Supreme Court No. 94020-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JAI'MAR SCOTT,
Appellant.

SUPPLEMENTAL BRIEF OF PETITIONER

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INTRODUCTION

"[C]hildren are different." *Miller v. Alabama*, 567 U.S. 460, 481, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012); *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017).

Miller's holding rests on two prongs: (1) youth are generally "less culpable *at the time of their crimes* and culpability is of primary relevance in sentencing," *Houston-Sconiers*, 188 Wn.2d at 22 (citing *Miller*, 132 S. Ct. at 2464) (emphasis in *Houston-Sconiers*); and (2) children have greater prospects for reform. *Id.*

Miller's substantive rule of constitutional law applies retroactively. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016).

Procedural compliance with the substantive constitutional rule must encompass both of *Miller's* prongs and include consideration of the youth's diminished culpability at the time of crime commission, as well as the possibility that the youth will mature and become rehabilitated.

The Washington State Legislature addressed both factors in the statute mandating the resentencing of children convicted of aggravated murder (RCW 10.95.030; .035), including those whose sentences had long been final. *In re McNeil*, 181 Wn.2d 582, 590, 334 P.3d 548 (2014) ("The *Miller* fix remedies the unlawfulness of the petitioners' sentences by providing they must be resentenced in a manner that does not violate the

Eighth Amendment, consistent with *Miller.*").

But, for individuals convicted of less serious crimes, including those like Scott serving life-equivalent sentences, the Legislature did not provide for resentencing. Instead, the Legislature authorized only the possibility of parole in some instances, but not others. But the parole decision is concerned with the prospect of future behavior, not culpability for the crime. As a result, RCW 9.94A.730 only provides a partial fix in light of the two requirements of *Miller.*

Moreover, under longstanding Washington precedent, the possibility of release by parole cannot cure an unconstitutional sentence. The appropriate remedy is to remand for resentencing, where Scott's culpability at the time of the crime can be considered.

ISSUES PRESENTED ON REVIEW

1. Whether the parole provision of RCW 9.94A.730, which was enacted to provide a remedy for any sentence imposed on a juvenile in violation of *Miller*, and which does not include consideration of diminished culpability due to youth, provides an inadequate remedy to an offender who received a 900-month exceptional sentence on a murder conviction such that *Miller* is a "material" change in the law, as recognized in *Montgomery,* that exempts the offender's personal restraint petition from the one-year time limit on collateral relief pursuant to RCW

10.73.100(6).

2. Whether existing precedent requires the Court to disregard the possibility of parole in evaluating the constitutionality of a de facto life sentence.

STATEMENT OF THE CASE

In 1990, Jai'mar Scott received a 900-month (75-year) exceptional sentence for a murder committed when he was 17-years old. At sentencing, Scott's offender score was 0. His standard sentencing range was 240 to 320 months. The sentencing court did not make a finding of irreparable corruption or anything resembling such a finding.

On direct appeal, Scott asserted that the sentencing court erroneously failed to consider the fact that he was a child, not an adult, when imposing its sentence. The Court of Appeals rejected that argument as bordering on the "absurd." *State v. Scott*, 72 Wn. App. 207, 218, 866 P.2d 1258 (1993).

In 2016, Scott returned to King County Superior Court and successfully moved that court to vacate his sentence and to conduct a new sentencing hearing. The trial court agreed, reasoning: "An offender's age must be taken into consideration by the Court in imposing a sentence." The court continued:

> Mr. Scott was not sentenced to life without the possibility of parole, but was sentenced to 900 months. In the case of *State v. Ronquillo,* 190 Wn. App. 765 (2015), the Court of Appeals held

> that a sentencing court must consider the attributes of youth when imposing a "life equivalent" sentence. In that case, 52.5 years was determined to be a "life equivalent" sentence. Surely then, 900 months or 75 years is also a "life equivalent" sentence.

The State appealed.

