No. 146478

State of Michigan
In the Supreme Court

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

RAYMOND CARP,

Defendant-Appellant

ON APPEAL FROM THE COURT OF APPEALS
Court of Appeals No. 307758
St Clair County Circuit Court No. 06-001700-FC
Hon. James P. Adair

CDAM'S AMICUS BRIEF SUPPORTING RAYMOND CARP

Stuart G. Friedman (P46039)
Attorneys for Amicus, CDAM
3000 Town Center, Suite 1800
Southfield, MI 48075
(248) 228-3322
Fax: (248) 359-8695
e-Mail: stuartgfriedman@me.com

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Statement of Questions Involved

1. **Does the United States Supreme Court's in the collateral review case *Jackson v Hobbs* prove that the United States Supreme Court intended for the *Miller* rule to be fully retroactive?**

   Amicus *CDAM answers, "Yes."*
   Defendant-Appellant answers, "Yes."
   The St Clair Prosecutor and the Michigan Attorney General answer "No."
   The Court of Appeals answered, "No."
   The foreign jurisdictions which have addressed the issue are sharply divided.

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Statement of Facts

CDAM relies on the Appellant's Statement of Facts.

Argument

1. The United States Supreme Court's companion ruling in *Jackson v Hobbs* was a collateral review case. Mr. Jackson could only have been granted relief if *Miller v Alabama* was retroactive.

The United States Supreme Court's ruling in *Jackson v Hobbs* (the companion case of *Miller v Alabama)* was a retroactive application of the *Miller* ruling to a case which came to the Supreme Court from an Arkansas Supreme Court decision denying Mr. Jackson habeas corpus relief. Mr. Jackson's conviction predated the entire line of cases finding that mandatory death penalty or life sentence to a juvenile offender was cruel or unusual punishment under the Federal Eighth Amendment.[1]

If the Prosecutor's theory of retroactivity was correct, Mr. Jackson could not have received the benefit of this new ruling on collateral review.[2] If that was the case, the Court would have granted relief to Mr. Miller and denied it to Mr. Jackson.[3] This

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[1] *Roper v Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L Ed 2d 1 (2005); *Graham v Florida*, 560 US 48, 130 S.Ct. 2011, 2021–23, 176 L Ed 2d 825 (2010).

[2] *See Penry v Lynaugh*, 492 US 302, 313; 109 S Ct 2934; 106 L Ed 2d 256 (1989), *abrogated by Atkins v Virginia*, 536 US 304, 122 S Ct 2242; 153 L Ed 2d 335 (2002) (noting that under *Teague*, Supreme Court will not apply a new rule to a case on collateral review unless that rule applies retroactively to all cases on collateral review). "[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Teague v Lane*, 489 U.S. 288, 300; 109 S Ct 1060; 103 L Ed 2d 334 (1989). *See also Griffith v Kentucky*, 479 US 314, 323; 107 S Ct 708; 93 L Ed 2d 649 (1987) ("[S]elective application of new rules violates the principle of treating similarly situated defendants the same.")

[3] *Cf Graham v Collins*, 506 US 461, 466-67; 113 S Ct 892; 122 L Ed 2d 260 (1993) (declining to grant relief to the defendant in a collateral review case because granting

common sense point has caused a number of state courts to find that *Miller* is retroactive.

As the Massachusetts Supreme Judicial Court noted: [4]

> Following the issuance of the decision in Roper the defendant in Miller's companion case, Kuntrell Jackson, filed a petition for a writ of habeas corpus, arguing that a mandatory sentence of life in prison without parole for a fourteen year old offender who had been convicted of murder violated the Eighth Amendment. Miller, supra at 2461. After holding that the imposition of such a sentence on a juvenile homicide offender was unconstitutional because it constituted "cruel and unusual punishment," the Supreme Court applied this "new" rule to Jackson's case. As the Court stated in Teague "once a new rule is

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relief would require announcement of new rule of constitutional law), *with Johnson v Texas*, 509 US 350; 113 S Ct 2658; 125 L Ed 2d 290 (1993) (noting that defendant raising same issue as petitioner in *Graham* was entitled to ruling on merits because issue was raised on direct review).

