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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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In re the Personal Restraint of  
RUSSELL D. MCNEIL and HERBERT CHIEF RICE, JR.  
Petitioners.

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BRIEF OF AMICUS CURIAE  
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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## **I. INTEREST OF AMICUS CURIAE**

The Washington Association of Prosecuting Attorneys (WAPA) represents the elected prosecuting attorneys of Washington State. Those persons are responsible for the prosecution of all felony cases in this state and of all gross misdemeanor and misdemeanors charged under state statutes. As such they have an interest in cases like these concerning whether the application of new rules issued after the cases became final should be applied retroactively to those cases.

## **II. ISSUES PRESENTED**

Does the new rule announced in Miller v. Alabama, relating to sentencing murderers who were juveniles at the time they committed their crimes, apply retroactively to those juvenile murderers whose cases were final when Miller was decided?

## **III. STATEMENT OF FACTS**

The parties have set forth the facts of each case in their briefs. Those facts will not be addressed here.

## **IV. ARGUMENT**

### **A. MILLER ANNOUNCED A NEW RULE THAT SHOULD NOT BE APPLIED RETROACTIVELY TO CASES THAT WERE FINAL.**

In 2012 the United States Supreme concluded that mandatory life imprisonment without the possibility of parole for

juvenile murder defendants was barred by the Eighth Amendment. Miller v. Alabama, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). The petitioners concede that this is a new rule, and that their convictions were final at the time the new rule was announced. McNeil, supplemental brief at 5, Rice petition at 8. However, they argue the rule should nonetheless be applied to them retroactively. Because the rule is procedural and is not a “watershed” rule of criminal procedure, it should not be applied retroactively to either petitioner’s sentence.

The United States Supreme Court announced a framework for analyzing when new rules apply to cases that are final in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). In doing so the Court considered the destructive consequences attendant when new rules are applied to cases which were final. They include undermining principles of finality which are essential to the criminal justice system, eroding the deterrent effect of judgments and imposing additional costs on society because it would “continually forc[e] the States to marshal resources in order to keep in prison defendants whose trial and appeals conformed to then-existing constitutional standards.” Id. at 309-10 (emphasis in the original). For those reasons the Court

severely limited application of new rules to cases which were final. A new rule would apply if it placed “certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe.” *Id.* at 307 quoting, Mackey v. United States, 401 U.S. 667, 692, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971). It would also apply if it constitutes a “watershed rule of criminal procedure.” *Id.* at 311. This framework was designed to ensure that gradual developments in the law over which reasonable jurists could disagree would not later be used to upset the finality of state convictions that were valid when entered. Sawyer v. Smith, 497 U.S. 227, 234, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990). Recently this Court has emphatically stated that this framework will be applied to cases in this state. In re Haghghi, \_\_\_ P.3d \_\_\_, 2013 WL 4857955 (2013).

The first exception to non-retroactivity involves substantive rules 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 States’ power to punish.” Shriro v. Summerlin, 542 U.S. 348, 352, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). Rules that “decriminalize a class of conduct [or] prohibit the imposition of... punishment on a

particular class or persons” fall within this category. Id. at 353, quoting, Saffle v. Parks, 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). Rules that “regulate only the manner of determining the defendant’s culpability are procedural.” Id. (emphasis in the original). Procedural rules do not fall within this narrow exception. Id. at 352.

The Court clearly stated the new rule announced in Miller was procedural. “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 ... before imposing a particular penalty.” Miller, 132 S.Ct. at 2471. Several courts have denied collateral relief pursuant to Miller because it was a procedural rule. Craig v. Cain, No. 12-30035 at 2, 2013 WL69128 (5<sup>th</sup> Cir. 2013)<sup>1</sup>, In re Morgan, 713 F.3d 1365, 1368 (11<sup>th</sup> Cir. 2013), State v. Huntley, 118 So.3d 95, 103 (La. 2013).

The Court gave three reasons for concluding the Miller rule was procedural in Chambers v. State, 831 N.W.2d 311 (Minn. 2013). First the Miller rule did not invalidate the power of States to impose life imprisonment without parole to juveniles convicted of

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<sup>1</sup> A copy of the opinion is supplied in appendix A.

aggravated murder. Second, relevant federal authority had concluded the rule was not retroactive. Third, Miller did not create a new element for murder, i.e. that the defendant was a particular age. Id. at 328-29.

In contrast the Iowa Supreme Court cited three reasons why it found Miller was a substantive rule in State v. Ragland, 836 N.W.2d 107 (Iowa 2013). The reasoning in that case is flawed for three reasons. First it fails to acknowledge that in Miller the Court recognized there was a difference between the rule it announced there and the rules announced in earlier cases on which it relied. The rule in Miller did not bar a particular sentence for juveniles, while other cases did. Miller, 132 S.Ct. at 2471. This critical difference separates the substantive rules announced in those cases from the procedural rule announced in Miller. Second, it concluded Miller signaled an intent to apply the rule to cases on collateral review by consolidating it with a case in that procedural posture. However it failed to account for other Supreme Court authority that required an affirmative statement that a new rule was retroactive in order to apply it retroactively. Tyler v. Cain, 533 U.S. 656, 662-63, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001). Third it concluded that Miller constituted a substantive change in the law.

