No. _____

In The Supreme Court of the United States

STATE OF NEBRASKA,

Petitioner,

vs.

DOUGLAS M. MANTICH,

Respondent.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012) – which held that a state may not sentence a teenage murderer to life imprisonment without parole unless the state provides a process whereby the sentencer considers the offender's youth and attendant characteristics – should be applied retroactively to a murder conviction on collateral review.*

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* This question has also been presented in the petition for writ of certiorari pending in *Cunningham* v. *Pennsylvania,* Doc. #13-1038 (seeking review of *Commonwealth* v. *Cunningham*, 81 A.3d 1 (Pa. 2013).

PARTIES TO THE PROCEEDING

The Petitioner is the State of Nebraska. The Respondent is Douglas M. Mantich, currently a prisoner of the State of Nebraska, serving a life sentence without parole for the crime of murder in the first degree. There are no other parties to this proceeding.

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OPINIONS BELOW

The opinion of the Nebraska Supreme Court in this matter, filed on Feb. 7, 2014, is reported as *State* v. *Mantich,* 287 Neb. 320, 842 N.W.2d 716. (Pet. App. 1)

The March 12, 2014 order of the Nebraska Supreme Court staying its mandate in this matter is not reported. (Pet. App. 90)

The opinion of the District Court of Douglas County, Nebraska, denying state postconviction relief is unreported. (Pet. App. 54)

JURISDICTION

This petition for certiorari is filed within ninety days of the issuance of the Nebraska Supreme Court's opinion. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

STATEMENT OF THE CASE

A. The Crime and Trial[1]

On December 5, 1993, a group gathered at a home in Omaha, Nebraska, ostensibly to mourn the death of Michael Campbell, who was a member of "Lomas," an Omaha street gang. Numerous Lomas members attended the party, including Respondent Douglas Mantich. While at the party, Mantich consumed 5-10 beers and smoked parts of two marijuana cigarettes over a three-hour period.

Lomas gang members at the party discussed revenging Campbell's death. Gang member Juan Carrera wanted to steal a car, and Daniel Eona made a plan about "jackin' somebody putting a gun to their head." Gang member Angel Huerta intended to do a drive-by shooting of a house belonging to the grandmother of a rival gang member, Ignacio Palma. Mantich knew that Huerta had a gun at the party.

As the party began to break up, Mantich's girlfriend, Diane Barrientos, offered to give Carrera and Eona a ride home. They refused. Eona said he intended to get a "G-ride" home, which Barrientos understood to mean that Eona would steal a car. Mantich waited in front of the party house while Eona and fellow gang member Gary Brunzo left to find a car.

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[1] The following is taken from the Nebraska Supreme Court's description of Mantich's crime in his direct appeal, *State* v. *Mantich*, 249 Neb. 311, 314-317 (1996).

Eona and Brunzo returned within 15 minutes driving a maroon 1989 Dodge Caravan. Carrera and Huerta got into the van; Mantich started to follow. Barrientos begged Mantich to go home with her and tried to "hang" on Mantich to prevent him from joining the other gang members. That didn't stop Mantich from jumping in, even though he knew the van was probably stolen.

Mantich soon learned that his fellow gang members had kidnapped Henry Thompson, who was on the floor between the driver and passenger seats, hands behind his head. The Lomas gang members taunted Thompson, demanded money, and told him "We're gonna shoot you" and "You're gonna die." Thompson cried and pled for his life.

To hide their gang affiliation, the Lomas members chanted words like "Cuz" and "Blood" to make Thompson think they belonged to the Bloods, another Omaha street gang. Brunzo and Eona jabbed their gun barrels into Thompson's head repeatedly. They also rifled Thompson's pockets and stole his wallet.

Carrera handed Mantich a gun and, at the other gang members' urging, Mantich executed Thompson with a single shot to the back of his head. Later, Mantich bragged about the murder to Brian Dilly and Dilly's two brothers. Mantich told Brian that if he didn't believe Mantich, Brian should watch the 6 o'clock news. When the news told the story about Thompson's murder, Mantich boasted, "I told you so" and then retold the story of the brutal execution.

When arrested and confronted with the allegations against him, Mantich lied and said that Brunzo shot Thompson. It was only after further interrogation that Mantich broke down and admitted that he was, in fact, the murderer.

Tried as an adult, a jury convicted Mantich of murder in the first degree and use of a firearm to commit a felony. That conviction became final on February 9, 1996.

