

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,
Appellant/Plaintiff,

v.

ANSEL WOLFGANG HOFSTETTER,
Respondent/Defendant.

RESPONDENT'S BRIEF

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A. INTRODUCTION

The State's appeal raises only an invited error.

In this appeal, the State does not appear to challenge the sentencing court's decision to vacate the previous judgment and to resentence Hofstetter. Although the State's assignment of error asks in part whether the trial court erred in resentencing Hofstetter in light of *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), the State does not contest the trial court's conclusion that *Miller* is retroactive. In any event, the State's appeal was filed more than 30 days after the trial court vacated the judgment (which gave rise to the State's right to appeal). So any appeal on those grounds would have been untimely.¹

Instead, the State confines its argument to whether the sentencing court erred when it resented Hofstetter using a discretionary range that started at 20 years (the constitutional mandatory minimum for first-degree murder) and a life without parole as the maximum possible sentence.

Hofstetter was sentenced within the discretionary range that the State argued applied. CP 144-151. While Hofstetter claims no error occurred, the State cannot complain about an invited error.

¹ The State argues that Hofstetter's actions unfairly upset the victims' interests in finality and certainty, but the State has only itself to blame since it had the right, but chose not to timely appeal the order vacating Hofstetter's sentence.

Further, the State makes no argument that the sentencing court abused its discretion or resentenced Hofstetter based, in whole or in part, on some improper factor.

B. STATEMENT OF ADDITIONAL FACTS

On September 30, 2013, in response to Hofstetter’s motion to vacate the judgment and for resentencing, the sentencing court issued a written order, which found Miller to be retroactively applicable to defendant’s sentence. CP 157. The State did not timely appeal this order.

Instead, the State argued: “Assuming, arguendo, that the Court does find *Miller v. Alabama* requires resentencing of the defendant, the Court should impose a discretionary sentence of life in prison.” CP 147.

The State specifically argued: “The ‘standard range’ for post-Miller juvenile aggravated murderers is likely twenty years to life.” *Id.* The State continued:

Keeping in mind that *Miller* did not hold juvenile life sentences unconstitutional per se, and the maximum penalty for a class A felony is life in prison, it appears the maximum sentence for a post-*Miller* juvenile aggravated murderer is still life in prison, under either 9A.20.021 or 10.95.030(1) as modified by *Miller*.

Given that the definition of aggravated first degree murder includes that the person committed murder in the first degree, the minimum sentence would appear to be controlled by RCW 9.94A.540(1)(a), which states, ‘An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years.’ RCW 9.94A.540(1)(a).

Accordingly, the minimum sentence for a post-*Miller* juvenile aggravated murderer appears to be twenty years total confinement

and the maximum sentence is life without the possibility of parole.

Id. at 147-48. *See also* RP 4.

The State then argued that the Court should presume LWOP to be the appropriate sentence. The State did not argue that the court was powerless to act. Instead, it affirmatively invited the court to sentence Hofstetter to a determinate life without parole term. In addition, the State even took a “fall back” position: “the State would suggest fifty years (600 months), which sentence would reflect both the egregious nature of the crime and the will of the people of Washington that aggravated first degree murder be punished as severely as legally possible.” *Id.* at 151.

The sentencing court imposed a 40-year determinate term.

C. ARGUMENT

1. Both the State and Hofstetter Agreed that the Discretionary Range was 20 Years to Life Without Parole.

The basic premise of the invited error doctrine is that a party who sets up an error cannot claim that very action as error on appeal. *State v. Momah*, 167 Wash.2d 140, 153, 217 P.3d 321 (2009). In determining whether the doctrine applies, Washington courts have considered whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it. *See City of Seattle v. Patu*, 147 Wash.2d 717, 58 P.3d 273 (2002) (a party may not request a jury instruction and later complain on appeal that the requested instruction was given).

In this case, the State argued that the sentencing court had the discretion to impose a determinate sentence somewhere between 20 years and life. The State urged a particular sentence (LWOP), and even argued for a 600 month determinate term, if the Court concluded LWOP was unconstitutional or unwarranted.

The State should not now be heard to complain about the sentence that was imposed within the range that it urged upon the court.

It is true that in earlier pleadings (focused on why Hofstetter's motion to vacate should be denied) that the State argued the Legislature needed to act (both to make *Miller* retroactive and to provide new sentencing guidance.). However, the State did not timely appeal from the order vacating the judgment. Instead, after the new sentencing hearing was ordered, the State took the position (both in writing and at the sentencing hearing) that the sentencing should go forward and the sentencing court should exercise its discretion within the agreed range.

