**NO. _____**

In the
Supreme Court of the United States

***FERNANDO JUAREZ,***
***Petitioner*,**

**v.**

***LORIE DAVIS,***
***Respondent*.**

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

# PETITION FOR WRIT OF CERTIORARI

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Dated: August 30, 2019

## QUESTIONS PRESENTED

In the context of 28 U.S.C. § 2254(d), which allows an application for a writ of habeas corpus on behalf of a person in custody under a state-court judgment to be granted with respect to a claim that was adjudicated on the merits in state-court only if the adjudication of the claim was: (i) contrary to or involved an unreasonable application of clearly established Federal law as determined by this Court; or (ii) based on an unreasonable determination of the facts considering the evidence presented in state court, Petitioner presents these questions:

1. Does an automatic sentence of life in prison with no possibility of parole for 40 years violate the Eighth and Fourteenth Amendments under *Miller v. Alabama* because it is a de facto life-without-parole sentence?

2. Does a sentencing-law enacted after the date of an offense that inflicts a greater punishment than what was constitutionally available on the date of the offense violate the Ex Post Facto Clause of U.S. Const. Art. I, § 10?

## PARTIES TO THE PROCEEDING

Fernando Juarez, Petitioner

Lorie Davis, Director of the Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.

## RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

## RELATED CASES

- *Juarez v. Davis*, No. 18-10672 (5th Cir. June 4, 2019) (Judgment and Order denying motion for certificate of appealability)

- *Juarez v. Davis*, No. 3:16-CV-00843 (N.D.Tex. May 10, 2019) (Judgment and Order Accepting Findings and Recommendations of the United States Magistrate Judge)

- *Juarez v. Davis*, No. 3:16-CV-00843 (N.D.Tex. March 28, 2019) (Findings, Conclusions, and Recommendations of the United States Magistrate Judge)

- *Ex parte Juarez*, No. WR-84,689-01 (Tex.Crim.App. March 23, 2016) (denial of the application for writ of habeas corpus)

- *Ex parte Juarez*, No. 34946CR/A (40th Dist. Ct. Ellis Co. Feb. 23, 2016) (Findings of Fact and Conclusion of Law and Order on Application for Writ of Habeas Corpus)

- *Juarez v. State*, No. PD-1393-14 (Tex.Crim.App. Feb. 4, 2015) (denial of the petition for discretionary review)

- *Juarez v. State*, No. 10-11-00213-CR, 2014 Tex.App.-LEXIS 11227 (Tex.App.-Waco Oct. 9, 2014)

- *Juarez v. State*, No. PD-1049-13, 2014 Tex.Crim.App.Unpub.LEXIS 666 (Tex.Crim.App. July 23, 2014) (denial of the petition for discretionary review)

- *Juarez v. State*, No. 10-11-00213-CR, 2013 Tex.App.-LEXIS 9293 (Tex.App.-Waco July 25, 2013)

- *State v. Juarez*, No. 34946CR (40th Dist. Ct. Ellis Co. June 1, 2011) (Judgment Jury Verdict and sentence)

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Fernando Juarez respectfully petitions for a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit:

## OPINIONS BELOW

The Order and Judgment denying the motion for certificate of appealability of the Fifth Circuit ("Order") are attached in the Appendix (App.1-2) and is cited as *Juarez v. Davis*, No. 18-10672 (5th Cir. June 4, 2019).

The Judgment and Order Accepting Findings and Recommendations of the United States Magistrate Judge are attached in the Appendix (App.3-7) and is cited as *Juarez v. Davis*, No. 3:16-CV-00843 (N.D.Tex. May 10, 2019).

The Findings, Conclusions, and Recommendations of the United States Magistrate Judge ("Findings") are attached in the Appendix (App.8-24) and are cited as *Juarez v. Davis*, No. 3:16-CV-00843 (N.D.Tex. March 28, 2019).

## STATEMENT OF JURISDICTION

On June 4, 2019, the Fifth Circuit issued the Order and Judgment denying the motion for certificate of appealability. *Juarez v. Davis*, No. 18-10672 (5th Cir. June 4, 2019) (App.1-2). This Court has jurisdiction under 28 U.S.C. § 1254 (2019).

## RELEVANT CONSTITUTIONAL PROVISIONS

The Ex Post Facto Clause of U.S. Const. Art. I, § 10 provides in relevant part, "No State shall…pass any…ex post facto Law…"

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII.

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

## FEDERAL STATUTES AFFECTED

28 U.S.C. § 2254(d) (2019) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the

merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

## STATEMENT OF THE CASE

### Introduction

Under 28 U.S.C. § 2254(d), an application for a writ of habeas corpus on behalf of a person in custody under a state-court judgment may be granted with respect to a claim that was adjudicated on the merits in state-court only if the adjudication of the claim was: (i) contrary to or involved an unreasonable application of clearly established Federal law as determined by this Court; or (ii) based on an unreasonable determination of the facts considering the evidence presented in state court. If a district court has denied the constitutional claims on the merits, the movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This demonstration includes showing that reasonable

jurists could debate or agree that the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Id*. A district court must conduct a "threshold examination" that "[r]equires an overview" of the applicant's claims and "[a] general assessment of (the merits of the claims)." *Smith v. Dretke*, 422 F.3d 269, 273 (5th Cir. 2005); *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003); *Buck v. Davis*, 137 S.Ct. 759, 773 (2018).

Petitioner will show that he made a substantial showing of the denial of constitutional rights and reasonable jurists would have found the district court's resolution debatable or wrong on these issues: (1) an automatic life sentence with no possibility of parole for 40 years violates the Eighth and Fourteenth Amendments because it is a de facto life-without-parole sentence; and (2) a sentencing-law enacted after the date of an offense that inflicts a greater punishment than what was constitutionally available on the date of the offense violates the Ex Post Facto Clause of U.S. Const. Art. I, § 10.

## Procedural History

Petitioner was convicted of Capital Murder under the law of parties and sentenced to life-without-parole for an offense committed on April 18, 2010 when Petitioner was under 18. (ROA.74, 2499, 2689)[1];

[1] Record citations are to the Appendix ("App._") or the record on appeal, which are cited to the Clerk's Record, cited as "CR" and the page number, and the Reporter's Record, cited as "RR" followed by the volume and page or exhibit number ("SX" for

Tex. Penal Code § 19.03(a)(2) (2010); Tex. Penal Code § 7.02(a)(2) (2010).

