NO. 19-_____

In the Supreme Court of the United States

JASON ISAIAH ROBINSON,

Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

AVRAM DAVID FREY
COUNSEL OF RECORD
ELIZABETH ANN HENNEKE
LONE STAR JUSTICE ALLIANCE
1411 WEST AVENUE, SUITE 200
AUSTIN, TX 78701
(512) 394-5791
AFREY@LSJA.ORG

DECEMBER 16, 2019 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit failed to conduct the requisite threshold inquiry and imposed an unduly burdensome standard in denying a Certificate of Appealability (COA) to Petitioner Jason Robinson under 28 U.S.C. § 2253(c), because it is debatable among jurists of reason whether this Court's jurisdictional holding in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), that retroactive application of new, substantive rules is constitutionally required:

(a) rendered the one-year statute of limitations of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d)(1), inapplicable to Robinson's claims under *Miller v. Alabama*, 567 U.S. 460 (2012); or

(b) required the federal district court to determine under the Suspension Clause, U.S. Const. Art. I, § 9, cl. 2, whether the collateral proceedings afforded to Robinson in State court provided an adequate substitute for federal habeas corpus proceedings prior to dismissing his petition under 28 U.S.C. § 2244(d)(1).

LIST OF PROCEEDINGS

United States Court of Appeals for the Fifth Circuit

No. 18-50968

Jason Isaiah Robinson v. Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division

Decision Date: September 16, 2019

United States District Court, Western District of Texas, Waco Division

No. W-18-CV-090-ADA

Jason Isaiah Robinson v. Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division

Decision Date: September 17, 2018

Reconsideration Denial Date: October 17, 2018

Court of Criminal Appeals of Texas

No. WR-41,486-02

Ex Parte Jason Isaiah Robinson

Decision Date: March 21, 2018

27th Judicial District Court of Bell County, Texas

No. 45,401-B

Ex Parte Jason Isaiah Robinson

Date of Entry of Findings of Fact
and Conclusions of Law: January 29, 2017

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

OPINIONS BELOW

The September 16, 2019 decision of the United States Court of Appeals for the Fifth Circuit denying Mr. Robinson a COA is unreported and attached at App.1a. The October 17, 2018 decision of the United States District Court for the Western District of Texas denying Mr. Robinson's Motion to Alter or Amend that Court's prior judgment is unreported and attached at App.3a. The September 17, 2018 order of the United States District Court for the Western District of Texas denying Mr. Robinson's Petition for Writ of Habeas Corpus and denying Mr. Robinson's request for a COA is unreported and attached at App.6a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on September 16, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- **U.S. Const. amend. XIV**

  Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

- **U.S. Const. amend. XIV § 1**

  . . . 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.

- **Suspension Clause, U.S. Const Art. I, § 9, cl. 2**

  The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

- **28 U.S.C. § 2244(d)**

  (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

  [. . .]

  (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]

- **28 U.S.C. § 2253(c)**

  (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-

  (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

  [. . .]

  (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. Introduction

In *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), this Court considered whether its prior decision in *Miller v. Alabama*, 567 U.S. 460 (2012), applied retroactively, but because it granted certiorari from a State post-conviction decision concerning the retroactivity of *Miller*, the Court faced a threshold issue: whether the State court's decision even raised a federal question. It did, *Montgomery* held, because retroactive application of new, substantive rules is constitutionally required. 136 S.Ct. at 729. The Court found support for this holding in the nature of new, substantive rules, themselves, because such rules render a conviction or sentence "'not merely erroneous, but [ ] illegal and void'" with the result that they

"'cannot be a legal cause of imprisonment'" because the criminal court "acquired no jurisdiction of the causes." *Id.* at 730-31 (quoting *Ex Parte Siebold*, 100 U.S. 371, 376-77 (1880)). As a result, following *Montgomery*, "the Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final." *Id.* at 729.

Petitioner Jason Robinson was convicted of a homicide offense that occurred when he was 16 years old, resulting in a mandatory sentence of life with the possibility of parole after 40 years. Parole has been granted to defendants like Robinson, *i.e.* juveniles convicted of capital murder, in approximately 5% of cases in Texas in the last 50-plus years. After *Montgomery* held that *Miller* applies retroactively, Robinson filed a State habeas petition in Texas alleging that his sentence was unconstitutional in violation of the Eighth Amendment under *Miller*. That petition was ultimately denied in proceedings that afforded no consideration of Robinson's pleadings or opportunity for factual development, and which were otherwise replete with procedural irregularities. Robinson then proceeded to federal court, raising his *Miller* claim in a petition for writ of habeas corpus. But the district court dismissed the petition as time-barred under 28 U.S.C. § 2244(d)(1)(C), which imposes a one-year statute of limitations for claims based on a right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." As interpreted in *Dodd v. United States*, 527 U.S. 522 (2003), that one-year limitations period begins to run on the date the new right is recognized, not the date it is held to apply retroactively. Therefore, the district court held, Robinson was required to file

within a year of *Miller*, not *Montgomery*, making his petition out-of-time.

Robinson sought a COA from that decision under 28 U.S.C. 2253(c)(2), arguing, *inter alia*, that he was entitled to a merits determination of his *Miller* claims per the jurisdictional holding of *Montgomery*. Under this Court's precedent, Robinson was entitled to a COA if "jurists of reason could disagree with the district court's resolution of his constitutional claims or [if] jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). In analyzing Robinson's request, the federal courts were thus required to determine whether his underlying legal claim was "debatable." *Buck v. Davis*, 137 S.Ct. 759, 773 (2017). The district court summarily denied a COA, however, stating that "reasonable jurists could not debate the dismissal or denial of the Petitioner's section 2254 petition on substantive or procedural grounds." Robinson appealed that decision, and the Fifth Circuit denied a COA in equally conclusory fashion, discussing the standard for obtaining a COA and stating only, "Robinson has not made such a showing."

