No. 13-1348

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2013

STATE OF NEBRASKA,

PETITIONER,

v.

DOUGLAS M. MANTICH,

RESPONDENT.

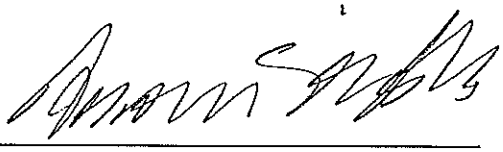
ON PETITION FOR WRIT OF CERTIORARI
TO THE NEBRASKA SUPREME COURT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent Douglas M. Mantich respectfully moves the Court pursuant to Rule 39 of the Supreme Court Rules of Practice and Procedure to proceed *in forma pauperis* for the reason the District Court for the County of Douglas, Nebraska, appointed the undersigned counsel and granted Respondent permission to proceed on appeal before the Nebraska Supreme Court *in forma pauperis* upon filing of Respondent's Notice of Appeal. Neb. Rev. Stat. §29-3002 and §25-2301.01 *et. seq.* A copy of the order to appoint counsel and order granting application to proceed *in forma pauperis* on appeal is attached hereto.

Dated this 6th day of June, 2014.

DOUGLAS MANTICH, Respondent,

By: 

Adam J. Sipple, No. 20557
Johnson and Mock
9900 Nicholas Street, Suite 225
Omaha, NE 68114
(402) 346-8856

Counsel of Record

000471367D01

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	Doc. 134 No. 137
	)	CR 10 9026529
Plaintiff,	)	
	)	
vs.	)	**ORDER GRANTING**
	)	**APPLICATION TO PROCEED**
DOUGLAS M. MANTICH,	)	***IN FORMA PAUPERIS* ON APPEAL**
	)	
Defendant.	)	

This case comes before the Court on the application of Douglas M. Mantich, to proceed on appeal *in forma pauperis*. The Court finds the application should be and hereby is sustained. Mantich is granted leave pursuant to Neb. Rev. Stat. §29-3002 and §25-2301.01 *et. seq.* to proceed on appeal without payment the fees, costs, or security required.

SO ORDERED THIS 12th day of April, 2011.

BY THE COURT:

J Russell Derr, District Court Judge

PREPARED AND SUBMITTED BY:

Adam J. Sipple, No. 20557
Johnson & Mock
1321 Jones Street
P.O. Box 3157
Omaha, NE 68103-0157
(402) 346-8856
Attorney for Defendant

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	Doc. 134 No. 137
	)	CR-10 - 9026529
Plaintiff,	)	
	)	
vs.	)	**ORDER TO APPOINT COUNSEL**
	)	
DOUGLAS M. MANTICH,	)	
	)	
Defendant.	)	

This case comes before the Court on the motion of Douglas M. Mantich, to appoint Adam J. Sipple to represent him on appeal to the Nebraska Supreme Court/Court of Appeals. The Court finds the motion should be and hereby is sustained. Pursuant to *Neb. Rev. Stat.* §29-3004(Reissue 2008) Adam J. Sipple is hereby appointed to represent Douglas M. Mantich on appeal in the Nebraska Supreme Court/Court of Appeals.

SO ORDERED THIS 26 day of April, 2011.

BY THE COURT:

J. Patrick Mullen, District Judge

FILED
2011 APR 28 AM 10:51
CLERK DISTRICT COURT

PREPARED AND SUBMITTED BY:

Adam J. Sipple, No. 20557
Johnson & Mock
P.O. Box 3157
Omaha, NE 68103-0157
(402) 346-8856
Attorney for Defendant

No. 13-1348

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2013

STATE OF NEBRASKA,

PETITIONER,

vs.

DOUGLAS M. MANTICH,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEBRASKA SUPREME COURT

BRIEF IN OPPOSITION

Adam J. Sipple, No. 20557
Johnson and Mock
9900 Nicholas Street, Suite 225
Omaha, NE 68114
(402) 346-8856
ajsipple@johnsonandmock.com

Counsel of Record

QUESTION PRESENTED FOR REVIEW

The question presented by Petitioner fails to present an important federal question warranting review by this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited:

Federal Statutes Cited:

State Statutes Cited:

Constitutional Provisions Cited:

JURISDICTIONAL STATEMENT

The State of Nebraska's statement as to the basis for this Court's jurisdiction is insufficient. Though the judgment below concerns Appellant's claim the life sentence he is serving violates the protections provided by the Eighth Amendment, that issue is not the subject of the State's Petition for Writ of Certiorari. Rather, the Petition invites review of the state court's remedial decision to retroactively apply the holding in *Miller v. Alabama,* 132 S. Ct. 2455 (2012) – that the Eighth Amendment precludes a sentence of mandatory life imprisonment for crimes committed by juveniles – in Respondent's state collateral proceedings.

The non-retroactivity rule established in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060 (1989) does not "limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions." *Danforth v. Minnesota,* 552 U.S. 264, 280-282, 128 S.Ct. 1029, 1041 (2008). The state Supreme Court below recognized its authority to grant retroactive relief under state law, and its decision to do so neither impairs enforcement of the new rule of federal constitutional law, requires interpretation of the Federal Constitution, nor involves federal courts in matters of state government. As such, it does not present a federal question for this Court's review.

It is true that to determine this issue of state law the Nebraska Supreme Court relied upon the *Teague* analysis as a guide. However, neither Article III of the Constitution nor the Congressional enactment defining the scope of this Court's

jurisdiction over state courts, extend to a state court ruling which, though it relies upon a federal judicial doctrine, does not draw into question the validity of any federal or state treaty or statute, or address a claim of any title, right, privilege, or immunity under the United States Constitution. 28 U.S.C.A. § 1257 (West). Here, the judgment below concerns only a state court remedy, not a case arising under the Federal Constitution, Federal Law, or Federal Treaty. *See,* U.S.C.A. Const. Art. III § 2, cl. 1 (limiting this Court's power "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made").

Further, because *Danforth* unquestionably permits the state court below to choose the remedy provided on state collateral review, the ruling sought by the State of Nebraska would have no effect in the case at hand and would amount to dictum. What the State seeks in its Petition is only a ruling regarding whether *Miller* is retroactive in federal habeas proceedings, that is, a ruling correcting the state court's views of federal habeas law. Regardless of the holding on that issue, the Nebraska Supreme Court could render the same judgment on remand, establishing this Court's review as nothing more than an advisory opinion. Article III's "case or controversy" requirement prevents exercise of jurisdiction when a ruling on the issue before the Court would be advisory only. *Michigan v. Long*, 463 U.S. 1032, 1042, 103 S. Ct. 3469, 3477 (1983).

The Petitioner's failure to establish this Court's jurisdiction is discussed in more detail in Respondent's Argument, *infra.*

CONSTITUTIONAL PROVISION INVOLVED

U.S.C.A. Const. Art. III § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

FEDERAL STATUTE INVOLVED

28 U.S.C. §1257(a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

A. The Crime

A jury convicted Respondent of felony murder for his involvement, at age sixteen, in a crime resulting in the death of the victim, Henry Thompson. The facts developed at trial are accurately set forth in the opinion below[1] and, for the most part, are not relevant to the State of Nebraska's Petition for Writ of Certiorari or Respondent's objection thereto.

It must be noted that to the extent the State's Petition suggests "Mantich executed Thompson with a single shot to the back of the head" and then lied about it,[2] the State's version of Respondent's offense is inconsistent with the jury's verdict convicting him of felony murder.[3] Respondent took the stand and testified at trial. Consistent with his initial accounts to police, he testified he did not shoot the victim. Consistent with Respondent's testimony, both Juan Carrera and Angel Huerta, the other two juveniles who were in the van and who testified for the State pursuant to plea agreements, denied seeing anyone hand Appellant a gun, seeing Appellant either with a gun or near the victim, or seeing Appellant shoot the victim.

