No. 102879-2
Court of Appeals No. 85902-1-I

THE SUPREME COURT OF THE STATE OF

STATE OF WASHINGTON,

Respondent,

v.

MARVIN LEO,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

Petition for Review

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A. Introduction

Marvin Leo was sentenced to die in prison for crimes he committed as a child.

Fourteen years after Marvin's crimes, the Legislature ordered new sentencing hearings for juveniles sentenced to life in prison.

The trial court conducted the required hearing. The court found Marvin's youthfulness at the time of his offenses substantially mitigated his culpability. The court found Marvin has demonstrated a capacity for rehabilitation. But the court still set a minimum term of 40 years, a sentence which denies Marvin a meaningful opportunity for life outside of prison and which likely will exceed his natural life.

The Court of Appeals concluded Marvin might be released with a sliver of time left to make something of a life outside prison. That, the court, is all that is constitutionally required. That is not what this Court has required.

B. Issue Presented

Article I, section 14 does not permit a court to impose a life sentence for a crime a person committed as a child. The constitution also bars sentences which will not permit the person a meaningful opportunity for life outside of prison. The trial court found Marvin's crimes reflected his youthfulness rather than incorrigibility and that he has a demonstrated capacity for rehabilitation. But the court still imposed a sentence that does not afford Marvin a meaningful opportunity for release during his lifetime. That sentence violates article I, section 14 and contradicts this Court's precedent.

C. Statement of the Case

Just as he entered adolescence, Marvin's family moved from Hawaii to Tacoma's Hilltop neighborhood. CP 444. His parents were separating and Marvin routinely witnessed violence and drug use in his home. CP 44, 443-44. Marvin also witnessed the gang violence in his neighborhood. *Id.* Yet, up to the time of these events, had no prior convictions. CP 51.

Dr. Nathan Henry, a forensic psychologist, explained "gang association has an important effect on adolescent identity and personality development and often accompanies a disruption in prosocial identity development. Essentially, youth look to other sources of support when they experience family dysfunction and, in this case, major cultural interruption." *Id.* Marvin joined a gang.

In 1998, a year before Amazon would announce it had finally achieved its first annual profit, Marvin participated in a shooting at the Trang Dai Cafe in Tacoma. CP 442. Marvin, 17 years-old, acted with and at the direction of several older gang members. CP 43. Five people died and five more were injured. CP 442. The two principle actors killed themselves as police closed in on them. CP 43.

Marvin was arrested. The State charged him with 5 counts of aggravated first degree murder and five counts of first degree assault. CP 442. Each of the 10 counts alleged that a firearm was used in the offense. *Id.*

Marvin pleaded guilty as charged, even though that plea would require the court to sentence him to a sentence of life in prison without the possibility of parole. CP 441.

Following the enactment of RCW 10.95.030, Marvin received a new sentencing hearing. CP 441.

At that hearing, the trial court found that at the time of the offenses Marvin's "vulnerability and risk level for criminal behavior . . . was exacerbated [b]y a confluence of factors." CP 443. Marvin's "youth and . . . brain development contribute[ed] to poor decision making and his susceptibility to peer pressure." *Id.* Marvin was exposed to physical violence and alcohol abuse by his parents in his home. *Id.* The court found Marvin was "particularly vulnerable to these pressures" due to a number of simultaneous events including his parents' separation and his family's relocation to Tacoma's Hilltop neighborhood. CP 443-44.

In the Hilltop, Marvin was regularly exposed to gang violence and criminal activity. CP 444. Dr. Nathan Henry, a

forensic psychologist, explained "gang association has an important effect on adolescent identity and personality development and often accompanies a disruption in prosocial identity development. Essentially, youth look to other sources of support when they experience family dysfunction and, in this case, major cultural interruption." *Id.*

As an adult, more than a quarter of a century later, Marvin does not exhibit characteristics or traits associate with increased risk of violence and the Department of Corrections has classified him as a "low risk offender." *Id.* Marvin earned this classification through good behavior and demonstrated low risk behavior. The court found it "very significant" that Marvin has not exhibited any violent behavior in the 10 years preceding his resentencing and has not been diagnosed as anti-social or as suffering from any major mental illness. CP 444-45. The court recognized Marvin has matured since the time of his offenses and his voluntary engagement in a variety of pro-social and self-improvement programs, even before he had the opportunity

for earlier release, demonstrates his capacity for rehabilitation. CP 445-46.

