NO. 91687-0
Court of Appeals No. 46002-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GUADALUPE SOLIS-DIAZ,

Appellant.

MEMORANDUM OF AMICI CURIAE WASHINGTON DEFENDER ASSOCIATION; AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON; WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; and FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF APPELLANT'S MOTION TO TRANSFER CASE

GREGORY C. LINK
Attorney for Amicus
WASHINGTON DEFENDER ASSOCIATION
1511 Third Avenue, Suite 701
Seattle, WA 9810
(206) 522-1821
greg@washapp.org

NANCY L. TALNER
Attorney for Amicus
ACLU-WA Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184

Additional Counsel Listed Inside Cover

SUZANNE LEE ELLIOTT
Attorney for Amicus
WASHINGTON ASSOCIATION
OF CRIMINAL DEFENSE
LAWYERS
705 2nd Avenue, Suite 1300
Seattle, WA 98104-1797
(206) 623-0291

ROBERT S. CHANG
Attorney for Amicus
FRED T. KOREMATSU
CENTER FOR LAW
AND EQUALITY
901 12th Avenue
Seattle, WA 98122
(206) 398-4025
changro@seattleu.edu

TABLE OF CONTENTS

A. INTRODUCTION 1

B. INTEREST OF AMICI CURIAE 1

C. SUMMARY OF ISSUE TO BE ADDRESSED BY AMICI 2

D. ARGUMENT 3

Because a prompt determination of the application of *Miller* in Washington is needed this Court should grant appellant's motion to transfer 3

E. CONCLUSION 7

TABLE OF AUTHORITIES

Washington Supreme Court

In re the Personal Restraint of Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012) 4
State v. Ha'mim, 132 Wn.2d 834, 940 P.2d 633 (1997) 4
State v. Law, 154 Wn.2d 85, 110 P.3d 717 (2005) 4

Washington Court of Appeals

State v. Scott, 72 Wn. App. 207, 866 P.2d 1258 (1993) 5

United States Supreme Court

Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) 3, 4
J.D.B. v. North. Carolina, __ U.S. __, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) 3
Miller v. Alabama, __ U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) ..... passim
Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed.2d 1 (2005) 3

Statutes

RCW 9.94A.730 6

A. INTRODUCTION

Appellant Guadalupe Solis-Diaz has filed a motion to transfer his appeal from the Division Two of the Court of Appeals to this Court. Because of the significant constitutional questions presented and the need for a definitive ruling by this Court, *amici curiae* ask this Court to grant that motion. *Amici* have filed a separate motion to file an amicus memorandum in support of the motion to transfer.

B. INTEREST OF AMICI CURIAE

The Washington Defender Association ("WDA") is a statewide non-profit organization whose membership is comprised of public defender agencies, attorneys who represent indigent defendants and those who are committed to seeing improvements in indigent defense.

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 50,000 members and supporters, dedicated to the principles of liberty and equality embodied in the United States Constitution and the Washington Constitution.

The Washington Association of Criminal Defense Lawyers ("WACDL") is a nonprofit association of more than 1100 attorneys practicing criminal defense in Washington. As stated in its bylaws,

WACDL's objectives include "to protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, and to resist all efforts to curtail such rights."

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center"), based at Seattle University School of Law, advances justice through research, advocacy, and education. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

The organizations have had numerous briefs accepted by this and other courts in the past.

C. SUMMARY OF ISSUE TO BE ADDRESSED BY AMICI

Amici urge this Court to grant appellant's motion to transfer this case pursuant to RAP 4.4. The issues raised in appellant's case are arising in increasing numbers in cases across the State. In those cases, as here, lower courts are in need of guidance as to the proper application of the dictates of *Miller v. Alabama*, __ U.S. __, 132 S. Ct. 2455, 2467, 183 L. Ed. 2d 407 (2012). *Amici* contend there is a growing urgency for resolution of the questions which arise in these cases. This case provides a good vehicle to address these issues, as the

claims were properly presented to the sentencing court and the arguments fully developed.

D. ARGUMENT

Because a prompt determination of the application of *Miller* in Washington is needed this Court should grant appellant's motion to transfer.

Miller recognized

> [Y]outh is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuousness, and recklessness. It is a moment and condition of life when a person may be most susceptible to influence and to psychological damage. And its signature qualities are all transient.

