

NO. 94020-7

SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JAI'MAR SCOTT

Appellant.

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AMICUS CURIAE BRIEF  
OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON,  
COLUMBIA LEGAL SERVICES, JUVENILE LAW CENTER,  
NATIONAL JUVENILE DEFENDER CENTER, TEAMCHILD,  
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE  
LAWYERS, AND WASHINGTON DEFENDER ASSOCIATION

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## **I. IDENTITY AND INTEREST OF AMICI**

The identity and interest of *Amici* are set forth in the concurrently filed Motion for Leave to File Amicus Curiae Brief, which is hereby incorporated by reference.

## **II. INTRODUCTION**

The United States Supreme Court has made clear that children are fundamentally, constitutionally different than adults when it comes to sentencing. *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Advances in social and brain science have confirmed that the hallmark features of youth are factors that mitigate culpability. These factors must be considered to comply with the Eighth Amendment, particularly when meting out the harshest of sentences to children. And *Miller* is a substantive rule of constitutional law that is retroactively applicable. *Montgomery v. Louisiana*, 577 U.S. \_\_\_, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016).

Washington State has thoroughly embraced *Miller* and the principles underlying it to protect the right of children to be free from cruel and unusual punishment. In recent years, this Court has repeatedly held that juvenile sentences that fail to address the mitigating qualities of youth are unconstitutional and has rejected efforts to limit *Miller's* scope. This Court has made clear that *prior* to any consideration of early release from a life equivalent sentence, when adult court sentences are imposed for crimes committed as a juvenile, Washington law and values, and the

Constitution, all *first* require a *sentence* that reflects the mitigating qualities of youth.

It is undisputed that Jai'Mar Scott was sentenced unconstitutionally under *Miller*, which is retroactively applicable. The Court of Appeals erroneously held, however, that Scott's motion for resentencing was time barred. As set forth in Defendant's Supplemental Brief and below, the Court of Appeals' reasoning was legally flawed. There is no procedural bar to the consideration of Scott's request. Further, the State's arguments about the narrow scope of Scott's rights under *Miller* and the adequacy of other remedies are contrary to Washington law and should be rejected. Scott's sentence was unconstitutional and the necessary remedy is resentencing.

### **III. STATEMENT OF THE CASE**

Twenty-seven years ago, Jai'Mar Scott received a 900 month (75 year) sentence for a murder committed when he was 17 years old, despite the standard adult sentencing range of 240 to 320 months, the standard juvenile sentencing range of 180 to 224 weeks, and his offender score of zero. *See State v. Scott*, 72 Wn. App. 207, 210, 866 P.2d 1258 (1993); RCW 13.40.0357 (1989). Under the law at the time, there was no consideration by the sentencing court of the fact that Scott was a child at the time of the crime, with diminished capacity and culpability. Scott's arguments on appeal about this error were rejected, under the law at the time, as approaching the "absurd." *Scott*, 72 Wn. App. at 218.

In 2016, Scott, who is now 45 years old, filed a CrR 7.8 motion requesting that his unconstitutional sentence be vacated and that he be resentenced in a manner consistent with the constitutional requirements set forth in *Miller* and related cases. *See State v. Scott*, 196 Wn. App. 961, 964, 385 P.3d 783 (2016). The trial court granted the motion and ordered a resentencing that would comply with the law. *Id.*

On the State's appeal, the Court of Appeals reversed, holding that Scott's resentencing motion was untimely under RCW 10.73.090 as a collateral attack not brought within one year. *Id.* at 972. The Court of Appeals concluded that the exception to the one-year time bar for retroactively applicable significant changes in the law such as *Miller* made no difference. *Id.* This Court granted review.