Petitioner's conviction and sentence were upheld on appeal. *Juarez v. State*, No. 10-11-00213-CR, 2013 Tex.App.-LEXIS 9293 (Tex.App.-Waco July 25, 2013) (Unpublished opinion). On discretionary review, the Texas Court of Criminal Appeals ("TCCA") granted relief and remanded the case to the Court of Appeals to consider Petitioner's claim under *Miller v. Alabama,* 567 U.S. 460 (2012). *Juarez v. State*, No. PD-1049-13, 2014 Tex.Crim.App.Unpub.LEXIS 666 (Tex.Crim.App. 2014) (Unpublished opinion). On October 9, 2014, the Court of Appeals reformed Petitioner's sentence to life with no possibility of parole for 40 years. *Juarez v. State*, No. 10-11-00213-CR, 2014 Tex.App.-LEXIS 11227 (Tex.App.-Waco, October 9, 2014) (Unpublished opinion).

Petitioner filed a petition for discretionary review, which was denied on February 4, 2015. *In re Juarez*, No. PD-1393-14, 2015 Tex.Crim.App.LEXIS 81 (Tex.Crim.App. Feb. 4, 2015). Petitioner then filed an Application for Writ of Habeas Corpus, which was denied on March 23, 2016 without a written order by the TCCA on the trial court's Findings of Fact and Conclusions of Law. (ROA.179-331, 332-337, 5198).

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State's exhibits or "DX" for Appellant's exhibits). Petitioner will make the record on appeal available to the court upon demand.

**Background Facts**

Petitioner's codefendants were Hernandez and Maldonado (adults) and Gonzalez (15 at the time of the offense). (ROA.2364-2366). In exchange for his testimony, Gonzalez pleaded guilty to Murder and Aggravated Robbery and received 45 years in prison. (ROA.1501, 2367, 2498-2500, 2647, 2660, 2759, 2760). Petitioner's alleged prior "bad-acts" were a criminal trespass when he was 14, "riot participation" (fight among students) when he was 15, and disorderly conduct when he was 17. (ROA.979-980). Petitioner lived with his parents, attended high school, was employed at a restaurant, and had never been adjudicated of a felony. (ROA.1089, 4162-4166).

The State's case was based mostly on Gonzalez's testimony. (ROA.2498-2597, 2647-2775). On April 18, 2010, Maldonado tells Gonzalez that they are going to commit a robbery planned by Hernandez, who worked for the decedent. (ROA.2391, 2420, 2505-2508, 2696-2700, 3621-3629). The sole plan was to rob the decedent. (ROA.3629-3639). There was never any discussion of shooting or killing. (ROA.2513-2514, 2649-2650, 3057-3058, 3114).

Maldonado carried a .380-caliber pistol and gave Gonzalez a .380-caliber Mac-11. Petitioner never exited or handled a weapon in the vehicle. (ROA.2508-2516, 2700-2704, 2733). Petitioner stops near the decedent's vehicle, which is stopped at a stop-sign. (ROA.2783). Holding the Mac-11, Gonzalez runs to the decedent's vehicle, opens the door, points it at the

decedent, telling him that he is not going to hurt him. (ROA.2521-2522, 2767-2768, 2711). Gonzalez's intent was to take the vehicle. (ROA.2523). The decedent begins to unbuckle his seat belt. (ROA.2521, 2653-2655, 2668). Without warning and to Gonzalez's shock, Maldonado shoots the decedent in the chest, killing him. (ROA.2521-2524, 2590-2591, 2650, 2655, 2699-2700, 2712, 2727, 3134-3142, 3908-3914, 4721, 4866-4867). Petitioner's fingerprints were not on the pistols and was excluded as a contributor to DNA on items related to the incident. (ROA. 3868-3874, 3894-3895, 4871).

The codefendants took the van to another location, where Maldonado, while laughing, set it on fire. (ROA.2537-2538, 2657-2658, 2726, 2826-2827, 2841, 2886-2897, 4577-4578). Maldonado bragged about the killing. (ROA.2750). Petitioner, however, told a witness that the robbery "went bad" and he did not mean for anybody to be harmed. (ROA.3191-3192). Petitioner's version of what occurred was the same as Gonzalez's. (ROA.4047-4061, 4896-4901)

Petitioner and Maldonado were convicted of Capital Murder, and Hernandez was convicted of Murder. (ROA.1113-1116, 4510). Under Tex. Penal Code § 12.31(a) (2010), on May 27, 2011 Petitioner was sentenced to life without parole. (ROA.1113-1116). After *Miller*, the Texas Legislature changed the mandatory sentencing law to automatic life with no possibility of parole for 40 years. Tex. Penal Code § 12.31(a)(1) (2013) (effective on July 22, 2013); Tex. Gov. Code § 508.145(b) (2019) (inmate serving under

§ 12.31(a)(1) is not eligible for parole until the actual calendar time served equals 40 year).

## STANDARD OF REVIEW

Because this petition involves the interpretation of federal constitutional law and prior holdings of this Court, the standard of review is de novo. *See Salve Regina College v. Russell*, 499 U.S. 225, 231-232 (1991).

## REASONS FOR GRANTING THE WRIT

**I. An automatic life in prison with no possibility of parole for 40 years violates the Eighth and Fourteenth Amendments under *Miller* because it is a de facto life-without-parole sentence. The Fifth Circuit's refusal to grant a certificate of appealability and the habeas-petition was: (i) contrary to or involved an unreasonable application of clearly established Federal law as determined by this Court; or (ii) based on an unreasonable determination of the facts considering the evidence presented in state court.**

**1. The State habeas court failed to address these issues, violating Petitioner's substantive due process rights**

Petitioner argued that under *Miller*, the sentence of automatic life with no possibility of parole for 40 years violates the Eighth Amendment because Petitioner did not kill or intend to kill, was convicted under the law of parties, and was sentenced to a de

fact life-without-parole sentence. (ROA.10, 13-14, 43-51, 58-64). The Findings conclude that "Petitioner has not shown that his sentence is a *de facto life-without-parole sentence* without parole under clearly established federal law" and "the concurring opinion in *Miller* is not clearly established law. He has not shown that clearly established law prohibits a life sentence for a juvenile who is guilty of capital murder as a party or as a co-conspirator." App.21-22.

