

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 14-6381

GEORGE TOCA
PETITIONER

VERSUS

STATE OF LOUISIANA
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEON A. CANNIZZARO, JR.
District Attorney
Parish of Orleans

Scott G. Vincent, Bar No. 14478
Assistant District Attorney
Counsel of Record

Donna R. Andrieu, Bar No. 26441
Assistant District Attorney

619 S. White St.
New Orleans, LA 70119
Phone: (504) 822-2414
Facsimile: (504) 571-2928
Email: svincent@orleansda.com

QUESTIONS PRESENTED FOR REVIEW

1. Is a federal question raised by a claim that a state collateral review court erroneously failed to find a *Teague* exception?
2. Does *Miller v. Alabama*, which “does not categorically bar a penalty” but instead “mandates only ... a certain process” state a “substantive” or “watershed” rule under *Teague*?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW. 2

TABLE OF AUTHORITIES 4

PERTINENT CONSTITUTIONAL AND STATUTORY AUTHORITIES. 6

JURISDICTION 6

STATEMENT OF THE CASE. 9

STATEMENT OF THE FACTS. 10

REASONS FOR DENYING THE PETITION 10

SUMMARY AND CONCLUSION 22

CERTIFICATE OF SERVICE. 23

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE:</u>
<i>Abdul-Kabir v. Quarterman</i> , 127 S.Ct. 1654 (2007).....	18
<i>Beard v. Banks</i> , 124 S.Ct. 2504 (2004).....	8, 17
<i>Bradshaw v. Stumpf</i> , 125 S. Ct. 2398 (2005).....	11
<i>Caspari v. Bohlen</i> , 114 S.Ct. 948 (1994).....	7, 11
<i>Chaidez v. United States</i> , 133 S.Ct. 1103 (2013).....	11
<i>Collins v. Youngblood</i> , 110 S.Ct. 2715 (1990).....	8
<i>Danforth v. Minnesota</i> , 128 S.Ct. 1029 (2008).....	7, 8, 14
<i>Eddings v. Oklahoma</i> , 102 S.Ct. 869 (1982).....	18
<i>Gideon v. Wainwright</i> , 83 S.Ct. 792 (1963).....	17, 18
<i>Goeke v. Branch</i> , 115 S.Ct. 1275 (1995).....	8, 11
<i>Graham v. Florida</i> , 130 S.Ct. 2011 (2010).....	12, 15, 19, 21
<i>Griffith v. Kentucky</i> , 107 S.Ct. 708 (1987).....	7
<i>In re Elwood</i> , 408 F.3d 211 (5th Cir. 2005).....	11
<i>In re Sparks</i> , 657 F.3d 258 (5th Cir. 2011).....	11
<i>Johnson v. Texas</i> , 113 S.Ct. 2658 (1993).....	13
<i>Lambrix v. Singletary</i> , 117 S.Ct. 1517 (1997).....	15
<i>Millet v. Louisiana</i> , 2001 WL 839704 (E.D. La. Jul. 20, 2001).....	11
<i>Padilla v. Kentucky</i> , 130 S.Ct. 1473 (2010).....	11
<i>Roper v. Simmons</i> , 125 S.Ct. 1183 (2005).....	12, 19, 21
<i>Schiro v. Farley</i> , 114 S.Ct. 783 (1994).....	12
<i>Schriro v. Summerlin</i> , 124 S.Ct. 2519 (2004).....	14, 15, 17
<i>State v. Huntley</i> , 118 So.3d 95 (La. App. 3rd Cir. 2013).....	11

<i>State v. Tate</i> , 130 So.3d 829 (La. 2013), <i>cert. denied</i> , 134 S.Ct. 2663 (2014)	22
<i>State v. Toca</i> , 141 So.3d 265 (La. 2014)	10
<i>State ex rel. Taylor v. Whitley</i> , 606 So.2d 1292 (La. 1992)	14
<i>Teague v. Lane</i> , 109 S.Ct. 1060 (1989)	<i>passim</i>
<i>Thompson v. Oklahoma</i> , 108 S.Ct. 2687 (1988)	19
<i>Tyler v. Cain</i> , 121 S.Ct. 2478 (2001)	11
<i>Whorton v. Bockting</i> , 127 S.Ct. 1173 (2007)	17, 18, 19
<i>Woodson v. North Carolina</i> , 96 S.Ct. 2978 (1976)	18, 19
<i>Yates v. Aiken</i> , 108 S.Ct. 534 (1988)	8

CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. Const. art. III, § 2, cl. 1	6
U.S. Const. amend VIII.	<i>passim</i>
28 U.S.C.A. § 1331	6

OTHER AUTHORITIES

<i>Black's Law Dictionary</i> (8th ed. 2004)	16
--	----

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Excessive Bail, Fines, Punishments

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

U.S. Const. Amend. VIII.

Jurisdiction of Courts

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C.A. § 1331.

JURISDICTION

Article III, Section 2 of the Constitution vests federal courts with jurisdiction over “Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” U.S. Const. art. III, § 2, cl. 1; *see also* 28 U.S.C. § 1331 (granting federal district courts original jurisdiction over “all civil

actions arising under the Constitution, laws, or treaties of the United States.”). Whether a federal question is raised in the Petition for Writ of Certiorari filed in these proceedings is by no means clear.

While a state’s failure to apply a new rule on *direct* review “violates basic norms of constitutional adjudication,” the same is not true on *collateral* review after the conviction is final. *Griffith v. Kentucky*, 107 S.Ct. 708, 713 (1987). *Teague v. Lane*, 109 S.Ct. 1060 (1989), meanwhile, “prevents a *federal* court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final.” *Caspari v. Bohlen*, 114 S.Ct. 948, 953 (1994). But it has no such preclusive effect on a *state* court. In *Danforth v. Minnesota*, 128 S.Ct. 1029 (2008), this Court held that *Teague* is not binding on state courts, in the sense that it does not *prevent* a state court from granting relief under a new federal rule even though *no Teague* exception applies. *Danforth* left open, however, the question of whether a new rule that meets a *Teague* exception would *compel* a state court to grant relief on collateral review, 128 S.Ct. at 1034 n. 4.

Danforth implies a negative answer to that question because “*Teague* speaks only to the context of federal habeas.” *Danforth*, 128 S.Ct. at 1041. Every reference in *Teague* to “collateral review” or “habeas corpus” concerns *federal* habeas, and *only* federal habeas.¹ *Teague* arose from concerns unique to the federal habeas process, such as that federal

¹ *Danforth*, 128 S.Ct. at 1039 (“[N]ot a word in Justice O’Connor’s discussion ... intimates that her definition of the class eligible for relief under a new rule should inhibit the authority of any state agency or state court to extend the benefit of a new rule to a broader class than she defined”); 1039-40 (“*Teague*’s general rule of nonretroactivity was an exercise of this Court’s power to interpret the federal habeas statute. ... *Teague* is based on statutory authority that extends only to federal courts applying a federal statute”); 1040 (“the rule was meant to apply only to federal courts considering habeas corpus petitions challenging state-court criminal convictions. ... [Justice O’Connor] justified [it] ... in part by reference to comity and respect for the finality of state convictions. Federalism and comity considerations are unique to *federal* habeas review of state convictions) (citation omitted, original emphasis); 1041 (“Our subsequent cases, which characterize the *Teague* rule as a standard limiting only the scope of federal habeas relief, confirm that *Teague* speaks only to the context of federal habeas”).

imposition of constitutional rules on the states that did not exist at the time of final judgment would “seriously undermine[] the principle of finality which is essential to the criminal justice system.” The harm to society from rendering each criminal conviction tentative and constantly subject to fresh litigation would outweigh any benefit. *Teague*, 109 S.Ct. at 1074. And as a matter of comity, states should not be continually forced by federal courts to muster resources to defend judgments that conformed to then-extant federal law, nor asked to anticipate future rules in an attempt to comply with them. *Id.* at 1075. Later decisions of this Court consistently treat *Teague* not as a substantive principle of federal constitutional law, but as a procedural defense for states hauled into court in federal habeas actions. *E.g.*, *Beard v. Banks*, 124 S.Ct. 2504, 2511 (2004)(explaining that *Teague* is “a limitation on the power of federal courts to grant habeas corpus relief to ... state prisoner[s] that must be addressed when raised by the State regardless of whether the state court addressed the merits”(internal quotations omitted); *Goeke v. Branch*, 115 S.Ct. 1275, 1276 (1995) (“a court need not entertain the [*Teague*] defense if the State has not raised it”); *Collins v. Youngblood*, 110 S.Ct. 2715, 2718 (1990) (*Teague* has no effect if the State elects not to assert it).

