting leave, the issue presented in this appeal is limited to the question of whether *Miller* applies retroactively to cases that have become final after the expiration of the period for direct review under *Teague v Lane*, 489 US 288; 109 S Ct 1060 (1989) and *People v Maxson*, 482 Mich 385; 759 NW2d 817 (2008).

[113] Order, dated 6/8/12, Plaintiff-Appellee's Appendix p. 60.b
[114] Order, dated 8/9/12, Plaintiff-Appellee's Appendix p. 61.b

## I. THE RULE OF LAW ANNOUNCED IN *MILLER V ALABAMA* SHOULD NOT BE APPLIED RETROACTIVELY UNDER *TEAGUE V LANE*.

### A. STANDARD OF REVIEW

Questions of retroactivity of a court's decision are reviewed *de novo*. *People v Sexton*, 458 Mich 43, 52; 580 NW2d 404 (1998).

### B. LAW AND ANALYSIS

Raymond Carp's case reaches this court on collateral review for consideration of whether *Miller* should be applied retroactively under the limited exceptions set forth in *Teague*, supra. When a decision results in a "new rule," that rule applies to all criminal cases still pending on direct review. *Griffith v Kentucky*, 479 US 314, 328; 107 S Ct 708 (1987). As to convictions that are already final, such as Carp's conviction, the new rule applies only in limited circumstances: where it is substantive in nature, or where it is considered a "watershed rule." The rule announced in *Miller* is a new rule, but it is procedural in nature, not substantive. Furthermore, the rule in Miller is not a watershed rule. Therefore, for these reasons more fully set forth below, *Miller* should not be applied retroactively to Carp's case

#### 1. *Miller v Alabama* is a new rule.

The first step in the *Teague* analysis of retroactivity is determining whether the rule announced in *Miller* is "new." "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, at 301. A new rule is further defined as one that "was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* Clearly, the rule in *Miller* is new, as it was the first time that

mandatory or life-without-parole sentencing schemes were required to individualize sentencing for juveniles.

**2. *Miller v Alabama* is a procedural rule, not a substantive rule.**

A rule is considered substantive when it narrows the scope of a criminal statute by interpreting its terms. *Bousley v United States*, 523 US 614, 620-621; 118 S Ct 1604 (1998). The term "substantive" also includes constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. *Saffle v Parks*, 494 US 484, 494-495; 110 S Ct 1257 (1990). Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' " or faces a punishment that the law cannot impose upon him. *Bousley*, at 620 (quoting *Davis v United States*, 417 US 333, 346; 94 S Ct 2298 (1974). The definition of a substantive rule also covers rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense. *Penry v Lynaugh*, 492 US at 302, 329; 109 S Ct 2934 (1989).

Unlike substantive rules, new rules of procedure, generally do not apply retroactively. Procedural rules are those that regulate only the manner of determining the defendant's culpability. *Bousley*, at 620. They do not decriminalize a class of conduct or prohibit a certain category of punishment for a class of defendants.

In *Schriro v Summerlin*, 542 US 348; 124 S Ct 2519 (2004), the U.S. Supreme Court considered whether its decision in *Ring v Arizona*, 536 US 584; 122 S Ct 2428 (2002), should be applied retroactively to cases that had become final on direct review. In *Ring*, the court held that a sentencing judge may not find an aggravating circumstance necessary for imposition of the death penalty. Rather, such a finding must be made by a jury. The *Summerlin* court found that

*Ring* was a procedural rule, not a substantive rule. In making this determination, the court focused on the fact that the *Ring* holding did not alter the range of conduct that the state law subjected to the death penalty. Rather, it altered only the range of permissible methods for determining whether a defendant's conduct is punishable by death. The *Summerlin* court observed that in *Ring*, the range of conduct punished was the same before the controlling decision as after. *Id.* at 354. The *Summerlin* court further noted that "rules that allocate decision making authority in this fashion are prototypical procedural rules." *Schriro,* at 354. *Summerlin* highlights the distinction between a substantive change in facts that must be found and the procedural change in the manner in which they must be found:

> This Court's holding that, because Arizona has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive. *Summerlin*, at 354.

