No. 14-6673

IN THE
SUPREME COURT OF THE UNITED STATES

◊

RODNEY TOLLIVER,
Petitioner
v.

STATE OF LOUISIANA,
Respondent

◊

On Petition for Writ of Certiorari to the
Louisiana Supreme Court

◊

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

◊

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PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment VIII.

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

28 U.S.C. § 1257(a)

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

QUESTIONS PRESENTED FOR REVIEW

Whether *Miller v. Alabama,* 567 U.S. --, 132 S. Ct. 2455 (2012), is retroactive to persons whose convictions and sentences are final and who are seeking collateral review, pursuant to this Court's opinion in *Teague v. Lane,* 489 U.S. 288 (1989).

Whether the United States Supreme Court has jurisdiction over a state court determination of retroactivity of a case on collateral review, when a state has both adopted and applied *Teague.*

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On April 14, 1985, Rodney Tolliver ("the Petitioner") raped and murdered a seventy-year-old woman in her home in Lafayette Parish, Louisiana. *Louisiana v. Tolliver,* 2008–1486 (La. App. 3 Cir. 05/13/09), 11 So. 3d 584, 586, 588, 590–92. Without belaboring the point, suffice it to say that the rape in question was unusually brutal; the Petitioner inflicted numerous painful injuries on the victim before smothering her to death. *Id.* at 590-92. When the murder occurred, the Petitioner was sixteen years old. *Id.* at 595.

This case, like many others, became a cold case. Another man, Joseph Delhomme, was arrested and charged with the rape and murder. *Id.* at 589. The matter proceeded to trial, which resulted in a mistrial and the charges against Delhomme were ultimately dropped. *Id.* After that time, much of the evidence in this case was, unfortunately, destroyed. *See, e.g. id.* at 593, 608–11.

The victim in this case had jalousie windows, which have glass slats located on either side of a plate glass window that open up. *Id.* at 588 n.2. All of these windows were sealed with silicone except the one in the back door. Shortly after the crime occurred, a Lafayette Parish Sheriff's Detective noticed that the panes of the window at the back door had been opened and one of the panes had been pushed to the side. *Id.* at 589. Among other things, the Detective found one clear latent fingerprint on one of these glass panes and was able to get three complete lifts from it. *Id.*

In June 2003, a Lafayette Police Department Detective was having a slow work day, so she pulled fingerprints from old case files, including the print found on the jalousie window. *Id.* at 592. She ran this fingerprint through the Automated Fingerprint Identification System ("AFIS") system, and the print matched the Petitioner. The case was reopened, and the fingerprint match from AFIS was later confirmed. *Id.* at 592–93. The State later determined that the Defendant's DNA was present in the victim's mouth and on a towel at the crime scene. *Id.* at 593–94.

The Petitioner was indicted on February 19, 2004, and the trial began on April 17, 2007, and ended on April 24. *Id.* at 586. The jury found the Petitioner guilty of second degree murder, and on May 7, 2007, the sentencing court imposed a mandatory penalty of life imprisonment without parole. *Id.* at 586–87; *see also* La. Rev. Stat. § 14:30.1 (1985).[1] The Petitioner sought review from the Louisiana Supreme Court, which was denied on February 26, 2010. *Louisiana v. Tolliver*, 2009–1441 (La. 02/26/10), 28 So. 3d 269. Under Louisiana law, the Petitioner's conviction and sentence became final on direct review on that date — February 26, 2010. LA. CODE CRIM. PROC. art. 922(D).

[1] At the time of the crime, the penalty provision of the crime for which the Petitioner was convicted stated: "Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence." La. Rev. Stat. § 14:30.1 (1985).

The Petitioner filed a pro se motion to correct illegal sentence on June 20, 2013, arguing that *Miller* retroactively applied to his case. The district court denied the motion on July 2, 2013. The Petitioner sought supervisory writs, which were received by the Third Circuit Court of Appeal, the appropriate intermediate state court of appeal in Louisiana, on August 16, 2013. On November 19, 2013, the Third Circuit denied relief. The Petitioner sought supervisory writs with the Louisiana Supreme Court, which were filed on December 10, 2013. On August 4, 2014, the Louisiana Supreme Court denied relief, relying upon *Louisiana v. Tate,* 12–2763 (La. 11/5/13), 130 So. 3d 829, *reh'g denied* (La. 01/27/14), *cert. denied,* -- U.S. --, 134 S. Ct. 2663 (2014). *See Louisiana ex rel. Tolliver v. State*, 2013-2893 (La. 07/31/14), 147 So. 3d 176.

Petitioner filed the instant petition for a writ of certiorari on September 29, 2014. This Court ordered the State to respond by January 7, 2015. The State submits the following response.

REASONS FOR GRANTING THIS PETITION

The undersigned notes that he recently filed a brief in opposition in this Court in a case dealing with identical issues, but asked this Court to deny review. *See* Brief in Opposition, *Louisiana v. Montgomery*, No. 14-280 (2014). After that filing and on December 12, 2014, this Court granted review in *Toca v. Louisiana,* No. 14-6381 (2014). In that case, the State of Louisiana,

represented by the Orleans Parish District Attorney's Office, has taken the position that this Court does not have jurisdiction to determine whether *Miller* is retroactive on state collateral review.

