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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of
GREGORY O. THOMAS,
Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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 ORIGINAL

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A. AUTHORITY FOR RESTRAINT OF PETITIONER

Gregory O. Thomas is restrained pursuant to Judgment and Sentence in King County Superior Court No. 95-1-02081-6 SEA. Appendix A.

B. ISSUES PRESENTED

1. In Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed.2d 407 (2012), the United States Supreme Court held that *mandatory* life imprisonment without possibility of parole for a crime committed before the offender reached the age of 18 violates the Eighth Amendment's prohibition on cruel and unusual punishment. Thomas received a *discretionary* exceptional sentence of 999 months for the sexually motivated murder of a 71-year-old woman when he was 15 years old. Has Thomas failed to show that the change in the law effected by Miller is material to his sentence?

2. A new rule that prohibits imposition of a certain type of punishment for a class of offenders because of their status or offense will be applied retroactively on collateral review. The new rule in Miller did not categorically prohibit a sentence of life without parole for juveniles convicted of homicide, but merely required that the sentencing authority exercise discretion in imposing sentence in such cases. The trial court in Thomas's case was not required to

impose a 999-month sentence, but exercised its discretion in doing so. Has Thomas failed to show that the new rule announced in Miller has retroactive application in this collateral attack?

3. To gain relief, a personal restraint petitioner must show actual and substantial prejudice arising out of any violation of his constitutional rights. A new law passed by the Legislature offers offenders like Thomas an opportunity to petition for early release after they have served 20 years in confinement. Has Thomas failed to show actual and substantial prejudice, in that he now has the meaningful opportunity for release to which he would be entitled if Miller applied to him?

4. If a personal restraint petition containing multiple claims is filed after the one-year period allowed for filing a collateral attack has expired, and at least one of the claims is time-barred, the petition must be dismissed. Thomas's claim that his sentence amounts to cruel and unusual punishment under the federal and state constitutions is not based on any exception to the time bar. Must this petition be dismissed as a mixed petition?

C. STATEMENT OF THE CASE

Petitioner Gregory Thomas was charged by amended information with aggravated murder in the first degree (Count I),

murder in the first degree based on rape in the first or second degree and/or burglary in the first degree (Count II), and attempted residential burglary (Count III). Count II included an allegation that the murder was committed with sexual motivation. Appendix B.

The murder charges were based on the brutal murder and sexual assault of 71-year-old Ruth Lamere in her home on January 9, 1995. Lamere died from multiple blows to her head that were consistent with having been inflicted with a hammer. There was also evidence of sexual abuse: Lamere's body was naked from the waist down, there was a laceration on her right breast, there were abrasions in her vaginal and anal areas, and a condom was found near her body. Appendix B.

The intruder had forced entry into Lamere's home through a window. Police found items bearing Thomas's name at the point of entry and quickly arrested Thomas, who lived nearby. They found bloody clothing and shoes in his bedroom, and a bloody hammer in the yard. Appendix B.

The charge of attempted residential burglary was based on an incident that had occurred a few weeks before the murder, on December 21, 1994. Someone came to the home of Mary Jo Stout, ostensibly selling candy. Stout refused to open the door, and

told the person to leave. Shortly thereafter, Stout noticed that the motion-activated floodlights in her backyard had come on; when she looked out, she saw the intruder in her backyard, unscrewing the lights. Stout called 911. Thomas's fingerprints were later found on the floodlights. Appendix B.

Thomas pled guilty to the attempted burglary of Stout's residence. Appendix C. He confessed to the murder of Ruth Lamere, and entered a plea of not guilty by reason of insanity to that crime. Appendix D, E.

