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No. 97205-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Personal Restraint Petition of

ENDY DOMINGO-CORNELIO,

Petitioner.

MEMORANDUM OF AMICI CURIAE WASHINGTON DEFENDER ASSOCIATION, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS, AND FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Endy Domingo-Cornelio was convicted of several sexual offenses, alleged to have occurred when he was 14-16 years old. Charges were filed when he was an adult. At sentencing, the parties did not present, and the court did not consider the mitigating qualities of Mr. Domingo-Cornelio's youth. The court imposed the bottom of the standard range, which was characterized as the "minimum" sentence. RP 732.

In his PRP, Domingo-Cornelio seeks a new sentencing hearing arguing that there has been a significant, retroactive, and material change in the law. The Court of Appeals rejected this argument reasoning that *State v. Houston-Sconiers*, 188 Wn.2d 1, 20, 391 P.3d 409, 419 (2017), expanded on, but did not overturn prior precedent. *Opinion,* p. 33-34.

This Court should accept review and decide the significant question of law that it "saved" "for another day" in *Personal Restraint of Meippen*, __ Wn.2d __, __ P.3d __, 2019 WL 2050270 (May 9, 2019), whether *Houston-Sconiers* is a significant, material change in the law that applies retroactively to cases on collateral review. In addition, this Court should hold that a post-conviction petitioner establishes prejudice where the judge's sentencing discretion was limited by now-inapplicable SRA provisions; where the record reveals no consideration and/or weighing of

the *Mille*r factors; and where the judge imposed the sentence incorrectly characterized as the minimum.

II. INTEREST OF AMICI

The interest of Amici is set forth in the motion to permit the filing of this brief and is incorporated by reference, here.

III. STATEMENT OF THE CASE

Amici adopt Petitioner's statement of the case.

IV. ARGUMENT

This case involves a very young juvenile who was sentenced in adult court to the low end of the standard range before *Houston-Sconiers* mandated that a sentencing judge consider and weigh the *Miller* factors, and invested the judge with the discretion to consider and impose an exceptional downward sentence in light of such factors. *State v. Gilbert*, __ Wn.2d ___, 438 P.3d 133, 136 (2019). Amici urge this Court to accept review and hold that *Houston-Sconiers* is retroactive and that Domingo-Cornelio is entitled to a new sentencing hearing.

A. *The New Rules for the Sentencing of Juveniles.*

"[C]hildren are different." *Miller v. Alabama*, 567 U.S. 460, 481, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). In every case where a trial court sentences a juvenile in adult court, the Eighth Amendment requires a sentencing court "to treat children differently, with discretion, and with

consideration of mitigating factors." *Houston-Sconiers*, 188 Wn.2d at 20). When sentencing a juvenile, a court "must" consider the "mitigating circumstances related to the defendant's youth." *Houston-Sconiers*, 188 Wn.2d at 23 (quoting and citing *Miller*, 567 U.S. at 477).

Consideration of these factors is mandatory, not optional. *Id.* at 9 (sentencing court "must" take the defendant's youthfulness into account and "must have absolute discretion to depart as far as they want below otherwise applicable SRA ranges"); *Gilbert*, 438 P.3d at 136 (trial court was "required to consider Gilbert's youth as a mitigating factor and had discretion to impose a downward sentence").

Put another way, a defendant need not request that a sentencing court consider and weigh the mitigating circumstances of his youth. The obligation applies in every instance. The "sentencing court should consider these circumstances, the convictions at issue, the standard sentencing ranges, and any other relevant factors—and should then determine whether to impose an exceptional sentence." *Id*. at 136.

The second difference applicable when sentencing a juvenile in adult court is that the court has "complete discretion" to "consider exceptional sentencing even where statutes would otherwise limit it." *Id.* at 136. "*Miller* requires such discretion and provides the guidance on how to use it." *Houston-Sconiers*, 188 Wn.2d at 23. As this Court recently

summarized: "This court has also applied *Miller*'s reasoning to hold that 'sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant' and 'must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.'" *State v. Bassett*, 192 Wn.2d 67, 81, 428 P.3d 343 (2018). This frees a sentencing court from the requirement to impose a standard range sentence absent permissible crime-related mitigating facts. Put another way, the sentencing guidelines are optional for juveniles. In this case, the sentencing hearing was completely devoid of any mention of the *Miller* factors.

