

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Apr 29, 2013, 4:01 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

NO. 88172-3

THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF
HERBERT CHIEF RICE, JR.

RESPONSE TO PETITION BY YAKIMA COUNTY

David B. Trefry
WSBA #16050
Special Deputy Prosecuting Attorney
P.O. Box 4846
Spokane, WA 99220-0846

JAMES P. HAGARTY
Yakima County Prosecuting Attorney
Yakima County Court House
128 N. 2nd St. Room 329
Yakima WA 98901

 ORIGINAL

A. AUTHORITY FOR RESTRAINT

B. ISSUE PRESENTED BY PETITION

1. Petitioner's sentence of Life without the possibility of parole violates the Eighth Amendment of the U.S. Constitution and Article I, sec. 14 of the Washington Constitution. (LWOP)

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.

C. STATEMENT OF THE CASE

The State was supplied an electronic copy of the entire Yakima Superior Court Clerk's file the copy was sent in a ".TIF" format. There is no pagination on this file. However the format of the file does allow reference to specific pages within this file. The State has converted this to a PDF file and supplied this to the court for purposes of review in this case. The State shall refer to the page number within that PDF file. Do to the size of this file, 1203 pages; the State has supplied it to this court as a separate electronic file. The State has supplied counsel for Petitioner with a copy of this file. This file is "attached" to this Reply as Appendix 'A.' This file was scanned in and it would appear that the file is sequentially reversed. The last page in the file is the initial filing in this case and the first page would appear to be the last document filed in the Superior Court in this case.

The petitioner is under restraint pursuant to a felony conviction in the State of Washington. The date of the offenses is listed in the original information as "January 7, 1988." (R 1200) The record in the State's possession contains a copy of the order declining jurisdiction in the Juvenile division of the Superior Court for Yakima County mandating that Petitioner be tried as an adult. The Petitioners' date of birth is listed on this Judgment and Sentence as 8/15/70. (R 281) Therefore his age at the time he committed this crime was just under 17 and a half years. This court in State v. Rice, infra, indicates that Rice was 17 at the time of this crime. (Rice, 120 Wn.2d 554)

This Court set forth the following facts in its opinion filed in the original appeal;

On the evening of January 7, 1988, 82-year-old Mike Nickoloff and his 74-year-old wife, Dorothy Nickoloff, were stabbed to death in their home. Mr. Nickoloff was stabbed so many times in the chest and face that the police initially thought he was killed by a shotgun. Mrs. Nickoloff had been stabbed twice in the chest and numerous times in the back.

The investigation soon led to two 17-year-old boys-- Herbert "Chief" Rice, Jr. and Russell McNeil. McNeil was arrested on the evening of January 26, 1988 and confessed early the next morning. That same morning the police arrested Rice, and he also confessed within a few hours.

The confessions of McNeil and Rice agree on most of the following details. McNeil and Rice were driving around on the evening of January 7, 1988. Rice said he knew of a house they could rob. Only McNeil's confession states they showed their knives to each other on the way to the

Nickoloff home. McNeil's Confession, State's Exhibit 85 at 10. Rice and McNeil went to the door, and Mrs. Nickoloff answered and let them inside. Rice used the Nickoloffs' phone to call his girl friend, and McNeil used the bathroom. Then McNeil went into the kitchen where Mrs. Nickoloff was eating dinner. Rice went into the living room where Mr. Nickoloff was watching television. McNeil stabbed Mrs. Nickoloff repeatedly in the back, but stated that he did not stab her in the chest. Rice stabbed Mr. Nickoloff several times, but noticed that he was still breathing so he "let him have it again" and screamed "you'd better die." Rice's Confession, State's Exhibit 86, at 13-15. Rice and McNeil do not agree on who started the stabbing, but they occurred virtually simultaneously. They stole two television sets, which they sold later that evening.

Both McNeil and Rice were charged with one count of aggravated first degree murder and one count of accomplice to aggravated first degree murder. In the alternative, they were each charged with two counts of felony murder. The prosecutor sought the death penalty against both defendants.

On August 25, 1989, McNeil pleaded guilty to two counts of aggravated first degree murder, and the prosecutor recommended two life sentences for him, to be served consecutively, without the possibility of parole. Appendix to Appellant's Brief, Statement of McNeil on Plea of Guilty at 5.

On November 6, 1989, voir dire began for Rice's trial. It was not disputed that Rice stabbed Mr. Nickoloff, therefore, Rice went to trial on December 5, 1989, solely to determine premeditation and aggravation. The jury found Rice guilty of one count of aggravated first degree murder for Mr. Nickoloff, and one count of accomplice to aggravated first degree murder for Mrs. Nickoloff. The jury was unable to reach a conclusion on the death penalty, so Rice was sentenced to two life sentences without parole. Rice appealed directly to this court, and we now affirm. (Rice, supra 554-5)

Petitioner's case was tried to a jury starting on November 6, 1989. The petitioner was found guilty on December 22, 1989 after a jury trial of; Count one – 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. and Count Two Aggravated First Degree Murder pursuant to RCW 9A.32.030(1)/10.95.020(7)(8)(9).

