Electronically Filed 07/18/2013 05:12:56 PM ET

RECEIVED, 7/18/2013 17:14:55, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC13-865

REBECCA LEE FALCON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER REBECCA LEE FALCON

ON DISCRETIONARY REVIEW OF A DECISION OF THE
FIRST DISTRICT COURT OF APPEAL

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INTRODUCTION

Like Evan Miller and Kuntrell Jackson, Rebecca Falcon, a child of fifteen, was sentenced to life imprisonment without the possibility of parole. In all three cases, the judge lacked discretion to impose any other sentence. In all three cases, state law required that "each juvenile die in prison," even if the judge would have thought that "youth and its attendant characteristics, along with the nature of his [or her] crime," made a lesser sentence more appropriate. *Miller v. Alabama*, --- U.S. ----, 132 S. Ct. 2455, 2460 (2012).

The United States Supreme Court held that Evan Miller and Kuntrell Jackson had been sentenced under an unconstitutional sentencing regime – one that failed to provide the individualized sentencing consideration required by the Eighth Amendment, and were entitled to sentencing hearings at which the judge has the opportunity to consider their age and age-related characteristics, as well as their crimes. *Id.* Because *Miller*'s landmark holding must be retroactively applied, Rebecca Falcon is entitled to the same relief.

This brief will address: (i) the reasoning that animates *Miller*, and its particular pertinence to Ms. Falcon's case; (ii) the significance of the equal treatment accorded Evan Miller and Kuntrell Jackson; and (iii) *Miller*'s retroactivity under (a) *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and (b) *Teague v. Lane*, 489 U.S. 288 (1989).

STATEMENT OF CASE AND FACTS

At the time she committed the crimes of first degree murder and attempted robbery, Rebecca Falcon was 15 years old, was in the 10th grade, and had never

been arrested. (R.32, 51). Rebecca's childhood, up to the age of 15 years, had been characterized by sexual abuse, being led by older males, "untreated effects of trauma," and "immature thinking." (R.46-47).

Rebecca was close to her biological father. (R.47). But her parents divorced when she was only five years old, and she was thereafter abandoned by her father. (R.47, 51). "[T]his loss was very painful for her," according to Dr. Marty Beyer, a national expert on adolescent psychology, who evaluated Rebecca in 1998 and interviewed her several times between 2004 and 2006. (R.25, 45-47, 52). Dr. Beyer explained that her father's abandonment "affected Rebecca's subsequent attention-seeking from older guys." (R.47).

Rebecca was sexually abused by her mother's fiancé when she was six years old. *Id.* Rebecca told her mother about the abuse, but "her mother did not believe her." *Id.* Dr. Beyer found that "the sexual abuse and her mother not doing anything about the harm it caused were contributors to Rebecca's troubled relationships with older guys, as well [as] her self-dislike." *Id.*

Rebecca's mother married the sexual perpetrator, who became a strict disciplinarian and an "emotionally abus[ive]" step-parent. *Id.* Rebecca's mother later admitted that Rebecca "got sacrificed" in the mother's second marriage. *Id.*

During her elementary school years, Rebecca felt "awkward" and "overweight," showing signs of attention-deficit disorder and "self-dislike." (R.48). Dr. Beyer reported that "it was already evident that her self-dislike would lead to more serious future problems." *Id.* The family moved several times, including one move when Rebecca was in the ninth grade. *Id.* Rebecca described

herself as having "tried to start over in ninth grade," believing that she was "a 'nobody' desperate for attention." *Id.* "I didn't have much sense. I would do things just for approval." (R.48). She began smoking marijuana. *Id.* Rebecca continued to be sexually exploited, now by boys in school, including a gang rape by five boys when she was in ninth grade. (R.24, 48).

In 10th grade, Rebecca "fell in love" with a 20-year old, and, when her parents attempted to cut off the relationship, Rebecca tried to kill herself. (R.48). Instead of providing Rebecca with desperately needed psychotherapy, her parents sent her away in the fall of 1997 from her home in Kansas, to live with her grandparents in Panama City, Florida. (R.48). On November 19, 1997, Rebecca's boyfriend in Kansas called her and told her that he was ending their relationship. (R.32-33).

Later that same night, after her grandparents went to bed, Rebecca drank her grandparents' whiskey to the point of intoxication, hoping to "sleep off her sadness." (R.33, 48). While she was drunk, Rebecca received a telephone call from Bruce Johnson, a 15-year old Panama City schoolmate, asking her to sneak out of her grandparents' house, and she joined him and his 18-year old friend, Cliffton Gilchrist. (R.23, 32-33, 48). Rebecca explained to Dr. Beyer that she made an "impulsive" decision to go out because "I was still not popular. . . . I was drunk and not thinking right then about obeying my grandmother's rules." (R.48).

Gilchrist brought a gun with him, and Rebecca "[i]mpulsively . . . agreed to the idea of a robbery." (R.33, 48). "[N]ot thinking past wanting to be accepted

and looking tough," Rebecca "suggested we rob a cab." (R.33). Rebecca explained the crimes to Dr. Beyer:

> I had never thought of doing anything like that before. I was trying to fit in. I tried to act more brave, more tough than them to cover my true feelings of insecurity. This wasn't me in my heart, but I was going to overcome my fears and do it so they would like me. I was dizzy, tired, and cold and just wanted to go home, but I couldn't go back on it then and be a coward. When we were in the cab I pulled out [Gilchrist's] gun and put it to the driver's head and said, "I'm sorry I have to do this, but give me your money." [I]n the movies I'd seen the robber get the money and go. I didn't anticipate that it wouldn't be that way. When the cab driver spe[d] up and started swerving I panicked and by mistake pulled the trigger. When I shot the gun I didn't do it because I wanted to kill someone. I had no idea what would happen to the person at the other end of the gun.

(R.48-49).

On May 11, 1999, Rebecca was convicted of first-degree murder and attempted armed robbery. (R.111). The trial court imposed a mandatory life-without-parole sentence on the murder conviction and 207.5 months on the attempted armed robbery conviction, to run concurrently with the life sentence. (R.113, 115-16).

Rebecca has been incarcerated now for over 15 years and has been a model prisoner, free of disciplinary reports for many years. (R.36). She has earned her high school degree while in prison, has taken a correspondence college writing course from the University of Florida, and has earned a myriad of awards and certificates, such as Completion of the Faith & Character Program, Certificate of Participation for Black History Month Observance, and Evangelism Explosion International Trainer Program. (R.36, 85, 91, 94-95). She has devoted herself to

the faith-based program at Lowell Correctional Institution and has worked as a Chaplain's Clerk. (R.61).

Rebecca has taken full responsibility for her actions, admitting that she fired the gun, although the jury found that she did not have actual possession of the firearm. (R.53, 118). Rebecca has also written letters to the victim's wife, Mrs. McLeod, and also has spoken with her. (R.79-84, 126). As Rebecca explains, this has had a profound effect: "Since speaking with Mrs. McLeod and receiving a photograph of her and her children I have cried many times. Putting a face and a voice to the people I hurt has made me even more remorseful for my actions." (R.35). In support of Rebecca, Mrs. McLeod has written that she believes that "life without parole is too harsh of a sentence for Rebecca Falcon." (R.126).

Dr. Beyer concludes her 2006 assessment of Rebecca as follows:

> She has matured into a remarkable young woman in eight years of incarceration. The positive characteristics I saw in Rebecca at age 16 have blossomed, and she has outgrown and overcome most of the immaturity, trauma and disabilities that affected her behavior as a teenager. She lives in a faith-based unit and is actively involved in soul-searching group discussion and Bible study. She has told me how she tries to help other inmates. Although her long sentence excludes her from classes in the facility, she has continued her intellectual growth by reading. She still wants to complete college so she can be employed helping others. Although she has not had counseling, over the years she has developed more understanding of the effects of trauma on her thinking and relationships when she was a teenager. In eight years Rebecca has matured into an intelligent adult with mature thought processes, has outgrown her attention deficit, and has mostly recovered from trauma-caused low self-esteem and lack of self-confidence. Her family's continued interest in her college education, employment and ongoing family ties would like [sic] contribute to her stability in the community. In 1998, I believed 16-

> year old Rebecca could be rehabilitated. In 2006, I am convinced that she poses no danger and would make a positive contribution to others if she is permitted to leave prison.

(R.52).

