No. 13-1348

In the Supreme Court of the United States

STATE OF NEBRASKA, PETITIONER

v.

DOUGLAS M. MANTICH

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEBRASKA SUPREME COURT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND SIX OTHER STATES FOR PETITIONER

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Attorneys for *Amicus Curiae*
State of Michigan

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 by whereby the sentencer considers the offender's youth and attendant characteristics—should be applied retroactively to a murder conviction on collateral review.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTEREST OF *AMICI CURIAE*

The Attorneys General of the States are the chief law enforcement officers of their respective states, and they have a vital interest in protecting the finality of judgments for murder convictions that have been obtained over the last fifty years. This Court ruled in *Miller* v. *Alabama,* 132 S. Ct. 2455 (2012), that the *mandatory* imposition of life without parole for teenage murderers is unconstitutional. The question here is whether this decision applies retroactively.

The answer directly affects the administration of justice in the States. While federal prisons hold only 37 such prisoners, more than 2,000 criminals who committed murder while teenagers are currently incarcerated in state prisons. And the convictions for these state prisoners span more than five decades. Thus, the considerations of finality weigh heavily here. Any retroactive application of *Miller* would challenge the settled expectations of victims that these violent murderers would never be subject to release.

As guardians of the security of the community, the *amici* States note that these offenders are as a category some of the most dangerous. They committed the gravest crime—first-degree murder. And they have been incarcerated since they were teenagers, housed with other dangerous felons, which militates against their rehabilitation.[1]

---

[1] Consistent with Rule 37.1, the *amici* States provided notice to the parties' attorneys more than ten days in advance of filing.

INTRODUCTION

Contrary to the suggestion of some, these prisoners who seek the retroactive application of *Miller* are not all hapless aiders and abettors who played a secondary role and whose cases reached finality a year or two before the *Miller* decision. Rather, the cases span more than fifty years. And they include some of the most vicious crimes anywhere.

In Michigan's Supreme Court, for example, the State profiled the case of James Porter, who in 1982 at the age 16 systematically executed a woman and her four children. The idea of having a resentencing hearing more than 30 years later to examine Porter's "immaturity [and] impetuosity," 132 S. Ct. 2468, when he is now 46 years old is dubious. This is also true for Michigan's oldest case, Sheldry Topp, who was sentenced on December 17, 1962. It is hard to conceive how Topp could be meaningful resentenced applying the *Miller* factors. Such examples are legion throughout the states.

The issue requires this Court's review. The split between the state courts is deep and mature, reaching a tally of 7-to-5. And retroactivity cannot depend on whether the crime occurred in, say Michigan, as opposed to Nebraska.

On the merits, the determination whether a rule is substantive or procedural and to be applied retroactively should depend primarily on whether the conduct for which the defendant is currently incarcerated is not criminal or carries a sentence that law cannot impose. Under this definition, *Miller* did not announce a substantive rule.

This rule makes sense because while it offends basic fairness to force a criminal to serve a sentence that could never have been imposed, that is not the case here. *Miller* does not require a different sentence, but only a different process. Mantich is subject to the same sentence before and after *Miller*—life without parole. The *mandatory* nature of the sentence is not a part of the punishment, but only a description of the mechanism for the decision. *Miller* did not exclude a category of punishment.

In asking the Court to review this case, the *amici* States highlight the two primary errors of the courts below that applied *Miller* retroactively and of the United States in its concession that *Miller* should apply retroactively.

First, the fact *Miller* requires a sentencer to consider additional factors, namely the individual characteristics of the offender's youth and related characteristics, does not mean that it changes the sentencing elements. *Miller* does not require any specific finding. It changes only the process of the decision, i.e., it requires individual sentencing. The claim that it creates a new sentencing element proves too much, because that would require a jury determination under *Apprendi* v. *New Jersey,* 530 U.S. 466 (2000). *Miller* does not require that.

Second, the fact that *Miller* increases the possible range of sentences does not indicate that it is a substantive change. The key point is that the same sentence may be imposed. In this way, not a single criminal defendant is currently held for a sentence that could not have been imposed after *Miller*.

STATEMENT OF FACTS

Given that there are more than 2,000 murderers in prison currently who committed their offenses while teenagers, and that hundreds of these offenders were sentenced more than 25 years ago, the *amici* States wish to highlight the facts of one of these cases—the James Porter case from Michigan—to underscore the considerations of finality at issue.

