IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Docket No. 146478

vs.

RAYMOND CURTIS CARP

Defendant-Appellant.
_____/

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Docket No. 146819

vs.

CORTEZ DAVIS,

Defendant-Appellant.
_____/

BRIEF OF *AMICI CURIAE* AD HOC COMMITTEE OF FORMER PROSECUTORS, FORMER JUDGES, FORMER GOVERNMENTAL OFFICIALS, LEADERS OF BAR ASSOCIATIONS AND LAW SCHOOL DEANS AND PROFESSORS, IN SUPPORT OF DEFENDANTS-APPELLANTS

ORAL ARGUMENT NOT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF QUESTIONS INVOLVED

I. Does the Eighth Amendment Require That Children Be Treated Differently Than Adults Due to Their Reduced Culpability and Greater Capacity for Rehabilitation?

The Court of Appeals Answered: No.
Amici Answer: Yes.

II. Does the Eighth Amendment Mandate Particular Scrutiny of Life Without Parole Sentences Imposed on Children?

The Court of Appeals Answered: No.
Amici Answer: Yes.

III. Do Michigan Retroactivity Standards, Which are Imbued With Notions of Equity and Fairness, also Weigh Strongly in Favor of Retroactivity?

The Court of Appeals Answered: No.
Amici Answer: Yes.

INTRODUCTION

With *Miller v Alabama,* the United States Supreme Court established a new rule of constitutional law regarding what constitutes permissible and proportional punishment for youth under the age of 18. *Miller v Alabama*, ___ US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012). In holding that the Eighth Amendment "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," the Supreme Court recognized that the Eighth Amendment affords additional protections to children and limited the instances in which a child should serve the most severe sentence available. *Id.*, 132 S Ct 2469. The Court explained that such mandatory sentencing schemes violate the Eighth Amendment's prohibition on cruel and unusual punishment because they impose the state's harshest punishment on child offenders without individual consideration of the "characteristics and circumstances attendant to youth" and without recognition that a child's actions, rooted in immaturity and impulsivity, are less morally culpable than an adult's. *Id.*, 132 S Ct 2467. The Court's recognition of a child's unique capacity for rehabilitation also led it to conclude that the permissible occasions for imposing a life without parole sentence on a child must be rare and restricted to those circumstances when it is proven that the "crime reflects irreparable corruption." *Id.*, 132 S Ct 2469.[1]

The *Miller* Court did more than create procedures for sentencing youth; it also severely limited the circumstances under which it is appropriate for a child to be sentenced to life without parole. The Supreme Court cautioned that "appropriate occasions for sentencing children to this harshest possible penalty will be uncommon," and strongly suggested that it would *never* be

[1] Further, emphasizing how rare this occurrence should be the *Miller* Court opined that a determination that a "juvenile offender forever will be a danger to society" would require "mak[ing] a judgment that [he] is incorrigible"—and "'incorrigibility is inconsistent with youth.'" *Miller, supra,* p 2465, quoting *Workman v Commonwealth*, 429 S W 2d 374, 378 (Ky App 1968).

consistent with the Eighth Amendment for a sentence of life without parole to be imposed on "the juvenile offender whose crime reflects unfortunate yet transient immaturity." *Miller, supra,* 132 S Ct 2469, *citing Roper v Simmons*, 543 US 551, 573; 125 S Ct 1183; 161 L Ed 2d 1 (2005) and *Graham v Florida*, 560 US 48, 67; 130 S Ct 2031; 176 L Ed 2d 825 (2010).

The instant cases center on whether the constitutional core of *Miller*'s ruling – i.e., that the Eighth Amendment permits life without parole sentences to be imposed on children only *after* the State has made an actual, individualized finding that their crime reflected "irreparable corruption" rather than "unfortunate yet transient immaturity" – should apply to those individuals who, like Raymond Carp and Cortez Davis, are serving a mandatory life without parole sentence for offenses they committed as children, but for whom the State has *never* made the constitutionally-mandated showing of "irreparable corruption." *Id.*, 132 S Ct 2469. Amici believe this Court should apply *Miller* retroactively to ensure that no individual continues to serve this State's harshest sentence, imposed without individualized consideration of their child status, its attendant characteristics and impact on culpability. To do otherwise would be an ongoing violation of the Eighth Amendment and in contravention of the Supreme Court's findings in *Miller.*

Amici represent a group of 109 individuals from diverse professional experiences including retired judges, former prosecutors, former governmental officials, law school deans and professors, and former bar association presidents.[2] The distinctive and varied backgrounds of Amici imbue them with a unique perspective on the administration of justice in criminal cases based on decades of service to the state and federal courts in Michigan. Moreover, Amici share the belief that the fundamental integrity and fairness of Michigan's justice system requires:

[2] A full list of amici is submitted as Exhibit A to the brief.

- Adherence to the Eighth Amendment principle of proportional punishment for all offenders;
- Adherence to *Miller*'s holding that no person can be required to serve a sentence of life without parole for a crime committed while a child, unless and until the State has demonstrated that the crime reflected "irreparable corruption" rather than mere youthful immaturity; and
- A fair opportunity for those individuals, who were given the mandatory adult punishment of natural life in prison for an offense committed while a child, to have individualized reviews and resentencings after presentation of circumstances related to their child status, lesser culpability and unique capacity for rehabilitation.