[4] *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 466 Mass 655, 666-67 (2013). This fairness point was also raised by Dean Erwin Chemerinsky when he wrote:

> On balance, we think the best analysis of the issue is found in an article by Dean Erwin Chemerinsky. He stated: There is a strong argument that Miller should apply retroactively: It says that it is beyond the authority of the criminal law to impose a mandatory sentence of life without parole. It would be terribly unfair to have individuals imprisoned for life without any chance of parole based on the accident of the timing of the trial..... [T]he Miller Court did more than change procedures; it held that the government cannot constitutionally impose a punishment. As a substantive change in the law which puts matters outside the scope of the government's power, the holding should apply retroactively.Erwin Chemerinsky,

Chemerinsky: Juvenile Life-Without-Parole Case Means Courts Must Look at Mandatory Sentences, A.B.A. J. Law News Now, (Aug. 8, 2012, 8:30 AM), http://www.abajournal.com/ news/ article/Chemerinsky_juvenile_life-without-parole_case_means_courts_must_look_at_sen/.

> applied to the defendant in the case announcing the rule, even handed justice requires that it be applied retroactively to all who are similarly situated.

Similarly, as the Iowa Supreme Court recognized:[5]

> More specifically, the cases used by the Court in *Miller* to support its holding have been applied retroactively on both direct and collateral review. This practical observation of the treatment of the underlying authority of *Miller* is instructive. If a substantial portion of the authority used in *Miller* has been applied retroactively, *Miller* should logically receive the same treatment.
>
> The procedural posture of the *Miller* decision further supports retroactive application. *Miller* involved the companion case of *Jackson v. Hobbs. Miller* was a direct appeal, but *Jackson* involved a petition for habeas corpus brought after the conviction had been affirmed on direct appeal. *See id.* Nevertheless, the Supreme Court specifically held the new rule applied not only to the defendant in *Miller,* but also to the defendant in *Jackson* on collateral review. The Court directed that the defendant in *Jackson* be given an individualized hearing. *See id.* There would have been no reason for the Court to direct such an outcome if it did not view the *Miller* rule as applying retroactively to cases on collateral review. We also recognize that the dissent in *Miller* suggested the majority's decision would invalidate other cases across the nation. Again, the dissent would not have raised this concern if the Court did not believe its holding applied to cases on collateral review.

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[5] *State v Ragland*, 836 NW2d 107, 116 (Iowa 2013) (most citations omitted). *See also State v. Mantich*, 287 Neb. 320 (2014); *In re Simpson*, 13-40718, 2014 WL 494816 (5th Cir. Feb. 7, 2014) (granting leave to file a successive habeas corpus petition because the Defendant established a prima facie case that *Miller* is fully retroactive because of the Court's treatment of the *Jackson* matter).

This issue is designed to give this Court a fuller look at the *Jackson* ruling and to demonstrate that the Court necessarily decided the retroactivity question when it agreed to hear a case on collateral review to make this important decision.[6]

Contrary to the Attorney General's position, the Court was fully aware of the implication of its rulings as is evidenced by the *Miller* dissent which took notice of this issue. As dissenting Pennsylvania Supreme Court Justice Baer recognized, the Court's decision to take both of these cases and resolve and apply the remedy to both is telling and consistent with the Court's overarching recognition that "children are constitutionally different."[7]

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[6] U.S. Supreme Court precedent makes it clear that there does not need to be a formal opinion declaring a ruling fully retroactive for it to be retroactive. *Tyler v Cain*, 533 US 656, 668; 121 S Ct 2478; 150 L Ed 2d 632 (2001) (O'Connor J., concurring) (explaining that Supreme Court need not expressly hold new rule to be retroactive, but retroactivity may be "logically dictate[d]").

