COA No. 50818-4-II

NO. 97205-2

SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF

ENDY DOMINGO CORNELIO, Petitioner.

MOTION FOR DISCRETIONARY REVIEW

STATE'S ANSWER TO MEMORANDUM OF AMICI

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Pierce County Prosecutor, is the Respondent herein.

II. INTRODUCTION

Amici ask this Court to accept review of this case in order to hold retroactive, not the actual holding of *Houston-Sconiers*, but an unjustified interpretation of the case. *Houston-Sconiers* explicitly drew its authority from United States Supreme Court cases interpreting the Eighth Amendment and not any Washington constitutional provision. Therefore, its holding must be justifiable under those cases, which say the Eighth Amendment is implicated when *a sentencing scheme* would deny youthful offenders *a meaningful opportunity for release in their lifetimes*. When a law mandates a lifetime sentence thereby denying a youthful offender a meaningful opportunity for release, the sentencing judge must be allowed to consider youth and must have the discretion to depart from the mandatory scheme on this basis.

The Court did not, and would lack the authority to, extend the requirement for a *Miller* hearing to sentences other than those which deny the offender a meaningful opportunity for release. Nor did it

invent a rule requiring sentencing judges to investigate mitigating factors on behalf of the criminal defendant and independent of defense counsel's choices.

The rule the Amici proposes this Court adopt is not justified under the Eighth Amendment and not material to the facts in this case where (1) no law prevented the Defendant from requesting a departure to zero-months confinement; (2) the judge was not presented with an argument to depart from the standard range; (3) the sentencing judge actually considered Cornelio's youth when she decided to impose a low-end sentence as defense counsel requested; (4) Cornelio's determinate 20-year sentence is not a life sentence; (5) the judge's sentencing discretion was not limited by any mandatory enhancement, maximum, minimum, or consecutive sentence procedure; and (6) the score was correctly calculated.

III. RELIEF REQUESTED

Respondent asserts no error occurred in the sentencing of the Petitioner and requests this Court deny discretionary review.

IV. FACTUAL STATEMENT

The Defendant/Petitioner Endy Domingo Cornelio was sentenced on four class A sex offenses. Because he was under 18 at the time of his offenses, the Defendant is not subject to an indeterminate sentence. RP 729; RCW 9.94A.507(2). His standard sentencing range was 240-318 months (or 20-26 years). RP 729.

The Defendant did not request an exceptional sentence below the standard range or provide a factual basis which would have given the court the necessary factual predicate to depart from the standard range. RP 731-33. But defense counsel did request the low end, making repeated references to his client's age. RP 731-32.

The prosecutor recommended the high end, noting that the Indeterminate Sentencing Review Board would lack jurisdiction in this case to extend the Defendant's sentence. RP 729-30.

The court imposed the low end of the range, i.e. 20 years, and 36 months of community custody. RP 733. The sentencing judge made no comment which would suggest dissatisfaction with the standard range or a preference to impose an exceptional sentence.

The Washington Defender Association, Washington Association of Criminal Defense Attorneys, and the Korematsu Center

for Law and Equality have jointly filed a memorandum (hereinafter "Memo") supporting review of the Defendant's Personal Restraint Petition. They ask this Court to hold:

(1) "that *Houston-Sconiers* is retroactive" and

(2) that prejudice in a collateral attack is established:

a. where the judge's sentencing discretion was limited by now-inapplicable Sentencing Reform Act (SRA) provisions;
b. where the record reveals no consideration and/or weighing of the *Miller* factors; and
c. where the judge imposed the sentence incorrectly characterized as the minimum.

Memo at 1-2.

The State answers here that the request is not justified under the facts of this case or the Eighth Amendment.

V. ARGUMENT

A. THE HOLDING OF *HOUSTON-SCONIERS* IS CONSTRAINED BY THE EIGHT AMENDMENT.

Amici request the Court accept review in order to hold that *State v. Houston-Sconiers*, 188 Wn.2d 1, 691 P.3d 409 (2017) was a significant, material change in law requiring retroactive application. Before the Court can reach this question, it must settle the meaning of *Houston-Sconiers.*

According to amici, the rule that comes out of *Houston-Sconiers* is that, independent of the parties' wishes and choices and regardless of the impossibility of an excessive or *de facto* life sentence or even a disproportionate sentence, *the courts* have an obligation to engage in a *Miller* hearing in every adult sentencing where the defendant was less than 18 at the time of the offense. Memo at 2-3 (referencing *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)). This is not and could not be the holding in *Houston-Sconiers*.

