No._____

IN THE

SUPREME COURT OF THE UNITED STATES

D.L. - PETITIONER,

VS.

STATE OF WISCONSIN - RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF WISCONSIN
DISTRICT II

PETITION FOR WRIT OF CERTIORARI

D.L. #05095-089
Pro se Petitioner
P.O. Box 379
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QUESTION(S) PRESENTED: (1) Can the exceptions excusing procedural default of ineffective assistance of trial counsel claims in the Martinez/Trevino doctrine apply to State Habeas proceedings wherein the same standard of review is used as in its federal counterpart?

(2) Does Wisconsin's sentencing scheme as it applies to juveniles facing a mandatory life sentence in adult Court circumvent the rulings and spirit of Miller v. Alabama and its progeny, by mandating a judge, regardless of the Miller factors, to sentence a juvenile to a mandatory life sentence that amounts to a de facto LWOP?

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PETITION FOR WRIT OF CERTIORARI

D.L., Petitions for Writ of Certiorari to review the judgement of the Court of Appeals of Wisconsin which judgement affirmed the denial by the Milwaukee County Circuit Court of D.L.'s Petition for State Writ of Habeas Corpus § 974.06(8) to either vacate sentence imposed based on Miller v. Alabama, 132 S.Ct. 2455, 2463-64 (2012) and its progeny or, alternatively, to allow Habeas Corpus relief based on Martinez v. Ryan, 132 S.Ct. 1309, 1320 (2012); Trevino v. Thaler, 133 S.Ct. 1911, 1914 (2013).

OPINIONS BELOW

The opinions of the Court of Appeals of Wisconsin (App. A - Pg.A1-A5), and the Milwaukee County Circuit Court (App. B - B1-B6) are not reported.

STATEMENT ON JURISDICTION

This Court has jurisdiction over this Petition for Writ of Certiorari in that the State Court of last resort has denied

discretionary review over a decision of a lower State Court. The date the highest State Court denied discretionary review was: June 11, 2018. Therefore, this Honorable Court has jurisdiction of this matter under 28 § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant Constitutional and statutory provisions involved are too lengthy to be set forth verbatim in this Petition, but are set forth in the Appendix. (App. E - Pg.E1-E16).

STATEMENT

On July 18, 2014 D.L; after being denied pending review by the State's highest Court on March 20, 2014, filed a Petition for habeas Corpus pursuant to § 974.06(8), Memorandum in Support, and several motions. After not hearing from the Court, I filed for a status update and was informed by the Clerk, not withstanding proof of service, the Petition and accompanying documents could not be found. I was directed to re-submit the Petition. On May 8, 2015, I re-submitted an amended Petition for State Writ of Habeas Corpus which the Court accepted. (App. F - Petition for State Writ of Habeas Corpus - Pg.F1-F7), and on Feb 8, 2016 the State Trial Court denied the Petition. (App. B - Decision of the State Trial Court - Pg.B1-B6). A timely Notice of Appeal was filed with the Court of Appeals Wisconsin and on Jan 17, 2018 the Court of Appeals denied the appeal. (App. A - Decision of State Court of Appeals -Pg.A1-A5) A Motion for Reconsideration was filed and denied on March 7, 2018. (App. D - Decision on Motion for Reconsideration - Pg. D1-D2) A Petition for Review was filed to the State's highest Court and the Court (Supreme Court of Wisconsin) denied discretionary review on

June 11, 2018. (App. C - Decision of State Supreme Court denying review - Pg.C C1). This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

There is a divide across the country's entire judicial system, on whether the new Constitutional rules and exceptions in Miller v. Alabama, 136 S.Ct. 2455, 2463-64 (2012); Montgomery v. Louisiana, 136 S.Ct. 718 (2016), wherein a juvenile offender convicted of homicide cannot receive a mandatory sentence of life without parole. (LWOP) The divide is whether that also applies to discretionary sentences that end up amounting to de facto LWOP sentences. The Petitioner claims that his mandatory life sentence that he received at age 15 violates the prohibition set out in Miller and it's progeny. The lower Courts answered that it was not and his claims were without a basis in the law or fact.

The lower Courts failed to consider whether the exceptions in Martinez v. Ryan, 132 S.Ct. 1309, 1320 (2012); Trevino v. Thaler, 133 S.Ct. 1911, 1914 (2013), excused Petitioner's prior procedural default and provide a "sufficient reason" to hear Petitioner's claims of Ineffective Assistance of Counsel(s). Or whether the exceptions apply to cases as this one in State Habeas Corpus proceedings. An analysis of United States Supreme Court precedent along with Wisconsin law on procedural default will reveal that Wisconsin law must be interpreted in manner which complies with the Martinez/Trevino doctrine. An issue that the lower Courts chose to ignore, although the claims were properly before the Courts.

FACTS RELEVANT TO THE PETITION

Petitioner D.L., as a result of a myriad of factors, was charged on Jan 15, 1991 in the Milwaukee County Circuit Court,

Children's Court, D.L. was fifteen (15) years old at the time, in a Petition alleging that he was delinquent for committing one count of armed robbery and one count of first degree intentional homicide (App. G - Juvenile Complaint - Pg.G1-G4) Arising out of an incident which took place in the city of Milwaukee on Jan 13, 1991. The Petition alleged that on that date D.L. was responsible for causing the death of Mario Gonzalez. On April 22, 1991, the State of Wisconsin obtained an order waiving the jurisdiction of the Children's Court over D.L. and directing that, notwithstanding a STATE psychiatric recommendation AGAINST WAIVER, D.L. be tried as an adult. No appeal/post-conviction action was taken concerning the waiver to adult Court. (App. H - Waiver Order - Pg.H1-H3); (App. - I - State Recommendation AGAINST WAIVER - Pg.I1-I7) On April 23, 1991 D.L. was charged by criminal complaint with the same two counts. D.L.'s attorney (Att. Ann T. Bowe - the same attorney as the one in the Children's Court proceedings) waive a preliminary hearing on May 23, 1991 and entered pleas of not guilty to the charges and demanded a speedy trial.