With the advent of *Miller*, Rebecca filed a motion for post-conviction relief and a motion to correct illegal sentence, seeking vacatur of the life sentence and an individualized resentencing. (R.1-13, 132-35). The trial court entered its order denying the motion on December 15, 2012. (R.197-98). On appeal, the First District affirmed the order but certified to this Court the question whether *Miller* should be retroactively applied. *Falcon v. State*, 111 So. 3d 973, 974 (Fla. 1st DCA 2013).

STANDARD OF REVIEW

The question whether *Miller* should apply retroactively is a question of law, subject to *de novo* review. *Smiley v. State*, 966 So. 2d 330, 333 (Fla. 2007).

SUMMARY OF ARGUMENT

Miller v. Alabama, --- U.S. ----, 132 S. Ct. 2455, 2460 (2012), establishes that sentences to mandatory life without parole for those under the age of 18 at the time of their crimes violate the Eighth Amendment. The Court recognized that, because so many of the traits of youth are a result of immaturity, children are less culpable and possess greater prospects for reform than adults. Rebecca Falcon, who committed this crime over fifteen years ago at the age of fifteen, is proof of the truth of the Court's analysis.

The Court banned mandatory lifetime sentences for juveniles, basing its holding on two strands of capital jurisprudence that: (i) erected categorical bans on

sentencing practices because of mismatches between the class of offenders' culpability and the harshness of the penalty, and (ii) prohibited mandatory imposition of the death penalty, instead requiring that mitigating circumstances be considered to afford an individualized sentence. Life-without-parole sentences, akin to a death sentence for a child, should be uncommon.

The Supreme Court chose to accept and consolidate two state cases in *Miller*, one on direct review and the other on collateral review. The Court announced its new rule of constitutional law, and applied the new rule to both cases. Because the Supreme Court should, as a matter of federal supremacy, be the final arbiter of the retroactive effect of its constitutional decisions, the state courts are equally obligated to apply *Miller* retroactively to sentences imposed prior to its announcement, regardless of the posture in which individual defendants seek relief. There is no rational constitutional scheme in which the post-conviction defendant who was before the Supreme Court received an Eighth Amendment-compliant sentence but Rebecca Falcon does not.

Moreover, Rebecca would be entitled to relief even if the question was only whether the *Witt* standards require retroactive application. Only the third prong of *Witt* is at issue here, under which fundamentally significant constitutional changes in law must be applied retroactively. This third prong implicates two broad tests, either of which *Miller* satisfies.

To begin with, *Miller* places it beyond the states' power to impose *mandatory* life sentences without parole on juvenile defendants. And even if that were not so, *Miller* meets the three-fold purpose-reliance-effect standard.

Miller's purpose, to prevent excessive and disproportionate sentences for children, protects fundamental constitutional liberty interests. By requiring individualized sentencing at which age and lessened culpability and capacity for change can be considered, *Miller* announces a fundamentally significant rule essential to avoid the substantial risk of an inaccurate, unfair, and unreliable sentence, much as did *Hitchcock v. Dugger*, 481 U.S. 393 (1987), in capital cases.

Just as this Court consistently applied *Hitchcock* retroactively, so too should it apply *Miller* retroactively. Doing so would denigrate neither the reliance nor administration-of-justice factors, because retroactive application will affect only those juveniles caught between the implementation of the mandatory penalty statute and cases still pending on direct review. Granting relief to these defendants will not result in overturning convictions, but rather will merely provide a constitutionally mandated sentencing hearing.

Finally, the same result is warranted under the federal retroactivity standard. *Miller* must be applied retroactively because its rule is substantive, *i.e.*, it prohibits imposition of a category of punishment: mandatory life-without-parole sentences, on a class of defendants: juveniles under the age of eighteen, because of their status as children. And its rule also constitutes that rare watershed pronouncement warranting retrospective application because it compels changes from past sentencing practices that so diminished accuracy that there are impermissible risks of excessive punishments of lifetime incarceration of children.

ARGUMENT

I. REBECCA FALCON'S LIFE-WITHOUT-PAROLE SENTENCE IS UNCONSTITUTIONAL UNDER *MILLER v. ALABAMA*.

A. The *Miller* Rule.

In *Miller*, the Supreme Court once again proclaimed that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464.[1] Because youth is a "time of immaturity, irresponsibility, impetuousness[,] and recklessness," *id.* at 2467 (alteration in original; citation omitted), and because these traits are transient, *id.*, children are both less culpable and possess greater prospects for reform than adults. *Id.* at 2464. Accordingly, a mandatory sentencing scheme that treats children and adults alike cannot be countenanced when the end result is lifetime incarceration without the possibility of ever being free. *Id.* at 2465-66.

The Court premised its Eighth Amendment holding on the concept of proportionality – that a sentence must be proportional to the offender and the offense. *Id.* at 2463. Two distinct lines of precedent originating in the Court's capital-punishment jurisprudence led to the conclusion that mandatory life-without-parole sentences for juveniles are disproportionate.

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[1] The Supreme Court previously recognized the unique characteristics of juvenile offenders in *Roper v. Simmon*, 543 U.S. 551 (2005), in which the Court held the death penalty unconstitutional for children under 18 years of age. The Court reiterated the significance of the transitory traits and vulnerabilities of childhood in *Graham v. Florida*, 560 U.S. 48 (2010), in invalidating life-without-possibility-of-parole sentences for non-homicide juvenile offenders.

First, the Court looked to its decisions invalidating the death penalty for certain classes of offenders on the ground that the extreme sentence exceeded the offender's culpability. *Id.* This principle was subsequently extended beyond death-penalty law in *Graham v. Florida*, 560 U.S. 48 (2010), in which the Court struck life-without-parole sentences for juvenile non-homicide offenders, because such a sentence is like a death sentence when imposed on a child. 132 S. Ct. at 2463.

This same reasoning implicated a second line of capital cases that required individualized sentencing. *Id.* at 2463-64. Decisions grounded on this theory had struck mandatory death-penalty statutes and required consideration of expansive mitigation before a defendant could be sentenced to death. *Id.* at 2464. With these two strands of capital jurisprudence as a guide, the Court reached its groundbreaking decision that a mandatory life-without-parole sentence for a juvenile who commits a homicide violates the Eighth Amendment by dictating a sentence "akin to the death penalty," *id.* at 2466, without affording an individualized consideration of the child's characteristics and circumstances. *Id.* at 2463-64.

B. *Miller*'s Particular Pertinence to Rebecca Falcon.

Rebecca Falcon was fifteen at the time of the crime. (R.29). She came from a traumatic and tumultuous background laced with sexual and mental abuse; as a result of her sense of paternal abandonment in the aftermath of her father joining the armed services, she sought the attention of older boys. (R.32, 47-48).

In her early teenage years, a despondent Rebecca attempted suicide after her mother and step-father tried to end her destructive relationship with an older boy. (R.48). At the time of the crime, Rebecca had only recently been sent to Florida by her mother and step-father, to live with her grandparents. (R.32, 47-48). In this new community, Rebecca continued to suffer from depression and poor self-esteem, as she desperately wanted friends and to "fit in." (R.32, 48).

The crime was committed when Rebecca was intoxicated on her grandfather's whiskey. (R.33, 48). She had snuck out of her grandparents' home in response to a classmate's invitation, and found him accompanied by an older – and armed – teenage boy. (R.33, 48). Rebecca and Gilchrist started talking about committing a robbery, and Rebecca, trying to appear tough, impulsively took the gun and suggested that they rob a taxi cab driver. (R.33, 48). When the driver who picked them up responded to the demand for money by swerving the car and accelerating, Rebecca panicked, fired the gun, and killed the driver. (R.33, 48-49). Like the crimes of Evan Miller and Kuntrell Jackson, this was an instance in which "a botched robbery turns into a killing." 132 S. Ct. at 2465.

The *Miller* Court identified three reasons why children are constitutionally different from adults when it comes to sentencing. First, their "underdeveloped sense of responsibility" tends to make them reckless and impulsive, and can lead to "heedless risk-taking." 132 S. Ct. at 2464. Second, children are more vulnerable than adults "to negative influences and outside pressures, including from their family and peers" and have "limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Id.*

(alteration, citation, and internal quotation marks omitted). Finally, a child's character is not yet well formed and his or her "traits are less fixed" than an adult's, so that the child's actions are "less likely to be evidence of irretrievable depravity." *Id.* (alteration and internal quotation marks omitted).