If the Orleans Parish District Attorney's Office is correct, there will be a serious consequence for prosecutors in many states, as numerous state courts of last resort have adopted the *Teague* standard to determine whether a new rule of constitutional law is retroactive on state collateral review. The consequence would be that a State can never seek United States Supreme Court review of a decision where a state court has misconstrued the standard enunciated in *Teague*.

This interest is not adequately protected by Petitioner George Toca for two reasons. First, a criminal defendant has the ability to petition this Court for review of a state court decision that denies retroactivity on collateral review through the federal habeas corpus process. *See, e.g.,* 28 U.S.C. 2254(e)(2)(A)(i). The answer to the jurisdictional issue would not forever bar a petitioner seeking review from this Court on the basis that a state court has unreasonably applied this Court's decision in *Teague*. *See,* 28 U.S.C. 2254(d)(1). Second, neither Petitioner Toca, nor any other petitioner or respondent filing with this Court on the issue of jurisdiction (of which the undersigned is aware), has devoted any significant attention this Court's plurality opinion in *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 177–78 (1990), *overruled in part by Harper v. Virginia Dept. of Taxation*, 509 U.S. 86

(1993), its opinion in *Harper*, or the cases cited therein, which the undersigned argues are dispositive on the issue.

For these reasons, the State of Louisiana, in this case, respectfully joins the Petitioner in seeking certiorari from this Court.

JURISDICTION

As a matter of state law, the Louisiana Supreme Court has adopted the *Teague* standard to determine whether a new constitutional rule must be applied retroactively to cases on collateral review. *Louisiana ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992) (adopting *Teague v. Lane*, 489 U.S. 288 (1989)). The State, in *Louisiana v. Toca*, has argued that a decision by the Louisiana Supreme Court which interprets and applies *Teague* does not present a federal question for this Court to review. *See* Brief in Opposition at 6–9, *Louisiana v. Toca*, No. 14-6381 (2014). The State of Louisiana, in this case, respectfully disagrees.

In this case, both the Petitioner and the State claim that this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The question presented is whether *Miller v. Alabama*, 567 U.S. ··, 132 S. Ct. 2455 (2012), a decision interpreting the Eighth Amendment of the United States Constitution, must apply to Petitioner as a matter of the "basic norms of constitutional

adjudication." *Teague*, 489 U.S. at 304 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)).

The textual basis for this Court's authority to determine what the "basic norms of constitutional adjudication" are comes from Article III, Section 1 of the United States Constitution, vesting "[t]he judicial Power of the United States" with this Court. *See Griffith,* 479 U.S. at 322. The judicial power of this Court necessarily includes the determination of whether new pronouncements concerning constitutional law must be applied to cases that have already become final, and this Court has clearly stated that decisions regarding the retroactivity of its decisions are matters of federal law. For example, in *Am. Trucking Ass'ns., Inc. v. Smith*, the petitioners sought this Court's review from a decision of the Arkansas Supreme Court, which found, among other things, that *Am. Trucking Ass'ns., Inc. v. Scheiner,* 483 U.S. 266 (1987), did not require that certain taxes be refunded prior to the issuance of the decision in *Scheiner*. 496 U.S. at 174–76. This Court granted writs to determine whether *Scheiner* applies retroactively, *id.* at 171, 176, and reasoned that it had jurisdiction, explaining:

> In the present case, it is eminently clear that the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law...." [*Michigan v. Long,* 463 U.S. 1032, 1040, 103 S. Ct. 3469, 3476 (1983)]. Specifically, the Arkansas Supreme Court took the view that, whatever else Arkansas law might require, petitioners could not receive tax

refunds if *Scheiner* is not retroactive under the test of *Chevron Oil*.[2]

> *The determination whether a constitutional decision of this Court is retroactive—that is, whether the decision applies to conduct or events that occurred before the date of the decision—is a matter of federal law.* When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. See *Great Northern R. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 364, 53 S. Ct. 145, 148, 77 L.Ed. 360 (1932) ("We think the federal constitution has no voice upon the subject [of whether a state court may decline to give its decisions retroactive effect]"). The retroactive applicability of a constitutional decision of this Court, however, "is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman v. California,* 386 U.S. 18, 21, 87 S. Ct. 824, 826, 17 L.Ed.2d 705 (1967). In order to ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights, we have consistently required that state courts adhere to our retroactivity decisions. See, *e.g., Michigan v. Payne,* 412 U.S. 47, 93 S. Ct. 1966, 36 L.Ed.2d 736 (1973) (holding that the state court erred in applying *North Carolina v. Pearce,* 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969), retroactively to invalidate a resentencing proceeding occurring prior to the date of the decision in *Pearce*); *Arsenault v. Massachusetts,* 393 U.S. 5, 89 S. Ct. 35, 21 L.Ed.2d 5 (1968) (holding that the state court erred in determining that *White v. Maryland,* 373 U.S. 59, 83 S. Ct. 1050, 10 L.Ed.2d 193 (1963), requiring an accused to be represented by counsel during a preliminary hearing, did not apply retroactively to petitioner).

