NO. 45614-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT/RESPONDENT

v.

ANSEL W. HOFSTETTER, RESPONDENT/PETITIONER

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

No. 91-2-02993-0
[456141-II; 46836-1-II]

STATE'S CONSOLIDATED REPLY TO RESPONDENT'S BRIEF AND RESPONSE TO PETITIONER'S COLLATERAL ATTACK

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2. The invited error doctrine does not apply to facially invalid sentences and even if it did, the State could not be fairly characterized as inviting the error it continuously opposed to forestall the facially invalid sentence defendant convinced the court to impose.

3. Remand for resentencing pursuant to Washington's ***Miller*** fix is the only correct outcome in this case regardless of its retroactive effect since that constitutional remedial measure was enacted while defendant's invalid sentence was pending direct review.

4. The PRP defendant filed to challenge the community supervision component of his facially invalid sentence emphasizes the need to remand his case so a statutorily authorized sentence can be imposed.

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[1] ***Miller v. Alabama***, 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

B. ARGUMENT IN SUPPORT OF THE STATE'S REPLY.

1. THE STATE TIMELY APPEALED THE ENTRY OF THE TRIAL COURT'S FACIALLY INVALID ATTEMPT TO BRING DEFENDANT'S SENTENCE INTO COMPLIANCE WITH MILLER EVEN THOUGH A FACIALLY INVALID SENTENCE REMAINS SUBJECT TO CORRECTION WHENEVER IT IS CHALLENGED.

A final judgment disposing of all matters submitted to the court for its determination is a prerequisite to a direct appeal in a criminal case. ***In re Skylstad***, 160 Wn.2d 944, 949-950, 162 P.3d 413 (2007)(citing ***State v. Siglea***, 196 Wash. 283, 285, 82 P.2d 1204 (1938); ***State v. McDowall***, 197 Wash. 323, 335, 85 P.2d 660 (1938). A judgment cannot be final if the sentence has been vacated, for the sentence constitutes the judgment; hence, there can be no final judgment until sentence is pronounced. *Id.*(citing ***Berman v. United States***, 302 U.S. 211, 212, 58 S.Ct. 164, 82 L.Ed. 204 (1937); (***Siglea***, 196 Wash. at 286); ***State v. Rose***, 42 Wn.2d 509, 512-14, 256 P.2d 493 (1953); ***State v. King***, 18 Wn.2d 747, 753-54, 140 P.2d 283 (1943). Piecemeal appeals of interlocutory orders like the one defendant wrongly criticizes the State for not pursuing must be avoided in the interests of economical disposition of judicial business. *See* ***Minehart v. Morning Star Boys Ranc, Inc.***, 156 Wn. App. 457, 462, 232 P.3d 591 (2010) (citing ***Maybury v. Seattle***, 53 Wn.2d 716, 721, 336 P.2d 878 (1959) *rev. denied* 169 Wn.2d 1029, 249 P.3d 623 (2010)).

Defendant wrongly claims the State is incapable of timely challenging the trial court's decision to vacate his original judgment. Defendant asserts the original judgment was vacated more than 30 days before the State's notice of appeal was filed without a citation to the order he identifies as starting the clock. Resp.Br. 1. Review of the record suggests he is referring to the trial court's September 30, 2013, written decision to apply ***Miller*** retroactively to his sentence. CP 157. That order did not purport to vacate the original judgment. *Id.* In fact, an order expressly vacating the original judgment was never entered, so, if it ever occurred, vacation was implicitly achieved through the timely appealed entry of the challenged judgment. *E.g.,* RP (10-18-13) 36-37.

