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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER

v.

SPENCER MILLER, RESPONDENT

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Court of Appeals No. 42899-7  
Superior Court No. 01-1-05476-9

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**SUPPLEMENTAL BRIEF**

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A. ISSUES PERTAINING TO PETITION FOR REVIEW.

1. Did the trial court fail to follow this Court's precedent for assessing whether the three components of RCW 10.73.100(6) - the significant change in the law exception to the time limit for filing collateral attacks - had been met when it did not discuss two of the three components and failed to analyze the third component under the relevant legal standard?
2. Does the proper application of this Court's precedent result in the conclusion that Miller has not shown the applicability of RCW 10.73.100(6) to his untimely collateral attack and the trial court erred in finding the exception applied, vacating the judgment and granting a resentencing hearing?

B. STATEMENT OF THE CASE.

This is an appeal of a superior court order vacating judgment and granting a resentencing hearing as a result of a collateral attack that was filed over five years after the judgment became final under RCW 10.73.090. The procedural history of the case is as follows:

A jury found Spencer Miller ("defendant") guilty of two counts of attempted murder in the first degree; he was tried jointly with co-defendants Robert Bonds and Tonya Wilson, who were also each found guilty of two counts of attempted murder in the first degree. CP 49-70. All three codefendants were sentenced on May 24, 2002, by the Honorable Frank E. Cuthbertson. CP 175-263. Bonds asked the court to impose an exceptional sentence downward, but was given a mid-standard range sentence on each count for a total sentence of 560 months. CP 205-06,

211-12. Wilson, who was facing a standard range of 187.5 months to 249.75 months on one count, and a range of 180 months to 240 on the second, asked for an exceptional sentence of 120 months total; she was given an exceptional sentence downward<sup>1</sup>, to 120 months on each count. CP 216, 223-28, 234-40. After the court pronounced Wilson's sentence, the prosecutor asked whether the court intended those sentences to run consecutive or concurrent, and the court indicated that they were to be consecutive. CP 240.

When the court then turned to sentencing Miller, he did not ask for an exceptional sentence, but did ask the court to impose a low end standard range sentence. CP 255-59. Miller faced a standard range of 195.75 months to 260.25 months on Count I, and 180 -240 months on Count II. CP 161. He received a standard range sentence of 200 months on each count, which was near the lower end of the range for Count I, and near the middle of the range for Count II. CP 28-44, 259-261. In imposing the sentence, the court indicated that it was imposing that sentence "based upon the information I have before me." CP 261.

Defendant timely appealed, raising several claims of trial error, but none as to his sentence; the Court of Appeals affirmed his convictions, and

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<sup>1</sup>The trial court rejected Wilson's proposed legal justification for the exceptional sentence but found that the multiple offense policy of RCW 9.94A.589 created a presumptive range that was clearly excessive. CP 216, 223-28, 234-40

those of Bonds and Wilson, in an unpublished opinion. *Id.* The mandate issued May 9, 2005. CP 46-48.

Defendant later collaterally attacked his judgment by filing in Pierce County Superior Court a Motion for Reconsideration and New Trial pursuant to CrR 7.8. CP 71; 72-75. The motion raised trial issues, but none as to his sentence. CP 72-75. The motion was transferred to the Court of Appeals to be considered as a personal restraint petition, where it was dismissed as time barred. CP 76-77, 78-79. The certificate of finality was filed on October 12, 2009. CP 80-82.

On October 15, 2010, over five years after the date his judgment became final, Miller filed a second collateral attack in superior court. CP 83-101 (Motion to Vacate Judgment and Sentence). In that motion, defendant cited to this Court's decision in *In re Muholland*, 161 Wn.2d 322, 166 P.3d 677 (2007), and argued that as the trial court had the discretion to run the sentences on his two counts of attempted murder concurrently, the court should reconsider its sentence. CP 84-86. The motion did not mention the statutory time bar found in RCW 10.73.090 or the exceptions found in RCW 10.73.100. Defendant relied upon the provisions of CrR 7.8. CP 83-101. Miller claimed the trial court "failed to recognize its authority to impose an exceptional concurrent sentence" and that he "did not receive an opportunity to argue for a concurrent exceptional sentence" and /or that his "sentence was based on ... [a] misunderstanding and/or misapprehension of the law." CP 86. The only

evidentiary support he provided for his motion was a copy of his judgment and sentence. CP 88-101. The motion did not suggest any legal justification that would support an exceptional sentence. CP 83-101.