Thomas was sent to Western State Hospital ("WSH") for evaluation of his mental status. The trial court received a written report prepared by Dr. Charles Hale, a psychiatrist at WSH, and Dr. Carl Redick, a clinical psychologist at the facility. Appendix F. Thomas told the evaluators about the abuse he had suffered at the hands of family members, and about his anger stemming from that abuse. Id. at 9. He said that he felt sexually inadequate, and that he had mixed thoughts and emotions about sexuality and violence. Id. Thomas "related a fascination with violence and pain and indicated that he enjoyed mutilating and torturing bugs and animals, especially when he was upset about how he was being treated." Id.

Thomas "described violence against others apparently for entertainment and for release of pent-up emotions." Id.

Thomas talked specifically about the murder of Ruth Lamere. He told the evaluators that he was sexually attracted to her, and that he had observed her movements and habits. Appendix F at 10. "He was rather preoccupied with violence and sexuality and formulated a plan to enter her residence to steal from her and to rape her." Id. He broke into her residence, waited for her to come home, and then hid when she arrived. Id. "At one point, he stated that his intention in entering the house was to rape, rob and kill her. However, he placed more emphasis on his intending to rob and rape her and that he began thinking of killing her when he wanted to leave the residence and feared discovery from her." Id. Thomas said that he manipulated Lamere's body and prepared to rape her, but became disgusted by her smell and state, and did not follow through. Id.

The evaluators said that Thomas "clearly presented himself being fascinated by, and idealizing of, violence, sex and power." Appendix F at 12. Thomas indicated that he "could see himself engaging in such an act again." Id. The evaluators concluded that

Thomas “presented an extreme risk of further aggression toward himself or others. His risk of aggression towards others was imminent as well as long-term.” Id.

Dr. Redick testified at trial. Appendix G. Redick described the abuse that Thomas had suffered as a child. Id. at 13-18. Redick related that Thomas had told him that he could see himself committing murder again – that this was “[h]is job, his art.” Id. at 151. Thomas was confident that he could do a better job next time. Id. at 152. Thomas “described [what he did to Ruth Lamere] with fascination, and he talked about his pleasure at the event.” Id. at 179-80. Thomas told Redick that he had developed a desire to kill someone, and that he finally did it. Id. at 192. Redick concluded that Thomas was at risk of further aggressive acts. Id.

The jury could not reach agreement on aggravated murder (Count I), but convicted Thomas of first degree murder based on all three underlying felonies (first and second degree rape, and first degree burglary). The jury also found that Thomas committed the murder with sexual motivation. Appendix H.

Thomas's standard range was 250-333 months. Appendix A. The trial court imposed an exceptional sentence of 999 months, based on victim vulnerability, violation of zone of privacy, and the jury's finding of sexual motivation. Appendix A, I.

D. SUMMARY OF ARGUMENT

Thomas seeks relief under the United States Supreme Court's decision in Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed.2d 407 (2012). In an otherwise untimely petition, Thomas argues that Miller must be applied retroactively to this collateral attack.

Thomas's argument fails on multiple fronts. First of all, Miller, which prohibited a *mandatory* sentence of life without parole for juveniles, is not material to Thomas's sentence, which resulted from a *discretionary* decision by the trial judge to impose an exceptional sentence above the standard range. And even if Miller applied to Thomas's sentence, Miller is not retroactive to cases that were, like Thomas's, already final on direct appeal when Miller was issued. Contrary to Thomas's argument, the new rule announced in Miller does not categorically prohibit a particular punishment for an entire class of persons, but rather alters the *procedure* by which the punishment may be imposed. That is, Miller allows for the

possibility that a sentence of life without parole may still be appropriate for some juvenile offenders, but requires that courts have the *discretion* to impose a lesser sentence. Miller thus announced a procedural rule that is not applicable to cases already final on direct appeal when the rule was announced.

More fundamentally, Thomas cannot show actual and substantial prejudice from any alleged error stemming from the Miller decision. On March 28, 2014, Governor Inslee signed into law SSSB 5064. Under new section 10 of this law, Thomas will be eligible to petition the Indeterminate Sentence Review Board for early release once he has served 20 years of his sentence.¹ Thus, Washington's sentencing scheme now holds out the possibility of release before Thomas has served the sentence imposed. This Court should allow this new remedy to take its course in this case.