Although it found Marvin's crimes reflected his youthfulness and that he was not incorrigible but capable of rehabilitation, the trial court nonetheless set a minimum term of 40 years. CP 439-40. Thus despite the court's findings of rehabilitation and lessened culpability Marvin must spend an additional 15 years in prison before he may even be considered for release. Another co-defendant, John Phet, received a minimum term of just 25 years. KIRO7, *Gunman convicted as a teen in Tacoma's worst mass shooting could get chance at release*, November 2, 2022.[1]

[1] https://tinyurl.com/bdhmbp9t.

D. Argument

The court found the crimes Marvin committed when he was only 17 reflected the mitigating qualities of his youthfulness. But it imposed a 40 year sentence. That sentence violates article I, section 14.

Believing his youthfulness made him less blameworthy and revealed his prospects for rehabilitation, the trial court set a minimum that would reflect that. But the court still imposed a sentence which all but requires Marvin will die in prison. The two cannot coexist. This Court has made clear it is unconstitutional to impose a sentence which requires a person to die in prison for youth whose crimes reflects the diminished culpability and transit qualities of youth.

The Court of Appeals option is contrary to this court's cases and is contrary to this constitutional command. Review is warranted by RAP 13.4.

1. *The trial court properly found Marvin's crimes reflected the transient nature of his youthfulness, that he was not irredeemably corrupt or incorrigible.*

The principles underlying adult sentences -- retribution, incapacitation, and deterrence -- do not to extend to juveniles in the same way. *Graham v. Florida*, 560 U.S. 48, 71, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Children are categorically less blameworthy and more likely to be rehabilitated. *Miller v. Alabama*, 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *Roper v. Simmons*, 543 U.S. 551, 572, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). Children are less blameworthy because they are less capable of making reasoned decisions. *Miller*, 567 U.S. at 471.

Further, children cannot control their environments. *Id.* at 471-22. They are more vulnerable to and less able to escape from poverty or abuse and have not yet completed a basic education. *Id.*

Most significantly, juveniles' immaturity and failure to appreciate risk or consequence are temporary deficits. *Id*. at 471-72. As children mature and "neurological development occurs," they demonstrate a substantial capacity for change. *Id*. at 472.

Article I, section 14 does not permit the imposition of a de facto life sentence for a young offender whose "crime reflect[s] youthful immaturity, impetuosity, and failure to appreciate risks and consequences. *State v. Anderson*, 200 Wn.2d 266, 269, 516 P.3d 1213 (2022). The trial court found Marvin was not incorrigible. Instead, the rightly found his crimes reflected the transient characteristics of youthfulness. And yet, the sentence the trial court imposed almost certainly denies Marvin a life outside prison. That sentence violates article I, section 14.

"[I]ncorrigibility is inconsistent with youth." *Graham*, 560 U.S. at 73 (quoting *Workman v. Commonwealth,* 429 S.W.2d 374, 378 (Ky.1968)). "The relevance of youth as a

mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Roper*, 543 U.S. at 551 (quoting *Johnson v. Texas, 509* U.S. 350, 368, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). And so it was with Marvin.

The trial court properly recognized Marvin's crimes reflected his youthfulness. The trial court properly found his demonstrated rehabilitation on his own and without even the potential motivation that *Miller* later provided others, showed his diminished culpability and possibility of rehabilitation.

The trial court findings highlighted Marvin's reduced culpability and susceptibility to peer pressure. CP 442-44. The court found he was "particularly vulnerable to these pressures." CP 444. The trial court found these traits were transient and disappeared with Marvin's adulthood. *Id.* at 444-45. The court recognized Marvin matured since the time of his offenses and demonstrated his capacity for rehabilitation. CP 445-46.