These transient attributes of childhood are particularly relevant to Rebecca Falcon, in terms of who she was at the time of the crime and who she has become in the years since. At 15 years of age, Rebecca, who had never before been arrested, was immature, impulsive, and vulnerable to peer pressure – especially from older boys – and found herself in a lethal situation from which she knew not how to escape. Some 15 years later, after having spent half of her life in prison, Rebecca has obtained her GED, enrolled in college correspondence courses, and has been voluntarily involved in the prison faith-based program for many years, undertaking numerous courses of study and earning considerable recognition. (R.36-37; 85-100). Prison authorities and others continue to speak to her maturity and leadership. (R.59-64).

In her quest for redemption and forgiveness, Rebecca has corresponded with the victim's widow, who has stated her belief that a sentence of life imprisonment without the possibility of parole is too harsh a sentence for Rebecca. (R.126). In her own words, Rebecca explains that she was "lost as a teenager," but now "God has placed Himself into my heart more strongly giving me conscience, conviction, compassion and understanding for others." (R.36).

II. THE UNITED STATES SUPREME COURT'S APPLICATION OF *MILLER* TO A SENTENCE CHALLENGED IN STATE COLLATERAL-REVIEW PROCEEDINGS COMPELS RETROACTIVE APPLICATION TO REBECCA FALCON.

As Chief Judge Benton observed in his concurring opinion, "Kuntrell Jackson, the defendant in the Arkansas case — like the appellant in our case — had reached the end of the line on direct appeal, without obtaining relief. *Jackson v. State*, [194 S.W.3d 757 (Ark. 2004)]." *Falcon v. State*, 111 So. 3d 973, 974 (Fla. 1st DCA 2013) (footnote omitted). A subsequent state habeas corpus petition was dismissed, and that dismissal was affirmed by the Arkansas Supreme Court. *Jackson v. Norris*, 378 S.W.3d 103 (Ark. 2011), *rev'd sub nom. Miller v. Alabama*, --- U.S. ----, 132 S.Ct. 2455 (2012). It was from this decision that Jackson sought certiorari in the United States Supreme Court. *Miller*, 132 S. Ct. at 2461-62.

The Supreme Court granted certiorari and consolidated Jackson's case with that of Evan Miller, who was before the Court on direct review. *Id.* at 2460, 2463.

> The difference in their procedural postures notwithstanding, the Supreme Court of the United States reversed both state appeals court judgments and, in *Jackson* and *Miller* alike, remand[ed] the cases for further proceedings not inconsistent with this opinion, *i.e.*, in order to afford the states' sentencing authorities "the opportunity to consider mitigating circumstances before [possibly re]imposing the harshest possible penalty for juveniles."

Falcon, 111 So. 3d at 975 (Benton, C.J., concurring) (alteration in original) (citations omitted).

Quoting Justice Alito's dissenting opinion in *Miller*, 132 S. Ct. at 2489, Chief Judge Benton noted that these were two "carefully selected" cases. *Falcon*, 111 So. 3d at 975 (Benton, C.J., concurring). The "carefully selected" cases, he

explained, "make clear to the discerning reader that the rule laid down in *Miller* and *Jackson* applied whether or not the mandatory life-without-parole-sentenced juvenile's case was still 'in the pipeline.'" *Id.*

And the Supreme Court indeed made that eminently plain. Two cases – one on direct review and one on collateral review – received the identical result: reversal and remand for individualized sentencing proceedings. 132 S. Ct. at 2475.[2] For both petitioners, the mandatory sentencing regime of lifetime incarceration without possibility of parole violated the Eighth Amendment. *Id.* For both, the Court ordered that the sentencer must have the opportunity to impose an individualized sentence after consideration of relevant mitigation. *Id.*[3]

To prevent "the inequity that results when only one of many similarly situated defendants receives the benefit of the new rule," *Griffith v. Kentucky*, 479 U.S. 314, 327-28 (1987) (internal quotation marks omitted), the Supreme Court has

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[2] It bears mention that the dissenters, while taking issue with whether the mandatory sentencing scheme violated the Eighth Amendment, never suggested that Jackson was not entitled to relief because he was on collateral, instead of direct, review. *See* 132 S. Ct. at 2477-90.

[3] The Court's Eighth Amendment analysis, linking this decision to retroactive capital precedent invalidating mandatory sentences and death sentences imposed without individualized sentencing, makes clear the retrospective applicability that is actually effected by the relief afforded Jackson. *See Geter v. State*, No. 3D12-1736, 2013 WL 3197162, at *2-6 (Fla. 3d DCA June 26, 2013) (Emas, J., dissenting from denial of rehearing *en banc*) (relief granted to Jackson in light of *Teague*'s restriction on retroactive application, and Eighth Amendment capital precedent on which decision is based, indicate Supreme Court's intention to apply *Miller* retroactively); *accord Falcon v. State*, 111 So. 3d at 975-76 (Benton, C.J., concurring) (relief granted to Jackson shows Court's intent that *Miller* apply to all cases on collateral review).

elucidated that "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 v. Lane*, 489 U.S. 288, 300 (1989) (plurality). In *Teague*, a collateral-review case, because the rule sought by Teague would have been a new rule for which retroactive effect would be inappropriate, the Court declined to address the merits to avoid according Teague, but denying others similarly situated, the benefit of the holding. *Id.* at 311-15. The Court explained that it "can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated." *Id.* at 316; *see Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) (under *Teague*, Supreme Court will not apply a new rule to a case on collateral review unless that rule applies retroactively to all cases on collateral review), *abrogated on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002).

The import, then, of the Court's decision to grant relief to both Evan Miller and Kuntrell Jackson becomes abundantly clear, as does the conclusion that the Court's holding must be retrospectively applied on state collateral review. As this Court observed in *Johnson v. State*, 904 So. 2d 400, 408-09 (Fla. 2005), a holding by the Supreme Court that a new rule is not retroactive does not bind state courts, for a state can apply, and Florida has chosen to apply, a more expansive rule of retroactive application. *See Danforth v. Minnesota*, 552 U.S. 264, 282 (2008) (states free to grant retroactive application to constitutional violation not deemed retroactive for federal habeas purposes under *Teague*); *Witt*, 387 So. 2d at 928 (no

obligation to construe state post-conviction relief like federal courts "at least where fundamental federal constitutional rights are not involved").

But where a federal constitutional right is at issue – and here a substantive Eighth Amendment right is very much at issue – the Supreme Court is the ultimate arbiter of the minimum breadth of that federal constitutional right. *See Danforth*, 552 U.S. at 280 (state courts may "grant habeas relief to a broader class of individuals" and "give its citizens the benefit of our rule in any fashion that does not offend federal law"); *see id.* at 307-10 (Roberts, C.J., dissenting) (under the Supremacy Clause, state courts should not be free to grant or deny retroactive effect to Supreme Court decisions without regard to Supreme Court's own determination of retroactivity question). The Supreme Court's grant of retrospective relief to Kuntrell Jackson on his substantive claim is controlling.

The significance of the Supreme Court's decision to accept Jackson's collateral case as a companion to Miller's, and grant relief to both, cannot be overstated. No similarly situated post-conviction applicant should be denied the relief accorded to Jackson:

> [T]he harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment hardly comports with the ideal of administration of justice with an even hand. . . . We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review . . . .

Teague, 489 U.S. 315-16 (O'Connor, J., concurring) (citations and internal quotation marks omitted).[4] In sum, Jackson could only have been granted the relief that he received if *Miller* is retroactive and applies to all defendants on collateral review. Florida can apply a *broader* retroactivity test, but it cannot refuse to follow the Supreme Court's retroactive application of its Eighth Amendment holding. *Geter*, 2013 WL 3197162, at *3 n.2 (Emas, J., dissenting from denial of rehearing *en banc*).

Evenhanded justice, the bedrock of the Supreme Court's retroactivity analysis, is no less a vital concern of this Court in conducting Florida's retroactivity analysis under *Witt*. As this Court recognized in *Witt*, "[c]onsiderations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." 387 So. 2d at 925 (internal quotation marks omitted).

III. *MILLER* IS RETROACTIVE UNDER THE *WITT* STANDARDS.

A. The *Witt* Standards: An Overview.

Although the Supreme Court's retroactive application of *Miller* makes it unnecessary to address the question, retroactive application would independently be warranted under *Witt*. In setting forth Florida's retroactivity test, this Court

[4] That Florida does not employ *Teague*'s retroactivity analysis in no way undercuts the import of the Supreme Court's insistence that that Court will not announce new rules in cases on collateral review unless they are to be retroactively applied to *all* defendants on collateral review.

explained that the "main purpose" of Florida Rule of Criminal Procedure 3.850 is to provide access to review based on a "major change of law, where unfairness was so fundamental in either process or substance that the doctrine of finality had to be set aside." 387 So. 3d at 927.

