No. 12-3744

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KAMIL HAKEEM JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

GOVERNMENT'S RESPONSE TO PETITIONER'S APPLICATION FOR AUTHORIZATION TO FILE A SECOND OR SUCCESSIVE MOTION UNDER 28 U.S.C. § 2255

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The United States of America, by and through its attorneys, B. Todd Jones, United States Attorney for the District of Minnesota, and Jeffrey S. Paulsen, Assistant United States Attorney, submits this memorandum in response to petitioner Kamil Hakeem Johnson's November 16, 2012, Motion Pursuant to Title 28 U.S.C. § 2244, Requesting Authorization To File a Second or Successive 28 U.S.C. § 2255 To The District Court ("Application").

Johnson, who was a juvenile at the time of his 1996 offense, seeks authorization to file a second motion under Section 2255 to challenge the constitutionality of his mandatory life-without-parole sentence. In *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012), the Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" Although the Court had earlier held that a life-without-parole sentence for a non-homicide offense committed by a juvenile is always unconstitutional, see *Graham v. Florida*, 130 S. Ct. 2011 (2010), *Miller* did not bar such a sentence for a homicide committed before the age of 18. 132 S. Ct. at 2469. But under *Miller*, the sentencer for such a juvenile offense must have "discretion to impose a different punishment." *Id*. at 2460.

Johnson's mandatory life sentence is therefore constitutionally flawed. This Court may certify a second or successive Section 2255 motion where, as relevant here, the application makes a prima facie showing that it relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme

Court," 28 U.S.C. § 2255(h)(2). Because the United States agrees that Johnson's reliance on *Miller* makes such a prima facie showing, his motion should be granted and the case certified for filing in the district court.

I. Factual and Procedural Background

A. Offense Conduct

In 1996, Johnson, who was then 17 years old, was a member of the St. Paul, Minnesota, branch of the Rolling 60s Crips street gang. On the evening of July 20, 1996, Johnson and two other members of the Rolling 60s Crips, Keith Crenshaw and Timothy McGruder, spotted members of a rival gang at a gas station. All Rolling Crips had been ordered to shoot members of that gang on sight. Johnson and the others ran to an alley next to the gas station and began firing. Their fire was concentrated on a Cadillac parked about 30 feet in front of them, and a four-year-old child in the car was shot and killed. Ballistic evidence suggested that Johnson fired the shot that killed the child. *United States v. Crenshaw*, 359 F.3d 977, 981-983 (8th Cir. 2004); Gov't C.A. Br. (No. 02-4084) 1-4.

B. Conviction and Appeal

After a jury trial, Johnson and the two other shooters were each convicted of murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1). The district court sentenced Johnson to a mandatory term of life imprisonment. *Crenshaw*, 359 F.3d at 981; see 18 U.S.C. § 1959(a)(1).

On appeal, Johnson argued that Section 1959 was not a valid exercise of Congress's power under the Commerce Clause, that the evidence at trial was insufficient to support his conviction, and that the verdict was against the weight of the evidence. This Court rejected those claims and affirmed Johnson's conviction and sentence. *Crenshaw*, 359 F.3d at 981, 983-997, 1005.

C. First Section 2255 Motion

On April 28, 2005, Johnson filed a pro se motion to vacate his sentence under 28 U.S.C. § 2255. He argued that 18 U.S.C. § 1959 was invalid because it was not published in the Federal Register or enacted into "positive law" and that his conviction was unlawful because the indictment failed to name the "United States Federal Corporation" as the prosecuting authority. The district court denied the Section 2255 motion, finding that Johnson's claims had "no support in law," and declined to issue a certificate of appealability (COA). Order, *Johnson v. United States*, No. 05-cv-848 (D. Minn. Aug. 3, 2005). This Court also denied Johnson's application for a COA. *Johnson v. United States*, No. 05-3995 (8th Cir. Jan. 25, 2006).

