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SUPREME COURT NO. 91065-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

SPENCER MILLER,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frank Cuthbertson, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES ON REVIEW

1. Do “sufficient reasons exist” under RCW 10.73.100(6) to retroactively apply this Court's decision in In re Mulholland¹ to this case, as an exception to the statutory time bar in RCW 10.73.090?

2. Does this Court's decision in In re Yung-Cheng Tsai & Muhammadou Jagana, ___ Wn.2d ___, ___ P.3d ___, 2015 WL 2164187 (No. 88770-5, May 7, 2015), support affirming the Court of Appeals?

B. STATEMENT OF THE CASE

In April 2002, a jury convicted Spencer Miller of two counts of attempted first degree murder. CP 16, 21. The Honorable Frank Cuthbertson imposed 200-month sentences for each count and order them served "consecutively pursuant to RCW 9.94A.589[(1)](b)." CP 36. In an unpublished decision, the Court of Appeals affirmed Miller's convictions. CP 46-70; State v. Miller, 122 Wash. App. 1074 (2004). That appeal involved no sentencing issues. Id.

In September 2008, Miller filed a CrR 7.8 motion seeking a new trial based on violation of his public trial right and right to confrontation. CP 72-75. In November 2008, Judge Cuthbertson transferred the motion to the Court of Appeals as a personal restraint petition (PRP), finding that although

it was timely, it failed to raise a claim for which the trial court could provide relief. CP 76-77. In June 2009, the Court of Appeals dismissed the matter, concluding the PRP was untimely. CP 78-79.

On November 18, 2011, Judge Cuthbertson entered an order granting Miller's October 15, 2010 motion to vacate his judgment and sentence based on In re Mulholland, supra, which held a judge's failure to recognize it had authority to order concurrent sentences for serious violent offenses, despite language in RCW 9.94A.589(1)(b) indicating consecutive sentences are mandatory, warrants remand for resentencing. CP 83-101, 267-69; 161 Wn.2d at 328-29. The State appealed. CP 293-98.

The Court of Appeals affirmed, holding;

Mulholland constituted a significant change in the law, material to Miller's sentence, and that the superior court did not err in finding that the original sentencing court failed to recognize its discretion to impose concurrent terms of confinement. Because the record, indicates that the original sentencing court might have imposed concurrent terms as a mitigated exceptional sentence had it realized that it could, the superior court's findings properly support its conclusion that Miller was entitled to a new sentencing hearing due to a fundamental defect inherently resulting in a miscarriage of justice.

State v. Miller, 181 Wn. App. 201, 219-20, 324 P.3d 791 (2014), as amended on denial of reconsideration (Oct. 28, 2014), review granted, 182 Wn.2d

¹ 61 Wn.2d 322, 166 P.3d 677 (2007).

1028, 347 P.3d 459 (2015). This Court granted the State's petition for review.

C. ARGUMENT

UNDER RCW 10.73.100(6) AND THIS COURT'S DECISION IN TSAL, MILLER'S CHALLENGE TO HIS SENTENCE IS NOT TIME-BARRED.

Miller argued in his CrR 7.8 motion, and the lower courts agreed, that his sentence was invalid because Judge Cuthbertson failed to recognize he could have ordered the sentences for Miller's attempted first degree murder convictions served concurrently as a mitigated exceptional sentence, despite a sentencing statute indicating consecutive sentences were mandatory. The overarching questions for this Court, as they were for the lower courts, are whether Mulholland constitutes a "significant change in the law" and, if it does, whether it applies retroactively to Miller. Like the lower courts, this Court should answer both questions affirmatively.

In addressing these questions, it is important to recognize recent developments in how this Court determines what constitutes a "significant change in the law" and when retroactive application is appropriate.

1. This Court's recent departure from *Teague v. Lane*²

RCW 10.73.090 & .100 provide the statutory framework for determining whether a defendant may rely on recent developments in the law on collateral review. Specifically, they provide in relevant part;

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

...

(5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

...

CrR 7.8 (emphasis added)

Similarly, RCW 10.73.090 provides:

(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

...

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

Emphasis added.

RCW 10.73.100,³ however, provides,

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

....

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

Emphasis added.