#### **IV. ARGUMENT**

##### **A. Scott's Motion For Resentencing Is Not Procedurally Barred**

##### **1. The Court of Appeals erred in holding that Scott's motion was untimely, because the "material" "significant change in the law" requirement was met.**

A collateral attack filed more than one year after the underlying judgment will not be considered time barred by RCW 10.73.090 when it is based on a retroactively applicable "significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered." RCW 10.73.100(6). In this case, there is no dispute that *Miller* constituted a retroactively applicable, significant change in the law. *See Scott*, 196 Wn. App. at 965; *see also* Supp. Brief of Respondent

p. 19. Nonetheless, the Court of Appeals held that RCW 10.73.100(6) did not apply because *Miller* was not “material” to Scott’s unconstitutional sentence, and thus that Scott’s motion for resentencing was time barred. *Scott*, 196 Wn. App. at 972. The Court notably did not cite any authority concerning “materiality” under RCW 10.73.100(6). Its decision was error.

In its opinion, the Court of Appeals reasoned that *Miller* is not material to Scott’s sentence because RCW 9.94A.730 now provides Scott with the opportunity to petition the Indeterminate Sentencing Review Board (“ISRB”) for early release from his unconstitutional sentence. *Id.* at 971-72. Likewise, the State argues that *Miller* is not material to Scott’s sentence because the enactment of RCW 9.94A.730 “provides the necessary relief to remedy any constitutional violation.” Supp. Brief of Respondent p. 19. The analysis urged by the State and adopted by the Court of Appeals is flawed for at least two related reasons.

First, the Court of Appeals’ analysis evaluated the element of “materiality” at the wrong point in time. The Court essentially reasoned that *Miller* is immaterial because Scott has an opportunity to request release *now*, in light of subsequent legislative changes, rather than addressing the real question, which is whether *Miller* is material to Scott’s *actual sentence at the time it was entered*. This post-hoc analysis is inconsistent with the plain language of RCW 10.73.100(6) as well as the uniform Washington case law describing its requirements.

The statute itself directly contemplates assessing materiality by reference to the sentence as entered. It specifically uses the past-tense

phraseology “material to the conviction, sentence, or other *order entered*.” RCW 10.73.100(6) (emphasis added); *see also, e.g., In re Pers. Restraint of Greening*, 141 Wn.2d 687, 698, 9 P.3d 206 (2000) (“The plain language of RCW 10.73.100(6) exempts any legal ground based on a ‘significant change in the law’ *material to the court order being challenged*.”) (emphasis added). In other words, the assessment is whether the relevant change in the law was material at the time of or with respect to the original *court order entered*. Nothing in the statutory language suggests otherwise.

Likewise, Washington cases have repeatedly affirmed that the element of “materiality” is evaluated jointly with the element of “significant change” and assessed by reference to whether the law *was material to the original proceedings*. *See, e.g., In re Pers. Restraint of Colbert*, 186 Wn.2d 614, 619, 380 P.3d 504 (2016) (“A significant change in the law occurs when an intervening opinion has effectively overturned a prior appellate decision *that was originally determinative of a material issue*.”) (emphasis added) (quotations omitted); *In re Pers. Restraint of Tsai*, 183 Wn.2d 91, 104, 351 P.3d 138 (2015) (same); *In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 11, 84 P.3d 859 (2003) (same).

Here, there can be no debate that *Miller* effected a significant change in law “that was originally determinative of a material issue.” *Colbert*, 186 Wn.2d at 619. In his original appeal, Scott specifically argued that his youth “limited his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.” *Scott*, 72 Wn. App. at 218-19 (quotations omitted). The Court rejected his

arguments as “border[ing] on the absurd,” reasoning that “[p]remeditated murder is not a common teenage vice.” *Id.* This reasoning was both originally determinative of Scott’s initial appeal and plainly erroneous under *Miller*, which specifically noted “that the distinctive attributes of youth diminish the penological justification for imposing the harshest punishments on juvenile offenders, even when they commit terrible crimes.” 567 U.S. at 472. The change in law was determinative of a material issue in the original court order entered, and the materiality element is thus satisfied under settled Washington law.

Second, the Court of Appeals’ analysis wrongly conflated the *procedural* issue of whether the change in law was material to the original sentence (i.e., timeliness) with the *substantive* issue of whether Scott was entitled to resentencing to remedy his unconstitutional sentence. Neither the Court of Appeals nor the State have cited any authority for importing such merits considerations into the evaluation of the procedural bar, and there is no such authority in either the statute or the relevant case law.

