No. 16-6738

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CYNTOIA BROWN,
Petitioner-Appellant,

v.

CAROLYN JORDAN, WARDEN,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF OF THE RESPONDENT-APPELLEE

HERBERT H. SLATERY III
Attorney General and Reporter
State of Tennessee

ANDRÉE S. BLUMSTEIN
Solicitor General

JOHN H. BLEDSOE
Deputy Attorney General
Federal Habeas Corpus Division
P. O. Box 20207
Nashville, TN 37202
Telephone: (615) 741-4351
Facsimile: (615) 532-7791
E-mail: John.Bledsoe@ag.tn.gov

STATEMENT REGARDING CORPORATE DISCLOSURE

Under Fed. R. App. P. 26.1(a) and 6 Cir. R. 26.1(a), no corporate affiliate/ financial statement is required because the respondent-appellee ("the respondent") is an official of the State of Tennessee.

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STATEMENT REGARDING ORAL ARGUMENT

Under Fed. R. App. P. 34(a), 6 Cir. R. 28(b)(1)(B), and 6 Cir. R. 34(a), the respondent concurs in the request for oral argument made by the petitioner-respondent ("the petitioner").

JURISDICTIONAL STATEMENT

The district court's subject-matter jurisdiction is based upon 28 U.S.C. § 2254, under which the petitioner sought a writ of habeas corpus relative to her confinement on state-court criminal convictions for aggravated robbery and first-degree murder, for which she received concurrent sentences of eight years and life imprisonment. This Court's jurisdiction is grounded in 28 U.S.C. §§ 1291 and 2253(c), as the petitioner has perfected an appeal as of right from the district court's denial of her habeas corpus petition.

The district court denied the habeas corpus petition on October 28, 2016. (Memorandum & Order, R.E. 25 - 26, PageID# 5488-5503.)[1] The petitioner filed a motion to alter or amend the judgment on November 23, 2016. (Motion & Memorandum, R.E. 27 - 28, PageID# 5504-5524.) She filed a timely notice of appeal on November 28, 2016. (Notice, R.E. 29, PageID# 5525-5527.) On that same date, she moved the district court for a certificate of appealability on four issues. (Request, R.E. 30, PageID# 5528-5555.)

On September 15, 2017, the district court denied the motion to alter or amend the judgment and granted a certificate of appealability on the following issues:

1. Whether Brown's mandatory minimum life sentence is unconstitutional.

[1]A record entry from the district court shall be cited as "R.E."

2. Whether Brown was actually innocent because she was incapable of forming the requisite mens rea to commit the crimes for which she was convicted.

(Memorandum & Order, R.E. 43, PageID# 5666-5674.) The petitioner filed an amended notice of appeal on October 13, 2017. (Amended Notice, R.E. 44, PageID# 5675-5677.)

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I

Was the state court's determination that the petitioner's life sentence for crimes committed as a juvenile is not cruel and unusual punishment under the Eighth Amendment contrary to, or does it involve an unreasonable application of, clearly established Supreme Court precedent?

II

Is the petitioner's freestanding claim of actual innocence, based upon newly-presented evidence of her exposure to alcohol in utero, cognizable in a habeas corpus petition?

STATEMENT OF THE CASE

Trial Proceedings

The petitioner was indicted in the Davidson County Criminal Court for (1) first-degree premeditated murder, (2) first-degree felony murder in the perpetration of, or attempt to perpetrate, a robbery, and (3) especially aggravated robbery. (Indictment, R.E. 14-1, PageID# 243-247.) Proof at trial established that, on the evening of August 6, 2004, the victim, Johnny Allen, picked up the petitioner in his Ford F-150 truck and eventually took her to his home. (Petitioner's Statement, R.E. 14-6, PageID# 609-610, 616-617; Trial Testimony, R.E. 14-15, Page ID# 2117-2119.) During the night while the victim was in his bed, the petitioner shot him in the back of the head with a gun that she brought into the home. (Petitioner's Statement, R.E. 14-6, PageID# 612; Trial Testimony, R.E. 14-14, PageID# 1972; Trial Testimony, R.E. 14-15, PageID# 2011.)

Based upon the nature of the victim's wound and the lividity of his body, the medical examiner concluded that, when the petitioner fired the gun, the victim was lying in his bed in the same manner as he was later found, on his right side and stomach and with his fingers partially interlocked. (Trial Testimony, R.E. 14-15, PageID# 2010-2011, 2030-2031.) The gunshot wound was immediately fatal, and the victim was not able to move his body or extremities voluntarily once the petitioner shot him. (Trial Testimony, R.E. 14-15, PageID# 2010, 2016.) The

victim had no defensive wounds on his arms or hands. (Trial Testimony, R.E. 14-15, PageID# 1997.) Although the medical examiner classified this as an indeterminate range wound, the stellate lacerations around the entrance wound are "typically" seen with "close range fire," within "a couple inches or less, a few inches." (Trial Testimony, R.E. 14-14, PageID# 1973; Trial Testimony, R.E. 14-15, PageID# 1993, 2005-2007.) Gunshot residue from one of the victim's pillowcases indicated that the gun was three to six inches from the pillowcase when the gun discharged. (Trial Testimony, R.E. 14-12, PageID# 1550-1552, 1563-1564.)

