IN THE SUPREME COURT OF THE STATE OF OREGON

LYDELL MARCUS WHITE,	)	
Petitioner-Appellant	)	
Petitioner on Review	)	Marion County Circuit Court Case
	)	No. 11C24315
v.	)	
	)	Court of Appeals Case No. A154435
JEFF PREMO,	)	
Superintendent, Oregon State	)	Supreme Court Case No. 065188
Penitentiary,	)	
Defendant-Respondent,	)	
Respondent on Review	)	

BRIEF ON BEHALF OF *AMICI CURIAE* CONSTITUTIONAL LAW AND CRIMINAL PROCEDURE SCHOLARS

Review of Decision of Oregon Court of Appeals Affirming Judgment of the Circuit Court of Marion County, Honorable Thomas M. Hart

Opinion Filed May 17, 2017
Before: Sercombe, Presiding Judge, and Hadlock, Chief Judge, and Tookey, Judge

(Counsel listed on inside cover) December 4, 2018

ELLEN F. ROSENBLUM, #753239
Attorney General
BENJAMIN GUTMAN, #160599
Solicitor General
JEFF J. PAYNE, #050102
1162 Court Street NE
Salem, OR 97301
(503) 378-4402
paul.l.smith@state.or.us
Attorneys for Defendant-Respondent

ALIZA B. KAPLAN, #135523
Lewis & Clark Law School
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6721
akaplan@lclark.edu
Attorney for *Amici*

RYAN T. O'CONNOR, #053353
O'Connor Weber LLC
522 SW Fifth Avenue, Suite 1125
Portland, OR 97204
(503) 226-0923
ryan@oconnorweber.com
Attorney for Petitioner-Appellant

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PROPOSED *AMICI CURIAE* BRIEF IN SUPPORT OF PETITION FOR REVIEW

STATEMENT OF INTEREST

Amici are scholars of constitutional law and criminal procedure. They collectively bring substantial legal knowledge to bear on the issues before the Court. *Amici* come together in this case because the decision below undermines the fundamental purposes of state post-conviction review and implicates constitutional concerns established by the U.S. Supreme Court's decision in *Montgomery v. Louisiana*, 136 S Ct 718 (2016).

The following scholars join this brief: Leslie Harris, Dorothy Kliks Fones Professor Emerita, University of Oregon School of Law; Aliza Kaplan, Director, Criminal Justice Reform Clinic, Lewis & Clark Law School; Robert Klonoff, Jordan D. Schnitzer Professor of Law, Dean of the Law School (2007-2014), Lewis & Clark Law School; Susan F. Mandiberg, Distinguished Professor of Law, Lewis & Clark Law School; John T. Parry, Associate Dean of Faculty, Lewis & Clark Law School.

INTRODUCTION

In this matter, this Court has agreed to consider a range of issues involving state procedural bars, state constitutional guarantees, and the protections against the disproportionate sentencing of juveniles under the Eighth Amendment. Before delving into these issues, it is worth noting that the two petitioners, who were only

fifteen years old at the time of their crimes, are serving sentences that are incredibly severe even for an adult offender in Oregon, owing in large part to unfortunate timing and deficient representation.

The White brothers were sentenced during a narrow window of time between 1989 and 1993 when sentences for murder were determined by the guidelines, and upward departures from the presumptive guideline range were not capped. Prior to 1989, the penalty for murder was governed by ORS 163.115(3), which required an indeterminate life sentence, with a mandatory term ranging from ten to twenty-five years that must be served before a prisoner was parole-eligible. In 1989, the legislature enacted the sentencing guidelines, which replaced Oregon's indeterminate sentencing scheme with determinate sentences that were dictated by the guidelines calculation. *State v. Ambill*, 282 Or App 821, 826, 385 P3d 1110, 1112 (2016). However, "[i]n enacting the guidelines, the legislature did not explicitly repeal the indeterminate life sentence then specified in ORS 163.115(3)(a) (1989), or otherwise address expressly how an offender convicted for murder should be sentenced for that offense." *Id.*

In *State v. Morgan*, this Court clarified that murder, like other felony offenses, was subject to determinate sentencing under the guidelines. 316 Or 553, 558, 856 P2d 612, 615 (1993). The Court specifically held that defendants convicted of murder could be sentenced to determinate terms of 10 to 25 years, or

their required sentences under the guidelines could be imposed. Although this Court acknowledged that the indeterminate life sentence in ORS 163.115(3) was impliedly repealed by the guidelines, it also noted that a life sentence for murder was still, in theory, possible if the facts supported an upward departure. *Morgan*, 316 Or at 560. It took care to note, however, "We express no opinion as to whether 'imprisonment for life' under ORS 163.115(3)(a) may be appropriate as a departure sentence." *Id*.

