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Supreme Court No. 99560-5  
Court of Appeals No. 79818-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

D'ANGELO SALOY,

Petitioner.

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

D'Angelo Saloy requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *State v. D'Angelo Saloy*, No. 79818-9-I, filed January 11, 2021. A copy of the opinion is attached as Appendix A. The Court of Appeals denied D'Angelo's motion for reconsideration on February 4, 2021. A copy of that ruling is attached as Appendix B.

B. ISSUES PRESENTED FOR REVIEW

1. Article I, section 14, and the Eighth Amendment prohibit the trial court from imposing a de facto life sentence on a child. The trial court imposed a 41-year sentence on D'Angelo based only on its unsupported determination that D'Angelo's release at 60 years old did not condemn him to die in prison. But taking into account D'Angelo's sex, race, and adverse childhood experiences, he is likely to die in prison before reaching the age of 60. Further, children are entitled to be treated differently because they are capable of rehabilitation and reentry into the community as productive citizens, which is not achieved when the child is released at the age of retirement. Whether a sentence that imprisons D'Angelo until age 60 constitutes a de facto life sentence is a significant constitutional question that raises an issue of substantial public interest. Should this Court grant review? RAP 13.4(b)(3), (4).

2. Because children are different, the court is required at sentencing to consider how those differences make a youth less culpable and how the child's incompetencies worked to the detriment of the child during the prosecution of the case. At D'Angelo's resentencing the trial court wrongly rejected these standards and instead relied on the standards governing mitigating circumstances for adults, and a defendant's incompetency to stand trial. Should this Court grant review where the trial court applied the wrong standards at D'Angelo's sentencing hearing before condemning him to a likely death in prison? RAP 13.4(b)(4).

3. Under the Eighth Amendment and article I, section 14, children sentenced to decades in prison are entitled to a meaningful opportunity to demonstrate they should be released earlier based upon their maturity and rehabilitation. Whether a child commits an additional crime after the age of 18 may be relevant to whether that child is *granted* release, but has no bearing on whether the child is entitled to a meaningful *opportunity* to petition for release. However, RCW 9.94A.730(1) prevents youth such as D'Angelo from seeking release after 20 years of imprisonment, simply because he pled guilty to lesser crimes after turning 18. Should this Court grant review to determine the constitutionality of this provision? RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

**1. D'Angelo suffered severe neglect and abuse as a child.**

D'Angelo's mother had five children with men who were either absent from the home or abusive when present. CP 160. She had cerebral palsy and found her precocious youngest child, D'Angelo, difficult to parent. CP 161. She loved him, but she was abusive and neglectful. CP 154, 166. Child Protective Services opened approximately 74 referrals in regards to her home, and her second youngest child was adopted out of the home. CP 172. Some referrals were related to D'Angelo's older sister, who had two children by the time she was 15 years old. CP 126.

By age six, D'Angelo longed to have an adult care for him the way he had observed other parents caring for their children. CP 132. As a kindergartener, he expressed an eagerness to die. CP 169. A child psychiatrist found D'Angelo "has likely been exposed to an unpredictable and chaotic home environment with perhaps some lack of appropriate nurturing and of developmentally appropriate stimulation" and feared D'Angelo had been the victim of sexual assault. CP 169. Teachers identified D'Angelo as having impulse control issues as early as preschool, and the psychiatrist diagnosed D'Angelo with attention-deficit/hyperactivity disorder (ADHD). CP 168, 169. The psychiatrist recommended medication, but D'Angelo's mother refused. CP 169.

At age 13, school records noted D'Angelo was "compassionate and will assist peers as needed," and that he "can be a positive role model for others." CP 170. Yet he could not focus on a task and had no ability to manage his frustration when faced with an assignment that was boring, challenging, or new to him. CP 170. By this young age he was deemed "out of control" and refused to follow rules. CP 170. He had begun engaging in criminal behavior, was abusing drugs and alcohol, and was arrested for the first time at age 12 for selling crack cocaine on the street corner. CP 120, 170. He eventually refused to attend school and said he expected to be dead within five years. CP 171.