In 1982, James Porter was the friend of Eric Giuliani, who had graduated from the high school that Giuliani still attended. (1/11/83 Tr., vol. II, at 478–79.) In the few months before the date of the crime, the Giuliani home had been subject to a couple of burglaries. (*Id.* at 488–91.) On April 7, 1982, Eric's sister, Cindy, and her mother, Elizabeth Giuliani, were planning on going bowling. It had been a snow day. (*Id.* at 529.) On that same day, Porter's younger brother Kent saw James Porter leaving the family home with a "gun case." (1/10/83 Tr., vol. I, at 394–96.)

The evidence demonstrated that Porter arrived at the Giuliani home that morning and systematically executed the entire family, except the father, Richard Giuliani, who was not at home.

Mrs. Giuliani was found outside of her bathroom in the hallway; Porter had shot her twice in the head with a .22 rifle, once above her right eye and again above her left ear. (1/11/83 Tr., vol. II, at 616, 657.)

Sixteen-year-old Kathy was found next to her mother, still dressed in her pajamas; Porter shot her once in her left temple. (*Id.* at 620, 660.)

Kathy's younger sister, Cindy, who was 13, was found in the bathroom. (*Id*. at 661.) She was already dressed, wearing a blue blouse, blue jeans, and socks. (*Id*.) Porter shot her three times, once in her left shoulder, and twice in her head. (*Id*. at 626.)

Eric Giuliani was found near his own bedroom; Porter shot him twice in the head. (*Id*. at 628, 665.)

The final victim found in the house was Dean or "Deano" Giuliani, who was ten years old. He was in the small bathroom, fully dressed, apparently hiding in the shower stall. (*Id*. at 666.) Porter shot him in his left temple and face with the bullet passing through his brain. (Id. at 632). There were casings throughout the house. (*Id*. at 604 (the responding officer said the casings were "everywhere I went").)

Afterward, Porter withdrew some cash from Eric Giuliani's bank account and went shopping with a friend at a car audio store, K-Mart, and Taco Bell before his arrest. (1/13/83, vol. III, at 879–80.) Porter had argued with Eric about the earlier burglaries before his killing spree. (*Id*. at 984–86.)

James Porter was sentenced to life in prison for five counts of first-degree murder on March 14, 1983, more than 30 years ago.

Crimes such as Porter's reflect the crimes in this class of offenders. For example, the Florida Court of Appeals was the first appellate court to address *Miller*, holding that it did not apply retroactively to a 16-year old who committed a brutal murder. See *Geter* v. *State,* 115 So 3d 375 (Fla. App. 3 Dist. 2012).

The facts are indicative of the kinds of crimes in this class of offenders:

> Geter was arrested for first-degree murder in December 2000, on the eve of his seventeenth birthday. Earlier that same day, a rock or stone was thrown through the front window of the victim's home, breaking the window, and allowing Geter to gain entry into the home. The victim, in an attempt to defend her home, her child, and herself, struggled with Geter and struck him in the head with a crowbar. However, Geter was able to overpower the victim. He ripped the victim's panties from her body, raped her, and ejaculated inside her vagina. During the violent struggle between the victim and Geter, the victim's three-year-old son was awoken by his mother's screams.
>
> After the rape, Geter got a butcher knife. He stabbed the victim in the neck eight to twelve times. Geter then cut the victim from her elbow to her wrist so that she would bleed faster and die. When the victim still had not died, Geter finally choked her to death. The victim's three-year old son witnessed the brutal murder of his mother. Before leaving the victim's home, Geter passed by the victim's son and told him to be a good boy. [*Geter,* 115 So.3d at 376.]