A similar distinction is present in the case before this Court. *Miller* changed only the procedure by which the sentencing court may impose a sentence of life without parole on a minor by requiring the sentencing court to consider factors relative to the particular juvenile. *Miller* did not make a life without parole sentence unavailable. Although the *Miller* court qualified that the occasions in which a life without parole sentence will be uncommon, it is abundantly clear that courts may still impose life without parole on a juvenile convicted of murder, so long as the court does so with consideration to the individual juvenile and with the discretion to consider a lesser sentence. *Miller* at 2460. Certainly, if a significant change to the prerequisites necessary to impose the death penalty is deemed procedural, then the new rule applied by *Miller* must be deemed procedural as well.

The *Miller* decision does not categorically bar a penalty for a class of offenders or type of crime. It bars only those sentences made mandatory by a sentencing scheme. Therefore, the first exception under *Teague* does not apply. A sentence of life without parole for a juvenile murderer continues to be a constitutionally-permissible sentence, but only after the unique attributes of the juvenile, including the age and age-related characteristics are considered. It is only the mandatory nature of imposing the sentence that is unconstitutional for juveniles, not the sentence of life without parole itself.

Furthermore, the plain language of the *Miller* decision shows that it was not intended to be a substantive change, but rather a procedural one. The *Miller* court noted that its decision stemmed from two lines of precedent, one that involved a categorical ban of certain sentencing practices, like those in *Graham v Florida*, 560 US 48; 130 S Ct 2011 (2010). The *Miller* court expressly distinguished its opinion from the *Graham* case, stating "our decision does not categorically bar a penalty for a class of offenders or type of crime – as, for example, we did in *Roper* or *Graham*, Instead, it mandates only that a sentence follow a certain process – considering an offender's youth and attendant characteristics – before imposing a particular penalty. *Miller*, at 2471.

A number of courts have held that *Miller* should not be applied retroactively because it is a procedural change. Although these holdings are not binding on this court, the rationale applied is applicable and instructive. In *Chambers v Minnesota*, 831 NW 2d 311 (2013), the Minnesota Supreme Court declined to apply *Miller* to a defendant on collateral appeal:

> Although the *Teague* retroactivity doctrine necessarily denies certain defendants the benefit of new rules of criminal procedure, we have consistently recognized the need to safeguard the important principles underlying the doctrine, including finality and

> providing a bright-line rule for when relief is to be retroactive." *Id.* at 324.

The *Chambers* court reasoned that since they had denied retroactive application on collateral review of the new rules applied in *Blakely v Washington*, 542 U.S. 296; 124 S Ct 2531 (2004); *Crawford v Washington*, 541 US 36; 124 S Ct 1354 (2004), and *Padilla v Kentucky*, 559 US 356; 130 S Ct 1473 (2010), they should similarly deny retroactive application of Miller on collateral review in the interest of a bright-line rule for retroactivity, and in the interests of finality. The court concluded:

> In *Houston*, *Danforth III*, and *Campos*, we applied *Teague* and concluded that the defendant was not entitled to the retroactive benefit of a new rule announced by the Supreme Court. Our analysis in those cases denied certain defendants the benefit of new rules of criminal procedure, but safeguarded the important principles underlying the *Teague* retroactivity doctrine, particularly finality and providing a bright-line rule for when relief is to be retroactive. For the same reasons, we apply the *Teague* doctrine to this case. *Chambers*, at 325.

The *Chambers* court gave several reasons for its conclusion that the *Miller* rule was procedural in nature. First, that the *Miller* rule does not eliminate the power of the state to impose the punishment of live without the possibility of parole, but instead only invalidates a sentencing scheme that mandates this type of punishment. *Id.* at 328. Second, the court noted that federal decisions have found *Miller* to be procedural, citing *Craig v Cain*, 2013 WL 69128 (CA5 Jan 4, 2013)(unpublished). *Id.* at 329. Third, the *Miller* rule does not announce a new element or mandate that any aggravating factor be proven before the State imposes the life without the possibility of parole. *Id*, at 329.