Ultimately, D'Angelo's mother abandoned him and moved into an apartment with her own mother, leaving D'Angelo homeless and forcing him to entirely fend for himself before age 16. CP 176.

**2. D'Angelo turned to neighborhood gang members for the sense of belonging and guidance that was absent from his home.**

Gangs were strongly and actively present in D'Angelo's neighborhood and schools. CP 134, 166. It seemed inevitable to D'Angelo that he would need to join a gang, and older gang members fulfilled a sense of belonging in D'Angelo he could not find at home. CP 166; RP 117-18. D'Angelo's untreated ADHD made him more impulsive and reckless than his peers, and older gang members were eager to take



advantage of this. CP 134, 175; RP 46. They pressured him to take actions on behalf of the gang that they deemed too risky to engage in themselves. CP 134. In his teenage mind, the gang felt all consuming to D'Angelo and it did not occur to him he was "entitled to a future." CP 132-33. By 2008, when he was 16 years old, he had lost multiple friends to gang violence and did not expect to live to age 18. CP 135.

**3. D'Angelo fired shots out of a car at rival gang members and admitted to the shooting in a recording. Despite the evidence against him, he remained unable to consider a future for himself or how the State's plea offer impacted that future.**

In October of 2008, two kids were shot outside of a teen center in a drive-by shooting. CP 5. One was killed and one was injured. CP 5. Both were self-professed members of Central District gangs, which were considered "rivals" of the south end gang to which D'Angelo belonged. CP 6. The police were at a loss to identify the shooters for two years, in part because of a lack of cooperation from witnesses. CP 6.

Eventually, information emerged that D'Angelo and another gang member were claiming responsibility for the shooting. CP 8. An immigration and customs enforcement officer pressured D'Angelo's close friend to wear a recording device and ask D'Angelo about the shooting, and this friend captured D'Angelo's confession on tape. CP 9. The State filed charges two years after obtaining this recording. CP 1, 9-10. In the

interim, D'Angelo pled guilty to a second degree assault charge and charges of unlawful possession of a firearm and controlled substances when he was 19 years old. CP 386 (FOF 4).

Prior to trial on the murder and attempted murder charges, the State offered D'Angelo a plea offer that would result in a standard range sentence of 26 to 34 years. CP 183. Unaccustomed to contemplating a future for himself, he was unable to consider the risks a trial presented or the State's offer of a significantly reduced prison sentence. RP 113.

A jury convicted D'Angelo of first degree murder, attempted first degree murder, and found he was armed with a firearm during the commission of the crimes. CP 375-76. D'Angelo was originally sentenced to a standard range sentence of over 59 years in prison. CP 21. On appeal, the Court of Appeals remanded for a new sentencing hearing because the trial court failed to consider how children are meaningfully different than adults before imposing a life sentence on D'Angelo. CP 29.

**4. Now 28 years old, D'Angelo has already demonstrated significant growth and maturity. This is consistent with juvenile brain science.**

At his first sentencing hearing, D'Angelo was defiant and angry. CP 186. At resentencing, D'Angelo apologized for his past actions and expressed deep remorse for the irreparable harm he had caused. CP 186, 189; RP 298-99. During the time in between these two hearings, D'Angelo

was housed in closed custody at the prison as a result of his convictions. CP 135. This required him to spend 21 hours each day locked in his cell with his cell mate. CP 135. Only shortly before his resentencing did D'Angelo transfer out of closed custody and become eligible for counseling and the majority of prison programming. CP 164.

Despite closed custody's restrictions, D'Angelo read voraciously and took advantage of the limited resources available to him. CP 136. He obtained his GED, received certificates in self-awareness and food training, began conducting a weekly reading group, and helped plan a Juneteenth ceremony at the prison. CP 192-202, 206.

