COLORADO COURT OF APPEALS
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Appeal
District Court, Jefferson County, 1997CR1195
Honorable Tamara Russell, Judge

Plaintiff – Appellant

The People of the State of Colorado,

v.

Defendant - Appellee

Frank Vigil, Jr.

COURT USE ONLY

Peter A. Weir, District Attorney
Donna Skinner Reed
Chief Appellate Deputy District Attorney
500 Jefferson County Parkway
Golden, CO 80401-6002
Phone Number: (303) 271-6800
FAX Number: (303) 271-6888
E-mail: dsreed@jeffco.us
Atty. Reg. #: 8446

Court of Appeals Case No.:

13CA2046

PEOPLE'S OPENING BRIEF

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.

By /s/ Donna Skinner Reed
Donna Skinner Reed
Chief Appellate Deputy District Attorney
Registration No. 8446

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ISSUE PRESENTED FOR REVIEW

Whether the trial erred in granting defendant's Crim. P. 35(c) Motion and in ordering a new sentencing hearing.

(a) Whether *Miller v. Alabama*, __U.S.__, 132 S. Ct 2455 (2012) is to be applied retroactively to cases on collateral review.

(b) If *Miller* is retroactive, whether the court should have imposed a sentence of life with the possibility of parole after 40 years instead of ordering a new sentencing hearing.

STATEMENT OF THE CASE

The People appeal the trial court's grant of Defendant's Crim. P.35 (c) motion, which asked that defendant be given a new sentencing hearing pursuant to *Miller v. Alabama*, __U.S.__, 132 S.Ct. 2455 (2012).

On June 19, 1997 Defendant was charged as a juvenile direct file with a lead charge of First Degree Murder (both after deliberation and felony). (Docs: 001)

On January 14, 1998, a jury found the Defendant guilty of the following charges: Count 1, Murder in the First Degree, C.R.S. § 18-3-102(a), a class one

felony; Count 2, Murder in the First Degree (Felony Murder), C.R.S. § 18-3-102(b), a class one felony; Count 3, Second Degree Kidnapping, C.R.S. § 18-3-302(1), (3)(a), a class two felony; Count Four, Violent Crime (re: Second Degree Kidnapping), C.R.S. § 16-11-309, a sentence enhancer; Count 5, Violent Crime (re: Second Degree Kidnapping), C.R.S. § 16-11-309, a sentence enhancer; Count 7, First Degree Assault, C.R.S. § 18-3-202(1)(a), a class three felony; and Count 9, Conspiracy to Commit Second Degree Kidnapping, C.R.S. § 18-2-201, a class three felony. The jury found the defendant not guilty of Count 6, First Degree Sexual Assault, C.R.S. § 18-3-402(1)(a), a class two felony; and Count 10, Conspiracy to Commit First Degree Sexual Assault, C.R.S. § 18-2-201, a class three felony. (Docs. 802).

On February 23, 1998, the Defendant, as to Count One, was sentenced to life without parole to the Department of Corrections. The Court merged the Defendant's sentence for Count Two into Count One. As to Count Three, the Court sentenced the defendant to 48 years to be served consecutively with Count One. For Count Seven, the Court sentenced the Defendant to 32 years to be served consecutively with the sentence for Count One but concurrently with the sentence for Count Three. The Court sentenced the Defendant to 40 years for Count Eight to be served concurrently with the sentence for Count One. As to Count Nine, the

court sentenced the defendant to 30 years to be served concurrently with the sentence for Count One. The defendant received credit for 249 days of incarceration. (Docs. 380).

The Defendant's direct appeal ended on January 20, 2000, when the Colorado Court of Appeals issued its mandate affirming his conviction. See *People v. Vigil*, No. 98CA0689 (Colo. App. July 29, 1999) cert. den (Docs. 395-412). One of the Defendant's requests for postconviction relief was denied by the trial court and the Colorado Court of Appeals, No. 06CA2590. The Colorado Supreme Court denied his Petition for Writ of Certiorari, No. 07SC606. (Docs. 557-560). Defendant filed the instant Motion to Vacate Unconstitutional Sentence and Demand for Evidentiary Resentencing Hearing on May 9, 2013. (Docs. 635-646). The trial court granted it on September 27, 2013 (Docs. 726-736).

