STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Letica, P.J., and Borrello and Riordan, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Appellant,

v.

JOHN ANTONIO POOLE **No. 166813**
Appellee.

Wayne CC: 02-000893-FC
Court of Appeals No. 352569

APPELLANT'S BRIEF ON APPEAL

*****Oral Argument requested*****

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Summary of Argument

In the *Parks* decision, the Court unquestionably established a new rule of law—that under the Michigan Constitution's cruel or unusual punishment provision, one who while 18 yars sof age commits and is convicted of 1st-degree murder for the taking of another human life may not be sentenced to life without parole absent a sentencing hearing that takes into account the "mitigating factors of youth" and allows the possibility of a sentence other than life without parole**.** The question is whether that decision should apply to cases final at the time of the decision in *Parks*; that is, where the direct appeal has been completed.

Michigan law on retroactivity borrows its test from the United States Supreme Court, a 3-part test that that Court has jettisoned. With regard to cases final when a new rule is established, that rule will be applied only when substantive in the sense that it forbids criminal punishment of certain primary conduct or prohibits a certain category of punishment for a class of defendants because of their status or offense. Michigan should adopt that rule for consideration of retroactivity of new rules on collateral review.

Parks is not such a rule, and the United States Supreme Court decision in *Montgomery v. Louisiana* is an anomaly in applying *Miller v. Alabama* to cases on collateral review and has been repudiated by the United States Supreme Court in *Jones v. Mississippi*, which all but overruled *Montgomery*. This Court should follow *Teague v. Lane* as to the rule of law applied,and in its application find, consistent with the approach in *Jones,* that *Parks* is not retroactive on collateral review, as it does not forbid criminal punishment of certain primary conduct or prohibit a category of punishment for a class of defendants because of their status or offense. The justice meted out in the original sentences for the murder of the victims in these cases, and to which their survivors have long been assured is final, should not be disturbed.

Statement of the Question

I.

People v. Parks created a new rule of Michigan constitutional law that under 1963 Mich. Const. Art. 1, § 16 an 18 year old who commits 1st-degree murder is "entitled to the full protections of MCL 769.25 and our caselaw, as opposed to the automatic sentencing scheme in MCL 750.316(1)." This holding does not categorically bar a penalty for a class of offenders but mandates only that a sentencer follow a certain process before imposing a particular penalty. Under the principles of _Teague v. Lane_, which the Court should follow as a matter of Michigan law, should _Parks_ be applied retroactively on collateral attack?

The People answer: NO

Statement of Jurisdiction

The Court of Appeals opinion was issued January 18, 2024, and the application is thus timely from that decision

Statement of Facts

The case was remanded to the Court of Appeals by this Court for resolution of the retroactivity issue, and that court has found _Parks_ to be retroactive on collateral attack; that is, to convictions final at the time of decision in _Parks_.

Argument

I.

People v. Parks[1] created a new rule of Michigan constitutional law that under 1963 Mich. Const. Art. 1, § 16 an 18 year-old who commits 1st-degree murder is "entitled to the full protections of MCL 769.25 and our caselaw, as opposed to the automatic sentencing scheme in MCL 750.316(1)." This holding does not categorically bar a penalty for a class of offenders but mandates only that a sentencer follow a certain process before imposing a particular penalty. _Parks_ should not be applied retroactively on collateral review.

A. Introduction

> *1982: "There has been inconsistency in both analysis and result in the Supreme Court of Michigan's application of its law-changing decisions."*[2]
>
> *2024: "There exists considerable confusion in our caselaw surrounding the retroactivity of court decisions. This is derived in no small part from the confusion in then-existing federal law, which Michigan adopted decades ago as its standard to resolve questions of retroactivity of judicial decisions*."[3]

On an early December morning, Henry Covington left the house to start his fiance's car to warm it up before he drove her to work, as was his practice. When he did so, an assassin—defendant Poole—shot and killed him. The murder was a murder for hire—defendant killed Covington for money, $300—and kept phoning his uncle and codefendant, Harold Varner, who had paid him for the killing, for more money (in

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[1] *People v. Parks*, 510 Mich. 225, 987 N.W.2d 161 (2022).

[2] Blair Moody, Jr., *Retroactive Application of Law-Changing Decisions in Michigan*, 28 WAYNE L. REV. 439, 441 (1982).

[3] *Schafer v. Kent County*, —Mich.— , 2024 WL 3573500, at 9 (Mich. July 29, 2024) (July 29, 2004).

jurisdictions with the death penalty for murder, receiving payment for the murder is an aggravating factor towards the death penalty).[4] Defendant, then, committed a premeditated murder, ending Henry Covington's life, for monetary gain. Mr. Covington future was ended that day,[5] and those who loved him and cherished his life and his company are without him forever. To paraphrase Justice Boyle as she so well put the matter in discussing a proportionality argument under *Milbourn*,[6] "elaborate rationalizations for lowering sentences distance the appellate judiciary from meaningful connection with reality." As the tragedy of the murder victim here and his survivors is "mediated through the processes of [gross] [dis]proportionality," "the focus of the reviewing court shifts from the horror" of the assassination of the victim "to the image of . . . sympathetic defendant, incarcerated at great cost to the state."[7]

This Court remanded this case to the Court of Appeals for resolution of whether *Parks*'s[8] holding that the Michigan cruel or unusual punishment provision extends the

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[4] See e.g. 18 U.S.C.A. § 3592(c)(8): "Aggravating factors for homicide.—In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist: ****(8) Pecuniary gain.—The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

[5] "Hell of a thing, killin' a man. Take away all he's got and all he's ever gonna have." William Munny (Clint Eastwood), *Unforgiven* (Malpaso Productions/Warner Brothers 1992).

[6] Where "defendant himself described how he terrorized, tortured, burned, and sodomized eighty-four-year-old Marie Green; then left her for dead" *People v. Merriweather*, 447 Mich. 799, 802 (1994).

[7] Id., at 805.

[8] The People, of course, continue to believe that *Parks* was wrongly decided and that in its consideration of "brain science," it considered the wrong question—whether a person's brain is "*fully* developed" at 18 years of age—rather than the appropriate question—whether a person's brain is *sufficiently developed* at 18 to comprehend that the taking of another life under circumstances constituting 1st-degree murder is a terrible thing, so that the slayer may suffer the most severe state punishment—and *that* question is for the legislature, which has made a number of such decisions. See e.g. MCL § 722.52 (except as otherwise provided in the state constitution and notwithstanding any other provision

Miller rule to 18-year-olds, so that though life without parole is a permissible sentence, it cannot be imposed on a mandatory basis, a hearing on the "mitigating factors of youth" being required, should apply on collateral review to convictions already final, the motion for relief from judgment here being defendant's third.[9] On remand, the Court of Appeals held that *Parks* is retroactive on collateral review. This Court has granted leave to appeal, directing briefing and argument on whether *People v. Parks*

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of law to the contrary, "a person who is at least 18 years of age on or after January 1, 1972, is an adult of legal age for all purposes whatsoever, and shall have the same duties, *liabilities*, responsibilities, rights, and *legal capacity* as persons heretofore acquired at 21 years of age" (emphasis supplied)); MCL § 750.234f (a person who is 18 years of age or older may possess a firearm in public); MCL § 333.1053 (an individual who is 18 years of age or older and of sound mind may execute a do-not-resuscitate order on his or her own behalf, and a patient advocate of an individual who is 18 years of age or older may execute a do-not-resuscitate order on behalf of that individual); MCL § 551.103 (a person who is 18 years of age or older may contract marriage without the consent of his or her parents, and thus raise children); MCL § 700.2504 (a person who is 18 years or older may make a will); MCL § 330.1716 (a person who is 18 may consent to surgery); MCL § 722.52 (a person who is 18 may enter into valid and binding contracts); and see U.S. Const. amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age"). See further the dissent of Chief Justice Clement in *Parks* ("Even if 18-year-olds are not so well-developed neurologically as 27-year-olds, they are *sufficiently neurologically developed* to make major decisions about their lives.[as the above cited statutes demonstrate] . Moreover, first-degree murder, in particular, is an obviously serious offense, the gravity of which I believe 18-year-olds are generally more than able to comprehend"). *People v. Parks*, 510 Mich. 225, 283–284 (2022)) (Clement, C.J., dissenting) (emphasis supplied).