Until very recently, when addressing retroactivity questions under these statutes, this Court had not found cause to depart from the federal

³ See also, RAP 16.4(c)(4), defining in part the unlawful nature of restraint sufficient to justify collateral relief (emphasis added):

(4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard.

retroactivity test set forth in Teague v. Lane, *supra*.⁴ See e.g., In re Restraint of Gentry, 179 Wn.2d 614, 627, 316 P.3d 1020 (2014); In re Restraint of Haghighi, 178 Wn.2d 435, 441-42, 309 P.3d 459 (2013). But this Court recognized that Teague was developed for different federal purposes—“to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings [and] . . . to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions.” Gentry, 179 Wn.2d at 626 (quoting Danforth v. Minnesota, 552 U.S. 264, 280-81, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008)). Not surprisingly then, this Court foresaw “[t]here may be a case where our state statute would authorize or require retroactive application of a new rule of law when Teague would not.” State v. Evans, 154 Wn.2d 438, 448-49, 114 P.3d 627 (2005). “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.” Evans, at 449.

⁴ Under Teague, new constitutional rules of criminal procedure usually apply only to matters on direct review, but old rules apply to matters on both direct and collateral review. Whorton v. Bockting, 549 U.S. 406, 416, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007).

More recently this Court made clear that Teague does not necessarily dictate whether a significant change in the law applies retroactively in Washington. In Tsai, supra, this Court acknowledged the United States Supreme Court's holding in Chaidez v. United States, 133 S. Ct. 1103, 1113, 185 L. Ed. 2d 149 (2013), that its earlier decision in Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), created a new rule of federal law. Tsai, at 1 ¶1. It also concluded, however, that Padilla did work a significant change in the law in Washington because it elevated to the status of "deficient performance" in the context of an ineffective assistance of counsel claim, an attorney's failure to properly advise a criminal client about the relevant immigration consequences before pleading guilty.⁵ Id.

The Tsai Court noted that in 1983, 17 years ahead of Padilla, the Washington legislature enacted RCW 10.40.200, which "gives noncitizen defendants the unequivocal right to advice regarding immigration consequences and necessarily imposes a correlative duty on defense counsel to ensure that advice is provided." Tsai, at 4, ¶¶17 & 18. As such, this Court

⁵ To prove ineffective assistance of counsel, a criminal appellant must prove both "deficient performance" and prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

concluded Padilla did not create a new rule of law in Washington, but instead involved

a "garden-variety application[] of the test in Strickland" that simply refines the scope of defense counsel's constitutional duties as applied to a specific fact pattern. Chaidez, 133 S.Ct. at 1107. Because Padilla did not announce a new rule under Washington law, it applies retroactively to matters on collateral review under Teague.

Tsai, at 4, ¶20.

This Court further noted, "Padilla's application of the old Strickland test significantly changed state law by superseding Washington appellate cases that apparently foreclosed the possibility that defense counsel's unreasonable and prejudicial failure to fulfill his or her duties under RCW 10.40.200 could ever be constitutionally ineffective." Tsai, at 5, ¶21.⁶

2. Under *Teague*, *Mulholland* does not constitute a "new" rule of criminal procedure because it merely interpreted what RCW 9.94.589(1)(b) meant since it was amended in 2000

Generally speaking, a new rule will not be given retroactive application to cases on collateral review. Matter of St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992) (citing Teague, 489 U.S. at 311). But "[w]here a statute has been construed by the highest court of the state, the

⁶ Only petitioner Jagana's claim, however, was not time-barred. Jagana never raised the claim until after Padilla was decided, whereas petitioner Tsai had raised the claim in 2008 (pre-Padilla) in the trial court and lost, but failed to seek further review. Tsai, at 7, ¶¶ 30-32.

court's construction is deemed to be what the statute has meant since its enactment. In other words, there is no question of retroactivity." State v. Moen, 129 Wn.2d 535, 538, 919 P.2d 69 (1996).

The case Miller relied on to support his claim, Mulholland, is firmly rooted in interpretation of RCW 9.94A.589(1)(b), which remains unchanged except for recodification (RCW 9.94A.400 was recodified as RCW 9.94A.589 in 2001, Laws 2001, ch. 10, § 6.), since 2000, almost two years prior to Miller's conviction. Laws of 2000, chapter 28, §14. Thus, RCW 9.94A.589(1)(b) has meant what Mulholland said it means since at least 2000. Accordingly, this Court need not engage in an analysis as to retroactivity. Moen, 129 Wn.2d at 538.

4. Under Tsai, Mulholland Constitutes a "Significant Change in the Law"

In Miller, the Court of Appeals correctly determined Mulholland constitutes a "significant change in the law." It did so on the basis that although Mulholland did not expressly overrule established precedent, it did significantly alter how the relevant statutory sentencing language was being interpreted in practice. Miller, 181 Wn. App. at 210-14.

