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No. 97766-6

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**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,  
Respondent,

v.

TIMOTHY HAAG,  
Appellant.

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**MEMORANDUM OF AMICUS CURIAE  
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY  
IN SUPPORT OF PETITION FOR REVIEW**

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## **IDENTITY AND INTEREST OF AMICUS CURIAE**

The identity and interest of the Fred T. Korematsu Center for Law and Equality are set forth in the Motion for Leave to File Memorandum of Amicus Curiae in Support of Review, submitted contemporaneously with this memorandum.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

The U.S. Supreme Court observed that “[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only” because the juvenile offender “will on average serve more years and a greater percentage of his life in prison than an adult offender.” *Graham v. Florida*, 560 U.S. 48, 70, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). It further declared that “[t]his reality cannot be ignored.” *Id.* at 71.

If Timothy Haag had been under 16 years of age instead of being nearly two months past his 17th birthday when he committed the crime, Timothy, at resentencing, would have received a minimum term of 25 years. If Timothy had not been charged with aggravated murder and had been charged and convicted of lesser charges, he would likely have received a lengthy term of years sentence but would have been eligible to

seek release by parole after serving 20 years.<sup>1</sup> Instead, though the court at resentencing found that Mr. Haag had “reached a significant level of rehabilitation,” “exhibited a stellar track record in prison and has been assessed as a low risk for violently re-offending,” and that he was “not irretrievably depraved nor irreparably corrupt,” it nevertheless sentenced him to a minimum term of 46 years. Pet. for Review at 3 (citing RPI 27, 25).

This sentence, a maximum term of life and a minimum term of 46 years given to a juvenile offender convicted of aggravated murder, is different in name from life imprisonment without parole. The reality, though, as demonstrated below, is that Timothy will likely serve more time than those originally sentenced to death who had their sentences converted to life without parole after *State v. Gregory*, 192 Wn.2d 1, 36, 427 P.3d 621 (2018) (converting all death sentences to life imprisonment). That Timothy will likely serve more years and a greater percentage of his life in prison than will the so-called “worst of the worst” raises important constitutional concerns that must not be ignored.

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<sup>1</sup> Amicus notes that it appears that no child has been convicted of aggravated murder since 2004. Proving a negative can be difficult, but amicus is unaware of any such conviction. Though it is possible that no children have committed offenses chargeable as aggravated murder since then, it may be that charging or plea practices of prosecutors have changed. Amicus notes that this shift coincides with changes in juvenile sentencing ushered in by *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), which reflect an understanding that children are different from adults and are inherently less culpable.

Review is warranted under RAP 13.4(b)(3) and (4) to ensure that the procedures governing the sentencing of children in adult court manifest the heightened protection of article I, section 14 and that sentencing courts are exercising discretion within constitutional bounds and not abusing their discretion by setting minimum sentences greatly beyond the minimum permissible.

### **ARGUMENT**

The legislature in 2014 instituted broad-sweeping changes to the sentencing of children. Though responsive to and at times going beyond the letter of *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the legislation failed to create a sentencing scheme that incorporated fully the insights regarding adolescent brain development. Instead of focusing on culpability directly as a predicate to justify certain sentences, the legislature relied upon chronological age cutoffs. For aggravated murder, it created three categories: (a) those who were under 16 when they committed the crime were to be sentenced to a maximum term of life with a minimum term of 25 years, RCW 10.95.030(3)(a)(i); (b) those between 16 and 18 when they committed the crime were to be sentenced to a maximum term of life and a minimum term of at least 25 years up to life, RCW 10.95.030(3)(a)(ii); (c) those 18 and over could receive the death penalty or life without parole, RCW 10.95.030(2). In



addition, the legislature provided that anyone under 18 at time of crime commission not sentenced under RCW 10.95.030 or RCW 9.94A.507 was eligible for parole after serving 20 years of an incarceration sentence. RCW 9.94A.730(1).

Though these categories provide a certain degree of administrative convenience, the sentencing reforms did not resolve fully the legal issues, and whether the categories and resulting individual sentences pass muster remains the subject of much litigation. As an example, this Court has under its consideration *State v. Delbosque*, No. 96709-1 (challenge to a minimum sentence of 48 years for a 17-year-old convicted of aggravated murder), resolution of which might afford Timothy Haag relief.<sup>2</sup>

**I. Resentencing Courts, When Given Discretion, Are Setting Minimum Terms Far in Excess of Twenty-Five Years.**

At least 24 juvenile offenders convicted of aggravated murder have been resentenced under RCW 10.95.035 and RCW 10.95.030. Seven will have an opportunity to seek release after they serve 25 years. These seven were all under the age of 16 when they committed their crimes. The

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<sup>2</sup> The Korematsu Center, joined by other amici, suggested in *Delbosque* that in order to be compliant with article I, section 14 of the Washington Constitution, sentencing courts should set the minimum sentence under RCW 10.95.030 at 25 years unless the State proves by clear and convincing evidence that the child is irredeemably corrupt. If the Court accepts this argument in *Delbosque*, this approach would afford appropriate relief for Mr. Haag, with remand for resentencing with a minimum term of 25 years because the trial court has already found that Mr. Haag is not “irredeemably depraved nor irreparably corrupt.”

resentencing courts had no discretion and were required to set the minimum term at 25 years.

