Supreme Court No. 940207
Court of Appeals No. 75168-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JAI'MAR SCOTT,
Appellant.

MEMORANDUM OF *AMICUS CURIAE* FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF PETITION FOR REVIEW

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I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The identity and interests of the Fred T. Korematsu Center for Law and Equality are set forth in the Motion for Leave to File an *Amicus Curiae* Memorandum and Extension of Time to File, submitted to this Court on February 27, 2017.[1]

II. ISSUES TO BE ADDRESSED BY *AMICUS*

Whether review should be granted under RAP 13.4(b) to consider if the decision of the court below conflicts with well-established Washington jurisprudence and if the existence of a future opportunity for parole, as prescribed in RCW 9.94A.730, can substitute for a juvenile defendant's substantive constitutional right to have characteristics of youth fully considered at sentencing in light of the Eighth Amendment of the U.S. Constitution, as well as art. I, § 14, of the Washington State Constitution.

III. STATEMENT OF THE CASE

Amicus adopts Appellant/Petitioner's Statement of the Case.

[1] Because no order has issued regarding this motion, including whether or not an extension to March 24, 2017, is granted, this *Amicus* Memorandum in Support of Review is timely filed in accordance with RAP 13.4(h). Because the State was granted an extension to file its answer by March 13, 2017, *amicus* has not had the opportunity to review or address the State's arguments, if any, opposing review.

IV. REASONS WHY REVIEW SHOULD BE ACCEPTED

Review is justified in this case because the decision of the Court of Appeals is in conflict with a decision of this Court; a significant question of law under the Constitutions of the State of Washington and the United States is involved; and the petition involves an issue of substantial public interest. RAP 13.4(b)(1), (3) & (4).

A. This Court Should Accept Review Because the Court Below, by Following Dictum in *Montgomery*, Effectively Overturned this Court's Holding in *State v. Fain* that the Constitutionality of a Sentence Cannot Turn on the Possibility of Parole.

This Court should reverse the lower court's holding that the possibility of parole afforded by the *Miller* fix statute, RCW 9.94A.730, cures Mr. Scott's unconstitutional sentence, obviating the need for resentencing. *State v. Scott*, 196 Wn. App. 961, 971-72, 385 P.3d 783 (2016). The court's reliance on dictum from *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), is misplaced because it is in conflict with Washington jurisprudence 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 State v. Fain*, 94 Wn.2d 387, 395, 617 P.2d 720 (1980) (constitutionality of sentence turns on "its literal meaning" without consideration of possibility of release by parole). This

Court should accept review of Mr. Scott's case because to allow the lower court's opinion to stand would effectively overrule Washington Supreme Court precedent without consideration by any court.[2]

i. The *Montgomery* Court's Discussion of Parole Is Unpersuasive Dictum.

Precisely how a state might comply with *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), was not before the Court in *Montgomery*, was therefore not fully briefed and argued, and was certainly 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"); *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. In a brief paragraph that references a Wyoming statute, the Court uses permissive language to

[2] Though *amicus* concedes that the court below could decide that *Montgomery* might abrogate this aspect of *Fain*, this Court should not permit the well-settled rule in *Fain* to be overruled *sub silentio* without full consideration by the court below or by this Court.

provide some guidance to the states. *Montgomery*, 136 S. Ct. at 736 (citing Wyo. Stat. Ann. § 6-10-301(c)). Therefore, this Court is not bound by the language in *Montgomery* and should decline to find that the statutory remedy is Mr. Scott's exclusive remedy because to do so would not comport with Washington jurisprudence. *Cf. State v. Houston-Sconiers*, No. 92605-1, 2017 WL 825654, at *7 (Wash. Mar. 2, 2017) (noting that the Supreme Court has "spoken approvingly" of a *Miller* fix statute only once, in relation to possible treatment of cases on collateral review);[3] *see In re McNeil*, 181 Wn.2d 582, 589-90, 334 P.3d 548 (2014) (rejecting possibility of release by parole as exclusive remedy); *Fain*, 94 Wn.2d at 395 (requiring that courts assess constitutionality of life sentence without considering possibility of parole). By taking review of Mr. Scott's petition, this Court would have an opportunity to develop a constitutionally adequate remedy on collateral review through an adversarial presentation of the constitutional issues by the parties.