The overarching theme of *Witt*, then, is that "finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." *Id.* at 925. These twin goals could not be more at issue than here. Unless *Miller* is given retroactive effect, some, but only some, children will be sentenced for the remainder of their lives without the constitutionally required individualized sentencing that "take[s] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S. Ct. at 2469. Indeed, if an appropriate occasion for sentencing a juvenile to this severe penalty is, as the Supreme Court said, "uncommon," *id.*, then surely retroactive application of *Miller* – a decision that so dramatically alters the contours of juvenile sentencing from that which was not only common, but automatic – is compelled, under this Court's reasoning in *Witt*:

> Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.

Witt, 387 So. 2d at 925 (internal quotation marks omitted).

B. *Witt*'s Tripartite Test: A Supreme Court Decision, Constitutional in Nature, of Fundamental Significance.

The retroactivity question requires the balancing of the need for decisional finality against considerations of fairness and uniformity, *State v. Callaway*, 658 So. 2d 983, 986 (Fla. 1995), *receded from in part on other grounds, Dixon v. State*, 730 So. 2d 265 (Fla. 1999), and because of its concern for finality, the Court rarely has found that retroactive application is required. *Mitchell v. Moore*, 786 So. 2d 521, 529 (Fla. 2001). Recognizing the limited role for post-conviction proceedings, this Court has restricted retroactive application to cases that meet three requirements. The first and second of those requirements – that the new rule of law must emanate from either this Court or the United States Supreme Court and must be constitutional in nature, 387 So. 2d at 928-31 – are unquestionably satisfied.

The third component focuses on the fundamental significance of the change in law, an element that is of necessity somewhat more imprecise. But this Court clarified this component by explaining that "[a]lthough specific determinations regarding the significance of various legal developments must be made on a case-by-case basis, history shows that most major constitutional changes are likely to fall within two broad categories." *Id.* at 929.

(1) Fundamental significance: the first broad category relating to the state's authority.

The first broad category involves changes in law that "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties." *Id.* Respondent State of Florida previously has conceded that *Miller* is

such a change in law. *See Falcon*, 111 So. 3d at 975 n.3 (Benton, C.J., concurring) (state conceded in post-*Miller* habeas submission that the "*Miller* decision is retroactively applied, if not under federal law, as a matter of Florida law" because the "sentencing scheme was unconstitutional as applied to a clear class of offenders").

Judge VanNortwick, specially concurring in the affirmance and certification of the *Miller* retroactivity question in *Smith v. State*, 113 So. 3d 1058 (Fla. 1st DCA 2013), explains why *Miller* falls within this category and is therefore retroactive:

> In *Miller*, the U.S. Supreme Court held that a mandatory sentence of life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on "cruel and unusual punishments." 132 S. Ct. at 2460. This holding renders *Miller* a case that "place[s] beyond the authority of the state the power . . . to impose certain penalties." *Witt*, 387 So. 2d at 929. Thus, the *Miller* decision falls within the *first* category of major or fundamentally significant changes of law as outlined in *Witt.*

Id. at 1061-62 (alterations in original). *Miller* "falls squarely within this first category," *id.* at 1062, and does not "merely mandate a certain process," *id.*, because it categorically proscribes mandatory life sentences for juveniles:

> Under *Miller*, a defendant cannot be given a *mandatory* sentence of life without parole if the defendant was a juvenile when the offense was committed. That is, *Miller* categorically bans mandatory life sentences for juveniles. Thus, *Miller* "[p]laces beyond the authority of the state [of Florida] the power to . . . impose [a] certain penalt[y]" – mandatory life sentences for juveniles. *Witt*, 387 So. 2d at 929.

Id. (alterations in original).

As noted previously, *Miller* is premised on two strands of Eighth Amendment precedent: (1) the "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty"; and (2) decisions that "prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." 132 S. Ct. at 2463-64. The decision announces a new *substantive* bar to mandatory life sentences for all juveniles, proclaiming that the Eighth Amendment forbids such a mandatory sentencing scheme. *Id.* at 2464, 2469. Indeed, Chief Justice Roberts, in his dissenting opinion, recognizes the substantive proscription imposed by the majority decision, which "invokes [the Eighth] Amendment to ban a punishment . . . ," *id.* at 2477, expressly noting that the "sentence at issue is statutorily mandated life without parole," *id.* at 2479, and that the "premise of the Court's decision is that mandatory sentences are categorically different from discretionary ones," *id.* at n.2, so that the "Court's analysis focuses on the mandatory nature of the sentences in this case." *Id.* at 2481.[5]

The *Miller* decision could not be clearer, then, that the Court, while not categorically *precluding* a life sentence without parole for a juvenile in an

[5] Mandatory sentences are indeed categorically different, as the Supreme Court just reaffirmed in *Alleyne v. United States*, --- U.S. ----, 133 S. Ct. 2151 (2013), in pointing out that both the floor and ceiling of sentencing ranges define the legally prescribed penalty. 133 S. Ct. at 2160. Florida's mandatory life-without-parole statute essentially raises the floor to the ceiling, mandating that the juvenile be imprisoned until death. "It is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Id.* at 2161.

unidentified, but definitely uncommon, case, was *categorically* striking – as a matter of substantive Eighth Amendment law – all mandatory regimes that *require* such sentences:

> By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

Id. at 2475.[6] Thus, *Miller* places beyond the authority of the state the power to impose a certain penalty: mandatory life imprisonment without the possibility of parole, and warrants retroactive application under the first of *Witt*'s "two broad categories," 387 So. 2d at 929, of fundamentally significant changes of law.

(2) Fundamental significance: second broad category's threefold test of purpose, reliance, and effect.

Miller would equally compel retroactive application under the second broad category, that asks whether the change in law is of sufficient magnitude under the three-part test of *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965). *Witt*, 387 So. 2d at 929.[7] This test focuses on: (i) the

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[6] Florida has such a mandatory scheme for first-degree murder, a capital felony for which the only possible sentences are either death or life imprisonment without the possibility of parole. §§ 782.04(1), 775.082(1), Fla. Stat. (2012). Because a juvenile is not eligible for a death sentence, the only possible penalty is a mandatory sentence of life-without-parole, a penalty that the Eighth Amendment also categorically forbids.

[7] *Teague* was never intended to prohibit a state from granting broader retrospective relief when reviewing its own state convictions. *Danforth*, 552 U.S. at 280-81. It is thus entirely appropriate for a state to adhere to *Linkletter/Stovall* analysis, as Florida has done. Of course, even the *Linkletter/Stovall* test did not affirmatively (continued . . .)

purpose of the new rule; (ii) the reliance on the old rule; and (iii) the impact on the administration of justice in applying the new rule. *Id.* at 926.

(a) General rules for applying the purpose-reliance-effect test.

This Court noted in *State v. Barnum*, 921 So. 2d 513 (Fla. 2005), that its three-part test was adapted from the ABA Standards Relating to Post-Conviction Remedies (Approv. Draft 1968), Section 2.1(a)(vi), which provide:

> A post-conviction remedy ought to be sufficiently broad to provide relief (a) for meritorious claims challenging judgments of convictions, including claims:
>
> (vi) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence, where sufficient reasons exist to allow retroactive application of the changed legal standard.

Id. at 519 (quoting *Witt*, 387 So. 2d at 929 n.25). These ABA Standards inform the *Stovall/Linkletter* analysis under *Witt*, and evince that retroactive application of new rules will be granted – whether or not the rule is substantive or procedural and whether or not the rule pertains to the conviction or the sentence – so long as the rule represents a sufficiently significant change in the law.

The decisions of the Supreme Court in applying its own *Stovall/Linkletter* criteria are also instructive. *See Hughes v. State*, 901 So. 2d 837, 842-43, 848 (Fla. 2005) (finding analytical support for holding *Apprendi v. New Jersey*, 530 U.S.

(. . . continued)
delimit a state's right to grant more expansive retroactive effect to new rules. *Id.* at 274-75. States are still free to apply changes in law to a broader range of cases than is required by Supreme Court decisions. *See id.* at 277, 282.

466 (2000), not retroactive under *Witt* from pre-*Teague* Supreme Court precedent applying *Stovall/Linkletter* test adopted in *Witt*). In discussing the three-part analysis, the Supreme Court made manifest that "[f]oremost among these factors is the purpose to be served by the new constitutional rule." *Desist v. United States*, 394 U.S. 244, 249 (1969); *see also Hughes v. State*, 901 So. 2d at 849 (Lewis, J., concurring in result) ("the purpose served by a new rule of law is a key factor in determining retroactivity in Florida").

