STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Talbot, P.J., and Fitzgerald and Whitbeck, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

RAYMOND CURTIS CARP,

Defendant-Appellant

Supreme Court No.: 146478

Court of Appeals No.: 307758

Circuit Court No.: 06-001700-FC

ST. CLAIR COUNTY PROSECUTOR
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DEFENDANT-APPELLANT'S MOTION FOR LEAVE TO SUPPLEMENT AUTHORITY AND FILE A SUPPLEMENTAL BRIEF

NOW COMES Defendant-Appellant RAYMOND CURTIS CARP, through his attorney, PATRICIA L. SELBY, and asks this Honorable Court to permit him to supplement authority and file a supplemental brief, stating in support:

1. Since oral argument was held in this matter on March 6, 2014, two state courts of last resort, the Illinois Supreme Court and the Texas Court of Criminal Appeals, addressed

Miller v Alabama, 132 S Ct 2455 (2012). Both courts found the *Miller* decision to be retroactive. These decisions are offered for the Court's consideration. Ex. A, Ex. B.

2. As to the matter of a supplemental brief, at oral argument, Chief Justice Young inquired whether death penalty individualized sentencing cases, *Woodson v North Carolina*, 428 US 280 (1976), *Lockett v Ohio*, 438 US 586 (1978), and *Sumner v Shuman*, 483 US 66 (1987), were applied retroactively to petitioners other than those directly benefiting from those decisions. That discussion extended into the oral argument in the consolidated case *People v Davis (Cortez)*, Docket No. 146819. Mr. Bryan Stevenson, arguing pro hac vice for Defendant-Appellant Davis, responded to the Chief Justice's questions that those cases had indeed been applied retroactively.

3. The attached supplemental brief provides the case law demonstrating retroactive application of the United States Supreme Court's individualized sentencing decisions.

WHEREFORE, Defendant-Appellant respectfully requests that this Honorable Court permit the undersigned to supplement the authority by providing these recent decisions, and accept the attached supplemental brief.

Respectfully submitted,

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Dated: March 21, 2014

DEFENDANT-APPELLANT'S SUPPLEMENTAL AUTHORITY and BRIEF

Illinois and Texas have found *Miller* retroactive

1. On March 20, 2014, the Illinois Supreme Court unanimously held in *People v Davis*, Docket No. 115595 (Ex. A), that *Miller v Alabama*, 132 S Ct 2455 (2012), is substantive and thus retroactive, because the decision places juveniles constitutionally beyond the state's power to punish with a particular category of penalty, mandatory life without parole. *Slip op.*, 12.

2. On March 12, the Texas Court of Criminal Appeals, court of last resort for criminal matters,[1] decided *Ex Parte Maxwell*, Case No. AP 76,964. Ex. B. The court held *Miller* substantive and thus retroactive under *Schriro v Summerlin*, 542 US 348 (2004). *Slip op.*, 14.

Death penalty individualized sentencing decisions were held retroactive

3. At oral argument, members of this Court raised questions regarding the retroactive treatment of United States Supreme Court death penalty cases which established individualized sentencing and governed the consideration of mitigating evidence.

4. The Eleventh Circuit[2] held that *Lockett v Ohio*, 438 US 586 (1978), which required that all relevant mitigating evidence be introduced and given effect, was retroactive, finding "no doubt" about that status. *Songer v Wainwright*, 769 F2d 1488, 1489 (1985) (en banc), cert. denied, *Dugger v Songer*, 481 US 1041; 107 S Ct 1982 (1987).

5. Other jurisdictions acknowledging *Lockett*'s retroactivity include the Tenth Circuit, in *Dutton v Brown*, 812 F2d 593, 599 (CA10 1987); and the state of Florida, see *Riley v Wainwright*, 517 So 2d 656, 657 (Fla 1987).

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[1] See *In re Reece*, 341 SW3d 360, 371 (Tex 2011) (citing Tex. Const. art. V, § 5).

[2] The requirement that the U.S. Supreme Court must make new rules "retroactive to cases on collateral review" arises out of the the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See *Tyler v. Cain*, 533 US 656, 656 (2001) (citing 28 U.S.C. § 2244(b)(2) (A)). The requirement was thus inapplicable to the pre-AEDPA cases cited here.

6. *Sumner v Shuman*, 483 US 66 (1987), which established a new rule prohibiting mandatory death penalty sentences and requiring individualized sentencing for inmates who commit murder while serving life sentences, was also applied retroactively. See *Thigpen v. Thigpen*, 926 F2d 1003, 1005 (CA11 1991). Thigpen had exhausted all state remedies, and his conviction was final, when he filed a habeas petition in 1982. *Thigpen v Smith*, 792 F2d 1507, 1509-10 (CA11 1986). The Eleventh Circuit affirmed the district court's decisions upholding the murder conviction but setting aside the death sentence, "finding that [the state mandatory death penalty provision] was unconstitutional under *Sumner v Shuman*," *supra*. 926 F2d at 1005.

7. As for *Woodson v North Carolina*, 428 US 280 (1976), and its companion cases, the opportunity for retroactive application was limited to non-existent. The absence of case law expressly finding *Woodson* retroactive reflects the rapidly changing landscape of capital punishment case law in that time period, and not reluctance on the Court's part to apply such relief.

8. *Furman v Georgia*,[3] 408 US 238 (1972), invalidated death penalty sentencing statutes only four years previously. Supreme Court orders subsequent to *Furman* vacated over 100 capital sentences. See cases reported at 408 US 933-940, 92 S Ct 2845-2879 (1972). State and federal courts followed in kind, *State v Rhodes*, 164 Mont 455, 463; 524 P2d 1095 (1974); as did governors and parole boards. *State v Ragland*, 836 NW2d 107, 124 (Iowa 2013) (Mansfield, J., concurring) (listing states in which death sentences were commuted to life, post-*Furman*).

8. Between the *Furman* and *Woodson* decisions, new *Furman*-compliant capital sentencing schemes were promulgated in at least 35 states, only a portion of which elected a

[3] *Furman* itself was held retroactive. See *Michigan v Payne*, 412 US 47, 57 n 14 (1973); *Robinson v Neil*, 409 US 505, 508 (1973) (citing *Walker v Georgia*, 408 US 936 (1972)).

mandatory scheme to which *Woodson* would apply. *Gregg v. Georgia*, 428 US 153, 179-180 (1976).

9. Combining the invalidation or commutation of hundreds of death sentences following *Furman*, the limited period of time between decisions, and the changing status of sentencing statutes, post-*Furman* death sentences would not have achieved finality before *Woodson* was decided. Analysis of the retroactivity of the latter decision was thus not required.

10. Defendant-Appellant stands on the retroactive application of *Sumner v Shuman* and *Lockett v Ohio*. Those cases demonstrate that *Miller v Alabama*'s abolishment of mandatory sentencing and requirement for individualized sentencing should similarly be applied retroactively.

Respectfully submitted,

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