Amici are also mindful that Michigan's incarceration of 363 individuals sentenced to mandatory life without parole for crimes committed in their youth has long weighed on the consciences of judges across Michigan. A legislatively prescribed mandatory sentencing scheme removes the judicial discretion that this Court has recognized forms "the backbone of that [judicial] process." *People v Milbourn*, 435 Mich 630, 700, 461 N W 2d 1, 32 (1990).

Unless and until the State makes an inquiry into "their age and age-related characteristics and the nature of their crimes" that *Miller* requires, and determines which, if any, of those individuals committed a crime reflecting the degree of "incorrigibility" that is a prerequisite to sentencing a child to life without parole, Michigan will be imposing a cruel and unusual punishment that the Supreme Court likened as "akin to the death penalty" on these youthful offenders. *Miller, supra,* 132 S Ct 2466. ***Absent such a review, 363 people will continue to serve a sentence that has been declared unconstitutional.*** Amici urge this Court to apply the

protections of the Eighth Amendment for all of this State's citizens and ensure that each of these child offenders serves a constitutionally sound sentence.

ARGUMENT

Appellants' briefs ably demonstrate that *Miller* satisfies the standards for retroactive application announced in both *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989), and *People v Maxson*, 482 Mich 385; 759 N W 2d 817 (2008). Amici write separately to stress another, critically important reason that *Miller* must be applied retroactively: the integrity of Michigan's justice system requires that *Miller*'s rule, and its protections, be applied to all youthful defendants, not just those who were in a procedural posture that entitles them to relief or those who face the possibility of such a sentence in the future.

Once we acknowledge that a punishment is at odds with the "standards of decency that mark the progress of a maturing society" it undermines the integrity of our justice system to continue to enforce this cruel and unusual punishment. *Miller*, *supra,* 132 S Ct 2463. The sentences of mandatory life without parole being served by the individuals at issue in this appeal are, after *Miller*, clearly inconsistent with both standards of decency and the requirements of the Eighth Amendment, as well as fundamental principles of Michigan law.

Miller established a categorical ban on mandatory life without parole sentences for children precisely because such a punishment violates the Eighth Amendment and our "basic precept of justice that punishment for crime should be graduated and proportional to both the offender and the offense." *Miller, supra,* 132 S Ct 2463. This ban is based on a fundamental principle that "children are constitutionally different from adults for purposes of sentencing"; it is cruel and unusual punishment to impose the harshest sentence on children who have committed homicide crimes except in those uncommon circumstances where the crime is one

that evidences "irreparable corruption" and then only *after* all mitigating circumstances of the individual are taken into consideration. *Id.*, 132 S Ct 2469.

These Eighth Amendment principles are no less relevant for those children who received a mandatory sentence of life without parole before *Miller*. Those children received sentences that the Eighth Amendment now categorically prohibits: life without parole imposed based on nothing other than the strictures of a mandatory sentencing scheme, utterly indifferent to their status of children at the time of their offense. No inquiry was made into, nor allowance made for, the fact that these children committed their crimes at a time when the areas of their brains that control judgment, impulse control, and rational decision making were not yet fully developed.

The recognition of a child's lesser responsibility and intentionality is why our society limits children's ability to legally make choices with consequences that could affect the rest of their lives. We do not allow children to join the military, sign a contract, quit school, get married, drink alcohol, or smoke cigarettes, because they lack the maturity to understand the consequences of their actions. We have strict rules governing when a child may drive before the age of eighteen. We do not allow them to vote or serve on juries because their cognitive and moral faculties are not up to the task of making decisions that fundamentally affect other people's freedoms. We do not grant these youth the civil and political rights we grant to adults because they are children for whom adults are still responsible for their care and custody.

The practice of treating children as if they were fully mature adults is contrary to the rulings of the Supreme Court and has particularly inequitable consequences in the realm of criminal justice. This is as true under fundamental principles of Michigan law as it is under federal constitutional standards. Michigan has long based the punishment it imposes for crimes on a determination of the level of intentionality. The more plotted, preconceived, and calculating

the crime – the harsher the punishment. Premeditated murder carries the harshest punishment – life without possibility of parole, whereas a homicide resulting from drunk driving – is a vehicular manslaughter with a maximum punishment of fifteen years. MCL 257.625 *et seq.*

Children are uniquely incapable of forming the depraved criminal intentionality that the Eighth Amendment requires for a sentence of life without parole. Indeed, the general inability of children to do so was noted by the *Miller* Court as one of the "distinctive attribute[s] of youth" which "diminish[es] the penological justification for imposing the harshest sentences on juvenile offenders":

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

Miller, supra, 132 S Ct 2475 (citations and internal quotations omitted). This Court made a similar observation in *People v Hana* when it noted that the purpose behind the special rules that apply to juvenile proceedings "favor individualized tailoring of a juvenile's sentence with emphasis on both the child's and society's welfare." 443 Mich 202, 226-27, 504 N W 2d 166, 177-78 (1993).

Simply put, "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Miller, supra,* 132 S Ct 2465; see also *id.*, 132 S Ct 2470 ("[O]ur history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults.") (citation and quotation marks omitted). All of these distinctions and reasons for treating youth different apply equally to the 363 individuals sentenced as children that will be affected by this appeal; they, too, possessed the three

"significant" differences attributed to their youthfulness and are no less entitled to have these attributes considered in determining what is a proportional sentence in line with the Eighth Amendment and whether they are among the "rare" teen who evidences "irreparable corruption."[3] *Id.*, 132 S Ct 2469.

