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SUPREME COURT
STATE OF WASHINGTON
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NO. 87654-1

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THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF
RUSSELL DUANE MCNEIL

RESPONSE TO PETITION BY YAKIMA COUNTY

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ORIGINAL

A. AUTHORITY FOR RESTRAINT

B. ISSUE PRESENTED BY PETITION

1. Petitioner's rights were violated when he was sentenced to serve a mandatory life sentences without the possibility of probation or parole.

ANSWER TO ISSUES PRESENTED BY PETITION

1. Petitioner is under restraint as defined by RAP 16.4; Miller v. Alabama, infra, is not retroactive for cases which were fully and completely adjudicated at the time Miller was decided.

This petition should be dismissed.

C. STATEMENT OF THE CASE

The petitioner is under restraint pursuant to a felony conviction in the State of Washington. The petitioner pled guilty to;

Count one – Aggravated First Degree Murder pursuant to RCW 9A.32.030(1)/10.95.020(7)(8)(9) and Count Two – Accomplice to Aggravated First Degree Murder pursuant to RCW 9A.32.030(1) and RCW 10.95.020(7)(8)(9) and RCW 9A.08.020.

The State has been supplied an electronic copy of the entire Yakima Superior Court Clerk's file. This copy is a ".TIF" copy of the entire Superior Court file. There is no pagination on this file. However the format of the file does allow reference to specific pages within that ".TIF" file. The State has supplied this file to this court for purposes of review in this case. The State shall refer to the page number within that

“.TIF” file. Do to the size of this file, 1261 pages, the State has supplied it to this court and to the Petitioner in the same format it was delivered to the Respondent. This is “attached” to this Reply as Appendix ‘A.’

On or about March 15th 1988 the Superior Court for Yakima County filed extensive Findings of Fact and Conclusion of law regarding jurisdiction over McNeil. (R 778-786) The Juvenile court therein “... Ordered, Adjudged, and Decreed that juvenile jurisdiction over Russell Duane McNeil is permanently declined...” (Record at 783)

The State filed notice of intent to seek the death penalty on or about May 27, 1988. McNeil petitioned the trial court to dismiss this notice. After briefing the court declined to dismiss the notice of intent to seek the death penalty and indicated in a set of findings and conclusions the basis for this ruling. (R 751-753) The court also declared its ruling on the record. (R 754-69)

Thereafter counsel for Petitioner filed notice to have this ruling reviewed by this court. (R 746) The Motion for Discretionary Review was denied by a Commissioner of this court on November 4, 1988. (R 709-14) A subsequent motion to modify the Commissioner’s Ruling was denied by this court on January 10, 1989. (R 683) Petitioner requested further review of the trial court’s actions by this court, that request was also denied. (R 255-261)

On August 25, 1989 Petitioner McNeil pled guilty, he was nineteen years of age at the time of his plea. (R 162-69) In this Statement of Defendant on Plea of Guilty McNeil acknowledges that he killed one victim while his co-defendant was in another room murdering the husband McNeil's victim.

One of the conditions for the being allowed to plead guilty and receive the determinate sentence of Life without the possibility of parole, Petitioner agreed that is needed he would testify against his co-defendant. (R 166)

In that Statement of Defendant McNeil stated the following:

The Court has asked me to state briefly in my own words what I did that resulted in my being charged with the crimes in the Information, dated March 15, 1988.
This is my statement.

That on or about January 7, 1988, I was driving my car around the area outside Wapato, Washington with Chief Rice. Chief mentioned that he knew where we could get some money. He said it would be easy. He said they were old people, and that the man couldn't walk very well He said we could just go in, surprise them, stab them, and take their money. He directed me to the victims' house on Kays Road. I had never been there before, and I did not know the people who lived there. I was armed with a knife, and so was Chief. In the car, he showed me his knife, and asked me if I had mine. I showed it to him. I knew that the knives Chief and I had would be used to stab the old people who lived there. Chief and I discussed how we would do this, and we agreed that we would get inside the house by asking to use the telephone. After making the phone call, we would stab the old people and take their money, or whatever we could find

to sell. I parked my car in the driveway near a concrete planter, and we went first to the front door, and then to the back door. Mrs. Nickoloff asked us in when Chief told her that we needed to use the phone. Chief made a phone call, and I asked for a drink of water. Mrs. Nickoloff was finishing her supper after Mr. Nickoloff had gone into the living room. While Mrs. Nickoloff was eating, she and I both saw Chief Rice begin to attack Mr. Nickoloff with his knife. She got up from her chair and started to go toward the living room. I grabbed her, and forced her to the floor. While she was pinned to the floor, I stabbed her many times. Chief Rice continued to stab Mr. Nickoloff. I did not stab Mr. Nickoloff. After both Mr. and Mrs. Nickoloff had been stabbed, Chief and I removed two TV sets and put them in my car. We then drove to Wapato, and Chief gave one of them to another person to pay a bill he owed. The other TV was sold by Chief, and I received about \$15.00 from that sale. I believe that Chief received about \$35.00 from that sale.

I am very sorry that this happened. I feel awful about this. I was 17 when this happened, and I never imagined how awful this would be. I know that I have let down the people who care most about me, and more importantly, I know that I have ruined the lives of two innocent people and all their family. My own life is ruined, as are the lives of many, many people who did nothing wrong. I am very sorry. (R 167-68)

The Judgment and Sentence entered on August 25, 1989 sentenced McNeil to two consecutive terms of life in prison without the possibility of release. (R 159-61) An Amended Judgment and Sentence was entered on September 6, 1989. (R 150-52) There were Findings of Fact and Conclusions of law entered as an appendix to that Amended Judgment and Sentence, which set forth a basis for the imposition of an Exceptional Sentence and Findings of Aggravating Circumstances. (R 153-157) Based on the aggravating circumstance that the two victims were

“particularly vulnerable or incapable of resistance due to advanced age, disability, and ill health” the court imposed two consecutive life sentences. (R 153-4)

On or about September 22, 1989 McNeil filed notice that he was appealing his sentence of Life in prison without the possibility of parole of release. (R 124-25, 126-7) On October 23, 1990 the Court of Appeals Division III issued its opinion (R 79-82) This case was Mandated on November 28, 1990. (R 77)

The issues that were raised and addressed in that appeal were the issue presently before this court. The Court of Appeals Division III determined that the “exceptional sentence” imposed was not excessive. That court ruled that there was nothing in the record regarding a sentence recommendation by the State with regard to the life without the possibility of parole or probation and therefore the Court stated “[f]or purposes of this appeal, we will assume it did not.” (R 80)

The State’s records indicate that McNeil is presently serving out his sentence in this case.

D. ARGUMENT

1. Standards of Review.

RAP 16.4. Personal Restraint Petition – Grounds For Remedy.

(a) Generally. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioner's restraint is unlawful for one or more of the reasons defined in section.

Petitioner is under restraint however he has not and can not demonstrate, based on what is contained in this petition, the record and existing case law that the restraint is unlawful. In re Personal Restraint of Dyer, 143 Wn.2d 384, 391, 20 P.3d 907 (2001) "To prevail on a PRP alleging constitutional error, the petitioner must show he or she is under restraint and the restraint is unlawful under the provisions of RAP 16.4(c). In re Addleman, 139 Wn.2d 751, 753, 991 P.2d 1123 (2000). Dyer has been restrained; he is incarcerated."

In re Personal Restraint of Cook, 114 Wn.2d 802 812, 792 P.2d 506 (1990) "In order to obtain relief by way of personal restraint petition, . . . a person must establish (1) he or she is being unlawfully restrained, (2) due to a 'fundamental defect which inherently results in a complete miscarriage of justice.'"

See also, In re Personal Restraint of Capello, 106 Wn. App. 576, 24 P.3d 1074 (2001) "Accordingly, we evaluate Capello's PRP by examining only the requirements of RAP 16.4. Under that rule, petitioners must show they have been restrained (RAP 16.4(b)), and that the restraint is unlawful (RAP 16.4(c)). (Footnotes omitted.) While there is no doubt

that McNeil is under restraint it is equally clear that Miller does not mandate that person sentenced to LWOP is to be released. The Court does not indicate that a LWOP sentence for a juvenile can not be imposed. The Court prefaced the decision on the fact that these sentences were mandatory and did not give the trial court the discretion to take into account those criterion that the Court believed must be reviewed when sentencing a juvenile to a LWOP sentence. Therefore the actual "restraint" of McNeil is not "illegal" there was merely a procedural methodology the Court now says must be followed prior to imposition of this type of sentence for this group of offenders.

In re Personal Restraint of Dalluge, 162 Wn.2d 814, 177 P.3d 675 (Wash. 2008):

Dalluge can prevail if he can show he is under "unlawful" (as meant by RAP 16.4(c)) "restraint" (as meant in RAP 16.4(b)). Petitioners are restrained if, among other things, they are confined or are "under some other disability resulting from a judgment or sentence in a criminal case." RAP 16.4(b); *see also In re Pers. Restraint of Cashaw*, 123 Wash.2d 138, 149, 866 P.2d 8 (1994). (Some citations omitted.)

It is the position of the State that this case has no merit and this court should dismiss this petition. Petitioner can not and has not set forth facts or information upon which this court can review his claims:

We turn briefly to the remaining issues. First, we deny the department's motion to dismiss this case as moot.

Even assuming this case is moot (which, given that Dalluge will be subject to more stringent conditions in the future, is in doubt), we have the power to decide a moot case to resolve issues of "continuing and substantial public interest" if guidance would be helpful to public officers and the issue is likely to recur. Sorenson v. City of Bellingham, 80 Wash.2d 547, 558, 496 P.2d 512 (1972) (citing State ex rel. [162 Wn.2d 820] Yakima Amusement Co. v. Yakima County, 192 Wash. 179, 73 P.2d 759 (1937)). (Id at 819)

“To obtain relief through a PRP, a petitioner must show he or she was actually and substantially prejudiced by a violation of his or her constitutional rights or by a fundamental error of law. In re Personal Restraint of Cook, 114 Wn.2d 802, 810, 792 P.2d 506(1990); In re Personal Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994).

