No. _____

In the Supreme Court of the United States

George Toca, Petitioner

v.

State of Louisiana, Respondent

On Petition for a Writ of Certiorari
to the Louisiana Supreme Court

Petition for a Writ of Certiorari

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Question Presented

George Toca was barely 17 years old when he was arrested in 1984 for the accidental shooting of his best friend. He has credible evidence that he is actually innocent of this crime. The victim's family believes he is innocent and wants him released. Must George Toca die in prison because the Louisiana Supreme Court has found *Miller* non-retroactive in Louisiana?

List of Parties

All parties appear in the caption of the case on the cover page.

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Petition for a Writ of Certiorari

George Toca respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Supreme Court.

Opinions Below

The opinion of the Louisiana Supreme Court, *State v. Toca*, 141 So.3d 265 (La. 2014) is attached as Appendix A. That court's June 20, 2014, order granted the State's Application for Supervisory Writs and reversed the district court's order granting George Toca' Motion to Correct Illegal Sentence in light of *Miller v. Alabama*, 132 S. Ct. 2455 (2012). The opinion of the Louisiana Court of Appeal, *State v. Toca*, No. 2013-K-1061 (La. Ct. App. July 31, 2013) is unreported and attached as Appendix B. The trial court ruled that *Miller* applied retroactively to Mr. Toca's case. The minute entry for that hearing is attached as Appendix C and the transcript of the hearing is attached as Appendix D.

Jurisdiction

The State's application to the Louisiana Supreme Court for discretionary review was granted on June 20, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Relevant Constitutional Provisions

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Mr. Toca had just turned 17 years old when his best friend, Eric Batiste, was accidentally shot during a botched armed robbery in 1984. *State v. Toca*, 551 So.2d 4 (La. 1989). On April 16, 1985, Mr. Toca was convicted of this crime based only on the testimony of two white strangers, who identified Mr. Toca as the black teenager who had accidentally shot his partner while trying to rob them. Under Louisiana's mandatory sentencing scheme, he was sentenced to life without parole, probation, or suspension of sentence; a sentence to die in prison with no consideration of his youth, the circumstances of the crime, nor any other mitigating facts—most notably, the fact that the victim's family does not want him in prison. *Id.*

On June 25, 2012, this Court held in *Miller v. Alabama*, that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 132 S. Ct. at 2460. Mr. Toca filed a Motion to Correct Illegal Sentence in light of *Miller*. On June 28, 2013, the district court ruled that *Miller* applied retroactively to Mr. Toca's case, but did not vacate Mr. Toca's sentence or hold a sentencing hearing pursuant to *Miller*. The State filed an application for supervisory writ in the Fourth Circuit Court of Appeal, which denied the State's application on July 31, 2013. The State filed an application for supervisory writ in the Louisiana Supreme Court on August

2, 2013. On November 5, 2013, in *State v. Tate,* a divided Louisiana Supreme Court held that "*Miller* does not apply retroactively to cases on collateral review as it merely sets forth a new rule of criminal constitutional procedure, which is neither substantive nor implicative of the fundamental fairness and accuracy of criminal proceedings." No. 2012-OK-2763, 2013 WL 5912118, at *1 (La. Nov. 5, 2013) On June 20, 2014, relying on its decision in *Tate*, the Louisiana Supreme Court granted the State's writ application and reversed the decision of the district court in Mr. Toca's case, condemning Mr. Toca to die in prison despite the fact that his case contains many of the characteristics this Court was concerned with when it held that mandatory life without parole sentences imposed on children violate the Eighth Amendment. *State v. Toca,* 141 So.3d 265 (La. 2014). This petition follows.

REASONS FOR GRANTING THE WRIT

If this Court denies this writ and continues to allow Louisiana to deny him a sentencing hearing that was mandated by this Court in *Miller*, George Toca will die in prison. He will die in prison even though other life-sentenced prisoners around the country who were convicted as juveniles are given individual sentencing hearings. And he will die in prison even though he personifies rehabilitation and the facts of his conviction are a striking example of why mandatory life without parole for some juveniles is cruel and unusual. A constitution that provides equal protection and a legal system that treats like cases alike cannot mandate that Mr. Toca dies in prison while others are given sentencing hearings and released.

The question of retroactivity of *Miller v. Alabama* on collateral review is doctrinally and analytically straightforward. Most state and federal courts—and federal prosecutors nationwide—have correctly recognized that *Miller* created a new substantive rule that applies retroactively to children whose sentences became final before it was announced. As a result, *Miller* is being implemented retroactively in cases throughout the country. But courts in a handful of states—including Louisiana, which has a large population of juveniles automatically sentenced to die in prison—have misconstrued what this Court mandated in *Miller* and concluded the rule it announced is not retroactive. This Court should resolve this conflict now because hundreds of people entitled to new sentencing hearings under *Miller* are blocked from relief in the minority of states that have refused to recognize *Miller*'s retroactivity. Mr. Toca is entitled to a new sentencing hearing if *Miller* applies retroactively to his case, and this Court should intervene to set straight the erroneous minority view.

I. WHILE MOST COURT HAVE CORRECTLY REGONIZED THAT *MILLER* IS RETROACTIVE TO CASES ON COLLATERAL REVIEW, A FEW HAVE REACHED CONTRARY RESULTS THAT CREATE A CONFLICT CALLING FOR THIS COURT'S REVIEW.

There is universal agreement that *Miller* announced a new rule, and most lower courts have recognized that the rule is substantive and therefore retroactive within the framework established in *Teague v. Lane*, 489 U.S. 288, 301-22 (1989) (holding new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" apply retroactively to cases on collateral review), and *Penry v. Lynaugh*, 492 U.S. 302, 330

(1989) ("In our view, a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all."), *abrogated on other grounds by Atkins v. Virginia,* 536 U.S. 304 (2002). Understanding that "[r]ules that fall within . . . *Teague*'s first exception 'are more accurately characterized as substantive rules not subject to [*Teague*'s] bar,'" *Beard v. Banks,* 542 U.S. 406, 411 n. 3 (2004), most courts have readily identified *Miller* as a new *substantive* rule that "appl[ies] retroactively because [it] 'necessarily carr[ies] a significant risk that a defendant stands convicted of "an act that the law does not make criminal" *or faces a punishment that the law cannot impose upon him.*" *Schriro v. Summerlin,* 542 U.S. 348, 352 (2004) (emphasis added).

Indeed, the Supreme Courts of Illinois, Iowa, Massachusetts, Mississippi, and Nebraska, New Hampshire, Texas have readily concluded that *Miller* "alter[ed] the range of conduct or the class of persons that the law punishes" with a sentence of life without parole. *Id.* at 353. While acknowledging that the *Miller* rule has procedural components, these courts recognized it is primarily substantive because it requires states to modify their substantive sentencing laws. *People v. Davis,* 6 N.E. 3d 709 (Ill. 2014) (holding *Miller* is retroactive because it is "a new substantive rule"); *State v. Ragland,* 836 N.W.2d 107, 115 (Iowa 2013) (unanimously holding *Miller* is retroactive because it creates a "substantive change in the law that prohibits mandatory life without parole sentencing"); *Diatchenko v. Dist. Att'y Suffolk Cnty.*, 1 N.E.3d 270, 281 (Mass. 2013) (unanimously holding that *Miller* is

