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No. 87654-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Personal Restraint of:

RUSSELL D. MCNEIL,

Petitioner.

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PETITIONER'S AMENDED REPLY BRIEF

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LENELL NUSSBAUM  
VICTORIA LYONS  
Attorneys for Petitioner  
2003 Western Ave., Suite 330  
Seattle, WA 98121  
206.728.0996

 ORIGINAL

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## **I. INTRODUCTION**

There is no dispute that petitioner McNeil was in fact a juvenile at the time of the offense for which he is restrained. Mr. McNeil was not afforded due process and does meet criteria of *Miller v. Alabama* as he was a juvenile at the time of the crimes and the declination of juvenile jurisdiction.

As shown below, *Miller v. Alabama*, 132 S.Ct. 2455, 183 L. Ed. 2d 407 (2012), applies retroactively to Mr. McNeil's case. The State's position further violates Mr. McNeil's constitutional right to be free of cruel and unusual punishment and his right to due process.

The State has clearly failed in its duty as the State has neglected to file its answer in a timely manner on three (3) occasions, the State has failed to serve the Petitioner on two (2) separate occasions its motion in request of continuance, which were all granted without petitioner being allowed to reply as afforded by the laws of the State of Washington.

## **II. MILLER REQUIRES MORE THAN THE CONSIDERATION GIVEN AT A DECLINE HEARING.**

The State argues that Mr. McNeil's restraint is not unlawful because *Miller* does not absolutely prohibit a sentence of life without possibility of parole (LWOP) for a juvenile. Response at 6-8. While the

State acknowledges *Miller* “would appear to apply to the facts of this case,” it then suggests the juvenile court’s considerations at the time it declined juvenile jurisdiction over Mr. McNeil largely satisfies *Miller*’s requirements for individualized sentencing. Response at 8-15. The State is wrong.

The *Miller* Court itself rejected this argument. The import of *Miller* is the lack of discretion permitted at the time of sentencing. The court at the time of declining juvenile jurisdiction, or transferring jurisdiction,

typically will have only partial information at this early, pretrial stage about either the child or the circumstances of his offense. ... [T]he judge often does not know then what she will learn, about the offender or the offense, over the course of the proceedings.

Second and still more important, the question at transfer hearings may differ dramatically from the issue at a post-trial sentencing. ... [T]ransfer decisions often present a choice between extremes: light punishment as a child or standard sentencing as an adult (here, life without parole). ... Discretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term *with* the possibility of parole or a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate.

*Miller* at 2474-75.

*Miller* is not satisfied by the decline procedure. It requires reversal of Mr. McNeil's mandatory sentence of life without possibility of parole.

**III. RCW 10.73.100(5) AND (6) MAKE THIS PETITION TIMELY.**

RCW 10.73.100 provides the one-year time limit does not apply to a petition based solely on one or more of the following grounds:

(5) The sentence imposed was in excess of the court's jurisdiction; or

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

The United States Supreme Court has now held that the mandatory sentence of life without possibility of parole is a violation of the United States Constitution, and so beyond the court's jurisdiction to impose on a juvenile offender. The *Miller* decision is a significant change in the law material to Mr. McNeil's sentence, and as shown below, is to be applied retroactively.

**IV. MILLER APPLIES RETROACTIVELY.**

A. The U.S. Supreme Court Applied *Miller* Retroactively.

The *Miller* Court specifically applied its decision retroactively by granting relief not only to Mr. Miller but also to Kuntrell Jackson, whose conviction was final when he raised his claim. *See Miller* at 2461-62 (Mr. Jackson did not challenge his sentence on appeal; he filed a state petition for habeas corpus after the decision in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L. Ed. 2d 1 (2005)). The State does not address this point at all. Three courts, however, have found the resolution of Jackson's case to support their conclusion that *Miller* applies retroactively. *See: People v. Morfin*, 981 N.E.2d 1010 (Ill. App. 2012); ; *People v. Williams*, 982 N.E.2d 181 (Ill. App. 2012); *Hill v. Snyder*, 2013 WL 364198 (E.D. Mich. 2013).

B. *Miller* Places the Imposition of a Mandatory Sentence of LWOP on a Juvenile Beyond the Power of the Courts.

In *People v. Morfin*, 981 N.E.2d 1010 (Ill. App. 2012), the court found *Miller* to be retroactive under the first *Teague* exception.<sup>1</sup>

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<sup>1</sup> As discussed below, another division of the same court found *Miller* to be retroactive under the second *Teague* exception. Although the two Illinois opinions rely

[W]e find that *Miller* constitutes a new substantive rule. While it does not forbid a sentence of life imprisonment without parole for a minor, it does require Illinois courts to hold a sentencing hearing for every minor convicted of first degree murder at which a sentence other than natural life imprisonment must be available for consideration. *Miller* mandates a sentencing range broader than that provided by statute for minors convicted of first degree murder who could otherwise receive only natural life imprisonment.