Id. at 177–78 (emphasis added).[3]

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[2] In *Chevron Oil Co. v. Huson*, this Court enunciated a retroactivity analysis that applied to civil cases. 404 U.S. 97 (1971). This Court modified *Chevron Oil* and *Am. Trucking Ass'ns., Inc. v. Smith* in *Harper* by allowing a state to choose whether to adopt the federal retroactivity analysis or some other form of relief, so long as that relief satisfies federal due process. 509 U.S. at 102.

[3] Since the Court had jurisdiction to decide *Payne* and *Arsenault*, it has jurisdiction to decide this case.

Three years later, in *Harper*, this Court modified *Am. Trucking Ass'ns., Inc. v. Smith* in part by leaving to state courts the question of whether to adopt the federal retroactivity standard, "so long as that relief satisfies the minimum federal requirements we have outlined." 509 U.S. at 102; *see also Danforth v. Minnesota*, 552 U.S. 264, 287 (2008). Most pointedly, the *Harper* Court held, "Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law, cannot extend to their interpretations of federal law." 509 U.S. at 100 (citations omitted).

Most recently, in *Danforth*, this Court determined that the basic norms of constitutional adjudication allow a State to grant its citizens broader protection than the United States Constitution requires. 552 U.S. at 266, 288. Thus, a State may give retroactive effect to a new rule of constitutional law that would not fall into one of the exceptions to the *Teague* bar. The converse, of course, is not the case: a State may not decline to give retroactive effect to a decision this Court has found to be retroactive under *Teague.*

The Louisiana Supreme Court, relying on *Teague*, has determined that *Miller* is not retroactive. *Tate*, 130 So. 3d at 841. As that court has chosen to adopt the federal standard in *Teague*, the court's determination as to whether *Miller* is retroactive is "interwoven with the federal law." *Long*, 463 U.S. at 1040. Since the Louisiana Supreme Court's interpretation of *Teague*'s application is at issue in this case (as well as in *Toca*), this Court has

jurisdiction to hear the issues presented. *Contra* Brief in Opposition at 6–9, Louisiana v. Toca. Here, the Louisiana Supreme Court "decided the case the way it did because it believed that federal law [would require] it to do so." *Long*, 463 U.S. at 1041. Prior cases show that a state court is not entitled to misconstrue federal law. *See, e.g., Danforth,* 552 U.S. at 288–89 (discussing *Oregon v. Hass,* 420 U.S. 714 (1975)); *Tarble's Case,* 13 Wall. 397, 20 L. Ed. 597 (1872); *Ableman v. Booth,* 21 How. 506, 16 L. Ed. 169 (1859)).[4]

The conclusion that this Court has jurisdiction to decide this case is obvious, considering the practical effect of the opposite outcome. Absent this Court's intervention, a State seeking review of a judicial misconstruction of the federal standard enunciated in *Teague* has no redress in federal habeas.[5] If, arguendo, the Louisiana Supreme Court has erred in its interpretation of *Miller*, it has denied the Petitioner redress to which he would otherwise be entitled. To say that this Court may determine the meaning of *Teague* but allow a State to misconstrue it without any recourse before this Court would make the judicial power vested here one of "form without substance." *Marbury v. Madison,* 5 U.S. 137, 174 (1803).

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[4] This Court in *Danforth* did not rule on the precise issue presented here: "States that give broader retroactive effect to this Court's new rules of criminal procedure do not do so by misconstruing the federal Teague standard." *Danforth,* 552 U.S. at 289.

[5] This Court has already denied certiorari in several cases in which state courts of last resort have made determinations on the *Miller* issue. *See, e.g., Illinois v. Davis,* 6 N.E.3d 709 (Ill. 2014), *cert. denied,* No. 14-197, -- S. Ct. --, 2014 WL 4094821 (2014); *Nebraska v. Mantich,* 842 N.W.2d 716 (2014), *cert. denied,* 135 S. Ct. 67 (2014).

SUMMARY OF ARGUMENT

The Petitioner, who is filing pro se, simply concludes that *Miller* is retroactive as a new substantive rule. Pet. for Cert. at 4. He does not engage in a *Teague* analysis or even mention the case. Pet. for Cert. at 6–14. In the interest of discussing the merits of this issue, the State will discuss why common arguments in favor of finding *Miller* to have created a new substantive rule of constitutional law are erroneous.

First, some petitioners suggest that because this Court found Kuntrell Jackson was entitled to relief in the *Miller* case, that finding is dispositive on the retroactivity issue because Jackson's case came to this Court through state collateral review. *Miller,* 132 S. Ct. at 2475. This is unpersuasive.

Here, the Petitioner is not "similarly situated" to Jackson because the State raised the *Teague* bar in this case. *Teague,* 489 U.S. at 300. Arkansas failed to raise the *Teague* bar in Jackson's case, entitling this Court to reach the merits in that case without any application of *Teague. Caspari v. Bohlen,* 510 U.S. 383, 389 (1994) ("[A] federal court may, but need not, decline to apply *Teague* if the State does not argue it.") (citation omitted). Further, this Court has announced new rules of constitutional law on collateral review and later found them to be not retroactive. *Chaidez v. United States,* 133 S. Ct. 1103 (2013). Finally, this Court in *Miller* did not, through a holding, declare the opinion applies retroactivity. *Tyler v. Cain,* 533 U.S. 656, 663 (2001).