Prior to closing arguments, the judge granted the prosecutor leave to amend the Information to eliminate the allegation of premeditated murder. As to the first-

---

[1] *State v. Mantich,* 287 Neb. 320, 842 N.W.2d 716 (2014) (Appx, 3-5).

[2] State's Petition, pages 3-4.

[3] Under Nebraska law, the applicable definition of "First Degree Murder" included felony murder *simpliciter*, that is, "if he or she kills another person in the perpetration of or attempt to perpetrate [various felony offenses including robbery and kidnapping]." Neb. Rev. Stat. §28-303(2) (Reissue 1989). Nebraska law allowed conviction for First Degree Murder for aiding and abetting one of the underlying enumerated felonies. Neb. Rev. Stat. §28-206 (Reissue 1989).

degree murder charge, the trial court's instructions were limited to whether Appellant committed felony murder by aiding and abetting kidnapping and/or robbery. This is the issue upon which the jury found Appellant guilty. The verdict did not require a finding Appellant killed Thompson, attempted to kill Thompson, or acted with the intention to kill Thompson.

Thus, though the State repeatedly states Respondent "executed" the victim and claims this recitation of the crime is "taken from" the Nebraska Supreme Court's opinion in Respondent's direct appeal," the record shows Respondent was found guilty only of felony murder. Contrary to the State's claim Respondent "lied and said that Brunzo shot [the victim]," the jury's verdicts are consistent with Respondent's position he did not shoot the victim and is guilty only of encouraging the robbery or kidnapping of the victim by chanting words from the back of the van, while sixteen, high, and drunk.[4]

B. The Sentence

Prosecutors never sought the death penalty. Under Nebraska law, the trial judge had no choice but to impose a sentence of life imprisonment without parole. The State's brief should not be understood to say otherwise.

C. The Decision of the Nebraska Supreme Court

On collateral review under state post-conviction statutes, the Nebraska Supreme Court held that Respondent's sentence must be vacated and directed the

[4] These facts invite consideration by this Court of the interesting issue of whether Respondent's case is a non-homicide requiring application of *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011 (2010) to vacate his life sentence. *See, Miller,* 132 S.Ct. at 2475-76 (Breyer, Sotamayor, JJ., concurring). Respondent has not filed a Cross-Petition, however, because the Nebraska Supreme Court specifically withheld ruling on this issue. (Appx, 33-34).

trial court to resentence pursuant to Nebraska's recently passed sentencing provision providing a range of 40 years to life and requiring consideration of mitigating evidence.

The court acknowledged that "the *Teague/Schriro* retroactivity analysis [this Court] applies in federal habeas actions is not binding upon state courts when deciding issues of retroactivity under state law" and that, consistent with *Danforth v. Minnesota,* 552 U.S. 264, 128 S.Ct. 1029 (2008), it was "free to choose" whether to apply the new rule announced in *Miller* retroactively. The court also noted that it has "adhered" to the *Teague/Schriro* test in the past and found "no reason to depart from that analysis" in this case.[5]

After reviewing federal and state holdings on both sides of the the issue, the Nebraska Supreme Court provided five reasons the holding in *Miller* should be applied retroactively. First, *Miller* did more than "simply announce a rule that was designed to enhance accuracy in sentencing," it "made a certain fact (consideration of mitigating evidence) essential to imposition of a sentence of life imprisonment without parole." The court reasoned "this approaches" what [this Court] defined in *Schriro* as a new substantive rule."[6]

Second, because the *Miller* majority held that a sentence of life imprisonment without parole for a juvenile should not be imposed "except in the rarest of cases," it "amounts to something close to a de facto substantive holding."[7]

---

[5] Appx, 15-16.
[6] Appx, 29-30.
[7] Appx, 30.

Third, "[t]he substantive aspect of the *Miller* rule is also evident when considered in light of the effect of *Miller* on existing Nebraska law." In response to *Miller*, the Nebraska Legislature amended the applicable sentencing statute to provide, instead of mandatory life without parole, a sentencing range of 40 years to life imprisonment. The new law mandates that the sentencing judge "shall consider mitigating factors which led to the commission of the offense." §28-105.02(2). These "are substantive changes to Nebraska law and requirements that sentencers consider new facts prior to sentencing a juvenile convicted of first degree murder."[8]

Fourth, the rationale of *Miller* is that a sentencing scheme is cruel and unusual when it "fails to give a sentence a choice between life imprisonment without parole and something lesser." It is "the absence of that choice that makes the *Miller* rule more substantive than procedural." Consistent with the reasoning of the courts in Massachusetts, Mississippi, and Illinois, the *Miller* rule is substantive because it categorically bans a *mandatory* sentence of life imprisonment without parole for juveniles.[9]

Finally, it would be "terribly unfair" to "refuse to apply the rule announced in *Miller* to a defendant before [the Nebraska Supreme Court] on collateral review when [this Court] has already applied the rule to a defendant before it on collateral

[8] Appx, 30-31.
[9] Appx, 32.

review." "Evenhanded administration of justice is carried out only if Mantich, like Jackson, is entitled to the benefit of the new rule."[10]

REASONS FOR DENYING THE WRIT

I. ARTICLE III OF THE UNITED STATES CONSTITUTION DOES NOT EXTEND JURISDICTION TO THE ISSUE OF STATE LAW PRESENTED BY THE PETITION.

A. Judgment Below Does Not Present Federal Question

The *Teague* rule is designed to limit the power of federal courts to provide collateral relief from state court judgments in federal habeas proceedings. *Danforth v. Minnesota*, 552 U.S. 264, 281, 128 S. Ct. 1029, 1041 (2008); *Beard v. Banks,* 542 U.S. 406, 412, 124 S.Ct. 2504 (2004) ("*Teague*'s nonretroactivity principle acts as a limitation on the power of federal courts to grant habeas corpus relief to state prisoners).

As the Nebraska Supreme Court recognized, the *Teague* rule does not "limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions," even when providing a remedy based on a "new rule" deemed "nonretroactive" under federal habeas corpus doctrine. *Danforth,* 552 U.S. 264, 280-282, 128 S.Ct. 1029, 1041 (2008); *Johnson v. State of N.J.,* 384 U.S. 719, 733, 86 S. Ct. 1772, 1781 (1966)(while concluding new rules from

[10] Contrary to the implication of the State's Petition, the Nebraska Supreme Court expressed its concern with fairness only in regard to the fact this Court applied the rule on collateral review in *Jackson v. Hobbs,* 132 S.Ct. 2455 (2012). Appx, 33.

Miranda and *Escobedo* decisions would apply only prospectively, recognizing "States are still entirely free to effectuate under their own law stricter standards than those we have laid down and to apply those standards in a broader range of cases"). Simply, *Teague* is a rule governing federal habeas proceedings, not state collateral review of convictions under state law.

This understanding of *Teague* is not inconsequential for jurisdictional purposes. Clearly, a federal question is presented when the *Teague* analysis is applied in federal court to overturn a state conviction. In contrast, exercise of a state court's authority to retroactively apply new rules of constitutional law when reviewing its own state's convictions implicates only state law and does not trigger this Court's jurisdiction. *See, Danforth*, 552 U.S. at 280-81, 128 S. Ct. 1029 at 1041.

This distinction is consistent with and illustrated by this Court's application, in *American Trucking Associations, Inc. v. Smith,* 496 U.S. 167, 110 S.Ct. 2323 (1990), of *Teague's* civil counterpart, *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349 (1971). In *American*, this Court reversed the Arkansas Supreme Court's opinion regarding the appropriate remedy for an unconstitutional highway use tax. The *American* opinion reinforces Respondent's argument in two important respects. First, while holding review of the state court judgment *denying* retroactive application of the new rule did present a federal question, the opinion began by recognizing the state court's primary role in determining the issue:

> [I]n the past it has been our practice to abstain from deciding the remedial effects of such a holding. While the relief provided by the State must be in accord with federal constitutional requirements, we

> have entrusted state courts with the initial duty of determining appropriate relief.