Accordingly, where the purpose of the new rule is to deter future police misconduct with the application of evidentiary exclusionary rules, as it was in *Linkletter* and *Desist*, prospective application is appropriate. *Desist*, 394 U.S. at 249. But the Supreme Court expressly admonished that "we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice *only* when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity." *Id.* at 251 (emphasis supplied); *see Roberts v. Russell*, 392 U.S. 293, 295 (1968) (even where impact of retroactivity holding would be significant under "reliance" and "effect" components, rule will be retroactively applied to avert serious risk that issue of guilt may not have been reliably determined).

(b) Applying the three-part test to liberty interests: avoiding manifest injustice.

Consistent with the ABA Post-Conviction Standards, the Supreme Court has approved the retroactive application of new rules of law that implicate the integrity of the process that determines the sentence, as opposed to the conviction, where the

new rule involves the "basic requirements of procedural fairness." *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20, 522-23 n.22 (1968). And this Court has similarly found retroactive application compelled where the new rule of law "significantly impacts a defendant's constitutional liberty interests." *Callaway*, 658 So. 2d at 986. Indeed, in finding changes in the law that affect sentencing to be retroactive, this Court has been particularly sensitive to the injustice that results when some prisoners will serve lengthier terms of imprisonment than others who are similarly situated if a new rule is not deemed retroactive.

This Court's receptivity to permitting retrospective correction of sentences that were legal at the time imposed but thereafter determined to be illegal was apparent in *Villery v. Florida Parole and Probation Commission*, 396 So. 2d 1107 (Fla. 1980), *superseded by statute on other grounds, Van Tassel v. Coffman*, 486 So. 2d 528 (Fla. 1985), decided three months after *Witt*. *Villery* held that when incarceration is imposed as a condition of probation that incarceration cannot exceed one year, since a lengthier term of imprisonment ceases to serve a rehabilitative function and precludes parole opportunities that attach to a prison sentence in excess of one year. *Id.* at 1111. Without engaging in *Witt* analysis, the Court stated simply: "We further hold that this decision applies retroactively." *Id.*

In *Callaway*, the Court held that the change in law precluding the imposition of consecutive habitual-offender sentences on convictions arising from a single criminal episode satisfied *Witt's* three-part test. 658 So. 2d at 986-87. Focusing on the "fundamental significance" component, the Court reasoned that the new rule's

purpose is to ensure that defendants convicted of multiple offenses arising from one transaction do not receive doubly enhanced sentences. *Id.*

Although lower courts may have relied on the belief that consecutive habitual offender sentences were permitted over the preceding six years, the Court noted that trial courts "will not be required to overturn convictions or delve extensively into stale records," *id.* at 987, and that the administration of justice "would be more detrimentally affected if criminal defendants who had the misfortune to be sentenced during the six year window" are required to serve "two or more times as long as similarly situated defendants who happened to be sentenced after" the rule was announced. *Id.* The Court emphasized that the "concern for fairness and uniformity in individual cases outweighs any adverse impact that retroactive application of the rule might have on decisional finality." *Id.*

Similarly, in *State v. Stevens*, 714 So. 2d 347 (Fla. 1998), this Court held that retroactive application of the rule announced in *State v. Iacovone*, 660 So. 2d 1371 (Fla. 1995), was required under *Witt*'s tripartite test. The new rule limited the scope of the attempt statute to attempted first-degree murder, holding that to apply the attempt statute to attempted second- or third-degree murder led to absurd results. *Stevens*, 714 So. 2d at 348. The Court explained that "imposition of a hefty criminal sentence pursuant to a patently 'irrational' sentencing scheme" violates due process, and once more declared that the "concern for fairness and uniformity in individual cases outweighs any adverse impact that retroactive application of the rule might have on decisional finality." *Id.* (citation omitted).

Of course, when the Court's ruling is not a fundamental or constitutional change in the law, but a mere evolutionary refinement of standards for admitting evidence, for procedural fairness, for capital proportionality review, and the like, *Witt*, 387 So. 2d at 929-30, as was the case when reasons for departures from the Sentencing Guidelines were being formulated and approved or disapproved, retroactive application will not follow. *See McCuiston v. State*, 534 So. 2d 1144, 1146 (Fla. 1988) (decision holding habitual-offender status not reason to depart from guidelines but can be used to extend statutory maximum not retroactive). Similarly, this Court has refused to give retroactive effect to the holding that multiple convictions and sentences were not permitted for drug trafficking and delivery charges arising from a single criminal act where that holding was simply an attempt to harmonize prior decisions and retroactive application would not "cure any individual injustice or unfairness." *State v. Glenn*, 558 So. 2d 4, 8 (Fla. 1990).

But when the new rule requires a fundamental constitutional change, retrospective application has been granted. Indeed, almost a decade after *Glenn*, Justice Pariente underscored the principle animating the *Callaway* decision, and a theme that is at the heart of the Court's retroactivity holdings in sentencing cases: "Our underlying concerns in *Callaway* were fundamental fairness and uniformity in sentences between similarly situated prisoners" when the new rule "significantly impacts a defendant's constitutional liberty interests." *Dixon v. State*, 730 So. 2d 265, 267 (Fla. 1999).

C. Applying the Second Category: Purpose, Reliance, and Effect.

The fact that a new rule implicates the sentence to be served as opposed to the conviction in no way precludes retroactive application.[8] On the other hand, when the accuracy of neither the prior conviction nor the sentence is subject to serious question under the new rule, the rule's purpose is unlikely to outweigh the interests of finality. *Cf., Hughes*, 901 So. 2d at 844 ("neither the accuracy of convictions *nor of sentences* imposed and final before *Apprendi* issued is seriously impugned" (emphasis supplied; citation omitted)). The question thus becomes, what is *Miller*'s purpose and has the accuracy of prior mandatory lifetime sentences been seriously impugned.

(1) *Miller*'s purpose.

Miller prevents excessive and disproportionate lifetime sentences for children, and requires an individualized sentencing at which their lessened culpability and capacity for change can be duly considered. 132 S. Ct. at 2460. As the Court elucidated, the distinctive aspects of childhood diminish the penological justifications of retribution, deterrence, and incapacitation, *id.* at 2465, so that "[b]y making youth (and all that accompanies it) irrelevant to imposition of that

[8] The Third District's holding that retroactive application of *Miller* is unwarranted because the validity of the *sentence* rather than the *conviction* is at issue, *Geter v. State*, No. 3D12-1736, 2012 WL 4448860, at *5 (Fla. 3d DCA Sept. 27, 2012), therefore is simply wrong. Indeed, this Court, at least since 1968 when it adopted a rule for motions to correct illegal sentences, has recognized that the harm caused by an illegal – even if not unconstitutional – sentence is so significant that such a sentence should be correctable at any time. *Id.*

harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.* at 2469.

The Court, in holding that such a mandatory regime violates the Eighth Amendment, concluded:

> By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

Id. at 2475.[9]

It is at once apparent that this rule is rooted in accuracy: a mandatory-lifetime sentence "poses too great a risk of disproportionate punishment," *id.* at 2469, because "youth matters in determining the appropriateness of a lifetime of incarceration," *id.* at 2465, and because children's diminished culpability and heightened capacity for change means that lifetime sentences for children should be "uncommon." *Id.* at 2469. It is equally apparent that this rule is founded on principles of fundamental fairness and justice: the Eighth Amendment's proscription of cruel and unusual punishment guarantees the right not to be subjected to excessive sanctions, a right that "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the

[9] *Miller* unquestionably "alters" the "class of persons that the law punishes" – an indication that its purpose warrants retroactive application, *see Hernandez v. State*, Nos. SC11-941, SC11-1357, 2012 WL 5869660, at *5 (Fla. 2012) (citation omitted) – because *Miller* renders Florida's mandatory life-without-parole statute inapplicable to juveniles.

offender and the offense." *Id.* at 2463 (citation and internal quotation marks omitted). Unquestionably, *Miller* announces a rule that effects an accurate and proportional sentence and ensures basic fundamental fairness, and thus "significantly impacts a defendant's constitutional liberty interests." *Dixon*, 730 So. 2d at 267.

(a) *Apprendi*'s retroactivity: an inappropriate Sixth Amendment analog.

The Third District, in finding that *Miller* should not be given retrospective effect, equated *Miller*'s purpose with that of *Apprendi*. *Geter*, 2012 WL 4448860, at *3-7. That court read this Court's *Hughes* decision holding *Apprendi* not retroactive under *Witt*, as supportive of this comparison. *Id.* at *3-4. But the Third District overlooked both key components of *Hughes*, and key distinctions between the Sixth Amendment right at issue in that case and *Miller*'s Eighth Amendment ruling.