The Court of Appeals agreed that the sentence imposed was unconstitutional, but nevertheless reversed the trial court, holding that the statutory possibility of parole eliminated any Eighth Amendment violation. The Court of Appeals held that the "constitutional violation identified in the *Miller* line of cases is the failure to allow a juvenile offender the opportunity for release when his or her crime was the result of youthful traits," rejecting Scott's argument that *Miller* also requires an "individualized determination" of how the "offender's youth" decreases his culpability for the crime. *State v. Scott*, 196 Wn. App. 961, 971-72, 385 P.3d 783 (2016).

ARGUMENT

I. The Court's Own Precedent Establishes that the Constitutionality of a Sentence Cannot Turn on the Possibility of Release by Parole.

The Court of Appeals erred below by finding that Mr. Scott's unconstitutional sentence was cured by the possibility of parole, effectively overturning *sub silentio* this Court's holding in *State v. Fain*, 94 Wn.2d 387, 395, 617 P.2d 720 (1980). Because *Fain* controls, Scott's de facto life sentence must be assessed "according to its literal meaning,"

without consideration of the possibility for release by parole. *Id.*

In *Fain,* the defendant was sentenced to an indeterminate life term for the theft of approximately $400. The minimum term that Fain could serve was 10 years. This Court held that the possibility of parole did not cure the constitutional sentencing error. This Court stated:

> Finally, our cases and the foregoing statutory scheme reveal that Fain's chances of receiving parole have little to do with the crimes for which he was sentenced. Rather, his chances depend on his subsequent behavior in prison.

Id. at 395. This Court continued:

> Under these circumstances, and because Fain's chances for executive grace are not legally enforceable, we feel compelled to view Fain's sentence according to its literal meaning: a life sentence.

Id.

Likewise, the possibility of parole under RCW 9.94A.730, which is legally indistinguishable from the parole option in *Fain,* does not cure Mr. Scott's unconstitutional sentence.

This Court should not overrule *Fain.* Overruling prior precedent should not be taken lightly. *Keene v. Edie,* 131 Wn.2d 822, 831, 935 P.2d 588 (1997). This Court requires a clear showing that an established rule is incorrect and harmful before it may be overruled. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009); *In re Stranger Creek & Tributaries in Stevens Cty.*, 77 Wn.2d 649, 653, 466 P.2d 508

(1970) ("[Stare decisis] requires a clear showing that an established rule is incorrect and harmful before it is abandoned."). No such showing can be made with respect to the *Fain* rule.

The lower court's decision conflicts with *Fain* regarding how to evaluate the constitutionality of life sentences. *Compare Scott,* 196 Wn. App. at 971-72 (possibility of release by parole cures an otherwise unconstitutional sentence) *with Fain*, 94 Wn.2d at 395 (constitutionality of sentence turns on "its literal meaning" without consideration of possibility of release by parole). This Court should apply *Fain* and reverse the lower court.

To determine whether Mr. Scott's de facto life sentence is constitutional, it should be examined on its face, without consideration that parole may be granted before expiration of the maximum term. *Fain*, 94 Wn.2d at 393-95 (because "'parole is simply an act of executive grace'" and prisoners have no right to parole, it is not equivalent to a shorter sentence and should not be viewed as such) (quoting *Rummel v. Estelle*, 445 U.S. 263, 293, 100 S. Ct. 113, 63 L. Ed. 2d 382 (1980)). Courts have upheld parole's status as an uncertain privilege, rather than a right, over several decades. *See In re Dyer*, 175 Wn.2d 186, 196–97, 283 P.3d 1103 (2012) (inmates have no right to parole; parole rests exclusively with the discretion of the ISRB); *In re Ayers,* 105 Wn.2d 161, 164, 713

P.2d 88 (1986) ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.") (quoting *Greenholtz v. Inmates of Neb. Penal & Corr. Complex,* 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979)); *January v. Porter,* 75 Wn.2d 768, 774, 453 P.2d 876 (1969) (inmates have no right to parole; parole is a "privilege conferred as an act of grace by the state through its own administrative agency."). There is nothing in RCW 9.94A.730 that merits a different rule.

