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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of

RUSSELL McNEIL, Petitioner

and

In re the Personal Restraint Petition of

HERBERT CHIEF RICE, Petitioner

PETITIONERS' SUPPLEMENTAL BRIEF
RE: STATE RETROACTIVITY ANALYSIS
AND ANSWER TO BRIEF AMICI CURIAE
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

LENELL NUSSBAUM
Attorney for Petitioner McNeil
Market Place One, Suite 330
2003 Western Ave.
Seattle, WA 98121
(206) 728-0996

SUZANNE LEE ELLIOTT
Attorney for Petitioner Rice
705 2nd Ave., Suite 1300
Seattle, WA 98121
(206) 623-0291

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A. ISSUE FOR REVIEW

Does this case present sufficient state law concerns for this Court to adopt and apply a retroactivity test based on Teague¹ but more tailored to the state interests and issues at hand, to conclude Miller² should apply retroactively here?

B. SUMMARY OF ARGUMENT

In In re Pers. Restraint of Haghighi, ___ Wn.2d ___ (No. 87529-4, 9/12/2013), this Court noted it has consistently applied the retroactivity analysis of Teague v. Lane under State law. It further stated:

Moreover, no explanation is offered as to why our state would favor finality of judgments to a lesser extent than the federal system. Thus, we see no reason to depart from our established retroactivity analysis.

Id., Slip Op. at 11. The concurrence/dissent observed this court adopted the federal Teague

¹ Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

² Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

analysis in 1992 without doing a thorough analysis of the state values at stake.³

Then, in 2008, the United States Supreme Court decided Danforth⁴ and ruled, for the first time, that Teague was not designed for state courts and that state high courts can fashion their own retroactivity rules to serve their own state values. Danforth, 552 U.S. at 279-82.

This court has not yet done that post-Danforth analysis. The majority does not do so here--understandably, given that we have not been presented with a plausible alternative retroactivity theory under which Mr. Haghighi's claims would survive. Thus, despite its protestations to the contrary, the majority effectively leaves that question open for another day.

Haghighi, Slip Op. at 2 (Gordon McCloud, J., concurring).

Miller v. Alabama presents a new substantive rule of law which is retroactive under Teague. See Petitioner's Supplemental Brief.

However, if this court determines Miller is a new procedural rule, Petitioner proposes this Court adopt a rule to redress errors on collateral attack if there are "sufficient reasons" under state law

³ In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 324-26, 823 P.2d 492 (1992).

⁴ Danforth v. Minnesota, 552 U.S. 264, 280, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008).

to do so, regardless of whether it is substantive, procedural or has aspects of both. Both statute and court rule adopt this language, allowing this Court to balance the interests on a case-by-case basis consistent with its goal of accurate decision-making in our state's criminal justice system.

The Nevada Supreme Court has adjusted the Teague rule to permit it greater discretion in determining when to apply new rules retroactively in its own jurisprudence. Petitioner encourages this Court to adopt a similar approach that turns on "significant changes in the law" instead of "new rules," and regardless of whether the change is labeled substantive or procedural.

This brief therefore answers the argument of Amicus Curiae Washington Association of Prosecuting Attorney at pages 12-17.

C. LEGAL AUTHORITY AND ARGUMENT

1. STATUTES AND COURT RULES PROVIDE A STATE LAW FRAMEWORK FOR DETERMINING WHEN A NEW RULE OF LAW SHOULD BE RETROACTIVELY APPLIED.

a. Federal cases and statutes do not dictate state retroactivity law.

Teague v. Lane was created by the United States Supreme Court when there was no federal statute to determine when a newly announced constitutional rule would be applied in habeas proceedings to cases already final. For much of history, all new rules were applied retroactively.

Since the Teague decision, Congress greatly limited the scope of The Great Writ, largely codifying Teague's rules for habeas petitions for state convictions. See 28 U.S.C. § 2254(d)(1): Since relief can only be granted pursuant to "clearly established Federal law, as determined by the Supreme Court of the United States," new rules do not provide habeas relief.