It must be noted that while Miller v Alabama, ___ U.S. ___; 132 S.Ct. 2455; 183 L.Ed.2d 407 (2012) would appear to apply to the facts of this case Miller does not abrogate this conviction, only the sentence imposed. McNeil plead guilty to the two counts indicated above. While it can be stated that the mandatory nature of his sentence is “unlawful” there is nothing in the Miller ruling which would allow for the relief requested by McNeil, which is credit for time served. The only question is whether the original sentence imposed, “mandatory” Life without the possibility of probation or parole (LWOP) was appropriately imposed on an offender who was by legal definition a “juvenile” at the time he

committed the offense for which he was subsequently sentenced. The Miller court disapproved of mandatory LWOP sentences for juvenile defendants convicted of homicide offenses, but it declined to consider the defendants' alternative argument that the Eighth Amendment categorically bars LWOP sentences for juveniles, even for those who were 14 years of age or younger at the time of their offenses. (Miller, *supra*, 567 U.S. at p. ___ [132 S.Ct. at p. 2469].) “Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in Roper or Graham. Instead, it mandates only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.” (567 U.S. at p. ___ [132 S.Ct. at p. 2471].)

The State in this case conducted a decline hearing. While the transcript of that hearing is not available to this court the Findings of Fact and Conclusions of Law from that hearing are. It would appear that the trial court, from the record we have, conducted this hearing pursuant to the “Kent” factors.

The Washington Supreme Court first adopted the so called “Kent” factors, Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966), in State v. Williams, 75 Wn.2d 604, 606-07, 453 P.2d 418 (1969).

The eight Kent factors that juvenile courts should consider in deciding whether to transfer or retain jurisdiction are;

(1) the seriousness of the alleged offense and whether the protection of the community requires declination; (2) whether the offense was committed in an aggressive, violent, premeditated, or willful manner; (3) whether the offense was against persons or only property; (4) the prosecutive merit of the complaint; (5) the desirability of trial and disposition of the entire case in one court, where the defendant's alleged accomplices are adults; (6) the sophistication and maturity of the juvenile; (7) the juvenile's criminal history; and (8) the prospects for adequate protection of the public and rehabilitation of the juvenile through services available in the juvenile system. State v. Furman, 122 Wn.2d 440, 447, 858 P.2d 1092 (1993).

All eight of these factors need not be proven to support a declination decision but the record must demonstrate that each of the factors was considered. State v. Holland, 30 Wn.App. 366, 374, 635 P.2d 142 (1981), *aff'd*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

Two of the findings of fact entered when juvenile jurisdiction declined stated in pertinent part;

Findings of Fact

I

The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

...

The victims of these crimes, Mike Nickoloff and Dorothy Nickoloff, were an elderly couple, 82 and 74 years of age respectively, who were living alone in their single family home in rural Yakima county. Mr. Nickoloff was quite disabled in that he required a walker in order to move around. Both victims were essentially defenseless to the crimes committed against them. The murder of these two individuals occurred in the early evening of January 7, 1988, in the victims' home as part of a robbery in which property was removed from their home. Since these alleged acts involve crimes against persons and property while situated in their home, they are the most serious type of breach of community safety.

...

II

Whether the alleged offenses were committed in an aggressive, violent, premeditated or willful manner.

Autopsy reports, and the testimony of Sheriff deputies at the declination hearing both indicate without question that the victims both met a most aggressive and violent death. Both victims died as a result of multiple stab wounds and both appeared to have received defensive wounds to their hands and arms as they were being attacked. Mr. Nickoloff was killed as he sat in his chair in the living room of their home receiving stab wounds to the face, neck and chest. Mrs. Dorothy Nickoloff was killed in the kitchen of their home receiving numerous stab wounds to the back as she lay on the floor. Both victims received so many stab wounds that it is not possible to determine the-actual number of wounds received by each individual.

There is a final line which is hand written which appears to state:

“This would indicated a sociopathic or psychotically disorder by the perpetrator, whoever it may be.”

(R 779)

III

The alleged offense was against persons or against property.

The victims, Mike and Dorothy Nickoloff, were killed as a result of multiple stab wounds and property! that is, two television sets were taken from their home as part of this crime. The property taken has since been recovered and directly traced back to the two co—defendants in this case.

IV.

The prosecutive (sic) merit of the complaint whether there is evidence on which a grand jury may be expected to return an indictment.

The information in this case accuses each defendant of murdering one victim himself and acting as an accomplice to the other murder by his co—defendant. The crimes were discovered very shortly after their occurrence so that the Yakima County Sheriff's Department was able to adequately preserve available evidence. The property stolen from the victims' house during these crimes has been recovered and has been directly traced back to the two co—defendants. Both defendants have given the police statements implicating themselves in the crimes. The allegations of these cases therefore appear to be highly meritorious.

V.

The desirability of trial and disposition of the offense in one court when the -juvenile's associates in the alleged offense are adults.

This criteria appears not be appropriate as both co—defendants charged in this matter are juvenile and are both facing declination hearing at this time.

VI

Sophistication and maturity of the -juvenile considering his home environment, emotional attitude and pattern of living.

Russell McNeil was born on August 15, 1970, and is approximately 17 and a half years of age. He has lived with one of his parents until approximately November of 1987. At that time, he began living with his 20 year old brother in Wapato, Washington, and was attending Pace Alternative High School. There is no evidence that indicates Russell McNeil suffers from any type of mental retardation.

Mr. McNeil has worked as a ranch hand and in a firewood business for -at least the last two years. Mr. McNeil's living situation was independent and as an adult while working in the firewood splitting forest camp and was considered a mature, dependable worker when he worked as a ranch hand. Mr. McNeil's employers, teachers, and associates all consider him to be a mature individual with a good deal of sophistication and who is articulate and in control of himself.

VII.

Previous juvenile criminal history.

Russell McNeil has previously been convicted of Second Degree Burglary in Juvenile Court and has had one diversion agreement. Mr.

McNeil's previous criminal history is not considered remarkable.

VIII.

Prospects for adequate protection of the public and adequacy of the Juvenile Court system in this case.

The standard range for First Degree Murder in Juvenile Court for Russell McNeil as a 17 and a half year old is 180 to 224 weeks of confinement. Juvenile Court only has jurisdiction over an individual until age 21. Therefore the maximum period of supervision will be approximately 160 weeks of confinement. Additionally, it appears theoretically possible that after serving 60* of this sentence and assuming that the defendant has no problems while in the juvenile institution, he could be considered for some kind of a community residential placement for the last year of his confinement. Clearly, under either one of these possibilities, the time of confinement of the defendant is grossly insufficient considering the interests of protecting the public given the very serious nature of the crimes charged.

Once again there is handwritten section which appears to state;

“There is insufficient time for rehabilitation.”

The court then entered the following Conclusion of Law;

I

The above entitled court has jurisdiction on of the subject matter and of the juvenile.

II.

Declination of Juvenile Court jurisdiction over this juvenile is in the best interest of the public.

III.

An Order Permanently Declining Juvenile Court Jurisdiction and Transferring the Juvenile For Adult Criminal Prosecution should be entered.

And entered this order:

Based upon the above Findings of Fact and Conclusions of Law;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that juvenile jurisdiction over Russell Duane McNeil is permanently declined and the defendant shall be immediately transferred to the Yakima County Jail for incarceration until further adult proceedings in Yakima County Superior Court. Bail shall be maintained in the amount of \$250,000.00 until further proceedings in adult court if appropriate. (R 778-786)

In the review of this petition the State believes that it is of great importance that the trial court did in fact conduct an analysis regarding imposition of the death penalty as well as full declination hearing. The court conducted a review of the law addressing whether it was cruel and unusual punishment to execute a person under the age of 18. The trial court determined that it was not. The oral and written findings of this decision shed a bright light on the trial courts careful consideration of this issue. (R 51-68, 751-71)

Thereafter counsel for Petitioner filed notice to have this ruling reviewed by this court. (R 746) The Motion for Discretionary Review was denied by a Commissioner of this court on November 4, 1988. (R 709-14) A subsequent motion to modify the Commissioner's Ruling was denied by this court on January 10, 1989. (R 683) Petitioner requested further review of the trial court's actions by this court, that request was also denied. (R 255-261)

As the State has argued above one of the most important factors relied upon by the court in the final analysis of whether it was cruel punishment to impose the death penalty on a 17 year old is that fact that at the time of this offense this State was not a "mandatory" decline state. The State was required to conduct a hearing regarding decline of there has to be agreement of the parties. The trial court's references this hearing were extensive. The record that was preserved indicates the actions taken by the decline hearing judge were essential to the analysis by Judge Gavin who made the ruling regarding the availability of the death penalty. There can be no doubt Judge Gavin, a jurist who while now retired will be requested by the State to sit on this case if the matter is remanded for rehearing, will undoubtedly determine that LWOP, just as he determined the death penalty was not cruel punishment, is not cruel punishment based on the Washington State Constitution, Article 1, section 14.

It is the States position that based on the rulings of the trial court in both the decline hearing and the ruling regarding the imposition of the death penalty and the imposition of the exceptional sentence, which was upheld on appeal, ruled in manner which upon review by this court will result in this court determining that the analysis of Miller was followed by the trial court to a great extent back in 1989.

As is court is well aware a court of appeal need not remand a matter if it can determine that the decision would occur if the case were remanded. State v. Creekmore, 55 Wn. App. 852, 866-7, 783 P.2d 1068 (1989);

Creekmore contends the trial court erred by considering the possibility of earned early release. See RCW 9.94A.150(1). This was improper, but the trial court in Fisher made the same error, and our Supreme Court nevertheless affirmed. See State v. Fisher, 108 Wn.2d at 429 n.6. In State v. Dunaway, supra, our Supreme Court remanded after invalidating two of three reasons for an exceptional sentence, because "the great disparity, some 20 years, between the sentence imposed and the midpoint of the standard range" was "too great . . . to assume that the trial judge would still impose the same sentence". 109 Wn.2d at 220. A like disparity, however, does not necessitate a remand "when we are satisfied that the judge would have imposed the same sentence absent the improper factor." State v. Drummer, supra at 760 (210-month disparity; record did not support finding that victim was particularly vulnerable).