II. *Miller* Requires Individualized Consideration of Youth.

"(C)hildren are different from adults."

Houston-Sconiers, 188 Wn.2d at 18.

Before imposing "the harshest penalties" on juveniles, a court must provide individualized consideration of the juvenile, including the influence of age on the juvenile's culpability and prospects for rehabilitation. *Id.* Individualized consideration of a juvenile's age is required because, if "youth (and all that accompanies it) [is] irrelevant to that harsh sentence, such a scheme poses too great a risk of disproportionate punishment." *Miller*, 132 S. Ct. at 2469. The risk of disproportionality flows from the inherently mitigated culpability of juvenile offenders and the uniquely long incarceration that follows from sentencing a juvenile to death in prison. *Graham v. Florida*, 560 U.S. 48,

70, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). The Court explained that "youth matters for purposes of meting out the law's most serious punishments," *Miller*, 132 S. Ct. at 2471, and that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders," *id.* at 2465; *see also id.* at 2464-66, 2468-71.

This Court recently applied the *Miller* rule in *Houston-Sconiers*. This Court held, in accordance with *Miller,* that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system. *Houston-Sconiers*, 188 Wn.2d at 21. That "discretion to consider the mitigating qualities of youth" must exist and be exercised at the time of sentencing itself, regardless of what opportunities for discretionary release may occur down the line. *Id.* at 20 (citing *Miller*, 132 S. Ct. at 2468-72 (listing reasons why certain mitigating factors had to be considered at the time of child's initial sentencing)); *Graham*, 560 U.S. at 69-70 (Eighth Amendment bars imposition of life without parole sentence on juvenile non-homicide offender, despite the fact that Graham might be eligible for executive clemency).

No court has given individualized consideration of the required *Miller* factors to Mr. Scott.

A. Scott Is Entitled to the Full Protection of the Constitution.

Of the two procedural remedies available to juvenile offenders in Washington, parole under RCW 9.94A.730 and re-sentencing, parole may satisfy *Miller's* requirement that a sentencing scheme account for the possibility of maturation and rehabilitation, but (unless the parole criteria are amended) re-sentencing is necessary to satisfy *Miller's* requirement that youth be considered in determining culpability under Washington's current framework. Under the current statutory scheme, a juvenile offender's youth and its relationship to culpability are considered only at a sentencing hearing, and not during the parole process. *Compare* RCW 10.95.030(3)(b) (sentencing court must consider "mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S. Ct. 2455 (2012)") *with* RCW 9.94A.730(3) (no reference to youth or *Miller* in its list of considerations for release by parole).

The lower court concluded that the applicable parole provision satisfied the requirements of *Miller*. The lower court was wrong. Because the Washington parole system addresses only the second prong of what *Miller* holds makes children different, it fails to adequately implement the substantive constitutional rule. The States are "laboratories for experimentation, but those experiments may not deny the basic dignity the

Constitution protects." *Hall v. Florida*, __ U.S. __, 134 S. Ct. 1986, 2001, 188 L. Ed. 2d 1007 (2014).

Substantive constitutional rules can be implemented in a variety of procedural ways. *Atkins v. Virginia*, 536 U.S. 304, 317, 122 S. Ct. 2242, 2250, 153 L. Ed. 2d 335 (2002); *Ford v. Wainwright,* 477 U.S. 399, 416-17, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986). *Ford* acknowledged, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.*

The applicable procedural rule must implement the full constitutional rule. *Bailey v. Alabama*, 219 U.S. 219, 239, 245, 31 S. Ct. 145, 55 L. Ed. 191 (1911), establishes that if a State's procedures transgress a substantive constitutional right "in their natural operation," those procedures are unconstitutional. In *Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958), the United States Supreme Court again imposed express constitutional limits on state procedural rules implicating federal constitutional rights in the specific context of confronting a state law placing the burden of proof on an individual. Under these cases, a State cannot create procedures that effectively eviscerate a substantive constitutional right, but rather "must provide procedures which are adequate to safeguard against infringement of [the] constitutionally protected right [ ]." *Id.* at 521.