That Marvin's history of violence ended roughly around his 25th birthday is completely consistent with the science of brain development that lies at the core of *Roper*, *Graham* and *Miller*. *State v. O'Dell*, 183 Wn.2d 680, 695, 358 P.3d 359 (2015). The immaturity and impetuousness of youth is transient, and disappears through normal neurological development. The trial court properly found Marvin's crimes reflected the transient nature of his youthfulness and were not a product of irretrievable corruption. And yet, the court imposed a sentence which ignores all of that.

2. The trial court could not impose a sentence which denies Marvin a meaningful opportunity for life outside prison after the court found his crimes reflected the transient immaturity of his youthfulness.

Article I, section 14 bars a life sentence for crimes committed as a child. *State v. Bassett*, 192 Wn.2d. 67, 90, 428 Wn.2d 343 (2018). *Bassett* concerned an actual sentence of life without the possibility of parole, but the same constitutional bar applies to very lengthy sentences which will deny the person a

meaningful opportunity for life outside of prison - *de facto* life sentences. *State v. Haag*, 198 Wn.2d 309, 330, 495 P.3d 241 (2021); *see also*, *State v. Ramos*, 187 Wn.2d 420, 440, 387 P.3d 650 (2017) ("a juvenile cannot be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation").

The trial court found Marvin has demonstrated his rehabilitation and the capacity for change. The trial court found Marvin's crimes reflected the transient nature of his youthfulness and thus not permanent incorrigibility. In short, the court found Marvin does not deserve to die in prison. Yet the court imposed a sentence that likely requires just that.

Marvin must serve at least 15 more years before he has even an opportunity for release, even as his codefendant is eligible for release soon.

Assessing whether a sentence is a *de facto* life sentence does not begin and end with the length of the sentence alone. Instead, the person's age when they received a lengthy sentence

is equally important. A child like Marvin who receives a long sentence "has lost incalculably more than an adult in the same circumstances, the ability to work, to vote, or even to operate a motor vehicle." *Haag*, 198 Wn.2d at 329. And the child will serve that disproportionately harsher sentence for an "inherently different" crime than the adult because the child was less culpable to begin with. *Id*.

The opinion below points to *Haag*. Opinion at 5. Yet it does not apply *Haag's* analysis. *Haag* concluded a 46 year sentence was a *de facto* life sentence. *Haag*, 198 Wn.2d at 317. Yet here the court concludes a sentence 6 years shorter is not. In reaching that conclusion the opinion ignores most of the similarities between Marvin and Haag's sentences to focus largely on the fact that 40 is less than 46.

Rather than arbitrarily pick a number, *Haag* pointed to what was lost in the decades behind bars rather than what would left upon release. The Court observed the sentence "means they will miss out on the developments of the world."

Haag, 198 Wn.2d at 327. The Court pointed to technological advancements occurring during the decades of incarceration as having fundamentally changed the world the person will be released to. *Id*. The court pointed to all that had changed and would change before release. All of that is equally true for Marvin.

Marvin has been imprisoned since he was 17, since "ER," "Friends," and "Frasier" were the top-rated television shows, when television shows were still a thing that mattered. http://www.thetvratingsguide.com/1991/08/1998-99-ratings-history.html. He entered prison before he had the opportunity to meaningfully participate in society.

But the opinion here does not follow *Haag's* lead. The opinion says nothing of how the world has changed since 1999. It says nothing of the changes that will continue until 2039 when Marvin will be eligible for release. Instead, the opinion offers that if released after 40 years Marvin will have 10 years until he reaches "normal retirement age." Opinion at First, the

"normal retirement age" is a term of art referring to the age at which a person is entitled to full social security benefits based on their birth year. https://www.ssa.gov/oact/progdata/nra.html. It is not a "typical" or "average" age of retirement. Additionally, it is far from clear what benefits a person would even receive at the "normal" age after spending most of their adult life incarcerated.