D. Application to File a Second Section 2255 Motion

On November 16, 2012, Johnson filed a pro se application in this Court for authorization to file a second or successive Section 2255 motion based on *Miller v.*

Alabama, 132 S. Ct. 2455 (2012). In *Miller*, the Supreme Court held that a sentencing scheme that mandates imposition of life imprisonment without possibility of parole for juvenile offenders violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Id*. at 2469. Johnson argues that his claim satisfies the statutory requirements for filing a second or successive Section 2255 motion because *Miller* announced "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Application 1-2 (quoting 28 U.S.C. § 2255(h)(2)). He contends that *Miller* applies retroactively because it is a substantive rule that "removes a particular class of persons, specifically juveniles," from the reach of "statutes that impose mandatory life sentences for a homicide conviction without the possibility of parole." Application 4-5. He also argues that *Miller* should be applied retroactively because the Supreme Court granted relief to a second petitioner, Jackson, whose case arose on collateral review in the state system. Application 6-7; see *Miller*, 132 S. Ct. at 2461-2462, 2475. In addition, Johnson argues that *Miller* relied on prior decisions that have been applied retroactively on collateral review, see *id*. at 2463-2468, and that, like those decisions, *Miller* should be regarded as substantive and therefore retroactive. Application 7-8.

II. Legal Standards

Before a federal prisoner may file a second or successive motion under Section 2255, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No.

104-132, 110 Stat. 1214, requires that he seek certification from a court of appeals panel that his motion satisfies one of the "gatekeeping" conditions in 28 U.S.C. § 2255(h). A court of appeals should authorize a second or successive Section 2255 motion when the prisoner makes a "prima facie showing," 28 U.S.C. § 2244(b)(3)(C), that his application satisfies one of the substantive grounds for a successive Section 2255 motion. See 28 U.S.C. § 2255(h) (incorporating the standards from Section 2244 into Section 2255). Courts of appeals have defined the "prima facie showing" required by the gatekeeping provision as "'simply a sufficient showing of possible merit to warrant a fuller exploration by the district court.'" *Reyes-Requena v. United States*, 243 F.3d 893, 898-899 (5th Cir. 2001) (quoting *Bennett v. United States*, 119 F.3d 468, 469-470 (7th Cir. 1997)). "[I]f from the application and its supporting documents, 'it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition,'" the application should be granted. *Id.* at 899; see also, *e.g.*, *In re Holladay*, 331 F.3d 1169, 1173-1174 (11th Cir. 2003); *In re Williams*, 330 F.3d 277, 281 (4th Cir. 2003); *Bell v. United States*, 296 F.3d 127, 128 (2d Cir. 2002).

Section 2255(h)(2) permits a prisoner to apply for leave to file a second or successive Section 2255 motion based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). The Supreme Court may make a new

constitutional rule retroactive to cases on collateral review by explicitly so stating in the decision announcing the new rule, or it may "make a rule retroactive over the course of two cases * * * with the right combination of holdings." *Tyler v. Cain*, 533 U.S. 656, 666 (2001) (construing materially identical language of 28 U.S.C. § 2244(b)(2)(A)); see *id*. at 668 (O'Connor, J., concurring) (same) (brackets in original); *id*. at 670-673 (Breyer, J., dissenting) (agreeing that if a decision holding that a particular type of rule applies retroactively to cases on collateral review is followed by a second decision holding that a given rule is of that particular type, then the given rule has necessarily been made retroactive to cases on collateral review).

III. The Application Makes a Prima Facie Showing that *Miller*'s Holding Has Been Made Retroactive to Cases on Collateral Review by the Supreme Court

Miller's rule of constitutional law—that the Constitution forbids a mandatory life-without-parole sentence for a juvenile offender—is "new," in that no prior Supreme Court decisions dictated that holding. Whether it has been "made retroactive to cases on collateral review by the Supreme Court," 28 U.S.C. § 2255(h)(2), turns on the nature of *Miller*'s rule. Under the retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989), new *procedural* rules are not retroactive to cases on collateral review. But new *substantive* rules, the Supreme Court has established, are retroactively applicable on collateral review. *Bousley v. United States*, 523 U .S. 614, 620 (1998). *Miller*'s holding that juvenile defendants cannot be subjected to a mandatory

life-without-parole sentence is properly regarded as a substantive rule. *Miller* does not simply alter sentencing procedures; rather, it expands the range of possible sentencing outcomes for a category of defendants by requiring that the sentencer have the option of imposing a lesser sentence. Because *Miller*'s rule should be treated as substantive and the Supreme Court has already established that substantive rules apply retroactively, Johnson has made at least a prima facie showing that the *Miller* rule has been "made retroactive to cases on collateral review by the Supreme Court," as required by Section 2255(h)(2). See *Tyler*, 533 U.S. at 666 (stating that a decision holding that a new rule constituted structural error, and a decision holding that all structural errors were retroactive under *Teague*, would combine to render the new rule one that has been "made retroactive" by the Supreme Court).