retroactive because it "explicitly forecloses the imposition of a certain category of punishment—mandatory life in prison without the possibility of parole—on a specific class of defendants: those individuals under the age of eighteen when they commit the crime of murder. Its retroactive application ensures that juvenile homicide offenders do not face a punishment that our criminal law cannot constitutionally impose on them"); *Jones v. State*, 122 So. 3d 698, 702 (Miss. 2013) (holding that *Miller* is retroactive, substantive rule because it "modified our substantive law by narrowing its application for juveniles"); *State v. Mantich*, 287 Neb. 320, 341-42 (Neb. Feb. 7, 2014) (holding that "the fact that *Miller* required Nebraska to change its substantive punishment for the crime of first degree murder when committed by a juvenile . . . demonstrates the rule announced in *Miller* is a substantive change in the law and "[b]ecause the rule announced in *Miller* is more substantive than procedural" it applies retroactively"); *Tulloch v. Gerry*, No. 2013-566, at *7 (N.H. Aug. 29, 2014) (holding that the *Miller* rule is "a new, substantive rule which should be applied retroactively to cases on collateral review.")(citations and internal quotations omitted); *Ex parte Maxwell*, No. AP–76964, 2014 WL 941675, at *4 (Tex.Crim.App. Mar. 12, 2014) ("We conclude that [the *Miller* rule] is a new substantive rule that puts a juvenile's mandatory life without parole sentence outside the ambit of the State's power.") Three of the above-listed decisions—those of Illinois, New Hampshire, and Texas—occurred after Darryl Tate and Ian Cunningham submitted to this Court their petitions for a writ of certiorari to review the state supreme court decisions in their cases in February 2014.

In addition to the decisions of several states' highest courts, separate intermediate courts in California and Florida reached the same conclusion. *In re Rainey*, No. A138921, 2014 WL 794354, at *6 (Cal.Ct.App. Feb. 28, 2014) ("Thus, the *Miller* rule constitutes a new substantive rule, and is not subject to Teague's retroactivity bar, because it prohibits a certain category of punishment [life without parole] for a class of defendants [juvenile offenders convicted of homicide] because of their status [chronological age and its hallmark features] or offense.") (citations and internal quotations omitted); *Toye v. State*, No. 2D12—5605, 2014 WL 228639, at *2 (Fla. 2nd Dist. Ct. App. Jan. 22, 2014) (finding *Miller* is retroactive because it "dramatically disturbed the power of the State of Florida to impose a nondiscretionary sentence of life without parole on a juvenile convicted of a capital felony"),

Among the federal courts, the First, Second, Third, Fourth, and Eighth Circuits and a panel of the Fifth Circuit have permitted second or successive habeas petitions raising *Miller* claims because petitioners made a prima facie showing that this Court already has made *Miller* retroactive. *Evans-Garcia v. United States*, 744 F.3d 235, 238 (1st Cir. 2014); *In re Simpson*, No. 13-40718, 2014 WL 494816 (5th Cir. Feb. 7, 2014)[1]; *In re Pendleton*, 732 F.3d 280, 282 (3d Cir. 2013) (holding that petitioners "made a prima facie showing that *Miller* is retroactive"); *Williams v.*

[1] A different panel of the Fifth Circuit reached the opposite conclusion in a case where the habeas petitioner sought a certificate of appealability on several guilt-phase claims and did not present a claim or argument that raised the retroactivity of *Miller*. *Craig v. Cain*, No. 12-30035, 2013 WL 69128, at *2 (5th Cir. Jan. 4, 2013) (unpublished order denying motion to reconsider denial of COA) (finding that "*Miller* does not satisfy the test for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles").

United States, No. 13-1731 (8th Cir. Aug. 29, 2013) (order granting motion to file successive habeas petition brought solely on ground that *Miller* is a new rule retroactively applicable to cases on collateral review); *Wang v. United States*, No. 13-2426 (2d Cir. July 16, 2013) (same); *Johnson v. United States*, 720 F.3d 720, 720-21 (8th Cir. 2013) (per curium) (same); *Stone v. United States*, No. 13-1486 (2d Cir. June 7, 2013) (same); *In re Landry*, No. 13-247 (4th Cir. May 30, 2013) (same); *In re James*, No. 12-287 (4th Cir. May 30, 2013); *see also Alejandro v. United States*, No. 13 Civ. 4364(CM), 2013 WL 4574066, at *1 (S.D.N.Y. Aug. 22, 2013) ("Because *Miller* announced a new rule of constitutional law that is substantive rather than procedural, that new rule must be applied retroactively on collateral review."); *Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at *2 n.2 (E.D. Mich. Jane. 30, 2013) ("[T]his court would find *Miller* retroactive on collateral review, because it is a new substantive rule, which 'general apply retroactively.'" (internal citations omitted)). In addition, the Department of Justice has directed federal prosecutors nationwide to take the uniform position that *Miller* is substantive and therefore retroactive. *See e.g., Johnson*, 720 F.3d at 721 ("The government here has conceded that *Miller* is retroactive . . . .").

In conflict with these state and federal courts are the Supreme Courts of Louisiana, Michigan, Minnesota, and Pennsylvania, which have held in divided decisions that *Miller* is not retroactive because it is a procedural, not substantive, rule. *People v. Carp*, 496 Mich. 440, at *21 (2014); *State v. Tate*, No. 2012–OK–2763, 2013 WL5912118, at *1 (La. Nov. 5, 2013); *Chambers v. State*, 831 N.W.2d 311, 331

(Minn. 2013); *Commonwealth v. Cunningham*, 81 A3d 1, 10 (Pa. 2013). Intermediate appellate courts in Florida and Alabama have held *Miller* is not retroactive. *State v. Duncan*, No. CR-13-0879, 2014 WL 4387707 (Ala. Crim. App. Sept. 5, 2014); *Geter v. State*, 115 So.3d 375 (Fla. 3d Dist. Ct. App. 2012); *Gonzalez v. State*, 101 So.3d 886 (Fla. 1st Dist. Ct. App. 2012).

The Eleventh Circuit similarly has held that *Miller* is not retroactive because it does not categorically bar all life without parole sentences for children and therefore cannot be a substantive rule. *In re Morgan*, 713 F.3d 1365, 1367-68 (11th Cir. 2013) (reasoning that a "new rule is substantive when that rule places an entire class beyond the power of the government to impose a certain punishment regardless of the procedure followed" and determining *Miller* is not retroactive because it "did not prohibit the imposition of a sentence of life imprisonment without the possibility of parole on minors"); *see also Ware v. King*, 5:12-CV-147, 2013 WL 4777322, at *3 (S.D. Miss. Sept. 5, 2013) (finding *Miller* is not retroactive); *Johnson v. Ponton*, Civil Action No. 3:13-CV-404, 2013 WL 5663068, at *6 (E.D. Va. Oct. 16, 2013) (same); *Martin v. Symmes*, No. 10-CV-4753, 2013 WL 5653447, at *17 (D. Minn. Oct. 15, 2013) (same).

Courts in the minority have incorrectly conceptualized the rule this Court announced in *Miller*. In finding that the *Miller* rule is merely procedural, those courts erroneously continued to perceive life without parole as the default sentence for a child convicted of a homicide, and that *Miller* merely mandates a slight alteration in the process by which a child receives that sentence. However, it is clear

that that is not what this Court intended when it decided *Miller*. This Court made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," and that such a sentence can only be imposed after the sentence has "take[n] into account how children are different, and how those differences counsel *against* irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S.Ct. at 2469 (emphasis added). In other words, the harshest possible sentence should be the *exception*, while a sentence that provided a meaningful opportunity to obtain release would be the *norm*. By altering the State's power to impose life without parole on a child from every case to only the uncommon case, *Miller* narrowed the scope of the State's power to impose that punishment and, in practice, placed the vast majority of children beyond the State's power to do so. In so doing, the rule announced in *Miller* is substantive in nature, and thus should be applied retroactively to cases on collateral review.