STATEMENT OF FACTS

The defendant was a member Deuce 7 Crenshaw Mafia Blood gang and was known as Little Bang. The victim in this case was 14 years old. She was raped, tortured and brutalized with foreign objects by numerous gang members. Defendant is the one who said she had to be killed because she knew their names and had seen their faces. Ultimately, four gang members, including the Defendant,

put her handcuffed in a car and drove her out of town. One of the defendants stabbed her 28 times and tossed her off the roadway. She was not dead, she tried to get up but she bled to death. (1-7-98 Tr. Op. Arg. 2-18).

On February 23, 1998 at defendant's sentencing hearing, defendant's counsel argued that defendant should not have been tried as an adult and should not receive a life sentence without parole. He asked the court to look at the involvement of defendant Vigil and his age and he urged that under a proportionality review, the court should impose some sentence other than life. The court stated:

> And suffice it to say that the evidence does clearly indicate that he was involved in the abuse of ( ), which took place at the home of Mr. Martinez; that it was his idea to have her life taken because of her ability to recognize and identify the participants in this horrible set of events; and that he was actually one of the four who transported her to the place of her execution and where her body was dumped in the bed of Clear Creek.
>
> So far as any proportionality review, Mr. Canney, I think the evidence had done it for me. And this young man has chosen a path, the group that he wanted to associate with, style of life that was antisocial and certainly selfish, in regard to anybody else.
>
> And now it's time to pay the consequences. And it's unfortunate it happens to young people his age. But I think the legislature was well within the – the bounds of its judgment in imposing a life sentence on someone his age for the events which occurred in this case, which certainly were indescribable. (2-23-98 Tr. at 4,8-9).

The court also imposed a consecutive forty-eight year sentence on the kidnapping count.

SUMMARY OF ARGUMENT

Miller should not apply to cases on collateral review because it does not prohibit a category of punishment for a class of defendants: it only changed the procedure for imposing a life sentence without parole on minors.

ARGUMENT

I. *Miller* does not apply retroactively to Defendant because his conviction was final long before *Miller* was announced.

Standard of Review and Preservation

Review of constitutional challenges to sentencing determinations is de novo. *Lopez v. People*, 113 P.3d 713, 720 (Colo. 2005).

The People preserved the issue by objecting to the application of *Miller* to Defendant's First Degree Murder Conviction. (Docs. 653-658).

Analysis

The trial court erred in granting Defendant's Crim. P. 35(c) motion by applying *Miller v. Alabama*, __U.S.__, 132 S. Ct. 2455 (2012) retroactively to defendant's First Degree Murder Conviction which was final, after direct appeal, in January of 2000.

Miller sets forth a new rule of constitutional law by holding that defendants who are below the age of eighteen at the time of commission of a murder may be sentenced to life without the possibility of parole only after a sentencing hearing where their youth and attendant characteristics are considered. *Miller*, 132 S. Ct. at 2471.

All new rules of constitutional law, substantive or procedural, apply to criminal cases, pending and on direct appeal. *Griffith v. Kentucky*, 479 U.S. 314 (1987).

As to convictions, like defendant's conviction, which are already final, a new rule applies only in some circumstances. New substantive rules generally apply retroactively to convictions which are already final but new constitutional procedural rules do not generally apply retroactively to final convictions. *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004).

A. The *Miller* Rule is Procedural.

A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. *Summerlin*, 542 U.S. at 353, 124 S. Ct. at 2523; *Edwards v. People*, 129 P.3d 977, 984 n.7 (Colo. 2006). This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional decisions that place particular conduct, or persons, covered by a statute beyond the State's power to punish. *Summerlin*, 542 U.S. at 351-52, 124 S. Ct. at 2522. By contrast, rules that regulate only the manner of determining the defendant's culpability are procedural. *Summerlin*, 542 U.S. at 353, 124 S. Ct. at 2523; *Edwards*, 129 P.3d at 984.