B. *The New Sentencing Rules Apply Retroactively.*

This PRP is timely. However, this Court should address retroactivity because Petitioner contends that he is entitled to a new sentencing hearing due to a material change in the law that applies retroactively. RAP 16.4(c)(4). The court below is incorrect in deciding that *Houston-Sconiers* does not constitute a significant change in the law.

In *Meippen,* this Court saved retroactivity for another day. That day is here. The dissenting opinion sets forth the reasons why this Court should hold that *Houston-Sconiers* is retroactive.

First, by "providing defendants with the argument that a sentencing judge must consider youth, when this argument did not before exist (at

least not in any fashion endorsed or legitimated by this court), *Houston-Sconiers* was a significant change in law." *Matter of Meippen*, 2019 WL 2050270, at *6 (May 9, 2019) (Wiggins, J. dissenting).

Second, prior to *Houston-Sconiers*, the discretion to impose an exceptional sentence for a juvenile was both more limited and more amenable to review. *State v. Law*, 154 Wn.2d 85, 94, 110 P.3d 717 (2005); *State v. Mail*, 121 Wn.2d 707, 711, 854 P.2d 1042 (1993); *State v. Estrella*, 115 Wn.2d 350, 354, 798 P.2d 289 (1990). The rule in Houston-Sconiers "expressly overruled prior cases that indicated the inflexibility of the SRA." *Matter of Meippen*, 2019 WL 2050270, at *7. While previous caselaw did not preclude a defendant from arguing youth as a mitigating factor, it placed the burden on a defendant to establish that his youthfulness sufficiently diminished his culpability for the crime to constitute a substantial and compelling reason. Now the law requires a court to consider the mitigating qualities of youth in every case and permits a departure based on any of those facts.

In short, the law has changed. That change is retroactive because the change was substantive. *Houston-Sconiers* is substantive for the same reasons that the United States Supreme Court held in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), that *Miller* was retroactive. As the dissent in *Meippen* correctly states:

> *Houston-Sconiers* protects juveniles from facing certain disproportionate sentencing ranges. This parallels *Miller*'s rule, which prevents juveniles from facing disproportionate life without parole sentences. In this way, like *Miller*, *Houston-Sconiers* "prohibits 'a certain category of punishment for a class of defendants because of their status or offense.' " Like *Miller*, *Houston-Sconiers* was premised on the "central substantive guarantee of the Eighth Amendment": the prohibition against disproportionate punishment….Before *Houston-Sconiers*, every juvenile convicted of certain offenses faced certain sentencing ranges, while after *Houston-Sconiers*, juveniles no longer necessarily face those ranges now that sentencing courts not only have the discretion to go outside the bounds of the SRA but are required to consider the mitigating qualities of youth. Just as *Montgomery* considered Miller a substantive change in the law, so too should we hold that *Houston-Sconiers* is a substantive change of constitutional law.

Matter of Meippen, 2019 WL 2050270, at *7 (citations omitted). Because *Houston-Sconiers* changed the substantive law, that change is retroactive.

C. *The Change in the Law Is Material Because Domingo-Cornelio Was Prejudiced.*

Meippen does not overrule any prior caselaw and did not announce any change to the harm standard in post-conviction cases where the court's discretion was incorrectly defined at the time of sentencing.

In post-conviction cases where the sentencing court did not accurately understand its sentencing discretion, this Court has granted relief when the sentencing court was not already presented with the salient facts and when the court indicated an unwillingness to impose a lesser sentence—either by words or by inference from the sentence imposed.