On November 9, 2010, the defendant filed in superior court a motion to modify or correct judgment and sentence that raised substantially the same issue. CP 102-103. As with the motion filed in October, defendant offered no argument as to why his collateral attack was not time barred, no further evidence to support his claims, or argument as to what basis there was for an exceptional sentence in his case. CP 102-03. The State filed a response to the motion, arguing the trial court was required by CrR 7.8 to transfer the motion the court of appeals to be considered as a personal restraint petition because the defendant's collateral attack was time barred. CP 104-05. On November 30, 2010, the defendant filed a reply asserting, among other things, that as a result of the opinion in *Muholland*, his judgment and sentence was invalid on its face, referencing an exception to the time bar in RCW 10.73.090, and also that the opinion in *Mulholland* constituted a significant intervening change in the law, apparently referencing part of an exception to the time bar found in RCW 10.73.100(6). CP 106-112.

The superior court tried to send the pending motion to the Court of Appeals to be handled as a personal restraint petition pursuant to CrR 7.8, but the appellate court rejected transfer, finding the superior court's order

inadequate and the transfer incomplete; the Court of Appeals returned the matter to the superior court for further appropriate action. CP 113, 114. When the Court of Appeals did not receive any further transfer communications from the superior court, it issued a certificate of finality on March 23, 2011. CP 115-116.

In June of 2011, Miller filed a motion in superior court seeking to clarify the status of his previously filed motion to vacate the judgment and sentence. CP 119-125. This led to a hearing wherein the superior court found that it could keep the collateral attack for consideration in superior court because *Mulholland* represented a change in the law and that provided an exception to the time bar. 8/15/11 RP 4. The court did not explain why it considered the *Mulholland* decision to constitute a change in the law, other than to indicate that it was decided in 2007, which was several years after defendant's sentencing, and that it was the first time the Supreme Court held that the SRA permitted two serious violent convictions to be run concurrently if it was done via an exceptional sentence. *Id.*, *see also*, 10/17/11/RP 5.

On November 18, 2011, the court entered an order vacating the judgment and sentence previously imposed and setting a new sentencing hearing. CP 267-69; *See also* RP 11-18-11. The State timely appealed from entry of this order.

The Court of Appeals upheld the order vacating the judgment and sentence in a published decision. *State v. Miller*, 181 Wn. App. 201, 324 P.3d 791 (2014). The State obtained discretionary review in this Court.

C. ARGUMENT.

1. AS *MULHOLLAND* DID NOT CONSTITUTE A SIGNIFICANT CHANGE IN THE LAW UNDER THIS COURT'S JURISPRUDENCE, BOTH THE TRIAL COURT AND THE COURT OF APPEALS ERRED IN FINDING THAT IT WAS; FURTHER, BOTH LOWER COURTS ERRED IN HOLDING THAT DETERMINATION - BY ITSELF- BROUGHT MILLER'S UNTIMELY COLLATERAL ATTACK WITHIN THE EXCEPTION TO THE TIME BAR FOUND IN RCW 10.73.100(6).

In general, a defendant may not collaterally attack a judgment and sentence in a criminal case more than one year after his judgment and sentence becomes final. RCW 10.73.090(1). A motion to vacate judgment brought pursuant to CrR 7.8 is a collateral attack on a judgment. RCW 10.73.090(2). A judgment and sentence that is appealed becomes final on the day an appellate court issues its mandate disposing of a timely direct appeal from the conviction, RCW 10.73.090(3)(b).<sup>2</sup>

There are exceptions to the one year time limit, however. The Legislature provided several exceptions in RCW 10.73.100, including this one:

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:

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<sup>2</sup> This finality date assumes that certiorari is not sought in the United States Supreme Court. See RCW 10.73.090(3)(c).

....

(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.

RCW 10.73.100(6). This exception is comprised of three parts, each of which must be present for the exception to apply; a defendant must show: 1) a significant change in the law; 2) the change is material to his case; and 3) the change applies retroactively. *In re Gentry*, 179 Wn.2d 614, 625, 316 P.3d 1020 (2014); *In re Domingo*, 155 Wn.2d 356, 363 n. 4, 119 P.3d 616 (2005). And finally, even when a criminal defendant establishes all three components of this exception to allow consideration of his untimely collateral attack, he must still show that he was actually and substantially prejudiced by the alleged error before he would be entitled to collateral relief. *Gentry*, 179 Wn.2d at 630.