The jury then instructed on the punishments and then considered whether to impose the Death Penalty. The jury was unable to come to a unanimous decision on this question and therefore the court sentenced Petitioner to Life without the possibility of probation or parole. (LWOP) During this phase of the trial Petitioner presented sixteen witnesses. (R 11)

On or about March 15th 1988 the Superior Court for Yakima County filed extensive Findings of Fact and Conclusion of law regarding jurisdiction over Rice. (R 998-1007) The Juvenile court therein "... Ordered, Adjudged, and Decreed that juvenile jurisdiction over Herbert Rice Jr. is permanently declined..." (R at 1003)

On August 25, 1989 Co-defendant McNeil pled guilty, he was nineteen years of age at the time of his plea. In his Statement of Defendant on Plea of Guilty McNeil acknowledges that he killed one victim while his

co-defendant, Petitioner herein, was in another room murdering the husband of McNeil's victim.

The Judgment and Sentence entered on January 5, 1990 Rice was sentenced to two consecutive terms of life in prison without the possibility of release. (R 280-285) 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 283-284) 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)

This case was appealed, State v. Rice, 120 Wn.2d 549, 844 P.2d 416, (1993) the original appeal was Mandated on March 1, 1993. (R 70)

There have also been two subsequent Personal Restraint Petition filed. (PRP) There was a Certificate of Finality signed on August 21st, 2008 stating that matter became final on July 2, 2008 for petition 26889-6-III. It would appear that Rice raised this sentencing issue in his original PRP as well as he second PRP.

In Petitioner's second PRP, 30599-6 a Certificate of Finality signed on August 30, 2012 indicating the matter was final on June 26,

2012. in that second and successive petition, Petitioner raised numerous issues. He lists the Fourth Ground as follows;

THE IMPOSITION FO TWO CONSECUTIVE TERMS OF LIOFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE VIOLATES CONSTITUTIONMAL PROSCRIPTIONS AGAONST CRUEL AND UNUSUAL PUNISHMENT. (Errors in original.)

Rice cites specifically to many of the cases he now cites as a basis for this court to overturn his sentence, such as Roper v. Simmons, 543 U.S. 55, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2008), Furman v. Georgia, 408 U.S. 238, 239, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

This allegation was apparently raised in Petitioner’s first PRP also. As stated by the Chief Judge Kulik in the “Order Dismissing Personal Restraint Petition;”

Mr. Rice's ground 4 was also raised and rejected in his first personal restraint petition on the basis *Roper* is not material to his case because it relates to the death penalty for juveniles. *See Roper*, 543 U.S. at 568, 572 (death penalty for juveniles violates Eighth Amendment, but life imprisonment without parole is a constitutionally viable alternative to the death penalty for juveniles). (See appendix ‘B’)

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

D. ARGUMENT

1. Standards of Review.

RAP 16.4. Personal Restraint Petition – Ground 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 petitioners restraint is unlawful for one or more of the reasons defined in section.

Rice is under restraint because of the sentence that was imposed.

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). 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.'"

While there is no doubt that Rice is under restraint Miller specifically states that a court may still impose a sentence of LWOP if the court imposing that sentence follows the standards set forth in Miller. The Court grounded its 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 Rice and his co-defendant McNeil is not “illegal” there is

merely a procedural methodology the Supreme Court has now indicated courts must follow prior to imposition of a sentence of LWOP for a defendant who was under the age of eighteen at the time the offense was committed.

2.) Miller does not place the imposition of LWOP beyond the powers of the courts, only the mandatory imposition of such a sentence.

Rice states that Miller places the imposition of Mandatory Sentence beyond the power of the courts. While as worded this is true, the problem with this rationale is it paints with too broad of a brush. What Teague, *infra*, indicates is that a “new rule” will apply retroactively if that rule “places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.” Teague at 311. The “law-making authority” is not proscribed from imposing a LWOP sentence it can still “proscribe” Mr. Rice from ever leaving prison with a LWOP it, the legislature in this instance, just can not “mandate” that this ban.

RCW 10.73.090 specifically limits the filing of this type of action to within one year of the date the conviction became final. Rice presumes that Miller is retroactive when he then states that his case falls within one of the exceptions of RCW 10.73.100 because this is a “significant change in the law...which is material to the... sentence” and a court “determines

that sufficient reasons exist to require retroactive application of the changed legal standard.” This presumption is inaccurate. Once again, Rice may still be sentenced to the same sentence previously imposed; the court need only conduct a sentencing hearing that comports with the standards set forth in Miller.

This case was final on February 17, 1993 as indicated in the Mandate signed on March 1, 1993. (R 71) 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*). Finality was 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)).

...

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)).