A second common argument concerns the application of the primary conduct exception, which affords retroactivity to certain substantive rules. *Schriro v. Summerlin*, 542 U.S. 348, 351–53 (2004); *Teague*, 489 U.S. at 311. *Miller* does not fall within this exception. *Miller* simply does not place any conduct beyond the State's power to punish—murder is still illegal, and a life sentence without benefit of parole for juvenile murders is still legal. Nor does *Miller* carry a significant risk that a juvenile stands convicted of an act (murder) the law does not make criminal. Most significantly, *Miller* "does not categorically bar a penalty for a class of offenders or type of crime—as, for example, [this Court] did in *Roper* or *Graham*." *Miller*, 132 S. Ct. at 2471.[6] *Miller* does not alter the range of conduct the State may proscribe, nor does it affect the class of persons subject to the prohibitions on murder. To the contrary, *Miller* merely regulates the *manner* of determining the culpability of a juvenile who commits murder: it "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.*

Another argument concerns whether *Miller* is a watershed rule of criminal procedure, a rule "implicit in the concept of ordered liberty," the non-application of which creates "an impermissibly large risk that the innocent

[6] *See also id.* at 2469 ("Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. ").

will be convicted." *Teague,* 489 U.S. at 311–12 (citations omitted). Because *Miller* dealt with a sentencing issue, the watershed exception does not apply.

Finally, another common argument is that the "strands of precedent" referenced by this Court in *Miller* demand a finding of retroactivity. They do not. *Teague* and its progeny have never recognized that the retroactivity of precedent that underlies a new rule of constitutional law affects the eventual retroactivity of the newly-announced rule.

ARGUMENT

I. INTRODUCTION

Many of the issues to be considered in a *Teague* analysis are not contested in this case.

The State alleges that *Miller* announced a new rule of constitutional law; or, stated differently, that existing precedent did not compel the result in *Miller*. *Bohlen*, 510 U.S. at 390; *compare Chaidez,* 133 S. Ct. at 1105–13. The parties agree that Petitioner was a juvenile when the murder occurred and that his conviction and sentence became final prior to *Miller*. *See* Pet. for Cert. at 8–10.

The primary issue before this Court is whether either of the two exceptions to *Teague*'s general presumption of non-retroactivity should apply to Petitioner's case, which is on collateral review. *Teague,* 489 U.S. at 310.

There are two exceptions to *Teague*'s general bar to the retroactive application of new rules. First, a new rule should be applied retroactively if it places either "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or creates a new, substantive constitutional rule. *See id.* at 311 (citation omitted); *Summerlin,* 542 U.S. at 351–53. *Teague's* second exception applies to watershed rules of criminal procedure that are "implicit in the concept of ordered liberty," and must create "an impermissibly large risk that the innocent will be convicted." *Teague,* 489 U.S. at 311–12 (citations omitted).

The second exception is the easier of the two to address. Because *Miller* dealt with a sentencing issue, the watershed exception does not apply. As this Court noted in *Graham v. Collins*, watershed rules of procedure are "central to an accurate determination of innocence or guilt." 506 U.S. 461, 478 (1993) (quoting *Teague*, 489 U.S. at 313). The Petitioner's attempt to conflate the two exceptions ("*Miller* announced a new rule of criminal *procedure* that is substantive") is unavailing. Pet. for Cert. at 4 (emphasis added).

The first exception—the exception for substantive rules—is the question on which most state and federal courts have split. The State recognizes the split of authority on the retroactivity issue before this Court. Multiple state[7] and federal[8] courts have found *Miller* not retroactive on

[7] *Williams v. Alabama,* -- So. 3d --, 2014 WL 1392828 (Ala. Crim. App. Apr. 4, 2014); *Anderson v. Florida,* 105 So. 3d 538 (Fla. 5th Dist. Ct. App. 2013) (*Miller* not retroactive,

collateral review. Other state[9] and federal[10] courts have differed. For the reasons that follow, this Court should resolve the split and determine that the *Miller* rule fits neither *Teague* exception.

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although not applying *Teague*); *Gonzalez v. Florida*, 101 So. 3d 886 (Fla. 1st Dist. Ct. App. 2012) (same); *Geter v. Florida*, 115 So. 3d 375 (Fla. 3d Dist. Ct. App. 2012) (same); *Ellmaker v. Kansas*, 329 P.3d 1253 (Kan. Ct. App. 2014) (unpublished); *Tate*, 130 So. 3d at 829; *Michigan v. Carp*, 852 N.W.2d 801, *reh'g denied sub nom. Michigan v. Davis*, 854 N.W.2d 710 (Mich. 2014); *Chambers v. Minnesota*, 831 N.W.2d 311 (Minn. 2013); *Brooks v. Bowersox*, -- S.W.3d --, 2014 WL 5241645 (Mo. Ct. App. Oct. 15, 2014) (*Miller* not retroactive, although not applying *Teague*); *Pennsylvania v. Cunningham*, 81 A.3d 1 (Pa. 2013), *cert. denied sub nom. Cunningham v. Pennsylvania*, 134 S. Ct. 2724 (2014).

