

CASE NO. 16-6738

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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CYNTOIA BROWN,  
*Petitioner-Appellant,*

v.

CAROLYN JORDAN, Warden,  
*Respondent-Appellee.*

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On Appeal from the United States District  
Court for the Middle District of Tennessee

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REPLY OF APPELLANT CYNTOIA BROWN

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Abbe David Lowell  
Christopher D. Man  
Norton Rose Fulbright US LLP  
799 9th St., NW; Ste 1000  
Washington, DC 20001  
(202) 662-0200

Charles W. Bone  
Edward M. Yarbrough  
Bone McAllester Norton, PLLC  
511 Union Street; Ste 1600  
Nashville, TN 37219  
(615) 238-6300

J. Houston Gordon  
Lyle Reid  
114 W. Liberty Ave.  
Covington, TN 38019  
(901) 476-7100

Paul J. Bruno  
40 Music Square East  
Nashville, TN 37203  
(615) 251-9500

Joe G. Riley, Jr.  
115 Lake Street  
Ridgeley, TN 38080  
(731) 264-5671

C. Mark Pickrell  
*Lead Counsel*  
5701 Old Harding Pk; Ste 200  
Nashville, TN 37205  
(615) 352-9588

*Attorneys for Cyntoia Brown*

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REPLY ARGUMENT

I. MILLER v. ALABAMA

- A. "Meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" -- Miller v. Alabama

In Miller v. Alabama, 567 U.S. 460 (2012), the United States Supreme Court held that the Eighth Amendment to the United States Constitution prohibits the several States from imposing life imprisonment on juveniles. In its decision, the Court anticipated that some of the several States might try to avoid its central holding by merely providing to juvenile prisoners the faint hope of parole "some day". For that reason, the United States Supreme Court clearly and firmly held that our federal Constitution requires, for juvenile offenders, that the several States "must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" Miller, 567 U.S. at 479 (quoting Graham v. Florida, 560 U.S. 48, 75 (2010)).

In her brief in this appeal, Cyntoia Brown specifically relied on the United States Supreme Court's holding in Miller that her right to parole must be *meaningful*. Brief of the Appellant at 22-24. Her right to federal habeas relief under the Eighth Amendment is a function of clearly established federal law, as established by the United States Supreme Court.

In its brief, the State argues that Ms. Brown is not entitled to habeas relief because her sentence is not,

officially, life imprisonment without parole. Brief of the Appellee at 16-18. The State's brief is notable, however, for its failure to address both of the United States Supreme Court's holdings in Miller: that the several States may not sentence juveniles to life in prison without the possibility for parole, and that they may not avoid this limitation on their power by positing only a theoretical opportunity for parole. After Miller, a constitutional parole scheme for juveniles must provide a prisoner the opportunity to reasonably and timely demonstrate rehabilitation, which Ms. Brown will be able to do well before she has been imprisoned for half a century, and well before she is likely to die in prison.

The State's failure to address the Supreme Court's bedrock constitutional holdings in Miller is glaring, particularly in contrast to the State's copious and gratuitous retelling of the evidence of Ms. Brown's crime. Cf. Brief of the Appellee at 4-10. The United States Supreme Court in Miller did not carve out an exception for crimes that the several States may consider to be particularly heinous. After all, the Supreme Court had already established, prior to Miller, that the Eighth Amendment categorically protects juveniles who are found guilty of those crimes that some of the several States may deem to warrant the death penalty. Cf., Roper v. Simmons, 543 U.S. 551 (2005).

Because the State of Tennessee does not provide Ms. Brown a meaningful opportunity to demonstrate her maturity and rehabilitation, as required by the United States Supreme Court in Miller, Ms. Brown is entitled to federal habeas relief.

B. "There shall be no release eligibility for a person committing [murder in the first degree or second degree] on or after July 1, 1995" -- Tenn. Code Ann. § 40-35-501(i).

In her brief, Cyntoia Brown argued that Tennessee's law regarding her eligibility for parole is ambiguous. Cf. Brief of the Appellant at 18-19. Her argument should be uncontroversial, because the Tennessee Supreme Court has already held that Tennessee's sentencing law on this issue is contradictory. Vaughn v. Tennessee, 202 S.W.3d 106, 118 (Tenn. 2006) (Tennessee's statutory parole scheme contained "a conflict in [its] provisions"). Moreover, the Tennessee Supreme Court, to date, has not clarified whether Ms. Brown will ever be entitled to the possibility of parole.

Under the plain language of Tennessee's parole statutes, Ms. Brown will never be entitled to the possibility of parole: "There shall be no release eligibility for a person committing [murder in the first degree] on or after July 1, 1995 . . . ." Tenn. Code Ann. § 40-35-501(i). If the Tennessee Supreme Court gives effect to the plain language of that section, then Cyntoia Brown is, without any reasonable argument, entitled to federal habeas relief under Miller. Such a decision would save this Court, and the United States

district courts in Tennessee, significant work over the coming years, as Ms. Brown will probably not be the last juvenile sentenced under the Tennessee statute. In the interest of judicial efficiency, as well as in the interest of comity between the federal courts and Tennessee courts, Ms. Brown believes that the Tennessee Supreme Court should be given the opportunity to clarify the relevant Tennessee statutes.