We are satisfied the court would have imposed the same sentence even if it had not considered earned early release. The trial court considered Creekmore's killing "the most heinous crime that can be committed."

The Washington State Supreme Court recently reaffirmed its previous position that a "new rule" may only be applied to cases that have not been finalized by a direct appeal. State v. Hanson, 151 Wn.2d 783, 789-90, 91 P.3d 888 (2004), *citing* In re St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992), *and* Teague v. Lane, 489 U.S. 288, 311, 109 S.Ct. 1060:

St. Pierre sets out current prospective application analysis in Washington. The analysis derives from two United States Supreme Court cases. In Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), the Court held that a new rule applies prospectively to all cases pending on direct review or not yet final. In Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), the Court held that a new rule will not be given retroactive application to cases on collateral review except when either (a) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (b) the rule requires the observance of procedures implicit in the concept of ordered liberty. Teague, 489 U.S. at 290, 109 S.Ct. 1060.

A new rule breaks new ground or imposes a new obligation. Teague, 489 U.S. at 301, 109 S.Ct. 1060. A new rule is a "result ... not dictated by precedent existing at the time the defendant's conviction became final." *Id.* As stated in St. Pierre, the rule based on those cases is that a new rule prospectively applies to cases not yet finalized unless a collateral review exception is present. "The critical issue in applying the current [prospectivity] analysis is whether the case was final when the new rule was announced." St. Pierre, 118 Wash.2d at 327, 823 P.2d 492. The St. Pierre Court interpretation of finality is consistent with RAP 12.7.

We have stated that "[o]ur appellate court procedural rules provide two methods of seeking review of trial court decisions. One is review as a matter of right, called an 'appeal', and the other is review by permission of the reviewing court, called 'discretionary review.'" In re Dependency of Grove, 127 Wash.2d 221, 235, 897 P.2d 1252 (1995) (citing RAP 2.1(a)). We held in St. Pierre that finality of a case is to be contemplated as a whole and not the finality of a single issue. RAP 12.7 defines the finality of a decision by an appellate court.^[3] Once an appellate decision is final, review as a matter of right is exhausted.

[3] RAP 12.7 defines when a case is final and reads in part:

(a) Court of Appeals. The Court of Appeals loses the power to change or modify its decision (1) upon issuance of its mandate in accordance with rule 12.5, except when the mandate is recalled as provided in rule 12.9, (2) upon acceptance by the Supreme Court of review of the decision of the Court of Appeals, or (3) upon issuance of a certificate of finality as provided in rules 12.5(e) and rule 16.15.(e).

(b) Supreme Court. The Supreme Court loses the power to change or modify a decision of the Court of Appeals upon issuance of the mandate of the Court of Appeals in accordance with rule 12.5, except when the mandate is recalled as provided in rule 12.9. The Supreme Court loses the power to change or modify a Supreme Court decision upon issuance of the mandate of the Supreme Court in accordance with rule 12.5, except when the mandate is recalled as provided in rule 12.9.

This case was final on November 28, 1990. This court has addressed when a case is “final.” This occurs when “a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.” St. Pierre, 118 Wn.2d at 327, (*citations omitted*). McNeil did appeal his conviction that appeal was mandated on November 28, 1990. (R 77) Finality was once again addressed in State v. Kilgore, 167 Wn.2d 28, 43-44, 216 P.3d 393 (Wash. 2009):

Lastly, Kilgore argues Barberio is inapplicable where there has been an intervening change in law. In essence, he asks us to waive our rules of appellate procedure to

allow application of a new rule of law to defendants who have otherwise exhausted their right to appeal as long as there is a *possibility* of a change to their judgment and sentence. Finality occurs, however, when the " 'availability of appeal' " had been exhausted. St. Pierre, 118 Wash.2d at 327, 823 P.2d 492 (emphasis added) (quoting Griffith, 479 U.S. at 321 n. 6, 107 S.Ct. 708 n. 6 (citing Johnson, 457 U.S. at 542 n. 8, 102 S.Ct. 2579)). The fact that the trial court had discretion to reexamine Kilgore's sentence on remand is not sufficient to revive his right to appeal. Our rules of appellate procedure require that the trial court exercise its discretion in order to give rise to an appealable issue. We will not waive this rule to make exceptions for defendants where a mere possibility of direct review exists.

IV. CONCLUSION

We define finality for purposes of retroactive application of a new rule of law as the point at which " 'a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.' " *Id.* (quoting Griffith, 479 U.S. at 321 n. 6, 107 S.Ct. 708 n. 6 (citing Johnson, 457 U.S. at 542 n. 8, 102 S.Ct. 2579)). Here, the trial court entered its judgment and sentence on December 1, 1998; this court issued its mandate terminating Kilgore's right to appeal in state court on October 7, 2002; and on January 5, 2003, the time for filing a petition for certiorari in Kilgore's case expired. These events occurred prior to the Supreme Court's decision in Blakely. Because the trial court on remand chose not to exercise its discretion under RAP 2.5(c)(2), Kilgore's case remained final as to his right to appeal in state court as of October 7, 2002. RAP 12.5(c), 12.7(b). We therefore hold the trial court did not err when it declined to apply *Blakely* to invalidate Kilgore's exceptional sentence and affirm the Court of Appeals dismissal of Kilgore's appeal.

The heart of the question here then is, is the rule established in Miller retroactive to McNeil's case? It is the State's position that it is not.

RCW 10.73.100 Collateral attack - When one year limit not applicable. This statute sets forth the criterion which would allow this court to consider this petition.....

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

- (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
- (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
- (3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;
- (4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
- (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.

Petitioner states his claim "warrants review and application pursuant RCW 10.73.100(4). This however is not possible in that McNeil

plead guilty and as indicated above subsection “4” is only applicable if the matter went to trial. It is not the State’s job to determine the applicable statutes however to facilitate review in this case Petitioner must obviously be basing his request on subsection “6.” However he does not indicate to this court how the decision in Miller is retroactively applicable to his case which was final over two decades before the decision in Miller.

In, In re Markel, 154 Wn.2d 262, 268-70, 111 P.3d 249 (2005) our Supreme Court addressed the retroactive application of “Crawford” the analysis is appropriate for this case:

The current incarnation of our retroactivity analysis was first summarized in St. Pierre as follows:

1. A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break from the past.

2. A new rule will not be given retroactive application to cases on collateral review except where either: (a) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (b) the rule requires the observance of procedures implicit in the concept of ordered liberty. 118 Wash.2d at 326, 823 P.2d 492 (citing Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); Teague v. Lane, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)).

In this case, part one of the analysis is inapplicable because the Markels long ago exhausted direct review and their cases are now final. Part two, subsection (a), is also inapplicable because Crawford did not announce a new rule of substantive law but, rather, articulated a

change in the procedures required under the Sixth Amendment's confrontation clause. Thus, the question presented is whether Crawford is a "new rule" of procedure "implicit in the concept of ordered liberty" under the so-called Teague analysis.

The United States Supreme Court has recently described the Teague analysis as "giv[ing] retroactive effect to only a small set of 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." "Schriro v. Summerlin, --- U.S. ---, 124 S.Ct. 2519, 2523, 159 L.Ed.2d 442 (2004) (quoting Saffle v. Parks, 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (quoting Teague, 489 U.S. at 311, 109 S.Ct. 1060)). Further, "the rule must be one 'without which the likelihood of an accurate conviction is seriously diminished.'" Id. (quoting Teague, 489 U.S. at 313, 109 S.Ct. 1060). Finally, the Court has noted that "[t]his class of rules is extremely narrow, and 'it is unlikely that any ... 'ha[s] yet to emerge.'" " [2] Id. (quoting Tyler v. Cain, 533 U.S. 656, 667 n. 7, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001) (quoting Sawyer v. Smith, 497 U.S. 227, 243, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990))). It is with these principles in mind that we evaluate the possible retroactive application of Crawford.

Petitioner can not demonstrate to this court that under the current incarnation of this court's retroactivity analysis that Miller is applicable to his case in that 1.) A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break from the past, because his case has been closed for over two

decades and 2.) given the information set forth by Petitioner he has not nor can he demonstrate that Miller is a new rule.

Petitioner can has not provided this court with facts, information or circumstances which would provide this court with a method to apply Miller retroactively. As stated above “It is well settle that a new rule will not be given retroactive application to cases on collateral review except where either: (a) the new rule places certain kinds of primary, private individual conduct beyond the power of the state to proscribe, or (b) the rule requires the observance of procedures implicit in the concept of ordered liberty. It is clear that Miller does not meet the test set forth in (a) or (b) above. In re Haghghi, 167 Wn.App. 712, 276 P.3d 311 (2012) discussed the application of the retroactivity with regard to the admission of evidence at trial. The court stated:

We turn next to the retroactivity question. There is no dispute that *Winterstein* involves no “primary, private individual conduct beyond the power of the state to proscribe.” *Winterstein* applies retroactively only if it “requires the observance of procedures implicit in the concept of ordered liberty.” *Evans*, 154 Wash.2d at 444, 114 P.3d 627 (quoting *St. Pierre*, 118 Wash.2d at 326, 823 P.2d 492. This exception is reserved for only a “small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.”) *Markel*, 154 Wash.2d at 269, 111 P.3d 249 (internal quotation marks omitted) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S.Ct. 2519, 159 L.Ed.2d

442 (2004)). The United States Supreme Court has noted, " 'This class of rules is extremely narrow, and it is unlikely that any ... ha[s] yet to emerge.' " *Markel*, 154 Wash.2d at 269, 111 P.3d 294 (internal quotation marks omitted) (alterations in original) (quoting *Summerlin*, 542 U.S. at 352, 124 S.Ct. 2519); see also *In re Pers. Restraint Petition of Rhome*, 172 Wash.2d 654, 666, 260 P.3d 874 (2011).