In *Louisiana v Tate*, -- So 3d ----, 2013 WL 5912118 (La, 2013) the Supreme Court of Louisiana also denied retroactive application to cases on collateral review. The *Tate* court cited

the decision in *Lambrix v Singletary*, 520 US 518, 539; 117 S Ct 1517 (1997), wherein the court found that where a rule does not prohibit the imposition of capital punishment of a particular class of persons, the rule has been found to be procedural in nature.[115] The court found reasoned that where the new rule, like that in *Lambrix* regulates the manner in which the state exercises its power to impose the punishment in question, the rule is procedural, unlike a rule eliminating the power of the State to impose the punishment in question regardless of the procedures followed. Of significance to the Tate court in finding that the rule was procedural was also that the elements necessary for conviction were not altered.

The Supreme Court of Pennsylvania also denied retroactive application, finding that *Miller* was a procedural rule because it did not categorically bar all sentences of life imprisonment for juveniles, but only barred those made mandatory by a sentencing scheme. *Commonwealth v Cunningham*, 81 A 3d 1, 10 (Pa, 2013).

Federal courts at the circuit level have also declined retroactive application for reasons similar to the states. The 5th Circuit found that the rule in *Miller* could not be applied retroactively because it was not a categorical bar and only barred those sentences made mandatory by a sentencing scheme. See *Craig*, supra. The 11th Circuit found retroactivity improper because the Supreme Court had not held that *Miller* should be applied retroactively on collateral review, citing *Tyler v Cain*, 533 US 656, 662; 121 S. Ct. 2978 (2001). The 11th Circuit also stated that 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." *In re Morgan*, 713 F 3d 1365, 1368 (2013).

[115] See also, *Saffle*, supra, at 495

### 3. *Miller v Alabama* is not a "watershed rule"

The second exception to the non-retroactive application of new rules under *Teague* involves those that are considered "watershed rules." A watershed rule is one that meets two requirements. First, it must be necessary to prevent an impermissibly large risk of an inaccurate conviction. *Summerlin*, supra, at 356. Second, it must alter the understanding of the bedrock procedural elements essential to the fairness of a proceeding. *Id.* at 356. This class of "watershed rules" is extremely limited in scope, "clearly meant to apply only to a small core of rules" that "are implicit in the concept of ordered liberty." *Beard v Banks*, 542 US 406, 417; 124 S Ct 2504 (2004). In offering guidance as to what sort of rule might fall under this exception, the U.S. Supreme Court has noted, "we have repeatedly referred to the rule of *Gideon v. Wainwright*, [citation omitted] (right to counsel), and only to this rule." *Id.*

The *Miller* decision cannot be considered a watershed rule. The effect of *Miller* is limited. It only modifies the process by which the sentencing court must reach its decision for first-degree murder cases, and only does so for certain offenders: the subset of juvenile murderers. Other, more global changes to the criminal process have not been applied retroactively, such as the decision in *Crawford v Washington*, 541 US 36; 124 S Ct 1354 (2004). As the Supreme Court concluded in *Whorton v Bockting*, 549 US 406; 127 S Ct 1173 (2007):

> We have frequently held that the *Teague* bar to retroactivity applies to new rules that are based on "bedrock" constitutional rights. See, e.g., supra, 542 U.S., at 418, 124 S.Ct. 2504. Similarly, "[t]hat a new procedural rule is 'fundamental' in some abstract sense is not enough." *Summerlin*, supra, at 352, 124 S.Ct. 2519.
>
> Instead, in order to meet this requirement, a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding. In applying this requirement, we again have looked to the example of *Gideon*,

> and "we have not hesitated to hold that less sweeping and fundamental rules" do not qualify. *Beard*, supra, at 418, 124 S.Ct. 2504.
>
> In this case, it is apparent that the rule announced in *Crawford*, while certainly important is not in the same category with *Gideon*. *Gideon* effected a profound and " 'sweeping' " change. *Beard, supra*, at 418, 124 S.Ct. 2504 (quoting *O'Dell*, 521 U.S., at 167, 117 S.Ct. 1969). The *Crawford* rule simply lacks the "primacy" and "centrality" of the *Gideon* rule, *Saffle*, 494 U.S., at 495, 110 S.Ct. 1257, and does not qualify as a rule that "alter[ed] our understanding of the bedrock procedural elements essential to the fairness of a proceeding," Sawyer, 497 U.S., at 242, 110 S.Ct. *Bockting*, at 420-421.

If changes to the law that would affect cases universally, like *Crawford*, have not been considered watershed rules, then the holding of *Miller*, which affects the procedure of the sentencing of a limited number of offenders, should not be either.