The Supreme Court made clear that Teague's holding was based largely on the concept of comity and federalism.⁵ State courts have their own reasons for determining whether new rules justly

⁵ Danforth, 552 U.S. at 279-80.

are redressable under State law. They are not required to follow Teague. State courts' decisions affect only the cases within the state, and so do not have the far-reaching effects of the federal courts' rulings.

- b. State statutes and court rules adopt a different standard of retroactivity.

The same year Teague was decided, Washington's Legislature enacted RCW 10.73.100. In contrast to Teague, the Legislature contemplated the retroactive application of new rules for collateral relief:

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

...
(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.

(Emphases added.)

Teague's denial of retroactivity applies only to new procedural rules. The Legislature contemplated new rules "whether substantive or procedural." Thus it specifically left to the courts the interpretation of a change in the law, to determine whether "sufficient reasons" exist to apply it retroactively.

If this Court places the limitations of Teague on top of this statute, it completely rewrites the statute contrary to the Legislature's intent and purpose. The judiciary cannot rewrite the law this way. "If the language of the act is unambiguous, the statute is not subject to judicial construction, as there is nothing to construe."⁶

This Court adopted similar language in providing for relief by way of personal restraint petition in RAP 16.4(c):

(c) Unlawful Nature of Restraint.
The restraint must be unlawful for one or more of the following reasons:

...
(4) 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 proceeding or civil proceeding instituted by the state or

⁶ State v. Howell, 119 Wn.2d 513, 517, 833 P.2d 1385, 1387 (1992).

local government, and sufficient reasons exist to require retroactive application of the changed legal standard;

Thus this Court adopted the same policy consistent with the state statute and contrary to Teague. In Washington, new interpretations of statutes are properly redressed on collateral attack, especially to correct a sentence. In re PRP of Johnson, 131 Wn.2d 558, 569, 933 P.2d 1019 (1997);⁷ In re PRP of Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002); In re PRP of Greening, 141 Wn.2d 687, 9 P.3d 206 (2000); In re PRP of Vandervlugt, 120 Wn.2d 427, 432-33, 842 P.2d 950 (1992).

2. "SUFFICIENT REASONS" REQUIRES BALANCING INTERESTS. THE STATE COURT HAS DIFFERENT INTERESTS THAN THE FEDERAL COURTS.

Determining whether there are "sufficient reasons" to allow this Court to redress earlier

⁷ "Johnson was sentenced in 1985 based on an incorrect calculation of his offender score. The error did not appear until 1994 when this Court decided [In re PRP of Seitz [, 124 Wn.2d 645, 650, 880 P.2d 34 (1994), overruling State v. Chavez, 52 Wn. App. 796, 799, 764 P.2d 659 (1988)]." This Court applied Seitz retroactively to correct Mr. Johnson's sentence, holding the error was a "fundamental defect" in his sentence that resulted in a miscarriage of justice -- a potential difference of 11 months longer than under the correct offender score.

errors necessarily requires balancing interests. This Court has different interests to balance than do the federal courts that consider habeas challenges to state convictions.

Federalism and comity considerations are unique to *federal* habeas review of state convictions. . . . [F]inality of state convictions is a *state* interest, not a federal one.

Danforth, 552 U.S. at 279-80.

a. Comity and federalism vs. accuracy and correcting errors

Comity and federalism caution federal courts against widespread disturbance of a state court's final decisions. A federal court's ruling, if applied retroactively, would apply to all 50 states in addition to the federal system.

This Court, however, as the State's highest court, has an interest in correcting errors in its own system, especially constitutional errors.⁸ Thus it consistently has corrected inaccurate sentences on collateral review.⁹

⁸ See Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 787, 178 L. Ed. 2d 624 (2011) ("state courts are the principal forum for asserting constitutional challenges to state convictions").

⁹ See Johnson, Goodwin, Vandervlugt, and Greening, supra.

A new rule that promotes accurate decision-making is properly applied to past cases. See, e.g., Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002) (Nevada Supreme Court adopted broader rule for retroactivity than Teague, emphasizing accuracy in decision making). As the State's highest Court, this Court is the last resort to see that the system performs accurately for the people within its jurisdiction.

