IN THE MICHIGAN SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
Judges Kelly, Talbot and Murray

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORTEZ ROLAND DAVIS,

Defendant-Appellant.

SC: 146819
COA: 314080
Wayne CC: 94-002089-01-FC

BRIEF ON APPEAL – APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

On January 16, 2013, the Court of Appeals issued its order reversing the December 7, 2012 order of the Wayne County Circuit Court. Leave was granted by this Court to review the decision of the Court of Appeals on November 6, 2013.

This Court has jurisdiction pursuant to Const. 1963, Art. VI, § 4; MCL 600.212; MCL 600.215(3); and MCR 7.301(A)(2), to review a case after a decision by the Court of Appeals and the trial court.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PROHIBITION AGAINST "CRUEL AND UNUSUAL PUNISHMENTS" FOUND IN THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND/OR THE PROHIBITION AGAINST "CRUEL OR UNUSUAL PUNISHMENT" FOUND IN CONST. 1963, ART. 1, § 16, CATEGORICALLY BAR THE IMPOSITION OF A LIFE WITHOUT PAROLE SENTENCE ON A DEFENDANT UNDER THE AGE OF 18 CONVICTED OF FIRST-DEGREE MURDER FOR HAVING AIDED AND ABETTED THE COMMISSION OF A FELONY MURDER.

Defendant-Appellant answers: Yes.
Plaintiff-Appellee answers: No.

II. IF SUCH A CATEGORICAL BAR EXISTS, WHETHER IT APPLIES RETROACTIVELY, UNDER FEDERAL OR STATE LAW, TO CASES THAT HAVE BECOME FINAL AFTER THE EXPIRATION OF THE PERIOD FOR DIRECT REVIEW.

Defendant-Appellant answers: Yes.
Plaintiff-Appellee answers: No.

ORDER APPEALED FROM, STATEMENT OF ERROR AND RELIEF SOUGHT

Appellant Cortez Davis appeals the decision of the Michigan Court of Appeals issued January 16, 2013. The Court of Appeals' error in this case allows the constitutionally impermissible sentence of mandatory life without the possibility of parole to continue to be imposed on a juvenile offender in Michigan, even though in Cortez's case, the trial judge stated that she believed the mandatory sentence to be cruel and unusual.

The Hon. Vera Massey Jones of the Third Circuit Court issued an order dated December 11, 2012 following a hearing on Cortez's Motion for Post-judgment Relief Requesting Resentencing pursuant to *Miller/Jackson, infra*. The motion was granted by the trial court, which issued a written order stating:

> IT IS HEREBY ORDERED that defendant is GRANTED a resentencing hearing pursuant to Miller v Alabama 132 S Ct 2455.
>
> Defendant was convicted as a juvenile of First Degree Felony Murder in 1994. A sentencing hearing was held to determine whether to sentence defendant as a juvenile. The defendant was not the shooter, but an aider and abettor. This court found that although defendant could be rehabilitated, the time left under the juvenile sentencing Option was not enough time to assure that defendant was rehabilitated. Further, this court held that to sentence this particular defendant to natural life in prison was cruel and unusual punishment. The Michigan Court of Appeals in 1994 ordered this court to sentence Mr. Davis pursuant to statute. Mr. Davis pursued every means of appeal in the Michigan Courts including several subsequent motions for relief from judgment. The United States Supreme Court in Miller v. Alabama, 132 S. Ct 2455, has finally held that to sentence juveniles to natural life in prison without the possibility of parole is cruel and unusual punishment. This court uses the term "finally held" because Mr. Cortez Davis has been in prison for 18 years without a hearing before a parole board. This court is not aware if during these 18 years the defendant has had the opportunity for educational programs or any services that might prepare him to return to society. Thus, we have locked him behind bars for over 18 years as a juvenile who did not pull the trigger, who told the victim that he held at gunpoint that everything will be alright, and who had the potential to be rehabilitated. We, the People of the State of Michigan have treated this juvenile, now man, inhumanely.
>
> The People of the State of Michigan contend that the defendant should not be granted a (sic) relief because a Michigan Court of Appeals case holds that his relief is barred because retroactivity does not apply to a case on collateral review.

> The Michigan Court of Appeals was wrong when it ordered this court to impose a sentence pursuant to statute, which was cruel and unusual. The Supreme Court of the State of Michigan was wrong when it affirmed this defendant's conviction and sentence. To now hold that defendant is barred from relief because his case is reviewable only under a motion from relief from justice would be wrong and injustice.
>
> Based on the reasons stated above this court orders that defendant, Cortez Roland Davis, be GRANTED a resentence (sic) hearing to be held on January 25, 2013. Appellant's Appx. 1308a-09a.

On January 16, 2013, on Application by the Wayne County Prosecutor, the Court of Appeals granted expedited consideration and summarily reversed the Third Circuit Court without a hearing, stating:

> The Court Orders that the motion for immediate consideration is GRANTED.
>
> In lieu of granting leave to appeal, pursuant to MCR 7.205(D)(2), the Court further orders that the December 11, 2012 order of the Wayne County Circuit Court, which granted defendant's motion for judgment relief and granted resentencing pursuant to *Miller v Alabama*, 567 US ___; 132 S Ct 2455, 183 L Ed 2d 407 (2012), is REVERSED. In *People v Carp*, ___ Mich App ___, ___ NW2d ___ (Docket No. 307758, issued November 15, 2012), slip opinion, pp 24-31, this Court held that Miller is not to be applied retroactively to those cases on collateral review. The Carp decision has precedential effect under the rule of stare decisis, and the circuit court is required to follow published decisions from this Court. See MCR 7.215(C)(2); *People v Hunt*, 171 Mich App 174, 180, 429 NW2d 824 (1988).
>
> Pursuant to MCR 7.215(F)(2), this order shall take immediate effect. The Court retains no further jurisdiction. Appx. 64a, Order of the Court of Appeals, dated January 16, 2013

The Eighth Amendment has been incorporated and deemed to apply to the individual states through the Due Process Clause of the US Const. Amend XIV *Robinson v California*, 370 US 660, 82 S Ct 1417, 8 L Ed 2d 758 (1962).

The Michigan Court of Appeals erred in its January 16, 2013 Order in this case by denying the requested relief based on *People v Carp*, 298 Mich App 472, 828 NW2d 685 (Mich App 2012). This Court should REVERSE the Court of Appeals and REMAND to the Wayne County Circuit Court for resentencing pursuant to *Miller/Jackson, supra.*

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Cortez Roland Davis ("Cortez") was born March 7, 1977. Appellant's Appx. 661a. His life circumstances at the time of the commission of the offense in this case were horrific according to both his personal account and the 1994 Pre-sentence Investigation Report. Cortez's mother was 16 years old at the time of his birth, and was already struggling to care for his two-year-old sister. *Id.* Cortez's father passed away in 1986 or 1987 from drug use when Cortez was just 9 years old, at which time his mother turned to drug dealing and use. *Id.* She began to neglect Cortez and his other siblings by failing to keep food in the house. *Id.* When he reported to a Mason Elementary School counselor in 1987 what was happening in his home (of being hungry, living in a crack house, filth, inoperable plumbing, an infestation of cockroaches, and a leaking ceiling, which was in danger of imminent collapse), Child Protective Services intervened and took Cortez and his siblings from the home, citing neglect. *Id.* Protective Services also identified drug paraphernalia in the house as evidence of drug use. *Id.*

The Protective Services file indicated that since 1981 there had been thirteen referrals made alleging abuse and neglect. *Id.* Cortez and his siblings were placed with their Grandmother remained in her care until 1989, at which time they were returned to their mother—who lived in a drug-infested environment. *Id.* But after six months, due to her drug use and failure to provide nourishment, the children were again removed from the home. *Id.* The children were temporarily placed with their grandmother, until their maternal uncle was convicted of sexually assaulting Cortez's younger sister. *Id.* The two youngest children were placed in foster care in July of 1992. *Id.* Cortez escaped from placement in July of 1992 and the State could not locate him for a time. *Id.* He dropped out of school in 1993, in the 8th grade to support himself and his siblings. *Id.* At

one point, Cortez was homeless. *Id.* His maternal grandmother stated that his mother introduced Cortez to selling drugs from their home. *Id.*

This case began on December 14, 1993 with the robbery of Raymond Derrick Davis, Jr. ("Derrick") and Martin Arnold ("Arnold") on Fenkell St., between Stansbury St. and Lesure St. in Detroit, culminating in Michael Scott (MDOC No. 240464) ("Scott") shooting and killing Derrick. Scott and another individual, "Shay Man" picked Cortez up in a car, and the three were driving on Fenkell in the early hours of the morning, when Scott saw two men walking and said to the others they should "holler" or "holler at those fools". *Id.*, at 1a. The boys got out of the car, and Scott held Derrick at gunpoint while he robbed Derrick of his coat on one side of the street. *Id.* The police statement reflects that Cortez had a pistol that one of the others gave him. *Id.* Cortez was with Arnold on the opposite side of Fenkell from Scott, and told Arnold to "be cool and you [won't] get hurt." *Id.* It is unclear from the record where Shay Man was. After Scott forced Derrick to remove his coat at gunpoint, Derrick attempted to run away from Scott, at which point Scott shot him. *Id.* Cortez then fled without harming Arnold. *Id.*, at 2a. There are no facts in the record that Cortez intended to shoot Derrick, that Cortez had knowledge that Scott intended to shoot Derrick, or that Cortez gave aid or encouragement to Scott with respect to the shooting.

Cortez was 16 years, 9 months, and 7 days old at the time of this offense. *Id.*, at 1a. He was arrested later, and interrogated by the Detroit Police without counsel or his grandmother present. *Id.* He signed a written statement typed by the interrogating police sergeant. *Id.* In spite of not shooting Derrick, Cortez was charged by information on February 22, 1994 with murder, assault, and armed robbery. *Id.*, at 5a. The charging document was stamped with the words

"Automatic Juvenile Waiver," *id.*, and in spite of being a 16-year-old ward of the state[1], Cortez was waived into the adult criminal process. *Id.* At the time of his arrest for these offenses, Cortez's father had been dead for 6 years due to a drug overdose, *id.*, at 666a, his mother was in a drug rehabilitation center for crack cocaine use, *id.*, two of his siblings were in foster care, and the remaining siblings' whereabouts were unknown. *Id.*

Cortez was arraigned and a final conference was held on March 8, 1994. *Id.*, at 7a-14a. On May 4, 1994, the court held a hearing to hold and compel attendance of a "material witness" called Castelow at trial, since he was apparently unwilling to give testimony. *Id.*, at 15a-27a. Moreover, Mr. Castelow was not a witness to the crime, but apparently overheard a conversation about the crime later. *Id.* A jury trial on the charges was held on May 5, 9 and 10, 1994, and the jury convicted Cortez of (1) felony murder, MCL 750.316(1)(b); (2) armed robbery, MCL 750.529; (3) assault with intent to rob while armed, MCL 750.89, and (4) possession of a firearm during the commission of a felony, MCL 750.227b. *Id.*, at 653a-57a. An "aiding and abetting" instruction, which was allegedly marked "do not use" was read to the jury with respect to the murder charge, allowing the jury to transfer intent for robbery to that for murder, which formed the basis of Cortez's conviction. *Id.*, at 635a-637a. The issue of Cortez being waived into the adult process in spite of being a ward of the state does not appear to have been raised in the Court of Appeals.

