No. 87654-1

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF RUSSELL D. MCNEIL AND HERBERT C. RICE

PETITIONERS

BRIEF OF *AMICI CURIAE* WASHINGTON DEFENDER ASSOCIATION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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INTEREST OF AMICI CURIAE

The interests of amici are described in the amicus motion.

ISSUE PRESENTED

Whether this Court should retroactively apply the United States Supreme Court's ruling in *Miller v. Alabama*, -- U.S. --, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), or instead require that petitioners McNeil and Rice spend the remainder of their lives in prison, for crimes committed while they were juveniles and at a time when the life without parole sentences they received barred consideration of their youth and other mitigating factors.

STATEMENT OF THE CASE

This brief relies on the petitioners' statements of the case.

ARGUMENT

The United States Supreme Court's ruling in *Miller*, declaring mandatory life without parole ("LWOP") for juveniles unconstitutional under the Eight Amendment, effected a significant change in the law. While amici agree with the petitioners that *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), mandates retroactive application of *Miller*, there are additional "sufficient reasons" to apply *Miller* retroactively in Washington. First, the U.S. Supreme Court has already in effect applied *Miller* retroactively in the companion case of

Jackson v. Hobbs, -- U.S. --, 132 S. Ct. 548, 181 L. Ed. 2d 395 (2011), indicating there are sufficient reasons retroactive application of *Miller* outweighs the interest in finality. In addition, there are numerous other reasons favoring retroactive application of *Miller* in Washington, including statutes and court rules supporting retroactivity for "sufficient reasons," Washington policies recognizing juveniles should be treated differently than adults for sentencing purposes, case law favoring retroactive correction of facially invalid sentences and Washington's constitutional prohibition on cruel punishment that is more protective than its federal counterpart. And finally, at least one other state law test for retroactivity, consistent with *Teague*, supports the retroactive application of *Miller* in Washington.

A. *Teague* Mandates Retroactive Application of *Miller*.

Amici agree with McNeil and Rice that *Miller* is retroactive under *Teague*. As McNeil and Rice demonstrate in their briefing, *Miller* is retroactive under *Teague* because either it is a new substantive rule[1], a

[1] Several courts have concluded that *Miller* is retroactive under *Teague* because it is substantive. *See, e.g.*, *Hill v. Snyder*, No. 10-14568, 2013 WL 364198, at *2 n.2 (E.D. Mich. Jan. 30, 2013) (citing *Schriro v. Sumerlin*, 542 U.S. 348, 351-53, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004)) ("[a] rule is substantive rather procedural if it alters the range of conduct or the class or persons the law punishes. . . [and that s]uch rules apply retroactively because they necessarily carry a significant risk that a defendant . . . faces punishment that the law cannot impose . . . .") (citations and quotations omitted); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *Jones v. State*, No. 2009-CT-02033-SCT, 2013 WL 3756564, at *3 (Miss. July 18, 2013); *People v. Morfin*, 981 N.E.2d 1010, 367 Ill. Dec. 282 (Ill App. Ct. 2012).

watershed ruling of criminal law, or both. Of particular importance in the *Teague* analysis is the following observation by Dean Erwin Chemerinsky, which recognizes that there are some slight procedural aspects of *Miller*, but that its ruling is predominantly substantive.

> There is a strong argument that *Miller* should apply retroactively: It says that it is beyond the authority of the criminal law to impose a mandatory sentence of life without parole. It would be terribly unfair to have individuals imprisoned for life without any chance of parole based on the accident of the timing of the trial.
> . . .
> [T]he *Miller* court did more than change procedures; it held that the government cannot constitutionally impose a punishment. As a substantive change in the law which puts matters outside the scope of the government's power, the holding should apply retroactively.[2]

Should this Court have concerns about *Miller's* retroactive application under *Teague*, this Court should still apply *Miller* retroactively for a number of alternative reasons discussed in detail below. First, the U.S. Supreme Court has already implicitly applied *Miller* retroactively. Second, this Court should exercise its independent authority under Washington law to hold *Miller* retroactive.