A. *Miller* Announced a New Rule

Johnson correctly argues that *Miller* announced a "new" rule under *Teague*. See Application 2, 4 (discussing the "New Rule announced in Miller"). A rule is "new" if it was not "*dictated* by precedent existing at the time the defendant's conviction became final." *Chaidez v. United States*, No. 11-820 (Feb. 20, 2013), slip op. 4 (quoting *Teague*, 489 U.S. at 301); *Graham v. Collins*, 506 U.S. 461, 467 (1993).

Miller's holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," 132 S. Ct.

at 2469, was not "dictated" by existing precedent, *Graham v. Collins*, 506 U.S. at 467. The *Miller* Court reached its holding by extending and combining "two strands of precedent." 132 S. Ct. at 2463. As *Miller* explained, the first line of precedent "adopted categorical bans" on sentences that were excessively severe for a class of offenders. *Ibid.*; see, *e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Atkins v. Virginia*, 536 U.S. 304 (2002). Two such cases, the Court noted, involved juvenile offenders. *Roper v. Simmons*, 543 U.S. 551 (2005) (categorical ban on capital punishment); *Graham v. Florida*, 130 S. Ct. 2011 (2010) (*Graham*) (categorical ban on life-without-parole sentence for a non-homicide offense). The *Graham* Court had limited its holding to non-homicide offenses, reasoning that offenders who were both juvenile and who lacked intent to kill had "twice diminished moral culpability," *id.* at 2027. Observing that *Graham* had compared a juvenile life-without-parole sentence to the death penalty, however, *Miller* turned to a second line of precedent: decisions "prohibit[ing] mandatory imposition of capital punishment" without consideration of the characteristics of the defendant and his offense. *Miller*, 132 S. Ct. at 2463-2464 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion)). The *Woodson* line of decisions rested on the premise that "death is a punishment different from all other sanctions in kind rather than degree," and, therefore, "in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the

individual offender and the circumstances of the particular offense." 428 U.S. at 303-304.

Miller extended the first line of precedent—the *Roper-Graham* line of decisions—to conclude that juveniles are "constitutionally different" for sentencing purposes, even when, unlike in *Graham*, they commit homicide. 132 S. Ct. at 2464 (stating that *Graham*'s reasoning "implicates" all life-without-parole sentences imposed on juveniles, even though *Graham* "relate[d] only to non-homicide offenses"). *Miller* then extended the second line of precedent—the *Woodson* line of decisions—beyond its death-penalty context to hold that juveniles may not be subject to mandatory life-without-parole sentences, and the sentencer must consider the characteristics of juvenile defendants before imposing such a sentence. *Id*. at 2467. Rather than being dictated by precedent, then, *Miller*'s holding rested on the Supreme Court's extension of existing decisions beyond the limits expressed in those decisions. *Id*. at 2464 (noting that "confluence" of lines of precedent "leads to" the Court's conclusion, not that the conclusion was dictated by prior decisions). Because reasonable jurists considering petitioner's conviction at the time it became final could have concluded that then-existing precedent, including *Woodson*, did not establish the unconstitutionality of mandatory life-without-parole sentences for juveniles who committed homicide, *Miller* announced a new rule that was not dictated by precedent.

See *O'Dell*, 521 U.S. at 156. Indeed, that conclusion is particularly clear for Johnson, whose conviction became final in 2004—before either *Roper* or *Graham* was decided.

B. The New Rule Announced in *Miller* Is Substantive

Under *Teague*, new rules of criminal *procedure* do not apply retroactively on collateral review of already-final convictions, unless they constitute "watershed rules of criminal procedure." *Teague*, 489 U.S. at 311. The Supreme Court has held, however, that *substantive* rules are not subject to *Teague* at all, and they necessarily apply retroactively on collateral review. See *Beard v. Banks*, 542 U.S. 406, 411 n.3 (2004) ("Rules that fall within what we have referred to as *Teague*'s first exception 'are more accurately characterized as substantive rules not subject to [*Teague*'s] bar.'"). As the Court has explained, "*Teague* by its terms applies only to procedural rules." *Bousley*, 523 U.S. at 620. Because the rule announced in *Miller* is not solely about procedure, but alters the range of sentencing options for a juvenile homicide defendant, it is properly regarded as "substantive" for *Teague* purposes and applies retroactively to petitioner's conviction.

