

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2010-KA-01780-COA**

**TERRY HYE JR.**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

DATE OF JUDGMENT: 03/05/2010  
TRIAL JUDGE: HON. DALE HARKEY  
COURT FROM WHICH APPEALED: JACKSON COUNTY CIRCUIT COURT  
ATTORNEY FOR APPELLANT: GRAHAM PATRICK CARNER  
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL  
BY: LISA LYNN BLOUNT  
DISTRICT ATTORNEY: ANTHONY N. LAWRENCE II  
NATURE OF THE CASE: CRIMINAL - FELONY  
TRIAL COURT DISPOSITION: CONVICTED OF CAPITAL MURDER AND  
SENTENCED TO LIFE WITHOUT PAROLE  
IN THE CUSTODY OF THE MISSISSIPPI  
DEPARTMENT OF CORRECTIONS  
DISPOSITION: CONVICTION AFFIRMED; SENTENCE  
VACATED; REMANDED FOR  
RESENTENCING: 05/28/2013  
MOTION FOR REHEARING FILED:  
MANDATE ISSUED:

**EN BANC.**

**LEE, C.J., FOR THE COURT:**

**PROCEDURAL HISTORY**

¶1. A jury in the Jackson County Circuit Court convicted Terry Hye Jr. of capital murder. Hye was sentenced to life without parole in the custody of the Mississippi Department of Corrections. Hye's post-trial motions were denied. Hye now appeals, asserting the following issues: (1) jury instruction 7 omitted an element of the crime charged; (2) the

evidence was insufficient to prove he participated in the underlying crime; (3) the trial court erred in refusing an accessory-after-the-fact instruction; (4) the trial court erred in refusing an accomplice instruction; (5) the trial court erred in telling the jury panel that he was ineligible for the death penalty; (6) the indictment failed to properly charge capital murder; (7) his sentence was unconstitutional; and (8) cumulative error necessitates reversal.

## FACTS

¶2. On October 23, 2008, Michael and Linda Porter stopped at a Conoco gas station in Moss Point, Mississippi, to ask for directions. Linda testified that Michael got out of the car and began to walk toward the service station. Linda noticed three young black males standing near her car. One of these men had a white towel draped over his head. As Michael returned to the car, two of the men attacked him. Michael was able to get into the car, shut the door, and put the car in gear. Linda testified she saw the man with the white towel on his head walk toward the car, pull out a gun, and shoot Michael through the car window. Linda stated the car sped forward down the road. Linda tried to manage the car, eventually running the car into a ditch. Linda then sought help for Michael, who died from his injuries. Linda was unable to identify these three men.

¶3. The shooter was later identified as Darwin Wells, who was fifteen years old at the time of the murder. Wells was convicted of deliberate-design murder and sentenced to life imprisonment. Wells's conviction was affirmed by this Court in *Wells v. State*, 73 So. 3d 1203, 1204 (¶1) (Miss. Ct. App. 2011). Three other men were questioned about Michael's murder: Hye, Tevin Benjamin, and Alonzo Kelly. At the time of the murder, Hye was sixteen years old, Benjamin was fourteen years old, and Kelly was seventeen years old.

¶4. Kelly testified for the State at Hye's trial. Kelly was initially charged with capital murder but ultimately pleaded guilty to accessory after the fact and served eleven months in jail. According to Kelly, earlier that day he, Hye, and Benjamin met Wells at a store, the Little Super. Benjamin and Wells stated they needed money, and Wells said he would "hit a lick." Kelly stated this meant getting money by any means, legally or illegally. The group left the Little Super and walked to Kelly's house. On the way, Wells got into a fight with another person in the street. The police responded, and all four men were searched. No weapons or drugs were found on the men. After this, Wells left the group for the afternoon.

¶5. The group met again a few hours later at the Little Super. Wells stated again that he needed to "hit a lick." Hye indicated he needed to find someone to buy him cigarettes, so the group walked to the Conoco. On the way Wells showed his gun to Kelly. Kelly's testimony indicates the whole group, including Hye, knew Wells was carrying a gun. Once the group neared the Conoco, Kelly decided to leave and turned around at a stop sign one block away from the Conoco. Kelly was concerned that "every time we go down there or something, we always get locked up for something." As he was turning away, Kelly said he heard a gunshot and saw Wells, Benjamin, and Hye run past him. However, at one point, Kelly testified Hye and Benjamin were still standing in the road when Wells approached the Porters' car.