Houston-Sconiers only applies to *de facto* life sentences. It did not create a rule requiring judges to seek out mitigating facts independent of the defendant's wishes and choices.

1. *Houston-Sconiers* only applies to life sentences.

Houston-Sconiers is an Eighth Amendment case. *Houston-Sconiers*, 188 Wn.2d at 18-20, 23 (calling the decision "Our Eighth Amendment holding") and at 21, n.6 (declining to address an article 1, ¶ 14 claim raised for the first time in supplemental briefing). *See also Matter of Meippen*, -- Wn.2d --, 440 P.3d 978, 985 (2019) (Wiggins, J., dissenting) ("The entire case was premised on the dictates of the

Eighth Amendment."); *State v. Bacon*, 190 Wn.2d 458, 467, 415 P.3d 207, 212 (2018) ("our holding in *Houston-Sconiers* was based squarely on the United States Constitution").

If the Washington Supreme Court were to depart from federal jurisprudence, as it did in *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018), it must do so under independent grounds in the Washington State constitution. But *Houston-Sconiers* did not depart. It relied upon United States Supreme Court precedent which held that the Eighth Amendment is implicated when *a sentencing scheme* would deny youthful offenders *a meaningful opportunity for release in their lifetimes*. *Miller v. Alabama*, 567 U.S. at 479, (quoting *Graham v. Florida*, 560 U.S. 48, 75, 130 S. Ct. 2011, 2030, 176 L. Ed. 2d 825 (2010). Because children are different with a unique capacity for rehabilitation and change, courts must have the discretion to consider this when faced with a sentencing scheme that otherwise would not permit a meaningful opportunity for these offenders to be released in their lifetime subsequent to their rehabilitation. *Miller*, 567 U.S. at 477-78.

None of these federal cases would suggest that Cornelio's sentence of 20 years for four class A felonies of child sexual abuse

constitutes cruel and unusual or disproportionate punishment. *See Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (holding the Eighth and Fourteenth Amendments barred the death penalty for persons who were under 18 when their crimes were committed); *Graham v. Florida*, 560 U.S. at 75, (barring LWOP (life without the possibility of parole) in non-homicide cases for this same class of offenders, holding that this group was due "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"); *Miller v. Alabama*, 567 U.S. 460, (holding that LWOP in homicide cases for this class of offenders, while permissible, may not be mandatory, but must be based on individualized factors which take into consideration the offender's youth); *State v. Ramos*, 187 Wn.2d 420, 437, 387 P.3d 650 (2017) (holding that *Miller*'s scope includes both literal and *de facto* LWOP).

Prior to the issuance of *Houston-Sconiers*, this Court held that *Miller* applies to *de facto* life and LWOP sentences equally. *State v. Ramos*, *supra*. "*Miller* does not authorize this court to mandate sentencing procedures that conflict with the SRA unless it is shown that the SRA procedures so undermine *Miller's* substantive holding that they create an unacceptable risk of unconstitutional sentencing."

Ramos, 187 Wn.2d at 446. "*Miller*'s reasoning clearly shows that it applies to any juvenile homicide offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation." *Id.* at 438.

In that context, it makes little sense to interpret that only a month and a half later the same court would hold that the length of sentences was immaterial. *See also State v. Bacon*, 190 Wn.2d at 467 ("our decision in *Houston-Sconiers* concerned only the length of the sentence"). Rather, it is apparent that *Houston-Sconiers* regarded *de facto* life sentences resulting from mandatory provisions in the SRA. Houston-Sconiers and his co-defendant Roberts were facing sentences in excess of 40 years. *Houston-Sconiers*, 188 Wn.2d at 8. Such significant sentences can be considered *de facto* life sentences. *People v. Buffer*, -- NE.2d --, 2019 IL 122327, ¶ 41 (Ill. filed Apr. 18, 2019) (subject to revision or withdrawal) (holding that a sentence greater than 40 years is a *de facto* life sentence without meaningful opportunity to obtain release).