Federal Appellate courts have viewed Justice O'Connor's concurrence in *Tyler* as being representative of the majority's opinion and position. *See, e.g., Cannon v Mullin*, 297 F3d 989, 993-94, 993, n 3 (CA 10, 2002) (noting that Justice O'Connor's concurrence provided necessary fifth vote in *Tyler* and citing her description of standard for establishment of retroactivity by "strict logical necessity"); *In re Turner*, 267 F3d 225, 228 (CA 3, 2001) ("[Justice O'Connor's] reasoning adds to our understanding of the impact of *Tyler*."); *Forbes v United States*, 262 F3d 143, 145, n 4 (CA 2, 2001) (per curiam) (noting that Justice O'Connor's concurrence was "necessary to achieve a majority" in *Tyler*).

[7] *Com. v. Cunningham*, 81 A.3d 1, 18 (Pa. 2013) (Baer, dissenting). *See also* Mariko K. Shitama, *Bringing Our Children Back from the Land of Nod: Why the Eighth Amendment Forbids Condemning Juveniles to Die in Prison for Accessorial Felony Murder*, 65 Fla. L. Rev. 813, 854 (2013) (suggesting the Court's actions strongly implied that its ruling is retroactive).

N.b. A certiorari petition will be filed on *Cunnigham* on February 27, 2014. *See* U.S. Supreme Court docketing computer available at:

a. Overview of Arkansas Appellate Law

In Arkansas (like Michigan), a criminal defendant has an appeal of right of his/her criminal conviction.[8] Their system is similar to Michigan with an appeal of right to their intermediary Court of Appeals and a discretionary appeal to the Arkansas Supreme Court.

Once that appeal is over, the accused has a right to file a petition for post-conviction relief similar to Michigan's 6.500 motions. The caveat is that under Arkansas law, such a petition has to be filed within sixty days of the certification of the mandate.[9] A rule 37.1 petition is not a substitute for an appeal and an Arkansas criminal defendant is normally barred from raising issues that could have been raised on direct review. Additionally, an Arkansas criminal defendant is limited to one 37.1 petition (even in death penalty cases). *Ruiz v State*, 280 Ark 190; 655 SW2d 441 (1983).

In addition to these proceedings, Arkansas still recognizes various common law writs, but proceeding under them is highly disfavored and there are many prudential rules created to insure that these writs cannot be used to continue the appellate process. These

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http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13a713.htm

(last visited February 26, 2014).

[8] See *State v Markham*, 359 Ark 126, 127; 194 SW3d 765, 767 (2004) (noting that an accused, unlike the prosecution, has a broad constitutionally granted right to an appeal of right).

[9] Ark R Crim P 37.2. In cases involving guilty plea based convictions, the defendant has 90 days after the sentencing to bring the challenge. *Id.*

include the writ of coram nobis, mandamus, and relevant to this dispute, the state writ of habeas corpus.[10]

Under Arkansas law, a writ of habeas corpus is an exceptionally narrow writ which should not be used as a substitute for an appeal. Two issues are cognizable in an Arkansas petition for writ of habeas corpus: (1) is the petitioner in custody pursuant due to a valid conviction? and 2) did the convicting court have jurisdiction?[11] Convictions pass muster as long as they are not invalid on their face. Further, there is a presumption in favor of jurisdiction of the convicting court.[12] A "writ of habeas corpus petition is only proper when it is shown that a commitment is invalid on its face or the court lacked jurisdiction."[13]. The *Wallace* Court stated that errors in the sentencing process were not cognizable under the Arkansas writ of habeas corpus.[14]

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[10]The Arkansas statute providing for the writ of habeas corpus is Ark Code Ann § 16-112-101 (West 2012). The provision is also provided for in their Constitution. See Ark Const of 1874, art II, § 11. For a general discussion of Arkansas Post-Conviction remedies, see D. Ward, *Post-Conviction Remedies in Arkansas: What's a Lawyer to Do?* Ark Lawyer J 23, 25 (1994).