Finally, Thomas raises a claim of cruel and/or unusual punishment under the federal and state constitutions, based on his assertion that he is serving an "irrevocable life term." Because this claim does not fall under any exception listed in RCW 10.73.100, it is time-barred. Accordingly, under this Court's precedents, this petition must be dismissed as a "mixed petition."

¹ Thomas has been incarcerated since his arrest on January 10, 1995.

E. ARGUMENT

To obtain relief through a personal restraint petition, a petitioner must show that he was actually and substantially prejudiced by either a violation of his constitutional rights or a fundamental error of law. In re Personal Restraint of Benn, 134 Wn.2d 868, 884-85, 952 P.2d 116 (1998). The petitioner must carry this burden by a preponderance of the evidence. In re Personal Restraint of Cook, 114 Wn.2d 802, 814, 792 P.2d 506 (1990).

A personal restraint petition is not a substitute for a direct appeal, and the availability of collateral relief is limited. In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992). "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." In re Personal Restraint of Hagler, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982).

A personal restraint petition must ordinarily be filed within one year of the judgment becoming final. RCW 10.73.090(1). A judgment is final on the date that an appellate court issues its mandate disposing of a timely direct appeal. RCW 10.73.090(3)(b).

1. THE RULE ANNOUNCED IN MILLER IS NOT MATERIAL TO THOMAS'S SENTENCE.

Thomas's judgment and sentence was final when the mandate issued on August 20, 1999. Appendix J; RCW 10.73.090(3)(b). The exception to the one-year time bar on which Thomas relies is available to him only if there has been a "significant change in the law" that is "material" to his sentence, and the legislature has expressly provided that the law is to be applied retroactively or a court has determined that the law is retroactive. RCW 10.73.100(6). Thomas fails to satisfy this exception because the new rule announced in Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed.2d 407 (2012), is not material to his sentence.

The United States Supreme Court held in Miller that "the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders." 132 S. Ct. at 2469 (italics added). The petitioners in that case, Evan Miller and Kuntrell Jackson, were juvenile offenders who had been sentenced to mandatory life imprisonment without possibility of parole for murders committed when they were 14 years old. Id. at 2460, 2461 (jury verdict required that Jackson be sentenced to life without parole), 2463 (Miller's crime carried a mandatory minimum

punishment of life without parole). The Court identified its concern at the outset: "In neither case did the sentencing authority have *any discretion* to impose a different punishment." Id. at 2460 (*italics added*). The Court expanded on this concern:

State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate. Such a scheme prevents those meting out punishment from considering a juvenile's "lessened culpability" and greater "capacity for change" . . . and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties. We therefore hold 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. (*italics in original*). The word "mandatory" (or a variant of the word) appears no less than 44 times in the majority opinion.

Thomas's sentence is unaffected by the Miller decision. Unlike Miller and Jackson, Thomas was not sentenced under a scheme that mandated life without possibility of parole for his crime. Rather, the trial court imposed on Thomas an individualized and discretionary exceptional sentence above the standard range.

Thomas nevertheless argues that Miller should control the outcome in his case because his exceptional sentence of 999

months is the "functional equivalent" of life without possibility of parole. While that may be true in some contexts, the length of Thomas's sentence does not place it within the ambit of Miller.

In his attempt to fit his case into the Miller paradigm, Thomas fails to differentiate between Graham² and Miller. Indeed, some of the cases that Thomas relies on to support his argument that his sentence is no different from the mandatory life without possibility of parole sentences in Miller relied on Graham, not Miller. See Floyd v. State, 87 So.3d 45 (Fla. App. 2012); People v. Mendez, 188 Cal. App. 4th 47, 114 Cal. Rptr. 3d 870 (2010).