1. The divide between substantive and procedural rules, as it has evolved in the Supreme Court's decisions, reflects the fundamental difference between the way a case is adjudicated (procedure) and the possible outcomes of the case (substance). Originally, *Teague* borrowed from Justice Harlan's formulation to describe "substantive rules," which should be applied retroactively, as those that placed certain

primary conduct beyond the reach of the criminal law. 489 U.S. at 307 (citing *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring)). The Court subsequently expanded the category to include decisions categorically precluding a particular type of punishment or protecting a particular class of persons from such punishment. *Penry v. Lynaugh*, 492 U.S. 302, 329-330 (1989) ("[A] new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all."). The Court thus summarized that *Teague*'s bar on retroactive application does not extend to "a substantive categorical guarante[e] accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Saffle v. Parks*, 494 U.S. 484, 494 (1990) (citation and internal quotation marks omitted; brackets in original). The Court again expanded the class of substantive rules in *Bousley*, 523 U.S. at 620-621, holding that *Teague* does not apply to changes in the substantive scope of a criminal statute that have the effect of placing certain conduct outside of the reach of the law. Thus, "[n]ew *substantive* rules * * * include[] decisions that narrow the scope of a criminal statute by interpreting its terms," as well as decisions "that place particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 351-352 (2004).

Under this analysis, substantive rules affect the range of permissible outcomes of the criminal process, and procedural rules govern the *manner* of determining those outcomes. To date, the new rules the Court has treated as substantive have categorically prohibited a particular outcome for a particular class of defendants, regardless of the procedure employed. See *Summerlin*, 542 U.S. at 352 (citing *Bousley*, *supra*; *Saffle*, *supra*). But the category of substantive rules "includes" such rules, 542 U.S. at 351; it is not limited to them. See also *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008) (*Teague* is grounded in the authority of the courts "to adjust the scope of the writ in accordance with equitable and prudential considerations"). And the category of rules treated as "procedural," and thus not retroactive, has "regulate[d] only the *manner of determining* the defendant's culpability." *Summerlin*, 542 U.S. at 353; see, *e.g.*, *Hodge v. United States*, 602 F.3d 935, 937-938 (8th Cir.), cert denied, 131 S. Ct. 334 (2010); *Never Misses A Shot v. United States*, 413 F.3d 781, 783 (8th Cir. 2005). Such rules "do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise," which, the Court stated, is a possibility too "speculative" to warrant retroactivity. *Summerlin*, 542 U.S. at 352. Taken together, the Court's descriptions of "substantive" and "procedural" rules under *Teague* produce the conclusion that rules that go beyond

regulating only the "manner" of determining culpability—and instead categorically change the range of outcomes—should be treated as substantive rules.

2. The *Miller* rule, which holds that a juvenile defendant may not be subject to mandatory life without parole, but instead must be given the opportunity to demonstrate that a lesser sentence is appropriate, 132 S. Ct. at 2469, categorically expands the range of permissible outcomes of the criminal proceeding. It is therefore a substantive rule.

Miller is not solely about the procedures that must be employed in considering the range of sentencing options. Rather, *Miller* changes the range of outcomes that a juvenile defendant faces for a homicide offense. A jurisdiction that mandates life without parole for juveniles convicted of homicide permits only one sentencing outcome. *Miller* invalidates such regimes and requires a range of outcomes that includes the possibility of a lesser sentence than life. That is a substantive change in the law, not solely a procedural one. The *Miller* rule does not "regulate only the *manner of determining* the defendant's culpability." *Summerlin*, 542 U.S. at 353. Instead, the *Miller* rule gives juvenile defendants the opportunity to obtain a different and more favorable outcome than was possible before *Miller*.

By contrast, the decisions that the Supreme Court has classified as procedural have altered only the process used to determine a defendant's culpability without expanding or narrowing the range of possible outcomes of the criminal process. In

Summerlin, for instance, the Court emphasized that its holding in *Ring v. Arizona*, 536 U.S. 584 (2002), that a sentencing judge may not make the aggravating findings that subject a defendant to the death penalty, did not "alter the range of conduct Arizona law subjected to the death penalty." *Summerlin*, 542 U.S. at 353. "Instead, *Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable by death." *Ibid*.; see also *Saffle*, 494 U.S. at 486, 495 (rule concerning the permissibility of instructing the jury not to rely on sympathy for the defendant was procedural; range of outcomes continued to include death or a less severe sentence); *Graham v. Collins*, 506 U.S. at 477 (rule concerning the manner in which a sentencing jury considered mitigating evidence was procedural; range of outcomes continued to include death or a less severe sentence). Unlike these decisions, *Miller* does not simply address the "manner of determining" a defendant's culpability; instead, it expands the range of outcomes of the criminal proceeding beyond that permitted by mandatory life-without-parole statutes. It requires that juvenile defendants must have the opportunity to establish that life without parole is not an appropriate sentence. It is therefore a substantive rule.

