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SUPREME COURT NO. 100432-0
COURT OF APPEALS NO. 37121-2-III

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JEREMIAH GILBERT,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The State of Washington, Petitioner here and Respondent below, respectfully requests that this Court review the unpublished decision of the Court of Appeals in State v. Gilbert, No. 37121-2-III (November 2, 2021), a copy of which is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

Should this Court accept review of the Court of Appeals decision in this case, which conflicts with this Court's decision in State v. Ramos,¹ and presents a significant question of constitutional law and an issue of substantial public interest? How should a resentencing court consider the facts of the crime and the input of victims and their survivors when imposing sentence on a person who committed multiple murders and other serious violent offenses as a teenager? May a court

¹ 187 Wn.2d 420, 387 P.3d 650 (2017).

impose a more severe sentence on a teenager convicted of multiple murders, who remains a moderate risk to reoffend, than on a teenager convicted of a single murder, who is at low risk to reoffend?

C. STATEMENT OF THE CASE

Jeremiah Gilbert was convicted in 1993 for aggravated first-degree murder, premeditated first-degree murder, first-degree robbery with a deadly weapon, first-degree burglary with a deadly weapon, and first-degree theft, all committed when he was almost 16 years old. Originally sentenced to life without parole (LWOP) as the then-mandatory sentence for the aggravated murder, Gilbert has been twice resentenced.

By the time of his latest resentencing, the Indeterminate Sentence Review Board (ISRB) had already paroled Gilbert from his aggravated murder sentence to begin serving the

consecutive sentence for first-degree premeditated murder.²

The superior court received and gave meaningful consideration to Gilbert's mitigation evidence, including both his childhood experiences and his post-conviction efforts at rehabilitation. In part because of Gilbert's lengthy history of serious prison infractions, including attacking a prison guard at age 30 and instigating a physical fight with another inmate at age 40, and in part because psychological testing revealed that Gilbert retains antisocial personality characteristics and remains a significant risk to reoffend, the court concluded that neither Gilbert's youthfulness nor his proffered mitigation provided a substantial and compelling reason to impose an exceptional sentence below the range. The court reduced Gilbert's sentence

² Gilbert's situation is unlike other juvenile sentencing cases presented to this Court in that his need for resentencing was triggered by the literal LWOP sentence originally imposed for the aggravated murder, but since he had already been released from that sentence, the principal concern of the second resentencing hearing was the sentence for the nonaggravated first-degree murder.

for first-degree murder by 40 months, imposing a low-end, standard-range sentence of 240 months, consecutive to the aggravated murder sentence that he had already completed. RP 185-86. Gilbert will be released when he is 60 years old.

Without inviting the parties to brief the impact of this Court's recent decision in State v. Haag, ___ Wn.2d ___, 495 P.3d 241 (2021), Division Three of the Court of Appeals held that Haag required reversal. Slip op. at 10. In Haag, this Court held that a 46-year sentence is an unconstitutional de facto life sentence under both state and federal constitutions, and that a resentencing court misapplies the law and abuses its discretion when it places undue weight on the facts of the crime, the victims of the crime, and the penological objective of retribution when sentencing juvenile homicide offender. Declining to distinguish Haag on its facts, Division Three observed:

While the defendant in Haag was convicted of only one murder, the court's decision was not influenced by the quantity or quality of convictions for which the defendant

was sentenced. Instead, in reaching this decision, the court focused on the impact the sentence would have on the defendant.

Slip op. at 10.

The Court of Appeals further concluded that a 45-year sentence for Gilbert, who was 15 years old when he committed his crimes, was an unconstitutional life sentence under Haag, perfunctorily stating, “[T]here is no meaningful difference between a 46-year sentence and a 45-year sentence.” Slip op. at 10.

D. REASONS REVIEW SHOULD BE ACCEPTED AND ARGUMENT

RAP 13.4(b) permits review by this Court where a decision of the Court of Appeals is in conflict with a decision of the Supreme Court, raises a significant question of law under the Washington State or United States Constitution, or deals with an issue of substantial public interest. These criteria are met here. The decision below interprets this Court’s juvenile

sentencing jurisprudence to bar consideration of the facts of the crimes committed, the impact on the victims, and the legitimate penological objective of promoting respect for the law by providing punishment that is just. Moreover, the decision below categorically bans 45-year sentences for all juvenile offenders with no meaningful analysis or persuasive reasoning. This Court should accept review to correct such a significant and unwarranted expansion of constitutional principles.

1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN RAMOS AND THE WELL-SETTLED PRINCIPLE THAT APPELLATE COURTS DO NOT REWEIGH EVIDENCE ON REVIEW.

In State v. Ramos, this Court upheld an 85-year de facto life sentence imposed upon a person who murdered a family of four including two children when he was 14 years old. 187 Wn.2d 420, 429-30, 387 P.3d 650 (2017). Ramos was

resentenced after Miller.³ This Court held that “a properly conducted Miller hearing does not in any way permit sentencing courts to disregard the number of victims in determining an appropriate sentence,” observing that “Miller explicitly requires sentencing courts ‘to take into account the differences among defendants *and crimes*. ” 187 Wn.2d at 438 (quoting Miller, 132 S. Ct. at 2469 n.8) (emphasis supplied by this Court). This Court clarified that a Miller resentencing court “must receive and consider relevant mitigation evidence bearing on the *circumstances of the offense* and the culpability of the offender, including both expert and lay testimony as appropriate.” Id. at 443 (emphasis added).