"That a new procedural rule is fundamental in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is *seriously* diminished.' " *Rhome*, 172 Wash.2d at 667, 260 P.3d 874 (internal quotation marks omitted) (quoting *Summerlin*, 542 U.S. at 352, 124 S.Ct. 2519). Such a rule must " ' alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.' " *Rhome*, 172 Wash.2d at 667, 260 P.3d 874 (emphasis omitted) (internal quotations omitted) (quoting *Sawyer v. Smith*, 497 U.S. 227, 242, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990)).

We conclude *Winterstein* does not meet the requirements for a watershed rule of criminal procedure. The exclusion of relevant evidence is not a rule " "without which the likelihood of an accurate conviction is *seriously* diminished.' " *Rhome*, 172 Wash.2d at 667, 260 P.3d 874 (internal quotation marks omitted) (quoting *Summerlin*, 542 U.S. at 352, 124 S.Ct. 2519). The *Winterstein* court held the inevitable discovery rule unconstitutional premised on Washington Constitution, article I, section 7's guarantee of privacy and personal rights with no express limitations. See *Winterstein*, 167 Wash.2d at 631-36, 220 P.3d 1226. Nor does *Winterstein* " " alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.' " *Rhome*, 172 Wash.2d at 667, 260 P.3d 874 (emphasis omitted) (internal quotation marks omitted) (quoting *Sawyer*, 497 U.S. at 242, 110 S.Ct. 2822). As discussed above, *Winterstein* specifically addresses privacy under Washington's Constitution. That the United States Supreme Court adheres to the inevitable discovery exception to the exclusionary rule supports our conclusion that no bedrock rule of fundamental fairness is implicated here. (Haghighi at 720-22, footnotes omitted.)

It is the position of the State that Miller does not meet the test set out above for it to be applied retroactively. While it has established a new method of addressing the issue of LWOP in a case where a juvenile has committed an offense this is a procedural matter not a new rule of substantive law.

The State has reviewed most if not all of the approximately 75 cases that have cited Miller. To date there would appear to be eighteen states and three circuit courts of review that have addressed or cited Miller in opinions.

The State has found that two State courts of review have determined that Miller should not be retroactively applied; People v. Carp, 2012 WL 5846553 (Mich. App. Nov. 15, 2012); Gonzalez v. State, 1D12-3153 (FLCA1) Geter v. State, No. 3D12-1736, 2012 WL 4448860 (Fla. Ct. App. 3d Dist. Sept. 27, 2012)

The State has found two cases from Illinois where the court of review indicated that Miller should be retroactively applied; People v. Morfin, 2012 IL App (1st) 103568, 1-10-3568 (ILCA1); People v. Williams, 2012 IL App (1st) 111145, 1-11-1145, 1-11-2251 (ILCA1)

There have been courts in some of the other jurisdiction where Miller has been raise that have order the case remanded for

further action by the trial court. Some such as State v. Williams, 12-KA-355 (LACA5) STATE OF LOUISIANA, No. 12-KA-355, Court of Appeals of Louisiana, Fifth Circuit December 11, 2012, where the court took note of Miller and remanded so that the trial court could address portions of the sentence so that they would be “in conformity with Miller v. Alabama.”

After a review of all of the case that address the issue or retroactivity the State concurs with the opinions issued by the Courts in both Florida and Michigan and disagrees with the opinion from Illinois. It would appear from the analysis of the Michigan opinion that the facts, circumstances and law of that State resemble that of this case.

Carp’s case like McNeil’s was before the court on collateral review. Carp’s conviction occurred in 2006 and he had actively undertaken review of his case on numerous occasions. The opinion in People v. Carp is a masterfully written opinion which in its forty-one pages analyzes Miller and the application of retroactivity back to Linkletter v Walker, 381 U.S. 618; 85 S.Ct. 1731; 14 L.Ed.2d 601 (1965), abrogated in part Davis v United States, ___ US ___; 131 S.Ct. 2419; 180 L.Ed.2d 285 (2011). The

State will not attempt to set forth, in the body of this response, the analysis in Carp.

The State has included a lengthy portion of the Carp opinion that directly addresses the retroactive application of Miller in Appendix 'B.'

It is clear that there is a actual split in the application of Miller. It would appear the two methods to address or reconcile these disparate opinions are 1) additional direction from the Supreme Court of the United States or 2) a "fix" by our State legislature and or the legislatures of the other forty-nine states.

The State has petitioned this Court on two occasions for leave to stay this case pending the upcoming session of the Washington State Legislature. There is a proposed bill that has a prime sponsor that will be presented to the legislature. This bill was previously attached to the State's motion for Stay. That proposed bill has once again been attached to this Response as Appendix 'C.'

E. CONCLUSION

Petition has not presented this court with a basis to allow the retroactive application of Miller to his case. This case has been finalized for nearly twenty-two years. While it is obvious that Miller must be

applied to any case not finalized at the time Miller was decided it is equally clear that there is no legal basis for the reasoning in Miller to be applied retroactively to any case that was finalized at the time Miller was decided. Further, if this court determines that the edicts of Miller should be applied to McNeil's case this court must also set forth a method and means by which that should occur. Due to the "mandatory" nature of the sentence required in this case this court will have to "acknowledge that "a court's constitutional obligation is to interpret, not rewrite, the law" and that "[a]ny responsibility to rewrite the statutes lies with the Legislature." Carp supra. The court in Carp went on to state;

While cognizant of our role we also recognize our duty to the trial courts that will face sentencing issues on pending cases and which can be anticipated on remand. We must, we believe, provide guidance to these trial courts to assure a consistency of approach until the Legislature can respond by reworking the sentencing scheme for juveniles in Michigan to accord with *Miller*. We urge the Legislature to take up their task quickly in this matter. But we find it unacceptable in the interim to simply remand cases to the trial courts for resentencing. Without such guidance, the trial courts will be caught between the *Miller* Court's ruling that a mandatory life sentence without parole for a juvenile convicted of homicide is constitutionally defective while simultaneously required by the current statutory scheme in Michigan to impose such a sentence.

The State would once again urge this court to Stay consideration of this issue pending action by the Washington State Legislature on the Draft

Bill proffered by the Washington State Association of Prosecuting Attorney's. This bill, attached to this Reply, addresses all cases involving juvenile conviction where LWOP has or must be imposed, past, present and future. Allowing the Legislature to address this issue will guarantee the uniform application of law to all cases that must be addressed based on the opinion set forth in Miller.

Respectfully submitted this 27th day of January 2011.

s/ David B. Trefry
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DECLARATION OF SERVICE

I, David B. Trefry state that on December 27, 2012, mailed a copy of the State's Reply by First Class Mail to Russell Duane McNeil DOC #957470, Airway Heights Corrections Center, P. O. Box 2049, Airway Heights, WA 99001. Appendix 'A' has been submitted to this court and to Petitioner on a compact disc due to the enormous size of that file. This compact disc has been sent on this date, under separate cover, to this court.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27th day of December, 2012 at Spokane, Washington.

s/David B. Trefry
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APPENDIX 'A'

(PETITIONER HAS NOT SUPPLIED ANY RECORD TO THIS COURT. THEREFORE THE STATE HAS FILED THE ENTIRE RECORD CONTAINED IN THE SUPERIOR COURT CLERKS OFFICE, AS AN APPENDIX, IN AN ELECTRONIC FORMAT DUE TO ITS LENGTH.)

APPENDIX 'B'

People v. Carp, 307758 (MICA)

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,

v.

RAYMOND CURTIS CARP, Defendant-Appellant.

No. 307758

Court of Appeals of Michigan

November 15, 2012

St. Clair Circuit Court LC No. 06-001700-FC

...

Applying these standards, it is uncontested that *Miller* falls within the definition of a "new rule" because it "was not '*dictated*' by precedent existing at the time the defendant's conviction became final."^[99] "[T]here can be no dispute that a decision announces a new rule if it expressly overrules a prior decision."^[100] While not contested, the characterization of the *Miller* decision as comprising a new rule is of importance because:

When a decision of this Court results in a "new rule," that rule applies to all criminal cases still pending on direct review. As to convictions that are already final, however, the rule applies only in limited circumstances. New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. . . . Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him.

New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." That a new procedural rule is "fundamental" in some abstract sense is not enough; the rule must be one "without which the likelihood of an accurate conviction is seriously

diminished." This class of rules is extremely narrow, and "it is unlikely that any . . . 'ha[s] yet to emerge."^[101]

There is no dispute within this Court, by the litigants involved in this appeal or premised in federal law that *Miller* is applicable to all cases "pending on direct review or not yet final."^[102] What remains for this Court to determine is whether *Miller* is also to be applied retroactively to those cases on collateral review.

Having determined that *Miller* comprises a new rule, the next step in the analysis is for this Court to discern whether the new rule is substantive or procedural in nature; and if procedural whether it falls within a recognized exception to the rule of non-retroactivity. As noted, our decision whether *Miller* is to be applied retroactively to cases on collateral review will be dispositive to Carp's appeal. Carp's appeal is, without question, before us on collateral review. If *Miller's* new rule is substantive, we can apply it retroactively in such collateral review to consider the merits of Carp's appeal. If, however, *Miller's* new rule is procedural only and fails to meet any of the delineated *Teague* exceptions, then we cannot apply it retroactively to Carp's appeal.