RCW 10.73.100 set out the Washington State law for collateral attack, specifically stating those times when the one year limit is not applicable. This statute lists six criterion which would allow this court to consider this petition. Rice cites to subsection six of RCW 10.73.090:

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

The actions of the Court in Miller where not “significant.” The court did not invalidate the statute Miller was convicted under nor did it invalidate the sentence imposed. It merely stated that if a court were faced with a factual situation were a person who was a juvenile at the time he or she committed the offense for which they were being sentenced the sentencing court must take great care in that imposition and that court is now required to conduct a specific hearing that addresses the age related criterion set out in Miller. 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. This statute already mandates that reports be prepared and in the case of a conviction for a felony sexual offense, RCW 9.94A.500(1).

Even if this court were to apply Miller v Alabama, ___ U.S. ___; 132 S.Ct. 2455; 183 L.Ed.2d 407 (2012) retroactively to this case, that would not abrogate Rice's conviction for two counts of Aggravated First Degree Homicide, pursuant to RCW 10.95.030. It would only impact the possible sentence imposed. While it can be stated that the **mandatory** nature of this sentence is "unlawful" there is nothing in the Miller ruling which would allow for the relief requested by Rice which is in effect credit for time served. Rice's request for relief states that he should be resentenced for one count of murder in the first degree, without aggravators. There is no explanation of how this court would apparently vacate one count of aggravated murder in the first degree. (Petitioners PRP at 27)

The issue addressed in Miller was whether the original sentence imposed, "mandatory" life without the possibility 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 sentence 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 heart of the question here then is; is the rule established in Miller retroactive to Rice's case? It is the State's position that it is not.

The United States Supreme Court recently analyzed the retroactive application in Chaidez v. U.S., ___ 568 U.S. ___ (Feb. 20, 2013), 11-820 (FEDSC) the court stated:

We granted certiorari, 566 U. S. (2012), to resolve a split among federal and state courts on whether Padilla applies retroactively. Holding that it does not, we affirm the Seventh Circuit. II Teague makes the retroactivity of our criminal procedure decisions turn on whether they are novel. When we announce a "new rule," a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding.^[3] Only when we apply a settled rule may a person avail herself of the decision on collateral review. Here, Chaidez filed her coram nobis petition five

years after her guilty plea became final. Her challenge therefore fails if Padilla declared a new rule.

"[A] case announces a new rule," Teague explained, "when it breaks new ground or imposes a new obligation" on the government. 489 U. S., at 301. "To put it differently," we continued, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Ibid.* And a holding is not so dictated, we later stated, unless it would have been "apparent to all reasonable jurists." Lambrix v. Singletary, 520 U.S. 518, 527-528 (1997).

But that account has a flipside. Teague also made clear that a case does not "announce a new rule, [when] it '[is] merely an application of the principle that governed'" a prior decision to a different set of facts. 489 U. S., at 307 (quoting Yates v. Aiken, 484 U.S. 211, 217 (1988)). As Justice Kennedy has explained, "[w]here the beginning point" of our analysis is a rule of "general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." Wright v. West, 505 U.S. 277, 309 (1992) (concurring in judgment); see also Williams v. Taylor, 529 U.S. 362, 391 (2000). Otherwise said, when all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule for Teague purposes. (Footnotes omitted.)

The Washington State Supreme Court also 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.

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 not and 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 two State courts of review and one Federal Circuit Court that have determined Miller should not be applied retroactively. The United States Court of Appeals, Eleventh Circuit Court, in In Re Morgan, 13-11175-D (FED11) recently addressed Miller that court held:

The decision of the Supreme Court in *Miller* established a new rule of constitutional law. A rule is new if it "was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 1070 (1989). *Miller* held for the first time that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 132 S.Ct. at 2469. The Court reached this decision based on "the confluence of [] two lines of precedent . . ." *Id.* at 2464. The first line of precedents "adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Id.* at 2463.

The Michigan Court of Appeals ruled in People v. Carp, 2012 WL 5846553 (Mich. App. Nov. 15, 2012) that Miller was not retroactive. The

Florida Court of Appeals came to the same determination in; Gonzalez v. State, 1D12-3153 (FLCA1) and in Geter v. State, No. 3D12-1736, 2012 WL 4448860 (Fla. Ct. App. 3d Dist. Sept. 27, 2012)

The State has found three 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), People v. Luciano, 2013 IL App (2d) 110792, 2-11-0792 (ILCA2) However one Court of Appeal in Illinois did not apply Miller retroactively; cf. People v. Gray, 2013 IL App (1st) 112572, 1-11-2572 (ILCA1)

There have been courts in several jurisdictions where Miller has been raised that have ordered the case remanded for further action by the trial court, see for example 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 it is the States position that those cases from

Michigan, Florida and the 11th Circuit most closely reflect the law in this State.

The Carp case like Rice'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.'