At the time *Morgan* was decided, a life sentence for murder was possible because the administrative rules governing the guidelines permitted uncapped upward departure sentences for murder. *See* OAR 253-08-004 (1989) (limiting upward departures to "double the maximum duration of the presumptive incarceration term" for all offenses except murder). However, four months after the *Morgan* decision, a new rule went into effect that extended the limit on upward departures to murder offenses as well: upward departures were limited to twice the presumptive guidelines sentence. OAR 253-08-004 (1993); *see also State v. Davilla*, 157 Or App 639, 647 n.9, 972 P2d 902, 906 (1998) (discussing rule change).[1]

[1] In 1995, the legislature amended ORS 163.115, making the penalty for murder again an indeterminate life sentence, rather than a determinate guidelines sentence, but with a twenty-five year minimum term of confinement. *Ambill*, 282 Or App at 826-27, citing Or. Laws 1995, ch. 421, § 3.

Because the offenses of the petitioners here fell into this four-year window, the trial judge imposed upward departure sentences for murder which were more than three-and-a-half times their presumptive guidelines terms. In doing so, the court specifically noted, "Pursuant to OAR 253-08-004 (2), which was in effect at the time of the commission of this crime, this court finds that this court is not constrained by any sentencing cap, imposed by sentencing guidelines." *State v. Laycelle White*, No. 94C-20119, Judgment at 2 (Jan. 25, 1995).

Although the sentences imposed were substantial upward departures that resulted in an effective life sentence without any opportunity for release for both petitioners, defense counsel failed to lodge any meaningful or thoughtful objection to them. Neither petitioner's defense counsel argued that a nearly four-fold increase in the sentence was "[in]appropriate as a departure sentence," *Morgan*, 316 Or at 560, or challenged the factual basis for the departure, *see White v. Palmateer*, No. CIV. 99-500-HA, 2001 WL 213765 (D. Or. Jan. 4, 2001) (noting that upward departure was based, "in part, on the failure of earlier detention and incarceration measures when in fact [Laycelle] White had never been previously incarcerated but only sentenced to suspended commitments at a juvenile facility). Nor did counsel contend that any interpretation of the current statutory scheme that permitted sentences for murder to substantially exceed those for aggravated murder would be unconstitutional. *See State v. McLain*, 158 Or App 419, 423-24, 974 P2d

727, 729-30 (1999) (statutory scheme which required a life without the possibility of parole sentence for murder but a life with the possibility of parole sentence for aggravated murder was unconstitutionally disproportional). The Whites' counsel also failed to challenge the murder sentence as equivalent to one of "life imprisonment without the possibility of release or parole," which was specifically prohibited for 15-year old juveniles under Oregon law. *See* ORS 161.620 (1993); *Davilla*, 157 Or App at 643 (juvenile defendant's 1397-month departure sentence for murder was equivalent to "life without parole" and, therefore, prohibited by Oregon law). Although these challenges could have been raised and may very well have been successful, defense counsel simply failed to address any of them.

Instead, appellate counsel raised a single unpreserved claim, a disproportionality challenge to the 800-month sentence alone (ignoring the concurrent sentences). Perplexingly, appellate counsel did not challenge the other sentences because they were permitted under the statutory framework, but also conceded that the 800-month sentence was not a statutory violation. Appellate counsel's challenge was framed as follows: "[D]efendant challenges the sentence of 800 months based on the proportionality clause of Article I, section 16 of the Oregon Constitution. In addition, the sentence was excessive, cruel and unusual under the Eighth Amendment to the U.S. Constitution." Br. at 8, *State v. White*, No. A87437 (Or App July 21, 1995). The balance of the brief discusses caselaw

applying "the proportionality provision of Article 1, section 16." *Id.* On direct review, the appellate court simply affirmed from the bench. *State v. White*, 911 P2d 1287, 1287, 139 Or App 136, 136 (Jan. 31, 1996) *review denied* 323 Or 691, 920 P2d 550 (1996).