A hearing on whether to sentence Cortez as a juvenile and for disposition was held on June 10, 1994 and June 15, 1994. *Id.*, at 674a-800a. On June 20, 1994 the court deviated from the mandatory sentence, after finding that the juvenile system would not be sufficient to rehabilitate him but that the mandatory sentence was cruel and unusual. The court said:

[1] The fact that Cortez was a ward of the State is taken from the 1994 Presentence Report.

> But the court has also held that in this instance when this young man was not the person who pulled the trigger, he was an aider and abettor in an armed robbery, he was convicted of first degree murder by the jury, that the only other option of then sentencing him as an adult and imposing a life sentence, mandatory life sentence, is *cruel and unusual* punishment, when everyone agrees that he is capable of rehabilitation. And therefore, I am not in this instant [sic] going to impose mandatory life in prison, as I think it is cruel and unusual punishment. *Id.*, at 804a. (emphasis supplied).

On September 26, 1994, the trial court issued a written order regarding sentencing. That order restated its earlier finding:

> [t]he court having come to the conclusion that sentencing the defendant as a juvenile would be dangerous to society and there would not be enough time to rehabilitate him and sentencing him as an adult would be *cruel and unusual* punishment because he is not the shooter and can be rehabilitated. *Id.*, at 815a. (emphasis supplied).

After the State successfully appealed the initial sentence, the court had a re-sentencing hearing on December 22, 1994, wherein Defendant was sentenced to natural life in prison. At the re-sentencing hearing, the court said:

> I thought about it, because, very frankly, I think he's salvageable. This was a case, I don't know if I said it before at the sentencing, I believe somebody's been throwing this young man away from the day he was born.
>
> He was not the shooter. They printed in the paper that I had given him this second degree murder sentencing. And they talked about that he was a murderer. He didn't pull the trigger.
>
> Now, he was convicted of first degree felony murder, and he was an aider and abettor. But, when I looked at his background, I know that the juvenile justice system is not going to be able to rehabilitate him within the time they've got left. This man is a danger to society. And that's why I placed him in the adult system. But I still feel, and I continue to feel, that he could be rehabilitated. And maybe, when the legislator [sic], because they're beginning to take a look at it, that they may change it. Though it will be years from now, but they may change it.
>
> . . .
>
> Mandatorily, I must sentence you to natural life in prison on the murder one, and the mandatory two years on the felony firearm. And the other sentences will stand on the armed robbery and assault with intent to rob. I have no choice.
>
> . . .
>
> The only thing I can say to you is that it's my belief that they are going to change this. They're going to find out how unjust it is to do this. So, don't give up hope.

You may not be in there for the rest of your life. Good luck to you, sir, and be sure to fill out your appeal papers. *Id.*, at 816a-823a.

On January 5, 1996 a hearing on the defendant's Motion to determine probable cause to arrest him was held. *Id.*, at 856a-58a. On June 24, 1997, the Court of Appeals remanded the issue of probable cause to the trial court for a determination on the admissibility of Cortez's statement to the police.[2] *Id.*, at 859a-68a. On March 12, 1999, the trial court held an evidentiary hearing on instructions from the Court of Appeals. *Id.* at 869a-927a. The trial court found there was probable cause to arrest Cortez so as to support the admissibility of his statement to the police. *Id.*, at 918a. On July 23, 2001, Cortez filed a post-conviction motion for relief from judgment and Petition for a Writ of Habeas Corpus with the US District Court.

While the petition for a writ of habeas corpus was pending, on July 18, 2002, the state trial court granted Cortez a new trial, finding error in the instructions to the jury regarding the theory of aiding and abetting. The trial court indicated that the aiding and abetting instruction should have been given with regard to the armed robbery and not the first degree murder charge. On September 19, 2002, the Court of Appeals remanded the case to the trial court regarding its ruling finding defendant could not satisfy the "cause" and "prejudice" requirements necessary in

[2] *People v Davis*, No. 183428 and 192234 (Mich App June 24, 1997) (unpublished); *lv den* 459 Mich 863; 584 NW2d 923 (1998). In addition to adopting the now abrogated holding in *People v Launsburry*, 217 Mich App 358, 551 NW2d 460 (Mich App 1996), *lv den,* 562 NW2d 203 (Mich 1997), *reconsid den,* 454 Mich 883; 564 NW2d 900 (1997), that the mandatory juvenile life sentence was constitutionally permissible, the June 24, 1997 Court of Appeals decision ruled on a number of other procedural and substantive issues, including: I) whether the Trial Court's findings of fact relating to its decision to sentence defendant as an adult were clearly erroneous. The Court of Appeals held they were not; II) Whether the Trial court erred in sentencing Cortez as an adult. The Court of Appeals held it did not. III) Whether imposition of a mandatory life sentence for juveniles convicted of first-degree murder is cruel or unusual punishment pursuant to *Launsburry, supra*, which it said was not; IV) The Court of Appeals concluded that since the Legislature did not leave sentencing discretion to the court that the mandatory life sentence was not disproportionate to the crime; V) holding that the trial court abused its discretion when it granted Cortez a new trial; VI) holding that there was sufficient evidence to support the jury verdict; VII) Vacating the conviction of armed robbery, because a conviction on both the theory of felony murder and the underlying offense, in this case armed robbery, violated Cortez's right to against double jeopardy. *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996); VIII) Holding that Cortez's right to a fair trial was not tainted by prosecutorial misconduct; IX) finding trial court abuse of discretion in permitting the prosecutor to question the defendant about a statement made by trial counsel during opening argument; X) The issue of whether the confession obtained by police was the result of an unlawful arrest; finally, XI) The Court of Appeals declined to answer whether defense counsel failing to move to suppress the confession constituted ineffective assistance of counsel.

order to obtain post-judgment relief.[3] *Id.*, at 928a. The trial court then held a hearing on the Opinion and Order of the Court of Appeals on October 11, 2002. *Id.*, at 929a-47a. At this hearing, the judge again granted a new trial. During this hearing, the judge specifically found that:

> But I'm going to say – I'm going to waive the good cause because I concluded that there is a significant possibility that the defendant is innocent of the crime of felony murder. And but for the fact that this improper instruction was given, he might not have been convicted. *Id.*, at 944a.

On March 18, 2003, the US District Court issued an Opinion and Judgment denying Cortez habeas relief without prejudice because he had not yet exhausted his state court remedies. *Id.*, at 948a-54a. On Aug 31, 2004, the Michigan Court of Appeals issued an opinion again reversing the trial court's decision to grant defendant a new trial, this time with dissent.[4] *Id.*, at 956a-59a.

On March 12, 2007, the US District Court granted defendant's motion to reopen the habeas proceedings, and after hearing the defendant's habeas claims, issued a final Opinion and Judgment on April 30, 2008, denying habeas relief with prejudice.[5] *Id.*, at 961a-79a. The US District Court subsequently denied Cortez's request for a Certificate of Appealability regarding its denial of habeas relief with prejudice. *Id.*, at 980a-82a. The Sixth Circuit Court of Appeals also denied Cortez an appeal to that court on the habeas claims. *Id.*, at 1004a-1006a.

On May 17, 2010, the US Supreme Court issued its opinion in *Graham v Florida*.[6] On April 15, 2011, by his attorneys, Cortez filed a successive motion for relief from judgment in the Third Circuit Court Criminal Division for Wayne County claiming a retroactive change in the

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[3] *People v Davis*, No. 242997 (Mich App, September 18, 2002) (unpublished)
[4] *People v Davis*, No. 246847 (Mich App, August 31, 2004) (Cooper, J. dissenting), *lv den*, 472 Mich 927, 697 NW2d 525 (2005) (Kelly, J. dissenting).
[5] *Davis v Jackson*, 01-cv-72747-DPH, ECF doc. 27, filed April 30, 2008.
[6] 130 S Ct 2011, 176 L Ed 2d 825 (2010) (Announcing a categorical ban on the sentence of life without the possibility of parole for juvenile non-homicide offenders.)

law based on the holding in *Graham*, *supra*, asserting that felony murder is not a homicide crime. *Id.*, at 1136a-65a. The Hon. Vera Massey Jones issued an order dated April 25, 2011 denying defendant's motion stating that the "Defendant was convicted of Felony Murder, a homicide offense. Thus *Graham v Florida* does not apply." *Id.*, at 1166a-67a. Cortez timely requested leave to appeal to the Michigan Court of Appeals, *id.* at 1168a-95a, and was denied leave to appeal on November 16, 2011. *Id.*, at 1196. On January 7, 2012, Cortez filed an Application for Leave to Appeal the disposition of his motion under *Graham* to this Court.

While that application was pending, on June 25, 2012, the US Supreme Court issued its opinion in *Miller v Alabama* and *Jackson v Hobbs*.[7] That same day, Cortez supplemented his application for leave to appeal with the *Miller/Jackson* ruling.

On September 7, 2012, in lieu of granting leave to appeal, this Court remanded the issue of retroactivity to the Trial Court for its consideration in light of *Miller/Jackson*.[8] *Id.*, at 1281a. The trial court then scheduled a hearing for December 7, 2012. While waiting on that hearing, the Michigan Court of Appeals issued its opinion in *People v Carp*[9] on November 15, 2012.

The trial court held the December 7, 2012 hearing on *Miller*. *Id.*, at 1283a-1307a. With the *Carp* opinion in mind, on December 15, 2012, the Wayne Circuit Court issued a written order granting resentencing under *Miller/Jackson*, believing that the US Supreme Court's ruling controlled, and *Carp* did not. *Id.*, at 1308a-09a. On January 16, 2013, the Michigan Court of Appeals issued the Order that is the subject of this Appeal. *Id.*, at 1332a.

After the Court of Appeals issued its January 16, 2013 order in this case, on January 30, 2013, the United States District Court for the Eastern District of Michigan decided the case of

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[7] 132 S Ct 2455; 183 L Ed 2d 407 (2012) (abolishing mandatory life without the possibility of parole for homicide crimes.)

[8] *People v Davis*, 492 Mich 871, 820 NW2d 167 (2012).

[9] 298 Mich App 472, 828 NW2d 685 (Mich App 2012) (holding, *inter alia*, that *Miller/Jackson* would not be retroactively applicable to cases that had become final on direct review.)

Hill v Snyder[10], a civil suit to determine certain juvenile prisoners' rights under 42 USC § 1983 and the Eighth Amendment to the United States Constitution. *Id.*, at 1333a-38a. The District Court granted the relief requested by the plaintiffs, and said it would hold that *Miller/Jackson* is retroactively applicable to cases that have become final on direct review *Hill, supra.*

This Court granted leave to appeal on November 6, 2013.[11] On November 26, 2013, the US District Court for the Eastern District of Michigan issued an Order requiring compliance with *Miller*, and setting forth the guidelines to be met for compliance by a date certain.[12] That order has been stayed by the 6th Circuit Court of Appeals pending a full appeal. *Id.*, at 1334a-50a.

During Cortez's incarceration he has taken advantage of any program that he could, even looking outside the prison walls for rehabilitative and educational opportunities where none existed in the prison. He has a long list of educational accomplishments, has an active spiritual life, is involved with citizenship activities within the prison, and wishes to involve himself with at-risk youth mentoring. *Id.*, at 1104a-1133a. Most of these accomplishments are not available as a matter of course to "juvenile lifers."

STANDARD OF REVIEW

Both questions set forth by the Court in its Order Granting Leave to Appeal are questions of law. This Court reviews issues of law *de novo*. *People v Maxson*, 482 Mich 385, 759 NW2d 817, 819 (2008).

[10] 2013 WL 364193 (ED Mich Jan 30, 2013), Case No. 10-14568 (granting partial summary judgment to plaintiffs).
[11] *People v Davis*, SC No. 146819, (Mich Nov. 6, 2013).
[12] *Hill v Snyder*, (ED Mich Nov 26, 2013), Case No. 10-14568 (requiring Michigan to prepare a plan to comply with *Miller* by a date certain.)