After shooting the victim, the petitioner early in the morning on August 7, 2004, fled in the petitioner's truck, taking two of the victim's guns—a rifle and a shotgun—and $172 from his wallet. (Petitioner's Statement, R.E. 14-6, PageID# 611, 615, 617, 629-630; Trial Testimony, R.E. 14-13, PageID# 1796; Trial Testimony, R.E. 14-14, PageID# 1875.) She intended to sell or pawn the guns. (Petitioner's Statement, R.E. 14-6, PageID# 614, 621.) She drove to her room at an InTown Suites, deposited the guns in the room, and drove to a Wal-Mart, where she left the victim's truck. (Petitioner's Statement, R.E. 14-6, PageID# 618, 638-639.) From there, she asked someone for a ride back to the InTown Suites, around 2:00 a.m. on August 7, 2004. (Petitioner's Statement, R.E. 14-6, PageID# 618-620, 639; Trial Testimony, R.E. 14-11, PageID# 1364-1369, 1372-1375.)

Later that day, around 5:00 p.m., the petitioner knocked on the door at the InTown Suites of roommates Richard Reed and Samuel Humphrey. (Trial Testimony, R.E. 14-11, PageID# 1331.) Mr. Reed answered the door, and the petitioner asked him to drive her to Wal-Mart, which he agreed to do. (Trial Testimony R.E. 14-11, PageID# 1331-1334.) Once there, she went to the victim's truck. (Trial Testimony, R.E. 14-11, PageID# 1331-1334.) She told Mr. Reed that she previously placed the key to the truck inside Mr. Reed's vehicle, which she was able to do because his vehicle's back window was busted. (Trial Testimony, R.E. 14-11, PageID# 1335.) She retrieved the key from under Mr. Reed's seat and used it to open the door to the victim's truck. (Trial Testimony, R.E. 14-11, PageID# 1335.) She took a cellular phone out of the truck and returned to Mr. Reed's vehicle. (Trial Testimony, R.E. 14-11, PageID# 1334, 1336.)

En route back to the hotel, the petitioner asked Mr. Reed for a ride to a nearby house. (Trial Testimony, R.E. 14-11, PageID# 1336-1337.) She explained that she "shot somebody in the head for fifty thousand dollars and some guns," and she wanted Mr. Reed "to go over there and help her clean it out." (Trial Testimony, R.E. 14-11, PageID# 1337.) Mr. Reed did not believe her, and he refused to drive her to the house. (Trial Testimony, R.E. 14-11, PageID# 1336-1339.) Law enforcement officers later found, under the front passenger seat of Mr. Reed's vehicle, a folder containing real estate documents bearing the victim's name, which

Mr. Reed had never seen. (Trial Testimony, R.E. 14-11, PageID# 1359-1360; Trial Testimony, R.E. 14-13, PageID# 1778-1780.)

At 7:19 p.m. that same night, the petitioner used the victim's cellular phone to call 911, at which time the petitioner gave the victim's address and said "homicide" before hanging up. (911 Recording, R.E. 14-5, PageID# 503; Petitioner's Statement, R.E. 14-6, PageID# 621-622, 640.) Early in the morning on August 8, 2004, law enforcement officers knocked on the door of the petitioner's room. (Trial Testimony, R.E. 14-13, PageID# 1746.) Gary McClothen—otherwise known as "Cut"—opened the door, and officers pulled him out. (Trial Testimony, R.E. 14-13, PageID# 1746.) Immediately, the petitioner ran up behind him and shouted, "Cut had nothing to do with this. I'll tell you-all everything." (Trial Testimony, R.E. 14-13, PageID# 1746-1747.) When asked if there were any weapons in the room, the petitioner directed officers to the closet, where the victim's rifle and shotgun were found. (Trial Testimony, R.E. 14-13, PageID# 1747-1748.) The victim's money was found in her handbag. (Trial Testimony, R.E. 14-13, PageID# 1757-1758, 1796.)

The petitioner was taken into custody, and she gave a video-recorded statement. (Petitioner Statement, R.E. 14-6, PageID# 601-642; Trial Testimony, R.E. 14-13, PageID# 1775-1777.) She then made two phone calls during which she laughed and joked about her arrest for murder, to the extent that the person on one

of the calls did not believe her and asked for confirmation from an officer. (Trial Testimony, R.E. 14-11, PageID# 1420-1421; Trial Testimony, R.E. 14-13, PageID# 1694, 1703, 1712, 1720-1721, 1729, 1767-1768.) The petitioner also wrote a note professing her innocence and urging officers to search the vehicle of Richard Reed and Samuel Humphrey "for evidence linking them to the crime." (Handwritten Note, R.E. 14-5, PageID# 530; Trial Testimony, R.E. 14-11, PageID# 1398-1399, 1417; Trial Testimony, R.E. 14-13, PageID# 1771-1773.)

