No. 131385

In the Supreme Court of Virginia

At Richmond

Donte Lamar Jones, #1165814
Appellant,

v.

Commonwealth of Virginia,
Appellee.

Upon a Motion to Vacate Invalid Sentence from the Circuit Court for the County of York

Criminal Case No. CR943489

Brief of Juvenile Law Center *et al.* as *Amici Curiae*

in Support of Appellant Donte Lamar Jones

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I. INTEREST AND IDENTITY OF *AMICI CURIAE*

The organizations submitting this brief work on behalf of adolescents in a variety of settings, including adolescents involved in the juvenile and criminal justice systems. *Amici* are advocates and researchers who have a wealth of experience and expertise in providing for the care, treatment, and rehabilitation of youth in the child welfare and justice systems. *Amici* know that youth who enter these systems need extra protection and special care. *Amici* understand from their collective experience that adolescent immaturity manifests itself in ways that implicate culpability, including diminished ability to assess risks, make good decisions, and control impulses. *Amici* also know that a core characteristic of adolescence is the capacity to change and mature. For these reasons, *Amici* believe that youth status separates juvenile and adult offenders in categorical and distinct ways that warrant distinct treatment under the Eighth Amendment. *See* Appendix for a list and brief description of all *Amici*.

II. CONSENT OF THE PARTIES

Pursuant to Virginia Supreme Court Procedural Rules 5:4(a) and 5:30, counsel for *Amici Curiae* sought the consent of the parties. Appellant Jones consents to the filing of this *Amicus* Brief (see the proof of written consent enclosed with this brief). However, at the time of filing, counsel for *Amici* had not received a written response from counsel for the Commonwealth giving notice of their consent or non-consent. Therefore, *Amici* cannot advise the Court of whether or not the Commonwealth consents to the filing of its brief. Accordingly, pursuant to Rule 5:30, *Amici Curiae* Juvenile Law Center *et al.* have filed an accompanying motion asking the Court's leave to file this brief.

III. STATEMENT OF THE CASE AND THE FACTS

Amici incorporate by reference the Statement of the Case and the Facts in the Appellant's opening brief.

IV. ASSIGNMENTS OF ERROR

Amici incorporate by reference the Assignments of Error in the Appellant's opening brief.

V. STANDARD OF REVIEW

Amici incorporate by reference the Standard of Review in the Appellant's opening brief.

VI. SUMMARY OF ARGUMENT

In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the United States Supreme Court held that the mandatory imposition of life without parole sentences on juvenile offenders is unconstitutional. Instead, *Miller* requires that a sentencer make an individualized determination of the juvenile's level of culpability, taking into account the unique characteristics associated with his young age. When Appellant Donte Lamar Jones was convicted of murder for offenses he committed as a juvenile, he received a mandatory life without parole sentence which, pursuant to *Miller*, is unconstitutional.

Miller applies retroactively to Appellant Jones and to other cases that have become final after the expiration of the period for direct review. First, the United States Supreme Court has already applied *Miller* retroactively by affording relief in Kuntrell Jackson's case, which was before the Court on collateral review. Second, *Miller* announced a substantive rule, which pursuant to Supreme Court precedent applies retroactively. Third, *Miller* is a watershed rule of criminal procedure that applies retroactively. Fourth, *Miller* must be applied retroactively because, once the Court determines that a punishment is cruel and unusual when imposed on a child, any continuing imposition of that sentence is itself a violation of the Eighth Amendment; an arbitrary date on the calendar cannot deem a sentence

constitutional which the United States Supreme Court has now declared cruel and unusual punishment. Finally, Appellant's interest in receiving a constitutional sentence far outweighs the Commonwealth's interest in finality.

VII. ARGUMENT

A. The U.S. Supreme Court Has Repeatedly Held That Children Are Categorically Less Deserving Of The Harshest Forms Of Punishment

In *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama,* 132 S. Ct. 2455 (2012), the U.S. Supreme Court recognized that children are fundamentally different from adults and categorically less deserving of the harshest punishments.[1]

Relying on *Roper*, the U.S. Supreme Court in *Graham* cited three essential characteristics which distinguish youth from adults for culpability purposes: "As compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 569-70). *Graham* found that "[t]hese salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate

[1] *Roper* held that imposing the death penalty on juvenile offenders violates the Eighth Amendment, 543 U.S. at 578; *Graham* held that life without parole sentences for juveniles convicted of non-homicide offenses violate the Eighth Amendment, 560 U.S. at 82; and *Miller* held that mandatory life without parole sentences imposed on juveniles convicted of homicide offenses violate the Eighth Amendment, 132 S. Ct. at 2469.

yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.'" *Graham,* 560 U.S. at 68. (quoting Roper, 543 U.S. at 569, 573). The Court concluded that "[a] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" *Graham,* 560 U.S. at 68 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

The *Graham* Court found that because the personalities of adolescents are still developing and capable of change, an irrevocable penalty that afforded no opportunity for release was developmentally inappropriate and constitutionally disproportionate. The Court further explained that:

> Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U.S. at 570. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*

Id. The Court's holding rested largely on the incongruity of imposing a final and irrevocable penalty on an adolescent, who had capacity to change and grow.

In reaching these conclusions about a juvenile's reduced culpability, the U.S. Supreme Court has relied upon an increasingly settled body of research confirming the distinct emotional, psychological and neurological attributes of youth. The Court clarified in *Graham* that, since *Roper*, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 560 U.S. at 68. Thus, the Court underscored that because juveniles are more likely to be reformed than adults, the "status of the offenders" is central to the question of whether a punishment is constitutional. *Id*. at 68-69.

The U.S. Supreme Court in *Miller* expanded its juvenile sentencing jurisprudence, banning mandatory life without parole sentences for children convicted of homicide offenses. Reiterating that children are fundamentally different from adults, the Court held that, prior to imposing such a sentence on a juvenile offender, the sentencer must take into account the juvenile's reduced blameworthiness. *Miller*, 132 S. Ct. at 2460. Justice Kagan, writing

for the majority in *Miller*, was explicit in articulating the Court's rationale for its holding: the mandatory imposition of sentences of life without parole "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." *Id*. (quoting *Graham*, 560 U.S. at 68, 74). The Court grounded its holding "not only on common sense . . . but on science and social science as well," *Miller*, 132 S. Ct. at 2464, which demonstrate fundamental differences between juveniles and adults. The Court noted "that those [scientific] findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Id.* at 2464-65 (quoting *Graham*, 560 U.S. at 68-69); *see also Roper*, 543 U.S. at 570).

Importantly, the *Miller* Court found that none of what *Graham* "said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." 132 S. Ct. at 2465. The Court instead emphasized "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on

juvenile offenders, even when they commit terrible crimes." *Id*. As a result, it held in *Miller* "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," *id.* at 2469, because "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467.

B. *Miller v. Alabama* Applies Retroactively Pursuant to U.S. Supreme Court Precedent

United States Supreme Court precedent requires that *Miller* be applied retroactively. True justice should not depend on a particular date on the calendar. Nowhere is this principle steelier than in the Eighth Amendment's ban on cruel and unusual punishments. As Justice Harlan wrote: "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey v. United States,* 401 U.S. 667, 693 (1971) (Harlan, J., concurring). The U.S. Supreme Court's decisions interpreting the Eighth Amendment mark our nation's progress as a civilized society; once the Court sets down a marker along the continuum of our evolving standards of decency, all affected must benefit. To deny retroactive substantive application of *Miller* would compromise our justice system's consistency and legitimacy.

1. *Miller* Is Retroactive Because Kuntrell Jackson Received The Same Relief On Collateral Review

The Supreme Court's decision in *Miller* involved two juveniles, Evan Miller, petitioner in *Miller*, and Kuntrell Jackson, the petitioner in Miller's companion case, *Jackson v. Hobbs*. Kuntrell Jackson was sentenced to life imprisonment without parole and the Arkansas Supreme Court affirmed his conviction in 2004. *Jackson v. State*, 194 S.W.3d 757 (Ark. 2004). Having been denied relief on collateral review as well, Jackson filed a petition for certiorari; the U.S. Supreme Court granted certiorari in both Miller's and Jackson's cases and ordered that they be argued together. *Jackson v. Hobbs*, 132 S. Ct. 548 (2011); *Miller v. Alabama*, 132 S. Ct. 548 (2011). In its consolidated decision in *Miller* and *Jackson*, the U.S. Supreme Court vacated the judgments of sentences in both cases and remanded each for further proceedings. *Miller,* 132 S. Ct. at 2475.