B. The Sentence

Mantich was 16 years old when he executed Henry Thompson. (Pet. App. 1) At that time, Nebraska punished the crime of Murder in the First Degree with a maximum penalty of death and a minimum of life imprisonment without parole. Neb. Rev. Stat. § 28-303 (Reissue 1985) and § 28-104 (Reissue 1985). (Pet. App. 88-89; 87) The trial court sentenced Mantich to life without parole.

C. Post-*Miller* grant of relief

In his state postconviction proceeding, Mantich argued that his sentence violated the Eighth Amendment. The state trial court denied relief and Mantich appealed. (Pet. App. 54)

The Nebraska Supreme Court concluded that this Court's ruling in *Miller* v. *Alabama*, 132 S. Ct.

2455 (2012), was "defacto substantive"[2] and thus should be given retroactive application to Mantich's sentence under *Teague* v. *Lane,* 489 U.S. 288 (1989):

> 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.

(Pet. App. 33) "[A]ny other result would be 'terribly unfair.'" *Id.*

In his dissenting opinion, Associate Justice Cassel (joined by Chief Justice Heavican) stated:

> [Relying upon perceptions of what is "fair"] is a dangerous expansion of the power of judges, because it places no principled limit upon the scope of judicial power. While the distinction between procedural and substantive may be difficult to apply, it affords a principled basis for decision. If a judge allows his or her perceptions of fairness to intrude, the decision ceases to be an application of the law and becomes an application of the judge's personal biases and preferences.

(Pet. App. 39)

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[2] *State* v. *Mantich,* 287 Neb. at 340. (Pet. App. 30)

REASONS TO GRANT THE PETITION

I. This Court decides whether new rules of federal constitutional law are applied retroactively on collateral review.

A new rule of federal constitutional law is to be applied retroactively only if this Court has specifically held that the new rule is retroactively applicable to cases on collateral review. *Tyler* v. *Cain*, 533 U.S. 656, 662 (2001).

This Court has not yet decided whether *Miller* v. *Alabama* is to be applied retroactively on collateral review under the standards of *Teague* v. *Lane*, 489 U.S. 288 (1989).

The federal and state courts, the federal and state governments, the federal and state prisoners serving mandatory life sentences without parole for the crime of first degree murder committed while teenagers – all deserve a uniform answer to the question presented. This can only be achieved by this Court addressing and resolving the question presented.

II. Significant irreconcilable conflict of authority between federal courts and state courts of last resort.

The states' highest courts and the federal courts are hopelessly split on the question of *Miller*'s retroactive application to cases on collateral review upon application of the *Teague* analysis.

A. State courts holding that *Miller* is not retroactive under *Teague*.

The following state supreme courts, applying *Teague* standards, have concluded that *Miller* is not retroactive on collateral review:

- *Williams* v. *Alabama,* 2014 Ala. Crim. App. LEXIS 14 (April 4, 2014) ("[T]he rule announced in *Miller* v. *Alabama* is procedural in nature and does not fall within the narrow exception recognized for newly announced procedural rules; thus, the rule announced in *Miller* is subject to the general rule of nonretroactivity.").
- *State* v. *Tate,* 130 S.3d 829, 844 (La. 2013), *rehearing denied,* 2014 La. LEXIS 207 (La. Jan. 27, 2014) ("[W]e find, under the *Teague* analysis, *Miller* sets forth a new rule of criminal constitutional procedure, which is neither a substantive nor a watershed rule implicative of the fundamental fairness and accuracy of the criminal proceeding. Accordingly, we find the *Miller* rule is not subject to retroactive application on collateral review.").
- *Commonwealth* v. *Cunningham,* 81 A.3d 1, 11 (Pa. 2013) ("[N]othing in Appellant's arguments persuades us that *Miller*'s proscription of the imposition of mandatory life-without-parole sentences upon offenders under the age of eighteen at the time their crimes were committed

must be extended to those whose judgments of sentence were final as of the time of *Miller's* announcement.").

- *Chambers* v. *State,* 831 N.W.2d 311, 329-30 (Minn. 2013) ("[W]e conclude that the rule announced in *Miller* is procedural, not substantive, for three reasons. First, the *Miller* rule does 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. Second, our analysis is consistent with relevant federal decisions. Third, the *Miller* rule did not announce a new element.").

The following state intermediate appellate courts have reached the same conclusion:

- *Geter* v. *State,* 115 So.3d 375, 385 (Fla.Dist.Ct.App. 2012), *rehearing en banc denied, Geter* v. *State,* 115 So.3d 385 (2013) ("*Miller* does not warrant retroactive application to Florida juvenile homicide offenders whose convictions and sentences were final as of June 25, 2012, the date *Miller* was issued.").