## II. THE RELIEF PROVIDED TO THE DEFENDANT ON COLLATERAL REVIEW IN *JACKSON V HOBBS* DOES NOT REQUIRE THAT *MILLER V ALABAMA* BE APPLIED RETROACTIVELY TO OTHER DEFENDANTS ON COLLATERAL REVIEW.

### A. STANDARD OF REVIEW

As set forth in the previous section, questions of retroactivity of a court's decision are reviewed *de novo*. *Sexton*, supra, at 52 (1998).

### B. LAW AND ANALYSIS

Raymond Carp contends that because relief was granted to Kuntrell Jackson, the defendant in Miller's companion case of *Jackson v Hobbs*, even handed-justice dictates that *Miller* be applied retroactively to his case. There is no dispute that the *Miller* court vacated the sentences of both Evan Miller (on a direct appeal) and Kuntrell Jackson (on collateral appeal), however, the Court's decision was based on a waiver of the issue by the state and should not be applied to the case at bar.

In considering retroactive application on collateral review, the *Teague* court found that if a rule is applied retroactively to one defendant; it should be applied evenhandedly to other defendants similarly situated:

> We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated. *Teague*, at 316.

Although Kuntrell Jackson and Raymond Carp are similarly situated in that their cases were both on collateral review at the time the U.S. Supreme Court made mandatory life without

parole unconstitutional, they in different positions in that the issue of retroactivity was not raised by the State of Arkansas in Jackson's case. Retroactivity must be raised by the state or it is waived, and the Court is not obligated to consider this issue sua sponte. As the Court stated in *Collins v Youngblood*, 497 US 37; 110 S Ct 2715 (1990):

> Generally speaking, "[r]etroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Teague*, supra, 489 U.S., at 300, 109 S.Ct., at 1070. The State of Texas, however, did not address retroactivity in its petition for certiorari or its briefs on the merits, and when asked about the issue at oral argument, counsel answered that the State had chosen not to rely on *Teague*. Tr. of Oral Arg. 4-5. Although the *Teague* rule is grounded in important considerations of federal-state relations, we think it is not "jurisdictional" in the sense that this Court, despite a limited grant of certiorari, must raise and decide the issue sua sponte. *Youngblood*, at 41.

Nowhere in the *Miller* decision is the subject of retroactivity raised. While Carp urges this Court to find that the rule should be applied retroactively because it was applied to Jackson, the People contend that the absence of a retroactivity argument renders the decision to remand in *Jackson* inapplicable to the present case. Therefore, retroactivity remains an issue to be addressed by the state courts.

In his brief, Carp submits that the language of the dissent in *Miller* foreshadows the retroactivity issue. The fact that the dissenting opinion anticipates the issue of application of the holding to other cases does not equate to a mandate that the rule be applied retroactively. Quoted more fully, it is clear that Chief Justice Roberts's observations are not an indication that the holding should be applied retroactively, but rather a criticism of judicial infringement on the legislative role:

> Today's decision does not offer *Roper* and *Graham*'s false promises of restraint. Indeed, the Court's opinion suggests that it is merely a way station on the path to further judicial displacement of the legislative role in prescribing appropriate punishment for crime. The Court's analysis focuses on the mandatory nature of the sentences in this case. See ante, at 2466 – 2469. But then—although doing so is entirely unnecessary to the rule it announces—the Court states that even when a life without parole sentence is not mandatory, "we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Ante, at 2469. Today's holding may be limited to mandatory sentences, but the Court has already announced that discretionary life without parole for juveniles should be "uncommon"—or, to use a common synonym, "unusual."
>
> Indeed, the 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. *Roper* and *Graham* attempted to limit their reasoning to the circumstances they addressed— *Roper* to the death penalty, and *Graham* to nonhomicide crimes. Having cast aside those limits, the Court cannot now offer a credible substitute, and does not even try. After all, the Court tells us, "none of what [ *Graham* ] said about children ... is crime-specific." Ante, at 2465. The principle behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently. See ante, at 2467 – 2469. There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive. Unless confined, the only stopping point for the Court's analysis would be never permitting juvenile offenders to be tried as adults. Learning that an Amendment that bars only "unusual" punishments requires the abolition of this uniformly established practice would be startling indeed. *Miller*, at 2481-82.