Contrary to this Court's assumption that life without parole would be a sentence handed down only in exceptional cases, these courts envisioned the continued common sentencing of youth to this harshest sentence. *See e.g. People v. Carp*, 496 Mich. 440, at *17 (Mich. 2014) ("Because *Miller* continues to permit Michigan to impose a life-without-parole sentence on any juvenile homicide offender (but only after individualized consideration), it must necessarily be viewed as procedural rather than substantive."); *Chambers v. State*, 831 N.W.2d 311, 328 (Minn.2013) ("*Miller* requires 'that a sentencer follow a certain process—considering

an offender's youth and attendant characteristics—before imposing' a sentence of life imprisonment without the possibility of parole.") (citations omitted).

II. *MILLER* IS A NEW RULE THAT IS RETROACTIVELY APPLICABLE, AND THE LOUISIANA SUPREME COURT'S MINORITY VIEW IS WRONG.

In *Teague*, this Court held that a new rule will be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" (the "substantive rule exception") or creates a procedure "implicit in the concept of ordered liberty" (the "procedural rule exception"). 489 U.S. at 310-11. The new rule announced in *Miller* should be applied retroactively since it can be read to fit either exception.

A. THE LOUISIANA SUPREME COURT'S MINORITY VIEW IS WRONG.

This Court's holding in *Miller* that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders," created a new rule that is retroactively applicable to cases on collateral review. 132 S. Ct. at 2469. Under *Teague*'s first exception, new substantive rules apply retroactively to cases on collateral review. *See Bousley v. United States*, 523 U.S. 614, 619-20 (1998).

To reach the conclusion that *Miller* is not retroactive, the Louisiana Supreme Court unnecessarily distorted what the new rule announced in *Miller* actually provides, reasoning that "[w]hile the Court opined 'appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon,' it specifically did not 'foreclose a sentencer's ability to make that judgment in

homicide cases'" and so *Miller* "simply altered the range of *permissible methods* for determining whether a juvenile could be sentenced to life imprisonment without possibility of parole." *State v. Tate*, No. 2012–OK–2763, 2013 WL 5912118, at *10 (La. Nov. 5, 2013). As indicated by this passage, the Louisiana Supreme Court misconstrued this Court's ruling in *Miller* to imply that before this decision, there was already a "method[] for determining whether a juvenile could be sentenced to life imprisonment without parole." While in fact, when a sentencing scheme is mandatory, by definition, there is no "method" for making that determination. *Miller* did not alter an existing method, but rather altered *who is eligible* to receive this harsh sentence.

B. THE NEW RULE ANNOUNCED IN *MILLER* FITS WITHIN THE SUBSTANTIVE RULE EXCEPTION AND THUS SHOULD BE APPLIED RETROACTIVELY TO CASES LIKE MR. TOCA'S THAT ARE ON COLLATERAL REVIEW.

First in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and later in *Schriro v. Summerlin*, 542 U.S. 348 (2004), this Court expanded the *Teague* substantive rule exception. The rule announced in *Miller* fits both expanded definitions of a substantive rule. In *Penry*, this Court found that the substantive rule exception covers not only rules that forbid criminal punishment of certain primary conduct, but also rules that prohibit "a certain category of punishment for a class of defendants because of their status or offense." 492 U.S. at 305.

The rule articulated by this Court in *Miller* fits the *Penry* expansion of the substantive rule exception. The new rule established in *Miller* forbids a certain

category of punishment (life in prison without parole) for a class of defendants (youth under the age of 18 at the time of the crime) because of their status ("diminished culpability and heightened capacity for change"). *Miller*, 132 S. Ct. at 2469. As such, the new rule announced in *Miller* fits the *Penry* formulation of the substantive rule exception, and thus, should be applied retroactively. The few courts that have concluded that the *Miller* rule is not substantive have mischaracterized the class of defendants as all youth convicted of homicide and since a small subset of that class is still eligible to be sentenced to life without parole, they concluded the new rule is not substantive. But that characterization misses the entire purpose of the sentencing hearings mandated by *Miller* — the purpose is to separate those youth who do and do not have a "diminished culpability and heightened capacity for change" and those who don't. *Id.* Those that do that have that status or quality, are prohibited from being sentenced to life without parole.

This Court again expanded the substantive rule exception in *Schriro,* 542 U.S. 348. In *Schriro,* this Court found that when the new rule makes a certain fact essential to obtain a death sentence, this is akin to requiring proof of an additional element in order to convict someone of a particular crime. *Id.* at 354. Therefore, this Court concluded, such a rule should be considered substantive, and thus applied retroactively to cases on collateral review. *Id.* In *Miller* and its predecessor, *Graham v. Florida,* 560 U.S. 48, 130 (2010), this Court equated sentencing youth to die in prison with sentencing an adult to be executed. *Id.* at 2466. In *Miller,* this Court announced a new rule that in order to sentence a child to die in prison, a court must

conduct a sentencing hearing during which the mitigating factors of youth are presented with an emphasis on their diminished culpability and ability to reform with age. 132 S. Ct. at 2475. This Court also emphasized that such a sentence, like a death sentence, should be reserved only for those guilty of the most severe offenses. In other words, in order for a child to be sentenced to die in prison, the State must prove that he not only committed the *most* severe offence, but also that he is not capable of reform. In so doing, it altered the substantive factors that must be considered before a child can be sentenced to life imprisonment without parole. The elements of even the most aggravated homicide offense alone can no longer automatically be considered sufficient to justify that penalty; rather, the constitution "requires [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469. This new rule makes certain facts essential to obtain a life without parole sentence for a youthful defendant. This fits the formulation of the substantive rule exception described in *Schriro*, and therefore the new rule should be applied retroactively to cases on collateral review.

C. THE NEW RULE ANNOUNCED IN *MILLER* FITS WITHIN THE PROCEDURAL RULE EXCEPTION AND THUS SHOULD BE APPLIED RETROACTIVELY TO CASES LIKE MR. TOCA'S THAT ARE ON COLLATERAL REVIEW.

To the extent that the substantive rule of *Miller* requires new procedural considerations before sentencing a youth to life without parole, such procedural requirements amount to a "watershed rule of criminal procedure" under *Teague*. 489 U.S. at 311. A "watershed" rule must meet two requirements: (1) "the rule must

be necessary to prevent an impermissibly large risk" of injustice, *Schriro*, 542 U.S. at 356, and (2) "the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (internal quotation marks omitted).

1. MANDATORY LIFE WITHOUT PAROLE SENTENCES IMPOSED ON YOUTH RESULT IN AN IMPERMISSIBLY LARGE RISK OF INJUSTICE.

In the context of sentencing proceedings, the first requirement focuses on the risk that the procedure will result in an "'impermissibly large risk' of injustice." *See Schriro*, 542 U.S. at 355-56. Thus, an analysis of *Miller* under *Teague*'s second exception begins by considering whether mandatory sentences that fail to consider an offender's youthful characteristics lead to an impermissibly large risk of imposing a disproportionate sentence on a young defendant. This Court noted the fallibility of mandatory life without parole sentences for children in the *Miller* opinion, stating that "a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders . . . poses too great a risk of disproportionate punishment." 132 S. Ct. at 2469. This Court further emphasized that "given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* This Court's recognition that such sentences should be imposed rarely directly undermines the reliability and accuracy of all existing mandatory life

without parole sentences that have been imposed on children in Louisiana. For that reason, those existing sentences, like Mr. Toca's, must be reviewed in light of *Miller*.

