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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

LYDELL MARCUS WHITE, Petitioner-Appellant, Petitioner on Review v. JEFF PREMO, Superintendent, Oregon State Penitentiary Defendant-Respondent, Respondent on Review.	Marion County Circuit Court Case No. 11C24315 CA A154435 S065223

PETITIONER'S BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
On Appeal from the Judgment
of the Circuit Court for Marion County
Honorable Thomas M. Hart, Judge

Opinion Filed: May 17, 2017
Before: Sercombe, Presiding Judge, and Hadlock, Chief Judge, and Tookey, Judge*,
*Hadlock, C.J., *vice* Nakamoto, J. pro tempore.

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PETITIONER'S BRIEF ON THE MERITS

Introduction

Lydell White, petitioner-appellant, petitioner on review, is serving life sentence in prison with a minimum of 836 months (69.67) years for two homicide offenses and a non-homicide offense that he committed with his twin brother when they were 15 years old. The post-conviction trial court granted summary judgment to the state after concluding that petitioner was procedurally barred from asserting the grounds for relief in his successive petition, which challenged his sentence. The Court of Appeals affirmed. *Lydell Marcus White v. Premo*, 285 Or App 570, 397 P3d 504 (2017), *rev allowed*, 363 Or 727 (2018).[1]

In 1993 in the criminal case, the same judge sentenced Laycelle and Lydell in sentencing hearings on subsequent days. Their sentences are set out in the table below:

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[1] This court has also allowed review in petitioner's twin brother's post-conviction case, *Laycelle Tornee White v. Premo,* 286 Or App 123, 399 P3d 1034 (2017), *rev allowed*, 363 Or 727 (2018). The legal argument in each brief is essentially identical, except where petitioners applies the legal rules to his case. Petitioner uses his and his brother's first names throughout this brief to avoid confusion.

	Laycelle White	Lydell White
Offense and sentence	Aggravated Murder: life with the possibility of release	Aggravated Murder: life with the possibility of release
Offense and sentence	Murder: 800 months in prison, concurrent with life sentence	Murder: 800 months in prison, concurrent with life sentence
Offense and sentence		First-degree robbery: 36-months in prison, consecutive to 800-month sentence
Aggregate sentence	Life in prison with a minimum of 66 ½ years	Life in prison with a minimum of 69 ½ years
Age at earliest eligibility for release	81 years old	84 years old

At issue here is Lydell's 800-month prison sentence for one count of murder. The sentence violates the Eighth Amendment[2] to the United States Constitution because the sentence denies him a meaningful opportunity for release from prison during his lifetime and no court has held a hearing that complied with the procedural and substantive requirements necessary to impose a life-without-parole sentence on a juvenile, as required by *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012).

[2] The Eighth Amendment, which applies to the states through the Fourteenth Amendment, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." US Const, Amend VIII.

Additionally, the post-conviction trial court erred in refusing to reach the merits of Lydell's challenge to his sentence under *Miller* because the legislature did not intend the procedural bars in the Post-Conviction Hearing Act (PCHA), ORS 138.510-138-680, to apply to a ground for relief based on a substantive rule of constitutional law that applies retroactively. Those procedural bars and their respective escape clauses are contained in ORS 138.510(3), ORS 138.550(2), and ORS 138.550(3).[3] Even if this court concludes that the procedural bars apply, the United States Constitution

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[3] There are three procedural bars at issue here. One is the statute of limitations, which provides that a post-conviction petitioner must file a petition within two years of the conclusion of the direct appeal "unless the court on hearing a subsequent petition finds grounds for relief which could not reasonably have been raised in the original or amended petition." ORS 138.510(3).

The second is the preclusion rule that applies to direct appeal arguments, which provides that when a post-conviction petitioner challenged his or her conviction or sentence on direct appeal, he or she cannot assert a ground for relief "unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding." ORS 138.550(2).

The third is the preclusion rule that applies to prior post-conviction proceedings, which provides that when a petitioner prosecuted a prior post-conviction proceeding to a final judgment, any grounds for relief not asserted in the petition "are deemed waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein *which could not reasonably have been raised in the*" petition in the original proceeding." ORS 138.550(3).

requires a post-conviction court to apply the merits of *Miller*. A state court may not continue to carry out a sentence prohibited by the Eighth Amendment.

Questions Presented and Proposed Rules of Law[4]

First Question Presented[5]

When a petitioner asserts a ground for relief based on a new constitutional rule from the United States Supreme Court that applies retroactively to cases on collateral review despite the petitioner having previously raised a challenge based on the same constitutional provision, could the ground not reasonably have been raised or asserted previously under ORS 138.510(3) and ORS 138.550(2) and (3)?

First Proposed Rule of Law

Yes. When the United States Supreme Court announces a new constitutional rule that applies retroactively to cases on collateral review, the court has created a new ground for relief. A petitioner could not reasonably

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[4] This brief on the merits focuses on the issues related to petitioner's *Miller* claim. Petitioner also presented in his petition for review other arguments unrelated to *Miller*. He relies on his briefs in the Court of Appeals for those arguments, as permitted under ORAP 9.20(4).

[5] The petition for review focused on ORS 138.550(3) because that was the focus of the Court of Appeals decision. Petitioner includes questions related to ORS 138.510(3) and ORS 138.550(2). The state raised ORS 138.510(3) in the trial court and that statute and ORS 138.550(2) were discussed by the parties in the Court of Appeals.

have raised or asserted the ground for relief previously because the ground did not exist until the United States Supreme Court's decision. For the same reason, a prior argument based on the same constitutional provision did not raise the same ground for relief.

Second Question Presented

Alternatively, even when a petitioner previously challenged a criminal judgment by asserting the same general argument advanced in a ground for relief, may a petitioner obtain review on the merits when the ground for relief raised differs materially from the prior challenge under ORS 138.510(3) and ORS 138.550(2) and (3)?

Second Proposed Rule of Law

The ground is not the same as the previously asserted challenge when a petitioner asserts a ground for relief with legal or factual bases that differ materially from a prior challenge to the criminal judgment. The legislature then intended for a court to engage in an objective inquiry into whether the ground for relief could reasonably have been asserted within the statute of limitations under ORS 138.510(3), on direct appeal under ORS 138.550(2), or in the original post-conviction proceeding under ORS 138.550(3).

Third Question Presented

Further in the alternative, does *Montgomery v. Louisiana*, __ US __, 136 S Ct 718, 193 L Ed 2d (2016), require a post-conviction trial court to reach the merits of a ground for relief that a sentence violates the Eighth Amendment as interpreted in *Miller v. Alabama*, even if in ORS 138.510(3), ORS 138.550(2), or ORS 138.550(3) bar the ground?

Third Proposed Rule of Law

The United States Supreme Court held in *Montgomery* that the Supremacy Clause[6] prohibits a state from relying on a procedural bar to avoid reaching the merits of a juvenile's claim that his sentence violates the Eighth Amendment as interpreted in *Miller*, when a state collateral-review process allows a federal constitutional challenge to a sentence. Oregon permits a petitioner to challenge a sentence on federal constitutional grounds. ORS 138.530(1)(c). Because the statute of limitations in ORS 138.510(3) and the claim-preclusion rules in ORS 138.550(2) and (3) are

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[6] The Supremacy Clause provides:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

US Const, Art VI.

procedural bars, a post-conviction court may not apply them to avoid reaching the merits of a ground for relief based on *Miller*.

Fourth Question Presented

If this court reaches the merits of petitioner's *Miller* challenge, does the rule from *Miller* apply to a child convicted of homicide offenses and sentenced to a single term-of-years sentence of life without parole (also called *de facto* life without parole)?

Fourth Proposed Rule of Law

Yes. A court must assume that the mitigating qualities of youth identified in *Miller* are present in every child being sentenced for homicide. A sentence must provide the child with a meaningful opportunity for release based on demonstrated maturity and rehabilitation, unless the sentencer finds that the child is one of the rare children convicted of homicide whose offenses reflect irreparable corruption instead of the transience of youth. Although the sentencer may consider the number of victims and offenses when making that determination, those factors alone cannot justify sentencing a child to life in prison without a meaningful opportunity for release.

Fifth Question Presented

When does a term-of-years sentence imposed on a juvenile trigger the Eighth Amendment requirements from *Miller*?

Fifth Proposed Rule of Law

A term-of-years sentence triggers the Eighth Amendment requirements from *Miller* when it denies the child a meaningful opportunity for release from prison. A meaningful opportunity for release means that the child must have a realistic chance to be released from prison. A meaningful opportunity means a chance for release with a significant amount of life to live.

Sixth Question Presented

What type of sentencing hearing satisfies *Miller* when a child has been remanded to adult court and a court considers whether to impose a life-without-parole sentence?

Sixth Proposed Rule of Law[7]

Miller creates a presumptive sentence of life with a meaningful possibility of release from prison for any child convicted of homicide. To

[7] The petition for review included questions about the application of Article I, section 16, to a juvenile sentenced to *de facto* life in prison without a meaningful opportunity for release and whether a sentencer must find irreparable corruption beyond a reasonable doubt. Petitioner does not present those questions here because he believes that the appropriate time to raise them will be at a resentencing hearing.

impose the enhanced sentence of life without the possibility of release, a sentencer must find that the child is among the rarest of children who is irreparably corrupt.