The paltry Eighth Amendment claim raised on direct review gave rise to the lower court's resolution of the case, holding that the statutory bar on raising previously asserted grounds for relief foreclosed review of the claim that, in light of *Miller v. Alabama*, 567 US 460 (2012), the sentences imposed violated the Eighth Amendment.

ARGUMENT

"States may not disregard a controlling, constitutional command in their own courts." *Montgomery v. Louisiana*, 136 S Ct 718, 727 (2016). However, in the proceedings below, the Court of Appeals did just this when it dismissed Petitioner-Appellant's constitutional challenge premised on *Miller v. Alabama*, 567 US 460 (2012) as procedurally barred, as it has done in several other similar cases. *White v. Premo*, Or App 570, 397 P3d 504 (2017); *see also Kinkel v. Persson*, 276 Or App 427, 367 P3d 956 *aff'd on other grounds* 363 Or 1, 417 P3d 401 (2018); *Cunio v. Premo*, 384 Or App 698, 395 P3d 25 (2017) *held in abyeance* S065000 (Oct. 4, 2018). The court below reasoned that because Petitioner had previously brought an Eighth Amendment proportionality challenge to his sentence, a claim that his

sentence violates the Eighth Amendment as interpreted by the U.S. Supreme Court in *Miller* (and as made retroactive in *Montgomery*) is foreclosed because he "reasonably could" have raised it earlier, even though at the time of the prior litigation neither *Miller* nor *Montgomery* had been decided.

Neither the plain text nor the purpose behind Oregon's Post-Conviction Hearing Act is served by precluding all review of a substantial claim like the ones hear, which are premised on a new rule of substantive constitutional law held to apply retroactively to collateral review. *Montgomery*, 136 S Ct at 736. As discussed below, adopting *amici*'s position would avoid the "anomalous" result the drafters of the Act wished to avoid and as discussed in their frequently cited law review article. *See* Jack G. Collins and Carl R. Neil, *The Oregon Postconviction–Hearing Act*, 39 Or L Rev 337, 358 (1960).

By their very nature, claims premised on new rules of substantive constitutional law cannot be raised until the new rule is announced. For that reason, it is not "reasonable" to conclude that they could have been raised in prior proceedings and thus bar review on that basis. Moreover, under a fair and plausible reading of the case relied on below, *Verduzco v. State*, 357 Or 553, 355 P3d 902 (2015), review of claims relying on retroactively applicable new rules of substantive constitutional law should not be foreclosed. Thus, neither precedent nor the Post-Conviction Hearing Act dictates that such claims are barred.

A contrary holding is also at odds with the U.S. Supreme Court's mandate for states to provide a forum in which prisoners may retroactively seek to enforce new rules of substantive constitutional law. *Montgomery*, 136 S Ct at 731-32 ("States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge. . . . the retroactive application of substantive rules does not implicate a State's weighty interests in ensuring the finality of convictions and sentences."). The lower court's decision thereby erroneously and unnecessarily implicates both the state and federal Suspension Clauses. *See* Carlos Vazquez & Stephen Vladeck, *The Constitutional Right to Collateral Post-Conviction Review*, 103 Va L Rev 905, 905 (2017). Additionally, preventing state court review of state convictions is at odds with basic principles of federalism and the efficient and proper operation of the state and federal courts.

The holding below creates consequences that are as unacceptable as they are avoidable. Accordingly, this Court should reverse.

I. The Plain Text of the Post-Conviction Hearing Act Provides for Merits Review of a Claim Based on a New Rule of Constitutional Law.

The Post-Conviction Hearing Act requires relief to be granted where a petitioner's sentence is unconstitutional: "relief . . . shall be granted . . . when . . . petitioner [establishes the] sentence [is] 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 138.630(1)(c). The Act sets forth *the* mechanism for obtaining post-conviction review and may only be supplanted by habeas corpus to the extent it provides an unreasonable substitute for it. *Bartz v. State*, 314 Or 353, 364, 839 P2d 217 (1992) (noting courts rely on the Act only to the extent it serves as a reasonable substitute for habeas corpus).