But the holding of Graham is fundamentally different from the holding of Miller. In Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed.2d 825 (2010), the Supreme Court *categorically prohibited* the imposition of a sentence of life imprisonment without possibility of parole on juveniles who did not commit homicide, finding that such sentences violated the Eight Amendment's bar against cruel and unusual punishment. In addressing sentences for juveniles convicted of murder, Miller adopted no such categorical approach. Rather, after pointing out that the judges in that case had *no discretion* in sentencing the juveniles to life without parole,

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

the Court held that the Eighth Amendment “forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders.” Miller, 132 S. Ct. at 2469 (italics added). Miller left in place the possibility that some juvenile murderers would still be sentenced to life without parole, but required *individualized sentencing* in such cases. Miller, 132 S. Ct. at 2469.

Miller itself took pains to distinguish its holding from the earlier holding in Graham: “Our decision does not categorically bar a penalty for a class of offenders or type of crime – as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process – considering an offender’s youth and attendant characteristics – before imposing a particular penalty.” Miller, 132 S. Ct. at 2471. The Court was even more explicit in responding to the dissent: “*Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses.” Miller, 132 S. Ct. at 2466 n.6.

The “functional equivalent” argument makes sense in the context of Graham. Since life without possibility of parole is *wholly prohibited* for juveniles convicted of non-homicide offenses, a lengthy term-of-years sentence that exceeds the juvenile offender’s

projected life span arguably *is* the functional equivalent of life without parole. An argument can also be made that a *mandatory* term-of-years sentence that exceeds a juvenile homicide offender's projected life span would run afoul of Miller, since Miller requires individualized sentencing in such cases.³ Thus, if the trial court in Thomas's case had had no discretion to impose any sentence other than 999 months, Thomas might qualify for relief under Miller.

But the trial court *did* have discretion in Thomas's case. While a 999-month sentence may well be the functional equivalent of a life sentence, this distinction cannot be ignored. Thomas received the "individualized sentencing" that Miller requires. Thomas's attempt to fit his sentence within the narrow confines of Miller requires too great a leap beyond the logic of that case, and should be rejected.

Thomas then claims that the trial court did not "meaningfully consider his youth" in imposing sentence. Petitioner's Supplemental Brief ("PSB") at 7. Because Thomas's sentencing took place long before the Supreme Court's decisions in Graham or

³ At least one of the cases that Thomas cites to support his "functional equivalent" argument addressed a mandatory sentencing scheme. See State v. Taylor, 287 Neb. 386, 398, 842 N.W.2d 771 (2014) (under Nebraska statutes, juvenile convicted of first degree murder was subject to mandatory life imprisonment).

Miller, the trial court was not as explicit as it might be today as to the influence of age on its decision. But the court explicitly addressed a central factor identified in Miller – the “capacity” for change that is inherent in youth.⁴ The court clearly struggled with whether Thomas would ever be safe to live in society:

The jury found that these facts were committed with sexual motivation. The question, of course, then becomes whether or not that part of his make-up will ever change, that the additional count in this case^[5] of what has all the similar aspects of this crime gives this Court serious question of whether he is ever safe to be at large.

The only question that the Court is concerned about is the unknown factor of whether age in itself does away with the make-up of an individual so that the sexual factor is never again present. I don't know the answer to that issue. I do know that we see sex crimes committed by 80-year-olds. The acting out of that sexual motivation was so awful in this case that I'm going to follow the prosecutor's recommendation.

Appendix to PSB (Sentencing Hearing, 3/3/1996) at 29-30.

⁴ Miller, 132 S. Ct. at 2465.

⁵ The reference is to Thomas's conviction for attempted residential burglary of Mary Jo Stout's home only weeks before he broke into Ruth Lamere's home and murdered her. Appendix B,C.

The trial court also had before it evidence concerning the circumstances of Thomas's abusive childhood. This was brought to the court's attention through the WSH report (Appendix F at 7-8), and the testimony of Dr. Redick (Appendix G at 13-18).