Having granted relief to Jackson on collateral review, the Supreme Court's ruling should be deemed retroactive. In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court noted that the fair administration of justice requires that similarly situated defendants be treated similarly. *Id.* at 315-16. *See also Tyler v. Cain*, 533 U.S. 656, 663 (2001) ("The new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by

the actions of the Supreme Court."). Appellant here should likewise benefit from the Supreme Court's ruling in *Miller*.

2. *Miller* Applies Retroactively Pursuant To *Teague v. Lane*

In *Teague v. Lane*, the U.S. Supreme Court held that a new Supreme Court rule applies retroactively to cases on collateral review only if it is: (a) a substantive rule; or (b) a "watershed" rule of criminal procedure. 489 U.S. at 307, 311. *See also Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). Because *Miller* announced a new substantive rule or, in the alternative, a "watershed" procedural rule, *Miller* applies retroactively.

a. *Miller* Is Retroactive Because It Announced A Substantive Rule That Categorically Prohibits The Imposition Of Mandatory Life Without Parole On All Juvenile Offenders

The U.S. Supreme Court has held that "[n]ew *substantive* rules generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). A new rule is "substantive" if it "alters the range of conduct or the class of persons that the law punishes." *Id.* at 353. New substantive "rules apply retroactively because they 'necessarily carry a significant risk that a defendant' . . . faces a punishment that the law cannot impose upon him." *Id.* at 352 (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)). A new rule is substantive if it "'prohibit[s] a certain category of punishment for

a class of defendants because of their status or offense.'" *Saffle v. Parks*, 494 U.S. 484, 494 (1990) (quoting *Penry v. Lynaugh,* 492 U.S. 302, 329, 330 (2002), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002)).

The new rule announced in *Miller* is substantive and therefore retroactive, because Appellant is now serving a punishment – mandatory life without parole – that, pursuant to *Miller*, the law can no longer impose on them. *See Schriro*, 542 U.S. at 352. [2] Like the rules announced in

[2] Notably, the United States Department of Justice has taken a uniform position that *Miller* is, indeed, retroactive. *See, e.g.*, Gov't's Resp. to Pet'r's App. for Authoriz. to File a Second or Successive Mot. Under 28 U.S.C. § 2255 at 18, *Johnson v. United States*, 720 F.3d 720 (8th Cir. 2013) (No. 12-3744) (explaining that "*Miller* should be regarded as a substantive rule for *Teague* purposes under the analysis in Supreme Court cases."); Letter from the Gov't to the Clerk of Court, United States Court of Appeals for the Second Circuit, dated July 3, 2013 at 1, *Wang v. United States*, No. 13-2426 (2d Cir.) (explaining that "at least for purposes of leave to file a successive petition, *Miller* applies retroactively . . . under the law of this Circuit."); Gov't's Resp. to Pet'r's Mot. for Recons. of Order Den. Mot. for Leave to File a Second Mot. Purs. to 28 U.S.C. § 2255 at 10-11, *Stone v. United States*, No. 13-1486 (2d Cir. 2013) (explaining that "*Miller's* holding that juvenile defendants cannot be subjected to a mandatory life-without-parole sentence is properly regarded as a substantive rule" because *Miller* "alters the range of sentencing options for a juvenile homicide defendant"); Gov't's Resp. to Pet'r's App. for Authoriz. to File a Second or Successive Mot. Under 28 U.S.C. § 2255 at 13-14, *Williams v. United States*, No. 13-1731 (8th Cir. 2013) (explaining that rules that "categorically change the range of outcomes" for a defendant should be treated as substantive rules and, therefore, *Miller* announced a new substantive rule for retroactivity purposes); Resp. of the United States to Pet'r's App. for Authoriz. to File a Second or Successive Mot. Under 28 U.S.C. § 2255 at 8-15, *In re Corey*

Atkins, *Roper* and *Graham*, which have all been applied retroactively,[3] *Miller* "prohibit[s] a certain category of punishment" – mandatory life imprisonment without the possibility of parole – "for a class of defendants," – juvenile homicide offenders. *Horn v. Banks*, 536 U.S. 266, 271 n.5 (2002).

Miller holds that, prior to imposing a life without parole sentence on a juvenile, the sentencer must consider factors that relate to the youth's overall culpability. These factors include: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks

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Grant, No. 13-1455 (3d. Cir. June 17, 2013) (arguing that *Miller's* new rule is substantive).

[3] Courts across the country have applied *Atkins* retroactively. *See, e.g.*, *Morris v. Dretke*, 413 F.3d 484, 487 (5th Cir. 2005); *Black v. Bell*, 664 F.3d 81, 92 (6th Cir. 2011); *Allen v. Buss*, 558 F.3d 657, 661 (7th Cir. 2009); *Davis v. Norris*, 423 F.3d 868, 879 (8th Cir. 2005); *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003). Similarly, *Roper* and *Graham*, two cases upon which *Miller* relies, have been applied retroactively. *See Loggins v. Thomas*, 654 F.3d 1204, 1206 (11th Cir. 2011) (noting *Roper* applied retroactively); *Lee v. Smeal*, 447 F. App'x 357, 359 n.2 (3d Cir. 2011) (unpublished) (same); *Horn v. Quarterman*, 508 F.3d 306, 308 (5th Cir. 2007) (same); *LeCroy v. Sec'y, Florida Dept. of Corr*., 421 F.3d 1237, 1239 (11th Cir. 2005) (same); *See also In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (holding *Graham* was made retroactive on collateral review); *Bonilla v. State*, 791 N.W.2d 697, 700-01 (Iowa 2010) (holding *Graham* applies retroactively); *In re Evans*, 449 Fed. App'x 284 (4th Cir. 2011) (per curiam) (unpublished) (noting Government "properly acknowledged" *Graham* applies retroactively on collateral review); *State v. Dyer*, 77 So. 3d 928, 929 (La. 2011) (per curiam); *Rogers v. State*, 267 P.3d 802, 804 (Nev. 2011) (noting that district court properly applied *Graham* retroactively).

and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." 132 S. Ct. at 2468-69.

The fact that *Miller* imposed new factors that a sentencer must consider before imposing juvenile life without parole sentences necessitates a finding that *Miller* announced a substantive rule. The Supreme Court's refusal to hold *Ring v. Arizona*, 536 U.S. 584 (2002), retroactive in *Schriro v. Summerlin*, 542 U.S. at 358, illustrates this point. In *Ring,* the U.S. Supreme Court had held that the Sixth Amendment requires a jury, rather than a judge, to find the aggravating factors essential to imposition of the death penalty. In *Schriro*, the Court distinguished between *procedural* rules in which the Supreme Court determines who must make certain findings before a particular sentence could be imposed with *substantive* rules in which the U.S. Supreme Court itself establishes that certain factors are required before a particular sentence could be imposed:

> [the U.S. Supreme] Court's holding that, *because Arizona* has made a certain fact essential to the

> death penalty, that fact must be found by a jury, is not the same as [*the U.S. Supreme*] *Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.

542 U.S. at 354. Because *Miller* 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," *Miller*, 132 S. Ct. at 2469, the U.S. Supreme Court has made consideration of certain factors "essential" to imposing life without parole on juveniles. As directed by *Schriro*, *Miller* is a substantive rule.

Additionally, mandatory life without parole sentences are substantively distinct and much harsher than alternative sentencing schemes in which life without parole is, at most, a discretionary alternative. Most recently, in *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013), the U.S. Supreme Court stated that "[m]andatory minimum sentences increase the penalty for a crime." The Court described a sentence with a mandatory minimum as "a new penalty," *id*. at 2160, finding it "impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Id*. The Court explained that "[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime." *Id*. at 2161. *Alleyne* makes clear that a *mandatory* life without parole sentence is

substantively different from a *discretionary* life without parole sentence; it is substantively harsher, more aggravated, and implicates a more heightened loss of liberty.

As clarified by *Alleyne* and *Schriro*, *Miller* did not simply require that certain factors uniquely relevant to youth be considered before a juvenile can receive life without parole—it in fact *expanded* the range of sentencing options available to juveniles by prohibiting mandatory life without parole and requiring that *additional* sentencing options be put in place. This is a fundamental change in sentencing for juveniles that goes well beyond a change in a procedural rule.