This Court concluded that the resentencing court in Ramos did not abuse its discretion when it “clearly received and considered Ramos’ extensive mitigation evidence, was fully aware of its authority to impose an exceptional sentence

³ Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

below the standard range, and reasonably considered the issues identified in Miller when making its decision.” Id. at 453. Accordingly, this Court affirmed the de facto life sentence under the Eighth Amendment. Id. The court emphasized the deference due to the resentencing judge: “Although we cannot say that every reasonable judge would necessarily make the same decisions as the court did here, *we cannot reweigh the evidence on review.*” Id. (emphasis added).

Here, Division Three detailed the considerable evidence received by the resentencing court in this case. Slip op. at *3-9. This involved expert testimony, psychological evaluations by two expert psychologists, documentation of Gilbert’s achievements in prison, testimony about Gilbert’s early life and family, his lack of adverse childhood experiences (ACEs), the support Gilbert’s family could offer him on release, Gilbert’s conduct and culpability for the murders of two men, as well as testimony by the surviving victim and family of those slain, which “recounted how the murders had dramatically affected

their lives and continued to cause trauma each time Mr. Gilbert was resentenced.” Slip op. at *3-9. In recognition of these circumstances, the resentencing court reduced Gilbert’s sentence from the middle to the low end of the standard sentencing range, but concluded that Gilbert had not shown that his crimes were the result of transient immaturity or that he had been successfully rehabilitated. Slip op. at 8.

Acknowledging “evidence showing he is moving towards rehabilitation while incarcerated,” the court found that Gilbert’s 2017 infraction, which involved instigating a physical fight with another inmate, evidenced “a lack of impulse control and/or the ability to follow reasonable orders.” RP 183. The court further noted that Gilbert’s psychological testing indicated that he “still exhibits anti-social personality characteristics,” that a violence risk assessment showed a high risk to re-offend, and that another assessment indicated that Gilbert still has “problems [with] insight and violent ideation or intent,” and that his overall risk to re-offend was moderate. RP 184.

Under Ramos, Division Three should have affirmed the resentencing court's reasoned decision. Instead, interpreting this court's decision in Haag to require the resentencing court to disregard the "quantity or quality of convictions for which the defendant was sentenced," and focus *exclusively* on "the impact the sentence would have on the defendant," Division Three reweighed the evidence for itself, reversing and remanding for a third resentencing. This represents a conflict with this Court's decision in Ramos, misinterpretation of Haag, and warrants review by this Court. RAP 13.4(b)(1).

2. HAAG IS DISTINGUISHABLE AND ITS ONE-SIZE-FITS-ALL APPROACH TO RESENTENCING THOSE WHO KILLED AS TEENAGERS IS INCONSISTENT WITH LONG-STANDING PRINCIPLES OF SENTENCING LAW IN WASHINGTON.

The legislature has plenary authority over sentencing.

State v. Jones, 182 Wn.2d 1, 7, 338 P.3d 278 (2014). In

Washington, the legislature has established a system of guided

discretion in sentencing that explicitly requires consideration of both the offender's prior criminal history and the seriousness of the crimes of conviction. This structure applies to most offenses, but the legislature drastically limited sentencing discretion when it came to the most serious crime, mandating the death penalty or life sentences for aggravated murder. See LAWS OF 1981, ch. 138, § 3. By interpreting this Court's decision in Haag to bar a 45-year cumulative sentence for a juvenile homicide defendant regardless of the quantity and quality of the crimes of conviction, Division Three ignored timeless principles of punishment, significant distinctions between Haag and this case, failed to consider the nature and purposes of the Sentencing Reform Act, and undermined legislative authority to determine sentences. This Court should accept review of this significant question of constitutional law and public interest. RAP 13.4(b)(3), (4).

a. Background Of The Sentencing Reform Act.

The SRA was enacted in 1981. Before then, judges exercised broad sentencing discretion, setting the minimum and maximum terms of imprisonment and the Board of Prison Terms and Parole determined how much of the sentence would be served. See former chapter 9.95 RCW (1979). Under the indeterminate sentencing scheme, judges had virtually unfettered discretion, leaving little room for appellate review. See David Boerner, Sentencing in Washington: A Legal Analysis of the Sentencing Reform Act of 1981 § 9.2 (1985).

Although the goal of pre-SRA indeterminate sentencing was to allow for rehabilitation and redemption, “this was often not realized.” State v. McFarland, 118 Wn. App. 2d 528, 537, 492 P.3d 829 (2021). “Instead, pre-SRA sentences were frequently disproportionate and racially skewed.” Id. (citing Dan Kilpatrick & Jack Brummel, Sentencing Study, 52 Wash. L. Rev. 103, 118 (1976)). The SRA was designed to address these problems by structuring a judge’s discretion in a way that

ties sentencing decisions to the crime or crimes of conviction.

Under the SRA, each count of conviction is assigned a determinate sentencing range based on the statute of conviction and the defendant's criminal history. Sentences within that range ordinarily may not be appealed. RCW 9.94A.585(1).

Although the SRA reduced judicial discretion at sentencing, it did not eliminate it altogether. Exceptional sentence provisions allow judges to depart from the standard sentencing range in limited circumstances. To impose a sentence below the standard range, the sentencing court must find "substantial and compelling" mitigating circumstances, "established by the preponderance of the evidence." RCW 9.94A.535(1). The burden to prove substantial and compelling circumstances falls on the defendant. Ramos, 187 Wn.2d at 445. This Court has determined that allocating to juvenile offenders the burden to prove youthful mitigation is constitutional. State v. Gregg, 196 Wn.2d 473, 479-83, 474 P.3d 539 (2020). As for the most serious offenses, however,

the legislature decided that an offender must face either a death sentence or life imprisonment, as determined by a jury. Former RCW 10.95.030 (2013).