As Miller cannot show that he satisfied all three components of RCW 10.73.100(6) under the jurisprudence of this Court, his untimely collateral attack is time-barred. The courts below erred in finding the “significant change in the law” exception of RCW 10.73.100(6) applicable to Miller’s untimely collateral attack.

- a. *Mulholland* does not constitute a significant change in the law under RCW 10.73.100(6) using the standards set forth by this Court for assessing such a claim.

The touchstone for whether or not there has been a significant change in the law for purposes of RCW 10.73.100(6) is whether the defendant could have made the argument prior to the alleged change in the law. *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 258-59, 111 P.3d 837 (2005); *In re Personal Restraint of Turay*, 153 Wn.2d 44, 51, 101 P.3d 854 (2004) (“*Turay II*”); *In re Personal Restraint of Turay*, 150 Wn.2d 71, 83, 74 P.3d 1194 (2003) (“*Turay I*”); *In re Personal Restraint of Stoudmire*, 145 Wn.2d 258, 264, 36 P.3d 1005 (2002). This Court has stated numerous times that the “significant change in the law” exception in RCW 10.73.100(6) requires a showing of a case (or statute) that effectively overturns prior material law so that the arguments currently at issue were previously unavailable to the litigants. *Lavery*, 154 Wn.2d at 258-59; *Turay II*, 153 Wn.2d at 51-52; *In re Greening*, 141 Wn.2d 687,697, 9 P.3d 206 (2000); *see also, In re Personal Restraint of Rowland*, 149 Wn. App. 496, 503, 204 P.3d 953 (2009). The court in *Greening* elaborated on the nature of this exception:

While litigants have a duty to raise available arguments in a timely fashion and may later be procedurally penalized for failing to do so ... they should not be faulted for having omitted arguments that were essentially unavailable at the time, as occurred here. We hold that where an intervening

opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a “significant change in the law” for purposes of exemption from procedural bars.

*Greening*, 141 Wn.2d at 697. Not every decision announcing a new application of the law constitutes a significant change in the law. This Court has made clear that “[a]n appellate decision that settles a point of law without overturning prior precedent” is not a significant change in the law and neither is a case that “simply applies settled law to new facts.” *Turay I*, 150 Wn.2d at 83, citing *Greening*, 141 Wn.2d at 696.

A second method of showing a significant change in the law is by showing that a particular issue was raised on direct appeal in the defendant’s own case and that claim was rejected on the merits, but since the direct appeal there has been a subsequent appellate decision published which would entitle the defendant to relief on that issue. *See, Matter of Vandervlugt*, 120 Wn.2d 427, 842 P.2d 950 (1992); *In re Personal Restraint of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986).

In this case, Miller filed an untimely collateral attack in the superior court seeking a resentencing hearing under *Mulholland*. Although he did not address the time-bar of RCW 10.73.090 in his initial pleadings, Miller eventually claimed *Mulholland* represented a significant

change in the law that provided an exception for his untimely collateral attack under RCW 10.73.100(6). The trial court ultimately agreed that *Mulholland* was a significant change in the law and kept Miller's untimely collateral attack for consideration. In so ruling, the trial court did not refer to any of this Court's standards for assessing whether a decision constitutes a significant change in the law; nor did it explain why it considered the *Mulholland* decision to constitute a significant change in the law or identify which decision it effectively overruled. All the trial court did was to indicate that *Mulholland* was decided in 2007, several years after defendant's sentencing, and that it was the first time the Washington Supreme Court expressly held that the SRA permitted two serious violent convictions to be run concurrently if it was done via an exceptional sentence. 8/15/11 RP 4; *see also*, 10/17/11/RP 5.

Applying the standards set forth by this Court in *Greening*, *Domingo*, and *Turay I and II* for assessing whether *Mulholland* is a significant change in the law, it clearly is not. The decision in *Mulholland* expressly states that the issue it is deciding was one that the Court had not directly addressed before; namely, whether "a sentencing court may order that multiple sentences for serious violent offenses run concurrently as an exceptional sentence if it finds there are mitigating factors justifying such a sentence" *Mulholland*, 161 Wn.2d at 327-28.