Because *Miller* relies on a new, substantive interpretation of the Eighth Amendment that recognizes that children are categorically less culpable than adults, and because sentencers must consider how these differences mitigate against imposing life without parole sentences, the decision must be applied retroactively. Jones is entitled to be resentenced pursuant to a sentencing scheme that comports with *Miller*'s constitutional mandates – one that is proportionate and individualized.

b. *Miller* Is Retroactive Because It Involves A Substantive Interpretation Of The Eighth Amendment Based Upon The Supreme Court's Evolving Understanding Of Child And Adolescent Development

The Supreme Court consistently has recognized that a child's age is

far “more than a chronological fact,” and has recently acknowledged that it bears directly on children’s constitutional rights and status in the justice system. *See, e.g.*, *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (citations omitted). *Roper*, *Graham*, and *Miller* have enriched the Court’s Eighth Amendment jurisprudence with scientific research confirming that youth merit distinctive treatment. *See Roper*, 543 U.S. at 569-70 (explaining that “[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders” (citing Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339 (1992); Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003))); *Graham*, 560 U.S. at 68 (reiterating that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”); *Miller*, 132 S. Ct. at 2464 n.5 (“[t]he evidence presented to us in these cases indicates that the science and social science supporting *Roper*’s and *Graham*’s conclusions have become even stronger.”).

This understanding that juveniles, as a class, are less culpable than adult offenders is central to the Court’s holding in *Miller,* 132 S. Ct. at 2469,

and reflects a substantive change in children's rights under the Eighth Amendment. As previously described, to ensure that the sentencing of juveniles is constitutionally appropriate, *Miller* requires that, prior to imposing a life without parole sentence on a juvenile offender, the sentencer must consider the factors that relate to the youth's overall culpability and capacity for rehabilitation. 132 S. Ct. at 2468-69. *Miller* therefore requires a substantive, individualized assessment of the juvenile's culpability prior to imposing life without parole.

In requiring individualized sentencing in adult capital cases, the Supreme Court stated that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a *constitutionally indispensable* part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (emphasis added) (internal citation omitted). Since *Miller* acknowledges that life without parole sentences for juveniles are "akin to the death penalty" for adults, 132 S. Ct. at 2466, *Miller*'s requirement of individualized consideration of a youth's lessened culpability and potential for rehabilitation is similarly "constitutionally indispensable" and reflects a new substantive requirement in juvenile sentencing.

Indeed, by directly comparing a juvenile sentence of life imprisonment without parole to a death sentence, the U.S. Supreme Court's death penalty jurisprudence is instructive in answering the instant retroactivity question. Of particular relevance are the Supreme Court's decisions in *Woodson*, 428 U.S. 280 (1976) (plurality opinion), *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion) and *Sumner v. Shuman,* 483 U.S. 66 (1987). *Woodson*, in fact, was repeatedly relied upon by the *Miller* Court. *See Miller*, 132 S. Ct. at 2464, 2467, 2471.

In *Woodson, Roberts*, *and Shuman*, the Supreme Court held that a mandatory death penalty was a violation of the Eighth Amendment because it did not permit the sentencer to weigh appropriate factors in determining the proper sentence. "The mandatory death penalty statute in *Woodson* was held invalid because it permitted *no* consideration of 'relevant facets of the character and record of the individual offender or the circumstances of the particular offense.'" *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original) (citing *Woodson*, 428 U.S. at 304). In *Lockett*, the Supreme Court held that "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Id*. at 608.

This reasoning is similarly apt to mandatory juvenile life without parole: "By removing youth from the balance – by subjecting a juvenile to the same life-without-parole sentence applicable to an adult – these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Miller*, 132 S. Ct. at 2466. As the Supreme Court held in *Johnson v. Texas*, 509 U.S. 350 (1993), "There is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of *Lockett* and *Eddings*." *Id.* at 367.

Woodson, *Roberts, Lockett* and *Eddings* have been held retroactive (as should *Miller*) either as a "categorical ban on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty" or because the offending statute barred consideration of the relevant characteristics of the defendant and the offense. *Miller*, 132 S. Ct. at 2463-64. *See, e.g.*, *Songer v. Wainwright*, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc) (per curiam) (applying *Lockett* retroactively); *Harvard v. State*, 486 So.2d 537, 539 (Fla. 1986) (same); *Shuman v. Wolff*, 571 F. Supp. 213, 216 (D. Nev. 1983) (*Eddings* applied retroactively).

The language of *Miller* demonstrates that the rule announced was not considered a mere procedural checklist, but a substantive shift in juvenile sentencing. The Court found:

> But 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*. . . . Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, *we require it to 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 (emphasis added). The Court's finding that appropriate occasions for juvenile life without parole sentences will be "uncommon" and that the sentencer must consider how a child's status counsels against sentencing *any* child to life without parole underscores that *Miller* substantively altered sentencing assumptions for juveniles – from a pre-*Miller* constitutional tolerance for mandated juvenile life without parole sentences to a post-*Miller* environment in which even discretionary juvenile life without parole sentences are constitutionally suspect. *See, e.g.*, *State v. Mantich*, 287 N.W.2d 716, 730 (Neb. 2014), *petition for cert. filed,* No. 13-1348 (U.S. May 5, 2014) (describing *Miller* as substantive "because it sets forth the general rule that life imprisonment without parole should not be imposed upon a juvenile except in the rarest of cases where

that juvenile cannot be distinguished from an adult based on diminished capacity or culpability.").

c. *Miller* Is A "Watershed Rule" Under *Teague*

As discussed above, *Miller* must be applied retroactively pursuant to *Teague* because it is a substantive rule. *Miller* must also be applied retroactively pursuant to *Teague*'s second exception, which applies to "watershed rules of criminal procedure" and to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313. This occurs when the rule "requires the observance of 'those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Id.* at 307 (alteration in original) (internal citations omitted). To be "watershed[,]" a rule must first "be necessary to prevent an impermissibly large risk" of inaccuracy in a criminal proceeding and, second, "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 citations omitted). The Supreme Court has recognized that sentencing is a critical component of the trial process, and thus directly affects the accuracy of criminal trials. *See, e.g.*, *Witherspoon v. Illinois*, 391 U.S. 510, 523 n.22 (1968) (retroactively applying a decision on a jury selection process that related to sentencing because it

"necessarily undermined 'the very integrity of the . . . process' that decided the [defendant's] fate." (alteration in original) (internal citation omitted)).

Miller satisfies both requirements. First, mandatory life without parole sentences cause an "impermissibly large risk" of *inaccurately* imposing the harshest sentence available for juveniles. *Whorton*, 549 U.S. at 418. The automatic imposition of this sentence with no opportunity for individualized determinations precludes consideration of the unique characteristics of youth – and of each individual youth – which make them "constitutionally different" from adults. *Miller*, 132 S. Ct. at 2464. *See also id.* at 2469 (explaining that imposing mandatory life without parole sentences "poses too great a risk of disproportionate punishment."). By requiring that specific factors be considered before a court can impose a life without parole sentence on a juvenile, *Miller* alters our understanding of what bedrock procedural elements are necessary to the fairness of such a proceeding. *See id.* (requiring sentencing judges "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."). Indeed, some state appellate courts have adopted this analysis. *See, e.g.*, *People v. Williams*, 982 N.E.2d 181, 196, 197 (Ill. App. Ct. 2012) (granting petitioner the right to file a successive post-conviction petition because *Miller* is a "watershed rule," and at his pre-

Miller trial, petitioner had been "denied a 'basic 'precept of justice'' by not receiving any consideration of his age from the circuit court in sentencing," and finding that "*Miller* not only changed procedures, but also made a substantial change in the law."), *abrorgated by People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014) (holding *Miller* to be "a new substantive rule"). Moreover, *Miller's* admonition – and expectation – that juvenile life without parole sentences will be "uncommon" upon consideration of youth and its "hallmark attributes" explicitly undermines the accuracy of life without parole sentences imposed pre- *Miller* – the very sentences at issue in this appeal.

3. Having Declared Mandatory Life without Parole Sentences Cruel And Unusual When Imposed On Juvenile Homicide Offenders, Allowing Juvenile Offenders To Continue To Suffer That Sentence Violates The Eighth Amendment

The boundaries of the Eighth Amendment are dynamic and constantly evolving. "The [Supreme] Court recognized . . . that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). The Court has thus recognized that "a penalty that was permissible at one time in our Nation's history is not necessarily permissible

today." *Furman v. Georgia*, 408 U.S. 238, 329 (1972) (Marshall, J., concurring).