On August 14, 2004, while a patient at Western Mental Health Institute in Bolivar, the petitioner demanded to make a phone call to her mother, but the nurse, Kathy Franz, told her that she could not use the phone. (Trial Testimony, R.E. 14-12, PageID# 1479-1480, 1483, 1527-1528, 1530.) The petitioner "got angry" and attacked Ms. Franz. (Trial Testimony, R.E. 14-12, PageID# 1528.) She jumped over the nurses' desk, grabbed Ms. Franz by the hair and face, and hit her. (Trial Testimony, R.E. 14-12, PageID# 1480, 1485, 1528.) They both struggled onto the floor, and Ms. Franz received abrasions and bruises from the attack. (Trial Testimony, R.E. 14-12, PageID# 1485, 1528.) The petitioner threatened Ms. Franz's life, saying:

> I'm going to do you like I did him, but I'm not going to shoot you once in the back of the head. I'm going to shoot you three times and listen while your blood splatters on the wall.

(Trial Testimony, R.E. 14-12, PageID# 1481, 1528-1529.)

In November 2004, while confined in Davidson County, the petitioner discussed the murder with three other detainees, including Shayla Bryant, who heard the petitioner give the following explanation for her criminal charges:

> She basically . . . said this guy that she was talking to used to send her out to prostitute. And she was mad at him. And the man tried to rape her, so she shot him.

(Trial Testimony, R.E. 14-13, PageID# 1655-1656.) Ms. Bryant did not believe the petitioner because the story "just seemed too perfect." (Trial Testimony, R.E. 14-13, PageID# 1656.) Ms. Bryant told the petitioner that she was lying, at which point the petitioner started laughing. (Trial Testimony, R.E. 14-13, PageID# 1656.) The petitioner then confided that she shot the victim "just to see how it fe[lt] to kill somebody." (Trial Testimony, R.E. 14-13, PageID# 1656.) In offering this explanation, the petitioner "was just as jolly as she wanted to be." (Trial Testimony, R.E. 14-13, PageID# 1659.) She did not appear to have any remorse. (Trial Testimony, R.E. 14-13, PageID# 1659.)

Like other detainees, Ms. Bryant and the petitioner routinely passed notes, and Ms. Brown retained and disclosed one note in which the petitioner wrote, "Everything is the truth, I swear on my life except for 'I thought he was getting a gun' and the feelings of nervousness." (Handwritten Note, R.E. 14-5, PageID# 600; Trial Testimony, R.E. 14-13, PageID# 1656-1658, 1683-1684, 1788-1789, 1797-1798; Trial Testimony, R.E. 14-14, PageID# 1868-1869, 1894-1896.) Ms. Bryant

explained that she flushed other notes by the petitioner down the commode. (Trial Testimony, R.E. 14-13, PageID# 1682, 1687.) She intended to flush this one as well, but another detainee kept it and then asked Ms. Bryan to turn it over to law enforcement officers. (Trial Testimony, R.E. 14-13, PageID# 1687.) As Ms. Bryant explained, "If I would have kept the notes, you would have had a full confession." (Trial Testimony, R.E. 14-13, PageID# 1682.)

During a recorded telephone conversation on October 29, 2005, between the petitioner and her adoptive mother, Ellenette Washington, the petitioner stated to Ms. Washington, "I killed somebody. . . . I executed him." (Telephone Recording, R.E. 14-6, PageID# 715; Trial Testimony, R.E. 14-14, PageID# 1915; Trial Testimony, R.E. 14-15, PageID# 2041-2044.) She also acknowledged that she "attacked a nurse and told her I was gonna kill her." (Telephone Recording, R.E. 14-5, PageID# 714.)

The jury convicted the petitioner as charged. The trial court merged the petitioner's murder charges into one conviction of first-degree murder and imposed a sentence of life imprisonment. (Judgments, R.E. 14-1, PageID# 421-422.) At a subsequent sentencing hearing, the court imposed a 20-year sentence for aggravated robbery, to run concurrently with her life sentence. (Judgment, R.E. 14-1, PageID# 437.)