This Court pointed out that *Apprendi* shifts fact-finding responsibility for sentencing elements from the judge to the jury, as a safeguard against erosion of the Sixth Amendment jury-trial right. *Hughes*, 901 So. 2d at 841. That purpose does not warrant retroactive application, because the Supreme Court "was not concerned that the established procedure was fundamentally unfair." *Id.* As this Court noted, the Supreme Court has expressly stated that the Sixth Amendment right "does not turn on the relative rationality, fairness, or efficiency of potential factfinders." *Id.* at 841, 843.

In the same way that the Sixth Amendment jury-trial right at issue in *Duncan v. Louisiana*, 391 U.S. 145 (1968), did not apply retroactively – because that right "in no way impugned the integrity of bench trials," *Hughes*, 901 So. 2d at 842 (quoting *Duncan*, 391 U.S. at 149), and therefore prior bench trials were not fundamentally flawed or implicitly unfair – it followed that *Apprendi*'s more limited jury-trial guarantee could not warrant retroactive application. *Hughes*, 901 So. 2d at 842-43; *accord State v. Johnson*, No. SC09-1570, 2013 WL 3214599, at *8-9 (Fla. June 27, 2013) (holding *Blakely v. Washington*, 542 U.S. 296 (2004), does not apply retroactively where judicial fact-finding not proscribed; rule simply charged jury with making certain factual findings, and jury-trial right never held retroactive); *Johnson*, 904 So. 2d at 410 (holding *Ring v. Arizona*, 536 U.S. 584 (2002), does not apply retroactively because its purpose is to conform criminal procedure to Sixth Amendment jury-trial guarantee, not to enhance fairness or efficiency of death-penalty procedures); *see also Chandler v. Crosby*, 916 So. 2d 728, 730 (Fla. 2005) (Sixth Amendment confrontation rule announced in *Crawford v. Washington*, 541 U.S. 36 (2004), changing prior rule on evidence admissibility not retroactive because "purpose is not to improve the accuracy of trials or even to improve the reliability of evidence," but only to require "that reliability be assessed in a particular manner.") (citation and quotation omitted).

Thus, the determining factor was neither that the rule is "procedural" nor that it pertains to "sentencing." What matters is that the new rule only affects who is the fact-finder, and the accuracy, reliability, and fairness of past proceedings were accordingly in no way impugned by the change in law.

Of course, Rebecca Falcon's claim does not rest on the Sixth Amendment; nor does it concern who was the fact-finder at sentencing. Rebecca's claim, predicated on the Eighth Amendment, is that there was *no* fact-finder, because mitigating circumstances could not be considered by anyone due to the mandatory constraints on sentencing. For her, and all other children mandatorily sentenced to lifetime incarceration, the accuracy, fairness, and reliability of the sentence could not be any more at issue. Because they were all indiscriminately sentenced to a sentence that should be uncommon, because their youth and attendant transient factors that call for a lesser sentence could not be taken into account, because the possibility of maturity and rehabilitation could not be considered, the law that mandated that "each juvenile die in prison" created the substantial risk of an inaccurate, unfair, and unreliable sentence. *Miller*, 132 S. Ct. at 2460, 2466, 2469. Consequently, a more appropriate analog is found in this Court's decisions holding retroactive the Eighth Amendment rule of *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

(b) *Lockett/Hitchcock* retroactivity: a more apt Eighth Amendment analog.

The Supreme Court, in *Lockett*, held that individualized sentencing is an Eighth Amendment prerequisite to a valid death sentence and therefore, a sentencer must not be precluded from considering in mitigation any aspect of a defendant's character or record or circumstances of the crime that the defendant proffers in mitigation. 438 U.S. at 604. This Court, after noting that the federal appeals court had declared *Lockett* retroactive, independently concluded that

retroactive application was appropriate and required the grant of new sentencing proceedings in cases where trial judges believed that mitigating consideration was limited to the statutory mitigating circumstances:

> It is our independent view that an appellant seeking post-conviction relief is entitled to a new sentencing proceeding when it is apparent from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out in the capital sentencing statute in determining whether to impose a sentence of death or life imprisonment without parole for twenty-five years.

Harvard v. State, 486 So. 2d 537, 539 (Fla. 1986) (citations omitted); *accord Foster v. State*, 518 So. 2d 901, 902 (Fla. 1987) (habeas corpus petition granted where record indicated that trial judge did not consider nonstatutory mitigation; rejecting the state's argument that *Lockett* claims are procedurally barred).

The United States Supreme Court, in *Hitchcock*, held that Florida's capital-sentencing regime violated the Eighth Amendment where the advisory jury was instructed not to consider, and the sentencing judge refused to consider, nonstatutory mitigating evidence. 481 U.S. 393-99. The Court premised this holding on its Eighth Amendment jurisprudence that mandated consideration of relevant mitigating evidence, as first espoused in *Lockett* and reaffirmed in *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982), and *Skipper v. South Carolina*, 476 U.S. 1 (1986).

The obligation to consider all relevant mitigating evidence at the sentencing proceedings was necessary to avert disproportionality between the offender and the sentence – in other words, to avoid "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S. at

605. The Court, reaching back to its decisions overturning mandatory sentencing schemes, emphasized the need for individualized sentencing that takes into account the character and record of the individual offender and the circumstances of the particular offense. *Id.* at 604-05; *accord Eddings*, 455 U.S. at 111-12; *Skipper*, 476 U.S. at 4. The Florida death penalty structure was flawed, not because it precluded all consideration of mitigation, but because the statute was interpreted as restricting the advisory jury and sentencing court to the mitigating circumstances set forth in the statute. *Hitchcock*, 481 U.S at 396-97.

The holding in *Miller* is premised on identical Eighth Amendment tenets as *Hitchcock*, and is thus strikingly similar. There are two distinctions. First, *Hitchcock* involved the death penalty, while *Miller* only involved a sentence of life without parole. But the Supreme Court has already elaborated on the insignificance of this distinction when it comes to lifetime sentences for children.

The Court, "by likening life-without-parole sentences imposed on juveniles to the death penalty itself," *Miller*, 132 S. Ct. at 2466, reiterated what it first declared in *Graham*, that mandatory life sentences share characteristics with death sentences "that are shared by no other sentences." 130 S. Ct. at 2027. The Court explained that imprisoning a child until she dies alters the remainder of her life "by a forfeiture that is irrevocable" and is particularly harsh because she will "almost inevitably serve more years and a greater percentage" of her life than an adult offender. *Miller*, 132 S. Ct. at 2466 (quotations omitted). The Court thus made clear that such a sentence "when imposed on a teenager, as compared with an older

person, is therefore the same in name only," *id.* (alterations and internal quotation marks omitted), indeed, is "akin to the death penalty." *Id.*

The second distinction between *Hitchcock* and *Miller* involves the scope of the denial of the Eighth Amendment guarantee of proportionality and individualization in sentencing. Hitchcock, and those similarly situated, were prohibited from presenting only non-statutory mitigation to the jury and judge. They were able to offer, and their advisory jury and sentencing court were able to consider, evidence relevant to the seven broad mitigating circumstances set forth in the Florida statute. Not so for Rebecca, who – like Evan Miller and Kuntrell Jackson – was confronted with a mandatory sentencing scheme that prohibited the presentation of *any* evidence in mitigation and inexorably compelled a lifetime sentence.

Because the constitutional underpinnings of *Hitchcock* and *Miller* are the same and the severity of the sentence and defect in the sentencing process are "akin" for all intents and purposes, *Miller*, 132 S. Ct. at 2466, this Court's retroactivity analysis for *Hitchcock* claims is instructive. With little fanfare, this Court held that *Hitchcock* applies retroactively. The first case, decided less than two months after *Hitchcock*, was *McCrae v. State*, 510 So. 2d 874 (Fla. 1987). McCrae, on his third post-conviction motion, challenged his death sentence on the ground that the sentencing judge had believed that he could not consider non-statutory mitigating circumstances. *Id.* at 880. Finding that the record "shows a situation similar to that found in *Hitchcock*," *id.* (citation omitted), the Court reversed the denial of the 3.850 motion and remanded for a new sentencing

proceeding before the trial judge. *Id.* at 880-81. Because the advisory jury had recommended a life sentence, there was no need to empanel a new jury for an additional jury proceeding. *Id.* at 881.