At his resentencing, Tye Hunter, Ph.D. explained the socio-emotional function of the brain, which seeks immediate rewards and is heavily susceptible to social influence, develops by age 15 or 16, but the executive function of the brain, responsible for judgment and impulse control, may not fully develop until the individual is 25. CP 175. This developmental combination results in a brain that is deficient in judgment and highly prone to risk-taking behaviors. CP 175.

Dr. Hunter explained several other factors negatively impacted D'Angelo's executive function as a child, including his untreated ADHD and resulting learning deficits, his parents' neglect and abuse, and the post-traumatic stress disorder (PTSD) he suffered as a result of growing

up in a chaotic and abusive environment. CP 175. Specifically, Dr. Hunter found D'Angelo suffered “a catastrophic accumulation of Adverse Childhood Experiences (ACEs). . . with few protective factors.” CP 147.

**5. The court sentenced D'Angelo to 41 years in prison.**

The trial court imposed a 41-year sentence on D'Angelo. CP 376; RP 310. It found this lengthy prison sentence was just because he needed more time than his peers to mature, given his horrific childhood. RP 310.

**D. ARGUMENT IN FAVOR OF GRANTING REVIEW**

**1. The trial court imposed an unconstitutional de facto life sentence on D'Angelo.**

This Court has repeatedly declined to address the question of what length of sentence constitutes a de facto life sentence because the question was not squarely presented to the Court. *State v. Delbosque*, 195 Wn.2d 106, 122, 456 P.3d 806 (2020) (citing *State v. Ramos*, 187 Wn.2d 420, 438, 439 n.6, 387 P.3d 650 (2017)). This significant constitutional question is squarely presented here. RAP 13.4(b)(3).

“[T]he direction of change in this country is unmistakably and steadily moving toward abandoning the practice of putting child offenders in prison for their entire lives.” *State v. Bassett*, 192 Wn.2d 67, 86, 428 P.3d 343 (2018). In *Bassett*, this Court held our state constitution offers greater protections to juveniles at sentencing than the Eighth Amendment.

*Id.* at 82; Const. art. I, § 14.

The trial court's 41-year sentence will imprison D'Angelo until he is 60 years old for a crime he committed when he was just 16 years old. CP 386, 392 (FOF 2, COL 7). The court acknowledged sentencing D'Angelo to life in prison violated article I, section 14, and D'Angelo would not be eligible to petition for release under RCW 9.94A.730(1). CP 387 (FOF 13, 14). But it adopted the State's argument that although the low end of the standard range, 51 years, may constitute an unconstitutional life sentence, 41 years did not. CP 392 (COL 4, 7). The trial court determined D'Angelo's release at 70 years old condemned D'Angelo to the prospect of dying in prison, but release at 60 years old did not.

This Court does not distinguish between literal life sentences and de facto life sentences. *Ramos*, 187 Wn.2d at 438; *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed.2d 407 (2012); *see also State v. Ronquillo*, 190 Wn. App. 765, 775, 361 P.3d 779 (2015) (the *Miller* factors apply anytime the youth "would otherwise face 'the prospect of geriatric release'"). In *Ronquillo*, the Court of Appeals reversed after the trial court sentenced the juvenile to 51.3 years in prison, which would result in his release at age 68. 190 Wn. App. at 775. The court held this constituted a de facto life sentence that assessed the youth "as virtually irredeemable," even though it also acknowledged it was "not necessarily a

life sentence for a 16-year-old.” *Id.* at 774-75. It remanded for resentencing and directed the trial court to apply the *Miller* factors. *Id.* at 785.

Here, the trial court made no findings of fact to support its conclusion that release at age 60 did not constitute a de facto life sentence, and the trial court was wrong to determine D’Angelo’s release at 60 years old did not effectively sentence him to a life of incarceration. First, children are entitled to be treated differently because they can be rehabilitated and successfully return to the community as productive, contributing members. *See Graham v. Florida*, 560 U.S. 48, 75, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Even when a child is not certain to die in prison, releasing the child just as he reaches retirement age does not serve the goal of treating children differently because recognition of a child’s lessened culpability and rapid rehabilitation is meaningless where the child is released after his most productive years are behind him.

