

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

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Court of Appeals Case
No.:

13CA2046

PEOPLE’S REPLY 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 18 pages.

By /s/ Donna Skinner Reed
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The People submit the following Reply Brief.

ARGUMENT

I. This Court has Jurisdiction to hear this Appeal.

Defendant filed a Crim. P. 35(c) motion asking that his sentence be vacated and a new sentencing hearing be granted. (CF, pp. 635-646). The trial court granted his motion. (CF, pp. 726-736).

Defendant now argues that the trial court order is not a final appealable order. Crim. P. 35(c) (1X) states that the “order of the trial court granting or denying the motion is a final order reviewable on appeal”. Thus this appeal is properly before this court.

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

As noted in both the opening and answer briefs, courts are divided on whether *Miller* should be retroactively applied. Of interest, certiorari was denied recently in two cases which held that *Miller* was not retroactive. *Com. V.*

Cunningham, 81 A.3d 1 (Pa. 2013) cert. den. *Cunningham v. Pennsylvania*,

__U.S.__, 2014 WL797250 (U.S. June 9, 2014) and *State v. Tate*, 130 So. 3d 829

(La. 2013) cert. den. *Tate v. Louisiana*, __U.S.__, 2014 WL 834279 (U.S. May 27, 2014).

The *Miller* decision simply does not meet the *Teague* exception and should not be applied retroactively. *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989).

III. 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*

The defendant asks this court to affirm the lower court's order of an individualized sentencing hearing instead of applying the as yet to be announced Colorado Supreme Court decisions in pending cases as to the proper remedy in the application of *Miller*. However at the trial court, after the trial court granted defendant's 35(c) motion, defendant filed a "Request for a Stay of Proceedings" pending resolution of *Banks* and *Tate* in the Colorado Supreme Court. (CF, pp. 737-738). He cannot now argue this is not the proper resolution if this court finds *Miller* is retroactive.

Wherefore, the People ask this Court to find that *Miller v. Alabama*, __U.S.__, 132 S. Ct. 2455 (2012) is not to be retroactively applied to the instant case and to reverse the trial court's grant of Defendant's Crim. P. 35(c) motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and People's Reply Brief was e-filed with ICCES on June 18, 2014.

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