NO. 45614-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

ANSEL WOLFGANG HOFSTETTER, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 91-1-02993-0

CORRECTED BRIEF OF APPELLANT

MARK LINDQUIST
Prosecuting Attorney

By
JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ASSIGNMENT OF ERROR.

Did the trial court err when it resentenced defendant to bring the mandatory life sentence he received as a juvenile into compliance with ***Miller v. Alabama***[1] before the legislature fixed the legal punishment for juveniles convicted of aggravated murder?

B. ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR.

Should defendant's case be remanded for resentencing pursuant to the recently enacted Miller fix since the trial court lacked statutory authority to impose a sentence less than mandatory life when defendant's 2014 sentence was entered?

C. STATEMENT OF THE CASE.

On February 3, 1992, the jury convicted defendant of aggravated first degree murder for fatally shooting Linda Denise Miller twice in the head as part of his plan to rob a convenience store in Orting, and to kill the store clerk so there would be no witnesses. CP 13-14, 20.[2] He was sentenced to the only permissible sentence of life without the possibility of parole. *Id.* at 395; CP 1-10; RCW 10.95.030 (1981). His judgment and sentence became final December 7, 1994, when this Court filed its mandate terminating review. CP 11.

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[1] ***Miller v. Alabama*** ,567 U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 407 (2012).
[2] ***State v. Hofstetter***, 75 Wn. App. 390, 391, 395, 878 P.2d 474 (1994).

Defendant filed a "Motion for Relief of Judgment" in the trial court presided over by the Honorable Kathryn J. Nelson on October 12, 2012, requesting to be resentenced in light of the United States Supreme Court's decision in ***Miller v. Alabama***, which held mandatory life imprisonment without parole for those under the age of 18 at the time of the underlying offense violates the Eight Amendment's prohibition on cruel and unusual punishment. CP 40-44; 132 S. Ct. at 2475. Defendant urged the trial court to apply ***Miller*** retroactively, even though retroactive application remained an open question of law. *E.g.* ***Toca v. Louisiana***, 141 So.3d 265 (2014) *certiorari granted in part by*, __ U.S. ___ (2014)(No. 14-6381, WL 4743531). The State opposed the motion, arguing ***Miller*** should not be retroactively applied, and in the alternative, that the court must wait for the Legislature to act in order to know what relief to grant the defendant. CP 45-49. In reply to the latter point, defendant claimed "a sentencing judge must have the authority to consider lesser sentences", then advocated the court impose a determinate term of incarceration between the 20 year mandatory minimum for first degree murder and the maximum sentence of life. CP 50-62.

On June 25, 2013, the State again requested the court postpone resentencing until the Legislature enacted a statute to alter the relevant sentencing process. CP 76. The resentencing proposed by defendant was compared to the *ad hoc* procedures, unsupported by statute, which were

disapproved and resulted in reversals in the wake of the United States Supreme Court's decision in ***Blakely v. Washington***, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). CP 78 (citing *e.g.*, ***State v. Applegate***, 147 Wn. App. 166, 174, 194 P.3d 1000 (2008). Defendant invoked Washington's speedy sentencing rule to oppose additional delay. CP 135 (citing ***State v. Rich***, 160 Wn. App. 647, 248 P.3d 597 (2011) (should not delay sentencing because favorable change in the law anticipated). The State responded by emphasizing the reasonableness of some delay since the Legislature had already begun work on a ***Miller*** fix, and because the State Supreme Court had accepted review of ***In re McNeil*** (No. 87654-1; now 334 P.3d 548 (2014)). CP 138-39. Defendant again pressed for immediate resentencing on speedy sentencing grounds. CP 140-43. The court heard the parties' oral argument on the motions; whereupon a recess was called for the parties to submit supplemental briefing on retroactivity. RP (8-9-13) 18, 21.

On September 30, 2013, the court issued a written order, which found ***Miller*** to be retroactively applicable to defendant's sentence and that a ***Miller***-compliant sentence must be imposed. CP 157. Resentencing was held October 18, 2013. RP (10-18-13) 1. The State reminded the court of defendant's "very cold, very calculated, completely unnecessary murder of an innocent victim who was doing nothing more than going to work that day to make money to pay for herself and her family ... That there was a

decision by the defendant to take the victim's life for no reason other than his own convenience to make the robbery less difficult and less likely to be detected", and concluded by asking the court to impose a discretionary life sentence without the possibility of parole; in the alternative, a determinate sentence of 50 years or longer. *Id.* at 6-8. Several of the victim's family members addressed the court, to include the victim's daughter who has no recollection of her mother because she was an infant when the murder occurred. *Id.* at 8-12.