Taken in context, Justice Roberts's dissent should not be interpreted as evidence that the *Miller* decision was intended to apply retroactively.

It also bears mentioning that the Supreme Court in Jackson's case did not reverse his judgment of sentence. Rather, it reversed only the judgments of the state appellate courts and remanded the case "for further proceedings not inconsistent with this opinion." *Miller*, at 2475. The state could have raised the *Teague* issue of retroactivity on remand, but did not,[116] conceding retroactivity with no judicial ruling on the issue.[117]

The Supreme Court of Pennsylvania also did not find the *Miller* application to Jackson to be dispositive on the issue of retroactivity:

> Initially, we reject Appellant's position that the *Miller* Court's reversal of the state appellate court decision affirming the denial of post-conviction relief in the *Jackson* case compels the conclusion that *Miller* is retroactive. In the first instance, it is not clear that the issue was even placed before the Court, and, as the Commonwealth observes, the Supreme Court need not entertain questions of retroactive application where the government has not raised it. *See Goeke*, 514 U.S. at 117, 115 S.Ct. at 1276; cf. *Carp*, 828 N.W.2d at 713 ("In *Jackson*, because the State did not raise the issue of retroactivity, the necessary predicate for the Court to resolve the question of retroactivity was waived."). Whether the matter was waived or, as the Commonwealth contends, remained available to be asserted on remand is of no moment here, since the United States Supreme Court has made clear enough that *Teague* determinations are not inherently implicit in all new constitutional rulings implemented by that Court. But see *Williams*, 367 Ill.Dec. 503, 982 N.E.2d at 197 (deriving support for the holding that *Miller's* holding is retroactive from its disposition of the *Jackson* case); *Morfin*, 367 Ill.Dec. 282, 981 N.E.2d at 1023 (same). Rather, in the absence of a specific, principled retroactivity analysis by the United States Supreme Court (or a functional equivalent), we do not believe that a *Teague* assessment by subordinate state courts is foreclosed. *Cunningham*, at 9-10.

In a decision against retroactive application, the U.S. District Court observed that the U.S. Supreme Court has not always engaged in a retroactive analysis as a threshold question:

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[116] *Jackson v Norris*, 2013 Ark 175 2013 WL 1773087 (2013)

[117] This argument was made by the state in *Commonwealth v Cunningham*, 81 A3d 1 (2013) to defeat retroactive application to a defendant on collateral review.

> Johnson asks this Court to assume that the Supreme Court, having chosen to apply the newly announced *Miller* rule to Jackson's collateral claim, necessarily determined that the new rule should be retroactively applicable to all cases on collateral review. This Court declines to make such an assumption, particularly in light of the Supreme Court's treatment of similar cases. Although retroactivity analysis is a threshold question and a prerequisite for announcement of a new constitutional rule, the Supreme Court has foregone this analysis more than once. *Id.*; see, e.g., *Miller*, 132 S.Ct. 2455; *Padilla v. Kentucky*, 559 U.S. 356 (2010). In *Padilla*, the petitioner brought a collateral challenge to his conviction, and in reversing the decision below, the Supreme Court announced a new constitutional rule. *Padilla*, 559 U.S. at 374–75; Chaidez v. United States, 133 S.Ct. 1103, 1113 (2013); *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (2008). Notwithstanding its application of a new constitutional rule to Padilla's collateral claim, the Supreme Court later announced that the *Padilla* rule would not be applied retroactively to other cases on collateral review. *See Chaidez*, 133 S.Ct. at 1113. In light of such history, this Court will not assume that the Supreme Court's application of a new constitutional rule to Jackson's collateral claim necessarily acts as a determination of the *Miller* rule's retroactivity. *Johnson v Ponton*, 2013 WL 5663068 (E.D. Va. 2013)

The Court of Appeals below correctly found that the issue of retroactivity was waived by the state in Jackson's case, relying on the reasoning in *Caspari v Bohlen*, 510 US 383; 114 S Ct 948 (1994) and *Schriro v Farley*, 510 US 222; 114 S Ct 783 (1994). The cases that Carp cites, which found that the relief granted to Jackson in his case supports retroactive application, should not be persuasive to this Court because none of these cases considered the issue of a waiver by the state.[118] Each of these cases cited the fact that Jackson was granted relief, and concluded that this meant the Court intended retroactive application, but there is no discussion or even mention of whether the state raised the issue of retroactivity.