Summary of Argument

A post-conviction petitioner is entitled to relief if she or he establishes that her or his sentence violates the United States Constitution, among other grounds. But the legislature enacted a claim preclusion statute, ORS 138.550, providing that a court cannot reach the merits of a ground for relief if the ground was not asserted and could not reasonably have been asserted at trial, on direct appeal, or in prior post-conviction proceeding. Similarly, if a ground is alleged in a petition filed outside the statute of limitations, a court cannot reach the merits unless the petitioner could not reasonably have raised the ground within the limitations period.

1. The 1959 legislature who enacted the PCHA intended to codify existing *res judicata* rules in ORS 138.550. Thus, the claim preclusion rules from ORS 138.550 apply when a petitioner asserted a ground for relief in prior litigation and was denied on the merits or when a petitioner could have reasonably asserted the ground in prior litigation. When a petitioner asserts a ground for relief that relies on a newly announced substantive rule of federal constitutional decided after the petitioner's prior litigation that applies

retroactively to cases on collateral review, ORS 138.550 does not apply. The new rule created a new ground for relief that did not exist previously. A petitioner did not and could not reasonably have asserted that ground for relief in prior litigation.

The 1989 legislature enacted the statute of limitations in ORS 138.510 using the same words that the 1959 legislature used in the claim preclusion provision in ORS 138.550(3). The escape clauses are identically worded, and the text, context, and legislature history provide no evidence that the legislature intended for the words to have a different meaning.

2. Alternatively, if this court concludes the legislature intended for it to compare the grounds for relief previously asserted with the newly created ground based on a retroactive federal constitutional right, the legislature intended a court to ask when the grounds for relief have legal or factual bases that differ materially from a prior challenge to the criminal judgment on which the petitioner was denied relief on the merits. If a ground has materially different bases or if the petitioner was not denied relief on the merits, then the legislature intended for a court to engage in an objective inquiry into whether the ground for relief could reasonably have been asserted within the statute of limitations, at trial, on direct appeal, or in a prior post-conviction proceeding.

This court has previously explained that the inquiry is a continuum when the ground for relief relies on new case law. The newer and more novel or surprising a case, the more likely that it could not reasonably have been raised earlier.

A new substantive rule of federal constitutional law that applies retroactively to cases on state collateral review is rare, new and groundbreaking by definition. The Court held in *Montgomery* that *Miller* is one of those rare, new, groundbreaking substantive rules. Accordingly, a ground for relief based on *Miller* could not reasonably have been raised earlier.

Here, Lydell raised in a prior post-conviction proceeding an Eighth Amendment challenge to his 836-month sentence. That argument was made about 15 years prior to *Miller*, when the Eighth Amendment permitted juveniles to be sentenced to life without parole for non-homicide offenses. The argument differs materially from a *Miller* claim, and it was procedurally barred at the time because there had been no groundbreaking federal constitutional case excused Lydell's failure to raise the claim at trial. The trial court erred in granting summary judgment to the state and the Court of Appeal erred in affirming.

3. If this court concludes that the PCHA bars petitioner's ground for relief based on *Miller*, then the Supremacy Clause of the United States Constitution requires a court to reach the merits. In *Montgomery*, the Court held that a state must resolve the merits of a *Miller* claim if the state collateral review process permits a petitioner to bring a federal constitutional challenge to a sentence. The PCHA permits a federal constitutional challenge to a sentence. Accordingly, the trial court and the Court of Appeals erred in refusing to reach the merits of the *Miller* claim.

4. In *Miller*, the Court declared unconstitutional state sentencing schemes that required a court to sentence a juvenile convicted of homicide to life without parole in prison. But *Miller* and *Montgomery* make clear that the Eighth Amendment applies equally when a state seeks to impose a sentence of life without parole on a juvenile as a term-of-years. The Eighth Amendment does distinguish between a 200-year prison sentence, for example, and a sentence labeled "life without parole."

5. *Miller* applies to a term-of-years sentence that denies a juvenile a meaningful opportunity for release from prison based on demonstrated maturity and rehabilitation. A meaningful opportunity means some years in the community and opportunity to participate meaningfully in society. This court need not draw a bright line in this case, because Lydell's 800-month

sentence for murder denies him an opportunity for release until he is 81 years old, an age that he is very unlikely to reach in prison.

6. A sentencer may impose a sentence of life without parole on a juvenile convicted of homicide only if the sentencer holds a sentencing hearing, presumes that the offense reflects the transience of youth and that the juvenile is one of the vast majority of juveniles capable of maturity and rehabilitation, but nonetheless finds that the rare juvenile murderer is irreparably corrupt.

Here, the sentencing hearing did not comply with the Eighth Amendment as interpreted in *Miller*. The 800-year sentence denies Lydell a meaningful opportunity for release with some years to live in the community. The court did not recognize the children are different for sentencing under the Eighth Amendment. Accordingly, if this court reaches the merits, it should hold that *Miller* requires a resentencing hearing.

Statement of Facts

I. Summary of prior litigation in Lydell White's case

The Court of Appeals opinion accurately summarizes the facts. *Lydell White*, 285 Or App at 572-77. Petitioner supplements the facts when additional detail is necessary to resolve the questions before this court.

A. Criminal trial court proceedings

Petitioner was born on   1978. APP-1.[8] In 1993, when Laycelle and Lydell were 15 years old, they killed an elderly couple. *Lydell White*, 285 Or App at 572. Lydell was waived into adult court. *Id*. He and the state agreed to stipulated facts pursuant to negotiations, and the court found him guilty of aggravated murder, ORS 163.095, of one victim and murder, ORS 163.115, of the other victim, as well as first-degree robbery, ORS 164.415. *Id*. at 126.

The transcript of the sentencing hearing is not part of the record in this case. Petitioner asks this court to take judicial notice of the transcript, the judgment, and the electronic case register because they are all part of the official court record in *State v. Lydell White*, Marion County Circuit Court case no. 94C20118 and Court of Appeals case no. A87436. A copy of the transcript is attached at APP-1-66.

The same judge sentenced both boys, who are black, and the same prosecutor represented the state. APP-126 (OECI case register). The state did not call any witnesses.

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[8] The document in the appendix is a final order of the Board of Parole and Post-Prison Supervision. Petitioner cites it only as evidence of Lydell's birth date, which is not in dispute.

Lydell's attorney called six witnesses.[9] Three of the witnesses were family friends who testified that Lydell was generally sweet-natured and kind, but that he and Laycelle struggled because their father had abandoned their family. APP-5-15.

One of the witnesses was Lydell's mother, White. She testified that Lydell was a loving child, protective of his brothers, and loved animals. APP-17.White and her three boys (the twins had a younger brother) moved to Oregon because the boys' father was in prison in Oregon from 1984 to 1990. Their father left the family about five months after he was released from prison. APP-16. Lydell and Laycelle both loved sports and they kept their grades up so they could play sports. APP-17.

White did not know why they had killed the victims. She had seen Lydell grow and express remorse in the year and a half since the offenses, even though he was not permitted to participate in therapy at while in custody because of the pending charges. APP-21. She ended her testimony by saying, "I brought these kids into this world and they are not adults. Their thinking is not as an adult. The crime is an adult crime." APP-23.

An adult mentor, who worked for a non-profit to help troubled kids also testified. He had been meeting with Lydell since he was

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[9] The Court of Appeals took judicial notice of the transcript of the sentencing hearing.

placed in custody for the charges. In his opinion, Lydell was friendly and "interested in the types of positive things that I think [are] appropriate[.]" APP-25. Lydell had expressed remorse to him and would trade his life for the victims' lives if that would bring back the victims, believed. APP-26. had observed Lydell grow up during the last few months, and he believed that Lydell would be productive in the community if he were released someday. APP-26.

A clinical psychologist, Dr. Norvin Lowery, testified that he had evaluated Lydell at Lydell's attorney's request. APP-27. He testified that Lydell is depressed and has long-term behavior problems. He administered an IQ test to Lydell, and Lydell's score was in the borderline intelligence range to low-average intelligence range, which was consistent with Lydell's academic performance. APP-32. Lydell scored in the psychopathic range on the MMPI, but Dr. Lowery cautioned that it was "well known in the profession [that] adolescents score very high on what is called the psychopathic deviant scale and psychosomatic scale." APP-35.

In his meetings, Lydell was friendly, cooperative, and demonstrated a depth of thought that was inconsistent with people with antisocial personality disorder. Dr. Lowery said that "it's difficult to ascertain particularly with youngsters a firm diagnosis as to their personality

development[,]" particularly when negative environmental factors like "gang bravado" are part of the child's environment. APP-30. But, Dr. Lowery testified, he had not "had enough exposure to [Lydell] as a personality to know" for certain. APP-30. He thought Lydell had the potential to be rehabilitated depending on his environment. APP-36.