The legislature, or the People through the Constitution, may, of course, choose to reserve some things for those who are older, such as the purchase of alcohol or the holding of certain elective offices, which are limited to those 21 or older. See e.g. MCL § 436.1109(6); MCL § 436.1109(6); 1963 Mich. Const. Art IV, § 7; 1963 Mich. Const. Art V, § 20 (governor or lieutenant governor must be at least 30).

[9] "[O]n remand, the Court of Appeals shall determine whether defendant is entitled to relief based on our holding in *People v Parks* . . . . The Court of Appeals shall determine what remedy, if any, is available to defendant under Parks, including whether defendant should be resentenced pursuant to MCL 769.25a." *People v. Poole*, 977 N.W.2d 530, 531 (Mich. 2022).

"applies retroactively to cases that have become final after the expiration of the period for direct review."[10]

Four decades ago, Justice Blair Moody, Jr. lamented that "there has been inconsistency in both analysis and result in the Supreme Court of Michigan's application of its law-changing decisions."[11] He called for a "new and detailed look at both the factors which should enter into a retroactivity determination and the means by which this decision should be reached,"[12] and expressed the hope that his call would "provide a starting point for such reexamination and reanalysis."[13] It did not. Though we are well into a new millennium, Michigan retroactivity jurisprudence remains as inconsistent as it was when Justice Moody urged that it was "time for the Michigan high court to take a long look" at it,[14] though in *Schafer v. Kent County*[15] the Court very recently took a large step toward clarity with regard to civil cases. The People urge this Court to do the same in criminal cases and recognize that principles of retroactivity of new rules are different as to cases final at the time of the decision of the new rule than those applicable to cases pending on appeal at that time, to adopt the principles of *Teague v. Lane*[16] on retroactivity, and to find that under those principles, the rule this Court created in *Parks* should not apply to cases final at the time of its decision.

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[10] *People v. Poole*, 7 N.W.3d 541 (Mich. 2024).

[11] Blair Moody, Jr., supra.

[12] Id.

[13] Id.

[14] Id. at 509.

[15] See supra, fn 3.

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

B. Discussion

1. Defining terms: the four faces of retroactivity

An overruling decision or new rule is considered retroactive if it is applied to conduct or events occurring before the decision. Levels or degrees of retroactivity exist because courts sometimes do not apply an overruling decision to conduct or events occurring before the decision at all; sometimes apply it to only that conduct or those events occurring before the decision litigated in the very case announcing the decision; sometimes apply it to that conduct or those events occurring before the decision where an adjudication on direct review has not yet been completed and the question has been properly raised; and sometimes apply it to that conduct or those events occurring before the decision even when adjudication on direct review has been completed, allowing the judgment rendered to be attacked collaterally.[17]

Both the cases and the literature in the field tend to use terms such as "prospective," "fully prospective," "partially prospective," "retroactive," and "fully retroactive" without precision, so that what is defined by some cases or commentators as "full retroactivity" is described by others as "partial retroactivity." One court has defined the terms in this manner:

- *Purely prospective*: a new rule or overruling decision is not applied even to the parties to the case in which the rule or overruling is announced, but applies only to future events;
- *Prospective*: a new rule or overruling decision is applied to the parties to the case in which the rule or

[17] One could view the question as one of the level of specificity, or, on the other hand, the level of generality, that application of the new rule is to have. *See* Bradley Scott Shannon, "The Retroactive and Prospective Application of Judicial Decisions," 26 Harv J. L. & Pub. Pol'y 811, 812 (2003).

Retroactivity on collateral review is extremely limited in civil cases, See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540, 111 S. Ct. 2439, 2446, 115 L. Ed. 2d 481 (1991) ("in the civil arena . . . there is little opportunity for collateral attack of final judgments").

overruling is announced, but to no others, including pending cases with the issue preserved, applying only, aside from the parties, to future events.

- *Retroactive*: a new rule or overruling decision is applied to the parties to the case in which the rule or overruling is announced, and to all other cases then pending on direct review where the issue is preserved; and

- *Fully retroactive*: a new rule or overruling decision is applied not only to the parties to the case in which the new rule or overruled is announced and all other cases then pending on direct review where the issue is preserved, but also after the direct review is over where asserted by way of collateral proceedings.[18]

Though this description of what might be termed the four faces of retroactivity is both accurate and useful, some adjustment of the nomenclature is required; it is confusing to refer to one application of an overruling decision as "prospective" if there is also an application that is "purely prospective." If there is a greater degree of prospectivity than prospective, then the lesser degree is more sensibly known as partial prospectivity.[19] The differences in the opportunity for review between civil and criminal cases also require some adjustment in the terminology. Once direct review is completed in a civil case, a collateral attack on the judgment is extremely rare, save for fraud,[20] and thus to use the term partially retroactive to refer to those decisions applicable to the parties to the case in which the new rule or overruling is announced and to all other cases then pending on direct review where the issue is preserved makes no sense in civil cases, for in civil cases this is "full" retroactivity. In criminal cases, collateral attack is

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[18] *Blackwell v. Commonweatlh, State Ethics, Comm'n*, 589 A.2d 1094, 1103 (PA, 1991) (Justice Zappala concurring); *see also PNC Bank v. Workers' Compensation Appeal Board*, 831 A.2d 1269, 1282-1283 (Commonwealth Ct, 2003).

[19] A rule of partial prospectivity is also necessarily one of partial retroactivity, applying to some conduct or events that occurred prior to the overruling decision, but in the scheme of things is more usefully referred to as partially prospective.

[20] *See, e.g.*, *Matter of Bulic*, 997 F.2d 299 (CA 7, 1993); *Rogoski v. Muskegon*, 107 Mich. App. 730, 736 (1981).

more generally available through such mechanisms as state postconviction proceedings—in Michigan, the motion for relief from judgment—though the grounds for relief are ostensibly narrower than on direct review. It is more sensible to call decisions establishing new rules that are applicable to the parties and to those cases pending on appeal where the issue has been preserved "fully retroactive," so to have a consistent terminology with civil and criminal cases, and to have a separate category of retroactivity for criminal cases where a new rule is applicable even on collateral attack. And indeed, federal decisions refer to this sort of retroactivity as "retroactive on collateral attack" or "retroactive to cases on collateral review."[21]

The four faces of retroactivity are thus described here as follows:

- *Purely prospective*: a new rule or overruling decision is not even applied to the parties to the case in which the rule or overruling is announced, but applies only to future events;

- *Partially Prospective*: a new rule or overruling decision is applied to the parties to the case in which the rule or overruling is announced, but to no others, including pending cases with the issue preserved, applying only, besides to the parties, to future events.

- *Fully Retroactive*: a new rule or overruling decision is applied to the parties to the case in which the rule or overruling is announced, and to all other cases then

[21] *See, e.g.*, *Bottone v. United States*, 350 F.3d 59 (CA 2, 2003).

pending on direct review where the issue is preserved;[22] and

- *Retroactive on Collateral Attack*: a new rule or overruling decision is applied not only to the parties to the case in which the new rule or overruled is announced and all other cases then pending on direct review where the issue is preserved, but also after the direct review is over where asserted by way of collateral proceedings. This principal essentially has application only in criminal cases.