Moreover, the children that we are calling upon this Court to protect from excessive punishment have, in many instances, themselves been the victims of failed social systems designed for their care. Many of them suffered severe physical or sexual abuse at the hands of adults without adequate protections or intervention, had untreated mental health issues, learning disabilities, or emotional problems.[4] Although all children are vulnerable, many of Michigan's children serving life without parole sentences were particularly vulnerable when they committed the crimes that landed them in adult prison. It is these very vulnerabilities and hardships over which they had little control that the United States Supreme Court has declared to be mitigating factors required to be considered before sentencing a child to such severe punishment.

I. The Eighth Amendment Requires That Children Be Treated Differently Than Adults Due to Their Reduced Culpability and Greater Capacity for Rehabilitation

Miller recognized that the Eighth Amendment's mandate of proportionality in punishment provides formidable -- and substantive -- protections to children facing the possible sentence of life without parole. A child waived into adult court cannot receive that sentence unless the State considers the extent to which his "distinctive (and transitory) mental traits and environmental vulnerabilities" may have contributed to the commission of his crime, and makes the "uncommon" determination that he is the "rare juvenile offender whose crime reflects

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[3] In some regards, even easier as the Court will be able to view the many, like Cortez Davis for whom the idea of rehabilitation upon maturity came to evident fruition.

[4] *Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons* at 13-17, available at http://www.aclumich.org/sites/default/files/file/Publications/Juv%20Lifers%20V8.pdf.

irreparable corruption." *Miller*, *supra,* 132 S Ct 2469. If the State does not make this inquiry and determination, it will have done what *Miller*, *Graham,* and *Roper* forbid: imposed its "most severe penalties on juvenile offenders . . . as though they are not children." *Id.*, 132 S Ct 2466.

Miller thus did more than merely pronounce a new procedure that must be followed before a life without parole sentence can be imposed on a child: it established that all such sentences imposed without that procedure – that is, imposed on children "as though they are not children" – are *ipso facto* violations of the Eighth Amendment. *Id.,* 132 S Ct 2483. *Miller* makes it plain that the Eighth Amendment permits a sentence of life without parole to be imposed on a child only after the sentencer has taken account not just of the nature of the crime, but also the nature of the child who committed it – including, most importantly, the overwhelming likelihood that their crime resulted in whole or in part from their cognitive and psychosocial immaturity. *Id.*, 132 S Ct 2464-2470. Children who commit homicide offenses have the same underdeveloped traits as children who commit other serious offenses. They are less mature than adult offenders; they are more vulnerable to negative influences; and their characters and reasoning capacities are less fully formed. As with all children, they also have less control over and experience with their environment. For these and other reasons, child homicide offenders, just like other child offenders, are less culpable for their actions and more susceptible to change than adults. See generally, *id.* The Eighth Amendment mandates that the State take these factors into account before imposing its harshest penalty on children. *Id.*

Nor was *Miller* the first time that the Supreme Court recognized that these fundamental and incontestable facts have significant Eighth Amendment consequences. In *Graham v Florida*, the Court held that the Eighth Amendment prohibited life sentences without the possibility of parole for children convicted of non-homicide offenses. Its holding was based on the critical

differences between children and adults that it first noted in *Roper v Simmons*—differences that do not absolve children of responsibility for their crimes, but that do reduce their culpability and undermine any justification for definitively ending their free lives. The Court noted that children lack adults' capacity for mature judgment; that they are more vulnerable to negative external influences; and that their characters are not yet fully formed. *Graham, supra,* p 2026-2027; *Roper, supra*, p 569-570, 573. "The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Roper, supra*, p 570. Children's vulnerability and lack of control over their surroundings means they "have a greater claim than adults to be forgiven for failing to escape negative influences in their . . . environment." *Id.* And "[j]uveniles are more capable of change than are adults," meaning that "their actions are less likely to be evidence of 'irretrievably depraved character,'" even in the case of very serious crimes. *Graham, supra*, p 68; see *Roper, supra*, p 570. Accordingly, "[t]he juvenile should not be deprived of the opportunity to achieve maturity of judgment and self- recognition of human worth and potential"—with "no chance to leave prison before life's end"—because "[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation." *Graham, surpa*, p 79.

Unless *Miller* is applied to Cortez Davis, Raymond Carp and others similarly situated, none of these individuals will have the opportunity to demonstrate their maturity and rehabilitation and will be forced to simply serve a constitutionally impermissible sentence until the die in prison. The fundamental principles of *Miller* and its Eighth Amendment underpinnings – that children are different, that they have lesser culpability than adults and must receive punishment that is proportional to their culpability – require that the justice system provide meaningful hearings. Amici urge this Court to hold that it must do so.

II. The Eighth Amendment Mandates Particular Scrutiny of Life Without Parole Sentences Imposed on Children

A life without parole sentence imposed on a child is not only longer, it is also qualitatively different, and substantially more cruel, than any other sentence, including long-term sentences. As the Supreme Court recognized in *Graham*, a life without parole sentence amounts to the "denial of hope." 560 US 70. And as one child serving such a sentence explained: "It makes you feel that life is not worth living because nothing you do, good or bad, matters to anyone. You have nothing to gain, nothing to lose, you are given absolutely no incentive to improve yourself as a person. It's hopeless."[5]

For this reason, *Miller* recognized that a sentence of life without parole for children is akin "to the death penalty itself":

> Imprisoning an offender until he dies alters the remainder of his life "by a forfeiture that is irrevocable." And this lengthiest possible incarceration is an "especially harsh punishment for a juvenile," because he will almost inevitably serve "more years and a greater percentage of his life in prison than an adult offender." The penalty when imposed on a teenager, as compared with an older person, is therefore "the same . . . in name only." All of that suggested a distinctive set of legal rules: In part because we viewed this ultimate penalty for juveniles to the death penalty, we treated it similarly to that most severe punishment.