At best, there is authority for the proposition that state collateral review must apply a constitutional rule that is *not* new -- *i.e.*, that preceded the final judgment -- where the state court did not invoke any limitation on the issues available in collateral proceedings and addressed the merits. *Yates v. Aiken*, 108 S.Ct. 534 (1988) (holding that the case in issue “did not announce a new rule”). *Yates*, like *Danforth*, does not address whether a new rule that meets a *Teague* exception is binding on state collateral review.

On the other hand is the view of the *dissent* in *Danforth*, that “the retroactivity of new federal rules is a question of federal law binding on States.” 128 S.Ct. at 1048 (Roberts, C.J.,

and Kennedy, J., dissenting). Under this view the existence of a *Teague* exception would be critical. *Teague* establishes that a new rule may be so exceptional that a federal court cannot be barred, on retroactivity grounds, from applying it against a final state criminal judgment. That which makes a new rule exceptional as a matter of constitutional law -- *i.e.*, it is essential to a valid criminal conviction, or places persons or conduct beyond the state's proscriptive power -- would arguably oblige a state to apply that new rule in its own collateral review process. If so, where a *Teague* exception is claimed on state collateral review, this Court would have jurisdiction to decide whether or not the exception applies.

STATEMENT OF THE CASE

George Toca (hereinafter referred to as "Toca") filed a Motion to Correct Illegal Sentence, wherein he sought the vacation of his mandatory life sentence in accordance with the United States Supreme Court's recent decision in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), and resentencing under the guidelines set forth in *Miller v. Alabama*. According to the Motion to Correct Illegal Sentence, Toca, a minor at the time of the offense for which he was convicted, was convicted of second degree and sentenced to life imprisonment at hard labor without benefit of probation, parole or suspension of sentence. By Judgment rendered on June 28, 2013, the trial court granted the Motion to Correct Illegal Sentence, ruling that *Miller* applies retroactively, and stayed the proceedings for thirty (30) days.

The State of Louisiana ("the State") filed an application for supervisory review with the Louisiana Fourth Circuit Court of Appeal seeking review of the trial court's Ruling. By Judgment issued on July 31, 2013, the Fourth Circuit Court of Appeal denied the writ application and denied a stay of the proceedings. *See* Fourth Cir. No. 2013-K-1061 (unpub'd).

The State filed an application for supervisory writ with the Louisiana Supreme Court seeking review of the appellate court's ruling. By Judgment issued on June 20, 2014, the Louisiana Supreme Court granted the writ and reversed the district court's ruling. *State v. Toca*, 2013-KK-1880 (La. June 20, 2014), reported at 141 So.3d 265. Toca filed his Petition for Writ of Certiorari in the instant proceedings on September 18, 2014.

STATEMENT OF THE FACTS

The facts of this case are not necessary to a determination of the issue presented for review.

REASONS FOR DENYING THE PETITION

No Implicit Holding of Retroactivity in Jackson v. Hobbs

In his Original Memorandum filed in the Louisiana Supreme Court, petitioner argued that this Court implicitly fashioned a new rule of retroactivity in *Miller v. Alabama/Jackson v. Hobbs* since the Court remanded Kuntrell Jackson, whose conviction was before the Court on collateral review,² for resentencing in accordance with the guidelines enunciated in *Miller/Jackson*.³ In other words, Jackson, who was before the Court on collateral review, received the same relief that Miller received. However, the mere fact that the Court remanded

² *Miller/Jackson* involved two appeals consolidated by the Supreme Court. Evan Miller arrived at the Supreme Court on a petition for writ of certiorari following an unsuccessful direct appeal to the Alabama Supreme Court. Miller's case was therefore not yet final on direct appeal. However, the case of the second defendant, Kuntrell Jackson, was already final on direct appeal, arriving at the United States Supreme Court following the Arkansas trial court's dismissal of his postconviction petition for writ of habeas corpus (and the affirmance of that ruling by the Arkansas Supreme Court).