The state presented no witnesses. Members of the victims' family made statements, including describing the terrible toll the killing of their elderly relatives had on them. APP-44-48.

Lydell made a statement in allocution in which he apologized and said he wished that he could do something to bring back the victims. He said, "I can't find all the right words to say what I'm feeling but all I can say is I'm sorry for what I have done. I know over the years that [if] I have enough time to figure out just why I did what I did and how sorry I am." APP-49.

The state argued for the same sentence that the court had imposed on Laycelle the day before: an indeterminate sentence of life in prison with a concurrent 800-month upward duration departure sentence under the guidelines. APP-53. The state highlighted the brutality of the crimes. Lydell and Laycelle had targeted the elderly couple because of their vulnerability and beaten them to death, stealing a wedding ring and their car. APP-51-52. The prosecutor also emphasized an evaluation performed by a doctor for the

waiver hearing when the court waived Lydell to adult court, which had concluded that Lydell would continue to be a violent person because he is "psychotic" and "seething with anger." APP-52.

Defense counsel understood that the court would sentence Lydell to "substantial time," but he argued that Lydell had the potential to change as he grew older and became an adult. APP-54. He also argued that the waiver report relied on by the prosecutor had been done a year and a half before sentencing, which is a long time for a teenager. He argued that Lydell had matured since then. APP-54. He asked the court to rely on Dr. Lowery's more recent report and to "consider the recommendation in the Presentence Investigation Report and give Mr. Lydell White a lesser sentence." APP-56.

The court commented that the brutal nature of the crime and the other evidence before it led the court to conclude that Lydell lacked impulse control, although the court was not sure why that was:

> "[THE COURT:] I don't think you have the internal control to control your behavior. I don't know fully the reasons for that, perhaps some of it is genetic, perhaps some of it is the way your father treated your family. I'm sure some is related to your gang affiliation and your close involvement with that subculture, but ultimately the responsibility for our conduct, each of us, is ourselves. No matter the past, no matter the reasons, no matter the failures of the system to intervene earlier, to give more treatment at an earlier stage, no matter about anything else, you did what you did. And the simpl[e] matter is we can't afford to take a chance on you ever again."

APP-61.

The court imposed a life sentence for the aggravated murder of one victim under ORS 163.105 and ORS 161.620. APP-86. On the conviction for murder, the court identified the presumptive grid block range as 178 to 194 months. APP-86. The court found six reasons for an upward durational departure sentence of 800 months—the same six departure factors that the court identified in Laycelle's case:

> "1) The brutality of the crime * * * .
>
> "2) The forethought involved in the murder * * *.
>
> "3) The defendant knew of the particular vulnerability of the victims * * *.
>
> "4) The defendant was on supervision when he committed the instant offense.
>
> "5) Lengthy incarcerations, parole, probation and detention have not deterred the defendant's criminal conduct.
>
> "6) A lengthy term of incarceration is necessary for protection of society."

APP-87. The court sentenced Lydell to 36 month in prison for robbery, consecutive to the 800-month sentence for murder. APP-87-88(judgment at 2-3).

Defense counsel objected to the sentence as "excessive" because it is "twice the guidelines[,] "it's disproportionate to other people similarly

situated and violative of the constitution that requires rehabilitation[.]" APP-64. The court rejected those arguments and said, "I hope [Lydell] does get rehabilitated and becomes more productive, but I think it should be inside the walls rather than outside the walls." APP-65.

B. Direct Appeal

Petitioner filed a direct appeal.[10] The same attorney represented Lydell and Laycelle on direct appeal, and the legal arguments in their briefs are identical, as are the state's responses. Laycelle summarized the direct appellate briefing in his brief on the merits because the Court of Appeals based its decision in Laycelle's case on his direct appeal arguments. *Laycelle White*, 286 Or App at 131-33. Because the Court of Appeals decision in Lydell's case was based on his prior post-conviction arguments, not based on the direct appeal arguments, Lydell does not summarize the direct appeal arguments here. To the extent they are relevant to Lydell's case, he adopts the summary in Laycelle's brief on the merits. The Court of Appeals affirmed without opinion and this court denied review. *State v. Lydell White*, 139 Or App 136, 911 P2d 1287, *rev den*, 323 Or 691, 920 P2d 550 (1996).

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[10] Copies of the appellant's brief, the state's respondent's brief, and the petition for review are attached at APP-70-125. They are not part of the record. Lydell asks this court to take judicial notice of them, as the Court of Appeals did for briefs in Laycelle's direct appeal. *Laycelle White*, 286 Or App at 126 n 3.

C. Prior relevant collateral challenges

In 1997, Lydell timely filed for post-conviction relief. Trial Court File (TCF) 20. As the Court of Appeals explained:

> "Among other things, petitioner asserted that defense counsel was inadequate for failing to object to the sentence as 'illegal and unauthorized.' He also claimed that '[t]he trial court was in error for imposing a life sentence and 836 month[s] on petitioner[,] a remanded juvenile. The sentence violates the Eighth Amendment protection against Cruel and Unusual punishment.' The post-conviction court denied relief and, on appeal from the post-conviction judgment, we, again, affirmed without opinion and the Supreme Court, again, denied review. *See White v. Thompson*, 163 Or App 416, 991 P2d 63 (1999), *rev den*, 329 Or 607, 994 P2d 132 (2000). Petitioner later filed a second unsuccessful petition for post-conviction relief. We summarily affirmed the judgment in that case, and the Supreme Court entered an order denying review."

Lydell White, 285 Or App at 573.

Petitioner filed a petition for a writ of habeas corpus in the Federal District Court for the District of Oregon. The district court denied petitioner relief because his original post-conviction counsel had failed to raise the claim that trial counsel was ineffective for failing to object to the 800-month guidelines sentence, and the Ninth Circuit Court of Appeals affirmed the district court in 2004. TCF 57-58. Thus, petitioner was procedurally barred from obtaining relief in federal habeas corpus. TCF 58.

II. Summary of proceedings in this post-conviction case

In 2012, the United States Supreme Court decided *Miller v. Alabama*, which is discussed in greater detail in the argument section. Petitioner had filed an amended petition for post-conviction relief that alleged,

> "that he had been denied adequate assistance of trial counsel in a number of ways, including that counsel failed to 'object to, as unconstitutionally disproportionate punishment, the imposition of the 800-month sentence on the Murder conviction that would likely greatly exceed the sentence on the more serious charge of Aggravated Murder,' and failed to 'object to the constitutionality of the 800-month sentence on the grounds that it constituted a de facto sentence of Life without the possibility of parole.' He also asserted that he had received inadequate and ineffective assistance of post-conviction counsel and was, therefore, deprived of the 'ability to fully challenge the validity of his sentences in subsequent proceedings.' Petitioner acknowledged that the petition was successive but noted that ORS 138.550 'allows for successive petitions when "the court on hearing a subsequent petition finds grounds for relief asserted which could not reasonably have been raised in the initial or amended petition."' He asserted that he could not reasonably have raised the ground for relief set forth in the petition prior to, among other things, the Supreme Court's decision in *Miller*."

Lydell White, 285 Or App at 574 (footnote omitted).

The state moved for summary judgment, arguing, among other things that the grounds for relief were barred under ORS 138.510(3) and ORS 138.550(3). *Lydell White*, 285 Or App at 574-76.

At the hearing on the motion for summary judgment, the court summarized petitioner's argument based on *Miller v. Alabama* as follows:

> "THE COURT: Well, I mean, I understand your arguments. And really what you're wanting me to do is to apply retroactively some of the things that were not available to trial counsel, appellate counsel or post-conviction counsel, because the has been significantly changed –
>
> "[PETITIONER'S COUNSEL]: It has been.
>
> "THE COURT: -- since the time that the conviction and sentence were imposed."

Tr 12. The court then ruled that petitioner's grounds for relief did not satisfy the escape clauses or apply retroactively:

> "THE COURT: Okay. And while I can understand why he might want to, these arguments could very well have been made in the earlier proceedings if somebody had the forethought to really see significant changes in the law.
>
> "* * * * *
>
> "THE COURT: In any event, this is successive. It is not within any of the escape clauses, because frankly, these facts are not really in dispute. And some of the things that he relies on now were well after the fact, well after all the sentencing. And there's no real authority for me to impose it retroactively. And I'm not going to. Okay? And so therefore if it doesn't fit in the escape clause, it's untimely, and I'm going to grant the motion for summary judgment."

Tr 13-14.

Petitioner appealed. The Court of Appeals affirmed in a written opinion. The court held that the trial court correctly concluded that ORS 138.550 barred petitioner's grounds for relief, relying on *Verduzco v. State*, 357 Or 553, 355 P3d 902 (2015); *Kinkel v. Persson*, 276 Or App 427, 367

P3d 956, *affirmed on other grounds*, 363 Or 1, 417 P3d 401 (2018); and *Cunio v. Premo*, 284 Or App 698, 395 P3d 25 (2017). *Lydell White v. Premo*, 285 Or App at 579-580.