The state habeas court did not address these issues or allow a hearing. (ROA.259-263). Instead, it merely concluded that Petitioner was guilty as a party and a co-conspirator and the sentence does not violate the Eighth Amendment, merely citing the decision of the TCCA on direct appeal. (ROA.262).

When a state court fails to address a ground, the petitioner is not afforded procedural due process. Due process is not the same as receiving a "full-and-fair hearing," the right to which was eliminated by the AEDPA. *Valdez v. Cockrell*, 274 F.3d 941, 942 (5th Cir. 2001) (A full-and-fair hearing is not a prerequisite to the operation of the AEDPA's deferential scheme under 28 U.S.C. § 2254(e)(1)). A literal reading of § 2254(e)(1) may lead to a conclusion that the state court need not even be a court of competent jurisdiction. *See Valdez*, 274 F.3d at 956 (Dennis, J., dissenting), *citing* 17A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4265.2 (2d ed. 1994). Because such a conclusion is absurd, the AEDPA cannot be interpreted as having eliminated the right to due process, which requires

the state habeas court to at least consider the issue and rule on it.

If government-action depriving a person of life, liberty, or property survives substantive due-process-scrutiny, it must be implemented in a fair manner, *i.e.*, with procedural due process. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *see, e.g.*, *Gray v. Hall*, 265 P. 246, 255 (Cal. 1928) ("…[d]ue process of law requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights."); *United States ex rel. Carr v. Martin*, 172 F.2d 519, 521 (2d Cir. 1949) (Holding that if due process of law was available to a petitioner in the state courts, the petitioner is denied no right under the federal constitution, so conversely the due process of law must have been made available to the petitioner in state courts); and *Holden v. Hardy*, 169 U.S. 366, 389-390 (1989) ("…no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defence.").

Here, the state court did not address these issues in its findings. (ROA.332-336). This does not comport with due process. Then, the TCCA denied the application without a written order (ROA.337, 5198), Thus, Petitioner did not receive even minimal due process of being heard on the issue.

**2. Juveniles who do not kill or intend to kill "are categorically less deserving of the most serious forms of punishment than are murderers"**

Contrary to the Findings (App.22), Petitioner did not argue that the "concurring opinion in *Miller* is (clearly established law)." Rather, Petitioner cited it because its reasoning supports the clearly established law set forth in *Miller*, which is that "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment" (*id.* at 460) and "…[a] sentencer (must) have the ability to consider the 'mitigating qualities of youth.'" *Id.* at 476. This Court cited clearly established law from *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), *Johnson v. Texas*, 509 U.S. 350, 367 (1993), *Roper v. Simmons*, 543 U.S. 551, 570 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010). *Miller*, *id.* at 476:

> "Everything we said in *Roper* and *Graham* about that stage of life also appears in these decisions…[A]s we observed, 'youth is more than a chronological fact.…[I]t is a time of immaturity, irresponsibility, impetuousness, and recklessness.…[I]t is a moment and condition of life when a person may be most susceptible to influence and to psychological damage…"

As this Court observed in *Graham*, the "ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Graham*, 560 U.S. at 59, *citing Weems v. United States*, 217 U.S. 349, 367 (1910). To determine the "graduated and proportioned" punishment, a court should "look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society." *Graham*, 560 U.S. at 58. When analyzing categorical bans of punishment on children, this Court considered "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Id.* at 57 (citations omitted). A court "…[a]lso considers whether the challenged sentencing practice serves legitimate penological goals." *Id.*

This reasoning is so because juveniles (like Petitioner) who did not kill or intend to kill "are categorically less deserving of the most serious forms of punishment than are murderers." *Miller*, *id.* at 499. Such juveniles should not be sentenced as defendants who intended to kill as though their culpabilities are the same. This is consistent with the holdings in *Graham* and *Miller*. Under the mandatory sentencing-law imposed (automatic life with no possibility of parole for 40 years), persons like Petitioner are treated as though they are as culpable as another who personally killed. This is contrary to the established Supreme Court law.

Further, this Court addressed that sentencing juveniles "makes relevant (this Court's) cases

demanding individualized sentencing." *Miller*, 567 U.S. at 475. Mandatory schemes that impose the harshest penalties are flawed if they "(give) no significance to the character and record of the individual offender or the circumstances of the offense and excluded from consideration….the possibility of compassionate or mitigating factors." *Id*. And, "[e]very juvenile will receive the same sentence as every other [despite age], the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." *Id*. at 477.

As the concurring opinion observed: (1) when compared to an adult murderer, a juvenile who did not kill or intend to kill has a "twice diminished moral culpability," *Miller*, 567 U.S. at 490; (2) when "compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed," *Id*.; (3) "[P]sychology and brain science continue to show fundamental differences between juvenile and adult minds" making their actions "less likely to be evidence of 'irretrievably depraved character' than are the actions of adults, *id*., *quoting Roper* , 543 U.S. at 570; and (4) the lack of intent normally diminishes the "moral culpability" that attaches to the crime, making those that do not intend to kill "categorically less deserving of the most serious forms of punishment than are murderers," *id*., *citing Graham*, 560 U.S. at 50.

The *Miller*-factors that must be considered are: (1) age at the time of the offense; (2) extent of culpability; (3) capacity for change; (4) circumstances of the crime; (5) extent of participation in the crime; (6) environment in which Petitioner grew up; (7) emotional maturity and development; (8) criminal history; (9) peer pressure; (10) history of drugs or alcohol; (11) mental health history, and (12) potential for rehabilitation. *Miller*, 567 U.S. at 468-479. Thus, the concurring opinion in *Miller* provides a detailed explanation of the holding and the "*Miller*-factors." The district court's conclusion that Petitioner based his arguments on a concurring opinion is incorrect.

*Graham* and *Miller* hold that a juvenile who lacks the foresight and ability to understand the possible consequences of his actions and who does not kill or intend to kill should not be held as culpable as a person who intended to kill. In *Miller*, this Court observed that although Jackson knew his accomplice was armed with a firearm, "(Jackson's) age could well have affected his calculation of the risk that posed." *Miller*, 567 U.S. at 478. Thus, if a juvenile does not kill or intend to kill, a court must consider that he has twice diminished culpability even if a "reasonable adult" could have foreseen a life being lost, which is the standard under the law of parties in Texas.

