No. 88172-3 consolidated with 87654-1 1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Personal Restraint of:

HERBERT CHIEF RICE, JR.,

Petitioner.

ADDITIONAL AUTHORITY
RAP 10.8

Suzanne Lee Elliott
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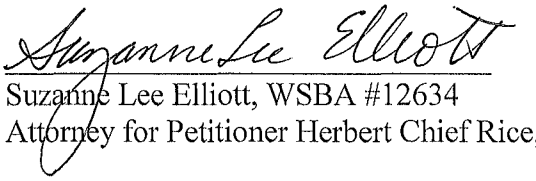
Petitioner Rice offers the attached additional authority on the issue of retroactivity.

DATED this 4th day of October, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this document and attachments on the following:

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10/4/13
Date

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12-3617, 12-3996 and 13-1455

In re: MICHAEL J. PENDLETON,

Petitioner in Case No. 12-3617

In re: FRANKLIN X. BAINES,

Petitioner in Case No. 12-3996

In re: COREY GRANT,

Petitioner in Case No. 13-1455

On Applications for Leave to File a Second or Successive
Habeas Petition pursuant to 28 U.S.C. Section 2244(b)
No. 12-3617 related to W.D. Pa. No. 12-cv-00195
before the Honorable Kim R. Gibson, District Judge and
Honorable Keith A. Pesto, Magistrate Judge
No. 12-3996 related to E.D. Pa. No. 12-cv-05672
before the Honorable Edmund V. Ludwig
No. 13-1455 related to D. N.J. No. 06-cv-05952
before Honorable Harold A. Ackerman

Argued on September 10, 2013

Before: RENDELL, JORDAN and GREENAWAY, JR.,
Circuit Judges.

(Opinion filed: October 3, 2013)

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PER CURIAM

In *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2010), 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.'" Corey Grant, Franklin X. Baines, and Michael J. Pendleton (collectively, "Petitioners"), each of whom claims to be serving a mandatory sentence of life without the possibility of parole for offenses committed as juveniles, seek our authorization to file successive habeas corpus petitions under 28 U.S.C. §§ 2254 (for Baines and Pendleton) and 2255 (for Grant) to raise *Miller* claims. Both Baines and Pendleton were convicted in state court in Pennsylvania, and Grant was convicted in federal court in New Jersey. Because these petitions raise similar legal

questions, we consolidated them for argument and now address them jointly.

Before a second or successive petition may be filed in district court, the petitioner must apply for a certification from the appropriate United States court of appeals. *See* 28 U.S.C. § 2244(b)(3)(A). A certification giving leave to file a successive petition will be granted when the petitioner has made a "prima facie" showing that his or her claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2244 (b)(2)(A) & (3)(A)(C); *see also* § 2255(h)(2). Under our precedent, a "prima facie showing" in this context merely means "'a sufficient showing of possible merit to warrant a fuller exploration by the district court.'" *Goldblum v. Klem*, 510 F.3d 204, 220 (3d Cir. 2007) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)).

The parties here agree that *Miller* states a new rule of constitutional law, but dispute whether the Supreme Court has made *Miller* retroactive to cases on collateral review. In Pendleton's and Baines's cases, Pennsylvania argues that *Miller* is not retroactive; in Grant's case, the United States asserts that *Miller* is retroactive but that Grant's sentence satisfies the new *Miller* rule and so no relief is warranted.[1]

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[1] At this early stage, we will not consider whether Grant actually qualifies for relief under *Miller*. We only determine whether Grant has made a prima facie showing that *Miller* created "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). *See Goldblum*, 510 F.3d at 219 ("'[S]ufficient showing of possible merit' in this context does not refer to the merits of

Petitioners argue: (1) that the Supreme Court implicitly made *Miller* retroactive by applying the rule to *Miller*'s companion case, *Jackson v. Hobbs*, which came to the Court through Arkansas's state collateral review process; (2) that *Miller* announced a substantive rule that "necessarily carr[ies] a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him," *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (internal quotations marks omitted), and therefore should be given retroactive effect under *Teague v. Lane*, 489 U.S. 288 (1989) (plurality); and (3) that, in the alternative, *Miller* qualifies as a "watershed procedural rule[] of criminal procedure" meriting retroactive application under *Teague*, 489 U.S. at 311.

After extensive briefing and oral argument, we conclude that Petitioners have made a prima facie showing that *Miller* is retroactive. In doing so, we join several of our sister courts of appeals. *See, e.g.*, *Wang v. United States*, No. 13-2426 (2d Cir. July 16, 2013) (granting motion to file a successive habeas corpus petition raising a *Miller* claim); *In re James*, No. 12-287 (4th Cir. May 10, 2013) (same); *Johnson v. United States*, 720 F.3d 720 (8th Cir. 2013) (per curiam) (same). *But see In re Morgan*, 713 F.3d 1365 (11th Cir. 2013) (concluding that *Miller* is not retroactive), *reh'g en banc denied*, 717 F.3d 1186; *Craig v. Cain*, No. 12-30035, 2013 WL 69128 (5th Cir. Jan. 4, 2013) (per curiam) (same).

However, we stress that our grant is tentative, and the District Court must dismiss the habeas corpus petition for

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the claims asserted in the petition. Rather, it refers to the merits of a petitioner's showing with respect to the substantive requirements of 28 U.S.C. § 2244(b)(2).").

lack of jurisdiction if it finds that the requirements for filing such a petition have not in fact been met. *Goldblum*, 510 F.3d at 219-20; *see also* 28 U.S.C. § 2244(b)(4) ("A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section."). We therefore grant Petitioners' motions under §§ 2244(b)(3) and 2255(h) and authorize each to file a successive habeas corpus petition in the district court.