No. 13-8915

IN THE SUPREME COURT OF THE UNITED STATES

DARRYL TATE, Petitioner,

v.

STATE OF LOUISIANA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

This Court should grant certiorari to clarify that the limitation on the power of states to sentence children to lifetime imprisonment without parole adopted by this Court in Miller v. Alabama, 132 S. Ct. 2455 (2012), applies retroactively to cases on collateral review under Teague v. Lane, 489 U.S. 288 (1989). The straightforward reasons for this conclusion are laid out in Darryl Tate's petition and are not meaningfully addressed by Respondent's Brief in Opposition. Thus, Petitioner submits only two additional brief points in response to Respondent's pleading.

I. LOUISIANA PROVIDES NO PERSUASIVE REASON WHY THIS COURT'S REVIEW IS NOT APPROPRIATE IN THIS CASE.

Louisiana does not contest that there are compelling reasons for this Court to grant certiorari review in this case. It does not dispute that the retroactivity of Miller is an important question impacting hundreds of cases. Nor does it deny that the decision below differs from that of most other courts that have addressed this issue, creating a conflict. Indeed, since the petition in this case was filed, that conflict has only deepened. The highest courts of Texas and Illinois have correctly ruled that Miller is a substantive rule that applies retroactively. See Ex parte Maxwell, No. AP-76964, 2014 WL 941675, at *4 (Tex. Crim. App. Mar. 12, 2014) (concluding Miller

is retroactive because it "alters the range of outcomes available for certain criminal conduct") (internal citation omitted); People v. Davis, No. 115595, 2014 IL 115595, at *9 (Ill. Mar. 20, 2014) (unanimously holding Miller is retroactive because it "mandates a sentencing range broader than that provided by statute for minors convicted of first degree murder who could otherwise receive only natural life imprisonment") (internal citation omitted). In contrast, the Alabama Court of Criminal Appeals, which was reversed by this Court in Miller, has refused to apply Miller to cases on collateral review. Williams v. State, No. CR-12-1862, 2014 WL 1392828 (Ala. Crim. App. Apr. 4, 2014).

The State does suggest that this Court lacks jurisdiction because no federal question was addressed below. (Resp't's Br. Opp'n 7.) However, the Louisiana Supreme Court has explicitly adopted the federal standard for retroactivity. That court reaffirmed in this case that "the standards for determining retroactivity set forth in Teague . . . apply to 'all cases on collateral review in our state courts.' Accordingly, our analysis is directed by the Teague inquiry." Tate v. State, 130 So. 3d 829, 834 (La. 2013). The court went on to discuss retroactivity exclusively as a question of federal law, relying primarily on cases from this Court. Id. at 834-41.

Despite this, the State heavily relies on Danforth v. Minnesota, 552 U.S. 264 (2008), to argue that states can adopt a narrower standard for determining retroactivity than that applied by the federal courts. (Resp't's Br. Opp'n 6-9.) Danforth does not stand for that proposition and held only that state courts can "give ***broader*** effect to new rules of criminal procedure than is required by [Teague]," 552 U.S. at 266

(emphasis added).[1]

But more importantly, the court below did not rely on any narrower state standard; rather, it based its refusal to apply the federal constitutional rule in Miller to Mr. Tate solely on its understanding of this Court's interpretation of Teague. Consequently, the decision below "fairly appears to rest primarily on federal law," and this Court's jurisdiction is not in doubt. Michigan v. Long, 463 U.S. 1032, 1040 (1983); see also id. at 1044 (holding that this Court "ha[s] jurisdiction in the absence of a plain statement" that court below is relying on state law).[2]

Louisiana courts cannot deny relief on a federal constitutional claim "by judicial misconstruction of federal law." Danforth, 552 U.S. at 288 (citing inter alia Oregon v. Hass, 420 U.S. 714, 719 (1975) (noting that state court may not adopt different interpretation of federal law than this Court)). As laid out in detail in Darryl Tate's petition, the decision below is precisely such a misconstruction, and this Court should grant review to correct it.