However the substantive change did not relate to the sentence imposed, only the procedure by which it was imposed. Because the basis on which Ragland, and other cases which have adopted similar reasoning, is flawed, this Court should not follow it. Instead this Court should follow the better reasoned analysis in Chambers.

Similarly this Court should conclude that Miller did not announce a watershed rule of criminal procedure. A watershed rule is one that is either necessary to prevent an impermissibly large risk of an inaccurate conviction, or alters the understanding of “bedrock procedural elements essential to a fair proceeding.” Whorton v. Bockting, 549 U.S. 406, 418, 127 S. Ct. 1173, 167 L.Ed.2d 1 (2007). Courts have found that Miller does not satisfy this standard because it was simply an extension of other principles relating to sentencing. Chambers, 831 N.W. 2d at 330-31, People v. Carp, 828 N.W.2d 685, 713 (Mich. 2012). Because Miller built on earlier decisions concerning juvenile sentencing procedures, it represents a gradual development in the law. It is therefore not the kind of decision the Court said was a “watershed rule.” Sawyer 497 U.S. at 234.

**B. RCW 10.95 DOES APPLY TO JUVENILES CONVICTED OF AGGRAVATED MURDER.**

Petitioner McNeil argues in his supplemental brief that as a matter of statutory construction RCW 10.95 does not apply to juveniles. This Court should reject that argument.

McNeil relies on this Court's decision in State v. Furman, 122 Wn.2d 440, 858 P.2d 1092 (1993). There this court construed RCW 10.95 and RCW 13.40.110 in light of Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988). Thompson held it was unconstitutional to sentence juveniles under 16 years old to death. Neither Washington statute at issue limited the age for which the death penalty could be imposed. Noting its duty to construe statutes to uphold their constitutionality whenever possible, this Court construed those statutes to not authorize the death penalty for any juvenile. Furman, 122 Wn.2d at 458.

McNeil argues that the legislature did not consider how a sentence of mandatory life without parole would apply to juveniles. Supplemental Brief at 23. Legislative action in light of Furman suggests that it has done so.

The legislature is presumed to know how courts have construed statutes. State v. Roggenkamp, 153 Wn.2d 614, 629,

106 P.3d 196 (2005). The Court's statutory construction remains in effect until the legislature amends the statute. Id. at 630. In Furman this Court remanded for imposition of life without parole. Id. at 458. Yet the legislature took no action to amend that statute afterwards to either exempt juveniles from application of RCW 10.95, or restrict its application to juveniles over a certain age. The legislature did take action to exempt juveniles who were tried as adults pursuant to RCW 13.04.030(1)(e)(i) from serving mandatory minimum terms applicable to adults. RCW 9.94A.540(3)(a) and (b). The legislature did so because "emerging research on brain development" indicated there were differences between adolescent and adult brains. Laws of Washington, 2005 Ch. 437, §1. However the Legislature did not make that amendment to RCW 9.94A.540 retroactive, nor did it include juveniles subject to RCW 10.95. In light of these circumstances the Legislature did mean for juveniles to be subject to life without parole under appropriate circumstances.

McNeil argues the provision for mandatory sentencing in RCW 10.95 cannot be severed, and so as to juveniles it cannot be constitutionally construed under Miller. He does not support his claim with any meaningful argument. RCW 10.95 did not distinguish between offenders under 16 and offenders over 16

when it construed the statute to eliminate the death penalty for all juveniles who committed aggravated first degree murder. Similarly, while the statute does not distinguish between those offenders under 18 and those over 18, there is no rational reason not to construe RCW 10.95 to eliminate the mandatory sentencing requirement as applied to juvenile offenders for cases that are not yet final.

**C. IF MILLER APPLIES RETROACTIVELY THE REMEDY IS TO REMAND FOR FACT FINDING.**

Petitioner Rice argues that he is entitled to a sentence within the standard range for first degree murder. He relies on this court's decision in 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, 156 L.Ed.2d 466 (2006). In Hughes the defendants were sentenced to an exceptional sentence based on a judicial determination of factors justifying those sentences. Id. at 125-30. Since that procedure had been invalidated in Blakely<sup>2</sup>, and there was no statutory procedure in effect to permit empaneling a jury to determine whether factors existed to justify the exceptional

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<sup>2</sup> Blakely v. Washington, 530 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

sentence, this Court remanded to the trial courts for imposition of sentences within the standard range. Hughes, 154 Wn.2d at 156.

Unlike Hughes the jury in this case did find additional factors which justified the sentence imposed. Remand for sentencing within the standard range would fail to account for that jury finding. Unlike RCW 9.94A.537 the court had no discretion to impose a standard range sentence once those aggravating factors were found. RCW 10.95.030(1) required the court to impose the life without parole sentence.