Defendant *should* feel uncomfortable casting blame at the State for upsetting the victims' sense of closure by allegedly failing to effectively oppose his unwavering efforts to deprive them of as much of it as he can persuade a court to give him in the form of undeserved early release. *See* Resp.Br. 1, fn.1; RP (10-18-13) 9, 12, 13; PRP 1. It is unfortunate he could so soon forget that he is and ever will be the instrument of their immeasurable pain. RP (10-18-13) 9, 12, 13; PRP 1. When he was old enough to be trusted to drive an automobile through the community and about 7 months away from eligibility for military service, he callously aimed a firearm at working mother's head and pulled the trigger, not once, but twice, to avoid prosecution for robbing a convenience store. CP 13-14,

20; ***State v. Hofstetter***, 75 Wn. App. 390, 391, 878 P.2d 474 (1994); RCW 46.20.075; 10 U.S.C.A. 31 § 505(a). The State has and continues to do what it can to help his victim's family deal with the wreckage he left in his wake by resisting his efforts to escape the full measure of punishment he deserves for irredeemably deciding to execute Linda Miller when he was so clearly capable of deciding not to. *See* RP (10-18-13) 9, 12, 13; ***Hofstetter***, 75 Wn. App. 395.

Defendant combines his attempt to raise a procedural barrier with an unfounded claim the State's focus on correcting his invalid sentence amounts to conceding ***Miller's*** retroactive effect. ***Miller's*** retroactivity remains an unsettled question of law for the United States Supreme Court. ***Miller's*** yet to be decided reach is immaterial to the necessary correction of defendant's sentence, for Washington's Legislature independently exercised its authority to apply its ***Miller*** fix retrospectively to all sentences inconsistent with ***Miller***, irrespective of how the issue of ***Miller's*** much disputed retroactivity will be decided. LAWS of 2014, ch.130 § 11(1); RCW 10.95.030. The State would be wasting this Court's scarce resources to call upon it to decide ***Miller's*** retroactivity when the answer is immaterial to what needs to occur in defendant's case on account of the undisputable retroactivity of Washington's ***Miller*** fix.

Because this case can and should be resolved through application of Washington's ***Miller*** fix, this Court need not and should not engage in divining the United States Supreme Court's undisclosed plan for ***Miller***. *See* ***State v. McEnroe***, 179 Wn.2d 32, 35, 309 P.3d 428 (2013)(citing ***Cmty. Telecable of Seattle Inc. v. City of Seattle***, 164 Wn.2d 35, 41, 186 P.3d 1032 (2008)("[Appellate courts] will avoid deciding constitutional questions where a case may be fairly resolved on other grounds"). Particularly when the Supreme Court appears poised to speak for itself. *E.g.*, ***Montgomery v. Louisianna***, 135 S.Ct. 1546 (2015) (Petition for writ of certiorari granted). Should this Court accept defendant's improvident invitation to decide ***Miller's*** reach, it should join the states that declined to give ***Miller*** retroactive effect. *E.g.*, ***State v. Toca***, 141 So.3d 265 (2014) (*cert. granted in part by* ***Toca v. Louisiana***, 135 S.Ct. 190 L.Ed.2d 649 (2014) and *cert. dismissed by* 135 S.Ct. 1197, 191 L. Ed. 149 (2015); ***People v. Carp***, 496 Mich. 440, 495, 852 N.W.2d 801, 832, *reh'g denied sub nom.* ***People v. Davis***, 854 N.W.2d 710 (Mich. 2014); ***Chambers v. State***, 831 N.W.2d 311, 331 (Minn.2013); ***Com. v. Cunningham***, 81 A.3d 1, 11 (Pa. 2013) *cert. denied sub nom.* ***Cunningham v. Pennsylvania***, 134 Ct. 2724, 189 L. Ed. 2d 763 (2014)).

2. THE INVITED ERROR DOCTRINE DOES NOT APPLY TO FACIALLY INVALID SENTENCES AND EVEN IF IT DID THE STATE COULD NOT BE FAIRLY CHARACTERIZED AS INVITING THE ERROR IT CONTINUOUSLY OPPOSED TO FORESTALL THE FACIALLY INVALID SENTENCE DEFENDANT CONVINCED THE COURT TO IMPOSE.