In denying Robinson a COA in this manner, however, the Fifth Circuit failed to conduct the requisite threshold analysis as to whether Robinson's legal claim was "debatable." Additionally, the Court of Appeals applied an unduly burdensome standard under 28 U.S.C. 2253(c)(2), just as it did in *Buck*, 137 S.Ct. 759. That is, jurists of reason could certainly debate whether the decision in *Montgomery*, by constitutionalizing the requirement that new, substantive

rules apply in collateral proceedings regardless of when the underlying conviction or sentence became final, rendered the one-year statute of limitations under 28 U.S.C. § 2244(d)(1)(C) inapplicable to Robinson's *Miller* claims. And furthermore, Robinson pleaded sufficient facts to show that he received a wholly inadequate process in State court, with the result that he has been effectively denied any forum to test his claim that his sentence "'cannot be a legal cause of imprisonment.'" *Montgomery*, 136 S.Ct. at 730-31 (quoting *Siebold*, 100 U.S. at 376-77). Reasonable jurists could thus also debate whether dismissal of Robinson's petition on statute of limitations grounds, with no analysis of the constitutional adequacy of his State habeas proceedings, violated the Suspension Clause. In nonetheless denying a COA with no analysis, the Fifth Circuit thus applied an unduly stringent standard. For these reasons, Robinson seeks a petition for writ of certiorari from this Court. In particular, Robinson asks this Court to summarily reverse the Fifth Circuit's decision below and remand for the requisite consideration of whether his arguments are "debatable"; in the alternative, because this Court may properly find that Robinson's arguments are, in fact, "debatable" on the existing record, Robinson asks the Court to reverse the decision below, grant a COA, and remand to the Court of Appeals for determination in the first instance of whether § 2244(d)(1)(C)'s one-year statute of limitations properly applies to his *Miller* claims.

B. Factual and Procedural History

On October 14, 1994, Jason Robinson, then 16 years old, robbed a pawn shop together with two other

juveniles in Killeen, Texas, one of whom stabbed and killed Troy Langseth, the shop clerk. On May 16, 1995, a juvenile court waived jurisdiction over Robinson and certified him to stand trial for capital murder. After a two-day trial, Robinson was convicted and the court immediately imposed a mandatory life sentence, as was required by Texas Penal Code Annotated §§ 12.31(a), 19.03(a)(2) (1994). In Texas, a life sentence permits a first parole opportunity after 40 years. Tex. Gov. Code § 508.145(b) (2014). Robinson appealed, but the Third District Court of Appeals affirmed and on October 23, 1996, the Court of Criminal Appeals (CCA) denied discretionary review, rendering Robinson's conviction and sentence final. On January 6, 1999, Robinson filed a habeas petition in State court pursuant to Article 11.07 of the Texas Code of Criminal Procedure. That petition raised claims not pertinent to the present matter.

After this Court's decision in *Montgomery*, Robinson filed a second State habeas petition on January 26, 2017. That petition raised three claims. First, Robinson alleged that his sentence violated the Eighth Amendment to the United States Constitution under *Miller* and *Montgomery*. Though those decisions concerned sentences of life without parole, Robinson argued that his mandatory life sentence was nonetheless unconstitutional because since 1962, only 17 of 366 juveniles sentenced to life for capital murder—less than five percent—have ever been paroled in Texas. Robinson also provided evidence that the Texas parole guidelines treated youth as an aggravating rather than a mitigating factor, thus explaining the low parole grant rates. This fact, he alleged, rendered any difference between his mandatory life sentence

and one formally labelled "life without parole" illusory, depriving him of the "'meaningful opportunity for release based on demonstrated maturity and rehabilitation'" to which he was entitled. *Miller*, 567 U.S. at 475 (quoting *Graham v. Florida*, 560 U.S. 48, 79 (2010)). Second, Robinson alleged that the Eighth Amendment categorically barred imposition of either a formal or *de facto* life without parole sentence on a juvenile like himself who neither killed nor intended to kill, because such defendants have a "twice diminished moral culpability." *Graham*, 560 U.S. at 69. Third, Robinson alleged that the underlying transfer order in his case, certifying him to stand trial as an adult, was legally insufficient under *Moon v. State*, 451 S.W.3d 28 (Tex. Crim. App. 2014) and *Kent v. United States*, 383 U.S. 541 (1996). On December 1, 2017, Robinson filed an amended petition raising the same claims, but with additional documentation in support, and requested an evidentiary hearing.

On January 22, 2018, after the time for the district court to take action on Robinson's petition had elapsed, *see* Tex. Code Crim. Pro. Art. 11.07(b)-(d) (allotting 20 days for the Court to either designate issues for factual development or return the petition to the CCA for decision on the pleadings), counsel for Robinson contacted the clerk's office to ascertain the status of the petition. At that time, the clerk stated that the district court was not in possession of the petition and indeed had never received it. Rather, the clerk explained, Robinson's petition, in keeping with local custom, had been conveyed directly and exclusively to the district attorney for his initial review, to be later conveyed to the district court at the district attorney's discretion together with a recommended

disposition. Four days later, on January 26, 2018, a Friday, at 3:16 p.m., the State filed proposed findings of fact and conclusions of law recommending that Robinson's petition be dismissed without an evidentiary hearing, and the following Monday, January 29, 2018, the district court signed the State's proposed findings and conclusions verbatim in a written order. The order was signed by a judge other than the convicting court in Robinson's case, in breach of Texas Code of Criminal Procedure Article 11.07(b) ("An application for writ of habeas corpus filed after final conviction in a felony case, other than a case in which the death penalty is imposed, must be filed with the clerk of the court in which the conviction being challenged was obtained, and the clerk shall assign the application to that court.").

On March 5, 2018, Robinson filed objections to the district court's findings of fact and conclusions of law. This included evidence that Robinson's mandatory life sentence was the functional equivalent of life without parole, namely, proof that the Texas Board of Pardons and Paroles (TBPP) treats youth at the time of the offense as an aggravating circumstance; does not otherwise take account of youth; and has granted parole to juveniles convicted of capital murder in less than five percent of cases, or 17 times total, over the past 65 years. Robinson also repeated his request for discovery and an evidentiary hearing, and he further challenged the jurisdiction of the district court because it was not the court of conviction.