2. The development of the law of retroactivity federally

Whatever view one may take of retroactive application of decisions that overrule prior decisions with regard to the common law—and the matter is extremely complex—that decisions construing statutes and constitutional provisions, even decisions overruling previous constructions, do no more than express what the law actually *is*, applying necessarily to events occurring before the overruling construction, was long the orthodox, if not the only, view, though this did not mean that final judgments could be upset. The view that the Constitution itself *changes*—as determined by the Supreme Court—with regard to cruel and unusual (or in Michigan, cruel or

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[22] In *Schafer*, supra, 2024 WL 3573500, at 11, the Court essentially adopted this formulation:

> A more precise reading of relevant caselaw is that the "usual" retroactive application in Michigan applies to: (1) the case before the court, (2) all cases that could have and did raise the issue that are pending at the time of the decision, and (3) all cases timely filed after the decision. Michigan caselaw has described this standard as "limited retroactivity," but this phrase is an anachronism from the traditions of *Chevron Oi*l *and Linkletter*. This phrase appears to be a comparison to complete retroactive application on collateral review.
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> *****
>
> [T]he term "limited retroactive effect" is an artifact from prior federal caselaw that has been subsequently clarified and refined. "Limited retroactive effect" in Michigan law is more accurately termed "full retroactive effect."

unusual) punishment is a marked departure from that understanding.[23] From the beginning of our constitutional democracy it has been understood that it is "the province and duty of the judicial department to say what the law is,"[24] not what it shall be. And Chief Justice Marshall was simply expressing the commonly accepted Blackstonian understanding that when a "former determination is most evidently contrary to reason," a decision setting that decision aside would "not pretend to make a new law, but to vindicate the old one from misrepresentation," the former decision not being declared bad law, but "that it was *not law*."[25] As stated by Justice Holmes, "I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years."[26] Though considering the effect of a statute that had intervened after a decision, Chief Justice Marshall's statement in *The Schooner Peggy*[27] case was understood to apply also to intervening changes in a judicial construction of a statute:

> If subsequent to [a] judgment, *and before the decision of the appellate court*, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . [T]he court must decide according to existing laws, and if it be necessary to set aside a

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[23] This occurs by application of an "evolving standards of decency" test. See *Roper v. Simmons*, 543 U.S. 551, 608, 125 S. Ct. 1183, 1217, 161 L. Ed. 2d 1 (2005) (Scalia, J., dissenting) ("the Court's conclusion [is] that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was wrong, but that the Constitution has changed"); *Atkins v. Virginia*, 536 U.S. 304, 348, 122 S. Ct. 2242, 2265, 153 L. Ed. 2d 335 (2002) (Scalia, J., dissenting) ("'[T]he Constitution,' the Court says, 'contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.' . . . *The arrogance of this assumption of power takes one's breath away*") (emphasis supplied).

[24] *Marbury v. Madison*, 5 U.S .(1 Cranch), 137, 177, 2 L Ed 60 (1803).

[25] 1 BLACKSTONE, COMMENTARIES 69-70 (1803) (emphasis in the original).

[26] *Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 372, 30 S.Ct. 140, 148 (1910) (Holmes, J., dissenting).

[27] *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801).

> judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.[28]

The "new rule," then, was understood to apply to cases not yet final ("and before the decision of the appellate court').

The entire notion of retroactivity, then, is a relative newcomer[29] to American jurisprudence, the notion that an overruling construction of a statute, or other source of law, might *not* apply on review of actions that occurred before the overruling decision simply not existing. It was the sea change in constitutional jurisprudence worked by the Warren Court that virtually demanded limitation of the effects of that Court's many overruling decisions,[30] and thus consideration of a doctrine of retroactivity. In part because the purpose of the exclusionary rule is to deter unlawful police conduct, a purpose that cannot be served when the conduct condemned occurs before it is declared improper, the Court limited the reach of *Mapp v Ohio*[31] in *Linkletter v Walker*[32] regarding habeas proceedings, limited its reach on direct appeal in *Johnson v New Jersey*,[33] and continued on to limit other new rules of criminal procedure to preclude

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[28] Id. (emphasis supplied).

As stated, courts understood that this principle applied to overruling judicial decisions as well, for the law—the statute—had pre-existed the overruling decision, and its correct meaning had to be applied in the case at hand: courts were required to "conform their orders to the. . . law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered." *Vanderbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 542, 61 S.Ct. 347, 85 L.Ed. 327 (1941)..

[29] Kermit Roosevelt III, "A Little Theory Is A Dangerous Thing: The Myth of Adjudicative Retroactivity," 31 Conn. .L Rev. 1075, 1082 (1999).

[30] "The list of opinions destroyed by the Warren Court reads like a table of contents from an old constitutional law casebook." Philip B. Kurland, *Politics, the Constitution, and the Warren Court* 90-91(1970).

[31] *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

[32] *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

[33] *Johnson v. New Jersey*, 384 U.S. 719, 732, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966).

their application to conduct occurring before the Court's overruling construction of the Constitution.[34]

The test for retroactivity developed by the United States Supreme Court—since repudiated by that Court[35]—applied three factors:

- the purpose of the new rule;
- the general reliance on the old rule; and
- the effect of retroactive application of the new rule on the administration of justice.[36]

The concern that reliance on the old rule may well have created "settled expectations" was considered important in resolving the question of applicability of a new rule to cases already tried and to conduct which has already taken place.

But because a new construction of a statute or constitutional provision, even one overruling prior precedent, is considered an expression of what the law is, this three-prong retroactivity test was eventually abrogated by the United States Supreme Court in favor of Justice Harlan's view that overruling decisions are applicable on direct appeal to the case before the court and all cases then pending on appeal with the issue preserved—which is here termed full retroactivity.[37] As to decisions final at the time of the overruling decision in the criminal arena, where collateral attack is possible, an overruling decision will be applicable on collateral attack only in very limited circumstances, the Court adopting, with some modification, Justice Harlan's view on this point as well. A new rule was initially said to be applied retroactively on collateral

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[34] *See* discussion in *Griffin v. Kentucky*, 479 U.S. 314, 321, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).

[35] *See Teague v. Lane,* supra.

[36] Michigan currently continues to follow this test, though now abandoned in the federal system. *See, e.g., People v. Maxson*, 482 Mich. 385, 392–394 (2008).

[37] *Griffin v Kentucky* at 322-23.

attack if it 1) alters the range of conduct or the class of persons that the law punishes, or 2) announces a new watershed rule of criminal procedure necessary to the fundamental fairness of the criminal proceeding;[38] very recently, the Court abolished the second category: "New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund. It must 'be regarded as retaining no vitality.'"[39]

Civil retroactivity principles that closely approximated the *Linkletter* test were created in the *Chevron Oil*[40] case, and have also been laid to rest by the Court. In *James Beam Distilling v. Georgia*,[41] the Court, through various opinions, considered purely prospective application of overruling decisions. Justice Scalia wrote in his opinion that purely prospective opinions are *outside of the judicial power* confided in the judiciary by the Constitution, as the judicial power as historically understood is the "power to say what the law is," not the power to change it.[42] Thus, when judges "make law" it is as "though they were 'finding' it."[43] Pure prospectivity is pure legislation. Justice Blackmun agreed that "failure to apply a newly declared constitutional rule to cases pending on direct review violates basic norms of constitutional adjudication, and is outside of the Court's authority to 'decide only 'Cases' and "Controversies.'" "Unlike a legislature, we do not promulgate new rules to 'be applied prospectively only.'"[44]

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[38] *Teague v. Lane, supra*; see *Jones v. Mississippi*, 593 U.S. 98, 111, 141 S. Ct. 1307, 1318, 209 L. Ed. 2d 390 (2021).

[39] *Edwards v. Vannoy*, 593 U.S. 255, 272, 141 S. Ct. 1547, 1560, 209 L. Ed. 2d 651 (2021).

[40] *Chevron Oil Co. v Huson*, 404 U.S. 97, 92 S.Ct. 349, 355–356, 30 L.Ed.2d 296 (1971).

[41] *James B. Beam Distilling Co.*, supra.

[42] Id., 111 S. Ct. at 2451 (Scalia, J., concurring).

[43] Id. *See also* Scalia, *A Matter of Interpretation*, p. 7.

[44] *James Beam*, 111 S. Ct. at 2449 (Blackmun, J., concurring).

Later, in *Harper v Virginia Department of Taxation*,[45] the Court considered whether to apply its decision in *Davis v Michigan Department of Treasury*[46] retroactively. Through Justice Thomas, a majority made clear what was implicit in the multiple opinions in *Beam*:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases *still open on direct review* and as to all events, regardless of whether such events predate or postdate our announcement of the rule.[47]

As stated by Justice Scalia concurring, "[t]he true traditional view is that *prospective decisionmaking is quite incompatible with the judicial power* and that courts have no authority to engage in the practice." Indeed, historically "fully retroactive decisionmaking was considered a principal distinction between the judicial and legislative power."[48] In sum, then, "[a] judicial construction of a statute [or constitutional provision] is an authoritative statement of what the statute [or constitutional provision] meant before as well as after the decision of the case giving rise to that construction."[49] New rules applied, then, to "cases still open on direct review."