SUMMARY OF THE ARGUMENTS

There is a de facto categorical ban on life without parole for aiding and abetting a felony murder under federal law. The prohibition against "cruel and unusual punishments" found in the Eighth Amendment to the United States Constitution bars the imposition of a life without parole sentence on a defendant under the age of 18 convicted of first-degree murder for having aided and abetted the commission of felony murder.

Categorical Ban Under Federal Law

The evolution of Federal Law has created a categorical ban on non-parolable life sentences for accessory, diminished culpability juveniles involved in serious crimes. Life without parole can never constitutionally be imposed upon a juvenile offender who is not "irretrievably corrupt" under *Miller/Jackson*, and an aider and abettor to a felony murder is never irretrievably corrupt having stopped short of the ultimate act, and being even further removed from the crime as a non-principal.

Categorical Ban Under Michigan Law

There is also a categorical ban on life without parole for aiding and abetting a felony murder under Michigan law. Since existing Michigan law mandatorily imposing life without parole upon juveniles is abrogated, considering the diminished culpability of juveniles, their prospects for reform, and their distance from a killing when convicted under the legal fiction of felony murder, there is a categorical ban on the sentence for aiding and abetting a felony murder.

Michigan's statutory sentencing scheme mandating juvenile life without parole and interpretive case law, *People v Launsburry*, 217 Mich App 358, 551 NW2d 460 (Mich App 1996), *lv den* 562 NW2d 203 (Mich 1997), *reconsid den* 454 Mich 883, 564 NW2d 900 (1997),

were abrogated by *Miller/Jackson*. Therefore Michigan's existing law concerning proportionality, *People v Bullock*, 440 Mich 15, 485 NW2d 866 (1992), applies.

Permanent incarceration for crimes committed by juveniles with diminished culpability violates Michigan's prohibition against "cruel or unusual punishment" found in Const. 1963, Art. 1, § 16, creating a categorical ban on the punishment because the most gruesome murder committed by an adult principal actor and the most diminished culpability felony murder committed by a juvenile will be treated exactly the same at sentencing. Such a scheme necessarily violates existing principles of proportionality set forth in Michigan law for four reasons.

(1) Evaluating the gravity of the offense versus the harshness of the penalty militates in favor of finding JLWOP to be a necessarily disproportionate sentence for aiding and abetting a felony murder, because stopping short of the ultimate act of killing is disproportionate to the sentence of death in prison.

(2) Comparing the sentences imposed on other criminals in the same jurisdiction militates in favor of finding JLWOP to be a necessarily disproportionate sentence for aiding and abetting a felony murder because a culpable adult murderer can receive a lesser sentence under Michigan's second degree murder statute than a juvenile with diminished culpability who aided and abetted a felony murder.

(3) Comparing the sentences imposed for commission of the same crimes in other jurisdictions militates in favor of finding JLWOP to be a necessarily disproportionate sentence for aiding and abetting a felony murder, because there is no national consensus on the sentence, with it being common in states like Michigan, uncommon in states like Texas, and completely abolished in other states.

(4) Since the goal of rehabilitation is unavailable for juveniles serving life without parole, and if rehabilitation of less culpable juveniles is a sincere goal, this prong militates in favor of finding the sentence to be necessarily disproportionate for aiding and abetting a felony murder, especially for those juveniles capable of rehabilitation.

Retroactivity Under Federal Law

Categorical bans are retroactive under the federal law because they necessarily implicate a category of punishment (life without parole) that may not be inflicted upon a class of individuals (juvenile aiders and abettors).

Miller/Jackson must be applied retroactively under both federal and state law. The new rule announced by *Miller/Jackson* satisfies the first exception to the general rule of non-retroactivity set forth in *Teague v Lane* because *Miller/Jackson* puts the sentence of life without the possibility of parole for aiding an abetting a crime beyond the power of law making authorities to proscribe.

Moreover, the categorical approach of *Miller/Jackson* makes it substantive and retroactive. *Miller/Jackson* is a new, substantive rule for four reasons. (1) At its core, it makes facts that were not previously required to be considered now necessary prerequisites to punishment. (2) It dictates what must be considered to impose juvenile LWOP rather than how such sentences are found. (3) It prohibits a category of punishment (LWOP) for a class of individuals (juveniles) because of their status. (4) The joint decision in *Miller/Jackson* logically dictates retroactivity.

Retroactivity Under State Law

Under state law, the new rule announced by *Miller/Jackson* satisfies both the general rule Michigan, which is that judicial decisions are fully retroactive, and weighing the three part test

recently used in *People v Maxson* also leads to the conclusion that *Miller/Jackson* is retroactively applicable.

(1) The purpose of the new rule announced in *Miller/Jackson* is to ensure that juveniles are not being treated disproportionately at sentencing, which is a rule that should be applied to all persons similarly situated.

(2) There was no reliance in this case by the trial court on the practice of unconstitutionally imprisoning juveniles for life on a mandatory basis because it originally declared the sentence unconstitutional. Moreover, general reliance on the rule of *People v Launsburry* was misplaced since that rule is now abrogated, and in any event, Launsburry was not the rule when the original sentence was imposed in this case.

(3) Resentencing juveniles serving LWOP will impose a significantly lesser administrative burden on the judiciary than if the *Maxson* court had retroactively applied *Halbert v Michigan*. On average, retroactively applying *Miller/Jackson* will place approximately 2 cases on each sentencing judge's docket, which is not the kind of administrative burden that the "administrative burden" exception to the general rule of retroactivity is designed to insulate against.

Finally, in Michigan, unconstitutional statutes are void *ab initio*, that is from their inception, not from the date they are found unconstitutional. MCL 750.316(1)(b) and MCL 791.234(6)(a), as automatically applied to juveniles are, therefore, void. Cortez has, therefore, been serving an unconstitutional sentence since 1994. The only available remedial measure is to retroactively apply *Miller/Jackson* for "juvenile lifers."

ARGUMENTS

I. THE PROHIBITION AGAINST "CRUEL AND UNUSUAL PUNISHMENTS" FOUND IN THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND THE PROHIBITION AGAINST "CRUEL OR UNUSUAL PUNISHMENT" FOUND IN CONST. 1963, ART. 1, § 16, EACH CATEGORICALLY BAR THE IMPOSITION OF A LIFE WITHOUT PAROLE SENTENCE ON A DEFENDANT UNDER THE AGE OF 18 CONVICTED OF FIRST-DEGREE MURDER FOR HAVING AIDED AND ABETTED THE COMMISSION OF A FELONY MURDER.

A. Life without parole can never constitutionally be imposed upon a juvenile offender who is not "irretrievably corrupt" under federal law; an aider and abettor is never irretrievably corrupt having stopped short of the ultimate act; and Cortez's case is not the "uncommon" case where such a sentence is constitutionally permissible.

Miller v Alabama and *Jackson v Hobbs*, 132 S Ct 2455 (2012), *Graham v Florida*, 130 S Ct 2011 (2010), and *Roper v Simmons*, 543 US 551 (2005) together create a categorical ban on the sentence of life without the possibility of parole for diminished culpability juveniles, who did not "pull the trigger." The *Miller/Jackson* Court made clear that mandatory LWOP violated the Eighth Amendment and as a category, juvenile offenders must be treated differently than adults in process and substance. *Miller/Jackson, supra*, at 2469-71. Such a requirement renders the slow death of mandatory life prison unconstitutional for juveniles who did not kill or intend to kill, because they are not irretrievably corrupt. Considering that Cortez is serving the same sentence as Christopher Simmons, the sentence of life without the possibility of parole for a conviction of felony murder under an aiding and abetting theory is necessarily disproportionate to other sentences imposed upon more culpable juvenile offenders—and to the crime. In sum, Cortez's case is not the "uncommon" one in which imposition of the harshest sentence available in Michigan is constitutional under US Const. Amend. VIII.

Justice Breyer and Justice Sotomayors' concurrence in *Miller/Jackson* took special note of the facts in Kuntrell Jackson's case, which, of all the cases recently decided by the Supreme

Court, most closely resembles the facts in this case. They concluded that life without parole is forbidden for aiders and abettors who did not intend to kill. They further said that even if Jackson intended to kill, there is an open question about whether the Eighth Amendment permits a sentence of life without parole. The development of the *Miller/Jackson* rule began years ago, but even in the short time since *Roper v Simmons* was decided, much has been learned about the juvenile mind. When this Court considers the facts of *Roper, Graham*, *Miller/Jackson*, and this case, especially in light of the fact that each of these crimes resulted in the same punishment, it becomes clear that LWOP is necessarily disproportionate for aiding and abetting crimes.

Roper v Simmons

Seventeen-year-old Christopher Simmons proposed to fifteen-year-old Charles Benjamin and sixteen-year-old John Tessmer that they commit burglary and murder by breaking and entering, tying up a victim, and throwing the victim off a bridge. *Roper*, 125 S Ct at 1187. Simmons assured his friends they could "get away with it" because they were minors. *Id.* While he was still a junior in high school, Simmons acted on this conspiracy. *Id.*

The three met at about 2 a.m. on the night of the murder, but Tessmer left before the other two set out. (The State later charged Tessmer with conspiracy, but dropped the charge in exchange for his testimony against Simmons.) *Id.* Simmons and Benjamin entered the home of the victim, Shirley Crook, after reaching through an open window and unlocking the back door. *Id.*, at 1187-88. Simmons turned on a hallway light. *Id.* Awakened, Mrs. Crook called out, "Who's there?" In response Simmons entered Mrs. Crook's bedroom, where he recognized her from a previous car accident involving them both. *Id.* Simmons later admitted this confirmed his resolve to murder her. *Id.* Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. *Id.* They reinforced the

bindings, covered her head with a towel, and walked her to a railroad trestle spanning the Meramec River. *Id.* There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below. Employing a lengthy discussion on the culpability of juvenile offenders, the Supreme Court categorically barred the imposition of a death penalty on a minor under the age of 18, reversing *Stanford v Kentucky*, 492 US 361, 109 S Ct 2969, 106 L Ed 2d 306 (1989).

Graham v Florida

In July 2003, sixteen-year-old Terrance Jamar Graham and three other school-age youths attempted to rob a barbeque restaurant in Jacksonville, Florida. *Graham*, 130 S Ct at 2018. One youth, who worked at the restaurant, left the back door unlocked just before closing time. *Id.* Graham and another youth, wearing masks, entered through the unlocked door. *Id.* Graham's masked accomplice twice struck the restaurant manager in the back of the head with a metal bar. *Id.* When the manager started yelling at the assailant and Graham, the two youths ran out and escaped in a car driven by the third accomplice. *Id.* The restaurant manager required stitches for his head injury and no money was taken. *Id.* For this incident, Graham was apprehended and charged with two felonies as an adult: armed burglary with assault or battery and attempted armed-robbery to which he pled guilty. *Id.* The trial court accepted the plea agreement. The court withheld adjudication of guilt as to both charges and sentenced Graham to concurrent 3-year terms of probation. Graham was required to spend the first 12 months of his probation in the county jail, but he received credit for the time he had served awaiting trial, and was released on June 25, 2004.

Less than 6 months later, on the night of December 2, 2004, Graham again was arrested on the state's theory that earlier that evening, Graham participated in a home invasion robbery.