132 S Ct 2466 (citations omitted). The same Eighth Amendment considerations that apply to an adult facing the death penalty also "apply when a juvenile confronts a sentence of life (and death) in prison." *Id.*, 132 S Ct 2468. For the reasons we set forth below, justice demands that

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[5] Human Rights Watch, *"When I Die, They'll Send Me Home," Youth Sentenced to Life without Parole in California*, p 60 (Jan. 2008), www.hrw.org/reports/2008/us0108web.pdf; see also *The Rest of Their Lives*, p 63 (2005), http://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf (reporting another child serving a LWOP sentence asking "what am I supposed to hope for except for dying tomorrow maybe?").

each individual serving this exceptionally harsh sentence for a crime committed as a child have his or her sentence re-evaluated under *Miller*'s standards.

A. Michigan has Unique Reasons to Review the Sentencing of Those Children Sentenced to Life Without Parole

Miller's holding applies with particular urgency in Michigan. Nationally, Michigan has the second highest number of youth serving life without the possibility of parole. A confluence of unrelated statutes and circumstances including mandatory sentencing, an expansive definition of first-degree homicide to include felony murder, the mechanism for direct file in adult court beginning at age fourteen, and a troubled indigent defense system have brought us here. While this Court has never reviewed the constitutionality of Michigan's mandatory sentencing scheme that treats children as if they were adults, our judiciary has long been concerned with this legislative framework and has articulated their concern in countless sentencing transcripts over the years.

Indeed, there can be little doubt that Michigan's mandatory sentencing scheme has forced judges to impose life without parole on many children who they otherwise would have given far less severe sentences, for the precise reasons identified in *Graham, Roper,* and *Miller*: the children lacked the degree of depraved intentionality needed to support such a harsh sentence, and instead possessed good prospects for rehabilitations and reform. *Miller* makes plain that those sentences violated the Eighth Amendment when imposed, and that continuing to impose those sentences will result in an ongoing abridgement of those individuals' constitutional rights. The following is a small sample reflective of the fact that applying *Miller* to the individuals covered by this appeal would result not just in an additional layer of procedure with uncertain outcomes but, rather, would in many cases result in a different punishment for those currently serving life without parole.

> Now we come to the third tragedy, the sentencing of [this juvenile]. The Court finds that all the evidence produced at the sentencing hearing demonstrates that the defendant is amenable to treatment. In fact, all of the evidence shows that defendant has been a model detainee while in juvenile custody. The staff at the detention home all describe him as well behaved, courteous and a hard-working student who is now receiving As and Bs. The Court also finds that the defendants' history does not show a repetitive pattern of offenses . . . . The only conclusion that I can reach is that the law deprives me of doing justice in this case . . . . It is further the recommendation, strong recommendation, of this court to the future governors of this state that you be given serious consideration for reprieve, commutation or pardon after serving 20 years in prison.

People v Michael Perry, TR 6/27/1991; Hon. Leopold P. Borrello, Saginaw Cir Court.

> I wish I had some type of options because of the sentence that's mandatory under a conviction for first degree murder. I truly wish that it was a sentence of, for instance, armed robbery: any number of years up to life. But I don't have that option. The sentence provided for first degree murder conviction calls for a mandatory sentence, there's no option with the Court.

People v Bosie Smith, TR 12/31/1992; Hon. William F. Ager, Jr., Washtenaw Cir Court.

> If the Court was granted discretion in imposing sentence in this case, the minimum sentence that I would impose would probably be in the range of 20-25 years, with the maximum life. My thoughts in that regard are that the defendant would be incarcerated in the circumstance until he's approximately 35 or 40 years old, I think, at a minimum, and if he exhibited appropriate behavior during that period of time, he could, should, in my opinion be considered for parole.

People v Matthew Bentley, TR 08/31/1998; Hon. M. Richard Knoblock, Huron Cir Court.

> Well, the first thing the Court is going to say, I don't know how good it will do, I find the limitations of the statute to be totally unfair to everyone concerned. However, I have to live with them and deal with them . . . . So looking all of it, I don't think I have a choice. I think must sentence him as an adult, and I am going to impose a life sentence on the first count of first degree felony murder, and two years on the felony firearm, and it is mandated by statute. I have no choice.

People v Jose Burgos; TR 06/16/1992; Hon. Clarice Jobes, City of Detroit Recorder's Court.

> [T]hose who are 18 or younger at the time they commit a crime, who, like in this case, did not mean for death to occur, or, frankly, for even serious injury to occur,

but it was so obvious that was going to happen that the jury rightly held you to the knowledge that the statute says is enough, we need some kind of a review mechanism after long term of years. I mean 25 years of thereabouts . . . . I'm saying that, in decency, we ought have a mechanism for looking at things, because, frankly, it's simply impossible to predict here in the year 2006 what you're going to be like in a whole other generation in the year 2021 or 31 or 40, whatever . . .I don't know whether the law will change, but it's never going to change unless someone in my position says something. And, as I did in that other file, I'm going to ask that 25 years from now the governor, whoever he or she is of that particular state, take a look at this case to see if maybe you've changed. And, if you have, to consider some mercy.