[8] *In re Morgan*, 713 F.3d 1365 (11th Cir. 2013), *reh'g en banc denied*, 717 F.3d 1186 (11th Cir. 2013); *Craig v. Cain*, No. 12-30035, 2013 WL 69128 (5th Cir. 2013) (unpublished); *Malvo v. Mathena*, No. 13–375, 2014 WL 2808805 (E. D. Va. June 20, 2014); *Dumas v. Clarke*, No. 13–398, 2014 WL 2808807 (E. D. Va. June 20, 2014); *Stewart v. Clarke*, No. 13–388, 2014 WL 2480076 (E. D. Va. Mar. 13, 2014), *report and recommendation adopted*, 2014 WL 1899771 (E. D. Va. Apr. 29, 2014); *Landry v. Baskerville*, No. 13–367, 2014 WL 1305696 (E. D. Va. Mar. 31, 2014); *Thompson v. Roy*, No. 13–1524, 2014 WL 1234498 (D. Minn. Mar. 25, 2014); *Sanchez v. Vargo*, No. 13–400, 2014 WL 1165862 (E. D. Va. Mar. 21, 2014); *Contreras v. Davis*, No. 13–772, 2013 WL 6504654 (E. D. Va. Dec. 11, 2013); *Johnson v. Ponton*, No. 13–404, 2013 WL 5663068 (E. D. Va. Oct. 16, 2013); *Martin v. Symmes*, No. 10–4753, 2013 WL 5653447 (D. Minn. Oct. 15, 2013); *Ware v. King*, No. 5:12cv147-DCB-MTP, 2013 WL 4777322 (S. D. Miss. Sept. 5, 2013).

[9] *In re Rainey*, 168 Cal. Rptr. 3d 719 (Cal. App. 2014), *review granted*, 326 P.3d 251 (Cal. 2014); *Cotto v. Florida*, 141 So. 3d 615 (Fla. 4th Dist. Ct. App. 2014), *reh'g denied* (*Miller* retroactive, although not applying *Teague*); *Toye v. Florida*, 133 So. 3d 540 (Fla. 2d Dist. Ct. App. 2014) (same); *Davis*, 6 N.E.3d at 709; *Iowa v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *Mantich*, 842 N.W.2d at 716; *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 466 Mass. 655 (2013); *Jones v. Mississippi*, 122 So. 3d 698 (Miss. 2013), *reh'g denied*; *Petition of State*, -- A.3d --, 2014 WL 4253359 (2014); *Darden v. Tennessee*, No. M2013-01328-CCA-R3-P3, 2014 WL 992097 (Mar. 13, 2014) (unpublished), *appeal denied* (applying a state standard identical to *Teague* on this issue); *Ex parte Maxwell*, 424 S.W.3d 66 (Tex. 2014); *Aiken v. Byars*, -- S.E.2d. --, 2014 WL 5836918 (2014); *Wyoming v. Mares*, 335 P.3d 487 (Wyo. 2014).

[10] *Grant v. United States*, No. CIV.A. 12-6844 JLL, 2014 WL 5843847 (D.N.J. Nov. 12, 2014); *Songster v. Beard*, No. 04–5916, 2014 WL 3731459 (E. D. Pa. July 29, 2014); *United States v. Orsinger*, No. 01–1072, 2014 WL 3427573 (D. Ariz. July 15, 2014); *McLean v. Clarke*, No. 13–409, 2014 WL 5286515 (E. D. Va. June 12, 2014); *Flowers v. Roy*, No. 13–1508, 2014 WL 1757884 (D. Minn. Feb. 3, 2014), *report and recommendation not adopted*, No. CIV. 13-1508 JNE/SER, 2014 WL 1757898 (D. Minn. May 1, 2014); *Pete v. United States*, No. 03–355, 2014 WL 88015 (D. Ariz. Jan. 9, 2014); *Alejandro v. United States*, No. 13–4364, 2013 WL 4574066 (S.D.N.Y. Aug. 22, 2013); *Hill v. Snyder*, No. 10–14568, 2013 WL 364198 (E. D. Mich. Jan. 30, 2013). The State has not included federal circuit courts of appeals that have only granted leave for a petitioner to file a successive habeas petition, as those determinations only involve whether the petitioner has made a prima facie showing.

II. KUNTRELL JACKSON'S CASE DOES NOT MAKE THE *MILLER* RULE RETROACTIVE.

Criminal defendants have frequently suggested that this Court's determination that Kuntrell Jackson was entitled to relief in *Miller* is dispositive on the issue of retroactivity because Jackson's case came to this Court through Arkansas state collateral review. *Miller,* 132 S. Ct. at 2475.[11]

Here, the Petitioner is not "similarly situated" to Jackson. In the instant case the Louisiana Supreme Court and the Louisiana Third Circuit Court of Appeal relied on the *Teague* bar to deny relief, and the State raises the *Teague* bar in this Court. *See Teague,* 489 U.S. at 300. By contrast, Arkansas failed to raise the *Teague* bar in Jackson's case.[12] Thus, this Court was entitled to reach the merits without any application of *Teague* to Jackson. *Bohlen*, 510 U.S. at 389 ("[A] federal court may, but need not, decline to apply *Teague* if the State does not argue it") (citation omitted).[13] Had Arkansas raised the *Teague* defense in Jackson's case, this Court would have been bound to apply it. *Goeke v. Branch,* 514 U.S. 115, 117 (1995).[14] The Petitioner has not and cannot point to any subsequent case by this Court that

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[11] Jackson is entitled to the benefit of this Court's opinion in his own case. *Jackson v. Norris,* 426 S.W.3d 906, 910 (2013) (citing *Yates v. Aiken,* 484 U.S. 211, 218 (1988)).