Argument

In section I, petitioner explains that a ground for relief based on *Miller* meets the escape clauses to the procedural bars in the Post-Conviction Hearings Act (PCHA) because the categorical rule from *Miller v. Alabama* was so groundbreaking that an Eighth Amendment proportionality challenge raised prior to *Miller* was not the same ground for relief as a ground based on the holding in *Miller*. Thus, petitioner's *Miller* claim satisfies the escape clauses in ORS 138.510(3), ORS 138.550(2), and ORS 138.550(3), as he explains in section II. In section III, petitioner discusses how the Court holding in *Montgomery* means that the Supremacy Clause to the United States Constitution requires this court to reach the merits of petitioner's ground for relief based on *Miller*, even if this court were to conclude that the legislature intended to bar the ground.

In section IV, petitioner discusses the scope of the rule from *Miller*. *Miller* applies to a term-of-years sentence that denies a child a meaningful opportunity for release from prison based on demonstrated maturity and rehabilitation, even when a child killed more than one person and even when

a trial court has discretion. A *de facto* life sentence violates the Eighth Amendment when the sentencer failed to presume the offenses reflect the transient qualities of youth and thus that the child must be given a meaningful opportunity for release. A sentencer may not deny a child the opportunity for release unless it finds that the child is one of the rare children who is irreparably corrupt and who cannot be rehabilitated. In section V, petitioner applies that rule to his case and explains that his 66.67-year sentence for one count of homicide constitutes a life without parole sentence and that his sentencing hearing failed to comply with *Miller*.

I. The rule from *Miller v. Alabama* applies retroactively to cases on collateral review.

Petitioner begins with summaries of *Miller v. Alabama*, *Montgomery v. Louisiana*, and *Kinkel v. Persson*, 363 Or 1, 417 P3d 401 (2018), because those cases frame the issues discussed in the rest of the brief.

A. *Miller v. Alabama*

The Eighth Amendment requires proportionality in sentencing. When determining the proportionality of a sentence, a court must recognize that children are constitutionally different than adults because scientific research shows children possess three characteristics that make them less culpable and blameworthy than adults. *Graham v. Florida*, 560 US 48, 59, 130 S Ct 2011, 176 L Ed 2d 825 (2010). First, "a lack of maturity and an

underdeveloped sense of responsibility are found in youth more often than in adults." *Roper v. Simmons*, 543 US 551, 569, 125 S Ct 1183, 161 L Ed 2d 1 (2005) (citations omitted). Those "qualities often result in impetuous and ill-considered actions and decisions." *Id*. (internal quotation marks and citations omitted). Second, children "are more vulnerable or susceptible to negative influences," and they have "less control, or less experience with control, over their own environment." *Id*. at 569. Third, "personality traits of juveniles are more transitory, less fixed." *Id*. at 570.

Based on those differences, the Court in *Roper*[11] held that the Eighth Amendment categorically prohibits states from imposing a death sentence on a person who committed a crime before the age of 18. 543 US at 574-75. Sentencing a child to death does not serve any legitimate penological purpose. *Id*. at 569. And a sentencer could be too disturbed by the facts of the offense to give full weight to a child's youth and other mitigating evidence. *Id*. at 573. The Eighth Amendment thus requires a categorical ban on the death penalty for juveniles because the differences between children and adults are "too marked and too well understood to risk allowing a

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[11] *Roper* overruled *Stanford v. Kentucky*, 492 US 361, 109 S Ct 2969, 106 L Ed 2d 306 (1989), in which the Court had held that executing a 16- or 17-year old convicted of murder did not violate the Eighth Amendment.

youthful person to receive the death penalty despite insufficient culpability." *Id*. at 572-73.

After *Roper*, the Court held that the Eighth Amendment categorically prohibits a state from sentencing a juvenile to life without parole for non-homicide offenses. *Graham*, 560 US at 82. No legitimate penological theory could justify a sentence of life without parole, which is second only to the death penalty in severity. *Id*. at 69. The differences between children and adults create such a high likelihood that a sentence of life without parole could be imposed on a juvenile who committed a non-homicide offense without a legitimate penological basis that the Eighth Amendment required a categorical ban. *Id*. at 77.

In *Miller v. Alabama*, the Court held in 2012 that a state violates the Eighth Amendment when it requires a court to sentence a juvenile to life without parole for homicide, relying on *Roper* and *Graham*. Mandatory life-without-parole sentencing schemes are disproportionate because a court cannot consider a child's age, the nature of the offense, or other mitigating factors before imposing the harshest available sentence for children. *Miller*, 567 US at 488. "Children are different" and "youth matters for purposes of meting out the law's most serious punishments[,]" the court explained. *Id*. at 484. A sentencer must consider mitigating facts to determine how "children

are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at 480. The Court explained that the Eighth Amendment would only rarely permit a sentence of life without parole for a juvenile convicted of homicide because it will be the "rare juvenile offender whose crime reflects irreparable corruption." *Id*. at 479-80 (quotation marks omitted).

B. *Montgomery v. Louisiana*

Four years later, in 2016, while this case was pending in the Court of Appeals, the Court held that the rule from *Miller* is a new substantive rule that applies retroactively to cases on collateral review in state court. *Montgomery*, 136 S Ct at 732. The Court also held that "when a new substantive rule of constitutional law controls the outcome of a case, the Supremacy Clause of the Constitution requires state collateral review courts to give retroactive effect to that rule." *Id*. at 729; *see also id*. at 730 ("There is no grandfather clause that permits States to enforce punishments the Constitution forbids."). Thus, "[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id*. at 732.

The Court clarified aspects of the rule from *Miller*. It again reiterated that "children's diminished culpability and heightened capacity for change" means that "sentencing juveniles to this harshest penalty will be uncommon." *Id*. at 733-34. *Miller* requires a court to hold a hearing at which "youth and its attendant circumstances are considered as sentencing factors[.]" *Id*. at 735. A sentence of life without parole imposed on a child "whose crime reflects transient immaturity * * * is disproportionate under the Eighth Amendment." *Id*. Finally, the Court emphasized that a sentence of life without parole will be constitutionally proportionate only "for the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id*. at 734.

C. *Kinkel* left open the questions presented in this case.

This court recently considered many of the legal issues in this case in *Kinkel*, but it did not resolve them. 363 Or at 12-27. This court noted the procedural bar questions and the open question of whether *Miller* applies to an aggregate, term-of-years sentence. It declined to resolve them and instead resolved the case on the fact-specific ground that the petitioner's sentencing hearing complied with *Miller* because the sentencer found that he was one of the rare children who is irreparably corrupt. The sentencing court based its conclusion on evidence of a psychological disorder and the severity of

petitioner's offenses—he intentionally killed his parents and two classmates and he shot and wounded nearly two dozen innocent students at his school, "intending to kill each and every one of them." *Kinkel*, 363 Or at 29-31. Thus, in this brief petitioner first addresses the procedural question and then the merits of *Miller* as applied to his 800-month sentence for a single homicide.

II. The Post-Conviction Hearing Act does not bar petitioner's ground for relief based on *Miller v. Alabama*.

A. A new rule of law that applies retroactively to cases on collateral review could not reasonably have been raised or asserted earlier under ORS 138.510 or ORS 138.550.

The PCHA, ORS 138.510-138.680, provides a statutory process for a person convicted of a crime to collaterally challenge his or her conviction or sentence. A petitioner may obtain post-conviction relief if he or she establishes, among other things, a "[s]entence in excess of, or otherwise not in accordance with, the sentence authorized by law for the crime of which petitioner was convicted; or unconstitutionality of such sentence." ORS 138.510(1)(c).

The PCHA sets out procedural bars to reaching the merits of a ground for relief. This court interprets statutes to determine the legislature's intent by examining the text in context and giving any legislative history the

weight that this court deems appropriate. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009).

i. Text of ORS 138.550(2) and ORS 138.550(3)

The legislature codified claim preclusion principles in the PCHA:

> "(2) When the petitioner sought and obtained direct appellate review of the conviction and sentence of the petitioner, no ground for relief may be asserted by petitioner in a petition for relief under ORS 138.510 to 138.680 *unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding*. * * *."
>
> "(3) All grounds for relief claimed by petitioner in a petition pursuant to ORS 138.510 to 138.680 must be asserted in the original or amended petition, and any grounds not so asserted are deemed waived *unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition*. However, any prior petition or amended petition which was withdrawn prior to the entry of judgment by leave of the court, as provided in ORS 138.610, shall have no effect on petitioner's right to bring a subsequent petition."

ORS 138.550 (emphasis added).

This court has previously explained the meaning of the text of ORS 138.550(2) and (3):

> "Read together, those two statutory provisions express the legislature's determination that, when a petitioner has appealed and also has filed a post-conviction petition, the petitioner must raise all grounds for relief that reasonably could be asserted. *See Johnson v. Premo*, 355 Or 866, 874-75, 333 P3d 288 (2014) (explaining that ORS 138.550(3) codifies claim preclusion principles). The failure to do so will bar a petitioner from later raising an omitted ground for relief. *Id*."