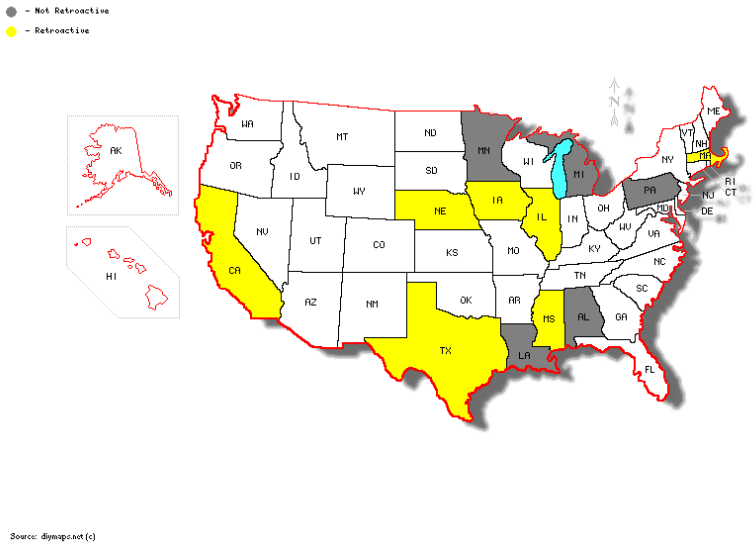
ARGUMENT

I. The state courts are deeply split on whether *Miller* should apply retroactively.

This case presents the paradigm of an issue that has divided the state courts. Under Rule 10(b), three state supreme courts have ruled that *Miller* is not retroactive, while five others have ruled that it is. Another four intermediate state courts have also divided on the question.

A. The state courts are hopelessly divided.

The twelve state courts that have reached this issue have fundamentally disagreed about whether *Miller* should be applied retroactively. The decisions create a patchwork throughout the country:



Five state courts have ruled that *Miller* is not retroactive: *Williams* v. *Alabama,* 2014 WL 1392828 (Ala. Crim. App. 2014); *State* v. *Tate,* 130 So.3d 820 (La. 2014); *People* v. *Carp,* 828 N.W.2d 685 (Mich. Ct. App. 2012); *Chambers* v. *State,* 831 N.W.2d 311 (Minn. 2013); *Commonwealth* v. *Cunningham,* 81 A.3d 1 (Pa. 2013). Another seven courts have found *Miller* to be retroactive: *In re Rainey,* 224 Cal. App. 4th 280 (Cal. App. 1 Dist. 2014); *State* v. *Ragland,* 836 N.W.2d 107 (Iowa 2013); *People* v. *Davis,* 6 N.E.3d 709 (Ill. 2014); *Dianchenko* v. *District Att'y for Suffolk Dist.,* 1 N.E.3d 270 (Mass. 2013); *Jones* v. *State,* 122 So.3d 698 (Miss. 2013); *State* v. *Mantich,* 842 N.W.2d 716 (Neb. 2014); *Ex Parte Maxwell,* 424 S.W.3d 66 (Tex. Crim. App. 2014).

These states reflect hundreds of offenders:

State	Offenders
Not Retroactive	
Alabama	62
Louisiana	335
Michigan	346
Minnesota	2
Pennsylvania	444
Retroactive	
California	250
Iowa	44
Illinois	103
Massachusetts	57
Mississippi	24
Nebraska	24
Texas	4

See "Map – Juveniles Serving Life Without Parole," http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/etc/map.html (last accessed on May 30, 2014).

The point is an obvious one: regardless of the proper substantive answer, an issue like this should not turn on the location of where the murderer committed his crime. The more than 1,000 offenders in the five states (Alabama, Louisiana, Michigan, Minnesota, Pennsylvania) that have found *Miller* not to be retroactive will not be resentenced. In contrast, the more than 500 offenders in the seven states (California, Iowa, Illinois, Massachusetts, Mississippi, Nebraska, Texas) that have found *Miller* to be retroactive will be resentenced or otherwise will be eligible for release. The Florida appellate courts governing 266 offenders have divided. See *Cotto* v. *State,* 2014 WL 2480189, 5 (Fla. App. 4 Dist. 2014).

The division between the state courts is definitive. All the decisions have arisen in the two years since *Miller*, and the matter need not percolate any further. The five states with the largest number of offenders (Pennsylvania, Michigan, Louisiana, Florida, and California) all have state-court decisions on the issue. Although Michigan, Florida and California cases are intermediate state-court decisions and the issue is now pending on review in their supreme courts, *Carp,* 838 N.W.2d 873 (2013), (leave granted), *Falcon* v. *State,* 111 So.3d 973 (Fla. App. 1 Dist. 2013) (leave granted), and *Rainey,* 224 Cal. App. 4th 280 (leave sought), there is no reason to wait any longer. The disagreement is evenly divided, and there is no reason to believe that all the state courts on either side will revisit their decisions.

B. The federal courts are also divided on the question.

The Fifth and Eleventh Circuits have found *Miller* not to be retroactive, while the Second, Third, Fourth, and Eighth Circuits have indicated that it is retroactive as a prima facie matter. See *In re Pendleton,* 732 F.3d 280, 283 (3d Cir. 2013) (collecting cases).

