

FILED
SUPREME COURT
STATE OF WASHINGTON
2/3/2020 3:53 PM
BY SUSAN L. CARLSON
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NO. 95578-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of

SAID OMER ALI,

Petitioner.

**ANSWER TO BRIEF OF AMICI CURIAE
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WASHINGTON DEFENDER ASSOCIATION,
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS, AMERICAL CIVIL LIBERTIES UNION OF
WASHINGTON, TEAMCHILD, AND
CENTER FOR CHILDREN & YOUTH JUSTICE**

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A. INTRODUCTION AND SUMMARY OF ARGUMENT

Several organizations have submitted an amicus curiae brief in support of Ali, who challenges his 26-year sentence¹ for assault and robbery under the Eighth Amendment. Ali, whose conviction is long-final, is not entitled to be resentenced. This Court should reject Amici's invitation to apply State v. Houston-Sconiers² retroactively to final cases. Houston-Sconiers announced a new constitutional rule regulating sentencing procedures for juvenile offenders in adult court. It did not conclude that any sentence — including Ali's — was constitutionally disproportionate or impermissible. It is a procedural rule that does not apply retroactively.

This Court should further reject Amici's argument that a presumption of prejudice applies to all juvenile offenders who collaterally attack long-final sentences that were imposed without a hearing on the mitigating qualities of youth. Per se prejudice is inconsistent with the type of error alleged and is inconsistent with the principles of finality that are the bedrock of collateral review. Nor should this Court conclude that a personal restraint petitioner has met his burden to prove actual and

¹ The State has conceded Ali's date of birth should be amended so that he is eligible to seek early release after 20 years under RCW 9.94A.730.

² 188 Wn.2d 1, 391 P.3d 409 (2017).

substantial prejudice whenever a sentencing court imposes anything other than a low-end or an exceptionally low sentence. This Court should decline to accept an invitation — made solely by Amici — to alter the well-established standard for prejudice that a personal restraint petitioner must demonstrate.

Finally, Amici urge this Court to decide another issue that was not raised or briefed by the parties — whether article I, section 14 of the Washington Constitution requires a presumption of a mitigated sentence for all juveniles sentenced in adult court. This Court has consistently declined to address arguments raised solely by an amicus. It certainly should not abandon that rule in this case, where Amici ask this Court to embark on a dramatically new course, and where the issue is squarely presented in another case presently pending before the court.

B. ARGUMENT

1. CONSIDERATION OF YOUTH AND SENTENCING DISCRETION ARE PROCEDURAL RULES BECAUSE THEY REGULATE HOW A SENTENCE IS IMPOSED BUT DO NOT PROHIBIT ANY PARTICULAR PUNISHMENT.

Amici urge this Court to adopt the reasoning of the dissent in In re Pers. Restraint of Meippen,³ regarding Houston-Sconiers' retroactivity.

³ 193 Wn.2d 310, 324, 440 P.3d 978 (2019).

But in Meippen, the State did not argue or brief the issue of retroactivity, instead relying on its argument that the petitioner had failed to show that Houston-Sconiers was material to his sentence.⁴ The Meippen dissent did not have the benefit of adversarial briefing or argument on the issue. Now with the advantage of full discourse, this Court should conclude that Houston-Sconiers announced a new, non-retroactive constitutional rule of criminal procedure.

The retroactivity question here turns on whether the new constitutional rule announced in Houston-Sconiers is substantive or procedural. Rules that regulate the manner of determining a defendant's culpability are procedural, while rules that alter the range of punishable conduct or the punishable class of persons are substantive. Schriro v. Summerlin, 542 U.S. 348, 353, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

More specifically, rules that regulate sentencing procedures in order to enforce the substantive guarantees of the Eighth Amendment are procedural only. See Beard v. Banks, 542 U.S. 406, 408, 416-17, 420, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004) (new rule prohibiting death penalty unless jury allowed to consider all mitigating factors is procedural);

⁴ See Supp. Brf. of Respondent, located at: <http://www.courts.wa.gov/content/Briefs/A08/953945%20Amended%20Supp%20Brief%20Resp.pdf#search=meippen>.

Summerlin, 542 U.S. at 354 (new rule prohibiting death penalty unless aggravating factors are found by a jury is procedural); O'Dell v. Netherland, 521 U.S. 151, 167, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997) (new rule that capital defendant allowed to inform jury of parole ineligibility when government argues future dangerousness is procedural); Sawyer v. Smith, 497 U.S. 227, 242, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990) (new rule prohibiting death penalty if sentencer under mistaken belief that responsibility for determining its propriety rests elsewhere is procedural).

Like the federal rules outlined above, Houston-Sconiers' requirements that courts consider youth and possess discretion are rules regulating *how* juveniles are sentenced in adult court in order to enforce the Eighth Amendment's guarantee of proportional sentencing. They are procedural rather than substantive.