Moreover, by conflating procedural and merits issues, the Court of Appeals’ analysis was inconsistent with the very purpose of RCW 10.73.100(6) and the public policies that underlie its exception to the one-year bar. Under its flawed “materiality” reasoning, claims can be considered time barred even though they are based on arguments that could not have been made at the time of direct appeal (or, as here, arguments that were made but were rejected under the law at the time, which was subsequently determined to be erroneous by the significant

change in the law at issue). Such a result is contrary to the entire point of RCW 10.73.100(6), as this Court has previously explained:

*While litigants have a duty to raise available arguments in a timely fashion and may later be procedurally penalized for failing to do so . . . they should not be faulted for having omitted arguments that were essentially unavailable at the time, as occurred here.* We hold that where an intervening opinion has effectively overturned a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a ‘significant change in the law’ for purposes of exemption from procedural bars.

*Greening*, 141 Wn.2d at 697 (emphasis added); *see also Tsai*, 183 Wn.2d at 104 (explaining that the exception “is intended to *reduce* procedural barriers to collateral relief in the interests of fairness and justice”) (emphasis in original). Regardless of whether Scott is entitled to resentencing as a remedy, his *Miller* claim is not time barred.

Indeed, this Court has already indicated that *Miller* was material to sentences such as Scott’s. In *In re Pers. Restraint of Thomas*, 180 Wn.2d 951, 952, 330 P.3d 158 (2014), this Court considered a personal restraint petition filed more than one year after the judgment that included a *Miller* claim. The Court dismissed the petition in a per curiam opinion “as mixed and time barred” because one of the claims was a state constitutional claim that could have been asserted earlier. *Id.* With respect to the *Miller* claim, however, this Court explained: “We recognize that Thomas’s claim premised on *Miller* may not be time barred; if we agreed with Thomas that the rule in *Miller* applies retroactively, *then that claim satisfies the*

exception to the one-year time bar in RCW 10.73.100(6) and we could reach its merits.” *Id.* (emphasis added).<sup>1</sup> Thus, at least implicitly, this Court confirmed in *Thomas* that *Miller* is “material” to a sentence imposed in violation of the *Miller* rule. *Id.* It is now settled that the rule in *Miller* does apply retroactively. *Montgomery*, 136 S. Ct. at 736. Thus, under the reasoning in *Thomas*, Scott’s *Miller* claim is not time barred.

**2. The State’s contention that Scott has not been prejudiced by his unconstitutional sentence is meritless.**

The State has also made the similarly flawed argument that Scott should not be entitled to resentencing because he has not been actually and substantially prejudiced by his unconstitutional sentence, in light of the procedure for requesting early release provided by RCW 9.94A.730. *See* Supp. Brief of Respondent p. 19-20. This argument, too, confuses a threshold issue, prejudice, with the separate merits issue of whether Scott is entitled to a remedy. This Court rejected the identical argument in *In re Pers. Restraint of McNeil*, 181 Wn.2d 582, 589, 334 P.3d 548 (2014), where the State had moved to dismiss a *Miller* claim for lack of prejudice. This Court held: “The State’s argument wrongly conflates a threshold showing of prejudice with the availability of other adequate remedies.” *Id.* at 590. This Court further acknowledged that “the *Miller* fix indicates

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<sup>1</sup> Likewise, in *In re Pers. Restraint of Boone*, No. 88993-7, 2015 Wash. LEXIS 404 (Wash. Apr. 3, 2015), a unanimous Department of this Court (Chief Justice Madsen and Justices Owens, Stephens, Gonzalez and Yu) dismissed a personal restraint petition involving a *Miller* claim as mixed because it also raised untimely state constitutional issues, but again stated: “We recognize that Boone’s *Miller* claim may not be time barred and that if we agreed with Boone that the rule in *Miller* applies retroactively, then that claim satisfies the exception to the one-year time bar in RCW 10.73.100(6).” *Id.* at \*1.

that noncompliance with *Miller* is per se prejudicial.” *Id.* There is no procedural basis for denying Scott’s request for relief.