- *People* v. *Carp,* 298 Mich.App. 472, 515 (2012), *discretionary appeal granted, People* v. *Carp,* 838 N.W.2d 873 (2013) (. . . *Miller* does not comprise a substantive new rule and, therefore, is not subject to retroactive application for cases on collateral review. . . .").

B. State courts holding that *Miller* is retroactive under *Teague*.

The following state courts have reached the opposite conclusion and held that *Miller* is retroactive on collateral review upon applying *Teague* standards:

- *State* v. *Mantich,* 287 Neb. 320, 342 (2014)[3] ("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.").
- *Jones* v. *State,* 122 So.3d 698, 703 (Miss. 2013) ("We are of the opinion that *Miller* created a new, substantive rule which should be applied retroactively to cases on collateral review.").
- *State* v. *Ragland,* 836 N.W.2d 107, 117 (Iowa 2013) ("[W]e hold *Miller* applies retroactively.").
- *Diatchenko* v. *District Attorney for Suffolk Dist.,* 466 Mass. 655, 666 (2013) ("[W]e conclude that the 'new' constitutional rule announced in *Miller* is substantive and, therefore, has retroactive application to cases on collateral review, . . . ").

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[3] The decision for which the Petitioner seeks this Court's review.

- *In re Rainey,* ___ Cal.Rptr.3d ___, 224 Cal. App. 4th 280, 290 (Ct.App. 2014) ("We therefore conclude *Miller* announced a new substantive rule that applies retroactively to cases on collateral review.").
- *People* v. *Davis,* ___ N.E.3d ___, 2014 IL 115595 (Ill. 2014) ("[W]e view *Miller* as a new substantive rule, which is outside of *Teague* rather than an exception thereto.").

C. Federal circuit courts holding *Miller* not retroactive under *Teague.*

The following federal circuit courts have concluded that *Miller* is not retroactive:

- *In re Morgan*, 713 F.3d 1365, 1367 (11th Cir. 2013), *rehearing en banc denied*, *In re Morgan,* 717 F.3d 1186 (2013) ("[T]he Supreme Court has not held that *Miller* is retroactively applicable to cases on collateral review.").
- *Craig* v. *Cain,* No. 12-30035, 2013 U.S. App. LEXIS 431, 4-5 (5th Cir. 2013) (unpublished opinion) ("*Miller* does not satisfy the test for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles; . . . ").

D. Federal circuit court holding *Miller* retroactive under *Teague*.

In re Pendleton, 732 F.3d 280 (3d Cir. 2013), permitted petitioners to file successive habeas corpus petitions in the district court because the circuit court concluded the petitioners had made a *prima facie* showing that *Miller* is to be applied retroactively on collateral review.

E. U.S. Attorney General's concession.

In two cases, the federal courts have been denied the opportunity for judicial analysis of the question presented as a result of the United States Department of Justice's concession of *Miller* retroactivity. See, *Evans-García* v. *United States*, 2014 U.S. App. LEXIS 3855, 8-9, fn2 (1st Cir. 2014) ("Whether the new rule announced in *Miller* has been made retroactive by the Supreme Court presents a much closer question. We need not answer that question, however, because the government has also conceded that *Miller* has been made retroactive, at least under the prima facie standard."); *Johnson* v. *United States*, 720 F.3d 720, 721 (8th Cir. 2013) ("The government here has conceded that *Miller* is retroactive and that Mr. Johnson may be entitled to relief under that case, and we therefore conclude that there is a sufficient showing here to warrant the district court's further exploration of the matter.").

The federal executive branch's unexplained concession in a few federal courts will not resolve the

conflict of authority on the constitutional issue which requires this Court's judicial analysis and decision.

III. The Nebraska Supreme Court erroneously applied *Miller* retroactively on collateral review by misapplying federal law.

A. Federal *Teague* analysis was used.

The Nebraska Supreme Court made it clear that it was applying the federal *Teague* standard in resolving the issue of retroactive application of *Miller* on collateral review:

> 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 and we see no reason to depart from that analysis.