The Act also places limitations on when relief must be granted. Relevant here, the Act precludes review of grounds for review that were either previously asserted or which could have been reasonably asserted. It places limits based on what was raised on direct review: "When the petitioner sought and obtained direct appellate review . . . no ground for relief may be asserted by petitioner . . . unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding." ORS 138.550(2). The Act also forecloses successive petitions unless the claim "could not reasonably have been raised in the original or amended petition." ORS 138.550(3).

This Court has explained that these "two statutory provisions 'express a complete thought' and read together, '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.'" *Kinkel*, 276 Ore App at 440 (2016) (quoting *Verduzco*, 357 Or at 565). Failing to do so "will bar a petitioner from later raising an omitted ground for relief." *Id.* If

neither limitation applies, the Petitioner's claims here must be considered on the merits.

However, this "complete thought" still leaves two key questions of statutory interpretation in this case. First, whether Petitioner has previously "asserted" the ground, and, second, if not, whether a failure to do so was "reasonable."

a. A Claim Based on a New Rule of Substantive Constitutional Law Cannot Be Asserted Prior to the Existence of That Rule.

These provisions are premised on the idea that a petitioner cannot assert a claim based upon a rule of constitutional law that does not yet exist. A petitioner can neither anticipate what the elements of a particular claim might be nor understand the ramifications of the reasoning undergirding the new rule in question. Moreover, even the significance of the claim is likely to be lost on the parties prior to the existence of the relevant rule.

Prior to the U.S. Supreme Court's decision in *Miller v. Alabama*, no one could have reasonably predicted the elements of an Eighth Amendment claim that a sentence of life without the possibility of parole constituted cruel and unusual punishment. Although the basis for an argument that life without the possibility of parole was unconstitutional for all juveniles sentences was readily available and often made, the ruling in *Miller* was significantly more nuanced and was not made prior to *Miller*.

After *Miller*, as interpreted in *Montgomery v. Louisiana*, it is clear that a sentence of life without the possibility of parole violates the Eighth Amendment unless the juvenile has been convicted of murder and that juvenile is among the rare juvenile offenders who are irreparably corrupt. *See Kinkel*, 363 Or at 16. This formulation, limiting life without parole to the irreparably corrupt, was unknown prior to *Miller*.

That is, to the best of *Amici*'s knowledge, no lawyer, in any jurisdiction, prior to the decision in *Miller* pleaded a claim that her (1) juvenile client, (2) convicted of murder, (3) was not irreparably corrupt, and was, therefore, ineligible for a sentence of life without the possibility of parole. When *Miller* was decided, such a claim was unknown and could not reasonably have been anticipated. And, as discussed *supra*, such a claim is nothing like the nod towards the Eighth Amendment raised here on direct review.

Moreover, even if a claim that a juvenile was not irreparably corrupt had been raised prior to *Miller*, the full significance of such a claim could not have been appreciated and the underlying issues could not have been fully litigated. That is, prior to *Miller*, the legal significance of "irreparable corruption" was nil. After *Miller*, it was the difference between a lifetime in prison and a reasonable opportunity to obtain release. For these reasons, even if the very elements constituting a *Miller* claim had been asserted – and they were not – as a matter of

sound practice, a so-called "*Miller* claim" raised prior to the *Miller* decision should not be considered to have been "asserted" within the meaning of the rule of preclusion.

A U.S. Supreme Court case decided in the context of the death penalty is illustrative. In *Bobby v. Bies*, 556 US 825 (2009), the Supreme Court addressed whether the state court's pre-*Atkins* determination that the defendant was intellectually disabled could, after *Atkins v. Virginia,* 536 US 304 (2002) barred execution of the intellectually disabled, serve as the basis to bar the petitioner's death sentence. The Court reasoned that the "change in applicable legal context" wrought by *Atkins* entitled the state to litigate the issue of Mr. Bies's intellectual disability anew. *Bies*, 556 US at 834. Moreover, the Court noted that the issue of Mr. Bies's intellectual disability was not, prior to *Aktins*, an "ultimate fact" necessary to the outcome, as might prevent its relitigation based on double-jeopardy concerns. *Id.* at 836-37.