Some of the other factors mentioned in Miller clearly were not relevant in this case. This was not a case where a juvenile succumbed to peer pressure in committing the crime; Thomas acted wholly on his own in sexually molesting and murdering Ruth Lamere. Nor can the crime be attributed to impulsivity or heedless risk-taking; Thomas carefully observed Lamere's habits over a period of time, tried to set up an easy entry to her home through a window in advance, waited a considerable time in her home for Lamere to return from work, and observed Lamere surreptitiously for a lengthy period before revealing himself and bludgeoning her to death. See Appendix B, D; Miller, 132 S. Ct. at 2464.

Because Thomas pled not guilty by reason of insanity, there was abundant evidence introduced at trial concerning his mental status. This was understandably a major focus at sentencing as well. The court had the report from WSH detailing Thomas's

mental health issues. Appendix F. The court also had extensive expert testimony concerning Thomas's mental status, including that of Dr. Redick. Appendix G.

Much of this evidence raised serious long-term concerns for public safety. The WSH report detailed Thomas's reactions to the abuse that he had suffered as a child; he was angry, and had felt homicidal toward his abusers. Appendix F at 9. He had mixed thoughts and emotions about sexuality and violence. Id. He was fascinated by violence and pain, and enjoyed mutilating and torturing bugs and animals. Id.

Thomas told Dr. Redick that he had developed a desire to kill a person, and that he had finally done it. Appendix G at 192. He said that this was his "art" or his "job." Id. at 151. He said that he could see himself doing it again, but that he would do it better next time. Id. at 152. Thomas "described [the murder] with fascination," and "talked about his pleasure at the event." Id. at 179-80.

Dr. Redick also found significant Thomas's attempt, only weeks before the murder, to break into the home of Mary Jo Stout. Id. at 165-66. This raised the concern that Thomas was developing a "pattern of behavior." Id. at 166.

Based on everything that he had learned about Thomas, Dr. Redick concluded that Thomas was at risk for further aggressive acts, and that he was not safe to be at large. Id. at 191-92.

Given this evidence, it is not surprising that Thomas's mental state garnered most of the court's attention at sentencing. The court's paramount concern for public safety was based on very detailed information about who Thomas was as a person by the time he committed this crime. The court did not ignore Thomas's age and circumstances, but rather took them into consideration and afforded Thomas the individualized sentencing that Miller requires.

The Court in Miller referred to "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.'" Miller, 132 S. Ct. at 2469. But the Court did "not foreclose a sentencer's ability to make that judgment in homicide cases" so long as it considered the offender's youth. Id. Under the facts of this case, Thomas's sentence does not offend Miller.

2. MILLER IS NOT RETROACTIVE.⁶

Even if the holding of Miller were material to Thomas's sentence, he could not avail himself of that holding because Miller is not retroactive to cases already final when Miller was issued. Thomas's petition should thus be dismissed as time-barred.

This Court has long been in accord with the United States Supreme Court in deciding whether to give retroactive application to newly articulated principles of law. State v. Evans, 154 Wn.2d 438, 444, 114 P.3d 627 (2005); see e.g., In re St. Pierre, 118 Wn.2d at 324; In re Personal Restraint of Haghghi, 178 Wn.2d 435, 441-43, 309 P.3d 459 (2013). When a decision of the Supreme Court announces a "new rule" of criminal procedure, that rule will apply to all criminal cases still pending on direct review. Evans, 154 Wn.2d at 444. A rule is new if it was not "dictated" by precedent existing at the time the conviction became final. Id. (citing Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 103 L. Ed.2d 334 (1989)). If, before the opinion was announced, reasonable jurists could have disagreed, the rule is new. Evans, 154 Wn.2d at 444 (citing Beard v. Banks, 542 U.S. 406, 411, 124 S.

⁶ The question whether Miller is retroactive to cases on collateral review is before this Court in In re Personal Restraint of Russell D. McNeil, No. 87654-1. The Court heard oral argument in McNeil on November 12, 2013.