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). The judiciary does not have the inherent authority to read special sentencing provisions into a statute. *Id.* A sentence is facially invalid when it exceeds the issuing court's statutory authority. ***In re Coats***, 173 Wn.2d 123, 137, 267 P.3d 324 (2011). Parties cannot extend a court's statutory sentencing authority by error or agreement. *See* ***State v. Peltier***, 181 Wn.2d 290., 296, 332 P.3d 457 (2014); (citing ***In re Moore***, 116 Wn.2d 30, 38-39, 803 P.2d 300 (1991)).

Washington's ***Miller*** fix was enacted to retroactively bring sentences like defendant's original sentence into compliance with ***Miller***. The fix would apply to defendant's sentence even if it was not expressly made retroactive by the Legislature because it was enacted during the pendency of the State's direct appeal. *See* ***Johnson v. United States***, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (intervening change in the law made error plain on appeal); ***State v. Kilgore***, 167 Wn.2d 28, 35-36, 216 P.3d 393 (2009).

Defendant claims the State invited his illegal sentence by finally adapting its sentencing arguments to the confines of the opaque legal void he convinced the trial court enter by fashioning an *ad hoc* sentencing range for defendant's case over the State's comprehensively articulated opposition. CP 50-62, 78, 138-39; RP (8-9-13). Once met with the trial court's definitive rejection of the State's arguments against proceeding, the State was not required to remain silent during defendant's resentencing or to respond to defendant's request for what would have approximated a credit for time served sentence by futilely restating its already duly noted objections to proceeding without the necessary legislation in place. *See* ***State v. Hortman***, 76 Wn. App. 454, 459, 886 P.2d 234 (1994); ***State v. Poe***, 74 Wn.2d 425, 426, 445 P.2d 196 (1968). Rather, after respectfully preserving its objections, the State was entitled to do what it could to salvage as much of the original sentence as possible under the challenging circumstances presented by the trial court's decision to proceed without the statutory authority it needed to act.

It was only after defendant convinced the court to rank speed over accuracy that the State advocated for a life sentence without the possibility of parole, or, in the alternative, a determinate sentence of 50 years or more, without the legislative authority it already told the court it needed to no avail. RP (10-18-13) 6-8. Defendant's invited error claim is meritless.

3. REMAND FOR RESENTENCING PURSUANT TO WASHINGTON'S MILLER FIX IS THE ONLY CORRECT OUTCOME IN THIS CASE REGARDLESS OF ITS RETROACTIVE EFFECT SINCE THAT CONSTITUTIONAL REMEDIAL MEASURE WAS ENACTED WHILE DEFENDANT'S INVALID SENTENCE WAS PENDING DIRECT REVIEW.

The Washington State Supreme Court has repeatedly reversed trial courts that deviate from legislatively prescribed sentencing procedures in the period between their invalidation by a Supreme Court ruling and their replacement with constitutionally compliant procedures. *E.g.*, ***State v. Davis***, 163 Wn.2d 606, 610, 184 P.3d 639 (2008). Those rulings were grounded on the Court's decision Washington's judicial branch lacks inherent authority to read special sentencing provisions into a statute. ***Pillatos***, 159 Wn.2d at 469. The Court likewise decided sentences are facially invalid when they exceed the sentencing authority of the issuing court. ***In re Coats***, 173 Wn.2d at 137.

Without any citation to countervailing authority, defendant characterizes the invalidating effect these rules have on his sentence as "absurd", at least when applied to the components of the sentence he would like to keep, for in his consolidated PRP defendant has no difficulty challenging the community supervision term in his invalid judgment as exceeding the court's statutory authority. Defendant incorrectly interprets Washington law as entitling him to have it both ways. He also seems to overlook the fact that the State recently argued courts do have authority to

improvise sentencing solutions in a period of legislative silence only to have the argument rejected by the Supreme Court in favor of the rule controlling the outcome of defendant's case, however "absurd" he perceives it to be. ***Davis***, 163 Wn.2d at 616-17.