Direct Appeal

The Tennessee Court of Criminal Appeals ("TCCA") modified the conviction for especially aggravated robbery to aggravated robbery and remanded for resentencing on that offense. Otherwise, the court affirmed the conviction, and the Tennessee Supreme Court denied discretionary review. *State v. Brown*, No. M2007-00427-CCA-R3-CD, 2009 WL 1038275 (Tenn. Crim. App. Apr. 20, 2009), *perm. app. denied* (Tenn. Sept. 28, 2009) ("*Brown I*").[2]

On petitioner's challenge to the legal sufficiency of the evidence to support her convictions, the TCCA recognized that, although the petitioner claimed to have acted in self-defense, "there was no evidence that the victim was armed at the time of his death, as no other weapon was found in the victim's bedroom and the victim's fingers were locked beneath his head when he was found by police." *Id*. at *36. The petitioner "admitted to police that the victim did not try to force himself upon her and that he did not threaten her with a gun at any point during the evening." *Id*. The petitioner's "procurement of a weapon, using the weapon against an unarmed victim, and her relative calm after the shooting all support the jury's finding that the defendant acted with premeditation in killing the victim." *Id*. Based upon this proof, as well as the petitioner's inculpatory statements to others, the evidence is

[2]On remand, the trial court imposed an eight-year sentence for aggravated robbery, to run concurrently with the petitioner's life sentence. (Judgment, R.E. 14-26, PageID# 3059.)

legally sufficient to support a conviction for first-degree premeditated murder. *Id*. at *37. As for first-degree felony murder and aggravated robbery, the petitioner "took the victim's guns and money immediately after she killed him." *Id*. "This proof establishes the sufficient connection of time, place, and continuity of action to show that the killing occurred in perpetration of the robbery." *Id*.

Post-Conviction Review

The petitioner sought post-conviction relief in the convicting court under Tenn. Code Ann. §§ 40-30-101, et seq. (Petition, R.E. 14-26, PageID# 3060-3080; Amended Petition, R.E. 14-16, PageID# 3082-3084.) Following an evidentiary hearing, the trial court concluded that the petitioner was not entitled to relief on any of her claims and denied the petition. (Order, R.E. 14-27, PageID# 3189-3247.) The TCCA affirmed, and the Tennessee Supreme Court denied discretionary review. *Brown v. State*, No. M2013-00825-CCA-R3-PC, 2014 WL 5780718 (Tenn. Crim. App. Nov. 6, 2014), *perm. app. denied* (Tenn. May 15, 2015) ("*Brown II*").

The TCCA rejected as a juvenile offender, her sentence of life imprisonment is cruel and unusual punishment in violation of the Eighth Amendment, because the petitioner failed to provide applicable authority to support her claim. *Id*. at *20-*21. The TCCA specifically observed that *Miller v. Alabama*, 567 U.S. 460 (2012), involved a sentence of life imprisonment without the possibility of release and that it had repeatedly "refused to expand the holding in *Miller* to life sentences for

juveniles, let alone sentences involving less than life." *Id*. at *21. On petitioner's state-law, freestanding claim of actual innocence based on newly-presented evidence of her exposure to alcohol in utero, the TCCA concluded that the petitioner failed to prove by clear and convincing evidence that "no jury would have convicted her in light of the new evidence." *Id*. at *18.

Federal Habeas Corpus Petition

The petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Middle District of Tennessee. (Petition, R.E. 1, PageID# 1-20; Amended Petition, R.E. 13, PageID# 157-191.) Ultimately, the district court denied relief on all claims, dismissed the petition, and granted a certificate of appealability on two issues. (Memorandum, R.E. 25, PageID# 5488-5502; Order, R.E. 26, PageID# 5503; Memorandum & Order, R.E. 43, PageID# 5666-5674.)

SUMMARY OF THE ARGUMENT

The petitioner argues that, under *Miller*, her sentence of life imprisonment violates the Eighth Amendment as cruel and unusual punishment because it is the functional equivalent of life imprisonment without the possibility of parole. The TCCA considered and rejected the claim in the petitioner's post-conviction appeal. Under the deferential review required for habeas corpus claims adjudicated on the merits in state court, the petitioner cannot show that the state court's rejection of her claim was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent.

The petitioner claims that she is actually innocent of first-degree murder based on newly-presented evidence of her exposure to alcohol while in utero. To the extent that the petitioner challenges the legal sufficiency of her trial evidence, the Court is without jurisdiction to consider the claim because no certificate of appealability was granted on it. Furthermore, the petitioner's free-standing claim of actual innocence based upon newly-presented evidence is not cognizable in habeas corpus proceedings.

STANDARD OF REVIEW

In a habeas corpus appeal, this Court reviews the district court's legal conclusions *de novo* and its factual findings under a "clearly erroneous" standard. *Cvijetinovic v. Eberlin*, 617 F.3d 833, 836 (6th Cir. 2010) (quoting *Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir. 1999)); *see also Moore v. Haviland*, 531 F.3d 393, 401 (6th Cir. 2008).

ARGUMENT

I. THE STATE COURT'S REJECTION OF THE PETITIONER'S EIGHTH AMENDMENT CHALLENGE TO HER LIFE SENTENCE WAS NOT CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED SUPREME COURT PRECEDENT.