496 U.S. at 176, 110 S. Ct. at 2330 [citations omitted]. Since Arkansas decided its remedy would not include retroactive application of the new rule to refund taxes previously paid, the decision presented a federal question regarding whether this met minimum constitutional requirements imposed on taxing states by previous federal decisions. 496 U.S. at 178, 110 S.Ct. at 2331.[11]

Second, the Majority was careful to point out it could "discern no reason apart from [a] misapprehension of the force of *Chevron Oil* that caused it to deny petitioners' request for [refund of certain taxes previously paid by retroactive application of the new rule]." 496 U.S. 167 at188, 110 S. Ct. at 2336. In contrast, the Nebraska Supreme Court afforded retroactive application of the new constitutional rule, implicating no concerns about its enforcement of the rule in state court. Further, while doing so, the court expressed no belief its conclusion was compelled by federal law. To the contrary, it recognized the remedy provided was permitted under state law.

Simply, *Danforth* makes the issue decided below one of state law – one not materially different than would be presented if the Nebraska Legislature passed a law, in response to the *Miller* decision, requiring re-sentencing of Respondent and others, or if, Nebraska executives decided to commute Respondent's sentence in response to *Miller*. Such remedial actions are, under *Danforth*, for the states to

---

[11] Principally, *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Fla.*, 496 U.S. 18, 110 S.Ct. 2238 (1990).

determine, and do not involve interpretation of the Federal Constitution or Federal Statutes.

Thus, if Petitioner's purpose is to win a judgment prohibiting, on the authority of *Teague,* retroactive application of *Miller* under state law, then the Attorney General should be asking to overturn *Danforth.*[12] This is a request Petitioner was likely disinclined to make, as there is no authority for the proposition this Court can constrain a state's decision to retroactively apply a new rule of constitutional law. The *Danforth* Majority recognized as much only six years ago. 552 U.S. at 289, 128 S.Ct. at 1045.

B. Petitioner Requests An Advisory Opinion

Instead of attacking *Danforth* head on, the Nebraska executive seeks an advisory opinion. The Nebraska Supreme Court decided the issue of state law left by *Danforth.* On sound reasoning presenting no threat to federal constitutional principles, the court below decided the *Miller* rule should be applied retroactively to convictions on collateral review in state court. Though the court followed a federal *Teague/Shriro* law analysis to reach this result, it did so after recognizing its exclusive authority, under state law, to decide the issue.[13] Nonetheless, the State of Nebraska seeks from this Court a judgment providing a different interpretation of

[12] Such an effort would also implicate this Court's holdings that, at least in federal habeas proceedings, state executives may waive Teague's retroactivity bar. *Danforth,* 552 U.S. 289, 128 S. Ct. at 1046 *citing Collins v. Youngblood,* 497 U.S. 37, 41, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (States can waive a *Teague* defense, during the course of litigation, by expressly choosing not to rely on it); *see also,* 28 U.S.C. §2254(b)(3).

[13] Appx, 15-26 ("In other words, [under *Danforth]* states can give broader effect to new rules than is required by the *Teague/Schriro* test").

Teague under federal law, apparently with hope the Nebraska Supreme Court would alter its approach under state law.[14]

Because it decided an issue of state law sufficient to support the judgment, the state court's holding would not be affected by resolution of the federal issue in Petitioner's favor. As such, the decision Petitioner seeks in this Court would be advisory only. *Michigan v. Long*, 463 U.S. 1032, 1042, 103 S. Ct. 3469, 3477 (1983) ("if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion") *citing Herb v. Pitcairn,* 324 U.S. 117, 126, 65 S.Ct. 459, 463 (1945); *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2554 (1991)("if resolution of a federal question cannot affect the [state court] judgment, there is nothing for the Court to do"); *Tyler v. Cain,* 533 U.S. 656, 668, 121 S. Ct. 2478, 2485 (2001) ("We cannot decide today whether [*Cage v. Louisiana*] is retroactive to cases on collateral review, because that decision would not help Tyler in this case. Any statement on *Cage's* retroactivity would be dictum, so we decline to comment further on the issue").

In *Long,* this Court adopted a new approach for use when it unclear whether the state court judgment rested on federal law or an adequate and independent state law basis, relying on federal precedents as a guide. The Court held, "If a state

---

[14] There is no merit to Petitioner's lead suggestion that all concerned "deserve a uniform answer to the question presented." (Petition, 6). As Justice Stevens put it in *Danforth,* "Nonuniformity is, in fact, an unavoidable reality in a federalist system of government." 552 U.S.at 280, 128 S. Ct. 10041.

court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." 463 U.S. at 1041, 103 S. Ct. at 3476.

Here, the Nebraska Supreme Court provided that "plain statement" by its clear recognition of *Danforth's* holding that "the *Teague/Schriro* retroactivity analysis it applies in federal habeas actions is not binding upon state courts when deciding issues of retroactivity under state law," and accordingly, "states can give broader effect to new rules than is required by *Teague/Schriro* test."[15] The court went on to review and rely upon precedents from various courts, including eight state appellate courts, before ruling in favor of retroactive application. There is no suggestion the court treated the *Teague* line of cases as compelling the result.

For these reasons, this Court understandably cannot affect the judgment below by requiring Nebraska to deny Respondent relief, or by requiring him to serve out a sentence that would be unconstitutionally cruel and unusual if imposed today. Petitioner's pursuit of an advisory opinion, through its request for a Writ of Certiorari, should be denied.

[15] Appx, 15-16.

II. PETITIONER DEMONSTRATES NO SPLIT IN AUTHORITY WARRANTING THIS COURT'S INTERVENTION.

There is no "hopeless split" between the states' highest courts and the federal courts, or between the federal circuit courts, on any important federal question.[16] As discussed above, state court holdings affording the remedy of retroactive application do not present a federal question at all.[17] Moreover, the truth is only one federal circuit court, the United States Court of Appeals for the Fifth Circuit in *Craig v. Cain,* No. 12-30035, 2013 WL 69128 (5th Cir. 2013)(unpublished opinion), has concluded *Miller* is not retroactive. None have held it is retroactive on federal collateral review. As such, the score in the United States circuit courts is 1-0.

In *In re Morgan,* 713 F.3d 1365, 1367 (11th Cir. 2013), *rehearing en banc denied,* 717 F.3d 1186 (2013), Morgan was seeking permission pursuant 28 U.S.C. §2255 to file a successive post-conviction motion attacking his federal sentence. That statute requires, in relevant part, a "prima facie showing" the application is based on a new rule of constitutional law "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. §2255(h). The United States Court of Appeals correctly decided this Court has not so held. 713 F.3d at 1367. Accepting *Morgan's* invitation to engage a *Teague* analysis, the circuit court declined to find that "multiple decisions of the Supreme Court necessarily dictate retroactivity of the new rule." 713 F.3d at 1367 (11th Cir. 2013) *citing In re Moss,* 703 F.3d 1301,

---

[16] Petition, 6.

[17] This is perhaps the reason executive officials in Mississippi, Iowa, and Massachusetts declined to file Petitions. To date, no State other than Nebraska has sought further review of a holding applying *Miller* retroactively.

1303 (11th Cir. 2013). This is not the same as determining the merits of the retroactivity issue.

Similarly, the holding of the United States Court of Appeals for the Third Circuit, in *In re Pendleton,* 732 F.3d 280 (3rd Cir. 2013), was limited to whether petitioners made a prima facie showing supporting a successive petition. In that case, the circuit court joined other circuits in finding the petitioner had met the prima facie standard, which requires only a "sufficient showing of possible merit to warrant a fuller exploration by the district court." 732 F.3d 280, 282-83 *citing Wang v. United States,* No. 13–2426 (2d Cir. July 16, 2013) (granting motion to file a successive habeas corpus petition raising a Miller claim); *In re James,* No. 12–287 (4th Cir. May 10, 2013) (same). In two other cases, the United States Department of Justice conceded the prima facie showing had been met. *Evans-Garcia v. United States,* 2014 U.S. App. LEXIS 3855, 8-9, fn2 (1st Cir. 2014); *Johnson v. United States,* 720 F.3d 720 (8th Cir.2013) (per curiam) (same). Again, these holdings fall short of a holding on the merits of the retroactivity issue.