This court should also decline to consider Petitioner's offer to be resentenced for one offense with a standard range sentence. As Rice notes in his motion this State does not allow for judicially created sentencing schemes and yet he then proposes that this court ignore the edict of the legislature when it specifically indicated through the enactment of the statutes addressing aggravated first degree murder that mandated a life sentence. Even is Miller had, which is does not, removed LWOP from the

options of sentence available this court would have to look to the guidance of the legislature which would be to strike the mandatory sentence and impose “just” a life sentence. Such sentences were imposed in the past in this State and were then regulated by the parole board. There is absolutely nothing in the law that would allow this court to return this case to the trial court with an order to sentence Rice to a standard range sentence which would in effect let him walk free. It is necessary to remind this court that Rice was not some fourteen year old at the time of this offense, he was seventeen and a half. A mere six months from being legally an adult.

3.) If rule announced in Miller is not a “Watershed Rule” procedural rule and therefore is not retroactively applicable.

Rice is correct that the second exception set forth in Teague allows for retroactive application of a “Watershed rule” of criminal procedure. To qualify under this exception the rule must meet two requirements: (1) it must be necessary to prevent “an impermissibly large risk” of an inaccurate conviction, and (2) it must “alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.” Whorton v. Bockting, 549 U.S. 406, 418, 127 S.Ct. 1173, 167 L.Ed.2d 1, (2007) quoting, Summerlin, 542 U.S. at 356. This Miller ruling did not address a issue pertaining Miller’s conviction and it most certainly did not

address a “bedrock” procedural issue such as Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) a case often cited when the question of a “bedrock” principle of criminal procedure arises.

The problem with the claim that Miller is a “watershed” rule was addressed by United States Supreme Court in Schriro v. Summerlin, 542 U.S. 348, 352, 124 S.Ct. 2519, 159 L.Ed.2d 442, 72 USLW 4561 (2004) stated the following with regard to “Watershed” procedural rules;

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.” *Saffle, supra*, at 495, 110 S.Ct. 1257 (quoting *Teague*, 489 U.S., at 311, 109 S.Ct. 1060 (plurality opinion)). 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.” *Id.*, at 313, 109 S.Ct. 1060 (emphasis added). **This class of rules is extremely narrow, and “it is unlikely that any... [ha]s yet to emerge.”** *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)). (Emphasis mine.)

There is little doubt that if the Supreme Court had determined that Miller announced a “watershed” rule that it would clearly have stated that

seeing that this type of ruling is “extremely narrow” and “it is unlikely that any ha[s] yet to emerge.

See also, Beard v. Banks, 542 U.S. 406, 417-18, 124 S.Ct. 2504, 159 L.Ed.2d 494, 72 USLW 4578 (2004);

We have repeatedly emphasized the limited scope of the second *Teague* exception, explaining that “it is clearly meant to apply only to a small core of rules requiring observance of those procedures that ... are implicit in the concept of ordered liberty.” *O’Dell, supra*, at 157, 117 S.Ct. 1969 (quoting *Graham, supra*, at 478, 113 S.Ct. 892). And, because any qualifying rule “would be so central to an accurate determination of innocence or guilt [that it is] unlikely that many such components of basic due process have yet to emerge,” *Graham, supra*, at 478, 113 S.Ct. 892 (quoting *Teague, supra*, at 313, 109 S.Ct. 1060), it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception. Perhaps for this reason, respondent does not even attempt to argue that Mills qualifies or to rebut petitioners’ argument that it does not, Brief for Petitioners 23-26.

In providing guidance as to what might fall within this exception, we have repeatedly referred to the rule of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (right to counsel), and only to this rule.

...

By contrast, we have not hesitated to hold that less sweeping and fundamental rules do not fall within *Teague*’s second exception. In *O’Dell v. Netherland, supra*, for example, we considered the retroactivity of the rule announced in *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994). *Simmons* held that a capital defendant must be allowed to inform the sentencer that he would be ineligible for parole if the prosecution argues future dangerousness. We rejected the petitioner’s argument that the *Simmons*

rule was " 'on par' with *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)," emphasizing "the sweeping [nature] of *Gideon*, which established an affirmative right to counsel in all felony cases." *O'Dell*, *supra*, at 167, 117 S.Ct. 1969.

Petitioner argues the rule in Miller is substantive, because mandatory LWOP is absolutely precluded for offenders who were under 18 when the offense was committed. He states the first exception applies to rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense" citing Pnery v. Lynaugh, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) abrogated on other ground by Atkins v. Virginia, 536 U.S. 3034, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). He then argues the "category of punishment" is broad enough to include Washington's mandatory sentence for aggravated murder. That argument completely ignores the specific language of the Court: "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." Miller, 132 S.Ct. at 2471. Contrary to the petitioner's claim the decision in Miller is distinctly different from Graham. Graham does not support the conclusion that the rule in Miller falls within the first Teague exception.

As indicated above, the action of this court is nothing more than the requirement that in a case where a juvenile offender is faced with a

sentence of LWOP that person shall be afforded a procedural hearing to ascertain historical information that will assist the sentencing authority, just as is required with other sentences such as those resulting from a conviction for a felony sex crime.