On March 21, 2018, the CCA dismissed Robinson's petition. In its three-page decision, the CCA found that Robinson had not met his burden to file a succes-

sive petition under Texas Code of Criminal Procedure Article 11.07 § 4, since, as pertinent here, he "was given a sentence of life with parole," such that his allegations were not "minimally sufficient to bring him within the ambit of that new legal basis for relief" announced in *Miller* and *Montgomery*. The following day, on March 22, 2018, after the petition had been finally adjudicated, the district court clerk submitted to the CCA a supplement to the record that included an order from the district court issued March 15, 2018—never previously included in the record or provided to Robinson—summarily upholding its findings and conclusions over Robinson's objections and denying his request for a hearing. *See* App.89a.

On March 22, 2018, Robinson filed the federal habeas petition here at issue with the United States District Court for the Western District of Texas. Robinson raised the same three claims that he had alleged in his State habeas petition and argued that he was entitled to relief because the CCA's decision was both "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), and "based on an unreasonable determination of the facts in light of the evidence," *id.* at § 2254(d)(2). Robinson specifically argued that he had been denied a fair and impartial decision in State habeas proceedings and requested an evidentiary hearing.

On September 17, 2018, the federal District Court dismissed Robinson's petition as time-barred under 28 U.S.C. § 2244(d)(1)(c). Citing *Dodd v. United States*, 545 U.S. 353 (2005), the District Court held that the

petition was subject to a one-year statute of limitations that began to run on the date that *Miller*, not *Montgomery*, was decided, making Robinson's petition untimely. On October 15, 2018, Robinson filed a motion to alter or amend the judgment, arguing that *Montgomery*'s jurisdictional holding—that the Constitution requires enforcement of new, substantive rules no matter the date on which the underlying conviction became final—entitled him to a judicial forum to adjudicate his *Miller* claims on the merits, without regard to the one-year statute of limitations. In the alternative, Robinson requested a COA on the same basis. In a three-page order, the Court denied that motion two days later on October 17, 2018.

Robinson timely filed a Notice of Appeal on November 16, 2018. On March 6, 2019, he then filed a motion and supporting brief seeking a COA in the United States Court of Appeals for the Fifth Circuit. In his brief, Robinson argued that he was entitled to equitable tolling of the limitations period under *Holland v. Florida*, 560 U.S. 631 (2010), while also repeating the argument that, following *Montgomery*, his sentence was not merely voidable but void, with the result that the Constitution guaranteed him a judicial forum to challenge his sentence regardless of when it became final. By two-page decision entered October 16, 2019, the Fifth Circuit disagreed and denied a COA. The Court of Appeals characterized Robinson's argument only as a request for equitable tolling, and after detailing Robinson's burden in obtaining a COA, stated simply that, "Robinson has not made such a showing."

Robinson timely files this petition for writ of certiorari to seek reversal of that decision. Specifically, Robinson seeks certiorari for this Court to summarily reverse the decision below and remand for a proper COA analysis, or in the alternative, Robinson asks this Court to reverse the decision below, grant a COA, and remand to the Fifth Circuit to determine in the first instance whether the one-year limitations period of 28 U.S.C. § 2244(d)(1) is inapplicable to his claims under *Miller*.

REASONS FOR GRANTING THE WRIT

Montgomery's holding that retroactive application of new, substantive rules is constitutionally required has profound implications for a juvenile defendant's rights in collateral proceedings, both State and federal. And the particular questions presented in this case – whether the one-year statute of limitations for filing a federal habeas petition applies in the case of claims arising from new, substantive rules like the one announced in *Miller*; or whether it may apply here under the Suspension Clause, given that Robinson received a constitutionally inadequate forum in State habeas proceedings—are significant legal questions which jurists of reason could certainly debate.

Yet the Fifth Circuit gave these questions no consideration whatever, in stark defiance of this Court's precedents requiring a threshold inquiry into whether Robinson's claims are "debatable." *Buck*, 137 S.Ct. at 774. And though the Court of Appeals did not perform any analysis, it nonetheless denied a

COA, despite the fact that Robinson's argument, that AEDPA's statute of limitations does not apply to his *Miller* claims, is plainly debatable among jurists of reason. Thus, not only did the Fifth Circuit not undertake the mandated threshold inquiry, in nevertheless denying a COA, it applied an overly stringent standard. This Court has previously recognized the Fifth Circuit's propensity for applying an unduly restrictive standard for issuance of COAs. *See Buck*, 137 S.Ct. at 773-74 (holding that the Fifth Circuit applied an overly restrictive standard in denying a COA and reversing); *Miller-El*, 537 U.S. at 341 (reviewing the Fifth Circuit's denial of a COA and finding "no difficulty concluding that a COA should have issued"); *see also Jordan v. Fisher*, 135 S.Ct. 2647, 2652 n.2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari) (citing Fifth Circuit decisions denying a COA and commenting, "the pattern [these cases] and others like them form is troubling").[1] As a result, just as in *Buck* and *Miller-El*, for the reasons that follow, this Court should reverse the Fifth Circuit's denial of a COA, below.

---

[1] As the *Buck* Petitioner pointed out in his petition for writ of certiorari, a COA was denied by both the district court and the Fifth Circuit in 59% of cases over the five years preceding the *Buck* Petition in 2016, as compared with 6.25% in the Eleventh Circuit, and 0% in the Fourth Circuit. *Buck v. Stephens*, Cert. Pet., 2016 WL 3162257, at *21 (Feb. 4, 2016).

I. THE FIFTH CIRCUIT IGNORED THIS COURT'S PRECEDENT REQUIRING DETERMINATION OF WHETHER ROBINSON'S CLAIM WAS "DEBATABLE" SUCH THAT A COA SHOULD ISSUE

The law governing issuance of a COA is well-established: "A COA may issue 'only if the applicant has made a substantial showing of the denial of a constitutional right.'" *Buck*, 137 S.Ct. at 773 (quoting 28 U.S.C. § 2253(c)(2)). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327 (citing *Slack*, 529 U.S. at 484). In applying this standard, federal courts must conduct "'a threshold inquiry into the underlying merit of [the] claims," and ask '[ ] if the District Court's decision was debatable.'" *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 327)); *accord Miller-El*, 537 U.S. at 336 ("The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits."). To demonstrate that a claim is "debatable," a petitioner is required to show "'something more than the absence of frivolity' or the existence of mere 'good faith[,]'" but less than proof "that some jurists would grant the petition for habeas corpus," since "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 334 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). Thus, a federal court undertaking a COA determination must not engage in "full consideration of the

factual or legal bases adduced in support of the claims," *id.* at 336, because "[t]he COA inquiry . . . is not coextensive with a merits analysis," *Buck*, 137 S.Ct. at 773. Instead, as noted above, "[a] 'court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims,'" and ask "only if the District Court's decision was debatable." *Buck*, 137 S.Ct. at 774 (quoting *Miller-El*, 537 U.S. at 327) (modifications in *Buck*).