Thus, only the Fifth Circuit has decided whether the *Teague* analysis makes *Miller* retroactive. This lone opinion, deciding an issue distinct from the issue of state law decided below, neither establishes a basis for issuance of the writ under either Rule 10, or jurisdiction of this Court under 28 U.S.C. §1257.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

Adam J. Sipple, No. 20557
Johnson and Mock
9900 Nicholas Street, Suite 225
Omaha, NE 68114
(402) 346-8856

Counsel for Respondent

No. 13-1348

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2013

STATE OF NEBRASKA,

PETITIONER,

v.

DOUGLAS M. MANTICH,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEBRASKA SUPREME COURT

APPENDIX

STATE OF NEBRASKA, APPELLEE, v.
DOUGLAS M. MANTICH, APPELLANT.

No. S-11-301.

SUPREME COURT OF NEBRASKA

287 Neb. 320; 2014 Neb. LEXIS 16

February 7, 2014, Filed

COUNSEL: Adam J. Sipple, of Johnson & Mock, for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

JUDGES: HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, AND CASSEL, JJ. CASSEL, J., dissenting. HEAVICAN, C.J., joins in this dissent.

OPINION BY: STEPHAN

OPINION

STEPHAN, J.

In 1994, Douglas M. Mantich was convicted of first degree murder and use of a firearm to commit a felony. He was sentenced to life imprisonment for the murder conviction and 5 to 20 years' imprisonment for the firearm conviction. The murder was committed when Mantich was 16 years old. On direct appeal, we affirmed his convictions and life imprisonment

sentence and vacated and remanded his firearm sentence for resentencing.[1]

In 2010, Mantich filed an amended postconviction motion alleging his life imprisonment sentence violated the Eighth Amendment's prohibition on cruel and unusual punishment because it was (1) categorically prohibited under the U.S. Supreme Court's holding in *Graham v. Florida*[2] and (2) grossly disproportionate to the offense for which he was convicted. Mantich also alleged that the attorney who represented him at his trial and on direct appeal was ineffective in not asserting these Eighth Amendment claims. The district court denied the postconviction motion without conducting an evidentiary hearing, and Mantich appealed from that order.

We heard oral arguments in the appeal on October 7, 2011. On July 11, 2012, we set the case for reargument and ordered supplemental briefing after the U.S. Supreme Court held in *Miller v. Alabama*[3] that the Eighth Amendment forbids a state sentencing scheme that mandates life in prison without the possibility of parole for a juvenile offender convicted of homicide. We now hold that Mantich's life imprisonment sentence is unconstitutional under *Miller*.

---

[1] *State v. Mantich,* 249 Neb. 311, 543 N.W.2d 181 (1996).

[2] *Graham v. Florida,* 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

[3] *Miller v. Alabama,* ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Cite as 287 Neb. 320

I. FACTS

On December 5, 1993, a gathering was held to mourn the death of a "Lomas" gang member. Several members of the gang attended the party, including Mantich, Gary Brunzo, Daniel Eona, Juan Carrera, and Angel Huerta. At the gathering, Mantich consumed between 5 and 10 beers and smoked marijuana in a 2½-hour period.

Sometime after 1 a.m., Carrera decided that he wanted to steal a car and commit a driveby shooting of a member of a rival gang. While holding a gun, Eona responded that he also wanted to steal a car and talked about "jackin' somebody" and "putting a gun to their head." Brunzo and Eona then walked toward Dodge Street to steal a vehicle. They returned about 20 minutes later in a stolen red minivan, and Carrera and Huerta got in. Over his girlfriend's objection and attempt to physically restrain him, Mantich also got into the van.

The van had no rear seats. Eona was in the driver's seat, and Brunzo was in the front passenger seat. Carrera sat behind the driver's seat; Huerta sat on the passenger side, close to the sliding side door; and Mantich sat behind Carrera and Huerta, toward the back of the van. After a short time, Mantich realized that a man, later identified as Henry Thompson, was in the van. Thompson was kneeling between the driver's seat and the front passenger seat with his hands over his head and his head facing the front of the van.

The gang members began chanting "Cuz" and "Blood." Mantich thought the purpose was to make Thompson believe they were affiliated with a different gang. Eona demanded Thompson's money, and Brunzo told Thompson they were going to shoot him. Mantich saw Brunzo and Eona poke Thompson in the head with their guns. Eventually, a shot was fired and Thompson was killed. Thompson's body was pulled out of the van and left on 13th Street.

The group then drove to Carrera's house so he could retrieve his gun. After this, they drove by a home and fired several shots at it from the vehicle. Later, they sank the van in the Missouri River and walked back to 13th Street. From there, Mantich and Huerta took all the guns and went to Huerta's house to hide them. Brunzo, Eona, and Carrera walked toward the area of Thompson's body.

After hiding the guns with Huerta, Mantich walked to Brian Dilly's house. While still intoxicated, Mantich told Dilly and Dilly's brothers about the events of the night. Mantich claimed he had pulled the trigger and killed Thompson. When the 6 o'clock news featured a story on the homicide, Mantich said, "'I told you so,'" and "'I told you I did it.'" About an hour after the newscast, Mantich told Dilly that Brunzo was actually the person who shot and killed Thompson. The police later learned about Mantich's conversations with Dilly, and arrest warrants were issued for Mantich, Brunzo, Eona, and Carrera. Mantich was arrested on January 4, 1994.

Mantich agreed to talk with Omaha police about what happened and initially claimed that Brunzo shot Thompson. The police told Mantich that statements were being obtained from Brunzo, Eona, and Carrera and that Mantich's statement was inconsistent with the information the police had acquired. The police also told Mantich that Dilly said Mantich confessed to shooting Thompson. Mantich admitted telling Dilly he shot Thompson, but explained that it was a lie and that he was only trying to look like "a bad ass." Mantich claimed that he had not shot anyone and that Brunzo was the shooter.

The police then told Mantich they knew what happened and assured Mantich that his family and girlfriend "would not abandon him" if he told the truth. At this point, Mantich admitted that he had pulled the trigger. Mantich said, "'I'm sorry it happened. I wished it wouldn't have happened.'" Mantich further stated, "'They handed me the gun and said shoot him, so I did it.'" Mantich again confessed during a taped statement to shooting Thompson.

Mantich testified in his own behalf at trial. He acknowledged his statements to Dilly and the police that he had shot Thompson, but told the jury that he had not shot Thompson. On September 26, 1994, the jury returned a verdict of guilty on one charge of first degree murder and one charge of use of a firearm to commit a felony.

1. SENTENCING AND DIRECT APPEAL

In October 1994, the district court sentenced Mantich to a term of life imprisonment on the first degree murder conviction and to 5 to 20 years' imprisonment on the conviction of use of a firearm to commit a felony. Mantich's life imprisonment sentence carries no possibility of release on parole unless the Board of Pardons commutes his sentence to a term of years.[4] The court ordered the sentences to run consecutively.

On direct appeal, Mantich assigned various errors, including that the evidence was insufficient to support his convictions. He did not assert an Eighth Amendment claim with respect to his life imprisonment sentence. We found no merit in any of his assignments of error, but concluded that there was plain error resulting from a failure to give credit for time served on his sentence for use of a firearm to commit a felony. We therefore affirmed his convictions but vacated the firearm sentence and remanded the cause with directions to resentence Mantich, giving him credit for time served.[5]

---

[4] *See*, Neb. Const. art. IV, § 13; Neb. Rev. Stat. § 83-1,126 (Reissue 2008); *Poindexter v. Houston,* 275 Neb. 863, 750 N.W.2d 688 (2008).

[5] *See Mantich, supra* note 1.