II. On the merits, the *Miller* rule should not apply retroactively.

On the merits, *Miller* creates a procedural rule that should not apply retroactively. It is also not a watershed rule. And the arguments that *Miller* should apply retroactively—that it is a substantive rule—would significantly change this Court's retroactivity jurisprudence and would not serve the primary values undergirding the reasons for retroactivity identified by this Court

A. The new rule that *Miller* created is a procedural one.

The basic value underlying the protection of convictions that are no longer subject to review is finality. "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague* v. *Lane*, 489 U.S. 288, 309 (1989) (plurality opinion). The retroactive application of new rules to cases on collateral review impedes the effective operation of state criminal justice systems by "continually forc[ing] the States to marshal

resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Id.* at 310. By limiting the retroactive application of new rules in collateral review, "the *Teague* principle protects not only the reasonable judgments of state courts but also the States' interest in finality quite apart from their courts." *Beard* v. *Banks*, 542 U.S. 406, 413 (2004).

Based on these principles, this Court has held that new rules announced in its decisions apply to all cases that are pending on direct review or not yet final. *Schriro* v. *Summerlin*, 542 U.S. 348, 351 (2004). But for convictions that are already final, the new rule applies in only "limited circumstances." *Id.* at 351–52.

The exceptions to the rule of nonretroactivity fall into two categories. "The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe, or addresses a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Graham* v. *Collins*, 506 U.S. 461, 477 (1993) (internal citations omitted). The second exception, which applies to watershed rules, has not yet been fully defined but is "clearly meant to apply only to a small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty." *Id.* (internal citations omitted).

On the question whether the *Miller* rule is a substantive or procedural rule, this Court has explained that the key to the analysis for a

procedural change is that it "regulates only the manner of determining the defendant's culpability." *Summerlin,* 542 U.S. at 353. As a consequence, a procedural rule does not "alter the range of conduct the statute punishes." *Id.*

In contrast, a substantive change *does* change the range of conduct subject to punishment. This Court has explained that a substantive rule:

- "Prohibit[s] a certain category of punishment for a class of defendants because of their status or offense."[2]
- "Place[s] particular conduct or persons covered by the statute beyond the State's power to punish."[3]
- "Narrow[s] the scope of a criminal statute by interpreting its terms."[4]
- "[M]odifies the elements of an offense."[5]

These descriptions interplay with one another. For example, where a decision modifies the elements of a crime, it alters the range of conduct the statute punishes rendering some formerly unlawful conduct lawful. *Summerlin,* 542 U.S. at 354.

---

[2] *Beard,* 542 U.S. at 416, citing *Penry* v. *Lynaugh,* 492 U.S. 302, 330 (1989). Accord *Graham* v. *Collins,* 506 U.S. at 477.

[3] *Summerlin*, 542 U.S. at 351-52.

[4] *Id.*

[5] *Id.* at 354.

Applying these standards, *Miller* does not decriminalize any class of conduct, see *Graham* v. *Collins*, 506 U.S. at 477, and does not prohibit a certain category of punishment for a class of defendants—juvenile murderers may still be sentenced to life without parole. *Id*. And there is no dispute that the *Miller* decision does not narrow the scope of a criminal statute, see *Summerlin*, 542 U.S. at 351–52, and does not place particular conduct outside the State's power to punish. *Id*. Finally, it does not change the sentencing elements for the imposition of life without parole sentence because it does not require any specific finding.

Rather, *Miller* is a change to the sentencing process. In summarizing the nature of this change, the Court explained it as if the Court was answering the retroactivity question at the same time:

> Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty. [*Miller,* 132 S. Ct. at 2471.]

The thing that the new scheme requires is "individualized sentencing." *Id.* at 2466 n.2 ("*Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses."). This is a change to the process.

To put it another way, a convicted teenage murderer post-*Miller* may still be sentenced to the punishment of life without parole. This is why it is not a categorical bar. Cf. *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989) ("[I]f we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review."). *Miller* is different in this way then from this Court's other categorical exclusions. Cf. *Graham* v. *Florida,* 560 U.S. 48 (2010) (excluding life sentence for juveniles for non-homicides); *Roper* v. *Simmons,* 543 U.S. 551, 568 (2005) (excluding death penalty for juveniles); *Atkins* v. *Virginia,* 536 U.S. 304, 321 (2002) (excluding the death penalty for the mentally disabled). *Miller* does not exclude any penalty.