B. The U.S. Supreme Court Has Already Implicitly Applied *Miller* Retroactively and this Court Should Follow Suit.

[2] Erwin Chemerinsky, Chemerinsky: Juvenile Life-Without-Parole Case Means Courts Must Look at Mandatory Sentences, ABA Journal Law News Now (Aug. 8, 2012, 8:30 AM), http://www.abajournal.com/news/article/chemerinsky_juvenile _life-without-parole_case_means_courts_must_look_at_sen/.

In applying *Miller* retroactively, this Court need not enter into uncharted territory. Indeed, the U.S. Supreme Court itself applied *Miller* retroactively in the companion case of *Jackson*. *Miller*, 132 S. Ct. at 2461; *see also Jackson*, 132 S. Ct. 548 (pairing *Jackson* and *Miller*). In *Jackson* the U.S. Supreme Court reversed the Arkansas Supreme Court's denial of Kuntrell Jackson's post-conviction petition. 132 S. Ct. 548. In doing so, the U.S. Supreme Court impliedly "addressed the retroactivity question in the very case announcing the new rule," *see Teague*, 489 U.S. at 300, even while it did not explicitly address the *Teague* test, and the Court recognized that the rule from *Miller* applies to convictions that became final before the new rule was announced. Accordingly, this Court should follow the U.S. Supreme Court's lead and apply *Miller* retroactively.

The U.S. Supreme Court granted certiorari in both *Jackson* and *Miller*, and, in the same opinion, reversed each. *Miller*, 132 S. Ct. at 2463. With respect to Jackson, the U.S. Supreme Court reversed the Arkansas Supreme Court's denial of his petition for habeas corpus and remanded the case for proceedings not inconsistent with *Miller*. *Id.* at 2475. The Arkansas Supreme Court then applied the ruling retroactively, in *Jackson v. Norris*, No. 09-145, 2013 Ark. 175, -- S.W.3d -- (Ark. Apr. 25, 2013).

In doing so, the Arkansas Supreme Court held that "Jackson is entitled to the benefit of the United States Supreme Court's opinion in his own case," and issued a writ of habeas corpus with instruction for resentencing. *Id.* at 6, 9.

By granting certiorari to Jackson and then deciding his case, the U.S. Supreme Court manifested no hesitation about applying its new rule retroactively to other similarly situated defendants. In *Teague*, the Court held that a case on collateral review "cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review." 489 U.S. at 316 (emphasis in original). The *Miller* Court—which must be presumed to have acted with knowledge of this mandate from *Teague*—elected to use Jackson's habeas proceeding as one of the two vehicles to announce its new constitutional rule. Had it not intended to apply the opinion retroactively, the Court could have solely selected *Miller*—a direct review case—as the vehicle to resolve the Eight Amendment issue it addressed, and remanded *Jackson* to the Arkansas Supreme Court to determine the retroactivity question in the first instance. This Court should view the U.S. Supreme Court's choice to take a different route as revealing. Indeed, it should follow *Miller*'s lead and apply it "retroactive[] to all defendants on collateral review," including McNeil, Rice, and all other

twenty-eight similarly situated offenders sentenced to LWOP in Washington for crimes committed while they were under age 18.[3]

Moreover, explicit in *Teague* is a requirement of fundamental fairness: if a new rule is applied retroactively to one petitioner, it must be applied to other similarly situated petitioners. *Id.* at 300 ("[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."). Jackson, whose conviction became final in 2004, will be resentenced in accordance with the new rule announced in *Miller*. No principled basis exists for denying the same right to McNeil, Rice, and the twenty-eight other similarly situated offenders in Washington.

C. Even if *Teague* and *Jackson* Do Not Dictate Retroactive Application of *Miller*, this Court Should Exercise its Independent Authority Under Washington Law to apply *Miller* Retroactively.

Even if this Court decides that neither *Teague* nor *Jackson* provide for retroactive application of *Miller* (a conclusion it should not make), it should nevertheless exercise its authority under state law to make *Miller*

[3] The U.S. Supreme Court has had no shortage of direct review cases raising the issue it ultimately decided in *Miller*. *See, e.g.*, *Wilson v. Texas*, -- U.S. --, 133 S. Ct. 108, 184 L. Ed. 2d 5 (2012); *Whiteside v. Arkansas*, -- U.S. --, 133 S. Ct. 65, 183 L. Ed. 2d 708 (2012). The Court, however, found it unnecessary to accept all cases involving the *Miller* rule, and in several direct review cases granted certiorari, vacated the opinion below, and remanded. *See, e.g.*, *Wilson*, 133 S. Ct. at 108; *Whiteside*, 133 S. Ct. at 65. It is, therefore, telling that of the two cases the Court ultimately selected as appropriate to announce its new rule: one was on direct review while the other was on collateral review.