[118] *Diatchenko v District Attorney*, -- NE 2d --; 466 Mass 655; 2013 WL 6726856 (Dec. 24, 2013); *State v Ragland*, 836 NW2d 107 (Iowa 2013); *Jones v State*, 122 So 3d 698 (Miss 2013)

## III. THE RULE OF LAW ANNOUNCED IN *MILLER V ALABAMA* SHOULD NOT BE APPLIED RETROACTIVELY UNDER *PEOPLE V MAXSON.*

### A. Standard of Review

As set forth in the previous sections, questions of retroactivity of a court's decision are reviewed *de novo*. *People v Sexton*, 458 Mich 43, 52; 580 NW 2d 404 (1998).

### B. Law and Argument

The *Miller* decision should not be applied retroactively under *Maxson*, supra. In *Maxson*, the court set forth the considerations for constitutional retroactivity. As the *Maxson* court noted, Michigan courts have regularly declined application of new rules of criminal procedure to cases where a defendant's conviction is final. *Id.* at 393. Whether a law should be applied prospectively only, or retroactively, depends on: 1) the purpose of the new rule; 2) the general reliance on the old rule; and 3) the effect on the administration of justice. *Maxson*, at 393.

#### 1. Purpose of the New Rule

Under the "purpose" prong of the test, a law may be applied retroactively when it "concerns the ascertainment of guilt or innocence." *Maxson*, at 393, citing *Sexton*, at 63. Where a new rule does not affect the integrity of the fact-finding process, however, it should be given only prospective effect. *Id.*

The decision in *Miller* established a procedure for sentencing juveniles convicted of first-degree murder. It did not set forth any new rule affecting the ascertainment of guilt or innocence, and it did not in any way affect the fact-finding process as it relates to the elements of the crime of murder. Significantly, *Miller* did not categorically bar any penalty, but rather

required the sentencing court to consider mitigating factors. Therefore, the purpose of *Miller* can be characterized as a change to the manner in which trial courts sentence juveniles convicted of murder, but not as to the range of sentences available.

**2. Reliance on the Old Rule**

When considering "reliance," a court examines whether individual persons or entities have been "adversely positioned ... in reliance" on the old rule. Detrimental reliance on the old rule requires that a defendant must have relied on the rule in not pursuing an appeal. *Maxson*, at 394. Second, a defendant who relied on the old rule in not filing an appeal must also have suffered actual harm from that reliance. That is, the old rule would have had to preclude defendant from filing an appeal that would have resulted in some form of relief. *Maxson*, at 396.

In this case, as pointed out by the Court of Appeals, there is no guarantee that Carp, or any other similarly situated defendant would actually receive relief under *Miller*. Because it is not a categorical ban on life without parole sentences, it is possible and entirely probable that these defendants would receive the exact same sentence after the sentencing court reviewed the factors required by *Miller* as to the individual characteristics of the juvenile. Although the *Miller* court said that life without parole sentences would be "unusual," they did leave the door open for the states to impose such sentences, after appropriate consideration was given to the juvenile status.

The sentencing judges in local jurisdictions, who are faced with the facts of heinous, deliberate murders committed by juveniles, may not find an actual life without parole sentence to be so unusual when considered in the context of juvenile murderers as opposed to the general population of criminal defendants. By the time a juvenile reaches the point where a life without

parole sentence is imposed, some consideration has already been given to the decision to charge him or her as an adult as opposed to a juvenile. Moreover, a determination has also been made that the sentence imposed should be within the realm of the adult court, not within the jurisdiction of the juvenile court. The sentencing courts where the crimes were prosecuted have heard the horrifying factual backgrounds of these murders, and are fully able under *Miller* to exercise their discretion in determining which juveniles are deserving of the harshest punishment. Therefore, to say there has been detrimental reliance by Carp is not entirely accurate. Furthermore, as the Court noted in *Maxson*, the possibility of some number of defendants receiving relief is not justification for retroactive application:

> While it cannot be disputed that some number of defendants would receive relief if *Halbert* were made retroactive, this would be true of extending any new rule retroactively, yet this is not generally done. Instead, we must consider, as best as possible, the extent of the detrimental reliance on the old rule, and then balance this against the other Sexton factors, as well as against the fact that each defendant who pleaded guilty has received all the rights under the law to which he or she was entitled at the time. Here, we conclude that the extent of the detrimental reliance is remarkably minimal and, as explained above and below, does not outweigh the other Sexton factors that clearly counsel against retroactive application.