At best, in light of Miller, the petitioners are entitled to a new hearing for the trial court to hear relevant information. If the trial court were convinced that the LWOP sentence imposed was justified, it need not resentence the petitioners. Miller, 132 S.Ct. at 2469 (rejecting the argument that the Eighth Amendment bars life without parole for juvenile offenders). See, Washington v. State, 103 So.3d 917, 920 (Florida 2012), Commonwealth v. Batts, 66 A.3d. 286 (Penn. 2013).

Finally, even if a standard range sentence were the appropriate remedy for juvenile offenders convicted of aggravated first degree murder, for some of those offenders the sentence would be the virtual equivalent of life without parole. Appendix B

contains a list of offenders who were convicted of aggravated first degree murder committed as a juvenile<sup>3</sup>. Many of those offenders were convicted of multiple offenses, and many had prior convictions that would count toward an offender score. For those convicted of multiple serious violent offenses the standard range sentences would be served consecutively. RCW 9.94A.589(1)(b).

McNeil and Rice both had had prior convictions. App. B. Their standard range sentence for each murder charge would be 240 - 320 months confinement. Former RCW 9.94A.310. A standard range sentence without consideration of the aggravating factors that McNeil admitted to and that the jury found in Rice's case would still net a sentence of 480 to 640 months confinement.

These aggregate sentences would not violate either the Eighth Amendment or Washington Constitution art. 1, §14. The proper inquiry under either constitutional provision is the proportionality of the individual sentence, not the aggregate sentences. Wahleithner v. Thompson, 134 Wn. App. 931, 937-38, 143 P.3d 321 (2006), United States v. Aiello, 864 F.2d 257, 265 (2<sup>nd</sup> Cir. 1988). Whether a sentence is so disproportionate to the crime committed is based on the gravity of the offense, the

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<sup>3</sup> The facts listed in Appendix B are taken from opinions and reports from trial judges submitted to the Court.

harshness of the penalty, and the sentence imposed on others for the same type of crime. Id. The legislative purpose behind the statute is also a consideration. State v. Fain, 94 Wn.2d 387, 397, 617 P.2d 720 (1980). The offenses at issue here are the most serious offenses proscribed in Washington. The purpose of the sentence is in part to protect the public, promote respect for the law by providing punishment that is just, and reducing the risk of reoffending by offenders in the community. RCW 9.94A.010. Given the seriousness of the offense a very lengthy prison sentence is not disproportionate.

**D. THIS COURT SHOULD NOT ADOPT A SEPARATE STATE ANALYSIS IN DETERMINING THE RETROACTIVITY OF MILLER.**

Petitioners claim the exception to the time bar under RCW 10.73.100(6) applies to their case and request this Court to apply a separate state retroactivity analysis. This Court has interpreted RCW 10.73.100(6) consistent with the Teague retroactivity analysis. "Since Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), this court has consistently and repeatedly followed and applied federal retroactivity analysis as established in Teague." In re Haghghi, \_\_\_ P. 3d at ¶12. Even before this Court

adopted and applied the Teague analysis, the Court attempted to stay in step with federal retroactivity analysis. *Id.*

Petitioners provide no legal rationale as to when a separate state analysis under RCW 10.73.100(6) should be applied in lieu of the Teague analysis, except when it's "in the interest of fairness." McNeil Amended Reply Brief at 14; Rice Petition at 19. As was noted in Haghighi, the Teague analysis is supported by approximately 25 years of precedent, and the Court has not been provided with an adequate basis for deviating from it. *Id.* at ¶14. Prior to this Court's adoption of the Teague analysis in In re St. Pierre, retroactivity analysis had developed erratically, and application of the prior federal standard had led to a series of inconsistent results. In re St. Pierre, 118 Wn.2d 321, 324-25, 823 P.2d 492 (1992).

The State has a strong interest in finality of judgments. See, In re Cook, 114 Wn.2d 802, 809, 792 P.2d 506 (1990) ("collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders"); Teague, 489 U.S. at 309 (applying new rules to cases that were final "seriously undermines the principle of finality which is essential to the operation of our criminal justice

system”); In re Woods, 154 Wn.2d 400, 409, 114 P.3d 607 (2005), overruled in part on other grounds, Carey v. Musladin, 549 U.S. 70 (2006) (threshold showing of actual and substantial prejudice resulting from constitutional error necessary to preserve societal interest in finality, economy, and integrity of trial process); RCW 10.04.010 (savings statute); see also, *infra* at 2-3. This interest in finality extends to sentencing as well as to the conviction.

The State could be significantly hampered at any resentencing hearing given the passage of time that has occurred in most of these cases. Aside from the costs to society, the practical considerations are significant: it is likely in a number of the cases that the judge who heard the trial testimony will no longer be sitting as a superior court judge and that affected friends and family members of the murdered victims may no longer be available or able to attend any such hearing. Any judge new to the case will have to review presumably lengthy transcripts of all the testimony or the hearing will devolve into a mini-trial to ensure that the judge is aware of all the relevant testimony. At a minimum, testimony from the offender will need to be presented regarding his or her mitigating circumstances. There may also be testimony from the

State to refute or rebut that testimony. Witnesses the State may wish to present may no longer be available.