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[45] *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

[46] *Davis v. Michigan Department of Treasury*, 489 U.S 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989),

[47] *Harper*, 113 S. Ct. at 2517 (emphasis supplied).

[48] *Harper*, 113 S. Ct. at 2523 (Scalia, J., concurring) (emphasis supplied). The Eighth Circuit in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (CA 8, 1997), addressing questions of privilege in regard to subpoenas issued by the Office of Independent Counsel, considered whether it could resolve the questions involved without applying them in the very case before it. The court concluded it could *not*. Citing to recent United States Supreme Court cases on the point, the court stated that "purely prospective adjudication is at least unwise and *most likely beyond our power*. . . ." In short, "a purely prospective decision is little more–perhaps nothing more–than an advisory opinion."

[49] *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 312-313, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994).

3. Development of the law of retroactivity in Michigan

a. Civil case examples[50]

Michigan's jurisprudence justifies the late Justice Moody's lament that "there has been inconsistency in both analysis and result in the Supreme Court of Michigan's application of its law-changing decisions," though again, the most recent *Shafer* decision provides very helpful clarity. A number of cases demonstrate the point in the civil arena; because this case, of course, involves retroactivity on collateral attack in criminal cases, the People will not tarry too long here. In 1923, the Court held that riparian owners along the Great Lakes owned only to the meander line, and so the title to land beyond was held in trust by the state for the public.[51] Because of this decision, a lessor stopped payment of rent on that portion of the land he leased that was beyond the meander line. But seven years later the Court overruled that decision in *Donohue v. Russell*,[52] and held that a riparian owner owns the land beyond the meander line to the edge of the water.[53] The lessor thus demanded payment of the withheld seven years rent. The lessee refused, and the circuit court held for the lessor. This Court recognized that the matter depended "on whether the overruling decision is given prospective or retrospective effect."[54] The Court stated the general rule:

> The effect of overruling a decision and refusing to abide by the precedent there laid down is retrospective and makes the law at the time of the overruled decision as it is declared to be in the last decision, except in so far as the construction last given would impair the obligations of contracts entered into or injuriously affect vested rights

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[50] The civil and criminal cases examples here are not intended as an exhaustive survey.

[51] *Kavanaugh v. Rabior*, 222 Mich. 68 (1923).

[52] *Donohue v. Russell*, 264 Mich. 217 (1933).

[53] Hilt v. Weber, 252 Mich. 198 (1930).

[54] *Donohue* at 219. *See also Gentzler v. Smith*, 320 Mich. 394, 397–399 (1948); *Metzen v. Dep't of Revenue*, 310 Mich. 622, 629 (1945).

> acquired in reliance on the earlier decision. . . . *The overruled decision remains the law of the case with respect to the particular case in which it was rendered.*[55]

This represents what is called here a fully retroactive decision, as it applied to the parties, and to *conduct* before that time where there had been no final adjudication of the matter, but with the overruled decision remaining the law of the case with respect to the particular case in which it was rendered.

The Court over time began to become less precise. In *The Lake Shore & Michigan Southern R. Co. v. Miller*[56] a wagon was struck by a train, and a passenger in the wagon sued the railroad. In an opinion by Justice Christiancy, the Court unanimously held that based on the doctrine of imputed negligence, the passenger could not recover.[57] The doctrine of imputed negligence was overruled by the Court in *Bricker v. Green*[58] almost three-quarters of a century later. Though the retroactive application of the ruling appears identical to previous decisions, the terminology changed somewhat: *Lake Shore* was overruled "so far as pending and future cases are concerned."[59] So long as "pending" may be taken to include "pending on appeal," then the case was fully retroactive.

The Court's retroactivity jurisprudence morphed into partial retroactivity in at least some cases as time went on. In *Downs v. Harper Hospital*[60] the Court held that a beneficiary of a nonprofit hospital who sustained injuries through arguable negligence of an employee of the hospital could not recover damages from the hospital, but

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[55] *Donohue* at 218-219 (emphasis supplied).

[56] *The Lake Shore & Michigan Southern R. Co. v. Miller*, 25 Mich. 274 (1872).

[57] *Id*. at 277 (emphasis supplied).

[58] *Bricker v. Green*, 313 Mich. 218 (1946).

[59] *Id*. at 236.

[60] *Downs v. Harper Hosp*, 101 Mich. 555 (1894).

overruled that decision sixty-six years later in *Parker v. Port Huron Hospital*.[61] The Court held that "[i]n the interests of justice and fairness, in view of the new ruling and the reliance that some, albeit few, charitable, nonprofit hospital corporations may have placed on the old ruling, and may have failed to protect themselves by the purchase of available insurance, we believe the new rule should apply to the instant case and to all future causes of action *arising after September 15, 1960, the date of the filing of this opinion*."[62] This is a form of partial prospectivity, as only the plaintiff in the case received the benefit of the application of the overruling decision to events before the overruling. And this limitation on retroactive application of the decision was justified on grounds of "fairness," with no finding that to do otherwise "would impair the obligations of contracts entered into or injuriously affect vested rights acquired in reliance on the earlier decision."[63] But then in *Womack v. Buchhorn,*[64] where the Court overruled precedent holding that an action does not lie at common law for a negligently inflicted prenatal injury,[65] the Court limited the reach of the overruling, but *included* conduct occurring before the date of the overruling, applying the decision to "all pending and future cases,"[66] as in *Bricker v. Green*.

The historical practice of retroactivity of overruling decisions to cases pending on appeal and thus not yet final exerts a form of hydraulic pressure that works in favor of stare decisis. On the other hand, as courts have discovered, limiting the retroactive reach of overruling decisions is very liberating to appellate courts; this Court four

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[61] *Parker v. Port Huron Hosp*, 361 Mich. 1, 9 (1960).

[62] *Id*. at 28 (emphasis supplied).

[63] See also *Whetro v. Awkerman*, 383 Mich. 235, 244 (1970) ("the rule of law announced herein will apply to the instant case and *all claims for compensation arising after March 12, 1970* the date of the filing of this opinion") (emphasis supplied).

[64] *Womack v. Buchhorn*, 384 Mich. 718 (1971).

[65] *Newman v. City of Detroit*, 281 Mich. 60 (1937).

[66] *Womack* at 725-726.

decades ago was quite explicit in this recognition, saying in the *Placek* case when overruling the common-law rule of contributory negligence in favor of comparative negligence that

> The benefit of flexibility in opinion application is evident. If a court were absolutely bound by the traditional rule of retroactive application, *it would be severely hampered in its ability to make needed changes in the law* because of the chaos that could result in regard to prior enforcement under that law. . . . Without the flexibility to so apply the decision, it would be unlikely that much needed change could be effectuated in this state.[67]

The Court thus felt more free to turn the course of the substantive common law in the direction that it felt best as a matter of policy, saying not what the law is but what it should be, by limiting the reach of the decision in some respect, though still applying it

> to the instant case and all appropriate cases in which trial commences after the date of this opinion including those in which a retrial is to occur because of remand on any other issue. Further, we find comparative negligence applicable to any case presently pending on appeal in which application of the doctrine was requested at the trial court and the issue preserved for appeal. Finally, comparative negligence shall be the applicable rule in any case commenced but not submitted to the trier of fact prior to the date of this decision, but in no case shall it apply unless there is an appropriate request by counsel prior to submission to the trier of fact.[68]

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[67] *Placek v. City of Sterling Heights*, 405 Mich. 638, 665, 275 N.W.2d 511, 521 (1979).

