

No. 08172-3
Yakima County Superior Court No. 88-1-00427-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of:
HERBERT CHIEF RICE, JR.,
Petitioner.

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PERSONAL RESTRAINT PETITION WITH LEGAL ARGUMENT
AND AUTHORITIES

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TABLE OF CONTENTS

I. STATUS OF PETITIONER/PROCEDURAL HISTORY.....1

II. STATEMENT OF THE CASE.....1

III. GROUNDS FOR RELIEF2

IV. ARGUMENT.....2

 A. THE *MILLER* DECISION2

 B. THE PETITION IS NOT BARRED AS SUCCESSIVE.....5

 C. THE PETITION IS TIMELY6

 D. *MILLER* APPLIES RETROACTIVELY7

 1. Introduction7

 2. *Miller* Places the Imposition of a Mandatory Sentence of
 LWOP on a Juvenile Beyond the Power of the Courts.....8

 3. If *Miller* Is Considered a “Procedural” Ruling, Then as a
 Watershed Rule It Should Be Applied Retroactively11

 4. The U.S. Supreme Court Has Treated *Miller* As Retroactive.....17

 5. If This Court Finds that *Miller* Would Not Be Retroactive
 Under *Teague* It Should Use Its Authority to Find *Miller*
 Retroactive Under Washington Law18

 E. THIS COURT SHOULD RULE THAT THE WASHINGTON
 CONSTITUTION PROHIBITS LWOP FOR JUVENILES
 UNDER ALL CIRCUMSTANCES.....20

 F. REMEDY24

 1. Introduction24

V. REQUEST FOR RELIEF27

VI. OATH27

TABLE OF AUTHORITIES

Cases

<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, <i>reh'g denied</i> , 542 U.S. 961, 125 S.Ct. 21, 159 L.Ed.2d 851 (2004).....	25
<i>Bruton v. United States</i> , 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).....	13
<i>Campbell v. Blodgett</i> , 978 F.2d 1502 (9th Cir.), <i>reh'g granted</i> , 978 F.2d 1519 (9th Cir. 1992), <i>reconsideration denied</i> , 992 F.2d 984 (9th Cir. 1993).....	15
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	13, 14, 15
<i>Danforth v. Minnesota</i> , 552 U.S. 264, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008).....	8, 19
<i>Desist v. United States</i> , 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248, <i>reh'g denied</i> , 395 U.S. 931, 89 S.Ct. 1766, 23 L.Ed.2d 251 (1969)	11
<i>Graham v. Florida</i> , 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).....	9, 20
<i>In re Goodwin</i> , 146 Wn.2d 861, 50 P.3d 618 (2002).....	19
<i>In re Greening</i> , 141 Wn.2d 687, 9 P.3d 206, 212 (2000)	5, 19
<i>In re Johnson</i> , 131 Wn.2d 558, 933 P.2d 1019 (1997).....	6, 19
<i>In re Markel</i> , 154 Wn.2d 262, 111 P.3d 249 (2005).....	14
<i>In re Pers. Restraint of Carle</i> , 93 Wn.2d 31, 604 P.2d 1293 (1980).....	19
<i>In re Pers. Restraint of Vandervlugt</i> , 120 Wn.2d 427, 842 P.2d 950 (1992).....	18, 19
<i>In Re Sparks</i> , 657 F.3d 258 (5th Cir. 2011).....	9
<i>In Re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	12

<i>Ivan V. v. City of New York</i> , 407 U.S. 203, 92 S.Ct. 1951, 32 L.Ed.2d 659 (1972).....	12
<i>Jackson v. Norris</i> , 2011 Ark. 49, 378 S.W.3d 103 (Ark.), <i>cert. granted sub nom Jackson v. Hobbs</i> , 132 S.Ct. 538, 181 L.Ed.2d 395 (2011).....	17
<i>Jackson v. State</i> , 359 Ark. 87, 194 S.W.3d 757 (Ark. 2004).....	17
<i>Kuhlmann v. Wilson</i> , 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986).....	6
<i>Mackey v. United States</i> , 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971).....	11
<i>Matter of Jeffries</i> , 114 Wn.2d 485, 789 P.2d 731 (1990).....	6
<i>Matter of St. Pierre</i> , 118 Wn.2d 321, 823 P.2d 492 (1992).....	18
<i>McDougall v. Dixon</i> , 921 F.2d 518 (4th Cir. 1990), <i>cert. denied</i> , 501 U.S. 1223, 111 S.Ct. 2840, 115 L.Ed.2d 1009 (1991).....	15
<i>Miller v. Alabama</i> , -- U.S. --, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)passim	
<i>Padilla v. Kentucky</i> , -- U.S. --, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010).....	17
<i>Penry v. Lynaugh</i> , 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), <i>abrogated on other grounds by Atkins v. Virginia</i> , 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).....	9, 17
<i>Personal Restraint of Jagana</i> , 170 Wn. App. 32, 282 P.3d 1153 (2012).....	17
<i>Roberts v. Russell</i> , 392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed.2d 1100, <i>reh'g denied</i> , 393 U.S. 899, 89 S.Ct. 73, 21 L.Ed.2d 191 (1968)	13
<i>Roper v. Simmons</i> , 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).....	20, 21
<i>Saffle v. Parks</i> , 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415, <i>reh'g denied</i> , 495 U.S. 924, 110 S.Ct. 1960, 109 L.Ed.2d 322 (1990)	9