On July 15, 1991, the morning of D.L.'s scheduled trial, the Court conducted a Goodchild-Maranda hearing to determine whether any statement or other evidence to be utilized by the State against D.L. would be suppressed for Constitutional violations. Notwithstanding the availability of competent witnesses to establish a case for suppression, counsel chose to call NO witnesses and to present NO arguments regarding the multiple, obvious Constitutional violations which occurred. For example, despite clear and unambiguous United States Supreme Court precedent on

coercive custodial interrogation of minors, the trial Court held all of the minor child's statements, including the confession and the weapon retrieval, to be admissible. This is all the more shocking when the record revealed that despite defense counsel's complete failure to address these critical Constitutional issues, the Court sua sponte recognized that D.L.'s father had invoked the right to counsel on his minor child's behalf when the attorney's business card had been presented to the police by D.L.'s father. However, the Court ultimately held that D.L.'s father invocation of the right to counsel was ineffective because, "there are ample cases that hold it is the interviewee who must request an attorney not someone else on his behalf." The Court did not cite any cases or discuss or differentiate as to those cases involved adults or juveniles, and it did not inquire whether D.L. had in any way demonstrated agreement with his father's invocation. Defense counsel made no objection or counter-argument and presented no examples of controlling precedent to demonstrate that the Court was misapplying applicable law. She was completely unprepared and some how wholly unable to cite any law or even make a common sense argument relating to a parent's absolute right to protect and assert the rights of his minor child. Who, but a parent, is going to assert the Constitutional rights of his 15 year old son? Under no circumstances does the law require a child to protect himself against Constitutional abuses.

Immediately following the suppression hearing, D.L.'s trial began. In opening statement, D.L.'s counsel conceded that her client was guilty of armed robbery and guilty of causing the victim's death. Counsel advised the jury that the only issue for their

determination would be whether D.L.. "intended" to cause the victim's death. Absent D.L.'s, statement to the police detectives, the signed confession, and the weapon retrieved from D.L., the State's case against D.L. was wholly circumstantial. One witness saw a momentary passing glance of an individual's face leaving the crime scene. But that witness was unable to proffer a positive identification and did not witness the crime. Another witness, "John Davis", testified that he was sitting in a van across the road from where he was sitting, 30 feet or more from the scene. Davis further testified that the second man shot twice, then take a "bag" from the victim. Although in his original statement to police, Davis said he observed a total of four shots and did not observe whether a "bag" was taken. (App. M - Davis's Statement - Pg. M1-M2). Davis did not identify D.L.. The State did not present the testimony of D.L.'s two co-defendants, who had already pled guilty to lesser charges in exchange for reduce sentences. No other witness other then Davis, called by the State, offered testimony relevant to intent. The issue of Davis's testimony was discussed in the lower Court(s) and will be also addressed in this Petition. D.L. testified on his own behalf, provided a factual verison in conformity with descriptions in his arguments, and asserted that he never intended to end the victim's life.

Importantly, and as fully argued in the lower Court, the record of trial proceedings is most significant for what is wholly and patently absent. For example, after establishing with the jury that D.L.'s defense centered upon his lack of specific intent, a fact that the State absolutely had to prove for the jury to return a verdict of guilty on the charge of first degree intentional

homicide, it became blatantly obvious that defense counsel had conducted no investigation or prepared any cognizable defense related to the issues of specific intent. No expert was called to educate the jury on the effect alcohol has on a minor's mental capacity to form specific intent. No jury instruction was ever requested on voluntary intoxication. No experts were called to inform the jury of the psychological effects on a minor of a prior unprovoked deadly assault. No jury instruction was sought on mental defect or extreme emotional disturbance. No factual witnesses were called to explore the state D.L.'s intoxication or his discernible lack of capacity. No forensic experts were called on behalf of defense. The psychiatrist who recommended that D.L. NOT be waived into adult Court was not even called as a witness.

Even in closing arguments, counsel made no more than passing reference to D.L.'s sole defense, that is ability to formlate the requisite intent was precluded by alcohol consumption. In essence, what is painfully obvious is that defense counsel scripted a defense for D.L., but completely failed to investigate and prepare such defense, and ultimately failed to even present any cognizable defense. The trial proceedings make it abundantly clear that this was not some form of strategic decision by defense counsel, rather this was simply ineffective assistance based on lack of preparation, investigation and ineptitude. Importantly, the State never argued in the proceedings below that the claims now before this Court were unsubstantiated. Only that the claims were procedurally barred, or did not apply. The State has never identified a single instance in which D.L. has misrepresented a disputed fact as undisputed.

The jury returned the only verdict they could - guilty on both

counts as charged. On Sept 4, 1991, the Hon. Frank T. Crivello, sentenced D.L. as follows: for the homicide conviction, a mandatory indeterminate LIFE sentence with parole eligibility date set in the year 2025 (35 years into the future); for the armed robbery conviction, a consecutive term of ten (10) years imprisonment.[1] A timely Notice of Appeal was filed and counsel from the State's Public Defender's Office was appointed. (Att. Jeffery W. Jensen). The relationship between appointed post-conviction/appellate counsel and his, by now sixteen year old client proved unprofessional and unethical right from its inception. Notwithstanding counsel's ethical obligation to zealously represent the interests of his minor client, counsel only met his client one time and only for about 15-20 mins for discussion of his appeal. In fact, D.L.'s attorney never filed the required post-conviction motion, thus abandoning D.L.'s only chance to file for ineffective assistance of trial counsel. In Wisconsin, claims of ineffective assistance of trial counsel can be raised on direct appeal ONLY if the defendant first raises the claim in the trial court in a post-conviction motion. See State ex rel. Rothering v. McCaughtry, 205 Wis.2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996). The attorney who brings such a post-conviction motion is uaually referred to as a "post-conviction counsel," This attorney usually also represents the defendant on direct appeal, and at that point he or she is referred to as appellate counsel. See id. at 678-79 In this case Att. Jensen was appointed post-conviction and appellate counsel. Additionally, none of the issues which were detailed for counsel to include were

[1] The sentence exceeded the State's request. The State asked for life with parole eligibility no earlier than 2016. The consecutive 10 year sentence changes parole eligibility. Life sentence is mandatory.

not submitted in any form to the Courts. Counsel had, for reasons unknown to D.L., failed to identify and include the myriad of significant Constitutional issues in the record. Instead counsel opted to not file a post-conviciton motion and filed a single issue brief - challenging the sufficiency of the evidence at trial for conviction, a weak argument and one that is almost never sustainable.

As expected the Wisconsin Court of Appeals denied the single issue appeal.

After the Court of Appeals denial. D.L. received a letter from his counsel advising him of his option to further appeal to the Wisconsin Supreme Court. D.L. repeatedly attempted to reach his attorney but could never reach him.