[68] *Id*. at 667–668, 275 N.W.2d at 522. Remarkably, the Court justified applying the decision in this fashion not on traditional concepts of retroactivity, but because, in a sense, the bar had "fair warning" the Court might someday reach this result:

> Since July, 1977, the bench and bar of this state have had clear notice that three Justices of this Court were ready to adopt comparative negligence and that three others might be willing in another case. . . . [some] members of the bar of this state have diligently argued the issue on behalf of their clients. At this Court alone we presently have three cases being held pending this decision in which comparative negligence was raised and argued. If no retroactive application is accorded our decision today, the fortuity that the instant plaintiffs' case was the first to arrive at this Court would be the sole determinant of who would benefit from the fairer

Indeed, the partial dissent would have gone farther in limiting retroactivity and even more boldly recognized the legislative nature of the Court's overruling decision, though when the dissent said that "whenever a court overrules prior precedent it is functioning in a lawmaking capacity,"[69] it was almost certainly referring to decisions overruling prior precedent concerning *common-law* causes of action, and thus law that was "judge made" at its inception. Judicial legislation is ameliorated, the dissent continued, if the overruling court applies its decision as a legislature would new legislation: "Prospective overruling 'is a procedural device which expressly recognizes the legislative nature of the act of overruling prior decisions, and recognizing it proceeds to establish a time from which the New law applies.' It is relevant that new statutory law is prospective from the effective date unless otherwise provided. . . . considerations of justice, judicial administration and sound jurisprudence mandate a prospective application of our holding."[70] The dissent would have thus made the opinion an advisory opinion: "comparative negligence should be applicable to all causes of action accruing after the effective date of this opinion."[71] Aside from the advisory opinion difficulty, this leaves very little constraint in terms of stare decisis, and as Justice Scalia once said, when judges "make law" with regard to the common law

> they make it *as judges make it,* which is to say *as though* they were "finding" it—discerning what the law *is,* rather than decreeing what it is today *changed to,* or what it will *tomorrow* be. Of course this mode of action poses "difficulties of a ... practical sort," . . . when courts decide to overrule prior precedent. But those difficulties are one of the understood checks upon judicial law-making; *to eliminate them is to render courts substantially more free to "make new law," and thus*

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doctrine of comparative negligence. This would be true despite the fact that many litigants had exercised the same diligence exercised by the instant plaintiffs in raising the issue.

[69] *Id*. at 686, 275 N.W.2d at 531.

[70] *Placek,* at 685-687 (Coleman, C.J., dissenting in part).

[71] *Id*. at 701 (Coleman, C.J. dissenting in part).

> *to alter in a fundamental way the assigned balance of responsibility and power among the three branches*.[72]

A majority of the Court did apply an overruling decision involving a statute purely prospectively in the *Pohustki* case.[73] The Court held that the statute[74] does not contain or permit a trespass-nuisance exception to governmental immunity, but, because this was an overruling of a prior decision, the Court applied the decision purely prospectively, so that, though as a matter of statute the municipalities were entitled to immunity, immunity was denied them.[75] But later, in the *Hathcock*[76] case, when the Court overruled precedent that allowed use of the state's power of eminent domain to take private property and provide it to a private entity, the overruling decision was held fully retroactive, the Court remarking that "that there is a *serious question as to whether it is legitimate . . . to render purely prospective opinions as such rulings are, in essence, advisory opinions*."[77] There are, of course, other examples.

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[72] *James B. Beam Distilling Co*., 111 S. Ct. at 2451 (Scalia, J., concurring) (first three emphases in the original).

[73] *See Pohutski*, *supra*.

[74] MCL § 691.1407.

[75] "]T]his decision will be applied only to cases brought on or after April 2, 2002. In all cases currently pending, the interpretation set forth in *Hadfield* will apply." *Pohutski*, 699.

[76] *See County of Wayne v. Hathcock,* 471 Mich. 445 (2004)..

[77] *Id,* at 484, fn 98 (emphasis supplied).

And see *Devillers v. Auto Club Ins. Ass'n*, 473 Mich. 562, 587 (fn 57)(2005) ("to accord a holding only prospective application is, essentially, an exercise of the legislative power to determine what the law shall be for all future cases, rather than an exercise of the judicial power to determine what the existing law is and apply it to the case at hand. Const. 1963, art. 3, § 2 prohibits this Court from exercising powers properly belonging to another branch of government except when expressly authorized by the Constitution. As we further explained in Hathcock, supra at 484 n. 98, 684 N.W.2d 765, prospective opinions are, in essence, advisory opinions, and our only constitutional authorization to issue advisory opinions is found in Const. 1963, art. 3, § 8, which does not apply in this case").

b. Criminal Case Examples

Criminal cases also illustrate Justice Moody's point regarding the confused nature of Michigan's retroactivity jurisprudence, and the recent *Shafer* opinion, being a civil case, does not speak to this.[78] Though the Court has, despite its repudiation by the United States Supreme Court, professed adherence to the principles of the three-prong *Linkletter* test for retroactivity,[79] it is not consistent in their application. In *People v. Aaron*[80] the Court changed the law of homicide by "abrogating" the portion of the common-law definition of murder that any killing during the course of a felony is murder, the statute then elevating the degree of the offense to 1st-degree murder where certain felonies are involved. The Court then made this change applicable to all future trials and trials in progress, not applying the change even to cases then pending on appeal.[81] And in the *Stevenson*[82] case, where the Court abolished the year-

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[78] See *Shafer*, supra, slip opinion at 19-20, fn 60:
> Michigan courts continue to use the factors originally stated in *Linkletter* to determine whether a new rule of criminal law applies retroactively to final judgments on collateral review. . . . By contrast, the Supreme Court of the United States has replaced the *Linkletter* standard with the standard established under *Teague* . . . for retroactive application of new rules of criminal law on collateral review.

[79] *See, e.g.*, *People v. Sexton*, 458 Mich. 43, 60–61 (1998) ("we recognize[ ] [a] three-part test of retroactivity that assesses (1) the purpose of the new rules; (2) the general reliance on the old rule, and (3) the effect of retroactive application of the new rule on the administration of justice."); *People v. Carp*, 496 Mich. 440, 451, cert. granted, judgment vacated sub nom. *Carp v. Michigan*, 136 S. Ct. 1355, 194 L. Ed. 2d 339 (2016) (referring to "Michigan's separate and independent test for retroactivity set forth in *People v. Sexton*"). The Court appears to have first applied the *Linkletter* factors to a decision based on state law in *People v. Hampton*, 384 Mich. 669, 674 (1971) ("The United States Supreme Court has discussed various factors to be used in determining whether a law should be applied retroactively or prospectively. There are three key factors which the court has taken into account: (1) The purpose of the new rule; (2) The general reliance on the old rule; and (3) The effect on the administration of justice. See, e.g., *Linkletter v. Walker*").

[80] *People v Aaron*, 409 Mich. 672 (1980).

[81] *People v. Aaron*, at 733–34. This application follows from the Court acting legislatively in amending the murder statute. Murder is a statutory crime, not a common-law crime, and when the legislature uses a common-law term without alteration, it has

and-a-day rule of causation for homicide, the new rule was made purely prospective so as not to be applicable even in the case at hand,[83] rendering the opinion an advisory opinion, something the Court has since doubted is permissible.[84].

The inconsistency in retroactivity terminology is further illustrated by *People v. Tanner*.[85] There the Court, construing the statutory requirement[86] that a sentence be indeterminate, established that the minimum could be no more than two-thirds of the stated maximum. The Court said that its holding was "prospectively limited," but held that it was applicable to "those cases in which sentence is to be or has been imposed after date of filing of this opinion and to those cases which on date of filing of this opinion are pending on appeal and which have properly raised and preserved the issue for appeal."[87] This sort of application is a *fully* retroactive application (though not an application retroactively on collateral attack).

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enacted the common-law meaning, which the Court is not free to change. As this Court has now recognized, "[w]hen the Legislature codifies a common-law crime without articulating its elements, we must look to the common law for the definition of the crime. . . . *We are bound by the common-law definition until the Legislature modifies it*." *People v. Perkins*, 468 Mich. 448 (2003) (emphasis added).

Recently this Court has directed argument as to whether this portion of this 44-year-old precedent should be overruled. *People v. Langston*, 6 N.W.3d 404, 405 (Mich. 2024).