In the petitioner's post-conviction appeal, the TCCA rejected the petitioner's Eighth Amendment claim raised under *Miller*. *Brown II*, 2014 WL 5780718, at *20-*21. That state-court decision was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent. (Memorandum, R.E. 25, PageID# 5496, 5501-02.)

In *Miller*, the Supreme Court held that the Eighth Amendment "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S. at 479. Tennessee's courts have repeatedly concluded that *Miller* does not apply to a juvenile offender sentenced to life imprisonment for first-degree murder because the offender retains the potential for release after serving 51 to 60 years. *State v. Davis*, No. M2016-01579-CCA-R3-CD, 2017 WL 6329868, at *25 (Tenn. Crim. App. Dec. 11, 2017) (perm. app. filed) (collecting cases). The "sentencing scheme" does not "mandate[] life in prison without possibility of parole." *Miller*, 567 U.S. at 479.

Under 28 U.S.C. § 2254(d)(1), a habeas petitioner may obtain relief on a claim "adjudicated on the merits" by a state court only when the state court's adjudication

"resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States." The "clearly established Federal law" is the law in effect at the time of the state court's adjudication. *Greene v. Fisher*, 565 U.S. 34, 38-40 (2011). "State-court decisions are measured against [the Supreme] Court's precedents as of the time the state court renders its decision." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (internal quotation marks omitted).

A state-court decision is "contrary to" clearly established Supreme Court precedent when the state court "appl[ied] a rule that contradicts the governing law set forth in [Supreme Court] cases" or "confront[ed] a set of facts that are materially indistinguishable from a decision of" the Supreme Court and nevertheless arrived at a different result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); *see also Metrish v. Lancaster*, 133 S. Ct. 1781, 1786 n.2 (2013). A state court is said to have unreasonably applied clearly established Supreme Court precedent only when the state court "identifie[d] the correct governing principle from [the Supreme Court's] decisions but unreasonably applie[d] that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. This application must be "objectively unreasonable" and not merely incorrect. *Id*. at 409, 411. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law

erroneously or incorrectly." *Id*. at 411; *see also White v. Woodall*, 134 S. Ct. 1697, 1702 (2014), and *Gagne v. Booker*, 680 F.3d 493, 513-14 (6th Cir. 2012) (en banc) (plurality opinion).

In *Miller*, the Supreme Court reviewed cases from Alabama and Arkansas in which juvenile offenders, upon conviction for first-degree murder, were sentenced automatically to life imprisonment without the possibility of parole. The Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishment.'" *Miller*, 567 U.S. at 465. "[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id*. at 489.

In Tennessee, a juvenile offender convicted of first-degree murder may be sentenced to life imprisonment or life imprisonment without the possibility of parole. Tenn. Code Ann. § 37-1-134(a)(1) and § 39-13-202(c). If the State does not file a pretrial notice of intent to seek a sentence of life imprisonment without the possibility of parole, then, upon entry of a guilty verdict for first-degree murder, the trial court shall sentence the defendant to life imprisonment. Tenn. Code Ann. § 39-13-208(c). In this case, the State did not file a notice; therefore, the trial court sentenced the petitioner to life imprisonment after the jury found the petitioner guilty

of first-degree premeditated murder and first-degree felony murder. (Verdict, R.E. 14-16, PageID# 2241-2242.)

As relevant in this habeas corpus case, the Supreme Court did not "clearly establish" in *Miller* that the automatic imposition of some sentence less than life imprisonment without the possibility of parole—the "harshest possible penalty for juveniles"—violates the Eighth Amendment as cruel and unusual punishment. *Miller*, 567 U.S. at 489. *Miller* concluded that an automatic sentence of life imprisonment *without the possibility of parole* violates the Eighth Amendment. *See Hill v. Snyder*, 878 F.3d 193 (6th Cir. 2017) ("*Miller* held that the Eighth Amendment prohibits mandatory sentences of life without parole for those under the age of eighteen at the time of their crimes."). The Court did not determine whether the automatic imposition of some sentence less than life imprisonment without the possibility of parole violates the Eighth Amendment. "*Miller* did not hold that mandatory life sentences for juvenile offenders with the possibility for parole violate the Eighth Amendment. Rather, *Miller's* holding is limited to juvenile offenders sentenced to life imprisonment without the *possibility* of parole." *Hood v. Davis*, No. 3:15-cv-1821, 2016 WL 7188299, at *2 (N.D. Tex. Dec. 12, 2016) (emphasis in original).

In *Starks v. Easterling*, 659 Fed. Appx. 277 (6th Cir. Aug. 23, 2016), this Court addressed the same Eighth Amendment claim now raised regarding a

sentence of life imprisonment against a juvenile offender convicted of first-degree murder, and the Court considered the claim under the deferential review required by 28 U.S.C. § 2254(d). In that case, the Tennessee trial court had sentenced the juvenile offender to life imprisonment upon his conviction for first-degree felony murder, and it subsequently imposed a consecutive sentence of 11 years for attempted especially aggravated robbery. The state courts rejected the petitioner's *Miller* claim because state law did not preclude the petitioner's eventual release from prison. *Id*. at 279.