2. THE RULE ANNOUNCED IN *MILLER* FORBIDDING MANDATORY LIFE WITHOUT PAROLE SENTENCES FOR CHILDREN ALTERED OUR UNDERSTANDING OF PROCEDURES ESSENTIAL TO THE FAIRNESS OF A PROCEEDING.

Miller altered our understanding of what "bedrock procedural elements" are necessary to any fair proceeding resulting in a constitutionally adequate sentence of life without parole for a juvenile. *Whorton,* 549 U.S. at 418. The decision mandates courts to conduct an entirely new procedure of criminal law—a sentencing hearing unlike any that have previously existed. It must cover the depth and breadth of a death penalty sentencing phase *plus,* the trial court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller,* 132 S.Ct at 2469.

Consequently, even only considering the procedural implications of *Miller*, the case should be applied retroactively under *Teague* as a "watershed rule of criminal procedure." *Teague*, 489 U.S. at 311. The cases most similar to *Miller*— those that banned mandatory death sentencing schemes - although decided prior to *Teague,* were all applied retroactively because of similar concerns regarding procedures for meting out mandatory sentences that so closely skirt the boundaries of the Eighth Amendment. *Sumner v. Shuman,* 483 U.S. 66 (1987); *Lockett v. Ohio,* 438 U.S. 536 (1978); *Woodson v. North Carolina,* 428 U.S. 280 (1976).

Most lower courts have followed this Court's well-marked precedent and reached the conclusion that *Miller* is retroactive, but the Louisiana Supreme Court misconstrued the mandate announced by this Court in *Miller* and arrived at the wrong result. This Court should grant review to set it back on course.

III. THE RETROACTIVE EFFECT OF *MILLER* IS AN IMPORTANT ISSUE THAT THIS COURT SHOULD RESOLVE NOW IN THIS CASE.

The retroactive application of *Miller* to the hundreds of cases of children whose mandatory life without parole sentences became final prior to its announcement is exceptionally important for principled and practical reasons. This Court should resolve this question now because it is a threshold issue—and an outcome determinative one—that state and federal courts must address in hundreds of cases nationwide.

The question whether *Miller* is retroactive has absorbed—and will continue to absorb—substantial time and resources from state and federal courts across the country. Waiting to intervene will serve only to deepen the conflict among courts and the procedural morass in which increasing numbers of petitioners—already struggling to meet complicated and confusing state and federal filing requirements without counsel—will find themselves.

The retroactivity of *Miller* is determinative of the outcome of this case. The State has not contested that George Toca is entitled to a new sentencing hearing where the sentence must give full consideration to the factors articulated in *Miller* if it is retroactively applicable to his case. George Toca was barely 17 years old when his best friend, Eric Batiste, was accidentally shot during a botched armed

robbery. Evidence shows the shooting was unintended and the result of youthful recklessness. Additional evidence, not heard at trial, establishes that a different friend of Mr. Batiste's was the last person seen alive with him, has confessed to shooting him, and matches the witnesses' descriptions of the shooter far better than Mr. Toca.[2] Since Mr. Toca was convicted of this shooting 30 years ago, he has grown into a peaceful adult who can make a valuable contribution to society. He entered prison without even a high school diploma and he has since earned a Bachelor's degree. The most compelling reason why Mr. Toca should be re-sentenced and have a chance at freedom is because that is what Eric Batiste's family wants. They were never notified that Mr. Toca was being charged with the Eric's murder and their pleas for mercy to two different District Attorneys have fallen on deaf ears. It is time for Eric's family's pleas for justice to finally be heeded - this Court must tell Louisiana that *Miller* is retroactive so that he can have an opportunity to be re-sentenced.

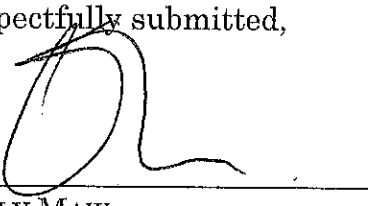
Because the trial court 30 years ago imposed a mandatory life without parole sentence, George Toca's background and potential for rehabilitation was never considered; neither were the wishes of Eric Batiste's family. If *Miller* applies retroactively, it will afford him his first ever chance to present evidence that demonstrates he is not one of the "uncommon" cases in which sentencing a child to the harshest possible penalty is appropriate. *Miller*, 132 S.Ct. at 2469.

Conclusion

[2] Louisiana is yet to recognize new non-DNA evidence of innocence as a ground for post-conviction relief. *See State v. Conway*, 816 So. 2d 290 (La. 2002).

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

Respectfully submitted,



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Index of Appendices

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS.

NO. 2013-KK-1880

GEORGE TOCA

- - - - - -

IN RE: State of Louisiana; - Plaintiff; Applying For Supervisory and/or Remedial Writs, Parish of Orleans, Criminal District Court Div. G, No. 301-875; to the Court of Appeal, Fourth Circuit, No. 2013-K-1061;

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June 20, 2014

Granted. The district court's order granting respondent's Motion to Correct an Illegal Sentence is reversed. The decision in Miller v. Alabama, 567 U.S. __, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), does not apply retroactively in respondent's case. See State v. Tate, 12-2763 (La. 11/15/13); 130 So.3d 829, cert. denied, Tate v. Louisiana, No. 13-8915 (May 27, 2014).

MRC

JPV

JTK

JLW

GGG

JDH

JOHNSON, C.J., dissents and would deny the writ with reasons.

Supreme Court of Louisiana
June 20,2014

Robin A. Burras

Deputy Clerk of Court
For the Court

EXHIBIT
App A

SUPREME COURT OF LOUISIANA

No. 2013-KK-1880

JUN 20 2014

STATE OF LOUISIANA

VERSUS

GEORGE TOCA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FOURTH CIRCUIT, PARISH OF ORLEANS

JOHNSON, C.J. dissents and would deny the writ.

I respectfully dissent. On June 25, 2012, the United States Supreme Court issued an opinion in *Miller v. Alabama*, which held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." *Miller v. Alabama*, 567 U.S. ----, 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012). In *State v. Tate*, 2012-2763 (La. 11/5/13), 130 So. 3d 829, this court held that *Miller* does not retroactively apply to juvenile offenders whose life sentences were handed down before the Supreme Court issued its opinion. I dissented from this court's ruling in *Tate*, finding that *Miller* announced a new rule of criminal procedure that is substantive and consequently should apply retroactively. For the same reasons expressed in my dissent in *Tate*, I must dissent in this case.

NO. 2013-K-1061

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS

GEORGE TOCA

IN RE: STATE OF LOUISIANA

APPLYING FOR: REQUEST FOR STAY; EXPEDITED CONSIDERATION REQUESTED

DIRECTED TO: HONORABLE JULIAN A. PARKER
CRIMINAL DISTRICT COURT ORLEANS PARISH
SECTION "G", 301-875

WRIT DENIED; STAY DENIED

The State seeks review of the trial court's June 28, 2013 ruling. On the showing made, we deny relator's supervisory writ application and deny a stay of the proceedings.

New Orleans, Louisiana this 31st day of July 2013.