Id. His two accomplices were Meigo Bailey and Kirkland Lawrence, both 20-year-old men. *Id.* According to the State, at 7 p.m. that night, Graham, Bailey, and Lawrence knocked on the door of the home where Carlos Rodriguez lived. *Id.* Graham, followed by Bailey and Lawrence, forcibly entered the home and held a pistol to Rodriguez's chest. *Id.* For the next 30 minutes, the three held Rodriguez and another man, a friend of Rodriguez, at gunpoint while they ransacked the home searching for money. *Id.* Before leaving, Graham and his accomplices barricaded Rodriguez and his friend inside a closet. *Id.*, at 2018-19. Further, Graham, Bailey, and Lawrence, later the same evening, attempted a second robbery, during which Bailey was shot. *Id.* Graham, who had borrowed his father's car, drove Bailey and Lawrence to the hospital and left them there. *Id.* As Graham drove away, a police sergeant signaled him to stop. *Id.* Graham continued at a high speed but crashed into a telephone pole. *Id.* He tried to flee on foot but was apprehended. Three hand-guns were found in his car. *Id.* The night that Graham allegedly committed the robbery, he was 34 days short of his 18th birthday. *Id.* In the violation of probation sentencing hearing, the trial court found Graham guilty of the earlier armed burglary and attempted armed robbery charges, and sentenced him to life without parole. *Id.*, at 2020.

Miller v Alabama

In 2003, fourteen-year-old Evan Miller was at home with a friend, Colby Smith, when a neighbor, Cole Cannon, came to make a drug deal with Miller's mother. *Miller*, 132 S Ct at 2462. The two boys followed Cannon back to his trailer, where all three smoked marijuana and played drinking games. *Id.* When Cannon passed out, Miller stole his wallet, splitting about $300 with Smith. Miller then tried to put the wallet back in Cannon's pocket, but Cannon awoke and grabbed Miller by the throat. *Id.* Smith hit Cannon with a nearby baseball bat, and once released, Miller grabbed the bat and repeatedly struck Cannon with it. Miller placed a sheet over Cannon's

head, told him "I am God, I've come to take your life," and delivered one more blow. *Id.* The boys then retreated to Miller's trailer, but soon decided to return to Cannon's trailer to cover up evidence of their crime. *Id.* Once there, they lit two fires. Cannon eventually died from his injuries and smoke inhalation. *Id.* The state charged Miller as an adult with murder in the course of arson. That crime (like capital murder in Arkansas) carries a mandatory minimum punishment of life without parole. *Id.*, at 2463.

Prior to the crime, Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten. *Id.*, at 2469.

Jackson v Hobbs

In November 1999, fourteen-year-old Kuntrell Jackson, and two other boys decided to rob a video store. *Jackson*, 132 S Ct at 2461. En route to the store, Jackson learned that one of the boys, Derrick Shields, was carrying a sawed-off shotgun in his coat sleeve. *Id.* Jackson decided to stay outside when the two other boys entered the store. *Id.* Inside, Shields pointed the gun at the store clerk, Laurie Troup, and demanded that she "give up the money." *Id.* Troup refused. A few moments later, Jackson went into the store to find Shields continuing to demand money. *Id.* At trial, the parties disputed whether Jackson warned Troup that "[w]e ain't playin'," or instead told his friends, "I thought you all was playin'." *Id.* When Troup threatened to call the police, Shields shot and killed her. *Id.* The three boys fled empty-handed. *Id.* The state charged Jackson with capital felony murder and aggravated robbery. *Id.*

Following the Supreme Court's decision in *Roper*, Jackson filed a state petition for habeas corpus. *Id.* He argued, based on Roper's reasoning, that a mandatory sentence of life without parole for a 14-year-old also violates the Eighth Amendment. The circuit court rejected

that argument and granted the State's motion to dismiss. *Id.* While that ruling was on appeal, the Supreme Court held in *Graham* that life without parole violates the Eighth Amendment when imposed on juvenile nonhomicide offenders. After the parties filed briefs addressing that decision, the Arkansas Supreme Court affirmed the dismissal of Jackson's petition. *Id.* The majority found that Roper and Graham were "narrowly tailored" to their contexts: "death-penalty cases involving a juvenile and life-imprisonment-without-parole cases for nonhomicide offenses involving a juvenile." Two justices dissented. They noted that Jackson was not the shooter and that "any evidence of intent to kill was severely lacking." *Id.*, at 2462. And they argued that Jackson's mandatory sentence ran afoul of Graham's admonition that "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Id.* (Internal quotations omitted).

Reasoning

The continuum of facts in *Roper*, *Graham*, and *Miller/Jackson* demonstrate the wide range of *mens rea* juveniles have when committing horrible crimes, which stands in contrast to the fact that each of these juveniles is serving the same sentence, and highlights the reasons for categorical bans for juveniles as opposed to a case-by-case approach. These cases show the inconsistent, erratic, and often unpredictable behaviors of juveniles, and that states are not employing a robust proportionality analysis. The Court chose these cases, presumably, to demonstrate through factual situations how juveniles act when confronted with choices which may result in someone's death or serious injury and also to throw these vastly different sets of facts into relief against the sentence of mandatory life, ultimately requiring a robust proportionality analysis for the entire class of juvenile offenders when the state seeks to impose the most serious punishments upon them. These cases are based on developing brain science,

which explains the development of the juvenile mind and why juveniles make irrational, and impulsive decisions. *Roper, Graham,* and *Miller/Jackson* thoroughly discuss these discoveries. *Miller*, at 2490 n. 5.

A categorical ban acknowledges the distinct attributes of juvenile offenders, as opposed to a case-by-case approach, which fails juveniles as a class for many reasons. "The dilemma of juvenile sentencing demonstrates this." *Graham, at* 2032.

First, a categorical ban for juvenile offenders guards against the whim of a judge imposing the harshest possible sentence. "[E]xisting state laws, allowing the imposition of these sentences based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved, are insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability." *Id.*

Second, "[e]ven if we were to assume that some juvenile nonhomicide offenders might have sufficient psychological maturity, and at the same time demonstrate sufficient depravity to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change. *Id.* (internal quotation marks, brackets and citations omitted). "Here, as with the death penalty, the differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive a sentence of life without parole for a nonhomicide crime despite insufficient culpability." *Id.*

Third, a categorical approach guards against a problem with a case-by-case approach which is "that it does not take account of special difficulties encountered by counsel in juvenile representation." *Id.* "[T]he features that distinguish juveniles from adults also put them at a

significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understanding[] of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense." *Id.*

Finally, and most importantly, "a categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform." *Id.* "The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id.* "Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Id.* "Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation." *Id.* By contrast, "[a] young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual." *Id.* In some prisons, like in Michigan, the system itself becomes complicit in the lack of development. *Id.*, at 2032-33. Some prisons withhold counseling, education, and rehabilitation pro-grams for those who are ineligible for parole consideration. *Id.*, at 2033. A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term." *Id.*

Moreover, as a result of the necessarily diminished culpability of juveniles, the penological justifications for the harshest available sentences—including death by imprisonment—are not as strong for juveniles and become less so as the offender becomes less culpable in the crime to a point where it is impermissible to impose such a sentence. From Simmons' deliberate premeditation and conspiracy to commit a gruesome murder, to fourteen-year-old Kuntrell Jackson unwittingly being tied up in a homicide that he did not intend to result from a robbery, the Supreme Court has never downplayed the seriousness of the crime, but has

developed the Eighth Amendment jurisprudence with the seriousness of the crime in mind. In each of these cases, it

> [e]mphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. *Miller/Jackson* at 2465, *citing Graham*, 130 S Ct, at 2028 (quoting *Tison v Arizona*, 481 US 137, 149, 107 S Ct 1676, 95 L Ed 2d 127 (1987); *Roper*, 543 US, at 571, 125 S Ct 1183) (internal quotations omitted).

Nor, in the Court's opinion, "[c]an deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." *Id.* (internal quotations omitted).

Instead of retribution and deterrence, the *Miller/Jackson* opinion emphasizes the penological ideal of rehabilitation for youth who acted with diminished culpability. "[T]his mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." *Miller*, at 2468. The *Miller* Court stated "[g]iven all we have said in *Roper, Graham,* and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* The state must, therefore, pick up where the youth's upbringing left off—to form the youth into a person who is able to function lawfully in society.

The Supreme Court recognized this. The *Graham* and *Miller/Jackson* decisions caution the states that the Constitution does not favor the remedy of death in prison as a solution to undeveloped and underdeveloped youth minds making terrible decisions. "[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, at 2469. Michigan currently does not rehabilitate "juvenile

lifers" believing that rehabilitative and reentry programming is not necessary if there is no likelihood of release. Since rehabilitation is a stated requirement for diminished culpability juveniles, and the opportunity for release must be meaningful, it follows that a life without parole sentence is impermissible for these offenders.

Further support for a categorical ban on life without parole for juvenile offenders under an aiding and abetting theory is found in Justice Breyer and Justice Sotomayors' concurrence in *Miller/Jackson*. In the concurrence, Justice Breyer took special note of the facts in Kuntrell Jackson's case, which, of all the cases recently decided by the Supreme Court, most closely resembles this one. He said that:

> [i]f the State continues to seek a sentence of life without the possibility of parole for Kuntrell Jackson, there will have to be a determination whether Jackson killed or intended to kill the robbery victim. *Graham v Florida*, 560 US__, __, 130 S Ct 2011, 2027, 176 L Ed 2d 825 (2010). In my view, without such a finding, the Eighth Amendment as interpreted in Graham forbids sentencing Jackson to such a sentence, regardless of whether its application is mandatory or discretionary under state law. *Miller* at 2475. (Breyer, J. concurring) (internal brackets and quotations omitted).

He concluded that life without parole is forbidden for aiders and abettors who did not intend to kill. He stated that "[t]he upshot is that Jackson, who did not kill the clerk, might not have intended to do so either. In that case, the Eighth Amendment *simply forbids* imposition of a life term without the possibility of parole." *Miller/Jackson*, at 2477 (Breyer, J. concurring) (emphasis added). He further said that even if Jackson intended to kill the clerk, there is an open question about whether the Eighth Amendment permits a sentence of life without parole. "If, on remand, however, there is a finding that Jackson did intend to cause the clerk's death, the question remains open whether the Eighth Amendment prohibits the imposition of life without parole upon a juvenile in those circumstances as well. *Id.*

The concurrence held, and added to the majority opinion, that there is a categorical ban on the sentence of life without the possibility of parole for juvenile aiders and abettors who did not kill or intend to kill.

People v Davis

An aider an abettor to felony murder—the person who did not kill and for whom circumstantial proof of intent to kill is lacking but who was nonetheless present—is an "offender whose crime reflects unfortunate yet transient immaturity," *Roper*, 543 US, at 573, as opposed to "the rare juvenile offender whose crime reflects irreparable corruption." *Id.* "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Graham*, at 2026, *citing Roper,* at 573. This is a principled reason for establishing a categorical ban. When the juvenile is not irretrievably corrupt, the state has a duty to rehabilitate the youth, not merely to ensure that he dies in prison, which is the purpose of mandatory life without parole sentencing schemes. *See generally, Miller/Jackson.*

In Cortez's case, the evidence reflects that he took Arnold to the opposite side of the street and told him "be cool and you [won't] get hurt." Noting this fact, the trial court believed Cortez should have been acquitted of felony murder, but for the erroneous jury instruction regarding aiding and abetting. The decision to rob Derrick and Arnold reflected Cortez's "transient immaturity" at the time and also the "horrific crime-producing settings" in which he was raised. He was certainly "more vulnerable to negative influences and outside pressures," including "from [his] family and peers." *Miller*, at 2458.