Again the Michigan court in Carp fully analyzed this issue and found that the actions of the Court in Miller were in fact procedural and were not “watershed” in nature.

Rice indicates that “Miller changes the likelihood of a juvenile convicted of aggravated murder receiving LWOP from 100% to nearly 0%.” This statement is pure fiction; it is based on nothing but air. The Court in Miller states that it anticipated that the imposition of LWOP would be uncommon but to presuppose his petition that there will be no future defendants who will receive this sentence is baseless.

It is repugnant to State that Rice states he committed a “transgression” as a child and therefore should not be imprisoned for life. (Petitioner’s PRP at 16-17) Rice was months shy of being legally an adult and as this court stated “82-year-old Mike Nickoloff and his 74-year-old wife, Dorothy Nickoloff, were stabbed to death in their home. Mr. Nickoloff was stabbed so many times in the chest and face that the police initially thought he was killed by a shotgun.” This is not some childhood

transgression, some afternoon shoplifting spree, this was a premeditated murder committed by a young man.

4.) The U.S. Supreme Court did not treat Miller as retroactive.

The court in Miller did not address the retroactivity of its ruling this alone is a very significant reason for this court not to apply Miller retroactively in this or any other case that was final before Miller was decided.

This very question was fully addressed in Carp, supra, where the Michigan court stated;

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.

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.

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.

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. (Footnotes omitted, emphasis in original.)

5.) Inherent Authority of this Court.

Rice asks this court to use its authority and apply Miller retroactively even if this court were to determine Miller is not retroactive under Teague. This would be contrary to this court's previous rulings regarding retroactive application, In re Markel, 154 Wn.2d 262, 268, 111 P.3d 249 (Wash. 2005);

Historically, we have attempted to maintain congruence in our retroactivity analysis with the standards

articulated by the United States Supreme Court. ^[1] See *In re Pers. Restraint of Sauve*, 103 Wash.2d 322, 328, 692 P.2d 818 (1985) (holding that the balancing test established by the United States Supreme Court was still appropriate to determine the retroactivity or nonretroactivity of a new decision); *In re Pers. Restraint of St. Pierre*, 118 Wash.2d 321, 324-26, 823 P.2d 492 (1992) (stating that "we have attempted from the outset to stay in step with the federal retroactivity analysis," and discussing a recent change in the federal retroactivity analysis); *In re Pers. Restraint of Benn*, 134 Wash.2d 868, 940, 952 P.2d 116 (1998) (citing the federal analysis discussed by this court in *St. Pierre* as the current retroactivity analysis in Washington State). Cf. *State v. Hanson*, 151 Wash.2d 783, 789, 91 P.3d 888 (2004) (stating that *St. Pierre* sets out the current *prospective* application analysis in Washington, which is derived from the two United States Supreme Court retroactivity analysis cases cited in *St. Pierre*).

6.) The Washington Constitution does not prohibit LWOP for juveniles.

The petitioner argues that the United States Supreme Court is headed toward holding life without possibility of parole is prohibited under the Eighth Amendment in all circumstances involving juveniles. He cites the actions of that court in cases such as Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct 2687, 101 L.Ed 2d 702 (1988) (the Eighth Amendment prohibits execution of juveniles under the age of 16) and continuing to the present ruling in Miller.

He suggests this Court should not wait for that ruling. Instead he asks this Court to anticipate what the United States Supreme Court will

do, as he claims this Court did in State v. Furman, 122 Wn.2d 440, 858 P.2d 1092 (1993).

This Court should not speculate what the United States Supreme Court will do in the future. The majority in Miller specifically refused to consider the petitioner's argument that the Eighth Amendment required a categorical bar on life without parole at least for offenders 14 and younger. Miller, 132 S.Ct. 2469. The Court justified its hold in part because it did not categorically bar that sentence for juveniles who commit murder. Id. at 2471.

The petitioner next argues this Court should anticipate a categorical bar to LWOP for juveniles as it anticipated a bar to executing offenders who are under 18 years old in State v. Furman, 122 Wn.2d 440, 858 P.2d 1092 (1993). Furman was decided on the basis of statutory construction, not under Washington Constitution art. 1, §14. The United States Supreme Court held the Eighth Amendment barred execution of juveniles 15 and under in Thompson v. Oklahoma, 478 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d (1988). In Furman, this Court reasoned that because neither of the two applicable statutes, the juvenile decline statute and the statute authorizing the death penalty, could be construed to authorize the death penalty for crimes committed by juveniles, stating that absent that authorization the death sentence could not be imposed.

Furman, 122 Wn.2d at 458. Once again this was an interpretation of the statutes governing juveniles granted the court the authority to act as it did; it was not a constitutional prohibition.