Several people then spoke on defendant's behalf claiming he deserved an opportunity to live his life despite depriving Linda Miller the opportunity to live hers, and her daughter the opportunity to grow up with a mother. See *Id.* at 15-27. Defendant also explained why he thought he deserved an opportunity to pursue his life ambitions despite his decision to brutally murder Linda Miller, and despite the heartache, and suffering, and grief he caused, citing his efforts at self improvement. See *Id.* 27-29. He claimed commitment to make "amends" for taking Linda Miller's life as well as for causing her friends and family to suffer so much after they had just stated his request for early release was causing them to suffer more,

and the amends they sought was his life-long incarceration[3] for the sister, daughter, and mother he selfishly took from them. *Id.* 27-29. The court imposed a 480 month (or 40 year) term of imprisonment in lieu of the life sentence he previously received. *Id.* at 37; CP 175. The State's notice of appeal was timely filed. CP 183.

The State's appeal was briefly stayed pending our Supreme Court's resolution of ***In re McNeil***, which was decided September 25, 2014. 334 P.3d at 550. Three months prior, on June 1, 2014, the Legislature responded with the ***Miller*** fix. *Id.* at 552 (citing Laws of 2014, ch.130, § 9(3)(b)). The ***Miller*** fix sets new sentencing guidelines for aggravated murder committed by juvenile offenders and requires the sentencing court to "take into account mitigating factors that account for the diminished culpability of youth as provided in ***Miller***." *Id.* (citing § 9(3)(a)). The statute restricts the imposition of life sentences to older juvenile offenders; provided it is consistent with ***Miller***. *Id.* If life in prison without the possibility of parole is not imposed, the offender is given an indeterminate sentence with a minimum term of at least 25 years. *Id.* "Any juvenile

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[3] **Pamela Arntz** (victim's sister): "I'm here ...to tell you why I feel Mr. Hofstetter should not get a lighter sentence for what he has done.". RP (10-18-13) 9.
Trista Miller (victim's daughter): "I never got to meet my mom. He took that away from me. He – took away my daughter ever meeting her grandma. I don't think it's right that he's even asking to get out." *Id.* at 12.
Janie Arntz (victim's mother): "I'm ... our Linda's mother ... I've missed her every single day ... I remember the morning when the Chaplain came to my door ... He said that she was shot and she died ... She ha[d] a daughter to raise... And I took over that responsibility ... I still say that he should not get out because he has no right to take another life ... And so I just feel like that he should stay in there." *Id.* at 13.

offender who was given a mandatory sentence of life without the possibility of early release before the ***Miller*** fix became effective is automatically entitled to resentencing consistent with the new guidelines." *Id.* (citing § 11 (1)).

D. ARGUMENT.

DEFENDANT'S CASE SHOULD BE REMANDED FOR RESENTENCING PURSUANT TO THE RECENTLY ENACTED MILLER FIX SINCE THE TRIAL COURT LACKED STATUTORY AUTHORITY TO IMPOSE A SENTENCE LESS THAN MANDATORY LIFE WHEN DEFENDANT'S 2014 SENTENCE WAS ENTERED.

The Washington Supreme Court "has consistently held that the fixing of legal punishments for criminal offenses is a legislative function. ***State v. Pillatos*** *et al.*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007)(citing ***State v. Hughes***, 154 Wn.2d 118, 151-52, 70, 110 P.3d 192 (2005) *overruled in part on other grounds by* ***Washington v. Recuenco***, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Accordingly, "[i]t is the function of the legislature and not of the judiciary to alter the sentencing process." *Id.* (quoting ***State v. Ammons***, 105 Wn.2d 175, 180, 713 P.2d 718 P.2d 796 (1986)). The judiciary does not have the inherent authority to read special sentencing provisions into a statute. ***Pillatos***, 159 Wn.2d at 469; ***State v. Martin***, 94 Wn.2d 1, 7, 614 P.2d 164 (1980). For this reason, the Washington State Supreme Court has repeatedly reversed trial courts that deviate from legislatively prescribed sentencing procedures in the

that deviate from legislatively prescribed sentencing procedures in the period between a Supreme Court opinion which renders them unconstitutional, and the effective date of a legislative amendment enacted to cure the constitutional deficiency. *E.g.*, ***State v. Davis***, 163 Wn.2d 606, 610, 184 P.3d 639 (2008)(courts could not improvise a solution to the legislative void following ***Blakely***).

