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SUPREME COURT
STATE OF WASHINGTON
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No. 88172-3

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of:

HERBERT CHIEF RICE, JR.,

Petitioner.

REPLY BRIEF

Suzanne Lee Elliott
Attorney for Petitioner
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

ORIGINAL

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I.
REPLY ARGUMENT

A. *MILLER* WAS A SIGNIFICANT CHANGE IN THE LAW

The State argues: “The actions of the Court in *Miller* where [sic] not significant.” Response at 10. The State says that all that *Miller* requires is that a sentencing court “take great care” in the imposition of life without the possibility of parole when the defendant is a juvenile at the time the crime is committed. *Id.* The State says:

This is no different than the legislative enactments in this State that require specific reports shall be supplied to the sentencing court prior to sentence being imposed many of which are presently set forth in RCW 9.94A.500.

Id. at 10-11.

This is a substantial misreading of *Miller*. In *Miller v. Alabama*, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), the U.S. Supreme Court held that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’” *Id.* at 2460. The Court based the ruling on the Eighth Amendment’s “concept of proportionality,” which is viewed “less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society.” *Id.* at 2463 (citations and internal quotation marks omitted). The Court summarized its rationale as follows:

[I]n imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Id. at 2468. Thus, a mandatory sentence of life without parole “poses too great a risk of disproportionate punishment.” *Id.* at 2469.

This is a significant change in the law.

B. *MILLER* ANNOUNCED A SUBSTANTIVE CHANGE IN THE LAW

The State maintains that *Miller* does not meet the first *Teague*¹ exception because the Supreme Court did not absolutely prohibit the

¹ *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334, *reh'g denied*, 490 U.S. 1031, 109 S.Ct. 1771, 104 L.Ed.2d 206 (1989).

imposition of life without parole under all circumstances. At least two courts disagree.

In *Illinois v. Morfin*, 2012 IL App (1st) 103568, 981 N.E.2d 1010 (2012), the intermediate appellate court found *Miller* to be retroactive under the first *Teague* exception.

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

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

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

Moreover, this court would find *Miller* retroactive on collateral review, because it is a new substantive rule, which “generally apply retroactively.” *Schiro v. Summerlin*, 542 U.S. 348, 351-52 (2004). “A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.” *Id.* at 353. “Such rules apply retroactively because they ‘necessarily carry a significant risk that a defendant ... faces punishment that the law cannot impose upon him.’” *Id.* at

352. *Miller* alters the class of persons (juveniles) who can receive a category of punishment (mandatory life without parole).

Hill v. Snyder, 2013 WL 364198 at *3 n.2 (E.D. Mich. 2013). *But see Michigan v. Carp*, 298 Mich. App. 472, 513-14, 828 N.W.2d 685 (2012) (*Miller* not substantive because it does not categorically bar LWOP for juveniles).

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

C. IF *MILLER* IS CONSIDERED A “PROCEDURAL” RULING, THEN AS A WATERSHED RULE IT SHOULD BE APPLIED RETROACTIVELY

The State maintains that *Miller* is a procedural ruling and that it does not fit within the “watershed” exception. In *Illinois v. Williams*, 2012 IL App (1st) 111145, 982 N.E.2d 181 (2012), however, the Court ruled otherwise. It found the watershed exception applied for essentially the same reasons Rice set out in his PRP. “*Miller* should be retroactively applied in this case because it is a rule that ‘requires the observance of those procedures that are implicit in the concept of ordered liberty.’” *Id.* at para. 52 (quoting *Teague*, 489 U.S. at 311). Further, the Court found that *Miller* required a new procedure “without which the likelihood of an accurate conviction is seriously diminished.” *Id.* at para. 53 (quoting *Teague*, 489 U.S. at 313).

Michigan v. Carp rejects the second *Teague* exception, but its reasoning is flawed. The court believed that the exception can apply only to procedures that affect the conviction rather than the sentence. *Id.*, 2012 WL 5846553 at p. 14-15.

The U.S. Supreme Court disagrees.

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

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

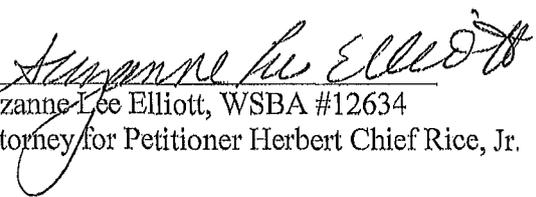
Similarly, in *Schriro v. Summerlin*, 542 U.S. 348, 355-57, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), the Supreme Court considered the

new rule that juries rather than judges must decide whether a defendant is eligible for the death penalty. *Id.* at 349. The Court addressed the “watershed” standard, finding that it was not satisfied because jury findings were not necessarily more fair or accurate than judge findings.

It is true that the Supreme Court has sometimes expressed the issue as whether a new rule affects the fairness and accuracy of a “conviction” but that is because the case before them dealt with the conviction rather than the sentence. *See, e.g., Whorton v. Bockting*, 549 U.S. 406, 418, 127 S.Ct. 1173, 1182, 167 L.Ed.2d 1 (2007) (“The *Crawford* rule does not satisfy the first requirement relating to an impermissibly large risk of an inaccurate conviction.”)

DATED this ²⁹ day of May, 2013.

Respectfully submitted,


Suzanne Lee Elliott, WSBA #12634
Attorney for Petitioner Herbert Chief Rice, Jr.

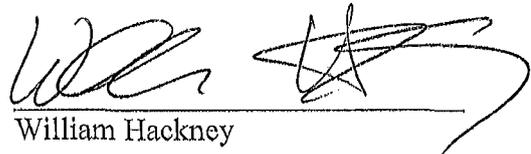
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James P. Hagarty
Yakima County Prosecutor
128 North 2nd Street, Room 329
Yakima, WA 98901

Mr. Herbert Chief Rice #962175
Washington State Penitentiary
1313 North 13th Street
Walla Walla, WA 99362

30 May 2013
Date


William Hackney

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Attached for filing in *In re the Personal Restraint of Herbert Chief Rice, Jr., No. 88172-3*, is the reply brief. Paper copies will be sent to the client and opposing counsel.

This pleading is filed by Suzanne Lee Elliott, WSBA #12634, 206-623-0291, Suzanne-elliott@msn.com. Thank you for your assistance.

~William Hackney
Legal Assistant