This Court has repeatedly made clear that a sentencing court should be afforded an opportunity to determine the appropriate sentence based upon accurate information. *See, e.g., In re Call*, 144 Wn.2d 315, 333, 28 P.3d 709 (2001). Where the sentencing court misunderstood the scope of its discretion, this Court has reversed sentences in post-conviction petitions where it is fair to infer a reasonable probability of a lesser sentence.

In *In re Johnson*, 131 Wn.2d 558, 569, 933 P.2d 1019 (1993), Johnson was sentenced in 1985 based on an incorrect calculation of his offender score, which did not appear until 1994 when this Court decided a case reversing previous applicable caselaw. Because the offender score was incorrectly calculated, the judge thought a sentence of 261 months was the low end of the standard range. Under the proper calculation, the low end of the standard range was 250 months. This Court reversed, citing the imposition of a sentence at the bottom of the incorrectly calculated standard range as constituting sufficient prejudice and holding: "Johnson should have another sentencing hearing for the trial court to consider his sentence, with a proper calculation of his offender score." *Id*. at 560.

This Court went further and found prejudice in *Call,* even though the court did not impose a sentence at the low end of the incorrectly calculated range. Instead, this Court held: "The sentencing court should be

afforded an opportunity to determine the appropriate sentence based upon accurate information used as a basis for calculating an offender score and in determining the correct sentence range under the SRA. *Call*, 144 Wn.2d at 335. *See also In re Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007) ("The record does not show that it was a certainty that the trial court would have imposed a mitigated exceptional sentence if it had been aware that such a sentence was an option. Nonetheless, the trial court's remarks indicate that it was a possibility. In our view, this is sufficient to conclude that a different sentence might have been imposed had the trial court applied the law correctly.").

In contrast, the court in *Meippen* found no prejudice because the court imposed a sentence at the very top of the range. *Meippen*, 2019 WL 2050270, at *3 ("Meippen does not show by a preponderance of the evidence that his sentence would have been shorter if the trial court had absolute discretion to depart from the SRA at the time of his sentencing.").

In this case, like in *Johnson*, the court imposed a sentence at the bottom of the range. That fact alone establishes prejudice.

However, Domingo-Cornelio can also establish prejudice because none of the mitigating qualities of his youth were before the court at sentencing. In *Meippen*, the sentencing court was presented with evidence that Meippen was "too young to appreciate the nature and consequences of

his actions;" that he "lack[ed] an understanding ... of the seriousness of the situation he involved himself in;" and was "very immature in his thought processes and beliefs." *Meippen*, 2019 WL 2050270, at *1. Nevertheless, the sentencing judge found the crime committed by Meippen deserved the harshest available punishment. As a result, he was not prejudiced.

None of the facts required under *Miller* were presented at Domingo-Cornelio's sentencing. Facts establishing Domingo-Cornelio's lesser culpability due to his young age were readily available. *See State v. Ramos*, 187 Wn.2d 420, 451, 387 P.3d 650 (2017) (noting that the mitigating qualities of youth can be presented by expert and/or lay testimony and through the presentation of articles reflecting scientific consensus regarding brain development).

For example, the sentencing court was not presented with empirical research establishing that adolescents are less capable of self-regulation than adults. Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence*, 18 Behav. Sci. & L. 741, 748-749, 754 & tbl. 4 (2000). The sentencing court was also not presented with the fact that adolescents not only struggle to regulate their behavior in response to their impulses, but also respond differently to perceptions of risk and reward. Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*,

46 Developmental Psychol. 193, 204 (2010); Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 39 (2009).

These factors also diminish a defendant's culpability under the law. *Bassett*, 192 Wn.2d at 88. Yet, none of the empirical research establishing that even late-adolescents (18-mid 20's) have not fully developed these abilities and hence lack an adult's capacity for mature judgment was presented in this case. Of course, Domingo-Cornelio was not on the cusp of adulthood. He was a middle adolescent, more than a decade away from neurobiological maturity at the time of the instant crimes. Mr. Domingo-Cornelio has established the requisite prejudice.

V. CONCLUSION

This Court should grant review, reverse, and remand for resentencing.

DATED this 21st day of May 2019.

Respectfully Submitted:

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