The victims' family and friends may not have appeared, or remained silent, at the previous sentencing because they were aware that life without the possibility of parole was a mandatory sentence. If the friends or family members are no longer available or unable to attend the hearing on remand, their voices, crucial to the discretionary decision the judge must make, will not be heard. A new sentencing hearing, of course, will bring with it as well a huge emotional toll on the families and friends of the victims.

Petitioner McNeil asserts Miller should be given retroactive application to his case because from now on juveniles who commit aggravated first degree murder will get the benefit of that decision. While it is true offenders whose cases are pending will benefit from Miller's new rule and those whose cases are final would not, that is the intent of retroactivity analysis, in order to preserve the finality of judgments. The U.S. Supreme Court has applied the retroactivity precept even in the context of the death penalty. See, Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). There is no reason why that legal precept should not apply when an

offender has been convicted of aggravated first degree murder and is serving the less severe penalty of life without possibility of parole.

Petitioners also cite to a number of cases for the proposition that the court has “freely corrected sentences when new court decisions show them to be erroneous.” McNeil Supplemental Brief at 24; Rice Petition at 19. In each of the cases cited however, the trial court sentenced the defendant based on its understanding of the relevant statutory authority. Later this Court interpreted the applicable statutes to mean something different. Because the court’s interpretation of the meaning of a statute is what the statute means from the time of its enactment, the sentences imposed in those cases were therefore in excess of the court’s authority at the time they were imposed. In re Johnson 131 Wn.2d 558, 568, 933 P.2d 1019 (1997); In re Vandervlugt, 120 Wn.2d 427, 436, 842 P.2d 950 (1992).

This Court specifically rejected the argument that the interpretation of a statute was a “new rule” that should be subjected to retroactivity analysis in Vandervlugt, 120 Wn.2d at 436. That portion of the decision highlights the distinction between “new rules,” which require a retroactivity analysis, and a new interpretation of a statute that relates back to the enactment of the

statute. That distinction renders the cases cited by petitioners inapposite to the situation here. The court in Miller did not interpret the meaning of a statute, it held the mandatory nature of the statute unconstitutional as applied to juvenile offenders. Petitioners' sentences were legal under both statutory and constitutional principles at the time they were imposed. RCW 10.95.030, State v. Massey, 60 Wn. App. 131, 803 P.2d 340, review denied, 115 Wn.2d 1021 (1990), cert. denied, 499 U.S. 960 (1991). Their sentences are still permissible under Miller.

McNeil also asserts that if this Court does not apply Miller retroactively, then juveniles will continue to be held in unconstitutional punishment. McNeil Supplemental Brief at 26. This is not the case. Miller does not preclude imposition of a life without parole sentence for juveniles convicted of aggravated first degree murder, it only requires a sentencing court to consider certain mitigating information when considering the sentence to be imposed, which can include life without parole.

**E. LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR JUVENILES CONVICTED OF AGGRAVATED MURDER DOES NOT VIOLATE WASHINGTON'S CONSTITUTION.**

Petitioner Rice requests this Court to find his sentence unconstitutional under the State's prohibition on cruel punishment.

A sentence violates Washington's constitutional prohibition on cruel punishment if it is "grossly disproportionate to the crime for which it is imposed." State v. Morin, 100 Wn. App. 25, 29, 995 P.2d 113, review denied, 142 Wn.2d 1010 (2000). Whether a statute imposes "cruel" punishment is determined by consideration of the four factors set forth in State v. Fain, *supra*. Amicus will not reiterate the arguments set forth in the State's Response regarding each of the factors, but would note that while no one factor is determinative, the nature of the offense, *i.e.*, whether the crime is a crime against a person as opposed to property, is given considerable weight. Morin, 100 Wn. App. at 30. Moreover, in this context this Court has found that the distinction between life sentences with and without parole is not significant; the court views a life with parole sentence as a life sentence. Fain, 94 Wn.2d at 394-95; see also, In re Grisby, 121 Wn.2d 419, 427, 853 P.2d 901 (1993).

Petitioner Rice 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 adult's. Those differences are not relevant in this context because the first Fain factor focuses on the nature of the offense, not the offender. 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. The Court in Graham noted: "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 v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 2030, 176 L.Ed.2d 825 (2010). A virtual life sentence imposed on a 16 year old offender for non-homicide crimes was upheld after Graham in Bunch v. Smith, 685 F.3d 546 (6<sup>th</sup> Cir. 2012), cert. denied, \_\_\_ U.S. \_\_\_ (2013).

A number of other jurisdictions permit a similar sentence. In Loggins v. Thomas, decided just one year before Miller, the court reviewed the available data and concluded that around 40 jurisdictions had statutes which permitted life without parole for juvenile offenders who committed murder. Loggins v. Thomas, 654 F.3d 1204, 1224-25 (11<sup>th</sup> Cir. 2011). The court concluded the national trend was toward life without parole for homicides committed by juvenile offenders. Id. at 1225.