[12] Brief of Respondent, *Jackson v. Hobbs,* 2012 WL 523347 (2012); Respondent's Brief in Opposition, *Jackson v. Hobbs,* 2011 WL 5373676 (2011).

[13] Although *Teague* and *Penry v. Lynaugh* suggest that courts are bound to apply *Teague* even if it is not raised, later rulings, such as *Bohlen*, have clearly clarified or altered that requirement where *Teague* was not raised by the State. *Penry,* 492 U.S. 302, 313 (1989) *overruled on other grounds by Atkins v. Virginia,* 536 U.S. 304 (2002); *Teague,* 489 U.S. at 314–316.

[14] Arkansas state courts have never adopted nor discussed *Teague* in any available opinion on Westlaw. The last time retroactivity was discussed in an Arkansas state criminal case was 1967. *See Rowe v. Arkansas,* 419 S.W.2d 806 (1967). Arkansas was not required to assert the *Teague* bar by virtue of the *Danforth* decision. *Danforth,* 552 U.S. 264.

contradicts these clear statements. *See, e.g., Day v. McDonough,* 547 U.S. 198, 206 (2006).

Moreover, this Court recently held that the rule announced in *Padilla v. Kentucky,* 559 U.S. 356 (2010), did not apply retroactively, notwithstanding the fact that *Padilla* was decided on collateral review. *See Chaidez,* 133 S. Ct. at 1113. This Court has made neither *Padilla* nor *Miller* retroactive to cases on collateral review because it has not held them to be retroactive. *Tyler,* 533 U.S. at 663; *see also Tate,* 130 So. 3d at 833 n.1.

Therefore, the fact that Jackson was granted relief does not, in and of itself, make the *Miller* rule retroactively applicable to cases on collateral review.

III. THE *MILLER* RULE DOES NOT FALL UNDER *TEAGUE*'S PRIMARY CONDUCT EXCEPTION.

The instant involves application of the primary conduct exception, which affords retroactivity to a very limited class of newly announced substantive rules. *Teague,* 489 U.S. at 311 (discussing *Mackey v. United States,* 401 U.S. 667, 692 (1971) (Harlan, J., concurring in judgment in part and dissenting in part)).[15] This Court has defined the scope of this exception:

> This [exception] includes decisions that narrow the scope of a criminal statute by interpreting its terms... as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to

[15] This Court has also described substantive rules as not subject to the *Teague* bar at all, rather than treated as an exception. *Summerlin,* 542 U.S. at 352 n.4.

> punish... Such 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.
>
> * * *
>
> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes... In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural.

Summerlin, 542 U.S. at 351–53 (citations and footnote omitted, emphasis in original).

Miller does not fall within this exception. *Miller* simply does not place any conduct beyond the State's power to punish—murder is still illegal. Nor does *Miller* carry a significant risk that a juvenile stands convicted of an act (murder) the law does not make criminal. *Miller* did not alter the range of conduct the State may proscribe, nor did it affect the class of persons subject to the prohibitions on murder.

Most significantly, *Miller* "does not categorically bar a penalty for a class of offenders or type of crime—as, for example, [this Court] did in *Roper* or *Graham*." *Miller*, 132 S. Ct. at 2471. This Court's statement in *Penry*, considered in light of the fact that *Miller* does not categorically bar any penalty, should be dispositive of the issue: "[I]f we held, as a substantive matter, that the Eighth Amendment prohibits [a punishment]... *regardless of the procedures followed*, such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on

collateral review." 492 U.S. at 330 (emphasis added); *see also Morgan,* 713 F.3d at 1368.

What *Miller* did was regulate the procedure for determining the culpability of a juvenile who commits murder. *Miller* "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." 132 S. Ct. at 2471. Simply put, life without benefit of parole is still a legal sentence for juvenile murderers after *Miller.* The Louisiana Supreme Court dutifully applied this Court's analysis set forth in *Summerlin* and correctly found that *Miller* did not announce a substantive rule as that term has been defined by this Court. *Tate,* 130 So. 3d at 836–37.