retroactive in Washington. Under the holdings of this Court and the U.S. Supreme Court, it is beyond doubt that *Teague* does not limit this Court's retroactivity determinations. *Danforth v. Minnesota*, 552 U.S. 264, 280-81, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008) (permitting state courts to apply a new rule retroactively even where it would not be retroactive under *Teague*: states "are free to choose the degree of retroactivity or prospectivity which [states] believe appropriate to the particular rule under consideration, so long as [courts] give federal constitutional rights at least as broad a scope as the United States Supreme Court requires," *id.* at 276, and inviting states to create their own retroactivity standards based on state interests, *id.* at 280); *State v. Evans*, 154 Wn.2d 438, 448-49, 114 P.3d 627 (2005) (recognizing that *Teague* is not binding on Washington state courts but declining to depart from *Teague* analysis in the particular case before it). And, in certain circumstances, Washington law enables courts to apply a new rule of law retroactively even when *Teague* does not.

Two different provisions of Washington law support retroactive application of a new legal rule for "sufficient reasons." First, for petitioners whose judgment is final, RCW 10.73.100 creates limited exceptions to the general rule that a collateral attack on a judgment must be brought within one year. The sixth exception in that statute provides

that the one-year limit does not apply in the following circumstance:

> (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) (emphasis added). Although this statute functions only to remove the one-year collateral attack deadline in listed circumstances, subsection (6) illustrates the legislature's intention that, where sufficient reasons exist, new legal rules may apply retroactively. This Court twice has reasoned the same.

In *State v. Evans* this Court noted that RCW 10.73.100(6) has been interpreted consistently with *Teague*, but that sufficient reasons may authorize retroactive application of a new legal rule even when *Teague* would not. 154 Wn.2d at 448. However, the *Evans* court concluded that the petitioner failed to provide sufficient reasons for retroactivity. *Id.* at 449. In *In re Pers. Restraint of Markel*, 154 Wn.2d 262, 268 n.1, 111 P.3d 249 (2005), this Court indicated a similar view of the statutory exception, noting that while the Court looks to federal retroactivity analysis for guidance, that analysis "does not necessarily define the full scope of RCW

10.73.100(6)." Instead, this Court acknowledged "that there may be a case where a petitioner would not be entitled to relief under the federal analysis . . . but where sufficient reason would exist to depart from that analysis." *Id.* Thus, although this Court has not yet found sufficient reasons to depart from the *Teague* analysis under RCW 10.73.100(6), it recognizes that the avenue for such an approach already exists under Washington law.

Under the similarly worded RAP 16.4(c)(4), this Court previously has found sufficient reasons for retroactive application of a later decision. *In re Pers. Restraint of Vandervlugt*, 120 Wn.2d 427, 435, 842 P.2d 950 (1992). Rule 16.4(c) of the Rules of Appellate Procedure, in its list of reasons why a petitioner's restraint may be unlawful, contains a nearly identically worded provision:

> (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*.

In *Vandervlugt*, the petitioner was given an exceptional sentence for his conviction of first degree assault and kidnapping with a dangerous weapon. 120 Wn.2d at 428. This sentence relied in part on the sentencing judge's finding of future dangerousness. Two years later, this Court ruled

that a finding of future dangerousness may not contribute to an exceptional sentence. *Id.* (discussing *State v. Barnes*, 117 Wn.2d 701, 818 P.2d 1088 (1991)). After completing his appeals, the petitioner in *Vandervlugt* filed a personal restraint petition ("PRP") that challenged, in part, his exceptional sentence. *Id.* at 431. While the PRP was pending, this Court issued *Barnes*. *Id.* In evaluating whether "sufficient reasons" supported applying *Barnes* retroactively in *Vandervlugt*, this Court noted that the primary reason for the exceptional sentence was invalid under *Barnes*. *Id.* at 435. To explain why sufficient reasons justified retroactive application, the Court stated as follows:

> Under these circumstances we could not say for certain that the judge would have imposed the same exceptional sentence had he known he could not rely on the improper factors. Thus, on the facts of this case, it would be fundamentally unfair not to apply *Barnes* to Vandervlugt's sentence.