In the months that followed, this Court repeatedly held that *Hitchcock* claims warranted retroactive application on post-conviction collateral motions or habeas petitions. First, in *Riley v. Wainwright*, 517 So. 2d 656 (Fla. 1987), the Court noted that *Lockett* was certainly retroactive as it pertains to the trial judge so that a trial judge who imposed a death sentence under the mistaken belief that mitigation was limited to the statutory factors "commits reversible error whether sentence was imposed post- or pre- *Lockett.*" *Id.* at 657. The Court, after acknowledging that the Supreme Court, as well as this Court, had vacated sentences imposed prior to, but in violation of, *Lockett*, concluded that the same result was required when it was the jury due to faulty jury instructions that failed to consider non-statutory mitigation. *Id.* Because Riley's pre-*Lockett* advisory sentencing proceeding violated *Lockett*, "[u]nder *Hitchcock*, this finding is sufficient to require a new [jury] sentencing proceeding." *Id.* at 659. The Court rejected the state's argument that the Court had previously approved the advisory jury instructions, and pointed out that, "[e]ven if the precise issue had been squarely and adequately presented to this Court, *Hitchcock* would compel us to remand for resentencing." *Id.*

Six days later, in *Thompson v. State*, 515 So. 2d 173, 175 (Fla. 1987), the Court re-affirmed that *Hitchcock* would be applied retroactively. The Eleventh Circuit had already rejected the claim on the merits, finding that Thompson had not presented any significant nonstatutory mitigating circumstances. *Thompson v.*

Wainwright, 787 F.2d 1447, 1457 (11th Cir. 1986). But this Court concluded "that the recent United States Supreme Court decision in *Hitchcock v. Dugger*," required new sentencing proceedings before the jury and the judge. 515 So. 2d at 174, 176. Rejecting the state's contention that the Eleventh Circuit decision somehow made the procedural-default rule applicable, the Court noted that only this Court or the Supreme Court could "effect a sufficient change of law to merit a subsequent post-conviction challenge to a final conviction." *Id.* at 175 (citing *Witt*, 387 So. 2d at 930). The Court declared that *Hitchcock* was such a change of law:

> We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its *Hitchcock* opinion represents a sufficient change in the law that potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default.

515 So. 2d at 175. The Court then found that the jury sentencing proceeding was flawed and that the death sentence violated *Lockett* and *Hitchcock*, necessitating a sentencing hearing before a new jury. *Id.*

On the same day that the Court reversed Thompson's death sentence and remanded for a new jury sentencing proceeding, the Court granted the same relief in *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987). The Court, noting that its prior standard of review for *Hitchcock* claims had upheld death sentences so long as defense counsel was not precluded from presenting nonstatutory mitigation, recognized that the "mere presentation" was insufficient under *Hitchcock*. *Id.* at 1071. Finding *Hitchcock* to be a "substantial change in the law," *id.* at 1070, the Court ordered a new jury sentencing. *Id.* at 1071-72.

Numerous post-conviction cases thereafter compelled identical reversals and remands for new jury sentencing proceedings. *E.g.*, *Way v. State*, 568 So. 2d 1263, 1266-67 (Fla. 1990) (collateral attack on death sentence permitted and case remanded for new sentencing hearing before a jury); *Hall v. State*, 541 So. 2d 1125, 1126 (Fla. 1989) ("as we have stated on several occasions, *Hitchcock* is a significant change in law, permitting defendants to raise a claim under that case in postconviction proceedings"; resentencing proceeding before a jury required), *receded from on other grounds*, *Coleman v. State*, 64 So. 3d 1210, 1226 (Fla. 2011); *Cooper v. Dugger*, 526 So. 2d 900, 901, 903 (Fla. 1988) ("no procedural bar to *Lockett/Hitchcock* claims in light of the substantial change in the law"; remand for a new sentencing before a jury required); *Waterhouse v. State*, 522 So. 2d 341, 344 (Fla. 1988) (habeas corpus relief granted and new sentencing before a jury ordered, because the Court, "since the issuance of *Hitchcock v. Dugger*, [has] consistently declined to uphold death sentences where the proceedings violate[d]" *Lockett*) (citations omitted); *Mikenas v. Dugger*, 519 So. 2d 601, 602 (Fla. 1988) (collateral relief granted and case remanded for a new sentencing before a jury; "Mikenas is not barred from raising this claim since *Hitchcock* represented a sufficient change in the law to defeat the application of procedural default.") (citation omitted).

The jury and the judge in *Hitchcock* and in the cases granting retroactive relief could not consider non-statutory mitigation in determining sentence, and could not perform the requisite individualized sentencing. Ms. Falcon's judge could not consider her youth or any attendant mitigation, *statutory or otherwise.*

The purpose of the new rules in both *Hitchcock* and *Miller* thus is the same. Both changes in the law are fundamentally significant and substantial, as both rules protect against a disproportionate, and consequently inaccurate, unreliable, and unfair sentence. Just as *Hitchcock* and *Lockett* warranted retrospective application, so does *Miller*. *See Geter*, 2013 WL 3197162, at *6-8 (Emas, J., dissenting from denial of rehearing *en banc*).

(2) Reliance on old rule; effect of applying new rule.

The remaining two components of *Witt* analysis under the three-fold "fundamental significance" test, also call for *Miller*'s retroactive application. The mandatory statute was necessarily relied upon, but fortunately, a relatively short period of time has passed since the 1994 mandatory statute was enacted, Ch. 94-288, § 1, Laws of Fla., and there are relatively few juveniles who were convicted and sentenced for first-degree murder whose cases have concluded direct review. Retroactive application will affect only those juveniles sandwiched between the implementation of the mandatory penalty statute and cases still pending on direct review.[10]

And the impact on the administration of justice weighs heavily in favor of retroactivity since convictions will not be overturned. A juvenile granted *Miller* relief will only receive a sentencing proceeding where none was originally had.

[10] The latest data reflects that 195 juveniles were mandatorily sentenced to life without parole under Florida's unconstitutional sentencing scheme. http://fairsentencingofyouth.org/reports-and-research/how-many-people-are-serving-in-my-state/. These statistics include those whose cases have not yet been through direct appeal.

See Callaway, 658 So. 2d at 987 (where belief that habitual-offender sentences could run consecutively could have existed for six-year period, and courts will not be required to overturn convictions or delve extensively into stale records, the administration of justice would be more detrimentally affected if defendants who had the misfortune to be sentenced during those six years are required to serve much lengthier sentences than those who happened to be sentenced later); *cf. Hernandez*, 2012 WL 5869660, at *5-6 (concluding *Padilla v. Kentucky*, 559 U.S. 356 (2010), does not apply retroactively where thousands of past plea colloquies for noncitizens could be questioned, requiring evidentiary hearings, and many could involve overturning convictions for trials, with stale records, lost evidence, and unavailable witnesses). Indeed, considering the administration of justice from a state economic standpoint, the expense of incarcerating for many, many years, the great majority of children for whom, as *Miller* makes plain, lifetime incarceration is excessive and inappropriate, can only be labeled a taxing waste on the administration of justice. *Cf. Teague*, 489 U.S. at 310 (costs imposed by retroactively applying new rules may force states "to marshal resources in order to *keep* [defendants] in prison" (emphasis supplied)).

At the time *Hitchcock* was decided, Florida's death row was home to 267 men and women. See NAACP Legal Defense and Educational Fund, Inc., *Death Row, U.S.A.*, May 1, 1987 at 872-74. The scope of the remedy for the error – the lengthy death-qualifying *voir dire* and seating of a new jury, the presentation of trial evidence as well as sentencing evidence to that new jury, the sequestered jury deliberations, followed by a sentencing proceeding before the trial judge – was not

insignificant in terms of the burden imposed on the courts should this Court impose retrospective application. The remedy surely exceeded the resentencing proceeding before the trial judge at issue here, especially because a judge can read pertinent portions of the trial record, and conduct a more truncated proceeding without significant danger of lost evidence and unavailable witnesses. But fairness and uniformity compelled retroactive application of this Eighth Amendment guarantee.

It is essential, once again, to return the focus to the purpose of the change in law, "foremost" among the threefold factors, to explicate why retroactivity is required here. *See Desist*, 394 U.S. at 249. The importance of the Eighth Amendment right advanced in both *Hitchcock* and *Miller* – ensuring that the sentencer affords meaningful individualized consideration to mitigation to avert the serious risk of disproportionate and excessive punishment – patently outweighs any disruption to the administration of justice. *See Mitchell*, 786 So. 2d at 530 (disruption to the administration of justice may be outweighed by the importance of the right being advanced).