This distinction between substance and procedure is rooted in basic fairness. *Teague* ensures that a substantive rule applies retroactively because otherwise there is "[1] a significant risk that a defendant stands convicted of an act that the law does not make criminal or [2] faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 352 (internal quotes and citations omitted). Under *Miller,* a juvenile murderer is still subject to a life-without-parole sentence. It makes sense therefore that none of this Court's definitions of substance apply to *Miller.*[6]

---

[6] The *amici* will not reiterate the arguments that Nebraska makes about why *Miller* is not a watershed rule. Pet. 18.

B. The two primary arguments about why *Miller* is substantive are unavailing.

Many of the lower courts, perhaps influenced by the concession of the United States Government, have concluded that *Miller* is substantive either because it requires a sentencer to consider certain factors at sentencing or because it expands the range of possible punishments. These arguments would require a significant change in law and would not further the basic values underlying the *Teague* test. This Court should reject them.

1. Requiring consideration of specific factors, as *Miller* does, is primarily a change in process.

In deciding that *Miller* was substantive and therefore retroactive, the Nebraska Supreme Court's primarily relied on the requirement that "a sentencer consider specific, individualized factors before handing down a sentence of life imprisonment without parole." Pet. 29. This conclusion conflicts with the thrust of this Court's analysis in *Miller* and its death-penalty jurisprudence on retroactivity as it relates to consideration of mitigating circumstances.

The key sentences from *Miller* explaining the Court's holding underscore that the Eighth Amendment requires a change to the sentencing process, and does not require any specific findings. *Miller*, 132 S. Ct. 2469 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders") (emphasis added); *id.* at 2475 ("the mandatory sentencing schemes before us violate this principle of proportionality"). The change

in process is predicated on the need for the proper consideration of mitigating factors, but is nonetheless still a procedural change. This is true for all the mitigation cases.

For this Court's retroactivity analysis on consideration of mitigating factors, the cases that are most analogous—those involving new rules for death penalty sentencing—were all ones in which the changes were not applied retroactively. See, e.g., *Beard* v. *Banks*, 542 U.S. 406 (2004) (new rule that invalidated capital sentencing schemes that required unanimity on mitigating factors was not retroactive); *Summerlin*, 542 U.S. at 356 (new rule requiring fact-finding by jury for element necessary for the death penalty not retroactive); *Graham* v. *Collins*, 506 U.S. at 475 (new rule that state cannot "limit[] the manner in which [defendant's] mitigating evidence may be considered" during death penalty sentencing phase was not retroactive); *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990) (new rule that would prohibit an instruction telling the jury to avoid the influence of sympathy during death-penalty sentencing phase was not retroactive).

This Court's cases directly relate to rules that enable the sentencing body to more fully consider mitigating circumstances before imposing the death penalty, and this Court ruled that any change was not substantive. It is difficult to reconcile this body of case law with the analysis from the Nebraska court's decision.

The Nebraska court also conflates the change in process that enables the sentencer to consider mitigating circumstances with the Court establishing a requirement that the sentencer make a specific finding necessary to a particular sentence, the latter of which would be a substantive change. Rather, the point is that *Miller* requires a change to the sentencing scheme—the procedure of sentencing—to enable the sentencer to consider mitigating factors. *Miller*, 132 S. Ct. at 2458 ("But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations [of the offender's youth].").

The analysis from *Summerlin* demonstrates the point and confirms that the change here is not a substantive one. In *Summerlin*, this Court announced that *Ring* v. *Arizona*, 536 U.S. 584 (2002), established a procedural rule when *Ring* held that a jury—not a sentencing judge—must find aggravating circumstances necessary for the imposition of the death penalty. *Summerlin*, 542 U.S. at 353. *Summerlin* evaluated a death-penalty sentencing phase in which the finding of the presence or absence of specific aggravating factors were essential for the imposition of death and therefore were the equivalent of elements for federal constitutional purposes. *Id.* at 354 ("those aggravators effectively were elements for federal constitutional purposes, and so were subject to the procedural requirements the Constitution attaches to trial of elements"). This Court noted that where it "made a certain fact essential to the death penalty," it would be a substantive change. *Id*. That is inapplicable here.