Second, an individual’s expected lifespan is influenced by many factors. At birth, Black men have a lower life expectancy than both Black women and white individuals. Bond & Herman, *Lagging Life Expectancy for Black Men: A Public Health Imperative*, 106(7) *Am. J. Public Health*

1167-69 (2016).<sup>1</sup> On average, a Black man can expect to live only 72.2 years. *Id.* The average life expectancy for a white man is 76.6 years, for a Black woman 78.2 years, and for a white woman 81.1 years. *Id.*

In addition, D'Angelo's adverse childhood experiences, as detailed by Dr. Hunter, further reduce D'Angelo's life expectancy, lessening the chance he will survive to the already reduced age of the average Black man.<sup>2</sup> In an advanced literature review published in *The Lancet*, researchers explained that a systematic review and meta-analysis of the relevant studies demonstrated individuals with four or more adverse childhood experiences are at an increased risk for *all* of the poor health outcomes evaluated, leading to an increased likelihood of premature death. Hughes, Bellis et al., *Lancet Public Health*, 2:e 356-66 (2017).<sup>3</sup> Dr. Hunter described D'Angelo as having suffered a "catastrophic accumulation of Adverse Childhood Experiences." CP 147. Thus, as a Black man, having suffered significant and consequential adverse

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<sup>1</sup> See <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4984780/>.

<sup>2</sup> D'Angelo is biracial and identifies as a Black man. CP 177.

<sup>3</sup> See <https://www.thelancet.com/action/showPdf?pii=S2468-2667%2817%2930118-4>. The article cited is a systematic review of all research published prior to May 6, 2016, regarding the effect of multiple adverse childhood experiences (ACEs) on an individual's health. Hughes, Bellis et al., *supra* at 356. Applying strict criteria and harnessing the power of the results of 37 studies, with a total of 253,719 research participants, the authors concluded individuals with at least four adverse childhood experiences had an increased risk of *every* poor health outcome studied, including diabetes, cancer, heart disease, and respiratory disease. *Id.* at 356-57. Unsurprisingly, the research showed this also leads to an increase in premature death. *Id.* at 356.

childhood experiences, D'Angelo's expected lifespan is significantly shorter than the average individual in our general population.

The Court of Appeals declined to grapple with what constitutes a de facto life sentence, holding simply that D'Angelo had not demonstrated he was likely to die in prison. Slip Op. at 6. It relied on *Ramos*, but ignored this Court's emphasis on the practical application of a sentence. Slip Op. at 6; *Ramos*, 187 Wn.2d at 439. As this Court acknowledged, "a lengthy term of years for a juvenile offender will become a de facto life sentence at some point." *Ramos*, 187 Wn.2d at 439.

The line drawn in this case at 60 years old is baseless and arbitrary, and cannot be reconciled with the trial court's determination that D'Angelo's release at 70 years old would be the practical equivalent of a life sentence or the Court of Appeals' determination that release at 68 years old was the equivalent of a life sentence in *Ronquillo*, 190 Wn. App. at 775. The trial court's imposition of 41 years is a de facto life sentence for D'Angelo and violates article I, section 14, and the Eighth Amendment. This Court should accept review. RAP 13.4(b)(3), (4).

**2. The trial court misapprehended the requirements of *Miller* and applied the wrong legal standards at D'Angelo's resentencing.**

When the trial court misapplies the law at sentencing, this Court should reverse. *Delbosque*, 195 Wn.2d at 116. Reversal is required here,



and this Court should accept review, because the trial court disregarded the requirements of *Miller*<sup>4</sup> and relied on legal standards that do not account for how children are different than adults.