It would defy all logic – as well as *Witt*'s teachings – to hold that some children must die in prison for their crime, without any consideration of their youth or attendant circumstances calling for a less harsh sentence, while others, who are no less culpable or more worthy of mitigating consideration, are granted an individualized sentencing and the opportunity to prove their potential for maturity and rehabilitation, all because of timing. *Miller* is a sweeping change of law that "so drastically alter[s] the substantive or procedural underpinnings of a final

conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice." *Witt*, 387 So. 2d at 925. Considerations of fairness and uniformity make it impossible to justify depriving a person of his or her liberty "under process no longer acceptable and no longer applied to indistinguishable cases." *Id.*[11]

IV. *MILLER* SATISFIES THE FEDERAL RETROACTIVITY STANDARDS.

States are free to assess the retroactivity of changes in the law by their own standards so long as they grant broader protection than the federal system requires. *See Danforth*, 552 U.S. at 276 (noting with approbation state supreme court's decision soon after *Linkletter* that "correctly stated that we are free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires") (citation and internal quotation marks omitted).

Florida has chosen to apply a broader test by adhering to *Witt*'s retroactivity analysis, which "provides more expansive retroactivity standards than those adopted in *Teague*." *Johnson*, 904 So. 2d at 409 (citation omitted). But *Miller*

[11] As Chief Judge Benton noted, the district court, in *Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at *2 (E.D. Mich. Jan. 30, 2013), declared that "if ever there was a legal rule that should – as a matter of law and morality – be given retroactive effect, it is the rule announced in *Miller*. To hold otherwise would allow the state to impose *unconstitutional* punishment on some persons but not others, an intolerable miscarriage of justice." *Falcon*, 111 So. 3d at 973 n.4 (Benton, C.J. concurring).

warrants retroactive application even under the stricter federal standard that grants retrospective effect when either of two tests are met.

A. *Miller* Announces a Substantive Rule that Categorically Prohibits Imposing Mandatory Life-Without-Parole Sentences on Juveniles as a Class.

A new criminal-law rule will apply retroactively to cases on collateral review if the rule is substantive in that it places certain conduct beyond the power of the authorities to proscribe. *Teague*, 489 U.S. at 311. The Court has held that this substantive category applies no less in the sentencing context, for a new rule placing a certain class of individuals beyond the State's power to punish with a certain penalty is analogous to a new rule placing certain conduct beyond the State's power to punish at all. *See Penry*, 492 U.S. at 330.

As Justice O'Connor explained in *Penry*:

> In both cases, the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of retroactivity have little force. As Justice Harlan wrote: "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." Therefore, the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.

Id. (citation omitted). Thus, such rules are substantive because they alter the class of persons that the law punishes, *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004), and apply retroactively because they "necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him." *Id.* at 352 (citations and internal quotations omitted).

It follows that *Miller*'s rule of law is substantive because it prohibits a certain category of punishment: mandatory life-without-parole sentences, on a class of defendants: children under the age of eighteen. *Miller*, 132 S. Ct. at 2460. In other words, *Miller* alters the class of persons that the law prescribing mandatory lifetime sentences, Section 775.082, Florida Statutes, may punish by limiting the class to only adults, and removing the class of juveniles because of their status as children. *Id.* The rule restricting mandatory lifetime sentences to exclude children accordingly applies retroactively because a mandatory life-without-parole sentence for a child "poses too great a risk of disproportionate punishment," *id.* at 2469, such that a child faces a punishment that cannot, consistent with the Eighth Amendment, be imposed upon her. That *Miller* constitutes a substantive and retroactive mandate is borne out further by the Court's insistence that "youth matters in determining the appropriateness of a lifetime of incarceration," *id.* at 2465, and that, because of children's diminished culpability and heightened capacity for change, appropriate lifetime sentences are "uncommon." *Id.* at 2469.

The Court's conception of mandatory life-without-parole sentences as a substantive category of punishment is evidenced by its holding, particularly when juxtaposed against its capital jurisprudence.[12] *Miller* holds that imposition of the

[12] That *mandatory* life-without-parole is a category of penalties distinct from life-without parole *simpliciter* is reinforced by the Court's holding in *Alleyne*, 133 S. Ct. at 2160-61, recognizing the significance of mandatory-minimum sentences that raise the floor of a prescribed penalty.

harshest and most severe sentence of "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Miller*, 132 S. Ct. at 2460.[13] The Court's capital precedent holds that the Eighth Amendment erects a substantive ban against the infliction of mandatory sentences that are "unduly harsh and unworkably rigid." *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976). Accordingly, mandatory death sentences are also categorically precluded because of their "unacceptable severity," *Roberts v. Louisiana*, 428 U.S. 325, 332 (1976), and notably, this proscription against mandatory death sentences has been applied by the Court on collateral review. *Sumner v. Shuman*, 483 U.S. 66, 68, 77-78, 84 (1987). *Miller*'s analogy to capital precedent: that lifetime incarceration for a child is "akin to the death penalty," *id.* at 2466, and equally unconstitutional, *id.* at 2475, is no accident. *Miller*'s holding is identically substantive.

That *Miller* recognizes the mandatory nature of life without parole as a certain category of punishment such that its proscription constitutes a substantive ban for a class of juvenile offenders is also evident by the Court's treatment of *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991). *Miller*, 132 S. Ct. at 2470. *Miller* notes that the Court's refusal in *Harmelin* to ban mandatory lifetime sentences for adults did not preclude a disparate holding for juveniles because "a

[13] In his dissenting opinion, Chief Justice Roberts understood the majority decision as invoking the Eighth Amendment "to ban a punishment," *id.* at 2477, and noted that the "sentence at issue is statutorily mandated life without parole," *id.* 2479, and that the "premise of the Court's decision is that mandatory sentences are categorically different from discretionary ones." *Id.* at n.2.

sentencing rule permissible for adults may not be so for children." *Id.* The Court emphasized that children are not "miniature adults," and again drawing on its capital jurisprudence, analogized that just as "'death is different,' children are different too." *Id.*

Acknowledging that its holding provides an "exception for children" when it comes to a "law relating to society's harshest punishments," *id.* (citation omitted), the Court announced a substantive rule that prohibits a category of punishment – mandatory life-without-parole – on a class of juveniles because of their status as children.

B. If *Miller*'s Holding is Not Substantive, It Still Must be Retroactively Applied as a Watershed Rule.

Procedural rules carry a "more speculative connection" to innocence, or, in the sentencing context – "innocence" of, or inappropriateness of – a certain sentence. *See Schriro*, 542 U.S. at 352. Because of this speculative connection, these rules are only retroactive if they are "watershed rules of criminal procedure [that] implicat[e] fundamental fairness and accuracy of the criminal proceeding." *Id.* (citations and internal quotation marks omitted). This category is extremely narrow, and pertains to a rule that effects a procedural change from a past procedure "that so *seriously* diminishe[s] accuracy that there is an impermissibly large risk" of an inaccurate and excessive punishment. *See id.* at 355-56. (original alterations; citations omitted). It is not enough that a procedural change is based on a bedrock right. The "new rule must itself constitute a previously unrecognized

bedrock procedural element that is essential to the fairness of a proceeding." *Whorton v. Bockting*, 549 U.S. 406, 420-21 (2007).

All that has been said thus far about *Miller* makes manifest that its rule compels a change to a mandatory practice that seriously diminishes accuracy. The Court stated it plainly: "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Miller*, 132 S.Ct. at 2469. Indeed, the Court went one step further with its insistence that, given a child's "diminished culpability and heightened capacity for change," appropriate occasions for lifetime sentences are "uncommon." *Id.*

That being so, the mandatory system that made these sentences not only common, but the sentence compelled in every case, indubitably satisfies even the most stringent interpretation of this standard of bedrock elements essential to the fairness of a sentencing proceeding. For it is a given that a "sentencer misses too much if he treats every child as an adult." *Id.* at 2468. Mandatory lifetime sentencing for all children, without any possibility of mitigating consideration of their youth, diminished culpability, and prospects for reform, ineluctably creates "an impermissibly large risk" that such sentences were imposed inaccurately and devoid of the proportionality and fundamental fairness that *Miller* and the Eighth Amendment require.

CONCLUSION

Based on the foregoing, Rebecca Falcon requests the Court to quash the First District's decision and to remand with directions to reverse the trial court's order

denying post-conviction relief and to remand to the trial court for an individualized sentencing proceeding that complies with *Miller*.

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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