The State tries to distinguish the Tennessee Court of Appeals' Myrick decision, arguing that Myrick involved second degree murder, not first-degree murder. Brief of the Appellee at 23. The State's "distinction" is one without a difference, because Section 40-35-501(i) treats both first-degree and second-degree murder the same. The conflict in Tennessee's law, identified by the Tennessee Supreme Court in Vaughn, is the same for both first-degree and second-degree murder convictions. Moreover, it would be an absurd result that prisoners convicted of first-degree murder would have the opportunity for parole, but those convicted of second-degree murder would have no such opportunity.

Regardless of how the Tennessee Supreme Court ultimately interprets Tennessee law, Ms. Brown is entitled to federal habeas relief under Miller. The only possible question in following Miller is how broadly the lower federal courts should read that decision. If the Tennessee Supreme Court decides to follow the plain language of Tenn. Code Ann. § 40-35-501(i), then the outcome of this appeal is simple. If Ms.

Brown, however, turns out to actually be eligible for parole after 51 years (as the Tennessee Attorney General believes), then she nonetheless is *still* entitled to federal habeas relief under Miller, because she will not have a meaningful opportunity to demonstrate her maturity and rehabilitation.

C. Prior Panel Rule

Rather than grapple with the United States Supreme Court's holdings in Miller, and rather than acknowledge the ambiguity in Tennessee's sentencing scheme, the State argues that this Court (specifically, the panel of this Court deciding Ms. Brown's appeal) should simply follow a prior, unpublished panel decision, Starks v. Easterling. Cf., Brief of the Appellee at 19-20.

The State's argument fails to recognize why this Court has already decided that unpublished decisions should not bind subsequent panels. Unpublished decisions, for a variety of reasons, may not thoroughly address the issues presented in a case. Most importantly, the Starks panel did not address the central questions in Ms. Brown's appeal: whether Ms. Brown is actually denied the possibility of parole by Section 40-35-501(i), and why the Supreme Court in Miller specifically and clearly required that the several States provide a meaningful opportunity for a juvenile to show "maturity and rehabilitation".



Respectfully, before this Court considers rejecting Ms. Brown's federal habeas petition, it should at least determine the scope of the Supreme Court's Miller decision. If a State offers a juvenile the possibility of parole after 100 years of imprisonment, is Miller violated? If so, why? If not, why not?

## II. ACTUAL INNOCENCE

### A. The Certificate of Appealability

On the second issue in this appeal, the district court issued the following Certificate of Appealability: "Whether Brown was actually innocent because she was incapable of forming the requisite mens rea to commit the crimes for which she was convicted?"

In its brief, the State argues that Ms. Brown "conflates" actual innocence and sufficiency-of-the-evidence (including proof of the elements of the offense), Brief of the Appellee at 27, without apparently recognizing that the district court rightly believed (and certified to this Court) that the two issues are intertwined. If Ms. Brown did not possess the mental capacity to form the requisite intent to commit first-degree murder, then she is actually innocent of that crime. That is the issue that the district court certified for appeal, and that is the issue that Ms. Brown argued in her initial brief. The State's assertion that Ms. Brown's

argument on this issue has not been certified for appeal is, frankly, ridiculous.

The State probably seeks to avoid addressing the factual issue regarding Ms. Brown's mental state because, as shown in the State-court proceedings, Ms. Brown was actually incapable of forming the requisite mens rea to commit first-degree murder. The evidence of this fact was amply presented in Ms. Brown's State post-conviction hearing, and it was unrebutted by the State.

B. Actual Innocence as a Cognizable Habeas Claim

The State relies on Herrera v. Collins, 506 U.S. 390 (1993), to argue that actual-innocence claims are not cognizable on federal habeas review. Brief of the Appellee at 28. In Herrera, the Supreme Court assumed, without deciding, that a claim of actual innocence would be an independent basis for a violation of the U.S. Constitution. Id. at 418. In the intervening years, the Supreme Court has continued to grapple with the existence of a stand-alone actual-innocence claim on federal habeas review, without resolving the issue. Compare, In re Davis, 557 U.S. 952, 953 (2009) (AEDPA "is arguably unconstitutional to the extent it bars relief for a death row inmate who has established his innocence") (Stevens, concurring), with In re Davis, 557 U.S. at 954 ("This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is

later able to convince a habeas court that he is 'actually' innocent.") (Scalia, J., dissenting) (emphasis in the original).