Robinson seeks a COA from the District Court's decision that his federal habeas petition was time-barred under 28 U.S.C. § 2244(d)(1). In seeking a COA, Robinson argues that it is at least debatable among jurists of reason whether AEDPA's one-year statute of limitations should apply to his *Miller* claims at all, irrespective of the Court's holding in *Dodd* that the limitations period runs from the underlying substantive decision and not a subsequent decision regarding its retroactivity. In denying a COA, however, the Fifth Circuit below failed to undertake the requisite analysis as to whether Robinson's claim is "debatable" in clear defiance of this Court's precedents in *Buck* and *Miller-El*, among others. That is, in merely reciting the standard for issuance of a COA and summarily concluding that "Robinson has not made such a showing," the Court of Appeals improperly failed to consider whether Robinson's arguments on the merits showed "more than the absence of frivolity or the existence of mere good faith," *i.e.*, that they were "debatable." *Miller-El*, 537 U.S. at 334 (citation and quotation marks omitted). Furthermore, in concluding that Robinson was not entitled to a COA, despite foregoing the analysis required by this Court's precedents, the Court of Appeals applied an unduly

stringent standard, because, as detailed below, it is certainly debatable among jurists of reason whether AEDPA's statute of limitations applies to Robinson's *Miller* claims.

In such circumstances, this Court has the authority to reverse the denial of a COA—as it has done on more than one occasion in reviewing a decision of the Fifth Circuit, in particular. Thus, in *Buck*, this Court held that the Fifth Circuit applied an overly stringent standard in denying a COA, reversed the decision below, and went on to reach the merits, ultimately holding that the petitioner's claim was not only debatable but warranted relief. 137 S.Ct at 774-75. In *Miller-El*, the Court similarly performed a threshold inquiry into whether the petitioner's claim was debatable, found "no difficulty concluding that a COA should have issued," and reversed and remanded for the Fifth Circuit to determine the underlying claim on the merits. 537 U.S. at 341. So, too, should the Court now summarily reverse the decision of the Fifth Circuit below and remand for the Court of Appeals to conduct the COA analysis required under *Buck* and *Miller-El*. Alternatively, for the reasons that follow, this Court may itself conclude that Robinson's claims are "debatable," issue a COA, and remand for a decision of his appeal on the merits. But in either event, this Court should grant certiorari and require the Fifth Circuit to adhere to the standard for determining the issuance of a COA, particularly given the importance of the underlying issues in Robinson's case.

II. CERTIORARI SHOULD BE GRANTED BECAUSE REASONABLE JURISTS COULD DEBATE WHETHER AEDPA'S ONE-YEAR STATUTE OF LIMITATIONS APPLIES TO NEW, SUBSTANTIVE RULES POST *MONTGOMERY*

It is debatable among jurists of reason whether AEDPA's one-year statute of limitations period applies here in light of this Court's jurisdictional holding in *Montgomery*. There, the Court began its analysis by asking whether it had jurisdiction to determine the retroactive application of *Miller* in an appeal from State post-conviction proceedings. An *amicus curiae* was specifically appointed to argue against the Court's jurisdiction, and *Amicus* argued that there was no federal question implicated because the States are free to make their own rules regarding retroactivity, citing *Danforth v. Minnesota*, 552 U.S. 264 (2008), which authorized States to apply new rules more expansively than is permitted in the federal system under *Teague v. Lane*, 489 U.S. 288 (1989). To the extent that *Teague* required the retroactive application of new, substantive rules and "watershed" rules of procedure, *Amicus* argued, those exceptions merely reflected an interpretation of the federal habeas statute, and so did not control State practices. *Montgomery*, 136 S.Ct. at 728.

Importantly, this Court rejected that argument, holding that retroactive application of new, substantive rules is constitutionally mandated. *Montgomery*, 136 S.C. at 729 ("*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises."). This, *Montgomery* explained, follows from the nature of

new, substantive rules. Because such rules "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose[,]" they go to "'the foundation of the whole proceedings'" with the effect that the original court "'acquired no jurisdiction of the causes'" in the first place. *Id.* at 729-31 (quoting *Siebold*, 100 U.S. at 376-77). Thus, "[a] conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void." *Id.* at 731 (citing *Siebold*, 100 U.S. at 376). Under such circumstances, a State may not "'constitutionally insist that [a petitioner] remain in jail,'" *id.* at 730 (quoting *Desist v. United States*, 394 U.S. 244, 261 n.2 (1969) (Harlan, J., dissenting)), and, likewise, "a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced," *id.* at 731.

Montgomery applied this reasoning to hold that States are required to apply new, substantive rules in State collateral proceedings, but the same reasoning speaks to the question here at issue: the applicability of AEDPA's statute of limitations to claims based on new, substantive rules in federal habeas proceedings. In recognizing that sentences in violation of new, substantive rules are void and imposed without jurisdiction, *Montgomery* held that courts are constitutionally required to remedy such sentences, making no distinction between collateral proceedings brought in State versus federal habeas. *Id.* at 731 ("[A] court has no authority to leave in place a conviction or sentence that violates a substantive rule[.]"); *see id.* at 729 ("[T]he Constitution requires substantive rules

