<table>
<tr><td>COLORADO COURT OF APPEALS
STATE OF COLORADO

2 E. 14TH Avenue
Denver, CO 80203</td><td rowspan="3">DATE FILED: May 28, 2014 2:52 PM
CASE NUMBER: 2014SC495

s COURT USE ONLY s</td></tr>
<tr><td>Appeal
District Court, Jefferson County, 1997CR1195
Honorable Tamara Russell, Judge</td></tr>
<tr><td>Plaintiff – Appellant

The People of the State of Colorado,

v.

Defendant - Appellee

Frank Vigil, Jr.</td></tr>
<tr><td>Attorney for Defendant - Appellee:

STACIE NELSON COLLING, Reg. No. 38301
Nelson Colling Law LLC
2373 Central Park Blvd.
Suite 100
Denver, CO 80238
(720) 288-0813
nelson@nelsoncollinglaw.com</td><td>Case Number: 13CA2046</td></tr>
<tr><td colspan="2">ANSWER BRIEF</td></tr>
</table>

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g). It does not exceed 30 pages and contains 2,945 words.

By _s/ Stacie Nelson Colling
Stacie Nelson Colling
Attorney for Defendant - Appellee
Registration No. 38301

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

STATEMENT OF ISSUES

I. Whether the Appellant has appealed a final judgment.

II. If the District Court's Ruling Constitutes a Final Judgment, Whether *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455 (2012) applies retroactively to Mr. Vigil's sentence.

SUMMARY OF ARGUMENT

The Order appealed by the People in this case is not a final judgment, and as such this Court does not have jurisdiction to review the People's claim. If, however, this Court finds that it does have jurisdiction, it should find that *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455 (2012) is a new rule of substantive constitutional law therefore applies retroactively to Mr. Vigil's case.

ARGUMENT

I. THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE DISTRICT COURT'S ORDER IN APPELLEE'S CASE, AS IT IS NOT A FINAL JUDGMENT.

The Court of Appeals may review, "a final judgment of any district…court." C.A.R. 1(a)(1). A prosecutor may only appeal a ruling or order that "produced a final judgment." *People v. Crouse*, --- P.3d. --- (Colo. App. 2013), citing *People v. Gabriesheski,* 262 P.3d 653, 657 (Colo. 2011). A final judgment "ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties

involved in the proceedings." *Id*., citing *People v. Guatney,* 214 P.3d 1049, 1050–51 (Colo. 2009) ("[P]rosecution appeals ... are subject to the final judgment requirement of C.A.R. 1.").

A final judgment occurs in a criminal case when the defendant is acquitted, the charges are dismissed, or the defendant is convicted and sentence is imposed. *See Sanoff v. People*, 187 P.3d 576, 577 (Colo. 2008); *Ellsworth v. People*, 987 P.2d 264, 266 (Colo. 1999); *People v. Gallegos*, 946, P.2d 946, 950 (Colo. 1997); *Hellman v. Rhodes*, 741 P.2d 1258, 1259-60 (Colo. 1987).

In this case, the District Court vacated Mr. Vigil's sentence of Life Without Parole and set the matter for a re-sentencing hearing. The Court did not impose a new sentence upon Mr. Vigil, nor did it order a new trial. It certainly did not leave "nothing further for the court pronouncing it to do" as it explicitly stated that the District Court would hold a new sentencing hearing. Therefore, this Court does not have jurisdiction over Mr. Vigil's claim and the appeal should be dismissed.

II. IF THIS COURT FINDS THAT IT DOES HAVE JURISDICTION OVER THE APPEAL IN THIS CASE, IT SHOULD FIND THAT *MILLER V. ALABAMA*, __ U.S. __, 132 S.CT. 2455 (2012) APPLIES RETROACTIVELY TO MR. VIGIL'S CASE.

The federal district court in *Hill v. Snyder* best describes why *Miller* is retroactive. In *Hill*, the court stated that, although the case before it was on direct rather than collateral review, "[i]ndeed, 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*." No. 10-14568, 2013 WL 364198 at p. *2 (E.D. Mich. April 30, 2013) (unpublished). It went on to say that, "to hold otherwise would allow the state to impose unconstitutional punishment on some persons but not others, an intolerable miscarriage of justice." *Id.*

In *Miller*, the U.S. Supreme Court created a new rule of substantive constitutional law and as such, it should be applied retroactively to cases on collateral review. In addition, the U.S. Supreme Court, Colorado law, and principles of fairness and justice require that *Miller* be applied retroactively to cases on collateral review.

