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No. 75168-9-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Appellant,

v.

JAI'MAR SCOTT,
Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

In 1990, Jai'mar Scott received a 900–month (75–year) exceptional sentence for a crime committed when he was 17-years old. On appeal, Scott asserted that the sentencing court erroneously failed to take into account his youth when it imposed that life-equivalent sentence. This Court rejected that argument as bordering on the "absurd." *State v. Scott*, 72 Wash.App. 207, 866 P.2d 1258 (1993).

There is now a new constitutional standard of decency for juveniles.

In 2016, Scott returned to King County Superior Court and moved that court to vacate his sentence and to conduct a new sentencing hearing. The trial court agreed that the law had changed and granted the motion. CP 92-94. The State now appeals. CP 95.

II. FACTS

Mr. Scott does not dispute Appellant's factual statement. To briefly summarize, Mr. Scott was convicted of a murder committed when he was 17. At sentencing, Scott's offender score was 0. His standard sentencing range was 240 to 320 months. The court imposed an exceptional sentence of 900 months. CP 120-129. The sentencing court did not make a finding of irreparable incorrigibility or anything resembling such a finding.

As reported on appeal, Scott asserted "that his youth, 17 years old at the time of the crime, limited his 'capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law,' RCW 9.94A.390(1)(e) , and thus, the exceptional sentence was improper." This Court rejected the argument that his youth needed to be considered stating that it "borders on the absurd." *Id.* at 218. This Court added:

> Granted, teenagers are more impulsive than adults and lack mature judgment. However, Scott's conduct cannot *seriously* be blamed on his "lack of judgment," as he contends. Premeditated murder is not a common teenage vice.

Id. at 219 (emphasis in original). This Court further concluded:

> As long as the sentencing court relies solely on valid aggravating factors, that is, does not rely on any inappropriate factors…and so long as the duration of the sentence does not exceed the statutory maximum or otherwise shock the appellate court's conscience in all the circumstances of the case being reviewed, it cannot be said that the sentence, although harsh, is so clearly excessive that no reasonable person would have imposed it. Certainly Scott received the SRA's determinate sentencing equivalence of a life sentence for this crime. The aggravating factors are both numerous and individually and collectively egregious, however. All of the factors fall within the Legislature's own non-exclusive list of examples of valid aggravating factors. It cannot be said that the sentence is clearly excessive in light of all the purposes of the SRA.

Id. at 221-22. See also CP 149-192.

In 2016, Scott file a motion for resentencing arguing that the law had changed and that he was entitled to a new sentencing hearing. CP

4-7. The trial court agreed, reasoning: "An offender's age must be taken into consideration by the Court in imposing a sentence." CP 92-94. 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 WA. 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 lower court ordered:
>
> …the Court grants the defendant's motion for relief from judgment and orders that a new sentencing date be set.

Id. Because the State filed a timely appeal from the order, Mr. Scott has not been resentenced.

III. ARGUMENT

A. Introduction

The evolving standards of decency that undergird the Eighth Amendment now mandate that the imposition of a most serious criminal penalty for a juvenile offender cannot proceed as though the defendant was not a child. Because that did not happen when Mr. Scott was sentenced, the lower court judge ordered a new sentencing hearing—a hearing where Scott's youth will be considered and weighed.

There are at least two reasons to affirm the trial court's order. First, a juvenile convicted of a homicide offense cannot be sentenced to life in prison or a life-equivalent sentence absent consideration of the special circumstances which accompany youth. Second, a finding of irreparable incorrigibility or something resembling that standard must accompany any life or life-equivalent sentence for a juvenile. Both of those constitutional rules apply retroactively. Scott's 900-month sentence fails to comply with both constitutional commands.

B. Children are Different, Constitutionally Speaking.

Introduction

The Eighth Amendment requires courts to consider a juvenile's chronological age "and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller v. Alabama,* 567 U.S. ___, 132 S.Ct. 2455, 2468 (2012). When Scott was given a *de facto* life sentence, this Court affirmed that his youth was irrelevant to that sentence. That was then. This is now. The Constitution has evolved. The law has changed. That change applies retroactively. This Court should affirm the trial court.

Tracing the Evolution

The characteristics of youth on which *Miller* relied were those first summarized in *Roper v. Simmons*, 543 U.S. 551 (2005). *Miller*, 132 S. Ct. at 2464–65. In *Roper* the Court identified three general differences between adults and juveniles central to an Eighth Amendment analysis. First, juveniles more often display " '[a] lack of maturity and an underdeveloped sense of responsibility,' " often resulting in " 'impetuous and ill-considered actions and decisions.' " *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367, (1993)). This susceptibility means that their " 'irresponsible conduct is not as morally reprehensible as that of an adult.' " *Roper*, 543 U.S. at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)). Second, juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Roper*, 543 U.S. at 569. This "vulnerability and comparative lack of control over their immediate surroundings" give juveniles "a greater claim than adults to be forgiven for failing to escape negative influences." *Id.* at 570. Finally, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles ... less fixed." *Id.* at 570. Thus, "it is less supportable to conclude that even a heinous crime

committed by a juvenile is evidence of irretrievably depraved character." *Id.* at 570.

In finding these differences, the Court in *Roper*, *Miller*, and the intervening *Graham v. Florida*, 560 U.S. 48, 68 (2010), drew on developments in brain science showing " 'fundamental differences between juvenile and adult minds'—for example, in 'parts of the brain involved in behavior control.' " *Miller*, 132 S. Ct. at 2464 (quoting *Graham*, 560 U.S. at 89–90).

Miller Changed the Law. That Change Applies Retroactively.