While the "distinction between substance and procedure is an important one"^[103] it is not necessarily always a simple matter to divine.^[104] The Supreme Court has indicated that decisions of "criminal procedure" encompass those which implicate the functioning of the criminal trial process. Retroactivity of new procedural rules is severely limited as only substantive new rules or decisions of "procedure" that incorporate into the criminal trial process a mechanism "without [which] the likelihood of an accurate conviction is seriously diminished, " referred to as watershed rules, are to be applied retroactively.^[105] Only these two exceptions have been identified to the "general rule of nonretroactivity for cases on collateral review."^[106] In summary, as described by the *Teague* Court:

First, a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Second, a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'"^[107]

Decisions characterized as comprising "substantive criminal law" extend beyond issues of procedural function and address the meaning, scope and application of substantive criminal statutes.^[108] In contrast, *Teague* has established that a new rule is procedural if it impacts the

operation of the criminal trial process.^[109] By way of clarification, "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. In contrast, rules that regulate only the manner of determining the defendant's culpability are procedural."^[110]

Examining *Miller's* language and historical precedents, we find that it is procedural in nature. We recognize that *Roper* and *Graham* "establish[ed] that children are constitutionally different from adults for purposes of sentencing."^[111] And unlike its predecessors *Miller* specifically eschews a categorical ban on sentencing juveniles to life in prison without parole.^[112] The *Miller* Court indicated that its ruling was procedural in nature, stating, "But where, as here, this Court *does not categorically bar* a penalty, but instead *requires only that a sentence follow a certain process*, this Court has not scrutinized or relied on legislative enactments in the same way."^[113] Targeted prohibitions are by definition less restrictive than a categorical ban.^[114] While the Court opined that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," it specifically did not "foreclose a sentencer's ability to make that judgment in homicide cases. . . ."^[115] When stating its ruling, the Court reiterated:

Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments.^[116]

Consistent with the Court's reference and reliance on its earlier decisions, *Graham* justified and distinguished its imposition of a categorical ban of a mandatory sentence of life without parole for non-homicide offenders by indicating:

The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. There is a line "between homicide and other serious violent offenses against the individual." Serious nonhomicide crimes "may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' . . . they cannot be compared to murder in their 'severity and irrevocability.'" This is because "[l]ife is over for the victim of the

murderer, " but for the victim of even a very serious nonhomicide crime, "life . . . is not over and normally is not beyond repair." Although an offense like robbery or rape is "a serious crime deserving serious punishment, " those crimes differ from homicide crimes in a moral sense.^[117]

In *Graham* the Court drew a line and distinguished between homicide and non-homicide juvenile offenders and the sentences that could be imposed in conformance with the Eighth Amendment. That distinction was reasserted in the *Miller* Court's refusal to impose a categorical ban regarding the sentencing of juvenile homicide offenders to life in prison without parole.

Our determination that *Miller* does not comprise a substantive new rule and, therefore, is not subject to retroactive application for cases on collateral review, is supported by the fact that the ruling does not place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."^[118] *Miller* does not alter the elements necessary for a homicide conviction. Rather it simply necessitates the consideration of certain factors, when juveniles are involved, in sentencing. In other words, *Miller* is not substantive as it does not serve to "alter[] the range of conduct or class of persons that the law punishes, "^[119]merely the manner in which a punishment may be imposed. Juveniles can still be subject to a sentence of life in prison without parole. It is simply the manner and factors to be considered in the imposition of that particular sentence that *Miller* dictates, rendering the ruling procedural and not substantive in nature.

This does not, however, end our inquiry. While *Miller* does not meet the substantive exception recognized in *Teague*, a second exception exists, which may render a new procedural rule retroactive on collateral review. "A new rule applies retroactively in a collateral proceeding only if . . . the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."^[120] "In order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."^[121] In applying these requirements it is instructive to review *Gideon v Wainwright*^[122], as it comprises the only case to date "identified as qualifying under the [watershed] exception."^[123] The *Gideon* Court "held that counsel must be appointed for any indigent defendant charged

with a felony. When a defendant who wishes to be represented by counsel is denied representation, *Gideon* held, the risk of an unreliable verdict is intolerably high. The new rule announced in *Gideon* eliminated this risk.^[124]

The *Miller* ruling fails to satisfy the initial requirement pertaining to an "impermissibly large risk of an inaccurate conviction."^[125] *Miller* deals exclusively with sentencing and does not pertain to criminal trial procedures leading to conviction. *Miller* is focused solely on accuracy in sentencing and does not address or impinge on the accuracy of a juvenile defendant's conviction for a homicide offense. Addressing the second criteria that a "watershed" rule "must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding,"^[126] the decision in *Miller* is not comparable to the rule the Court announced in *Gideon*. The *Miller* ruling has a more restrictive scope of application and does not relate to the accuracy of the fact-finding process.^[127] Further, this second requirement to establish a "watershed rule" "cannot be met simply by showing that a new procedural rule is based on a 'bedrock' right."^[128]

The United States Supreme Court has consistently found "that the *Teague* bar to retroactivity applies to new rules that are based on 'bedrock' constitutional rights" and "[t]hat a new procedural rule is 'fundamental' in some abstract sense is not enough."^[129] Specifically, "in order to meet this requirement, a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding. In applying this requirement, we again look to the example of *Gideon*, and 'we have not hesitated to hold that less sweeping and fundamental rules' do not qualify."^[130] While *Miller* will indisputably have an impact on sentencing procedures for juveniles, it cannot be construed to qualify "in the same category with *Gideon* . . . [in having] effected a profound and sweeping change."^[131]

We must address one final issue of federal law before finalizing our determination on retroactivity. Carp and the amici here contend that the *Miller* Court impliedly rendered its decision retroactive through the remand of the companion case of *Jackson v Hobbes*, which they assert was clearly before the Court on collateral review. State convictions and sentences are final "for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied."^[132] Specifically, Carp contends that

in the companion case, Jackson had fully expended his appellate rights because the Arkansas Supreme Court had affirmed his convictions and, subsequently, dismissed his petition for habeas corpus.^[133] Yet, the *Miller* Court granted certiorari to both Miller and Jackson.^[134]

Contrary to Carp's contention, the mere fact that the Court remanded Jackson for resentencing does not constitute a ruling or determination on retroactivity. Specifically:

The only way the Supreme Court can, by itself, "lay out and construct" a rule's retroactive effect, or "cause" that effect "to exist, occur, or appear," is through a holding. The Supreme Court does not "ma[k]e" a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts. In such an event, any legal conclusion that is derived from the principles is developed by the lower court (or perhaps by a combination of courts), not by the Supreme Court. We thus conclude that a new rule is not "made retroactive to cases on collateral review" unless the Supreme Court holds it to be retroactive.^[135]

In addition:

The nonretroactivity principle *prevents* a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final. A threshold question in every habeas case, therefore, is whether the court is obligated to apply the *Teague* rule to the defendant's claim. We have recognized that the nonretroactivity principle "is not 'jurisdictional' in the sense that [federal courts] . . . must raise and decide the issue sua sponte." Thus, a federal court may, but need not, decline to apply *Teague* if the State does not argue it. But if the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court must apply *Teague* before considering the merits of the claim.^[136]

This is consistent with the Court's determination in *Schiro v Farley*, which provides:

Nevertheless, the State failed to argue *Teague* in its brief in opposition to the petition for a writ of certiorari. In deciding whether to grant certiorari in a particular case, we rely heavily on the submissions of the parties at the petition stage. If, as in this case, a legal issue appears to warrant review, we grant certiorari in the expectation of being able to decide that issue. Since a State can waive the *Teague* bar by not raising it, and since the propriety of reaching the merits of a dispute is an important consideration in deciding whether or not to grant certiorari, the State's omission of any

Teague defense at the petition stage is significant. Although we undoubtedly have the discretion to reach the State's *Teague* argument, we will not do so in these circumstances.^[137]

In *Jackson*, because the State did not raise the issue of retroactivity, the necessary predicate for the Court to resolve the question of retroactivity was waived. Hence, merely because *Jackson* was before the Court on collateral review is not dispositive on the issue of retroactivity.

Before concluding our analysis that *Miller* is not retroactive under federal law, we must also address whether Michigan law would require its retroactive application. At the outset, we note, "A state may accord broader effect to a new rule of criminal procedure than federal retroactivity jurisprudence accords."^[138] We also note that the Michigan Supreme Court has stated, "Michigan law has regularly declined to apply new rules of criminal procedure to cases in which a defendant's conviction has become final."^[139] Our Supreme Court has delineated "three factors" in determining the retroactivity of a new rule of criminal procedure: "(1) the purpose of the new rule[]; (2) the general reliance on the old rule[]; and (3) the effect of retroactive application of the new rule on the administration of justice."^[140] Addressing the "purpose prong" as the first of the three factors to be considered our Supreme Court has stated that, "a law may be applied retroactively when it "concerns the ascertainment of guilt or innocence;" however, "a new rule of procedure . . . which does not affect the integrity of the fact-finding process should be given prospective effect."^[141] Because *Miller* is not concerned with "the ascertainment of guilt or innocence" and "does not affect the integrity of the fact-finding process,"^[142] this first prong militates against retroactivity.

Under the second prong, "a defendant who relied on the old rule . . . must also have *suffered actual harm*. . . ."^[143] While undoubtedly some defendants could receive sentencing relief should we apply *Miller* retroactively, "this would be true of extending any new rule retroactively, yet this is not generally done."^[144] In this instance, there is no guarantee that Carp or any defendant would receive relief as *Miller* is not a categorical ban of life without parole sentences. Our Supreme Court implies that even if this prong is favorable to a defendant, it is not dispositive to the issue of retroactivity. "Instead, we must consider, as best as possible, the extent of the detrimental reliance on the old rule, and then balance this against the other *Sexton* factors, as well as against the fact that

each defendant . . . has received all the rights under the law to which he or she was entitled at the time."^[145]

Our Supreme Court has indicated that the final prong pertaining to the effect of retroactive application on the administration of justice involves a determination of whether "[t]he state's strong interest in the finality of the criminal justice process would be undermined."^[146] Citing federal decisions, the *Maxson* Court opined:

"[F]inality of state convictions is a state interest . . . that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts." The principle of finality "is essential to the operation of our criminal justice system." The state's interest in finality discourages the advent of new rules from "continually forc[ing] the State[] to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards[.]"^[147]

Here, while undoubtedly retroactive application could result in a number of juveniles convicted of homicide and sentenced under the mandatory scheme of life in prison without parole to some relief if resentenced there exists a commensurate concern regarding the impact of these potential appeals on our limited judicial resources. Consistent with our Supreme Court's decision in *Maxson*, "it is our judgment that those resources would be better preserved for defendants currently charged [or pending on direct review]—some of whom may be . . . entitled to relief."^[148] Particularly when viewed in conjunction with our determination under federal law, we find that *Miller* is not subject to retroactive application to cases on collateral review.