In recent years, Eighth Amendment jurisprudence has evolved with extraordinary speed in the context of juvenile sentencing. Prior to the Court's 2005 decision in *Roper*, juvenile offenders could be executed. Less than a decade later, not only the death penalty, but life without parole sentences for children are constitutionally disfavored. *See Miller*, 132 S. Ct. at 2469 ("[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty [life without parole] will be uncommon."). This evolution in Eighth Amendment jurisprudence has been informed by brain science and adolescent development research that explains why children who commit crimes are less culpable than adults, and how youth have a distinctive capacity for rehabilitation. *See* Section VII. A., *supra*. In light of this new knowledge, the Court has held in *Roper*, *Graham*, and *Miller* that sentences that may be permissible for adult offenders are unconstitutional for juvenile offenders. *See, e.g., Miller,* 132 S. Ct. at 2465 ("In [*Graham*], juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime.").

While this understanding of adolescent development was not fully incorporated into Eighth Amendment jurisprudence when Appellant Jones'

direct appeal rights were exhausted, this does not change the fact that Jones, as well as all other juveniles sentenced pre-*Miller*, are categorically less culpable than adults convicted of homicide and therefore are serving constitutionally disproportionate sentences. *See Miller*, 132 S. Ct. at 2475 (finding "the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment"). Forcing individuals to serve constitutionally disproportionate sentences for crimes they committed as children based on nothing other than the serendipity of the date on which they committed their offenses and their convictions became final runs counter to the Eighth Amendment's reliance on the evolving standards of decency and serves no societal interest. *See Mackey v. United States*, 401 U.S. 667, 692-93 (1971) (Harlan, J., concurring) ("[T]he writ [of habeas corpus] has historically been available for attacking convictions on [substantive due process] grounds. This, I believe, is because it represents the clearest instance where finality interests should yield. There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."). It is both common sense and a fundamental tenet of our justice system that

> the individual who violates the law should be punished to the extent that others in society deem

> appropriate. If, however, society changes its mind, then what was once "just deserts" has now become unjust. And, it is contrary to a system of justice that a rigid adherence to the temporal order of when a statute was adopted and when someone was convicted should trump the application of a new lesser, punishment.

S. David Mitchell, *Blanket Retroactive Amelioration: a Remedy for Disproportionate Punishments*, 40 Fordham Urb.L.J. City Square 14 (2013), *available at* urbanlawjournal.com/?p=1224.

Additionally, depriving the majority of juveniles sentenced to life without parole the benefit of *Miller*'s holding because they have exhausted their direct appeals violates the Eighth Amendment's proscription against the arbitrary infliction of punishments. *See Furman*, 408 U.S. at 256 (Douglas, J., concurring) ("The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and non-arbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."). In his concurring opinion in *Furman*, Justice Brennan found:

> In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause – that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it

> inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments.

Id. at 274 (Brennan, J., concurring). Unless *Miller* is applied retroactively, children who lacked sufficient culpability to justify the life without parole sentences they received will remain condemned to die in prison simply because they exhausted their direct appeals. As the Illinois Appellate Court concluded in finding *Miller* retroactive for cases on collateral review, in addition to mandatory life without parole sentences constituting "cruel and unusual punishment[,]" "[i]t would also be cruel and unusual to apply that principle only to new cases." *Williams*, 982 N.E.2d at 197. *See also Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at *2 (E.D. Mich. Jan. 30, 2013) (proclaiming that "if ever there was a legal rule that should – as a matter of law and morality – be given retroactive effect, it is the rule announced in *Miller*. To hold otherwise would allow the state to impose *unconstitutional* punishment on some persons but not others, an intolerable miscarriage of justice."). The constitutionality of a child's sentence cannot be determined by the arbitrary date his sentence became final. Such a conclusion defies logic, and contravenes Eighth Amendment jurisprudence.

Finally, the U.S. Supreme Court has found that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."

Trop v. Dulles, 356 U.S. 86, 100 (1958). *See also Furman*, 408 U.S. at 270 (Brennan, J., concurring) ("The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings."). The Eighth Amendment's emphasis on dignity and human worth has special resonance when the offenders being punished are children. As Justice Frankfurter wrote over fifty years ago in *May v. Anderson,* 345 U.S. 528, 536 (1953), "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." More recently, the Court has found that:

> [juveniles'] own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. . . . From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Roper, 543 U.S. at 570.

In order to treat Jones – and any other children sentenced to mandatory life without parole sentences seeking collateral review – with the dignity that the Eighth Amendment requires, *Miller* must apply retroactively. "The juvenile should not be deprived of the opportunity to achieve maturity

of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Graham*, 560 U.S. at 79.

4. Appellant's Interest In Receiving A Constitutional Sentence Is More Compelling Than The Commonwealth's Interest In Finality

Even were this Court to determine that *Teague* does not require the retroactive application of *Miller*, this Court is free to evaluate whether concerns with finality outweigh Appellant's interest in serving a constitutional sentence. *See Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) ("[F]inality of state convictions is a *state* interest, not a federal one. It is a matter that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts."). This Court should hold that a defendant's interest in receiving a sentence that comports with the Eighth Amendment outweighs the Commonwealth's interest in finality.

The Commonwealth's interest in finality is less compelling when a defendant challenges only his sentence, and not his underlying conviction. As one commenter has written,

> [C]ourts and scholars analyzing whether and how defendants should be able to attack final criminal

> judgments have too often failed to explore or even recognize that different conceptual, policy and practical considerations are implicated when a defendant seeks only review and reconsideration of his final sentence and does not challenge his underlying conviction.

Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 Wake Forest J.L. & Pol'y 151, 152 (2014).

As Professor Berman notes, "[c]riminal trials are inherently backward-looking, offense-oriented events" and "merely the passage of time . . . provides reason to fear that any new review or reconsideration of backward-looking factual determinations of guilt made during a trial will be costly and inefficient, will be less accurate, and will raise questions about the accuracy and efficacy of criminal trials generally." *Id*. at 167, 170. Sentencings, conversely, are "forward-looking," and therefore

> the passage of time – when societal perspectives on just punishment necessarily evolve, when further evidence concerning an offender's character emerges, and when new governmental and victim interests may enter the picture – can provide reason to *expect* that review or reconsideration of an initial sentence may be an efficient way to save long-term punishment costs, may result in a more accurate assessment of a fair and effective punishment, and may foster respect for a criminal justice system willing to reconsider and recalibrate the punishment harms that it imposes upon its citizens.

Id. at 170. The Commonwealth therefore has a less compelling interest in finality when only the sentence, and not the conviction, is challenged.

Appellant, whose current mandatory life without parole sentence violates the Eighth Amendment of the U.S. Constitution, has a strong and compelling interest in receiving a constitutional sentence. Because the Commonwealth's competing interest in finality is diminished when a defendant challenges only his sentence – and because the Commonwealth's interest in accuracy would be enhanced by allowing resentencing – this Court should hold that Appellant is entitled to be resentenced in accordance with *Miller*.

VIII. CONCLUSION

Sentencing practices that preclude consideration of the distinctive characteristics of individual juvenile defendants are unconstitutionally disproportionate punishments. Requiring individualized determinations in these cases does not require excusing juvenile offending. Juveniles who commit serious offenses should not escape punishment. But the U.S. Supreme Court's recent Eighth Amendment jurisprudence striking particular sentences for juveniles does require that additional considerations and precautions be taken to ensure that the sentence reflects the unique developmental characteristics of adolescents. As the Supreme Court has acknowledged, a child's age is far "'more than a chronological fact.'" *See J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). Virginia must comply with *Miller* and provide individualized sentencing to all individuals serving mandatory juvenile life without parole sentences.

The Supreme Court's decision in *Miller* applies retroactively to cases on collateral review. While this conclusion seems obvious from the Supreme Court's application of *Miller* to Kuntrell Jackson, Petitioner in its companion case, *Jackson v. Hobbs,* this ruling is likewise dictated by the Court's retroactivity analysis in *Teague v. Lane*. Accordingly, this Court

should vacate the Appellant's sentence and remand his case for re-sentencing in accordance with *Miller*.