These holdings follow that children "[c]annot be viewed simply as miniature adults." *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011). *J.D.B.* considers the "reasonable child" rather than a "reasonable adult" in the context of Miranda warnings. In *J.D.B.*, the government argued that a

child's age is of no relevance when considering whether the child is "in custody" for *Miranda* purposes. *Id.* at 271. This Court disagreed, finding that "[i]n some circumstances, a child's age 'would have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave.'" *Id.* at 272. Thus, a "reasonable child" subjected to police questioning may feel pressured to submit when a "reasonable adult" would feel free to go. *Id.* And, a child's age "is far more than a chronological fact." *Id.* at 272, *citing Eddings*, 455 U.S. at 115 and *Roper*, 543 U.S. 551 at 569. This "generates commonsense conclusions about behavior and perception." *J.D.B.*, 564 U.S. at 272. Further, "such conclusions apply broadly to children as a class…and are self-evident to anyone who was a child once himself, including any police officer or judge." *Id.*; *see, e.g., Rodriguez v. McDonald*, 872 F.3d 908, 922 (9th Cir. 2017) (in the context of the waiver of the right to counsel, "youth is impossible to ignore" since juveniles are "particularly susceptible to pressure from police."); *see also Gallegos v. Colorado*, 370 U.S. 49, 52-54 (1962) (a juvenile "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions" for determining whether a confession was obtained in violation of due process).

### 3. The sentencing-law violates *Miller*

Despite *Miller*, *Graham*, *Eddings*, *Roper*, and other cases cited, the Texas sentencing-law of automatic life with no parole for 40 years without individualized sentencing treats all juveniles the same. Applying the law of parties to juveniles like

Petitioner for the acts of adults like Maldonado treats Petitioner like "a miniature adult" (not allowed by *J.D.B.*) and like he was an adult. Automatically sentencing a juvenile who did not kill or intend to kill to a sentence violates *Miller*. The *Miller*-factors show that due to immaturity, children are more likely to engage in risky behavior, are more susceptible to peer-influence as Petitioner was and are less-capable that adults of foreseeing the outcome of their actions. *See Miller*, 567 U.S. 477. There is no indication that Petitioner would have ever been involved but-for the two adults, Maldonado and Hernandez. When this Court considers the *Miller*-factors implicated: (1) age at the time of the offense (17); (2) extent of culpability (role was only conspiring to commit a robbery); (3) capacity for change (no indication that Petitioner cannot change or would have been involved but-for Maldonado and Hernandez); (4) circumstances of the crime (very tragic, but per the State's star witness, Maldonado acted with independent-impulse, *see Solomon v. State*, 49 S.W.3d 356, 368 (Tex.Crim.App. 2001)); and (5) extent of participation in the crime (getaway driver and never handled the weapons used after he entered the vehicle) Petitioner should be afforded individualized sentencing.

Further, a juvenile's overall diminished culpability due to immaturity, peer-pressure, and inability to foresee consequences that is outlined in *Miller* and *Graham* is increased where the juvenile did not kill or intend to kill. A juvenile like Petitioner may not take the actions or words of a codefendant seriously. He may not foresee how an armed-robbery could lead to death or that acting as the driver could

cause the same punishment as being the mastermind. Treating Petitioner substantially the same as Maldonado negates the *Miller*-requirement. *Graham* requires that Petitioner be afforded an individualized sentencing-hearing, which is reaffirmed in *Miller* and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

**4. The sentencing-law is a de facto life-without-parole sentence**

Juveniles should have a meaningful opportunity for parole. *See Jackson v. Norris*, 426 S.W.3d 906, 911 (Ark. 2013) ("there will have to be a determination whether (Jackson) 'kill[ed] or intend[ed] to kill' the robbery victim"), *citing Graham*, 560 U.S. at 69. "[W]ithout such a finding, the Eighth Amendment as interpreted in *Graham* forbids sentencing (Jackson) to such a sentence, regardless of whether its application is mandatory or discretionary under state law." *Id*. However, the sentence imposed on Petitioner is a de facto life-without-parole sentence.

In Texas, "life" in a capital case for a juvenile means no parole eligibility or consideration of good-conduct until the juvenile serves 40 years. Tex. Gov. Code § 508.145(b) (2019). This scheme violates the Eighth Amendment and *Miller* because it takes sentencing-discretion away from juries and courts. When Petitioner is 57, the *Miller*-factors and supporting evidence will be irrelevant and unavailable (it is unlikely that witnesses today will be available in 40 years). Petitioner will be reviewed by the Texas Board of Pardons and Board (TBPP) under

"standard parole guidelines." Tex. Gov. Code § 508.144(a) (2019). The TBPP has "complete discretion" to grant or deny parole. 37 Admin. Code § 145.2(a) (2019). The criteria used are: (1) the crime for the incarceration, (2) the amount of time Petitioner has served and his institutional adjustment, and (3) the overall criminal history. 37 Admin. Code § 145.2(b)(2) (2019).

The most important factor is the crime of incarceration followed by the overall criminal record. 37 Admin. Code § 145.2(b)(2)(E) (2019); *see Long v. Briscoe*, 568 F.2d 1119, 1120 (5th Cir. 1978). Because the crime is Capital Murder, Petitioner has no meaningful opportunity for parole. The TBPP Guidelines Annual Reports of 2009 through 2014 show that when calculating the risk-assessment of a potential parolee, Capital Murder yields the highest score in offense-severity class. (ROA.165, 171, 177, 184, 189. 199). Next, the "Static-Factors" are based upon Petitioner's criminal record and do not change over time: (1) prior criminal record; (2) age at first commitment; (3) prior incarcerations; (4) history of supervisory release revocations for felony offenses; (5) employment history; and (6) commitment offense. (ROA.165, 171, 177, 184, 189, 199). Capital Murder causes the "Static-Factor" to yield the highest Guideline Level Score, making release after 40 years illusory. (ROA.126-227).

The TBPP also considers "Dynamic-Factors" (characteristics demonstrated since incarcerated), but they carry far less weight than Static-Factors. Dynamic-Factors are: (1) age when considered for

parole; (2) whether Petitioner is a "confirmed security threat group (gang) member" (3) education, vocational, and certified on-the-job training programs completed during incarceration; (4) disciplinary conduct; and (5) prison custody-level. *Id.* Dynamic-Factors are irrelevant when Static-Factors are high.