³ Respondent notes that petitioner has not raised this issue in his Petition filed in the instant proceedings. Respondent addresses the issue because the conclusion that *Miller* applies retroactively reached in cases cited by petitioner in his Petition is founded in part on the courts' finding that the *Miller* Court must have intended the new rule established therein to apply retroactively to cases on collateral review since it remanded Jackson for resentencing.

Jackson for resentencing does not constitute a ruling or determination on retroactivity. This Court in *Tyler v. Cain*, 121 S.Ct. 2478, 2482 (2001), addressed this very issue as follows:

The only way the Supreme Court can, by itself, “lay out and construct” a rule’s retroactive effect, or “cause” that effect “to exist, occur, or appear,” is through a holding. The Supreme Court does not “ma[k]e” a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts. In such an event, any legal conclusion that is derived from the principles is developed by the lower court (or perhaps by a combination of courts), not by the Supreme Court. We thus conclude that a new rule is not “made retroactive to cases on collateral review” unless the Supreme Court holds it to be retroactive. (footnotes omitted).

In accordance with *Tyler v. Cain*, the Court’s action in *Jackson v. Hobbs* in remanding the case for a sentencing hearing cannot be construed as fashioning a new rule of retroactivity.^{4,5}

Moreover, in *Jackson*, the State of Arkansas failed to raise the non-retroactivity of *Miller*. The state bears the burden of asserting the *Teague* defense, and where the state fails to raise the non-retroactive application of a new Supreme Court pronouncement, the court may apply the new rule retroactively. *Bradshaw v. Stumpf*, 125 S. Ct. 2398 (2005)(declining to apply *Teague* when the state did not raise the argument); *Caspari v. Bohlen*, 114 S. Ct. 948, 953 (1994)(“a federal court may, but need not, decline to apply *Teague* if the State does not argue it”). But “a court must apply it if it was raised by the State.” *Goeke v. Branch*, 115 S. Ct. 1275, 1276 (1995)(per curiam). In *Schiro v. Farley*, 114 S.Ct. 783, 788-89 (1994), the Court explained the rule as follows:

⁴ More recently, this Court held that the rule announced in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), that defense counsel’s failure to advise the defendant that his plea of guilty made him subject to automatic deportation constituted deficient performance, did not apply retroactively notwithstanding the fact that *Padilla* was decided on collateral review. See *Chaidez v. United States*, 133 S.Ct. 1103 (2013).

⁵ The Louisiana courts have adopted the rule set forth in *Tyler v. Cain*. See *State v. Tate*, 130 So.3d 829, 833 n. 1 (La. 2013); *State v. Huntley*, 118 So.3d 95, 100 (La. App. 3rd Cir. 2013); *In re Sparks*, 657 F.3d 258 (5th Cir. 2011); *In re Elwood*, 408 F.3d 211 (5th Cir. 2005); *Millet v. Louisiana*, 2001 WL 839704 (E.D. La. Jul. 20, 2001).

Nevertheless, the State failed to argue *Teague* in its brief in opposition to the petition for a writ of certiorari. In deciding whether to grant certiorari in a particular case, we rely heavily on the submissions of the parties at the petition stage. If, as in this case, a legal issue appears to warrant review, we grant certiorari in the expectation of being able to decide that issue. Since a State can waive the *Teague* bar by not raising it, and since the propriety of reaching the merits of a dispute is an important consideration in deciding whether or not to grant certiorari, the State's omission of any *Teague* defense at the petition stage is significant. Although we undoubtedly have the discretion to reach the State's *Teague* argument, we will not do so in these circumstances.

Therefore, since the State of Arkansas did not raise *Teague* in *Jackson*, this Court was well within its authority in applying the *Miller* holding to Kuntrell Jackson.