Our legislature thus adopted a sentencing structure intended to ensure that the sentence imposed reflects both the seriousness of the crimes committed and the offender's history and circumstances, allowing for departure when warranted by the offender or the crime.

- b. This Court Should Grant Review To Resolve The Conflict Between Its Own Decisions And Provide Meaningful Guidance To Sentencing And Resentencing Courts.

As explained above, this Court in Ramos affirmed, under the Eighth Amendment, an 85-year de facto life sentence because the resentencing court received and considered evidence of mitigation, even though it ultimately was not persuaded to impose an exceptional sentence. In affirming the trial court's discretion, this Court provided guidance about what

courts resentencing former juvenile non-aggravated murder offenders must consider.⁴ 187 Wn.2d at 443.

At the *Miller* hearing, the court must meaningfully consider how juveniles are different from adults, how those differences apply to the facts of the case, and whether those facts present the uncommon situation where a life-without-parole sentence for a juvenile homicide offender is constitutionally permissible. If the juvenile proves by a preponderance of the evidence that his or her crimes reflect transient immaturity, substantial and compelling reasons would necessarily justify an exceptional sentence below the standard range because a standard range sentence would be unconstitutional.

Id. at 434-35.

The resentencing court must also consider the offender's chronological age and the hallmark features of youth, the offender's family and home environment at the time of the offense, the circumstances of the homicide offense, including the extent of the offender's participation, and whether the "incompetencies of youth" had any impact on the proceedings.

Id. at 443-44.

⁴ RCW 10.95.030(3)(b) outlines the factors a court considers when sentencing juvenile aggravated murderers.

Because Ramos' resentencing court "clearly received and considered Ramos' extensive mitigation evidence, was fully aware of its authority to impose an exceptional sentence below the standard range, and reasonably considered the issues identified in Miller when making its decision," this Court held the resentencing court acted within its discretion. Id. at 453. Stated another way, as long as the sentencing court gives due consideration to how juveniles differ from adults and how that concept applies to the crimes at issue, it remains within the court's discretion to impose a standard-range de facto life sentence unless the offender proves by a preponderance that youth is a substantial and compelling mitigating factor. Id. This Court noted that reasonable judges could disagree with the resentencing court's decision, but nevertheless affirmed because "we cannot reweigh the evidence on review." Id. at 453.

Since reinforcing trial court discretion to impose even de facto life sentences upon due consideration of an offender's

mitigation evidence in Ramos, this Court has reversed two resentencing decisions on grounds that the sentencing court failed to properly weigh mitigation evidence.⁵ State v. Delbosque involved the resentencing of a man who brutally murdered two young people when he was 17 years old. 195 Wn.2d 106, 110-11, 456 P.3d 805 (2020). The resentencing court heard evidence that Delbosque had accumulated numerous prison infractions, was repeatedly investigated for gang-related violence between ages 29 and 32, and that as late as 2010, helped arrange a gang-related assault on another inmate. Id. at 113. The court considered a corrections officer’s opinion that Delbosque functioned as a minimum-security

⁵ When resentencing an offender for aggravated murder under RCW 10.95.030, the court is *statutorily* required to consider rehabilitation. That is not so for crimes under the SRA. Ramos notes that a resentencing court “may certainly exercise its discretion to consider evidence of subsequent rehabilitation where such evidence is relevant to circumstances of the crime or the offender’s culpability” but “declined to hold that the court is *constitutionally* required to consider such evidence in every case.” 187 Wn.2d at 449 (emphasis added).

prisoner and two experts who evaluated Delbosque concluded that childhood trauma affected his decision-making as an adolescent and that he now posed a low risk to reoffend. Id. at 113. The court considered victim impact statements, as well as supportive testimony from Delbosque’s siblings. Id. After considering all of this evidence, the resentencing court imposed a minimum sentence of 48 years, finding “that the crime committed by Mr. Delbosque is one of those rare cases where a life without the possibility of parole sentence would be appropriate.” Id. at 113-14. The resentencing court found that Delbosque’s trial effort to blame another for the murders and his violent prison record as an adult betrayed “an ongoing attitude to others that is reflective of Mr. Delbosque’s underlying murder.” State v. Delbosque, 6 Wn. App. 2d 407, 417, 430 P.3d 1153 (2018).

This Court reversed and remanded for another resentencing on grounds that the sentencing court failed to consider the mitigation evidence properly, overemphasizing the

facts of the crime, Delbosque’s effort to avoid responsibility by blaming another, and his violent prison infractions as a mature adult, while disregarding or minimizing evidence supporting his claim of rehabilitation, including two expert opinions that he was a low risk for future dangerousness. 195 Wn.2d at 118-20. The Court recognized that juvenile sentencing law had continued to evolve after Delbosque’s resentencing and offered additional guidance to resentencing courts. Citing a Ninth Circuit case with approval, this Court instructed courts to “reorient the sentencing analysis to a forward-looking assessment of the defendant’s capacity for change or propensity for incorrigibility, rather than a backward-focused review of the defendant’s criminal history.” *Id.* at 122 (quoting United States v. Briones, 929 F.3d 1057, 1067 (9th Cir. 2019)).

While this Court did not overrule Ramos in Delbosque, the two decisions cannot be reconciled on any principled basis. One case holds that so long as the record clearly demonstrates that the sentencing court gave meaningful individualized

consideration to juvenile brain development science and how that impacts culpability and the potential for rehabilitation, a reviewing court may not reweigh this evidence to invalidate a sentence. The other does exactly that, concluding on its review of the record that the sentencing court gave too much weight to evidence that Delbosque continued to violently offend after his brain reached maturity and not enough weight to his paid expert's opinions of his low risk to offend in the future.