These conclusions are supported by TBPP's data: between 2009 and 2014, those in the Guideline Level Score of 1 (Petitioner's level) were approved at: 2009-4.33% (ROA.166); 2010-8.03% (ROA.172); 2011-6.99% (ROA.178); 2012-13% (ROA.186); 2013-17.24% (ROA.192); and 2014-10% (ROA.202). But 4.33% to 17.24% does not tell the entire story since they reflect all cases. For those convicted of Capital Murder, TBPP's data shows that out of 62 applications for commutation, TBPP recommended none. (ROA.133, 141, 149, 157).

Despite this evidence showing that Petitioner's sentence is a de facto life-without-parole sentence that does not consider the *Miller*-factors, the Findings misinterpreted *Virginia v. LeBlanc*, 137 S.Ct. 1726 (2017) (App.20-21):

> "the habeas petitioner contended that his life sentence for a nonhomicide crime violated *Graham*. Virginia did not have parole for felonies, but it provided for geriatric release that allowed prisoners who are sixty years old and who have served at least ten years of a sentence to petition for conditional release…The parole board considers the prisoner's

> individual history, conduct during incarceration, and changes in attitude toward himself and others…The state court held that because the geriatric release program used standard parole factors, it satisfied the Graham requirement that a juvenile convicted of a nonhomicide crime have a meaningful opportunity to receive parole…The Supreme Court stated that Graham did not decide whether a life sentence for a juvenile with the possibility of a geriatric release violates the Eighth Amendment...For that reason, the state court's rejection of the claim was not objectively unreasonable….

*LeBlanc* was not decided under *Miller* but under *Graham*'s requirement that a juvenile convicted of a nonhomicide crime have a meaningful opportunity to receive parole. "Miller" does not appear in *LeBlanc*. And, *LeBlanc* does not address the issue of de facto life-without-parole sentences. *LeBlanc* is not based on the Eighth Amendment. The petitioner raped a woman in 1999 when he was 16 and received life. *Id*. at 1727. Virginia had abolished parole for felony offenders and replaced it with a "geriatric release" program that allowed some older inmates to receive conditional release. *Id*. After *Graham* held that juvenile offenders convicted of nonhomicide offenses cannot be sentenced to life without parole and must be allowed a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, the petitioner sought to vacate his

sentence. Virginia held that its geriatric release program satisfies *Graham*'s requirement of parole for juvenile offenders. *LeBlanc*, 137 S.Ct. at 1727-1728. The Fourth Circuit reversed, but this Court held that the Circuit "erred by failing to accord the state court's decision the deference owed under AEDPA." Importantly, *Graham* did **not** decide "…that a geriatric release program like Virginia's failed to satisfy the Eighth Amendment because that question was not presented." *Id*. at 1728.

The underlying issues in *LeBlanc* are not relevant to Petitioner. As this Court found in *LeBlanc*, "[i]t was not objectively unreasonable for the state court to conclude that, because the geriatric release program employed normal parole factors, it satisfied *Graham*'s requirement that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole…"*Id*. *Miller*-factors are not related to eligibility for "geriatric release" because *Miller* requires consideration of factors that exist now for individualized-sentencing.

Other cases support Petitioner's arguments. In *State v. Zarate*, 908 N.W.2d 831 (Iowa 2018), the court held that a juvenile is deprived of the individualized-hearing required by *Miller* when he was sentenced for murder with a mandatory sentence based on a belief that there should be a minimum term for anyone who commits murder regardless of age. *Id*. at 855. The sentence of life-with-the-possibility-of-parole after 25 years did not provide a meaningful opportunity for release under *Miller* and is a de facto life-without-parole sentence. *Id*. at 853-855.

In *People v. Caballero*, 282 P.3d 291, 294-296 (Cal. 2012), the court held that a sentence of 110 years to life was a de facto sentence of life-without-parole and prohibited under *Graham* since there was no meaningful opportunity for release. The reasoning is that the defendant (when eligible for parole) would have no opportunity to "demonstrate growth and maturity" to try to secure release. *Id.* at 294.

In *People v. Rainer*, 412 P.3d 520 (COA 2013), the juvenile (age 17) was sentenced to an aggregate 112 years in prison. *Id.* at 523. Although he was eligible for parole after serving 56 years, the Colorado sentence "qualifies as an unconstitutional de facto sentence to life-without-parole" and does not offer "a meaningful opportunity to obtain release" before age 75 (his average life expectancy while imprisoned was only 63.8 to 72 years based on CDC statistics). *Id.* 534. Further, even if the juvenile is alive when he becomes eligible for parole, he is unlikely to receive it because data shows that almost 90% of those first eligible for discretionary parole are denied release. *Id.* The facts in *Rainer* are strikingly similar to those of Petitioner.

In *Henry v. State*, 175 So.3d 675, 679-680 (Fla. 2015), the juvenile was sentenced to life plus 60 years. The court remanded for resentencing, finding that juvenile offenders must be afforded "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." And in *Gridine v. State*, 175 So.3d 672 (Fla. 2015), the same court found that a 70-year sentence with no parole for 25 years assessed against a juvenile was a de facto life-

sentence since it fails to provide a meaningful opportunity for parole based upon a demonstration of maturity and rehabilitation. *Id.* at 673-674. Petitioner's sentence of life with no possibility of parole for 40 years is fare more severe than the sentence imposed in *Gridine*.

In *State v. Null*, 836 N.W.2d 41 (Iowa 2013), the court overturned a sentence for murder where the juvenile received 75 years with parole-eligibility after 52.5 years. *Id.* at 45. This was held to be a de facto life-without-parole sentence. *Id.* The court used the *Miller*-factors, holding that a juvenile have: (1) less culpability than an adult convicted of the crime; and (2) a higher chance than an adult of being reformed. *Null*, 836 N.W.2d at 72.

In *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014), the juvenile was sentenced to consecutive 20-25 year terms. *Id.* at 135. The case was remanded for an individualized resentencing-hearing under *Miller*. The court found that *Roper, Graham, and Miller* require courts to provide individualized sentencing-hearings to weigh factors for determining diminished culpability and greater prospects for reform before imposing a de facto life-without-parole sentence. *Id.* at 141-142. "To do otherwise would be to ignore the reality that lengthy aggregate sentences have the effect of mandating that a juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence…more appropriate." *Id.* at 142. Such a sentence is a denial of hope and makes good behavior and character-

improvement immaterial. This is why *Miller* was decided. *Id*. The court declined to make projections about the juvenile's life-expectancy, instead holding that "…a juvenile sentenced to a lengthy term-of-years sentence will not have a 'meaningful opportunity for release." *Id*. at 142. The U.S. Sentencing Commission recognizes the same reality. *Id*.

