

FILED
SUPREME COURT
STATE OF WASHINGTON
8/27/2019 2:28 PM
BY SUSAN L. CARLSON
CLERK

NO. 95578-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of

SAID OMER ALLI,

Petitioner.

**SUPPLEMENTAL BRIEF REGARDING
IN RE PERS. RESTRAINT OF MEIPPEN**

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TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u>	1
B. <u>SUPPLEMENTAL ISSUE PRESENTED</u>	1
C. <u>SUPPLEMENTAL ARGUMENT</u>	1
1. ALI MUST DEMONSTRATE THAT <u>HOUSTON-SCONIERS</u> IS A SIGNIFICANT, MATERIAL CHANGE IN THE LAW THAT APPLIES RETROACTIVELY	2
2. <u>HOUSTON-SCONIERS</u> APPLIES ONLY TO EFFECTIVE LIFE SENTENCES AND IS NOT MATERIAL TO ALI’S SENTENCE	3
3. <u>HOUSTON-SCONIERS</u> IS A SIGNIFICANT CHANGE IN THE LAW, BUT IT DOES NOT APPLY RETROACTIVELY TO CASES ON COLLATERAL REVIEW	9
a. <u>Houston-Sconiers</u> Is A Significant Change In The Law	10
b. <u>Houston-Sconiers</u> Announced A New Procedural Rule That Does Not Apply Retroactively To Final Cases	11
i. <u>Houston-Sconiers</u> announced a new rule ...	11
ii. <u>Houston-Sconiers</u> announced a procedural rule	12
iii. <u>Houston-Sconiers</u> ’ requirement of judicial sentencing discretion and consideration of youth is not a watershed rule of criminal procedure.....	20

iv.	<u>Houston-Sconiers</u> was not a statutory- construction case.....	23
D.	<u>CONCLUSION</u>	24

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Beard v. Banks, 542 U.S. 406,
124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004)..... 12, 18, 21, 22

Garcia v. United States, 923 F.3d 1242 (9th Cir. 2019) 18

Gideon v. Wainwright, 372 U.S. 335,
83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)..... 21, 22

Graham v. Florida, 560 U.S. 48,
130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)..... 4, 5, 7, 16, 19

Harmelin v. Michigan, 501 U.S. 957,
111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)..... 5

Lambrix v. Singletary, 520 U.S. 518,
117 S. Ct. 1517, 137 L. Ed. 2d 771 (1991)..... 12, 14

Miller v. Alabama, 567 U.S. 460,
132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).....3-9, 14-17, 19

Mills v. Maryland, 486 U.S. 367,
108 S. Ct. 1860, 100 L. Ed. 2d 384 (2009)..... 21, 22

Montgomery v. Louisiana, ___ U.S. ___,
136 S. Ct. 718, 193 L. Ed. 2d 599 (2016)..... 13, 14, 15, 17, 19, 20

O’Dell v. Netherland, 521 U.S. 151,
117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997)..... 18, 22

Penry v. Lynaugh, 492 U.S. 302,
109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)..... 13

Roper v. Simmons, 543 U.S. 551,
125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)..... 4, 5, 16, 19

Sawyer v. Smith, 497 U.S. 227,
110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990)..... 18, 22

<u>Schriro v. Summerlin</u> , 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).....	11, 13-15, 18, 20, 21
<u>Teague v. Lane</u> , 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).....	11, 12, 19, 20, 21, 22
<u>Welch v. United States</u> , ___ U.S. ___, 136 S. Ct. 1257, 194 L. Ed. 2d 387 (2016).....	11
<u>Whorton v. Bockting</u> , 549 U.S. 406, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007).....	20, 21
<u>Woodson v. North Carolina</u> , 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).....	5
<u>Washington State:</u>	
<u>Cowiche Canyon Conservancy v. Bosley</u> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	3
<u>Dykstra v. County of Skagit</u> , 97 Wn. App. 670, 985 P.2d 424 (1999).....	3
<u>In re Pers. Restraint of Colbert</u> , 186 Wn.2d 614, 380 P.3d 504 (2016).....	11, 23
<u>In re Pers. Restraint of Haghghi</u> , 178 Wn.2d 435, 309 P.3d 459 (2013).....	11
<u>In re Pers. Restraint of Light-Roth</u> , 191 Wn.2d 328, 422 P.3d 444 (2018).....	10
<u>In re Pers. Restraint of Meippen</u> , 193 Wn.2d 310, 440 P.3d 978 (2019).....	1, 16, 17, 18, 19
<u>In re Pers. Restraint of Rhome</u> , 172 Wn.2d 654, 260 P.3d 874 (2011).....	20
<u>In re Pers. Restraint of Yung-Cheng Tsai</u> , 183 Wn.2d 91, 351 P.3d 138 (2015).....	9, 11