Id. (citations omitted). *Vandervlugt* thus offers a compelling example of retroactive application of a subsequent ruling, based on the alternative retroactivity analysis presented in RCW 10.73.100(6) and RAP 16.4(c)(4).[4]

[4] The State in *Vandervlugt* argued that retroactive application of *Barnes* was inappropriate because *Barnes* created a new rule. 120 Wn.2d at 436. This Court rejected that argument, reasoning that *Barnes* did not create a new rule. However, even had the Court agreed with the State's argument, this conclusion would not have precluded retroactive application via RAP 16.4(c)(4). As noted later in *Evans* and *Markel*, these State law provisions offer courts an alternative to *Teague*, where sufficient reasons justify

Indeed, the rationale applied by this Court in *Vandervlugt* applies with equal force here. McNeil and Rice could receive a sentence other than LWOP if that sentence is not mandatory, and if, for the first time, youth at the time of the offense is considered along with other mitigating factors, as *Miller* now requires. Thus, it would be fundamentally unfair not to apply *Miller* retroactively.

This Court has repeatedly applied new sentencing rules retroactively. *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 933 P.2d 1019 (1997).[5] In *Johnson*, the defendant sought relief on the grounds that the sentencing court erred in calculating his offender score. *Id.* at 563. Johnson had previously been denied similar relief on the authority of *State v. Chavez*, 52 Wn. App. 796, 799, 764 P.2d 659 (1988) (holding that overlapping sentences not considered as one offense for purposes of calculating offender score). *Id.* at 562. Nine years after Johnson had been assigned an offender score, however, this Court overruled *Chavez* in *In re Pers. Restraint of Sietz*, 124 Wn.2d 645, 650, 880 P.2d 34 (1994). *Id.* at

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such a departure.

[5] *See also, e.g., In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004) (sentence invalid on its face under a subsequent Washington Supreme Court ruling that assault could not be the predicate offense for a conviction of second degree murder); *In re Pers. Restraint of Greening*, 141 Wn.2d 687, 9 P.3d 206 (2000) (granting petition because of intervening state Supreme Court holding regarding firearm enhancements); *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980) (granting petition on the grounds that subsequent to petitioner's conviction the state Supreme Court held that the enhanced penalty provisions of RCW 9.41.025 did not apply in a conviction for first degree robbery).

562-63. "Under th[e] new rule [announced in *Seitz*], Johnson's offender score should have been 1 instead of 2." *Id.* at 563. This Court held that Johnson's sentence was unlawful "to the extent he was sentenced on the basis of an incorrect calculation of his offender score[,]" *id.* at 568, and, twelve years after Johnson had been erroneously sentenced, ordered that he receive a new sentencing hearing "with a proper calculation of his offender score."

As in *Johnson*, the interests in error correction and fundamental fairness outweigh the interests in finality here. Applying the *Johnson* decision five years later to another facially invalid sentence, this Court stated that "a sentence based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice." *In re Per. Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002) (citing *Johnson*, 131 Wn.2d at 569). As the *Johnson* Court explained, the interest in finality is not always dispositive, particularly when constitutional errors rather than simply a statutorily erroneous sentence is at stake:[6]

> [while] a subsequent change in the law would not allow a litigant to reopen a case already decided, the United States

[6] While this Court did not apply *Teague* in *Johnson*, this Court's rationale that the value of finality is of diminished importance in criminal proceedings applies with equal force here. *Johnson*, 131 Wn.2d at 567, n.4. In fact, it supports amici's arguments that *Miller* is retroactive under *Teague* and that, in the alternative, this Court should retroactively apply *Miller* under Washington law.

> Supreme Court has observed [that c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. . . . The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ.

Id. at 567, n.4. McNeil's and Rice's sentences, based upon Washington's unconstitutional use of mandatory LWOP for juvenile offenders, are fundamentally defective and have resulted in the miscarriage of justice. As such, those sentences are facially invalid. At stake in this case is the life and liberty of both McNeil and Rice as well as the infringement of their constitutional rights as described in *Miller*. Accordingly, McNeil and Rice each deserve a correct and proper sentencing hearing in which the sentencing court considers the fact they were under the age of 18 when they committed their respective crimes, along with any other mitigating factors. This Court has the power and duty to correct the manifest injustice worked upon McNeil and Rice, *Carle,* 93 Wn.2d at 33-34, and it should now act accordingly by invalidating their sentences.

i. Sufficient Reasons Exist for *Miller's* Retroactive Application under Washington Law.