In State v. Haag, ___ Wn.2d ___, 495 P.3d 241 (2021), this Court again decided that a court resentencing a former juvenile murderer had weighed the evidence wrong. There, a 17-year-old strangled and drowned a little girl in 1995, was convicted of aggravated murder, and was sentenced to mandatory life without parole. Id. at 243. He was resentenced in 2018 to a minimum term of 46 years to life. Id. This Court reversed on grounds that the resentencing court “gave undue emphasis to retributive factors over mitigating factors.” Id.

The mitigating evidence in Haag included his single prison infraction, two defense experts who opined that he was a low risk of reoffending, a volunteer chaplain's opinion that Haag is "a mature adult," testimony by Haag's family and former cellmate, Haag's religious conversion and Haag's own testimony that he wants to help people. 495 P.3d at 243-44. "In contrast," this Court pointed out, "the State offered no expert testimony and no testimony designed to rebut the evidence produced showing that Haag was unlikely to reoffend." Id. at 244. This Court faulted the sentencing court for focusing more on the youth and lost future of the seven-year-old child Haag killed than on Haag's own youth. Id. at 248. And by pointing out that the State had "produced only victim impact testimony," the Haag court appeared to discount entirely the impact Haag's crimes had on the victim's family.

In Haag, this Court acknowledged that "we have not prohibited sentencers from taking into account retributive factors," citing Ramos as "impliedly permitting sentencer's

invocation of the penological justifications from Miller, which would include retribution” and Delbosque as “impliedly permitting sentencer’s use of the nature of the crime in its evaluations.” 495 P.3d at 248. But the court held that the resentencing court abused its discretion by placing “*more* emphasis on retribution than mitigation.” Id. (emphasis in original). “We hold that in a Miller-fix hearing conducted under RCW 10.95.030, retributive factors must count for *less* than mitigating factors.” Id. at 249 (emphasis added).

By concluding that resentencing courts must give “more” weight to mitigation evidence and “less” weight to retributive factors, Haag purports to allow for the consideration of punishment and the impact of the crime on the family and community. But by reweighing the evidence on appeal, the court in Haag and the court of appeals here call into question the very concept of deference to the sentencing court upon which Ramos relied. The Court’s effort to reconcile its decision with Ramos is limited to a casual observation that both

cases concerned whether the resentencing court “reasonably considered the appropriate factors” and reassurance that “sentencing courts retain the discretion to determine whether and to what extent a juvenile offender has been rehabilitated, whether youthfulness contributed to the crime, and whether he or she is likely to reoffend.” 495 P.3d at 250. But such discretion is illusory if this Court reverses whenever it disagrees with the sentencing court’s determination.

This Court should accept review to provide a workable standard for sentencing and resentencing courts faced with juvenile murderers. How much is too much emphasis on the circumstances of the crime and its impacts on victims? Is it really this Court’s rule, as Division Three concluded in this case, that “the quantity or quality of convictions for which the defendant was sentenced” makes no difference to what sentence is constitutionally permissible? If so, what is the point of victim impact statements and how does a sentencing or resentencing court give effect to the constitutional right of

victims and survivors to “a meaningful role in the criminal justice system”? WASH. CONST. art. I, § 35. Must sentencing courts truly focus only on “the impact the sentence would have on the defendant,” as the Court of Appeals inferred in this case?

Here, the transcript of the resentencing court’s oral ruling is 13 pages long. RP 174-87. Less than half of the court’s ruling focuses on the circumstances of the crimes. RP 175-78, 187. The court then shifted focus to Gilbert’s post-conviction conduct, which includes both significant efforts toward rehabilitation and dozens of prison infractions. RP 178-79. After that, the court specifically addressed and applied each of the Miller factors. RP 180-84. The court then noted that Gilbert was at a high risk to reoffend by some measures, and at best, still posed a moderate risk to reoffend. RP 184. The court then imposed its sentence, shaving more than three years from Gilbert’s first-degree murder sentence. RP 185. Did the court weigh retributive and rehabilitation factors correctly? Is there

any way to know short of bringing every resentencing decision before this Court?

- c. This Court Should Grant Review Because Without Analysis The Court Of Appeals Decision Bars A Sentence Of 45 Years.

The Court of Appeals here concluded that Gilbert’s 45-year cumulative sentence is unconstitutional because this Court held that the 46-year sentence imposed in Haag was an unconstitutional de facto life sentence and “there is no meaningful difference between a 46-year sentence and a 45-year sentence.” Slip op. at 10. As a practical matter, this logically flawed reasoning simply invites expansion, for if there is no difference between 46 and 45, then arguably there is also no difference between 45 and 44, and so on.⁶ But the Court of

⁶ The court’s reasoning is an example of a sorites paradox. “According to this paradox, taking a grain of sand away from a heap of sand makes no significant difference: What we are left with will still be a heap of sand. . . . [T]he sorites paradox maintains that each time we take a grain of sand away from the heap, it will make no difference ‘because one grain is too small

Appeals' decision is understandable considering the Haag majority's perplexing rationale for drawing a line at 46 years and its failure to indicate whether 46 years is itself the ceiling or whether it exceeds some lower-yet-undefined ceiling.