Respectfully,

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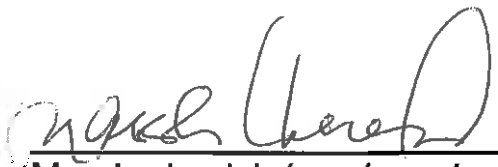

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Dated: May 23, 2014

IX. APPENDIX

IDENTITIES AND INTEREST OF *AMICI*

Founded in 1975 to advance the rights and well-being of children in jeopardy, **Juvenile Law Center (JLC)** is the oldest multi-issue public interest law firm for children in the United States. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential placement facilities or adult prisons, and children in placement with specialized service needs. JLC works to ensure that children are treated fairly by the systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC also works to ensure that children‘s rights to due process are protected at all stages of juvenile court proceedings, from arrest through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

The **Campaign for the Fair Sentencing of Youth (CFSY)** is a national coalition and clearinghouse that coordinates, develops and supports efforts to implement just alternatives to the extreme sentencing of America's youth

with a focus on abolishing life without parole sentences for all youth. Our vision is to help create a society that respects the dignity and human rights of all children through a justice system that operates with consideration of the child's age, provides youth with opportunities to return to community, and bars the imposition of life without parole for people under age eighteen. We are advocates, lawyers, religious groups, mental health experts, victims, law enforcement, doctors, teachers, families, and people directly impacted by this sentence, who believe that young people deserve the opportunity to give evidence of their remorse and rehabilitation. Founded in February 2009, the CFSY uses a multi- pronged approach, which includes coalition-building, public education, strategic advocacy and collaboration with impact litigators--on both state and national levels-to accomplish our goal.

The **Center for Children's Law and Policy (CCLP**) is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. The Center's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. CCLP works locally in DC, Maryland and Virginia and also across the country to reduce racial and ethnic disparities

in juvenile justice systems, reduce the use of locked detention for youth and advocate safe and humane conditions of confinement for children. CCLP helps counties and states develop collaboratives that engage in data driven strategies to identify and reduce racial and ethnic disparities in their juvenile justice systems and reduce reliance on unnecessary incarceration. CCLP staff also work with jurisdictions to identify and remediate conditions in locked facilities that are dangerous or fail to rehabilitate youth.

JustChildren is a child advocacy program of the Legal Aid Justice Center. JustChildren works to make certain that young people receive services and support needed to lead successful lives. Our strategies include individual representation, community education and organizing, and statewide advocacy. From our offices in Charlottesville, Richmond, and Petersburg, we provide free legal representation to low-income children who have unmet needs in the education, foster care, and juvenile justice systems. We also provide training materials for lawyers, parents, and other service providers to help them become informed and skilled advocates. Since 2003, we have worked to reform Virginia's juvenile justice system in such areas as access to counsel, conditions of confinement, juvenile reentry, and juvenile transfer. We also represent youth who have been

convicted as adults and who are serving the first several years of sometimes long adult sentences in a juvenile correctional center before being transferred to an adult facility to serve out the remainder of their sentences. We help them access appropriate educational, therapeutic, and other supportive services while in the facilities, and work with them, their parole officers, and their families to develop appropriate reentry plans that meet their needs for supervision, housing, mental health care, and other needs. This work has demonstrated to us and to the judges who review -- and often reduce -- their sentences before they are transferred to adult facilities that children can change. Boys and girls involved in extensive dangerous behaviors have matured, turned their lives around, and persuaded Virginia judges that they no longer need to serve lengthy adult sentences. JustChildren believes that all children deserve the chance to show that, over time, acts they have committed as children do not necessarily determine the people they become as adults.

Formed in 1997, the **Justice Policy Institute (JPI)** is a policy development and research body which promotes effective and sensible approaches to America's justice system. JPI has consistently promoted a rational criminal justice agenda through policy formulation, research, media events, education and public speaking. Through vigorous public education

efforts, JPI has been featured in the national media. The Institute includes a national panel of advisors to formulate and promote public policy in the area of juvenile and criminal justice. JPI conducts research, proffers model legislation, and takes an active role in promoting a rational criminal justice discourse in the electronic and print media.

Amicus Curiae **National Association of Criminal Defense Lawyers (NACDL)** is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates. NACDL is dedicated to advancing the proper, efficient, and just administration of justice including issues involving juvenile justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal

defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case because the proper administration of justice requires that age and other circumstances of youth be taken into account in order to ensure compliance with constitutional requirements and to promote fair, rational and humane practices that respect the dignity of the individual.

The **National Juvenile Defender Center** was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and the quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. The National Juvenile Defender Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural, and tribal areas. The National Juvenile Defender Center also offers a wide range of Integrated services to juvenile defenders and advocates, including

training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

The **National Juvenile Justice Network (NJJN)** leads and supports a movement of state and local juvenile justice coalitions and organizations to secure local, state and federal laws, policies and practices that are fair, equitable and developmentally appropriate for all children, youth and families involved in, or at risk of becoming involved in, the justice system. NJJN currently comprises forty-three members in thirty-three states, all of which seek to establish effective and appropriate juvenile justice systems. NJJN recognizes that youth are fundamentally different from adults and should be treated in a developmentally appropriate manner that holds them accountable in ways that give them the tools to make better choices in the future and become productive citizens. Youth should not be transferred into the adult criminal justice system where they are subject to extreme and harsh sentences such as life without the possibility of parole, and placed in adult prisons where they are exceptionally vulnerable to rape and sexual assault and have much higher rates of suicide. NJJN supports a growing body of research that indicates the most effective means for addressing youth crime are age-appropriate, rehabilitative, community-based programs that take a holistic approach, engage youth's family

members and other key supports, and provide opportunities for positive youth development.

The **National Legal Aid & Defender Association (NLADA)** is the nation's leading advocate for frontline legal aid and defender attorneys, other equal justice professionals — those who make a difference in the lives of low-income clients, and their families and communities. Representing legal aid and defender programs, as well as individual advocates, NLADA is privileged to be the oldest and largest national, nonprofit membership association devoting 100 percent of its resources to serving the broad equal justice community. NLADA and its members are keenly aware of the need to insure that reduced culpability as a child and subsequent maturation are considered fairly. It follows therefore, that life without parole sentence is disproportionate and inappropriate. *Miller v. Alabama*, 132 S. Ct. 2455 (2012). In the past NLADA has worked with the Campaign for the Fair Sentencing of Youth and the National Association of Criminal Defense Lawyers to highlight the all important responsibility to advocate for opposition to using the pre-*Miller* U.S. Sentencing Guidelines to calculate any child's sentence because the Sentencing Guidelines, if applied, would yield an unconstitutional starting point: namely, a life without parole sentence. While working to continue this and like partnerships

NLADA has worked with Criminal Justice Act Attorneys, federal, and state defenders to establish, develop and maintain accessible resources to better aid in comprehensive advocacy for our juvenile clients involving new scientific and criminological knowledge developed and presented in *Miller.*

The **Youth Law Center** is a San Francisco- based national public interest law firm working to protect the rights of children at risk of or involved in the juvenile justice and child welfare systems. Since 1978, Youth Law Center attorneys have represented children in civil rights and juvenile court cases in California and two dozen other states. The Center's attorneys are often consulted on juvenile policy matters, and have written widely on a range of juvenile justice issues. They are often consulted on important juvenile law issues and have provided research, training, and technical assistance on juvenile policy issues to public officials in almost every state. The Center has long been involved in public policy discussions, legislation, and court challenges involving the treatment of juveniles as adults. Center attorneys were consultants in the John D. and Catherine T. MacArthur Foundation project on adolescent development, and authored a law review article on juvenile competence to stand trial. The Center has participated as *amicus curiae* in cases involving the application of the principles of adolescent culpability set forth in *Roper v.*

Simmons, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010), 130 S. Ct. 2011 (2010); and *Miller v. Alabama*, 132 S. Ct. 2455 (2012). The Center has great interest in assuring that all youth who were subjected to the kinds of mandatory sentencing schemes found unconstitutional in *Miller* may benefit from that holding.

UNPUBLISHED DECISIONS

449 Fed.Appx. 284
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Fourth
Circuit Rule 32.1 (Find CTA4 Rule 32.1)
United States Court of Appeals,
Fourth Circuit.

In re: Ronald EVANS, a/k/
a Freak, a/k/a Man–Man, Movant.

No. 11–194. | Argued: Sept.
21, 2011. | Decided: Oct. 6, 2011.

On Motion for Authorization to File Successive Application. (2:92–cr–00163–5).