2. POSTCONVICTION PROCEEDINGS

Mantich filed a pro se motion for postconviction relief on September 25, 2006. The court dismissed the first five grounds of the motion, reasoning they were the same grounds Mantich raised on direct appeal. The court did not dismiss Mantich's claim of ineffective assistance of counsel and appointed counsel to represent Mantich with respect to that claim. That attorney filed the operative amended motion for postconviction relief on August 31, 2010.

The amended motion asserted Mantich's sentence of life imprisonment without parole violated the Eighth Amendment because it was (1) categorically prohibited under *Graham v. Florida*[6] and (2) disproportionate to the offense for which he was convicted. In *Graham,*[7] the U.S. Supreme Court held that "the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender." The amended motion also alleged the attorney who represented Mantich during trial and on direct appeal was ineffective for not objecting to the life imprisonment without parole sentence on Eighth Amendment grounds.

The State moved to dismiss Mantich's amended motion, asserting *Graham* did not apply because Mantich was convicted of a homicide offense. The

---

[6] *Graham, supra* note 2.

[7] *Id.,* 560 U.S. at 75.

State further contended that Mantich's counsel was not ineffective.

On March 17, 2011, the district court denied Mantich's amended motion without an evidentiary hearing. The court concluded that Mantich's life imprisonment sentence was not categorically barred under *Graham* or any decision of this court. Mantich filed this timely appeal. While it was pending, the U.S. Supreme Court decided *Miller v. Alabama.*[8] *Miller* held that a sentence of mandatory life imprisonment without parole for a juvenile violated the Eighth Amendment's prohibition on cruel and unusual punishment. We ordered reargument and supplemental briefing on the effect of *Miller* on Mantich's postconviction motion.

II. ASSIGNMENTS OF ERROR

In the original appeal from the denial of postconviction relief, Mantich assigned, restated and summarized, that the district court erred in (1) failing to vacate his sentence pursuant to the holding of *Graham,* (2) failing to vacate his sentence as unconstitutionally disproportionate to the offense of felony murder, and (3) failing to hold an evidentiary hearing on the issues presented by his ineffective assistance of counsel and Eighth Amendment claims. After we ordered supplemental briefing in light of *Miller,*

[8] *Miller, supra* note 3.

Mantich reasserted all of the assignments of error raised in his initial brief. He also assigned, restated and consolidated, that his life imprisonment sentence is a violation of the 8th and 14th Amendments based on the U.S. Supreme Court's decision in *Miller*.

III. STANDARD OF REVIEW

Whether a sentence violates the Eighth Amendment's cruel and unusual punishment clause presents a question of law.[9] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[10]

IV. ANALYSIS

1. *MILLER V. ALABAMA* APPLIES TO MANTICH

In *Miller v. Alabama*,[11] the Court held that the "Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." The Court reached its conclusion by applying two lines of precedent. First, the Court recognized two previous juvenile cases, *Graham v. Florida*[12] and *Roper v.*

---

[9] *See State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003).

[10] *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008).

[11] *Miller*, *supra* note 3, 132 S. Ct. at 2469.

[12] *Graham*, *supra* note 2.

Simmons.[13] *Graham* held that a juvenile could not be sentenced to life imprisonment without parole for a nonhomicide offense. *Roper* held that a juvenile could not be sentenced to death. Both thus announced categorical bans on sentencing practices as they apply to juveniles. The Court in *Miller* reasoned that *Graham* and *Roper* established that "children are constitutionally different from adults for purposes of sentencing."[14] Specifically, the Court in *Miller* noted that compared to adults, children lack maturity and have an underdeveloped sense of responsibility, are more vulnerable to outside influences and pressures, and have yet to fully develop their character. Because of these differences, the Court reasoned juveniles have "diminished culpability and greater prospects for reform."[15]

Second, the *Miller* Court recognized prior Court jurisprudence requiring individualized decisionmaking in capital punishment cases.[16] It then applied this jurisprudence to the imposition of life imprisonment on juveniles by reasoning that a life imprisonment

---

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

[14] *Miller, supra*, note 3, 132 S. Ct. at 2464.

[15] *Id.*

[16] *Miller, supra* note 3. *See, Sumner v. Shuman,* 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (1987); *Eddings v. Oklahoma,* 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); *Lockett v. Ohio,* 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Woodson v. North Carolina,* 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

without parole sentence for a juvenile is tantamount to a death sentence for an adult.[17] According to the Court, because the Eighth Amendment when applied to adults requires individualized sentencing prior to the imposition of a death sentence, the Eighth Amendment when applied to juveniles requires individualized sentencing prior to the imposition of a sentence of life imprisonment without parole.[18]

The threshold question presented to us in this appeal is whether the holding in *Miller* applies to Mantich so that his sentence must be vacated and this cause remanded for a new sentencing hearing. We held in *State v. Castaneda*[19] that life imprisonment sentences imposed on juveniles in Nebraska prior to *Miller* were mandatory sentences and were equivalent to life imprisonment without parole. But Mantich's life imprisonment sentence was imposed and his first degree murder conviction became final years before *Miller* was decided. He is entitled to be resentenced only if the rule announced in *Miller* applies retroactively to cases that became final prior to its pronouncement, i.e., cases on collateral review.

---

[17] *Miller, supra* note 3.

[18] *Id.*

[19] *State v. Castaneda,* 287 Neb. 289, ___ N.W.2d ___ (2014).

(a) Retroactivity Test

In its 1989 decision in *Teague v. Lane,*[20] the U.S. Supreme Court set forth a test for determining when a new rule of constitutional law will be applied to cases on collateral review. Before announcing the test, however, the Court emphasized that "the question 'whether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision.'"[21] The Court explained that "[r]etroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[22]

According to *Teague,* "new rules should always be applied retroactively to cases on direct review, but . . . generally they should not be applied retroactively to criminal cases on collateral review."[23] The rationale for the distinction is that collateral review is not designed as a substitute for direct review and that

---

[20] *Teague v. Lane,* 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

[21] *Id.,* 489 U.S. at 300, quoting Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law,* 79 Harv. L. Rev. 56 (1965).

[22] *Teague, supra* note 20, 489 U.S. at 300.

[23] *Id.,* 489 U.S. at 303.

the government has a legitimate interest in having judgments become and remain final.[24]

Teague articulated two exceptions to the general rule of nonretroactivity for cases on collateral review. First, a new rule should be applied retroactively if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[25] Second, a new rule should be applied retroactively if it "requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'"[26] The ultimate holding in Teague was this: "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[27]

Since *Teague,* the Court has refined the retroactivity analysis. The most significant refinement occurred in *Schriro v. Summerlin.*[28] The issue in

---

[24] *See Teague, supra* note 20.

[25] *Id.,* 489 U.S. at 307, quoting *Mackey v. United States,* 401 U.S. 667, 91 S. Ct. 1160, 28 L. Ed. 2d 404 (1971) (Harlan, J., concurring in part, and in part dissenting).

[26] *Id.,* quoting *Mackey, supra* note 25 (quoting *Palko v. Connecticut,* 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937), *overruled on other grounds, Benton v. Maryland,* 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)).

[27] *Teague, supra* note 20, 489 U.S. at 310.

[28] *Schriro v. Summerlin,* 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

Schriro was whether the Court's decision in *Ring v. Arizona*[29] applied retroactively to a death penalty case on federal habeas review. In deciding this, the Court stated:

> When a decision of this Court results in a "new rule," that rule applies to all criminal cases still pending on direct review. . . . As to convictions that are already final, however, the rule applies only in limited circumstances. New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, . . . as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. . . . Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him.[30]

The Court explained that although it had sometimes referred to rules of this type as "falling under an exception to *Teague*'s bar on retroactive application of procedural rules, . . . they are more accurately

---

[29] *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[30] *Schriro, supra* note 28, 542 U.S. at 351-52 (citations omitted).

characterized as substantive rules not subject to the bar."[31]

Schriro further explained that new "rules of procedure" generally do not apply retroactively.[32] The only exception is those rules that are "'"watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.'"[33] This class of rules is extremely narrow.[34]

In 2008, the U.S. Supreme Court ruled that the *Teague/Schriro* retroactivity analysis it applies in federal habeas actions is not binding upon state courts when deciding issues of retroactivity under state law.[35] In doing so, the Court noted that a state court is "'free to choose the degree of retroactivity or prospectivity which [it] believe[s] appropriate to the particular rule under consideration, so long as [it] give[s] federal constitutional rights at least as broad a scope as the United States Supreme Court requires.'"[36] In other words, states can give broader

---

[31] *Id.*, 542 U.S. at 352 n.4 (citations omitted).