¶6. Hye testified in his own defense and denied any involvement with Michael's death. Hye stated he thought Wells wanted to sell drugs when he said "hit a lick." Hye said he found someone to buy him cigarettes at the Conoco, but he never set foot on the property. According to Hye, after the Porters drove up, Wells ran from the side of the store but slipped and fell. Only then did Hye notice Wells had a gun. Hye said he and Kelly were walking

away when he heard a gunshot.

¶7. Benjamin and Wells were called to the stand but refused to testify, each invoking his right against self-incrimination. Zachary Kelly, Alonso Kelly’s cousin, was called to testify as to a conversation he had with Kelly. Zachary also invoked his right against self-incrimination.

## DISCUSSION

### I. JURY INSTRUCTION 7

¶8. In his first issue on appeal, Hye argues jury instruction 7 omitted the deadly-weapon element of the underlying crime of armed robbery as charged in the indictment. Hye admittedly failed to object, but contends the error cannot be harmless. The indictment charges that Hye did “wilfully, unlawfully, feloniously[,] and without the authority of law, with or without any design to effect death, kill and murder Michael David Porter, a human being, while engaged in commission of the crime and felony of [r]obbery, as defined by [Mississippi Code Annotated s]ection 97-3-79 [(Rev. 2006)].” The State argues Hye was indicted for the underlying felony of robbery, not armed robbery. The State contends the reference to section 97-3-79 was a scrivener’s error. If so, then jury instruction 7, which tracks the robbery statute, Mississippi Code Annotated section 97-3-73 (Rev. 2006), would be a correct statement of the law.

¶9. The real issue here appears to be whether the indictment was defective. We review the legal sufficiency of an indictment de novo. *Tran v. State*, 962 So. 2d 1237, 1240 (¶12) (Miss. 2007) (citation omitted). This Court has stated that “[t]he incorrect citation of a statute number does not alone render an indictment defective, but rather is ‘mere surplusage’

and not prejudicial to the defendant.” *Brown v. State*, 944 So. 2d 103, 106 (¶8) (Miss. Ct. App. 2006) (quoting *Evans v. State*, 916 So. 2d 550, 552 (¶6) (Miss. Ct. App. 2005)). “When an indictment provides the essential elements of the crime, the statutory subsection under which the defendant was charged need not be specified.” *Evans*, 916 So. 2d at 552 (¶6) (citation omitted). The indictment charging Hye with capital murder does not provide the essential elements of the crime of robbery. The indictment only says “[r]obbery, as defined by [s]ection 97-3-79.”

¶10. However, “[a] capital murder indictment based on an underlying felony, other than burglary, does not have to specifically set forth the elements of the underlying felony used to elevate the crime to capital murder.” *Gray v. State*, 728 So. 2d 36, 71 (¶174) (Miss. 1998) (citing *State v. Berryhill*, 703 So. 2d 250, 256 (¶23) (Miss. 1997); *Mackbee v. State*, 575 So. 2d 16, 34-35 (Miss. 1990)).

¶11. The indictment clearly put Hye on notice that he was being charged with capital murder based on the underlying felony of robbery. It is clear from the record that Hye was aware the underlying felony he was being charged with was robbery and not armed robbery. The record contains no references to armed robbery, even though Wells shot Michael. Both the State and Hye’s attorney repeatedly referred to robbery, not armed robbery, throughout the trial. We find that this issue is without merit.

¶12. We note that Hye also argues the trial court should have instructed the jury on the elements of attempted robbery since the jury instruction said Hye would be guilty if he “did take, steal[,] and carry away or attempt to take, steal[,] and carry away the personal property of Michael . . . .” Hye admittedly failed to object and raises this issue for the first time on

appeal; thus, this argument is waived. *See Rubenstein v. State*, 941 So. 2d 735, 761 (¶90) (Miss. 2006).

## II. INSUFFICIENT EVIDENCE

¶13. In his next issue on appeal, Hye contends the evidence was insufficient to prove he committed armed robbery. Since Hye was indicted for the crime of robbery and not armed robbery, we decline to address this issue.