Petitioner would have this court declare that RCW 10.95.030(1) is constitutionally defective in the context of acts committed by juveniles. In this state a statute is presumed constitutional it is of the party challenging the statute to prove that statute unconstitutional. State v. Farmer, 116 Wn.2d 414, 419, 805 P.2d 200 (1991). The party challenging a statute has the burden to prove it is unconstitutional beyond a reasonable doubt. Id.

Our Constitution states “Excessive bail shall not be required, excessive fines impose, nor cruel punishment inflicted.” Washington Constitution art, 1, §14. State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980) sets for the those factors which must be considered when a court is determining whether a sentence is cruel, those factors are (1) the nature of the offense; (2) the legislative purpose behind the statute; (3) the punishment the defendant would receive in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction. Id. at 397.

It is clear that these factors demonstrate that the constitutional prohibition of “cruel” punishments does not require a categorical ban on

life without parole for juveniles who commit aggravated first degree murder.

The Nature of the Offense

Aggravated First Degree Murder is the most serious criminal offense that can be committed in the State of Washington. It carries only two possible penalties; death or life without the possibility of parole the most severe penalties that can be imposed in this State. Lesser offenses justified a sentence of life without possibility of parole are only those where there has been a series of criminal acts on the part of the offender, who has committed three “most serious offenses” where those offenses involved a threat of violence against another person and where it has been determined that the offender must be segregated from society for an extended period of time. State v. Thorne, 129 Wn.2d 736, 774-75, 921 P.2d 514 (1996).

To qualify for the sentence imposed on Rice under RCW 10.95.030(1) the offender must not only threaten violence the offender must also have actually committed a violent act against another person. This criminal act was determined to have been intentionally committed, and one or more aggravating circumstances must have also existed at the time the offense was committed. RCW 10.95.020. The trial court concluded that Rice knew that these victims were particularly vulnerable

or incapable of resistance due to advanced age, disability, and ill health when it imposed consecutive sentences. The jury found that said murder:

1. Was for the purpose to conceal the identity of the person(s) committing the crime;
2. Was part of a common scheme or plan in which there was more than one murder victim;
3. Was committed in the course of, or in furtherance of, or in immediate flight from the crime of burglary in the first degree;
4. Was committed in the course of, or in the furtherance of, or in immediate flight from the crime of robbery in the first degree.

Those were the two offenses at issue in Thorne, 129 Wn.2d at 774-75.

The petitioner states the crime is different when committed by a juvenile rather than an adult citing Miller for the proposition that a juvenile's culpability and capacity for change is not the same as an adults. Petition at 22-23. Those differences are not relevant to the Fain factor because it focuses on the nature of the offense, not the nature of the offender. Regardless of the age of the person who committed the offense, it remains a serious violent crime against another human being.

Even if the age of the offender were relevant to this factor it would not support a total ban on life without parole for juvenile offenders who commit aggravated first degree murder. Roper, Graham, and Miller all relied on the differences between juveniles and adults and the difference

between homicide and non-homicide offenses to justify the parameters for sentencing juveniles in a given case.

In Roper the Court cited the generally transitory nature of characteristics associated with juveniles when finding them less culpable than adult offenders. Roper, 543 U.S. at 569-70. The Court acknowledged the difficulty in drawing the line for a categorical bar at 18 because some of the characteristics associated with juveniles do not automatically disappear at 18, and “some under 18 have already attained a level of maturity some adults will never reach.” Id. at 574. Graham rejected a sentence of life without the possibility of parole for non-homicide offenders, but did not foreclose a sentence that effectively resulted in that sentence. “Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives.” Graham, 130 S.Ct. at 2030. The Court was also careful to draw the distinction between offender who commit murder and those who do not. “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.” Id. at 2027. Thus the Court did not prohibit a life without parole sentence for a juvenile murderer, but rather required the court to consider relevant characteristics of the juvenile before making that

judgment. Miller, 1332 S.Ct. at 2469. None of these authorities suggest that a categorical bar of life without possibility of parole should be placed on juvenile offenders who commit intentional aggravated murder.

The Legislative Purpose.

The purpose of RCW 10.95 is to impose an enhanced penalty on offenders who commit a first degree murder when one or more aggravating circumstances are present. State .v Kincaid, 103 Wn.2d 304, 309, 692 P.2d 823 (1985). The year after Furman was decided, in 1994, the Legislature enacted comprehensive amendments to numerous statutes and enacted new statutes to address the increase in youth violence. Laws of Washington 1994 1st Special Session, Ch. 7. The Legislature spelled out its intent stating the amendments were designed to address youth violence that increased at an alarming rate. id. at § 101 “It is the immediate purpose of this chapter.. to...(3) increase the severity and certainty of punishment for youth and adults who commit violent acts...” Id. In particular, the criminal court was given exclusive jurisdiction over juveniles 16 and 17 years old who were alleged to have committed serious violent offenses and violent offenses. Id. at §519. A serious violent offense included first degree murder. RCW 9.94A.030(29), Laws of Washington 1994, Ch. 261, §16. By operation of the legislative

amendments, the petitioner was tried in superior court without first applying the juvenile jurisdiction decline statute.