(Pet. App. 16) Throughout the remainder of its analysis, the Nebraska Supreme Court relied exclusively upon the federal *Teague*-based standards to reach its conclusion. [4]

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[4] Although the Nebraska Supreme Court made reference to this Court's opinion in *Danforth* v. *Minnesota*, 552 U.S. 264 (2008), which recognized that states may employ broader retroactivity standards that those announced in *Teague* when deciding issues of retroactivity under state law (Pet. App. 15), the Nebraska Supreme Court made clear that it was applying only the federal *Teague* standard in resolving this issue. (Pet. App. 16) As a result, there is no independent state ground for the Nebraska Supreme Court's decision.

B. Nebraska Supreme Court misapplied *Teague* in holding that *Miller* applies retroactively on collateral review.

The new rule that *Miller* announced is procedural, not substantive. *Miller* is not the first "watershed" procedural rule that this Court recognized in *Teague* would be a very rare – if not hypothetical – occurrence.

There is no real dispute that the rule announced in *Miller* is new. At the time this Court decided *Miller*, 28 states had mandatory life-without-parole sentencing schemes for teenage murderers tried and convicted as adults. This Court had never before suggested that these state statutes were unconstitutional for not providing individualized sentencing factors. The Nebraska Supreme Court held that the rule announced in *Miller* is a new rule. (Pet. App. 29)

Where the Nebraska Supreme Court erred in *Mantich* was in its conclusion that "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 [*Jackson* v. *Hobbs*, 132 S. Ct. 2455 (2012), the companion case to *Miller*], we conclude that the rule announced in Miller applies retroactively to Mantich." (Pet. App. 33) That conclusion conflicts with *Miller*'s own description of the rule it was announcing, as well as this Court's retroactivity precedent. *Miller* could not have been more clear. In explaining the rule announced, this Court emphasized that its *Miller* decision did "*not* categorically bar

a penalty for a class of offenders or type of crime." 132 S. Ct. at 2471 (emphasis added). "Instead," the decision "mandate[d] only that a sentence follow a certain *process* – considering an offender's youth and attendant characteristics – before imposing a particular penalty." *Id.* (emphasis added). *Miller*'s self-description is entirely consistent with a *Teague* analysis conclusion the *Miller* rule is procedural in nature.

As this Court has explained, new substantive rules are those that "narrow the scope of a criminal statute by interpreting its terms," and those that "place particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro* v. *Summerlin*, 542 U.S. 348, 351-52 (2004) (citations omitted). To put it another way, "a decision that modifies the elements of an offense is normally substantive," and one that does not "alter the range of conduct the statute punishes" is procedural. *Id.* at 354. Unlike substantive rules, procedural rules "regulate only the *manner of determining* the defendant's culpability[.]" *Id.* at 353, citing *Bousley* v. *United States*, 523 U.S. 614, 620 (1998) (emphasis added).

In *Miller*, this Court rejected a plea to categorically ban life-without-parole sentences for teenage murderers. 132 S. Ct. at 2469 ("we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles."). Instead, the Court mandated a certain "process," i.e., an individualized sentencing process to consider a murderer's "youth and attendant characteristics." *Id.* Thus, a teenage

murderer remains exposed to the imposition of a life without parole sentence after *Miller*. All that *Miller* changed is the procedure a court must engage in before imposing a sentence. *Miller* did not narrow the scope of a criminal statute, or place particular conduct outside a state's power to punish. *Schriro*, 542 U.S. at 351-52. Thus, the *Miller* rule is procedural, just as the opinion itself announced.

That conclusion is buttressed by other recent decisions of the Court. On the one hand, *Graham* v. *Florida*, 560 U.S. 48 (2010), was an example of a new substantive constitutional rule applicable on collateral review. *Graham* held that the government could not impose a life-without-parole sentence on a teenager convicted of a non-homicide offense. *Graham* announced a substantive rule, because it excluded a category of punishment for a class of defendants. Lower courts have had no trouble determining that *Graham* must be applied retroactively. E.g., *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011).

On the other hand, *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), held that a jury must find, beyond a reasonable doubt, any fact (other than a prior conviction) that results in an increased penalty beyond the prescribed statutory maximum. While a defendant with a final conviction and an enhanced sentence might very well receive a different outcome if allowed a second bite at the apple in front of a jury, the holding merely changes process. Unsurprisingly (and correctly), the federal courts have unanimously held *Apprendi* to be procedural, not substantive, and thus

not retroactive to final convictions. E.g., *Sepulveda* v. *United States*, 330 F.3d 55, 61 (1st Cir. 2003).