A. *Miller* should be applied retroactively because it has already been applied retroactively by the U.S. Supreme Court.

Contrary to the State's argument, the fact that the companion case to *Miller* was a case on collateral review is very important to the issue of *Miller's* retroactivity. In *Teague v. Lane*, the U.S. Supreme Court explained why it is important to consider the posture of a case in determining whether or not its holding should be applied retroactively:

> In our view, the question of "whether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision." Mishkin, FOREWORD: THE HIGH COURT, THE GREAT WRIT, AND THE DUE PROCESS OF TIME AND LAW, 79 Harv.L.Rev. 56, 64 (1965). Cf. *Bowen v. United States*, 422 U.S.

> 916, 920 (1975) (when "issues of both retroactivity and application of constitutional doctrine are raised," the retroactivity issue would be decided first). Retroactivity is properly treated as a threshold question, for, once 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.

489 U.S. 288, 300-301 (1989) (emphasis added).

The U.S. Supreme Court applied its holding in *Miller* to Kuntrell Jackson, the defendant in Mr. Miller's companion case of *Jackson v. Hobbs*. Mr. Jackson's case reached the U.S. Supreme Court after a post-conviction habeas corpus petition, his conviction having become final long before his case reaching the Court. Accordingly, the Court's application of *Miller* to Kuntrell Jackson in *Jackson v. Hobbs* makes clear that *Miller* is retroactive to all cases, whether final or not. *Also see, e.g., Iowa v. Ragland*, 836 N.W.2d 107, 116-17 (Iowa 2013) (finding that *Miller* should be applied retroactively, because the U.S. Supreme Court itself applied it retroactively in the companion case of *Jackson v. Hobbs*).

B. *Miller v. Alabama* created a new rule of substantive constitutional law.

Mr. Vigil disagrees with the State that *Miller* announced a new rule of procedural law, and instead asserts that *Miller* created a new rule of substantive constitutional law. In general, new rules of substantive, as opposed to procedural, constitutional law apply retroactively to cases that have previously become final.

See, e.g. People v. Wenzinger, 155 P.3d 415, 419 (Colo. App. 2006) ("new substantive rules generally apply retroactively to cases that are not final, whereas new procedural rules do not"), citing *Schriro v. Summerlin*, 542 U.S. 348, 352-53 (2004); accord *People v. Johnson*, 142 P3d 722, 725 (Colo. 2006). *Miller* created a new rule of substantive constitutional law, and therefore this Court should hold that it applies retroactively to cases on collateral review.

Several jurisdictions have found that *Miller* creates a new rule of substantive law, and as such should be applied retroactively. *See Nebraska v. Mantich*, 842 N.W.2d 716, 731 (Neb. 2014) ("[b]ecause the rule announced in *Miller* is more substantive than procedural and because the Court has already applied that rule to a case on collateral review, we conclude that the rule announced in *Miller* applies retroactively"); *People v. Davis*, 6 N.E. 3d 709, 721 (Ill. 2014) (holding that *Miller* should be applied retroactively because it is a new substantive rule); *Alejandro v. U.S.*, 2013 WL 4574066 (S.D.N.Y. Aug. 22, 2013) (finding that, "[b]ecause *Miller* announced a new rule of constitutional law that is substantive rather than procedural, that new rule must be applied retroactively on collateral review" and ordering a re-sentencing hearing for the defendant); *Jones v. State*, 122 So. 3d 698, 703 (Miss. 2013) (finding that, "*Miller* created a new, substantive rule which should be applied retroactively to cases on collateral review"). *But see*

State v. Tate, 130 So.3d 829, 841 (La. 2013) (finding that *Miller* announced a new rule of constitutional procedure that is neither substantive nor a watershed rule); *Com. v. Cunningham,* 81 A.3d 1, 10 (Pa. 2013) ("holding that the rule announced by *Miller* "is procedural and not substantive for purposes of *Teague"*) *(petition for cert. filed)*; *In re Morgan*, 713 F.3d 1365 (11th Cir. 2013) (finding that *Miller* established a new rule of constitutional law but that it is procedural rather than substantive and therefore should not apply retroactively); *Chambers v. Minnesota*, 831 N.W.2d 311 (Minn. 2013) (finding that the rule announced in *Miller* is procedural rather than substantive and does not apply retroactively).