People v LeeClifton Moore; TR 02/20/2006; Hon. Dennis C. Kolenda, Kent Cir Court.

I know, you didn't want to kill anybody. . . it was something stupid that got out of hand . . . . I did not want this because a person of your age and what you thought was going to happen was completely different from what actually happened . . . . I don't like to have to sentence you on a case like this and had it been up to me it wouldn't have ended this way. . . . It is nothing that I can do to it. That is mandatory, by the statute; that is the only thing I can send her to. It is a waste. It really bothers me to have to do it . . . . This is really the hardest sentence I have ever had to do.

People v Kimberly Simmons; TR 07/04/1988; Hon. Leonard Townsend, Wayne Cir Court.

While I believe that a sentence of a term of years might be somewhere – a term of years somewhere between those two alternatives might be more productive and might produce rehabilitation in time, that is not an option which this Court has today . . . . It is a sad duty to have to sentence a 16-year-old youngster to life in prison, without the possibility of parole. And, as much as this Court's heart goes out to the family of [the victim], I wish it were otherwise. However, under the circumstances, this Court will have no alternative as to what the sentence may be.

People v Leonard Williams; TR 04/24/1991; Hon. Ronald J. Taylor, Berrien Cir Court.

I am sure that you have a lot of good points. I am sure, based on the testimony of several people who came in here to testify about you change in the last six months while in jail, that you have the potential of making the best of what the rest of your life has to offer . . . . The legislature has chosen to take away the judge's discretion in your case, and I have no choice in the sentence on the first-degree-murder charge.

People v Amy Black; TR 07/03/1991; Hon. Ronald H. Pannucci, Muskegon Cir Court.

> [T]he sentence is mandatory and there is nothing that I can do about it, and if there were, I would give some consideration in this case, but there is nothing that I can do about it, because the sentence is already set by law and there is nothing I can do about that.

People v. Robert Morton; TR 02/04/1974; Hon. Henry Heading, Detroit Recorder's Court.

> V]ery frankly, I think he's salvageable. . .I believe somebody's been throwing this young man away from the day he was born. He was not the shooter. . . . He didn't pull the trigger. . . he was convicted of first degree felony murder, and he was an aider and abettor . . . . 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 sentenced 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.

People v. Cortez Davis; TR 12/22/1994; Hon. Vera Massey-Jones, Wayne Cir Court.

This Court has similarly recognized that:

> When all else is said and done and guilt has been determined, a defendant stands before the court for sentence. At that moment no trial judge can be indifferent to the vulnerability and isolation of the human being who awaits that pronouncement. Every judge who has ever had to pronounce sentence knows that the act requires moral courage; the courage to grant leniency to a deserving defendant despite community feeling or victim outrage, or the courage to deprive the defendant of his liberty and his family of their loved one for a substantial period of time when the situation demands it. The unavoidable reality of the human context to which the judge must apply his legal, moral, and factual experience in evaluating the defendant, the act, and its human consequences, is the backbone in that process.

Milbourn, 435 Mich at 700. Yet, Michigan's mandatory life sentencing scheme for youth took away trial court's judges inherent power to impose a sentence proportionate to the crime and culpability of the defendant. As we now know from *Miller*, the imposition of life sentences,

without the possibility of parole, that did not consider the youthful status of the offender are unconstitutional.

Miller requires there to be individualized consideration of mitigating circumstances that might warrant a sentence less severe than lifetime incarceration. *Miller, supra,* 132 S Ct 2475. This rule is not merely suggestive—it is required: "*Graham, Roper,* and our individualized sentencing decisions make clear that a judge or jury *must* have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* (emphasis added); see also *id.*, 132 S Ct 2469 ("[A] sentence need[s] to examine all circumstances before concluding that life without any possibility of parole [i]s the appropriate penalty."). Denying youth this flexibility in sentencing, especially given their diminished culpability as children, prevent them from receiving proportionate punishment—a concept intrinsic to the Eighth Amendment. See *id.*, 132 S Ct 2475 ("By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.").

Miller is nothing less than a specific enunciation of the Eighth Amendment's requirement for fair, accurate, reliable, and proportionate punishment. Mandatory life sentences for children violate these constitutionally indispensable principles because they are neither "graduated" nor "proportioned." See *Miller, supra,* 132 S Ct 2469 ("By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment."). As many judges recognized, in order to ensure that such

individuals receive this "precept of justice"—one that is "implicit in the concept of ordered liberty," see *id.* (quotation marks omitted)—*Miller* must apply retroactively.[6]

To hold otherwise would mean that children, who lack sufficient culpability to receive life without parole sentences and go on to demonstrate their rehabilitation, are nonetheless forced to serve such sentences until their death. The fundamental unfairness of such a result is highlighted in many cases of those serving life without parole, where neither judges, nor victims' family, nor the corrections department would oppose release and yet there is no fair and equitable mechanism to review each case.