In *Casiano v. Commissioner*, 115 A.3d 1031 (Conn. 2015), the juvenile personally killed and was sentenced to an effective-term of 50 years. *Id*. at 1033-1034. The court held that the sentence is subject to procedures set forth in *Miller* since "the 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." *Id*. at 1044. Further, "…[e]vidence suggests that a juvenile offender sentenced to a 50-year term of imprisonment may never experience freedom." *Id*. And, "[A] juvenile offender is typically put behind bars before he has had the chance to exercise the rights and responsibilities of adulthood, such as establishing a career, marrying, raising a family, or voting. Even assuming the juvenile offender does live to be released, after a half-century of incarceration, he will have irreparably lost his opportunity to engage meaningfully 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." *Id*. at 1046. The court also noted that in *Miller* and *Graham*, this Court viewed the concept of "life'" more broadly than mere "biological survival" and an

individual is effectively incarcerated for 'life' if he will have no opportunity to reenter society or have any meaningful life outside of prison. *Id*. Thus, the *Miller*-factors and individualized-sentencing must be considered before a court sentences a juvenile to such a term. *Id*. at 1047-1048.

In *State v. Boston*, 363 P.3d 453 (Nev. 2015), the juvenile was sentenced to 14 life-sentences with the possibility of parole after 100 years for serious non-homicide offenses. The court held that the Eighth Amendment is violated when a juvenile is sentenced to the "…functional equivalent of (life-without-parole)." *Id*. at 458.

**5. A sentencing-hearing is required so that a court may consider the *Miller*-factors, "youth and its attendant characteristics," and whether there is evidence of "irretrievable-depravity"**

As discussed above, before a juvenile is sentence to life-without-parole (actual or de facto), *Miller* "has a procedural component" through which a juvenile is entitled to show that he belongs to a "constitutionally protected class." *Montgomery*, 136 S.Ct. at 734-735. To accomplish this, Petitioner must be allowed a sentencing-hearing that considers the *Miller*-factors, "youth and its attendant characteristics," and whether there is evidence if "irretrievable-depravity." *Id*. at 735. Otherwise, a sentence of life-without-parole (actual or de facto) is excessive but for "the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 567 U.S. at 479-480; *Montgomery*, *id*. at 733-736 (life-

sentences should be only for "the rare juvenile offender who exhibits such irretrievable-depravity that rehabilitation is impossible," for those "rarest of juvenile offender whose crimes reflect permanent incorrigibility," for "those children whose crimes reflect irreparable corruption.").

Petitioner was not afforded a sentencing-hearing to present evidence of the *Miller*-factors. But, the evidence shows that he was the getaway driver of what he thought was going to be only a robbery. Petitioner did not kill or intend to kill. His alleged prior "bad-acts" were an alleged criminal trespass, "riot participation" (fight among students), and disorderly conduct (all misdemeanors). Petitioner lived with his parents, attended high school, was employed, and had never been adjudicated of a felony. (ROA.4162-4166). This is evidence of a juvenile worthy of a meaningful chance of release.

**6. The opinion of the Third Circuit in *Grant* is a conflict between the Circuits.**

In *United States v. Grant*, 887 F.3d 131 (3d Cir. 2018), the Third Circuit held that "…a de facto LWOP sentence cannot possibly provide a meaningful opportunity for release because it relegates the juvenile offender to spending the rest of his or her life behind prison bars and prohibits him or her from ever reentering society." *Id.* at 144-145. The juvenile was convicted under RICO, drug-trafficking charges, and a firearms-charge. *Id.* at 134-135. The district court determined that Grant would never be fit to reenter society and sentenced him to life in prison without the possibility of parole. *Id.* Post-*Miller*, Grant filed and

was granted relief under 28 U.S.C. § 2255 . *Id*. at 134-135.

On remand, the district court determined purportedly considered the *Miller*-factors yet sentenced him to 65 years without parole. *Id*. The Third Circuit held this to be a de facto life-without-parole sentence that violates *Miller* and *Montgomery* since it fails to account for his capacity for reform and afford a meaningful opportunity for release. *Id*. "[W]e feel it necessary to state the obvious: a de facto life-without-parole sentence cannot possibly provide a meaningful opportunity for release because it relegates the juvenile offender to spending the rest of his or her life behind prison bars and prohibits him or her from ever reentering society." *Id*. at 145-146. The court also adopted a "rebuttable presumption that a non-incorrigible juvenile offender should be afforded an opportunity for release before the national age of retirement..." *Id*. at 152. Thus, (1) a sentence that meets or exceeds a non-incorrigible juvenile's life-expectancy violates *Miller*; (2) courts must hold evidentiary hearings to determine the non-incorrigible juvenile homicide offender's life-expectancy before sentencing him to a term that may meet or exceed expected mortality; and (3) when sentencing him, a court must consider sentencing factors like life-expectancy and the national age of retirement to structure a meaningful opportunity for release. *Id*. at 153.

## II. A sentencing-law enacted after the date of an offense that inflicts a greater punishment than what was constitutionally available on the date of the offense violates the Ex Post Facto Clause of U.S. Const. Art. I, § 10. The Fifth Circuit's refusal to grant a certificate of appealability and the habeas-petition was: (i) contrary to or involved an unreasonable application of clearly established Federal law as determined by this Court; or (ii) based on an unreasonable determination of the facts considering the evidence presented in state court.

### 1. Petitioner's sentence inflicts a greater punishment than what was constitutionally available on the date of the offense.

Petitioner's sentence of automatic life in prison with no possibility of parole for 40 years under Tex. Penal Code § 12.31(a) (2013) (effective on July 22, 2013) violates the Ex Post Facto Clause of U.S. Const. Art. I, § 10 because Petitioner's offense occurred in 2010, and the new sentencing-law did not begin until July 22, 2013. When the offense occurred, the only sentence available was the now-unconstitutional Tex. Penal Code § 12.31(a) (2010). The only other sentence available for Murder then was Tex. Penal Code § 12.32(a) (2010), which punishes "by imprisonment in (TDCJ) for life or for any term of not more than 99 years or less than 5 years" (a first-degree felony sentence). Thus, the sentencing-law under which

Petitioner is sentence was enacted after the date of the offense and is more severe than punishment that was constitutionally available on the date of the offense (since the pre-*Miller* version of Tex. Penal Code § 12.31(a) was held unconstitutional). This violates the Ex Post Facto Clause of U.S. Const. Art. I, § 10.