Ct. 2504, 159 L. Ed.2d 494 (2004)). Thomas agrees that the rule announced in Miller is “new” for retroactivity purposes. PSB at 3.

An exception is made for new rules of criminal procedure that implicate the fundamental fairness and accuracy of the criminal proceeding; such rules are known as “watershed” rules. Schiro v. Summerlin, 542 U.S. 348, 352, 124 S. Ct. 2519, 159 L. Ed.2d 442 (2004). The Supreme Court has described this class as “extremely narrow,” and has said that it is unlikely that any such rule has yet to emerge. Id.

New substantive rules, by contrast, generally apply retroactively. Id. at 351. Substantive rules include “decisions that narrow the scope of a criminal statute by interpreting its terms,” and “constitutional determinations that place particular conduct or persons covered by the statute beyond the State’s power to punish.” Id. at 351-52. This latter category includes rules that “prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense.” Sawyer v. Smith, 497 U.S. 227, 241, 110 S. Ct. 2822, 111 L. Ed.2d 193 (1990).

Thomas argues that the new rule announced in Miller is substantive because it “prohibits imposition of a mandatory sentence of life in prison without parole for a class of persons –

those under 18 years of age.” PSB at 11. He compares the Miller rule to the rule announced in Graham. But the Supreme Court explicitly rejected Thomas’s argument, and his analogy to Graham, in Miller: “Our decision does not categorically bar a penalty for a class of offenders or type of crime – as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentence follow a certain process – considering an offender’s youth and attendant characteristics – before imposing a particular penalty.” Miller, 132 S. Ct. at 2471.

Even if Miller could be interpreted as announcing a categorical ban on a penalty for a class of offenders – juveniles – the ban would apply to “mandatory” life without parole. But Thomas’s arguments are at cross-purposes in this regard: to argue that his sentence fits within the Miller paradigm, he must ignore the fact that it was discretionary, not mandatory; but to argue that the rule is substantive, and thus retroactive to him, he *depends* on the mandatory aspect of the Miller prohibition to argue that it established a categorical bar on a certain “type of punishment” for juveniles as a class.

Thomas argues in the alternative that Miller is a “watershed” rule that must be given retroactive effect. PSB at 16-18. The only

case that the Supreme Court has ever placed within the “watershed” category is Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963), wherein the Court announced the requirement that counsel be appointed for indigent defendants charged with felonies. Whorton v. Bockting, 549 U.S. 406, 419, 127 S. Ct. 1173, 167 L. Ed.2d 1 (2007). In the years since Teague, the Court has “rejected every claim that a new rule satisfied the requirements for watershed status.” Bockting, 549 U.S. at 418. In light of the many new and important rules that have not been granted “watershed” status, this Court should reject Thomas’s claim that Miller announced a “watershed” rule. See People v. Carp, 298 Mich. App. 472, 828 N.W.2d 685, 711-12 (2012) (explaining why the rule in Miller does not qualify as “watershed”), review granted, 838 N.W.2d 873 (2013).

Thomas also argues that the Miller rule is necessarily retroactive to his case because the Supreme Court applied it in Jackson’s case as well as in Miller’s, and Jackson was himself on collateral review. PSB at 12-13. This argument reflects a fundamental misunderstanding of the Supreme Court’s application of retroactivity analysis.

A new rule is made retroactive by the Supreme Court only if the Court *holds* that it is retroactively applicable to cases on collateral review. Tyler v. Cain, 533 U.S. 656, 662, 121 S. Ct. 2478, 150 L. Ed.2d 632 (2001). The Teague bar to retroactive application of new rules is not jurisdictional. Schiro v. Farley, 510 U.S. 222, 228, 114 S. Ct. 783, 127 L. Ed.2d 47 (1994). A federal court may decline to apply Teague if the State does not argue it. Caspari v. Bohlen, 510 U.S. 383, 389, 114 S. Ct. 948, 127 L. Ed.2d 236 (1994).