Verduzco v. State, 357 Or 553, 565, 355 P3d 902 (2015).

The legislature's use of the word "could," modified by the adverb "reasonably," indicates that a court should ask whether a petitioner was "capable of" raising a ground for relief. That is, "whether the petitioner reasonably could have raised those grounds for relief earlier, [is] a question that calls for a judgment about what was 'reasonable' under the circumstances." *Id*. at 566 (internal quotation marks omitted).

When the new ground for relief is based on newly announced case law,

> "[t]he touchstone is not whether a particular question is settled, but whether it reasonably is to be anticipated so that it can be raised and settled accordingly. The more settled and familiar a constitutional or other principle on which a claim is based, the more likely the claim reasonably should have been anticipated and raised. Conversely, if the constitutional principle is a new one, or if its extension to a particular statute, circumstance, or setting is novel, unprecedented, or surprising, then the more likely the conclusion that the claim reasonably could not have been raised."

Verduzco, 357 Or at 571 (quoting *Long v. Armenakis*, 166 Or App 94, 101, 999 P2d 461 (2000) (quotation marks omitted)).

1. The meaning of "was not asserted" in ORS 138.550(2)

One part of ORS 138.550(2) differs from the text of the escape clauses in ORS 138.510(3) and ORS 138.550(3). When a petitioner "sought

and obtained direct appellate review," the petitioner may not assert a ground in post-conviction "unless such ground *was not asserted* * * * in the direct appellate review proceeding." ORS 138.550(2) (emphasis added). The text requires an objective inquiry into what grounds were "asserted in the direct appellate review proceeding[,]" and then a comparison to the ground asserted in post-conviction.

The verb "assert" means "to state or affirm positively, assuredly, plainly, or strongly[,] * * * to demonstrate the existence of (an attribute) : signify[,]" or "to demand and compel recognition of[.]" *Webster's Third New Int'l Dictionary* 131(unabridged ed 2002). The text could suggest that merely stating a ground on direct appeal triggers the preclusive effect of ORS 138.550(2). Or the text could mean that the legislature meant to preclude only a ground that was maintained on direct appeal and a ground for which the petitioner "obtained direct appellate review[.]" ORS 138.550(2). That is, an argument that an appellate court refused to reach because it was unpreserved may have been asserted, but the petitioner did not obtain direct appellate review of that ground.

2. The meaning of "grounds for relief"

The statutory term "grounds for relief" is a term of art with a specified legal meaning.[12] When the legislature enacted the PCHA, "ground" was defined as "[a] foundation or basis; points relied on." *Black's Law Dictionary* 832 (4th ed 1957). A "ground of action" was "[t]he basis of a suit; the foundation or fundamental state of facts on which an action rests; the real object of the plaintiff in bringing his suit." *Id*. Those definitions indicate that the legislature intended "grounds for relief" in the escape clause to refer to both the legal and factual basis for a petitioner's assertion of a post-conviction claim.

The PCHA defines the "grounds" for relief that entitle a petitioner to a post-conviction remedy in ORS 138.530(1). In *Datt v. Hill*, 347 Or 672, 678, 227 P3d 714 (2010), this court equated "grounds" with "types of claims" a petitioner may bring and noted that it included "those in which a petitioner asserts a denial of constitutional rights, lack of jurisdiction, excessive

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[12] This argument was previously presented to this court in *Gutale v. State*, 285 Or App 39, 395 P3d 942, *rev allowed*, 361 Or 885, 403 P3d 760 (2017); and *Perez-Rodriguez v. State*, 284 Or App 890, 393 P3d 1209, *rev allowed*, 361 Or 885, 403 P3d 760 (2017). Those cases present questions about the meaning of ORS 138.510(3). Those cases are currently under advisement in this court.

sentence, or the unconstitutionality of a statute." The term "grounds" thus defines the claims for which a petitioner may obtain post-conviction relief.

That definition is consistent with this court's prior interpretations of the escape clause in ORS 138.510(3). In *Bartz v. State*, 314 Or 353, 839 P2d 217 (1992), this court considered whether an untimely petition for relief satisfied the escape clause. 314 Or at 357-60. This court described the petitioner's "grounds for relief" as "the failure of his trial counsel to advise him of a possible statutory defense." *Id.* at 358. Thus, a "ground for relief" is the legal and factual elements of a post-conviction claim entitling a petitioner to relief. *See also Church v. Gladden*, 244 Or 308, 309-11, 417 P2d 993 (1966) (considering the petitioner's "grounds for relief" that the "trial court was without jurisdiction to receive [the] petitioner's plea of guilty to second-degree murder because second-degree murder is not a lesser included crime of first-degree felony murder" and that "[t]he indictment * * * was based solely on testimony which was legally inadmissible").

ii. Context of ORS 138.550(2) and (3)

This court's case law has correctly characterized ORS 138.550(2) and (3) as codifying "claim preclusion principles." *Verduzco*, 357 Or at 565 (citing *Johnson v. Premo*, 355 Or 866, 874-75, 333 P3d 288 (2014)). The legislature intended to codify the *res judicata* (claim preclusion) holding

from *Barber v. Gladden*, 215 Or 129, 134-37, 332 P2d 641 (1958). *Johnson*, 355 Or at 874. In *Barber*, this court held that "a final decision in a habeas corpus proceeding should have preclusive effect 'not only of matters actually determined in a prior proceeding but also matters which could properly have been determined in such earlier proceeding.'" *Johnson*, 355 Or at 875 (quoting *Barber*, 215 Or at 133). The court in *Barber* cited to the preclusion provision of the Uniform Post-Conviction Act (1955) (Uniform Act), on which the PCHA was based. *Barber*, 215 Or at 136.

In *Verduzco*, 357 Or at 561, this court addressed whether the successive petition bar in the "identically worded" ORS 138.550(3) applied to the petitioner's post-conviction petition asserting that he received inadequate immigration advice under *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010). This court held that ORS 138.550(3) barred Verduzco's claim because he had, in fact, raised the exact same Sixth Amendment ineffective assistance of counsel claim in a first, timely post-conviction action prior to *Padilla*. *Verduzco*, 357 Or at 557, 573. This court also noted that *Verduzco* could have obtained the benefit of the rule from *Padilla* if he had petitioned the United States Supreme Court for *certiorari*,

because *Padilla* was before the court at that time. *Verduzco*, 357 Or at 573 n 20.[13]

The context clarifies that the legislature intended to incorporate the element of a final ruling on the merits—or that the party could have obtained a final ruling on the merits—as a prerequisite to the application of claim preclusion in ORS 138.550. That was the rule referred to by *Barber*. *Kelley v. Mallory*, 202 Or 690, 277 P2d 767 (1954) (describing *res judicata*). When the legislature placed the burden on the petitioner to establish that a ground for relief "was not asserted" on direct appeal, the legislature codified the *res judicata* rule that precludes a party from re-litigating a claim that the party had already lost on a final judgment on the merits. When the legislature placed the burden on the petitioner to establish that a ground for relief "could not reasonably have been asserted" on direct appeal, the legislature codified the *res judicata* rule from *Barber* that precludes a party from re-litigating a claim for which the party reasonably could have obtained a ruling on the merits if the claim had been asserted.

[13] This court also interpreted ORS 138.550(3) in *Eklof v. Steward*, 360 Or 717, 385 P3d 1074 (2016), in the context of newly available facts. Petitioner does not summarize *Eklof* here because *Verduzco* provides the relevant context.

iii. Legislative history

In 1959, the Oregon legislature enacted the PCHA based on the Uniform Act. *Verduzco*, 357 Or at 570. The goal of the Uniform Act was "to clarify and simplify present procedures through consolidating them into a single action and so to eliminate the confusion of cases that now burden the courts, and at the same time provide for the petitioner a more complete protection than he now has in his assertion of valid claims." Uniform Act at 9. The Oregon legislature had the same intent in enacting the PCHA, which was based in large part on the Uniform Act. *See* Jack G. Collins and Carl R. Neil, *The Oregon Postconviction Hearing Act*, 39 Or L Rev 337 (1960) (hereafter "Collins and Neil").[14] Thus, the PCHA attempted to strike a balance between efficiency and finality of convictions, on the one hand, and providing people convicted of crimes in Oregon courts at least one opportunity for a ruling on the merits of their legal challenges to their sentences.

To that end, the 1959 legislature codified a version of claim preclusion in the PCHA. Sections 15(2) and (3) of the 1959 Act became

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[14] This court regularly relies on the Collins and Neil article as a type of legislative history when interpreting provisions of the PCHA enacted in 1959 because the authors participated in the drafting of the act. *Verduzco*, 357 Or at 570.

ORS 138.550(2) and (3) and they have not been amended since. Or Laws 1959, ch 636, §§ 15(2), (3). Collins and Neil at 356.