In Colwell, the Nevada Supreme Court also expressed its goal to encourage its courts to "strive for perspicacious, reasonable application of constitutional principles in cases where no precedent appears to be squarely on point."¹⁰

b. The Washington Constitution is more protective than the Eighth Amendment.

Miller held that a mandatory life sentence on juveniles was "cruel and unusual punishment." U.S. Constitution, Amend. 8. Our state Constitution prohibits punishments that are merely cruel. Constitution, art. 1, § 14. It is more protective than the Eighth Amendment. State v. Thorne, 129

¹⁰ 118 Nev. at 818.

Wn.2d 736, 772, 921 P.2d 514 (1996); State v. Fain, 94 Wn.2d 387, 393, 617 P.2d 720 (1980).

Washington's Constitution often provides broader protections than does the United States Constitution.¹¹ This Court is the final authority on the Washington Constitution. It should also be the final authority on when it will apply constitutional rules retroactively within its boundaries.

c. Our state courts have a greater interest in reaching the merits of a case than the federal courts.

As the final arbiter of justice within this State, this Court has a greater interest of reaching the merits of cases instead of using procedural reasons to avoid them.¹² For this reason, this Court should consider adjusting the Teague doctrine to better facilitate deciding cases on the merits for the guidance of the lower courts and all people in the state.

¹¹ See State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

¹² See RAP 1.2 (rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits).

d. Finality of sentences vs. finality of convictions

Courts and society have an interest in decisions being final. But both the statute and the court rule, as a matter of state policy, place less importance on finality than does Teague.¹³

This Court, not the United States Supreme Court, is the proper authority to balance when finality is a greater interest than accuracy in its criminal justice system.

Finality also is less crucial when applied to sentences as opposed to convictions. Correcting inaccurate sentences is less disruptive than overturning convictions. This Court need not adopt a rule in this case that specifically applies to collateral attacks on convictions. But the rule it adopts from this case should turn on a lower interest in finality, and the state's greater interest in accuracy, of sentences.

The State argues Miller permits a sentencing court to impose a sentence of life without possibility of parole, and so petitioners' sentence

¹³ "[C]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." Johnson, 131 Wn.2d at 567 n.4.

is not "illegal." In Johnson, supra, the sentencing court calculated the sentencing range as 261-347 months based on an offender score of 2. This Court later overruled prior law. The new rule made Mr. Johnson's proper score 1, with a range of 250-333 months. The Court rejected the State's argument that he was not entitled to relief because the 261-month sentence was within the proper range of 250-333 and therefore still within the court's authority. Johnson, 131 Wn.2d at 568-59.

Miller's new holding has the same effect on petitioners' sentence. The sentencing court understood the law required a minimum term of life without parole. While after Miller the court still has the authority to impose that sentence, it must reconsider the sentence with the knowledge of the Constitutionally required "range," including something less than life without parole.

Once the Court has determined the meaning of a statute, that is what the statute has meant since its enactment.¹⁴

This rule applies with even greater force to the meaning of the Constitution. If statutory error of

¹⁴ Johnson, 131 Wn.2d at 568; Vandervlugt, 120 Wn.2d at 436; In re Personal Restraint of Moore, 116 Wn.2d 30, 37, 803 P.2d 300 (1991).

a potential 11 months is a "fundamental defect that inherently results in a miscarriage of justice," how much greater is the miscarriage of justice here: life without the possibility of parole when a lesser sentence should have been available and considered.

- e. The United States Supreme Court's extremely restrictive application of Teague warrants this Court adjusting the test for retroactivity in state courts.

In Haghighi, this Court noted it had followed Teague for 25 years. Over those years, however, the Court's interpretation of Teague has become more and more restrictive. The Nevada Supreme Court acknowledged the Teague analysis articulated reasonable principles, but concluded its practical effect is too restrictive for the state's purposes.

Though we consider the approach to retroactivity set forth in Teague to be sound in principle, the Supreme Court has applied it so strictly in practice that decisions defining a constitutional safeguard rarely merit application on collateral review.