Certain courts have erroneously determined that the *Miller* Court categorically prohibited a punishment: a mandatory sentence of life without parole ("LWOP"). Such a determination displays a fundamental misunderstanding of the term "punishment:"

> *Miller* did not prohibit any category of punishment for juveniles. Punishment is defined as "[a] sanction—such as a fine, penalty, confinement, or loss of property, right, or privilege—assessed against a person who has violated the law." *Black's Law Dictionary* 1353 (9th ed. 2009). And Black's Law Dictionary cross-references "punishment" with "sentence," which is defined as "[t]he judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer a sentence of 20 years in prison." *Id.* at 1485. *Miller* did not prohibit the punishment of life imprisonment without the possibility of parole for juvenile offenders, but only the mandatory procedure by which that punishment had been imposed. 132 S. Ct. at 2469. The attempt

> of Judge Barkett's dissent to define the word "punishment" to include a "mandatory life sentence" is contrary to the ordinary legal meaning of that word. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 73 (2012) ("[W]hen the law is the subject, ordinary legal meaning is to be expected ...."). A juvenile offender who serves a life sentence without the possibility of parole imposed under a mandatory sentencing scheme receives the same punishment as a juvenile offender who serves a life sentence without the possibility of parole imposed under a discretionary sentencing scheme.

Morgan, 717 F.3d at 1192 (Pryor, J., respecting the denial of rehearing en banc); *see also Ex parte Maxwell,* 424 S.W.3d at 77 (Keasler, J., dissenting ("I am unaware of any defendant being sentenced to 'mandatory life without parole,' at least not in Texas. The sentence is life without parole.")).

Some courts have concluded that *Miller* established a substantive rule because the sentencer must now have the discretion to impose a range of sentences, including those with the possibility of parole. However, expanding the range of sentencing options does not fall within this Court's definition of a substantive rule. This Court has unequivocally held that substantive rules will require that a defendant "face a punishment that the law cannot impose upon him." *Summerlin,* 542 U.S. at 352 (citations omitted); *see also Penry,* 492 U.S. at 330. This argument does not fall within this Court's description of a substantive rule because a juvenile who commits murder may still be subject to life without parole, consistent with *Miller* and the Eighth Amendment.

The sole mechanism for the Petitioner to obtain success is for this Court to overrule *Teague*'s definition of finality. If "[f]inality in the criminal law is an end which must always be kept in plain view," changing finality's very definition would blur it. *Mackey,* 401 U.S. at 690 (Harlan J., concurring in judgments in part and dissenting in part) (citations omitted). The *Teague* Court recognized that "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [collateral] proceeding, new constitutional commands." 489 U.S. at 310 (citations omitted). That frustration is increased when courts have not only faithfully applied existing constitutional law but have likewise faithfully interpreted this Court's definition of finality, only for the definition of finality to change.[16] This Court significantly changed its retroactivity analysis in *Linkletter v. Walker,* 381 U.S. 618 (1965).[17] Less than twenty-five years later, that standard of finality was replaced by *Teague.* 489 U.S. at

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[16] Justice Harlan opined:

> At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all.

Mackey v. United States, 401 U.S. 667, 690–91 (1971) (Harlan, J., concurring in judgments in part and dissenting in part); *Teague,* 489 U.S. at 321 n.3.

[17] The concept of finality has remained fluid throughout the history of this republic. From the founding through the 1950s, habeas corpus relief only applied to a criminal defendant's case that had become final where a state court judgment lacked jurisdiction. *Danforth,* 552 U.S. at 271–72 n.6; *see, e.g., Harlan v. McGourin,* 218 U.S. 442, 447 (1910). Although this concept remained consistent throughout that period of time, the scope of questions that went to the jurisdiction of the court of conviction has crept constantly and steadily, covering more and more ground. *Danforth,* 552 U.S. at 271–72 n.6. The concept of jurisdiction eventually became a "fiction" by the middle of the twentieth century and was dropped altogether. *Id.* at 272 n.7 (citation omitted). Throughout the 1950s and until 1965, "'[n]ew' constitutional rules of criminal procedure were, without discussion or analysis, routinely applied to cases on habeas review." *Danforth,* 552 U.S. at 272.

301.[18] To again alter the test of finality would understandably frustrate the interest in finality that all share: "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." *Mackey,* 401 U.S. at 691 (Harlan, J., concurring in judgments in part and dissenting in part); *see also Teague,* 489 U.S. at 309.

In the instant matter, the Louisiana Supreme Court exhibited "conceptual faithfulness" as well as "decisional obedience" to this Court's opinions. *Desist v. United States,* 394 U.S. 244, 265 n.5 (1969) (Harlan, J., dissenting) (citation omitted). It determined that "because the *Miller* Court, like the Court in *Summerlin,* merely altered the *permissible methods* by which the State could exercise its continuing power, in this case to punish juvenile homicide offenders by life imprisonment without the possibility of parole, we find its ruling is procedural, not substantive in nature." *Tate,* 130 So. 3d at 838 (emphasis in original and footnote omitted). This Court should affirm the Louisiana Supreme Court's decision.

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[18] This Court correctly pointed out that at least the *Teague* standard has been an improvement over the "confusing 'retroactivity' cases decided in the years between 1965 and 1987." *Danforth,* 552 U.S. at 271.

IV. THE PRECEDENT UNDERLYING *MILLER* DOES NOT MAKE *MILLER* RETROACTIVE.

Others have argued before this Court that the "strands of precedent" referenced by this Court demand a finding of retroactivity in *Miller*. This is not the case. *Teague* and its progeny have never recognized that the retroactivity of precedent that underlies a new rule of constitutional law affects the eventual retroactivity of the newly-announced rule.