<i>Schriro v. Summerlin</i> , 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).....	12
<i>State v. Evans</i> , 154 Wn.2d 438, 114 P.3d 627, <i>cert. denied</i> , 546 U.S. 983, 126 S.Ct. 560, 163 L.Ed.2d 472 (2005).....	18
<i>State v. Fain</i> , 94 Wn.2d 387, 617 P.2d 720 (1980).....	21, 22, 24
<i>State v. Forrester</i> , 21 Wn. App. 855, 587 P.2d 179, 188 (1978), <i>rev. denied</i> , 92 Wn.2d 1006 (1979)	5, 7
<i>State v. Furman</i> , 122 Wn.2d 440, 858 P.2d 1092 (1993)	14, 21, 23
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986)	22
<i>State v. Hughes</i> , 154 Wn.2d 118, 110 P.3d 192 (2005), <i>abrogated on other grounds by Washington v. Recuenco</i> , 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).....	25, 26
<i>State v. Massey</i> , 60 Wn. App. 131, 803 P.2d 340, <i>rev. denied</i> , 115 Wn.2d 1021, 802 P.2d 126 (1990), <i>and cert. denied</i> , 499 U.S. 960, 111 S.Ct. 1584, 113 L.Ed.2d 648 (1991).....	4, 5, 6, 7
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995), <i>cert. denied</i> , 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996).....	26
<i>State v. Rice</i> , 120 Wn.2d 549, 553, 844 P.2d 416, 418 (1993)	1
<i>State v. Roberts</i> , 142 Wn.2d 471, 14 P.3d 713 (2000).....	22
<i>State v. Thorne</i> , 129 Wn.2d 736, 921 P.2d 514 (1996).....	21
<i>Sumner v. Shuman</i> , 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987).....	14, 15
<i>Teague v. Lane</i> , 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334, <i>reh'g denied</i> , 490 U.S. 1031, 109 S.Ct. 1771, 104 L.Ed.2d 206 (1989).....	passim
<i>Thigpen v. Thigpen</i> , 926 F.2d 1003 (11th Cir.), <i>reh'g denied</i> , 933 F.2d 1023 (11th Cir. 1991).....	15

Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988)..... 20

Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)..... 14, 15

Statutes

RCW 10.73.090 6

RCW 10.73.100 7, 18, 20

RCW 10.73.140 6

RCW 10.95 1, 23

RCW 13.40.0357 24

RCW 13.40.110 23

Other Authorities

Cynthia F. Adcock. *The Twenty-Fifth Anniversary of Post-Furman Executions in North Carolina: a History of One Southern State's Evolving Standards of Decency*, 1 *Elon L. Rev.* 113, 119 (2009) 14

The Journal of the Washington State Constitutional Convention: 1889 501-02 (B. Rosenow ed. 1962) 21

Rules

RAP 16.4..... 5

Constitutional Provisions

Const. art. I, § 14 (Cruel & Unusual Punishment)..... 2

U.S. Const. amend. VIII (Cruel & Unusual Punishment)..... passim

I.
STATUS OF PETITIONER/PROCEDURAL HISTORY

Herbert Chief Rice, Jr., seeks relief from confinement. He was convicted of aggravated murder after a jury trial in Yakima County Washington, under cause number 88-1-00427-2. He is presently in custody at the Washington State Penitentiary in Walla Walla serving two consecutive mandatory sentences of life in prison without the possibility of parole.

II.
STATEMENT OF THE CASE

Mr. Rice was charged with two counts of capital murder committed when he was 17 years old. The jury returned guilty verdicts on both counts but refused to impose a death sentence. Thus, by operation of RCW 10.95, the only available sentence for both counts was life in prison without the possibility of parole. He was sentenced on January 5, 1999, by the Honorable James Gavin. He was represented at trial by Michael Frost and Rick Hoffman.

Mr. Rice appealed. *State v. Rice*, 120 Wn.2d 549, 553, 844 P.2d 416, 418 (1993). On appeal he was represented by Lewis M. Schrawyer. This Court rejected his claims that: 1) the trial court abused its discretion by not granting a change of venue; 2) the admission of hearsay statements from his co-defendant violated his constitutional right to confrontation; 3)

“death qualification” of jurors created a guilt prone jury during the guilt phase of his trial, thus denying him equal protection; and 4) there was prosecutorial misconduct during closing argument.