<u>State v. Brown</u> , 139 Wn.2d 20, 983 P.2d 608 (1999).....	10, 12, 23
<u>State v. Evans</u> , 154 Wn.2d 438, 114 P.3d 627 (2005).....	12, 20
<u>State v. Furman</u> , 122 Wn.2d 440, 858 P.2d 1092 (1993).....	7
<u>State v. Gregg</u> , ___ Wn. App. 2d ___, 444 P.3d 1219 (2019).....	9
<u>State v. Houston-Sconiers</u> , 188 Wn.2d 1, 391 P.3d 409 (2017).....	1-3, 7-12, 15-20, 22-24
<u>State v. Miller</u> , 185 Wn.2d 111, 371 P.3d 528 (2016).....	10
<u>State v. Moen</u> , 129 Wn.2d 535, 919 P.2d 69 (1996).....	23
<u>State v. Ramos</u> , 187 Wn.2d 420, 387 P.3d 650 (2017).....	8, 14, 15

Other Jurisdictions:

<u>State v. Taylor G.</u> , 110 A.3d 338 (Conn. 2015).....	9
--	---

Constitutional Provisions

Federal:

U.S. CONST. amend. VIII.....	1, 3-8, 12, 13, 16, 17, 22-24
------------------------------	-------------------------------

Statutes

Washington State:

RCW 9.94A.730..... 19
RCW 10.73.090 2
RCW 10.73.100 2, 9

Rules and Regulations

Washington State:

RAP 10.3..... 3

A. INTRODUCTION

Ali contends that State v. Houston-Sconiers¹ constitutes a material, significant change in the law that allows his untimely petition to be heard. He relies on the dissenting opinion in In re Pers. Restraint of Meippen² to support that claim. Ali's argument should be rejected. Houston-Sconiers is not material to his sentence and does not apply retroactively regardless. Ali's petition is time-barred and should be dismissed.

B. SUPPLEMENTAL ISSUE PRESENTED

Has Ali failed to establish that Houston-Sconiers constitutes a material, significant change in the law that applies retroactively to authorize his untimely personal restraint petition? Should this Court reject the analysis of the dissenting opinion in Meippen?

C. SUPPLEMENTAL ARGUMENT

Houston-Sconiers was based solely on the Eighth Amendment, and as such, is limited to sentences that deny juveniles a meaningful opportunity for release in their lifetimes. Ali's 26-year sentence affords him such an opportunity and therefore does not implicate the Eighth Amendment. Houston-Sconiers is not material to Ali's sentence.

¹ 188 Wn.2d 1, 391 P.3d 409 (2017).

² 193 Wn.2d 310, 440 P.3d 978 (2019).

Moreover, even if this Court decides that Houston-Sconiers is material to Ali's sentence, it announced a significant *procedural* change in the law — not a *substantive* one — that does not apply retroactively to final cases like Ali's. Ali's untimely request to be resentenced should be dismissed.

1. ALI MUST DEMONSTRATE THAT HOUSTON-SCONIERS IS A SIGNIFICANT, MATERIAL CHANGE IN THE LAW THAT APPLIES RETROACTIVELY.

RCW 10.73.090 limits collateral attacks of criminal convictions to one year after the judgment becomes final, if the judgment and sentence is valid on its face. RCW 10.73.090(1). An exception exists for significant changes in the law that are material to the sentence and that apply retroactively. RCW 10.73.100(6).