Moreover, such a rosy claim ignores the health impacts of incarceration. One study found that each year of incarceration can decrease life expectancy by as much as 2 years. Evelyn Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-200*3, 103 Am. J. Pub. Health, 523, 523 (March 2013). The court cannot rely on metrics derived from non-incarcerated individuals to assess what is "life" for Marvin. *See Haag*, 198 Wn.2d at 329. Yet the opinion concludes that at age 57, and after 40 years of the attendant health consequences of incarceration, Marvin will be presented with the opportunity to establish a "career." Opinion

at 7. That he may be able to work for whatever few years remain in his life in 2039 is hardly a career.

Just as the sentence in *Haag*, a 40 years sentence imposed for a crime committed as a 17 year-old boy is a *de facto* life sentence. Because the trial court found Marvin's crimes reflect his youthfulness, it could not impose a *de facto* life sentence. *Haag*, 198 Wn. 2d at 330.

Article I, section 14 does not permit a court to sentence a child to a *de facto* life sentence where the court has found the child is not permanently incorrigible. *Haag*, 198 Wn.2d at 330 (citing *Ramos*, 187 Wn.2d at 437; *Bassett*, 192 Wn. 2d at 91); *Anderson*, 200 Wn. 2d at 269. Because the court properly found his crimes were the product of his transient immaturity and not permanent incorrigibility, article I, section 14 did not allow the court to impose a sentence requiring Marvin to spend decades more in prison, perhaps beyond his natural life.

The Court of Appeals option is contrary to this court's cases and is contrary to this constitutional command. Review is warranted by RAP 13.4.

E. Conclusion

Article I, section 14 required reversal of Marvin's sentence to permit the trial court to impose a constitutional sentence. This Court should accept review and direct that to occur.

This brief complies with RAP 18.17 and contains 2559 words

Respectfully submitted this 13th day of March, 2024.

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FILED
2/14/2024
Court of Appeals
Division I
State of Washington

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

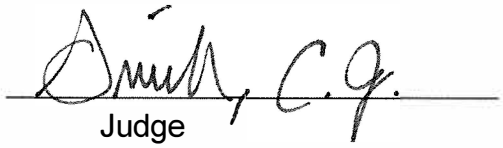
STATE OF WASHINGTON, Respondent, v. MARVIN LOFI LEO, Appellant.	No. 85902-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Marvin Leo has moved for reconsideration of the opinion filed on February 5, 2024. The panel has considered the motion pursuant to RAP 12.4 and has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



Judge

FILED
2/5/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MARVIN LOFI LEO, Appellant.	No. 85902-1-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — In 1998, 17-year-old Marvin Leo and several accomplices orchestrated a mass shooting in Tacoma's International District. Leo was charged with five counts of aggravated murder in the first degree and five counts of assault in the first degree. Each charge carried a firearm enhancement. He pleaded guilty and was sentenced to mandatory life without the possibility of parole plus 1,100 months to run consecutively to his life sentence. In 2016, Leo was resentenced under the Miller-fix statutes. After considering Leo's youthfulness as a mitigating factor, the resentencing court imposed a minimum term of 40 years to life, with all counts to be served concurrently. Leo appeals, contending that the new sentence is an unconstitutional de facto life sentence. Because the resentencing court properly focused on Leo's youth as a mitigating factor and because the new sentence allows Leo a meaningful opportunity for life outside of prison, we disagree and affirm.

FACTS

In the early morning hours of July 5, 1998, Marvin Leo and several other accomplices opened fire into the Trang Dai Café in Tacoma, Washington, killing five people and injuring five others. Leo was 17 years old at the time.

Following his arrest, Leo pleaded guilty to five counts of aggravated murder in the first degree and five counts of aggravated assault in the first degree. Each of the ten charges carried a 60-month firearm enhancement mandated to run consecutively. In February 2000, Leo was sentenced to life without the possibility of parole plus 1,100 months to run consecutively to his life sentence.