It simply cannot be said that transforming a mandatory sentencing scheme into a discretionary one and requiring sentencing courts to consider youth alters "the range of conduct" or "class of persons" that the law may punish. These requirements change only the permissible *methods* for determining whether a juvenile's conduct is punishable by a specific sentence length. They do not insulate juveniles from any punishment — offenders sentenced after Houston-Sconiers may receive the same

sentences as offenders sentenced before Houston-Sconiers. Although the new rules mean that it is possible for a juvenile sentenced after Houston-Sconiers to receive a lesser sentence than a juvenile sentenced before it, they are nonetheless procedural. Summerlin, 542 U.S. at 352. That is because Houston-Sconiers allows courts to give sentences below the adult ranges but does not *forbid* sentences within them.

United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), drives home the point that a grant of judicial sentencing discretion is a non-retroactive procedural rule. There, the Supreme Court concluded that the Federal Sentencing Guidelines ran afoul of a defendant's Sixth Amendment right to a jury trial on disputed factual issues that increase the maximum punishment. Booker, 543 U.S. at 243-44 (Stevens, J.). The Guidelines' allocation of decision-making authority to judges (with a lesser standard of proof) violated the Sixth Amendment because their application was mandatory. Id. at 234-45. The Court remedied the constitutional dilemma by declaring the guidelines to be advisory rather than mandatory. Id. at 245 (Breyer, J.). In other words, like Houston-Sconiers, Booker allows courts to depart from the federal guidelines but does not *forbid* sentences within them.

In Booker's wake, all federal circuit courts that addressed the issue concluded that Booker was not retroactive because it announced a new,

non-watershed procedural rule. Guzman v. United States, 404 F.3d 139, 141 (2nd Cir. 2005); Lloyd v. United States, 407 F.3d 608, 615-16 (3rd Cir. 2005); United States v. Morris, 429 F.3d 65, 72 (4th Cir. 2005); United States v. Gentry, 432 F.3d 600, 603 (5th Cir. 2005); Humphress v. United States, 398 F.3d 855, 860 (6th Cir. 2005); McReynolds v. United States, 397 F.3d 479, 481 (7th Cir. 2005); Never Misses A Shot v. United States, 413 F.3d 781, 783 (8th Cir. 2005); United States v. Cruz, 423 F.3d 1119, 1120 (9th Cir. 2005); United States v. Bellamy, 411 F.3d 1182, 1187 (10th Cir. 2005); Varela v. United States, 400 F.3d 864, 868 (11th Cir. 2005); In re Fashina, 486 F.3d 1300, 1304 (D.C. Cir. 2007). From this, it is apparent that new rules that grant courts discretion to impose certain sentences — while not removing the ability to do so — are procedural rather than substantive.

Like the Meippen dissent, Amici rely heavily on a footnote in Houston-Sconiers appearing to characterize its own holding as “substantive.” In the footnote, the Houston-Sconiers court stated that the decisions in Roper v. Simmons,⁵ Graham v. Florida,⁶ and Miller v. Alabama⁷ “make two substantive rules of law clear” — that “certain

⁵ 543 U.S. 551, 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

⁶ 560 U.S. 48, 74, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

⁷ 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

sentences that are routinely imposed on adults [are] disproportionately too harsh when applied to youth,” and second, that discretion is required. Houston-Sconiers, 188 Wn.2d at 19, n.4. As to the court’s first point, the cited cases plainly did announce new substantive rules shielding juveniles from the imposition of certain sentences altogether: Roper completely banned imposition of the death penalty on juveniles and Graham categorically barred life-without-parole sentences for juvenile non-homicide offenders. Miller then prohibited transiently immature juvenile murderers from receiving life-without-parole sentences.

But as to the footnote’s second suggestion — that the exercise of discretion is itself a substantive rule — the United States Supreme Court has declared that discretion is the *procedural* mechanism required to effectuate Miller’s *substantive* rule shielding transiently immature juveniles from life-without-parole sentences. Montgomery v. Louisiana, ___ U.S. ___, 136 S. Ct. 718, 734-35, 193 L. Ed. 2d 599 (2016). Houston-Sconiers offered no authority to support its characterization of discretion as a substantive requirement. Nor was the court considering the retroactivity of its holding or using the term “substantive” in that context. Amici’s reliance on a single word in a footnote of Houston-Sconiers to support retroactivity is not persuasive.

To summarize, Houston-Sconiers announced a new constitutional rule regulating sentencing procedures for juvenile offenders in adult court. To ensure proportionate sentencing under the Eighth Amendment, courts now must follow a certain process — they must consider the mitigating qualities of youth and have discretion. Houston-Sconiers did not conclude that any particular sentence was constitutionally disproportionate or impermissible for juveniles, and thus it did not announce a new substantive rule. It is not retroactive and does not authorize untimely collateral review of long-final sentences.