Miller, 132 S. Ct. at 2467 (internal quotations, citations and brackets omitted). Based upon this recognition that juveniles are both categorically less culpable and more amenable to rehabilitation than adults, they must be treated differently by the justice system. *See Id*. (barring sentence of life without possibility of parole for homicide for juveniles); *J.D.B. v. North. Carolina*, __ U.S. __, 131 S. Ct. 2394, 2406, 180 L. Ed. 2d 310 (2011) (age must be considered in determining whether child in custody for purposes of *Miranda* warnings); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (barring sentence of life without possibility of parole for juveniles convicted of nonhomicide offense); *Roper v. Simmons*, 543 U.S. 551,

125 S. Ct. 1183, 161 L. Ed.2d 1 (2005) (death penalty unconstitutional as applied to juveniles).

While these cases mandate consideration of youth and its attendant circumstances when imposing lengthy sentences for crimes committed by children, Washington case law precludes such consideration. *State v. Law*, 154 Wn.2d 85, 110 P.3d 717 (2005); *State v. Ha'mim*, 132 Wn.2d 834, 940 P.2d 633 (1997). The State agrees that these and other cases precluding consideration of youth as a mitigating factor are inconsistent with the holdings of *Miller* and its predecessor cases. 3/3/14 RP 4. *Amici* agree with the State's assessment of the continuing validity of those cases.

But no amount of agreement can alter the fact that *Ha'mim* and *Law* have not been overruled. Lower courts are bound by the decisions of the Supreme Court even where those opinions are potentially erroneous. *In re the Personal Restraint of Heidari*, 174 Wn.2d 288, 293, 274 P.3d 366 (2012). Thus, at sentencing in this case the trial courtconcluded existing case law precluded its consideration of youthfulness and the attendant diminished culpability when assessing a proper sentence. Despite *Roper, Graham, J.D.B*, and *Miller* and the science underpinning those decisions, the trial court pointed to prior

Washington cases dismissing such arguments as bordering on absurd. 3/3/14 RP 50 (quoting *State v. Scott*, 72 Wn. App. 207, 218-19, 866 P.2d 1258 (1993)). Far from absurd, *Miller* and its predecessor cases make clear such arguments have constitutional and scientific force for even the most serious crimes.

As identified in appellant's motion to transfer, similar issues have arisen in cases across the state. Appellant's Motion to Transfer at 4. In addition, when addressing a prior personal restraint petition in this case, the Court of Appeals stated its belief that it lacked authority to declare unconstitutional a sentence of more than 92 years for a crime by a child. *In re Diaz*, 42064–3–II, fn 6 (September 18, 2012). There is no benefit in asking that court to once again consider a question which it believes it lacks the authority to answer.

In its brief, the State argues that because the trial court set a review hearing to occur in 2029, 15 years after sentencing, the mandate of *Miller* is satisfied. Brief of Respondent at 21. Rather than resolve the issues, that contention demonstrates the need for this Court to address them. First, as the law currently exists, the trial court would lack any authority to release Mr. Solis-Diaz 15 years into his sentence even where the State and trial court agree that is the appropriate time.

Second, the State's contention is an implicit admission that a 92-year sentence is unconstitutional. Third, advocating for a 15-year review is an acknowledgment that the 20-year review available under RCW 9.94A.730 is inadequate in this case. The trial court's effort to create extra-statutory, but unlawful, procedures in an effort to satisfy *Miller* demonstrates the need for an authoritative decision by this Court. The parties and lower courts are left with no means to apply the mandate of *Miller*.

Finally, the State suggests newly-adopted RCW 9.94A.730 may resolve these question. Brief of Respondent at 20-21. Here again, application of that statute to a sentence like the one in this case is itself an issue that no court has decided. Just as it did away with parole in 1984 with the adoption of the Sentencing Reform Act, the Legislature could repeal the release provisions of RCW 9.94A.730 or lengthen the minimum term at any time in the future . Further, reliance on that statue ignores the State and trial court's belief that 15 years was the appropriate time for review. The constitutional infirmity of the 92-year sentence imposed in this case remains, and it is pure speculation as to whether a meaningful opportunity for release will exist at any given point in during the term of confinement.

A determination of the proper application the mandate of *Miller* in Washington is a significant constitutional issue of statewide import. This case illustrates it is an issue which this Court should address sooner rather than later.

E. CONCLUSION

For the reasons above, *amici* urge this court to grant the appellant's motion to transfer.

DATED this 21st day of May, 2015.

/s/Gregory C. Link
GREGORY C. LINK - 25228
Attorney for Washington Defender Association

/s/Nancy L. Talner
NANCY L. TALNER - 11196
Attorney for American Civil Liberties Union Washington

/s/Suzanne Lee Elliott
SUZANNE LEE ELLIOTT - 12634
Attorney for Washington Association of Criminal Defense Lawyers

/s/Robert S. Chang
ROBERT S. CHANG - 44083
Attorney for FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GUADALUPE SOLIS DIAZ, JR., Appellant.	)))))))))	NO. 91687-0

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF MAY, 2015, I CAUSED THE ORIGINAL **AMICUS CURIAE MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER CASE** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SARA BEIGH, DPA [appeals@lewiscountywa.gov] [sara.beigh@lewiscountywa.gov] LEWIS COUNTY PROSECUTING ATTORNEY 345 W MAIN ST FL 2 CHEHALIS, WA 98532	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL
[X] JOHN HAYS [jahayslaw@comcast.net] ATTORNEY AT LAW 1402 BROADWAY ST LONGVIEW, WA 98632-3714	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF MAY, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710