Attorneys and Law Firms

ARGUED: Bryan A. Stevenson, Equal Justice Initiative, Montgomery, Alabama, for Ronald Evans. Richard D. Cooke, Assistant United States Attorney, Office of the United States Attorney, Richmond, Virginia, for the United States. **ON BRIEF:** Matthew W. Greene, Greene Law Group PLLC, Springfield, Virginia; Benjamin W. Maxymuk, Equal Justice Initiative, Montgomery, Alabama, for Ronald Evans. Neil H. MacBride, United States Attorney, Alexandria, Virginia, for the United States.

Before WILKINSON, MOTZ, and DAVIS, Circuit Judges.

Opinion

Motion granted by unpublished PER CURIAM opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

After a jury convicted Ronald Evans of six narcotics crimes committed as a juvenile and a criminal conspiracy that extended for some time after his eighteenth birthday, a judge sentenced him to life imprisonment without the possibility of parole. Now, relying on *Graham v. Florida*, —— U.S. ——, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), Evans moves for authorization to file a successive habeas application. *See* 28 U.S.C. § 2255(h)(2). At oral argument, the Government properly acknowledged that in the appropriate case *Graham* establishes a previously unavailable rule of constitutional law that applies retroactively on collateral review. *See* 28 U.S.C. § 2244(b)(3)(C), (2)(A). The Government, however, contends that this is not such a case. Because Evans has made a "prima facie showing" that his "claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," *id.*, we grant his motion for authorization to file a successive habeas application. We of course do not suggest any view on the ultimate merits of Evans' claim.

MOTION GRANTED.

Parallel Citations

2011 WL 4600666 (C.A.4)

2013 WL 364198
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

Henry HILL, et al., Plaintiffs,
v.
Rick SNYDER, et al., Defendants.

No. 10–14568. | Jan. 30, 2013.

Opinion

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' CROSS–MOTION FOR SUMMARY JUDGMENT

JOHN CORBETT O'MEARA, District Judge.

***1** Before the court are cross-motions for summary judgment, which have been fully briefed. The court heard oral argument on September 20, 2012, and took the matter under advisement. For the reasons discussed below, Plaintiffs' motion is granted in part and denied in part, and Defendants' motion is denied.

BACKGROUND FACTS

On November 17, 2010, Plaintiffs filed a complaint challenging the constitutionality of M.C.L. § 791.234(6)(a), which prohibits the Michigan Parole Board from considering for parole those sentenced to life in prison for first-degree murder. Specifically, Plaintiffs seek a declaration the M.C.L. § 791.234(6)(a) is unconstitutional as applied to those who were convicted when they were under the age of eighteen. On July 15, 2011, the court granted Defendants' motion to dismiss, on statute of limitations grounds, as to all Plaintiffs except Keith Maxey. The court found that Maxey could state a claim for relief under the Eighth Amendment. On February 1, 2012, Plaintiffs filed an amended complaint, adding Plaintiffs whose claims are not barred by the statute of limitations . [1]

The United States Supreme Court recently held that mandatory life without parole sentences for juveniles violate the Eighth Amendment's prohibition against cruel and unusual punishment. *Miller v. Alabama*, 132 S.Ct. 2455 (2012). Based upon *Miller*, Plaintiffs seek summary judgment and equitable relief on their Eighth Amendment claim.

LAW AND ANALYSIS

I. *Michigan's Parole Statute Is Unconstitutional as Applied to Juveniles*

In *Miller*, the Court found mandatory life without parole sentencing schemes for juveniles convicted of homicide to be unconstitutional:

> *Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

Miller, 132 S.Ct. at 2475. In this case, each of the Plaintiffs was tried as an adult and convicted of first-degree murder. As a result, they received mandatory life sentences. Pursuant to statute, the parole board lacks jurisdiction over anyone convicted of first-degree murder. M.C.L. § 791.234(6). This statutory scheme combines to create life without parole sentences for those who committed their crimes as juveniles. This type of sentencing scheme is clearly unconstitutional under *Miller*.

II. *MillerApplies Retroactively*

Defendants argue, however, that *Miller* does not apply retroactively. Courts have disagreed whether *Miller* applies retroactively to cases on collateral review. *Compare Craig v. Cain*, 2013 WL 69128 (5th Cir. Jan. 4, 2013) (not retroactive); *People v. Carp*, 2012 WL 5846553 (Mich.App. Nov. 15, 2012) (not retroactive); *Geter v. State*, 2012 WL 4448860 (Fla.App. Sept. 27, 2012) (not retroactive); *with State v. Simmons*, 99 So.3d 28 (La.2012) (allowing for resentencing on collateral review in light of *Miller*); *People v. Morfin*, 2012 WL 6028634 (Ill.App. Nov. 30, 2012) (*Miller* retroactive). This case is not, however, before the

court on collateral review. Rather, Plaintiffs challenge the constitutionality of Michigan's parole statute under § 1983.

***2** "[B]oth the common law and our own decisions" have "recognized a general rule of retrospective effect for the constitutional decisions of this Court." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 94 (1993). "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Id.* at 97. Because *Miller* was decided while this case was pending, its rule applies to the parties before the court.[2] Indeed, if ever there was a legal rule that should—as a matter of law and morality—be given retroactive effect, it is the rule announced in *Miller*. To hold otherwise would allow the state to impose *unconstitutional* punishment on some persons but not others, an intolerable miscarriage of justice.

III. *Relief Sought by Plaintiffs*

The issue here is what type of relief this court can afford to Plaintiffs. In considering this, the court must be mindful of the procedural posture of this case. Plaintiffs have exhausted direct review of their convictions and sentences; they are not seeking a writ of habeas corpus. Rather, they are asking that the court declare M.C.L. § 791.234(6) (the parole statute) unconstitutional under § 1983. The distinction is important because Plaintiffs cannot attack their *sentences* under § 1983; rather, such relief must be obtained in state court or through habeas corpus. Indeed, Plaintiffs were careful to circumscribe their request for relief, emphasizing that they were *not* attacking their sentences, in order to survive Defendants' motion to dismiss. *See* July 15, 2011 Order at 8–9.

For this reason, the court cannot announce a categorical ban on a sentence of life without parole for juveniles, as Plaintiffs now request. *See Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005) ("[A] prisoner in state custody cannot use a § 1983 action to challenge 'the fact or duration of his confinement.' He must seek federal habeas corpus relief (or appropriate state relief) instead.").

Despite the fact that they cannot challenge their sentences here, Plaintiffs suggest in their brief that they are entitled to a "judicial hearing with full consideration of the mitigating circumstances attendant to their child status at the time they committed the offense so that their punishment reflects their lesser culpability and inherent rehabilitation capabilities." Pls.' Br. at 1. In other words, Plaintiffs suggest that they are entitled to re-sentencing. This is not relief that this court can grant in this case. Plaintiffs must seek such relief in state court or, if necessary, through a writ of habeas corpus.

Plaintiffs are entitled to relief with respect to the parole statute itself, however. The court declares M.C.L. 791.234(6) unconstitutional as it applies to these Plaintiffs, who received mandatory life sentences as juveniles. As a result, Plaintiffs will be eligible and considered for parole. It remains to be determined how that process will work and what procedures should be in place to ensure that Plaintiffs are fairly considered for parole. In this respect, the court will need further input from the parties.

***3** Plaintiffs argue that the current parole system in Michigan, where parole may be denied "for any reason or no reason at all," is not a constitutional mechanism for compliance with *Graham* and *Miller*. However, is not clear what Plaintiffs want the system to look like, other than to require "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 130 S.Ct. at 2030. The undefined nature of Plaintiffs' request regarding changes in the parole system does not satisfy Plaintiffs' burden of demonstrating that they are entitled to summary judgment here. Plaintiffs need to articulate more clearly what changes in the parole system they believe are required by Eighth Amendment.

It may be that Plaintiffs are granted new sentencing hearings in state court, which may obviate the need for changes in the parole system. It appears, however, that the State and state courts (*see Carp*) intend to resist granting such hearings. Under these circumstances, the court believes that compliance with *Miller* and *Graham* requires providing a fair and meaningful possibility of parole to each and every Michigan prisoner who was sentenced to life for a crime committed as a juvenile.

The court directs the parties to provide further briefing on the issue of the procedures that court may equitably put in place to ensure that Plaintiffs receive a fair and meaningful opportunity to demonstrate that they are appropriate candidates for parole. Plaintiffs shall submit their brief by **March 1, 2013;** Defendants shall submit a response by **March 22, 2013.** Plaintiffs may submit a reply by **March 29, 2013.**

ORDER

IT IS HEREBY ORDERED that Plaintiffs' motion for summary judgment is GRANTED IN PART and DENIED IN PART, consistent with this opinion and order.