Contrast the impulsiveness of the crime and Cortez's poor decisions with what he has accomplished while incarcerated. This Court should look to Cortez's case as an example of the

rehabilitative potential of juveniles faced even with a complete denial of hope. In prison, he has taken advantage of all the available programming, albeit severely limited, and has looked outside the prison walls for rehabilitative, learning, outreach and citizenship opportunities that are otherwise not available to him because of his status as a "juvenile lifer." Appellant's Appx. 1104a-1133a. This vindicates the sentencing judge's original determination that Cortez would take about ten years to rehabilitate.

If Cortez was sentenced for the armed robbery for which he was convicted and not the felony murder charge, the judge would have had the discretion to sentence him from two to any term of years. MCL 750.529. Her first sentence in this case was ten to forty years, having determined that the juvenile system period of incarceration and rehabilitation would not be sufficient, but a mandatory life sentence would be "cruel and unusual." Appellant's Appx. 810a. The trial judge was prophetic in her understanding of the Eighth Amendment by ruling that the mandatory sentence was cruel and unusual, but the law would not find this result for another eighteen years.

The evolution of the rules concerning mandatory life without parole sentencing for youth offenders leads to the conclusion that there is a *de facto* categorical ban on life without the possibility of parole in "aiding and abetting felony murder" cases because such a penalty is necessarily disproportionate to the crime under federal law. Furthermore, the concurrence in *Miller/Jackson* indicated that without a showing of intent, life without parole in Jackson's case is prohibited. Aiders and abettors are not "irretrievably corrupt" having stopped short of committing the ultimate act leading to a death, and by definition a conviction under the fiction of felony murder means the defendant is even further removed from the crime. By not "pulling the trigger" and refraining from the killing, a juvenile cannot be said to be irretrievable, but is

capable of rehabilitation instead and is never the "uncommon" case in which the harshest possible sentence is constitutionally permissible.

B. Existing Michigan law mandatorily imposing life without parole upon juveniles is abrogated and there is a categorical ban on the sentence for aiding and abetting a felony murder.

1. There is a categorical ban on LWOP for all diminished culpability juvenile offenders, and more so for aiders and abettors convicted of felony murder because not only is their culpability diminished, but they are further removed from the crime as a non-principal.

Under *People v Kelly*, 423 Mich 261, 378 NW2d 365 (1985) and *People v. Robinson*, 715 NW2d 44, 475 Mich 1 (2006), a defendant is liable for the offense the defendant intended to commit or intended to aid and abet. The state does not need to prove an "intent to kill" for even the principal of the offense in aiding and abetting case. *Robinson*, at 48. Under either test set forth in *Robinson* for aiding and abetting, it is sufficient that a defendant could foresee consequences; he is liable for the crime he intends to aid or abet as well as the natural and probable consequences of that crime. *Id.*, at 3. *Kelly* addressed aiding and abetting felony murder. *Kelly* stands for the proposition that, at a minimum, the aider and abettor is liable for the crime he or she had the intent to commit. *Kelly*, at 278; *Robinson*, at 52. *People v Aaron*, 409 Mich 672, 299 NW2d 304 (1980) makes clear that one who aids and abets a felony murder must have the requisite malice to be convicted of felony murder, but need not have the same malice as the principal.

Robinson reiterated the three elements necessary to obtain a conviction under an aiding and abetting theory. (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement."

Only the first element was met in Cortez's case. The murder was committed by Michael Scott, and it was charged to Cortez. However, there are virtually no facts in the record that demonstrate Cortez gave encouragement to Scott to shoot Derrick, nor are there any facts that show that Cortez had knowledge of an imminent shooting. The "natural and probable consequences of the offense" paradigm set forth in *Robinson* waivers and ultimately fails when applied to juvenile offenders who are accused of aiding and abetting a felony murder because they are less able to understand the natural and probable consequences of their actions. "The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Graham*, at 2027. (citations omitted).

Miller and *Graham* guard against criminal liability for aiding and abetting a felony murder being used against the juvenile defendant with diminished culpability at sentencing. While *Robinson, Kelly* and *Aaron* discuss the *mens rea* necessary to *convict* an adult of aiding and abetting a felony murder, they fail to fully address how a juvenile should be *punished* for such an offense. Convictions using intent-transferring schemes and legal fictions like the felony murder doctrine, and the aiding and abetting "theory of prosecution"[13] lead to necessarily disproportionate sentences for adults, and even more so for juveniles because of their underdeveloped capacity to appreciate the direct consequences of their crimes, let alone the *probable* consequences of their crimes. In fact, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham* at 2026. No juvenile making a poor, impulsive decision in the heat of a moment is calculating the

[13] This Court in Robinson noted that aiding and abetting is not itself a not a separate substantive offense, but that "[b]eing an aider and abettor is simply a theory of prosecution. . . " *Robinson*, 475 Mich at 6, *citing People v Perry*, 460 Mich 55, 63 n. 20, 594 NW2d 477 (1999).

probable consequences of his misguided act because he is likely *unable* to do so, or at most his capacity to do so is not completely formed. Understanding this, courts establish categorical bans on certain punishments for juveniles as a prophylactic against the necessarily disproportionate sentences states seek to impose upon them, such as life without the possibility of parole, because they realize that punishing a juvenile for the fiction of foreseeable consequences is no longer reasonable.

Cortez is an example of the problem with ever imposing life without parole on juveniles who aid and abet felony murder. Aiding and abetting a felony murder is, by definition, a multiple-offender situation. Aiders and abettors convicted of felony murder are usually not the principal or the "shooter." This makes what the Supreme Court said *Graham* and *Miller* more applicable in this case. "As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." *Graham*, at 2026, *citing Roper*, at 569-570 (internal quotations omitted). What we know and what is being learned about children indicates they are likely to feel pressured by peers into multiple offender situations, and they tend to follow others including the people by whom they are surrounded, especially older adults.

The harshest sentence available in Michigan can not be imposed upon this class of juveniles. The category of youth offenders has twice diminished culpability, or even more since the fiction of felony murder makes them even further removed from the crime. Imposition of life without parole is, categorically, disproportionate to this offense.

2. Permanent incarceration for aiding and abetting felony murder committed by juveniles is necessarily disproportionate to the offense under Michigan law, creating a *de facto* categorical ban on the punishment.

In Michigan, the law requires that proportionate sentences be imposed and proportionality is a component of "cruel or unusual" punishment. *People v Bullock*, 440 Mich 15, 485 NW2d 866 (1992), *contra People v Correa*, 791 NW2d 285, 488 Mich 989 (2010) (Markman, J. concurring). The second of two questions answered by Bullock, was whether Michigan's mandatory penalty of life in prison without possibility of parole, for possession of 650 grams or more of any mixture containing cocaine, is "cruel or unusual" under our state Constitution. *Id.*, at 21. Contrary to the restricted proportionality test advanced by the US Supreme Court in *Harmelin v Michigan*, 501 US 957 (1991), this Court relied on existing Michigan law and answered that question in the affirmative.

On February 24, 1988, defendants Hasson and Bullock were arrested at the Lansing Airport on suspicion of possessing cocaine. *Id.* After being charged, the trial court resolved Hasson's and Bullock's evidentiary objections against them, admitting the cocaine into evidence. *Id.* Both were convicted, in separate jury trials, of knowingly possessing 650 grams or more of cocaine in violation of M.C.L. Sec. 333.7403(2)(a)(i). *Id.* As mandated by that statute, in conjunction with M.C.L. Sec. 791.234(4), both defendants were sentenced to life in prison without any possibility of parole. *Id.*

Deciding whether to follow the newer *Harmelin* "restricted proportionality test" or the proportionality test set forth in *People v Lorentzen*, 387 Mich 167, 194 NW2d 827 (1972) and *Solem v Helm*, 463 US 277 (1983), the *Bullock* Court noted the disjunctive nature of Const. 1963, art. 1, § 16. *Id.*, at 30-31. It looked to *Lorentzen* for the proposition that "[t]he prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition." *Lorentzen*, at 172. Second, the Court rejected the notion that the Michigan Constitution does not include a prohibition on grossly

disproportionate sentences. *Bullock*, at 33, *citing Weems v United States*, 217 US 349, 366-367, 371 (1910); *Harmelin*, 111 S Ct at 2710 (White, J., dissenting); *People v Mire*, 173 Mich 357, 361-362, 138 N.W. 1066 (1912)(internal citations omitted). Third, and finally, the Bullock Court noted that Const. 1963, art. 1, § 16, has long followed an approach more consistent with the reasoning of the *Harmelin* dissenters than with that of the *Harmelin* majority. *Id.*, *citing* 387 Mich at 181.

Critically important, especially in light of the concurrence in *People v Correa, supra,* is this Court's admonition of the difficulty of the proportionality test; that it is not a substitution for legislative authority and that it may be politically unpopular. It is this Court's duty, according to *Bullock*, to protect the principles of our Constitution, especially when a legislature acts in disregard of its commands in a moment of political opportunity. *Id.*, at 40-41.

Therefore, when testing the constitutionality of a sentence under the Michigan Constitution, this Court will "[f]irst, look to the gravity of the offense and the harshness of the penalty"; "[s]econd, to compare the sentences imposed on other criminals in the same jurisdiction"; "[t]hird, to compare the sentences imposed for commission of the same crime in other jurisdictions", and "Finally, *Lorentzen* applied a fourth criterion rooted in Michigan's legal traditions, and reflected in the provision for "indeterminate sentences" of Const. 1963, art. 4, Sec. 45: the goal of rehabilitation." *Id.*, at 33-34.

a. The gravity of the offense versus the harshness of the penalty militates in favor of finding JLWOP to be a necessarily disproportionate sentence for aiding and abetting a felony murder.

Any crime involving the death of a human being is admittedly serious. However, for a juvenile who did not kill or intend to kill, the state should not impose the harshest penalty

available for the most culpable adult murderer.[14] Moreover, no longer may the harshness of the penalty be explained away by simply regurgitating the will of the legislature, because this court has said and the US Supreme Court has said that a proportionality analysis is necessary to determine whether a sentence passes constitutional muster.[15] Nor is it sufficient to simply say that because the crime is harsh, so must the sentence be and end the inquiry there. The state cannot cure a constitutionally defective sentence by simply imposing that unconstitutional sentence equally upon everyone. A categorical ban is necessary to protect the constitutional guaranty of freedom from excessive penalties imposed mandatorily by a legislature for the entire class of juvenile offenders.

b. Comparing the sentences imposed on other criminals in the same jurisdiction militates in favor of finding JLWOP to be a necessarily disproportionate sentence for aiding and abetting a felony murder.

Juvenile life without parole sentences are disproportionately large when compared to the sentences of fully culpable adult offenders in Michigan for the similar and more severe crimes. Aiders and abettors, having stopped short of the ultimate act of killing, and in some cases being altogether oblivious to the imminent death of a victim, are punished as harshly as the most violent adult principal murderer. This court need look no further than any number of adults convicted of, or having pled guilty to, first degree murder. Cortez by contrast was 16, and fought the allegation that he committed the murder at every juncture. Yet, the two are serving the same sentence.

[14] Life without parole is the harshest available sentence because in 1846 Michigan became the first state in the United States of America to ban the death penalty. That ban continues to this day. Const. 1963 Art. IV, § 46.
[15] *Contra People v Hall*, 396 Mich 650; 242 NW2d 377 (1976) (holding the sentence of mandatory life without parole for adults who commit first degree felony murder is not cruel or unusual.)

Moreover, in Michigan, a juvenile or adult convicted of second degree culpable murder can be sentenced to a term of years that is potentially much less than an aider and abettor who did not "pull the trigger."