B. The Sentences of Individuals Serving Mandatory Life Without Parole Should be Examined in Light of the Shortcomings of Michigan's Indigent Defense System

Michigan's indigent defense system has been identified as extremely problematic. In recognition of problems identified by the National Legal Aid and Defender Association in a June 2008 report, Governor Snyder signed the Michigan Indigent Defense Commission Act in July 2013. MCL 780.981 *et seq.*, to "propos[e] minimum standards for the local delivery of indigent criminal defense services" that are "designed to ensure the provision of indigent criminal defenses that meet constitutional requirements for the effective assistance of counsel" and with

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[6] The Nebraska Supreme Court recently decided that *Miller* applies retroactively, reasoning that: ". . . *Miller* did not simply announce a rule that was designed to enhance accuracy in sentencing. Instead, *Miller* held that a sentencer must consider specific, individualized factors before handing down a sentence of life imprisonment without parole for a juvenile. Effectively, then, *Miller* required a sentencer of a juvenile to consider new facts, i.e. mitigation evidence, before imposing a life imprisonment sentence with no possibility of parole." *State v Mantich*, 287 Neb 320, 340 (2014). The Nebraska Supreme Court also observed: "Moreover, the entire rationale of *Miller* is that when a sentencing scheme fails to give a sentencer a choice between life imprisonment and something lesser, the scheme is necessarily cruel and unusual. Here, it is undisputed that Mantich's sentencer was denied that choice, and it is the absence of that choice that makes the *Miller* rule more substantive than procedural." *Id.* at 341-342.

"identify[ing] and encourag[ing] best practices for delivering the effect assistance of counsel to indigent defendants charged with crimes." MCL 780.985(3) and (4).[7]

The deficiencies in Michigan's indigent defense system weigh especially heavily on the individuals who would be impacted by applying *Miller* retroactively. As *Miller* recognized, child status can negatively affect everything from confessions, a child's ability to assist in his/her own defense and a lack of appreciation of long term consequences sufficient to impair his/her ability to assess plea offers. 132 S Ct 2468-69.[8] Their lack of understanding of adult criminal proceedings and the lack of protections they would have if they were in juvenile court leave children particularly vulnerable to convictions and harsher sentences.[9] See *Graham, supra,* p 78. And while certainly the existence of a troubled counsel system alone may not warrant resentencing, the Supreme Court has recognized that a child is disadvantaged in adult criminal proceedings, even with adequate representation, such that the Court includes adequacy of representation as a factor to be considered in sentencing. *Miller, supra*, 132 S Ct 2465.

This appeal presents this Court with an opportunity to fix these injustices. In Michigan, contrary to the court's concern in *Carp* regarding the cost of resentencing, major Michigan law

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[7] National Legal Aid & Defender Association, *A Race to the Bottom -- Speed & Savings Over Due Process: A Constitutional Crisis* (June 2008), available at http://www.michbar.org/publicpolicy/indigentdefense.cfm.

[8] See also Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary, in The Changing Borders of Juvenile Justice* 379 (2000); Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 Crim. Just. 27, 28 (Summer 2000).

[9] See also *Basic Decency: Protecting the Human Rights of Children: An Examination of Natural Life Sentences for Michigan's Children* at 18, available at http://www.mijuvjustice.org/docs/ACLU%20BasicDecencyReport2012.pdf. (a 2012 report from Second Chances 4 Youth stated that, among children charged with homicide, 75% were represented by court-appointed counsel because their family could not afford to hire an attorney).

firms and prominent counsel have stepped forward to offer their services pro bono to represent over 100 youth in mitigation hearings, as a commitment to justice in these cases. Granting the individuals at issue on this appeal the review of their sentences mandated by *Miller*, and fundamental notions of justice, will not impose any undue strain on the court system.

III. Michigan Retroactivity Standards, Which are Imbued With Notions of Equity and Fairness, also Weigh Strongly in Favor of Retroactivity

Michigan's retroactivity doctrines also compel that *Miller's* rule be applied to all individuals currently serving sentences of mandatory life without parole for crimes they committed as children. In *Carp*, the Appeals Court found that the parole statute which deprives the parole board of jurisdiction over those convicted of first degree homicide offenses MCL 791.234(6)(a) was "unconstitutional as written as applied to juvenile offenders convicted of homicide" after *Miller. People v Carp*, 298 Mich App 472, 538; 828 N W 2d 685, 723 (2012). The appellate court recognized that the statute must fall as constitutionally infirm as it failed to "to acknowledge a sentencing court's discretion to determine that a convicted juvenile homicide offender may be eligible for parole." *Id.* at 531; 828 N W 2d 723.

The conclusion that Michigan's mandatory sentencing scheme violates the Eighth Amendment after *Miller* also settles the question whether *Miller* should be applied retroactively. This Court has long held that when a statute is deemed unconstitutional, it is void *ab initio*. *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135, 144; 253 NW2d 114, 116-117 (1977). Michigan courts have thus repeatedly given retroactive application to decisions declaring statutes unconstitutional. See *id.* at 145, 253 NW2d 116-117; *Briggs v Campbell, Wyant & Cannon Foundry Co*, 379 Mich 160; 150 NW2d 752 (1967); *Johnson v White*, 261 Mich App 332; 682 NW2d 505 (2004); *Horrigan v Klock*, 27 Mich App 107; 183 NW2d 386 (1970). It is also a "general rule . . . that judicial decisions are to be given complete retroactive effect." *Michigan Ed*

Employees Mut Ins Co v Morris, 460 Mich 180, 189; 596 NW2d 142, 146 (1999); *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847, 854 (1986).