JUDGE TERRI F. LOVE

McKAY, C.J., CONCURS WITH REASONS

CHIEF JUDGE JAMES F. MCKAY, III

JUDGE JOY COSSICH LOBRANO

EXHIBIT App B

STATE OF LOUISIANA	*	NO. 2013-K-1061
VERSUS	*	COURT OF APPEAL
GEORGE TOCA	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA
	*	
	*	

* * * * * * *

MCKAY, C.J., CONCURS WITH REASONS

The issue in the State's writ application concerns the retroactive application of the United State Supreme Court's decision in *Miller v. Alabama*, 567 U.S.___ 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012), which the Louisiana Supreme Court adopted and followed in *State v. Williams*, 2012-1723 (La. 3/8/13), 108 So.3d 1169. The issue of retroactive application is currently under review by the Louisiana Supreme Court in a number of writs. However, we are still guided by *Miller*, and its progenies. Accordingly, we deny this writ application and the State's request for stay.

CRIMINAL DISTRICT COURT OF ORLEANS PARISH, LOUISIANA

SECTION "G" Judge: THE HONORABLE JULIAN PARKER
Minute Clerk: MARCELLE BUTSCHER
Court Reporter: LINDA LEGAUX
Assist. D.A.: LAURA RODRIGUEZ, HEATHER HOLLAND, MICHAEL DANON
OIDP Attorney: SCOTT SHERMAN

Date: FRIDAY, June 28, 2013
Case Number: 301-875
State of Louisiana
versus
GEORGE C TOCA JR Violation: RS 14 30.1

THE DEFENDANT, GEORGE C TOCA JR, APPEARED BEFORE THE COURT FOR HEARING WITH COUNSEL, KRISTEN WENSTROM.

ADA, SCOTT VINCENT, PRESENT ON BEHALF OF THE STATE.
ARUGMENT HEARD BY STATE AND DEFENSE.
AFTER REVIEW OF THE MOTIONS, LAW, AND ARGUMENT, COURT FINDS THAT MILLER V. ALABAMA/JACKSON V. HOBBS DO APPLY RETROACTIVELY IN THIS CASE.
FURTHER, COURT NOTED THAT THE 4TH CIR. HAS NOT SPECIFICALLY STATED THAT A SENTENCING HEARING BE HELD IN EVERY CASE IN WHICH THE DEFENDANT WAS A JUVENILE AT THE TIME OF THE HOMICIDE; HOWEVER, IT SEEMS THAT THIS IS THE WAY THE 4TH CIR. IS LEANING.
COURT NOTED STATE'S OBJECTION.
COURT NOTED STATE'S INTENT TO SEEK A WRIT.
COURT STAYED THIS MATTER FOR 30 DAYS.
COURT NOTED DEFENSE'S OBJECTION AS TO THE STAY.
LATER,

STATE FILED:

-NOTICE OF INTENT TO SEEK WRITS, SET A RETURN DATE, AND STAY.
RETURN DATE: 07/29/2013.
STAY GRANTED UNTIL 7/29/2013.
DEFENSE OBJECTION TO STAY NOTED.

MARCELLE BUTSCHER, Minute Clerk

Clerk's Office 6-28 2013
by A True Copy
Deputy Clerk
Hon. Arthur A. Morrell
Clerk of Criminal District Court
Orleans Parish

EXHIBIT
App C

CRIMINAL DISTRICT COURT FOR PARISH OF ORLEANS

STATE OF LOUISIANA CASE NUMBER: 301-875

VERSUS SECTION "G"

GEORGE C TOCA

Transcript of the Motion Hearing in the above entitled Matter, as Heard before the Honorable Julian A. Parker, Judge presiding under the date of June 28, 2013.

APPEARANCES:

FOR THE STATE:

Scott Vincent, Esq., ADA

FOR THE DEFENSE:

Kristin Wenstrom, Esq.

REPORTED BY: LINDA B. LEGAUX, CCR

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PROCEEDINGS

MR. VINCENT:

Scott Vincent for the State. Before I start my presentation, Your Honor, I would like to apologize to the Court and correct a gross misrepresentation that was made on behalf of the State when we were here last on Wednesday. It's a technical misrepresentation, but a misrepresentation nonetheless. And it concerns the Brief that the State filed.

I represented that we had filed the Brief, and I had the two lawyers from this particular Section say that they had provided a copy to, Your Honor, and a copy to Ms. Alice, if I'm not mistaken. And the reason why they said that is we have about 30 of these Miller motions. In the last week, we have filed 10 exactly, verbatim, the same exact packet except a different caption. And they had filed in this section at least one of these packets.

When I got back to my office, in light of the comments that were made that the Court had not received it, and Ms. Alice had not received it, I looked on my computer and I grabbed the original. I filed my original memo in this case way back in October. So there's no way that we had provided a copy the day before. I apologize to Your Honor for the confusion that it caused.

THE COURT:

You filed it in October of 2012?

MR. VINCENT:

I believe so. That's what the certificate

-- I looked at the certificate of service on my computer, and it said October something, October or November. So it was awhile back. In fact, when I filed it, it came -- or rather Craig, which is the lead case we're going to argue today, the 5th Circuit case, hadn't even come out yet. So since then there are now cases on point.

I cited in my original Brief, a Florida case, probably Geeker, (phonetically), which is a State case, which holds the same thing. I now I have a Federal Fifth Circuit case. So I apologize, Your Honor. And I was going to start. Did you want to make a --

MS. WENSTROM:

Kristin Wenstrom, Your Honor, on behalf of George Toca.

THE COURT:

And let the Record reflect that Mr. Toca is present in Court.

MR. VINCENT:

Okay. Your Honor, I'm going to go ahead and briefly respond to argument that was made by the defendant on Wednesday. Every argument I'm going to make is in my Brief, so I'm going to try to do my argument within two minutes and answer any questions the Court may have.

THE COURT:

Okay. When you say your Brief, which one are you referring to, the supplemental memorandum in opposition to the defendant's Motion to Correct Illegal Sentence?

MR. VINCENT:

Yes, Your Honor. I call it supplemental since I now know that the original was filed way back when.

THE COURT:

Listen. For today's purposes, I appreciate your candor, but that really is of no moment. I just want to make sure that I have the correct document in front of me as I listen to your presentation. Proceed.

MR. VINCENT:

Your Honor, Counsel made two arguments as to why you should disregard Cain, Craig actually, Craig versus Cain. It's right on point. If the Court applies it, it has no discretion but to deny the defendant's motion. So does Craig apply?

The first argument is that Cain or Craig is unpublished. You know, Your Honor, that kind of reminds me of the Wizard of Oz, disregard the old man behind the curtain. Craig is so important and so compelling, Defense Counsel is tell you don't look at it, throw it away. They better. Because if you look at it, Your Honor, and you read it and feel compelled to follow it, it's over. So they're going to tell you that.

As far as it not being reported, the Fifth Circuit Federal Rule and the Louisiana State Rule, when you and I got out of law school, you could not cite -- not only could a Court not rely on an unpublished opinion, it was improper to cite them. The State Rule has changed. And

the Federal Rule, which of course is a Federal case, Craig is a Federal case, allows and provides for the citing and the using of unpublished opinion. Cain has been relied upon by the Eleventh Circuit, which Your Honor knows is a branch off of the Fifth Circuit, in Morgan. So, you know, this don't look at it, you've got to look at it, Your Honor. Now, whether you apply it or not, that's another matter.

THE COURT:

When you and I got out of law school?

MR. VINCENT:

Your Honor, I believe at the time we got out --

THE COURT:

You graduated --

MR. VINCENT:

In 1984.

THE COURT:

You're right.

MR. VINCENT:

I believe you graduated in '81.

THE COURT:

'83.

MR. VINCENT:

'83. I'm sorry, Your Honor, I apologize for your error.