The "absurd[ity]" defendant sees in the controlling authority may be attributable to the oversimplified hypothetical he applies it to. He conjures a worst-case scenario in which remediless aggravated murder defendants are forced to serve their mandatory life sentences without a ***Miller*** hearing as the Legislature openly rebels against ***Miller*** by refusing to bring RCW 10.95.030 into compliance with the constitution each legislator swore to uphold. Of course, defendant's sentencing court was not confronted with that problem since the Legislature was already working on the now enacted ***Miller*** fix while defendant was pressing the court to sentence him without the statutory authority it required.

Embedded in defendant's hypothetical is the false choice between improvising a temporary sentencing procedure and doing nothing. Whereas the judiciary conceivably would have other means, consistent with the precedent defendant resists, of bringing the sentences of incarcerated aggravated murderers in line with ***Miller***, such as issuing a Writ of Mandamus to compel the enactment of a ***Miller*** fix or motivating compliance through its contempt power as it may to procure the legislation

required by the ***McCleary*** decision.[2] *E.g.* ***Walker v. Munro***, 124 Wn.2d 402, 407-08, 879 P.2d 920 (1994)(citing Wash.Const. Art. IV, § 4). But since courts are to avoid deciding issues on constitutional grounds when others are available, it follows this Court should not declare a plan of action for addressing a hypothetical constitutional crisis already averted through the Legislature's rapid achievement of ***Miller***-compliant amendment to the statute controlling defendant's sentence.

Defendant concludes his opposition to correcting the components of the invalid sentence he would like to keep by incorrectly comparing his case to others where double jeopardy principals prevented the State from replacing invalidated convictions with valid ones by "retry[ing]" defendants for previously prosecuted criminal acts. Resp.Br. 9; ***State v. Hall***, 162 Wn.2d 901, 904, 177 P.3d 680 (2008)(citing ***In re Andress***, 147 Wn.2d 602, 56 P.3d 981 (2002); ***In re Hinton***, 152 Wn.2d 853, 100 P.3d 801 (2004); ***State v. Walters***, 146 Wn. App. 138, 188 P.3d 540 (2008)). The most glaring error in the comparison is the State's request for correction of defendant's facially invalid sentence does not raise any double jeopardy problems. *See* ***In re McNeil***, 181 Wn.2d 582, 593, 334 P.3d 548 (2014).

Another significant problem with defendant's comparison lies in the procedural posture of his case. Both ***Hall*** and ***Walters*** addressed a

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[2] ***McCleary v. State***, 173 Wn.2d 477, 269 P.3d 227 (2012); http:// www. thenewstribune.com/2015/04/30/3769154_supreme-court-to-legislature keep.html?rh=1.

highly unusual circumstance in which the State prophylactically moved to vacate invalidated convictions the defendants were content to keep. The courts' rejection of the State's correction effort was largely grounded in their opinion "[f]airness and justice dictate ... an individual who has served his sentence, and is not seeking any relief other than that imposed in the original action, should not be retried by the State for the same offense." ***Hall***, 162 Wn.2d at 911 (emphasis added); *see also* ***Walters***, 146 Wn. App. at 147. Defendant, in contrast, is the one who initiated the resentencing the State continues to challenge as invalid on direct review. Defendant, through his PRP, also initiated a challenge to the community supervision component of that very sentence, claiming it exceeded the trial court's sentencing authority. Had the trial court granted the reasonable delay the State requested to accommodate enactment of the then pending ***Miller*** fix, all the effort going into correcting defendant's invalid sentence would have been avoided.

4. THE PRP DEFENDANT FILED TO CHALLENGE THE COMMUNITY SUPERVISION COMPONENT OF HIS INVALID SENTENCE EMPHASIZES THE NEED TO REMAND THE CASE SO A LAWFUL SENTENCE CAN BE IMPOSED.