First, the court misapprehended its obligation to consider the “incompetencies associated with youth” and instead applied the standards used to determine whether an adult defendant is entitled to an exceptional sentence or an individual is competent to stand trial. CP 388 (FOF 17); CP 393 (COL 8, 9).

The State’s evidence at trial included a wire recording of D’Angelo telling his friend he committed the shooting. CP 9. Before trial, the State offered D’Angelo a choice of plea deals that would reduce D’Angelo’s standard range sentence from to 46 to 57 years to 26 to 34 years, but D’Angelo refused to consider this offer. CP 183; RP 113. Dr. Hunter explained D’Angelo’s refusal to accept a plea deal, given the evidence against him, demonstrated “evidence of incompetence that was based on his developmental immaturity.” RP 113. Rather than considering *how* D’Angelo’s youthful incompetency negatively impacted his ability to

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<sup>4</sup> The trial court must consider: (1) the hallmark features of the juvenile’s youth, including immaturity, impetuosity, and a failure to appreciate risks and consequences; (2) the circumstances of the offense and how familial and peer pressure impacted the juvenile’s actions; and (3) the “incompetencies associated with youth” that may have impacted the proceedings, including the child’s incapacity to assist his attorney or consider a plea offer. *Ramos*, 187 Wn.2d at 443-44 (citing *Miller*, 567 U.S. at 477).

make decisions during his criminal proceeding, the court relied on legal standards governing mitigating circumstances for adults and a defendant's competency to stand trial. CP 393 (COL 8, 9). It then determined the evidence presented failed to satisfy these standards. CP 393 (COL 8, 9).

The Court of Appeals determined the trial court's consideration of these standards "does no harm." Slip Op. at 9. In fact, the court's failure to understand "youthful incompetency" was grievously harmful. The trial court erroneously accepted the State's argument that D'Angelo's circumstances were no different than those of an adult defendant who regrets not accepting a plea deal after losing at trial. RP 280. It failed to understand the relevant juvenile brain science and misapplied the law when it relied upon these adult legal standards rather than acknowledging youthful incompetency exists in *all* children and applying the science to the facts presented in D'Angelo's case. *See Miller*, 567 U.S. at 477; *Graham*, 560 U.S. at 78.

Second, the court did not consider impulsivity as a feature inherent to all youth, but instead sought to evaluate whether D'Angelo's actions, in particular, demonstrated impulsivity. CP 390 (FOF 35). This constitutes legal error because, under *Miller*, impetuosity and a failure to appreciate risks and consequences are "hallmark features" of youth. 567 U.S. at 477.

At the hearing, Dr. Hunter explained how an immature brain

engages in judgment impulsivity, causing adolescents *to act with deliberation* but fail to consider the long-term consequences of their actions. RP 63. Misunderstanding both this juvenile brain science and *Miller*, the trial court wrongly found it was required to “weigh” Dr. Hunter’s conclusions with the facts of the crime that reflected “deliberate, not impulsive acts.” RP 390 (FOF 35). The Court of Appeals found no error because *Miller* and its progeny do not hold juveniles are incapable of committing an intentional act or require a sentencing court to ignore the facts of the crimes. Slip Op. at 11. Like the trial court, the Court of Appeals misunderstands the relevant juvenile brain science.

In *Miller*, the court explained juvenile brain science shows children do not appreciate the risks and consequences of their actions. 567 U.S. at 477-78; *see also Ramos*, 187 Wn.2d at 443-44. This does not mean children do not act with deliberation to make bad decisions and carry them out. *See* RP 63 (Dr. Hunter explained marrying someone two days after meeting them reflects both an intentional act and judgment impulsivity). When the trial court effectively rejected Dr. Hunter’s conclusion that D’Angelo was unable to appreciate the risks and consequences of his actions because it determined he took deliberate actions during the commission of the crimes, it failed to correctly apply the law. CP 390 (FOF 34, 35). Indeed, by focusing on the deliberateness with which

D'Angelo acted, the trial court effectively created an exception under *Miller* for children who are convicted of any crime that requires planning or deliberation. No such exception exists.