## III. ACCESSORY-AFTER-THE-FACT JURY INSTRUCTION

¶14. Hye contends the trial court erred in refusing his accessory-after-the-fact jury instruction. The standard of review for the giving or refusal of jury instructions is abuse of discretion. *Victory v. State*, 83 So. 3d 370, 373 (¶12) (Miss. 2012) (citation omitted). When reviewing the giving or refusal of jury instructions, we do not view the jury instructions in isolation, but instead we consider them as a whole. *Rushing v. State*, 911 So. 2d 526, 537 (¶24) (Miss. 2005) (citation omitted). Included in a defendant's right to a fair trial is the right to a proper jury instruction on his theory of defense. *Mitchell v. State*, 90 So. 3d 584, 589 (¶10) (Miss. 2012) (citation omitted). The trial court may refuse the requested jury instruction if it (1) incorrectly states the law, (2) is covered elsewhere in the instructions, or (3) is without an evidentiary foundation. *Id.* "One cannot be both a principal in the crime and an accessory after the fact." *Hoops v. State*, 681 So. 2d 521, 534 (Miss. 1996) (citations omitted).

¶15. Hye claims that he helped cover up the crime by denying his involvement and concocting false alibis for himself and the others. According to Mississippi Code Annotated section 97-1-5(1) (Supp. 2012), a person is guilty of accessory after the fact if he has

“concealed, received, or relieved any felon, or ha[s] aided or assisted any felon, knowing that the person had committed a felony, with intent to enable the felon to escape or to avoid arrest, trial, conviction[,], or punishment after the commission of the felony . . . .” The trial court found that no evidence was presented to support Hye’s request. We agree. One of the elements of accessory after the fact is that “a completed felony has been committed.” *Gangl v. State*, 539 So. 2d 132, 136 (Miss. 1989). In *Gangl*, the Mississippi Supreme Court found it was error for the trial court to deny Gangl an accessory-after-the-fact instruction. *Id.* at 137. Gangl was found guilty of armed robbery, but there was some evidence presented to support Gangl’s claim he was an accessory after the fact because his involvement occurred after the felony had been committed. *Id.* at 136. In this case, the evidence showed that Hye’s involvement in the robbery began earlier in the day when the group decided to go “hit a lick” and headed to the gas station. Furthermore, Hye never presented this theory of defense to the jury. We find no merit to this issue.

#### IV. ACCOMPLICE INSTRUCTION

¶16. Hye next contends the trial court erred in refusing an accomplice instruction in regard to Kelly’s testimony. The decision to give an accomplice instruction is within the trial court’s discretion. *Burke v. State*, 576 So. 2d 1239, 1242 (Miss. 1991). Our supreme court has described an accomplice as “a person who is implicated in the commission of the crime.” *Slaughter v. State*, 815 So. 2d 1122, 1134 (¶66) (Miss. 2002) (citation omitted). “In other words, if the evidence gives a reasonable inference that the person may have been a co-perpetrator or the sole perpetrator, then the person is an accomplice.” *Bailey v. State*, 960 So. 2d 583, 590 (¶30) (Miss. Ct. App. 2007) (citations omitted). Kelly was convicted of

accessory after the fact; thus, he was not an accomplice. *See id.* at 591 (¶37). We find no abuse of discretion by the trial court in refusing an accomplice instruction.

#### V. TRIAL COURT’S STATEMENT TO THE JURY PANEL

¶17. During voir dire of the jury panel, the trial court informed the panel that although Hye was charged with capital murder, “[t]he death penalty is not involved in this particular case[,] and the jury selected for this trial will determine guilt or innocence solely, and not be required to advise the Court or return a verdict or deliberate on the death penalty.” Hye contends this statement was reversible error.