**B. Resentencing Is The Necessary Remedy To Cure Scott’s Unconstitutional Sentence**

**1. Children are constitutionally different.**

As this Court knows well, in the last fifteen years, juvenile brain development science and social science has informed a major constitutional shift. With respect to sentencing, “children are constitutionally different,” as they have “diminished culpability and greater prospects for reform.” *Miller*, 567 U.S. at 471. This constitutional principle is based in part on the scientific reality that juveniles suffer from a “lack of maturity and an underdeveloped sense of responsibility,” “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” and do not have a character that is “as well formed as that of an adult.” *Roper v. Simmons*, 543 U.S. 551, 569-70, 125 S. Ct. 1183, 161 L. Ed. 2d (2005) (citations omitted).

In *Miller*, the United States Supreme Court held that imposing life without parole sentences on juveniles whose crime reflected the transient immaturity of youth violated the Eighth Amendment, and that all of the mitigating qualities of youth must be evaluated before a sentence of life without parole may be imposed. 567 U.S. at 469-80. To satisfy constitutional requirements, any such sentence must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison,” and must give due

consideration to the child’s “diminished culpability and heightened capacity for change.” *Id.* at 479-80. Recognizing the substantive significance of *Miller*’s change in the law, the rule announced in *Miller* has been held retroactively applicable. *Montgomery*, 136 S. Ct. at 732.<sup>2</sup>

**2. Washington courts have broadly applied the lessons of *Miller* and related cases.**

Since *Miller*, Washington courts have repeatedly recognized the broad constitutional principles articulated in that decision and its predecessors, and rejected attempts to narrow its scope. Despite this clear precedent, the State urges this Court to interpret *Miller* as requiring only that the State “give most juvenile offenders a meaningful opportunity for release from prison within their natural lifetimes.” Supp. Brief of Respondent p. 6. This interpretation is contrary to repeated decisions by this Court emphasizing the importance of fully considering the mitigating qualities of youth at the time of sentencing, and should be rejected.

For example, in *State v. O’Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), this Court held that “a defendant’s youthfulness can support an exceptional sentence below the standard range . . . and that the sentencing

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<sup>2</sup> After *Miller*, states began attempting to address their unconstitutional sentencing schemes. See *Montgomery*, 136 S. Ct. at 736 (noting the “grave risk that many are being held in violation of the Constitution”). In 2014, the Washington Legislature enacted statutes purporting to address *Miller* violations in the state. See 2013 Bill WA S.B. 5064 (proposing three changes to Washington law to address *Miller*); RCW 10.95.030 (amended June 1, 2014) (amending aggravated first degree murder sentencing to prevent juvenile mandatory life without parole sentences); RCW 10.95.035 (effective June 1, 2014) (directing resentencing for juveniles mandatorily sentenced to life without parole); RCW 9.94A.730 (effective June 1, 2014) (adding parole opportunity, after twenty years of confinement, for juveniles sentenced under other adult sentencing schemes).

court must exercise its discretion to decide when that is.” *Id.* at 698-99. Notably, the defendant was 18 at the time of his crime, yet this Court confirmed *Miller* applied, referencing both the *Miller* line of cases and the literature about the fundamental differences of youth. *Id.* at 680, 683. It candidly acknowledged that the legal reasoning in some prior state decisions about the sentencing of children had been “thoroughly undermined by subsequent scientific developments.” *Id.* at 680. Poignantly, this Court specifically identified Scott’s direct appeal as just such an example. *Id.* at 694-95. The *O’Dell* decision confirmed that the need to consider the mitigating factors of youth in Washington extends beyond only those facing the harshest punishments.