Ali's judgment became final on April 20, 2011, the date the mandate issued in his direct appeal. RCW 10.73.090(3)(b); see Appendix 11-12 to State's Response to Pers. Restraint Pet. He filed this collateral attack in October 2017. Therefore, unless Ali demonstrates that Houston-Sconiers is a: (1) material, (2) significant change in the law, that (3) applies retroactively, his untimely petition must be dismissed.³

³ For the first time in his reply brief filed August 13, 2018, Ali argued that his petition is timely under RCW 10.73.100(5)'s exception for sentences in excess of the court's jurisdiction. He also argued for the first time that judicial estoppel

2. HOUSTON-SCONIERS APPLIES ONLY TO EFFECTIVE LIFE SENTENCES AND IS NOT MATERIAL TO ALI'S SENTENCE.

Houston-Sconiers is not material to Ali's sentence regardless of whether it is a significant, retroactive change in the law. Ali's 26-year prison sentence assures that he will be released well within his lifetime and therefore does not implicate the Eighth Amendment's prohibition against cruel and unusual punishments.

Juveniles are generally more impulsive, more vulnerable to negative influences and outside pressures, and less likely to have fixed antisocial character traits than adults who commit the same crimes. Miller v. Alabama, 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Due to these general traits and juveniles' presumptively greater prospects for reform, the United States Supreme Court has determined that the penological goals of sentencing — retribution, deterrence, incapacitation, rehabilitation — do not justify the “harshes sentences” for juvenile offenders.

precludes the State from now arguing against resentencing. A reply brief is not the proper forum to address new issues because the respondent does not get an opportunity to address the newly raised issues. Dykstra v. County of Skagit, 97 Wn. App. 670, 676, 985 P.2d 424 (1999). Accordingly, courts generally do not consider arguments that are improperly raised for the first time in the reply brief. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). See also RAP 10.3(c) (“A reply brief should . . . be limited to a response to the issues in the brief to which the reply brief is directed”). This Court should refuse to consider Ali's new arguments raised in his August 13, 2018, reply.

In Roper v. Simmons, the Court concluded that the Eighth Amendment categorically bars capital punishment for juveniles, explaining that the penological justifications for the death penalty have less force than for adults, due to juveniles' lesser culpability. 543 U.S. 551, 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). Then, in Graham v. Florida, the Court likened a life-without-parole sentence for a juvenile to the death penalty, because it "forswears altogether the rehabilitative ideal," and is at odds with a juvenile's capacity for change. 560 U.S. 48, 74, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Because a life-without-parole sentence for a juvenile is like a death sentence, Graham extended Roper and categorically barred such sentences for juvenile non-homicide offenders. Id. at 69-70. However, Graham acknowledged that it would not necessarily be unconstitutional for a juvenile offender to receive an indeterminate sentence and remain incarcerated for life. Id. at 75.

In Miller, the Court considered an Eighth Amendment challenge to a statutory scheme mandating life-without-parole sentences for juveniles convicted of homicide. Once again equating such sentences for juveniles to the death penalty, the Court invoked the well-settled Eighth Amendment requirement of individualized sentencing in death-penalty

cases,⁴ to conclude that the Eighth Amendment bars life-without-parole sentences for juveniles whose crimes reflect transient immaturity and requires individualized sentencing before a juvenile murderer can receive such a sentence. Miller, 567 U.S. at 474-77, 479-80. In doing so, the Court stated that its decision “flows straightforwardly” from the confluence of its precedent in Roper and Graham with its precedent requiring individualized sentencing in capital cases. Id. at 483.

But the analytical justifications for Roper, Graham, and Miller simply do not apply to lesser sentences. Until Miller, the United States Supreme Court held that the Eighth Amendment requires judicial discretion only for a death sentence. See Harmelin v. Michigan, 501 U.S. 957, 995, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (affirming mandatory life sentence for adult, stating “a sentence which is not otherwise cruel and unusual” does not “becom[e] so simply because it is ‘mandatory’”). And because a life-without-parole sentence for a juvenile is *so similar to a death sentence*, Miller required discretion before imposing such a sentence on a juvenile murderer. See 567 U.S. at 489 (discretion required for life-without-parole sentence because of Roper, Graham, and “our individualized sentencing decisions [in the death penalty context]”).

⁴ See Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

Moreover, as stated above, the Eighth Amendment bars death sentences and most life-without-parole sentences for juveniles because the rationales for punishment are weakened to the point that those sentences become constitutionally disproportionate. Miller, 567 U.S. at 473-75. While a death or life-in-prison sentence is not proportional for a less-culpable offender class, the same is certainly not true for *every* sentence applied to that class.⁵ And rather than undermine the legitimate goals of sentencing, sentences that provide punishment and a meaningful opportunity for release respect and promote both retribution and a juvenile’s enhanced capacity for reform. Finally, incapacitation during the time that it takes a juvenile to fully mature protects the public.