Miller sets forth a procedural rule. It does not alter the range of conduct that the law punishes: the criminality of first-degree murder is not changed in any respect. Nor does it alter the class of persons upon whom the law my impose the punishment in question. The states are still left with the authority to impose life without parole on juvenile murderers. The states simply must follow a new process before doing so:

> Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty.

Miller, 132 S. Ct. at 2471. See *Chambers v. State*, 831 N.W.2d 311, 326-30 (Minn. 2013) (presenting in-depth analysis and concluding *Miller*'s rule is procedural, not substantive); *People v. Carp*, 828 N.W.2d 685, 709-11, 298 Mich. Ct. App. 472, 511-15 (2012); *State v. Tate*, 130 So.3d 829 (La. 2013); *State v. Huntley*, 118 So.3d 95, 103 (La.Ct.App. 2013); *Geter v. State*, 115 So. 3d 375, 378-79 (Fla. Dist. Ct. App. 2012) (concluding *Miller* is a procedural change in juvenile homicide sentencing); *id*. at 376-77 ("Clearly and unequivocally, the Supreme Court distinguished between the substantive determinations of a categorical bar prohibiting a penalty for a class of offenders or type of crime… and the procedural determination in *Miller* that merely requires consideration of mitigation factors of youth in the sentencing process.") (internal quotation marks omitted); *Craig v. Cain*, 2013 WL 69128 (5th Cir.); *In re Morgan*, 713 F.3d 1365 (11th Cir. 2013), *rehearing en banc denied*, 717 F.3d 1186, 1189 ("the procedural nature of the rule established in *Miller* is not debatable").

Miller's procedural nature is highlighted by the contrast between its holding and the holdings of *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005), and *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010). *Miller* left available to the states the option of punishing juvenile offenders with life without parole, so long as an individualized sentencing procedure is used. *Roper* categorically prohibited a particular punishment (death) for a class of offenders (juveniles) because of their status, no matter what the procedure. *Graham* did the same, forbidding the punishment of life without parole for the class of juvenile nonhomicide offenders, no matter what the procedure.

B. New Procedural Rules Generally Do Not Apply Retroactively to Final Convictions.

In *Teague v. Lane*, the Supreme Court formulated rules as to when a new constitutional rule of criminal procedure would apply retroactively. 489 U.S. 288, 109 S.Ct. 1060 (1989). In general, an opinion applying an existing or "old rule" is applicable to collateral attack cases, while a "new rule" applies only to cases that are not final when the decision is announced.

In *Teague*, the Supreme Court noted the burden that widespread retroactivity would have on the states' judicial resources and recognized the need for finality in criminal adjudications. Otherwise, states would be

compelled continually to marshal resources in order to keep in prison defendants whose trials and appeals had conformed to then-existing constitutional standards. *Teague* states that applying constitutional rules not in existence at the time a conviction become final seriously undermines the principle of finality, without which the criminal law is "deprived of much of its deterrent effect." *Id*., 489 U.S. at 309, 109 S.Ct. at 1074. "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation." *Id*. at 309, 109 S.Ct. at 1075 (quoting *Mackey v. United States*, 401 U.S. 667, 691, 91 S.Ct. 1160, 1179 (1971) (Harlan J., concurring in judgments in part and dissenting in part)). In addition, though not explicitly mentioned, applying new rules retroactively seriously impacts victims, victims' families, and friends.

Thus, the *Teague* Court held that a new constitutional rule of criminal procedure will not apply retroactively to cases on collateral review, unless the new rule falls within one of two specific and narrow exceptions. Our supreme court has adopted the *Teague* test for Crim. P. 35 (c) postconviction motions. *Edwards*, 129 P.3d at 981-83.