Carp, like most other defendants in his position, received all the rights under the law to which he was entitled to at the time. Clearly, applying the rule retroactively could afford some number of defendants, like Carp, relief if the sentencing courts found them deserving of a lesser sentence. However, some amount of relief would result from the application of any rule retroactively, and as the *Maxson* Court noted, retroactive application is not generally done. *Id.* at 397. The Court cautions that the extent of the detrimental reliance on the old rule must be balanced against the factors set forth in Sexton: purpose of the new rule, general reliance on the

old rule, and effect on the administration of justice. In this case, the first and third factors weigh heavily against retroactive application.

### 3. Effect on the Administration of Justice

The state has a strong interest in the principle of finality in the criminal justice system, which would be undermined greatly by retroactive application of the *Miller* case. On the subject of finality, the *Maxson* court noted:

> "[F]inality of state convictions is a state interest ... that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts." *Danforth*, supra at 1041 (emphasis in original). The principle of finality "is essential to the operation of our criminal justice system." *Teague*, supra at 309, 109 S.Ct. 1060. The state's interest in finality discourages the advent of new rules from "continually forc[ing] the State[ ] to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards," id. at 310, 109 S.Ct. 1060 (emphasis omitted), and also "serves the State's goal of rehabilitating those who commit crimes because '[rehabilitation] demands that the convicted defendant realize that he is justly subject to sanction, that he stands in need of rehabilitation.' " *Kuhlmann v. Wilson*, 477 U.S. 436, 453, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), quoting *Engle v. Isaac*, 456 U.S. 107, 128 n. 32, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) (citation and quotation marks omitted). *Id.* at 398.

The Court of Appeals acknowledged that retroactive application would result in relief to some juveniles, but expressed "a commensurate concern regarding the effect of these potential appeals on our limited judicial resources." *Carp*, at 522. The Court also quoted *Maxson* in support of this concern: "it is our judgment that those resources would be better preserved for defendants currently charged [or pending on direct review]—some of whom may be ... entitled to relief." *Carp*, at 522, quoting *Maxson*, at 398-399.

The Court of Appeals also found Florida's decision in *Geter v Florida*, 115 So 3d 375 (2012), to be instructive. The Florida appellate court applied a substantially similar test to *Maxson*, and concluded that *Miller* does not have retroactive application. The court found that the purpose to be served by *Miller* was to provide a new process in juvenile homicide sentencing. *Geter*, at 378. Further, the court stated that *Miller* did not affect the determination of guilt or innocence, did not address a miscarriage of justice, and did not cast serious doubt on the veracity or integrity of the original trial proceeding. *Id.* at 379. The court characterized the procedural change in juvenile homicide sentencing as merely an "evolutionary refinement" that "does not compel an abridgement of the finality of judgments. *Id.* The principle of finality was also emphasized by the Florida court:

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. *Id.* at 380-381.

The *Geter* court considered the extent of reliance on the old rule and found that this factor weighed heavily against retroactive application, as Florida law had long permitted courts to impose life sentences on juveniles after first degree murder convictions. The court also found that because "the *Miller* determination is a procedural change in criminal law and has implications that could not have been accounted for in the past, reliance on the old rule weighs against retroactive application." *Id.* at 383. This observation applies strongly to the cases that would benefit from retroactive application. In these situations, the factors that the *Miller* court directs trial courts to consider (immaturity, failure to appreciate risks and consequences, family and home environment, circumstances of the homicide offense, extent of participation, effect of

familial and peer pressures, inability to deal with police and prosecutors, and incapacity to assist his own attorneys) have never been the subject of specific fact-finding and are not a part of the record. Retroactive application to cases on collateral review brings cases back before the trial court that may be decades old. Those that knew the most about the case at the time (i.e., investigating officers, the trial prosecutor, families of victims, and even the presiding judge) are frequently unavailable. Furthermore, it is impossible to make the types of findings about the individual as a juvenile years later after they have grown into adulthood.