When a petitioner had a direct appeal and was represented by counsel, the legislature intended to preclude only claims that were actually presented and decided on the merits by the appellate court:

> "Where the prisoner took an appeal from his conviction, and could have raised or actually did raise the claims asserted in the habeas corpus proceeding, the Oregon court has generally refused to decide the merits of the petition. However, this rule has been abandoned on questions of 'public importance.' Subsection (2) [ORS 138.550(2)] would appear to state a justifiable rule for this situation, allowing postconviction attack only when a claim could not reasonably have been raised on the appeal. *If a petitioner had a reasonable opportunity to present a question before the highest court of the state*, there is no substantial reason why further judicial time should be spent in litigating the question in other state courts."

Id. at 357 (footnotes omitted) (emphasis added).

Understood in that context, the legislature intended ORS 138.550(2) to bar relief in post-conviction when a petitioner had raised a ground for relief on direct appeal and the appellate court denied that claim on the merits, or when a petitioner reasonably could have raised a ground for relief on direct appeal and obtained a ruling on the merits. When the appellate court cannot reach the merits of an argument on direct appeal because the argument was not preserved or because the merits rely on extra-record evidence (like a claim of ineffective assistance of counsel), then claim

preclusion in ORS 138.550(2) does not apply. A post-conviction court then asks whether the petitioner reasonably could have obtained a ruling on the merits on the same ground on direct review. If the answer is "yes," then the ground is precluded under ORS 138.550(2). If the answer is "no," then the ground is not precluded.

When discussing section 15, the authors posited a hypothetical in which a criminal defendant was convicted at trial based on evidence in violation of the Fourth Amendment and the Constitution permitted the state to use the evidence at trial to obtain a conviction (which was the state of the law in 1959). Collins and Neil at 358. Two years later (hypothetically), the United States Supreme Court held that a conviction based on such evidence "violates the rights guaranteed by the fourteenth amendment." *Id*. at 359. The authors proposed the following four hypothetical courses taken by the defendant:

> "(1) no appeal and no postconviction proceeding; (2) appeal, but the conviction was affirmed by the Oregon Supreme Court; (3) no appeal, but postconviction proceeding under the act and conviction upheld by an Oregon court; or (4) no appeal, but postconviction proceeding raising other grounds only and denial of relief by an Oregon court."

Collins and Neil at 359.

The authors also proposed the following answers under section 15 of the PCHA:

> "In the first situation, [the defendant] could obtain relief by bringing a postconviction proceeding. His failure to appeal is immaterial under subsection (1), and this would be his first postconviction proceeding. If he had followed the second course of action, subsection (2) would apparently bar relief when [the defendant] was represented by counsel on appeal. The same is true in the third situation, since a second postconviction proceeding is barred by subsection (3). In the fourth situation, [the defendant] could obtain relief only if the unconstitutionality of the conviction is deemed a ground for relief which he could not 'reasonably' have raised in his first postconviction proceeding. Thus, the prisoner who took no appeal and brought no postconviction proceeding would obtain relief after the change of constitutional interpretation by the United States Supreme Court, whereas the man who raised the issue *but was denied relief erroneously*, as it later appears, would presumably be without remedy, at least in the state courts."

Id. at 359 (emphasis added).

Although this court relied in part on that hypothetical in *Verduzco*, the hypothetical does not control the legislature's intent in enacting ORS 138.550 and it does not purport to address every circumstance in which a petitioner could satisfy the escape clauses in ORS 138.550. As relevant here, the hypothetical did not address the application of ORS 138.550(2) when a new substantive rule of federal constitutional law applies retroactively to cases that became final before the new rule was announced. It also presumed that relief had been denied on the merits; the defendant was "denied relief erroneously, as it later appears[.]" The authors did not address how ORS 138.550(2) or (3) would apply when an appellate court or prior post-

conviction court had not reached the merits of a claim. That was likely because well-established *res judicata* principles made clear that claim preclusion applies only when the same claim has been decided on the merits in a prior proceeding or when the same claim could properly have been decided on the merits in the prior proceeding. *E.g.*, *Kelley*, 202 Or at 277 (describing *res judicata*).

In sum, ORS 138.550 bars a ground for relief unless the petitioner could not reasonably have raised it at trial, on direct appeal, or in a prior post-conviction proceeding. When a ground for relief is based on a newly decided rule of law, it could not reasonably have been raised if it is a new, surprising, or novel rule. Similarly, a ground could not reasonably have been raised when a petitioner had no reasonable opportunity for a decision on the merits of the ground. ORS 138.550(2) also bars a ground for relief that "was asserted" on direct appeal. A ground was asserted on direct appeal if it was properly raised and denied on the merits.

iv. The escape clause in ORS 138.510(3) has the same meaning as the escape clause in ORS 138.550(3).

The statute of limitations and the escape clause provides:

> "A petition pursuant to ORS 138.510 to 138.680 must be filed within two years of [the date the conviction becomes final], *unless the court on hearing a subsequent petition finds grounds for relief asserted which could not reasonably have been raised in the original or amended petition*[.]

ORS 138.510(3) (emphasis added). The legislature enacted the statute of limitations and the escape clause in 1989 (and modified it in 1993) and it chose the same words as the escape clause in ORS 138.550(3), except that a court analyzes whether the ground for relief "could not reasonably have been raised" within the limitations period. The analysis of ORS 138.550 above applies equally to ORS 138.510 because the text, context, and legislative history do not indicate that the legislature intended a different meaning.

B. A new substantive rule of federal constitutional law that applies retroactively to cases on collateral review was not asserted and could not have been asserted in prior litigation because the ground for relief did not exist until the Supreme Court announced the new, groundbreaking rule.

A new rule of federal constitutional law applies retroactively to a case on collateral review if it announces a new substantive rule of constitutional law or a "watershed rule[] of criminal procedure." *Montgomery*, 136 S Ct at 728 (internal quotations omitted). "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane*, 489 US 288, 301, 109 S Ct 1060, 103 L Ed 334 (1989). A rule is substantive when, among other things, it "prohibits a certain category of punishment for a class of defendants because of their status or offense" or it prohibits "criminal punishment of a certain primary conduct." *Teague*, 489 at 307.

The *Teague* test for retroactivity mirrors the test that this court announced in *Verduzco* for determining whether a case creates a ground for relief that could not reasonably have been raised earlier. *Verduzco*, 357 Or at 571 ("'if a constitutional principle is a new one * * * then the more likely the conclusion that the claim reasonably could not have been raised[]'") (quoting *Long*, 166 Or App at 101)). A rule that breaks new ground or imposes a new obligation on the states by definition creates a ground for relief that did not exist earlier.

For the same reasons, a ground for relief based on a new substantive rule of federal constitutional law that applies retroactively under the *Teague* test "was not raised" on direct appeal under ORS 138.550(2). Whatever argument the petitioner made on direct appeal was not the same as an argument asserting the new federal constitutional right, even if the argument was based on the same constitutional provision and facts. Thus, in the rare event that a new substantive rule of federal constitutional law applies retroactively, ORS 138.550(2) does not bar relief, regardless of how closely the petitioner's direct appeal arguments track the ground for relief.

C. ORS 138.510(3) and ORS 138.550(2) and (3) do not bar Lydell's ground for relief based on *Miller v. Alabama*.

The Court of Appeals held that petitioner's challenge to his sentence was barred by ORS 138.550(3) because

> "in his original petition for post-conviction relief, petitioner asserted that the sentences imposed on him in the 1995 judgment violated 'the prohibition against cruel and unusual punishment secured by the Eighth Amendment [to] the United States Constitution.' In particular, he asserted that the 'life' and '836 month' sentences imposed on him, 'a remanded juvenile,' violated the 'Eighth Amendment protection against Cruel and Unusual punishment.'"

Lydell White, 285 Or App at 579-80.[15]

Petitioner filed the original petition in 1997. He asserted a stand-alone Eighth Amendment challenge to the 836-month sentence. ER-6. That challenge was plainly barred by ORS 138.550 and *Palmer v. State*, 318 Or 352, 867 P2d 1368 (1994) because that general proportionality challenge could reasonably have been made at Lydell's sentencing hearing in 1995. In *Palmer*, this court held that, under ORS 138.550(1):

> "When a criminal defendant fails to raise an issue at trial that the defendant reasonably could have been expected to raise, the defendant cannot obtain post-conviction relief on that ground unless the defendant alleges and proves that the failure to raise the issue was due to one (or more) of a few narrowly drawn exceptions."

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[15] Petitioner pleaded the *Miller* ground in a paragraph alleging ineffective assistance of trial counsel, as the Court of Appeals noted. *Lydell White*, 285 Or at 576 n 8. Although petitioner may need to amend the claim on remand to allege a stand-alone *Miller* claim, both the trial court and the Court of Appeals based their decisions on the conclusion that petitioner could have raised—or did in fact raise—a *Miller* claim earlier. If, for example, the trial court had agreed that it could reach the merits of a *Miller* claim but that the claim needed to be pleaded as a stand-alone claim, petitioner could have simply moved to amend the petition in the trial court.