Finally, while lacking precedential value, we note that Florida appellate courts have recently reached the same conclusion regarding the retroactive application of *Miller* to cases on collateral review.^[149] While the analysis of the Florida courts is of limited value as relying almost exclusively on state law, we find the reasoning, analysis and its ultimate conclusions to be instructive and consistent with that of this Court.^[150]

^[99] *Id.* at 416 (citation omitted).

^[100] *Graham*, 506 U.S. at 467.

^[101] *Schriro v Summerlin*, 542 U.S. 348, 351-352; 124 S.Ct. 2519; 159 L.Ed.2d 442 (2004) (internal citations and quotation marks omitted).

[102] *Teague*, 489 U.S. at 304-305; see also *Davis v United States*, ___ US ___; 131 S.Ct. 2419, 2430; 180 L.Ed.2d 285 (2011).

[103] *Bousley v United States*, 523 U.S. 614, 620; 118 S.Ct. 1604; 140 L.Ed.2d 828 (1998).

[104] *Robinson v Neil*, 409 U.S. 505, 509; 93 S.Ct. 876; 35 L.Ed.2d 29 (1973).

[105] *Bousley*, 523 U.S. at 620, quoting *Teague*, 489 U.S. at 313.

[106] *Teague*, 489 U.S. at 307.

[107] *Id.*

[108] *Bousley*, 523 U.S. at 620. See also *Davis v United States*, 417 U.S. 333, 346; 94 S.Ct. 2298; 41 L.Ed.2d 109 (1974) (indicating that included within the definition of "substantive" are those decisions that remove primary conduct from the purview of criminal punishment).

[109] *Bousley*, 523 U.S. at 620.

[110] *Schriro*, 542 U.S. at 353 (citations omitted).

[111] *Miller*, 132 S.Ct. at 2464.

[112] *Id.* at 2459, 2469.

[113] *Id.* at 2459 (emphasis added).

[114] See *United States v Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815; 120 S.Ct. 1878; 146 L.Ed.2d 865 (2000).

[115] *Miller*, 132 S.Ct. at 2469.

[116] *Id.* at 2471.

[117] *Graham*, 130 S.Ct. at 2027 (citations omitted).

[118] *Teague*, 489 U.S. at 307 (citation omitted).

[119] *Schriro*, 542 U.S. at 353.

[120] *Whorton*, 549 U.S. at 416, citing *Saffle v Parks*, 494 U.S. 484, 495; 110 S.Ct. 1257; 108 L.Ed.2d 415 (1990), quoting *Teague*, 489 U.S. at 311.

- [121] *Whorton*, 549 U.S. at 418 (internal citations and quotation marks omitted).
- [122] *Gideon*, 372 U.S. at 335.
- [123] *Whorton*, 549 U.S. at 419.
- [124] *Id.*
- [125] *Id.* at 418.
- [126] *Id.* at 418 (internal citations and quotation marks omitted).
- [127] *Id.* at 419.
- [128] *Id.* at 420-421.
- [129] *Id.* at 421 (citations omitted).
- [130] *Id.* (citations omitted).
- [131] *Id.* (citations and quotation marks omitted).
- [132] *Caspari v Bohlen*, 510 U.S. 383, 390; 114 S.Ct. 948; 127 L.Ed.2d 236 (1994).
- [133] *Miller*, 132 S.Ct. at 2461.
- [134] *Id.* at 2463.
- [135] *Tyler v Cain*, 533 U.S. 656, 663; 121 S.Ct. 2478; 150 L.Ed.2d 632 (2001) (footnotes omitted).
- [136] *Caspari*, 510 U.S. at 389 (citations omitted, emphasis in original).
- [137] *Schiro v Farley*, 510 U.S. 222, 229; 114 S.Ct. 783; 127 L.Ed.2d 47 (1994) (citations omitted).
- [138] *People v Maxson*, 482 Mich. 385, 392; 759 N.W.2d 817 (2008), citing *Danforth*, 552 U.S. at 128.
- [139] *Maxson*, 482 Mich. at 392-393.
- [140] *Id.* at 393 (citation omitted).
- [141] *Id.*, citing *People v Sexton*, 458 Mich. 43, 63; 580 N.W.2d 404 (1998), quoting *People v Young*, 410 Mich. 363, 367; 301 N.W.2d 802 (1981).

[142] *Maxson*, 482 Mich. at 393.

[143] *Id.* at 396 (emphasis in original).

[144] *Id.* at 397.

[145] *Id.*

[146] *Id.* at 397-398.

[147] *Id.* at 398 (citations omitted).

[148] *Id.* at 398-399.

[149] *Geter v Florida*, ___ So.3d ___ (Fla App, 3 Dist, 2012) (WL 4448860); see also *Gonzalez v Florida*, ___ So.3d (Fla App, 1 Dist, 2012) (WL 5233454).

[150] *People v Conrad*, 148 Mich.App. 433, 439; 385 N.W.2d 277 (1986).

APPENDIX 'C'

BILL REQUEST - CODE REVISER'S OFFICE

BILL REQ. #: S-0037.2/13 2nd draft

ATTY/TYPIST: AI:lel

BRIEF DESCRIPTION: Concerning persons sentenced for offenses committed prior to reaching eighteen years of age.

AN ACT Relating to persons sentenced for offenses committed prior to reaching eighteen years of age; amending RCW 9.94A.510, 9.94A.540, 9.94A.6332, 9.94A.729, 9.95.425, 9.95.430, 9.95.435, 9.95.440, and 10.95.030; adding a new section to chapter 9.94A RCW; adding new sections to chapter 10.95 RCW; prescribing penalties; providing an effective date; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 9.94A.510 and 2002 c 290 s 10 are each amended to read as follows:

TABLE 1

Sentencing Grid

SERIOUSNESS

LEVEL

OFFENDER SCORE

	0	1	2	3	4	5	6	7	8	9 or more
XVII	<u>Life sentence without parole/death penalty for offenders over the age of eighteen. For offenders under the age of eighteen, a term of thirty years to life.</u>									
XV	23y4m	24y4m	25y4m	26y4m	27y4m	28y4m	30y4m	32y10m	36y	40y
	240-	250-	261-	271-	281-	291-	312-	338-	370-	411-
	320	333	347	361	374	388	416	450	493	548
XIV	14y4m	15y4m	16y2m	17y	17y11m	18y9m	20y5m	22y2m	25y7m	29y
	123-	134-	144-	154-	165-	175-	195-	216-	257-	298-
	220	234	244	254	265	275	295	316	357	397
XIII	12y	13y	14y	15y	16y	17y	19y	21y	25y	29y
	123-	134-	144-	154-	165-	175-	195-	216-	257-	298-
	164	178	192	205	219	233	260	288	342	397
XII	9y	9y11m	10y9m	11y8m	12y6m	13y5m	15y9m	17y3m	20y3m	23y3m
	93-	102-	111-	120-	129-	138-	162-	178-	209-	240-
	123	136	147	160	171	184	216	236	277	318
XI	7y6m	8y4m	9y2m	9y11m	10y9m	11y7m	14y2m	15y5m	17y11m	20y5m
	78-	86-	95-	102-	111-	120-	146-	159-	185-	210-
	102	114	125	136	147	158	194	211	245	280
X	5y	5y6m	6y	6y6m	7y	7y6m	9y6m	10y6m	12y6m	14y6m
	51-	57-	62-	67-	72-	77-	98-	108-	129-	149-
	68	75	82	89	96	102	130	144	171	198

IX	3y	3y6m	4y	4y6m	5y	5y6m	7y6m	8y6m	10y6m	12y6m
	31-	36-	41-	46-	51-	57-	77-	87-	108-	129-
	41	48	54	61	68	75	102	116	144	171
VIII	2y	2y6m	3y	3y6m	4y	4y6m	6y6m	7y6m	8y6m	10y6m
	21-	26-	31-	36-	41-	46-	67-	77-	87-	108-
	27	34	41	48	54	61	89	102	116	144
VII	18m	2y	2y6m	3y	3y6m	4y	5y6m	6y6m	7y6m	8y6m
	15-	21-	26-	31-	36-	41-	57-	67-	77-	87-
	20	27	34	41	48	54	75	89	102	116
VI	13m	18m	2y	2y6m	3y	3y6m	4y6m	5y6m	6y6m	7y6m
	12+-	15-	21-	26-	31-	36-	46-	57-	67-	77-
	14	20	27	34	41	48	61	75	89	102
V	9m	13m	15m	18m	2y2m	3y2m	4y	5y	6y	7y
	6-	12+-	13-	15-	22-	33-	41-	51-	62-	72-
	12	14	17	20	29	43	54	68	82	96
IV	6m	9m	13m	15m	18m	2y2m	3y2m	4y2m	5y2m	6y2m
	3-	6-	12+-	13-	15-	22-	33-	43-	53-	63-
	9	12	14	17	20	29	43	57	70	84
III	2m	5m	8m	11m	14m	20m	2y2m	3y2m	4y2m	5y
	1-	3-	4-	9-	12+-	17-	22-	33-	43-	51-
	3	8	12	12	16	22	29	43	57	68
II		4m	6m	8m	13m	16m	20m	2y2m	3y2m	4y2m
	0-90	2-	3-	4-	12+-	14-	17-	22-	33-	43-
	Days	6	9	12	14	18	22	29	43	57
I			3m	4m	5m	8m	13m	16m	20m	2y2m
	0-60	0-90	2-	2-	3-	4-	12+-	14-	17-	22-
	Days	Days	5	6	8	12	14	18	22	29

Numbers in the first horizontal row of each seriousness category represent sentencing midpoints in years(y) and months(m). Numbers in the second and third rows represent standard sentence ranges in months, or in days if so designated. 12+ equals one year and one day.

Sec. 2. RCW 9.94A.540 and 2005 c 437 s 2 are each amended to read as follows:

(1) Except to the extent provided in subsection (3) of this section, the following minimum terms of total confinement are mandatory and shall not be varied or modified under RCW 9.94A.535:

(a) 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.