The trial court was required to accept this well-established juvenile brain science and consider *how* D'Angelo's incompetency and poor executive brain function led to his commission of the crimes and worked to his detriment during the prosecution. Because the trial court failed to conduct the inquiries fundamental to a *Miller* hearing, the court's error cannot be deemed harmless. *See State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013) (burden is on the State to show harmlessness beyond a reasonable doubt); *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). This Court should accept review.

**3. The exception in RCW 9.94.730(1) violates the Eighth Amendment and article I, section 14 by denying children who committed crimes after their eighteenth birthday the opportunity to demonstrate they have rehabilitated.**

Children are entitled to a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” and cannot be denied the chance to show they are “fit to rejoin society.” *Graham*, 560 U.S. at 79. In order to comply with this directive, the legislature enacted RCW 9.94A.730(1), which generally allows juveniles to petition for release after 20 years of imprisonment. However, the legislature carved out exceptions

to this method of relief, including that the juvenile must not have been convicted of a crime after his eighteenth birthday. This exception in RCW 9.94A.730(1) forecloses the opportunity for a youth to petition for release after 20 years in prison in the rare circumstance where he commits a crime serious enough to result in a prison sentence greater than 20 years, but also commits any crime after he turns 18. RCW 9.94A.730(1).

As the trial court found at sentencing, D'Angelo will be forever precluded from seeking relief under this statutory provision because he pled guilty to charges of assault and unlawful possession of a firearm and controlled substances at age 19, before the State filed the charges against him in this case. CP 387 (FOF 14).

This exception in RCW 9.94A.730(1) violates the Eighth Amendment and article I, section 14. *See Bassett*, 192 Wn.2d at 82 (holding our state constitution offers greater protections to juveniles at sentencing than the Eighth Amendment); U.S. Const. amend. VIII; Const. art. I, § 14. A child's entitlement to a meaningful opportunity for release and return to his community is not contingent on whether he has committed a crime after turning 18. A child must be granted this opportunity because he risks facing a greater percentage of his life in prison than an adult with the same sentence, but the penological goals of retribution, deterrence, incapacitation, and rehabilitation do not justify a

life of incarceration. *Bassett*, 192 Wn.2d at 87-89.

The Court of Appeals declined to reach the constitutionality of RCW 9.94A.730(1), relying upon *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 736, 93 L. Ed. 2d 599 (2016), to find D'Angelo had not demonstrated manifest error under RAP 2.5(a) because parole is merely a "substitute for resentencing" rather than required "in addition to resentencing." Slip Op. at 13-14. This is incorrect. As D'Angelo explained in his opening and reply briefs, while the *Miller* resentencing hearings are designed to ensure the juvenile's youth is adequately considered at the time of sentencing, allowing a juvenile to petition for his release after 20 years in prison pursuant to RCW 9.94A.730(1) ensures a child will not be denied a meaningful opportunity to show he has matured and rehabilitated. Op. Br. at 33-37; Reply Br. at 12-14. D'Angelo is entitled to this opportunity under *Graham*, 560 U.S. at 79, and *Bassett*, 192 Wn.2d at 90. Contrary to this court's opinion, *Montgomery*, 136 S. Ct. at 736, does not resolve the issue presented here.

In *Bassett*, this Court found Mr. Bassett's resentencing to be "an illustration of the imprecise and subjective judgments a sentencing court could make regarding transient immaturity and irreparable corruption." 192 Wn.2d at 89. D'Angelo's resentencing is equally illustrative of the imprecise and subjective judgments a trial judge must make when

determining how long a child should be confined to prison. *See* Op. Br. at 35-37 (discussing how the trial judge rejected the psychologist's conclusion that D'Angelo was likely to be rehabilitated in 20 years time and instead determined D'Angelo's adverse childhood experiences warranted imprisoning him for longer than a child who had not been burdened by the same disadvantages).