Fearing what would happen if the appeal was not pursued D.L. wrote his attorney on July 29, 1993, indicating his desire to appeal (App. J - Letter from D.L. to Att. Jensen - Pg.J1). After all of this, despite counsel's knowledge that D.L. wanted to pursue his appeal, counsel filed a No Merit Petition for Review, representing to the Court that no non-frivolous issues on appeal existed. He did this without ever speaking to D.L. to discuss the matter. A direct breach of his ethical obligations to his minor client and clearly an act of a grossly negligent and ineffective counsel. Thus, after failing and refusing to identify and include significant and potentially outcome determinative Constitutional issues in D.L.'s brief to the Court of Appeals, and never filing any post-conviction motions, and after conferring with his client on only one occasion in person and only in connection with a media interview, and after negligently failing to investigate the appeal or to expand approved

funds for investigators, D.L.'s post-conviction/appellate counsel unilaterally decided to ignore what his client told him in writing, and to ignore what should have been obvious to him had he reviewed the record, filing a document essentially waiving his clients appellate rights.[2]

At this stage, D.L. had no idea that his counsel had unilaterally undertaken to file a No Merit Petition, during his continued attempts to reach his attorney he finally reached someone who told him that his counsel no longer worked there and had left behind no forwarding information. D.L. was in shock and immediately wrote to the Chief Appellate Defender seeking immediate substitute representation (App. K - Letter to Chief Appellate Defender - Pg.K1) Despite this request, D.L. was denied. And fearing the worst, and feeling abandoned, the now seventeen year old defendant furiously began a pro se effort to preserve his rights on appeal.

Left to fend for himself, D.L. submitted a hadwritten Petition for Review to the Wisconsin Supreme Court. In his submission, D.L. expressed all the issues which he believed established that his Constitutional rights had been violated. D.L., an unschooled, minor, pro se litigant, raised the following issues for consideration to the highest State Court in Wisconsin:

a) Violation of Constitutional rights under the First, Fourth, Fifth, Sixth and Fourteenth Amendments:

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2 Petitioner recognizes that the law does not require a minimum number of meetings or period of time to provide effective representation. United States v. Goad, 44 F.3d 580, 590 n. 18 (7th Cir. 1995). However, when failure to consult with the client leads to a failure of investigation and identification of issues for appeal, it is part of the totality which the Court considers on review.

b) Conviction obtained by an illegally coerced confession form a minor;

c) Conviction obtained by failure of police to honor a proper invocation of D.L.'s right to counsel, repeatedly invoked by his father in his presence and with his concurrence;

d) Failure of the trial Court to properly suppress D.L's custodial statements, confession, and the retrieved weapon, based upon clear Constitutional infirmities;

e) Juror misconduct resulting in denial of D.L.'s right to a fair trial;

f) Ineffective assistance of Counsel(s) (trial/post-conviction/ appellate, for a myriad of issues including, without limitation, failure to investigate and failure to raise patently obvious issues; and

g) Insufficiency of and introduction of, and failure of counsel to cross examine on evidence which represented a clearly impossible rendition of the facts.

Despite D.L's, compelling arguments for relief the Wisconsin Supreme Court denied review and ended D.L.'s direct review process.

D.L. went on to file, in the Milwaukee County Circuit Court a pro se Petition to review his case. The Court denied D.L.'s request. Stating in part, "The Motion under statue § 974.06 is the appropriate procedure..." Pursuant to the Court's direction D.L. Pro se filed a Motion under **Wis. Stat.** § 974.06. The trial

Court denied the Motion solely on the ground that D.L. failed to raise the Constitutional issues in his direct appeal. D.L. appealed the decision and the Court of Appeals affirmed. Later the Wisconsin Supreme Court denied review.

In 2001 a Motion to Modify Sentence was filed in the Milwaukee County Circuit Court. This Motion was granted in part and denied in part, due to D.L.'s cooperation in a federal racketeering prosecution. Based on new factors the Court made his sentence for armed robbery and homicide concurrent rathe than consecutive. After D.L.'s 2001 Motion for Sentence Modification, he filed a Petition for Writ of Habeas Corpus § 2254 in federal Court in 2002. This Petition was denied on the grounds that it had been untimely filed. What is interesting is the Judge issued a Certificate of Appealability, setting forth the following basis for issuing the COA:

> "...in my opinion, the Constitutional issues which Lozano has identified in his Petition of Certificate of Appealability are adequate and deserve encouragement to proceed further."

The 7th Circuit Court of Appeals ordered oral arguments and affirmed the dismissal of the the Petition as untimely. Never ruling on the merits of the case. In opposing the federal Petition, the State of Wisconsin vigorously argued that D.L.'s application should be dismissed for failure to exhaust State remedies. Specifically, the State advised the 7th Circuit:

> "Lozano has failed to exhaust the claim of ineffective assistance of appellate counsel, which can <u>still</u> be raised in a State Habeas Petition filed in the Wisconsin Court of Appeals...he can file a <u>Knight</u> Petition...the Court that heard his direct appeal."

Following what was, at its very essence, guidance from the State, D.L. filed a <u>Knight</u> Petition in the Wisconsin Court of

Appeals. Finally bringing his claims of ineffective of assistance of appellant/post-conviction counsel properly before the Court. Or so he thought. The Court ruled the Petition was procedurally barred. D.L. sought review but that was also denied.

In 2011, D.L.'s attorney (Att. Joel A. Mogren), filed a Motion to Modify Sentence based on new factors, due to his cooperation with the federal government in another case. This time the federal government was in support of modification, and the State of Wisconsin did not support the motion. A hearing was held and the motion was denied. An appeal to the Wisconsin Court of Appeals was denied. Review was denied by the Wisconsin Supreme Court. What is important is during the time the Wisconsin Courts were deciding that appeal, the United States Supreme Court decided Miller v. Alabama; Martinez v. Ryan; Trevino v. Thaler. So on July 18, 2014 D.L. filed a Petition for State Habeas Corpus, claiming relief based on the above retroactive United States Supreme Court decisions. The decision(s) stemming from the State Habeas Corpus filed on July 18, 2014, has lead to this Petition for Writ of Certiorari.

CERTIORARI IS APPROPRIATE TO DETERMINE WHETHER THE EXCEPTIONS IN THE MARTINEZ/TREVINO DOCTRINE CAN APPLY TO CASES AS THIS ONE IN STATE HABEAS CORPUS PROCEEDINGS. THE LOWER COURTS NEVER TOUCHED ON THE ISSUE

WISCONSIN LAW

A brief review of Wisconsin law is essential to understanding the application of Martinez and Trevino to the case at bar.

It has long been the law in Wisconsin, indeed across the land, that successive attempts at post-conviction relief will not be tolerated in the absence of extraordinary circumstances. This is true regardless of whether the successive attempt is a post-

conviction motion under **Wis. Stat. § 974.06**, a Habeas Petition, or a motion seeking substantive post-conviction relief captioned in some other way.