Applying *Miller* retroactively does not necessarily "require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole." *Montgomery*, 136 Sup. Ct. at 736. While a *Miller* violation may be remedied "by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them," *id.*, that is true only when the parole process includes consideration of how youth diminishes responsibility.

The lower court in this case construed the "children are different" rule too narrowly when it stated the "constitutional violation identified in the *Miller* line of cases is the failure to allow a juvenile offender the opportunity for release when his or her crime was the result of youthful traits." *Scott,* 196 Wn. App. at 971. The constitutional violation identified in *Miller,* applied retroactively in *Montgomery* and explained by this Court in *Houston-Sconiers*, was the failure to consider the mitigating qualities of youth at the time of the crime and in the future. In fact, this Court recognized "*Miller* is mainly concerned with what must happen at sentencing because *Miller's* holding rests on the insight that youth are generally less culpable *at the time of their crimes* and culpability is of primary relevance in sentencing." *Houston-Sconiers*, 188 Wn.2d at 22 (emphasis in original).

The part of the *Miller* fix statute applicable to this case, RCW 9.94A.730, prioritizes public safety considerations and likelihood of recidivism. It makes no allowance for consideration of any of the mitigating factors of youth that *Miller* requires at the time of sentencing. *Houston-Sconiers*, 188 Wn.2d at 22.

While the Washington Legislature conceptually could have adopted a parole system that considers both prongs of *Miller,* it did not do so. Instead, the legislature created a statute that determines release based on rehabilitation. As a result, a child who received a sentence where the mitigating qualities of his youth at the time of the crime was not considered by the sentencing court cannot compel the parole board to consider that evidence at a hearing to determine whether he will be released. There is no language in RCW 9.94A.730 directing the ISRB to consider a defendant's diminished culpability due to his youth at a parole hearing.

As a result, the parole statute implements, at most, only half of the constitutional requirement. Criminal procedure laws that fail to take defendants' youthfulness fully into account are flawed. Scott is entitled to the full protection of the Constitution. Scott is entitled to a hearing in which the decision-maker has the "complete discretion to consider mitigating circumstances associated with" his youth. *Houston-Sconiers*,

188 Wn.2d at 21. The only forum in Washington where that can currently take place is at a resentencing hearing.

B. *Montgomery* Does Not Hold Otherwise.

While *Montgomery* noted that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them," 136 S. Ct. at 736, the Court's comment is classic dictum. *Cf. City of Seattle v. Holifield,* 170 Wn.2d 230, 244 n.13, 240 P.3d 1162 (2010) (court's comments in an opinion that are immaterial to the outcome are dicta); *State v. Halgren,* 137 Wn.2d 340, 346 n.3, 971 P.2d 512 (1999) (same). While dicta "may be followed if sufficiently persuasive," *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627, 55 S. Ct. 869, 79 L. Ed. 1611 (1935), the dictum in *Montgomery* is not.

First, the Court in *Montgomery* cited to the Wyoming statute regarding parole for juveniles in support of this comment. However, Wyoming provides more than the possibility of parole. The Wyoming statute expressly provides for commutation by the Governor of the juvenile's sentence. And, if the Governor does not commute to a lesser sentence, the statute makes the juvenile parole eligible after serving a minimum of 25 years, *i.e.*, the same minimum term adopted for juveniles under 16 convicted of aggravated murder in Washington. *See* Wyo. Stat. Ann. § 6–

10–301(c) (2013).

Further, whether the possibility of release by parole might satisfy the constitutional requirements of *Miller* was not essential to the outcome regarding retroactivity. *See Montgomery*, 136 S. Ct. at 725 (certified question was "whether [*Miller*'s] holding is retroactive to juvenile offenders whose convictions and sentences were final when [it] was decided").