Where the State fails to argue Teague in its brief in opposition to a petition for a writ of certiorari, the Court need not reach that issue. Schiro, 510 U.S. at 229. In deciding whether to grant certiorari, the Court relies heavily on the submissions of the parties at the petition stage. Id. If a legal issue appears to warrant review, the Court will grant certiorari in the expectation that it will decide that issue on the merits. Id. Thus, the State's omission of a Teague defense at the petition stage is significant. Id.

Based on this case law, the Court of Appeals of Michigan rejected the very argument that Thomas now makes in favor of retroactivity. People v. Carp, supra. Like Thomas, Carp argued that Miller was necessarily retroactive because the Miller court

granted relief to Jackson, whose case was on collateral review in the state court. 828 N.W.2d at 712. The court in Carp explained that “the mere fact that the Court remanded Jackson for resentencing does not constitute a ruling or determination of retroactivity.” 828 N.W.2d at 712. Pointing out that because the State had not raised retroactivity in Jackson’s case it waived the issue, the Michigan court declined to find Miller retroactive on this basis. 828 N.W.2d at 713.

The State of Arkansas indeed failed to raise the retroactivity issue in its brief in opposition to Jackson’s petition for certiorari. See Appendix K. Thus, the Supreme Court’s decision to grant a remedy to Jackson says nothing about whether Miller is retroactive to Thomas’s collateral attack.⁷

Thomas alternatively urges this Court to find that Miller is retroactive under the collateral review provisions of Washington law, specifically RCW 10.73.100. PSB at 18-20. This argument

⁷ A recent example may be found in Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010). While the Supreme Court granted relief to Padilla, whose case was on collateral attack, the Court in Chaidez v. United States, ___ U.S. ___, 133 S. Ct. 1103, 185 L. Ed.2d 149 (2013) explicitly found that Padilla did *not* apply retroactively.

was rejected most recently by this Court in In re Haghighi, 178 Wn.2d at 444-45; see also State v. Abrams, 163 Wn.2d 277, 291-92, 178 P.3d 1021 (2008).

Thomas's argument that his sentence is illegal under Miller and thus must be corrected also fails.⁸ Thomas relies on his characterization of his sentence as an "irrevocable life equivalent sentence." PSB at 22. Whatever the merit of that claim prior to the passage into law of SSSB 5064, the claim fails in light of the new law, under which Thomas appears to be eligible to petition for release after he has served 20 years of his sentence: Appendix L.

3. THOMAS CANNOT SHOW PREJUDICE.

Even if Thomas could show a constitutional violation under Miller, he would nevertheless have to show actual and substantial prejudice before he could gain relief in this collateral attack. See In re Benn, 134 Wn.2d at 884-85. Every aspect of Thomas's life was scrutinized in this case. Thomas can point to nothing that the court should have considered in sentencing him that would likely have

⁸ The only post-Miller case that Thomas cites in support of this argument involved a *mandatory* sentence of life without possibility of parole for a 17-year-old offender. State ex rel. Landry v. State, 106 So.3d 106 (La. 2013).

changed the outcome. Thomas's mental status, and the resulting concerns for public safety, would be the primary factors determining his sentence under *any* sentencing regime.

In addition, new legislation prevents Thomas from showing actual and substantial prejudice. On March 28, 2014, the governor of Washington signed into law SSSB 5064, codified at Laws of 2014, Chapter 130. Appendix L. Under "New Section" 10 of this bill:

[A]ny person convicted of one or more crimes committed prior to the person's eighteenth birthday may petition the indeterminate sentence review board for early release after serving no less than twenty years of total confinement, provided the person has not been convicted for any crime committed subsequent to the person's eighteenth birthday, the person has not committed a major violation in the twelve months prior to filing the petition for early release, and the current sentence was not imposed under RCW 10.95.030 or 9.94A.507.