C. Under the Required Three-Step Retroactively Analysis, *Miller* does Not Apply to Final Convictions.

Under *Teague*, the determination whether a constitutional rule of criminal procedure applies to a case on collateral review involves a three-step process:

1. the court must determine when the defendant's conviction became final;
2. the court must ascertain the legal landscape as it then existed, in order to determine whether the later decision announced a new rule; and
3. if the rule is new, the court must determine whether the rule falls within either of the two expectations to non-retroactivity.

Beard v. Banks, 542 U.S. 406, 411, 124 S.Ct. 2504, 2510 (2004); *O'Dell v. Netherland*, 521 U.S. 151, 156-57, 117 S.Ct. 1969, 1973 (1997); *Edwards*, 129 P.3d at 983. When this three-step process is applied to *Miller*, it is clear that *Miller* cannot be applied retroactively.

The trial court found that defendant's conviction was final and that the *Miller* decision announced a new rule. (Docs. 730). This appeal does not challenge those findings.

Since *Miller* constitutes a new rule, and Defendant's conviction was final before *Miller*, he is not allowed to avail himself of that change on collateral review unless this new rule falls within one of *Teague*'s expectations. It does not.

1. *Teague*'s First Exception

The first exception is for rules that place certain kinds of primary, private, individual conduct beyond the power of the criminal-law-making authority to proscribe, *Teague*, 489 U.S. at 311, 109 S.Ct. at 1075, or that prohibit a certain category of punishment for a class of defendants because of their status or offense. *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 2953 (1983).

It recently has been recognized that rules of this type are more accurately characterized as substantive rules not subject to *Teague*'s bar, rather than as *exceptions* to *Teague*'s bar on the retroactivity of *procedural* rules. *Summerlin*, 542 U.S. at 352 n.4, 124 S.Ct. at 2522; *Beard*, 542 U.S. at 411 n.3, 124 S.Ct. at 2510. *See Mackey v. United States*, 401 U.S. 667, 693, 91 S.Ct. 1160, 1180 (1971) (Harlan J., concurring in judgments in part and dissenting in part). From whichever perspective the question is approached, it is the same question: Is the rule one which places certain conduct or classes beyond the government's power to impose criminal penalties? For the reasons discussed above, *Miller* is not

such a rule. This exception is not implicated. *Cf. Summerlin*, 542 U.S. at 352, 124 S.Ct. at 2523.

2. *Teague*'s Second Exception

The second *Teague* exception states that a new rule of constitutional law will be applied retroactively to final cases if it is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the proceeding. *Beard*, 542 U.S. at 416, 124 S.Ct. at 2513; *see Teague*, 489 U.S. at 311-13, 109 S. Ct. at 1076-77. This is an extremely narrow class. *See id.*; *Beard*, 542 U.S. at 417, 124 S.Ct. at 2513-14. The Supreme Court has only identified one rule that qualifies; the right of indigent defendants to receive counsel, declared in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963). *See Edwards*, 129 P.3d at 979.

In order to satisfy this *Teague* exception, a new rule must meet two requirements: (1) infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and (2) the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. *Tyler v. Cain*, 533 U.S. 656, 665, 121 S.Ct. 2478, 2484 (2001); *Edwards*, 129 P.3d at 987.

The new rule announced in *Miller* does not meet either requirement of this exception. With regard to the first component, *Miller* does not even address conviction; it only concerns sentence. Obedience *vel non* to *Miller* will not influence the accuracy of a juvenile murderer's conviction at all. *See Chambers*, 831 N.W.2d at 330-31; *Carp*, 828 N.W.2d at 515-17, 298 Mich.Ct.App. at 711-12; *State v. Huntly*, 118 So.3d at 103. The question is whether "there is an impermissibly large risk of punishing conduct the law does not reach." *Summerlin*, 542 U.S. at 356, 124 S.Ct. at 2525 (internal quotation marks omitted). And the answer is that there is *no* risk, let alone an impermissibly large one.