*Id.* at para. 56. In a concurring opinion, Judge Sterba further noted that *Miller* is substantive because it “forbids a *mandatory* sentence of life imprisonment for juveniles.” *Id.* at para. 65 (emphasis in original). Both of these points, of course, apply equally to Washington’s sentencing scheme.

The U.S. District Court for the Eastern District of Michigan reached the same conclusion.

Moreover, this court would find *Miller* retroactive on collateral review, because it is a new substantive rule, which “generally apply retroactively.” *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). “A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.” *Id.* at 353. “Such rules apply retroactively because they ‘necessarily carry a significant risk that a defendant ... faces punishment that the law cannot impose upon him.’” *Id.* at 352. *Miller* alters the class of persons (juveniles) who can receive a category of punishment (mandatory life without parole).

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on different exceptions to the *Teague* rule, neither expressly rejects the analysis of the other.

*Hill v. Snyder*, 2013 WL 364198 at \*3 n.2 (E.D. Mich. 2013). *But see*, *People v. Carp*, 2012 WL 5846553 at p. 14,<sup>2</sup> – N.W.2d – (Mich. App. 2012) (*Miller* not substantive because it does not categorically bar LWOP for juveniles).

This Court should follow the persuasive reasoning of the *Morfin* and *Hill* opinions.

C. FEDERAL LAW REQUIRES RETROACTIVE APPLICATION.

*Miller* differs somewhat from previous decisions announcing substantive rules, all of which narrowed, rather than expanded, the range of permissible outcomes of the criminal process by prohibiting a particular outcome for a category of defendants. *See, e.g., Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 2031, 176 L. Ed. 2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 568-75, 125 S.Ct. 1183, 161 L. Ed. 2d 1 (2005). *Miller* does not categorically hold that juvenile defendants may never be sentenced to life without parole for a homicide offense; instead, it requires the sentencer take into account “how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison,” before such a sentence may be imposed. 132 S.Ct. at 2469. Thus,

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<sup>2</sup> Westlaw does not provide any paragraph or star numbering for this case. The pinpoint citations refer to the page number when the case is printed out from Westlaw.

*Miller* stated that its holding “does not categorically bar a penalty for a class of offenders or type of crime,” but instead “mandates only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.” *Id.* at 2471. In that respect, *Miller* has a procedural component.

But nothing in *Miller* implies that the Court viewed its decision as purely procedural—and its holding makes clear that it is not. By mandating that a juvenile defendant’s characteristics must be taken into account at sentencing, the Court also mandated that new and more favorable potential outcomes be made available to defendants who previously had faced only one possible outcome—life without parole. *Miller*, 132 S.Ct. at 2469. This is not akin to a procedural rule that simply requires admission of a class of evidence or changing the factfinder from judge to jury. It requires that new sentencing options be available. And the Court did not suggest that its alteration of the range of options available for a sentencer would have only the “speculative” effect on outcomes of most procedural rules. *Schriro*, 542 U.S. 325, 352. Rather, the *Miller* Court stated that “we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” 132 S.Ct. at 2469.

Certainly, the government may still contend that a life-without-parole sentence should be imposed on a juvenile convicted of a homicide offense. But *Miller* categorically mandated that the sentencer be able to consider a lesser sentence as well.

In only one prior context has the Supreme Court invalidated a particular severe sentence as unconstitutional because of its mandatory character: the imposition of mandatory capital punishment. See *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L. Ed. 2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L. Ed. 2d 974 (1976); *Sumner v. Shuman*, 483 U.S. 66, 107 S.Ct. 2716, 97 L. Ed. 2d 56 (1987). In conclusively ending mandatory death sentences, the Court refused to countenance “a departure from the individualized capital-sentencing doctrine” it had adopted, even for murder by life-term inmates. *Sumner*, 483 U.S. at 78. The Court never had the opportunity to consider whether the *Woodson* principle was retroactive under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), because it amounted to a substantive rule. When the Court granted habeas relief in *Sumner*, only three individuals in the United States appear to have been under

mandatory death sentences, *id.* at 72 n.2, and *Teague* lay 20 months in the future.<sup>3</sup>

But it seems unlikely that non-retroactivity grounds would have been used to deny habeas relief for a capital defendant who never had any opportunity to ask a sentencer to impose a lesser sentence. Like *Miller*, *Woodson* has a procedural component. See *Woodson*, 428 U.S. at 305 n.40 (plurality opinion) (“[T]he death sentences in this case were imposed under procedures that violated constitutional standards.”). But *Woodson*, like *Miller*, also does much more. By requiring individualized consideration before imposing the harshest penalty available by law, each decision expanded the sentencing options that must be made available to the sentencer, i.e., each case changed the substance of the sentencing decision by requiring that a less-harsh sentence be available.