A sentence is unconstitutional and violates the ex post facto clause if it: (1) punishes a previously committed act as a crime, (2) makes a punishment more burdensome, or (3) deprives a person of any defense available according to the law at the time the act was committed. *Collins v. Youngblood*, 497 U.S. 37, 52 (1990). For a law (and a sentence) to be ex post facto, "[i]t must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29 (1981). A law is retrospective if it "changes the legal consequences of acts completed before its effective date." *Weaver*, 450 U.S. at 31; *see also Ross v. Oregon*, 227 U.S. 150, 161 (1913) (prohibition against ex post facto laws is "[a] restraint upon legislative power and concerns the making of laws, not their construction by the courts."); *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 263-264 (1994) (Courts must apply the law in effect at the time their decisions are rendered).

The issues are whether the law under which a defendant is sentenced: (1) existed when the offense occurred; and (2) is more punitive than what was constitutionally available when the offense occurred. In *United States v. Lanz*, 26 Fed.Appx. 768 (9th Cir.

2002) (unpublished), the petitioner's supervised released was revoked and he was sentenced to 36 months in prison. *Id*. at 768. At the time he committed the underlying offense and sentencing, the statutory maximum under 18 U.S.C. § 3583(e)(3) was 36 months. The 9th Circuit rejected the petitioner's claim that he was exposed to an ex post facto sentence "…because the relevant statutory provisions have been in effect since (the petitioner) committed the underlying offense." *Id*. This reasoning is what Petitioner asks to be applied to him: that he be sentenced to what was in effect when the offense occurred. Petitioner cannot be sentenced to an unconstitutional sentence that existed when the offense occurred in 2010. Instead, he should be sentenced under Tex. Penal Code § 12.32(a) (2010), the only constitutional sentence available then. *See In re Medley*, 134 U.S. 160 (1890) (If a law is passed **after** the commission of an offense for which a defendant is tried that inflicts a greater punishment than the law pertaining to the offense at the time it was committed, such a law is ex post facto. Regardless of the sentence, the ex post facto clause prohibits punishing a person by a law passed after the date of the offense, so the defendant should have been sentenced under a statute in effect when the crime was committed). *See also, e.g.*, *Garner v. Comm. of Corr.*, 196 A.3d 1138, 1144-1145 (Conn. 2018) (An amendment to a parole-eligibility statute applied retroactively violated the ex post facto clause because the inmate earned the maximum risk-reduction credits available and there was no reason to believe that the inmate would be denied risk-reduction credit in the future or that credit already earned was likely

to be revoked. This caused harm to his ability for early release and parole-eligibility and effectively imposed a more onerous punishment than the laws in existence when the offense was committed.).

### 2. The Findings misinterpret relevant cases

The district court misinterprets *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), where this Court observed that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Id*. at 736. This line was taken out of context by the district court. *Montgomery* explains immediately following this quoted text, "[T]his (consideration for parole) would neither impose an onerous burden on the States nor disturb the finality of state convictions. And it would afford someone like Montgomery, who submits that he has evolved from a troubled, misguided youth to a model member of the prison community, the opportunity to demonstrate the truth of *Miller's* central intuition that children who commit even heinous crimes are capable of change." *Id*. at 736. Montgomery also provides "[A]llowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Id*. at 736.

In *Montgomery*, this Court held that a post-*Miller* resentencing scheme should allow for persons like Petitioner, who engaged in an armed-robbery

where the evidence shows that the victim was killed because of an independent-impulse-act of an adult the adult-participant in the armed-robbery to be eligible for a meaningful opportunity for parole. This is what the Court refers to when it adds, "who (has) since matured will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Id.* at 736. The imposition of a de facto life-without-parole sentence does not meet the requirements of *Miller* or *Montgomery*.

The Findings also misinterpret *Skipper v. Cain*, 2017 U.S.Dist.LEXIS 214829, 2017 WL 6884335 at *4 (M.D. La. Nov. 6, 2017), *rec. adopted*, 2018 WL 343851 (M.D. La. Jan. 9, 2018), quoting that "reformation of a juvenile's unconstitutional life sentence without parole to a life sentence, with a parole eligibility date to be determined under a statute that was not in effect when the offense was committed, was not an ex post facto violation, because the reformed life sentence with parole eligibility was more favorable than the original life sentence without parole." The statute is La. R.S. § 15:574.4(A)(2) (2018), which provides in relevant part, "…unless eligible for parole at an earlier date, a person committed to (prison) for a term or terms of imprisonment with or without benefit of parole for thirty years or more shall be eligible for parole consideration upon serving at least twenty years of the term or terms of imprisonment in actual custody and upon reaching the age of forty-five." *Skipper*, 2017 U.S.Dist.LEXIS 214829, at *10. Under this law, a person in Petitioner's position would have been eligible for parole after 20 years (age 37). This is not

comparable to the Texas sentencing-scheme of automatic life with parole after 40 years (which is a de facto life-without-parole sentence).

Further, Louisiana did not create a new sentencing-scheme for La. R.S. § 15:574.4(A)(2) (2018) after *Miller*. That petitioner was sentenced under La. R.S. § 15:574.4(A)(2) (2018), the step-down sentencing-statute from Louisiana's unconstitutional juvenile life-without-parole statute. Petitioner asks that he also be sentenced under the step-down Texas statute that existed in 2010, Tex. Penal Code § 12.32(a) (2010), which again punishes by 5 to 99 years or life. This step-down statute allows for the possibility of parole after 30 calendar years even if one is sentenced to life in prison. Tex. Gov. Code § 508.145(d)(1) (2010). And, Tex. Penal Code § 12.32(a) (2010) meets the requirements of *Miller* since it allows for consideration of the *Miller*-factors (*see* Question 1).