[11] *Mitchell v State*, 233 Ark 578, 346 SW2d 201 (1961); *Bargo v Lockhart,* 279 Ark 180, 650 SW2d 227 (1983).

[12] *Wallace v Willock,* 301 Ark 69, 781 SW2d 484 (1989); *Holt v State*, 281 Ark 210, 662 SW2d 882 (1984).

[13] *Wallace*, 301 Ark at 71; 781 SW2d at 485

[14]*Morgan v Hobbs*, No. 5:11-CV-00120-BSM-JJ, 2012 WL 2389912 (ED Ark May 23, 2012), *report and recommendation adopted* 5:11CV00120 BSM-JJV, 2012 WL 2389896 (June 22, 2012) *But see:*

> It is true that we will treat allegations of void or illegal sentences similar to the way that we treat problems of

A petition for writ of habeas corpus is simply not part of Arkansas's "ordinary appellate process."[15] While reasonable minds can differ as to whether an Arkansas Court could correct an unconstitutional sentence via their writ of habeas corpus, it is clear that habeas corpus is an extraordinary remedy that clearly qualifies as a collateral attack on a criminal conviction under *Teague*.

> subject-matter jurisdiction. *Taylor v State,* 354 Ark 450, 125 SW3d 174 (2003). Detention for an illegal period of time is precisely what a writ of *habeas corpus* is designed to correct. *Id.* at 455, 125 SW3d at 178. However, a *habeas corpus* proceeding does not afford a prisoner an opportunity to retry his case, and is not a substitute for direct appeal or postconviction relief. *Meny v Norris,* 340 Ark 418, 420, 13 SW3d 143, 144 (2000). In the case at hand, the type of issue raised by appellant is precisely that which should be limited to relief pursuant to a timely petition for postconviction relief under Ark R.Crim. P. 37.1

Friend v Norris, 364 Ark 315, 317; 219 SW3d 123, 125 (2005).

[15]Recently, the Arkansas Supreme Court again reiterated that a state writ of habeas corpus cannot be used to challenge non-jurisdictional errors. The Court stated:

> Appellant's remaining claims in the petition, those concerning his right to confrontation and defective jury instruction, are also allegations of trial error. Although appellant couched the claim as one of confrontation, his allegation that the trial court lacked jurisdiction because one of the victims did not testify against him was in fact a claim that the evidence against him was not sufficient. The sufficiency of the evidence and the admissibility of evidence are matters to be addressed at trial and on the record on direct appeal; such challenges are not cognizable in a habeas proceeding. If certain jury instructions were improper, appellant's remedy lay in timely objections in the trial court and appeal of any adverse ruling. Mere trial error does not deprive a court of jurisdiction.

b. *Jackson v Norris was unquestionably on collateral review by the time it reached the Supreme Court. Mr. Jackson conviction and direct appeal had long predated the Roper/Graham/Miller Trilogy; he had let the time for filing a petition for direct appeal lapse and was proceeding on an extraordinary writ in the state courts. The U.S. Supreme Court could only have given Mr. Jackson the benefit of its ruling if* Jackson v Hobbs *was fully retroactive.*

Jackson v Hobbs (known as "*Jackson v Norris*" before it reached the U.S. Supreme Court) was a collateral challenge to his criminal conviction. Kuntrell Jackson was sentenced to life imprisonment without parole for felony murder occurring during a robbery incident on in 1999, less than three weeks after his 14th birthday.

The State's evidence showed that Mr. Jackson and two older boys were walking through a housing project when they started thinking about robbing a local video store.[16] Mr. Jackson was the lookout while the two other boys robbed the store. One of the other boys shot the video store clerk when she threatened to call the police.

The prosecutor chose to charge Mr. Jackson as an adult with one count of capital felony murder and one count of aggravated robbery. Following the trial court's refusal to transfer the case to juvenile court,[17] he was convicted of capital felony murder and aggravated robbery. The trial judge was required under Arkansas law to give the defendant a non-parolable life sentence. The Arkansas Supreme Court upheld his

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[16] *Jackson v State,* 194 SW3d 757, 758 (Ark. 2004).