Teague Analysis

In *Miller v. Alabama, supra*, this Court held 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.’ ” *Miller*, 132 S.Ct. at 2460. The Court’s opinion discusses “two strands of precedent reflecting our concern with proportionate punishment.” *Id.* at 2463. The first strand of precedent the Court refers to is the *Roper*⁶ and *Graham*⁷ line of cases, respectively providing that the Eighth Amendment bars capital punishment for juveniles, and prohibits a sentence of life without the possibility of parole for juveniles who committed nonhomicide offenses. *Id.* at 2458. The most fundamental take away from *Graham* is that “youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.” *Id.* This strand, the Court writes, is focused on the sentencer taking into account youth. “By removing youth from the balance -- by subjecting a juvenile to the same life-without-parole sentence applicable to an adult -- these

⁶ *Roper v. Simmons*, 125 S.Ct. 1183 (2005).

⁷ *Graham v. Florida*, 130 S.Ct. 2011 (2010).

laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.* at 2466.

The second strand of precedent references the body of law that has held mandatory death sentences violate the Eighth Amendment. In these cases, the Court noted it was especially important that the sentencer have the opportunity to consider the "mitigating qualities of youth." *Miller*, 132 S.Ct. at 2467 (quoting *Johnson v. Texas*, 113 S.Ct. 2658, 2669 (1993)). These two strands lead to the conclusion that imposing a mandatory life-without-parole upon a juvenile precludes the sentencer from taking into account the defendant's youth and various issues related to defendant's youth, such as a "failure to appreciate risks and consequences." *Id.* at 2468. The Supreme Court further wrote that they would require a 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.

Under *Miller*, automatic imposition of a life sentence without the possibility of parole violates the United States Constitution. However, *Miller* does not impose a categorical ban on a sentence of life without parole for juvenile homicide offenders. Although the Court thought "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," it did "not foreclose a sentencer's ability to make that judgment in homicide cases," assuming that sentencers "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. Thus, under *Miller*, judges must take an individualized approach to sentencing juveniles in homicide cases, taking into account the offender's status as a juvenile and the numerous characteristics that accompany this status, and consider factors which predict whether a juvenile is amenable to reform or beyond salvation.

The test for determining whether a decision of this Court announcing a new rule of constitutional law applies retroactively or prospectively is set forth in *Teague*.⁸ Under *Teague*, a new constitutional rule is not applicable to those cases which have become final before the new rule is announced, unless they fall within an exception to the general rule. A new rule is applied retroactively to cases on collateral review if it (1) “places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe” or (2) “requires the observance of those procedures that are implicit in the concept of ordered liberty.” *Teague*, 109 S.Ct. at 1073.

A threshold inquiry is whether the rule in question constitutes a “new rule.” “In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.” *Teague*, 109 S.Ct. at 1073. A rule is thus new “if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.” *Id.* When Tate’s conviction became final, *Miller* was not dictated by precedent. Instead, *Miller* established for the first time a requirement of individualized sentencing outside the death penalty context. *See Miller*, 132 S.Ct. at 2470.

“New rules” of constitutional law do not apply retroactively to criminal cases that have become final before the rule was announced, unless the new rule falls within one of two narrow exceptions. *See Teague*, 109 S.Ct. at 1074. The first exception permits the retroactive application of “[n]ew *substantive* rules.” *Schriro v. Summerlin*, 124 S.Ct. 2519, 2522 (2004). The second exception authorizes the retroactive application of “a small set of watershed rules

⁸ In *Danforth v. Minnesota*, 128 S.Ct. 1029 (2008), this Court held that state courts are not bound by *Teague* in fashioning rules regarding the retroactive application of Supreme Court judicial pronouncements and, when reviewing state criminal convictions, may give *broader* retroactive effect to new rules of criminal procedure that would be deemed “non-retroactive” under *Teague*. Louisiana has adopted the *Teague* standard for retroactivity. *See State ex rel. Taylor v. Whitley*, 606 So.2d 1292, 1296-97 (La. 1992) (“We now . . . adopt the *Teague* standards for all cases on collateral review in our state courts.”).