318 Or at 358. There had been no significant changes in Eighth Amendment proportionality law between petitioner's sentencing in 1995 and his 1997 post-conviction proceedings that might even arguably have satisfied the escape clauses in ORS 138.550. Accordingly, petitioner's assertion of the Eighth Amendment ground in his post-conviction relief petition was not properly raised in post-conviction relief and the claim preclusion rules from the PCHA do not apply.

The Court of Appeals based its decision on *Kinkel*, which, in turn, relied on *Verduzco*. In *Verduzco*, the petitioner's ground for relief was the same as the ground for relief raised and denied on the merits in his prior post-conviction proceeding. 357 Or at 557-58. He alleged that his trial counsel was ineffective for failing to adequately advise him of the immigration consequences of his conviction. *Id*. at 557. The allegations were based on the same facts and law in both cases. *Id*. at 559-60. The only difference was that the Supreme Court decided *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010), in the interim. *Id*. at 558-59. *Padilla* does not apply retroactively to cases on collateral review under federal law. *Chaidez v. United States*, 568 US 342, 133 S Ct 1103, 185 L Ed 2d 149 (2013). Accordingly, this Court held that petitioner could have, and in fact did, raise the same ground for relief in his prior post-conviction

proceeding. Therefore, ORS 138.550(3) barred the ground. *Verduzco*, 357 Or at 573-74.

Verduzco does not control this case. Petitioner's improperly raised proportionality challenge in 1997 is not the same ground for relief as a *Miller* claim. The 1997 ground for relief asserted a general proportionality challenge that appeared to parrot petitioner's unpreserved direct appeal arguments. ER-6. As explained above, in 2012 *Miller* announced a new, groundbreaking rule of substantive federal constitutional law that satisfies the stringent test for retroactive application to cases on collateral review. *Montgomery*, 136 S Ct at 736. The rule from *Miller* "is a new one, and * * * its extension" to juveniles convicted of homicide and sentenced to life without parole is "novel, unprecedented, or surprising[.]" *Verduzco*, 357 Or at 571 (quoting *Long*, 166 Or App at 101). Accordingly, no one could reasonably have raised a ground for relief based on the rule announced in *Miller* in the early-to-mid-1990s, around 10 years before the Supreme Court had banned the death penalty for juveniles convicted of homicide and around 15 years before the Court banned life without parole and juveniles convicted of non-homicide offenses.

The Court of Appeals did not base its decision in Lydell's case on the arguments that he made on direct appeal. The court did, however, hold that

Laycelle's argument was barred based on the arguments that he made on direct appeal. *Laycelle White*, 286 Or App at 131-33. Lydell raised exactly the same arguments on direct appeal as Laycelle. For the reasons explained in Laycelle's brief on the merits, the direct appeal arguments also do not bar the ground for relief based on *Miller*.

D. Alternatively, the Supremacy Clause requires a state to review a *Miller* claim on its merits instead of applying a procedural bar.

The Court's decision in *Montgomery* requires the post-conviction court to reach the merits of petitioner's ground for relief based on *Miller* even if this court concludes that the PCHA bars petitioner's ground for relief because of the arguments he made on direct appeal 17 years prior to *Miller*. The Court in *Montgomery* explained that a state must apply *Miller* retroactively if the state permits a federal constitutional challenge to a criminal sentence in the state's post-conviction process. *Montgomery*, 136 S Ct at 732. A state may not rely on a procedural bar to justify the imposition of an unconstitutional sentence. *Id*. at 731-32.

Oregon permits a post-conviction petitioner to challenge the constitutionality of a criminal sentence. ORS 138.530(1)(c). An Oregon court must apply *Miller* retroactively to cases on collateral review for a petitioner whose case became final prior to *Miller*. *Montgomery*, 136 S Ct at

732 (holding that Louisiana must reach the merits of a *Miller* challenge because "[t]he State's collateral review procedures are open to claims that a decision of this Court has rendered certain sentences illegal, as a substantive matter, under the Eighth Amendment"). Thus, even if petitioner's claim would otherwise be barred by the PCHA, the trial court and the Court of Appeals violated the Supremacy Clause as interpreted in *Montgomery* in applying those bars to petitioner's *Miller* claim.

III. On the merits, the rule from *Miller* applies when a court sentences a child to a term-of-years sentence that denies the child a meaningful opportunity for release from prison.

There are two types of Eighth Amendment proportionality challenges. "One involves challenges to a term of years in light of all the circumstances of a case." *Kinkel*, 363 Or at 13 (citations omitted). The second "involves categorical limits on certain sentencing practices." *Id. Roper*, *Graham*, and *Miller* impose categorical limits on the punishments that states may impose on children. *Id*. at 14.

Here, the sentencing court violated the categorical prohibition announced in *Miller*. The sentencing court imposed a term-of-years sentence that denies Lydell a meaningful opportunity for release without finding that he is one of the rare children whose crimes reflect irreparable corruption

rather than the transience of youth. *See Montgomery*, 135 S Ct at 734 (explaining *Miller*).

A. A term-of-years sentence violates the Eighth Amendment when it denies a child a meaningful opportunity for release from prison.

The Eighth Amendment proportionality analysis focuses on the practical impact of a sentence on a person, not on the label placed on the sentence. *See Sumner v. Shuman*, 483 US 66, 83, 107 S Ct 2716, 97 L Ed 2d 56 (1987) ("[T]here is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy."). That is, a 200-year sentence for murder is the same for Eighth Amendment purposes as sentenced labeled "life without parole[.]"

A term-of-years sentence violates the Eighth Amendment under *Miller* when it denies a juvenile a meaningful opportunity for release from prison. A juvenile must have a meaningful opportunity for release based on demonstrated maturity and rehabilitation unless a court finds irreparable corruption after holding a hearing that complies with *Miller*. *Montgomery*, 136 S Ct at 733. The science on children and juvenile delinquency relied on in *Roper*, *Graham*, and *Miller* also supports the conclusion that the rule from

Miller applies to a term-of-years sentence that denies a meaningful opportunity for release based on demonstrated maturity and rehabilitation. Most juvenile offenders will mature and outgrow their criminal behavior as they mature. *Roper*, 543 US at 570 (citing Steinberg & Scott, *Less Guilty by Reason by Adolescence: Development Immaturity, Diminished Responsibility, and the Juveniles Death Penalty*, 58 Am Psychologist 1009, 1014 (2003)). A meaningful opportunity means a chance to live a meaningful life in the community, not geriatric release. *People v. Contreras*, 411 P3d 445, 454 (Cal 2018) (holding that *Graham* requires release with "a sufficient period to achieve reintegration as a productive and respective member of the citizenry" and that a 50-year sentence is the functional equivalent of life without parole).

The vast majority of jurisdictions to have considered the issue have held that a lengthy term-of-years sentence triggers the requirements of *Miller*. *See Carter v. State*, 192 A3d 695, 725 n 35 (Md 2018) (so stating and collecting cases). Many of these cases also apply *Miller* to aggregate sentences in cases with multiple victims. *See Kinkel*, 363 Or at 22 n 17 & 18 (citing cases for and against that proposition); *see also, e.g*, *State ex rel Carr v. Wallace*, 527 SW3d 55, 63 (Mo 2017) (50-year sentence for three homicides); *Bear Cloud v. State*, 334 P3d 132, 142-44 (Wyo 2014) (45-year

aggregate sentence for homicide and non-homicide offenses); *Casiano v. Commissioner*, 115 A3d 1031, 1048 (Conn 2015), *cert den sub nom*, *Semple v. Casiano*, 136 S Ct 1364 (2016) (50-year sentence for felony murder). Those cases have correctly interpreted the mandate from *Miller* that children must be given a meaningful opportunity for release from prison absent the rare irreparably corrupt child.

Whatever the term of years short enough to provide a meaningful opportunity for release, a sentence that provides for release only in a juvenile's 70s or 80s does not do so. *See Montgomery*, 136 S Ct at 737 (describing a meaningful opportunity for release as "hope for some years of life outside prison walls"). All but the rarest juveniles must be permitted release based on demonstrated maturity and rehabilitation, with a chance to reintegrate to society. *See Contreras*, 411 P3d at 454. The Eighth Amendment does not permit a court to label a sentence a "term of years" sentence to avoid the prohibition on life without parole sentence.

B. *Miller* applies when a child committed more than one offense.

Lydell was sentenced to an 800-month sentence on a single count for murder during a hearing at which he was also sentenced to a concurrent sentence of life with the possibility of parole for the aggravated murder of another victim. Thus, the case law discussed in *Kinkel* on aggregated

consecutive sentences does not directly apply. *See Kinkel*, 363 Or at 22-27 (discussing application of *Miller* to aggregate sentences). Petitioner discusses cases on aggregate sentences because they are relevant to how *Miller* applies when a child committed multiple offenses against multiple victims, even when the petitioner challenges a single sentence.

There is a split of authority over whether *Miller* and *Montgomery* apply to aggregate sentences imposed for multiple homicides, as this court noted in *Kinkel*, 363 Or at 22. This court struck "a middle ground" on the issue by holding that a sentencing court may consider "the nature and number of petitioner's crimes," in addition to the mitigating qualities of youth when considering whether the child is one of the rare children who is irreparably corrupt. *Kinkel*, 363 Or at 26-27. That holding is consistent with the vast majority of courts to have considered the issue.