[82] *People v. Stevenson*, 416 Mich. 383 (1982).

[83] Id., 416 Mich. at 400.

[84] See *Hathcock*, supra, fn 77 and accompanying text.

[85] *People v Tanner*, 387 Mich 683, 690 (1972);.

[86] MCL § 769.9.

[87] *Tanner supra* at 690, 199 N.W.2d at 205.

In *People v. Markham*[88] the Court held that its then (and at the time newly established) same-transaction jeopardy rule[89] would apply "only when the prosecution upon which a former jeopardy claim is based began on or after November 20, 1973" when the new rule was established.[90] With regard to the newly established, and later overruled, Michigan dual-sovereignty jeopardy rule,[91] the Court said that "an analytical distinction has evolved. When considering procedural rules governing trial conduct, the *Linkletter-Hampton* criteria play a predominant role. However, when non-procedural or substantive rights of a fundamental nature are affected, they are normally to be accorded retrospective application. The *Linkletter-Hampton* considerations may be addressed, but only in the rare instance will they have determinative effect."[92] But when construing the new-trial statute so as to preclude trial judges as acting as 13th juror in the *Lemmon*[93] case, the Court applied its ruling purely prospectively, so as to *affirm* the grant of a new trial that, under the construction of the statute it was announcing, should have been *reversed*. More recently, the Court held that Michigan continues to follow *Linkletter*, despite its repudiation federally.[94] *People v. Barnes* declined, based on Michigan law, to apply the rule of *People v. Lockridge*[95] that the sentencing guidelines

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[88] *People v. Markham*, 397 Mich. 530 (1976) (a pre-*Teague* decision).

[89] *People v. White*, 390 Mich. 245 (1973), overruled by People v. Nutt, 469 Mich. 565 (2004).

[90] *Markham*, 397 Mich. at 535.

[91] *People v. Cooper*, 398 Mich. 450 (1976), overruled by *People v. Davis*, 472 Mich. 156 (2005).

[92] *People v. Gay*, 407 Mich. 681, 706–07, 660 (1980) (a pre-*Teague* decision).

[93] *People v Lemmon*, 456 Mich 625 (1998).

[94] "The state-law test in *Hampton* was derived from *Linkletter* . . . . *Linkletter* was subsequently disavowed as the federal standard for retroactivity in *Griffith v. Kentucky* . . . but we recognized the *Hampton/Linkletter* standard's continued viability as the state-specific standard in *People v. Sexton." People v. Barnes*, 502 Mich. 265, 274 (2018).

[95] *People v Lockridge*, 498 Mich. 358 (2015).

are advisory only retroactively to collateral attacks. The Court did not distinguish between cases on direct review and those bringing a collateral attack, simply applying the *Linkletter/Hampton*[96] analysis to the case and saying that "we recognized the *Hampton/Linkletter* standard's continued viability as the state-specific standard in *People v. Sexton*."[97] But none of the three consolidated cases in *Sexton* were on collateral review, and so whether a different standard of retroactivity should apply on collateral attack as opposed to direct review was not before the Court in *Sexton*.[98] And the Court in *Barnes*, though saying it was applying the *Linkletter/Hampton* standard and rejecting retroactivity on collateral attack under that test "[b]ecause of this general reliance on the old rule, the effect on the administration of justice to extend the *Lockridge* rule retroactively on collateral review would be incalculable, with potentially every criminal defendant sentenced in at least the last 19 years being eligible for relief" so that "*Lockridge* will be given only prospective application on collateral review," also referred to "retroactive application" of the new rule on collateral review as an "*extraordinary remedy*" to which defendant was not entitled.[99] There are many other examples that make the late Justice Moody's case.[100]

4. A rule of retroactivity of new rules or overruling decisions on collateral review

Michigan has not adopted the United State Supreme Court's *Teague* approach regarding retroactivity of new rules and overruling decisions on collateral attack after the conviction is final; that is, the direct appeal is over. In civil cases, judgments final

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[96] *People v. Hampton*, 384 Mich. 669 (1971).

[97] *Barnes*, at 274 (fn 5).

[98] It is well-established that "A point thus assumed without consideration is, of course, not decided." *Allen v. Duffy*, 43 Mich. 1, 11 (1880); *Rott v. Rott*, 508 Mich. 274, 290 (2021).

[99] Id., at 274-275 (emphasis supplied).

[100] And, of course, the Court of Appeals continues to follow *Linkletter*.

on appeal may only be reopened for fraud,[101] but in criminal cases, *Teague* allows judgments to be set aside though final on appeal, but only where the new rule or decision is substantive in the sense that it forbids criminal punishment of certain primary conduct or prohibits a certain category of punishment for a class of defendants because of their status or offense.[102] These principles make sense for cases where the direct appeal is over, which is, of course, why the Supreme Court adopted them. Michigan continues to apply its adoption of *Linkletter* both on direct appeal and collateral attack as a "state rule" of retroactivity,[103] but that formulation was simply adopted by this Court from *Linkletter* rather than fashioned as a Michigan rule; as it should with new rules and overruling decisions on direct appeal, Michigan should follow the lead of the United States Supreme Court with regard to retroactivity of new rules on collateral attack.[104] Retroactivity *should* be rare on collateral review, and, as the *Vannoy* case says, never apply to new rules of criminal procedure. Adoption of *Teague* has a further virtue. The United States Supreme Court never announces the retroactive effect of a new rule in the case establishing the rule, as, other than its application to the parties, such an announcement is actually pure dicta, having nothing to do with resolution of the case. But establishment of retroactivity principles in *Jim Beam* and *Teague* allows lower courts to make that determination; in criminal cases, the only litigated matter is whether (as here) a new rule is substantive or procedural. Where that question is not subject to dispute, the retroactivity question is readily resolved, which, in most cases, would be the case in Michigan (the present case being an exception) were *Teague* followed.

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[101] *See supra* note 20.

[102] As noted previously, the United States Supreme Court no longer considers the possibility of new procedural rules being retroactive on collateral attack.

[103] *See supra* note 94.

[104] The state is free, of course, to have a different, more expansive, retroactivity rule or rules even for new federal constitutional than does the United States Supreme Court. *Danforth v. Minnesota*, 552 U.S. 264, 267-268, 128 S Ct 1029, 169 L Ed 2d 859 (2008).

5. Michigan should not apply *Parks* retroactively on collateral attack by following the reasoning of the dissent of Justice Scalia in *Montgomery*

The United States Supreme Court held that life without parole could not be imposed as a sentence on a defendant under the age of 18 when the crime was committed without a hearing that considers the "mitigating factors of youth," though the sentence might then be imposed. In *Montgomery*, the Court, applying *Teague,* held that this rule was retroactive on collateral attack to convictions already final at the time of decision in *Miller* because, in its view, the new rule was substantive rather than procedural, despite having said the *opposite* in *Miller* itself: "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*."[105]

Parks, of course, is not based on the United States Constitution's Eighth Amendment but on the Michigan Constitution,[106] and so the retroactivity of *Parks* to convictions already final is entirely up to this Court. Following *Linkletter/Hampton*, the Court of Appeals found that the decision applies to convictions already final. This Court should adopt *Teague* as a matter of state law, but in applying it to *Parks,* should reach a different conclusion from *Montgomery*, as it is free to do, by following the reasoning and logic of Justice Scalia dissenting in that case, as well as statements in the recent decision of *Jones v. Mississippi*[107] essentially repudiating the *Montgomery* analysis. Justice Scalia in dissent in *Montgomery* pointed out the Court's statement in *Miller* in contradiction of its conclusion in *Montgomery*\that the rule stated there is

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[105] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 2459, 183 L. Ed. 2d 407 (2012) (emphasis supplied).

[106] The People would refer the Court to their brief, and to that of the PAAM amicus, in *People v. Czarnecki*, 7 N.W.3d 556 (Mich. 2024), to be argued together with the present case.