IT IS FURTHER ORDERED that Defendants' motion for summary judgment is DENIED.

Footnotes

1 The court dismissed Plaintiffs' due process and "customary international law" claims for failure to state a claim on July 15, 2011. Plaintiffs' amended complaint contains the due process and customary international law claims that were previously dismissed. These claims are no longer before the court.

2 Moreover, this court would find *Miller* retroactive on collateral review, because it is a new substantive rule, which "generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 351–52 (2004). "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Id.* at 353. "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant ... faces punishment that the law cannot impose upon him.' " *Id.* at 352. *Miller* alters the class of persons (juveniles) who can receive a category of punishment (mandatory life without parole). Further, the Supreme Court applied *Miller* to the companion case before it—on collateral review—and vacated the sentence of Kuntrell Jackson. "[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Teague v. Lane*, 489 U.S. 288, 300 (1989).

447 Fed.Appx. 357
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Third Circuit LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7)
United States Court of Appeals,
Third Circuit.

Percy LEE, Appellant
v.
Acting Secretary Shirley Moore SMEAL, Pennsylvania Department of Corrections; The District Attorney of the County of Philadelphia; The Attorney General of the State of Pennsylvania; Robert Collins, Superintendent of the State Correctional Institution at Frackville.

No. 10–4669. | Argued Sept. 13, 2011. | Opinion Filed: Oct. 6, 2011.

Synopsis

Background: Following affirmance on direct appeal of petitioner's state-court conviction for first-degree murder, 541 Pa. 260, 662 A.2d 645, he filed petition for writ of habeas corpus. The United States District Court for the Eastern District of Pennsylvania, J. Curtis Joyner, J., 2010 WL 5059544, denied petition. Petitioner appealed.

Holdings: The Court of Appeals, Rendell, Circuit Judge, held that:

[1] prosecutor's references during closing arguments to non-testifying codefendant's inculpatory statements to the police violated petitioner's Confrontation Clause rights, and

[2] Confrontation Clause violations were harmless error.

Affirmed.

West Headnotes (2)

[1] Criminal Law
Confessions or declarations of codefendants
Criminal Law
Homicide and assault with intent to kill

Prosecutor's references during closing arguments to non-testifying codefendant's inculpatory statements to the police violated defendant's Confrontation Clause rights, in first-degree murder prosecution; even if the statements themselves were redacted and did not specifically use defendant's name, the prosecutor repeatedly referred to the codefendant's statements as persuasive evidence of the defendant's guilt. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[2] Criminal Law
Comments on evidence or witnesses, or matters not sustained by evidence

Prosecutor's references during closing arguments to non-testifying codefendant's inculpatory statements to the police as persuasive evidence of defendant's guilt, in violation of defendant's Confrontation Clause rights, were harmless error, in first-degree murder prosecution, in light of other strong evidence of defendant's guilt, including witness testimony placing defendant and codefendant in victim's apartment building on morning of the murder. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

***358** Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 2–09–cv–04023), District Judge: Honorable J. Curtis Joyner.

Attorneys and Law Firms

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Joshua S. Goldwert, Esq. [ARGUED], Philadelphia County Office of District Attorney, Philadelphia, PA, for Appellees.

Before: RENDELL, JORDAN and BARRY, Circuit Judges.

Opinion

OPINION OF THE COURT

RENDELL, Circuit Judge.

Percy Lee appeals the District Court's denial of his habeas petition seeking collateral review of his 1987 conviction for first-degree murder in the Court of Common Pleas of Philadelphia County. We have been greatly aided in this difficult case by the thorough Report and Recommendation of Magistrate Judge Elizabeth T. Hey, which was adopted by District Judge Joyner. *See Lee v. Collins,* No. 09–4023, 2010 WL 5059517 (E.D.Pa. July 22, 2010). Like Judge Hey, we conclude that the error raised by Lee, although of constitutional proportions, was harmless, and we will therefore affirm.

I.

Lee was tried jointly with co-defendant Russell Cox in April and May of 1987 for the murders of Tina Brown and her mother Evelyn Heath Brown, who were found dead of multiple stab wounds in their North Philadelphia apartment. The statements of Lee's co-defendant, Cox, were introduced as evidence, over defense counsel's objection. Lee's habeas petition raises the following single issue:

> Did the Confrontation Clause violations in this case have a substantial and injurious effect on Lee's murder convictions where the Commonwealth relied on the co-defendant's unconfronted statements to establish and/or bolster every aspect of its case?

Lee's argument relies on the Supreme Court's opinion in *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and its progeny. *Bruton* held that a defendant's right to confrontation under the Sixth Amendment is violated when the state uses the extra-judicial statements of a non-testifying co-defendant to incriminate a defendant in a joint trial. *Bruton,* 391 U.S. at 135–36, 88 S.Ct. 1620. *Bruton* noted that some trial courts had opted to redact incriminating statements as a way of avoiding the Confrontation Clause problem. *See id.* at 133–34 & n. 10, 88 S.Ct. 1620.

In 1987, shortly before Lee's trial, the Supreme Court decided *Richardson v. Marsh,* 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). *Marsh* made clear that, in addition to forbidding the introduction of a "facially incriminating confession of a nontestifying codefendant," *id.* at 207, 107 S.Ct. 1702, the Confrontation Clause also prohibits the government from seeking "to undo the effect of [a] limiting instruction by urging the jury to use [the co-defendant's] confession in evaluating [the defendant's] case," *id.* at 211, 107 S.Ct. 1702. The Court left open the question whether "a confession in which the defendant's name has been replaced with a symbol or neutral pronoun" violates the Confrontation Clause. [1] *Id.* at 211 n. 5, 107 S.Ct. 1702.

***359 II.**

Here, the government introduced three out-of-court statements Cox gave to the police. All references to Percy Lee were replaced with "X" as the statements were read to the jury. Cox's statements described the events of the evening of the murders, some of which were corroborated and explained in more detail by other witnesses. Cox's statements, the only witness account of the murders themselves, described in detail the tying up of each woman, the rape of Tina, and the murders. Cox laid blame for the stabbings on "X." At one point, while using one of the statements to cross-examine a witness, the prosecutor slipped and, instead of saying "X," said the word "pers." After a sidebar discussion, the prosecutor substituted "person" instead of "X."

The prosecution's closing argument referred repeatedly to Cox's statements as persuasive evidence of Lee's guilt. When defense counsel objected, the trial court expressed surprise that the Commonwealth was undoing in argument what had been done by the redactions: "You're reading his statement and you're attributing his statement as placing everything on Lee despite the redactions." (App.1034.) The prosecutor, seeming oblivious to the problems this presented, agreed that this was exactly what he intended: "As I have throughout my argument indicating [*sic*] that Mr. Cox has always tried to put this on the other person. And I argued to the jury the other person is Percy Lee ... based on our evidence." (*Id.*) Despite

this admission, the trial court denied Lee's counsel's motion for a mistrial. (App.1034–35.)

The charge to the jury was extensive and included lengthy instructions on conspiracy and accomplice liability. The judge made several references to the fact that the jury could consider Cox's statements as evidence of his guilt only, not Lee's. (App.1059, 1061, 1064.)

The jury found both defendants guilty of first-degree murder and sentenced both to death.[2] Cox was also found guilty of rape.

On direct appeal to the Pennsylvania Supreme Court, Lee urged that the way the statements were used violated his Sixth Amendment right to confrontation under *Bruton.*[3] The court dismissed this issue cursorily because "the statements admitted at trial were redacted and contained no explicit references to Lee." *Commonwealth v. Lee*, 541 Pa. 260, 662 A.2d 645, 652 (1995). The Court then continued: "Our review of the record reveals ***360** that the Commonwealth presented sufficient independent evidence of Lee's guilt such that even if Lee was implicated by context, the result was harmless error." *Id.* (citations omitted).

All state-court collateral relief sought by Lee thereafter was of no avail, and Lee filed a petition for a writ of habeas corpus in the District Court, based solely on the *Bruton* violation. The District Court referred the proceedings to Magistrate Judge Hey, who, in a detailed Report and Recommendation, recommended that Lee's habeas petition be denied. Judge Hey concluded that the admission of Cox's statements and the prosecutor's use of those statements to incriminate Lee during his closing argument violated Lee's Confrontation Clause rights and that the Pennsylvania Supreme Court applied clearly established Federal law unreasonably by holding to the contrary. *Lee*, 2010 WL 5059517, at *12–13. She then held, however, that, applying the standard the Supreme Court first articulated in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), the error was harmless. 2010 WL 5059517, at *16.