The most analogous case is *Graham* v. *Collins*, 506 U.S. 461 (1993). In *Collins*, a 17-year-old murderer who was sentenced to death argued that the jury was not allowed to consider mitigating evidence of his youth, family background, and positive character traits, *id.* at 463, a claim virtually indistinguishable from the one Mantich makes here. Nonetheless, the Court determined that the proposed new rule – enabling the jury to more fully consider these mitigating circumstances of the murderer's youth – was not a substantive change in law. *Collins*, 506 U.S. at 475. "Plainly, [the *Teague* substantive] exception has no application here because the rule Graham seeks would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons." *Id.* at 477 (internal quotes omitted). So too here, a new rule requiring a process to consider the mitigating circumstances of youthfulness is not a substantive change in the law.

In its decision below, the Nebraska Supreme Court began by acknowledging that the *Miller* rule "certainly contains a procedural component, because it specifically requires that a sentence follow a certain process before imposing the sentence of life imprisonment" without parole on a teenage murderer. (Pet. App. 29) However, the Nebraska Supreme Court then erred by holding *Miller*'s rule analogous to the rule in *Schriro*, because *Miller* "imposed a new requirement as to what a sentence must consider in order to

constitutionally impose life imprisonment without parole" on a teenage murderer. (Pet. App. 30)

What *Schriro* actually said was that "rules that regulate only the *manner* of determining the defendant's culpability *are procedural*." 542 U.S. at 353 (emphasis added). "A new rule is substantive when that rule places an entire class beyond the power of the government to impose a certain punishment regardless of the procedure followed, *not* when the rule expands the range of possible sentences." *In re Morgan*, 713 F.3d at 1368 (emphasis added). The latter kind of rule, one which expands the range of possible sentences, is precisely the rule adopted by *Miller*.

In the death-penalty context, this Court has denied retroactive application of new procedural rules. See, *Lambrix* v. *Singletary*, 520 U.S. 518, 539 (1997) (prohibiting a jury from weighing aggravating circumstances in some instances); *Sawyer* v. *Smith*, 472 U.S. 227, 241 (1990) (insuring that a jury is not led to believe that responsibility rests elsewhere for determining a death sentence's appropriateness); *Beard* v. *Banks*, 542 U.S. 406, 417 (2004) (jury is not barred from considering all mitigating evidence). *Miller*'s imposition of a new process that requires consideration of mitigating factors is procedural, not substantive.

C. *Miller* did not announce a "watershed" rule.

This Court has defined a watershed rule as one that "implicate[s] the fundamental fairness" of criminal proceedings. *Teague*, 489 U.S. at 311, 312 (plurality opinion). To give meaning to that definition, this Court has cited only one example of what *might* be considered watershed, the landmark right-to-counsel ruling in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). And the Court has emphasized that it has "rejected *every* claim that a new rule satisfied the requirements for watershed status." *Whorton* v. *Bockting*, 549 U.S. 406, 417-18 (2007).

Miller is not a "watershed" case. The sweep of its rule is limited, modifying only the process by which a sentencer must reach its decision in a limited class of cases, and even then, only for an even more limited class of offenders. See, *DeStafano* v. *Woods*, 392 U.S. 631, 635 (1968) (the right to a jury trial under the Sixth Amendment applied to the states is not a watershed rule.) Accordingly, *Miller* did not announce a watershed rule that requires its retroactive application and the re-opening of otherwise final first degree murder convictions.

D. The fact that *Jackson* v. *Hobbs* was on collateral review is not dispositive of the question presented.

The Nebraska Supreme Court's analysis was further misguided by relying upon the fact that

Jackson v. *Hobbs,* the companion case with *Miller,* was a collateral review case.

First, this Court did not discuss *Teague* or the issue of retroactivity in the context of *Miller*'s direct review or *Jackson*'s collateral attack. Both cases were remanded "for further proceedings not inconsistent with this opinion." 132 S. Ct. at 2475. The disposition did not address or decide the question presented in this case.

Second, a state must raise the issue of retroactive application or it is waived. This Court need not address a retroactivity issue that a state waived or failed to raise:

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

> the sense that this Court, despite a limited grant of certiorari, must raise and decide the issue *sua sponte*.

Collins v. *Youngblood*, 497 U.S. 37, 40-41 (1990).

In *Jackson* v. *Hobbs*, Arkansas did not raise the issue of retroactivity, either in its brief in opposition to Jackson's petition for certiorari, or in its merits briefing. Arkansas waived any retroactivity claim. As a result, this Court in *Miller* and *Jackson* never discussed *Teague* or retroactivity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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