The Wisconsin Supreme Court has held that **Wis. Stat. § 974.06 (4)** bars a defendant from bringing a collateral post-conviction motion after direct appeal unless "sufficient reason" is provided to permit such successive review. See Escalona-Naranjo, **185 Wis. 2 at 181-84**, State v. Lo, 2003 WI 107, 29-47, 264 Wis. 2d 1, 655 N.W. 2d 756. The procedural bar on successive post-conviction action stems from the public policy to conserve judicial resources by avoiding piecemeal post-conviction challenges that lack justification for the successive efforts. Importantly though, it is not meant to allow for any Court to permit manifest injustice to prevail under any circumstances. See Escalona; See also Martinez and Trevino. The procedures governing the review of Wisconsin criminal convictions are set forth in **Wis. Stat. § § 974.02, 974.06**. After a conviction in a Wisconsin trial Court , a defendant's first avenue of relief is a POST-CONVICTION MOTION UNDER **Wis. Stat. § 974,02**. This motion is filed in the trial Court in which the conviction was adjudicated. Arguments concerning sufficiency of evidence or issues previously raised before the trial Court need not be raised in this motion in order to preserve the right of appeal with respect to these issues. Any other claim, such as ineffective assistance of trial counsel, MUST FIRST be brought in a § 974.02 motion or it is waived, absent a "sufficient reason" for failure to raise such a claim. Therefore, a post-conviction motion is the first chance for a prisoner to file a claim of ineffective assistance of trial counsel. Wisconsin law does not allow an argument on direct appeal

that trial counsel was ineffective absent a post-conviction motion FIRST being filed concerning the issue.

MARTINEZ AND TREVINO

Martinez and Trevino provide for an exception to the "raise or waive it" rule in ineffective assistance of counsel claims. Specifically, this Court has held that in States where post-conviction proceedings are a prisoner's first chance to raise a "substantial claim" of ineffective assistance of counsel at trial, "...Habeas Court will not be barred from hearing that claim if Petitioner's post-conviction counsel was ineffective and failed to raise the claim in the State post-conviction proceeding.", Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012)(emphasis added), see also Trevino v. Thaler, 133 S. Ct. 1911, 1914 (2013)(extending Martinez). The exceptions in both cases are allowed despite the omission of such argument in the first post-conviction stage and the reason is actually rather simple: absent effective counsel how could a neophyte possibly begain to navigate waters as treacherous as post-conviction proceedings.

Under the Martinez rule, a procedural default by state post-conviction relief counsel for failure to raise the issue of ineffective assistance of trial counsel is excused if four requirements are met. In Trevino, the Court, summarizing it's holding in Martinez, opined that there is a clear exception allowing a federal Habeas court to find cause, thereby excusing a defendant's procedural default where:

1. The claim of ineffective assistance of trial counsel was a substantial claim;

2. The cause consisted of there being no counsel or only ineffective counsel during the State collateral/post conviction review proceedings;

3. The State collateral review proceeding was the 'initial' review proceeding in respect to the 'ineffective assistance trial counsel claim'; and

4. State law requires that an 'ineffective assistance of trial counsel [claim]...be raised in an initial-review collateral proceeding.'

Thus, the Court made it abundantly clear that these are the only four requirements to overcome a procedural default under Martinez and that in cases where these are satisfied, the case must be permitted to proceed on the merits; to allow otherwise would viable claims based upon strong facts to die on the vine, where the defendant was helpless by ineffective counsel. (All four requirements and the underlying issues were fully argued and briefed by the Petitioner in the proceedings below. The lower Courts, without so much as a footnote, circumvented the standard set out by the United States Supreme Court and never addressed the issue.)

An analysis of the U.S. Supreme Court precedent along with Wisconsin law on procedural default, reveal that Wisconsin law must be interpreted in a manner which complies with the Martinez/Trevino doctrine.

As discussed earlier, Martinez establishes four requirements which must be met to overcome a procedural default such as the one currently blocking D.L. herein from having the facts of his case see the light of day. The Court has determined that a prisoner must demonstrate that the underlying ineffective assistance of trial counsel claim is a substantial one, which is to say that the prisoner demonstrate that the claim has some merit, under the standard for issuing a certificate of appealability, which the Court incorporated in its definition of substantially, a Petitioner must show that

reasonable jurists could debate whether (or, for that matter, agree that) the Petition should have been resolved in a different manner or to proceed further. Stated otherwise, a claim is insubstantial if it does not have any merit or is wholly without factual support. The same principles apply to the State of Wisconsin's legal system and D.L.'s case is deserving of having these same important principles applied to his case. Importantly, the "deserve encouragement to proceed further" standard has been met in this case concerning the same ineffective assistance of counsel(s) claims, in a prior proceeding in the U.S.D.C. East. Dist. Wisc. See Order. (App. L - Order Granting Petition for COA - L1-L5). The above should be enough to satisfy the two requirements. It is easier to address the third and fourth requirements, as Wisconsin law answers this for us in short order. In Wisconsin, as it has been discussed, the defendant must raise a claim of ineffective assistance of trial counsel in a post-conviction motion as mandated by **Wis. Stat. § 974.02.** Failure to make this motion results in a forfeiture of all of defendants claims. Thus, it must logically follow that if a procedural default will not a bar a federal habeas court from hearing a substantial claim of ineffective assistance of post-conviction/trial counsel where Martinez and Trevino apply, that this United States Supreme Court mandate must apply to Wisconsin law in the context of the case at bar. Simply, Wisconsin should not be permitted to enforce and apply a statutory scheme that circumvents the well-reasoned and Constitutioally supported intent of Martinez and Trevino.

FAILURE TO ALLOW APPLICATION OF THE UNITED STATES SUPREME COURT'S HOLDING IN MARTINEZ AND TREVINO, TO

THE CASE AT BAR IN THE LOWER COURTS, DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND RENDERED THE UNITED STATES SUPREME COURT"S INTENT A NULLITY IN WISCONSIN STATE COURT PROCEEDINGS

The few opinions in Wisconsin addressing the crux of Justice Kennedy's well reasoned holding in Martienz all do there best to attempt to render the holding a nullity as it would, and in fact, should apply to Wisconsin State Courts. And from the stand point of pure judicial resources, the Wisconsin Courts do this with good reason, form their point of view. Simply, they are deeply concerned of opening what they believe will be a pandora's box of endless, "floodgates" style filings. While it is easy to see their point of view if one examines it myopically through a financial resources/ Judicial resources lens, the fact remains that eliminating the holding in Martinez and its progeny from the arsenal which should be available to qualified Wisconsin defendants infringes directly on a defendant's Constitutional right to effective assistance of counsel. The reasoning in Nash v. Hepp, 740 F.3d 1075 (7th Cir. 2014), solves their issue. Unfortunately, the reasoning is not merely flawed it is blatantly wrong. In Nash, the Court held, "Wisconsin law expressly allows-indeed, in most cases requires defendant's to raise claims of ineffective assistance of trial counsel as part of a cosolidated and counseled direct appeal, and provides an opportunity to develop an expanded record." at 1075 Then goes on to reason, "...attorney is required to file within 20 days a notice of intent to pursue post-conviction relief. See **Wis. Stat. §§ 809.30(2)(b), 973.18(5)**, under WI post-conviction procedure, filing this form allows a defendant to challenge trial counsel's performance with new appointed counsel (post-conviction)