[107] *Jones v. Mississippi*, 593 U.S. 98, 141 S. Ct. 1307, 209 L. Ed. 2d 390 (2021).

substantive, and said that "it is impossible to get past *Miller*'s unambiguous statement that '[o]ur decision does not categorically bar a penalty for a class of offenders" and "mandates only that a sentencer follow a certain process ... before imposing a particular penalty.' . . . It is plain as day that the majority is not applying *Miller*, but rewriting it."[108]

And *Jones,* though not formally overruling *Montgomery*,[109] found the *Teague* analysis in that case wanting. *Miller*, it said, "required a sentencing procedure similar to the procedure that this Court has required for the individualized consideration of mitigating circumstances in capital cases . . . . [which] require sentencers to consider relevant mitigating circumstances when deciding whether to impose the death

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[108] Id., 136 S. Ct. at 743 (Scalia, J., dissenting).

[109] Principally, it appears, because already "as a result of *Montgomery*, many homicide offenders under 18 who received life-without-parole sentences that were final before Miller have now obtained new sentencing proceedings and have been sentenced to less than life without parole" and "[b]y now, most offenders who could seek collateral review as a result of *Montgomery* have done so and, if eligible, have received new discretionary sentences under *Miller*." Id, 141 S. Ct. at 1318, 1322.

As one court has said:

> In its recent decision in *Jones v. Mississippi* . . . the Supreme Court appears to have "[o]verrule[d] *Montgomery* in substance but not in name." . . . The *Jones* Court expressly declined to overrule "*Montgomery*'s holding that Miller applies retroactively on collateral review [because b]y now, most offenders who could seek collateral review as a result of *Montgomery* have done so and, if eligible, have received new discretionary sentences under *Miller*." . . . However, *the Court effectively rejected Montgomery's finding that Miller announced a new substantive rule of constitutional law*. The Court *recognized it had employed a unique approach in deciding Montgomery*, one that was "in tension with the Court's retroactivity precedents that both pre-date and post-date *Montgomery*[.]" . . . Significantly, the Court cautioned that "those retroactivity precedents — and not *Montgomery* — must guide the determination of whether rules other than *Miller* are substantive." Id. (emphasis added). *The decision in Jones leads to one inescapable conclusion: Montgomery's key holding (declaring Miller retroactive) has been preserved, but the Court's reasoning behind that conclusion has not*.

Commonwealth v. Cobbs, 256 A.3d 1192, 1221 (Pa. 2021) (emphasis supplied).

penalty."[110] And most importantly, the Court said that "[a]s the Court's post-*Montgomery* decision in *Welch*[111] already indicates, to the extent that *Montgomery*'s application of the *Teague* standard is in tension with the Court's retroactivity precedents that both pre-date and post-date Montgomery, *those retroactivity precedents—and not Montgomery*—must guide the determination of whether rules other than *Miller* are substantive."[112] *Jones* establishes that *Montgomery*'s *Teague* analysis is an outlier—a "one-off" that should not be followed in future cases.

If this Court adopts *Teague*, it should, then, be guided by the Court's pre-and post-*Montgomer*y precedents that "are in tension with *Montgomery*," as "those retroactivity precedents—and not *Montgomery*—must guide the determination" of whether new rules are substantive, and should guide this Court. So applied, those cases compel the result that the rule in *Parks* is procedural, so that it should not be applied on collateral attack. As said in the *Welch* case, a Court determines whether a rule is substantive or procedural "by considering the function of the rule" itself and not "by asking whether the constitutional right underlying the new rule is substantive or procedural," so that a rule is procedural if it regulates "'only the manner of determining the defendant's culpability."[113] This is the case here. Following Justice Scalia's cogent dissent in *Montgomery* and the ruling and statements in *Jones*, *Parks* does not categorically bar a penalty for a class of offenders, but mandates that the sentencer follow a certain process before imposing a particular penalty, as the Court said itself in

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[110] Id, 141 S. Ct. at 1315-1316.

[111] "The Court determines whether a rule is substantive or procedural for retroactivity purposes 'by considering the function of the rule' itself—not 'by asking whether the constitutional right underlying the new rule is substantive or procedural.'" *Welch v. United States*, 578 U. S. 120, 130–131, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016)..

[112] *Jones*, 141 S. Ct. at 1318.

[113] *Welch*, 136 S.Ct. 1264 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).

Miller.[114] Under the *Teague* framework, new procedural rules do not apply on collateral attack, and *Parks* should not apply here.

6. *Carp* is the law on retroactivity of *Miller* under the state retroactivity test and ought not be overruled

And even if the *Linkletter/Hampton* standard were to be applied, for the reasons given in *Barnes* to hold that *Lockridge* is not retroactive on collateral attack,[115] defendant should not receive what the Court there said was the "extraordinary remedy" of application of *Parks* retroactively on collateral attack. First, *Miller* itself, though it must be applied retroactively on collateral attack as a matter of federal constitutional law under *Montgomery*, is not retroactive as a matter of *state* constitutional law under *People v. Carp*.[116] The majority of the Court of Appeals here said that because *Montgomery* found the *Miller* rule to be substantive "*Carp*'s analysis of retroactivity, constructed upon the faulty premise that *Miller*'s rule was a procedural rule, does not control the outcome here."[117] But the Court of Appeals cannot overrule this Court. "Only this Court has the authority to overrule one of its prior decisions. Until this Court does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become obsolete."[118] The

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[114] See *Montgomery*, 136 S. Ct. at 743 (Scalia, J., dissenting).

This is very similar to *Beck* and *Lockridge*, which are not retroactive on collateral review. See *Barnes,* supra, and *People v. Motten*,—Mich. App.— , 2024 WL 1684853 (No. 363044, Mich. Ct. App. Apr. 18, 2024)

[115] To paraphrase *Barnes*, "Because of this general reliance on the old rule [18 year-old 1st-degree murderers sentenced automatically to a term of life not subject to parole], the effect on the administration of justice to extend the [*Parks*] rule retroactively on collateral review would be incalculable, with potentially every criminal defendant [who was 18 years old when committing 1st-degree murder] sentenced [at any time in the past] being eligible for relief" so that "*Parks* [should] be given only prospective application on collateral review."

[116] *People v. Carp*, supra.

[117] *People v. Poole*, –Mich. App.–, 2024 WL 201925, at 9 (2024).

[118] *Paige v. City of Sterling Heights*, 476 Mich. 495, 524 (2006).

Court's conclusion that as a matter of *state* law the *Miller* rule is procedural and not retroactive remains the law, and the Court of Appeals erred in failing to follow its holding that "*Miller* is not entitled to retroactive application under Michigan's test for retroactivity."[119] The "faulty premise" here is that of the Court of Appeals' majority, for that *Montgomery* viewed *Miller* as a substantive rule under the United States Constitution does not compel that result under the Michigan Constitution, for those either under 18, or 18 under *Parks*. Even after *Montgomery,* unless *Carp* is overruled the result of *Montgomery* does not obtain under the *Michigan* Constitution, though courts are required to apply the Eighth Amendment as construed by the United States Supreme Court, and so any "extension" of *Miller* under the Michigan Constitution should not be applied retroactively under *Montgomery*'s flawed—as noted in *Jones*—retroactivity analysis. *Carp* remains the law.[120]

Further, the People agree with the analysis of Judge Riordan in dissent in the Court of Appeals regarding the application of the current Michigan retroactivity test, as the thorough application of the Michigan test as a matter of Michigan law to retroactivity of *Miller* laid out in *Carp* should it be adhered to. Put briefly, to summarize that application:

- The first factor, the purpose factor, assesses the nature and focus of the new rule and the effect the rule is designed to have on the implementation of justice. . . . Under this first factor, when a new rule "concerns the ascertainment of guilt or innocence, retroactive application may be appropriate." In every case to date in which this Court has applied the state retroactivity test, the "integrity of the fact-finding process" has always been referred to in the context of determining a defendant's "guilt or innocence.". . . the first factor must be afforded more weight than either of the other two factors when the first factor does

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[119] *Carp*, at 512.

[120] See dissent of Judge Riordan, "After careful consideration, the Court held that Miller satisfied neither the federal test for retroactivity nor the state test for retroactivity." 2024 WL 202751. *Montgomery* does not affect the conclusion in *Carp* that *Miller* is not retroactive under the *state* constitution.