In short, the complex penological goals of sentencing — those that the Court found lacking when juveniles are sentenced to death or to die in prison without the possibility of release — remain valid for sentences that provide juveniles a meaningful opportunity for release. Miller cannot be read to suggest that the Eighth Amendment prohibits *all* mandatory sentencing provisions for juveniles in adult court.

⁵ Miller recognized that a life-without-parole sentence for a juvenile is an “especially harsh punishment” because he will serve more years and a greater percentage of his life in prison than an adult. 567 U.S. at 474-75. But the same is simply not true of a term-of-years sentence less than effective life.

In Houston-Sconiers, this Court stated that the Eighth Amendment requires sentencing courts to have complete discretion when sentencing juveniles in adult court.⁶ 188 Wn.2d at 21-26. At issue was the firearm-enhancement provision of the Sentencing Reform Act (“SRA”), the plain language of which denies a sentencing court discretion. Courts cannot rewrite a statute to expressly exclude juveniles from mandatory sentencing procedures. State v. Furman, 122 Wn.2d 440, 458, 858 P.2d 1092 (1993). But courts are required to interpret statutes in a constitutional manner when possible. Id. Thus, by interpreting the firearm-enhancement statute as discretionary for juveniles, Houston-Sconiers avoided the constitutional dilemma that occurs when a juvenile faces an effective life-without-parole sentence in adult court through the concurrent application of the automatic-adult jurisdiction statute and the stacking of multiple firearm enhancements. 188 Wn.2d at 24-26 (citing mandatory sentences of 50, 52.5, and 45 years as implicating Miller).

Houston-Sconiers’ interpretation of an otherwise-mandatory enhancement statute as discretionary for juveniles was permissible only to bring the statute into compliance with the Eighth Amendment. But as outlined above, the Eighth Amendment, as interpreted in Graham and

⁶ See Houston-Sconiers, 188 Wn.2d at 23 (“Miller requires such discretion,” and “Our Eighth Amendment holding...”).

Miller, is implicated *only* when a sentencing scheme would deny a juvenile offender a meaningful opportunity for release. Because Houston-Sconiers applied only the Eighth Amendment, Houston-Sconiers must be limited to juveniles facing sentences that would deny such opportunity. To the extent that Houston-Sconiers' broad language suggests that sentencing courts can disregard all mandatory sentencing provisions, regardless of the length of the potential sentence at issue, such language should be disavowed.

Indeed, this Court has recognized that the Eighth Amendment only prohibits the legislature from enacting sentencing provisions that “so undermine Miller's substantive holding that they create an unacceptable risk of unconstitutional sentencing.” State v. Ramos, 187 Wn.2d 420, 446, 387 P.3d 650 (2017). Miller requires that juveniles whose crimes reflect transient immaturity may not be sentenced to die in prison and that discretion must be exercised before denying a juvenile the meaningful opportunity for release. But sentencing courts must adhere to mandatory sentencing provisions that do not deny juveniles such an opportunity. This Court should reject Ali's over-broad reading of Houston-Sconiers and limit it to effective life sentences.

Ali's 26-year sentence does not demonstrate the futility of rehabilitation or permanently deprive him of becoming a productive

member of society. See State v. Gregg, __ Wn. App. 2d __, 444 P.3d 1219, 1223 (2019) (37-year sentence for 17-year-old offender not a de facto life sentence); see also State v. Taylor G., 110 A.3d 338, 345-46 (Conn. 2015) (mandatory minimum sentences of 5 and 10 years do not implicate Miller). Ali's sentence allows him the chance of rehabilitation and the hope of a productive life. Houston-Sconiers is not material to his sentence.

3. HOUSTON-SCONIERS IS A SIGNIFICANT CHANGE IN THE LAW, BUT IT DOES NOT APPLY RETROACTIVELY TO CASES ON COLLATERAL REVIEW.

Even if this Court concludes that Houston-Sconiers is material to Ali's sentence, in order to overcome the time bar, he must still demonstrate both that it is a significant change in the law and that it applies retroactively. See In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 103, 351 P.3d 138 (2015) (outlining three distinct requirements in RCW 10.73.100(6)). Ali's untimely petition should be dismissed because Houston-Sconiers, although a significant change in the law, is a procedural rule that does not apply retroactively.

a. Houston-Sconiers Is A Significant Change In The Law.