SSSB 5064 (Appendix L). It appears that Thomas may qualify for this relief at some point. This prevents his sentence from being "irrevocable," and constitutes the meaningful opportunity for release that Thomas seeks through his petition. Because Thomas cannot show prejudice from any constitutional violation under Miller, his petition should be dismissed.

**4. THIS PETITION SHOULD BE DISMISSED AS A
"MIXED" PETITION.**

Finally, Thomas argues that his sentence violates the Eighth Amendment's prohibition on cruel and unusual punishment, as well as the Washington Constitution's prohibition on cruel punishment under article 1, section 14. Neither of these claims is based on any change in the law brought about by the Miller decision; thus, the claims are time-barred.⁹ Accordingly, this petition should be dismissed as "mixed."

Thomas acknowledges that the Supreme Court in Miller "declined to consider whether the Eighth Amendment, which bans cruel and unusual punishment, erects a constitutional barrier to irrevocable life terms for juveniles." PSB at 23. See Miller, 132 S. Ct. at 2469 ("[W]e do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger."). He nevertheless claims that the Supreme Court's

⁹ Even if the claims were not time-barred, they would necessarily fail in light of the new law granting the possibility of early release. In any event, Thomas provides no persuasive authority for his claim that either the federal or the state constitution forbids his discretionary sentence given the facts of his crime.

holdings “foretell” such a ruling, and he urges this Court to rule on the issue. PSB at 24-25 (“This Court need not and should not wait for that ruling.”).

Because this claim does not arise out of Miller, Thomas cannot rely on the exception to the time bar found in RCW 10.73.100(6) for a significant *change* in the law. This claim thus renders this petition at best “mixed”; as such, it must be dismissed. See In re Personal Restraint of Stoudmire, 141 Wn.2d 342, 345-46, 5 P.3d 1240 (2000) (to excuse compliance with one-year time limit on collateral attack, petition must be based *solely* on exceptions set out in RCW 10.73.090 or 10.73.100); In re Personal Restraint of Hankerson, 149 Wn.2d 695, 697, 72 P.3d 703 (2003) (“[I]f a personal restraint petition with multiple claims is filed after the one-year period expires, and the court determines that at least one of the claims is time barred, the petition must be dismissed.”).

Similarly, Thomas’s belated claim under article I, section 14 of the Washington Constitution is untethered to a significant change in the law, or any other exception to the one-year time bar. This claim also renders this petition “mixed,” and requires dismissal.

F. CONCLUSION

For all of the foregoing reasons, this personal restraint petition should be dismissed.

DATED this 7th day of April, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Deborah A. Dwyer
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Andrew P. Zinner**, the attorney for the petitioner, at the following address: **Nielsen, Broman & Koch, PLLC, 1908 East Madison, Seattle, WA 98122**, containing a copy of the **SUPPLEMENTAL BRIEF OF RESPONDENT**, in **IN RE PERSONAL RESTRAINT PETITION OF GREGORY O. THOMAS**, Cause No. **88921-0**, in the Supreme Court of the State of Washington.

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

Name



Date

04-07-14

Done in Seattle, Washington

OFFICE RECEPTIONIST, CLERK

To: Ly, Bora
Cc: Dwyer, Deborah; 'zinnera@nwattorney.net'
Subject: RE: In PRP of Gregory Thomas/88921-0

Received 4/7/2014

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

From: Ly, Bora [mailto:Bora.Ly@kingcounty.gov]
Sent: Monday, April 07, 2014 2:10 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Dwyer, Deborah; 'zinnera@nwattorney.net'
Subject: In PRP of Gregory Thomas/88921-0

Dear Supreme Court Clerk,

Attached please find the Supplemental Brief of Respondent, and the Motion for Permission to File Overlength Brief, to be filed in the above-referenced case.

Please note that the appendices will follow by messenger service and should arrive at the Court, tomorrow.

Thank you,

Bora Ly
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For

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