

NO. 94020-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

JAI'MAR SCOTT,

Respondent.

**SUPPLEMENTAL BRIEF OF APPELLANT-RESPONDENT
STATE OF WASHINGTON ADDRESSING STATE V. FAIN**

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A. SUPPLEMENTAL ARGUMENT ADDRESSING STATE V. FAIN.

For the first time in his supplemental brief, Scott cites to State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980), to argue that the opportunity for release cannot be an adequate remedy to an Eighth Amendment violation even though such a remedy was explicitly approved in Montgomery v. Louisiana, ___ U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). His reliance on Fain is misplaced.

First of all, Fain involved a direct appeal, not a collateral attack. A defendant challenging a sentence on direct appeal need only show a constitutional violation that was not harmless beyond a reasonable doubt. In contrast, a petitioner challenging a sentence through a collateral attack needs to show actual and substantial prejudice from a constitutional error, and that other remedies are inadequate. In re Pers. Restraint of Lord, 152 Wn.2d 182, 188, 94 P.3d 952 (2004); RAP 16.4(d). If Scott had recently been sentenced and was challenging his sentence as a violation of Miller on direct appeal, he would be entitled to resentencing if this Court found a Miller violation. But that is not the case for an offender challenging a sentence in a collateral attack, as was explicitly recognized in Montgomery, and noted by this Court in

State v. Ramos, 187 Wn.2d 420, 458, 387 P.3d 650 (2017), and

State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017).

This Court has thus previously acknowledged the adequacy of parole eligibility for cases long final, as opposed to cases on direct appeal. In Ramos, this Court stated, “We acknowledge that the Supreme Court has held that for cases on collateral review, 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. However, this case is before us on direct appeal.” Ramos, 187 Wn.2d at 436 (citing Montgomery, 136 S. Ct. at 736). In Houston-Sconiers, this Court stated, “Indeed, the only time the Supreme Court has spoken approvingly of a postsentencing Miller ‘fix’ such as extending parole eligibility to juveniles is when addressing how to remedy a conviction and sentence that were long final.” Houston-Sconiers, 188 Wn.2d at 20. Thus, to the extent that Fain would affect the Eighth Amendment analysis on direct appeal, it does not apply to Scott’s collateral attack.

Second, Fain was explicitly based on article I, section 14 of the Washington State Constitution banning cruel punishment. Fain, 94 Wn.2d at 391-93; WA. CONST. art. I, sec. 14. Scott has not cited

to the state constitution in his briefing, nor argued that the state constitution requires a different result than the Eighth Amendment in his case.

Third, the parole possibility in Fain was far more speculative than the right to petition for release afforded to Scott under RCW 9.94A.730. In that case, Fain was found by a jury to be a habitual offender pursuant to former 9.92.090. Fain, 94 Wn.2d at 390. That statute authorized an indeterminate sentence of "life imprisonment" for certain repeat offenders. Id. at 390, n.2. Fain received such a sentence after having been convicted three times of nonviolent theft-related crimes. Id. at 389-90. Because the United States Supreme Court had already rejected an Eighth Amendment claim under similar facts in Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980), this Court turned to the state constitution, which bars the infliction of cruel punishment. Fain, 94 Wn.2d at 391-93. The Court rejected the State's argument that the sentence should not be considered a life sentence because of the availability of parole. Id. at 393. The Court noted that the availability of parole in Fain's case was anything but clear. Once sentenced to "life" by the sentencing court, the Board of Prison Terms and Paroles was allowed to establish the habitual offender's

minimum term at anything from 15 years to life. Id. Prisoners could obtain up to one-third credit for good behavior. Id. Thus, Fain could have been eligible for parole after serving 10 years, *if* the board set his minimum term at 15 and *if* he earned good time. Id. However, that was simply “theoretically” possible. Id. The board had authority to refix an offender’s minimum term to a higher term, up to life, making it possible he would never be eligible for parole. Id. at 394-95. In light of the speculative nature of the opportunity for parole, the Court rejected the invitation to treat Fain’s sentence as if it were only a 15-year sentence. Id. at 394. Noting that there was no right to parole, and that the board’s parole decision was not subject to judicial review, this Court concluded it should view Fain’s sentence as a life sentence. Id. at 395.