to have retroactive effect[.]") (emphasis added); *see also* Carlos M. Vazquez & Stephen I. Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 Va. L. Rev. 905, 910 (2017) ("*Montgomery*'s reading of *Teague* compels the conclusion that prisoners (both state and federal) have a federal constitutional right to enforce retroactively new substantive rules of constitutional law (such as the one articulated in *Miller*)—and that they therefore have a constitutional right to a collateral post-conviction remedy in cases in which direct relief is no longer available."). Indeed, the *Montgomery* dissents plainly recognized that the majority's decision imposed a constitutional requirement on federal habeas courts to remedy sentences issued in violation of later-recognized substantive rules. *See id.* at 739 (Scalia, J., dissenting) (characterizing the majority's decision as holding that, "'*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises' binding in both federal and state courts.") (quoting *id.* at 729); *id.* at 741 (Scalia, J., dissenting) ("Until today, no federal court was constitutionally obliged to grant relief for the past violation of a newly announced substantive rule. Until today, it was Congress's prerogative to do away with *Teague*'s exceptions altogether.") (emphasis in original); *see* Vazquez & Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 Va. L. Rev. at 925-26) (noting, "Justice Scalia's dissent highlighted the consequences—for both state and federal courts—of the majority's holding that *Teague*'s exceptions derive directly from the Constitution") (emphasis in original); *Montgomery*, 136 S.Ct. at 744-45 (Thomas, J., dissenting) ("[T]he Court holds

[that] . . . the Constitution purportedly requires state and federal postconviction courts to give 'retroactive effect' to new substantive constitutional rules by applying them to overturn long-final convictions and sentences."); *id.* at 745 (Thomas, J., dissenting) ("The Court . . . says that state postconviction and federal habeas courts are constitutionally required to supply a remedy because a sentence or conviction predicated upon an unconstitutional law is a legal nullity."). The constitutional requirement that courts remedy sentences in violation of new, substantive rules thus applies equally to State and federal collateral proceedings.

So, too, does *Montgomery*'s recognition of a constitutional requirement for retroactive application of new, substantive rules inherently override the finality concerns that undergird AEDPA's statute of limitations. That is, *Montgomery* required application of new, substantive rules to remedy void convictions and sentences regardless of when they were imposed, despite the fact that finality concerns mitigate against retroactive application of rules in cases where the conviction and sentence are final. 136 S.Ct. at 729 ("[T]he Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final.") (emphasis added); *id.* at 731 ("There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees."). This reflects the fact that finality concerns are weakest when the underlying conviction or sentence was imposed without jurisdiction. *See id.* at 732 ("'There is little societal interest in permitting the criminal process to rest at a point where it ought

properly never to repose.'") (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in the judgment in part and dissenting in part). Given that AEDPA's one-year statute of limitations "quite plainly serves the well-recognized interest in the finality of state court judgments," *Duncan v. Walker*, 533 U.S. 167, 179 (2001), that interest must yield in the case of new, substantive rules that undermine any interest in finality, and which require remedy as a constitutional matter. *See* Leah Litman, *Legal Innocence and Federal Habeas*, 104 Va. L. Rev. 417, 467 (2018) ("The finality concern 'has no application in the realm of substantive rules.'") (quoting *Montgomery*, 136 S.Ct. at 732). As the Court noted in finding AEDPA's statute of limitations subject to equitable tolling, "[t]he importance of the Great Writ, the only writ explicitly protected by the Constitution, Art. I, § 9, cl. 2, . . . counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open." *Holland v. Florida*, 560 U.S. 631, 649 (2010).

And while this Court has yet to rule upon the applicability of 28 U.S.C. § 2244(d)(1) to new, substantive rules post-*Montgomery*,[2] it has refused to

---

[2] In *Greene v. Fisher*, the Court examined the language of 28 U.S.C. § 2254(d)(1)—permitting federal courts to grant the writ to State court defendants only where the State courts' adjudication "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"—to determine "whether 'clearly established Federal law' includes decisions of [the] Court that are announced after the last adjudication of the merits in state court but before the defendant's conviction becomes final." *Greene*, 565 U.S. at 35. The Court

apply procedural bars in federal habeas proceedings to claims analogous to those rooted in new, substantive rules under a "miscarriage of justice exception," and it is debatable among jurists of reason whether such an exception should also apply to claims founded in *Miller*. *See*, *e.g.*, *McQuiggin v. Perkins*, 569 U.S. 383, 397 (2013). Thus, in *McQuiggin*, the Court held that a habeas petitioner could overcome the § 2244(d)(1) time bar under the "miscarriage of justice" exception by making a showing of actual innocence under the standard of *Schlup v. Delo*, 513 U.S. 298 (1995). The *McQuiggin* Court reasoned that "[s]ensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations[,]" adding that, "[t]he text of § 2244(d)(1) contains no clear command countering the courts' equitable authority

---

held that in the typical case, AEDPA's statutory language would not include Supreme Court decisions announced after the last adjudication on the merits in State court. However, the Court expressly left open whether a different result would be required where a Supreme Court decision issued after the last State court adjudication created a new, substantive rule, stating, "[w]hether § 2254(d)(1) would bar a federal habeas petitioner from relying on a decision that came after the last state-court adjudication on the merits, but fell within one of the exceptions recognized in *Teague*, 489 U.S. at 311, 109 S.Ct. 1060, is a question we need not address to resolve this case." *Greene*, 565 U.S. at 39 n.*. Thus, the Court recognized that whether AEDPA's restrictions on the scope of federal habeas apply in the case of new, substantive rules presents a distinct question meriting a considered decision in an appropriate case. The Court's restraint on this point is further evidence that the question here presented, which similarly concerns the application of AEDPA's restrictions to federal habeas claims rooted in a *Teague* exception—is one that reasonable jurists could debate, such that a COA should issue.

to invoke the miscarriage of justice exception to overcome expiration of the statute of limitations governing a first federal habeas petition." 569 U.S. at 393, 397.[3] Similarly, in *Bousley v. United States*, 523 U.S. 614 (1998), the Court held that a federal habeas petitioner's procedural default was excusable if he could establish that he was innocent of "using" a firearm under 18 U.S.C. § 924(c) as that term was later narrowed in *Bailey v. United States*, 516 U.S. 137 (1995). *Bousley*, 523 U.S. at 623 ("[I]t would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on our decision in *Bailey*[.]"). And in *Sawyer v. Whitley*, 505 U.S. 333 (1992), the Court recognized an exception to the rule against successive federal habeas petitions for those "innocent of the death penalty," which innocence the Court held could be demonstrated, *inter alia*, by "a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met." *Id.* at 345.[4] Thus, the Supreme Court has repeatedly

---

[3] The same reasoning animated the Court's holding that AEDPA's statute of limitations is subject to equitable tolling, since "equitable principles have traditionally governed the substantive law of habeas corpus" and the Court "will not construe a statute to displace courts' traditional equitable authority absent the clearest command." *Holland*, 560 U.S. at 646 (citations and quotation marks omitted). This further supports Robinson's claim that it is at least debatable whether AEDPA's statute of limitations should apply to his *Miller* claims without regard to the underlying equities.