To be a significant change in the law, an intervening appellate decision must overturn a decision that was determinative of a material issue. In re Pers. Restraint of Light-Roth, 191 Wn.2d 328, 333-34, 422 P.3d 444 (2018) (citing State v. Miller, 185 Wn.2d 111, 114-15, 371 P.3d 528 (2016)). An intervening appellate decision that settles a point of law without overturning prior precedent or applies settled law to new facts is not a significant change in the law. Miller, 185 Wn.2d at 114-15.

In State v. Brown, this Court held that the weapon-enhancement statute does not allow for any judicial discretion. 139 Wn.2d 20, 983 P.2d 608 (1999). But Houston-Sconiers held that courts have sentencing discretion under the SRA — and the firearm enhancement statute specifically — when sentencing juveniles. 188 Wn.2d at 21. In so concluding, Houston-Sconiers cited to Brown, and stated, “To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled.” Id. Thus, Houston-Sconiers itself recognized that Brown had previously decided the issue to the contrary. Because Houston-Sconiers effectively overruled Brown with respect to juveniles, it constitutes a significant change in the law.

b. Houston-Sconiers Announced A New Procedural Rule That Does Not Apply Retroactively To Final Cases.

This Court applies the federal retroactivity analysis as established in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). In re Pers. Restraint of Haghghi, 178 Wn.2d 435, 441, 309 P.3d 459 (2013). Under Teague, with two exceptions, new constitutional rules apply only to cases still on direct review. Yung-Cheng Tsai, 183 Wn.2d at 100; Schriro v. Summerlin, 542 U.S. 348, 351, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

As to convictions that are final when a new rule is announced, retroactivity is required only for (1) substantive rules that place certain behavior beyond the power of the State to proscribe; or (2) watershed procedural rules implicating the fundamental fairness and accuracy of a criminal proceeding. Welch v. United States, ___ U.S. ___, 136 S. Ct. 1257, 1264, 194 L. Ed. 2d 387 (2016) (citations omitted); In re Pers. Restraint of Colbert, 186 Wn.2d 614, 624, 380 P.3d 504 (2016).

i. Houston-Sconiers announced a new rule.

Under Teague, a “new rule” is one that breaks new ground or imposes a new obligation and the result was not dictated by precedent that existed when the defendant’s conviction became final. Yung-Cheng Tsai, 183 Wn.2d at 104 (quoting Teague, 489 U.S. at 301). A rule is “dictated”

by existing precedent when the application of that precedent is “apparent to all reasonable jurists.” Lambrix v. Singletary, 520 U.S. 518, 527-28, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1991). Stated differently, if reasonable jurists could have disagreed on the rule before the new opinion, the rule is new. State v. Evans, 154 Wn.2d 438, 444, 114 P.3d 627 (2005) (citing Beard v. Banks, 542 U.S. 406, 411, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004)).

Houston-Sconiers announced a new constitutional rule under Teague. In 1999, this Court interpreted the weapon enhancement statute to be mandatory and to require that enhancements are served consecutively to all other sentencing provisions, including other weapon enhancements. Brown, 139 Wn.2d at 29. Houston-Sconiers expressly stated that the Eighth Amendment compelled it to overrule Brown with respect to juvenile offenders. 188 Wn.2d at 21, n.5. No reasonable jurist could have disagreed about the mandatory nature of the statute prior to Houston-Sconiers. Thus, Houston-Sconiers announced a new constitutional rule.

- ii. Houston-Sconiers announced a procedural rule.

The first exception to the non-retroactivity rule in Teague is for substantive rules, which either forbid criminal punishment of certain

conduct or prohibit the imposition of a certain punishment on a particular class of persons because of their status or offense. Montgomery v. Louisiana, ___ U.S. ___, 136 S. Ct. 718, 728, 193 L. Ed. 2d 599 (2016). Substantive rules set forth “categorical constitutional guarantees” that place certain punishment beyond the State’s power to impose, “*regardless of the procedures followed.*” Penry v. Lynaugh, 492 U.S. 302, 329, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (emphasis added); Montgomery, 136 U.S. at 729; Summerlin, 542 U.S. at 352.