Defendant cannot logically reconcile the incongruent response brief contention he is entitled to retain *à la carte* desired components of the invalid sentence he convinced the trial court to impose with his PRP request for an apparently less desirable community supervision component

of sentence to be stricken because it suffers from the same deficiency that invalidates the entire sentence. The State agrees the community supervision component should be corrected—with the rest of defendant's sentence—pursuant to RCW 10.95.030. According to subpart (3)(h) "[a]n offender released by the board is subject to the supervision of the department of corrections for a period of time to be determined by the board...."

Defendant's collateral attack leaves his case even further estranged from the case he relied upon to urge this Court to reject the State's challenge to his invalid sentence. There defendant cited ***Hall*** to discount the materiality of the State's legitimate concern he would exploit the invalidity of his sentence by collaterally attacking it whenever he perceived it to be tactically beneficial. Resp.9. ***Hall*** is inapplicable as it addressed a double jeopardy issue not present in defendant's case and the sentence at issue was not pending direct review. Those differences aside, the Court decided it was premature to adjudicate Hall's foreseeable future attempt to challenge his conviction because he demonstrated himself to be content to retain it with the sentence he received. 162 Wn.2d at 909. In stark contrast, defendant is already collaterally attacking invalidities in his sentence.

Defendant's current sentence is plagued with errors since none of it is statutorily based. If, as defendant asserts in his response brief, the trial

court had the inherent authority to create a special sentence just for him, then the life time community supervision term should stand as it was drawn from the same well as the determinate sentence defendant claims he should be able to retain. In the alternative, the community supervision component suffers from the same invalidity as the rest of defendant's sentence, so it should be remanded for correction in its entirety—whether remand is required because the trial court erred by imposing it, the sentence became error through the enactment of the ***Miller*** fix while it was pending direct review, or because defendant invoked the jurisdiction of the court through his PRP to correct a facial invalidity in his sentence, which in turn empowers the court to ensure the entirety of his sentence is made lawful to conserve scarce judicial resources going forward. *See* ***In re Finstad***, 177 Wn.2d 501, 510, fn.9, 301 P.3d 450 (2013)(When the trial court imposes a sentence that contains unlawful conditions, this court will regularly correct the sentence, whether challenged directly or collaterally). All of the obvious pitfalls inherent in giving defendant what he wants but cannot prove he deserves can be at once fairly avoided by sending his case back to the trial court so he can be sentenced according to the statute that applies to every other similarly situated aggravated murder defendant in the State of Washington.

C. CONCLUSION.

In the end, defendant overcomplicates the straight forward need to bring his facially invalid sentence into compliance with Washington's retroactive ***Miller*** fix. Contrary to his representations, he was not sentenced based on existing law, as the *applicable law* existing at the time of his sentence required him to remain in prison for the rest of his life without the possibility of parole. Defendant was sentenced based on the trial court's inaccurate predication of what the applicable law might allow when enacted based in part on existing statutes designed to address significantly less serious offenders. *E.g.*, RCW 9.94A.515(Murder 1, level XV, 240-548 months) 10.95.030; 9.94A.510 (Agg.Murder, level XVI, 25yrs to life for offenders under eighteen).

There is no identified statute or decision entitling defendant to be treated differently than every other similarly situated aggravated murder defendant in the State of Washington simply because he was able to convince a court to create an *ad hoc* sentencing procedure for him over the State's repeated objections, especially when the legislative fix the State repeatedly urged the trial court to await was enacted while defendant's unlawful sentence was pending direct review. This case should be

remanded for resentencing consistent with revised RCW 10.95.030, and any eligibility for early release should conform to that sentence.

RESPECTFULLY SUBMITTED: May 5, 2015.

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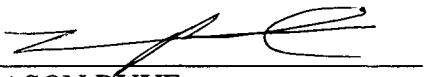

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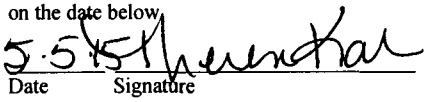
5-5-15 

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