The State invited the result that it now argues was error.

2. Prior to the *Miller*-fix, a Determinate Sentence was Required.

In any event, the sentencing court did not err.

Miller is retroactive, an issue that the State does not contest.

The Supreme Courts of Illinois, Iowa, Massachusetts, Mississippi, Nebraska, New Hampshire, South Carolina, and Texas have concluded that *Miller* "alter[ed] the range of conduct or the class of persons that the law

punishes" with a sentence of life without parole. *Id.* at 353. Therefore, despite the fact that *Miller* contains some procedural elements, courts have recognized that because *Miller* forbids the imposition of a particular punishment on a class of offenders, it is a substantive rule warranting retroactive application. See *Aiken v. Byars*, No. 2012-213286, ___ S.E.2d ___, 2014 WL 5836918, at *2 (S.C. 2014) (holding that “*Miller* creates a new, substantive rule and should therefore apply retroactively. The rule plainly excludes a certain class of defendants—juveniles—from specific punishment—life without parole absent individualized considerations of youth. Failing to apply the *Miller* rule retroactively risks subjecting defendants to a legally invalid punishment.”); *State v. Mares*, 335 P.3d 487, 504 (Wyo. 2014) (“*Miller* prescribes a substantive rule, and that under *Teague*, the rule applies retroactively to cases on collateral review.”); *People v. Davis*, 6 N.E. 3d 709 (Ill. 2014) (holding *Miller* is retroactive because it is “a new substantive rule”); *State v. Ragland*, 836 N.W.2d 107, 115 (Iowa 2013) (unanimously holding *Miller* is retroactive because it creates a “substantive change in the law that prohibits mandatory life without parole sentencing”); *Diatchenko v. Dist. Atty Suffolk Cnty.*, 1 N.E.3d 270, 281 (Mass. 2013) (unanimously holding that *Miller* is retroactive because it “explicitly forecloses the imposition of a certain category of punishment—mandatory life in prison without the possibility of parole—on a specific class of defendants: those individuals under the age of eighteen when they commit the crime of murder. Its retroactive application ensures that juvenile homicide offenders do not face a punishment that our criminal law

cannot constitutionally impose on them"); *Jones v. State*, 122 So. 3d 698, 702 (Miss. 2013) (holding that *Miller* is retroactive, substantive rule because it "modified our substantive law by narrowing its application for juveniles"); *State v. Mantich*, 287 Neb. 320, 341-42 (Neb. Feb. 7, 2014) (holding that "the fact that *Miller* required Nebraska to change its substantive punishment for the crime of first degree murder when committed by a juvenile ... demonstrates the rule announced in *Miller* is a substantive change in the law and "[b]ecause the rule announced in *Miller* is more substantive than procedural" it applies retroactively"); *Tulloch v. Gerry*, No. 2013-566, at *7 (N.H. Aug. 29, 2014) (holding that the *Miller* rule is "a new, substantive rule which should be applied retroactively to cases on collateral review.") (citations and internal quotations omitted); *Ex parte Maxwell*, No. AP-76964, 2014 WL 941675, at *4 (Tex.Crim.App. Mar. 12, 2014) ("We conclude that [the *Miller* rule] is a new substantive rule that puts a juvenile's mandatory life without parole sentence outside the ambit of the State's power.").

Among the federal courts, the First, Second, Third, Fourth, and Eighth Circuits and a panel of the Fifth Circuit have permitted second or successive habeas petitions raising *Miller* claims because petitioners made a prima facie showing that the Supreme Court already has made *Miller* retroactive. *Evans-Garcia v. United States*, 744 F.3d 235, 238 (1st Cir. 2014); *In re Simpson*, No. 13-40718, 2014 WL 494816 (5th Cir. Feb. 7, 2014)1; *In re Pendleton*, 732 F.3d 280, 282 (3d Cir. 2013) (holding that

petitioners "made a prima facie showing that *Miller* is retroactive"); *Williams v. United States*, No. 13-1731 (8th Cir. Aug. 29, 2013) (order granting motion to file successive habeas petition brought solely on ground that *Miller* is a new rule retroactively applicable to cases on collateral review); *Wang v. United States*, No. 13-2426 (2d Cir. July 16, 2013) (same); *Johnson v. United States*, 720 F.3d 720, 720-21 (8th Cir. 2013) (per curium) (same); *Stone v. United States*, No. 13-1486 (2d Cir. June 7, 2013) (same); *In re Landry*, No. 13-247 (4th Cir. May 30, 2013) (same); *In re James*, No. 12-287 (4th Cir. May 30, 2013); see also *Alejandro v. United States*, No. 13 Civ. 4364(CM), 2013 WL 4574066, at *1 (S.D.N.Y. Aug. 22, 2013) ("Because *Miller* announced a new rule of constitutional law that is substantive rather than procedural, that new rule must be applied retroactively on collateral review."); *Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at *2 n.2 (E.D. Mich. Jan. 30, 2013) ("[T]his court would find *Miller* retroactive on collateral review, because it is a new substantive rule, which 'general apply retroactively.'" (internal citations omitted)).