This Court's precedents thus mandate that *Miller* be entitled to full retroactive unless there are "factual circumstances [that] might warrant the retroactive application of an unconstitutional statute." *Stanton*, 400 Mich at 147, 253 NW2d 116-117. As we explain below, there are no such circumstances in this case.

A. *Miller* must also be applied retroactively, as it did not announce a new principle of law and was foreseeable

Since the general rule states that judicial decisions finding statutes to be unconstitutional are given full retroactive application, some exception to this rule must apply in order to apply *Miller* prospectively only. This Court has stated that "[a]ppreciation of the effect a change in settled law can have has led this Court to favor only limited retroactivity when overruling prior law." *Tebo v Havlik*, 418 Mich 350, 360; 343 NW2d 181, 183 (1984). "Therefore, the first criterion that must be determined in deciding whether a judicial decision should receive full retroactive application is whether that decision is establishing a new principle of law, either by overruling clear past precedent on which the parties have relied or by deciding an issue of first impression where the result would have been unforeseeable to the parties. If the decision does not announce a new principle of law, then full retroactivity is favored." *Michigan Ed Employees Mut Ins Co*, *supra,* p 190. "A rule of law is new for purposes of resolving the question of its retroactive application ... either when an established precedent is overruled or when an issue of first impression is decided which was not adumbrated by any earlier appellate decision." *Id.* at 190-191 citing *People v Phillips*, 416 Mich 63, 68; 330 N W 2d 366, 368 (1982).

Here, there is no support for the argument that *Miller* overruled "clear past precedent on which the parties have relied." The *Miller* Court specifically stated that "[o]ur ruling thus neither

overrules nor undermines nor conflicts with *Harmelin* [*v Michigan*, 501 US 957, 111 S Ct 2680, 115 L Ed 2d 836 (1991)]." *Miller, supra,* 132 S Ct 2470; see also *id.*, 132 S Ct 2489 (stating that majority "overrules legislative judgments," rather than judicial precedent).

Additionally, there is no argument that the result in *Miller* was unforeseeable. As the *Miller* Court stated:

> We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children. ***Capital punishments, our decisions hold, generally comports with the Eighth Amendment – except it cannot be imposed on children.*** See *Roper*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1; *Thompson*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702. So too, life without parole is permissible for nonhomicide offenses – except, once again, for children. See *Graham*, 560 U.S., at --, 130 S.Ct., at 2030. Nor are these sentencing decisions an oddity in the law. To the contrary, " '[o]ur history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults." *J.D.B.*, 564 U.S., at --, 131 S.Ct. at 2404 (quoting *Eddings*, 455 U.S., at 115-116, 102 S.Ct. 869, citing examples from criminal, property, contract, and tort law). So if (as *Harmelin* recognized) "death is different," children are different too. Indeed, it is the odd legal rule that does not have some form of exception for children. In that context, it is no surprise that the law relating to society's harshest punishments recognizes such a distinction. Cf. *Graham*, 560 U.S., at --, 130 S.Ct. at 2404 (ROBERTS, C.J., concurring in judgment) ("Graham's age places him in a significantly different category from the defendan[t] in ... *Harmelin*.").

Miller, 132 S Ct 2470 (emphasis added). *Miller* was merely the most recent in a line of cases recognizing a distinction between children and adults and is in no way a surprise or unforeseeable.

Miller neither overruled clear past precedent nor produced an unforeseeable result. Accordingly, there is no basis for refusing to apply its ruling immediately. MCL 791.234(6) is clearly unconstitutional, and sentences imposed under its sentencing scheme must be invalidated. The general rule applies, and *Miller* must be applied retroactively.

B. Even if the Court finds that *Miller* did introduce a new principle of law, *Miller* should still apply retroactively as a matter of fair administration of justice

Even if the Court finds that *Miller* did overrule clear past precedent or decided an unforeseeable result, *Miller* should still apply retroactively under the three-prong *Linkletter* test which recognizes that "resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy" and weighs: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Michigan Ed Employees Mut Ins Co, supra,* p 190; *see also Johnson v White*, 261 Mich App 332, 337; 682 NW2d 505, 508 (2004).[10]

Under the purpose prong, a law may be applied retroactively when it concerns the ascertainment of guilt or innocence; however, a new rule of procedure that does not affect the integrity of the fact-finding process should be given prospective effect. *Maxson, supra*, p 385.[11] Under *Miller*, the mandatory imposition of life imprisonment without parole on child defendants completely vitiates the integrity of the fact-finding process, replacing a constitutionally required factual inquiry with a compulsory sentence. The *Miller* Court found that such sentences are constitutional only when a sentencer concludes that the defendant is "the rare juvenile offender whose crime reflects irreparable corruption," rather than the "juvenile offender whose crime reflects unfortunate yet transient immaturity." *Miller, supra,* 132 S Ct 2469. The first prong therefore weighs in favor of retroactive application.

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[10] In *Johnson v White*, the Michigan Court of Appeals suggested that "these three factors appear to comprise a guideline test to be utilized by the courts as a decision-making aid, rather than an affirmative test, the outcome of which would mandate the court's decision." 261 Mich App 337.

[11] In *People v Carp*, 298 Mich App 521-22, the Court of Appeals applied the same three-prong test in concluding that *Miller* should not be applied retroactively. For the reasons stated above, the court erred.