The Middle District of Louisiana applied *Collins* incorrectly. The district court concluded that "[t]he Ex Post Facto Clause is implicated only if a change in the law disadvantages a criminal defendant by redefining crimes, defenses, or punishment. By this reasoning, retroactive application of a law violates the Ex Post Facto Clause only if it: (1) punish[es] as a crime an act previously committed, which was innocent when done"; (2) "make[s] more burdensome the punishment for a crime, after its commission"; or (3) "deprive[s] one charged with crime of any defense available according to law at the

time when the act was committed, citing *Skipper*, 2017 U.S.Dist.LEXIS 214829, at *10-11.

However, *Collins* held that the retroactive application of a statute allowing judicial reformation of an improper verdict did not violate the Ex Post Facto Clause because it did not make the prisoner's punishment more burdensome. *Collins*, 497 U.S. at 40-41 & 51-52. In *Collins*, the defendant was convicted of aggravated sexual abuse and was sentenced to life in prison and fined $10,000. *Id*. at 39. He argued that the Texas Code of Criminal Procedure did not authorize a fine in addition to prison, so the judgment and sentence were void and he was entitled to a new trial. *Id.* Before his writ-application was considered by the TCCA, the Texas legislature passed Tex. Code Crim. Proc. Art. 37.10(b) (2018), which allows an appellate court to reform an improper verdict that assesses an illegal punishment. *Id*. at 39-40. Based on this new law, the TCCA reformed the verdict by ordering deletion of the $10,000 fine but denied the defendant's request for a new trial. *Id*. at 40. This Court found that because the defendant was in a 'better position' than he was before due to the judicial reformation of the verdict (he no longer was subject to a $10,000 fine), ex post facto did not apply. Thus, the "step-down" punishment under the law that existed when he committed the crime (or was sentenced) was to not pay a fine.

Petitioner's sentence was not judicially reformed like the fine in *Collins*. Instead, due to *Miller*, Texas created Tex. Penal Code 12.31(a), which is not a step-down from Tex. Penal Code § 12.31(a)

(2010). Instead, it created a sentence that is effectively no better than life-without-parole. The concurring opinion of Justice Stevens is worth noting: the ex post facto clause "has been construed to embrace any law that deprives a person accused of crime of a 'substantial protection' that the law afforded at the time of the alleged offense, so the clause prohibits the retroactive creation of new criminal offenses and harsher penalties..." *Collins*, 497 U.S. at 52 (Stevens, concurring).

### 3. Clearly established Supreme Court law supports Petitioner's arguments

The Findings assert that "Although the Supreme Court (in *Montgomery*) did not consider whether application of the statute was an ex post facto violation, its opinion suggests that a state court's application of such a retroactive statute as a remedy for a *Miller* violation would not be contrary to clearly established federal law." (App.18). Clearly established Supreme Court law however states that any law that inflicts a greater punishment than the law pertaining to the crime when committed, or that alters the situation of the defendant to his disadvantage is an ex post facto law. *Calder v. Bull*, 3 U.S. 386 (1798); *In re Medley*, 134 U.S. 160 (1890), & *Lindsey v. Washington*, 301 U.S. 397 (1937). The district court seems to believe that the sentence imposed is a retrospective law rather than an ex post facto law. However, this is not the case. In *Calder*, which was a case about a conflict over a will-bequest, the legislature changed the applicable law in 1795 that was applicable retroactively to 1793. that was

applicable for two years prior to the date the law was enacted. in 1793, causing a refusal to record the will that allowed the petitioners to claim the property. *Calder*, *id*. at 386. The *Calder* court distinguished a retrospective law from an *ex post facto* law, concluding that a law that increases the punishment that was available at the time of an offense is an illegal ex post facto law, prohibiting those laws "that create, or aggravate, the crime; or encrease [sic] the punishment, or change the rules of evidence, for the purpose of conviction…" *Id*.

But a retrospective law merely alters the situation of a defendant to his disadvantage without altering substantial protections. *Collins*, 497 U.S. at 46. It imposes a punishment for an act that was not punishable at the time it was committed, provides an additional punishment to the law then-prescribed (Petitioner's case), or changes the rules of evidence by which less is sufficient to convict than was then required. *Id.* A retrospective law may alter the situation of a party, but substantial protections with which the existing law surrounds the party are not disturbed. *Id*. An example is *Donald v. Jones*, 445 F.2d 601, 603-605 (5th Cir. 1971), where after indictment but prior to trial, Tex. Code Crim. Proc. Art. 37.07 § 2(b) (1967) was amended to require that a defendant elect whether he wants the jury to assess punishment when the defendant enters his plea in "open court." The Fifth Circuit found that the defendant still had the opportunity to make an election because "open court" means when a defendant makes his plea to the indictment before the jury in "open court" and not necessary when the

defendant first enters his plea (i.e., at the initial arraignment). *Id.* at 604. Thus, the change in law in *Donald* did not alter any substantial protections afforded to the defendant.

A retrospective law can be considered ex post facto if it is punitive. The factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963) are to be considered. *Smith v. Doe*, 538 U.S. 84, 97 (2003). These are whether: (1) the sanction involves an affirmative disability or restraint, (2) the sanction has historically been regarded as a punishment, (3) the sanction comes into play only on a finding of scienter, (4) the sanction's operation will promote the traditional aims of punishment-retribution and deterrence, (5) the behavior to which the sanction applies is already a crime, (6) an alternative purpose to which the sanction may rationally be connected is assignable for it, and (7) the sanction appears excessive in relation to the alternative purpose. *Mendoza-Martinez*, 372 U.S. at 168-169. For Petitioner, the weight of these factors point to the present-sentence being punitive and not remedial.

Petitioner showed that the decision of the district court was not reasonable given the facts of the case and clearly established Supreme Court law. And, the holdings in *Collins*, *Landgraf*, *Medley*, *Lindsey*, and *Calder* show that the state-court decision resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by this Court.

## CONCLUSION AND PRAYER

For the reasons stated in this petition, the lower courts erred by not granting the petition under 28 U.S.C. § 2254(d) and the motion for certificate of appealability because Petitioner was not afforded procedural due process and the adjudication (if any) of the claims were: (i) contrary to or involved an unreasonable application of clearly established Federal law as determined by this Court; or (ii) based on an unreasonable determination of the facts considering the evidence presented in state court. Thus, the Fifth Circuit decided important federal questions in ways that conflict with: (1) relevant decisions of this Court; and (2) the decision of another United States court of appeals on the same important matter. Petitioner asks this Court to grant certiorari, reverse the Order and Judgment of the Fifth Circuit, and grant the relief requested.

Respectfully submitted,

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