[32] *Id.*, 542 U.S. at 352.

[33] *Id.*

[34] *Id.*

[35] *Danforth v. Minnesota*, 552 U.S. 264, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008).

[36] *Id.*, 552 U.S. at 276, quoting *State v. Fair*, 263 Or. 383, 502 P.2d 1150 (1972).

effect to new rules than is required by the *Teague/Schriro* test.[37]

We have adhered to the *Teague/Schriro* test in the two cases in which we have addressed the retroactivity of a new rule announced by the U.S. Supreme Court to cases on state postconviction review,[38] and we see no reason to depart from that analysis.

(b) Court Precedent

It is very clear that *Miller* announced a new rule. This is so because the rule announced in *Miller* was not dictated by precedent existing at the time Mantich's first degree murder conviction became final.[39] The new rule can apply to Mantich, who is before this court on collateral review, if it is either a substantive rule or a watershed rule of criminal procedure.[40]

According to *Schriro,* the key distinction in the retroactivity analysis is whether the new rule is substantive or procedural.[41] *Schriro* held that

---

[37] *Danforth, supra* note 35.

[38] *State v. Lotter,* 266 Neb. 245, 664 N.W.2d 892 (2003); *State v. Reeves,* 234 Neb. 711, 453 N.W.2d 359 (1990), *cert. granted and judgment vacated* 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409 (1990).

[39] *See Whorton v. Bockting,* 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007).

[40] *Id.*; *Schriro, supra* note 28.

[41] *Schriro, supra* note 28.

substantive rules *include* those that (1) narrow the scope of a criminal statute by interpreting its terms or (2) place particular conduct or persons covered by the statute beyond the State's power to punish. The second category encompasses "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[42] Substantive rules apply retroactively because they 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."[43]

It is clear that categorical bans on sentences are substantive rules.[44] Rules forbidding imposition of the death sentence on persons with mental retardation[45] or on juveniles[46] and a rule forbidding life imprisonment for a juvenile convicted of a nonhomicide offense[47] have been considered substantive rules.[48]

---

[42] *Penry v. Lynaugh,* 492 U.S. 302, 330, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), *abrogated on other grounds, Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

[43] *Schriro, supra* note 28, 542 U.S. at 352, quoting *Bousley v. United States,* 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998).

[44] *See Penry, supra* note 42.

[45] *Atkins, supra* note 42.

[46] *Roper, supra* note 13.

[47] *Graham, supra* note 2.

[48] *See, e.g., Allen v. Buss,* 558 F.3d 657 (7th Cir. 2009) (*Atkins*); *Nixon v. State,* 2 So. 3d 137 (Fla. 2009) (*Atkins*); *McStoots v. Com.,* 245 S.W.3d 790 (Ky. App. 2007) (*Roper*);

(Continued on following page)

In comparison, rules that "regulate only the *manner of determining* the defendant's culpability are procedural."[49] They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.[50]

In the sentencing context, the Court has found a number of rules to be procedural. In *Schriro v. Summerlin,*[51] the Court addressed whether the rule announced in *Ring v. Arizona*[52] applied retroactively to cases on collateral review. *Ring* held that a jury, and not a judge, had to find an aggravating circumstance necessary for imposition of the death penalty. *Schriro* held this rule was procedural, noting it merely "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death."[53] It noted that rules that "allocate decisionmaking authority in this fashion

---

Duncan v. State, 925 So. 2d 245 (Ala. Crim. App. 2005) (*Roper*); *People v. Rainer,* 2013 COA 51, 2013 WL 1490107 (Colo. App. 2013) (*Graham*); *Bonilla v. State,* 791 N.W.2d 697 (Iowa 2010) (*Graham*).

[49] *Schriro, supra* note 28, 542 U.S. at 353.

[50] *Schriro, supra* note 28.

[51] *Id.*

[52] *Ring, supra* note 29.

[53] *Schriro, supra* note 28, 542 U.S. at 353.

are prototypical procedural rules."[54] Notably, however, the Court stated:

> This Court's holding that, *because* [a state] has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.[55]

In *Lambrix v. Singletary,*[56] the Court addressed whether the rule announced in *Espinosa v. Florida*[57] applied retroactively to cases on collateral review. *Espinosa* held that if a sentencing judge in a state that requires specified aggravating circumstances to be weighed against any mitigating circumstances at the sentencing phase of a capital trial is required to give deference to a jury's advisory sentencing recommendation, then neither the jury nor the judge is constitutionally permitted to weigh invalid aggravating circumstances. Without extensive analysis, the *Lambrix* Court concluded this rule did not prohibit the imposition of capital punishment on a particular class of persons.

---

[54] *Id.*

[55] *Id.,* 542 U.S. at 354.

[56] *Lambrix v. Singletary,* 520 U.S. 518, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997).

[57] *Espinosa v. Florida,* 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992).

In *Sawyer v. Smith*,[58] the Court addressed whether the rule announced in *Caldwell v. Mississippi*[59] applied retroactively to cases on collateral review. *Caldwell* held that the Eighth Amendment prohibits imposition of the death penalty by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the sentence rests elsewhere. The *Sawyer* Court concluded the rule was not retroactive, because it was simply a procedural rule "designed as an enhancement of the accuracy of capital sentencing."[60]

(c) *Miller* and Other Jurisdictions

A number of jurisdictions have considered whether *Miller* announced a rule that is to be applied retroactively. The results are varied. The primary point of dissension is whether the rule announced in *Miller* is substantive.

The Louisiana Supreme Court held in *State v. Tate*[61] that the rule announced in *Miller* was a procedural one, largely because the Court in *Miller*

---

[58] *Sawyer v. Smith,* 497 U.S. 227, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990).

[59] *Caldwell v. Mississippi,* 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).

[60] *Sawyer; supra* note 58, 497 U.S. at 244.

[61] *State v. Tate,* No. 2012-OK-2763, 2013 La. LEXIS 2376, 2013 WL 5912118 at *6 (La. Nov. 5, 2013), quoting *Miller; supra* note 3.

specifically stated that "'[o]ur decision does not categorically bar a penalty for a class of offenders or type of crime.'" Louisiana reasoned that *Miller* simply "altered the range of **permissible methods**" for determining whether a juvenile could be sentenced to life imprisonment without parole.[62] In *Com. v. Cunningham*[63] the Pennsylvania Supreme Court adopted similar reasoning, holding that "by its own terms, the *Miller* holding 'does not categorically bar a penalty for a class of offenders.'" A U.S. district court in Virginia has also adopted this rationale.[64]

The Minnesota Supreme Court held in *Chambers v. State*[65] that the rule announced in *Miller* was procedural and not substantive because it did not "eliminate the power of the State to impose the punishment of life imprisonment without the possibility of release upon a juvenile offender who has committed a homicide offense." Instead, it reasoned that *Miller* simply requires "'that a sentencer follow *a certain process* – considering an offender's youth and attendant characteristics – before imposing'" a sentence of life imprisonment without parole.[66] The U.S.

---

[62] *Id.*

[63] *Com. v. Cunningham,* 81 A.3d 1, 10 (Pa. 2013), quoting *Miller, supra* note 3.

[64] *Johnson v. Ponton,* No. 3:13-CV-404, 2013 U.S. Dist. LEXIS 149021, 2013 WL 5663068 (E.D. Va. Oct. 16, 2013) (memorandum opinion).