[4] In addition, three Justices would have held in *Dretke v. Haley*, 541 U.S. 386 (2004), that where there was "no factual basis for respondent's conviction as a habitual offender," "it follows inexorably that respondent has been denied due process of law" giving rise to a "'miscarriage of justice'" which, despite petitioner's procedural default, "entitled [him] to immediate and unconditional

held that procedural bars should not prevent federal habeas petitioners from demonstrating that their confinement was not only unlawful, but without legal authority and void, and that the federal judiciary has corresponding equitable authority to set such procedural obstacles aside.

The above decisions thus provide persuasive authority here because petitioners raising claims based on new, substantive rules are analogous to the petitioners in *McQuiggin*, *Bousley*, and *Sawyer*: all were incarcerated as a result of sentences that the State was powerless to impose. This is the characteristic of a conviction or sentence that *Montgomery* held to require remedy under the Constitution, just as the Court relied upon that characteristic to set aside procedural bars, including AEDPA's statute of limitations, under a miscarriage of justice exception. *See*, *e.g.*, *McQuiggin*, 569 U.S. at 393 ("'[T]he fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.'") (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)); *Bousley*, 523 U.S. at 620-21 (petitioner was entitled to establish innocence despite procedural default because to deny relief would mean judicial sanction of a conviction without legal basis, and "under our federal system it

---

release" in federal habeas proceedings. *Id.* at 397 (Stevens, J., dissenting, joined by Justices Kennedy and Souter) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 91 (1977)). Significantly, the majority did not reject this argument in *Dretke*, but instead remanded the matter for initial decision on those claims that were not procedurally defaulted, citing the principle of constitutional avoidance. *Id.* at 393-94.

is only Congress, and not the courts, which can make conduct criminal"). Accordingly, it is at least debatable among jurists of reason that, following this Court's precedents, petitioners raising claims based on the new, substantive right announced in *Miller* are constitutionally entitled to review of their claims in federal habeas corpus, notwithstanding the one-year limitations period of 28 U.S.C. § 2244(d)(1), whether because of the express holding of *Montgomery*, or under a "miscarriage of justice" exception of the type recognized in *McQuiggin*. *See* Litman, *Legal Innocence*, 104 Va. L. Rev. at 444, 474 (defining as "legally innocent" those "[d]efendants who receive sentences that cannot be constitutionally imposed on them," and arguing, "[t]he rule that actual innocence excuses the statute of limitations should be understood to encompass cases of legal innocence").

In this case, Robinson plausibly alleges that his sentence was imposed in violation of *Miller*. Following *Montgomery*, "*Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, [ ] render[ing] life without parole an unconstitutional penalty for a class of defendants because of their status." 136 S.Ct. at 734 (internal citations and quotation marks omitted). Thus, "*Miller* announced a substantive rule of constitutional law." *Id.* Consequently, if Robinson's *Miller* claims are meritorious, then his sentence is void and, per *Montgomery*'s jurisdictional holding, he is constitutionally entitled to a remedy. Under these circumstances, in light of the foregoing, it is at least debatable among jurists of reason whether AEDPA's one-year statute of limitations was applicable to Robinson's *Miller* claims at

all, and as a result, the Fifth Circuit applied an overly restrictive standard in denying a COA as to that question.

III. CERTIORARI SHOULD BE GRANTED BECAUSE REASONABLE JURISTS COULD DEBATE WHETHER THE DISTRICT COURT WAS REQUIRED TO DETERMINE THAT ROBINSON'S STATE HABEAS PROCEEDINGS WERE AN ADEQUATE SUBSTITUTE FOR FEDERAL HABEAS CORPUS UNDER THE SUSPENSION CLAUSE BEFORE DISMISSING HIS *MILLER* CLAIMS PURSUANT TO 28 U.S.C. § 2244(d)

As previously noted, the jurisdictional holding in *Montgomery* requires federal courts to provide a forum for retroactive application of new, substantive rules. But even if the Court were to narrow that holding to require only that some judicial forum—whether State or federal—be available to remedy a sentence in violation of a new, substantive rule, the Fifth Circuit's denial of a COA would yet be in error. That is because it is debatable among jurists of reason whether enforcement of AEDPA's statute of limitations as applied in this case would amount to suspension of the writ in violation of Art. I, § 9, cl. 2, given that Robinson's collateral State process failed to provide an adequate substitute for federal habeas proceedings.

The Court's Suspension Clause jurisprudence "does not contain extensive discussion of standards defining suspension of the writ or of circumstances under which suspension has occurred." *Boumediene*, 553 U.S. at 773. This scarcity of precedent itself suggests that Robinson's Suspension Clause issue is debatable. But what caselaw exists also supports the issuance of

a COA. In *Boumediene*, relying on its prior decisions in *Swain v. Pressley*, 430 U.S. 372 (1977), and *United States v. Hayman*, 342 U.S. 205 (1952), this Court traced a three-factor standard for determining whether a statute effects suspension of the writ. First, the Court examines whether Congress intended to narrow the federal judiciary's habeas jurisdiction. *See Boumediene*, 553 U.S. at 774, 776 (noting that *Swain* and *Hayman* "provide little guidance" because "[t]he statutes at issue were attempts to streamline habeas corpus relief, not to cut it back," whereas in the case at bar, the Court "confront[ed] statutes . . . that were intended to circumscribe habeas corpus actions"); *Hayman*, 342 U.S. at 219 (stating, in support of holding that suspension did not occur, "[n]owhere in the history of Section 2255 [the statute at issue] do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions"). Second, the Court determines—and assigns great weight to—whether the statute includes a savings clause, permitting resort to federal habeas jurisdiction where available alternatives are "inadequate or ineffective." *See Boumediene*, 553 U.S. at 776-77 (calling it a "significant fact" that in *Swain* and *Hayman,* "[n]either statute eliminated traditional habeas relief" because "the statute at issue had a saving clause, providing that a writ of habeas corpus would be available if the alternative process provided inadequate or ineffective," and contrasting the statutes at bar, in which "[n]o savings clause exists," and which the Court ultimately held to suspend the writ); *Swain*, 430 U.S. at 381 (holding that statute did not suspend the writ because it contained a savings clause "allow[ing] the District Court to entertain a habeas corpus application if it