2. THIS COURT SHOULD DECLINE AMICI'S INVITATION — NOT MADE BY ALI — TO ALTER ESTABLISHED STANDARDS FOR DEMONSTRATING PREJUDICE IN COLLATERAL ATTACKS.

Amici urge this Court to adopt two different standards for establishing prejudice on collateral review of long-final sentences for juvenile offenders. Ali himself has not made such arguments. This Court generally does not consider issues that are raised only by an amicus. State v. Duncan, 185 Wn.2d 430, 440, 374 P.3d 83 (2016). See also RAP 12.1(a) (appellate court will generally decide a case only on issues briefed by parties). Regardless, this Court should reject Amici's invitation to alter well-established standards for collateral relief.

First, Amici urge a per se prejudice standard on collateral review whenever a sentencing court did not consider the mitigating qualities of youth when sentencing a juvenile. But this Court has long acknowledged a distinction between direct appeal and collateral review: collateral relief “undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders.” In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 597, 316 P.3d 1007, (2014) (quoting In re Pers. Restraint of Hagler, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982)). The importance of finality generally requires “a higher standard be met before a presumption of prejudice attaches on collateral review.” In re Pers. Restraint of Coggin, 182 Wn.2d 115, 120, 340 P.3d 810 (2014).

As such, this Court has refused to adopt categorically a rule that errors that are never harmless on direct appeal are per se prejudicial on collateral review. See, e.g., In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 330, 823 P.2d 492 (1992) (deficient charging document); Stockwell, 179 Wn.2d at 602-03 (plea misadvice as to sentencing consequence). Instead, the general rule is that a personal restraint petitioner alleging constitutional error bears the burden to prove, by a preponderance, that the error worked to his actual and substantial prejudice. St. Pierre, 118 Wn.2d at 329.

In general, this rule has been relaxed only when the error itself gives rise to a conclusive presumption of prejudice. St. Pierre, 118 Wn.2d at 328. For example, a petitioner who proves ineffective assistance of counsel has necessarily proven prejudice and no further showing is required on collateral review. In re Pers. Restraint of Crace, 174 Wn.2d 835, 843, 280 P.3d 1102 (2012). That is because a petitioner need not prove additional prejudice if prejudice is inherent in proving the error itself.

Amici cite Crace to argue that whenever a juvenile is sentenced without a Miller hearing, he or she is “completely deprived of the underlying constitutional protections” of Miller and Houston-Sconiers, and prejudice inheres in the proof of the error itself. Brf. of Amici, at pg. 4. But Crace refused to apply the heightened collateral review standard of prejudice because in order to establish ineffective assistance of counsel in the first place, a petitioner must establish a reasonable probability that counsel’s deficient performance prejudiced him. 174 Wn.2d at 842-43 (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 2052 (1984)).

The same cannot be said of the Eighth Amendment violation alleged here. Evidence that juvenile brains are less developed, more impulsive, more susceptible to influence, and possess a greater capacity

for change does not in itself mitigate a juvenile's culpability or warrant a mitigated sentence — certainly not for crimes that reflect significant planning, sophistication, preparation, and deliberate forethought. And not every juvenile offender can demonstrate that transient immaturity contributed to his or her crime and that he or she is capable of change or likely to be rehabilitated. Thus, proof that a Miller hearing did not occur is not in itself proof that the juvenile would have received a lesser sentence. To conclude that prejudice inheres in the error, this Court would have to hold that a juvenile is automatically entitled to a mitigated sentence by virtue of his age alone.

Moreover, a per se prejudice rule also fails to account for the large percentage of cases in which juvenile offenders accepted favorable plea offers to reduced and/or dismissed charges in exchange for their agreements that a standard-range sentence was appropriate, or in which

they pled guilty in exchange for an *agreed* mitigated sentence.⁸ It cannot be said that those juveniles were prejudiced by the absence of a Miller hearing.

Amici cites no persuasive authority or reason for this Court to erode the well-established rule that personal restraint petitioners bear the burden to prove, by a preponderance, that actual and substantial prejudice flowed from a constitutional error.