Applying 28 U.S.C. § 2254(d), this Court affirmed the district court's denial of habeas corpus relief. The sentence dictated by Tennessee law was life imprisonment, not life imprisonment without the possibility of parole. In this Court's view, the TCCA did not unreasonably apply *Miller* because the state court "could read *Miller* to require that a defendant must be sentenced to life without the possibility of parole for it to apply." *Id*. at 280. "Because the Supreme Court has not yet explicitly held that the Eighth Amendment extends to juvenile sentences that are the functional equivalent of life, and given the fact that lower courts are divided about the scope of *Miller*, . . . the Tennessee courts' decisions were not contrary to, or an unreasonable application of, clearly established federal law as defined by the Supreme Court." *Id*. at 280-81; *see also Demirdjian v. Gipson*, 832 F.3d 1060,

1076 (9th Cir. 2016) ("There is a reasonable argument that *Miller* . . . applies only to life-without-parole sentences.").

The petitioner attempts to distinguish *Starks* by arguing that the TCCA misconstrued Tennessee sentencing law and that the petitioner's life sentence requires a lifetime in confinement with no release, like the sentence at issue in *Miller*. The petitioner's state-law argument is simply wrong, in light of how Tennessee's courts have consistently construed Tenn. Code Ann. § 40-35-501(h) and (i).

Under Tenn. Code Ann. § 40-35-501(h)(1), a criminal defendant sentenced to life imprisonment for first-degree murder is eligible for release after serving 60 percent of 60 years, "less sentencing credits earned and retained by the defendant, but in no event shall a defendant sentenced to imprisonment for life be eligible for parole until the defendant has served a minimum of twenty-five (25) full calendar years of the sentence . . ." But for a defendant sentenced to life imprisonment for first-degree murder on an offense committed on or after July 1, 1995, there is no release eligibility. Tenn. Code Ann. § 40-35-501(i). "Such person shall serve one hundred percent (100%) of the sentence imposed by the court less sentence credits earned and retained. However no sentence reduction credits . . . shall operate to reduce the sentence imposed by the court by more than fifteen percent (15%)." *Id.* "The passage of section 40-35-501(i) did not repeal section (h), as section (h) still

applies to a person committing an offense before July 1, 1995." *Vaughn v. State*, 202 S.W.3d 106 (Tenn. 2006).

In applying state law, this Court is bound by the controlling decision of the state's highest court. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *National Union Fire Ins. Co. of Pittsburgh v. Alticor, Inc*., 472 F.3d 426, 438 (6th Cir. 2007) (citation omitted). In 2006, the Tennessee Supreme Court concluded that Tenn. Code Ann. § 40-35-501(h) and (i) for first-degree murder offenses committed on or after July 1, 1995, is construed to mean that "the actual earliest release eligibility date for a person convicted of first degree murder [is] fifty-one years." *See Vaughn*, 202 S.W.3d at 116. That is, a criminal defendant serving a life sentence for a first-degree murder offense committed on or after July 1, 1995, must serve 51 to 60 years before release consideration.

Since the Tennessee Supreme Court decided *Vaughn*, the TCCA has repeatedly applied the same construction. *See State v. Self*, No. E2014-02466-CCA-R3-CD, 2016 WL 4542412, at *61-*62 (Tenn. Crim. App. Aug. 29, 2016), *perm. app. denied* (Tenn. Jan. 19, 2017); *Blake v. State*, No. W2015-01423-CCA-R3-PC, 2016 WL 4060696, at *11 (Tenn. Crim. App. July 27, 2016), *perm. app. denied* (Tenn. Nov. 22, 2016); *State v. Guerrero*, No. M2014-01669-CCA-R3-CD, 2015 WL 2208546, at *2 (Tenn. Crim. App. May 11, 2015), *perm. app. denied* (Tenn. Sept. 17, 2015); *Williams v. State*, No. W2013-00555-CCA-R3-HC, 2013

WL 5493568, at *2 (Tenn. Crim. App. Sept. 30, 2013); *Carney v. Barbee*, No. W2011-01977-CCA-R3-HC, 2012 WL 5355665, at *4 (Tenn. Crim. App. Oct. 31, 2012) (no perm. app. filed); *Clinard v. State*, No. M2012-00839-CCA-R3-HC, 2012 WL 4459717, at *5 (Tenn. Crim. App. Sept. 27, 2012), *perm. app. denied* (Tenn. Feb. 15, 2013).