In *Bies*, the Court was drawing on principles of res judicata, the very principles underlying the prior adjudication bar that was invoked by the Court of Appeals here. Under the Court's prior precedent, "no single mitigator or aggravator was determinative of the judgment." *Id.* at 834. After *Atkins*, intellectual disability was complete bar to a sentence of death. For this reason, the Court concluded that "even if the core requirements for issue preclusion had been met, an exception to

the doctrine's application would be warranted due to this Court's intervening decision in *Atkins*. *Id.* at 836. Just as an *Atkins* claim could not be asserted prior to *Atkins*, the reasons underlying the decision in *Bies* even more strongly support the conclusion that a *Miller* claim could not be "asserted" prior to the existence of *Miller*.

The State's likely rejoinder, that litigants regularly advance novel theories, does not answer the logic of this position. It is not until those theories have been vindicated – and a clear rule established – that a claim can be asserted. *Bies*, 556 US at 836.

Amici's argument is narrow and does not undermine the general rule of non-retroactivity set forth in *Teague v. Lane*, 489 US 288 (1989). *See Montgomery*, 136 S Ct at 732 ("the retroactive application of substantive rules does not implicate a State's weighty interests in ensuring the finality of convictions and sentences."). The extent of "new" rules outside the reach of the preclusion bar is narrow. It is limited to "new rules" of constitutional law. The limited set of new substantive constitutional rules is a small subset of rules of constitutional law. Substantive new rules, like the rule at issue here, represent one of two exceptions to the "general rule of nonretroactivity." *Montgomery*, 136 S Ct at 728. The Court has yet to hold that any rule fitting into the other exception, a new procedural rule, falls within the other *Teague* exception, watershed rules of criminal procedure. *See*,

e.g., *Miller v. Lampert*, 340 Or 1, 9, 125 P3d 1260 (2006) ("Since *Teague*, the Court . . . has pointed 'only' to the right to counsel recognized in *Gideon* [*v. Wainwright*, 372 US 335 (1963)] . . . as the kind of rule that would qualify."). Adopting *amici*'s position does not create a floodgates problem.

A rule is "new" if it "breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 US at 302. A rule is not new "if a state court considering [Petitioner's] claim at the time of his conviction became final would have felt compelled by existing precedent to conclude the rule [Petitioner] seeks was required by the Constitution." *Saffle v. Parks*, 494 US 484, 488 (1990). Most claims, even if based on new precedent, will not be new under this rubric. Instead, they will likely rely on existing precedent, which will provide the elements of the claims that a petitioner would assert within the meaning of the Post-Conviction Hearing Act. All of the most common post-conviction claims fall into this category.

This Court should explicitly adopt the federal standard for determining whether a claim based on a new rule of law can be asserted under circumstances such as Petitioner's, despite the general principle of nonretroactivity. Generally, if the rule the claim is based on is "new," within the meaning of the relevant federal caselaw under *Teague*, it cannot be considered to have been "asserted" prior to the existence of the precedent establishing the rule. The only exception is if the claim

asserted previously includes all of the elements articulated under the new rule. Thus, claims predicated on "new" rules should not be barred by the prior adjudication rules of preclusion.

b. Before *Miller* It Was Reasonable not to Raise a Claim that Only Irreparably Corrupt Juveniles Convicted of Murder May be Sentenced to Life Without the Possibility of Parole.

If a claim based on a "new" rule cannot be "asserted" until the case establishing that rule exists, the next question is whether it was "reasonable" not to raise a claim based on that rule, which had not been announced prior to the antecedent litigation. The corollary to the above rule, *supra* § I(a), is that where a claim is *not* based on a new rule, it is reasonable to expect litigants to raise it. Thus, the Act bars post-conviction claims that are not based on new rules.

It would be patently unreasonable to expect a petitioner to have raised a *Miller* claim prior to the high Court's ruling.[2] Prior to *Montgomery*, the rule in *Miller* had divergent interpretations, in part because it was difficult to ascertain. Some courts interpreted *Miller* as providing both a categorical exclusion from punishment and procedural protections designed to enforce the exclusion. Other courts, by contrast, believed that *Miller*'s emphasis on the problems with

[2] A closer case would be claims, for example, before *Atkins* that the intellectually disabled are ineligible for execution. Such claims were commonly raised and a reasonable extension of existing precedent.

mandatory life without the possibility of parole sentences may have suggested a procedural rule only. *See Montgomery*, 136 S Ct at 725 (noting split of authority).