More importantly, the United States Supreme Court's reference to parole simply acknowledges that a state could fashion a parole system in a manner consistent with both *Miller* prongs. But the permissive language does not and could not account for variances in a particular state as to whether the possibility of parole cures an unconstitutional sentence.

When faced with this issue, courts in other states have determined that the mere fact that a juvenile offender may be eligible for parole does not by itself satisfy *Graham* and *Miller*. Across the board, where courts have considered the adequacy of parole to cure an otherwise unconstitutional sentence, they have found the consideration of youth at some stage of the process to be paramount. *See Md. Restorative Justice Initiative v. Hogan*, Civil Action No. ELH-16-1021, 2017 WL 467731, at *24–27 (D. Md. Feb. 3, 2017) (denying motion to dismiss and permitting plaintiffs to pursue claim that Maryland's system of parole did not provide a

meaningful and realistic opportunity for release based in part on the failure of the parole system to account for youth); *Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 30 N.Y.S.3d 397, 400-01, 140 A.D.3d 34 (N.Y. App. Div. 2016) (inmate entitled to new parole release hearing at which his youth would be considered after parole board failed to consider the juvenile offender's youth and its attendant characteristics); *Atwell v. Florida*, 197 So. 3d 1040, 1050 (Fla. 2016) (re-sentencing required for juvenile homicide offender because existing statutory parole system failed to consider youth as required by *Miller*); *Greiman v. Hodges*, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015) (denying motion to dismiss and holding that plaintiff was entitled to discovery and full consideration of his claim that Iowa's system of parole did not provide him with a meaningful opportunity for release where decision was based solely on severity of the crime without consideration of youth, rehabilitation, or maturity); *Hayden v. Keller*, 134 F. Supp. 3d 1000, 1010–11 (E.D.N.C. 2015) (finding that North Carolina's system of parole did not provide plaintiff a meaningful opportunity for release in violation of the Eighth Amendment where youth not considered as part of parole process); *Wershe v. Combs*, 763 F.3d 500, 505–06 (6th Cir. 2014) (remanding for consideration as to whether Michigan's system of parole and procedures for parole provide a meaningful, realistic opportunity for release because youth was not

considered at district court level). *Cf. Connecticut v. Williams-Bey*, 167 Conn. App. 744, 747, 144 A.3d 467 (2016) (denying resentencing and holding that parole hearing where mitigating factors of youth must be considered is sufficient to satisfy constitutional requirements); *Arizona v. Vera*, 235 Ariz. 571, 576–77, 334 P.3d 754 (2014) (holding resentencing not required under *Miller* because legislature provided for possibility of release by parole and youth of the defendant was considered as a mitigating factor at time of sentencing).

These cases make clear that the mere existence of a system of parole is insufficient to satisfy *Graham* and *Miller*, notwithstanding *Montgomery*'s dictum. In Mr. Scott's case, the court below, in error, relied solely upon the *Miller* fix statute without considering whether Washington's system of parole actually satisfies *Graham* and *Miller*.

In addition to failing to require consideration of the qualities of youth that diminish culpability, additional factors support the conclusion that Washington's parole system does not adequately ensure compliance with the "children are different" doctrine.

Parole practices do not provide the same protections afforded at re-sentencing. *See, e.g.*, CrR 3.1(b)(2) (lawyer shall be provided at every stage of the proceedings, including sentencing); CrR 7.1(c)–(d) (new evidence and other reports may be furnished); and CrR 7.2 (appealability

of sentence). At a parole proceeding in Washington, there is only a limited right to counsel[1] and limited opportunity to provide evidence,[2] and the denial of parole is only reviewable to the extent that unlawful restraint can be demonstrated.[3] Importantly, the Washington Administrative Code contains no specific parole considerations for juveniles, who are therefore treated the same as adult offenders for purposes of procedural and substantive standards for release. *See* WAC 381-10-030; WAC 381-40-030. Although RCW 9.94A.730(3) includes a presumption of release for petitioning juveniles, it also vests the board with considerable discretionary authority and attaches strict conditions upon release.