So too here, the TCCA recognized in the petitioner's post-conviction appeal that the petitioner is eligible for release after serving at least 51 years in confinement. *Brown II*, 2014 WL 5780718, at *21. At the evidentiary hearing on the post-conviction petition, Roberta Anderson from the Tennessee Department of Correction ("TDOC") testified that an inmate sentenced to life imprisonment for a first-degree murder offense committed on or after July 1, 1995, is "required to serve 60 years before parole eligibility," although the inmate "can earn up to 15 percent off of that, 51 years, before any type of release." (Hearing Testimony, R.E. 14-28, PageID# 3271.)

In short, neither this Court in *Starks* nor the TCCA in the petitioner's post-conviction appeal misapplied prevailing state law under Tenn. Code Ann. § 40-35-501(h) and (i) on the service of a life sentence.

The petitioner's reliance on *Myrick v. State*, No. M2013-02352-COA-R3-CV, 2014 WL 5089347 (Tenn. Ct. App. Oct. 8, 2014), *perm. app. denied* (Tenn. Jan. 16, 2015), is misplaced for one glaring reason: the criminal defendant in that case was

convicted of second-degree murder, not first-degree murder. Unlike one serving a sentence of life imprisonment, one convicted of second-degree murder, a Class A felony, carries a determinate sentence set at between 15 and 60 years. Tenn. Code Ann. §§ 39-13-210(c) and 40-35-111(b)(1). The defendant must serve 100 percent of that sentence without release eligibility, subject to a sentence reduction of up to 15 percent. Tenn. Code Ann. § 40-35-501(i)

The release eligibility calculation for a second-degree murder conviction implicates Tenn. Code Ann. § 40-35-501(i) alone, without any consideration of Tenn. Code Ann. § 40-35-501(h), which applies only in a first-degree murder case. Unsurprisingly, the Tennessee Court of Appeals ("TCOA") concluded under Tenn. Code Ann. § 40-35-501(i) that, before release, the defendant convicted of second-degree murder must serve 100 percent of his 16-year sentence, as reduced up to 15 percent by sentenced reduction credits. *Id*. at *3. This straightforward conclusion does not address the state-law issue raised here—whether a life sentence is treated as a 51-to-60-year term of confinement—and the petitioner has presented no other authority to support her reading of state law that runs counter to Tennessee's consistent construction of it.

Because the petitioner's life sentence includes release consideration after service of 51 to 60 years, it is not the same sentence that the Supreme Court considered in *Miller*, and the TCCA was not compelled to hold that *Miller* renders

it unconstitutional. At the time of the petitioner's post-conviction appeal, it was not "clearly established" that the rationale of *Miller* must extend to an automatic sentence of something less than life imprisonment without the possibility of parole. The state court "could read *Miller* to require that a defendant must be sentenced to life without the possibility of parole for it to apply." *Starks*, 659 Fed. Appx. at 280. As the district court accurately observed, "[t]here is no controlling case law that recognizes that the petitioner's life sentence, as it currently stands, is violative of the Constitution." (Memorandum, R.E. 25, PageID# 5502.)

Under 28 U.S.C. § 2254(d), the petitioner cannot show, as she must, that when the state court rejected her Eighth Amendment claim, it reached a decision that contravened, or involved an unreasonable application of, then-applicable clearly established Supreme Court precedent. For that reason, the district court correctly denied relief on the petitioner's Eighth Amendment claim.

II. THE PETITIONER'S FREESTANDING ACTUAL-INNOCENCE CLAIM IS NOT COGNIZABLE IN A HABEAS CORPUS PETITION.

The petitioner argues that newly-presented evidence about her exposure to alcohol while in utero renders her actually innocent of first-degree murder because she was incapable of forming the requisite mental state for the offense. But the Court lacks jurisdiction to review any sufficiency-of-the-evidence claim, and a free-standing claim of actual innocence is not cognizable in a habeas corpus petition under 28 U.S.C. § 2254(a). Consequently, the petitioner is entitled to no relief.

In the district court, the petitioner claimed (1) that she is actually innocent of first-degree murder based upon newly-presented evidence, and (2) that the evidence presented at trial is legally insufficient to support her conviction. (Petition, R.E. 1, PageID# 6; Amended Petition, R.E. 13, PageID# 172-173.) On the first claim, the district court held it non-cognizable in a habeas corpus petition. On the second claim, the court determined that the TCCA's determination that the evidence at trial is legally sufficient to support the murder conviction was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent. (Memorandum, R.E. 25, PageID# 5491-5492, 5499-5501.) The district court further concluded that, on the trial record, "any reasonable juror could find that the petitioner had formed the *mens rea* needed to commit these crimes." (Memorandum, R.E. 25, PageID# 5501.)