Amici submit that the following reasons, individually and collectively, constitute sufficient reasons for retroactive application of *Miller* in Washington.

a. Washington Should Recognize, as *Miller* Does, that Juveniles Possess a Unique Potential for Rehabilitation.

The purposes of punishment, namely, rehabilitation, retribution, deterrence and incapacitation, have significantly different impacts on juveniles than adults. As the Supreme Court stated in *Miller*, there are three specific ways in which juveniles "are constitutionally different from adults for purposes of sentencing":

> First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. . . . Second, children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. . . . And third, a child's character is not as well formed as an adult's; his [or her] traits are less fixed and his [or her] actions less likely to be evidence of irretrievabl[e] deprav[ity].

Miller, 132 S. Ct. at 2464 (alterations in original) (citations and quotation marks omitted). Importantly, because a juvenile's "moral culpability" is less than an adult's, the retribution rationale is not as compelling. *Id.* at 2465. The deterrence rationale is likewise not as compelling because juveniles are "less likely to consider potential punishment." *Id.* Because juveniles are not fully developed, and thus more likely to change and mature, long-term incapacitation is less often required. *Id.* A sentence of LWOP imposed on an offender who is under age 18 at the time the offense

is committed improperly "forswears . . . the rehabilitative ideal" and "reflects an irrevocable judgment about [a juvenile offender's] value and place in society, at odds with a child's capacity for change." *Id.* (alteration in original) (citations and quotation marks omitted).

Significant scientific research and public policy reasons provide compelling support that this Court should agree with the above described aspect of *Miller*, as explained in the brief of Amici Columbia Legal Services *et al.* also filed in this case.

b. Washington's Ban on Cruel Punishment Supports Retroactive Application *Miller*.

As discussed, *Miller* held that mandatory LWOP for juvenile offenders is unconstitutional under the Eighth Amendment's ban on cruel and unusual punishment. 132 S. Ct. 2455. Importantly, the cruel punishment clause of the Washington State Constitution is distinct from the cruel and unusual punishment clause of the Eight Amendment of the U.S. Constitution. *State v. Fain*, 94 Wn.2d 387, 393, 617 P.2d 720 (1980). Indeed, article 1, section 14 of the Washington State Constitution is more protective than its federal counterpart. *State v. Thorne*, 129 Wn.2d 736, 772, 921 P.2d 514 (1996), *abrogated on other grounds as recognized by In re Pers. Restraint of Eastmond*, 173 Wn.2d 632, 636, 272 P.3d 188 (2012), ("[T]he state constitutional provision barring cruel punishment is

more protective than the Eight Amendment."); *see also Fain*, 94 Wn.2d at 392 ("As we have stated in previous decisions, we may interpret the Washington Constitution as more protective than its federal counterpart.").

Not only is Washington's prohibition on cruel punishment more protective than its federal counterpart, so too has this Court historically been ahead of the U.S. Supreme Court in recognizing and realizing our society's "evolving standards of decency," especially when it comes to the punishment of juvenile offenders. *State v. Furman*, 122 Wn.2d 440, 858 P.2d 1092 (1993) (prohibiting the execution of defendants who were under the age of 18 at the time of their offense, more than 10 years before the U.S. Supreme Court arrived at that same holding in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L. Ed. 2d 1 (2005)). In recognition of Washington's ban on cruel punishment, and in keeping with this Court's tradition of shielding juveniles from punishment that completely fails to account for their potential for rehabilitation, this Court should apply *Miller* retroactively.

D. Nevada's Test for Retroactivity, Consistent with *Teague*, Supports the Retroactive Application of *Miller*, and this Court Should Adopt it for Purposes of Applying *Miller* Retroactively.