Judge Hey concluded that "the evidence against Lee was strong enough, even apart from the evidence admitted in violation of *Bruton*, that the error did not cause actual prejudice." *Id.* at *13. While there may have been "some doubt" as to whether the jury would have convicted Lee without hearing Cox's statements, she concluded that doubt was not "grave." *Id.* at *16. Judge Hey nonetheless recommended that the District Court issue a certificate of appealability. *Id.* at *17. District Judge Joyner adopted the Judge Hey's Report and Recommendation, denied Lee's habeas petition, and issued a certificate of appealability.

III.

Under AEDPA,[4] the District Court could only grant Lee's habeas petition if it concluded that the state court unreasonably applied *Bruton* and *Marsh*, *see* 28 U.S.C. § 2254(d)(1), and we apply the same deferential standard on appeal, *see Thomas v. Horn*, 570 F.3d 105, 113 (3d Cir.2009) (because our review of district court's ruling on habeas petition without an evidentiary hearing is "plenary," "we review the state courts' determinations under the same standard that the District Court was required to apply"). As to the harmlessness of any error, however, we are to "perform our own harmless error analysis under *Brecht* "; we need not separately "review the state court's harmless error analysis under the AEDPA standard." *Bond v. Beard*, 539 F.3d 256, 275–76 (3d Cir.2008) (citing *Fry v. Pliler*, 551 U.S. 112, 121, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007)).

A.

[1] We agree with the District Court that the Pennsylvania Supreme Court unreasonably applied *Bruton* and *Marsh.* While the introduction of the redacted statements alone may not have been clearly prohibited under the caselaw at that time, there is no doubt that the use of Cox's statements in the prosecutor's closing argument was a clear *Bruton* violation in that the statements were definitely used to incriminate Lee. The prosecution admitted as much.

***361** B.

[2] The issue, then, is whether the prosecutor's use of the statements in his closing argument was nevertheless harmless. On this point, Judge Hey articulated and applied the proper standard: relief here is appropriate only if "the constitutional violation had a 'substantial and injurious effect' on the fairness of the trial." *Lee*, 2010 WL 5059517, at *13 (quoting *Fry*, 551 U.S. at 121, 127 S.Ct. 2321; additional citations omitted). Under this standard, petitioners "are not entitled to habeas relief based on trial error unless they can

establish that it resulted in 'actual prejudice.' " *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710 (citations omitted). But "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' " i.e., where the evidence is in "virtual equipoise," the "error is not harmless." *O'Neal v. McAninch*, 513 U.S. 432, 435–36, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995).

Our review of the evidence leads us to conclude that Judge Hey reached the correct result. The evidence at trial, other than Cox's statements, consisted of the following:

- Officer Gerald Lynch testified about a knife and pair of scissors seized from Lee's mother's apartment, where Lee was found when arrested. There was no scientific or other evidence linking these weapons to the crime, other than expert testimony that, based on the nature of the wounds, they could have been the murder weapons. The knife was located on the night table beside the bed where Lee was sleeping; the scissors were found in a kitchen cabinet full of sewing materials.

- Sonya Brown, Evelyn Brown's daughter and Tina Brown's sister, testified that Lee and a second individual whom she did not know knocked on the door of the family's apartment between 7 and 8 p.m. the night of the murders asking to use the telephone. Sonya knew Lee because he had lived in the Browns' apartment with his girlfriend, although he had moved out about a year before the murders occurred. Upon being refused entry, one of the two individuals (Sonya was not sure which one) kicked the door and wrote on it "all you bitches, hit man butter" in magic marker. Sonya left the apartment at approximately 10 p.m. to babysit at a friend's house and did not return until the next morning, after she learned from a phone call that her mother and sister had been killed.

- Denise Williams, a neighbor of the Browns' who knew who Lee was and recognized him, testified that, around 2 a.m., she saw Cox speaking to a female occupant through the Browns' closed apartment door. She testified, further, that Lee was standing off to the side with his back pressed up against the hallway, such that someone inside the Browns' apartment would not have been able to see him through the door's peephole.

- Samuel Gilbert, who lived in the Browns' apartment building, testified that Lee and Cox came to his apartment around 3:30 a.m. Gilbert had known Lee and his mother since Lee was young and had allowed Lee to stay with him occasionally after Evelyn Brown told him to move out. Lee woke Gilbert up and asked Gilbert to go into the bathroom with him while Cox remained at the door. Lee then told Gilbert that he "did something bad." When Gilbert asked whether Lee had robbed someone, Lee replied "no, I did something worse." He said, ***362** "I stabbed Evelyn." Lee stuffed some clothes he had been keeping at Gilbert's apartment into a plastic bag and told Gilbert he was going to his mother's house. Then Cox and Lee left the apartment. Gilbert also testified that Lee and Cox had been at his apartment earlier that evening and that, before they left, Lee said he needed to make a telephone call. (The defense tried to attack Gilbert's credibility in several respects, but his testimony was not shaken on cross examination.)

- Upon returning to the apartment the next morning, Sonya Brown confronted a horrific sight. The victims were lying in pools of blood in separate bedrooms. Both victims had been bound, stabbed, slashed, and punctured repeatedly (53 and 48 times), and Tina Brown had been raped. We need not recount all of the details but suffice it to say they are gruesome.

- Police recovered a bar of blood-stained soap from a bathroom sink inside the Browns' apartment.

- Laboratory testing of Lee's clothes confirmed the presence of human blood on Lee's pants and shoes, although in amounts insufficient to permit bloodtype testing with the technology then available.

Thus, even without Cox's statements, the evidence shows that Lee and Cox were together the entire evening and throughout the night of the murder and that Lee was not pleased when the Browns forbade him from entering their apartment. The description of the scene of the murders could easily lead the jury to conclude that this was the act of two people who both acted with the intent to kill. Indeed, it is clear that the jury actually determined as much, since it also convicted Cox of first-degree murder despite his statements blaming the murders solely on "X." Lastly, Gilbert's recounting of Lee's confession removes whatever doubt we may have had. There is no reason to doubt its veracity from a witness who testified consistently and did not want to hurt Lee. Given all of these factors, we cannot conclude that the *Bruton* violation had a " 'substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht*, 507 U.S. at 637–38, 113 S.Ct.

1710 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)).

IV.

Accordingly, we will affirm the order of the District Court.

Parallel Citations

2011 WL 4599668 (C.A.3 (Pa.))

Footnotes

1 The Supreme Court resolved that question in *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998), holding that "[r]edactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration" also violate the Confrontation Clause, *id.* at 192, 118 S.Ct. 1151. Because *Gray* was decided after the Pennsylvania Supreme Court addressed Lee's *Bruton* claim, however, we do not consider it in our analysis of whether the Commonwealth's adjudication of that claim involved an unreasonable application of "clearly established Federal law." *See* 28 U.S.C. § 2254(d)(1); *Greene v. Palakovich*, 606 F.3d 85, 94–95 (3d Cir.2010) (holding that the date of the "relevant state-court decision" controls for purposes of determining what constitutes "clearly established Federal law" under § 2254(d)(1)).

2 Because Lee was 17 at the time of the murders, his death sentence was later vacated under *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), and replaced with two consecutive life sentences, one for each of the two murders. *See Lee*, 2010 WL 5059517 at * 3 & n. 8.

3 The government contends that Lee's habeas petition impermissibly asserts a new claim. This argument lacks merit, as Lee clearly objected to the use of the statements under *Bruton* and the resulting Sixth Amendment violation in his direct appeal. We therefore conclude that the claim was fairly presented to the relevant state court.

4 AEDPA is the Antiterrorism and Effective Death Penalty Act of 1996, which is codified in relevant part at 28 U.S.C. § 2254(d).

CERTIFICATE OF SERVICE

I hereby certify that on this day, May 23, 2014, pursuant to Virginia Supreme Court Rule 5:26, I caused an electronic copy of the foregoing brief to be served via electronic mail to the Clerk of the Supreme Court of Virginia at scvbriefs@courts.state.va.us. Additionally, I caused 15 printed and bound courtesy copies to be delivered via overnight Federal Express shipment to:

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