BEFORE A DIRECT APPEAL IS TAKEN."(Emphasis added) What you see in some cases addressing Martinez issues is that they are twisting the factual scenario for the purpose of reaching their desired conclusion, to wit: that Martinez does not apply. However, our legal system should and in most cases does find such pseudo - legal machinations offensive to notions of fair play and justice dispenses with them in due course. That is what is required in the case at bar. A thorough review of the horrific set of facts, now before this Court, pure ineptitude at its worst coupled with a small group of actors more concerned with disposing of what they viewed as just another damaged piece of human trash with no shot at rehabilitation, piled on top of an overburdened Court system more concerned with disposing of cases then dispensing true justice, reveals a case screaming for a full vetting and application of Martinez and its progeny. Beneath all the machinations and hysteria and procedural roadblock after procedural roadblock is a case involving a 15 year old child the main suspect in a murder case, left alone with the police without parental or legal representation for hours and hours, so far out of his element in trying to deal with the authorities by himself that he might have well been from outer space visiting our planet, subject to Constitutional violation after Constitutional violation without ever knowing his rights were being blatantly ignored. Beneath all the legal mumbo-jumbo and ineptitude which has prevented the facts of this case from being examined at any level, lies this same 15 year old child whose attorney, when she finally came into the picture, would have been just as effective as she was if she never shown up. Does all this sound crazy? Does it sound like pure conjection and hyperbole? Of course it does. Because

unsubstantiated ineffective assisatnce of counsel by losing defendant's are a dime a dozen these days. However, this case is the exception. This case presents a factual scenario that is truly frightening. And this case mandates application of Martinez and its progeny because Justice Kennedy drafted his opinion knowing cases like D.L.'s, are out there, begging to be reviewed in the light of day.

THE MANDATORY LIFE SENTENCE IMPOSED ON A FIFTEEN (15) YEAR OLD DEFENDANT WITH THE POSSIBILITY OF PAROLE AFTER SERVING 45 YEARS, LEADING TO A DE FACTO LWOP SENTENCE, CAN TRIGGER THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE UNDER MILLER V. ALABAMA, AND ITS PROGENY

Pursuant to 2016 United States Supreme Court precedent, made retroactive to cases and controlling in cases on collateral review, a juvenile's **mandatory** sentence to LIFE with the possibility of parole in 35 years, followed by a consecutive 10 year sentence is considered a de facto LWOP sentence in violation of the Eightht Amendment of the U.S. Constitution and is contrary to the Wisconsin Constitution Art. I, Section 6., as explained in **Miller v. Alabama**, 132 S. Ct. 2455, 2463-64 (2012); **Graham v. Florida**, 130 S. Ct. 2011 (2011); **Roper v. Simmons**, 543 U.S. 551, 89 CrL 407 (2005); **Montgomery v. Louisana**, 136 S. Ct. 718 (2016).

WISCONSIN LAW

The Wisconsin legislature has determined that a juvenile who commits first degree intentional homicide on or after the juvenile's tenth (10) birthday is subjected to the criminal penalties provided for that crime. See **Wis. Stat. § 938.183(1) (am), (1m)(1997-98). A** person who commits first degree intentional homicide is guilty of a class A felony, **Wis. Stat. § 940.01(1) (1997-98)**, the penalty for which is life imprisonment, **Wis. Stat. § 939.50(3)(a) (1997-98).**

"...on or after the juvenile's tenth birthday is subjected to the penalties provided for that crime." See **Wis. Stat. § 938.183(1) (a m), (1m)(1997-98), Really? There is something very wrong with that fact!** The fact remains a 10 year old cannot vote in this country, cannot get a drivers license, cannot join the military, cannot work full time, cannot hold office, and definitely could not do the the job that this Honorable Court is tasked with doing. Why? The truth and simple answer is: he/she is just to young. What if a crime was committed against a 10 year old child or any minor for that matter, would not the person who committed that crime be enhanced because the crime was committed against a child? But yet Wisconsin allows for a 10 year old child to be sentenced to a mandatory life term in prison no matter mitigating circumstances. Candidily, Wisconsin Courts handling of juveniles in adult Court is draconian when compared to countries considered far less "enlightened". It boggles the mind. The Wisconsin Courts continue to treat children, such as Petitioner herein, as if they are evil incarnate, uncapable of change. It is as if Wisconsin has decided to wall itself off from the rest of the country, and ignore those in power, including the United States Supreme Court. It is simply untenable that the lower Courts ignored the ironclad, unchallenged finding of the States own psychologist who recommended against waiving the Petitioner to adult Court in the first place, and the United States Supreme Court's decision in Miller and its progeny.

Wisconsin law is very clear as to the penalty one faces if convicted of first degree intentional homicide. Pursuant to **Wis. Stat. 973.013(1)(b), a defendant convicted of a crime for which the minimum penalty is life shall be sentenced for life.** Thus the judge

has no discretion but to sentence the defendant to a mandatory life sentence. This is true regardless of any and all mitigating circumstances.

The Wisconsin sentencing scheme allows a Circuit Court to impose a parole eligibility date beyond a defendant's expected lifetime. See **Wis. Stat. § 973.014 sub. (1)(b)[now sub. (2)(b)].** This sentencing rule does nothing to provide for any special consideration for juveniles who are waived into adult Court in the State of Wisconsin. In Miller Justice Kagan opined: "we have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children." Wisconsin has never modified its sentencing structure to come into compliance with the United States Supreme Court's position relative to a juvenile facing a life sentence.

The Eighth Amendment of the United States Constitution, applicable to the States through the Fourteenth Amendment, guarantees individuals protection against excessive sanctions: "... nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII; see also Roper v. Simmons, 125 S. Ct. 1183 (2005). Article I. Section 6 of the Wisconsin Constitution contains substantively identical language: "...nor cruel and unusual punishments inflicted." The Wisconsin Supreme Court has interpret provisions of the Wisconsin Constitution consistent with the U.S. Supreme's Court's interpretation of parallel provisions of the federal Constitution. This is particularly true, as here, the text of the provision in Wisconsin's State Constitution is virtually identical to its federal counterpart, and no intended difference can be discerned. Thus, the analysis in this case should have been largely guided by

the United States Supreme Court's Eighth Amendment jurisprudence and in particular, the cases concerning juvenile offenders.

Life without parole, de facto life without parole, natural life sentence, discretionary life sentence, mandatory life sentence, or as the Chief Justice of the Wisconsin Supreme Court, Hon. Shirley S. Abrahamson has phrased the term: "death-in-prison sentence." No matter the phrase it is categorically unconstitutional how Wisconsin sentencing statutes and the application of those statues to a category of individuals (juveniles), namely a challenge to a "death-in-prison" sentence for a juvenile who committed a crime when 15 years or younger.