Substantive rules are retroactive because when the State enforces an unconstitutional penalty, the sentence is by definition unlawful. Montgomery, 136 S. Ct. at 729-30. For example, the Eighth Amendment prohibition on the execution of mentally retarded persons, regardless of the procedures allowed, applies retroactively to defendants on collateral review because it prohibits the government from imposing a certain type of punishment on a certain class of persons. Penry, 492 U.S. at 330.

Procedural rules, on the other hand, “are designed to enhance the accuracy of a conviction or sentence by regulating ‘*the manner of determining the defendant’s culpability.*’” Montgomery, 136 S. Ct. at 730 (quoting Summerlin, 542 U.S. at 353) (emphasis in original). For example, the rule that requires a jury, and not a judge, to find the existence of aggravating factors supporting an enhanced punishment is procedural,

because it only alters the range of permissible methods for determining whether a defendant is eligible for a certain punishment but does not *prohibit* the imposition of punishment on any given class. Summerlin, 542 U.S. at 353; Lambrix, 520 U.S. at 539. New procedural rules do not apply retroactively because, even when procedural error has occurred, the sentence may be accurate, and the defendant’s continued confinement may still be lawful. Id.

Miller announced a new substantive rule because “it rendered life without parole an unconstitutional penalty for ‘a class of defendants because of their status’—that is, juvenile offenders whose crimes represent the transient immaturity of youth.” Montgomery, 136 S. Ct. at 734. Miller held that life-without-parole was a constitutionally disproportionate sentence “for all but the rarest of juvenile offenders, those whose crimes represent permanent incorrigibility.” Id. at 735. This Court has itself recognized the substantive holding of Miller to be that “a life-without-parole sentence cannot be imposed on a juvenile homicide offender whose crimes reflect transient immaturity.” Ramos, 187 Wn.2d at 436.

Miller also created a procedural requirement meant to implement its substantive rule. Miller “requires a sentencer to consider a juvenile offender’s youth and attendant characteristics before determining that life without parole is a proportionate sentence.” Montgomery, 136 S. Ct. at

734. In Montgomery, the Court emphasized the distinction between the procedural component of Miller and its retroactive substantive rule: individualized sentencing “gives effect to Miller’s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.” Id. at 735. This Court has also distinguished between Miller’s substantive rule and its procedural imperative: “This individualized Miller hearing ‘gives effect to Miller’s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.’” Ramos, 187 Wn.2d at 428-29 (quoting Montgomery, 136 S. Ct. at 735).

Unlike Miller, Houston-Sconiers did not announce a new substantive rule. It did not forbid a particular punishment for a particular class. Rather, it altered only the manner for determining whether a juvenile defendant’s conduct is punishable by a specific sentence by announcing that judges have discretion when sentencing juveniles in adult court. Houston-Sconiers did not hold any particular sentence constitutionally disproportionate for juveniles, rather it “merely raises the possibility that someone [sentenced using] the invalidated procedure” might have been sentenced less harshly under the proper procedure. Summerlin, 542 U.S. at 352.

In Meippen, this Court did not determine whether Houston-Sconiers is a significant, material change in the law that applies retroactively to final cases. See 193 Wn.2d at 313 (saving the question “for another day.”). However, the dissenting opinion considered the question and would have concluded that Houston-Sconiers announced a new substantive rule. Meippen, 193 Wn.2d at 324-26 (Wiggins, J. dissenting). The dissent, without the benefit of briefing from the State,⁷ reasoned that Houston-Sconiers announced a substantive rule because it “protects juveniles from facing certain disproportionate sentencing ranges.” Id. at 325. But the only punishments that the United States Supreme Court has found constitutionally disproportionate as to juveniles are: (1) the death penalty (Roper); (2) life-without-parole for non-homicide offenders (Graham); and (3) life-without-parole for homicide offenders whose crimes reflect transient immaturity (Miller).

By granting sentencing courts discretion to consider youth and its attendant features, Houston-Sconiers embraces a *process* that protects juveniles whose crimes reflect transient immaturity from receiving effective life-without-parole sentences in violation of Miller. But

⁷ The State did not brief the question of retroactivity in Meippen, relying instead on its argument that Houston-Sconiers was not material to the defendant’s 19.25-year sentence because the sentence not implicate the Eighth Amendment.

Houston-Sconiers did not announce that the State is prohibited from imposing a particular sentence. It did not shed any light on what a “certain disproportionate sentencing range” might be for a juvenile, nor does it place any particular punishment outside the power of the State to impose.