And the execution of an individual who had no opportunity to seek a lesser sentence would completely violate the principle of “individualized sentencing” (*Sumner*, 483 U.S. at 75) that lay at the heart of *Woodson*.

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<sup>3</sup> Until *Miller*, no other case had extended *Woodson*. And in light of the Supreme Court’s holdings in *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (rejecting Eighth Amendment challenge to mandatory life-without-parole sentence for possession of 650 grams or more of cocaine), and *Chapman v. United States*, 500 U.S. 453, 467, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) (“Congress has the power to define criminal punishments without giving the courts any sentencing discretion.”), it seems highly unlikely that *Woodson* will be extended further.

*People v. Carp*, 2012 Mich. App. rejects the second *Teague* exception, but its reasoning is flawed.<sup>4</sup> The court believed that the exception can apply only to procedures that affect the conviction rather than the sentence. *Id.*, 2012 WL 5846553 at p. 14-15. The U.S. Supreme Court disagrees.

The second exception is for “watershed rules of criminal procedure” implicating the fundamental fairness and accuracy of the criminal *proceeding*. See *Teague, supra*, 489 U.S., at 311, 109 S.Ct., at 1076 (plurality opinion).

*Saffle v. Parks*, 494 U.S. 484, 495, 110 S.Ct. 1257, 1264, 108 L.Ed.2d 415, *reh’g denied*, 495 U.S. 924, 110 S.Ct. 1960, 109 L.Ed.2d 322 (1990) (emphasis added). In *Saffle*, the U.S. Supreme Court considered whether the petitioner could rely on a new rule that a capital sentencing jury must be permitted to consider sympathy for the defendant. *Id.* at 485-86. The Court found the second *Teague* exception relevant to that inquiry and expressly addressed it, even though the new rule had nothing to do with the defendant’s conviction. *Id.* at 495. The Court found that the exception was not satisfied, however, because “[t]he objectives of fairness and

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<sup>4</sup> A Florida intermediate appellate court also has rejected retroactive application of *Miller*. *Geter v. Florida*, 2012 WL 4448860, -- So.3d -- (2012). Its analysis is not helpful, however, because Florida’s unique retroactivity standards bear little relation to *Teague*. See *People v. Williams* at para. 55 (“Although we disagree with the result of *Geter* in that it held that *Miller* did not apply retroactively, it also used a different standard of analysis than that found in *Teague*”).

accuracy are more likely to be threatened than promoted” by consideration of sympathy. *Id.*

Similarly, in *Schriro v. Summerlin*, 542 U.S. 348, 355-57, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), the Supreme Court considered the new rule that juries rather than judges must decide whether a defendant is eligible for the death penalty. *Id.* at 349. The Court addressed the “watershed” standard, finding that it was not satisfied because jury findings were not necessarily more fair or accurate than judge findings.

It is true that the Supreme Court has sometimes expressed the issue as whether a new rule affects the fairness and accuracy of a “conviction” but that is because the case before them dealt with the conviction rather than the sentence. *See, e.g., Whorton v. Bockting*, 549 U.S. 406, 418, 127 S.Ct. 1173, 1182, 167 L.Ed.2d 1 (2007) (“The *Crawford* rule does not satisfy the first requirement relating to an impermissibly large risk of an inaccurate conviction.”) There can be no question. The *Miller* rule affects the fairness and accuracy of sentencing for juvenile offenders.

E. If This Court Finds that *Miller* Would Not Be Retroactive Under *Teague*. It Should Use Its Authority to Find *Miller* Retroactive Under Washington Law.

In *Matter of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492, 495 (1992), this Court first considered the *Teague* standard, and applied its definition of finality. In subsequent cases, this Court has “[g]enerally . . .

followed the lead of the United States Supreme Court when deciding whether to give retroactive application to newly articulated principles of law.” *State v. Evans*, 154 Wn.2d 438, 444, 114 P.3d 627, 630, *cert. denied*, 546 U.S. 983 (2005). The Court has recognized, however, that it is not bound by *Teague* when deciding whether a change in the law applies retroactively under RCW 10.73.100 (6).