of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.” 124 S.Ct. at 2523. But this Court has instructed that “[t]his class of rules is extremely narrow,” and “[n]ew rules of procedure ... generally do not apply retroactively.” *Id.*

This distinction between substantive and procedural rules makes sense. Substantive rules “apply retroactively because they necessarily carry 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.” *Summerlin*, 124 S.Ct. at 2522-23. On the other hand, rules that “regulate only the manner of determining the defendant’s culpability are procedural.” *Id.* at 2523. “They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.” *Id.* The definition of a procedural rule for purposes of the first *Teague* exception extends to rules that regulate the manner of determining a defendant’s sentence. *Lambrix v. Singletary*, 117 S.Ct. 1517, 1531 (1997).

By its very terms, the *Miller* “decision does not categorically bar a penalty for a class of offenders or type of crime[.]” *Miller*, 132 S. Ct. at 2471.⁹ Rather than categorically barring all sentences of life imprisonment for juveniles, *Miller* changed the procedure by

⁹ In contrast to the language in *Miller*, this Court’s language in *Graham* clearly indicates the announcement of a substantive rule. In *Graham*, the Court reviewed “whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime.” *Graham*, 130 S.Ct. at 2017-18. The Court held

that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because “[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,” those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.

130 S.Ct. at 2030 (alteration in original) (quoting *Roper*, 125 S.Ct. at 1197-98). The Court further explained that “[c]ategorical rules tend to be imperfect, but one is necessary here.” *Id.*

which a sentencer may impose a sentence of life without parole on a minor by “requir[ing] [the sentencer] to 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. Indeed, after *Miller*, juveniles convicted of homicide who are provided with the requisite procedural safeguard may still receive sentences of life without parole. Accordingly, *Miller* fails to satisfy the first *Teague* exception to nonretroactivity.

Petitioner argues that *Miller* is substantive because it since it narrows the State’s power to punish children with a sentence of life imprisonment without parole by depriving the State of the power to mandate such sentences. Petition, p. 10. This argument is founded on the premise that “mandatory life imprisonment without the possibility of parole” is a *sentence*. “Mandatory” is defined as “[o]f, relating to, or constituting a command; required; preemptory.” *Black’s Law Dictionary* 980 (8th ed.2004). Similarly, “mandatory sentence,” as defined by *Black’s Law Dictionary*, is “[a] sentence set by law with no discretion for the judge to individualize punishment.” *Black’s* 1394. Thus, “mandatory” speaks to discretion and the manner in which the sentence is imposed, not to the actual *sentence* itself.

A mandatory sentence of life imprisonment without parole does not, as petitioner argues, differ in substance from a discretionary sentence of life imprisonment without parole. A defendant who receives the former sentence is punished in precisely the same way as a defendant who receives the latter sentence: Both defendants spend the rest of their lives in prison. No one would say that one defendant received greater or lesser punishment than the other defendant. The only difference between the defendants is, in *Miller*’s words, the “*process*” that the sentencing court employed “before imposing [the] particular penalty.” 132 S.Ct. at 2471 (emphasis added).

After *Miller*, as before *Miller*, the government may impose a sentence of life imprisonment without parole on a juvenile homicide offender. Now, however, such a sentence cannot be imposed without the additional requirement that the sentencing authority consider alternative punishments in light of the offender's youth and attendant characteristics. This requirement is ultimately procedural; the process by which the government is permitted to impose sentences of life imprisonment without parole has been changed by *Miller*, but the government's authority to impose such sentences has not.

The second *Teague* exception applies to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" or "implicit in the concept of ordered liberty." *Beard v. Banks*, 124 S.Ct. 2504, 2513 (2004); *Teague*, 109 S.Ct. at 1073 (quotation omitted). "In order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v. Bockting*, 127 S.Ct. 1173, 1182 (2007) (citations omitted) (internal quotation marks omitted).