In 2016, Leo was resentenced under the Miller[1]-fix statutes, RCW 10.95.030 and RCW 10.95.035. At the resentencing hearing, forensic psychologist Dr. Nathan Henry testified that Leo presented a moderate to low risk of future dangerousness. Dr. Henry also testified about Leo's challenging childhood and family life, his eventual gang involvement, and his efforts toward rehabilitation while incarcerated. Dr. Henry noted that "adolescents who are going through difficult transition times . . . may be more prone to seek connection and support in ways that can be problematic." Therefore, Dr. Henry explained, it was "not surprising" that Leo sought out the acceptance of a gang. Dr. Henry also noted that Leo had taken advantage of opportunities for self-improvement

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

while incarcerated, including taking an anger management class, a cognitive behavioral life skills class, and a substance abuse class.

Leo requested a 30-year minimum term, with all counts and sentencing enhancements to be served concurrently. The State recommended that the court impose five consecutive terms of 25 years to life for each murder charge.

The resentencing court found that Leo's "vulnerability and risk level for criminal behavior in 1998 was exacerbated [b]y a confluence of factors," including his "youth and his brain development," which "contributed to his poor decision making and susceptibility to peer pressure." The court also found that Leo was "particularly vulnerable because it was a tumultuous time in his life," that he was "exposed to a history of domestic violence and conflicts between his parents and alcohol abuse by his parents," and that he was exposed to "environmental violence when his family resettled in . . . an area known for gang violence and criminal activity." The court noted that as an adult, Leo "does not exhibit the traits associated with increased risk of violence" and that he had "matured" since the time of the crimes. The court concluded that Leo's youth mitigated his crimes and that an exceptional sentence downward was warranted. The court then imposed a minimum of 40 years to life on each count, with all counts and corresponding firearm enhancements to run concurrently.

Leo appeals.

ANALYSIS

On appeal, Leo contends that the court erred by imposing a de facto life sentence of 40 years on each count. We disagree.

Because " '[c]hildren are different' " from adults, "our criminal justice system [must] address this difference when punishing children." In re Pers. Restraint of Ali, 196 Wn.2d 220, 225, 474 P.3d 507 (2020) (first alteration in original) (quoting State v. Houston-Sconiers, 188 Wn.2d 1, 8, 391 P.3d 409 (2017)). For youth to be a mitigating factor justifying an exceptional sentence below the standard range, a juvenile offender must show that their immaturity, impetuosity, or failure to appreciate the risks and consequences contributed to the commission of their crime. State v. Anderson, 200 Wn.2d 266, 285, 516 P.3d 1213 (2022). A juvenile offender can satisfy this burden by presenting " 'relevant mitigation evidence bearing on the circumstances of the offense and the culpability of the offender, including both expert and lay testimony as appropriate.' " State v. Haag, 198 Wn.2d 309, 321, 495 P.3d 241 (2021) (quoting State v. Delbosque, 195 Wn.2d 106, 121, 456 P.3d 806 (2020)).

At a Miller-fix resentencing 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' the juvenile offender is just as culpable as an adult offender." Anderson, 200 Wn.2d at 285 (quoting State v. Ramos, 187 Wn.2d 420, 434, 387 P.3d 650 (2017)). " 'The sentencing court must thoroughly explain its reasoning, specifically considering the differences between juveniles and adults identified by the Miller Court and how those differences apply to the case presented.' " Haag, 198 Wn.2d at 321 (quoting Ramos, 187 Wn.2d at 444). And though the court must focus on the mitigating qualities of youth, it must also consider the facts of

the case, including facts that may weigh in favor of punishment. Anderson, 200 Wn.2d at 286. If the court determines that a juvenile offender's crimes reflect those mitigating youthful characteristics, the court cannot impose a de facto life sentence that "creates an unacceptable risk that the juvenile offender will die in prison or have no meaningful opportunity to reenter society." Anderson, 200 Wn.2d at 286.

" 'We will reverse a sentencing court's decision only if we find a clear abuse of discretion or misapplication of the law.' " Haag, 198 Wn.2d at 317 (quoting Delbosque, 195 Wn.2d at 116). The court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. Haag, 198 Wn.2d at 317. The court's decision is based on untenable grounds if its factual findings are unsupported by the record. Delbosque, 195 Wn.2d at 116. " 'We review findings of fact for substantial evidence,' which 'exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.' " Haag, 198 Wn.2d at 317 (quoting Delbosque, 195 Wn.2d at 116).