A constitutional error is manifest where the appellant shows actual prejudice and the record contains the facts necessary to consider the error. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). A showing of actual prejudice exists where the asserted error results in "practical and identifiable consequences." *Id.* Here, the consequences are identified in the trial court's factual finding that D'Angelo is ineligible to seek relief under RCW 9.94A.730(1). CP 387 (FOF 14).

Further, the record provides the facts necessary to evaluate the error. The trial court acknowledged the impossibility of accurately predicting when D'Angelo would be rehabilitated, given his young age at the time of the crime. RP 304. Indeed, the court held it was impossible for *any* human being to know what will happen to another human being. RP 304; *see also* Op. Br. at 33-34. Faced with this impossible task, the trial court rejected the expert's conclusion and sentenced D'Angelo to 41 years in prison.

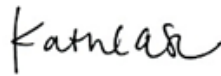
With no opportunity for release until he is 60 years old, the exception in RCW 9.94A.730(1) deprives D'Angelo of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 79; *see also Bassett*, 192 Wn.2d at 90. It violates the Eighth Amendment and article I, section 14. This is important constitutional issue that is of substantial public interest and this Court should accept review. RAP 13.4(b)(3), (4).

E. CONCLUSION

D'Angelo Saloy suffered a "catastrophic" childhood and committed a tragic act at age 16. He faces a lifetime in prison with no opportunity for release because the trial court applied the wrong legal standards at sentencing, imposed an unconstitutional de facto life sentence, and the legislature unconstitutionally foreclosed his only opportunity to demonstrate his rehabilitation. For all of the reasons stated, this Court should grant review.

DATED this 8th day of March, 2021.

Respectfully submitted,



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Kathleen A. Shea – WSBA 42634  
Attorney for Petitioner



APPENDIX A

**COURT OF APPEALS, DIVISION ONE OPINION**

**January 11, 2021**

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

THE STATE OF WASHINGTON,

Respondent,

v.

D'ANGELO A. SALOY,

Appellant.

No. 79818-9-I

DIVISION ONE

UNPUBLISHED OPINION

APPELWICK, J. — Saloy appeals from the judgment and sentence entered at his resentencing. He contends that (1) his 41 year sentence constitutes a de facto life sentence, (2) the trial court misapprehended the requirements of Miller at resentencing, (3) RCW 9.94A.730(1) is unconstitutional under the Eighth Amendment and article I, section 14, (4) the court erred in placing the burden on Saloy to prove he was entitled to an exceptional sentence below the standard range, and (5) the court erred in imposing a \$100 DNA collection fee, as his DNA had previously been collected. We affirm his sentence but remand to strike the DNA collection fee.

**FACTS**

On October 31, 2008, in a drive-by shooting, D'Angelo Saloy shot two teenagers standing near the Garfield High School baseball fields. Quincy Coleman was killed, while Demario Clark sustained nonfatal injuries. Police could not identify the shooter at the scene. Eventually, several individuals interviewed by

police indicated Saloy had been claiming responsibility for the shooting. One individual said Saloy claimed the shooting was in retaliation for the shooting of a “South End” gang member. The victims, Coleman and Clark, were both self-professed members of Central District gangs. Saloy was 16 at the time of the shooting and a member of a South End gang. In 2008, he had lost multiple friends to gang violence.

On December 1, 2010, during a judicially authorized wire recording, Saloy confessed to a friend that he had fired the shots during the drive-by and disposed of the gun in Lake Washington.

In 2011, at the age of 19, Saloy was charged with several adult felonies. He pleaded guilty to possession of controlled substances, unlawful possession of a weapon, assault II, and unlawful possession of a firearm. In 2012, at the end of his sentence for those crimes, he was arrested and charged with murder and attempted murder stemming from the 2008 shooting.