Petitioner Rice asserts that this Court should not consider the sentence he would receive as an adult for other serious violent offenses, but only the maximum that he could receive as a juvenile. In juvenile court, the maximum a juvenile could be sentenced to is

age 21. In most of these cases that would mean a sentence of less than five years. A sentence of five years is certainly disproportionate to the aggravated murders these offenders committed. The insufficiency of a sentence in juvenile court is invariably one of the reasons the legislature passed the autodecline statute and mandated decline hearings for juveniles 16 and 17 years of age accused of serious violent offenses. See, State v. Salavea, 151 Wn.2d 133, 144, 86 P.3d 125 (2004) (in passing autodecline statute, legislature intended to address the problem of youth violence by increasing the severity and certainty of punishment for youth who commit violent acts). The issue is not what sentence a juvenile would receive in juvenile court, but what that offender would receive for commission of similar, serious violent offenses. Washington's constitutional prohibition on cruel punishment does not preclude a sentence of life for juveniles convicted of aggravated murder, the most serious offense in Washington.

Respectfully submitted on October 11, 2013.

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2013 WL 69128

Only the Westlaw citation is currently available.

United States Court of Appeals,  
Fifth Circuit.

Dale Dwayne CRAIG, Petitioner--Appellant

v.

Burl CAIN, Warden, Louisiana State  
Penitentiary, Respondent--Appellee.

No. 12-30035. | Jan. 4, 2013.

Appeal from the United States District Court for the Middle  
District of Louisiana, Baton Rouge.

**Attorneys and Law Firms**

John M. Landis, Esq., Stone Pigman Walther Wittmann,  
L.L.C., New Orleans, LA, for Petitioner-Appellant.

Colin Andrew Clark, Esq., Assistant Attorney General, Office  
of the Attorney General, Baton Rouge, LA, for Respondent-  
Appellee.

Before HIGGINBOTHAM, OWEN, and SOUTHWICK,  
Circuit Judges.

**Opinion**

PER CURIAM:

\*1 A member of this panel previously denied Dale Dwayne  
Craig's request for a certificate of appealability ("COA") to  
appeal from the district court's denial of his 28 U.S.C. § 2254  
application. Craig has filed a motion asking this court to  
reconsider the denial in light of the United States Supreme  
Court's decision in *Miller v. Alabama*, — U.S. —, 132  
S.Ct. 2455, 183 L.Ed.2d 407 (2012). Additionally, Craig  
argues that his request for a COA was erroneously denied  
based on this court's application of the waiver doctrine.

In *Miller*, the Supreme Court held that "the Eighth  
Amendment forbids a sentencing scheme that mandates life  
in prison without possibility of parole for juvenile offenders."  
*Id.* at 2469. Craig was seventeen at the time of his offense. He  
was originally sentenced to death; however, his sentence was  
commuted to life without the possibility of parole following  
the Supreme Court's decision in *Roper v. Simmons*, 543 U.S.  
551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). *Miller* was  
decided after 1997 when Craig's sentence became final, and

Craig now seeks retroactive application of *Miller* in this  
collateral attack on his sentence.

A new rule is applied retroactively to cases on collateral  
review if it (1) "places certain kinds of primary, private  
individual conduct beyond the power of the criminal law-  
making authority to proscribe" or (2) "requires the observance  
of those procedures that are implicit in the concept of ordered  
liberty." *Teague v. Lane*, 489 U.S. 288, 307, 109 S.Ct. 1060,  
103 L.Ed.2d 334 (1989) (internal quotations omitted).

A threshold inquiry is whether the rule in question constitutes  
a "new rule." *E.g.*, *Beard v. Banks*, 542 U.S. 406, 411,  
124 S.Ct. 2504, 159 L.Ed.2d 494 (2004). "In general ...  
a case announces a new rule when it breaks new ground  
or imposes a new obligation on the States or the Federal  
Government." *Teague*, 489 U.S. at 301. A rule is thus new  
"if the result was not dictated by precedent existing at the  
time the defendant's conviction became final." *Id.* When  
Craig's conviction became final, *Miller* was not dictated  
by precedent. Instead, *Miller* established for the first time a  
requirement of individualized sentencing outside the death  
penalty context. *See* 132 S.Ct. at 2470.

To overcome the general bar to retroactivity of new  
rules on collateral review, Craig must meet one of the  
two *Teague* exceptions. *Teague*, 489 U.S. 307. The first  
exception extends to "rules prohibiting a certain category  
of punishment for a class of defendants because of their  
status or offense." *O'Dell v. Netherland*, 521 U.S. 151, 157,  
117 S.Ct. 1969, 138 L.Ed.2d 351 (1997). This exception  
appears to apply only when a new rule completely removes  
a particular punishment from the list of punishments that  
can be constitutionally imposed on a class of defendants, not  
when a rule addresses the considerations for determining a  
sentence. For example, we have used *Teague's* first exception  
in applying prohibitions on the execution of defendants who  
are mentally handicapped or juveniles, and sentences of  
life imprisonment without parole for juveniles convicted of  
nonhomicide offenses. *Bell v. Cockrell*, 310 F.3d 330, 332  
(5th Cir.2002) (retroactively applying *Atkins v. Virginia*, 536  
U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)); *In re*  
*Sparks*, 657 F.3d 258, 262 (5th Cir.2011) (citing *Arroyo v.*  
*Dretke*, 362 F.Supp.2d 859, 883 (W.D.Tex.2005)) (*Roper*  
*v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1  
(2005)); *Sparks*, 657 F.3d at 262 (*Graham v. Bell*, — U.S.  
—, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)).