In conducting its analysis, the Miller court noted this Court's decision in In re Personal Restraint of Vandervlugt, 120 Wn.2d 427, 433-34, 842 P.2d 950 (1992) and In re Personal Restraint of Cook, 114 Wn.2d 802, 808-13,

792 P.2d 506 (1990), which both found a "significant changes in the law" without the need to overrule controlling precedent. 181 Wn. App. at 210. Thus, having concluded overruling controlling precedent is not required to find a "significant change in the law," the court set out to analyze "how clear and unequivocal the law was before Mulholland that consecutive sentences were mandatory in these circumstances." 181 Wn. App. at 211. It began by noting:

In this inquiry we keep in mind that where courts and practitioners have uniformly worked under the assumption that a certain principle is the law, no occasion may have arisen for an appellate court to repudiate that principle for a long span of time. Dicta from our Supreme Court, furthermore, may constrain the conduct of trial courts as surely as does a holding of this court or a statute. When a case does arise that squarely presents the issue, . . . an appellate court's repudiation of such a long-accepted principle could still amount to a significant change in the law. As the dicta from our Supreme Court discussed below demonstrate, the notion that sentences for multiple serious violent felonies must run consecutively is just such a long-accepted principle. The Mulholland court's reliance on the plain language of the statute in rejecting this principle subtracts nothing from the consistent and categorical message of the case law before Mulholland that these sentences must run consecutively.

181 Wn. App. 211-12 (internal citations omitted).

Having already noted its prior decision in State v. Flett, 98 Wn. App. 799, 806, 992 P.2d 1028 (2000), which stated erroneously in dicta that "[c]onsecutive sentencing is mandatory" for multiple serious violent offenses,

the Miller court then looked to this Court's prior decisions bearing on the issue. For example, the court cited State v. Jacobs, 154 Wn.2d 596, 602–03, 115 P.3d 281 (2005), which stated, "sentences for 'two or more serious violent offenses arising from separate and distinct criminal conduct' must be applied consecutively to each other[.]" citing and quoting RCW 9.94A.589(1)(b). Miller, 181 Wn. App. at 212.

It then noted In re the Personal Restraint of Charles, 135 Wn. 2d 239, 245, 955 P.2d 798, 800 (1998), which addressed the question, "When two or more offenses each carry deadly weapon enhancements and the offenses are sentenced concurrently, are the enhancements consecutive to each other or are they consecutive to the base sentence but concurrent to each other?" Miller, 181 Wn. App. at 212. In Charles, this Court stated;

The exception to the rule that current offenses are to be served concurrently occurs when the person has committed two or more "serious violent offenses," in which case sentences are consecutive. RCW 9.94A.400(1)(b).⁷ This exception does not apply under the facts of the present cases before the Court.

135 Wn.2d at 245, n.2.

The Miller court acknowledged the excerpts it noted from Jacob and Charles constituted dicta. It pointed out, however, the potent effect of such

⁷ RCW 9.94A.400 was recodified as RCW 9.94A.589 in 2001. Laws 2001, ch. 10, § 6.

dicta in practice, noting as an example its decision in Flett, which relied on this Court's decision in Charles to wrongly conclude there were no exceptions to the consecutive sentence requirement for serious violent offenses under RCW 9.94A.589(1)(b). 181 Wn. App. at 212-14.

Similar to the situation in Tsai, where the correct interpretation and application of a statute enacted in 1983 lagged well behind the 2010 decision in Padilla, the correct interpretation and application of former RCW 9.94A.400(1)(b) and current RCW 9.94A.589(1)(b) lagged well behind the 2007 decision in Mulholland, which significantly changed the law to recognize an exception to the requirement for consecutive sentences for multiple serious violent offenses. Like Judge Cuthbertson, the Miller court correctly concluded that Mulholland constitutes a significant change in the law because it debunked dicta relied on in practice for years. 181 Wn. App. at 214. This Court should affirm that holding.

D. CONCLUSION

For the reasons stated, this Court should affirm the Court of Appeals decision in Miller.

DATED this 2nd day of July, 2015.

Respectfully Submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	
Petitioner,)	
v.)	NO. 91065-1
SPENCER MILLER,)	
Respondent.)	

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I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

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[X] SPENCER MILLER
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SIGNED IN SEATTLE WASHINGTON, THIS 2ND DAY OF JULY 2015.

X Patrick Mayovsky

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Attached for filing today is a supplemental brief of respondent for the case referenced below.

State v. Spencer Miller

No. 91065-5

Supplemental Brief of Respondent

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