> All other kinds of murder shall be murder of the second degree, and shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same.

MCL 750.317.

This necessarily tilts the proportionality analysis in favor of the juvenile who aids and abets a felony murder, because if the law demands that a culpable murderer can receive a term of years less than life, then a diminished culpability juvenile accessory *cannot* be given a greater sentence than such a culpable adult.

c. Comparing the sentences imposed for commission of the same crimes in other jurisdictions militates in favor of finding JLWOP to be a necessarily disproportionate sentence for aiding and abetting a felony murder.

The most populous states impose JLWOP in radically different ways, and in many cases, not at all. California, Florida, Louisiana, Michigan, and Pennsylvania have the largest numbers of youth sentenced to JLWOP, and they all impose the sentence on a presumptive or mandatory basis for some categories of offense. Appellant's Appx. 1019a. According to the US Census bureau, Pennsylvania was the sixth most populous state in 2010, *id.* at 1389a, and it housed the greatest number of JLWOP inmates in 2008 at 444. *Id.*, at 1009a. Louisiana was the twenty-fifth most populous state in 2010, according to the Census, *id.* at 1369a, but had the second highest number of JLWOP prisoners at 334. *Id.*, at 1009a. Michigan's population was 9,883,640 in 2010, making Michigan the ninth most populous state in the United States. *Id.*, at 1373a. In 2008 Michigan had 316 prisoners serving JLWOP. *Id.*, at 1009a. Today, that number has swelled to 363, or more, juveniles in Michigan serving mandatory life without parole sentences, ranking it

third among states that impose JLWOP sentences. *Id.*, at 1404a. In 2008, Florida had 266 inmates serving JLWOP, ranking fourth in the nation, and was also the fourth most populous state in the United States. *Id.*, at 1009a, 1360a. California had 227 inmates serving JLWOP, and was the most populous state in the United States. *Id.*, at 1009a, 1355a.

By contrast, other populous states had vastly different proportions of prisoners serving JLWOP compared to the population of their state. For example, the second most populous state in the United States, Texas, had only one inmate serving JLWOP in 2008, *id.*, at 1395a, 1009a, and New York, New Jersey and Ohio, the third, eleventh and seventh most populous states, respectively, had no inmates serving JLWOP. Id., at 1009a, 1385a, 1383a, 1386a. It is not that these states do not experience juveniles committing terrible crimes, but they impose different sentences for such crimes or do not impose JLWOP at all. This prong of the proportionality analysis, therefore, militates in favor of a categorical ban on JLWOP for aiding and abetting felony murder crimes, and should convince the court that there is no consensus on how the states view this punishment, but that Michigan is objectively one of the harshest states in the nation with respect to mandatory juvenile life sentences.

d. The goal of rehabilitation is unavailable for those serving JLWOP, and therefore if rehabilitation of less culpable juveniles is a sincere goal, this prong militates in favor of finding JLWOP to be a necessarily disproportionate sentence for aiding and abetting a felony murder, especially for those juveniles capable of rehabilitation.

For aiding and abetting a felony murder, Michigan does not give a sentencing judge discretion to fashion a sentence that accounts for juveniles' inherent incorrigibility, and prospects for reform. Instead, Michigan opted for a sentencing scheme that included felony murder—which is an often less culpable crime than principal murder—and that makes no distinction

between adult and juvenile offenders or a juvenile's diminished culpability and increased prospects for reform.

Three separate statutes interact to create this unconstitutional sentence.[16] MCL 712A.2; MCL 600.606. *Id.* These statutes allow the prosecuting attorney to file charges against a juvenile as a juvenile in the family division of circuit court or directly as an adult in the circuit court. *Id.* Second, in 1996, the legislature required that juveniles tried as adults in circuit court be sentenced the same as an adult for the most serious crimes, instead of allowing the judge to determine whether to sentence as an adult or a juvenile, as under prior law. *Id.* Finally, the sentence for first degree murder (including felony murder) is mandatory life without parole. MCL 750.316.

In addition to the statutes identified by Professor Thomas, three more statutes are involved with the sentencing scheme at issue when considering an "aiding and abetting" theory. First, Michigan's applicable parole statute is what operates to give the "without parole" to the mandatory life sentence. MCL 791.234(6)(a). Second, Michigan has abrogated the common law distinction between aiding and abetting liability and principal actor liability. MCL 767.39. *accord People v Palmer*, 392 Mich 370, 378, 220 NW2d 393 (1974). Third, Michigan's definition of what constitutes a "homicide crime" is broad, because it includes "non-shooters" in felony murder cases. MCL 777.1(c). This perfect storm of sentencing laws has resulted in Michigan having the second largest population of incarcerants for crimes committed when they were under 18,[17] and the third highest number of juveniles serving mandatory life without parole sentences. Appellant's Appx. 1009a.

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[16] This has been referred to as a "Perfect Storm of Laws" by legal scholars. Kimberly Thomas, JUVENILE LIFE WITHOUT PAROLE: UNCONSTITUTIONAL IN MICHIGAN? 90 Mich Bar. J. No. 2 34, 35 (2011).
[17] Thomas, 90 Mich Bar. J. at 35.

Michigan does not make rehabilitative programming widely available to youth offenders serving JLWOP. In this case, the sentencing judge specifically said on the record that:

> I thought about it, because, very frankly, I think he's salvageable. This was a case, I don't know if I said it before at the sentencing, I believe somebody's been throwing this young man away from the day he was born.
>
> He was not the shooter. They printed in the paper that I had given him this second degree murder sentencing. And they talked about that he was a murderer. He didn't pull the trigger.
>
> Now, he was convicted of first degree felony murder, and he was an aider and abettor. But, when I looked at his background, I know that the juvenile justice system is not going to be able to rehabilitate him within the time they've got left. This man is a danger to society. And that's why I placed him in the adult system. But I still feel, and I continue to feel, that he could be rehabilitated. And maybe, when the legislator [sic], because they're beginning to take a look at it, that they may change it. Though it will be years from now, but they may change it.
>
> . . .
>
> Mandatorily, I must sentence you to natural life in prison on the murder one, and the mandatory two years on the felony firearm. And the other sentences will stand on the armed robbery and assault with intent to rob. I have no choice.
>
> . . .
>
> The only thing I can say to you is that it's my belief that they are going to change this. They're going to find out how unjust it is to do this. So, don't give up hope. You may not be in there for the rest of your life. Good luck to you, sir, and be sure to fill out your appeal papers. Appellant's Appx. 816a-823a.

In sum, there is a categorical ban on the sentence of life without parole for aiding and abetting a felony murder under federal law and under the state law. *Miller v Alabama, Jackson v Hobbs, Graham v Florida, and Roper v Simmons* together create a categorical ban on the sentence of life without the possibility of parole for diminished culpability juveniles, who did not "pull the trigger." The *Miller/Jackson* Court made clear that mandatory LWOP violated the Eighth Amendment and as a category, juvenile offenders must be treated differently than adults in process and substance. *Miller/Jackson, supra*, at 2469-71. Such as requirement renders the slow death of mandatory life prison unconstitutional for juveniles who did not kill or intend to kill, because they are not "irretrievably corrupt." Under Michigan's current sentencing scheme a

juvenile aider and abettor to a felony murder can receive the same sentence as a fully culpable adult murderer and a greater sentence than an adult culpable for second degree murder, which is necessarily disproportionate to the offense, making the sentence categorically unavailable for juvenile offenders.

II. MILLER V ALABAMA MUST BE APPLIED RETROACTIVELY UNDER BOTH FEDERAL AND STATE LAW.

A. Miller/Jackson is Retroactively Applicable Under Federal Law.

1. Categorical Bans on Certain Punishments for a Class of Offenders Are Retroactive as a Matter of Federal Law.

Because there is a categorical ban on sentencing a juvenile with twice-diminished culpability to the harshest sentence available, this ban is retroactively applicable to cases that have become final on direct review. As a threshold matter, in order to be retroactively applicable, a rule of criminal procedure must be "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 v Lane*, 489 US 288, 310 (1989). It is undisputed that the threshold question of whether the holding in *Miller/Jackson* constitutes a "new rule" for purposes of an analysis under *Teague*. Never before had the Supreme Court acted on the question of whether juveniles, as a class, may be mandatorily imprisoned for life without parole for homicide offenses.

When the Supreme Court establishes a new rule, "that rule applies to all criminal cases still pending on direct review" and applies "to convictions that are already final . . . only in limited circumstances." *Schriro v Summerlin*, 542 US 348, 351 (2004). Under *Teague*, a new rule applies retroactively where it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 311 (internal quotation marks and citation omitted). The Supreme Court has explained that this exception

"should be understood to cover . . . rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry v Lynaugh*, 492 US 302, 330 (1989), *abrogated on other grounds by Atkins v Virginia*, 536 US 304 (2002).

Eighth Amendment cases announcing new categorical bans on certain punishments upon juveniles as a class are retroactively applied. *See e.g., In re Brown*, 457 F3d 392 (5th Cir 2006) (permitting successive petition after *Atkins*); *Bell v Cockrell*, 310 F3d 330 (5th Cir 2002), *citing Teague* ("[I]f we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons . . . such a rule would fall under the first exception to [*Teague's*] general rule of non-retroactivity and would be applicable to defendants on collateral review."). *See also Arroyo v Dretke*, 362 F Supp 2d 859, 883 (WD Tex 2005), *aff'd on other grounds sub nom, Arroyo v Quarterman*, 222 Fed Appx 425 (5th Cir 2007) (retroactively applying *Roper*). *And see Moore v Biter*, 725 F3d 1184 (9th Cir 2013) (retroactively applying *Graham*); *In re Sparks*, 657 F3d 258 (5th Cir 2011) (retroactively applying *Graham*); *Moss v United States*, 703 F3d 1301 (11th Cir 2013) (retroactively applying *Graham*).

It is clearly established that categorical bans for certain punishments upon juveniles as a class are retroactively applied because they satisfy the first exception to the *Teague* general rule against retroactivity, and federal courts uniformly give categorical bans on certain categories of punishment upon certain classes of offenders retroactive effect under *Teague*. Juveniles have been found to be necessarily less culpable for their involvement in serious crimes as a class because of their diminished culpability, their inability to appreciate the consequences of their actions or to control their impulses. They are necessarily less deserving of the most severe punishments. A juvenile who did not his or her self intend to kill, have knowledge that a principal intended to kill, and who did not give aid or encouragement to a principal with respect

to a killing constitutes a class of offenders. Due to the twice diminished culpability of these offenders, life without parole sentences are necessarily disproportionate, creating a categorical ban. Categorical bans on certain punishments, like life without parole, upon a class of offenders, in this case juveniles, are retroactively applicable under federal law.

2. The new rule announced by *Miller/Jackson* satisfies the first Exception to the General Rule of Non-Retroactivity set forth in *Teague v Lane* because *Miller/Jackson* announced a new, substantive rule.

Another way of characterizing the *Teague* exceptions is that new constitutional rules apply to cases on collateral review if it is a substantive rule of criminal law or a "watershed" rule of procedure. *Schriro, supra, at* 350-52 (2004); *Bousley v United States*, 523 US 614, 620 (1998); *Teague, supra.* A rule is substantive if it narrows the scope of a criminal statute, places particular conduct beyond the State's power to punish, or establishes a "substantive categorical guarante[e] accorded by the Constitution," that "prohibit[s] a certain category of punishment of a class of defendants because of their status or offense." *Graham, supra,* at 477 (internal quotations and citations omitted); *O'Dell v Netherland*, 521 US 151, 156-57 (1997); *Saffle v Parks*, 494 US 484, 495 (1990); *Summerlin, supra* at 352-53. 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.*" *Summerlin, supra*, at 353 (emphasis added) (internal quotations and citations omitted); *see also Bousley, supra*, at 620. In contrast, "rules that regulate only the *manner of determining* the defendant's culpability are procedural" and will not be applied retroactively unless they represent a watershed rule. *Summerlin, supra*, at 353, (emphasis in original), *citing Bousley supra*, at 620.