¶18. Hye cites to Justice Diaz’s specially concurring opinion in *Edmonds v. State*, 955 So. 2d 787, 808 (¶¶66-69) (Miss. 2007), for support. In *Edmonds*, the trial court also informed the jury panel during voir dire that the case was not a death-penalty case. *Id.* *Edmonds* was a juvenile at the time he was accused of murder. *Id.* at 804 (¶56). Justice Diaz relied upon *Warren v. State*, 336 So. 2d 726 (Miss. 1976), and *Smith v. State*, 288 So. 2d 720 (Miss. 1974), in determining this particular statement by the trial court was error. *Edmonds*, 955 So. 2d at 808 (¶68). However, in *Warren*, the trial court instructed the jury as to the specific sentences the defendant could receive for murder and manslaughter. *Warren*, 336 So. 2d at 729. And in *Smith*, the trial court instructed the jury that the trial court would sentence the defendant to a certain number of years in the penitentiary if he was convicted of manslaughter. *Smith*, 288 So. 2d at 722. We note that in *Smith*, the supreme court affirmed the conviction but set aside the sentence and remanded the case for resentencing based on the trial court’s statement to the jury. *Id.* These cases are not controlling with respect to the issue at hand. We find no error on the part of the trial court in informing the jury panel it

would not be required to deliberate on the death penalty. This issue is without merit.

#### VI. CAPITAL-MURDER INDICTMENT

¶19. Hye argues the indictment was defective because the capital-murder statute, Mississippi Code Annotated section 97-3-19(2)(e) (Rev. 2006), was cited in the heading of the indictment but not the body of the indictment. Mississippi Code Annotated section 99-17-20 (Rev. 2007) requires capital-murder indictments to list the statute section and subsection in the indictment. Hye’s indictment lists the appropriate section and subsection in the heading and tracks the language of the statute in the body. Section 99-17-20 does not specify where the charged section and subsection number must appear in the indictment. Hye failed to object; thus, his argument is waived. *See Rubenstein*, 941 So. 2d at 761 (¶90).

#### VII. ILLEGAL SENTENCE

¶20. Hye, who was sixteen years old at the time of the crime, contends his mandatory life sentence without parole is unconstitutional. The State concedes this, and we agree. The United States Supreme Court recently held that mandatory life imprisonment without parole for those who were juveniles at the time of their crimes violates the Eighth Amendment’s prohibition on cruel and unusual punishments. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012). The Court in *Miller* suggested factors to consider when determining whether a juvenile should be sentenced to life or life without parole, including “chronological age and its hallmark features,” “family and home environment,” “circumstances of the homicide offense,” and “the possibility of rehabilitation.” *Id.* at 2468. Thus, we reverse and remand for resentencing in accordance with *Miller*.

#### VIII. CUMULATIVE ERROR

¶21. Hye contends the cumulative errors necessitate reversal. Although we reverse on a sentencing issue, we find no reversible error in any of Hye's other issues; thus, this issue is without merit.

**¶22. THE JUDGMENT OF THE JACKSON COUNTY CIRCUIT COURT OF CONVICTION OF CAPITAL MURDER IS AFFIRMED. THE SENTENCE OF LIFE WITHOUT PAROLE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS VACATED, AND THIS CASE IS REMANDED TO THE JACKSON COUNTY CIRCUIT COURT FOR RESENTENCING. ALL COSTS OF THIS APPEAL ARE ASSESSED TO JACKSON COUNTY.**

**IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, ROBERTS, MAXWELL, FAIR AND JAMES, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION.**

**CARLTON, J., DISSENTING:**

¶23. I respectfully dissent from the majority's opinion. The majority retroactively applies *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012), to the present case, and in turn reverses Hye's sentence of life imprisonment without parole, and remands the case for resentencing.<sup>1</sup>

I disagree with the majority's application of *Miller*. I submit that *Miller*'s prohibition of mandatory life sentences for juveniles constitutes only a procedural safeguard that should be applied prospectively, rather than retroactively. In *Miller*, the United States Supreme Court did not render all life sentences of juveniles substantively unconstitutional, but instead prohibited mandatory life sentences for juveniles without consideration of individual mitigating factors, in order to prevent disproportionate sentences.<sup>2</sup> *Id.* at 2471. A review of

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<sup>1</sup> See *Jackson v. State*, 194 S.W.3d 757, 761 (Ark. 2004).