'appears that remedy by motion is inadequate or ineffective,'" because "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus") (citation omitted); *Hayman*, 342 U.S. at 223 (holding that no constitutional question was presented where statute "provide[d] that the habeas corpus remedy shall remain open to afford the necessary hearing").

Third, particularly if the statute does not contain a savings clause, the Court considers whether available proceedings provide an "adequate substitute" for federal habeas, using a traditional due process analysis to measure their reliability. *See Boumediene*, 553 U.S. at 781-82 ("What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral."); *Swain*, 430 U.S. at 382-84 (noting that alternative proceedings were identical to federal habeas jurisdiction save only for life tenure of the judges in federal habeas, which difference, standing alone, gave rise to "no reason to doubt the adequacy of the remedy provided by [the statute]"); *Hayman*, 342 U.S. at 222-23 (examining alternative statutory procedures and stating, "[n]othing has been shown to warrant our holding at this stage of the proceeding that [those] procedure[s] will be 'inadequate or ineffective'"). Under this third factor, the Court has not provided "a comprehensive summary of the requisites for an adequate substitute for habeas corpus," and has noted that "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings." *Boumediene*, 553 U.S. at 779, 781. But, whatever the foregoing process, the Court has held it "uncontroversial . . . that the privilege of habeas corpus entitles

the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Id.* at 779 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

Under this standard, it is plainly debatable whether dismissal of Robinson's petition under 28 U.S.C. § 2244(d)(1) amounted to suspension of the writ given the facts of his particular case.[5]

First, the purpose of AEDPA's several gatekeeping provisions was to narrow the scope of federal habeas review and reduce instances of the writ's issuance, as *Boumediene* recognized. 553 U.S. at 773-74 (stating that "most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ's protection but to expand it," but adding, "[t]here are exceptions, of course," and citing AEDPA's "gatekeeping provisions"); *see Williams v. Taylor*,

---

[5] *Felker v. Turpin*, 518 U.S. 651 (1996) does not suggest to the contrary. There, the Court determined that AEDPA's limitation on second or successive petitions, 28 U.S.C. § 2244(b), did not constitute a categorical suspension of the writ because it only moderately expanded the Court's own common law "abuse of the writ" doctrine. *Id.* at 664 ("The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process [of the 'abuse of the writ' doctrine.]"). Here, the one-year statute of limitations, unlike the rule against successive petitions, does not reflect an expansion on prior habeas doctrine but rather an entirely new and severe constraint on federal habeas jurisdiction. Moreover, unlike the restraint at issue in *Felker*, the one-year statute of limitations applies to initial petitions, and as the Court has warned, "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996).

529 U.S. 420, 436 (identifying "AEDPA's purpose" as "to further the principles of comity, finality, and federalism"); *see* Jed S. Rakoff, *The Magna Carta Betrayed?*, 94 N.C. L. Rev. 1423, 1428 (2016) ("[T]he purpose of AEDPA was to reduce access to the federal courts by those convicted of any kind of crime in state courts, by limiting the scope of habeas review.").

Second, AEDPA's statute of limitations contains no savings clause. *Cf. Holland* 560 U.S. at 647-48 (pointing out that the statute "is silent as to equitable tolling"). And while *Holland* held that AEDPA's statute of limitations is nonetheless subject to equitable tolling, there is currently no failsafe, whether statutory or judicially imputed, for the petitioner who cannot meet the high bar for equitable tolling, *see id.* at 652 ("the circumstances of a case must be 'extraordinary before equitable tolling can be applied"), but who has a meritorious claim and has been deprived of an adequate substitute proceeding.

Third, review of Robinson's State habeas proceedings reveals that he did not receive an adequate substitute for habeas corpus because he was denied a "meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene*, 553 U.S. at 779. As previously detailed, Robinson's State habeas petition was not submitted to the State district court for its independent review—rather, it was conveyed directly to the district attorney's office, which submitted the petition contemporaneously with proposed findings of fact and conclusions of law recommending summary dismissal. Those proposed

findings and conclusions were filed by the State on a Friday afternoon and signed by a district court—not the convicting court, as required by law, but instead some other court—without a single edit the following Monday. That the district court signed the State's proposed findings and conclusions only one business day after that pleading was submitted, despite the fact that Robinson's petition, turned over to the court at the same time, was supported by approximately 60 pages of briefing and 100 pages of documentation, renders it highly suspect that the district court ever reviewed Robinson's pleadings. Instead, the facts suggest that the district attorney was permitted to write its own decision, cherry-pick a court to sign it, and so recommend dismissal directly to the CCA, curtailing Robinson's ability to develop facts in support of his claims in the process. This was in clear breach of fundamental notions of due process. *See Concrete Pipe & Prods. Of California, Inc. v. Constr'n Laborers Pension Trust for S. California*, 508 U.S. 602, 617-18 (1993) ("[D]ue process requires a 'neutral and detached judge in the first instance'. . . . Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator.") (citation omitted); *see also Jefferson v. Upton*, 560 U.S. 284, 294 (2010) (per curiam) (noting, "we have [] criticized the practice" of "a court's 'verbatim adoption of findings of fact prepared by prevailing parties," adding "we have not considered the lawfulness of, nor the application of the habeas statute to, the use of such a practice" where the order was solicited *ex parte*, the opposing party had no opportunity to respond, and the evidence suggests the court did not read the pleadings).