The United States Supreme Court strongly suggested that *Miller* and *Montgomer*y apply to aggregate sentences imposed for homicide offenses when it reversed the Arizona state appellate courts in *Tatum v. Arizona*, 580 US __, 137 S Ct 11, 196 L Ed 2d 284 (2016), and four related cases and sent the cases back to the Arizona state courts for reconsideration in light of *Montgomery*. At least one of the cases, *Purcell v. Arizona*, __ US __, 137 S Ct 369, 196 L Ed 2d 287 (2016), involved a juvenile who was convicted of

multiple counts of homicide and non-homicide offenses against two victims and sentenced to consecutive life sentences under a sentencing scheme that was discretionary, not mandatory, life without parole. *State v. Purcell*, 2015 WL 245319 (Ariz Ct App 2015), *vacated and remanded by Purcell*, 137 S Ct 369. Justice Sotomayor, concurring in the order, explained that the Eighth Amendment requires more than consideration of an offender's youth, even when the offender killed two people. *Tatum*, 137 S Ct at 12-13 (Sotomayor, J., concurring).

"[N]one of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." *Miller*, 132 S Ct at 2465; *see also Montgomery*, 136 S Ct at 733 (*Miller* "established that the penological justifications for life without parole collapse in light of the 'distinctive attributes of youth'") (internal quotation omitted). Although the circumstances of the crimes may be considered, the focus is whether the child is one of those rare children whose crimes reflect irreparable corruption. *Montgomery*, 136 S Ct at 733. A court violates the Eighth Amendment by imposing a life without parole sentence based on the number of victims or the gruesomeness of the offense. *Adams v. Alabama*, __ US __, 136 S Ct 1796, 1800, 195 L Ed 2d 251 (2016) (Sotomayor, J., concurring, in decision to grant, vacate, and reverse).

Accordingly, offenses committed against multiple victims does not preclude the application of *Miller*. Instead, *Miller* applies any time a court considers imposing a life without parole sentence, whether for one offense or multiple offenses.

The majority of courts to have considered the issue have concluded that *Miller* applies even to consecutively imposed sentences that add up to life without parole. *See Carter*, 192 A3d at 732 n 50 (Md 2018) (so stating, collecting cases, and counting this court in *Kinkel* as among the jurisdictions to apply *Miller* to consecutive sentences). As the Ohio Supreme Court observed when discussing *Graham*, "Whether the sentence is the product of a discrete offense or multiple offenses, the fact remains that it was a *juvenile* who committed the one offense or several offenses and who has diminished moral culpability." *State v. Moore*, 76 NE 3d 1127, 1142 (Ohio 2017) (emphasis in original). Because even consecutive sentences that create a sentence of life without parole trigger protections of *Miller*, a *de facto* life without parole sentence on a single count must trigger the protections of *Miller* even when a child committed other offenses against other victims.

C. A sentencing hearing held prior to *Miller* will rarely have satisfied the Eighth Amendment.

A sentencing hearing held prior to *Miller* will rarely satisfy the requirement of the Eighth Amendment, even when a court considered a

child's age. *Montgomery*, 136 S Ct at 734 ("Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity."). The procedural and substantive requirements of *Miller* fundamentally altered juvenile sentencing. During a pre-*Miller* hearing, "youth was just one consideration among many; after *Miller*, we know that youth is the dispositive consideration for 'all but the rarest of children.'" *Adams*, 136 S Ct at 1800 (quoting *Montgomery*, 136 US at 726) (Sotomayor, J., concurring).

In *Adams*, the court granted, vacated, and remanded the cases of petitioners who were sentenced to death for crimes they committed before they turned 18 and, in most cases, their sentences were automatically converted to life without parole after *Roper*. 136 S Ct at 1799. Justice Sotomayor explained how *Miller* had so changed the sentencing inquiry that resentencing was required. *Adams*, 136 S Ct at 1799-1800 (Sotomayor, J., concurring). Thus, a new sentencing hearing is required at which the lower court "ask[s] the difficult but essential question whether petitioners are among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Id*. at 1801 (Sotomayor, J., concurring) (quoting *Montgomery*, 136 S Ct at 734).

IV. Petitioner's 800-month prison sentence for a single murder violates the Eighth Amendment.

Lydell was convicted of three offenses: aggravated murder, murder, and first-degree robbery. The court imposed an indeterminate life sentence for aggravated murder. APP-87. He is eligible for release from the life sentence, subject to a decision from the parole board under ORS 144.125. The court imposed an 800-month prison sentence for murder as an upward departure from the presumptive guidelines sentence, concurrent to the life sentence. APP-87-88. The court also imposed a 36-month sentence for robbery for stealing a ring from one of the victims, consecutive to the 800-month sentence.

The sentence of 800 months for murder, by itself, violates *Miller*. Thus, even though Lydell is serving an aggregate sentence for homicide and non-homicide offenses committed against two victims, this court need not rely on the consecutive 36-month prison sentence for robbery for its Eighth Amendment analysis. That distinguishes this case from *Kinkel*, because in *Kinkel* it was only the sum of multiple consecutive sentences that equaled a de facto life without parole sentence. 363 Or at 3.

Lydell will almost certainly die in prison because he would have to live to be 81 years old be eligible for release. [16] That sentence thus triggers the rule from *Miller*. The sentence is proportionate only if a sentencing court held an individualized sentencing hearing, presumed that the crimes reflected the transience of youth, and nonetheless found beyond a reasonable doubt that Lydell is one of the rare juvenile offenders whose crimes reflect irreparable corruption in the sense that it is impossible that he could be rehabilitated.

Lydell's hearing did not comply the Eighth Amendment as interpreted in *Miller*. The court intended to impose a de facto life sentence, but in doing so it failed to consider the *Miller* factors, and failed to give the constitutionally required presumption that Lydell, as a 15-year-old child when he committed the offenses, was very likely capable of rehabilitation. In fact, the court acknowledged Lydell's impulsivity and expressed uncertainty over the source of the impulsivity. APP-61. *Miller* requires a

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[16] A life expectancy table from the Centers for Disease Control and Prevention (CDC) for black males, like petitioner, is attached at APP-132. The table shows that a black male who was 37 years old in 2015, like petitioner, has a life expectancy of 38 or 39 more years, to 75 or 76 years old. Elizabeth Arias, Ph.D., and Jiaquan Xu, M.D., *United States Life Tables, 2015*, 67 National Vital Statistics Report No. 7, 23 (Nov 13, 2018), (available at https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_07-508.pdf).

court to presume that Lydell's impulsivity was a product of his youth, which was not mentioned by the trial court as a possible reason for Lydell's inability to control his behavior. *Id*. And the science relied on in *Miller* provides the explanation for that impulsivity. Also, the trial court expressed its "hope" that Lydell would be rehabilitated, but that the court hoped that would happen in prison. APP-65. That expressly contradicts *Miller* and *Montgomery*, which hold that a child who is capable of rehabilitation may not be sentenced to life without parole.

The court found six departure factors. Three of them relate to the offense: the brutality of the crime; the forethought involved in the murder; and Lydell knew of the particular vulnerability of the victims. The court's reliance on those factors directly conflicts with the United States Supreme Court's direction that the gruesomeness or heinousness of the crime is insufficient to justify a life without parole sentence. *Adams*, 136 S Ct at 1800 (Sotomayor, J., concurring).

One of the factors was that Lydell was on supervision when he committed the offense. Another factor was that "lengthy" incarcerations or other sanctions had not deterred Lydell. Given that Lydell was 15 years old at the time of the offense, it is difficult to understand how Lydell had served any "lengthy" sanction at the time of the homicides. Applying the adult

departure factor for "lengthy" sanctions failing to deter criminal behavior also conflicts with *Miller*'s mandate.

The final aggravating factor was that "a lengthy term of incarceration is necessary for protection of society." That finding may superficially appear similar to a finding of "irreparable corruption." But it cannot satisfy *Miller* because the sentencing court did not "ask the difficult but essential question whether [Lydell is] among the very 'rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.'" *Adams*, 136 S Ct at 1801 (Sotomayor, J., concurring) (quoting *Montgomery*, 577 US at 734).

In sum, over 20 years ago, a court imposed a sentence of life without parole on a 15-year-old Lydell White after a sentencing hearing that did not satisfy the procedural and substantive requirements of the Eighth Amendment.

Conclusion

Petitioner asks this court to reverse the decision of the Court of Appeals, reverse the judgment of the post-conviction court, and remand to the post-conviction court for further proceedings.

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DATED December 3, 2018.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) that the word count of this brief (as described in ORAP 5.05(2)(a)) is 13,642 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point font for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on The Merits to be filed with the Appellate Court Administrator, Appellate Courts Records section, 1163 State Street, Salem, OR 97301.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this original Petitioner's Brief on the Merits will be served by US mail delivery on Paul L Smith, #001870, attorney for Respondent on Review.

DATED December 3, 2018.

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