THE COURT:

Well, you look at a lot younger than you are.

MR. VINCENT:

Thank you, Your Honor.

THE COURT:

You're welcome.

MR. VINCENT:

Okay. Second argument is very compelling as to why you should ignore Craig, and that is this: And it's a very good argument. In fact, I'll concede it at least at it's initial first blush. And that is this: It's unfair. And it really is, procedurally. What happened in Craig is the Fifth Circuit, on it's own motion without allowing what we're doing today, filing Briefs, making argument, filing oppositions, the Fifth Circuit on it's own held Miller's not retroactive. And it is unfair to apply it in this case.

Of course, Your Honor, before I continue on with Cain, I want to point out that Simmons, which they say the Supreme Court held that Miller's retroactive, Simmons never holds anything. Simmons is a Writ. And Miller had just come out. In fact, Simmons is a Graham Writ, Your Honor. Graham says you can't throw a juvenile in jail for life on a non-murder offense. So Mr. Simmons filed a Graham Writ. He had a final conviction. He had been convicted a number of years ago, and it had been appealed and it was all over. He files a post-conviction petition, and he files it under Graham. Why doesn't he file it under Miller? Miller hadn't come out yet.

While it's still up there pending before the Supreme Court, Miller comes out. So in

Simmons, the Supreme Court says we got Miller and remands it to be re-sentenced. By the way, they didn't call the State back in. The same argument that they're arguing about Craig, I think is a very good argument. They didn't say let's have Briefs on this. We're about ready to consider this new issue. They probably didn't catch it. I promise you they've caught it now, because I've got Writs in Darryl Tate.

THE COURT:

When you say "they," you're referring to --

MR. VINCENT:

The Supreme Court, Your Honor. So, you know, that's a very good argument. And I would concede that the Court should disregard Craig completely because of that, except one little thing. In Craig, they filed a Motion to Reconsider where they specifically fought over Simmons, and that was Briefed. So, you know, so that has been fully Briefed. Craig specifically addresses the issue --

THE COURT:

Has his Motion to Reconsider been ruled upon yet?

MR. VINCENT:

Yes, in Craig. I've attached it. It was a Motion to Vacate. I've submitted that as an exhibit.

THE COURT:

All right.

MR. VINCENT:

So that has been fully litigated in open

Court with Pleadings in Craig, and ruled accordingly. Okay. Your Honor, just to report to the Court, in Darryl Tate we filed Briefs. I just got the defendant's brief yesterday, and I anticipate filing a reply by the end of next week. We have not gotten Briefing deadlines. I'm expecting a September oral argument before the Louisiana Supreme Court. That's sort of the official, unofficial estimation as to when we're going to argue it; although, we have no official Briefing schedule from the Court.

Your Honor, the defendant referred to, as far as the Teague analysis, and one of the things in Teague is a procedure -- if the change in law -- if under the old law, under a Teague analysis, things were so unfair that there is sort of you've got to have doubt in the whole process itself, then you apply the new law retroactively. And Defense Counsel made an argument that in this particular case, it should fall under that exception. First of all, the Eleventh Circuit and the Fifth Circuit have specifically rejected that argument. But I want to let the Court know that it then re-sparks. The Fifth Circuit, U.S. Fifth Circuit held that Graham is retroactive. And I've heard this a lot, so therefore Miller should be retroactive, right? I mean, it does make sense.

Here's the difference, Your Honor: Graham prohibits all -- you know, you can never convict a juvenile of a non-murder offense without parole, you know, probation. So it's a ban

across the board, and that is inherently fair. In other words, under the new law, the old law is so unfair that it should be applied retroactively. Under Miller, the Miller Court specifically noted there is nothing inherently unconstitutional about a life sentence without benefit of parole, or probation or suspension of sentence, you know, for murder. So, you know, it's a change in the law, but it is not such a big change that it should be applied retroactively. And again, the Fifth Circuit and the Eleventh Circuit have rejected that argument.

Your Honor, Louisiana applies the Teague analysis, that's the Taylor versus Whitley case. And again, Simmons did not -- the Supreme Court and Simmons did not conduct a Teague retroactivity analysis. In fact, they didn't even discuss retroactivity. It wasn't an issue.

THE COURT:

Wait a minute. Standby. Proceed.

MR. VINCENT:

On Wednesday, the defendant made the representation that under Danforth, this Court and the Louisiana Courts should adopt a different standard, and that is somewhat half true. In other words, in Danforth the U.S. Supreme Court said as far as the retroactivity of new Supreme Court cases like the Miller case, you know, under Federal Law, under Teague you apply the Teague analysis. But in Danforth they made it clear that States are free to adopt

their own standard.

And so, of course, that's another tact the Defense is using in these Miller case is, adopt another standard. Well, we haven't adopted another standard. In Tyler, the Louisiana Supreme Court adopted the Teague analysis. So until the Supreme Court, the Louisiana Supreme Court decides otherwise, we are a Teague State.

Your Honor, in the supplemental Brief that was filed yesterday by the defendant, they attached a recent case. The name escapes me, a Fourth Circuit case where the Fourth Circuit basically citing Simmons as recent as last week, rules that Miller is retroactive. That creates a --

THE COURT:

Wait a minute. Hold on. The one they filed on the 27th?

MR. VINCENT:

Yes, sir. It's a very short supplemental Brief, just to attach --

THE COURT:

I have it.

MR. VINCENT:

The name is --

THE COURT:

I have it.

MR. VINCENT:

The name of the case escapes me, Your Honor, but there's a Writ attached where the Fourth Circuit --

THE COURT:

Eduardo Robinson; is that what you're referring to?

MR. VINCENT:

What's the first name of the defendant?

THE COURT:

Eduardo Robinson; is that what you're referring to?

MR. VINCENT:

I thought it was a different name, Your Honor.

THE COURT:

Anderson Hill?

MR. VINCENT:

Anderson Hill, that's it, Your Honor. Anderson Hill just last week, the Fourth Circuit did cite Simmons and apply Miller retroactively, reversed, if I'm not mistaken, Section D, I may be wrong, but reversed a Judge in this Court that had held that Miller is not retroactive, and the Fourth Circuit reversed them just last week.

Your Honor, let me tell you what's going on with the Fourth Circuit.

THE COURT:

Hold on a second. Let me take a look at it.

MR. VINCENT:

Sure.

THE COURT:

For the Record, this is what the Fourth Circuit said. "In light of State versus Simmons and State versus Williams, the District Court

judgement is vacated and remanded for reconsideration in light of current jurisprudence within 60 days of this order. As proof of compliance, the District Court is ordered to provide this Court with a copy of its judgement following reconsideration."

Let the Record reflect that this was an application for a Supervisory Writ directed to Judge Buras, presiding Judge of Section H of the Criminal District Court. And it's authored by Lombard, McKay and Belsom.

The judgement was vacated and remanded for reconsideration. It doesn't even order a hearing. It doesn't order that the Court conduct the hearing that is mandated by Miller. It doesn't even require that the District Judge conduct any type of a hearing in open Court. It's remanded for reconsideration.

MR. VINCENT:

I apologize, Your Honor, to the extent I said the Fourth Circuit reversed the trial Court. I read it briefly --

THE COURT:

That's not what I mean. I'm not getting that nit-picky. That's not what I meant. What I means is: I can't read this as the Fourth Circuit's ruling that Miller must be applied retroactively.

MR. VINCENT:

Then I will address that particular case no longer. Unless the Court has questions, I have completed by presentation.