Although trial courts are generally prohibited from reopening criminal sentences, an exceedingly limited exception to the general rule is triggered when the sentence is facially invalid. *See* ***In re Runyan***, 121 Wn.2d 432, 441-42, 853 P.2d 424 (1993); ***In re Adams***, 178 Wn.2d 417, 426, 309 P.3d 451 (2013); *see also* ***State ex rel. Schock v. Barnett***, 42 Wn.2d 404, 932-33, 259 P.2d 404 (1953). ***In re Coats***, 173 Wn.2d 135-36, 267 P.3d 324 (2011). "A ... sentence is facially invalid if the trial court lacked authority to impose the challenged sentence." ***In re Snively***, 180 Wn.2d 28, 32, 320 P.3d 1107 (2014)(citing ***Coats***, 173 Wn.2d at 136); *e.g.*, ***In re Tobin***, 165 Wn.2d 172, 176, 196 P.3d 670 (2008)(sentence exceeded statutory maximum, remanded for resentencing); ***In re West***, 154 Wn.2d 204, 206-07, 110 P.3d 1122 (2005)(sentence remanded for deletion of term the trial judge lacked statutory authority to impose). The only proper remedy for curing a facial invalidity in a final judgment one year after RCW 10.73.090's collateral attack time limit has expired is remand only for correction of the invalidity. ***Snively***, 180 Wn.2d at 32.

Defendant's 40 year determinate sentence is facially invalid since the trial court entered it without legislative authority roughly eight months before the ***Miller*** fix's effect date. It is also substantively deficient as it imposed a 40 year *determinate* sentence, when the ***Miller*** fix mandates imposition of an *indeterminate* sentence with a minimum term of at least 25 years. Laws of 2014, ch. 130, § 9(3)(a)(i)-(ii).

If corrective action is not promptly undertaken, defendant will remain free to collaterally attack the facially invalid sentence he convinced the trial court to impose whenever it appears beneficial for him to do so as he serves out the balance of his 40 year sentence. Should the resentencing judge who heard from the victims, defendant's witnesses, and defendant retire in the interim, defendant would be afforded an exceedingly underserved windfall opportunity to test his argument for additional leniency in front of a different judge. Not only would the inherent uncertainty attending the prospect of a delayed and defendant-initiated correction deprive the victim's family the "dignity, respect ... and sensitivity" owed to them under Washington law, it may eliminate their ability to speak on Linda Miller's behalf should future life circumstances prevent them from making another appearance at resentencing. *See* RCW 7.69.010.

Defendant is no way prejudiced by remand for resentencing as he is not entitled to his unlawful sentence. Nor does he have the capacity to

agree to it as the Washington State Supreme Court made it resoundingly clear a defendant cannot by agreement exceed the statutory authority given to the courts. *See* ***State v. Peltier***, 181 Wn.2d 290, 297, 332 P.3d 457 (2014). The Supreme Court's decision in ***In re McNeil*** made it equally clear a defendant cannot resist the ***Miller*** fix resentencing on *ex post facto* grounds since the fix did not increase the mandatory life sentence applicable defendants initially faced when they committed aggravated first degree murder before the fix. 334 P.3d at 553.

E. CONCLUSION.

Unfortunately for the victim's family, the Court, and the State, defendant convinced the trial court to prematurely resentence him several months before it was vested with the statutory authority to impose a sentence other than mandatory life. The result is a facially invalid sentence which ought to be corrected now, as the alternative is to impose upon the victim's family and the public undeserved further hardship by leaving the problem in place to be redressed at some likely later date of defendant's choosing.

RESPECTFULLY SUBMITTED: January 8, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JASON RUYF, WSB # 38725
Deputy Prosecuting Attorney

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1-9-15 Theresa Ka
Date Signature

PIERCE COUNTY PROSECUTOR

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