In *State v. Ramos*, 187 Wn.2d 420, 387 P.3d 650 (2017), this Court unanimously rejected several State arguments for limiting the applicability of *Miller*, and held that *Miller*’s requirements extended to sentences imposed for multiple homicides and to those facing de facto (not just literal) sentences of life imprisonment without parole, including through aggregated sentences.<sup>3</sup> *Id.* at 437-39. This Court went on to hold that every case where a juvenile faces a sentence of life without parole or its functional equivalent must include a *Miller* hearing by the sentencing court. *Id.* at 443. Further, it emphasized that a *Miller* hearing “is not an

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<sup>3</sup> Division One of the Court of Appeals had previously reached the same conclusion. In *State v. Ronquillo*, 190 Wn. App. 765, 361 P. 3d 779 (2015), the Court held that *Miller* extended to “de facto life sentence[s].” *Id.* at 775. It further held that the defendant’s 51-year sentence was unconstitutional because it was determined without consideration of *Miller* and that the “*Miller* fix” under RCW 9.94A.730 did “not correct the error,” which had to be “corrected in the trial court” on resentencing. *Id.* at 779.

ordinary sentencing proceeding,” and that to satisfy constitutional requirements under *Miller* the court conducting the hearing must comply with specified procedural safeguards. *Id.* at 443-44. In doing so, this Court again underscored the need to observe *Miller*’s mandate.

Most recently, in *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), this Court again applied *Miller* to reverse sentences of 26 and 31 years against children convicted of multiple counts of armed robbery. This Court held that courts must have absolute discretion to consider the mitigating circumstances associated with youth and to depart as far as they want below any otherwise applicable sentencing ranges or enhancements when sentencing juveniles. *Id.* at 9, 21. It explained that the Eighth Amendment requires that all criminal procedure laws take youthfulness into account, as described in *Miller*, and held that to the extent any state statutes have been interpreted by prior court rulings to bar discretion when sentencing juveniles, those rulings were overruled. *Id.* This Court acknowledged that its decision was an expansion of constitutional principles beyond those specifically addressed by the United States Supreme Court, but found the decision required by the Eighth Amendment’s mandate to treat children differently. *Id.* at 20. The fundamental principle articulated in *Houston-Sconiers* is that sentencing courts “must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence” taking those qualities into

account. *Id.* at 21. Any sentence imposed otherwise is unconstitutional.

*Id.*<sup>4</sup>

**3. RCW 9.94A.730 does not eliminate the need for Scott to obtain a resentencing that remedies his unconstitutional sentence.**

The State argues that Scott should be prohibited from obtaining resentencing as relief for his unconstitutional sentence because of RCW 9.94A.730, which provides that children sentenced to life in prison without parole for crimes other than aggravated murder will under certain circumstances have the opportunity to apply for early release once they have served at least twenty years in prison. The State’s position should be rejected. It defies common sense that children convicted of aggravated murder are entitled to a resentencing hearing in court fully compliant with *Miller* (RCW 10.95.035) while the State contends that children convicted of lesser crimes are prohibited from obtaining that same relief.

Taken together, the relevant federal and Washington cases establish that in Washington a juvenile sentence that was imposed without due consideration of the mitigating qualities of youth is unconstitutional. The constitutional violation inheres in the flawed sentencing itself. This

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<sup>4</sup> In the most recent state decision involving the sentencing of children, *State v. Bassett*, 198 Wn. App. 714, 394 P.3d 430 (2017), Division Two of the Court of Appeals held that juvenile life without parole sentences violate the Washington State Constitution, and thus that RCW 10.95.030(3) (part of the “*Miller* fix”) is unconstitutional. The Court explained that “the *Miller*-fix statute results in an unacceptable risk that juvenile offenders whose crimes reflect transient immaturity will be sentenced to life without parole or early release because the sentencing court mistakenly identifies the juvenile as one of the uncommon, irretrievably corrupt juveniles.” *Id.* at 742. The Court recognized that “Washington’s jurisprudence has embraced the reasoning of *Miller*” and its predecessors, “and has built upon it.” *Id.* at 737 (quotations omitted).

violation is not cured by providing a limited potential opportunity for early release, twenty years later, based on factors unrelated to the reason the sentence was unconstitutionally flawed. Instead, consistent with ample authority and as the trial court recognized, Scott must first receive a resentencing hearing that complies with the constitutional requirement to consider the mitigating qualities of youth.