III. GROUNDS FOR RELIEF

1. Rice’s sentence of mandatory life without parole violates the Eighth Amendment to the U.S. Constitution.
2. Rice’s sentence of life without parole violates article I, § 14 of the Washington Constitution.

IV. ARGUMENT

A. THE *MILLER* DECISION

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

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

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

The Court based its conclusions in part on relatively recent scientific findings that only a small percentage of adolescents who engage in illegal activity “develop entrenched patterns of problem behavior,” and that the juvenile brain is fundamentally and anatomically different from the adult brain, particularly regarding “behavior control.” This means that the “moral culpability” of a juvenile is less than an adult’s, and also that there is much more likelihood that his “deficiencies will be reformed” as

his “neurological development occurs.” *Id.* at 2464-65 (citations and internal quotation marks omitted).

The Court expressly rejected the notion that the exercise of discretion in charging the juvenile as an adult satisfied the Eighth Amendment. *Id.* at 2474-75. First, the court may not have full information at that stage of the proceedings. Second, and “more important,” such decisions “often present a choice between extremes” since some states (including Washington) require a child convicted as a juvenile to be released at the age of 21. *Id.* This reasoning directly contradicts the second rationale in *State v. Massey*, 60 Wn. App. 131, 803 P.2d 340, *rev. denied*, 115 Wn.2d 1021, 802 P.2d 126 (1990), *and cert. denied*, 499 U.S. 960, 111 S.Ct. 1584, 113 L.Ed.2d 648 (1991): that the superior court’s decision to decline juvenile jurisdiction justified imposition of the same sentence that would apply to an adult. *Id.* at 145-46 (footnote omitted).

The Court left open whether “the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger.” *Miller*, 132 S. Ct. at 2469. “But given all we have said . . . about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” *Id.* “That is especially so

because of the great difficulty . . . of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Id.* (citations and internal quotation marks omitted).

The *Miller* decision effectively overruled the Court of Appeals cases in *State v. Massey*, 60 Wn. App. at 145, and *State v. Forrester*, 21 Wn. App. 855, 870, 587 P.2d 179, 188 (1978), *rev. denied*, 92 Wn.2d 1006 (1979). This Court has never squarely considered whether a sentence of life imprisonment without the possibility of parole constitutes cruel and unusual punishment when applied to a juvenile.

B. THE PETITION IS NOT BARRED AS SUCCESSIVE

Several provisions of Washington case law, statutes, and rules bar successive claims under certain circumstances. None of them apply here.

RAP 16.4(d) provides: “No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.” “A successive petition seeks similar relief if it either renews claims already previously heard and determined on the merits or raises new issues in violation of the abuse of the writ doctrine.” *In re Greening*, 141 Wn.2d 687, 699, 9 P.3d 206, 212 (2000) (citations and

internal quotation marks omitted). Mr. Rice has filed previous PRP's but none have raised the issues raised in this PRP.

A represented petitioner abuses the writ by raising in a successive petition a claim that was “available but not relied upon in a prior petition.” *Matter of Jeffries*, 114 Wn.2d 485, 492, 789 P.2d 731, 737 (1990) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n. 6, 106 S.Ct. 2616, 2622 n. 6, 91 L.Ed.2d 364 (1986)). Rice's current claim was not available to him because – prior to *Miller* – no intervening change in the law created an exception to the one-year time limit. In fact, the Court of Appeals decision in *State v. Massey* remained the law in Washington until *Miller* was decided.

RCW 10.73.140 prohibits the Court of Appeals from considering a personal restraint petition if the petitioner has “filed a previous petition on similar grounds,” and, if he did not raise the current ground in a previous petition, requires the petitioner to show “good cause” for that failure. Because this statute does not apply to the Supreme Court, there is no need to address it. *See In re Johnson*, 131 Wn.2d 558, 933 P.2d 1019 (1997).

C. THE PETITION IS TIMELY

Collateral attacks must generally be filed within one year of the date that the conviction became final. RCW 10.73.090. Mr. Rice's conviction became final many years ago. But, there is an exception,

however, for a “significant change in the law . . . which is material to the . . . sentence” and a court “determines that sufficient reasons exist to require retroactive application of the changed legal standard.” RCW 10.73.100.

Miller is obviously a significant change in the law, as evidenced by *Massey*’s own direct appeal. Until *Miller* was decided, the Court of Appeals decisions in *Massey* and *Forrester* stood as binding precedent in Washington. As noted above, those two divisions of the Court of Appeals flatly concluded that age was simply not a factor in assessing whether an LWOP sentence constitutes cruel and unusual punishment.

The *Miller* decision is certainly “material” to Rice’s sentence because the mandatory LWOP sentence he received is unquestionably unconstitutional under *Miller*.