Miller does differ from previous decisions announcing substantive rules, all of which narrowed, rather than expanded, the range of permissible outcomes of the criminal process by prohibiting a particular outcome for a category of defendants. See, *e.g.*, *Graham*, 130 S. Ct. at 2031; *Roper*, 543 U.S. at 568-575. *Miller* does not

categorically hold that juvenile defendants may never be sentenced to life without parole for a homicide offense; instead, it requires the sentencer take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," before such a sentence may be imposed. 132 S. Ct. at 2469. Thus, *Miller* stated that its holding "does not categorically bar a penalty for a class of offenders or type of crime," but instead "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id*. at 2471. In that respect, *Miller* has a procedural component.

But nothing in *Miller* implies that the Court viewed its decision as purely procedural—and its holding makes clear that it is not. By mandating that a juvenile defendant's characteristics must be taken into account at sentencing, the Court also mandated that new and more favorable potential outcomes be made available to defendants who previously had faced only one possible outcome—life without parole. *Miller*, 132 S. Ct. at 2469. This is not akin to a procedural rule that simply requires admission of a class of evidence or changing the factfinder from judge to jury. It requires that new sentencing options be available. And the Court did not suggest that its alteration of the range of options available for a sentencer would have only the "speculative" effect on outcomes of most procedural rules. *Summerlin*, 542 U.S. at 352. Rather, the *Miller* Court stated that "we think appropriate occasions for

sentencing juveniles to this harshest possible penalty will be uncommon." 132 S. Ct. at 2469. Certainly, the government may still contend that a life-without-parole sentence should be imposed on a juvenile convicted of a homicide offense. But *Miller* categorically mandated that the sentencer be able to consider a lesser sentence as well.

In only one prior context has the Supreme Court invalidated a particular severe sentence as unconstitutional because of its mandatory character: the imposition of mandatory capital punishment. See *Woodson*, *supra*; *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Sumner v. Shuman*, 483 U.S. 66 (1987). In conclusively ending mandatory death sentences, the Court refused to countenance "a departure from the individualized capital-sentencing doctrine" it had adopted, even for murder by life-term inmates. *Sumner*, 483 U.S. at 78. The Court never had the opportunity to consider whether the *Woodson* principle was retroactive under *Teague* because it amounted to a substantive rule. When the Court granted habeas relief in *Sumner*, only three individuals in the United States appear to have been under mandatory death sentences, *id.* at 72 n.2, and *Teague* lay 20 months in the future.[1/] But it seems unlikely that non-retroactivity grounds would have been used to deny habeas relief for

[1/] Until *Miller*, no other case had extended *Woodson*. And in light of the Supreme Court's holdings in *Harmelin v. Michigan*, 501 U.S. 957 (1991) (rejecting Eighth Amendment challenge to mandatory life-without-parole sentence for possession of 650 grams or more of cocaine), and *Chapman v. United States*, 500 U.S. 453, 467 (1991) ("Congress has the power to define criminal punishments without giving the courts any sentencing discretion."), it seems highly unlikely that *Woodson* will be extended further.

a capital defendant who never had *any* opportunity to ask a sentencer to impose a lesser sentence.

Like *Miller*, *Woodson* has a procedural component. See *Woodson*, 428 U.S. at 305 n.40 (plurality opinion) ("[T]he death sentences in this case were imposed under procedures that violated constitutional standards."). But *Woodson*, like *Miller*, also does much more. By requiring individualized consideration before imposing the harshest penalty available by law, each decision expanded the sentencing options that must be made available to the sentencer, *i.e.*, each case changed the substance of the sentencing decision by requiring that a less-harsh sentence be available. And the execution of an individual who had no opportunity to seek a lesser sentence would completely violate the principle of "individualized sentencing" (*Sumner*, 483 U.S. at 75) that lay at the heart of *Woodson*. *Miller* rests on the same principle of "individualized sentencing" as *Woodson*: a court may not impose the "harshest possible penalty for juveniles" without the juvenile having an opportunity to ask for a lesser sentence. *Miller*, 132 S. Ct. at 2460, 2464 n.4, 2466 n.6, 2475. Just as *Woodson* changed the substance of capital sentencing, *Miller*'s fundamental change in the law should similarly be regarded as substantive under *Teague*.