(b) An offender convicted of the crime of assault in the first degree or assault of a child in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years.

(c) An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than five years.

(d) An offender convicted of the crime of sexually violent predator escape shall be sentenced to a minimum term of total confinement not less than sixty months.

(e) An offender convicted of the crime of aggravated first degree murder for a murder that was committed prior to the offender's eighteenth birthday shall be sentenced to a term of total confinement not less than thirty years.

(2) During such minimum terms of total confinement, no offender subject to the provisions of this section is eligible for community custody, earned release time, furlough, home detention, partial confinement, work

crew, work release, or any other form of early release authorized under RCW 9.94A.728, or any other form of authorized leave of absence from the correctional facility while not in the direct custody of a corrections officer. The provisions of this subsection shall not apply: (a) In the case of an offender in need of emergency medical treatment; (b) for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree; or (c) for an extraordinary medical placement when authorized under RCW 9.94A.728(~~(4)~~) (3).

(3)(a) Subsection (1)(a) through (d) of this section shall not be applied in sentencing of juveniles tried as adults pursuant to RCW 13.04.030(1)(e)(i).

(b) This subsection (3) applies only to crimes committed on or after July 24, 2005.

Sec. 3. RCW 9.94A.6332 and 2010 c 224 s 11 are each amended to read as follows:

The procedure for imposing sanctions for violations of sentence conditions or requirements is as follows:

(1) If the offender was sentenced under the drug offender sentencing alternative, any sanctions shall be imposed by the department or the court pursuant to RCW 9.94A.660.

(2) If the offender was sentenced under the special sex offender sentencing alternative, any sanctions shall be imposed by the department or the court pursuant to RCW 9.94A.670.

(3) If the offender was sentenced under the parenting sentencing alternative, any sanctions shall be imposed by the department or by the court pursuant to RCW 9.94A.655.

(4) If a sex offender was sentenced pursuant to RCW 9.94A.507, any sanctions shall be imposed by the board pursuant to RCW 9.95.435.

(5) If the offender was released pursuant to section 10 of this act, any sanctions shall be imposed by the board pursuant to RCW 9.95.435.

(6) If the offender was sentenced pursuant to RCW 10.95.030(3) or section 11 of this act, any sanctions shall be imposed by the board pursuant to _____ RCW _____ 9.95.435.

(7) In any other case, if the offender is being supervised by the department, any sanctions shall be imposed by the department pursuant to RCW 9.94A.737. If a probationer is being supervised by the department pursuant to RCW 9.92.060, 9.95.204, or 9.95.210, upon receipt of a violation hearing report from the department, the court retains any authority that those statutes provide to respond to a probationer's violation of conditions.

~~((6))~~ (8) If the offender is not being supervised by the department, any sanctions shall be imposed by the court pursuant to RCW 9.94A.6333.

Sec. 4. RCW 9.94A.729 and 2011 1st sp.s. c 40 s 4 are each amended to read as follows:

(1)(a) The term of the sentence of an offender committed to a correctional facility operated by the department may be reduced by earned release time in accordance with procedures that shall be developed and adopted by the correctional agency having jurisdiction in which the offender is confined. The earned release time shall be for good behavior and good performance, as determined by the correctional agency having jurisdiction. The correctional agency shall not credit the offender with earned release credits in advance of the offender actually earning the credits.

(b) Any program established pursuant to this section shall allow an offender to earn early release credits for presentence incarceration. If an

offender is transferred from a county jail to the department, the administrator of a county jail facility shall certify to the department the amount of time spent in custody at the facility and the amount of earned release time. The department may approve a jail certification from a correctional agency that calculates earned release time based on the actual amount of confinement time served by the offender before sentencing when an erroneous calculation of confinement time served by the offender before sentencing appears on the judgment and sentence.

(2) An offender who has been convicted of a felony committed after July 23, 1995, that involves any applicable deadly weapon enhancements under RCW 9.94A.533 (3) or (4), or both, shall not receive any good time credits or earned release time for that portion of his or her sentence that results from any deadly weapon enhancements.

(3) An offender may earn early release time as follows:

(a) In the case of an offender sentenced pursuant to RCW 10.95.030(3) or section 11 of this act, the aggregate earned release time may not exceed ten percent of the sentence.

(b) In the case of an offender convicted of a serious violent offense, or a sex offense that is a class A felony, committed on or after July 1, 1990, and before July 1, 2003, the aggregate earned release time may not exceed fifteen percent of the sentence.

~~((b))~~ (c) In the case of an offender convicted of a serious violent offense, or a sex offense that is a class A felony, committed on or after July 1, 2003, the aggregate earned release time may not exceed ten percent of the sentence.

~~((c))~~ (d) An offender is qualified to earn up to fifty percent of aggregate earned release time if he or she:

(i) Is not classified as an offender who is at a high risk to reoffend as provided in subsection (4) of this section;

(ii) Is not confined pursuant to a sentence for:

(A) A sex offense;

(B) A violent offense;

(C) A crime against persons as defined in RCW 9.94A.411;

(D) A felony that is domestic violence as defined in RCW 10.99.020;

(E) A violation of RCW 9A.52.025 (residential burglary);

(F) A violation of, or an attempt, solicitation, or conspiracy to violate, RCW 69.50.401 by manufacture or delivery or possession with intent to deliver methamphetamine; or

(G) A violation of, or an attempt, solicitation, or conspiracy to violate, RCW 69.50.406 (delivery of a controlled substance to a minor);

(iii) Has no prior conviction for the offenses listed in ~~((e))~~ (d)(ii) of this subsection;

(iv) Participates in programming or activities as directed by the offender's individual reentry plan as provided under RCW 72.09.270 to the extent that such programming or activities are made available by the department; and

(v) Has not committed a new felony after July 22, 2007, while under community custody.

~~((d))~~ (e) In no other case shall the aggregate earned release time exceed one-third of the total sentence.

(4) The department shall perform a risk assessment of each offender who may qualify for earned early release under subsection ~~(3)~~~~((e))~~ (d) of this section utilizing the risk assessment tool recommended by the Washington state institute for public policy. Subsection ~~(3)~~~~((e))~~ (d) of this section does not apply to offenders convicted after July 1, 2010.

(5)(a) A person who is eligible for earned early release as provided in this section and who will be supervised by the department pursuant to RCW 9.94A.501 or 9.94A.5011, shall be transferred to community custody in lieu of earned release time;

(b) The department shall, as a part of its program for release to the community in lieu of earned release, require the offender to propose a release plan that includes an approved residence and living arrangement. All offenders with community custody terms eligible for release to community custody in lieu of earned release shall provide an approved residence and living arrangement prior to release to the community;

(c) The department may deny transfer to community custody in lieu of earned release time if the department determines an offender's release plan, including proposed residence location and living arrangements, may violate the conditions of the sentence or conditions of supervision, place the offender at risk to violate the conditions of the sentence, place the offender at risk to reoffend, or present a risk to victim safety or community safety. The department's authority under this section is independent of any court-ordered condition of sentence or statutory provision regarding conditions for community custody;

(d) If the department is unable to approve the offender's release plan, the department may do one or more of the following:

(i) Transfer an offender to partial confinement in lieu of earned early release for a period not to exceed three months. The three months in partial confinement is in addition to that portion of the offender's term of confinement that may be served in partial confinement as provided in RCW 9.94A.728(5);

(ii) Provide rental vouchers to the offender for a period not to exceed three months if rental assistance will result in an approved release plan. The

voucher must be provided in conjunction with additional transition support programming or services that enable an offender to participate in services including, but not limited to, substance abuse treatment, mental health treatment, sex offender treatment, educational programming, or employment programming;

(e) For each offender who is the recipient of a rental voucher, the department shall include, concurrent with the data that the department otherwise obtains and records, the housing status of the offender for the duration of the offender's supervision.

(6) An offender serving a term of confinement imposed under RCW 9.94A.670(5)(a) is not eligible for earned release credits under this section.

Sec. 5. RCW 9.95.425 and 2009 c 28 s 30 are each amended to read as follows:

(1) Whenever the board or a community corrections officer of this state has reason to believe an offender released under RCW 9.95.420, 10.95.030(3), or section 10 of this act has violated a condition of community custody or the laws of this state, any community corrections officer may arrest or cause the arrest and detention of the offender pending a determination by the board whether sanctions should be imposed or the offender's community custody should be revoked. The community corrections officer shall report all facts and circumstances surrounding the alleged violation to the board, with recommendations.

(2) If the board or the department causes the arrest or detention of an offender for a violation that does not amount to a new crime and the offender is arrested or detained by local law enforcement or in a local jail, the board or department, whichever caused the arrest or detention, shall be financially

responsible for local costs. Jail bed costs shall be allocated at the rate established under RCW 9.94A.740.

Sec. 6. RCW 9.95.430 and 2001 2nd sp.s. c 12 s 308 are each amended to read as follows:

Any offender released under RCW 9.95.420, 10.95.030(3), or section 10 of this act who is arrested and detained in physical custody by the authority of a community corrections officer, or upon the written order of the board, shall not be released from custody on bail or personal recognizance, except upon approval of the board and the issuance by the board of an order reinstating the offender's release on the same or modified conditions. All chiefs of police, marshals of cities and towns, sheriffs of counties, and all police, prison, and peace officers and constables shall execute any such order in the same manner as any ordinary criminal process.

Sec. 7. RCW 9.95.435 and 2007 c 363 s 3 are each amended to read as follows:

(1) If an offender released by the board under RCW 9.95.420, 10.95.030(3), or section 10 of this act violates any condition or requirement of community custody, the board may transfer the offender to a more restrictive confinement status to serve up to the remaining portion of the sentence, less credit for any period actually spent in community custody or in detention awaiting disposition of an alleged violation and subject to the limitations of subsection (2) of this section.