This Court then examined the plain language of RCW 9.94A.535 and found that it allowed a trial court to impose concurrent sentences for serious violent offenses as an exceptional sentence. *Id* at 329-30.

The Court went on in *Mulholland* to address the State's contention that such a holding was inconsistent with the decision in *State v. Flett*, 98 Wn. App. 799, 992 P.2d 1028 (2000). The Supreme Court disagreed, finding that the language in *Flett* stating that Flett's first degree assault sentences are "required to be consecutively sentenced[,]'" was dicta as it did not bear upon the court's holding on the issue before it - which was whether the trial court could run firearm enhancements concurrently. *See, Mulholland*, 161 Wn.2d at 331, citing *Flett*, 98 Wn. App. at 806. The Supreme Court did not overrule *Flett*, it simply identified the portions that were dicta. *Id.* 161 Wn. 2d at 331. This Court concluded that "while there is language in *Flett* that ... provided encouragement for the State's position, the language is dicta and does not stand up to a plain reading of the statutes at issue here." Thus this Court construed the relevant statutes at issue in *Mulholland*, and issued its holding without overruling a single earlier appellate decision.

As such, *Mulholland* does not constitute a significant change in the law under *Domingo*, *Greening*, *Turay I* or *II*. The trial court's rationale for concluding *Mulholland* represents a change in the law

conflicts with the decision in *Turay I*, which provides “an appellate decision that settles a point of law without overturning prior precedent... does not constitute a significant change in the law.” *Turay*, 150 Wn.2d at 83.

Nor can Miller show that *Mulholland* represented a significant change in the law on the basis of prior appellate decisions within his own case history as was done in *Vandervlugt*. *Vandervlugt* involved a situation where the petitioner had previously raised the same issue on direct appeal and had the claim denied. An appellate court subsequently issued a published opinion in another case granting relief on the very basis that had previously been denied to *Vandervlugt*. Under such circumstances, *Vandervlugt* could show there had been a significant change in the law as it related to the issues in his case based upon the appellate history of his own case. Miller, however, did not raise any claims in his direct appeal regarding his sentence as he has done in his collateral attack so he cannot show that his situation is akin to that in *Vandervlugt*. See, CP 46-70.

In short, nothing prevented Miller from making the same argument that was available to *Mulholland* at the time of his sentencing or his direct appeal; he just did not raise the claim. As the argument made by

Mulholland was equally available to Miller, he cannot show that the decision in *Mulholland* constituted a significant change in the law.

The Court of Appeals, in holding that *Mulholland* constituted a significant change in the law, failed to properly apply the holdings of this Court. The Court of Appeals relied upon four opinions to support its holding: *Vandervlugt, In re Personal Restraint of Cook*, 114 Wn.2d 802, 808-13, 792 P.2d 506 (1990); *State v. Jacobs*, 154 Wn.2d 5696, 602-03, 115 P.3d 281 (2005); and *Flett. See Miller*, 181 Wn. App. at 214. The Court of Appeals' reliance upon *Flett* and *Vandervlugt* is misplaced for the reasons stated above. Its reliance upon *Cook* and *Jacobs* is also misplaced.

In *Cook*, this Court noted that time limitations on the filing of collateral attacks had recently been enacted and codified at RCW 10.73.090-.140, but that Cook's collateral attack had been filed before the effective date of the legislation so that "those statutory limitations are not applicable here". 114 Wn.2d at 805. As the provisions of RCW 10.73.090 and .100 were not at issue in *Cook*, nothing in that decision is controlling as to how to construe the "significant change in the law" exception of RCW 10.73.100. *Id.* Additionally, Cook was in a position similar to the petitioner in *Vandervlugt* in that he had previously raised the same issue on appeal only to have it rejected on the merits; then after his

claim was rejected, there was a published decision that would have provided him relief. *See, Cook*, 114 Wn.2d at 813-14 (“Finally, after the defendant’s convictions, this court interpreted RCW 10.43.040 as providing protection not previously available to defendants, *but clearly sought by petitioner during his trial and on direct appeal.*” (emphasis added)). As Miller did not previously challenge his sentence in his direct appeal, he cannot rely upon the *Vandervlugt/Cook* analysis for determining whether there has been a significant change in the law.