MILLER V. ALABAMA AND ITS PROGENY

In Miller v. Alabama and most recently in Montgomery v. Louisana, the United Supreme Court held that the Eighth Amendment prohibition of cruel and unusual punishment forbids the imposition of a sentence of life imprisonment without parole upon a juvenile homicide offender by a mandatory sentencing scheme that does not allow the sentencing judge to consider a lesser sentence, no matter if there is mitigating evidence related to the offender.

Four decades before becoming eligible for parole on a mandatory life sentence, imposed on a 15 year old qualifies as a LWOP sentence. Courts are similarly divided as to whether the Miller rule applies only to "life" sentences in the literal sense, or applies also to other very long prison sentences; de facto LWOP sentences.

Though not binding upon Wisconsin, it is most informative what other Courts across the land have decided on this point. The U.S. Court of Appeals for the Seventh Circuit ruled the Eighth Amendment's cruel and unusual punishment clause prohibits even discretionary

sentences of de facto life imprisonment for murders committed by juveniles if the sentencing judge does not actually consider the features of youth that are mitigating factors. See **McKinley v. Butler**, 809 F.3d 908 (7th Cir. 2016). See also **People v. Holman**, 2017 BL 333608, ILL., Docket No. 120656, 9/21/17, where Illinois judges must consider age when sentencing juveniles to **discretionary** life sentences, not just mandatory life sentences, according to a Sept. 21 ruling from the ILL Supreme Court in 2017. In doing so, Illinois joins a growing majority of States--including California, Iowa, Missouri, Mississippi, Oklahoma and Pennsylvanian--that have expanded the application of the U.S. Supreme Court's decisions in **Miller** and **Montgomery**. Under those rulings, Courts must consider the characteristics of youth when sentencing juveniles to mandatory LWOP.

Other States have taken a more literal stance on the rulings and limited their application to mandatory sentences. Those who were sentenced to LWOP, but had the opportunity for a shorter sentence, were excluded. But that interpretation goes against the spirit of the U.S. Supreme Court's rulings, the Illinois Supreme Court said:

> "The greater weight of authority has concluded that **Miller** and **Montgomery** send an unequivocal message: Life sentences, whether **mandatory** or **discretionary**, for juvenile defendants are disproportionate and violate the Eighth Amendment, unless the trial Court considers youth and its attendant characteristics ..." wrote the majority.

Just recently the U.S. Court of Appeals for the Third Circuit ruled:"[1]- The district Court improperly sentenced the juvenile to life in prison without the possibility of parole (LWOP) because, having found that the juvenile was capable of reform, the sentence of LWOP was categorically foreclosed, **whether de jure or de facto**,

under U.S. Const. amend. VIII and the juvenile had to have some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation; [2]-When sentencing the non-incorrigible juvenile offender, a Court must consider as sentencing factors his or her life expectancy and the national age of retirement, in addition to the 18 U.S.C. § 3553(a) factors, and hold evidentiary hearings to determine the juvenile's life expectancy because a sentence that either met or exceeded a non-incorrigible juvenile offender's life expectancy violated U.S. Const.amend. VIII."[3]

In Casiano v. Commissioner of Corrections, 2015 BL 164932, Conn., No. 19345, 5/26/15, the Court reported that most Courts that have considered the issue agree that a lengthy term of years for a juvenile offender, "will become a de facto life sentence at some point". However, it was quick to add that, "there is no consensus on what that point is". The Court cited decisions of other jurisdiction into two groups:

> * Courts that have concluded that only a sentence that would exceed the juvenile offender's natural life expectancy constitutes a life sentence; and
>
> * courts that have concluded that a sentence is properly considered a de facto life sentence if a juvenile offender would not be eligible for release until near the expected end of his life. (Note: that the Court said "eligible for release", not eligible for consideration FOR release, i.e., parole).

"[T]he Supreme Court's focus in Graham and Miller was not on the label of a "life sentence" but rather on whether a juvenile would, as a consequence of a lengthy sentence without the possibility of parole actually be imprisoned for the rest of his life," the Connecticut Court said.

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3 See United States of America v. Corey Grant, No. 16-3820, (3rd Cir. Ct. App. 2018)

Connecticut statues treat a term of 60 years as a life sentence for other purposes, but the Court decided that shorter terms can qualify, too. Taking a statistical approach first, the Court said that federal statistics indicate that the average life expectancy for an unincarcerated male in the U.S. is 67.1 - (all races) - which is about the age that the average male juvenile offender would be after serving 50 yrs. See United States v. Taveras, 426 F. Supp.2d 493, 500 (E.D.N.Y. 2006), "life expectancy within the federal prison is considerably shorten." (Petitioner is a State prisoner in the Federal Witness Security Program "WITSEC" therefore in federal custody); see also U.S. v. Nelson, 491 F.3d 344, 349-50 (7th Cir. 2012), "acknowledging the decreased life expectancy for incarcerated individuals based on United States Sentnecing Commission Data." For purposes of this Petition the starting date of D.L.'s sentence is Jan 14,1991. And his consideration for parole is Jan 1, 2035. D.L. was sentenced on Sept 6, 1991 to a mandatory life sentence with parole eligibility in 2025 and a consecutive 10 year sentence, pushing P.E. date to 2035. As a result D.L.'s substantial assistance to the government D.L.'s sentence was modified to have both sentences run concurrent. No other reward was given. Moreover, this had absolutely nothing to do with any of the Miller factors. This bolsters D.L.'s argument that D.L.'s sentence is a de facto LWOP, during the sentence modification hearing the Court said there was no mitigating factors to be considered in D.L.'s case. Can that really be true? Of course not! Even a cursory review of the report of the State's own psychology expert reveals a plethora of mitigating factors which the Court clearly ignored. How can anyone possibly argue that a parole

eligibility date (which Court after Court has stated offers nothing more than a mere, but unlikely, possibility of release), after serving 45 years in prison, is not a de facto LWOP?

The Connecticut Court also looked at the issue from a policy perspective:

> "A juvenile is typically put behind bars before he has the chance to exercise the right and responsibilities of adulthood, such as establishing a career, marrying, raising a family, or voting. Even assuming the juvenile offender does live to be release, after a half century of incarceration, he will have irreparably lost the opportunity to engage meaningful in many of these activities and will be left with seriously diminished prospects for his quality of life for the few years he has left."

That is the case herein. D.L. knows he does not "technically" have a LWOP sentence, yet common sense dictates that, in reality, he does; He has a de facto LWOP sentence. The Lower Court never address the "de facto" argument/point.