Rather, there is no single controlling factor—no "certain fact" essential—under *Miller* that a sentencing court must find to justify its sentence. It does not create a sentencing "element." If the Nebraska court were right, *Miller* would require a jury determination, since any new sentencing element would be prerequisites to the penalty. *Ring*, 536 U.S. at 604 ("the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict."). But there are none here. The punishment of life without parole is available without any new required finding. Instead, *Miller* sets out a different sentencing scheme—"individualized sentencing"—rather than a mandatory penalty scheme. That is a change to process.

To be sure, *Miller* is replete with references about the importance of the sentencing court to consider the teenage murderer's youthful characteristics and requiring the sentence to "tak[e] account of an offender's age and the wealth of characteristics and circumstances attendant to it," 132 S. Ct. at 2467, but nevertheless this Court was unambiguous that the cure to this ill was to provide an individualized sentence, i.e., to give the sentencing court "discretion to impose a different punishment." *Id.* at 2460; 2466 n.2 (describing the rule it sets out as one of "individualized sentencing"). It is a change in the process, not in the "elements" or findings a court must make. See *Miller*, 132 S. Ct. at 2471 ("it mandates only that a sentencer follow a certain process") (emphasis added). It is not a substantive change.

2. The fact that life without parole for juveniles is still available after *Miller* is dispositive.

The Nebraska court also relied on the fact that *Miller* expands the range of possible outcomes for juvenile murderers by requiring at least the consideration of life *with* the opportunity to parole. Pet. 31 ("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 demonstrates the rule announced in *Miller* is a substantive change in the law."). This same argument serves as the basis for the U.S. Government's concession on retroactivity. See Government's Response, *Johnson* v. *United States,* 720 F.3d 720 (8th Cir. 2013), at 13 ("The *Miller* rule, which holds that a juvenile defendant may not be subject to mandatory life without parole, but instead must be given the opportunity to demonstrate that a lesser sentence is appropriate, 132 S. Ct. at 2469, categorically expands the range of permissible outcomes of the criminal proceeding. It is therefore a substantive rule.").

But the change in possible outcomes does not fit within any of this Court's existing categories of the definition of "substantive." *Miller* does not exclude a category of punishment, see *Beard,* 542 U.S. at 416, but requires consideration of a lesser punishment that was not previously available. *Miller,* 132 S. Ct. at 2460 ("for example, life *with* the possibility of parole") (emphasis in original).

That the change may yield different outcomes cannot be dispositive. As with all significant changes to procedure for sentencing, a change in process very well may alter the sentence imposed. The most obvious example of such a change is from *Beard,* striking down a unanimity requirement on mitigating factors for death penalty cases, did not apply retroactively. 452 U.S. at 420. A jury might well decide to impose a lesser sentence, rather than the death penalty, where the jurors no longer must agree on the same basis for mitigation. See *Mills* v. *Maryland,* 486 U.S. 367, 384 (1988) ("The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk.").

To define "substantive" to include expanding the range of sentencing options would not further the considerations of justice that undergird this Court's retroactivity analysis. Finality yields where someone is serving a sentence that the government could not have lawfully imposed. See *Summerlin*, 542 U.S. at 352 (standards of retroactivity ensure that a criminal defendant will not "face[ ] a punishment that the law cannot impose upon him.") (internal citations omitted). But no one convicted of committing murder while a juvenile in Nebraska—or anywhere else in this country—is currently serving a sentence that could not have been imposed. All of them could have received the same life-without-parole sentence if they committed first-degree murder today. For these offenders, the considerations of finality should govern.

CONCLUSION

This Court should grant Nebraska's petition for certiorari.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Attorneys for *Amicus Curiae*
State of Michigan

Dated: JUNE 2014

Luther Strange
Attorney General
State of Alabama
501 Washington Ave.
Montgomery, AL 36130

Thomas C. Horne
Attorney General
State of Arizona
1275 W. Washington St.
Phoenix, AZ 85007

Dustin McDaniel
Attorney General
State of Arkansas
323 Center St., Ste. 200
Little Rock, AR 72201-2610

James D. "Buddy" Caldwell
Attorney General
State of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804

Timothy C. Fox
Attorney General
State of Montana
P.O. Box 201401
Helena, MT 59620-1404

Joseph A. Foster
Attorney General
State of New Hampshire
33 Capitol St.
Concord, NH 03301