D. *MILLER* APPLIES RETROACTIVELY

1. Introduction

There are four reasons why this Court should apply *Miller* retroactively. First, *Miller* places the act of imposing a mandatory sentence of LWOP on a juvenile beyond the power of the courts. Second, and alternatively, *Miller* is a watershed rule of constitutional procedure. Third, the United States Supreme Court indicated in *Miller* itself that it should be applied retroactively by affording relief to the defendant in *Miller*’s companion case. Fourth, regardless of federal retroactivity

standards, this Court should exercise its authority to correct Mr. Rice's sentence given that *Miller* shows it to be erroneous.

When deciding whether a new ruling applies retroactively, the United States Supreme Court follows the standards set out in *Teague v. Lane*, 489 U.S. 288, 300-01, 109 S.Ct. 1060, 1070, 103 L.Ed.2d 334, *reh'g denied*, 490 U.S. 1031, 109 S.Ct. 1771, 104 L.Ed.2d 206 (1989).¹ The rule will apply to any cases still pending on direct review. *Id.* at 304. For cases on collateral review, such as Rice's, the next issue is whether the rule is "new", that is, one not dictated by existing precedent. If so, the case will generally apply prospectively only. *Id.* at 301. Rice concedes that *Miller* sets out a new rule. As discussed below, however, at least one of *Teague*'s two exceptions to the non-retroactivity rule applies here.

2. *Miller* Places the Imposition of a Mandatory Sentence of LWOP on a Juvenile Beyond the Power of the Courts

Under *Teague* a new rule will apply retroactively if it "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 311 (citation and

¹ Although Justice O'Connor's opinion in *Teague* was only a plurality, the Supreme Court later confirmed that it represented the opinion of a majority of the Court. *See Danforth v. Minnesota*, 552 U.S. 264, 266, 128 S.Ct. 1029, 1033, 169 L.Ed.2d 859 (2008).

internal quotation marks omitted). This exception applies “not only [to] rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.” *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). An example of such a case is *Graham v. Florida*, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), which held that the Eighth Amendment precludes a sentence of life without parole for a juvenile who did not commit a homicide offense. *See, e.g., In Re Sparks*, 657 F.3d 258 (5th Cir. 2011) (holding that *Graham* applies retroactively under the first *Teague* exception). Court rulings subject to this exception are sometimes referred to as “substantive.” *See Saffle v. Parks*, 494 U.S. 484, 494-95, 110 S.Ct. 1257, 108 L.Ed.2d 415, *reh’g denied*, 495 U.S. 924, 110 S.Ct. 1960, 109 L.Ed.2d 322 (1990).

The first *Teague* exception should apply here because *Miller* “prohibit[s] a certain category of punishment for a class of defendants because of their status or offense.” Mandatory LWOP is absolutely precluded for defendants who were under 18 at the time of the offense. *Miller* is therefore similar to *Graham v. Florida*, *supra*.

The State may argue, however, that the relevant inquiry is whether *Miller* forbids juvenile LWOP under all circumstances. The Court should reject such reasoning because the phrase “category of punishment” is broad enough to include the mandatory nature of Washington’s sentencing for aggravated murder. Further, although the *Miller* majority declined to decide whether the Eighth Amendment invariably prohibits LWOP for juveniles, it explained that when the proper factors are considered there will be few, if any, cases in which such a punishment would be appropriate. Thus, unlike rulings that have been categorized as “procedural,” *Miller* has nearly the same effect as a rule expressly prohibiting a certain punishment under all circumstances.

In the alternative, this Court should decide as a matter of Washington law that the *Miller* decision should be treated the same as a ruling forbidding juvenile LWOP under all circumstances. *See* section D(5), below.

Further, as discussed in section E below, this Court should take *Miller* one step further and hold – as the U.S. Supreme Court will likely do at some point – that LWOP is flatly prohibited for juveniles. If the Court agrees, then the Washington rule will unquestionably be “substantive” and the first *Teague* exception will clearly apply.

3. If *Miller* Is Considered a “Procedural” Ruling, Then as a Watershed Rule It Should Be Applied Retroactively

The second *Teague* exception applies to “watershed” rules of constitutional criminal procedure. *Teague*, 489 U.S. at 311. As the Supreme Court explained:

[I]n some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction.

Id. at 311 (emphasis in *Teague*) (quoting *Mackey v. United States*, 401 U.S. 667, 693-94, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971)). The Court continued:

In *Desist*², Justice Harlan had reasoned that one of the two principal functions of habeas corpus was “to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted,” and concluded “from this that all ‘new’ constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas.”

Id. at 312. The Court believed it to be “desirable to combine the accuracy element” from *Desist* with the “*Mackey* requirement that the procedure at issue must implicate the fundamental fairness of the trial.” *Id.* In doing so

² *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248, *reh’g denied*, 395 U.S. 931, 89 S.Ct. 1766, 23 L.Ed.2d 251 (1969).

the Court reconciled “concerns about the difficulty in identifying both the existence and the value of accuracy-enhancing procedural rules . . . by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished.” *Id.* at 313.