[3] In *Ramos*, this Court also noted that according to *Montgomery*, "life-without-parole sentences previously imposed without proper *Miller* hearings may be remedied 'by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.'" *State v. Ramos*, ___ Wn.2d ___, 387 P.3d 650, 659 (2017), *as amended* (Feb. 22, 2017), *reconsideration denied* (Feb. 23, 2017) (quoting *Montgomery*, 136 S. Ct. at 735).

ii. The Decision Below Conflicts with *State v. Fain*.

This Court has held that to determine whether a life sentence is proportionate under art. I, § 14, 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 393-94. Because "'parole is simply an act of executive grace'" and prisoners have no right to parole, it is not the same as having a shorter sentence and should not be viewed as such. *Id.* at 394-95 (quoting *Rummel v. Estelle*, 445 U.S. 263, 293, 100 S. Ct. 113, 63 L. Ed. 2d 382 (1980)); *see* RCW 9.94A.730 (parole not available if new crimes after 18th birthday or serious infractions in prior year; supervision authorized up to maximum term of sentence; if violation of parole can return to prison for duration of sentence). Due to the uncertainty that the privilege of parole will be granted or that, if granted, it will be permanent, its possibility should not be considered in assessing the constitutionality of Mr. Scott's sentence. *Fain*, 94 Wn.2d at 395.

B. This Court Should Accept Review Because Whether RCW 9.94A.730 Offers a Meaningful Opportunity for Release Is a Question of First Impression and Most Other Courts that Have Addressed this Issue Have Not Adhered Blindly to *Montgomery's* Dictum.

Despite *Montgomery's* dictum, most courts, when faced with the issue, have determined that the mere fact that a juvenile offender may be eligible for parole does not by itself satisfy *Graham* and *Miller*. *See Md.*

Restorative Justice Initiative v. Hogan, Civil Action No. ELH-16-1021, 2017 WL 467731, at *26-27 (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); *Hawkins v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 30 N.Y.S.3d 397, 401, 140 A.D.3d 34 (2016) (parole board failed to consider the juvenile offender's youth and its attendant characteristics); *Atwell v. Florida*, 197 So. 3d 1040, 1050 (Fla. 2016) (despite Florida's system of parole, resentencing required for juvenile homicide offender); *Greiman v. Hodges*, 79 F. Supp. 3d 933, 945 (S.D. Iowa 2015) (denying motion to dismiss and permitting plaintiff to pursue claim that Iowa's system of parole did not provide him with a meaningful opportunity for release); *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 a meaningful opportunity for release); *Wershe v. Combs*, 763 F.3d 500, 505-06 (6th Cir. 2014) (remanding for consideration of the juvenile offender's youth at the time of the crime as to whether Michigan's system of parole provided a meaningful opportunity for release). *Contra Arizona v. Vera*, 235 Ariz. 571, 576-77, 334 P.3d 754 (2014) (resentencing not required under *Miller* because legislature provided for possibility of release by parole), *cited in Arizona v. Mendez*, 2016 WL 2855660 (Ariz. Ct. App.

2016) (*Montgomery v. Louisiana* did not alter reasoning in *Vera*).

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

Although the United States Supreme Court spoke approvingly of parole as a possible remedy for those on collateral review, the Court did not make clear that parole was the only possible solution. *See Montgomery*, 136 S. Ct. at 736. Washington's *Miller* fix statute cannot be interpreted to be an exclusive remedy because it does not address the underlying unconstitutional de facto life sentence. *See Houston-Sconiers*, 2017 WL 82654, at *8 (*Miller* fix statute "makes no allowance for consideration of any of the mitigating factors of youth that *Miller* requires at the time of sentencing"). Further, the Court stated that the *Miller* fix statute "does not resolve whether petitioners' sentences are unconstitutional and in need of correction now." *Id*. This Court has recognized the insufficiency of the statutory scheme in curing unconstitutional sentences that fail to account for diminished culpability in a number of contexts. *Ramos*, 387 P.3d at 659 (direct appeal of de facto life sentence); *Houston-Sconiers*, 2017 WL 825654, at *8 (direct appeal of

stacked mandatory enhancements resulting in long sentences).