Importantly, "The United States Supreme Court views the concept of "life" in Miller and Graham more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for "life" if he will have no opportunity to TRULY reenter society or have any meaningful life outside of prison", the Connecticut Court ruled. This is exactly what is happening to D.L. herein. See Bearcloud v. State, 334 P3d 132, 95 CrL 684 (Wyo. 2014), which held that resentencing was called for where a mandatory sentence was "practically" identical to life imprisonment without parole."; See also Wyoming v. Sam, 401 P.3d 834, 2017 BL 297829, "the juvenile's sentence to life with the possibility of parole in 25 years, followed by three consecutive sets of concurrent sentences of 9 to 10 years, is a de facto LWOP sentence." Petitioner herein, was sentence to a mandatory life sentence with parole

eligibility in 35 years, followed by a consecutive 10 year sentence.

In Graham v. Florida, 130 S. Ct. 2011 (2011), the U.S. Supreme Court interpreted the Eighth Amendment as making LWOP categorically off-limits for all juveniles convicted of non-homicide offenses. In Miller, the Court extended the life without parole ban for juvenile offenders when sentence is mandatory. A few years earlier, the Court in Roper v. Simmons, 543 U.S. 551, CrL 407 (2005), banned the death penalty for any offense committed before the offender is 18. A clear trend had been developing culminating in Miller. While the U.S. Supreme Court viewed it's requirement for individualized determinations that would take account of "youth (and all that accompanies it)" sufficient to address the challenges by Miller, the Court was also clear that Miller must be read in the context of Roper and Graham. Continuing the trend created by Miller the Massachusetts Supreme Judicial Court went even further then its sister jurisdictions at the time, issuing an extremely well reasoned opinion clearly meant to insure that the intent of the Miller Court is adhered to as it was drafted: to realize that children are deserving of and must be given significant and special consideration before the Courts decide to let them die in prison. The Court ruled as a matter of State Constitutional Law that life without parole imposed for a juvenile crime is cruel and unusual and unconstitutionally disproportionate regardless of whether the sentence is mandatory or discretionary. See Diatchenko v. District Attorney, 1 N.E.3d 270 (Mass. 2013) (94 CrL 418, 1/18/14); after which the Court went on to rule in, Commonwealth v. Brown, 2013 BL 354533, Mass., No. SJC-11454, 12/24/13, the Court further held

that all LWOP sentences for juvenile offender's even those that are discretionary with the sentencing Court, violate the State Constitution proscription against inflicting punishment that is "cruel or unusual" because juveniles are "Constitutionally different". "Simply put, because the brain of a juvenile is not developed, either structurally of functionally, by the age of 18, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved", the Mass. Court said. That is exactly what has happened to D.L. herein. Without anything near a Miller compliant sentencing, without any real consideration for D.L.'s youth and mental status, the Court labeled him irretrievably broken. This cannot stand under Miller and its progeny. In State v. Pearson, Iowa, No. 11-1212, 8/16/13, the evidence in this case did not establish that the defendants prison term extended beyond their life expectancies, but the Court said, "we do not believe that determination of whether the principles of Miller or Graham apply in a given case should turn on the niceties of epidemiology, genetic analysis or actuarial sciences in determining prescise mortality dates." The Court recognized that a minimum of 35 years and 52 years imprisonment "is not techically a LWOP sentence" but decided that "such a lengthy sentence imposed on a juvenile is sufficient to trigger Miller - type protections." The Court went on to say, "the notion that the reasoning of Roper was limited to death penalty cases was proven wrong in Graham, and the notion that Graham's reasoning was limited to non-homicide cases was proven wrong in Miller...The prospect of geriatric release, if one is to be afforded the opportunity for rlease at all, does not provide a "meaningful opportunity" to demonstrate the

"maturity and rehabilitation" required to obtain release and reenter society as required by Graham." See People v. Contreras, Cal., 524566, 2/26/18, juvenile offender may not be sentenced to the functional equivalent of LWOP, the Court ruled. "...assuming defendants' parole eligibility dates are within their expected lifespans, the chance for release would come near the end of their lives; even if released, they will have spent the vast majority of adulthood in prison...our conclusion that a sentence of 50 years to life is functionally equivalent to (LWOP) is consistent with decisions of other State High Courts," the Court said. In Dismissing an argument from the State that, since the defendants eligibility lands within their life expectancies, there is no Constitutional prohibition.

See Sanders v. Graham, 2009 U.S. Dist. LEXIS 23132 (W.D. Wis. 24 2009), "...NO FACT that [Sanders] could prove at a hearing would entitle him to release...In other words, from the day Sanders first began serving his sentence, he constantly has faced the possibility that the parole commission would exercise its discretion in a manner that would cause him to serve the rest of his life in prison." The same applies to juveniles who are sentenced to life in the State of Wisconsin.

Wisconsin's sentencing scheme as it applies to juveniles directly contravenes the spirit of Miller and its progeny! It is absurd to believe that United States Supreme Court precedent could be allowed to be subverted in this manner.

In deciding on a sentence for a minor the U.S. Supreme Court requires the sentencing judge to take into account how children are different, and how those differences counsel against irrevocably

sentencing them to a lifetime in prison. Here, the Court below did nothing more then consider what can only be described as making a passing reference to D.L.'s youth - surely a far cry from what the Justices had in mind when drafting **Miller**. The judge thus did not consider the Supreme Court's, "children are different" statement in **Miller**,or similar statements in earlier U.S. Supreme Court cases, notably, **Roper v. Simmons**, 125 S. Ct. 1183 (2005), where the COurt had marshalled psychological evidence in support of its conclusion that to impose the death penalty on a minor was a per se violation of the Eighth Amendment. Id. at 569-75. The relevance to sentencing of "children are different" also cannot in logic depend on whether the legislature has made the life sentnece **discretionary** or **mandatory**; even discretionary life sentences must be guided by consideration of AGE-RELEVANT FACTORS. See, e.g., **People v. Gutierrez**, 58 Cal. 4th 1354, 171 Cal. Rptr. 3d 421, (Cal. 2014); **ex parte Henderson**, 144 SO3d 1262, 1280 1283-34 (ALA. 2013).

A review of the lower sentencing Court will reveal that the relevant factors relating to D.L.'s youth were never truly brought to light and properly considered. Rather, mere lip service was given to his youth, his childhood and his then existing, mental status. He was sentenced quite candidly, as if he were a fully and well developed adult with all the reasoning and judgement making abilities normally assigned to an adult offender. As if he were not 15 but 25 and as such obviously deserving of effectively a de facto LWOP sentence. In reviewing the lower sentencing Court herein reveals no inquiring into the **Miller** factors. There was a plethora of evidence available relating to D.L.'s chronological age, and its hallmark features including, impetuosity and the failure to

appreciate risks and consequences, his lack of maturity, the absence of mentoring, whether D.L. might have been charged and convicted of a lesser offense if not for the incompetencies associated with his youth such as his inability to deal with the police; the absence of a stable upbringing, the true circumstances of the offense, including, without limitation, the fact that the States own expert witness directly contradicted the States star "eye-witness" as to the all important second gun shot, and none of this was properly considered by the sentencing Court.