Miller/Jackson is a new, substantive rule. *Miller/Jackson* is substantive because it dictates *what* must be considered to impose juvenile JLWOP rather than *how* such sentences are

found. *Cf Saffle, supra,* at 490 ([t]here is a simple and logical difference between rules that govern *what* . . . and rules that govern *how*. . . .") Contrasting this case with *Summerlin* is instructive. In *Summerlin,* the Supreme Court held that *Ring v Arizona,* 536 US 584 (2002), which required that juries rather than judges find statutory aggravating factors necessary to impose death sentences, was a procedural rather than substantive rule. *Summerlin, supra,* at 354-55.

Unlike *Ring*, the prerequisite findings for imposing LWOP for cases involving a juvenile were not the same before *Miller/Jackson* as after. This new rule made "certain facts essential" to such sentences. *Id.* It introduced factors that judges *must* consider before sentencing a juvenile to LWOP, from nothing to all to the "mitigating qualities of youth." It is thus substantive rather than procedural.

Miller impacts a juvenile's substantive right to be free from punishments that are cruel and unusual in a very real way. Under *Miller/Jackson*, JLWOP is disproportionate unless the juvenile offender's "youth [and all that accompanies it]" are shown to be so tangential to the offender and his crime that he is nearly indistinguishable from an adult. *Miller/Jackson, supra,* at 2469. Drawing on decisions holding that mandatory death penalty laws violated the Eighth Amendment because they prevented consideration of mitigating factors, the Supreme Court similarly demanded that sentencers first be presented with, and consider evidence relevant to, the "mitigating qualities of youth" before they can impose LWOP. *Miller/Jackson, supra,* at 2467-2478, *quoting Johnson v Texas*, 509 US 350, 367 (1993); *see also Woodson v North Carolina,* 428 US 280 (1976) (holding mandatory death penalty violated Eighth Amendment); *Sumner v Nevada Dept. of Prisons,* 483 US 66, 74-76 (1987) (failure to allow death penalty sentencer to consider mitigating factors violated Eight Amendment). Any new procedures flowing from

Miller/Jackson represent merely the means to an end of preventing the wholesale imposition of disproportionate sentences that have for years resulted from mandatory LWOP statutes.

Miller/Jackson features a second substantive component in that it prohibits a category of punishment (mandatory LWOP) for a class of individuals (juveniles) because of their status. *Graham v Collins*, 506 US 461, 477 (1993). The *Miller/Jackson* Court recognized the well-established rule, recently re-affirmed in *Roper, supra,* and *Graham, supra,* that juveniles must as a class be treated differently to prevent "mismatches between the culpability of [this] class of offenders and the severity of a penalty." *Miller/Jackson, supra, at* 2463-64. Since LWOP is the harshest penalty available for juveniles, as the death penalty is for adults, *Miller/Jackson* held that prior decisions barring mandatory death penalty imposition and requiring individualized sentencing applied to juveniles in the non-death context. *Id. See Woodson, supra*; *Lockett v Ohio*, 438 US 586 (1978); *Eddings v Oklahoma*, 455 US 104 (1982). *Miller/Jackson* therefore established a "substantive categorical guarantee accorded by the Constitution," for all juveniles, and therefore applies retroactively. *Collins, supra*, at 477.

The Court drew heavily from the line of its decisions adopting "categorical bans on sentencing practices" with regard to classes of offenders to make its sweeping rule. *See Graham, supra*, at 2022–23 (listing cases); *Miller/Jackson, supra*, at 2463-64. The categorical approach of *Miller/Jackson* makes it substantive and retroactive.

Moreover, other courts considering the question of retroactivity recently held that the *Miller/Jackson* rule is substantive in nature, and that it satisfies the *Teague* retroactivity analysis. *See e.g., Diatchenko v Commonwealth*, No. SJC-11453, slip op. (Mass. Dec. 24, 2013); *Hill v Snyder*, No. 10-14568 (ED Mich Jan. 30, 2013) ("Indeed, if ever there was a legal rule that should - as a matter of law and morality - be given retroactive effect, it is the rule announced in

Miller. To hold otherwise would allow the state to impose unconstitutional punishment on some persons but not others, an intolerable miscarriage of justice."); *People v Morfin*, 2012 WL 6028634 (Ill App Nov 30, 2012) (held The mandatory life sentence imposed on defendant for two counts of first degree murder committed when he was a minor was vacated and the cause was remanded for a new sentencing hearing on the ground that pursuant to *Teague*, *Miller* is retroactively applicable to defendant's case on collateral review, and under *Miller*, a new sentencing hearing was required for defendant, and at the hearing, possible sentences include natural life, 20 to 60 years, or up to 100 years if an extended-term finding is made.). *See also, e.g., Alejandro v United States*, No. 2013 WL 4574066 (S.D.N.Y. Aug. 22, 2013); *People v Williams*, 982 NE2d 181 (Ill App.Ct 2012); *State v Ragland*, 812 NW2d 654 (Iowa 2012) (remanding for resentencing); *State v Ragland*, 836 NW2d 107 (Iowa 2013); *State v Bennett*, 820 NW2d 769 (Iowa Ct App 2012) (unpublished); *State v Lockheart*, 820 NW2d 769 (Iowa Ct App 2012) (unpublished); *Tulloch v Gerry*, No. 12-CV-849, 2013 WL 4011621, at *9 (NH Super Ct July 29, 2013); *In re Pendleton*, No. 12-3617, 2013 WL 5486170 (3d Cir Oct. 3, 2013) (per curiam) (concluding that petitioners showed prima facie evidence that Miller is retroactive); *Johnson v United States*, 720 F3d 720 (8th Cir 2013) (per curiam) (awarding preliminary authorization for review by the district court following government's concession that *Miller* is retroactive), *but see In re Morgan*, 713 F3d 1365, 1368 (11th Cir 2013); *Craig v Cain*, No. 12-30035, 2013 WL 69128, at *2 (5th Cir Jan 4, 2013) (per curiam); *State v Tate*, 2013 WL 5912118 (La 2013); *Chambers v State*, 831 NW2d 311 (Minn 2013). This Court should be persuaded by the authorities retroactively applying *Miller/Jackson*, and arrive at the same conclusion when conducting its retroactivity analysis.

B. The new rule announced by *Miller/Jackson* satisfies both the general rule Michigan, which is that judicial decisions are fully retroactive, and weighing the three part test recently used in *People v Maxson*.

1. *Miller/Jackson* is retroactively applicable based on the prevailing rule on retroactive application of new criminal rules in *People v Maxson*.

Even if this Court does not find *Miller/Jackson* retroactive under federal law, it is empowered to apply *Miller/Jackson* retroactively under state law. *Danforth v Minnesota*, 552 US 264 (2008), (federal law does not limit the state courts' authority to provide retroactive remedies even if a rule is deemed non-retroactive under *Teague*.) The general rule in Michigan is that judicial decisions are given full retroactive effect. *Pohutski v City of Allen Park*, 641 NW2d 219, 465 Mich 675 (2002), citing *Hyde v Univ of Michigan Bd. of Regents*, 426 Mich 223, 240, 393 NW2d 847 (1986). There is no reason to deviate from the general rule in this case.

This Court recently applied its retroactivity test in *People v Maxson*, 482 Mich 385, 759 NW2d 817 (2008). At issue in *Maxson* was whether the United States Supreme Court's decision in *Halbert v Michigan*, 545 US 605 (2005) (holding that indigent defendants who plead guilty to criminal offenses are entitled to appointed appellate counsel on direct appeal), should be applied retroactively to cases in which a defendant's conviction has become final. *Maxson*, at 386-87. In lieu of granting leave to appeal, this Court concluded under federal and state law that *Halbert* should not be applied retroactively to cases in which a defendant's conviction has become final. The *Maxson* Court employed a *Teague* analysis on retroactivity under federal law, and the three part test under *People v Sexton*, 458 Mich 43, 52, 580 NW2d 404 (1998) for retroactivity under state law. The three parts of the test are: (1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect of retroactive application of the new rule on the administration of justice. *Sexton*, at 60-61.

The *Maxson* Court declined to apply the *Halbert* rule retroactively, in part because under prong one, the "purpose" prong, Maxson, by pleading guilty, did not contest guilt but admitted it freely and, therefore, the appointment of counsel on appeal did not concern the ascertainment of guilt or innocence. An appeal from a guilty plea concerns only the *procedures* of the plea process. *Id.* 393-94. Under prong two, the "reliance" prong, the court did not feel compelled one way or another, however under prong 3, the "administration of justice" prong, the court held that "the state's strong interest in finality of the criminal justice process would be undermined as presumably significant numbers of the incarcerated population would be entitled to avail themselves of appointed counsel and new appeals, despite having knowingly and intelligently pleaded guilty to criminal conduct while represented by counsel." *Id.*, at 397-98. This can properly be branded the administrative burden prong.

a. The Purpose of the New Rule Announced in Miller is to Ensure that Juveniles are not being treated disproportionately during sentencing.

The facts of this case stand in stark contrast to the *Maxson* case. First, the rule announced in *Miller/Jackson* does not deal with "the ascertainment of guilt or innocence," but dealt with a juvenile's culpability during sentencing. In this way, the *Maxson* test fails to account for cases where there is a severe transgression of constitutional rights during sentencing, as there was here. This case does not deal retrospectively with only an element of pre-trial or trial procedure: whether an evidentiary issue was properly handled, whether the jury selection process was flawed, or whether there was effective assistance of trial or appellate counsel.

Instead, this case deals with a substantive matter: whether the sentence imposed upon Mr. Davis, then a juvenile, was constitutionally permissible under the applicable proportionality rule. Mr. Davis contested his guilt of the underlying crime in this case, and the trial judge was vocal

about her perception of the flaws in the result. The trial judge thought the outcome was so flawed, that she held in 1994 that the sentence of JLWOP was unconstitutionally cruel and unusual, and instead imposed a sentence of a term of years. Davis is not requesting a new trial procedure; he is requesting that his sentence be brought into compliance with constitutional requirements.

b. There was no reliance in this case by the trial court on the practice of unconstitutionally imprisoning juveniles for life on a mandatory basis, general reliance on the rule of *People v Launsburry* was misplaced, and *Launsburry* was not the rule when the original sentence was imposed in this case in 1994.

Prong two "concerns the 'general reliance on the old rule.'" *Maxson*, at 823. When considering "reliance," a court examines whether individual persons or entities have been 'adversely positioned . . . in reliance' on the old rule." *Id. citing Rowland v Washtenaw Co. Rd. Comm.*, 477 Mich 197, 221, 731 NW2d 41 (2007).

There was no reliance in this case by the trial court on the practice of unconstitutionally imprisoning juveniles for life on a mandatory basis because it originally declared the sentence unconstitutional. It said as much on several occasions. Moreover, general reliance on the rule of *Launsburry, supra,* was misplaced since that rule is now abrogated, and in any event, *Launsburry* was not the rule when the original sentence was imposed in this case in 1994.