This split reflects not only the pre-*Montgomery* confusion over *Miller*'s holding but also the uniqueness of the rule in *Miller*. No court (and perhaps no litigant) prior to *Miller* articulated the rule that would ultimately give rise to a substantive *Miller* claim: that only juveniles who are convicted of murder and are irreparably corrupt may constitutionally be sentenced to die in prison with no hope of release. *See* Jason M. Zarrow & William H. Milliken, *The Retroactivity of Substantive Rules to Cases on Collateral Review and the AEDPA, with a Special Focus on* Miller v. Alabama, 48 Ind L Rev 931, 952 (2015) ("no court to consider *Miller*'s retroactivity has found that it announces an old rule."). Requiring litigants to anticipate, raise, and succeed on this rule prior to *Miller* would be patently unfair.

Moreover, prior to *Miller*, even raising youth as a mitigating factor was not without some peril. As with intellectual disability, youth "can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found . . . ." *Atkins*, 536 U.S. at 321. Indeed, the U.S. Supreme Court has recognized that prior to making youth a bar to the relevant punishment, in "some cases a defendant's youth may even be counted against him." *Roper v. Simmons*, 543 US 551, 572-73 (2005). In *Roper*, the prosecutor

used youth as aggravation, arguing in closing, "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit." *Id.* at 558. Beyond the impossibility of anticipating a *Miller* claim, arguing youth in mitigation, prior to *Miller*, risked backfiring by raising the specter of future dangerousness.

It would be absurd to hold that a petitioner would be expected to raise a claim that he or she is ineligible for a sentence of life without the possibility of parole because he or she is not irreparably corrupt, absent any controlling Constitutional authority that dictated as much, and this Court should decline to impose such a rule.

II. *Verduzco v. State* Does Not Foreclose a Merits Review of a Claim Based on a New Rule of Substantive Constitutional Law.

The Court of Appeals has denied several "*Miller* claims" including in this case, relying on the discussion of the prior litigation bar in *Verduzco v. State*, 357 Or 553, 355 P3d 902 (2015). In light of the narrow holding in *Verduzco*, the court below need not have precluded merits review based on that case. However, to the extent this Court concludes *Verduzco* precludes review, the Court should overrule it.

Verduzco concerned a claim of ineffective assistance of counsel. *Id.* at 557-58. In Mr. Verduzco's first post-conviction proceeding, he alleged that his trial counsel had been ineffective as a matter of state and federal constitutional law

when his counsel provided what he claimed was inaccurate advice concerning the immigration consequences of the plea he entered. *Id.*

Shortly after the conclusion of Mr. Verduzco's first post-conviction proceedings, the U.S. Supreme Court held that failing to provide advice concerning immigration consequences of a guilty plea may violate the Sixth Amendment. *Padilla v. Kentucky*, 559 US 356, 366-67 (2010). The high Court applied the standard from *Strickland v. Washington*, 466 US 668 (1984) and concluded that Mr. Padilla's counsel was deficient and remanded for the lower court to assess whether Mr. Padilla was prejudiced as described in *Strickland*. *Padilla*, 559 US at 371.

Subsequently, Mr. Verduzco filed a successive post-conviction petition, relying on *Padilla* to again assert that his Sixth Amendment rights had been violated. The elements and factual bases of his claim were the same: trial counsel's advice fell below the standard of care required, and he was prejudiced by that failure. Thus, unlike here, the claims Mr. Verduzco raised in his two petitions were essentially identical.

The Court need not overrule *Verduzco* to permit merits review here. In *Verduzco*, the Court declined to address whether Mr. Verduzco "reasonably could have raised the constitutional claims in his first petition" because the Court did not have to address that question. *Verduzco*, 357 Or 573. The Court did not have to

address it because "[t]he fact is that, in this case, he did [raise the claim]." *Id.* And the claim was identical, both on the facts and the elements, as the claim in the second petition. In light of the narrow ruling in *Verduzco*, the court below erred by foreclosing review of the merits of the *Miller* claims here, where neither the facts nor the elements were identical to those asserted on appeal.