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[1] Danforth uses the word "broader" to describe the authority of state courts to provide retroactive remedies for constitutional violations more than ten times, 552 U.S. at 266, 268, 275, 277, 280, 282, 284, 288, and the State's argument that it grants state courts authority to adopt *narrower* retroactivity standards strains it well beyond its bounds. So too does the suggestion that Danforth supports the notion that retroactivity is a pure question of state law, given that the Court in Danforth explicitly recognized that retroactivity is "a mixed question of state and federal law." Id. at 291 (citation omitted).

[2] See also Michigan v. Payne, 412 U.S. 47, 50-57 (1973) (reviewing Michigan Supreme Court's application of federal retroactivity standard); Danforth, 552 U.S. at 283 (describing state authority to adopt broader retroactivity standard as not inconsistent with this Court's jurisdiction to review state court's retroactivity determination in Payne because based on federal law).

II. RESENTENCING HEARINGS PURSUANT TO MILLER REQUIRE UNEXCEPTIONAL EXERCISES OF SENTENCING DISCRETION AND PRESENT NO BAR TO THIS COURT'S REVIEW OR TO THE RETROACTIVE APPLICATION OF MILLER.

The State also argues that Miller should not be retroactively applied because the State cannot obtain evidence to rebut a juvenile offender's "heightened capacity for change" and "greater prospects for reform" after the offender reaches age eighteen. (Resp't's Br. Opp'n 20-22.) The State's argument that evidence of a juvenile offender's exemplary prison conduct and achievements "relates to mitigation and reform" but is not admissible in resentencing pursuant to Miller because it "has no bearing on" the appropriate sentence (Resp't's Br. Opp'n 22) evinces its fundamental misapprehension of this Court's precedent but itself has no bearing on whether this Court should grant review, much less on the retroactivity of Miller.

Miller requires the exercise of routine sentencing discretion based on historical facts about the offense and the offender that sentencers regularly evaluate in sentencing and resentencing proceedings. Distinct from adult sentencing proceedings, it directs in juvenile offender cases that the sentencer "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," 132 S. Ct. at 2469. The State properly recognizes that this sets up a presumption against sentencing juveniles to life imprisonment without parole, which the government may rebut with evidence tending to show the defendant is one of the "rare juvenile offender[s] whose crime reflects irreparable corruption." Id.

Contrary to Respondent's view, however, the "great difficulty" of "distinguishing

. . . between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity'" and the rare youth who will not manifest his inherent capacity for change is substantially diminished when the inquiry is not a prospective one undertaken "at this early age" but instead is informed by evidence of how the individual juvenile actually has developed and matured over time. Id. The State rightly will have difficulty rebutting the presumption against life without parole where prison records show the juvenile's "exemplary conduct and coursework and other achievements accomplished during their incarceration" (Resp't's Br. Opp'n 22) but such evidence is admissible in an individualized sentencing proceeding pursuant to Miller. See Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986) (holding that testimony that petitioner had been well-behaved and well-adjusted prisoner "may not be excluded from the sentencer's consideration"); see also Graham v. Florida, 560 U.S. 48, 73 (2010) (noting evidence of "prison misbehavior or failure to mature" could corroborate judgment that juvenile is incorrigible).

This Court's recognition that the "judgment that the juvenile is incorrigible" is "questionable" and is "difficult even for expert psychologists," Graham, 560 U.S. at 72-73, undermines the State's assertion that "the expert opinion of a psychologist" is necessary (Resp't's Br. Opp'n 21), much less reliable or persuasive, to rebut evidence of the offender's behavior in prison. Finally, that the "vast majority" of juveniles from Orleans Parish who are condemned to die in prison have prison records that show growth and maturity (Resp't's Br. Opp'n 21-22) demonstrates that "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence,

[a mandatory sentencing] scheme poses too great a risk of disproportionate punishment," Miller, 132 S. Ct. at 2469, and makes plain the critical importance of this Court's review in this case.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Supreme Court of Louisiana.

Respectfully submitted,

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