Although the language in *Teague* focuses on convictions, the Supreme Court has applied the “watershed” standard to procedures concerning sentencing. *See, e.g., Schriro v. Summerlin*, 542 U.S. 348, 355-57, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).

The U.S. Supreme Court has yet to hold that any case meets the “watershed” exception. One reason for this, however, is that the most fundamental rules of constitutional criminal procedure were announced, and had already been applied retroactively, prior to *Teague*. For example, in *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), the Supreme Court first held that the due process clause requires proof beyond a reasonable doubt in criminal and juvenile delinquency proceedings. In *Ivan V. v. City of New York*, 407 U.S. 203, 92 S.Ct. 1951, 32 L.Ed.2d 659 (1972), the Supreme Court held that *Winship* applies retroactively, using language nearly identical to the *Teague* standard. *Id.* at 204-05 (a lower standard “substantially impairs the truth-finding function” while the beyond-a-reasonable-doubt standard supports “that bedrock axiomatic and

elementary principal whose enforcement lies at the foundation of the administration of our criminal law”) (citations and internal quotation marks omitted).

Similarly, the fundamental right to confront a co-defendant’s statement incriminating the defendant, set out in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), was applied retroactively in *Roberts v. Russell*, 392 U.S. 293, 88 S.Ct. 1921, 1922, 20 L.Ed.2d 1100, *reh’g denied*, 393 U.S. 899, 89 S.Ct. 73, 21 L.Ed.2d 191 (1968). The *Russell* Court found that *Bruton* “correct[ed] serious flaws in the fact-finding process at trial,” and ““went to the basis of fair hearing and trial because the procedural apparatus never assured the (petitioner) a fair determination’ of his guilt or innocence.” *Id.* at 294 (citations and internal quotation marks omitted). This language suggests that *Bruton* would have passed the *Teague* test as well.

On the other hand, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), was not retroactive under *Teague*. While *Crawford* changed the constitutional standard for admission of hearsay statements, it did not greatly increase the likelihood of an accurate conviction because the previous standard required “adequate indicia of

reliability.” See *In re Markel*, 154 Wn.2d 262, 273, 111 P.3d 249, 254 (2005).³

The closest analog to *Miller* is the U.S. Supreme Court’s ruling in *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), a case the *Miller* court relied on.⁴ *Woodson* overturned a statute mandating the death penalty for any conviction of first-degree murder. *Id.* at 305. This rule was promptly applied to all 120 prisoners on death row in North Carolina, regardless of the procedural posture of their cases. See Cynthia F. Adcock. *The Twenty-Fifth Anniversary of Post-Furman Executions in North Carolina: a History of One Southern State’s Evolving Standards of Decency*, 1 *Elon L. Rev.* 113, 119 (2009).⁵ Similarly, *Sumner v. Shuman*, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987), struck down mandatory death sentences for defendants who commit murder while under sentence of LWOP. See *Miller*, 132 S.Ct. at 2467. It

³ In fact, *Crawford* arguably decreased the accuracy of trials because it expressly rejected reliability as a factor for determining which out-of-court statements may be admitted at trial. *Crawford*, 541 U.S. at 61.

⁴ See *Miller*, 132 S.Ct. at 2464.

⁵ Available at http://www.elon.edu/docs/e-web/law/law_review/Issues/Adcock.pdf.

likewise was applied retroactively.⁶ It does not appear that either *Woodson* or *Shuman* was ever expressly tested under the *Teague* standards.

Miller, like *Woodson*, is different from cases such as *Crawford* because it does not merely make an incremental improvement in the accuracy of a proceeding. Rather, it completely abolishes a mandatory sentencing scheme. No such ruling has ever been tested under *Teague*. This Court should find that the *Miller* ruling meets *Teague*'s second exception.

First, *Miller* alters the "bedrock procedural elements" of sentencing juveniles for aggravated murder. The current Washington system contains *no* procedural safeguards since a sentence of LWOP is automatic upon conviction for aggravated murder. *Miller* replaces that with a system requiring consideration of complex and individualized factors.

⁶ See *Campbell v. Blodgett*, 978 F.2d 1502, 1512-13 (9th Cir.), *reh'g granted*, 978 F.2d 1519 (9th Cir. 1992), *reconsideration denied*, 992 F.2d 984 (9th Cir. 1993) (determining merits of *Shuman* claim in case that became final two years before *Shuman* decided); *Thigpen v. Thigpen*, 926 F.2d 1003, 1005 (11th Cir.), *reh'g denied*, 933 F.2d 1023 (11th Cir. 1991) (noting death sentence set aside on *Shuman* grounds in federal habeas corpus case); *McDougall v. Dixon*, 921 F.2d 518, 530-31 (4th Cir. 1990), *cert. denied*, 501 U.S. 1223, 111 S.Ct. 2840, 115 L.Ed.2d 1009 (1991) (determining merits of *Shuman* claim in case that became final four years before *Shuman* decided).