Nor does the rule set out in *Miller* alter the understanding of the bedrock procedural elements essential to the fairness of a proceeding. *Chambers*, 831 N.W.2d at 331; *Carp*, 828 N.W.2d at 516-17, 298 Mich.Ct.App. at 711-12.

D. The fact that the defendant (Jackson) in the companion case to *Miller* came before the Court on collateral review does not render *Miller* retroactive.

The *Miller* opinion disposed of two case, *Miller*'s and the Arkansas case of Defendant Kuntrell Jackson. Jackson's case came up from a collateral review in the state court. Nevertheless, the Supreme Court reversed, and remanded Jackson's case to the Arkansas courts for further proceedings in keeping

with the opinion. But this does not mean, or even suggest, that *Miller* is therefore retroactive. The Supreme Court has explained:

> The nonretroactivity principle prevents a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final. A threshold question in every habeas case, therefore, is whether the court is obligated to apply the *Teague* rule to the defendant's claim. We have recognized that the nonretroactivity principle "is not' jurisdictional" in the sense that [federal courts]…must raise and decide the issue *sua sponte*." Thus, a federal court may, but need not, decline to apply *Teague* if the State does not argue it. But if the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court must apply *Teague* before considering the merits of the claim.

Caspari v. Bohlen, 510 U.S. 383, 389, 114 S.Ct. 948, 953 (1994) (citations omitted).

And this squares with *Schiro v. Farley*, 510 U.S. 222, 229, 114 S.Ct. 783, 788-89 (1994), where the Court stated:

> Nevertheless, the State failed to argue *Teague* in its brief in opposition to the petition for a writ of certiorari. In deciding whether to grant certiorari in a particular case, we rely heavily on the submissions of the parties at the petition state. See this Court's Rule 15.1. If, as in this case, a legal issue appears to warrant review, we grant certiorari in the expectation of being able to decide that issue. Since a State can waive the *Teague* bar by not raising it, and since the propriety of reaching the merits of a dispute is an important consideration in deciding whether or not to grant certiorari, the State's omission of any *Teague* defense at the petition state is significant. Although we undoubtedly have the discretion to reach the State's *Teague* argument, we will not do so in these circumstances.

(citations omitted). So the fact the Supreme Court addressed Jackson's case and afforded him relief reflects nothing more than that the State of Arkansas did not interject a nonretroactivity contention into the initial petition process.

E. *Miller* Does Not Apply Retroactively to Defendant's Conviction.

Because *Miller*'s new rule does not qualify under either *Teague* exception, it may not be applied retroactively to convictions final before its issuance on June 25, 2012. Two federal circuits that have considered the question have so ruled. *In re Morgan*, 713 F.3d 1365 (11th Cir. 2013) (holding *Miller*'s rule is not substantive), *rehearing en banc denied*, 717 F.3d 1186; *Craig v. Cain*. 2013 WL 69128 (5th Cir.). Appellate courts in four states have done the same. *Chambers v. State*, 831 N.W. 2d 311 (Minn. 2013) (applying the same *Teague* test that controls in Colorado); *People v. Carp*, 828 N.W.2d 685, 298 Mich.Ct. App. 472 (2012) (not retroactive under federal standard of *Teague* or under the more liberal test of *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731 (1965) used by that state regarding state collateral review); *State v. Tate*, 130 So.3d 829 (La. 2013) (not retroactive under *Teague*); *Geter v. State*, 115 So.3d 375 (Fla.Dist.Ct.App. 2012) (not retroactive under state's standard, which matches the more liberal *Linkletter* test). *But see Jones v. State*, 122 So.3d 698, (Miss. 2013) (finding *Miller*'s rule