\*2 By contrast, the Supreme Court has denied retroactive application of prohibitions against weighing invalid aggravating circumstances in certain circumstances, imposition of a death sentence by a jury that has been led to believe responsibility for determining the appropriateness of a death sentence rests elsewhere, and capital-sentencing schemes that foreclose a jury from considering all mitigating evidence. *Lambrix v. Singletary*, 520 U.S. 518, 539, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (foreclosing retroactive application of *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992)); *Sawyer v. Smith*, 472 U.S. 227, 241 (1990) (*Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)); *Beard v. Banks*, 542 U.S. 406, 417, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (*Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988)); see also *Saffle v. Parks*, 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (holding that a new rule prohibiting an antisympathy jury instruction did not fall under *Teague's* first exception).

The *Miller* “decision does not categorically bar a penalty for a class of offenders or type of crime....” *Miller*, 132 S.Ct. at 2471. *Miller* does not satisfy the test for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles; *Miller* bars only those sentences made mandatory by a sentencing scheme. *Id.* at 2469. Therefore, the first *Teague* exception does not apply.

The second *Teague* exception is limited in scope. *Beard*, 542 U.S. at 417. This exception applies to “watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding” or “implicit in the

concept of ordered liberty.” *Id.*; *Teague*, 489 U.S. at 307 (quotation omitted). “In providing guidance as to what might fall within this exception, [the Court has] repeatedly referred to the rule of *Gideon v. Wainwright* [ ] and only to this rule.” *Beard*, 542 U.S. at 417 (citations omitted). The Court has noted that “it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception.” *Id.*

The Supreme Court's decision in *Miller* is an outgrowth of the Court's prior decisions that pertain to individualized-sentencing determinations. The holding in *Miller* does not qualify as a “watershed rule[ ] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.” *Beard*, 542 U.S. at 417.

*Craig* also contends that this court erred in denying his COA based on waiver. At the outset, we note that *Craig's* COA was not denied based solely on his waiver of certain claims. Instead, it was denied based on his failure to make the requisite showing of “the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Nonetheless, the order denying *Craig's* COA stated: “To the extent that he has not raised his underlying claims that his defense counsel rendered ineffective assistance and that defense counsel's admission of guilt constituted a guilty plea, he has abandoned those unraised issues.” *Craig* failed to brief these issues in his COA motion; therefore, they were appropriately considered waived.

\*3 *Craig's* motion for reconsideration is DENIED.

APPENDIX B

NUMBER	NAME	AGE AT DATE OF CRIME	PRIOR OFFENSES	CURRENT OFFENSES	NUMBER OF MURDERS	NAME AND AGE OF VICTIMS
1	Sean Stevenson	16 years 2 months	None	Aggravated 1 <sup>st</sup> Degree Murder 2 counts 1 <sup>st</sup> Degree Murder	3	James Butler – 48 Margaret Butler – 35 Amy Stevenson - 18
2	Jose Munguia	15 years 9 months	1. 2d degree Burglary 2. Minor in possession, 2 counts 3. Disorderly Conduct 4. Possession of Dangerous Weapon 5. Possession of Marijuana	Aggravated 1 <sup>st</sup> Degree Murder	1	Guivi Darbellani – 27
3	David Anderson	17 years 10 months	None	Aggravated 1 <sup>st</sup> Degree Murder 4 counts	4	Kim Wilson – 17 Sister – 20 Parents – 52 and 46
4	Alex Baranyi	17 years 7 months	None	Aggravated First Degree Murder 4 counts	4	Kim Wilson – 17 Sister -20 Parents 52 and 46
5	Donald Lambert	15 years 6 months	1. 1 <sup>st</sup> Degree Child Molestation 2. 3 <sup>rd</sup> Degree Theft 3. 3 <sup>rd</sup> Degree Malicious Mischief	Multiple counts Defendant pled guilty in exchange for dismissal of other counts.	Unknown – reports lists aggravating factor is multiple victims	Name Unknown – 88 year old retired farm wife
6	Jeremiah J. Bourgeois	14 years 9 months	1. TMVWOP 2. TMVWOP 3. TMVWOP 4. Theft 3 <sup>rd</sup> Degree 5. Criminal Trespass 2 <sup>nd</sup> Degree	Aggravated 1 <sup>st</sup> Degree Murder 1 <sup>st</sup> Degree Assault	1	Tecele Ghebremichaele – late 40's Efram Isak – unknown age