The difficulties in the Haag majority's reasoning also traces to flaws in the opinion itself. This Court relied on decisions from sister states holding that lengthy term-of-years sentences trigger Miller's protections to conclude that such sentences violate the Eighth Amendment and the state constitution. 495 P.3d at 250-52. But since Miller does not forbid even literal LWOP sentences, our sister states' conclusions that lengthy sentences trigger Miller is not the same

to make a difference between something being a heap or not.' Repeated long enough, however, 'this line of reasoning will become absurd, for it will become obvious that what is left can no longer be described as a heap.'" Eric Lode, Slippery Slope Arguments and Legal Reasoning, 87 Calif. L. Rev. 1469, 1485 (1999) (citations omitted). See also Hyde, Dominic and Diana Raffman, "Sorites Paradox," The Stanford Encyclopedia of Philosophy (Summer 2018 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/sum2018/entries/sorites-paradox/>>.

as saying such sentences violate the Eighth Amendment. See 495 P.3d at 256 (Stephens, J., concurring). Moreover, the majority’s passing reference to State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018), does not suffice as an independent state ground on which to bar term-of-years sentences. See 495 P.3d at 257 (Stephens, J.) (“Bassett alone cannot support such a holding, as it did not involve a term of years sentence with the possibility of release. Yet the majority provides no other reasoning or authority under Washington’s constitution.”).

Finally, the Haag majority failed to grapple with the implications of its conclusion that a 46-year sentence is categorically barred by the state constitution under Bassett. The majority emphasizes Haag’s evidence of rehabilitation, but rehabilitation is no touchstone at all—if the constitution categorically bars a sentence of 46 years for any juvenile offender, that includes the unrepentant as well as the reformed. See 495 P.3d at 257 & n.7 (Stephens, J.) (“Lower courts will have good reason to wonder when they must assess the

individual offender’s rehabilitation before imposing a term of years and when a specific term of years is simply unconstitutional for any juvenile offender.” This Court should accept review to adequately assess the constitutional underpinnings of its conclusion in Haag that a 46-year sentence may not be imposed upon a juvenile offender and determine whether the same is true of sentences less than 46 years that permit release before age 63.

d. Haag Does Not Control In Distinguishable Circumstances.

The information provided at Gilbert’s second resentencing court established significant differences between Gilbert and other juvenile murderers. For example, Gilbert killed two people and tried to kill a third, whereas the defendant in Haag killed only one person. 495 P.3d at 243. Psychological testing showed that Gilbert had an overall moderate risk to offend, with some tests showing a high risk to reoffend,

whereas Haag had only a low risk. 495 P.3d at 244; Slip op. at *6. Haag had committed only one prison infraction in his decades in prison, 495 P.3d at 243, but Gilbert “accumulate[ed] at least 36 serious infractions over the first dozen years” and had committed two violent offenses at 30 and 40 years of age, well after achieving full brain maturity. Slip op. at *5. Whereas Haag’s psychological testing revealed no serious mental health issues, Gilbert’s testing demonstrated antisocial behavior and characteristics that may still affect his future behavior choices. Slip op. at *6.

The differences between Gilbert and other juvenile murders, and the differences in the magnitude and impact of their crimes, are significant. Under the SRA, these circumstances are not only relevant and due consideration in determining the length of a sentence, they *establish* the presumptive sentence unless the offender proves substantial and compelling reasons for a sentence below that range. Division Three’s conclusion that this Court’s decision in Haag precludes

such individualized consideration and categorically bars any sentence approaching 46 years regardless of the circumstances of the offender and his crimes contradicts Ramos and warrants review as a matter of substantial public interest and constitutional law. It also upends Miller's core holding that informed judicial discretion is key to sentencing youth.

E. CONCLUSION

No prosecutor or judge wants to impose an unconstitutional sentence, but the state of the law in this area makes it impossible to know what sentences pass constitutional muster. This Court's ad hoc approach to juvenile sentencing policy condemns prosecutors, defendants, and trial courts to a never-ending game of "guess what is constitutional" while retraumatizing crime victims and survivors. This Court should accept review to provide guidance more useful than Haag's standardless bright line rule.


This document contains 4,748 words, excluding the parts of the document exempted from the word count by RAP 18.17.

The State respectfully asks this Court to affirm.

DATED this 2nd day of December, 2021.

Respectfully submitted,

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	
)	No. 37121-2-III
Respondent,)	(Consolidated with
)	No. 37424-6-III)
v.)	
)	
JEREMIAH JAMES GILBERT,)	UNPUBLISHED OPINION
)	
Appellant.)	

STAAB, J. — The detailed facts underlying Mr. Gilbert’s convictions are outlined in *State v. Gilbert*, 193 Wn.2d 169, 438 P.3d 133 (2019) (*Gilbert I*).

FACTS

In 1992, shortly before his sixteenth birthday, Jeremiah Gilbert and his friend ran away from home in King County and headed toward Oregon. In Klickitat County, Mr. Gilbert murdered two people execution-style and attempted to murder a third person while attempting to steal a vehicle. Mr. Gilbert was convicted of six serious offenses, including first degree murder, aggravated first degree murder, second degree assault, first degree burglary, first degree theft, and first degree robbery. He was sentenced to life without the possibility of parole for the aggravated first degree murder conviction

consecutive to a sentence of 280 months on the first degree murder and concurrent with the sentences for the other convictions.

Following the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), Washington eliminated mandatory life sentences without parole for juvenile offenders and enacted the *Miller*-fix statute, RCW 10.95.035. Under this statute, juveniles previously sentenced to life without parole are to be returned for resentencing in accordance with RCW 10.95.030.