If the Court does not deem it possible to distinguish *Verduzco*, then *amici* urge the Court to overrule the case. As discussed *supra*, where a claim relies upon a new rule of constitutional law, that ground for relief cannot be considered "asserted" within the meaning of ORS 138.550(2). This Court has often relied upon a law review article authored by the drafters of the Post-Conviction Hearing Act after its enactment to discern the purposes of the Act. *See* Jack G. Collins and Carl R. Neil, *The Oregon Postconviction–Hearing Act*, 39 Or L Rev 337 (1960); *see, e.g.*, *Johnson v. Premo*, 355 Or 866, 875, 333 P3d 288 (2014). In that article, the drafters addressed a scenario that they believed produced an "anomalous result." Neil & Collins, *supra*, at 358. That scenario entailed a petitioner raising a claim on direct review or in postconviction that admission of an important piece of evidence violated the Fourteenth Amendment. *Id.* In the posited scenario, at the time of the conviction and appeal or initial post-conviction review, the admission of the evidence had not yet been held to be unconstitutional, but subsequent caselaw from the United States Supreme Court established that it was

unconstitutional. *Id.* at 359. Fortunately, as discussed *supra*, the plain text of the statute permits a construction that avoids this type of anomalous result by permitting review of grounds for relief premised on new rules of constitutional law.

Other states have reached a similar result. Recently, the Idaho Supreme Court addressed that state's preclusion of all claims not included in an "original petition" absent "sufficient reason." *Johnson v. State*, 395 P3d 1246, 1257 (Idaho 2017) *cert. denied* 138 S Ct 470 (Nov 27, 2017). That court held the state law bar did not apply to the petitioner's *Miller* claim. The court reasoned that "[w]hile it's true Johnson could have made an Eighth Amendment claim that her sentence was generally excessive or cruel or unusual, she could not have made the claim that her sentence was illegal under *Miller*'s holding interpreting the Eighth Amendment until after *Miller* was decided." *Id.* The court noted "that the recent decision in *Montgomery* made the holding in *Miller* retroactive and binding on the States[and,] …[c]onsequently, even if we decline to address the issue today, Johnson would be free to file a new petition and bring the claim anew." *Id.* at 1258. Other states have reached similar conclusions and allowed merits review of *Miller* claims. *See, e.g.*, *People v. Craighead*, 39 NE3d 1037, 1041 (Ill App Ct 5th Dist 2015) (explaining "it is well settled" the state's post-conviction statute "must be liberally construed to afford a convicted person an opportunity to present questions

of deprivation of constitutional rights"); *Commonwealth v. Jones*, No 947 MAL 2015, 2016 WL 594627, at *1 (Pa Feb 12, 2016) (allowing otherwise untimely, successive petition in light of *Montgomery*).

Second, Collins and Neil did not address the narrower situation at issue here: a new substantive rule of constitutional law that has been held to apply, as a matter of federal law, retroactively to post-conviction review. The scenario they posit relates only to a limitation on the admission of evidence, a limitation that is exceedingly unlikely to be held to apply retroactively to post-conviction review as a matter of federal law. By contrast, Mr. Cunio's *Miller* claim must, as a matter of federal law, be cognizable in state post-conviction review. To hold that it is not cognizable because he previously raised an Eighth Amendment proportionality claim would produce an "anomalous result" that even the authors of the legislation acknowledged was at odds with the purposes of the Post-Conviction Hearing Act.

Finally, the Act's bar on successive petitions is premised in part on the federal "abuse of the writ" doctrine. *See* Note, *The Uniform Post-Conviction Procedure Act*, 69 Harv L Rev 1289, 1300 (1956); Collins & Neil, *supra*, at 356. That doctrine, however, does not foreclose claims such as Mr. White's, *i.e.* claims premised on retroactively applicable new rules of substantive constitutional law. *See McClesky v. Zant*, 499 U.S. 467, 495 (1991) (noting same). Oregon's

limitation on successive petitions should not be construed to foreclose the narrow set of retroactively applicable new rules of constitutional law.

III. Providing Merits Review Avoids Difficult Constitutional Questions.

Foreclosing review here would flout *Montgomery*'s requirement for state courts to consider properly presented claims for relief under *Miller*, raising difficult constitutional questions about the Post-Conviction Hearing Act. *Bernstein Bros. v. Dep't of Rev.*, 294 Or 614, 621, 661 P2d 537, 541 (1983) (discussing doctrine of constitutional avoidance); *see also Dep't of Transp. v. Alderwoods, Inc.*, 358 Or 501, 526, 366 P3d 316, 330 (2015) (same).