The dissent in Meippen characterized Houston-Sconiers’ rule as substantive by noting that, like Miller, it was premised on the prohibition against disproportionate punishment — the “central substantive guarantee of the Eighth Amendment.” 193 Wn.2d at 325. From that principle, the dissent went on to reason that “[b]efore Houston-Sconiers, every juvenile convicted of certain offenses faced certain sentencing ranges, while after Houston-Sconiers, juveniles no longer necessarily face those ranges.” 193 Wn.2d at 326. But Miller’s discussion of the Eighth Amendment’s substantive guarantee against disproportionate punishment was tied to a specific sentence — life-without-parole for juveniles whose crimes reflect transient immaturity. Montgomery, 136 S. Ct. at 732-34. In contrast, Houston-Sconiers did not link its procedural requirement of discretion to any substantive protection against a particular disproportionate punishment. In other words, unlike in Miller, there is no attendant substantive rule in Houston-Sconiers that the procedural mechanism (judicial discretion) works to achieve.

Under the reasoning of the Meippen dissent, it necessarily would follow that any new rule conditioning imposition of a particular sentence on a particular procedure would be considered substantive. But that rationale eliminates the dichotomy between procedural and substantive rules and runs against United States Supreme Court precedent holding such rules to be procedural. See Summerlin, 542 U.S. at 354 (new rule prohibiting death penalty unless aggravating factors are found by a jury is procedural); Banks, 542 U.S. at 420 (new rule prohibiting death penalty unless jury allowed to consider all mitigating factors procedural only); O'Dell v. Netherland, 521 U.S. 151, 167, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997) (new rule that capital defendant must be allowed to inform jury of his parole ineligibility when government argues future dangerousness was procedural); Sawyer v. Smith, 497 U.S. 227, 242, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990) (rule prohibiting death penalty if sentencer under mistaken belief that responsibility for determining its propriety rests elsewhere was procedural).

Like Houston-Sconiers, none of the rules in these cases prohibit any particular punishment for a class of defendants due to their status or offense. Instead, they prohibit a punishment unless a particular process is followed. That is a procedural constraint. See also Garcia v. United States, 923 F.3d 1242, 1245-46 (9th Cir. 2019) (new rule that judges have

discretion to consider mandatory minimum sentence for enhancement when calculating appropriate length of predicate sentence is procedural and not retroactive).

The dissent in Meippen also rested on its belief that Houston-Sconiers itself “indicated that its holding was substantive.” 193 Wn.2d at 326. Houston-Sconiers, citing to Roper, Graham, and Miller, stated:

These cases make two substantive rules of law clear: first, ‘that a sentencing rule permissible for adults may not be so for children,’ ... rendering certain sentences that are routinely imposed on adults disproportionately too harsh when applied to youth, and second, that the Eighth Amendment requires another protection, besides numerical proportionality, in juvenile sentencings—the exercise of discretion.

188 Wn.2d at 19, n.4 (internal citations omitted). But Houston-Sconiers did not consider whether its holding was retroactive under Teague, and this Court should not conclude that it was using the word “substantive” in that legally-specific context. In fact, Houston-Sconiers explicitly noted that it was a direct review case, and acknowledged the possibility that RCW 9.94A.730 might provide an adequate remedy for similar cases on collateral review. 188 Wn.2d at 22-23.

Moreover, the United States Supreme Court is the ultimate authority on the question, and Montgomery explained Miller’s substantive rule to be that life-without-parole is an unconstitutional penalty for

juveniles whose crimes reflect transient immaturity, while “the exercise of discretion” is but “a *procedure* through which [a juvenile] can show he belongs to the protected class.” Montgomery, 136 S. Ct. at 734-35 (emphasis added).

Because Houston-Sconiers did not announce a rule that prohibits the imposition of a certain punishment on a particular class of persons, its rule is not substantive. Its requirement of discretion in juvenile sentencing is procedural because it alters only the manner of determining a juvenile defendant’s culpability or eligibility for a particular sentence.

- iii. Houston-Sconiers’ requirement of judicial sentencing discretion and consideration of youth is not a watershed rule of criminal procedure.

Teague’s second “exception” to its general non-retroactivity rule is for “watershed rules of criminal procedure,” which are those necessary to prevent an impermissibly large risk of an inaccurate conviction and 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); In re Pers. Restraint of Rhome, 172 Wn.2d 654, 666-67, 260 P.3d 874 (2011). “It is not enough for the right to be important; it must also play a vital instrumental role in securing a fair trial.” Evans, 154 Wn.2d at 445.