There may be a case where our state statute would authorize or require retroactive application of a new rule of law when *Teague* would not. Cf. *In re Pers. Restraint of Vandervlugt*, 120 Wash.2d 427, 432-33, 842 P.2d 950 (1992) (vacating exceptional sentence based on invalid sentencing factor); *In re Pers. Restraint of Smith*, 117 Wash.App. 846, 860-70, 73 P.3d 386 (2003). As Chief Justice Rehnquist sagely noted, *Teague* was “grounded in important considerations of federal-state relations.” *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). Limiting a state statute on the basis of the federal court’s caution in interfering with State’s self-governance would be, at least, peculiar.

*Id.* at 448-49. See also *Danforth v. Minnesota*, 552 U.S. 264, 266, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008) (*Teague* rule does not constrain authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion).

The Washington Courts have freely corrected sentences when new court decisions show them to be erroneous. See, e.g.: *In re Pers. Restraint of Vandervlugt*, 120 Wn.2d 427, 432-33, 842 P.2d 950 (1992); *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980); *In re Goodwin*,

146 Wn.2d 861, 869, 50 P.3d 618 (2002); *In re Johnson*, 131 Wn.2d 558, 933 P.2d 1019 (1997); *In re Greening*, 141 Wn.2d 687, 9 P.3d 206 (2000).

In the interest of fairness, this Court should apply *Miller* retroactively. Going forward, all juveniles will presumably receive appropriate sentences when convicted of murder with aggravating factors. There is no good reason for the juveniles whose convictions are final to languish in prison. Such a discrepancy would reflect poorly on our judicial system.

Any interest in finality is minimal for the courts to revisit the sentences imposed in these cases. Determining the appropriate term would actually be easier with the older cases than with the new ones. Rather than attempting to predict a juvenile's potential for rehabilitation, the courts could see how the offender has in fact demonstrated his rehabilitation during his many years in prison.

Even if this Court finds that *Miller* is retroactive under *Teague*, it may wish to make an alternate finding that, regardless of *Teague*, it is retroactive under RCW 10.73.100(6). That would avoid any chance that this Court's ruling might be called into question by some later ruling of the U.S. Supreme Court.

This Court has expressly ruled that it is not wedded to *Teague*. See *State v. Evans, supra*, 154 Wn.2d at 444 (2005). In fact, as noted above, the Court has declined to follow *Teague* in several cases involving changes in sentencing law. Thus, this Court would be *following* its own precedent if it declined to apply the *Teague* standards in this case.

Despite this Court's declaration that it is not bound by *Teague*, and this Court's refusal to follow *Teague* in some sentencing cases, the legislature has taken no steps to impose the *Teague* rule. Rather, it has accepted that Washington courts may apply a broader retroactivity analysis. This is a case appropriate for that broader analysis.

**V. CONCLUSION**

For the reasons stated above, this Court should apply *Miller* retroactively to grant Mr. McNeil relief.

DATED this 8th day of May, 2013.

Respectfully submitted:

  
LENELL NUSSBAUM  
WSBA No. 11140

  
VICTORIA J. LYONS  
WSBA No. 45531

Attorneys for Russell D. McNeil

**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing pleading by depositing the same in the U.S. Postal Service, postage prepaid, addressed as follows:

James P. Hagarty  
Yakima County Prosecutor's Office  
Yakima County Court House  
128 North 2<sup>nd</sup> Street, Room 329  
Yakima, WA 98901

Mr. David B. Trefry  
Special Deputy Prosecuting Attorney  
P.O. Box 4846  
Spokane, WA 99220-0846

Mr. Russell D. McNeil #957470  
P.O. Box 2049, #957470, T-A, 45  
Airway Heights, WA 99001

I declare under penalty of perjury under the laws of the State of Washington that the above statement is true.

May 8<sup>th</sup>, 2013 - SEATTLE, WA  
Date and place signed

  
Alexandra Fast

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Please accept for filing the attached "Petitioner's Amended Reply Brief" in regards to the Personal Restraint of Russell McNeil, 87654-1. A certificate of service is attached to the pleading.

Thank you for your time,

Alexandra Fast

Assistant to:

Lenell Nussbaum, Attorney at Law

Email: [Nussbaum@seanet.com](mailto:Nussbaum@seanet.com)

WSBA No. 15277

Lenell Nussbaum, Attorney at Law

2003 Western Ave., Suite 330

Seattle, Wa 98121

USA

Phone: [206-728-0996](tel:206-728-0996)

Fax: [206-448-2252](tel:206-448-2252)