Further, several federal circuit courts have found that appellants have made a prima facie showing that *Miller* applies retroactively to cases on collateral review. *See, e.g. In re Pendleton,* 732 F.3d 280, 282 (3d Cir. 2013); *Johnson v. United States*, 720 F.3d 720 (8th Cir. 2013) (per curium). But see *In re Morgan*, 713 F.3d 1365 (11th Cir. 2013).

In addition, the U.S. Supreme Court's recent case of *Alleyne v. United States* supports the retroactive application of *Miller* on the basis that *Miller* announced a new rule of substantive constitutional law. 133 S.Ct. 2151, 2153 (2013). The principal argument against *Miller's* retroactivity (in that *Miller* did not announce a new rule of substantive constitutional law) in the cases cited above is that *Miller*

did not categorically prohibit a penalty, because Life Without Parole is still a viable sentencing option so long as it follows an individual sentencing hearing. In *Alleyne*, the Supreme Court faced the issue of whether *Apprendi* applies to facts that increase a defendant's mandatory *minimum* sentence. In holding that yes, it does, the Court noted that a "penalty" is the legally proscribed range of sentences to which a defendant is exposed, and that changing the mandatory minimum changes the substantive offense. *Id.* at 2160-2161. The mandatory minimum sentence available to the sentencing court in Mr. Vigil's case was Life Without Parole. The Court's decision in *Miller* altered that minimum penalty, for every juvenile. *Alleyne* makes clear that both the floor and the ceiling of a sentencing range define a penalty. As such, it illustrates that *Miller* does in fact categorically prohibit a penalty, in that it prohibits a penalty with a mandatory minimum of Life Without Parole for juveniles. It makes no difference that *Miller* lowers the floor while *Roper* and *Graham* lower the ceiling; all substantively change the penalty at issue, and all should be applied retroactively.

Because *Miller* announced a substantive, rather than procedural, rule, *Teague* does not bar its retroactive application. *See Beard v. Banks*, 542 U.S. 406 (2004) quoting *Penry v. Lynaugh*, 429 U.S. 302 (1989) (recognizing that *Teague's* bar on retroactive application of new rules of constitutional criminal procedure

includes exceptions for rules forbidding punishment, "of certain primary conduct [or to] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense"). Mr. Vigil asserts that per *Alleyne*, discussed above, the holding in *Miller* prohibits a certain category of punishment (mandatory minimum Life Without Parole) for a class of defendants because of their status (juvenile defendants) or offense. Therefore, *Beard* is directly on point and explains why *Teague* does not bar retroactive application of *Miller* to Mr. Vigil.

C. Colorado law supports the retroactive application of *Miller*.

When, as here, there has been a significant change of law of constitutional magnitude after a defendant's conviction has become final, Colorado courts have held that they can review the new claim. *See, e.g., People v. Close*, 22 P.3d 933, 936 (Colo. App. 2000), *cert. granted on other grounds* (recognizing that it is proper to review a constitutional claim – in this case a due process violation based on an erroneous complicity instruction – when the 35(c) motion was filed timely, and what is at issue is an, "allegedly significant change in the interpretation of the law, of constitutional magnitude, determined since defendant's direct appeal was affirmed"), citing *People v. Allen*, 843 P.2d 97 (Colo. App. 1992) (finding that the defendant was not procedurally barred from raising a double jeopardy issue in a second post-conviction motion because the Supreme Court ruling the defendant

relied upon had not been announced when defendant filed the first 35(c) motion) and *People v. Diaz*, 985 P.2d 83 (Colo. App. 1999) (finding that post-conviction review was not precluded by the defendant's attempt to raise the same constitutional issue on appeal that the appellate court declined to address); *People v. McDowell*, 219 P.3d 332, 337 (Colo. App. 2009) (recognizing a, "narrow exception to the procedural bar that applies when a defendant alleges a significant change in the interpretation of constitutional law"), citing Rule 35(c)(3)(VII) and *Close*, 22 P.3d 933.

In addition, Colorado statutory law supports the retroactive application of *Miller*. The Colorado legislature has specifically provided that there is no statute of limitations for collateral challenges to class one felony convictions. C.R.S. § 16-5-402(1). As such, the legislature has recognized that principles of finality are of less concern when one is convicted of a serious offense for which he is sentenced to die in prison.