The Court of Appeals was also mistaken in classifying *Jacobs* as being prior authority contrary to *Mulholland*. The Court of Appeals’ acknowledge that the language it was citing in *Jacobs* was dicta. *See, Miller*, 181 Wn. App. at 212-13 (citing *State v. Jacobs*, 154 Wn.2d 596, 115 P.3d 281 (2005)). This Court has repeatedly stated that “statements ‘not necessary to the decision of any issue in the ... case’ are dicta *which do not control future cases.*” *State v. Pawlyk*, 115 Wn.2d 457, 487, 800 P.2d 338 (1990), quoting *Gilmour v. Longmire*, 10 Wn.2d 511, 516, 117 P.2d 187 (1941)(emphasis added). Indeed, this analysis of the Court of Appeals is directly contrary to this Court’s holding in *Domingo*. There, this Court expressly held that dicta in an opinion cannot establish a rule or principle that can later be used to establish “a significant change in the

law” because dicta need not be followed by any court. See *Domingo*, 155 Wn.2d at 363-366.

Having failed to show under the relevant legal standard that *Mulholland* constitutes a significant change in the law, Miller failed to establish the first of the three requirements necessary to bring his untimely collateral attack within the exception to the time bar under RCW 10.73.100(6). As such, the trial court was required to send the untimely collateral attack to the Court of Appeals under the terms of CrR 7.8. It erred in finding an exception to the time bar existed and in considering the untimely collateral attack.

b. The Trial Court Erred In Finding That The Exception To The Time Bar In RCW 10.73.100(6) Applied When There Was No Determination That All Three Components Of That Exception Had Been Satisfied.

As noted earlier the exception found in RCW 10.73.100(6) is comprised of three parts, all of which must be present for the exception to apply; a defendant must show: 1) a significant change in the law; 2) the change must be material to his case; and 3) that the change applies retroactively. *In re Gentry*, 179 Wn.2d 614, 625, 316 P.3d 1020 (2014); *In re Domingo*, 155 Wn.2d 356, 363 n. 4, 119 P.3d 616 (2005).

This Court has made it very clear that whether a rule is a significant change in the law, and whether a rule applies retroactively are distinct questions. *Gentry*, 179 Wn.2d at 625-26 (citing *Vandervlugt*, 120

Wn.2d at 435-36; *In re Pers. Restraint of Taylor*, 105 Wn.2d 683, 689, 717 P.2d 755 (1986)). This Court has adhered to the test announced in *Teague v. Lane* to determine questions of the retroactive application of new rules of criminal procedure. *In re Pers. Restraint of Haghghi*, 178 Wn.2d 435, 443, 309 P.3d 459 (2013) (citing *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989)); *Gentry*, 179 Wn.2d at 626, 627.

As this Court noted in *Gentry*, “*Teague* presents a very high hurdle to overcome,” and “...the *Teague* analysis almost never results in retroactive application of a rule of criminal procedure.” *Gentry*, 179 Wn.2d at 628 (citing *Teague*, 489 U.S. at 311).

Here, the trial court’s order addresses the significant change in the law component of the exception in RCW 10.73.100(6), but not the materiality component or the retroactivity component. CP 267-69. In fact, nothing in the trial record suggests that the trial court was aware of these requirements.

In particular, there is no discussion of *Teague* or of retroactivity by the trial court. The court simply did not consider this component of RCW 10.73.100(6) contrary to the decisions of this Court. As such, the trial court’s finding that the change in law exception was applicable to the untimely collateral attack was based upon an incomplete, and therefore erroneous, application of the law. On review, the Court of Appeals

discussion of this component of RCW 10.73.100(6) is limited to the following footnote:

The discussion in Parts II and III of this analysis also shows that under *Mulholland* and the other cited authority, sufficient reasons exist to require retroactive application of the changed legal standard, one of the criteria of RCW 10.73.100(6), set out above.

*Miller*, 181 Wn. App. at 219, n. 6. There is not a single word in the Court of Appeals decision discussing the relevant retroactivity analysis under *Teague*. This component of RCW 10.73.100(6) was not properly addressed in either of the lower courts.