The circumstances at issue in this Court's *McNeil* decision provide a useful comparison. There, this Court held that, for juveniles who received life in prison without parole sentences for aggravated murder, the state's applicable "Miller fix" statute (RCW 10.95.035) provided an adequate remedy. *McNeil*, 181 Wn.2d at 590-93. But that statute provides that such juveniles have to be resentenced in a process compliant with *Miller*. *Id.* at 590. The law expressly requires the resentencing court to take into account all mitigating qualities of youth. *See* RCW 10.95.030(3) ("[T]he court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller*."). Because the statute guarantees a full resentencing considering the *Miller* factors, this Court found that the petitioners' constitutional interests were adequately protected by the statute. *McNeil*, 181 Wn.2d at 593.

In stark contrast, the applicable statute here (RCW 9.94A.730) does not fully protect Scott's constitutional interests. It does not provide for any resentencing, let alone one sufficient to address all pertinent *Miller* factors. Instead, the statute merely offers the potential opportunity for some individuals to apply for early release after serving at least twenty

years in prison under an unconstitutionally imposed sentence. Moreover, the factors to be considered in assessing the possibility of early release do not include the mitigating qualities of youth, as required by *Miller* (and Washington's other "*Miller fix*" statute, which was considered in *McNeil*). Rather, the focus is on general public safety factors unrelated to the unconstitutionality of the underlying sentence. *See* RCW 9.94A.730(3); *see also* Indeterminate Sentence Review Board, Frequently Asked Questions, at <http://doc.wa.gov/corrections/isrb/faq.htm#consider-release> (listing factors considered by the ISRB in determining whether to release an individual, including the initial sentence imposed and prosecutor's recommendation at sentencing, scores on actuarial risk assessments, responsivity to programming, institutional behavior, and victim input).

The distinction between resentencing to a constitutionally valid sentence and the mere opportunity to request release from the ISRB was powerfully articulated by this Court in *Houston-Sconiers*. The State had argued there that RCW 9.94A.730 satisfied the requirements of *Miller* and thus made it unnecessary to address the constitutionality of the defendants' sentences, which this Court ultimately vacated. This Court rejected the State's position:

*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. But [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 22-23. In other words, the fact that RCW 9.94A.730 provided the juveniles there with an opportunity to request release after twenty years was not adequate to cure the constitutional violation. *Id.*

The State claims that Scott's sentence has been "converted" to "an indeterminate sentence of 20 years to life" because the statute offers a procedure to seek early release. Supp. Brief of Respondent p. 16. This statement is inaccurate; in fact, Scott is still serving a sentence of 900 months (75 years). It is also contrary to Washington law. This Court, in *Houston-Sconiers*, specifically rejected the State's position that RCW 9.94A.730 cures a sentence that violates *Miller*, 188 Wn.2d at 22-23, and has long held that the constitutionality of a sentence is assessed based on its literal meaning, without considering the possibility of early release. *See State v. Fain*, 94 Wn.2d 387, 395, 617 P.2d 720 (1980).

In *Houston-Sconiers*, this Court acknowledged that it was only addressing RCW 9.94A.730 in the context of a direct appeal, leaving for another day the relevance of the statute on collateral review. 188 Wn.2d at 22-23. But with respect to whether RCW 9.94A.730 cures a sentence that is unconstitutional for failing to address the mitigating qualities of youth, there is no distinction between a direct or collateral attack that could merit a different conclusion. This matter is properly presented to this Court on collateral review under state law (it is timely and otherwise

proper). And whether the posture is direct or collateral, the fact remains that RCW 9.94A.730 does not address the underlying unconstitutionality of the sentence, as this Court has already concluded. Although finality interests are appropriately considered on collateral review, resentencing the small number of individuals who received life equivalent sentences for crimes other than aggravated murder will not be an onerous burden, and any burden is well outweighed by the state interest in correcting the serious error of imposing unconstitutional sentences on children. In any event, finality interests cannot transform RCW 9.94A.730 from a statute that does not cure the constitutional violation, as confirmed in *Houston-Sconiers*, into one that does.