In *Montgomery v. Louisiana*, the Supreme Court held that *Miller v. Alabama*'s constitutional rule prohibiting life without parole for all but the "rarest of juvenile offenders," was a substantive rule of constitutional law enforceable retroactively via state (and federal) collateral review. 136 S Ct at 734. The Court explained that its "conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises." *Id.* at 729. The Court held that, "[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 rule that determines the outcome of that challenge." *Id.* at 731-32. Thus, in *Montgomery*, the Court issued a two-prong mandate, recognizing the constitutional limitations on sentencing juvenile

offenders to life without parole and also requiring state courts to honor this limitation on their ability to limit the availability of post-conviction proceedings.

Oregon's Post-Conviction Hearing Act is "the exclusive post-conviction vehicle for persons to challenge a criminal conviction on the substantive grounds set out in the PCHA." *Bartz v. State*, 314 Or 353, 362, 839 P2d 217 (1992). The federal and Oregon Suspension Clauses invalidate the Act to the extent it does not provide a "reasonable substitute" for the relief otherwise provided by the writ of habeas corpus. *Bartz*, 314 Or at 364; *see* US Const, art 1, § 9, cl 2; Or Const, art 1, § 23. Yet, procedural barriers like those applied in the proceedings below extinguish this guarantee, leaving petitioners without recourse for constitutionally defective sentences—despite the U.S. Supreme Court's holding that they have a right to bring this challenge.

The hypothetical availability of federal review does not relieve the Oregon courts of their duty to provide a forum for hearing constitutional claims. Under Article III of the U.S. Constitution, federal courts derive their jurisdiction wholly from Congress, which is "free to establish inferior federal courts" or "decline[] to create any such courts, leaving suitors to remedies afforded by state courts[]." *Lockerty v. Phillips*, 319 US 182, 187 (1943); *see Sheldon v. Sill*, 49 US 441, 448-49 (1850) (describing Congress's total discretion over the existence and scope of jurisdiction of the lower federal courts). Because the lower federal courts need not

even exist, state courts must provide a forum for constitutional claims held to apply retroactively to collateral review. Moreover, the very truncated review available in the federal courts counsels against relying on it as an assured venue for review of constitutional claims. *See, e.g.*, 28 USC 2254(d)(1) (limiting federal jurisdiction to claims where the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"); *Cullen v. Pinholster*, 563 US 170, 180-81 (2011) (limiting federal habeas corpus record to evidence presented in state court).

Fortunately, a reasonable interpretation of the Post-Conviction Hearing Act is available. That interpretation should be adopted to avoid these substantial constitutional questions. *See Bernstein Bros*, 294 Or at 621; *see also Alderwoods, Inc.*, 358 Or at 526.

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At bottom, this case concerns whether the Oregon courts will honor *Miller*'s promise: that only the rare juvenile homicide offender who is irreparably corrupt will be sentenced to die in prison. The Court of Appeals has erroneously, as matter of state and federal law, declined to even entertain a claim premised on *Miller*. It has done so because, decades prior to *Miller*'s unique holding, a materially different Eighth Amendment claim was raised concerning the sentence. Neither the state and

federal constitutions nor the Post-Conviction Hearing Act should be twisted to produce such a result.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully Submitted,

/s Aliza B. Kaplan
ALIZA B. KAPLAN, #135523
Lewis & Clark Law School
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6721
akaplan@lclark.edu
Attorney for *Amici*

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 4, 2018, I electronically filed the Brief in Support of the Petitioner with the Appellate Court Administrator, Appellate 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 Motion to Appear as Amici Curiae will be served electronically to Ryan O'Connor, Attorney for Petitioner on Review, and by U.S. mail delivery on Jeff J. Payne, #050102, attorney for Respondent on Review.

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.50(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 5,750 words. I further certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

DATED this December 4, 2018.

Respectfully Submitted,

/s Venetia L. Mayhew
VENETIA MAYHEW #176082
Lewis & Clark Law School
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6721
vmayhew@lclark.edu