Moreover, at the CCA level, it is unclear from the record whether Robinson's procedural and substantive objections to the district court's order were ever considered—the CCA's three-page decision did not address the procedural irregularities below and failed to address Robinson's specific arguments. Instead, the only response to Robinson's objections was submitted by the district court to the CCA after the CCA had already dismissed the case.

In short, it is at least debatable whether the State habeas proceedings afforded to Robinson satisfied minimal due process requirements or provided him with a "meaningful opportunity" to test the legality of his confinement. As a result, even if State habeas proceedings standing alone might, in the abstract, satisfy *Montgomery*'s requirement of a judicial forum to remedy a void sentence, the proceedings afforded to Robinson fell so far below due process requirements as to make the denial of Robinson's federal habeas petition on the basis of 28 U.S.C. § 2244(d)(1) at least debatably an unconstitutional suspension of the writ. In sum, where a State prisoner seeks a petition in federal habeas to remedy a void sentence, and that petition pleads facts tending to show that State collateral review did not provide an adequate substitute for federal habeas corpus, it is debatable whether the federal courts are required, at a minimum, to examine the adequacy of those State proceedings before dismissing the petition on statute of limitations grounds. Below, the Fifth Circuit conducted no such inquiry or analysis, and thus it is debatable among jurists of reason whether dismissal of Robinson's petition constituted a suspension of the writ.

IV. THE QUESTION PRESENTED IS OF EXCEPTIONAL SIGNIFICANCE

This Court should grant certiorari here because the question underlying Robinson's appeal and request for a COA—whether AEDPA's statute of limitations is applicable to his *Miller* claims—is of great doctrinal and practical significance. Within the *Miller* context, while hundreds of juveniles have been resentenced or provided an opportunity for parole since the Court's 2012 decision, many have not. In Texas alone, where the State has failed to systematically provide counsel to juveniles previously sentenced to a mandatory term of life without parole, of the 27 individuals so sentenced at the time of *Miller*, 11 have not yet been resentenced, and seven of those 11 are presently without counsel. Were the Texas courts to deny these individuals the constitutional remedy they are due in eventual State habeas proceedings, as occurred in Robinson's case, these individuals would be time-barred in federal habeas if 28 U.S.C. § 2244(d)(1) were held to apply. Application of the one-year statute of limitations to *Miller* claims would thus enable the States to impose mandatory terms of life without parole upon juvenile defendants, without consideration of whether these defendants are the "rare juvenile offender whose crime reflects irreparable corruption," though the Constitution expressly denies the States that authority. *Miller*, 567 U.S. at 479.

Of course, *Miller* is but one example of a new, substantive rule, and as the Court agreed in *Dodd*, it "rarely decides that a new rule is retroactively applicable within one year of initially recognizing that right." 545 U.S. at 359. It must be considered, there-

fore, that application of a one-year statute of limitations in the case of new, substantive rules would potentially leave many individuals incarcerated despite decisions of this Court holding that they are constitutionally entitled to relief from illegal and void convictions and sentences. And while *Dodd* recognized this "potential for harsh results" but nonetheless found § 2244(d)(1)'s one-year statute of limitations applicable, it did so as a matter of statutory construction, never considering the argument raised here, that retroactive application of new, substantive rules is constitutionally compelled without regard to the date that the underlying conviction and sentence became final. *Dodd* could not have considered that argument, of course, because it was only years later in *Montgomery* that the Court first announced that the Constitution itself requires retroactive application of new, substantive rules. But, below, the Court should have considered the plainly debatable question that *Dodd* never could—whether the fact that retroactive application of new, substantive rules is constitutionally required curtails application of AEDPA's time bar in particular cases. On remand, the Fifth Circuit may take up that highly significant question.

But even more broadly, the one-year statute of limitations is but one procedural restraint on federal habeas review effected by AEDPA. The issue in this case would further implicate whether AEDPA's other limitations—such as its restraint on successive petitions, 28 U.S.C. § 2244(b), and its requirement of deference to State court conclusions of law, *id.* at § 2254(d), and findings of fact, *id.* at § 2254(e)—are applicable to claims based on new, substantive rules. In other words, *Montgomery*'s jurisdictional holding

that the Constitution requires a remedy for sentences that are not merely voidable but void *ab initio* may render inapplicable other provisions of AEDPA in the case of petitioners raising claims based on new, substantive rules. Thus, the questions underlying Robinson's appeal would have direct implications for the many incarcerated individuals with claims based on new, substantive rules whose claims were adversely decided in State collateral proceedings prior to federal habeas review. The extent to which review of federal habeas petitions may be curtailed in the case of claims based on new, substantive rules thus implicates a broad array of issues and, in real terms, a massive number of years of incarceration spread across many individuals. In this sense, Robinson's case implicates nothing less than the purpose of the Great Writ itself, to serve as "a vital instrument for the protection of individual liberty." *Boumediene v. Bush*, 553 U.S. 723, 743 (2008).

CONCLUSION

This case represents a misapplication of the standard for issuance of a COA by the Fifth Circuit no less egregious than that reversed by this Court in *Buck v. Davis*, 157 S.Ct. 759. Further, the underlying merits issue is one of exceptional importance insofar as it concerns, at the very least, the rights of juveniles unconstitutionally sentenced under *Miller* to seek a remedy from their void sentences. For these reasons, Robinson asks this Court to exercise its authority to summarily reverse and remand to the Court of Appeals

for the requisite threshold consideration of whether Robinson's claims are "debatable" among jurists of reason. In the alternative, this Court may also reverse the decision below, issue a COA itself, and remand to the Court of Appeals for determination of Robinson's appeal on the merits. In either event, Robinson does not ask this Court to resolve the merits of his appeal in the first instance. Rather he asks this Court to remedy the Fifth Circuit's misapplication of the COA standard so that his claims may be resolved by that Court in due course, as the Constitution requires under *Montgomery*.

Respectfully submitted,

AVRAM DAVID FREY
COUNSEL OF RECORD
ELIZABETH ANN HENNEKE
LONE STAR JUSTICE ALLIANCE
1411 WEST AVENUE, SUITE 200
AUSTIN, TX 78701
(512) 394-5791
AFREY@LSJA.ORG

COUNSEL FOR PETITIONER

DECEMBER 16, 2019