THE COURT:

No. I mean, it's a one sentence granting of a Writ. In my experience with the Fourth Circuit over the last 30 years is when they say Writ granted, that doesn't mean Relief granted. Okay. All that means is that they will take a look at it. In many cases involving Post-Conviction Relief, the Writ is granted solely for the purpose of transferring whatever application the defendant has filed into the Fourth Circuit to the District Court, where in most cases it should have been properly lodged originally for consideration.

So Writ granted doesn't mean this Court holds that Miller must be applied retroactively. It means that the Fourth Circuit granted the Writ to take a look at it, vacated the judgement of the lower Court, but remanded it for reconsideration. And in light of recent jurisprudence, and I know all three of these Judges personally, and I know that Lombard and McKay have extensive experience in criminal law. McKay was a member of this Bench for about 20 years.

And if it was their intention in this Anderson Hill Writ to change the sentencing scheme for juveniles, that was in place when Judge Shey sentenced today's petitioner to a life sentence. I know that they would have said so, and that's not what they said. And maybe Defense, when they have their chance can clear that up for me, but proceed.

MR. VINCENT:

In closing, Your Honor, regardless of what the Fourth Circuit has done in that case and in others, the Supreme Court has made it clear that -- they have granted Writs not only in Darryl Tate, but there are two or three of these cases that actually got away from me. In other words, Shawn Williams, I lost in the Fourth Circuit and the Supreme Court denied my Writs. So that's sort of a final judgement. I don't want to use that as a literal phrase, because it's an interlocutory ruling. But anyway, I can't file another Writ.

There are two or three cases like Shawn Williams, Michelle Benjamin and there's another one where we lost. It went up on Writ, and the Writs were denied. So those cases should have or could have proceeded with a sentencing hearing. And those cases were decided, Shawn Williams I believe is late December of '12. Certainly there's time for a hearing.

What has happened since Darryl Tate, I got Writs granted in April, the hearings were being scheduled in those two or three cases where we have final judgements and we have lost, if you will. And I went in and filed Motions to Stay arguing, look, this is an important constitutional question. And we got Writs granted by the Supreme Court in Darryl Tate. And the Trial Courts in those sections said, no, Simmons is -- you know, you've got a final ruling. You've got a final judgement. We're

moving forward. I went to the Fourth Circuit and filed a writ, and these are the cases where I've already lost in the merits. And the Fourth Circuit denied my Writs citing Simmons.

I've got five orders by the Louisiana Supreme Court saying "Writ granted." We're going to hear Darryl Tate and we're going to decide this, and so we're staying everything. So I just want to apprize the Court I think the Supreme Court's granting Writs in Darryl Tate is very instructive as to where the Court is leaning, and continuing to stay other cases where there are final judgements. That would be the State's presentation unless, Your Honor, any further questions.

THE COURT:

No, sir.

MR. VINCENT:

Thank you, Your Honor.

THE COURT:

Okay. Standby. Let me take a look at something before you begin your presentation. I want to make another comment along those lines, and I want counsel to address this. And that is the Eduardo Robinson Writ that is attached to defendant's Supplemental Response to State's Opposition.

And in Robinson it states, and I quote, " Writ grant remanded. Robinson's Writ application was granted for purposes of transferring attached Motion to Correct an Illegal sentence, and Motion to Consolidate

Motions to Correct Illegal Sentence to the District Court for consideration." That has absolutely nothing to do with whether Miller versus Alabama should be applied retroactively to today's case or any other cases. We receive these types of documents from the Fourth Circuit on a fairly regular basis. And in the context that we receive them is this: There are pretrial detainees with cases pending on the docket that are set for motions or trial, and not withstanding the fact that they are represented by counsel, they file Pleadings, such as Discovery Pleadings, 701 Motions, Writs of Habeas Corpus, Motions for a Recognizance Bond directly into the Fourth Circuit. Now, why they do that? I don't know, but that's what they do.

And this is exactly what the Fourth Circuit does. And I've spoken to the former Chief Judge of the Fourth Circuit about this, as well as to the Clerk of Court that this "Writ granted" is misleading. And I assure you that this Robinson case used as an example, that when they say "Writ granted," they don't mean Relief granted. They don't mean we are now setting upon the District Courts to apply Miller and Jackson retroactively. It simply means that they received it. They didn't want to do anything with it, so they sent it to the District Court for consideration. And we don't even know whether Robinson filed his Pro Se. And these Pro Se Writs are filed by inmates everyday, pretrial detainees, as well as those seeking

Post-Conviction Relief. And this is exactly what the Fourth Circuit sends back if they choose not to grant any relief. So why don't you start your presentation with explaining to me the persuasiveness of these emergency Writs and Writs -- Supervisory Writs that you've attached to your Supplemental Response to State's Opposition.

And the other thing I want you to address is this: In Simmons the defendant was serving a life sentence for a murder committed in 1995 when he was a juvenile. While a motion or an application to correct an illegal sentence was pending and had not been ruled on, the Supreme Court remanded the case to the District Court to conduct a sentencing hearing.

It didn't even address the retroactivity - it wasn't even argued that Simmmons' case should stand for the proposition that Miller versus Alabama is applied retroactively. It wasn't raised in the trial court. I don't know whether it was raised in the Fourth Circuit. But just because they grant a Writ and remand it for a hearing, even if it's a sentencing hearing, unless the Supreme Court specifically holds that Miller applies retroactively, I don't think the District Courts can use these cases, and I use that word cases in a very liberal sense, as the authority to apply Miller retroactively to all cases, all cases. So with that, you may proceed.

MS. WENSTROM:

Yes, Your Honor. I think we can clarify the Fourth Circuit's view on the retroactivity of these cases. If you'll look at Exhibit 4, it said Joshua Williams and Dwayne Henry case.

THE COURT:

Of the original?

MS. WENSTROM:

No, in the supplemental that I filed that has the attachments. At the bottom of the first page.

THE COURT:

Okay.

MS. WENSTROM:

I believe it's the last sentence. It says, "In all three instances, the Court remanded those matters to the District Courts for reconsideration of the sentences. Ordering the District Court in each case to conduct a re-sentencing hearing in light of the principles annunciated in Miller v. Alabama." And that case -- here the Fourth Circuit is citing a previous Fourth Circuit decision, another man by the name of Williams, State v. Williams, which was Reginald Williams. And in Reginald Williams case, the Fourth Circuit said, "Miller is retroactive to cases that were final in Louisiana at the time the decision in Miller was rendered."

THE COURT:

Well, with all due respect, that's not what it says, but proceed.

MS. WENSTROM:

It does not say -- the quote that I just read came from Reginald Williams case, which is 108 So. 3d 255. It's the case that the Fourth Circuit is citing. So it makes that announcement and cites Miller -- it says it cites State v. Simmons, State v. Graham, and then also State v. Williams, it's own decision. And that's the 2012 1723 case. That's the Reginald Williams case. And that's the one in which the Fourth Circuit said, "Miller is retroactive to cases that were final in Louisiana at the time the decision in Miller was rendered."

I hope that clarifies your question. I understand that in some of these other Fourth Circuit decisions they were not that explicit, but in Reginald Williams they were explicit. The Fourth Circuit says it is retroactive to cases that are final in Louisiana.

In Simmons -- and to address the other question that you had regarding Simmons in this, the Louisiana Supreme Court's decision in Simmons. The Court was not obligated to undergo a Teague analysis or any sort of retroactivity analysis at all. It simply ruled the way that it felt was appropriate, which was to send it back and remand it and apply it retroactively in Mr. Simmons' case, the case that was on collateral review.