Leaving aside the question of a stand-alone claim of innocence, in Herrera the Supreme Court explicitly kept available "evidentiary review of a state court conviction on federal habeas" under Jackson v. Virginia, 443 U.S. 307 (1979). Herrera, 506 U.S. at 402. Such claims are "gateway" claims, requiring reliance on a prior constitutional right, such as the Due Process rights established in re Winship. Id. Those claims must: 1) have an independent constitutional violation, such as Winship; 2) be based on "record evidence;" and 3) determine whether the trier of fact made a *rational* decision. Id. As argued in her initial brief, Ms. Brown respectfully submits that each of the elements of a Jackson v. Virginia "gateway" claim, as described by the Supreme Court in Herrera, have been met in her case.

The district court's second COA makes particular sense in light of the Supreme Court's description of a "gateway" claim in Herrera. The fact that Ms. Brown did not possess the necessary mental state shows that the elements of the offense of conviction were not ultimately met and that the evidence of her guilt was ultimately insufficient, as required by the United States Constitution, based on Jackson, Patterson, and Winship.

## C. Evidence Introduced in State Court

The State argues that the question of actual innocence can only be determined, despite Sections 2254(d)(2) and (e)(1), by evidence "presented at trial, not newly presented evidence." Brief of the Appellee at 27. For this legal proposition, the State cites United States v. Powell, 469 U.S. 57 (1984). Powell does not remotely stand for the proposition that the State asserts. Powell was not a habeas case; it was not even a post-conviction case. That decision concerned an inconsistent federal-jury verdict, and the Court held that inconsistent jury verdicts may nonetheless permit a jury verdict of guilty to stand despite an inconsistent, simultaneous other verdict of "not guilty." Id. at 62-69.

The State's Powell argument is undermined by 28 U.S.C. § 2254(d)(2), which permits federal courts on habeas review to reject State-court factual findings based on evidence presented in State-court proceedings, including (as occurred in Ms. Brown's case) State post-conviction proceedings. E.g., Wood v. Allen, 558 U.S. 290 (2010). Consistent with the COA issued by the district court, and consistent with Section 2254(d)(2) and 2254(e)(1), Ms. Brown has made a factual argument, based on evidence presented in State court,<sup>1</sup> to show that she is actually innocent of the crime.

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<sup>1</sup>Ms. Brown respectfully submits that State post-conviction proceedings, as well as trial proceedings, constitute "record evidence" permitting factual review by this Court. After all, three years after Herrera, the Anti-Terrorism and Effective

It is important to emphasize that the State, in its brief, as in the State post-conviction proceeding, has made no factual argument to contradict Ms. Brown's clear and convincing evidence regarding her mental capacity at age 15. Under 28 U.S.C. § 2254(e)(1), the federal courts on habeas review may reject a State-court factual determination, like the final State-court decision below, when the evidence presented by the petitioner is clear and convincing. Particularly in light of the uncontradicted evidence presented in the State-court proceeding, Ms. Brown has shown by clear and convincing evidence that she is actually innocent, because she did not possess the necessary mental state to commit the crime charged.

Lacking any factual evidence to rebut Ms. Brown's factual evidence, the State is left only with tenuous legal arguments. They should be rejected by this Court.

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Death Penalty Act of 1996 amended section 2254 to permit factual review of factual decisions in State-court proceedings, not just trials. See 28 U.S.C. § 2254(d)(2); see also, Wood v. Allen, supra. At the same time, the AEDPA set higher standards for introduction of new evidence into federal court. See 28 U.S.C. § 2254(e)(2). In this case, Ms. Brown asks this Court to conduct its "gateway" review based only on the evidence presented in State court, including the State post-conviction proceeding.

CONCLUSION

The judgment of the district court denying Cyntoia Brown's petition for writ of habeas corpus should be reversed. If the Court deems that the interests of justice, judicial efficiency, and comity militate toward asking the Tennessee Supreme Court to clarify the applicability of Tenn. Code Ann. § 40-35-501(i) to Ms. Brown's case, then a certified question to the Tennessee Supreme Court would be appropriate.

Respectfully Submitted,

/s C. Mark Pickrell  
C. Mark Pickrell  
*Lead Counsel*  
5701 Old Harding Pk, No. 200  
Nashville, TN 37205  
(615) 352-9588

Charles W. Bone  
Edward M. Yarbrough  
Bone McAllester Norton, PLLC  
511 Union Street, Suite 1600  
Nashville, TN 37219  
(615) 238-6300

Paul J. Bruno  
40 Music Square East  
Nashville, TN 37203  
(615) 251-9500

Abbe David Lowell  
Christopher D. Man  
Norton Rose Fulbright US LLP  
799 9th St., NW; Ste 1000  
Washington, DC 20001  
(202) 662-0200

J. Houston Gordon  
Lyle Reid  
114 W. Liberty Ave.  
Covington, TN 38019  
(901) 476-7100

Joe G. Riley, Jr.  
115 Lake Street  
Ridgeley, TN 38080  
(731) 445-9624

*Attorneys for Cyntoia Brown*

CERTIFICATE OF SERVICE

A copy of the foregoing brief was served by electronic mail through the Court's CM/ECF system on February 28, 2018, to John H. Bledsoe, III, Office of the Attorney General, john.bledsoe@ag.tn.gov.

/s C. Mark Pickrell