Cortez cannot be said to have relied on the practice of imposing LWOP mandatorily on juveniles because it was contested during sentencing, and has been continually contested in this and other cases since 1994. In fact, the only "entity" that can be said to have relied on this rule is the prosecutor, arguing in this and other cases that the legislature proscribed this the mandatory LWOP sentence and that sentencing judges must follow that mandate.

The reliance prong is difficult to apply in this case because the amount of past reliance will often have a profound effect upon the administration of justice. *Johnson v White*, 261 Mich App 332, 682 NW2d 505, 508 (Mich App 2004) (noting that in some cases, the second and third factors meld together because the amount of past reliance will often have a profound effect upon the administration of justice.)(citing references omitted). In any event, there was not reliance, with the trial court directly addressing the unconstitutional nature of the sentence and the defendant challenging the mandatory sentence since it was imposed.

c. Resentencing juveniles serving LWOP will impose a significantly lesser administrative burden on the judiciary than if the *Maxson* Court had retroactively applied *Halbert*.

The third prong of the *Maxson* test seems to be where the court 'hangs its hat' on the issue of state retroactivity; what impact giving retroactive effect to a new rule will have on the administration of justice. The court should not allow the state's interest in finality to outweigh a juvenile's right to a sentence that is not cruel and unusual, and therefore constitutionally prohibited. The *Maxson* court reasoned:

> The state's strong interest in finality of the criminal justice process would be undermined as presumably significant numbers of the incarcerated population would be entitled to avail themselves of appointed counsel and new appeals, despite having knowingly and intelligently pleaded guilty to criminal conduct while represented by counsel. *Maxson*, at 397-98.

But this case is distinct from the facts of *Maxson* in many ways. First, a favorable ruling in these cases will only affect the *sentencing portion* (not entire trial procedure) of the cases of approximately 363 inmates[18], whereas Justice Markman's concern in *Maxson* was the reappointment of appellate counsel and new appeals from potentially *all* inmates who had pleaded guilty between 1994 and 2005. *Maxson,* at 823. There are 188 circuit judges in counties who may be delegated the duty of resentencing in these 363 cases. Appellant's Appx. 1403a-04a.

[18] Taken from Appellant's Appx. 1403a-04a "Number of JLWOP inmates by county."

This is an average of approximately 2 cases per circuit judge who could conduct a resentencing. *Id.* Some judges will admittedly have more of this load and some less because the number of juveniles, docket management and case assignment methods differ from county to county. However, to require any one judge—especially a judge whose docket is dedicated to the criminal division of the circuit court—to resentence even 10 juveniles, is not *per se* unduly burdensome, and will not create the type of drag on judicial resources feared by the court in *Maxson.*

Second the state's interest in finality is less important than the protection of a fundamental right of a child. "The state's interest in finality discourages the advent of new rules from continually forcing the State to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Maxson,* at 825, *citing Teague, supra,* at 310 (internal brackets and quotations omitted). The relevance of this statement is diminished when juveniles are involved because of their heightened capacity for change and rehabilitation making the goal of keeping them in prison secondary to the rehabilitative ideal. But also, the state's interest in protecting the liberty of its citizens, particularly children, is a leading reason for the State's existence at all. While the state's interest in finality is undoubtedly important, and often dictates the outcome of a case, it is not dispositive in all cases. *See e.g., Johnson v White, infra,* (giving retroactive effect to *DeRose v DeRose*, 249 Mich App 388, 643 NW2d 259 (Mich App 2002)).

Third, Cortez did not admit guilt and is not seeking a new trial procedure. He is, simply, seeking to be resentenced in accordance with *Miller*. The concerns of the *Maxson* Court are not present in this case, at least they are far from the same degree.

The *Maxson* court also considered whether allowing new appeals was appropriate where the goal of rehabilitation is at issue. "[Not giving retroactive effect to *Halbert*] 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.'" *Maxson*, at 825, *citing Kuhlmann v Wilson*, 477 US 436, 453 (1986). Juvenile "lifers" as they are referred to are not eligible for the same level of rehabilitative programming as non-lifers because the state has effectively locked them up and thrown away the key, and any programming that they do receive will never be used in a state where their fate is permanent incarceration. This militates in favor of retroactivity, if the state has a genuine interest in the penological goal of rehabilitation.

In conclusion, the *Miller/Jackson* rule is retroactively applicable under state law to cases on collateral review because in Michigan new judicial rules are generally retroactive and no cautionary exception to the general rule applies that would justify not retroactively applying *Miller/Jackson* when considered in light of the factors set forth in *People v Maxson*.

2. In Michigan, unconstitutional statutes are void *ab initio*, and therefore Cortez has been serving an unconstitutional sentence since 1994.

In Michigan, unconstitutional statutes are void *ab initio*. *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135, 253 NW2d 114 (1977).

> "The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed." (*Id.* at 144-145, 253 NW2d 114, quoting 16 Am. Jur. 2d, Constitutional Law, § 177, pp. 402-403.)

"The unconstitutional statute leaves the question that it purports to settle just as it would be had the statute not been enacted." *Sturak v Ozomaro*, 238 Mich App 549, 606 NW2d 411, 417 (Mich App 1999) (citing 16A Am. Jur. 2d, Constitutional Law, § 203, p. 90). The relevance of

this constitutional principal is that it makes the sentence Cortez has been serving for the last 20 years unconstitutional.

The two issues in *Stanton* were Whether plaintiff's injury arose out of and in the course of his employment with defendant and whether an agricultural worker is entitled to weekly benefits for a work-related injury sustained prior to this Court's decision in *Gallegos v Glaser Crandell Co.*, 388 Mich 654, 202 NW2d 786 (1972) (holding that the agricultural exclusion in the Worker's Disability Compensation Act of 1969, MCL § 418.115(d) was in violation of the equal protection clauses of the Michigan and United States Constitutions.).

Answering the second question in the affirmative, the court considered Defendant's argument that "since plaintiff's accident preceded this Court's holding in *Gallegos, supra,* that decision is not applicable to the instant case." *Stanton*, 253 NW2d at 117. "*Gallegos* held that MCL § 418.115(d) . . . was unconstitutional because it excluded certain agricultural employees from the coverage of the Michigan Worker's Disability Compensation Act of 1969, thus denying them equal protection of the laws." *Id.* (internal citations omitted). The Workers Compensation Board gave *Gallegos* prospective application. Affirming, this Court said

> "The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed." *Id.* That this rule has been consistently followed in Michigan there can be no doubt. *Id.* at 117-18 (citations omitted).

The prospective-retroactive issue is relevant in situations where a previously valid common-law doctrine or prior judicial rule of constitutional interpretation is being abandoned. *Stanton*, 253 NW2d at 118. In this case, the constitutional interpretation of the Eighth Amendment regarding mandatory life sentences for juveniles was *Launsburry, supra.*

Miller/Jackson abrogated not only Michigan's mandatory sentencing scheme for juveniles, but also the interpretive case law with respect to the Eighth Amendment. The rule in *Launsburry, supra* is, therefore, abandoned. The Stanton court did recognize the need for an exception for "necessities of governmental administration" to the rule in favor of retroactivity, noting the incredible administrative burden it would impose to renegotiate countless police and fire department arbitration panels. *Id. citing Dearborn Fire Fighters Union Local No. 412, IAFF v Dearborn*, 394 Mich 229, 231 NW2d 226 (1975). But such an administrative necessity exception did not exist in *Stanton.*

> "However, in the instant case, considerations of justice and practicality do not warrant the limited effect of the prospective application of *Gallegos*. Indeed, it would be patently unfair to deny plaintiff weekly benefits for injuries sustained in an accident occurring prior to the time the statutory exclusion was declared unconstitutional, but subsequent to the time the *Gallegos* plaintiffs were injured." *Id.*

The same can be said in this case. It would be patently unfair to bifurcate juveniles, as the Court of Appeals did in *Carp, supra*, into two groups: the first group receiving the benefit of *Miller/Jackson* for the reason that they committed their crimes recently enough for their cases to be pending on direct review on June 25, 2012, and the second group was not.

The Court of Appeals also gave retroactive effect to the declaration of unconstitutionality of MCL 722.27b in 2004. *Johnson v White*, 261 Mich App 332, 682 NW2d 505 (Mich App 2004) (giving retroactive effect to *DeRose v DeRose*, 249 Mich App 388, 643 NW2d 259 (Mich App 2002)). In *Johnson*, at issue was whether *DeRose* should be retroactively applied. The *Johnson* court noted this Court's directive that:

> [a]s a general rule, an unconstitutional statute is void *ab initio*; it is void for any purpose and is as ineffective as if it had never been enacted." *Id., citing Stanton, supra.* Pursuant to this rule, decisions declaring statutes unconstitutional have been given full retroactive application. *Id.* Another general rule is that judicial decisions are to be given complete retroactive effect. *Id.* (citation omitted)

The court admonished that "these rules are not blindly followed without concern for principles of justice and fairness. As the Court recognized in *Stanton*, certain factual circumstances might warrant the retroactive application of an unconstitutional statute." *Johnson* NW2d at 507-08 (internal citations and quotation marks omitted). Applying the same three-part test this court would employ four years later in *Maxson*, the Court of Appeals decided that *DeRose, supra,* was the kind of decision that would be retroactively applied. *Id.*

The rule, as it has developed in Michigan, therefore, is that absent some compelling reason against retroactivity due to an extreme governmental burden, unconstitutional statutes that have been declared so are void *ab initio*. Additional facts make this result more compelling in Cortez's case. First, as previously stated in this brief, the trial judge declared Cortez's sentence "cruel and unusual" and was forced by the Court of Appeals to impose an unconstitutional sentence. This fact taken together with the mandatory statutory scheme being invalidated by *Miller/Jackson*, leads to the conclusion that not only is Cortez serving an unconstitutional sentence, but that the only available course of action that complies with the Eighth Amendment is to retroactively apply *Miller/Jackson* and resentence Cortez in accordance therewith.

In conclusion, under state law, the new rule announced by *Miller/Jackson* satisfies both the general rule Michigan, which is that judicial decisions are fully retroactive, and weighing the three part test recently used in *People v Maxson*, also leads to the conclusion that *Miller/Jackson* is retroactively applicable. The purpose of the new rule announced in *Miller/Jackson* is to ensure that juveniles are not being treated disproportionately at sentencing, which is a rule that should be applied to all persons similarly situated. There was no reliance in this case by the trial court on the practice of unconstitutionally imprisoning juveniles for life on a mandatory basis because it originally declared the sentence to be unconstitutional. Moreover, *Launsburry* was not the rule

when the original sentence was imposed in this case. Resentencing juveniles serving LWOP will impose a significantly lesser administrative burden on the judiciary than if *Maxson* had retroactively applied *Halbert v Michigan*. Finally, in Michigan, unconstitutional statutes are void *ab initio*, that is from their inception, not from the date they are found unconstitutional. MCL 750.316(1)(b) and MCL 791.234(6)(a), as automatically applied to juveniles are, therefore, void from their making after the decision in *Miller/Jackson*. The only available remedial measure is to retroactively apply *Miller/Jackson* and resentence Cortez in line with our Constitution's protection against disproportionate sentences.

REQUEST FOR RELIEF

The Defendant-Appellant, Cortez Roland Davis, respectfully requests that this Court REVERSE the Court of Appeals' decision *People v Davis*, No. 314080 (Mich App, January 16, 2013) and REMAND to the Wayne County Circuit Court for re-sentencing pursuant to *Miller/Jackson, supra.* Cortez further preserves any issues not specifically herein addressed and requests that this Court grant any other relief to which he is entitled.

RESPECTFULLY SUBMITTED

Date: January 1, 2014

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