Id. at 818. "[A]s a state court we choose not to bind quite so severely our own discretion in deciding retroactivity." Id. at 819.

3. THIS COURT SHOULD ADOPT THE NEVADA SUPREME COURT'S APPROACH TO RETROACTIVITY ANALYSIS OF NEW RULES.

The Nevada Supreme Court found Teague interprets a "new rule" too broadly,¹⁵ and the exceptions, particularly for a "watershed" rule of procedure to be so limited as to be of no value.¹⁶

It articulated its retroactivity test as follows:

When a rule is new, it will still apply retroactively in two instances: (1) if the rule establishes that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain defendants because of their status or offense; or (2) if it establishes a procedure without which the likelihood of an accurate conviction is seriously diminished. These are basically the exceptions defined by the Supreme Court. But we do not limit the first exception to "primary, private individual" conduct, allowing the possibility that other conduct may be constitutionally protected from criminalization and warrant retroactive relief. And with the second exception, we do not distinguish a separate requirement of "bedrock" or "watershed" significance: if accuracy is

¹⁵ Petitioner does not dispute that Miller creates a "new rule" under any test. The Nevada Court, however, chooses to restrict its interpretation of what is a "new rule" more than Teague does. Colwell, 118 Nev. at 819.

¹⁶ The only "watershed" procedural rule recognized by the U.S. Supreme Court to date is the right to counsel.

seriously diminished without the rule, the rule is significant enough to warrant retroactive application.

Colwell, 118 Nev. at 820.

The Colwell retroactivity test permits the state court to apply its discretion under the same steps of analysis, but with a more watchful eye on the state's interests at stake. For example, it permits the state court to consider the interest in finality of sentences to be less than in the finality of convictions. It permits the state court to determine, within its own jurisdiction, when a "new rule" is really an articulation of a clear constitutional right that simply has not arisen in prior cases. It permits the state court to announce what are "bedrock" or "watershed" principles of the state or United States Constitution as the foundation for its state's jurisprudence.

4. UNDER THE NEVADA TEST, MILLER SHOULD APPLY RETROACTIVELY TO PETITIONERS' CASES.

a. New rule vs. "significant change in the law"

There is no dispute that Miller announced a new rule under Teague and Colwell. It also is a

"significant change in the law" under RCW 10.73.100 and RAP 16.4.

b. Substantive or procedural

The parties dispute whether Miller's holding is substantive or procedural. Under Washington law, RCW 10.73.100 and RAP 16.4, this distinction should not matter. The Legislature and this Court both provide "sufficient reasons" could warrant retroactive application whether "substantive or procedural."

c. Interests in finality vs. accuracy

The state's interest in finality of an unconstitutional sentence is far less than in the finality of a criminal conviction. It is far less burdensome to redress an unconstitutional sentence.

Accuracy for purposes of sentencing requires the court to consider the specific qualities of the individual before it. For juveniles, it means considering the possibility of rehabilitation on a yet developing personality, on his brain development to the time of the offense. By imposing a mandatory sentence of LWOPP without considering the possibility that a lesser sentence

would be adequate, courts were compelled to impose an inaccurate sentence.

All cases after Miller will be handled with appropriate deference to the neurological development of children, permitting the courts to consider how childhood development affected the individuals before them. The sentencing courts will be required to consider a lesser sentence. They will be able to determine an accurate sentence for the person before them.

Yet these 30 individuals, lacking redress, will remain under an unconstitutional sentence, in prison until they die. This State will continue to imprison them for actions they took when they were adolescents, when the law is clear that such sentences were cruel and unusual -- a more onerous standard than our Washington Constitution ostensibly protects against.

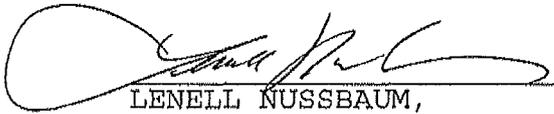
D. CONCLUSION

This Court should follow the lead of the Nevada Supreme Court and adjust the Teague analysis to include the specific qualities determined by the Legislature and court rule: a "significant change in the law" "whether procedural or substantive"

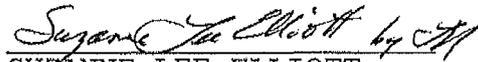
when there are "sufficient reasons" to apply it retroactively.