Of course, the Supreme Court was free to not to do that or to demand more of an analysis, and find whatever way it did. But it wasn't

obligated to do a Teague analysis, and so it just, you know, it ruled the way that it believed was appropriate and just.

THE COURT:

Well, what does that have to do with the question that I asked you?

MS. WENSTROM:

I believe you asked --

THE COURT:

I would assume that the Supreme Court at all times, does or at least in endeavors to do what is just.

MS. WENSTROM:

Of course.

THE COURT:

I would assume that, and I would apply that in every single case. But that doesn't answer my question.

MS. WENSTROM:

Mr. Simmons' case came before the Louisiana Supreme Court the way Mr. Toca's is. They're both on collateral review. Both of their cases were final at the time that Miller was decided. And the Supreme Court applied Miller retroactively to Mr. Simmons' case. It wasn't obligated to undergo a Teague analysis in that decision. It just applied it the way it felt was appropriate.

THE COURT:

So you're saying that if this Court is to be convinced that they ordered the lower Court to apply Miller retroactively in Simmons, that

this issue is now settled, and I must infer that because that's what they did in Simmons, without saying that's what they were doing, by the way, that now I must apply. And maybe you're right. But when we're talking about retroactive application of the law, and this is what I was trying to get y'all to understand before, I have to have more direct instructions from the Supreme Court than just Counsel's analogies and suppositions. You see, you spent a great deal of your time the day before yesterday, I think it was -- was that when we had the hearing?

MS. WENSTROM:

Wednesday, yes, Your Honor.

THE COURT:

Wednesday, discussing with the Court how unfair and unjust the mandatory sentencing scheme that was in place when your client was convicted is and was. And you explained how this gentleman has turned his life around, all the good things he's done, some of that was attached to your original application, that he's reformed himself. It was a youthful indiscretion. The gun went off accidentally. It wasn't him. It was somebody else. And you even went so far as to explain to me on Wednesday that a member of the victim's family was here in support of the Motion, which is something that Counsel shouldn't ever do again.

MS. WENSTROM:

Okay.

THE COURT:

Because I cannot let the wishes of the victim's family dictate how I interpret the law. It's an open forum. Everyone's willing to come in and have a seat. We've had a hearing on this before, not on Miller versus -- not on the retroactive application of Miller versus Alabama, but on the Post-Conviction application. And the victim's family members did testify that they thought that this gentleman was the wrong person. None of that has anything whatsoever to do with whether, in light of Simmons, this District Court should apply Miller retroactively.

So if it wasn't raised in the trial court, and I think this is less than five sentences, I think this issue would have been important enough to the Supreme Court that they would have specified that the District Courts must apply Miller retroactively. Maybe in the Simmons case they thought it was necessary to remand it for a sentencing hearing or whatever, but that doesn't convince me. In other words, you haven't convinced me that that case authorizes me to give your client the relief that he seeks. No matter how nice of a person he turned out over the last 29 years. No matter how much more mature he is now than he was 30 years ago. Okay.

MS. WENSTROM:

My response to that, Your Honor, is that the Fourth Circuit has read Simmons to mean and has explicitly said in the Reginald Williams

case that Miller is to be applied retroactively to all cases that were final at the time the decision was made.

THE COURT:

Finished?

MS. WENSTROM:

May I have a moment?

THE COURT:

Sure. That case you're citing, what number is it in your exhibits?

MS. WENSTROM:

There are two cases with defendants with the last name Williams, Joshua Williams is Exhibit 4.

THE COURT:

All right. Standby.

MS. WENSTROM:

It's in my supplemental.

THE COURT:

Okay. We've already discussed it.

MS. WENSTROM:

Right. And the other Williams case is --

THE COURT:

That's the one I'm looking for.

MS. WENSTROM:

-- Reginald Williams. I don't have a copy of that --

THE COURT:

That's the one I'm looking for.

MS. WENSTROM:

Sure. And it is available. It's published. It's 108 So. 3d 255.

THE COURT:

Do you have a copy? Do you have a copy of it in your file?

MS. WENSTROM:

I do not. I just have a citation.

THE COURT:

What I'm going to do is this: I'm going to take a short recess. When Ms. Grooms comes in, give her that citation and ask her to give us a copy of that.

****At this time a recess was taken****

THE COURT:

All right. I'm ready to give you a Ruling. I've heard all I need to hear, and I've read all I need to read. After having considered the various motions and exhibits submitted by both sides, the law and the arguments, it is the opinion of the Court that the case known as Miller versus Alabama, or Miller/Jackson does apply retroactively in this case.

I note the DA's objection. And I'm sure that the Supreme Court will have the final say on this, but I do find that the Fourth Circuit is most certainly leaning towards retroactive application; although, I want to note in my reasons for judgement that they haven't specifically mandated that a sentencing hearing be held in every case in which the defendant was a juvenile at the time of the homicide. It certainly seems that that is the way that they're leaning. And I believe that if the Court would give the ruling that the District

Attorney was hoping for, that the Fourth Circuit would just send it back in the form of one of these Writ granted remand to the District Court for further consideration. So I'm going to give the State ample opportunity to take this to the Fourth Circuit, and if necessary, the Supreme Court. And I'm going to give you a Stay.

MR. VINCENT:

Okay. Would you note the State's intent to seek Writs, Your Honor?

THE COURT:

Yes, I note your intent to seek Writs. Please follow that up with a written motion, as I'm sure you will. And I would anticipate that a review in Court may give you a Stay. So I'm not going to keep the State in place indefinitely, but I will say that the case is stayed for 30 days. And if you desire any further stay of activity in this case, you're going to have to get that from the Court of Appeals or the Supreme Court.

MR. VINCENT:

Your Honor, could the Court provide a return date on the Writ?

THE COURT:

You would get with the minute clerk on that, and she'll give you a return date. This is such an important issue that I'll let you have as much time as you need within reason.

MS. WENSTROM:

Your Honor, may I include a brief objection for the Record?

THE COURT:

You're going to object? I granted your motion. What are you objecting to? I'm serious.

MS. WENSTROM:

For the Record I'm objecting to the Stay that you're granting for those based on the decision, the Fourth Circuit decision of State versus Olivia in which the Fourth Circuit actually denied the State's request for a Stay. It's merely for the Record, Your Honor.

THE COURT:

That's up to the Foutrth Circuit.

MS. WENSTROM:

Yes.

THE COURT:

This isn't the Fourth Circuit. And again, that's it. It's done.

MS. WENSTROM:

Thank you, Your Honor.

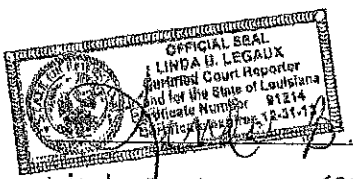
THE COURT:

Your Motion is Granted.

C E R T I F I C A T E

This certificate is valid only for a transcript accompanied by my original signature and original required seal on this page.

I, Linda B. Legaux, Official Court Reporter in and for the State of Louisiana, employed as an Official Court Reporter by the Orleans Parish Criminal District Court, for the State of Louisiana, as the officer before whom this testimony was taken, do hereby certify that this testimony was reported by me in the steno mask reporting method, was prepared and transcribed by me or under my direction and supervision, and is a true and correct transcript to the best of my ability and understanding, that the transcript has been prepared in compliance with transcript format guidelines required by statute or by rules of the board or by the Supreme Court of Louisiana, and that I am not related to counsel or to the parties herein, nor am I otherwise interested in the outcome of this matter.



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