The watershed exception, though, "is extremely narrow," and since its decision in *Teague*, this Court has "rejected every claim that a new rule satisfied the requirements for watershed status." *Whorton*, 127 S.Ct. at 1181-82. In fact, the Court has indicated "it is unlikely that any" watershed rules have " 'yet to emerge.' " *Summerlin*, 124 S.Ct. at 2519. The only case ever to satisfy this high threshold is *Gideon v. Wainwright*, 83 S.Ct. 792 (1963), in which the Court held that counsel must be appointed for any indigent defendant charged with a felony. *Whorton*, 127 S.Ct. at 1182. "When a defendant who wishes to be represented by counsel is denied representation, *Gideon* held, the risk of an unreliable verdict

is intolerably high. The new rule announced in *Gideon* eliminated this risk.” *Id.* Therefore, it is not enough that a new rule is aimed at improving the accuracy of trial, or even that it promotes the objectives of fairness and accuracy; the rule must institute procedures implicit in the concept of ordered liberty to come within this exception.

Miller is not a watershed rule for two reasons. First, *Miller* deals exclusively with sentencing and does not impact the accuracy of an underlying determination of guilt or innocence. Moreover, *Miller*’s holding, unlike the expansive rule in *Gideon* establishing a right to counsel in all felony cases, affects only a small subset of defendants, indicating that the rule does not have a fundamental and profound impact on criminal proceedings generally.

Second, the *Miller* Court’s review of its precedents demonstrates that its holding was not a “watershed” development. As the Court has repeatedly explained, this second requirement “cannot be met simply by showing that a new procedural rule is *based on* a ‘bedrock’ right.” *Whorton*, 127 S.Ct. at 1183 (emphasis in original). Similarly, “that a new procedural rule is fundamental in some abstract sense is not enough.” *Id.* Rather, the new rule “must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding.” *Id.* at 1184 (citations omitted). The Court’s cases have long established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual. See *Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654, 1664 (2007)(citing *Woodson v. North Carolina*); *Eddings v. Oklahoma*, 102 S.Ct. 869 (1982). *Miller*’s extension of this well-established principle to non-capital sentencing does not rise to the level of a rule like *Gideon* that “ ‘alter[s] our understanding of the *bedrock procedural*

elements essential to the fairness of a proceeding.’ ” Whorton, 127 S.Ct. at 1183 (emphasis added).

Petitioner argues that *Miller* is necessarily retroactive since the cases underlying the *Miller* decision -- *Graham, Roper, and Thompson v. Oklahoma*, 108 S.Ct. 2687 (1988) (holding that a death sentence for juvenile offender who was younger than 16 at time of the offense is unconstitutional) -- announced rules that were determined to be retroactive. A majority of the decisions underlying *Miller* involved the imposition of the death penalty; “members of the [United States Supreme] Court acknowledge what cannot fairly be denied ... death is a punishment different from all other sanctions in kind rather than degree.” *Woodson v. North Carolina*, 96 S.Ct. 2978, 2991 (1976). Moreover, those decisions, unlike *Miller*, categorically proscribed a certain punishment -- e.g., death for juveniles or mentally retarded defendants. *Cf. Graham* (barring life imprisonment without the possibility of parole for juveniles who committed nonhomicide offenses). *Miller*, by its own language, does not categorically prohibit the imposition of a sentence of life imprisonment without the possibility of parole. *Miller*, 132 S.Ct. at 2471.

Consequently, the rule announced in *Miller* is a new rule of criminal constitutional procedure that is neither substantive nor a watershed rule that alters the understanding of the bedrock procedural elements essential to the fairness of a proceeding. Therefore, Toca and those other similarly situated defendants are not entitled to the retroactive benefit of the *Miller* rule in post-conviction proceedings.

Practical Considerations

The retroactive application of *Miller* to cases on collateral review is problematic. The difficulty arises from the nature of proof required at a sentencing hearing conducted in accordance with *Miller*. *Miller* requires 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. “[Y]outh matters for purposes of meting out the law’s most serious punishments,” thus, *Miller* mandates that “a sentencer consider[] an offender’s youth and attendant characteristics before imposing a [sentence of life without parole].” 132 S.Ct. at 2471.