Second, the current system allows an “impermissibly large risk” that a juvenile will be sentenced to LWOP, and the new rule “significantly improve[s] the pre-existing fact-finding procedures.” *Teague*, 489 U.S. at 312. As the *Miller* Court noted, “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” 132 S.Ct. at 2469. Thus, in Washington, *Miller* changes the likelihood of a juvenile convicted of aggravated murder receiving LWOP from 100% to nearly 0%. In other words, the *Miller* Court found that the current system suffers not merely from the *possibility* of erroneous sentences in some cases but the near certainty of erroneous sentences in the vast majority of cases. In the words of the *Teague* Court, “the likelihood of an accurate [sentence]” was “seriously diminished,” 489 U.S. at 313, under the sentencing scheme that applied to Rice.

Finally, the *Miller* ruling affects the “fundamental fairness” of the proceeding, as this case demonstrates. *Miller* makes it clear that the individualized sentencing for juveniles is implicit in the concept of ordered liberty. It would be cruel and unusual to apply the principle only in “new” cases.

It is fundamentally unfair that a defendant such as Mr. Rice must automatically spend the rest of his life in prison for a transgression

committed as a child. Thus, this Court should find that the “watershed” exception applies here.

4. The U.S. Supreme Court Has Treated *Miller* As Retroactive

The *Miller* Court granted relief not only to Evan Miller but also to Kuntrell Jackson, the petitioner in a consolidated case. *Miller*, 13 S.Ct. at 2475. Jackson’s conviction became final in 2004, *Jackson v. State*, 359 Ark. 87, 194 S.W.3d 757 (Ark. 2004), and his case reached the Supreme Court after the Arkansas Supreme Court affirmed the dismissal of Jackson’s state petition for habeas corpus. *Jackson v. Norris*, 2011 Ark. 49, 378 S.W.3d 103 (Ark.), *cert. granted sub nom Jackson v. Hobbs*, 132 S.Ct. 538, 181 L.Ed.2d 395 (2011). The Supreme Court will not apply a new rule to a case on collateral review unless that rule applies retroactively to all cases on collateral review. *See Penry v. Lynaugh*, 492 U.S. at 313. *Cf. Personal Restraint of Jagana*, 170 Wn. App. 32, 53-58, 282 P.3d 1153, 1165-66 (2012) (that the U.S. Supreme Court reached the merits in *Padilla v. Kentucky*, -- U.S. --, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), although the petitioner was on collateral attack, suggested that the Court believed the ruling applied retroactively).

5. If This Court Finds that *Miller* Would Not Be Retroactive Under *Teague* It Should Use Its Authority to Find *Miller* Retroactive Under Washington Law

In *Matter of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492, 495 (1992), this Court first considered the *Teague* standard, and applied its definition of finality. In subsequent cases, this Court has “[g]enerally . . . followed the lead of the United States Supreme Court when deciding whether to give retroactive application to newly articulated principles of law.” *State v. Evans*, 154 Wn.2d 438, 444, 114 P.3d 627, 630, *cert. denied*, 546 U.S. 983, 126 S.Ct. 560, 163 L.Ed.2d 472 (2005). The Court has recognized, however, that it is not bound by *Teague* when deciding whether a change in the law applies retroactively under RCW 10.73.100(6).

There may be a case where our state statute would authorize or require retroactive application of a new rule of law when *Teague* would not. Cf. *In re Pers. Restraint of Vandervlugt*, 120 Wash.2d 427, 432-33, 842 P.2d 950 (1992) (vacating exceptional sentence based on invalid sentencing factor); *In re Pers. Restraint of Smith*, 117 Wash.App. 846, 860-70, 73 P.3d 386 (2003). As Chief Justice Rehnquist sagely noted, *Teague* was “grounded in important considerations of federal-state relations.” *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S. Ct. 2715, 111 L.Ed.2d 30 (1990). Limiting a state statute on the basis of the federal court’s caution in interfering with State’s self-governance would be, at least, peculiar.

Id. at 448-49. *See also, Danforth*, 552 U.S. at 266 (*Teague* rule does not constrain authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion).

The Washington Courts have freely corrected sentences when new court decisions show them to be erroneous. *See, e.g., In re Pers. Restraint of Vandervlugt*, 120 Wn.2d 427, 432-33, 842 P.2d 950 (1992); *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980); *In re Goodwin*, 146 Wn.2d 861, 869, 50 P.3d 618 (2002); *In re Johnson, supra*; *In re Greening, supra*.

In the interest of fairness, this Court should apply *Miller* retroactively. Going forward, all juveniles will presumably receive appropriate sentences when convicted of murder with aggravating factors. There is no good reason for the juveniles whose convictions are final to languish in prison. Such a discrepancy would reflect poorly on our judicial system.