The legislature is presumed to be aware of its own enactments, as well as the Court's decisions interpreting those enactments. ATU Legislative Council of Washington State v. State, 145 Wn.2d 544, 552, 554, 40 P.3d 656 (2002). Presumably the Legislature was aware of this Court's decision in Furman, interpreting RCW 13.40.110 and RCW 10.95 so as to not run afoul of the 8th Amendment after Thompson was decided. The 1994 statutory amendments did not include an amendment to RCW 10.95 in order to make 16 and 17 year olds eligible for the death penalty. In light of Furman and the legislative intent articulated in the 1994 amendments, it is clear that the legislature intended to make the enhanced sentence of life without possibility of parole applicable to juvenile offenders.

Punishment in Other Jurisdictions

Punishment in other jurisdictions is determined by looking at other state statutes. Fain, 94 Wn.2d at 399, State v. Rivers, 129 Wn.2d 697, 714, 921 P.2d 495 (1996) (comparing Washington's 3 strikes law to other state and federal legislation). Miller noted that the sentence at issue here is available in 29 jurisdictions. Miller, 132 S.Ct. at 2471. The petitioner relies on Miller to argue that since the sentence is only available by a

combination of juvenile decline statutes and penalty statutes it is impossible to say whether a legislature had endorsed a particular penalty for children. Petition at 24. The Court should reject this argument for two reasons.

First, the framework articulated in Fain to determine whether a given sentence is “cruel” under Washington Constitution art. 1, §14 is different from the framework employed by the United States Supreme Court in considering an 8th Amendment challenge to a sentencing practice. The petitioner cites no authority to support the proposition that the Court must attempt the impossible task of discerning what legislators in other states may have been thinking when they adopted certain statute affecting juveniles who commit crimes. Rather Fain clearly stated what was statutorily authorized in other jurisdictions is the relevant inquiry. Second, the claim that a sentence of life without parole is only available through the operation of the juvenile decline statute and the sentencing statute is not true for 16 and 17 year olds convicted of aggravated first degree murder.

It is the petitioner’s burden to show punishments in other jurisdictions support the contention that the penalty he received is disproportionate to the crime he committed. State v. Korum, 157 Wn.2d 614, 641, 141 P.3d 13 (2006). He has not produced any evidence in this

regard to support his contention. This factor does not support the conclusion that the sentence imposed was disproportionate to the crime under Washington's constitution.

The Punishment In Washington For Other Offenses

There is no other offense which is comparable in Washington. Aggravated First Degree Murder, it is the most serious crime that can be committed in this state.

Nonetheless a juvenile offender in Washington may face up to life in prison if he commits a serious violent, he is 16 or 17 years old at the time he is charged and tried for the offense, and aggravating factors are found by a trier of fact beyond a reasonable doubt. RCW 13.04.040(1)(e)(v)(A), RCW 9.94A.535, RCW 9.94A.537(6), State v. Salavea, 151 Wn.2d 133, 141, 86 P.3d 125 (2004). Thus a 16 or 17 year old juvenile convicted of second degree murder found to be aggravated by one or more of the factors set out in RCW 9.94A.535 could face up to life in prison. Similarly, a 16 or 17 year old juvenile who is convicted of first degree robbery with a criminal history that includes a prior first degree kidnapping and one or more aggravating factors are found may also face up to life in prison. RCW 13.04.030(1)(e)(v)(B), RCW 9.94A.535. RCW 9.94A.030(45)(a)(vi), 9.94A.030(54)(a)(i), RCW 9A.56.200(2).

When compared to other serious violent offenses in Washington for which a juvenile could receive a possible life sentence, Washington's constitutional prohibition of "cruel" punishment does not flatly ban a sentence of life without possibility of parole for juveniles convicted of the most serious offense in all cases.

This Court has never before found a sentence of life without possibility of parole is "cruel" under art 1, §14. If this Court does find that sentence violates the State constitution as applied to offenders who commit aggravated first degree murder as juveniles, then it would be a "new rule." Consistent with the analysis above that new rule should not apply retroactively to the petitioner.

The only method to address the sentence imposed in Rice's case is through legislative action.

Should this Court find that the decision in Miller should be applied retroactively it remains as to what remedy to apply. Miller did not flatly ban life without possibility of parole, so the sentence imposed on the petitioner itself does not violate the 8th Amendment. However the procedure by which it was imposed does.

"Fixing of penalties or punishments for criminal offenses is a legislative function, and the power of the legislature in that respect is plenary and subject only to constitutional provisions against excessive

finer and cruel and inhuman punishment.” State v. Mulcare, 189 Wash. 625, 628, 66 P. 2d 360 (1937). As early as 1909 this Court recognized that it is a legislative function to set those sentences that permit the court discretion and those that do not. State v. LePitre, 54 Wash. 166, 169, 103 P. 27 (1909). If sentencing proceedings need be altered, it is up to the legislature, and not the judiciary to do so. State v. Monday, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975).