[17] *Jackson v State,* No. CA 02-535, 2003 WL 193412 (Ark Ct App Jan. 29, 2003),

conviction without commenting on the sentence.[18] Mr. Jackson did not seek post-conviction review.[19]

In 2008, following the Court's decision in *Roper v Simmons,* 543 US 551 (2005), Mr. Jackson filed a petition for habeas corpus under Arkansas Code § 16-112-101 *et seq.* His petition argued that the Eighth and Fourteenth Amendments prohibit a mandatory sentence of life without parole for a 14-year-old child who was not the trigger person and who did not intend to kill. The State filed a motion to dismiss. The state circuit court granted the State's motion.

Mr. Jackson appealed to the Arkansas Supreme Court. While his appeal was pending, the Court decided *Graham v Florida,*[20] holding that juveniles cannot be sentenced to life without parole for non-homicide offenses. He was granted leave to file a supplemental brief regarding *Graham.* The Arkansas Supreme Court affirmed his sentence in 2011.

The Court started by discussing the narrow nature of the writ before them:[21]

> A writ of habeas corpus will only lie where the commitment is invalid on its face or where the court authorizing the commitment lacked jurisdiction. The writ may be granted where a petitioner pleads either facial invalidity or lack of jurisdiction and makes a "showing, by affidavit or other evidence, [of] probable cause to believe" he is so detained.

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[18] *Jackson,* 194 SW3d at 762.

[19] *Id.*

[20] *Graham v Florida*, 560 US 48, 130 S Ct 2011, 2021–23, 176 L Ed2d 825 (2010).

[21] *Jackson v Norris*, 2011 Ark 49 (2011), *cert gtd* 132 S Ct 548 (2011) and *rev'd and remanded sub nom. Miller v Alabama*, 132 S Ct 2455 (2012) (some citations omitted).

> *See* Ark.Code Ann. § 16–112–103 (Repl.2006). This court has recognized that detention for an illegal period of time is precisely what a writ of habeas corpus is designed to correct.

Turning to the merits, the Court stated: "[t]he [United States Supreme] Court's holdings in *Roper* and *Graham* are very narrowly tailored to death-penalty cases involving a juvenile and life-imprisonment- without-parole cases for non-homicide offenses involving a juvenile." A four-justice majority therefore "decline[d] to extend the Court's bans to homicide cases involving a juvenile where the death penalty is not at issue." Two justices dissented from the court's judgment. As was discussed in the other briefs in this case, the United States Supreme Court ultimately reversed this ruling.

As the foregoing discussion demonstrates, Mr. Jackson's petition was collateral. There is nothing in the state court record indicating that the State Supreme Court chose to adopt broader retroactivity as a matter of state law than is required by the United States Constitution. As the Iowa Supreme Court recognized: "There would have been no reason for the [U.S. Supreme] Court to direct such an outcome if it did not view the *Miller* rule as applying retroactively to cases on collateral review."[22]

Because Arkansas law provides such a tight window for filing post-conviction petitions, that Court has not had to the opportunity to decide whether *Teague v Lane* is part of Arkansas law[23]. A Westlaw search through the Arkansas database does not have

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[22] *Ragland*, 836 NW2d at 116.

[23] *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989).

any "hits" on either *Teague* or *Danforth v Minnesota.*[24] A review of Arkansas case law, however, shows that the Court has generally declined to apply new rules retroactively to state habeas corpus proceedings. Even Rule 37.1 petitions are considered very narrow grounds for relief under Arkansas law and the Court has said that they cannot be a substitute for an appeal.[25] Mr. Jackson's case was finalized and he had nothing in the Courts when the Court decided *Roper v Simmons* – the seminal case in this area. The fact that the Arkansas Supreme Court stated that his issues do not have merit is not evidence that the Court was choosing to waive retroactivity of the issue. The Court was simply choosing to utilize the simplest method to deny an argument that they believed had no merit.