If the sentence range is immaterial, as amici urge, the rule would require a full-blown *Miller* hearing for an offender facing a mandatory one day in jail for a DUI. RCW 46.64.5055(1)(a)(i). If it is

the existence of a range itself that offends, then the rule would require a full-blown *Miller* hearing for an offender facing a standard range of 0-6 months. RCW 9.94A.510; RCW 9.94A.517. There is no credible claim that these sentencing provisions are disproportionate when applied to youth. This cannot be and is not what the *Houston-Sconiers* opinion intended.

Houston-Sconiers receives its authority from the Eighth Amendment. Any rule which came out of this case would necessarily be limited to persons who were under 18 at the time of their offenses and who are sentenced as adults under a mandatory sentencing scheme that would deny them a meaningful opportunity for release in their lifetimes.

2. *Houston-Sconiers* limits the application of mandatory sentencing schemes; it does not put obligations on courts to investigate sentencing factors on behalf of the offender.

This Court has summarized the holding in *Houston-Sconiers* this way: the Legislature cannot limit the courts' discretion to consider the mitigating factors of youth during sentencing. *State v. Gilbert*, -- Wn.2d --, 438 P.3d 133, 136 (2019) (questioning any statute). Insofar

as the criticism is directed at the statutes and not the judges, this is consistent with *Miller*. *Miller v. Alabama*, 567 U.S. at 474, 132 S. Ct. at 2466 (mandatory LWOP "schemes at issue here prevent the sentencer from taking account of these central considerations" of youth's differences).

In the instant case, Cornelio's sentencing judge was not constrained by any law. There were no sentencing enhancements, no mandatory minimum, no mandatory maximum, and no mandatory consecutive terms. The judge could have imposed as little as zero months if she felt Cornelio's youth provided a substantial and compelling justification. *See Matter of Light-Roth*, 191 Wn.2d 328, 336, 422 P.3d 444 (2018) ("RCW 9.94A.535(1)(e) has always provided the opportunity to raise youth for the purpose of requesting an exceptional sentence downward"). But she did not feel it warranted. And neither did Cornelio's counsel or Cornelio himself. RP 731-33.

Amici interpret that *Houston-Sconiers* created new obligations on sentencing judges to engage in an investigation on behalf of the offender. Memo at 3 (arguing that the defendant has no obligation to bring the issue or any facts to the court's attention). Because the

court cannot consider a factor in the absence of a record, apparently amici would oblige the court to independently create a record on behalf of a party. This violates codes of judicial conduct regarding impartiality. Alternately, amici would oblige the court to interfere in the attorney-client relationship and direct defense counsel on how best to act in the interests of the client. This is not a reasonable interpretation of the *Houston-Sconiers* holding. Nor would such a holding find support in the federal cases from which *Houston-Sconiers* drew its authority. Rather, this line of cases, including *Houston-Sconiers*, grants courts new freedoms – the discretion to depart from otherwise mandatory laws.

3. *Houston-Sconiers* did not strike down the Sentencing Reform Act.

The SRA "structures, but does not eliminate, discretionary decisions affecting sentences." RCW 9.94A.010. Before the enactment of the SRA with its determinate sentences and standard ranges, sentencing judges in conjunction with parole boards had virtually unfettered discretion which inevitably resulted in severe disparities too often correlated with constitutionally suspect variables such as race. *Blakely v. Washington*, 542 U.S. 296, 315, 124 S. Ct.

2531, 2544, 159 L. Ed. 2d 403 (2004) (O'Connor, J., dissenting). The SRA ranges made the criminal justice system accountable to the public, ensuring punishment was proportionate to the seriousness of the offense and commensurate with the punishment imposed on others similarly situated. RCW 9.94A.010. It has substantially reduced racial disparity in sentencing across the state. *Blakely*, 542 U.S. at 317. "To the extent that unjustifiable racial disparities have persisted in Washington, it has been in the imposition of alternative sentences." *Id.* at 318-19. Amici believes *Houston-Sconiers* has dismantled this monument of legislative achievement. Memo at 4.