“That a new procedural rule is ‘fundamental’ in some abstract sense is not enough.” Summerlin, 542 U.S. at 352.

The United States Supreme Court has cautioned that this class of rules is extremely narrow, and that “it is unlikely that any [such rule] has yet to emerge.” Summerlin, 542 U.S. at 352. Rights that are based on “bedrock” constitutional rights do not qualify under the exception; the “new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of the proceeding.” Bockting, 549 U.S. at 421. In our nation’s history, the only rule the Supreme Court has yet identified as an example of what might fall within the watershed rule exception is the right to counsel in Gideon v. Wainwright.⁸ Bockting, 549 U.S. at 421 (citing Banks, 542 U.S. at 418).

In Mills v. Maryland, 486 U.S. 367, 374-75, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (2009), the Court determined that when deciding whether to impose the death penalty, a jury must not be precluded from considering, as mitigating, any relevant circumstance that the defendant proffers. Later, in Banks, the Court concluded that Mills’ new procedural rule did not qualify as a “watershed rule” under Teague. 542 U.S. at 420.

⁸ 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

In so doing, the Court cited to prior capital sentencing cases where it had declined to give retroactive effect to rules that effectively withheld relevant information from the sentencer. Banks, 542 U.S. at 418-19 (citing O’Dell v. Netherland, *supra*, and Sawyer, *supra*). Although acknowledging that the new rule in Mills was intended to enhance the accuracy of capital sentencing and to avoid arbitrary results, it effected only an “incremental change,” and was not “an absolute prerequisite to fundamental fairness.” Id. The Court acknowledged that the new rules outlined in its prior Eighth Amendment capital sentencing cases were “directed toward the enhancement of reliability and accuracy in some sense,” but that removing some possibility of arbitrary sentencing “does not suffice to bring [them] within Teague’s second exception.” Id. at 419-20 (quoting Sawyer, 497 U.S. at 243).

Likewise here, the relationship of Houston-Sconiers’ judicial-discretion rule to the accuracy of the sentencing process is far less direct or profound than the sweeping change of Gideon. If, as Banks established, new rules that allow for consideration of previously-excluded information in a death penalty sentencing are not “watershed” rules, then neither is Houston-Sconiers’ rule that allows for consideration of youth and the exercise of discretion in juvenile sentencing.

- iv. Houston-Sconiers was not a statutory-construction case.

Finally, Ali argues that Houston-Sconiers merely involved statutory construction. See Pers. Restraint Pet. at 24 (Houston-Sconiers retroactive because “it provides a new interpretation of the SRA.”). When a statute is construed by this Court, the construction is deemed to be what the statute has meant since its enactment, and there is no question of retroactivity. Colbert, 186 Wn.2d at 620 (citing State v. Moen, 129 Wn.2d 535, 538, 919 P.2d 69 (1996)). But this Court’s decision in Houston-Sconiers did not turn on any statutory language. Rather, this Court concluded that the Eighth Amendment requires that mandatory sentencing statutes are to be discretionarily applied to juvenile offenders, and expressly overruled any statutes that conflict with this constitutional imperative. Houston-Sconiers, 188 Wn.2d at 21. Houston-Sconiers announced a new constitutional rule; it was not grounded in statutory interpretation.

But even if it were, Houston-Sconiers would have overruled a *previous* interpretation of the weapon-enhancement statute, as outlined in Brown, *supra*. Thus, it would be a *reinterpretation* of the statute, and logically could only be deemed to be what the statute has meant from the

date of its reinterpretation.⁹ This Court should reject Ali’s argument that Houston-Sconiers, which was premised entirely on the Eighth Amendment, was a statutory-construction case.

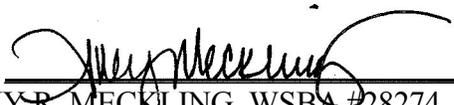
D. CONCLUSION

The State respectfully asks this Court to dismiss Ali’s untimely personal restraint petition.

DATED this 27th day of August, 2019.

Respectfully submitted,

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⁹ Ali implicitly concedes this point by arguing that Houston-Sconiers “announced a *new* interpretation of the Sentencing Reform Act.” Pet.’s Reply Brief at 11.

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