Furthermore, upholding Scott's right to a resentencing hearing in the trial court is consistent with the many Washington cases recognizing that an illegal sentence can be corrected at any time and that a board that considers petitions for release, like the ISRB, lacks the authority to change an illegal sentence. *See In re Pers. Restraint of Phelan*, 97 Wn.2d 590, 596, 647 P.2d 1026 (1982) (granting personal restraint petition and remanding for resentencing where the Board of Prison Terms and Paroles attempted to correct the trial court's sentencing order and noting that "[i]f the trial court had erred in its sentencing of petitioner, the appropriate procedure would be to return him to the trial court for resentencing"); *see also, e.g., In re Pers. Restraint of Call*, 144 Wn.2d 315, 334-35, 28 P.3d 709 (2001) (granting inmate's personal restraint petition and remanding for resentencing, stating that courts "have the duty and power to correct an

erroneous sentence upon its discovery,” even on collateral attack); *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999) (“It has been the consistent holding of this court that the existence of an erroneous sentence requires resentencing.”), *superseded by statute on other grounds*, RCW 9.94A.530(2); *Brooks v Rhay*, 92 Wn.2d 876, 877, 602 P.2d 356 (1979) (same); *State v. Pringle*, 83 Wn.2d 188, 193, 517 P.2d 192 (1973) (remanding case to trial court for correction of “erroneous and invalid sentence” and noting that the court “has the power and the duty” to do so).

The State places great emphasis on the United States Supreme Court’s dicta in *Montgomery* indicating that states could potentially remedy a *Miller* violation through a parole process rather than by resentencing. But this comment merely recognizes that it is *possible* a state could create a post-sentencing process that would constitute an adequate remedy for a *Miller* violation. No such process exists in Washington. This Court has already held that RCW 9.94A.730 does not satisfy the requirement imposed by *Miller*, and its underlying principles, that there be a constitutionally valid sentence in the first place. *See Houston-Sconiers*, 188 Wn.2d at 22-23 (holding that RCW 9.94A.730 does not satisfy *Miller*); *see also Ramos*, 187 Wn.2d at 443-44 (describing the procedures needed to comply with *Miller*).

Moreover, the Supreme Court’s dicta in *Montgomery* that *Miller* did not necessarily require states to re-litigate sentences came within the context of its analysis of federal retroactivity law. *Montgomery*, 136 S. Ct. at 736. The underlying federalism and comity considerations counseling

against federal interference with the finality of state proceedings, *id.*, are inapplicable here, in the context of state collateral review proceedings. *See, e.g., Tsai*, 183 Wn.2d at 104 (discussing differences between federal retroactivity analysis and state law analysis of opportunity for collateral relief); *Danforth v. Minnesota*, 552 U.S. 264, 279-82, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008) (holding that federal retroactivity analysis is not binding on state courts and does not limit state authority to fashion remedies serving their own state values).

The mechanism by which Washington addresses its past imposition of unconstitutional sentences upon children is a matter of state interest and state values. Washington courts are entirely free to, and should, ensure that the process followed in Washington is not just the bare minimum necessary to satisfy potential federal habeas concerns, but in fact fully remedies the violation and addresses all aspects of *Miller* and its underlying principles. RCW 9.94A.730 is not that type of remedy. *See Houston-Sconiers*, 188 Wn.2d at 22-23. Washington has never treated the opportunity for release from an unconstitutional sentence as an adequate substitute for receiving a constitutional sentence in the first place, and it should not do so now. Regardless of the *Montgomery* dicta, this Court should hold that in Washington juveniles sentenced in violation of *Miller* are entitled to resentencing.

V. **CONCLUSION**

For the reasons set forth herein, this Court should reverse the decision of the Court of Appeals and remand to the trial court for a new sentencing consistent with constitutional requirements.

Respectfully submitted this 28th day of July, 2017.

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DECLARATION OF SERVICE

I certify that on the date below, I caused the foregoing to be served on all parties of record and amicus curiae via the Washington State Appellate Courts' Portal.

DATED this 28th day of July, 2017.

/s/ Shawn Larsen-Bright  
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# DORSEY & WHITNEY LLP

July 28, 2017 - 11:06 AM

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