Secondly, Amici argue that in cases where sentencing courts *did* consider the mitigating qualities of youth but failed to understand the scope of their discretion under Houston-Sconiers, the general standard for prejudice on collateral review applies — the petitioner must prove by a

⁸ Amici refer to summary data from the Washington Caseload Forecast Council (CFC) regarding the number of juvenile offenders declined to adult court in fiscal years 2018 and 2019, as well as the number of mitigated sentences imposed on any offender during that same time frame. The King County Prosecuting Attorney's Office has obtained a full dataset from the CFC containing a detailed description of every felony sentence imposed statewide from mid-1999 through mid-2019. This full dataset is publicly available from the CFC pursuant to their Data Transfer and Sharing Agreement. The full dataset reveals that the total number of felony sentences in adult court from mid-1999 through mid-2019, imposed on offenders who were less than 18 years old at the time of their offenses, was approximately 5700. The dataset also establishes that the percentage of these juvenile-offender cases resolved by a plea or stipulated facts (rather than a jury or bench trial) consistently remained over 90% every year included in the dataset (mid-1999 through mid-2019). The data reveals that the percentage of juvenile offenders who pled guilty in adult court *after* Houston-Sconiers was decided has not varied to any appreciable degree from the percentage who pled guilty *before* it.

preponderance that he was actually and substantially prejudiced by the alleged constitutional error.⁹ Brf. of Amici, at pg. 5.

However, Amici go on to contend that such a standard is necessarily met whenever the court imposes a sentence other than the “top-end” of the standard range, and/or “fails to give mitigating weight” to the circumstances of youth. Amici contend that “expert testimony is not required because no child is an adult, neurodevelopmentally speaking.” Brf. of Amici, at pg. 9. They contend that the “deficits of youth exist in every child and are always mitigating.” *Id.* Thus, Amici argue, “A sentencing judge tasked with weighing a child’s diminished culpability along with other factors cannot refuse to give mitigating weight to those differences.” *Id.* at pgs. 9, 10. This Court should decline to adopt such imprecise and sweeping pronouncements.

Miller and Houston-Sconiers require more than a showing that a juvenile possesses the “hallmark features of youth.” Under Miller, the binary question is whether the juvenile offender’s *crime* reflected transient immaturity. State v. Ramos, 187 Wn.2d 420, 436, 387 P.3d 650 (2017). Miller prescribed that a sentencing court must *consider* the offender’s “chronological age and its hallmark features,” and other factors including

⁹ Amici concede that Ali’s case should be evaluated under this standard. Brf. of Amici, at pgs. 4-5.

the “the circumstances of the homicide offense,” in assessing the offender’s culpability. 567 U.S. at 477-78. The notion that age alone is necessarily mitigating is not supported by Miller or any of its progeny. The legislature and this Court have recognized that youthfulness *can* be mitigating. But it does not follow from logic, or experience, or science, or law that youthfulness *always* demands a lower sentence. It simply cannot be said that the penological justifications for every adult sentence — regardless of length — collapse due to the distinct attributes of youth. Indeed, Houston-Sconiers, while requiring that sentencing courts “must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements,” does not require that sentencing courts *must* go below the range. 188 Wn.2d at 21.

This Court should reject Amici’s far-reaching contention that a sentencing court’s imposition of any sentence other than low-end of the standard range or an exceptionally low sentence is by itself sufficient to demonstrate actual and substantial prejudice on collateral review.

3. ALI HAS NOT ADVOCATED FOR A REBUTTABLE PRESUMPTION OF A MITIGATED SENTENCE; THAT ISSUE – RAISED ONLY BY AMICUS – SHOULD NOT BE CONSIDERED IN THIS CASE.

Finally, Amici urge this Court to decide an issue not raised or briefed by the parties — whether article I, section 14 of the Washington Constitution requires a presumption of a mitigated sentence for all juveniles sentenced in adult court. This Court should decline to consider the issue because it was not raised or briefed by the parties and is squarely presented in another case currently before this Court, State v. Gregg, No. 97517-5, review granted, 194 Wn.2d 1002, 451 P.3d 341 (2019), set for oral argument on February 25, 2020. Amicus Fred T. Korematsu Center for Law and Equality has also filed an amicus brief in Gregg, and this Court will have the opportunity to address its arguments in that case.

An issue raised only by an amicus should not be considered by this Court. Satomi Owners Ass’n v. Satgmi, 167 Wn.2d 781, 819, 225 P.3d 213 (2009); State v. Gonzalez, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988). This Court adheres to this rule even when an amicus argues that the state constitution provides greater protections than the federal constitution. See State v. Clarke, 156 Wn.2d 880, 894, 134 P.3d 188 (2006) (declining to consider amicus’ argument that article I, section 21 provides greater protection of jury trial right because petitioner “did not

brief the issue, and this court does not consider arguments raised first and only by an amicus.”). This Court should decline to address Amici’s argument that a presumptive mitigated sentence is constitutionally required for juveniles.

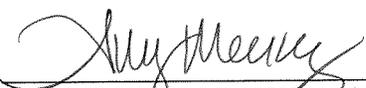
C. CONCLUSION

The State respectfully requests that this Court reject Amici’s invitation to apply Houston-Sconiers retroactively, to alter the standards for prejudice on collateral review, or to apply a presumption of a mitigated sentence for all juvenile offenders.

DATED this 3rd day of February, 2020.

Respectfully submitted,

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