Under this analysis, it should apply Miller's holding to require new sentencing hearings in these cases.

Respectfully submitted this 11th day of October, 2013,



LENELL NUSSBAUM,
WSBA No. 11140
Attorney for Mr. McNeil



SUZANNE LEE ELLIOTT
WSBA No. 12634
Attorney for Mr. Rice

DECLARATION OF SERVICE

ALEXANDRA FAST declares:

On this date I cause this document to be filed in the State of Washington Supreme Court; and caused a copy of this document to be served on the following entities via email, addressed as follows:

Mr. David B. Trefry
TrefryLaw@WeGoWireless.com

Mr. James P. Hagarty
James.Hagarty@co.yakima.wa.us

Mr. Nick Straley
Nick.Straley@ColumbiaLegal.org

Ms. Pam Loginsky
Pamloginsky@waprosecutors.org

Ms. Suzanne Elliott
suzanne-elliott@msn.com

Ms. Victoria Lyons
victorialyonslaw@gmail.com

Ms. Nancy Tenney
nancy_tenney@fd.org

Ms. Diane Kremenich
Diane.Kremenich@co.snohomish.wa.us

Ms. Hilary Thomas
hthomas@co.whatcom.wa.us

Ms. Kathy Webber
kwebber@co.snohomish.wa.us

Ms. Maureen Janega
Maureen.Janega@ColumbiaLegal.org

Ms. Martina Kartman
Martina.Kartman@ColumbiaLegal.org

Mr. Nick Allen
Nick.Allen@ColumbiaLegal.org

Ms. Melissa Lee
Melissa.Lee@ColumbiaLegal.org

I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

10/11/2013-SEATTLE, WA
Date and Place



ALEXANDRA FAST

OFFICE RECEPTIONIST, CLERK

To: Alexandra Fast
Cc: TrefryLaw@wegowireless.com; James.Hagarty@co.yakima.wa.us;
Nick.Straley@ColumbiaLegal.org; Pamloginsky@waprosecutors.org;
suzanne@suzanneelliottlaw.com; Victoria Lyons; nancy_tenney@fd.org;
Diane.Kremenich@co.snohomish.wa.us; hthomas@co.whatcom.wa.us;
kwebber@co.snohomish.wa.us; Martina.Kartman@ColumbiaLegal.org;
Nick.Allen@ColumbiaLegal.org; Melissa.Lee@ColumbiaLegal.org; Lenell Nussbaum;
Maureen.Janega@ColumbiaLegal.org
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Pamloginsky@waprosecutors.org; suzanne@suzanneelliottlaw.com; Victoria Lyons; nancy_tenney@fd.org;
Diane.Kremenich@co.snohomish.wa.us; hthomas@co.whatcom.wa.us; kwebber@co.snohomish.wa.us;
Martina.Kartman@ColumbiaLegal.org; Nick.Allen@ColumbiaLegal.org; Melissa.Lee@ColumbiaLegal.org; Lenell Nussbaum;
Maureen.Janega@ColumbiaLegal.org
Subject: McNeil, Russell 87654-1

Please accept for filing the attached "Petitioner's Supplemental Brief Re: State Retroactivity Analysis and Answer to Brief Amici Curiae Washington Association of Prosecuting Attorneys" in regards to the Personal Restraint of Russell McNeil, 87654-1. A certificate of service is attached to the pleading.

Alexandra Fast
Assistant to:
Lenell Nussbaum, Attorney at Law
Email: Nussbaum@seanet.com
WSBA No. 15277
Lenell Nussbaum, Attorney at Law
2003 Western Ave., Suite 330
Seattle, Wa 98121
USA
Phone: [206-728-0996](tel:206-728-0996)
Fax: [206-448-2252](tel:206-448-2252)