Miller took as its starting premise the principle established in *Roper* and *Graham* that "children are constitutionally different from adults for purposes of sentencing." 567 U.S., at___, *Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.*

The surest way to determine the rule announced in *Miller* is to review *Montgomery v. Alabama,* 136 S.Ct. 718 (2015), which both defined the substantive new rules announced in *Miller* and held that those rules apply retroactively. *Montgomery* stated that "*Miller* requires that before sentencing a juvenile to life without parole, the

sentencing judge take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 733. In other words, a sentencing judge is required to take youth into account when considering and imposing a life or life-equivalent sentence.

This substantive requirement of *Miller* stands in direct contrast with the decision of this court decades ago that Scott's juvenile status was irrelevant to the sentence imposed—that consideration of his youth was "absurd." 72 Wn.App. at 218. See also *State v. O'Dell,* 183 Wash.2d 680, 689, 358 P.3d 359 (2015) ("Thus, we find that the trial court did not meaningfully consider youth as a possible mitigating factor in this case, and we remand for a new sentencing hearing."). In fact, this Court's direct appeal opinion in this case was cited in *O'Dell* as representing the now outmoded relationship between youth and culpability. "When our court made that sweeping conclusion, it did not have the benefit of the studies underlying *Miller, Roper,* and *Graham*—studies that establish a clear connection between youth and decreased moral culpability for criminal conduct." *Id.* *O'Dell* recognized this change in the law. "For these reasons, a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender." *Id.* at 696.

Miller is not limited to life without parole sentences. This Court made it clear in *State v. Ronquillo,* 190 Wash.App. 765, 361 P.3d 779 (2015), that "life" includes a life equivalent term of years. In *Ronquillo,* this Court determined that a sentence of 51.3 years was "a de facto life sentence" and concluded that before imposing it, Miller required the court to " 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.' " Id. at 775, (*quoting Miller*, 132 S.Ct. at 2469).

Scott's sentence was even longer and it is indisputable that his youth was not considered.

Miller is also not limited to cases where the only statutorily-mandated sentence is life or a life-equivalent sentence. Anytime a sentencing court is considering such a sentence for a juvenile, the court must consider the mitigating aspects of youth. Where a sentencing court had the discretion to impose a term-of-years sentence but was not required to consider, and did not take into account, the individualized attributes of the juvenile offender's youth when exercising discretion, a new sentencing is warranted. Put another way, even in a discretionary sentencing scheme, the sentencing court's exercise of discretion before imposing a life sentence must be informed by consideration of the

juvenile offender's "youth and its attendant circumstances" as articulated in *Miller*.

Because the trial court was not required to, and did not take into account, the *Miller* factors, Scott's life-equivalent sentence is unconstitutional under the Eighth Amendment to the United States Constitution. In short, "[a]n offender's age is relevant to the Eighth Amendment," *Miller*, 132 S.Ct. at 2462, and a sentencer must take the juvenile offender's age into account "before imposing a particular penalty." *Id.* at 2471. The Supreme Court's requirement of individualized sentencing for juvenile offenders forbids a sentencer from "treat[ing] every child as an adult," because doing so inevitably ignores the "incompetencies associated with youth," and "disregards the possibility of rehabilitation even when the circumstances most suggest it." *Id.* at 2468.

C. Irreparable Incorrigibility

Montgomery explains that *Miller* did more than require a sentencing court to consider a juvenile offender's youth before imposing life without parole. *Miller* established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." 132 S.Ct., at 2465. *Montgomery* explained that *Miller* held:

> Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity. Because *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth.

Miller announced a substantive rule of law excluding a category of punishment from a class of offenders, i.e., "all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."

In this case, there was no finding of irreparable incorrigibility and no similar finding. The aggravating factors found by the sentencing court do not suffice.

This case dramatically demonstrates the Eighth Amendment problem of a life-equivalent sentence imposed upon a juvenile offender when the sentencer's discretion is not only not guided by the individualized sentencing factors deemed constitutionally significant in *Miller,* but where the applicable law made youth irrelevant to that sentence. As a seventeen-year-old convicted of murder, Scott faced a sentence range of between 20-30 years and up to the class of crime maximum of life imprisonment. This was the same sentencing range he would have been subject to if he had been an adult. Certainly,

the sentencing court was aware of Scott's age and his lack of prior record, but there is no indication that the court, when exercising its discretion to sentence Scott to a life-equivalent sentence as opposed to a standard range sentence, considered the "distinctive attributes of youth" as later articulated in *Miller* or found that Scott was irreparably incorrigible. Moreover, at the time the sentencing court exercised its discretion in deciding that Scott should never see the outside of prison walls for a crime he committed at age seventeen, the law made Scott's youth not only irrelevant, but an absurd consideration.

IV. CONCLUSION

The Supreme Court directed in *Miller* that the "distinctive attributes of youth," prohibit sentencing juvenile offenders to life imprisonment without first considering such attributes. In addition, *Miller* prescribed a "hearing where 'youth and its attendant characteristics' are considered as sentencing factors," in order "to separate those juveniles who may be sentenced to life without parole from those who may not." *Montgomery,* 136 S.Ct. at 735 (citing *Miller,* 132 S.Ct. at 2460).

At the heart of *Miller, Montgomery,* and indeed the entirety of the the Supreme Court's recent juvenile sentencing jurisprudence

interpreting the Eighth Amendment, is the axiom that "youth matters" for purposes of meting out the law's most serious punishments.

Youth did not matter when Scott was sentenced. The change in the constitutional requirement is a substantive change that applies retroactively. The lower court ordered a new sentencing hearing to be conducted in compliance with the constitution. Based on the above, this Court should affirm.

DATED this 2nd day of August, 2016.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that on today's date I efiled the attached response brief causing a copy to be sent to opposing counsel, Ann Summers,

August 2, 2016//Portland, OR /s/Jeffrey Ellis