Under the reliance prong, a court examines whether individual persons or entities have been adversely positioned in reliance on the old rule. *Maxson, supra*, p 395. The appellate court in *Carp* argued that it was insufficient to show that "some defendants could receive sentencing relief should we apply *Miller* retroactively, yet this is not generally done. In this instance, there is no guarantee that Carp or any defendant would receive relief because *Miller* is not a categorical ban of life-without-parole sentences." *Carp, supra*, p 521. This completely ignores *Miller*, which stressed that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon" and strongly suggested that it would never be consistent with the Eighth Amendment for a sentence of life without parole to be imposed on "the juvenile offender whose crime reflects unfortunate yet transient immaturity." *Miller, supra*, 132 S Ct 2649. The *Miller* Court went on to note that only about 15% of all youth life without parole juvenile sentences come from the 15 jurisdictions where such sentences are discretionary for children, whereas 85% come from the 29 mandatory jurisdictions, suggesting that "when given the choice, sentencers impose life without parole on children relatively rarely." *Id.*, 132 S Ct 2471 n 10. Rather than only "some" children finding relief under *Miller* as the lower court suggested, the *Miller* Court has already held that it will be the rare, irreparably corrupt child who is not entitled to some relief. This factor therefore also weighs in favor of retroactive application.

Under the administration of justice prong, a court considers the state's interest in the finality of the criminal justice process. *Maxson, supra*, p 397. Here, there can be no such concern regarding the finality of a previous decision, as no decision regarding the impact of a child's immaturity on his or her sentence has been made. Concerns about the effect of "these potential appeals on our limited judicial resources" or about new appeals "inundat[ing] the appellate process" are misplaced. *Carp, supra,* p 714; *Maxson, supra*, p 398. There are a finite number of

children serving mandatory life imprisonment without parole. Moreover, as it will be uncommon for children to be sentenced to life imprisonment without parole once their immaturity is taken into consideration, it is likely that most, if not all, will serve much shorter sentences, thus lessening the overall burden on the state's resources. This factor therefore also weighs in favor of retroactive application.

For all of these reasons, *Miller* should be retroactively applied, even if the Court determines that *Miller* stated a new principle of law.

CONCLUSION

None of the individuals at issue on this appeal have received what the Eighth Amendment requires: consideration of the fact that they were children, with all of the lessened culpability and heightened prospects for rehabilitation that accompanies youth, before they were condemned to live the rest of their lives in prison. Every one of their sentences is defective under the Eighth Amendment unless and until the State gives them this consideration. The integrity of Michigan's criminal sentencing system demands that *Miller* be applied retroactively. Amici urge the Court to hold that *Miller* applies retroactively, and to order that every Michigan inmate currently serving a sentence of life without parole imposed under Michigan's unconstitutional mandatory sentencing scheme be given a resentencing hearing to determine whether his or her sentence comports with the Eighth Amendment under the factors set forth in *Miller*.

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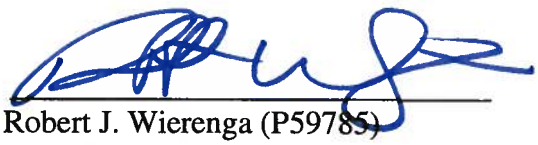
Dated: February 19, 2014

By: 
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Hon. Tom Eggleston	Former Newaygo County Probate Court Judge
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STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

RAYMOND CURTIS CARP

Defendant-Appellant.
/

Supreme Court
Case No. 146478

Court of Appeals
Case No. 307758

St. Clair County Circuit Court
Case No. 06-001700-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

CORTEZ DAVIS,

Defendant-Appellant.
/

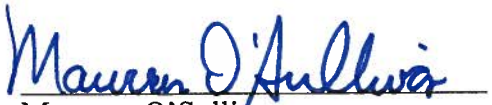
Supreme Court
Case No. 146819

Court of Appeals
Case No. 314080

Wayne County Circuit Court
Case No. 94-002089-FC

CERTIFICATE OF SERVICE

Maureen O'Sullivan states that on February 19, 2014, she caused to be served by first-class U.S. Mail, 2 copies of the Brief of Amici Curiae Ad Hoc Committee of Former Prosecutors, Former Judges, Former Governmental Officials, Leaders of Bar Associations and Law School Deans and Professors, in Support of Defendants-Appellants to: Jason W. Williams, 1441 St. Antoine, 11th Floor, Frank Murphy Hall of Justice, Detroit, MI 48226-2311; Clinton Hubbell, 25140 Lahser Road, Suite 271, Southfield, MI 48033; Timothy K. Morris, 201 McMorran Blvd., Room 3300, Port Huron, MI 48060-5409; Patricia L. Selby, P.O. Box 1077, Grosse Ile, MI 48138; Dawn A. VanHoek, State Appellate Defenders Office, 645 Griswold St., Suite 3300, Detroit, MI 48226; Timothy Baughman, 1441 St. Antoine, 11th Floor, Frank Murphy Hall of Justice, Detroit, MI 48226-2311; Stuart G. Freeman, 3000 Town Center, Suite 1800, Southfield, MI 48075; Daniel S. Korobkin, 2966 Woodward Avenue, Detroit, MI 48201 and one copy on Eric B. Rustuccia, 525 W. Ottawa Street, P.O. Box 30217, Lansing, MI 48909.



Maureen O'Sullivan