In contrast to the parole eligibility scheme at issue in Fain, RCW 9.94A.730 affords Scott the right to petition for release after 20 years of incarceration. Thus, the opportunity of parole is in no way speculative. RCW 9.94A.730 also provides a presumption of release and a standard for the ISRB to apply: whether it is more likely than not that Scott will commit new criminal law violations if released. RCW 9.94A.730(3). The statute requires the Department to offer services and programming that will make

release more likely. And even if denied released, or if released and then re-incarcerated, additional opportunities for release are afforded at least every five years. RCW 9.94A.730(6) and (7). And, the ISRB decision is subject to judicial review. In re Pers. Restraint of Dyer, 164 Wn.2d 274, 189 P.3d 759 (2008).

Finally, Fain involved a categorical bar to a particular sentence for a particular type of offense. However, the Eighth Amendment does not categorically bar a juvenile offender from serving a life sentence for a homicide. Parole is more than just a relevant consideration in the Eighth Amendment analysis based on this line of cases. The Court has explicitly held that the possibility for parole is what the Eighth Amendment guarantees juvenile offenders pursuant to Graham v. Florida,¹ Miller v. Alabama,² and Montgomery v. Alabama.

Fain is thus inapposite for four reasons. First, Fain was a direct appeal, not a collateral attack. Second, Fain was based on the state constitution. Third, the statutory structure that made parole eligibility only theoretically available in Fain did not guarantee multiple opportunities for release, as does RCW

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

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

9.94A.730. And finally, the Eighth Amendment does not categorically bar life imprisonment for a juvenile homicide offender such as Scott, but instead guarantees an opportunity for parole.

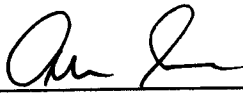
B. CONCLUSION

In sum, the opportunity for release after 20 years, guaranteed by RCW 9.94A.730, is a constitutionally adequate remedy that prevents Scott's incarceration from constituting cruel and unusual punishment under the Eighth Amendment.

DATED this 8th day of August, 2017.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

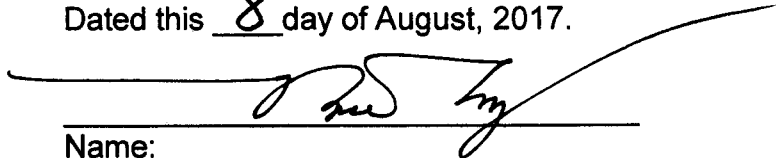
By: 
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jeffrey Ellis, the attorney for the petitioner, at jeffreyerwinellis@gmail.com, containing a copy of the Supplemental Brief of Appellant-Respondent State of Washington Addressing State v. Fain in State v. Jaimar Eli Scott, Cause No. 94020-7 in the Supreme Court for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 8 day of August, 2017.

A handwritten signature in black ink, appearing to read "J. Paul King", is written over a horizontal line. The signature is fluid and cursive.

Name:
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Shawn Larsen-Bright, Nancy Talner and Vanessa Hernandez, the attorneys for the amicus curiae at Larsen.bright.shawn@dorsey.com, talner@aclu-wa.org, and vhernandez@aclu-wa.org, containing a copy of the Supplemental Brief of Appellant-Respondent State of Washington Addressing State v. Fain in State v. Jaimar Eli Scott, Cause No. 94020-7 in the Supreme Court for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 8 day of August, 2017.

A handwritten signature in black ink, appearing to read "Shawn Larsen-Bright", written over a horizontal line.

Name:
Done in Seattle, Washington

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