This discretion rests in the hands of only a few people who are guided by standards that lack adequate procedural protections. *See* RCW 9.94.003(1) (Board consists of chair and four members); RCW 9.95.100 (prisoner not to be released unless in the Board's opinion his or her

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[1] *See Arment v. Henry*, 98 Wn.2d 775, 783, 658 P.2d 663 (1983) (holding that the Board is not constitutionally required to provide counsel for indigents at State expense); WAC 381-60-070 (inmate has right to have attorney present, but at her own expense "since the board has no funds to pay for attorneys"); *ISRB Frequently Asked Questions*, Wash. State Dep't of Corr., http://doc.wa.gov/corrections/isrb/faq.htm#attorney (last visited June 27, 2017) (juvenile inmates "not represented by an attorney during the release eligibility process, unless Board determines that a cognitive or mental health issue prohibits them from fully participating in the hearing").

[2] *See* WAC 381-60-080 (witnesses may be called at parolee's expense); WAC 381-60-090 (Board hearing restrictions); WAC 381-60-150 (admissibility of evidence).

[3] *Dyer*, 164 Wn.2d at 285 (must show unlawful restraint to succeed on a PRP challenge of an ISRB decision).

rehabilitation has been complete and is a fit subject for release); WAC 381-40-100 (conditioning eligibility on the presentation of a parole plan including means of support and suitable residence). Under the *Miller* fix statute, "[t]he board shall order the person released ..., unless the board determines by a preponderance of the evidence that, ..., it is more likely than not that the person will commit new criminal law violations if released." RCW 9.94A.730(3). However, the process is still far too subjective given this vague and speculative standard and the small number of people making the determination. Moreover, an inmate has limited ability to appeal an ISRB decision. Decisions made by the ISRB are only reviewable under an abuse of discretion standard. *Dyer*, 164 Wn.2d at 286 ("We must find the ISRB acted willfully and unreasonably to support a determination that the parolability decision is arbitrary and capricious."). Further, if a prisoner is denied parole, she may not be able to petition again for five years. RCW 9.94A.730(6).

This inherent subjectivity is further illustrated by how parole, once granted, can be revoked at almost any time. *See January*, 75 Wn.2d at 775 (the Board may revise or modify the conditions of parole or suspend parole based on a report by the parole officer or upon its own discretion); *see also* RCW 9.95.425 (allowing for arrest and detention where board has "reason to believe" parolee has violated law or terms of release). If parole

is revoked, discretion lies with the ISRB as to whether it will be reinstated. RCW 9.95.440. This aggregate discretion and subjectivity create serious doubts as to whether the Washington system of parole for juveniles provides a meaningful opportunity for release.

Parole also fails to provide a truly meaningful opportunity for release because when the state imposes a life-equivalent sentence, it subjects the incarcerated juvenile to an environment that frustrates personal development, yet relies heavily on reformability in determining whether parole is warranted. *See* Sally T. Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 Berkeley J. Crim. L. 1, 31–34 (2011). For individuals like Mr. Scott to mature and develop into functional members of society who are ready for re-integration, meaningful services encouraging and assessing such development must be provided. Yet the Washington Department of Corrections is not required to conduct an assessment of the offender or to identify services appropriate to prepare the offender for re-integration until five years prior to the expiration of their uniform twenty-year minimum sentence. *See* RCW 9.94A.730(2).

This high degree of uncertainty and subjectivity inherent to the parole process, coupled with the lack of consideration of youth, result in a process that fails to provide a meaningful opportunity for release as

required by the Eighth Amendment.

CONCLUSION

For the foregoing reasons, the Court should reverse the Court of Appeals' decision and grant Mr. Scott a new sentencing hearing in order to comply with *Miller* and *Fain*.

Dated July 5, 2017.

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