Any interest in finality is minimal since the courts would not need to revisit the convictions but merely the sentences. Determining the appropriate term would actually be easier with the older cases than with the new ones. Rather than attempting to predict a juvenile's potential for rehabilitation, the courts could see how the offender has in fact demonstrated his rehabilitation during his many years in prison.

Even if this Court finds that *Miller* is retroactive under *Teague*, it may wish to make an alternate finding that, regardless of *Teague*, it is retroactive under RCW 10.73.100(6). That would avoid any chance that this Court's ruling might be called into question by some later ruling of the U.S. Supreme court.

E. THIS COURT SHOULD RULE THAT THE WASHINGTON CONSTITUTION PROHIBITS LWOP FOR JUVENILES UNDER ALL CIRCUMSTANCES

The Supreme Court's ruling in *Miller* leaves a significant question unanswered: Does the Eighth Amendment prohibit LWOP for juveniles in all cases? The majority's strong condemnation of such a sentence suggests that it may well rule at some point that our standards of decency have evolved to the point that it is *never* appropriate to lock the door and throw away the key. Certainly, the Supreme Court's holdings seem to be moving on such a path. *See Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (Eighth Amendment prohibits execution of juveniles under 16 at time of offense); *Roper v. Simmons*, 543 U.S. 551, 556, 125 S.Ct. 1183, 1188, 161 L.Ed.2d 1 (2005) (prohibiting death penalty for 16 and 17-year-olds); *Graham v. Florida*, 130 S.Ct. at 2034 (prohibiting LWOP for juveniles convicted of non-homicide offenses); *Miller*, 132 S. Ct. at 2475 (prohibiting mandatory LWOP for

juvenile homicide offenses). It appears likely that the next ruling will be a flat ban on LWOP for juveniles.

This Court should not wait for that ruling, but should anticipate it. The Court took a similar approach when it ruled, 12 years before the decision in *Roper*, that Washington does not permit execution of those under 18 at the time of the offense. *See State v. Furman*, 122 Wn.2d 440, 858 P.2d 1092 (1993).

Article 1, section 14 of the Washington Constitution provides, “Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.” Const. art. 1, § 14. The state framers considered and rejected the language of the Eighth Amendment to the United States Constitution, which only prohibits punishment that is both “cruel” and “unusual.” U.S. Const. amend. VIII; *State v. Fain*, 94 Wn.2d 387, 393, 617 P.2d 720 (1980) (citing *The Journal of the Washington State Constitutional Convention: 1889 501-02* (B. Rosenow ed. 1962)).

Because of the differences in text and history, this Court has long held that article 1, section 14 provides greater protection than its federal counterpart. *State v. Thorne*, 129 Wn.2d 736, 772, 921 P.2d 514 (1996);

Fain, 94 Wn.2d at 393. Accordingly, a *Gunwall*⁷ analysis is not necessary. *State v. Roberts*, 142 Wn.2d 471, 506 n.11, 14 P.3d 713 (2000). Rather, this Court will “apply established principles of state constitutional jurisprudence.” *Id.*

To pass state constitutional muster, a sentence must be both inherently and comparatively proportional. *See Fain*, 94 Wn.2d at 397. This Court evaluates four factors in determining whether a sentence violates article 1, section 14: (1) the nature of the offense, (2) the legislative purpose behind the statute and whether that purpose can be equally well served by a less severe punishment, (3) the punishment the defendant would have received in other jurisdictions for the same offense, and (4) the punishment meted out for other offenses in the same jurisdiction. *Id.* at 397, 401 n.7

The Nature of the Offense: The crime of aggravated murder is of course extremely serious. It has only recently become clear, however, how different that crime is when committed by a juvenile rather than an adult. As the *Miller* Court explained, the culpability and capacity for change of a juvenile is not the same as that of an adult. *See Miller*, 132

⁷ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

S.Ct. at 2469, (noting that Court might bar LWOP for juveniles under 16 at the time of the offense even if it did not do so for older juveniles.)

The Legislative Purpose: Two statutory provisions are at issue. First, RCW 13.40.110 authorizes juveniles to be tried as adults under some circumstances. Second, RCW 10.95 sets out the penalties and procedures for sentencing on premeditated murder with aggravating circumstances. The only penalty options are death and life without parole. In *Furman*, 122 Wn.2d at 456-58, this Court addressed the interaction between these two provisions in the context of a juvenile sentenced to death. The Court noted that neither statute referred to the other. This created the anomaly that “a child as young as 8 could theoretically be tried as an adult and sentenced to death or life without parole for aggravated murder.” *Id.* at 457. The Court concluded that the legislature had simply not considered how RCW 10.95 would apply to juveniles tried as adults. “The statutes therefore cannot be construed to authorize imposition of the death penalty for crimes committed by juveniles.” Of course, the legislature did not consider how the sentence of LWOP should apply to juveniles tried as adults any more than it did for the sentence of death. Therefore, there is *no* legislative purpose to the provisions at issue here.