Evidence of a juvenile offender’s “heightened capacity for change,” 132 S.Ct. at 2469, “and greater prospects for reform,” 132 S.Ct. at 2464, requires evidence of the offender’s psychological state and would best presented through the expert opinion of a psychologist who has examined the juvenile offender. The ability to obtain such evidence is greatly diminished, if not foreclosed, once the offender has attained the age of majority. This problem is highlighted by the present case. Toca is presently forty-seven (47) years old. Absent a psychological exam conducted prior to his conviction that specifically addressed Toca’s “youth and attendant characteristics,” evidence as to Toca’s “diminished culpability and heightened capacity for change” “and greater prospects for reform” at the time of his conviction some thirty years ago on April 16, 1985 is likely nonexistent.

The only argument offered by Toca against a sentence of life imprisonment without parole is his claim of rehabilitation. In the vast majority of post-conviction petitions based on *Miller* filed in Orleans Parish, the petitioners typically cite their prison record, including their exemplary conduct and coursework and other achievements accomplished during their

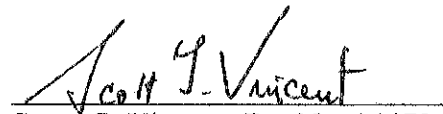
incarceration. However, evidence of exemplary prison conduct and achievements relates to mitigation and reform and has no bearing on a petitioner's "youth and attendant characteristics," "heightened capacity for change" "and greater prospects for reform" at the time of the petitioner's conviction. Therefore, such evidence is not relevant at a *Miller* sentencing hearing.

The problem is further exacerbated by the burden of proof applicable in sentencing hearings. Given this Court's declaration in *Miller* that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon*," 132 S.Ct. at 2469, and that "[t]hat is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the *rare* juvenile offender whose crime reflects irreparable corruption.' "), *id.*, a reasonable argument can be made by juvenile homicide offenders that the government bears the burden of proof at a sentencing hearing conducted in accordance with *Miller*. This being the case, since evidence of a postconviction petitioner's psychological state at the time of his conviction will generally be unavailable, the government will not be able to prove any aggravating factors under *Miller*, resulting in the imposition of no life sentences without parole. Certainly, the *Miller* Court did not intend such a result.

CONCLUSION

Based on the foregoing, Petitioner has failed to present compelling reasons why this Court should exercise its discretionary jurisdiction in the instant case. Accordingly, the State of Louisiana, respondent herein, respectfully that certiorari be denied.¹⁰

Respectfully submitted,



Scott G. Vincent, Bar No. 14478
Assistant District Attorney
Orleans Parish
619 S. White St.
New Orleans, LA 70119
Telephone: (504) 822-2414
Facsimile: (504) 571-2928

Attorney of Record for Respondent

¹⁰ This Court denied an identical writ application in *Darryl Tate v. State of Louisiana*, 134 S.Ct. 2663 (2014), wherein Darryl Tate sought reversal of the Louisiana Supreme Court's decision in *State v. Tate*, 130 So.3d 829 (La. 2013), that *Miller* does not apply retroactively to cases on collateral review.

CERTIFICATE OF SERVICE

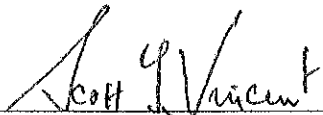
I **HEREBY CERTIFY** that a copy of the above and foregoing Amicus Curiae Brief has been served upon the following counsel of record, the Louisiana Supreme Court, the Louisiana Third Circuit Court of Appeal, and the trial judge by placing same in the U.S. mail, properly addressed, with first class postage affixed thereto, this 26th day of September, 2014:

Emily Maw, Esq.
Innocence Project New Orleans
4051 Ulloa Street
New Orleans, LA 70119
Counsel for Defendant/Petitioner

The Honorable John Tarlton Olivier
Clerk of Court
Louisiana Supreme Court
400 Royal Street, Suite 4200
New Orleans, LA 70130-8102

The Honorable Danielle A. Schott
Clerk of Court
Fourth Circuit Court of Appeal
400 Royal Street
New Orleans, LA 70130

The Honorable Julian A. Parker
Orleans Parish Criminal District Court
Section "G"
2700 Tulane Avenue
New Orleans, LA 70119



Assistant District Attorney