In *Engram v State*, 360 Ark 140, 154; 200 SW3d 367, 375 (2004), the Court stated that a state writ of habeas corpus should be permitted to collaterally challenge a death sentence where there was an intervening decision that placed severe limits on when the mentally retarded could be executed. The Court disagreed noting:

> Finally, Engram suggests that he might be able to pursue some form of state *habeas* relief, since there is no time limit on filing a petition for writ of *habeas corpus* based on an illegal sentence. *See Renshaw v Norris,* 337 Ark. 494, 989 S.W.2d 515 (1999) (to impose time limits on *habeas* relief "would contravene the proscription against suspending the right to *habeas corpus.*"). However, a writ of *habeas corpus* will only be issued if the commitment was invalid on its face, or the sentencing court lacked jurisdiction. *See Flowers v. Norris,* 347 Ark 760, 68 SW3d 289 (2002). Clearly, the

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[24] *Danforth v Minnesota*, 552 US 264; 128 S Ct 1029; 169 L Ed 2d 859 (2008). In *Danforth*, the Court noted the under a *Teague* analysis a state supreme court may give broader application to a new rule than is given by the United States Supreme Court.

[25] *Hayes v State*, 280 Ark 509; 660 SW2d 648 (1983).

> sentencing court in Engram's case possessed jurisdiction, and because Engram failed to get a ruling from the court that he was mentally retarded, the sentence of death was not invalid. Therefore, state *habeas* relief is not a proper avenue for Engram.

Absent some indication from the Arkansas Courts that they were voluntarily choosing to grant broader retroactivity in this area of law than required under *Teague*, the Court could only grant Mr. Jackson relief if its ruling was retroactive. This Court cannot infer this.

As was noted by Mr. Carp, the Court was fully aware of the retroactivity issue. It was cited by both the amicus (opposing Mr. Jackson) and the dissent in *Miller/Jackson.*[26] This Court should not regard the Court's decision to take both a direct review and collateral review case as an oversight. The Court was acutely aware of what it was doing and did so intentionally.

On remand, the Arkansas Supreme reversed itself and remanded the matter to a different court for a new sentencing hearing. The Court further stated that Mr. Jackson should be sentenced using the State's discretionary sentencing guidelines.[27]

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[26] *See* Brief, *National Association of Organization of Victims of Juvenile Lifers in Support of Respondent, Miller v Alabama, Supreme Court No. 10-9646*, p. 22 (par 2 & n. 8); 132 S Ct at 2477, 2480, 2481 (Roberts, C.J., dissenting) (noting that the ruling would effect 2,000 sentences). Justice Roberts numbers would only be correct if the ruling was retroactive.

[27] The Court's retroactivity analysis at this point was partially influenced by the State's concession of error. ""We agree with the State's concession that Jackson is entitled to the benefit of the United State's Supreme Court's opinion in his own case. *See Yates v. Aiken*, 484 U.S. 211, 218 (1988)." The Court finally stated:

c. *The Kentucky Scheme Involved in Padilla v Kentucky is Not Analogous to this Case.*

Padilla v Kentucky does not change this. [28] Critics have argued that the Court's decision not apply *Padilla* retroactively in *Chaidez v United States*[29] negates this argument. The critics' argument is that because *Padilla* was on collateral review at the time that the Court reviewed it,[30] the Court's subsequent decision not to give it retroactive strengthens their argument. These critics fail to fully consider the limited nature of Arkansas's post-conviction habeas corpus and the broad nature of Kentucky's. Under Kentucky law, an ineffective assistance of counsel claim functionally has to be raised on collateral review.[31] A variety of ethical concerns make it virtually impossible for trial counsel to raise his/her ineffectiveness on direct appeal. In 2006, the Kentucky Supreme Court held that failure

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> Finally, we are mindful that Jackson argues that as a matter of Eighth Amendment law, and because of the unique circumstances of this case, he cannot be sentenced to life imprisonment. However, it is premature to consider whether a life sentence would be permissible given that a life sentence is only one of the options available on resentencing.