The first strand of precedent discussed by the *Miller* Court principally involved *Graham v. Florida* and *Roper v. Simmons*. Both *Graham* and *Roper* are retroactive because they established categorical bans on a particular sentence: *Graham* banned life without parole for non-homicide crimes committed by juveniles, and *Roper* banned the death penalty for all crimes committed by juveniles. *Graham v. Florida*, 560 U.S. 48, 75 (2010) (noting that "[c]ategorical rules tend to be imperfect, but one is necessary here"); *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (describing the rule announced as "categorical").[19] These cases are retroactive by virtue of *Teague* precisely because they announced, categorically, the end of the imposition of a particular punishment on a certain class of persons. *See, e.g., In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (noting that *Graham*, *Roper*, and *Atkins* are retroactive because they prohibit a certain category of punishment for a certain class of defendants because of their status or offense) (citing *Penry*, 492 U.S. at 330). The same is not true for *Miller*; as the *Miller* Court stated,

[19] *Miller*, 132 S. Ct. at 2463–67.

"[o]ur decision does not categorically bar a penalty for a class of offenders or type of crime." 132 S. Ct. at 2471. Life without the possibility of parole remains a legal sentence for juvenile murderers, distinguishing *Miller* from *Roper* and *Graham*.

The second strand of precedent discussed by the *Miller* Court involved capital punishment cases that demanded individualized sentencing. *Id.* at 2463–64, 2467. Retroactivity of the underlying precedent leading to the announcement of a new constitutional rule has no effect on the new rule's retroactivity. None of the individualized sentencing capital cases discussed in *Miller* have been declared retroactive pursuant to *Teague*. *See Carp*, 852 N.W.2d at 827–29 ("Carp has not succeeded in demonstrating that any of the individualized sentencing capital-punishment cases, i.e., *Furman, Woodson, Lockett, Eddings*, or *Sumner*, have been applied retroactively under *Teague*.").[20]

V. PRACTICAL CONSIDERATIONS COUNSEL NON-RETROACTIVITY.

Finally, this Court must consider the practical effect of a declaration of retroactivity. The *Miller* Court stated that the sentencer must have the ability to consider the "mitigating qualities of youth." 132 S. Ct. at 2467 (citation omitted). The chronological fact of youth is easy to determine in any

[20] The Court in *Carp* also noted that "[n]either defendants nor the dissent has identified a single Supreme Court decision that has ever concluded that a noncategorical rule is entitled retroactive application under the first of *Teague's* two exceptions to the general rule of nonretroactivity." 852 N.W.2d at 827 n.16. Petitioner will not be able to produce such a case either.

case, regardless if a defendant is convicted soon after the crime occurs or many years later. But this Court has clarified that "youth is more than a chronological fact" and that "'[j]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered' in assessing his culpability." *Id.* (citations omitted). Assessing culpability by this standard presents a "great difficulty," regardless of the amount of time that has passed between the crime and sentencing. *See id.* at 2469. This "great difficulty" will necessarily be compounded when determining the culpability of offenders to whom *Miller* unquestionably applies—those convictions and sentences not yet final on June 25, 2012. Expanding the class of offenders will only exacerbate the burden on the States.

For example, the instant case was a cold case, solved many years after the crime—in other words, long after the Petitioner was no longer a juvenile. Cold cases are increasingly becoming a common phenomenon. *See, e.g.*, *Maryland v. King*, -- U.S. --, 133 S. Ct. 1958, 1973 (2013). The State asks that this Court consider that the length of time between the commission of the crime and sentencing--here, twenty-two years—will further compound the difficulty in reliably determining whether the Petitioner is deserving of a life sentence without parole. In the typical homicide case, quite a bit of information about the defendant will be collected at the time of the crime,

usually providing a wealth of details. The focus of the police was not on the Petitioner when this crime occurred, however, making a reliable picture of this Petitioner's juvenility that much more difficult to present, particularly thirty years after the fact. In addition to the loss of physical evidence in this case, witnesses' memories have also likely faded.

Juvenile murderers were convicted and sentenced years (and in many cases, decades) prior to *Miller* in a manner consistent with the Eighth Amendment as it was interpreted at that time. Justice Harlan's observation in *Mackey* is very prescient:

> This drain on society's resources [by the grant of habeas relief] is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.

401 U.S. at 691 (Harlan, J., concurring in judgments in part and dissenting in part) (citation omitted).

In this case, a hearing under Louisiana's *Miller* statute cannot produce a reliable picture of the circumstances of the offense (beyond the evidence presented at the trials), the impact of the offense on those persons affected most by the crime, or the character of the offender for a crime that occurred in 1985. The outcome of such a hearing may be determined by which group of lawyers presents stale facts more effectively.

statute [LA. CODE CRIM. PROC. art. 878.1.] will be the vehicle by which those already in jail would gain access." *Id.* at 844, n.5.

CONCLUSION

The petition for writ of certiorari should be granted and the Louisiana Supreme Court should be affirmed.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

No. 14-6673

RODNEY TOLLIVER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent,

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 7,500 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 23, 2014.

Colin Clark, Counsel of Record