Finally, the *Geter* court considered the effect of retroactive application and found that it would "destroy the stability of the law, render punishments uncertain, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Id.*, at 383. The court wisely observed the difficulties associated with retroactive application:

> Applying *Miller* retroactively would undoubtedly open the floodgates for postconviction motions where at the time of conviction and sentencing, the judge did not have an affirmative duty to consider mitigating factors of youth. Evidentiary hearings "[a]ddressing motions challenging convictions that have long since been final would present a logistical nightmare for the courts, with the proceedings themselves potentially raising more questions than they would be able to answer." *Barrios–Cruz*, 63 So.3d at 873. Among the clear and obvious difficulties in holding new sentencing hearings in cases that were final years ago are (1) the judge who tried the case and physically saw and heard the evidence may not be available, (2) trial transcripts may no longer be available, (3) prosecutors familiar with the case may no longer be employed with their respective office, and (4) family members who are still alive and who had to live through the trial, appeals, and postconviction motions, will be subjected to a new proceeding involving new lawyers, a new judge, stale memories, and additional appellate proceedings. *Id.* at 383.

These considerations are compelling, and were obviously of concern to the Court of Appeals in their determination not to apply *Miller* retroactively to Carp's case. The fact-finding

process that would be required to re-sentence all of these juveniles simply cannot be done in any meaningful way in older cases.

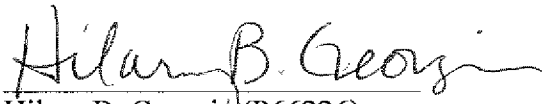
The three factors in *Maxson* all weigh in favor of this Court denying retroactive application of the rule set forth in *Miller*. The purpose of the new rule had no bearing on the question of guilt or innocence, or the fact-finding process at trial. Moreover, the affected juveniles have not been adversely positioned in reliance on the old rule, as most would receive a sentence exactly the same after a *Miller* analysis. Finally, the effect of resentencing these defendants would have a damaging effect on the administration of justice, particularly where the cases are old and relevant information under *Miller* cannot be obtained.

## RELIEF REQUESTED

WHEREFORE, for the reasons set out above, Plaintiff-Appellee requests that this Honorable Court reject Defendant-Appellant's allegations of error and affirm the Court of Appeals ruling and the trial court's denial of his motion for relief from judgment because *Miller v Alabama* announces a new rule of procedure that should not be applied retroactively to those cases that were final when *Miller* was decided.

Respectfully Submitted,

Michael D. Wendling
Prosecuting Attorney

By: 
Hilary B. Georgia (P66226)
Senior Assistant Prosecuting Attorney

Dated: February 15, 2014

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

v.

RAYMOND CURTIS CARP
Defendant-Appellee.

Supreme Court No. 146478

Court of Appeals No. 307758

Lower Court No. 06-1700-FC

/

HILARY B. GEORGIA (P-66226)
Attorney for Plaintiff-Appellee

PATRICIA SELBY (P-70163)
Attorney for Defendant-Appellant

ERIC RESTUCCIA (P-49550)
Attorney for Attorney General, Intervener

**PROOF OF SERVICE**

STATE OF MICHIGAN )
) ss.
COUNTY OF ST. CLAIR )

Julie A. LaMay, certifies that she is a secretary in the Office of the Prosecuting Attorney for the County of St. Clair, and that on the 20th[th] day of February, 2014 she served a copy of Plaintiff-Appellee's Amended Brief on Appeal, Plaintiff-Appellee's Brief on Appeal Appendix and Plaintiff-Appellee's Motion to Extend Time for Filing of Brief, upon Patricia Selby, Attorney for Appellant, P.O. Box 1077, Grosse Ile, MI 48138 and Eric Restuccia, Attorney for Attorney General, Intervener, P.O. Box 30212, Lansing, MI 48909, by enclosing a copy of same in an envelope plainly addressed as indicated above, and by depositing same in a United States mailbox located in the City of Port Huron, County and State aforesaid, with sufficient postage thereon fully prepaid.

I declare that the statement above is true to the best of my information, knowledge and belief.

2-20-14

Julie A. LaMay Date