As noted in *In re Pers. Restraint of Haghighi*, No. 87529-4, 2013 WL 4857955, at *3 (Wash. Sept. 12, 2013), this Court "has consistently

and repeatedly followed and applied the federal retroactivity analysis as established in *Teague*." Since the *Teague* analysis is, however, not binding upon state courts, *Danforth v. Minnesota*, 552 U.S. at 276; *State v. Evan*s, 154 Wn.2d at 448-49, this Court may also choose to employ a different test. Should this Court come to the conclusion that *Teague* and *Jackson* do not compel retroactive application of *Miller*, this Court should consider using the following test from the Nevada Supreme Court to apply the primarily substantive rule announced in *Miller* retroactively to the particular form of unconstitutional sentencing involved here.

In *Colwell v. State*, 118 Nev. 807, 59 P.3d 463 (2002),[7] the Nevada Supreme Court, which also resides in the Ninth Circuit, used a slightly modified version of the *Teague* analysis, albeit one consistent with *Teague*. The Court found that *Teague* was "sound in principle, [but] the Supreme Court has applied it so strictly in practice that decisions defining a constitutional safeguard rarely merit application on collateral review." *Id.* at 818. The Court therefore chose to "adopt the general framework of

[7] At issue in *Colwell* was whether the Nevada Supreme Court should retroactively apply the U.S. Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), which held that a capital punishment scheme that allows a judge to determine aggravating circumstances violates the defendant's Sixth Amendment right to a jury trial. While the Nevada Supreme Court refused to apply *Ring* retroactively in *Colwell*, because that rule "did not forbid either the criminalization of any conduct or the punishment in any way of any class of defendants," 118 Nev. at 821, because the likelihood of an accurate conviction was not diminished, *id.*, and because "Colwell pleaded guilty and waived his right to a jury trial[,]" *id.* at 822, as argued herein, under *Colwell's* modified *Teague* test, *Miller* would apply retroactively.

Teague, but reserve our prerogative to define and determine within this framework whether a rule is new and whether it falls within the two exceptions to nonretroactivity . . ." *Id*. at 819. Because *Colwell* is consistent with *Teague*, this Court should retroactively apply *Miller*, using *Colwell's* guidance to aid in articulating the appropriate test. *See Haghighi*, 2013 WL 4857955 (indicating that Washington engages in retroactivity analysis consistent with *Teague*).

The Nevada Supreme Court in *Colwell* decided that the first *Teague* exception should not be limited to "primary, private individual" conduct. *Id.* at 472. Further, it recognized a modification to *Teague* first articulated by the U.S. Supreme Court itself: "[t]his exception also covers 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Id*. at 470 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)). As *Miller* prohibits a certain category of punishment (LWOP) for a class of defendants (juvenile offenders) because of their status (juveniles) and offense (first degree murder), it applies retroactively under the first *Teague* exception as expressed by the U.S. Supreme Court in *Penry* and the Nevada Supreme Court's reasoning in

Colwell.[8] Accordingly, consistent with *Teague*, *Penry*, and *Colwell*, this Court should retroactively apply *Miller*.

In addition, the *Colwell* court also made a measured change to the second *Teague* exception, holding that they "do not distinguish a separate requirement of 'bedrock' or 'watershed' significance; if accuracy is seriously diminished without the rule, the rule is significant enough to warrant retroactive application." *Id.* at 472. Mandatory LWOP sentences have rendered completely ineffective Washington's ability to accurately sentence and rehabilitate juvenile offenders convicted of certain crimes. This historically diminished accuracy can only be corrected by retroactive application of *Miller*. As such, this Court should apply *Miller* retroactively in Washington.

Employing this modified version of the *Teague* analysis in cases such as McNeil's and Rice's would allow this Court to consistently follow *Teague* and federal retroactivity principles, while also honoring Washington State's tradition of retroactively correcting erroneous sentences.[9] Thus, this Court should apply *Miller* retroactively.

[8] While *Colwell* pre-dates *Miller* and Nevada has not yet decided the retroactivity of *Miller*, *Colwell*'s retroactivity analysis is offered for its insights into the *Teague* test.
[9] *See, e.g.*, *Goodwin*, 146 Wn.2d 861; *Vandervlugt*, 120 Wn.2d 427; *Carle*, 93 Wn.2d 31.

CONCLUSION

For the foregoing reasons, this Court should apply *Miller* retroactively, invalidate McNeil's and Rice's sentences, and remand for resentencing.

DATED this 11th day of October, 2013.

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