C. Johnson Is Entitled to Certification Under Section 2255(h)(2)

Johnson has made a"prima facie showing," 28 U.S.C. § 2244(b)(3)(C), that his application satisfies Section 2255(h)(2), because he has made "'a sufficient showing

of possible merit to warrant a fuller exploration by the district court.'" *Reyes-Requena*, 243 F.3d at 898-899. Under Section 2255(h)(2), a second or successive motion may rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. " 28 U.S.C. § 2255(h)(2). Johnson has a claim of "possible merit" that the Supreme Court has, through "a combination of holdings," made *Miller* retroactive to cases on collateral review. See *Tyler*, 533 U.S. at 666. And *Miller* was clearly "unavailable" to Johnson both when his sentence became final in 2004 and when he filed his first motion under Section 2255 in 2005. He had no opportunity to argue that a 2012 Supreme Court decision established that his mandatory life sentence is constitutionally flawed.

The Supreme Court has held that substantive rules are retroactively applicable on collateral review. See *Banks*, 542 U.S. at 411 n.3; *Bousley*, 523 U.S. at 620. As discussed above, *Miller* should be regarded as a substantive rule for *Teague* purposes under the analysis in Supreme Court cases. At the very least, the argument is substantial. Although *Teague* itself does not apply to state courts, see *Danforth*, *supra*, one state appellate court has concluded that *Miller* is retroactively applicable as a substantive rule. In *People v. Morfin*, 2012 WL 6028634, at *11 (Ill. App. Ct. Nov. 30, 2012), the Illinois intermediate appellate court, applying *Teague*'s framework, held that "*Miller* constitutes a new substantive rule" because it "mandates a sentencing range broader than that provided by statute for minors convicted of first

degree murder who could otherwise receive only natural life imprisonment." The *Morfin* court noted that Florida and Michigan appellate courts have concluded that *Miller* is procedural. See *id*. at *10-*11; *People v. Carp*, 2012 WL 5846553 (Mich. Ct. App. Nov. 15, 2012) (*Miller* is procedural under Michigan's application of *Teague* principles because it does not categorically bar life without parole); *Geter v. State*, 2012 WL 4448860 (Fla. Dist. Ct. App. Sept. 27, 2012) (*Miller* is procedural under state retroactivity law). But the argument that *Miller* is substantive remains of sufficient force at least to be worthy of further consideration by the district court.

Johnson also has a claim of "possible merit" that the Supreme Court has made *Miller* retroactive through a combination of holdings. *Banks* establishes that substantive rules are retroactive, and *Bousley* establishes that *Teague* is concerned only with rules of procedure. Johnson can therefore present a prima facie claim that the requirements of Section 2255(h)(2) are satisfied. Johnson should therefore be permitted to present his argument that *Miller* announced a substantive rule that applies retroactively to his conviction to the district court.[2/]

[2/] Johnson also argues that *Miller* should be applied retroactively even if it is a procedural rule, because the *Miller* Court granted relief to a second petitioner, Jackson, whose case arose on collateral review in the state system. Application 6-7; see *Miller*, 132 S. Ct. at 2461-2462, 2475. But *Teague* had no application to Jackson's case because it was on review from a state collateral proceeding. The Supreme Court has held that "the *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under

CONCLUSION

The application for authorization to file a second or successive Section 2255 motion should be granted.

Dated: February 22, 2013

Respectfully submitted,

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Teague." *Danforth*, 552 U.S. at 282. No federal *Teague* issue was before the Court in *Miller*. Furthermore, the *Teague* defense "is not 'jurisdictional.'" *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). When a State forfeits the *Teague* bar, the Court may announce a new rule even though the case might otherwise have presented *Teague* issues. The State in *Miller* did not raise *Teague* as a defense.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 22, 2013, I served the foregoing Government's Response to Petitioner's Application for Authorization to File a Second or Successive Motion under 28 U.S.C. 2255 by first-class mail, postage prepaid, on petitioner at the following address:

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