Moreover, there is nothing in the trial record to explain how *Mulholland* is material to Miller's case. The record from the sentencing hearing on Miller and his co-defendants shows the court *knew* it had the power to impose an exceptional sentence downward because it gave an exceptional sentence downward to Miller's co-defendant *immediately prior* to Miller's own sentencing. The court imposed an exceptional sentence on co-defendant Wilson by shortening the length of her confinement time to 120 months on each count - some 67.5 and 60 months below the low end of the standard range on each count. CP 216, 223-28, 234-40. Having just imposed an exceptional sentence on Miller's co-defendant, it would be absurd to conclude that the court was *unaware* of its discretion to impose an exceptional sentence upon Miller.

*Muholland* did not provide a new legal basis or create a new mitigating circumstance for the imposition of an exceptional sentence downward; it only established there was more than one method of departing from a standard range sentence when sentencing on multiple serious violent offenses. After *Mulholland*, it was clear that when sentencing on multiple serious violent felonies, the court could impose an exceptional sentence by: 1) reducing the term of confinement below the standard range on one or more counts; 2) running the sentences on the multiple serious violent offenses concurrently; or given sufficient legal justification<sup>3</sup>, 3) a combination of both 1 and 2.

When ruling on the applicability of RCW 10.73.100(6) to Miller's untimely collateral attack, the trial court indicated that it did not understand that it had the discretion to impose concurrent sentences on multiple serious violent offense via an exceptional sentence until *Mulholland* issued. CP 267-69. While that may be true, the court *did know at the time it imposed sentence* that it could impose a lower term of confinement upon Miller via an exceptional sentence. Yet knowing that an exceptional sentence as to length of confinement time was an available option, the court imposed a standard range sentence - and not even the

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<sup>3</sup> *Miller* has never articulated any legal justification for imposition of an exceptional sentence in his case. It was not done at the original sentencing and it has not been articulated in his collateral attack proceedings. Nor has the trial court indicated what mitigating circumstance it would rely upon to support an exceptional sentence downward. Thus, the legal basis for imposing an exception sentence upon Miller is speculative, at best.

lowest possible standard range sentence available. CP 28-44, 255-261. The sentencing court's statement at the time it imposed sentence was that it was "based upon the information I have before me." CP 261. That indicates the court imposed the sentence it felt Miller deserved rather than the lowest possible sentence that it could impose given the strictures of the Sentencing Reform Act. Thus, Miller's situation is easily distinguishable from the facts of *Mulholland*.

The sentencing hearing record demonstrates the court understood it had the discretion to impose an exceptional sentence upon Miller at the time of sentencing by imposing a sentence below the standard range, but it did not do so. Any exceptional sentence obtained by running the terms concurrently could also have been imposed by reducing the terms of confinement below the standard range. Consequently, the publication of *Mulholland* was immaterial to Miller's sentence. The component of RCW 10.73.100(6) requiring a showing of "materiality" was not shown below.

The trial court did not apply this Court's standards for determining whether the significant change in the law exception in RCW 10.73.100(6) is applicable to a claim raised in an untimely petition. The Court of Appeals perpetuated the errors in law made by the trial court by also ignoring this Court's precedents. The decisions below should be reversed. Under a proper application of this Court's precedents, there is no

applicable exception for Miller's untimely collateral attack. The trial court's order vacating the judgment and ordering a new sentencing hearing should be vacated.

D. CONCLUSION.

Miller cannot meet this Court's standards for showing that his untimely collateral attack falls with the exception to the time bar in RCW 10.73.100(6) as that requires a showing that there has been 1) a significant change in the law; 2) which is material to his case; and 3) that the change applies retroactively. As such, the trial court erred in vacating the judgment and in ordering a new sentencing hearing. This Court should vacate the order vacating the judgment, and return the matter to the trial court with directions to transfer the untimely collateral attack to the Court of Appeals where it should be dismissed as time barred.

DATED: July 2, 2015.

MARK LINDQUIST  
Pierce County Prosecuting Attorney

  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7.2.15 Sharen Ka  
Date Signature

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Please see attached the State's Supp Brief in the below matter:

St. v. Miller  
No. 91065-1  
Submitted by K. Proctor  
WSB # 14811

Please call me at 253/798-7426 if you have any questions.

Therese Kahn  
Legal Assistant to K. Proctor