The petitioner acknowledges these limitations on the Court to fashion a remedy citing State v. Hughes, 154 Wn.2d 118, 149, 110 P.3d 192 (2005), abrogated on other grounds, Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). In Hughes this Court considered exceptional sentences imposed before the United States Supreme Court decided Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Blakely followed the Court’s earlier decision holding other than the fact of a prior conviction any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Blakely held the statutory maximum is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. Blakely, 542 U.S. at 303.

The statutes under which the defendants in Hughes had been sentence provided for judicial, rather than jury, fact finding on aggravating circumstances. This Court refused to create a procedure that complied with Apprendi and Blakely. Hughes, 154 Wn.2d at 149-52. Accordingly, the remedy was to remand for sentencing within the standard range. Id. at 156.

The petitioner argues that like Hughes this Court could remand the case to the trial court to impose a standard range sentence. That argument flatly ignores that this case is nothing like Hughes. Consistent with Apprendi and Blakely the sentence imposed in this case was imposed based on the facts found by the jury beyond a reasonable doubt. Unlike Hughes the jury had found the aggravating factors that the murder was committed in the course or flight from a first degree robbery, and in the course of or flight from a first degree kidnapping. To return this case to the trial court with instructions to sentence the defendant within the standard range for first degree murder would not take into account those aggravating factors. Unlike RCW 9.94A.537 the trial court has no statutory discretion whether to impose a sentence above the standard range for first degree murder if any of the aggravating circumstances in RCW 10.95.020 are found beyond a reasonable doubt. Rather an offender convicted of the crime of aggravated first degree murder “shall be

sentenced to life imprisonment without possibly of release or parole.”
RCW 10.95.030(1).

The general rule is when the legislature uses the word “shall” it operates to create a duty rather than conferring discretion, unless contrary legislative intent is shown. State v. Bartholomew, 104 Wn.2d 844, 848, 710 P.2d 196 (1985). Here there is no contrary legislative intent. The court had the duty to impose the sentence prescribed by law. Consistent with Hughes this Court should not create a new procedure which has not been provided by the Legislature. Rather, this Court should give the Legislature a reasonable amount of time to amend the statutes so as to comply with the dictates of Miller.

Alternatively, this Court should consider remanding to the trial court for a hearing in which the trial judge may consider relevant information. If the trial court concludes that the sentence of LWOP was justified, then it need not resentence the petitioner. Courts in other jurisdictions considering this issue that were on direct review when Miller was decided have concluded this is an appropriate remedy. Washington v. State, 103 S.3d 917, 920 (Florida 2013), Commonwealth v. Batts, __ A.3d __ (2013).

E. CONCLUSION

It is clear that there is an 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.

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 twenty 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 Rice’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.

This petition should be denied.

Respectfully submitted this 29th day of April 2013.

s/ David B. Trefry
David B. Trefry WSBA #16050
Special Deputy Prosecuting Attorney
Attorney for Yakima County
Telephone – (509) 534-3505
Fax – (509)-534-3505
TrefryLaw@wegowireless.com

DECLARATION OF SERVICE

I, David B. Trefry state that on April 29, 2013, I emailed a copy of the State's Reply to Suzanne L. Elliott, at suzanne@suzanneelliottlaw.com and by First Class Mail to Mr. Herbert Chief Rice DOC #962175, Washington State Penitentiary, 1313 N. 13th Ave. Walla Walla, WA 99362.

Appendix 'A' has been submitted to this court by United States Mail, in a separate compact disc. This was approved after the State was unable to send this file by email. Counsel for Mr. Rice has previously received a copy of this record and has indicated that she does not need to be served with an additional copy. The Petitioner was served a copy on a compact disc due to the enormous size of that file. This compact disc has been sent on this date with the State's response to Mr. Rice.

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

DATED this 29th day of April, 2013 at Spokane, Washington.

s/David B. Trefry
DAVID B. TREFRY, WSBA #16050
Special Deputy Prosecuting Attorney
Yakima County, Washington
Telephone: (509) 534-3505
Fax: (509) 534-3505
TrefryLaw@wegowireless.com

APPENDIX 'A'

(PETITIONER HAS NOT SUPPLIED A 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 "[i]f life 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).

OFFICE RECEPTIONIST, CLERK

To: David B. Trefry; Suzanne Elliott
Subject: RE: In Re Rice 88172-3

Rec'd 4-29-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: David B. Trefry [<mailto:TrefryLaw@WeGoWireless.com>]
Sent: Monday, April 29, 2013 3:59 PM
To: OFFICE RECEPTIONIST, CLERK; Suzanne Elliott
Subject: In Re Rice 88172-3

Please find attached the State's response to Mr. Rice's petition.
Appendix A has been sent to this Court in CD format by United States mail.

David B. Trefry
Special Deputy Prosecuting Attorney
Yakima County