RCW 9.94A.535 gives the courts discretion to depart from the ranges based on an offender's youth. Because this is consistent with *Houston-Sconiers*, it is not reasonable to interpret that the court has struck down the SRA as unconstitutional as applied to youthful offenders. But assuming the proposition arguendo, the courts would lack authority to enact a new sentencing scheme or procedure as a stopgap measure.

The setting of sentences is inherently a legislative power. *State v. Rice*, 174 Wn.2d 884, 901, 279 P.3d 849, 857 (2012). The superior court may not deviate from legislatively prescribed

sentencing procedures during the interim between the supreme court's rejection of the law and the effective date of any subsequent amendment. *State v. Pillatos,* 159 Wn.2d 459, 150 P.3d 1130 (2007);

In *State v. Martin,* 94 Wn.2d 1, 614 P.2d 164 (1980), the court considered a statute which failed to anticipate that a defendant might plead guilty when facing the death penalty. No provision suggested that a jury could be impaneled after a guilty plea. Therefore, the state asked the supreme court "to imply the existence of a special sentencing provision to impanel a jury." *State v. Martin,* 94 Wn.2d at 7. The court refused, noting "it would be a clear judicial usurpation of legislative power" "to read into a statute that which we may believe the legislature has omitted, be it an intentional or an inadvertent omission." *State v. Martin*, 94 Wn.2d at 8.

> "It is one thing to fill a minor gap in a statute—to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality."

State v. Martin, 94 Wn.2d at 18 (Horowitz, J., concurring) (quoting *United States v. Jackson,* 390 U.S. 570, 579–80, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968)).

In the wake of *Blakely v. Washington, supra*, trial courts struggled to implement the exceptional sentence statute which lacked a mechanism for empaneling a jury to find aggravating factors. *State v. Hughes,* 154 Wn.2d 118, 125-30, 151, 110 P.3d 192 (2005), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The supreme court held "[t]o create such a procedure out of whole cloth would be to usurp the power of the legislature." *State v. Hughes,* 154 Wn.2d at 151-52. *See also United States v. Booker*, 543 U.S. 220, 250, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (declining to engraft a constitutional jury trial requirement onto the federal sentencing guidelines as plainly contrary to legislative intent).

If *Houston-Sconiers* had struck down the SRA as applied to youthful offenders, this Court would lack the constitutional authority to fashion a splint. It must wait for the Legislature to repair. In the interim, sentencing judges across the state would have free rein to sentence a youthful offender within the full range of RCW 9A.20.021.

B. THE NEW RULE IS *MILLER*, WHICH IS NOT MATERIAL TO THIS CASE.

In *Miller*, the court did not discuss *de facto* life sentences. Kuntrell Jackson and Evan Miller received LWOP sentences. However, it is reasonable to understand the rule which the *Miller* court reached also necessarily applies to *de facto* life sentences. And a majority of jurisdictions have reached this logical conclusion. *State v. Ramos*, 187 Wn.2d at 437. There is no meaningful difference between a sentence of life without the possibility of parole and an 80-year sentence. Those cases interpreting a right to a *Miller* hearing for *de facto* LWOP have not created a new rule apart from *Miller*, but only interpreted *Miller* meaningfully.

Likewise, *Miller* did not consider firearm enhancements. But *Houston-Sconiers* did not create a new rule when it held that mandatory firearm enhancements resulting in *de facto* life sentences offended the Eighth Amendment when applied to offenders whose crimes were committed before the age of 18. As with *Ramos*, *Houston-Sconiers* only interpreted *Miller* meaningfully.

> To be sure, the Supreme Court has not applied the rule that children are different and require individualized sentencing consideration of mitigating factors in exactly this situation [...]. But we see no way to avoid the

> Eighth Amendment requirement to treat children differently, with discretion, and with consideration of mitigating factors, in this context.

State v. Houston-Sconiers, 188 Wn.2d at 20. That context was a *de facto* life sentence.

This Court has stated that the holding in *Houston-Sconiers* was that the Legislature cannot limit the courts' discretion to consider the mitigating factors of youth during sentencing. *State v. Gilbert*, 438 P.3d at 136. This is not a new rule, but an interpretation of the true new rule that was *Miller. Montgomery v. Louisiana*, -- U.S. --, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).