Leo asserts that his 40-year sentence constitutes an impermissible de facto life sentence. We are not persuaded. Our Supreme Court's recent decision in Haag is instructive.

In Haag, our Supreme Court concluded that a 46-year sentence given to a 17-year-old constituted an unconstitutional de facto life sentence. 198 Wn.2d at 317. The court explained that "[a] juvenile sentenced to be released at the age of 63 has lost incalculably more than an adult in the same circumstances, the ability

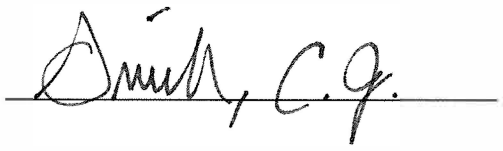
to work, to vote, or even to operate a motor vehicle." Haag, 198 Wn.2d at 329. The court then opined that "releasing Haag from confinement at the age of 63 deprives him of a meaningful opportunity to return to society, depriving him of a meaningful life." Haag, 198 Wn.2d at 329. In reaching this conclusion, the court in Haag relied on out-of-state cases that considered similarly long sentences and concluded that they were de facto life sentences. 198 Wn.2d at 328 (citing State v. Zuber, 227 N.J. 422, 448, 152 A.3d 197 (2017) (55-year minimum sentence for juvenile is the "practical equivalent of life without parole"); Bear Cloud v. State, 2014 WY 113, ¶¶ 11, 33, 334 P.3d 132 (2014) (45-year minimum sentence was the "functional equivalent of life without parole"); State v. Null, 836 N.W.2d 41, 70-71 (Iowa 2013) (52.5-year minimum term "is sufficient to trigger Miller-type protections")).

The present case is distinguishable from Haag. Here, the court imposed a 40-year sentence, rather than the longer sentences that were imposed in Haag and the out-of-state cases considered by the court in Haag. The charges at issue here are also far more severe than those in Haag—five counts of aggravated murder in the first degree as compared to one. And at 57 years old, Leo will still have a meaningful opportunity to return to society and to have a meaningful life outside of prison. Unlike the defendant in Haag, Leo will have ten years until he reaches the normal federal retirement age.[2] Leo will also be automatically eligible to vote, unlike the defendant in Haag. Compare RCW

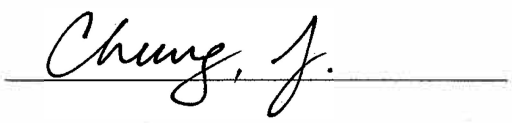
[2] See Normal Retirement Age, SOC. SEC. ADMIN., https://www.ssa.gov/oact/progdata/nra.html [https://perma.cc/N626-XQ3Q].

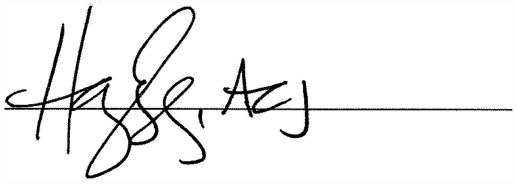
29A.08.520(1) (right to vote is automatically restored for individuals with felony convictions) with former RCW 29A.08.520(1) (2013) (right to vote is provisionally restored for individuals with felony convictions). He will have several years to " 'exercise the rights and responsibilities of adulthood,' " such as establishing a career. Haag, 198 Wn.2d at 327 (quoting Casiano v. Comm'r of Corr., 317 Conn. 52, 77, 115 A.3d 1031 (2015)). We also note that Leo has shown a commendable dedication to rehabilitation while incarcerated which is precisely why the Miller-fix statutes were created. However, we disagree that the resentencing court imposed a de facto life sentence.

We affirm.



WE CONCUR:





DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 85902-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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Date: March 13, 2024

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March 13, 2024 - 4:09 PM

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Filed with Court:	Court of Appeals Division I
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Appellate Court Case Title:	State of Washington, Respondent v. Marvin Lofi Leo, Appellant
Superior Court Case Number:	98-1-03161-3

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