If this Honorable Court refuses to apply the principles of **Miller** and it progeny to the case at bar because D.L. herein has a mere possibility of parole some 45 years in the future, the result borders on the absurd, to wit: an offender such as D.L., sentenced to life with the possibility of parole some four decades in the future ends up worst off then an offender sentenced to life with no possibility of parole, as the offender with no possibility of parole is the only one who receives the important benefit of]detailed individualized hearing under **Miller**. How can this possibly be allowed to stand? It defies logic and all common sense. Under this scenario, because of the significant protections built into a **Miller** analysis, it is far more likely that the youth sentenced to life without parole will end up with a mandate for a new lesser sentence because of the **Miller** analysis, and be released far earlier than the youth who is sentenced to life with the possibility of parole in some 45 years. As crazy as this seems, this means that attorney's representing minors are better off trying to press for a harsher sentence so that their clients is afforded the **Miller**

protections. Those attorneys who do "too good" a job for the clients achieving the possibility of parole are doing their minor client a disservice. It sounds absurd because it is absurd.

In the case below, the sentencing Court treated typical characteristics of youth, D.L.'s immaturity, his impetuosity, his underdeveloped sense of responsibility, his vulnerability to peer pressure and his poor risk assessment as aggravating factors, rather then mitigating factors as required by **Miller** and quite importantly, as required by common sense, rationality and decency, as well as our country's critical notion of justice and the firm belief that our youth are capable of true rehabilitation except under the most depraved of circumstances. An examination of the record below reveals that the sort of analysis necessary to even attempt to make a finding D.L. being "irreparably lost" and of "an irretrievably depraved character" **never** occurred. In fact, such an analysis was never even touched upon by the Court below. The Court simply decided, without consideration and with no hesitation, to declare D.L. not capable of rehabilitation. Yet there is no evidence in the record to support this conclusion. In fact, the States own expert opined that D.L. should **not** have been tried as an adult. The lower Court simply made a decision to ignore decades of well supported psychological data, in favor of what must have been a very powerful crystal ball, because as the U.S. Supreme Court noted, even expert psychologists have a difficult time predicting whether a juvenile offender is irretrievably broken. See **Miller** and its progeny!

The core message of the U.S. Supreme Court that emerges from **Roper**, **Graham**, **Miller**, **Montgomery**, is that "imposition of a State's

most serve penalties on juvenile offenders cannot proceed as though they were not children". From this foundational principle, all future Constitutional decisions about juvenile sentencing must flow! This case deserves Certiorari.

D.L., is requesting that this Honorable Court construe his request for Certiorari liberally, both as to the form and contents of this brief and appendix.

AS I have never been given any opportunity to address any Court at an evidentiary hearing, despite the fact that my case seems to fit squarely within the parameters that our Nation's Courts have now established and continue to establish with regard to the sentencing of juveniles, I hope this Court will do what all others have refused to do and take a moment to look beyond all the procedural bars and other roadblocks too complicated for me, as a pro se litigant, to work through and examine the facts that brought me here today. Despite my lack of formal legal training and despite my lack of access to the law of the very jurisdiction holding my fate in its hands, there is one fact of which I am one hundred percent certain: there is something very wrong when a 15 year old child is repeatedly summarily denied access to any review of the facts of his case after being sentence to what is clearly a de facto LWOP sentence and what amounts to having ineffective assistance of trial counsel and post-conviction/appellate counsel.

Certainly, the Courts can continue, as they have thus far, to shield themselves from the actual miscarriage of justice that has occurred here by hiding behind the rhetoric of procedure so complicated that even seasoned lawyers fall prey to the many

hidden pitfalls. But that does not make any of this right or just. It is beyond rational thought that any Court could possibly miss the fact that my lengthy and exhaustive litigation history has always had one theme which permeated every single argument: that a 15 year old child is simply unable to understand and protect his Constitutional rights!

In addition to the fact that the most recent decisions by the lower Courts again denied me any relief without so much as a thimble's worth of review on the merits, there appeared to be a complete circumvention of the appropriate standard of review.

I do not miss the irony in all of this. Here I am the accused and convicted of taking a man's life and I am the one asking for justice. Every time I sit down to compose my next legal filing I am filled with the feeling that I am in some way being insensitive by asking the Courts for justice after what I did. But I am able to push forward by remembering that this is what in fact makes our system of justice so amazing: there is supposed to be equal protection under the law for all of us...the victim and the accused. Sadly, that has not happened in this case and it will not happen until some type of review is granted.

How did a 15 year old child charged with a homicide end up in adult Court when the States own expert opined that waiver of the child into adult Court would be **inappropriate** under the circumstances of the case? How did a 15 year old child end up being interrogated for hours by detectives without counsel present when the child's father invoked the child's right to counsel? How did a trial Court rule that the invocation of the child's right to counsel was ineffective because the child's father, not the child, invoked the

right? How can Court after Court refuse to hear this case on its merits despite the United States Supreme Court's landmark rulings in Miller, Martinez and Strickland v. Washington, 466 U.S. 688 (1984). And despite the plethora of cases following the U.S. Supreme Court's mandate in these cases, such as D.L. was never afforded at any time? And these unanswered questions are just a small sample of the issues ignored from the cases inception.

In Strickland v. Washington, 466 U.S. 688 (1984), the U.S. Supreme Court set forth the well-know two prong test for determining ineffecyive assistance of counsel. The first prong requires a defendant to show that the performance of counsel fell below an objective standard of reasonableness. Id. at 688. According to the Court, "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."

The second prong of the Strickland analysis requires the Court, to determine whether a defendant was materially prejudiced by the claimed errors of counsel. According to Strickland, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. I believe review will show that these requirements have been met in this case. As discussed infra, the standard for issuing a Certificate of Appealability, a Petitioner must show that reasonable jurists could debate whether (or, for that matter,agree that) the Petition should be resolved in a different manner or to proceed further, under Martinez has been met in this case.(See App. -L- Order Granting Petition for COA - Pg.L1 - L5).

Petitioner respectfully submits that both applying individual

and cumulative considerations to all his claims, the proceedings below served to deny him effective assistance of counsel and that Petitioner's youth was never truly brought to light and properly considered. Petitioner is also well aware of the fact that under well reasoned, thoughtful analysis the issue of the State relying on false testimony could be corrected under **Giglio v. U.S.**, 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L.ed. 2d 104 (1972), and its progeny.

CONCLUSION

For all the reasons set forth, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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