[65] *Chambers v. State,* 831 N.W.2d 311, 328 (Minn. 2013).

[66] *Id.,* quoting *Miller, supra* note 3.

Court of Appeals for the 11th and 5th Circuits and the Michigan Court of Appeals have all adopted similar reasoning.[67] The 11th Circuit placed particular reliance on *Penry v. Lynaugh.*[68] In *Penry,* the Court held that a new rule "prohibiting a certain category of punishment for a class of defendants because of their status or offense" is retroactive, but only where a class cannot be subjected to the punishment "regardless of the procedures followed."[69] The 11th Circuit reasoned that *Miller* is not substantive, because it merely altered the range of permissible methods for determining whether a juvenile's conduct is punishable by life imprisonment without parole and did not completely forbid a jurisdiction from imposing a sentence of life imprisonment without parole.[70]

But at least four jurisdictions have reasoned that the rule announced in *Miller* is a substantive one, largely because it fits into the second category of substantive rules announced in *Schriro.* The Illinois Court of Appeals held in *People v. Morfin*[71] that *Miller*

---

[67] *See In re Morgan,* 717 F.3d 1186 (11th Cir. 2013) (en banc); *Craig v. Cain,* No. 12-30035, 2013 U.S. App. LEXIS 431, 2013 WL 69128 (5th Cir. Jan. 4, 2013) (unpublished opinion); and *People v. Carp,* 298 Mich. App. 472, 828 N.W.2d 685 (2012).

[68] *Penry, supra* note 42.

[69] *Id.,* 492 U.S. at 330.

[70] *In re Morgan, supra* note 67.

[71] *People v. Morfin,* 2012 IL App (1st) 103568, ¶ 56, 981 N.E.2d 1010, 1022, 367 Ill. Dec. 282, 294 (2012).

was a substantive rule because it "mandates a sentencing range broader than that provided by statute for minors convicted of first degree murder." A concurring opinion emphasized that the rule was substantive because *Miller* forbids an entire category of sentence – a mandatory sentence of life imprisonment for juveniles.[72] The concurrence also reasoned that a new rule that did not prohibit a certain sentence in every case but prohibited the mandatory imposition of that sentence was a substantive rule and not a procedural one.[73] Similarly, in *Jones v. Mississippi,*[74] the Supreme Court of Mississippi reasoned that *Miller* was a substantive rule because it "explicitly foreclosed imposition of a *mandatory* sentence of life without parole on juvenile offenders." It further reasoned that *Miller* required a substantive change in Mississippi law, because it required legislative modification of the existing law that had no provision for following the dictates of *Miller.* Very recently, the Supreme Judicial Court of Massachusetts held the *Miller* rule was substantive because it "forecloses the imposition of a certain category of punishment – mandatory life in prison without the possibility of parole – on a specific class of defendants."[75] And the

---

[72] *Morfin, supra* note 71 (Sterba, J., specially concurring).

[73] *Id.*

[74] *Jones v. Mississippi,* 122 So. 3d 698, 702 (Miss. 2013).

[75] *Diatchenko v. District Attorney for Suffolk Dist.,* 466 Mass. 655, 666, 1 N.E.3d 270 (2013).

Supreme Court of Iowa in *State v. Ragland*[76] recently held:

> From a broad perspective, *Miller* does mandate a new procedure. Yet, the procedural rule for [an individualized sentencing] hearing is the result of a substantive change in the law that prohibits mandatory life-without-parole sentencing. Thus, the case bars states from imposing a certain type of punishment on certain people. . . . "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant' . . . faces a punishment that the law cannot impose upon him."

The Iowa Supreme Court also emphasized an article written by constitutional scholar Erwin Chemerinsky in which he stated:

> "There is a strong argument that *Miller* should apply retroactively: It says that it is beyond the authority of the criminal law to impose a mandatory sentence of life without parole. It would be terribly unfair to have individuals imprisoned for life without any chance of parole based on the accident of the timing of the trial.
>
> ". . . .

[76] *State v. Ragland,* 836 N.W.2d 107, 115-16 (Iowa 2013), quoting *Schriro, supra* note 28.

> " . . . [T]he *Miller* Court did more than change procedures; it held that the government cannot constitutionally impose a punishment. As a substantive change in the law which puts matters outside the scope of the government's power, the holding should apply retroactively."[77]

Courts have also reached differing conclusions as to how the procedural posture of *Miller* affects the retroactivity analysis. *Miller* involved two defendants who were before the Court in separate but consolidated cases. Defendant Evan Miller was before the Court after his direct appeal from his criminal conviction was denied.[78] But the other defendant, Kuntrell Jackson, was before the Court on collateral review; he sought relief after a state court dismissed his application for a writ of state habeas corpus.[79] In announcing the new rule in *Miller,* the Court made no distinction between the procedural postures of the two defendants. Instead, it simply reversed both of the lower court judgments and remanded the causes "for further proceedings not inconsistent with this opinion."[80]

---

[77] *Ragland, supra* note 76, 836 N.W.2d at 117, quoting Erwin Chemerinsky, *Chemerinsky: Juvenile Life-Without-Parole Case Means Courts Must Look at Mandatory Sentences*, A.B.A. J. Law News Now (posted Aug. 8, 2012), http://www.abajournal.com/news/article/chemerinsky_juvenile_life-without-parole_case_means_courts_must_look_at_sen/.

[78] *See Miller, supra* note 3.

[79] *Id.*

[80] *Miller, supra* note 3, 132 S. Ct. at 2475.

At least three jurisdictions have reasoned that the Court's equal treatment of the two defendants is a factor that must be considered in the retroactivity analysis. In *Ragland,* the Iowa Supreme Court noted that Jackson's case was remanded so that Jackson could be given an individualized sentencing hearing and reasoned that "[t]here would have been no reason for the Court to direct such an outcome if it did not view the *Miller* rule as applying retroactively to cases on collateral review."[81] *Ragland* also noted that the dissent in *Miller* suggested the majority's decision would invalidate other cases across the nation and reasoned that the dissent would not have raised such a concern if the Court did not intend its holding to apply to cases on collateral review. In *People v. Williams,*[82] an Illinois appellate court found it "instructive" that the Court applied the *Miller* rule to Jackson when he was before the Court on collateral review. And another Illinois appellate court noted the "relief granted to Jackson in *Miller* tends to indicate that *Miller* should apply retroactively on collateral review."[83] Most recently, in *Diatchenko v. District Attorney for Suffolk Dist.*[84] the highest court in Massachusetts reasoned that because the Court

---

[81] *Ragland, supra* note 76, 836 N.W.2d at 116.

[82] *People v. Williams,* 2012 IL App (1st) 111145, ¶ 54, 982 N.E.2d 181, 197, 367 Ill. Dec. 503, 519 (2012).

[83] *Morfin, supra* note 71, ¶ 57, 981 N.E.2d at 1023, 367 Ill. Dec. at 295.

[84] *Diatchenko, supra* note 75, 466 Mass. at 667, 1 N.E.3d 270.

applied the rule to Jackson, "evenhanded justice requires that it be applied retroactively to all who are similarly situated."

Other jurisdictions, however, conclude the Court's treatment of Jackson is not a relevant factor in the retroactivity analysis. In *Com. v. Cunningham,*[85] the Pennsylvania Supreme Court noted that it was not clear the retroactivity issue was before the Court with respect to Jackson and that in the absence of a "specific, principled retroactivity analysis" by the Court, it would not deem the Court to have held the *Miller* rule applied retroactively just because the Court applied it to Jackson. Similarly, in *People v. Carp,*[86] the Michigan Court of Appeals reasoned that the "mere fact that the Court remanded Jackson for resentencing does not constitute a ruling or determination on retroactivity." *Carp* further reasoned that the issue of retroactivity was not raised as to Jackson and that thus, the Court had no reason to address it.