substantive and thus retroactive because, although it does not impose a categorical ban on the punishment the substantive law could impose, it forbids imposition of a *mandatory* sentence of life without parole for a juvenile offender); *State v. Ragland*, 836 N.W.2d 107 (Iowa. 2013) (concluding *Miller* is retroactive because the procedure it requires stems from banning a sentence, namely, mandatory life without parole, and because the companion case to *Miller* was on collateral review); *People v. Williams*, 982 N.W.2d 181 (I11.Ct.App. 2012)(holding *Miller* constituted a new procedural rule, but a watershed rule that applies retroactively because it requires the observance of those procedures that are implicit in the concept of ordered liberty), *contrast People v. Morfin*, 981 N.E.2d 1010 (I11.Ct.App. 2012) (holding *Miller* constitutes a substantive rule and is retroactive because, though it does not forbid a sentence of life without parole, it does require a sentencing hearing at which a lesser sentence must be available for consideration).

II. If *Miller* is Applied Retroactively then the Procedure Should be Consistent with the As Yet to Be Announced Colorado Supreme Court Decisions in *Tate* and *Banks*.

Standard of Review and Preservation

Whether the application of *Miller* to the instant case would result in a new sentencing hearing or the imposition of a life sentence with the possibility of parole after 40 years is a legal question subject to de novo review. *Lopez v. People*, 113 P.3d 713, 720 (Colo. 2005). The People preserved this issue by requesting the court to delay a decision until the Colorado Supreme Court had ruled on the issue. (Docs. 657).

Analysis

The Colorado Supreme Court granted certiorari in two post-*Miller* cases, *Banks* and *Tate*. *People v. Banks*, 2012 COA157, 2012WL 445 9101 (Colo. App. 2012) cert. gr. June 24, 2013; *People v. Tate*, Court of Appeals 07CA2467 (Sept. 13, 2012) cert. gr. July, 2013. In *Banks*, the Supreme Court granted certiorari on the following issues:

> "Whether, after *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Eighth Amendment to the U.S. Constitution is violated by the imposition on a juvenile of a sentence of mandatory life with the potential for parole after forty years; and
>
> Whether the court appeals exceeded its judicial authority by re-writing the criminal sentence statues in a way not authorized or compelled by Colorado Statute or sound "severability" analysis."

In *Tate*, the Supreme Court granted the State's Petition for Certiorari on the following issue:

> "Whether, after *Miller v. Alabama*, 132 S. Ct. 2455 (2012), invalidated mandatory life without parole for juveniles, the court of appeals erred by remanding the defendant's case for resentencing instead of upholding the defendant's life sentence and remanding the case to reflect that the defendant will be eligible for parole after forty calendar years."

The issue is before the Colorado Supreme Court in oral argument set for June 3, 2014.

The Colorado Supreme Court rulings in *Tate* and *Banks* should decide the issue of whether a new sentencing hearing or an imposition of life with the possibility of parole after 40 years is the appropriate result if *Miller* is retroactively applied. The trial court ordered a new sentencing hearing without any analysis of the *Banks* and *Tate* holdings and without an acknowledgement that *Banks* is a published court of appeals opinion. If this court determines that *Miller* is properly applied to defendant Vigil, the People ask this court to apply the Colorado Supreme Court's determination of the appropriate remedy.

CONCLUSION

The trial court erred in applying *Miller* to the First Degree Murder conviction of defendant Vigil.

Wherefore, the People ask this Court to find that *Miller* is not to be retroactively applied in the instant case and to reverse the trial court's grant of Defendant's Crim. P.35(c) motion.

Respectfully submitted,

PETER A. WEIR
District Attorney

By /s/ Donna Skinner Reed
Donna Skinner Reed
Chief Appellate Deputy District Attorney
Registration No. 8446

Original signatures on file at
Jefferson County District Attorney's Office

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and People's Opening Brief was e-filed with ICCES on April 25, 2014.

/s/Eleanor J. Myers, Legal Secretary
Original signature on file at
Jefferson County District Attorney's Office

To: Stacie Nelson Colling
Nelson Colling Law LLC
2373 Central Park Blvd, Suite 100
Denver, CO 80238