"clearly favor" retroactivity or prospectivity. We are persuaded by, and adhere to, *Payne*'s and *Desist*'s understanding regarding the heightened weight to be afforded the first factor when it strongly supports one side or the other of the retroactivity question.[121]

- Turning to the inquiry required to evaluate the second and third factors "together," the second factor—the reliance on the old rule—must be considered both from the perspective of prosecutors across the state when prosecutors faithfully abided by the constitutional guarantees in place at the time of a defendant's conviction . . . as well as from the collective perspective of the 334 defendants who would be entitled to resentencing if the new rule were applied retroactively . . . . Inherent in the question of reliance by prosecutors across the state is the extent to which the old rule received constitutional approval from the judiciary before the adoption of the new rule.

    - [W]hen the old rule has been specifically approved by the courts as passing constitutional muster, prosecutors have their strongest argument for having relied on the old rule in good faith. . . . Moreover, when prosecutors relied in good faith on the old rule and did so for a lengthier period of time, reliance can be viewed as more significant and the second factor will tend to counsel against retroactive application. . . . As for defendants' reliance on the old rule, they must demonstrate not only that they relied on the old rule by taking or not taking a specific action, but that they "detrimentally relied on the old rule."

    - The inquiry into reliance will significantly affect any inquiry into the burden placed on the administration of justice because when prosecutors have relied on the old rule, they have presumably taken few, if any, steps to comply with the new rule. The greater the extent of their reliance, and the greater the extent to which the new rule constitutes a departure from the old rule, the more burdensome it becomes for prosecutors to take the steps necessary to comply with the new rule. Similarly, the greater the extent of the departure, the more difficult it becomes for courts to look back and attempt to reconstruct what outcome would have resulted had the

[121] *Carp*, 497-499.

new rule governed at the time a given defendant was sentenced.

- A burden is placed on the administration of justice in the form of time and expense to the judiciary in retroactively accommodating the new rule. Far more importantly, when a new rule is likely to be difficult to apply retroactively, a burden is placed on the administration of justice in the form of compromising the accuracy with which the new rule can be applied and the confidence the public may have regarding judicial determinations in situations in which the new rule is applied to cases that became final many years or even decades earlier.

- Applying these considerations in evaluating the second and third factors to *Miller*, it is apparent that these factors do not sufficiently favor the retroactive application of *Miller* so as to overcome the first factor's clear direction against its retroactive application. . . .before *Roper* in 2005, United States Supreme Court precedent specifically held that it was constitutional to impose capital punishment on juveniles over the age of 16 convicted of homicide offenses. *Stanford v. Kentucky*, 492 U.S. 361, 380, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).

  - On the basis of this state of the law, prosecutors across Michigan entirely in good faith relied on the old rule whenever they sought life-without-parole sentences for juvenile homicide offenders. Considering the constitutional approval the old rule received from both our judiciary and the United States Supreme Court, as well as the length of time during which the old rule prevailed—dating back to our state's founding in 1837—the reliance on the old rule by Michigan prosecutors was significant and justified.

  - Conversely, we note that this is not a situation in which it can fairly be said that, as a group, the 334 defendants who would be entitled to resentencing if the rule in *Miller* were applied retroactively have "relied" on the old rule to their "detriment." First, we find it difficult to understand, and Carp and Davis themselves fail to identify, exactly what adverse action the 334 defendants have taken, or opted not to take, in "reliance" on the old

rule (except perhaps to recognize and abide by the old rule as the then extant law of this state).

- As between defendants and the prosecutors of this state, it is further apparent that the latter have relied far more heavily on the old rule, have done so in good faith, and would have relied "detrimentally" on behalf of the people were *Miller* to be applied retroactively. In particular, in relying on the old rule, prosecutors did not for the purpose of sentencing have any cause at the time to investigate or present evidence concerning the aggravating or mitigating factors now required to be considered by Miller. If *Miller* were to be applied retroactively, prosecutors would be abruptly required to bear the considerable expense of having to investigate the nature of the offense and the character of the 334 juvenile offenders subject to *Miller*'s retroactive application. This task, if newly thrust upon prosecutors, would be all the more burdensome and complicated because a majority of the 334 defendants were sentenced more than 20 years ago and another 25% were sentenced between 15 and 20 years ago. And in many, if not most, of those instances, the prosecutor who initially tried the case would likely no longer be available for a resentencing hearing. . . . There would be considerable financial, logistical, and practical barriers placed on prosecutors to re-create or relocate evidence that had previously been viewed as irrelevant and unnecessary.

- *Miller* requires trial courts to determine a defendant's moral culpability for the murder the defendant has committed by examining the defendant's character and mental development at the time of the offense. Even if the myriad evidence could somehow be obtained by the prosecutor, it is fanciful to believe that the backward-looking determination then required of the trial court could be undertaken with sufficient accuracy and trustworthiness so many years after the crime had been committed, the trial completed, and the defendant sentenced. Further, just as the prosecutor might no longer be available to represent the people's interest, neither might the sentencing judge.

- For these reasons, we find that the second and third factors do not sufficiently favor the retroactive application of *Miller* so as to overcome the first factor counseling against the retroactive application of *Miller*. As a result of this analysis, *Miller* is not

> entitled to retroactive application *under Michigan's test for retroactivity*.[122]

C. Conclusion: *Parks* should not be retroactive on collateral review

If the "Michigan test" for retroactivity is applied to *Parks* then the case is not retroactive, as *Carp* remains the law in Michigan and holds that under the Michigan test the rule requiring a "mitigation hearing" for those under the age of 18 before a sentence of life without parole may be imposed is not retroactive, though Michigan is required to apply *Montgomery's* holding that as a matter of federal retroactivity the *Miller* rule is retroactive on collateral review. *Carp* should not be overruled. Further, Michigan should jettison its test, which was simply adopted from United States Supreme Court decisions that have since been case aside, and follow *Teague*, as many other jurisdictions so.[123] Under *Teague* principles, correctly applied, *Parks* establishes a

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[122] Id., 503-512 (emphasis supplied).

And see *People v. Motten*, supra, holding held that *People v. Beck*, 504 Mich. 605 (2019), prohibiting consideration in sentencing of conduct for which a defendant has been acquitted, is not, under either *Teague* or *Sexton*, retroactive on collateral attack, as well as *People v. Shaver*, —Mich. App.—, 2024 WL 4094354 (No. 361488, Mich. Ct. App. Sept. 5, 2024).

[123] See *Thiersaint v. Comm'r of Correction*, 111 A.3d 829, 841–842 (Conn., 2015)

> *Thirty-three other states and the District of Columbia likewise apply Teague in deciding state law claims*.[see listing at footnote 11]. . . . Despite the prevailing view among other jurisdictions, the petitioner argues that *Teague* should be abandoned in Connecticut . . . We disagree.. . .
>
> We agree with the court's observation in *Teague* that "[a]pplication 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. Without finality, the criminal law is deprived of much of its deterrent effect." . . . We also agree with the court in *Teague* that "[t]he costs imposed upon the [states] by retroactive application of new rules of constitutional law on habeas corpus ... generally far outweigh the benefits.... In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions ... for it continually forces the [s]tates to marshal resources in order to keep in prison defendants whose trials and appeals conformed to the then-existing constitutional standards.". . . In other words,

procedural rule, *Montgomery*'s determination to the contrary with regard to the *Miller* being an aberration that need not and should not be followed as a matter of state law; as the Supreme Court has said with regard to application of *Teague* federally, "to the extent that *Montgomery*'s application of the *Teague* standard is in tension with the Court's retroactivity precedents that both pre-date and post-date Montgomery, *those retroactivity precedents—and not Montgomery*—must guide the determination of whether rules other than *Miller* are substantive."

The Court of Appeals should be reversed.

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states will be required to maintain records and expend additional administrative and financial resources on defendants for possibly many years following their convictions in order to defend against future habeas proceedings, which, if successful, may result in the need for another trial. *In addition, Teague provides a framework that is relatively easy for courts to apply and achieve consistent results* (emphasis and bracketed material supplied).

Relief

Wherefore, the People request that this Court reverse the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the brief follows the court rules and contains no more than 12,435 countable words.

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