When resentencing courts have had the discretion to set the minimum term before parole could be sought, they generally have set it much higher than the permissible minimum. Seventeen individuals were between the ages of 16 and 18 when they committed their crimes, and upon resentencing, they received minimum sentences of 42, 50, 48, 38, 48, 38, 48, 46, 40, 189, 26, 125, 32, and 35 years, and three received minimum sentences of life without parole.<sup>3</sup>

Resentencing courts, for the most part, do not set the minimum near the statutory minimum. Instead, the observed practice is that courts set the minimum term in the high range, at or approaching a de facto life sentence. The result is that those under 16 get a minimum term of 25

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<sup>3</sup> See, respectively, *State v. Backstrom*, No. 97-1-01993-6 (Snohomish Cty. Sup. Ct. June 27, 2017), *State v. Boot*, No. 95-1-00310-0 (Spokane Cty. Sup. Ct. Mar. 30, 2017), *State v. Delbosque*, No. 93-1-00256-4 (Mason Cty. Sup. Ct. Nov. 23, 2016), *State v. Forrester*, No. 1-25095 (1978) (Spokane Cty. Sup. Ct. Nov. 12, 2015), *State v. Furman*, No. 89-1-00304-8 (Kitsap Cty. Sup. Ct. Mar. 26, 2018), *State v. Haag*, No. 94-1-00411-2 (Cowlitz Cty. Sup. Ct. Jan. 19, 2018), *State v. Leo*, No. 98-1-03161-3 (Pierce Cty. Sup. Ct. Nov. 16, 2016), *State v. Loukaitis*, No. 96-1-00548-0 (Grant Cty. Sup. Ct. Apr. 19, 2017), *State v. Hofstetter*, No. 91-1-02993-0 (Pierce Cty. Sup. Ct. Oct. 18, 2013), *State v. Phet*, No. 98-1-03162-1 (Pierce Cty. Sup. Ct. Mar. 10, 2016), *State v. Skay*, No. 95-1-01942-5 (Snohomish Cty. Sup. Ct. June 1, 2016), and *State v. Thang*, No. 98-1-00278-7 (Spokane Cty. Sup. Ct. Sept. 23, 2015). Before juvenile life without parole was declared unconstitutional in *Bassett*, 192 Wn.2d 67, three received LWOP. See *State v. Ngoeung*, No. 94-1-03719-8 (Pierce Cty. Sup. Ct. Jan. 23, 2015 & July 12, 2019), *State v. Stevenson*, No. 87-1-00011-5 (Skamania Cty. Sup. Ct. Mar. 17, 2017), and *State v. Bassett*, No. 95-1-00415-9 (Grays Harbor Cty. Sup. Ct. Jan. 30, 2015). Of course, following *Bassett*, these three will have to be resentenced to have new minimum terms set, and Brian Bassett in his second resentencing was sentenced to 60 years.

years. For those past the age 16 threshold, there is a dramatic ratchet upward where these children receive the sentences described above. This raises important constitutional concerns as to whether judges are properly exercising their discretion when they sentence children between the ages of 16 and 18 to much harsher sentences than to those under age 16.

**II. The Worst of the Worst, Those Previously Sentenced to Death Whose Sentences Were Converted to Life Imprisonment, Will Likely Serve Less Time than Those Resentenced Pursuant to RCW 10.95.035 and .030.**

After this Court’s decision in *Gregory*, all death sentences were converted to life without parole. The average age of these individuals at the time of the commission of their crimes—those deemed the worst of the worst—is 37.63 years old.<sup>4</sup> It is quite likely that Mr. Haag, who faces a minimum term of incarceration of 46 years, will serve far more time than those already deemed to be the worst of the worst. This raises important constitutional concerns as to whether Timothy’s sentence requiring a minimum of 46 years is constitutional in light of the fact that the “worst of the worst” will likely serve less time than Timothy.

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<sup>4</sup> The age at the time of the commission of their respective crimes was: Jonathan Lee Gentry, 32 years old; Clark Richard Elmore, 44 years old; Cecil Emile Davis, 38 years old; Davya Michael Cross, 38 years old; Robert Lee Yates Jr., 45 and 46 years old; Conner Michael Schierman, 25 years old; Allen Eugene Gregory, 24 years old; Byron Eugene Scherf, 53 years old. Wash. State Dep’t of Corrs., *Inmates Sentenced to Capital Punishment 1* (rev. 2017), <https://www.doc.wa.gov/docs/publications/reports/100-SR001.pdf>.

**III. This Court Should Accept Review to Consider Whether the Resentencing Court's Exercise of Discretion in Setting the Minimum Term at 46 Years Violates this Court's Admonition that Juveniles Are Inherently Less Culpable than Their Adult Counterparts.**

When Brian Bassett was first resentenced as required by RCW 10.95.035, the resentencing court, acting within the authority explicitly granted by the legislature in RCW 10.95.030, determined that the minimum term of incarceration was life. *State v. Bassett*, No. 95-1-00415-9 (Grays Harbor Cty. Sup. Ct. Jan. 30, 2015). This Court, though, found that the explicit legislative grant exceeded the heightened protections afforded to juveniles under article I, section 14 of the Washington Constitution. *Bassett*, 192 Wn.2d at 91 (holding juvenile life without parole to be unconstitutional despite being explicitly authorized by the legislature).

Here, even though the minimum sentence of 46 years lies within the explicit legislative grant of authority under RCW 10.95.030, review is appropriate so this Court may consider whether this sentence exceeds the heightened protections afforded to juveniles under article I, section 14 of the Washington Constitution, due to their diminished culpability.

**CONCLUSION**

Amicus respectfully requests that the Court accept review for the foregoing reasons.

DATED this 9th day of December 2019.

Respectfully Submitted:<sup>5</sup>

/s/ Robert S. Chang

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<sup>5</sup> We acknowledge the contributions of Catherine Bentley, Shelby Bowden, and Kristen Schmit, students in the Korematsu Center Civil Rights Clinic.

## **DECLARATION OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington, that on December 9, 2019, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 9th day of December, 2019.

/s/ Jessica Levin

Jessica Levin

Attorney for Amicus Curiae

FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

# KOREMATSU CENTER FOR LAW AND EQUALITY

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