Because *Houston-Sconiers* only applies *Miller* to hold that courts must have discretion to depart from mandatory sentencing schemes which deny a youthful offender of a meaningful opportunity for release, it is not a new rule. It also is immaterial to the Defendant Cornelio's sentence. He was not facing and did not receive a *de facto* life sentence. And no statute tied the court's hands. *Matter of Light-Roth*, 191 Wn.2d at 336. Cornelio is not a member of the *Miller* or *Houston-Sconiers*' class.

C. CORNELIO DOES NOT FALL UNDER AMICI'S OWN PROPOSED RULE.

Amici have asked this Court to hold that prejudice is established in a collateral attack (a) where the judge's sentencing discretion was limited by non-applicable SRA provisions; (b) where the record reveals no consideration and/or weighing of the *Miller* factors; and (c) where the judge imposed the sentence incorrectly characterized as the minimum. Amici has expressed this rule using the conjunctive "and" which would indicate that all three factors must be present to establish prejudice. However, to be clear, amici argues that any one "fact alone establishes prejudice." Memo at 8.

Accepting review of this case will not empower the Court to adopt any part of this rule for two reasons. First, Eighth Amendment jurisprudence (which is limited to life sentences only) does not justify such a usurpation of Legislative powers. Second, the rule cannot emerge from the facts of the instant case where no part of the rule applies to Cornelio. He is not a part of the class that the amici would define. Therefore, this case cannot accomplish the goals which the amici seek to achieve.

1. No mandatory law limited the judge's discretion.

Under amici's proposal, resentencing would be required in any case where a mandatory sentencing provision limited the judge's discretion. None exists in the instant case. Cornelio was not subject to any sentencing enhancements. He was not subject to mandatory minima or maxima. No term of his sentence runs consecutive to any other where required by law or not. In other words, no law limited the judge from departing from the standard range and imposing no confinement at all. *Matter of Light-Roth*, 191 Wn.2d at 336.

2. While the judge actually considered the Defendant's youth, she was not required to hold a *Miller* hearing.

Amici argue that resentencing should be required in the absence of any consideration of the *Miller* factors.

First, the Defendant Cornelio is not a member of the *Miller* class. He will be released after no more than 20 years. He is not subject to mandatory LWOP. *Miller* does not apply to his case.

Second, the judge actually considered the Defendant's youth in imposing a standard range sentence. Faced with arguments for opposite ends of the standard range, the judge imposed the low-end

which the Defendant urged was appropriate due to his age at the time the acts were committed. RP 729-33.

Third, the judge is not required by any constitutional or statutory rule to make the Defendant's mitigating argument for him. She considered what the parties put before her.

3. The judge did not impose a mandatory minimum sentence based on an error of law.

Amici argue that resentencing should be required in every case in which the sentencing judge has "imposed the sentence incorrectly characterized as the minimum." Memo at 1. Such a rule would not require resentencing here.

Amici cite *In re Johnson*, 131 Wn.2d 558, 933 P.2d 1019 (1993) and *In re Call*, 144 Wn.2d 315, 28 P.3d 709 (2001) in support of this rule. Memo at 7. In both cases, after it was determined that the offender score (and therefore the standard range) had been incorrectly calculated, the sentence was remanded to allow the judge to reconsider the sentence in this new context. But there is no argument here that the offender score was incorrectly calculated. Those cases have no application here.

Moreover, there was no "minimum" sentence in Cornelio's case. There was a standard range. A court is free to depart from either end of this range if it is satisfied of the existence of substantial and compelling reasons which justify a departure. RCW 9.94A.535. In this case, no mitigating circumstance justifying a departure was presented for the court's consideration. Youth was presented as a circumstance justifying the low end only.

No part of Amici's proposed rule has any application in the instant case. It is neither constitutionally required, nor permitted.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court deny discretionary review.

DATED: June 17, 2019.

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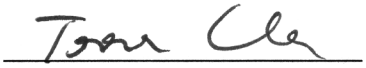

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PIERCE COUNTY PROSECUTING ATTORNEY

June 17, 2019 - 1:26 PM

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ANSWER TO MEMORANDUM OF AMICI

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