[28] *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010).

[29] *Chaidez v United States*, 133 S Ct. 1103, 185 L Ed 2d 149 (2013).

[30] Attorney General's brief, p. 23. *See also Johnson v. Ponton*, 3:13-CV-404, 2013 WL 5663068 (ED Va, Oct. 16, 2013) (employing a similar analysis to the Attorney General).

[31] *Leonard v Com.*, 279 SW3d 151 (Ky 2009).

to raise an ineffective assistance of counsel argument on direct appeal was not a procedural default.[32]

Padilla was decided by the Kentucky Supreme Court in 2008.[33] The Court rejected the defendant's challenge on the merit holding that there was no duty for trial counsel to inform Mr. Padilla of the collateral consequences and also that even if the advice was inaccurate on this collateral matter, this was not grounds for overturning the defendant's plea. Significantly, the Kentucky Court of Appeals has ruled for Mr. Padilla. It had said that "that counsel's wrong advice in the trial court regarding deportation could constitute ineffective assistance of counsel. It remanded Appellee's case to the trial court for an evidentiary hearing on his motion for RCr 11.42."[34] *Padilla*'s post-conviction petition was effectively a continuation of the direct appeal.[35] Conversely, *Chaidez* was a

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[32] *Martin v Com.*, 207 SW3d 1 (Ky. 2006).

[33] *Com. v Padilla*, 253 SW3d 482 (Ky 2008) *rev'd and remanded sub nom. Padilla v Kentucky*, 559 US 356, 130 S Ct. 1473, 176 L Ed. 2d 284 (2010)

[34] *Com. v Padilla*, 253 SW3d 482, 483-84 (Ky. 2008) *rev'd and remanded sub nom. Padilla v Kentucky*, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010)

[35]This point was made by the United States District of Massachusetts when it declined to apply Teague to a federal defendant in *United States v Payne*, 894 F Supp 534, 542 (D Mass, 1995). As the *Payne* Court pointed out, § 2255 proceedings are continuations of prior federal criminal proceedings. Elaborating on the continuous nature of § 2255 proceedings, Payne quoted from a leading habeas treatise:

> In contrast to the 'civil' and 'collateral' section 2254 remedy for state prisoners, the section 2255 remedy for federal prisoners bears the markings of an integral part of a continuous criminal proceeding that is segmented by no event or condition decisive of finality. This characteristic of section 2255 proceedings creates the possibility, ignored by

coram nobis proceeding. *Coram nobis* is an extraordinary writ comparable to the proceeding Again, this needs to be contrasted with the Arkansas appellate court ruling which relied on the restrictive nature of its state writ of habeas corpus used by Mr. Jackson.

When viewed in this context, it is should be clear that the High Court has made *Miller* retroactive.

> most courts and commentators that have faced the issue, that Teague does not apply in section 2255 proceedings ...."

Id. at 543 (quoting James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 22A.6, at 272-74 (Supp. 1993)); *see also* Christopher N. Lasch, *TheFuture of Teague Retroactivity, or "Redressability," after Danforth v. Minnesota: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 Am Crim Rev 1, 66 & n.456 (2009) (favorably discussing Payne). *See also Reina-Rodriguez v United States*, 655 F3d 1182, 1190 (CA 9, 2011) (explaining that after *Danforth*, "there is now some doubt as to whether Teague applies to federal-prisoner petitioners").

Relief

WHEREFORE, CDAM asks this Court declare that *Miller v Alabama* is fully retroactive.

Respectfully submitted,

/s/Stuart G. Friedman

Stuart G. Friedman (P46039)
Attorneys for CDAM
3000 Town Center, Suite 1800
Southfield, MI 48075
(248) 228-3322
Fax: (248) 359-8695
e-Mail: stuartgfriedman@me.com

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