NUMBER	NAME	AGE AT DATE OF CRIME	PRIOR OFFENSES	CURRENT OFFENSES	NUMBER OF MURDERS	NAME AND AGE OF VICTIMS
7	Timothy Haag	17 years 1 month	None	Aggravated 1 <sup>st</sup> Degree Murder	1	Rachel Dillard – 7
8	Brian Bassett	16 years 4 months	None	Aggravated 1 <sup>st</sup> Degree Murder 3 counts	3	Michael Bassett – 48 Wendy Bassett – 46 Austin Bassett - 5
9	Barry Loukaitis	14 years 11 months	None	1. 3 counts Aggravated 1 <sup>st</sup> Degree Murder 2. 1 count Assault 1 <sup>st</sup> Degree 3. 16 counts- Kidnapping 1 <sup>st</sup> Degree – 4. 1 count Assault 2 <sup>nd</sup> Degree	3	The victims were school teachers and students in the school Loukaitis attended - ages 14 to mid-40's
10	Nga Ngoeung	17 years 10 months	TMVWOP	1. 2 counts Aggravated 1 <sup>st</sup> Degree Murder 2. 2 counts 1 <sup>st</sup> Degree Assault 3. 2 counts TMVWOP 4. 1 <sup>st</sup> Degree Reckless Endangerment	2	Michael Welden - 17 Clinton Thayer - 17 Matthew Nordin – 17 Robert Forrest - 17
11	Michael Furman	17 years 10 months	1. 2 <sup>nd</sup> Degree Burglary 2. 2 <sup>nd</sup> Degree Burglary 3. 2 <sup>nd</sup> Degree Theft 4. 1 <sup>st</sup> Degree Burglary 5. 2 <sup>nd</sup> Degree Burglary 6 1 <sup>st</sup> Degree Trespass 7. 3 <sup>rd</sup> Degree Theft 8. 2 <sup>nd</sup> Degree Burglary	Aggravated 1 <sup>st</sup> Degree Murder	1	Ann Presler - 85

NUMBER	NAME	AGE AT DATE OF CRIME	PRIOR OFFENSES	CURRENT OFFENSES	NUMBER OF MURDERS	NAME AND AGE OF VICTIM
12	Michael Harris	15 years 5 months	4 prior juvenile adjudications	1. Aggravated 1 <sup>st</sup> Degree Murder 2. 1 <sup>st</sup> Degree Robbery (later dismissed) 3. 1 <sup>st</sup> Degree Burglary (later dismissed)	1	Paul Wang – Adult
13	Barry Massey	13 years 6 months	None	1. Aggravated 1 <sup>st</sup> Degree Murder 2. 1 <sup>st</sup> Degree Robbery (later dismissed) 3. 1 <sup>st</sup> Degree Burglary (later dismissed)	1	Paul Wang - Adult
14	Ansel Hofstetter	16 years	None	Aggravated 1 <sup>st</sup> Degree Murder	1	Linda Miller - Adult
15	Jeremiah Gilbert	15 years 9 months	1. 1 <sup>st</sup> Degree Criminal Trespass 2. 3 <sup>rd</sup> Degree Malicious Mischief	1. Aggravated 1 <sup>st</sup> Degree Murder 2. 1 <sup>st</sup> Degree Murder 3. 1 <sup>st</sup> Degree Robbery	2	Robert Gresham – Adult Loren Evans – Adult
16	Christian Delbosque	17 years 3 months	None	1. Aggravated 1 <sup>st</sup> Degree Murder 2. 2 <sup>nd</sup> Degree Murder	2	Unknown
17	Herbert Chief Rice	17 years 4 months	1. TMVWOP 2. 3 <sup>rd</sup> Degree Malicious Mischief	1 2 counts Aggravated 1 <sup>st</sup> Degree Murder	2	Mike Nickoloff – 82 Dorothy Nickoloff- 74
18	Russell McNeil	17 years 4 months	2. 2 <sup>nd</sup> Degree Burglary	1. 2 counts Aggravated 1 <sup>st</sup> Degree Murder	2	Male -82 Female – 74
19	Michael Skay	16 years 7 months	None	Aggravated 1 <sup>st</sup> Degree Murder	1	Blair Scott – 27