This is especially true in Mr. Vigil's case, where applying *Miller* to his case will not result in a new trial, but only a re-sentencing hearing. Given that the remainder of Mr. Vigil's life is at stake, and given the lack of certainty in the law about retroactivity, principles of fairness and justice urge this Court to apply *Miller* retroactively to Mr. Vigil's case. Indeed, "to hold otherwise would allow the state

to impose unconstitutional punishment on some persons but not others, an intolerable miscarriage of justice." *Hill*, 2013 WL 364198 at p. *2.

D. New rules must be applied retroactively when multiple holdings of the U.S. Supreme Court logically dictate the retroactivity of the new rule.

In her concurrence in *Tyler v. Cain*, Justice O'Connor explained that:

> If we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review. In such circumstances, we can be said to have "made" the given rule retroactive to cases on collateral review. The relationship between the conclusion that a new rule is retroactive and the holdings that "ma[k]e" this rule retroactive, however, must be strictly logical - i.e., the holding must dictate the conclusion and not merely provide principles from which one may conclude that the rule applies retroactively.

533 U.S. at 668-669 (2001). Because *Miller* creates a categorical ban on a mandatory minimum of Life Without Parole for juveniles, the fact that *Roper* and *Graham* have been applied retroactively argues strongly that *Miller* should be as well.

Even, assuming *arguendo* that *Miller* does not create a categorical ban, but only requires a certain process, there are multiple U.S. Supreme Court holdings that logically dictate its retroactive application. *Miller* relies on two strains of case law, both of which are applied retroactively. First, the Court relies on *Graham* and

Roper's "foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 132 S.Ct. at 2466. Second, *Miller*, like *Graham*, equates Juvenile Life Without Parole to the death penalty and, thus, relies on cases such as *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Sumner v. Shurman*, 483 U.S. 66 (1987), which strike mandatory death penalty statutes because they give, "no significance to 'the character and records of the individual offender or the circumstances' of the offense, and 'exclud[ed] from consideration...the possibility of compassionate or mitigating factors.'" *Miller*, 132 S.Ct. at 2467, quoting Woodson, 428 U.S. at 304.

In addition, *Sumner* involved a collateral proceeding in which the Court held that a mandatory death penalty for a convicted murderer already serving life in prison violated the Eighth Amendment because it made any mitigating circumstance irrelevant. So, just like *Miller*, which does not forbid a Juvenile Life Without Parole sentence, but requires that the sentencer consider and be able to give effect to a defendant's youth and other relevant circumstances, *Sumner* did not forbid the death penalty in all cases in which the accused was serving a life sentence when he committed the murder, but it did mandate that the sentencer be allowed to consider mitigating circumstances and impose a lesser sentence. *Sumner*, 483 U.S. 66. Since *Sumner* was a case on collateral review, it was applied

retroactively to Mr. Sumner. Because it is so analogous to *Miller*, by logical necessity, *Miller*, too, must be applied retroactively. Again, this conclusion is further bolstered by the fact that the Court applied *Miller* retroactively in its companion case of *Jackson v. Hobbs*.

In summary, U.S. Supreme Court jurisdiction, Colorado law, and principles of fairness and justice urge this Court to apply *Miller* retroactively to Mr. Vigil's case, and to affirm the trial court's ruling that he receive a re-sentencing hearing.

III. THE REMEDY FOLLOWING *MILLER* IS, AS THE TRIAL COURT IN THIS CASE ORDERED, AN INDIVIDUALIZED RE-SENTENCING HEARING.

The State asserts that if this Court finds that *Miller* is retroactive, the "procedure should be consistent with the as yet to be announced Colorado Supreme Court decisions in *Tate* and *Banks*." While Mr. Vigil agrees that any decision by this Court must be grounded in precedence, he maintains that the remedy provided by the trial court in his case is appropriate and should not be disturbed. The trial court's order that Mr. Vigil's sentence of Life Without Parole be vacated and that a new sentencing hearing be held is consistent with the rule announced by the U.S. Supreme Court in *Miller*, and should be affirmed.

CONCLUSION

This Court should dismiss Appellant's appeal as it is without jurisdiction, because the order being appealed is not a final judgment. If this Court concludes that it does have jurisdiction over this issue, it should find that *Miller v. Alabama* does apply retroactively to cases on collateral review, and affirm the trial court's order that Mr. Vigil be afforded a new sentencing hearing.

Respectfully Submitted,

s/ Stacie Nelson Colling

_____

Stacie Nelson Colling, Reg. No. 38301
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of May 2014, I have served a true and correct copy of the foregoing **Answer Brief** via Integrated Colorado Courts E-filing System (ICCES).

s/ Stacie Nelson Colling

_____