In 2015, Mr. Gilbert was resentenced by a second judge under the *Miller*-fix statute. The sentencing court concluded that it could only amend the life sentence without parole and did not have the authority to restructure the entire sentence. Accordingly, the court adjusted the life without parole sentence to life with a 25-year minimum term. Mr. Gilbert appealed this sentence, and our State Supreme Court reversed and remanded for resentencing. The court held that its holding in *Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017), applied to a resentencing under the *Miller*-fix statute. *Gilbert I*, 193 Wn.2d at 175. Consequently, the sentencing judge must consider Mr. Gilbert's youth as a mitigating factor and had the authority to impose an exceptional sentence below any mandatory or standard range sentencing requirements. *Id.*

While Mr. Gilbert's second sentence was pending before the Supreme Court, the Indeterminate Sentence Review Board (ISRB) determined that Mr. Gilbert was eligible

for release on the aggravated murder sentence and that he had finished serving the concurrent sentences. In April 2018, Mr. Gilbert was released on parole on the aggravated murder charge and began serving his consecutive sentence for first degree murder.

Before his second resentencing, Mr. Gilbert again retained the expert services of Dr. Ronald Roesch, a psychologist who had reviewed Mr. Gilbert's case and prepared a report for Mr. Gilbert's first resentencing in 2015. Defense counsel's motion to authorize \$5000 in public funds to retain Dr. Roesch was denied, but the trial court authorized \$2500 in fees.

A second resentencing occurred in May 2019 before a third sentencing judge. The State presented testimony from eight survivors of the victims along with the surviving victim, Farrell Harris. The court also considered written impact statements from survivors and family members. These witnesses and survivors recounted how the murders had dramatically affected their lives and continued to cause trauma each time Mr. Gilbert was resented. Consistently, these witnesses asked the court to impose the longest sentence possible.

Defense counsel called four members of Mr. Gilbert's family as witnesses. They testified that they maintained good relations with Mr. Gilbert and could provide him with a place to live, a job, and family support if he were to be released. Mr. Gilbert testified himself, apologized for his crimes and asked for a concurrent sentence.

Defense counsel filed extensive documentation supporting an exceptional sentence, including letters of support, certificates of achievement while in custody, and Department of Corrections (DOC) records. The court also considered a previously written report for the ISRB by Dr. Debra Wentworth¹ and the ISRB's decision to release Mr. Gilbert on his sentence for aggravated first degree murder.

Defense counsel also presented the report and testimony of its expert psychologist, Dr. Roesch. Dr. Roesch generally testified about adolescent development and cognitive functioning, echoing the generalized findings made in *Miller* and subsequent cases. He testified that as a class, fifteen-year-olds lack maturity and have an underdeveloped sense of responsibility. While they generally understand the difference between right and wrong, they have an issue with impulse control and considering the long and short-term consequences of decisions.

More specifically, Dr. Roesch testified that his evaluation of the circumstances surrounding the original crimes suggest that the 15-year-old Jeremiah Gilbert met most of the *Kent*² factors for declining juvenile jurisdiction but lacked maturity and sophistication. Dr. Roesch characterized the murders as unplanned while acknowledging

¹ Dr. Wentworth is a psychologist employed by the Department of Corrections and had prepared and submitted a report for the ISRB to consider in deciding whether to parole Mr. Gilbert on his sentence for aggravated first degree murder. She did not update her report for this sentencing hearing nor did she testify.

² *Kent v. United States*, 383 U.S. 541, 566-67, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).

a definite plan to commit crimes on the trip to Oregon. As to remorse, Mr. Gilbert initially denied involvement but quickly admitted his culpability and had not changed his story. Dr. Roesch acknowledged that Mr. Gilbert was primarily responsible for the crimes he committed, and Mr. Gilbert did not appear to be influenced by peer pressure in committing the crimes.

Dr. Roesch also testified about Mr. Gilbert's circumstances at the time of the crime. Mr. Gilbert's home life was generally positive, although the family moved frequently, and Mr. Gilbert's relationship with his parents began to deteriorate when he began abusing alcohol at a young age. On the Adverse Childhood Experiences scale, Mr. Gilbert scored a zero, indicating that he did not have exposure to emotional, physical, or sexual abuse or household dysfunction during childhood. Mr. Gilbert's use of alcohol as a teenager most likely impacted his brain development. But there was no evidence that he was under the influence of drugs or alcohol when he committed these crimes.

Finally, Dr. Roesch testified about Mr. Gilbert's activities while incarcerated. While Mr. Gilbert did well in juvenile detention, he struggled when transferred to adult corrections, accumulating at least 36 serious infractions over the first dozen years. The last two infractions were committed in 2006 when Mr. Gilbert was 30 and in 2017 when he was 40 years of age. Mr. Gilbert has participated in several programs while incarcerated and continues to maintain close contact with his family. Dr. Roesch

indicated that the correctional officers he had interviewed consistently stated that Mr. Gilbert was responsible, helpful, and contributed positively.

The sentencing court also considered evidence of psychological testing. Both Dr. Roesch and Dr. Wentworth conducted personality tests on Mr. Gilbert, and neither found evidence of mental health or personality disorders, or psychopathology. Dr. Wentworth did find some evidence of antisocial behavior and characteristics “that may continue to influence his future behavior choices.” Clerk’s Papers (CP) at 254.

Both psychologists administered risk management tests to assess the risk of future violence and recidivism. Dr. Roesch determined that Mr. Gilbert had a low risk to reoffend. Dr. Wentworth used a more recent and comprehensive version of the violence risk assessment guide (VRAG) and found that Mr. Gilbert’s scores placed him “in the high risk to reoffend.” CP at 254. However, when balanced against Mr. Gilbert’s protective and risk-reducing factors, his overall risk of reoffending was considered moderate. Attorneys for both sides dedicated significant time addressing each of the factors the court was to consider in determining an appropriate sentence. Defense counsel argued that juvenile offenders as a class should receive significantly reduced sentences for their crimes, even when convicted as adults. The State asked the court to reimpose the original sentence of 280 months. Defense counsel argued for a concurrent sentence of 25 years.