Washington State

Juvenile Aggravated First Degree Murder Defendants

NUMBER	NAME	AGE AT DATE OF CRIME	PRIOR OFFENSES	CURRENT OFFENSES	NUMBER OF MURDERS	NAME AND AGE OF VICTIMS
20	Kevin Boot	17 years 11 months	1. 1 <sup>st</sup> Degree Escape 2. 2 <sup>nd</sup> Degree Possession of Stolen Property 3. 3 <sup>rd</sup> Degree Assault – 2 count 4. Residential Burglary 5. TMVWOP	Aggravated 1 <sup>st</sup> Degree Murder	1	Felicia Reese - 22
21	Vy Thang	17 years 10 months	1. 1 <sup>st</sup> Degree Burglary 2. 1 <sup>st</sup> Degree Robbery 3. Residential Burglary 4. 1 <sup>st</sup> Degree Possession of Stolen Property	Aggravated 1 <sup>st</sup> Degree Murder	1	Mildred Klaus – 85
22	Kenneth Comelast	15 years 5 months	1. 2 <sup>nd</sup> Degree Burglary	1. Aggravated 1 <sup>st</sup> Degree Murder 2. Attempted 1 <sup>st</sup> Degree Murder – 2 counts	2	Kendra Grantham – 16 Cindy Buffin – 17
23	Terrence Weaver	16 years 1 month	None that would count in the offender score	1. Aggravated 1 <sup>st</sup> Degree Murder 2. 1 <sup>st</sup> Degree Rape	1	Female - 35
24	William Lembcke	16 years 3 months	2 <sup>nd</sup> Degree Theft	Aggravated 1 <sup>st</sup> Degree Murder – 4 counts	4	Father – 49 Mother – 43 Sister - 18 Brother - 12
25	Marvin Leo	17 years 4 months	1. TMVWOP 2. 2 <sup>nd</sup> Degree Theft 3. 2 <sup>nd</sup> Degree Malicious Mischief	1 Aggravated 1 <sup>st</sup> Degree Murder – 5 counts 2. 1 <sup>st</sup> Degree Assault – 5 counts	5	Names unknown – ages 21, 33, 25, 27, and 26

NUMBER	NAME	AGE AT DATE OF CRIME	PRIOR OFFENSES	CURRENT OFFENSES	NUMBER OF MURDERS	NAME AND AGE OF VICTIM
26	John Phet	16 years 9 months	NVOL	1. Aggravated 1 <sup>st</sup> Degree Murder – 5 counts 2. 1 <sup>st</sup> Degree Assault – 5 counts	5	Names Unknown - ages 21, 33, 25, 27, and 26
27	Ryan Alexander	16 years 5 months	1. 3 <sup>rd</sup> Degree Theft 2. Third Degree Theft 3. Residential Burglary	1. Aggravated 1 <sup>st</sup> Degree Murder 2. 1 <sup>st</sup> Degree Kidnaping	1	Male - 8
28	Susan Cummings	16 years 5 months	None	Aggravated 1 <sup>st</sup> Degree Murder	1	Christine Zacharias – 80+
29	Brandon Backstrom	17 years 1 month	1. Residential Burglary 2. Unlawful Possession of Firearm	Aggravated 1 <sup>st</sup> Degree Murder – 2 counts	2	Marnie Walls – 30 Korree Olin - 12

The contents of this chart were drawn from the following RCW 10.95.120 Judge's Questionnaires: Ryan Alexander, No. 270 (Whatcom, 2004); Alex Baranyi, No. 267 (King, 1999); John Phet, No. 246 (Pierce, 2002); Marvin Lofi Leo, No. 226 (Pierce, 2000); William Lembeke, No. 223 (Stevens, 2001); Donald E. Lambert, No. 222 (Grant, 1997); Terence A. Weaver, No. 209 (Whatcom, 1997); Kenneth Comeslast, No. 208 (Spokane, 1996); Vy Thang, No. 206 (Spokane, 1999); David C. Anderson, No. 205 (King, 2000); Barry D. Loukaitis, No. 196 (Grant, 1997); Jose A. Munguia, No. 195 (Benton, 1998); Kevin Jeremy Boot, No. 189 (Spokane, 1996); Brian Bassett, No. 171 (Grays Harbor, 1996); Michael Frank Skay, NO. 170 (Snohomish, 1996); Nga Ngoeung, No. 161 (Pierce, 1995); Timothy Edward Haag, No. 149 (Cowlitz, 1995); Christian Job Del Bosque, No. 145 (Mason, 1994); Jeremiah J. Bourgeois, No. 139 (King, 1993); Jeremiah James Gilbert, No. 134 (Klickitat, 1993); Ansel Wolfgang Hofstetter, No. 122 (Pierce, 1992); Barry C. Massey, No. 111 (Pierce, 1988); Michael E. Harris, No. 110 (Pierce, 1988); Michael Monroe Furman, No. 73 (Kitsap, 1990); Herbert A. Rice, No. 70 (Yakima, 1990); Susan Cummings, No. 67 (Walla Walla, 1985); Russell Duane Mcneil, No. 61 (Yakima, 1989); Sean Allen Stevenson, No. 50 (Skamania, 1987).

Washington State

Juvenile Aggravated First Degree Murder Defendants

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Good Afternoon...

RE: In RE PRP of Russell D. McNeil and Herbert Chief Rice, Jr.  
Supreme Court No. 87654-1  
Amicus Briefing

Attached is the Brief of Amicus Curiae of WAPA.

The Motion for Leave to File Amicus Curiae brief was filed yesterday.

Let me know if there is a problem opening the attachment.

Thanks.

Diane.

Diane K. Kremenich  
 Snohomish County Prosecuting Attorney - Criminal Division  
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