The petitioner later requested a certificate of appealability on the actual innocence claim but not the sufficiency claim. (Request, R.E. 30, PageID# 5528-5549.) In granting a certificate of appealability on the actual innocence claim, the district court stated that, due to the petitioner's newly-presented evidence, reasonable jurists could disagree with the district court's holding on the sufficiency claim. (Memorandum & Order, R.E. 43, PageID# 5669, 5673-5674.) The petitioner conflates the two issues by arguing that she is actually innocent of first-degree murder because, in light of her newly-presented evidence, the evidence is legally insufficient to support her first-degree murder conviction under *In re: Winship*, 397 U.S. 358 (1970), *Patterson v. New York*, 432 U.S. 197 (1977), and *Jackson v. Virginia*, 443 U.S. 307 (1979).

To the extent that the petitioner claims insufficient evidence under *Jackson*, the Court lacks jurisdiction to consider the claim because it is outside the scope of the certificate of appealability under 28 U.S.C. § 2253(c). "[T]his issue is not properly before this court, because it was not certified for appeal." *Searcy v. Carter*, 246 F.3d 515, 518 (6th Cir. 2001). Furthermore, a sufficiency challenge under *Jackson* requires consideration of the evidence presented at trial, not newly-presented evidence. "Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt." *United States v. Powell*, 469

U.S. 57, 67 (1984). The petitioner's newly-presented evidence has no bearing on the legal sufficiency of the evidence supporting her conviction.

As to her claim for relief due to newly-presented evidence of actual innocence, the claim is not cognizable, as the district court correctly concluded. (Memorandum, R.E. 25, PageID# 5491-5492.) "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 400 (1993). "[A] claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have [an] otherwise barred constitutional claim considered on the merits." *Id*. at 404.

Because the claim is not cognizable in a habeas corpus petition, the district court properly denied relief on it.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter
State of Tennessee

ANDRÉE S. BLUMSTEIN
Solicitor General

/s/ John H. Bledsoe
JOHN H. BLEDSOE
Deputy Attorney General
Federal Habeas Corpus Division
P. O. Box 20207
Nashville, Tennessee 37202
Telephone: (615) 741-4351
Facsimile: (615) 532-7791
E-mail: John.Bledsoe@ag.tn.gov
Attorney for Respondent-Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and 6 Cir. R. 32(a), I certify that this brief complies with the length limitations set out in Fed. R. App. P. 32(a)(7)(B)(i) and (f) and 6 Cir. R. 32(b)(1), in that the brief contains 5,673 words. In certifying the number of words in this brief, I have relied upon the word count of the word processing system used to prepare the brief.

/s/ John H. Bledsoe
JOHN H. BLEDSOE
Deputy Attorney General

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 6 Cir. R. 25(f), I certify that a true and exact copy of the foregoing was been forwarded by the Court's electronic filing system to C. Mark Pickrell, Attorney at Law, 5701 Old Harding Pike, Suite 200, Nashville, Tennessee 37205, on the 14th day of February, 2018.

/s/ John H. Bledsoe
JOHN H. BLEDSOE
Deputy Attorney General

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CYNTOIA BROWN,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	**No. 16-6738**
	)	
CAROLYN JORDAN, WARDEN,	)	
	)	
Respondent-Appellee.	)	

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6 Cir. R. 28(b)(1)(A)(i) and 30(g)(1), the respondent-appellee designates the following relevant documents from the district court's record in this case, listed by (1) record entry number, (2) description of document, and (3) PageID#:

1—Petition—1-20

13—Amended Petition—157-191

14-1—Indictment—243-247

14-1—Judgements—421-422, 437

14-5—911 Recording—503

14-5—Handwritten Note—530

14-5—Handwritten Note—600

14-6—Petitioner's Statement—601-642

14-6—Telephone Recording—714-715

14-11—Trial Testimony—1331, 1339, 1359-1360, 1364-1369, 1372-1375, 1398-1399, 1417. 1420-1421

14-12—Trial Testimony—1479-1480, 1483, 1485, 1527-1530, 1550-1552, 1563-1564

14-13—Trial Testimony—1655-1659, 1682-1684, 1694, 1703, 1712, 1720-1721, 1746-1748, 1757-1758, 1767-1768, 1771-1773, 1775-1780, 1787-1789, 1796-1798

14-14—Trial Testimony—1868-1869, 1875, 1894-1896, 1972-1973

14-15—Trial Testimony—1993, 1997, 2005-2007, 2010-2011, 2016, 2030-2031, 2117-2119

14-16—Verdict—2241-2242

14-26—Judgment—3059

14-26—Petition—3060-3080

14-26—Amended Petition—3082-3084

14-27—Order—3189-3247

14-28—Hearing Testimony—3271

25—Memorandum—5488-5502

26—Order—5503

27—Motion—5504-5506

28—Memorandum—5507-5524

29—Notice—5525-5527

30—Request—5528-5555

43—Memorandum & Order—5666-5674

44—Amended Petition—5675-5677

/s/ John H. Bledsoe
JOHN H. BLEDSOE
Deputy Attorney General