Although the court did not create written findings, its oral decision made several specific findings addressing the *Miller* factors and other factors affecting sentencing as directed by the Court in *Gilbert I*. As to Mr. Gilbert’s “immaturity and inability to appreciate risk,” the court found that at the time of the crime, Mr. Gilbert was an unsophisticated 15-year-old, unable to fully appreciate the risks of running away. His inability to appreciate risk was balanced by his prior involvement in the criminal justice system just months before the murders.

Mr. Gilbert was the product of a good family, but his surrounding environment became dysfunctional due to alcohol use at a young age. Mr. Gilbert’s family tried to get him treatment for his alcoholism.

Considering Mr. Gilbert’s participation in the crime, the court found that Mr. Gilbert held an active leadership role in crimes committed callously. Mr. Gilbert took his time to execute two individuals, one of whom he shot point-blank in the head to “shut him up.” RP at 183. Mr. Gilbert’s youth did not affect any legal defenses or arguments. (*Id.*) Nor were the crimes influenced by family dynamics or peer pressure.

Next, the court addressed factors suggesting that the juvenile might be successfully rehabilitated. The court noted that Mr. Gilbert’s program participation demonstrated potential for rehabilitation while incarcerated. He has, however, received two serious infractions that indicate a lack of impulse control as an adult. The court

suggested that Mr. Gilbert’s good behavior may be influenced by a hope for resentencing.³

The court discussed Dr. Wentworth’s 2017 psychological examination, noting that Mr. Gilbert exhibited antisocial personality characteristics that may influence future behavior choices. His score on the violence risk assessment, placing him at high risk to reoffend, was balanced by other risk-reducing factors for a finding of moderate risk to reoffend. Finally, the court considered the convictions at issue, finding that the murder convictions are at the apex of the culpability scale, and Mr. Gilbert was convicted of three other violent offenses from the same incident. The standard sentencing range called for a minimum 20-year sentence for Count 1, first degree murder, to run consecutive to the 25-year sentence for count 2, aggravated first degree murder and concurrent to the other charges, which had already been served.

In the end, the court expressly recognized that it had the authority to grant an exceptional sentence but found that the crimes were not the result of transient immaturity that would support an exceptional sentence. Instead, the court found that the mitigating factors of youth justified a reduction in Mr. Gilbert’s sentence for murder in the first

³ In the October 24, 2013 Department of Corrections Offender Management Network Information notes that were provided to the sentencing court, Amber Bates noted increased program participation and that Mr. Gilbert “is also looking forward to a court decision in Nov[ember] 2013 that may change his sentence structure. He is already planning for re-entry into the community an[d] working on not thinking about prison as ‘home.’” CP at 404.

degree by 40 months to 240 months, the bottom of the standard range. The court reimposed the already-served 25-year sentence for aggravated murder concurrent with the sentences for other charges that had already been served. Finally, the court ran the 240-month sentence for first degree murder consecutive to the sentence for aggravated first degree murder.

ANALYSIS

A. DE FACTO LIFE SENTENCE

Mr. Gilbert raises several issues on appeal that are premised upon his assertion that the sentence imposed in this case was a de facto life sentence. We address this argument first because it is dispositive. To be clear, on remand, Mr. Gilbert was sentenced to 240 months for first degree murder, to run consecutive to his already-served 25-year sentence for aggravated first degree murder and concurrent with the sentences for his other serious offenses. The cumulative sentence is 45 years. Mr. Gilbert will be eligible for release when he is 60 years old.

While a sentence of life without parole for juvenile offenders is not barred by the federal constitution, our State Supreme Court has held that such a sentence is categorically prohibited under our State Constitution. *Jones v. Mississippi*, 593 U.S. ___, 141 S. Ct. 1307, 1311, 209 L. Ed. 2d 390 (2021) (imposing a sentence of life without parole on a juvenile defendant does not require a finding of incorrigibility); *State v. Bassett*, 192 Wn.2d 67, 91, 428 P.3d 343 (2018). Our Supreme Court has recently held

that a “46-year minimum sentence amounts to an unconstitutional de facto life sentence.” *State v. Haag*, No. 97766-6, slip op. at 20 (Wash. Sept. 23, 2021), <http://www.courts.wa.gov/opinions/pdf/977666.pdf>. While the defendant in *Haag* was convicted of only one murder, the court’s decision was not influenced by the quantity or quality of convictions for which the defendant was sentenced. Instead, in reaching this decision, the court focused on the impact the sentence would have on the defendant. *Id.* at 23-24.⁴

Mr. Gilbert’s consecutive sentences amount to a 45-year sentence. Given the Supreme Court’s focus in *Haag*, there is no meaningful difference between a 46-year sentence and a 45-year sentence. Under *Haag*, Mr. Gilbert received a de facto life sentence. Under *Bassett*, life sentences for juvenile offenders are categorically prohibited. In light of *Haag*, we vacate Mr. Gilbert’s sentence and remand for resentencing.

Since we are remanding under *Haag*, we decline to address Mr. Gilbert’s claim that the trial court abused its discretion. We note, however, that *Haag*’s analysis on a sentencing court’s focus will control on resentencing in this case. It will be necessary for

⁴ In *Haag*, the court found that the 46-year sentence violated both the 8th Amendment and the state constitution because the sentencing court made a specific finding that Haag was “not irretrievably depraved.” *Haag*, at 24. In this case, the sentencing court found that the crimes were not the result of transient immaturity, but did not make a finding that the defendant was permanently incorrigible. Nevertheless, under our state constitution, a sentence that amounts to life without parole for a juvenile offender is categorically prohibited.

the State and Mr. Gilbert to present evidence at resentencing and for the court to make specific findings of fact and conclusions of law to support the sentence imposed.