As the table below demonstrates, upholding the decision below would result in the anomaly of de facto life sentences on collateral review being the only category of juveniles examined thus far not to receive resentencing with an individualized consideration of the factors associated with youth. The state's interest in finality must give way to a juvenile offender's constitutional right to a sentencing procedure whereby her or his youth and its attendant circumstances at the time the crime was committed can be fully considered.

CATEGORY OF JUVENILE DEFENDANT	DOES *MILLER* APPLY?	RIGHT TO RESENTENCING?	OPPORTUNITY FOR PAROLE?
Life without parole on direct appeal	Yes – *Miller*, 567 U.S. 460	Yes – RCW 10.95.035	Yes – RCW 10.95.030(3)
Life without parole on collateral review	Yes – *Montgomery*, 136 S.Ct. at 736	Yes – RCW 10.95.035	Yes – RCW 10.95.030(3)
De facto life on direct appeal	Yes – *Ramos*, 387 P.3d at 658	Yes – *Ramos*, 387 P.3d at 659	Yes – RCW 9.94A.730
De facto life on collateral review	Yes – *Ramos*, 387 P.3d at 658	**No according to the court below, but not yet considered by this Court**	Yes – RCW 9.94A.730
Less than life sentences on direct appeal	Yes – *Houston-Sconiers*, 2017 WL 825654, at *1	Yes – *Houston-Sconiers*, 2017 WL 825654, at *1	Yes – RCW 9.94A.730

C. The Court Should Accept Review Because Strong Constitutional and Public Interests Exist in Ensuring that Juvenile Offenders Such as Mr. Scott Have the Procedural and Substantive Protections Provided at Resentencing That Are Not Guaranteed During a Parole Proceeding.

The procedural protections afforded at resentencing include the right to counsel, CrR 3.1(b)(2) (lawyer shall be provided at every stage of the proceedings, including sentencing); broader right to provide evidence, CrR 7.1(c) – (d) (new evidence and other reports may be furnished); and reviewability of the decision, CrR 7.2 (appealability of sentence).

At a parole proceeding, there is no right to counsel,[4] there is a limited opportunity to provide evidence,[5] and the denial of parole is only reviewable to the extent that unlawful restraint can be demonstrated.[6] As this Court stated in *Fain*, a prisoner does not have a right to release by parole and is instead at the mercy of executive grace. 94 Wn.2d at 394. Furthermore, at resentencing, a juvenile offender has a constitutional right to have her or his youth and its attendant consequences considered, which is not required during the parole process. *Compare* RCW 10.95.030(3)(b)

[4] *In re McCarthy*, 161 Wn.2d 234, 244, 164 P.3d 1283 (2007) (finding no right to counsel at parole release hearing for determinate plus offender).
[5] WAC 381-60-080 (witnesses), WAC 381-60-090 (conducting a hearing), WAC 381-60-150 (admissibility of evidence).
[6] *In re Dyer*, 164 Wn.2d 274, 285, 189 P.3d 759 (2008) (must show unlawful restraint to succeed on a PRP challenge of an ISRB decision).

(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), including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated") *with* RCW 9.94A.730(3) (no reference to youth or *Miller* in its list of considerations for release by parole).

V. CONCLUSION

For the foregoing reasons, The Korematsu Center respectfully urges the Court to grant Mr. Scott's petition for review to decide this issue of substantial public importance, to resolve any unnecessary discrepancies in juvenile sentencing regimes in Washington State, and to address issues of constitutional significance in so doing.

DATED: March 6, 2017

FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on this date, I served a copy of

> MEMORANDUM OF *AMICUS CURIAE* FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF PETITION FOR REVIEW

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Signed in Seattle, Washington, this 6th day of March, 2017.

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