<sup>2</sup> See *Craig v. Cain*, No. 12-30035, 2013 WL 69128, at \*1 (5th Cir. Jan. 4, 2013); see also *Manning v. State*, 929 So. 2d 885, 897-98 (¶¶33-36) (Miss. 2006) (new procedural safeguards are not retroactively applied).

the record in the present case shows that Hye's sentence is proportionate when considering the offenses committed and Hye's background, as required by *Miller*. I turn to a short review of facts significant to this analysis.

¶24. On October 23, 2008, Michael Porter and his wife, Linda, stopped at the Conoco on their way to watch Linda's grandson play football so that Michael could go inside and ask for directions. While Michael was inside the gas station, Linda noticed three young black males standing near her car. As reflected in the majority opinion, Linda testified that when Michael returned to the car, two of the men surrounded the car and Michael, and they attacked him. Michael struggled to fight off the attackers and managed to get into the car, shut the door, and put the car in gear. Linda testified that during Michael's attempt to get into the car, she saw a third man, wearing a white towel on his head, walk toward the car, pull out a gun, carefully aim the gun at Michael, and shoot through the car window. The shooter was later identified as Wells. Michael had successfully cranked the car, and when he was shot, the car sped forward down the road. Linda tried to manage the car, eventually running the car into a ditch. Linda then sought help for Michael, but he died from his injuries.

¶25. Hye was arrested and incarcerated in November 2009. While in jail, Hye asked an inmate to deliver a note to Tevin Benjamin, another participant in the robbery and murder. The note revealed Hye's instructions to Benjamin to falsify testimony and relayed the version of the facts they would testify to at trial.

¶26. At trial, Hye chose to testify in his own defense. When Hye took the stand, he denied any involvement in Michael's death, despite the testimony of others to the contrary. Hye

even denied being on the property of the Conoco during the robbery and murder. He testified that he saw Wells run from the side of the store, then slip and fall, and that only then did Hye notice Wells had a gun. Hye claimed that he and Benjamin were walking away from the store when he heard a gunshot. However, the evidence presented at trial, including the testimony of Alonzo Kelly, Hye's friend, established Hye's participation in the robbery and murder of Michael.

¶27. On appeal, Hye contends his mandatory life sentence without parole is unconstitutional because he was sixteen years old<sup>3</sup> at the time of the crime. In *Miller*, the Supreme Court found that the Eighth Amendment's prohibition against cruel and unusual punishment guarantees individuals the right not to be subjected to excessive punishment.<sup>4</sup> *Miller*, 132 S. Ct. at 2483. The Court explained that the punishment should be graduated and proportioned to both the offense and the offender, and the Court acknowledged that the concept of proportionality was central to the Eighth Amendment. *Id.* Significantly, the Supreme Court also provided that the Court viewed the concept of proportionality "less through a historical prism than according to 'the evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 2463 (citation omitted).<sup>5</sup>

¶28. The Court in *Miller* also suggested factors to consider when determining whether a

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<sup>3</sup> In Mississippi, once certified as an adult, the defendant will always thereafter be treated as an adult. *See* Miss. Code Ann. § 43-21-157(8) (Rev. 2009). A sister jurisdiction has found that statutes governing juveniles apply protections afforded to minors prospectively, not retroactively. *See Jackson*, 194 S.W.3d at 761.

<sup>4</sup> *See Craig*, 2013 WL 69128, at \*2.

<sup>5</sup> *See Craig*, 2013 WL 69128, at \*2.

juvenile should be sentenced to life or life without parole, including chronological age, home environment, “circumstances of the homicide offense,” and “the possibility of rehabilitation.” *Id.* at 2468. In *Miller*, the juvenile defendant was fourteen years old<sup>6</sup> at the time of the crime. *Id.* at 2460. His stepfather had physically abused him and his drug-addicted mother had neglected him. *Id.* at 2462. The defendant had also been in and out of foster homes and had tried to kill himself several times. *Id.* Due to these factors as well as the defendant’s age, the *Miller* Court reversed the sentence to enable individual sentencing guidelines, rather than mandatory categorical sentencing guidelines, for that defendant and to allow consideration of evidence of his rehabilitative potential and his culpability in the crimes. *Id.* at 2469. *Miller* explains that the trial court lacked information to determine if the sentence reflected a constitutionally proportionate sentence; therefore, the Court reversed the sentence and banned mandatory sentencing guidelines in cases involving juveniles. *Id.* at 2474-75. However, I submit that *Miller* failed to expressly require the reopening of cases where the sentence has already been imposed.