(2) Following the hearing specified in subsection (3) of this section, the board may impose sanctions such as work release, home detention with electronic monitoring, work crew, community restitution, inpatient treatment, daily reporting, curfew, educational or counseling sessions,

supervision enhanced through electronic monitoring, or any other sanctions available in the community, or may suspend the release and sanction up to sixty days' confinement in a local correctional facility for each violation, or revoke the release to community custody whenever an offender released by the board under RCW 9.95.420, 10.95.030(3), or section 10 of this act violates any condition or requirement of community custody.

(3) If an offender released by the board under RCW 9.95.420, 10.95.030(3), or section 10 of this act is accused of violating any condition or requirement of community custody, he or she is entitled to a hearing before the board or a designee of the board prior to the imposition of sanctions. The hearing shall be considered as offender disciplinary proceedings and shall not be subject to chapter 34.05 RCW. The board shall develop hearing procedures and a structure of graduated sanctions consistent with the hearing procedures and graduated sanctions developed pursuant to RCW 9.94A.737. The board may suspend the offender's release to community custody and confine the offender in a correctional institution owned, operated by, or operated under contract with the state prior to the hearing unless the offender has been arrested and confined for a new criminal offense.

(4) The hearing procedures required under subsection (3) of this section shall be developed by rule and include the following:

(a) Hearings shall be conducted by members or designees of the board unless the board enters into an agreement with the department to use the hearing officers established under RCW 9.94A.737;

(b) The board shall provide the offender with findings and conclusions which include the evidence relied upon, and the reasons the particular sanction was imposed. The board shall notify the offender of the right to

appeal the sanction and the right to file a personal restraint petition under court rules after the final decision of the board;

(c) The hearing shall be held unless waived by the offender, and shall be electronically recorded. For offenders not in total confinement, the hearing shall be held within thirty days of service of notice of the violation, but not less than twenty-four hours after notice of the violation. For offenders in total confinement, the hearing shall be held within thirty days of service of notice of the violation, but not less than twenty-four hours after notice of the violation. The board or its designee shall make a determination whether probable cause exists to believe the violation or violations occurred. The determination shall be made within forty-eight hours of receipt of the allegation;

(d) The offender shall have the right to: (i) Be present at the hearing; (ii) have the assistance of a person qualified to assist the offender in the hearing, appointed by the presiding hearing officer if the offender has a language or communications barrier; (iii) testify or remain silent; (iv) call witnesses and present documentary evidence; (v) question witnesses who appear and testify; and (vi) be represented by counsel if revocation of the release to community custody upon a finding of violation is a probable sanction for the violation. The board may not revoke the release to community custody of any offender who was not represented by counsel at the hearing, unless the offender has waived the right to counsel; and

(e) The sanction shall take effect if affirmed by the presiding hearing officer.

(5) Within seven days after the presiding hearing officer's decision, the offender may appeal the decision to the full board or to a panel of three reviewing examiners designated by the chair of the board or by the chair's designee. The sanction shall be reversed or modified if a majority of the

panel finds that the sanction was not reasonably related to any of the following: (a) The crime of conviction; (b) the violation committed; (c) the offender's risk of reoffending; or (d) the safety of the community.

(6) For purposes of this section, no finding of a violation of conditions may be based on unconfirmed or unconfirmable allegations.

Sec. 8. RCW 9.95.440 and 2008 c 231 s 45 are each amended to read as follows:

In the event the board suspends the release status of an offender released under RCW 9.95.420, 10.95.030(3), or section 10 of this act by reason of an alleged violation of a condition of release, or pending disposition of a new criminal charge, the board may nullify the suspension order and reinstate release under previous conditions or any new conditions the board determines advisable under RCW 9.94A.704. Before the board may nullify a suspension order and reinstate release, it shall determine that the best interests of society and the offender shall be served by such reinstatement rather than return to confinement.

Sec. 9. RCW 10.95.030 and 2010 c 94 s 3 are each amended to read as follows:

(1) Except as provided in subsections (2) and (3) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The

department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death. In no case, however, shall a person be sentenced to death if the person had an intellectual disability at the time the crime was committed, under the definition of intellectual disability set forth in (a) of this subsection. A diagnosis of intellectual disability shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of intellectual disabilities. The defense must establish an intellectual disability by a preponderance of the evidence and the court must make a finding as to the existence of an intellectual disability.

(a) "Intellectual disability" means the individual has: (i) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.

(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.

(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

(3) Any person convicted of the crime of aggravated first degree murder for an offense committed prior to the person's eighteenth birthday shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than thirty years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.

(a) A person sentenced under this subsection shall serve the sentence in a facility or institution operated, or utilized under contract, by the state. During the minimum term of total confinement, the person shall not be eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release authorized under RCW 9.94A.728, or any other form of authorized leave or absence from the correctional facility while not in the direct custody of a corrections officer. The provisions of this subsection shall not apply: (i) In the case of an offender in need of emergency medical treatment; or (ii) for an extraordinary medical placement when authorized under RCW 9.94A.728(3).

(b) Any person sentenced pursuant to this subsection shall be subject to community custody under the supervision of the department and the authority of the indeterminate sentence review board for any period of time the person is released from total confinement before the expiration of the maximum sentence. As part of any sentence under this subsection, the court shall require the person to comply with any conditions imposed by the board.

(c) No later than one hundred eighty days prior to the expiration of the person's minimum term, the department shall conduct, and the offender shall participate in, an examination of the person, incorporating methodologies that are recognized by experts in the prediction of dangerousness, and including a prediction of the probability that the person will engage in future criminal behavior if released on conditions to be set by the board. The board may consider a person's failure to participate in an evaluation under this subsection in determining whether to release the person. The board shall order the person released, under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released. If the board does not order the person released, the board shall set a new minimum term of at least five additional years. The board shall give public safety considerations the highest priority when making all discretionary decisions regarding the ability for release and conditions of release.

(d) In a hearing conducted under (c) of this subsection, the board shall provide opportunities for victims and survivors of victims of any crimes for which the offender has been convicted to present statements as set forth in RCW 7.69.032. The procedures for victim and survivor of victim input shall be developed by rule. To facilitate victim and survivor of victim involvement, county prosecutor's offices shall ensure that any victim impact statements and known contact information for victims of record and survivors of victims are forwarded as part of the judgment and sentence.

(e) An offender released by the board is subject to the supervision of the department for life. The department shall monitor the offender's compliance with conditions of community custody imposed by the court, department, or board, and promptly report any violations to the board. Any

violation of conditions of community custody established or modified by the board are subject to the provisions of RCW 9.95.425 through 9.95.440.

NEW SECTION. **Sec. 10.** A new section is added to chapter 9.94A RCW to read as follows:

(1) Notwithstanding any other provision of this chapter, any person convicted of one or more crimes committed prior to the person's eighteenth birthday may petition the indeterminate sentence review board for early release after serving no less than thirty years of total confinement, provided the person has not been convicted for any crime committed subsequent to the person's eighteenth birthday, the person has not committed a major violation in the twelve months prior to filing the petition for early release, and the current sentence was not imposed under RCW 10.95.030 or 9.94A.507.

(2) No later than one hundred eighty days from receipt of the petition for early release, the department shall conduct, and the offender shall participate in, an examination of the person, incorporating methodologies that are recognized by experts in the prediction of dangerousness, and including a prediction of the probability that the person will engage in future criminal behavior if released on conditions to be set by the board. The board may consider a person's failure to participate in an evaluation under this subsection in determining whether to release the person. The board shall order the person released under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released. The board shall give public safety considerations the highest priority when making all discretionary decisions regarding the ability for release and conditions of release.

(3) In a hearing conducted under subsection (2) of this section, the board shall provide opportunities for victims and survivors of victims of any crimes for which the offender has been convicted to present statements as set forth in RCW 7.69.032. The procedures for victim and survivor of victim input shall be developed by rule. To facilitate victim and survivor of victim involvement, county prosecutor's offices shall ensure that any victim impact statements and known contact information for victims of record and survivors of victims are forwarded as part of the judgment and sentence.

(4) An offender released by the board is subject to the supervision of the department for the length of the court imposed term of incarceration. The department shall monitor the offender's compliance with conditions of community custody imposed by the court, department, or board, and promptly report any violations to the board. Any violation of conditions of community custody established or modified by the board are subject to the provisions of RCW 9.95.425 through 9.95.440.

(5) An offender whose petition for release is denied may file a new petition for release five years from the date of denial.

NEW SECTION. **Sec. 11.** A new section is added to chapter 10.95 RCW to read as follows:

(1) A person, who was sentenced prior to June 1, 2013, to a term of life without the possibility of parole for an offense committed prior to their eighteenth birthday, shall be returned to the sentencing court or the sentencing court's successor for the setting of a minimum term. The court may exercise its discretion to set a minimum term of up to life. In no case may the minimum term be fixed at less than thirty years. A minimum term of life will render the person ineligible for parole or early release. Release

and supervision of a person who receives a minimum term of less than life will be governed by RCW 10.95.030(3).

(2) The court shall provide an opportunity for victims and survivors of victims of any crimes for which the offender has been convicted to present a statement personally or by representation.

(3) The court's order setting a minimum term is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986.

(4) If a person receives a minimum term sentence under this section, no motion for collateral attack on the judgment and sentence as defined by RCW 10.73.090(2) may be filed after entry of the order setting a minimum term, if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction, unless the petition or motion is based solely on one of the grounds set forth in RCW 10.73.100.

NEW SECTION. **Sec. 12.** A new section is added to chapter 10.95 RCW to read as follows:

Sections 1 through 9 of this act apply to all sentencing hearings conducted on or after June 1, 2013, regardless of the date of an offender's underlying offense.

NEW SECTION. **Sec. 13.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. 14.** This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect June 1, 2013.

OFFICE RECEPTIONIST, CLERK

To: David B. Trefry
Subject: RE: In re the PRP of McNeil 976541

RECEIVED 12-27-12

From: David B. Trefry [<mailto:TrefryLaw@WeGoWireless.com>]
Sent: Thursday, December 27, 2012 3:47 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: In re the PRP of McNeil 976541

Please find attached the State Reply to this PRP. Appendix 'A' has been mailed to this office under separate cover due to the size of that portion of this response.

David B. Trefry
Special Deputy Prosecuting Attorney