In addition, the United States Department of Justice has directed federal prosecutors nationwide to take the uniform position that *Miller* is substantive and therefore retroactive. See e.g., *Johnson*, 720 F.3d at 721 ("The government here has conceded that *Miller* is retroactive . . .").²

² While Mr. Hofstetter has addressed *Miller*'s substantive nature, he maintains the three alternative grounds for *Miller*'s retroactive application. Thus, to the extent that the substantive rule of *Miller* requires new procedural considerations before sentencing a youth to life without parole, such

Under these circumstances, it is not surprising that the United States Supreme Court recently granted certiorari in a case where a state concluded that *Miller* did not apply retroactively. See *State v. Toca*, 141 So.3d 265 (La. 2014), *cert. granted*, (citation) Dec. 12, 2014 (No. 14-6381).³

3. Prior to Legislative Action, Washington Courts Were Not Powerless to Remedy an Unconstitutional Sentence.

The State's position on appeal is essentially this: if the legislature refused to act in the wake of *Miller*, juveniles sentenced to LWOP would forever be without a remedy because no applicable legislative sentencing authority would exist. That is absurd.

Miller struck mandatory life without parole sentences for crimes committed by children. The parties and the court in this case applied the existing SRA, minus the unconstitutional provision. Both parties agreed that this was the correct approach under the existing law.

Hofstetter does not quarrel with the proposition that the *Miller*-fix legislation applies to individuals sentenced after the law took effect.

However, Hofstetter chose not to wait for the new law (which has both

procedural requirements amount to a "watershed rule of criminal procedure" under *Teague*. *Teague v. Lane*, 489 U.S. 288, 311 (1989). Furthermore, insofar as the Supreme Court applied the rule announced in *Miller* to Petitioner Kuntrell Jackson, the companion case in *Miller* which was on collateral review, that rule should apply retroactively to Mr. Hofstetter. *Teague*, 489 U.S. at 300. Finally, this Court may apply *Miller/Jackson* retroactively irrespective of federal retroactivity jurisprudence.

³ The Supreme Courts of Michigan, Pennsylvania, and Minnesota have also declined to give *Miller* retroactive effect. *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 S. Ct. 2724, 189 L. Ed. 2d 763 (2014).

potential benefits and detriments over the 20-life determinate scheme under which Hofstetter was sentenced).

The State looks to post-*Blakely* decisions for support. Those cases hold only that Washington courts could not impose exceptional sentences for crimes committed before a constitutional procedure was authorized.

4. The State Cannot Move to Vacate Hofstetter's Sentence

The State then argues that it can urge this Court to invalidate Hofstetter's current sentence and require another resentencing. In support, the State invokes the specter of Hofstetter waiting for years and then filing an otherwise untimely PRP arguing that his current sentence is facially invalid. This Court rejected a similar argument (based on the same claimed future possibility) in *State v. Walters*, 146 Wash.App. 138, 188 P.3d 540 (2008), where the State sought and this Court refused to vacate an *Andress*-murder conviction. See also *State v. Hall*, 162 Wash.2d 901, 177 P.3d 680 (2008) (same). In both those cases, defendants were convicted on a legislatively unauthorized theory of felony murder. In both cases, the defendants did not seek relief. Instead, the State sought an order vacating the convictions arguing, as the State argues here, the defendant can wait for years in order to achieve a tactical advantage and then seek to undo his conviction. Both this Court and the Washington Supreme Court rejected these arguments.

The State cannot prevail on the same argument, here.

D. CONCLUSION

It is hardly remarkable to argue that Mr. Hofstetter was entitled to be sentenced based on the existing law. In fact, it is expressly required. RCW 9.94A.345. Based on the above, this Court should either dismiss the State's appeal and/or affirm.

DATED this 14th day of January, 2015.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that I served a copy of this supplemental reply brief on opposing counsel by sending a copy via email to the Pierce County Prosecutor's Appellate Division to the following email address:
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January 14, 2015//Portland, OR

/s/Jeffrey Ellis

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