A federal district court in Virginia has taken a slightly different approach. In *Johnson v. Ponton,*[87] the court reasoned that although the U.S. Supreme Court stated in *Teague v. Lane*[88] that the retroactivity analysis is a threshold question and a prerequisite for

---

[85] *Cunningham, supra* note 63, 81 A.3d at 9.

[86] *Carp, supra* note 67, 298 Mich. App. at 518, 828 N.W.2d at 712.

[87] *Johnson, supra* note 64.

[88] *Teague, supra* note 20.

announcement of a new constitutional rule, it has forgone this analysis in at least one recent case. Specifically, in *Padilla v. Kentucky,*[89] a petitioner brought a collateral challenge to his conviction. In deciding *Padilla,* the Court announced a new constitutional rule and applied it to the defendant before it, but did not engage in a retroactivity analysis. Later, in *Chaidez v. U.S.,*[90] the Court expressly held that the rule it announced in *Padilla* did not apply retroactively to other cases on collateral review. Based on the Court's actions in *Padilla* and *Chaidez,* the court in *Johnson* reasoned that the Court's application of the *Miller* rule to Jackson was not dispositive of its intent to apply the *Miller* rule to all cases on collateral review.

(d) Resolution

Under the *Teague/Schriro* retroactivity analysis, the distinction between substance and procedure is important. But how the rule announced in *Miller* should be categorized is difficult, because it does not neatly fall into the existing definitions of either a procedural rule or a substantive rule.

As other courts have noted, the *Miller* rule certainly contains a procedural component, because it

---

[89] *Padilla v. Kentucky,* 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

[90] *Chaidez v. U.S.,* ___ U.S. ___, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013).

specifically requires that a sentencer follow a certain process before imposing the sentence of life imprisonment on a juvenile.[91] And unlike the holdings in *Graham v. Florida*[92] and *Roper v. Simmons*,[93] the *Miller* rule does not categorically bar a specific punishment; a State may still constitutionally sentence a juvenile to life imprisonment without parole under *Miller*.

But at the same time, the *Miller* rule includes a substantive component. *Miller* did not simply change what entity considered the same facts.[94] And *Miller* did not simply announce a rule that was designed to enhance accuracy in sentencing.[95] 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. In our view, this approaches what the Court itself held in *Schriro* would amount to a new substantive rule: The Court made a certain fact (consideration of mitigating evidence) essential to imposition of a sentence of life imprisonment without

---

[91] *See, In re Morgan, supra* note 67; *Tate, supra* note 61; *Chambers, supra* note 65; *Cunningham, supra* note 63.

[92] *Graham, supra* note 2.

[93] *Roper, supra* note 13.

[94] Compare *Ring, supra* note 29.

[95] Compare *Caldwell, supra* note 59.

parole.[96] In other words, it imposed a new requirement as to what a sentencer must consider in order to constitutionally impose life imprisonment without parole on a juvenile.

And *Miller* itself recognized that when mitigating evidence is considered, a sentence of life imprisonment without parole for a juvenile should be rare. This is consistent with the underlying logic of *Miller*, based on *Graham*, that "'[i]t 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.'"[97] In essence, *Miller* "amounts to something close to a de facto substantive holding,"[98] because it sets forth the general rule that life imprisonment without parole should not be imposed upon a juvenile except in the rarest of cases where that juvenile cannot be distinguished from an adult based on diminished capacity or culpability.

The substantive aspect of the *Miller* rule is also evident when considered in light of the effect of *Miller* on existing Nebraska law. In response to *Miller*, the Nebraska Legislature amended the sentencing laws

---

[96] *Schriro, supra* note 28.

[97] *Graham, supra* note 2, 560 U.S. at 73, quoting *Roper, supra* note 13.

[98] *The Supreme Court, 2011 Term – Leading Cases,* 126 Harv. L. Rev. 276, 286 (2012).

for juveniles convicted of first degree murder.[99] The amendments changed the possible penalty for a juvenile convicted of first degree murder from a mandatory sentence of life imprisonment to a "maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment."[100] The Legislature also mandated that in determining the sentence for a juvenile convicted of first degree murder, the sentencing judge "shall consider mitigating factors which led to the commission of the offense."[101] A juvenile may submit any mitigating factors to the sentencer, including, but not limited to, age at the time of the offense, degree of impetuosity, family and community environment, ability to appreciate the risks and consequences of the conduct, intellectual capacity, and the results of a mental health evaluation.[102] We view these as substantive changes to Nebraska law and requirements that sentencers consider new facts prior to sentencing a juvenile convicted of first degree murder. Most specifically, the fact that *Miller* required Nebraska to change its substantive punishment for the crime of first degree murder when committed by a juvenile from a mandatory sentence of life imprisonment to a sentence of 40 years' to life imprisonment

---

[99] 2013 Neb. Laws, L.B. 44 (codified at Neb. Rev. Stat. § 28-105.02 (Supp. 2013)).

[100] § 28-105.02(1).

[101] § 28-105.02(2).

[102] *Id.*

demonstrates the rule announced in *Miller* is a substantive change in the law.

Moreover, the entire rationale of *Miller* is that when a sentencing scheme fails to give a sentencer a choice between life imprisonment without parole 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. Further, we agree that the *Miller* rule is entirely substantive when viewed as Massachusetts, Mississippi, and Illinois have – as a categorical ban on the imposition of a mandatory sentence of life imprisonment without parole for juveniles.[103]

We also find it noteworthy that the Court applied the rule announced in *Miller* to Jackson, who was before the Court on collateral review. Years ago, the Court stated that it would not announce or apply a new constitutional rule in a case before it on collateral review unless that rule would apply to all defendants on collateral review.[104] The Court specifically adopted this policy in order to ensure that justice is administered evenhandedly.[105] Although we recognize that the Court has strayed from this policy on one

---

[103] *See, Diatchenko, supra* note 75; *Jones, supra* note 74; *Morfin, supra* note 71.

[104] *Penry, supra* note 42; *Teague, supra* note 20.

[105] *Id.*

recent occasion,[106] we are not inclined to refuse to apply the rule announced in *Miller* to a defendant before us on collateral review when the Court has already applied the rule to a defendant before it on collateral review. Evenhanded administration of justice is carried out only if Mantich, like Jackson, is entitled to the benefit of the new rule announced in *Miller*.[107] As noted by the Supreme Court of Iowa, any other result would be "'terribly unfair.'"[108]

Because the rule announced in *Miller* is more substantive than procedural and because the Court has already applied that rule to a case on collateral review, we conclude that the rule announced in *Miller* applies retroactively to Mantich. Mantich's life imprisonment sentence must be vacated, and the cause remanded for resentencing under § 28-105.02.

2. OTHER CLAIMS

In Mantich's original appeal, he argued that his sentence of life imprisonment without parole was categorically invalid under *Graham v. Florida*.[109] *Graham* held that a juvenile convicted of a nonhomicide offense cannot be sentenced to life imprisonment without parole. Mantich invites us to

---

[106] *See Padilla, supra* note 89.

[107] *See Diatchenko, supra* note 75.

[108] *Ragland, supra* note 76, 836 N.W.2d at 117, quoting Chemerinsky, *supra* note 77.

[109] *Graham, supra* note 2.

extend this holding to a juvenile convicted of felony murder.

Because we find Mantich is entitled to be resentenced under the dictates of *Miller*, we do not reach this argument in this appeal. If Mantich, on remand, is resentenced to life imprisonment with no minimum term which permits parole eligibility, he may raise the *Graham* argument in an appeal from that sentence.

Likewise, in view of our disposition, we need not reach Mantich's claim that his counsel was ineffective in failing to assert an Eighth Amendment challenge at his original sentencing and on direct appeal.

V. CONCLUSION

The rule announced in *Miller* applies retroactively to Mantich. We remand the cause with directions to grant post-conviction relief by vacating his life imprisonment sentence and resentencing him pursuant to § 28-105.02.[110]

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

---

[110] *See Castaneda, supra* note 19.