¶29. Here, the record contains ample evidence of Hye’s maturity, deliberateness of his participation in the crime, his disdain for the law, and his disrespect for the value of human life. Hye grew up in a two-parent household with an older brother. Hye stated that he dropped out of school in the ninth grade. At the time of the crime, Hye was sixteen years old, only days away from his seventeenth birthday. Hye’s friend, Benjamin, was already under the supervision of the youth court. Hye testified that earlier in the day on October 23,

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<sup>6</sup> Hye was born on November 12, 1991, and he was almost seventeen years old at the time he participated in the robbery and murder of Michael — nearly three years older than the fourteen-year-old defendant in *Miller*.

2008, he smoked marijuana and cocaine with Kelly. The record also reflects that the owner of the Conoco had banned Hye from entering the premises because he had previously tried to solicit people to purchase cigarettes for him illegally. Hye testified that he had previously been arrested at the Conoco. Contrary to the assertions in Hye's brief, the evidence shows that he joined up with Wells, whom Hye knew possessed a gun, and others, and went to the Conoco with the specific intent to rob someone to get money to go to the fair.

¶30. The State also entered Hye's "jail-house" note to Benjamin into evidence as an exhibit for the jury to consider at trial. The jury saw that Hye had tried to exercise influence over another witness, Benjamin, to obtain false testimony by presenting an alternate version of the facts so that the two of them could "go home." Such evidence reflects Hye's brazen attempts to unlawfully influence witnesses and peers, his disrespect for the law, and his active participation even after committing the offenses. Linda's testimony describing the robbery also reflected Hye's deliberate participation in the crime and murder, showing Hye worked with another attacker to surround Michael and block him from his vehicle when he exited the Conoco. The record shows that Hye deliberately attacked Michael and then prevented Michael's escape long enough for Wells to shoot Michael.

¶31. *Miller* provides for an evolving, changing precedent, since the plain language applies an evolving standard of decency. I submit that the application of such an evolving standard satisfies proportionality under the facts of this case, where Hye was almost seventeen when he participated in the robbery and murder; where the evidence shows that Hye actively participated in the crimes; where the record affirmatively shows that he had prior knowledge of the intent to commit the crimes with a gun; and where Hye testified falsely at trial and

tried, before trial, to influence the testimony of another witness to obtain an alibi.

¶32. The record clearly shows that the sentence in the present case constitutes a proportionate sentence relative to the offender and the crimes committed. As stated, the application of the individual sentencing procedures of *Miller* constitutes a procedural rule, and such procedural safeguards should not be applied retroactively unless required by clear legislative intent or unless jurisprudence has found the issue related to a substantive unconstitutionality.<sup>7</sup> In *Craig*, 2013 WL 69128, at \*2, the Fifth Circuit recognized that *Miller* did not “categorically bar all sentences of life imprisonment for juveniles[,] . . . only those sentences made mandatory by a sentencing scheme.” As a result, the Fifth Circuit found that *Miller* failed to satisfy the test for retroactive application. *Id.* Accordingly, I submit that the holding in *Miller*, which provides a procedural safeguard against disproportionate sentencing for juveniles, should be applied prospectively on a categorical basis, not retroactively. *See Manning*, 929 So. 2d at 900 (¶42); *Jackson*, 194 S.W.3d at 761.

¶33. I, therefore, dissent, and I submit that Hye’s conviction and sentence should be affirmed since the record before us reflects that Hye’s sentence of life imprisonment without parole satisfies the proportionality requirements of the Eight Amendment. Hye’s sentence of life imprisonment without parole failed to result in substantive unconstitutionality.

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<sup>7</sup> The retroactive application of statutes is not favored by the courts, and a law is not retroactively applied unless the statute clearly expresses, or necessarily implies, retroactive application. *See* Sutherland Statutory Construction § 41:4 (7th ed. 2007). A procedural law pertains to the manner, order, or mode, while a substantive law enables rights and duties of a party. Procedural safeguards should be prospectively applied. *Id.* Only those laws relating to substantive unconstitutionality should be applied retroactively.