B. JUDICIAL BIAS

Mr. Gilbert asserts that the sentencing judge demonstrated actual bias because his oral decision did not seem “off the cuff” and the court partially denied his motion for expert witness fees. The only relief he seeks is reassignment at resentencing.

Pursuant to the appearance of fairness doctrine, a judicial proceeding is valid if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing. *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). The party asserting a violation of the appearance of fairness must show a judge’s actual or potential bias. *Id.* The test for determining whether the judge’s impartiality might reasonably be questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts. *Id.* The remedy of reassignment is available only in limited circumstances; even when a trial judge has expressed a strong opinion, reassignment is generally not available as a remedy if an appellate opinion offers sufficient guidance to limit the trial court’s discretion on remand. *Id.* In *Solis-Diaz*, the judge expressed frustration and unhappiness with the Court of Appeals and suggested that he was committed to the original sentence and would not modify it on remand. *Id.* at 541.

Nothing like *Solis-Diaz* happened here. This particular judge had not previously sentenced Mr. Gilbert and made no remarks indicating he was committed to any particular sentence. Instead, the judge accepted and considered all of Mr. Gilbert's evidence and closely followed the Supreme Court's mandate. His comments on the murders and their effect on the community reflect the seriousness of the crime and do not demonstrate bias. Accordingly, Mr. Gilbert has not met his burden of showing actual bias.

C. EXPERT WITNESS FEES

Mr. Gilbert asserts that the trial court's order, limiting public funds for payment of an expert psychologist to \$2500, was manifestly unreasonable. Prior to resentencing, Mr. Gilbert motioned the court for public funds to rehire a defense expert psychologist, Dr. Ronald Roesch. Dr. Roesch prepared a report for Mr. Gilbert's first resentencing in 2015, and his fees were \$4500. For the second resentencing, defense counsel filed supporting documentation, requesting \$5000 for 32 hours of services at \$225 per hour, plus travel expenses. The court approved \$2500 for Dr. Roesche to update his report. Dr. Roesch submitted a 13-page addendum report and testified at sentencing.

After sentencing, Dr. Roesch moved to reduce the authorized funding to a flat fee of \$5000. In a supporting declaration, counsel indicated that Dr. Roesch had spent 27 hours on the case. At a rate of \$225 per hour, his fee would normally be \$6075, but he would agree to \$5000 and also agree to pay his own travel costs. The declaration in

support of the motion for fees broke down Dr. Roesch's time as follows: testimony and travel (8 hours), telephone calls with correctional officers and the attorney (5.75 hours), new interviews of Mr. Gilbert and his family (5.75 hours), report preparation (4.75 hours), and record review (2.75 hours). The court denied the additional funding request and authorized payment of \$2500.

Mr. Gilbert moved to reconsider, citing local expert rates of \$200 and \$360 per hour and concluding that the time expended was reasonable. The court denied reconsideration.

Under CrR 3.1(f)(1), a defendant unable to afford necessary services may move the court to authorize payment for such services. This rule applies even when a defendant obtains private counsel. *State v. Punsalan*, 156 Wn.2d 875, 878, 133 P.3d 934 (2006).

Reasonable compensation for the services shall be determined and payment directed to the organization or person who rendered them upon the filing of a claim for compensation supported by affidavit specifying the time expended and the services and expenses incurred on behalf of the defendant, and the compensation received in the same case or for the same services from any other source.

CrR 3.1(f)(3). The court's determination as to what services are necessary and what amount is reasonable will not be reversed absent an abuse of discretion. *State v. French*, 157 Wn.2d 593, 607, 141 P.3d 54 (2006). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Delbosque*, 195

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Wn.2d 106, 116, 456 P.3d 806 (2020) (internal quotations omitted) (quoting *State v. Blair*, 191 Wn.2d 155, 159, 421 P.3d 937 (2018)).

While the sentencing court did not give a reason for denying Mr. Gilbert's motion for reconsideration, the record supports that the decision was not manifestly unreasonable. The primary difference between the services provided in 2015 and the services provided in 2019 was travel and testimony time. Dr. Roesch did not testify at the first resentencing, but billed five hours for travel and three hours for testimony for the second resentencing. At the second resentencing, Mr. Roesch largely read from his 2019 report, which mirrored his 2015 report except for the incorporation of legal argument, and the reports by ISRB and Dr. Wentworth. Most of the rehabilitation programming information from the most recent four years' material to the *Miller* analysis appeared in the referenced reports and did not seem to derive from the new reinterview of Mr. Gilbert his family, or the duplicate DOC interviews. Primarily the interviews and support letters vouched for his character and offered post release support in the same manner as four years previously. Moreover, defense counsel failed to indicate any attempts to eliminate or reduce costs in light of the court's preliminary decision. Instead, it seems that counsel went forward without regard to the court's decision.

We find that the sentencing court's limit of public funds to \$2500 was not an abuse of discretion. We recognize that our decision to remand for resentencing may require additional investigation services.

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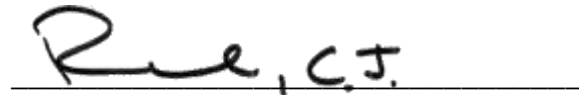
Vacate sentence and remand for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

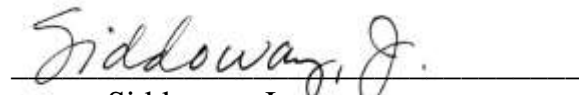


Staab, J.

WE CONCUR:



Pennell, C.J.



Siddoway, J.

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