Punishment in Other Jurisdictions: This issue is addressed in *Miller*, 132 S. Ct. at 2470-73. The Court rejected the notion that LWOP

for juveniles was widely accepted simply because it is a theoretical possibility in 29 jurisdictions. In most of these jurisdictions, as in Washington, the penalty becomes possible only through the combination of declining juvenile jurisdiction and then applying the penalties set out in the statutes pertaining to adults. Under those circumstances, it is “impossible to say whether a legislature had endorsed a given penalty for children (or would do so if presented with the choice).” *Id.* at 2472.

The Punishment in Washington for Other Offenses: For adult offenders, the sentence of LWOP is a reasonable, incremental increase from the already substantial guideline ranges for first-degree murder. For juvenile offenders, the better comparison is to the sentence they could face if prosecuted in the juvenile system. Even for the most serious crimes, incarceration can last only until the offender turns 21. RCW 13.40.0357. In Mr. Rice’s case, that yields a maximum sentence of 4 years.

Thus, in view of the current understanding of juvenile offenders, the *Fain* factors lead to the conclusion that Article I, section 14 absolutely prohibits LWOP for juvenile offenders under all circumstances.

F. REMEDY

1. Introduction

The *Miller* decision does not specify the remedy when a juvenile’s sentence of LWOP is overturned. On its face, the ruling would seem to

permit a resentencing hearing on a conviction for aggravated murder, as long as the proper factors are considered and lesser sentences are available.

Washington, however, does not permit judicially created sentencing schemes.

“This court has consistently held that the fixing of legal punishments for criminal offenses is a legislative function.” *State v. Ammons*, 105 Wash.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). “[I]t is the function of the legislature and not of the judiciary to alter the sentencing process.” *Id.* (quoting *State v. Monday*, 85 Wash.2d 906, 909-10, 540 P.2d 416 (1975) (emphasis added).

State v. Hughes, 154 Wn.2d 118, 149, 110 P.3d 192, 208 (2005), abrogated on other grounds by *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). In *Hughes*, this Court found the defendant’s sentence unconstitutional in view of *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, *reh’g denied*, 542 U.S. 961, 125 S.Ct. 21, 159 L.Ed.2d 851 (2004) (jury, rather than trial court, must find existence of aggravating factors). The Court declined to remand for the empaneling of a jury because “no procedure is currently in place allowing juries to be convened for the purpose of deciding aggravating factors.” *Hughes*, 154 Wn.2d at 149.

This court will not create a procedure to empanel juries on remand to find aggravating factors because the legislature did not provide such a procedure and, instead, explicitly

assigned such findings to the trial court. To create such a procedure out of whole cloth would be to usurp the power of the legislature.

Id. at 151-52. The Court, therefore, remanded for imposition of a standard range sentence, without aggravating factors. *Id.* at 156.

Similarly, this Court cannot create a sentencing scheme that would permit a judge or jury to impose a discretionary sentence for aggravated murder. On the other hand, as in *Hughes*, it could simply remand for resentencing without the aggravating factors. As this Court has explained, the factors that raise the penalty for premeditated murder to life without parole are merely sentencing enhancements rather than elements of the crime. *See State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245, 262 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996). Sentencing procedures are already in place for the crime of murder in the first degree. On remand the trial court can simply apply the guidelines for first-degree murder in existence at the time of the offense. That would yield a constitutional sentence in Mr. Rice's case.⁸

⁸ If Mr. Rice entered a plea to two counts of first degree murder, the standard sentencing range would have been 271-361 months in prison. He has an offender score of 3 because each murder was an "other current offense" which did not encompass the same conduct (two different victims). The sentences were ordered to be served consecutively. Thus, the sentence would be 542 to 722 months. Mr. Rice has already served 300 months in prison.

V.
REQUEST FOR RELIEF

For the foregoing reasons, this Court should vacate Mr. Rice's sentence and remand for resentencing within the standard range on one count of murder in the first degree, without aggravating factors.

VI.
OATH

After being first duly sworn on oath, I depose and say that: I am the attorney for petitioner, I have read the petition, know its contents, and believe the petition is true.

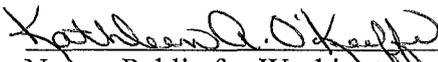
DATED this 6 day of December, 2012.

Respectfully submitted,


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

SUBSCRIBED AND SWORN TO before me, the undersigned
notary public, on this 6th day of December, 2012.




Notary Public for Washington
My Commission Expires: 05/09/15

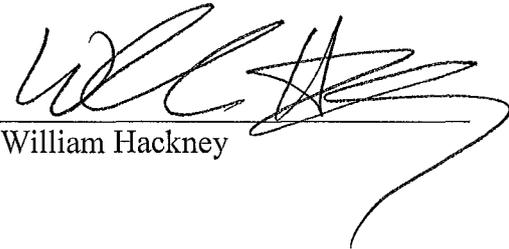
CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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06 Dec 2012
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William Hackney