In 2014, a jury convicted Saloy of first degree murder with a firearm and attempted first degree murder with a firearm. The trial court sentenced him to a standard range term of 712 months, or almost 60 years. On appeal, this court vacated his sentence and remanded for a new sentencing hearing on the grounds that his 712 month sentence constituted a de facto life sentence. State v. Saloy, no. 72467-3-1, slip. op. at 2 (Wash. Ct. App. Feb. 27, 2017) (unpublished), <https://www.courts.wa.gov/opinions/pdf/724673.pdf>. This court ordered the trial court to “consider the factors laid out in Miller and exercise its discretion to consider[] a sentence below the standard

adult range.” Saloy, no. 72467-3-1, slip. op. at 32 (citing Miller v. Alabama, 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)).

On January 3-4, 2019, the trial court conducted an evidentiary hearing pursuant to Miller. The court stated the purpose of the hearing was to “to determine if there are substantial and compelling reasons to justify an exceptional sentence below the standard range in this matter.” Defense presented evidence of Saloy’s development since the initial hearing, such as exhibitions of remorse, obtaining his general educational development certificate, and participating in a Juneteenth ceremony in prison. The sentencing court resentenced Saloy to 41 years, a nearly 20 year reduction from his initial sentence.

Saloy appeals.

#### DISCUSSION

We review a sentencing court’s decision for clear abuse of discretion or misapplication of the law. State v. Corona, 164 Wn. App. 76, 78, 261 P.3d 680 (2011). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Id. at 78-79. This standard is also violated where a trial court makes a reasonable decision but applies the wrong legal standard or bases its ruling on an erroneous view of the law. Thornock v. Lambo, 14 Wn. App. 2d 25, 31, 468 P.3d 1074 (2020). When we review whether a trial court applied an incorrect legal standard, we review de novo the choice of law and its application to the facts in the case. Corona, 164 Wn. App. at 79.

I. De Facto Life Sentence

Saloy asserts that the 41 year exceptional sentence imposed by the trial court at resentencing was an unconstitutional de facto life sentence.

An exceptional sentence must be reversed if the reasons for the sentence are not supported by the record or if they do not justify an exceptional sentence. RCW 9.94A.585(4)(a). If the reasons are supported by the record, and justify an exceptional sentence, then, to reverse an exceptional sentence, we must find “that the sentence imposed was clearly excessive or clearly too lenient.” RCW 9.94A.585(4)(b). The length of an exceptional sentence should not be reversed as clearly excessive absent an abuse of discretion. State v. Ritchie, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995) (emphasis omitted).

In June 2012, the United States Supreme Court held the Eighth Amendment ban on cruel and unusual punishment forbids mandatory life without parole sentences for juvenile offenders. Miller, 567 U.S. at 479. Our Supreme Court held “in the context of juvenile sentencing, article I, section 14 provides greater protection than the Eighth Amendment.” State v. Bassett, 192 Wn.2d 67, 82, 428 P.3d 343 (2018).

In Ramos, our Supreme Court held there was no distinction between juveniles receiving a literal mandatory life sentence and those receiving a de facto mandatory life sentence. State v. Ramos, 187 Wn.2d 420, 437, 387 P.3d 650 (2017). Either will trigger the need for a Miller hearing to consider what role youthfulness played in their crime and the appropriateness of a life without parole sentence. Id. at 434. “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 435

The court declined to give a bright-line rule regarding what length of sentence would constitute a de facto life sentence triggering the requirement of a Miller hearing. Ramos, 187 Wn.2d at 439. However, a sentence that “is the functional equivalent of a life sentence” is a de facto life sentence. See State v. Ronquillo, 190 Wn. App. 765, 775, 361 P.3d 779 (2015). This court has held a juvenile whose 51 year sentence contemplated his release at the age of 68 was a de facto life sentence. Id. His case was reversed and remanded for a resentencing with a Miller hearing. Id. at 785. At a Miller hearing, consideration must be given to the juvenile offender’s “chronological age and its hallmarks,” their “family and home environment,” and “the circumstances of the homicide offense” including “peer pressure.” Miller, 567 U.S. at 477.

In State v. Houston-Sconiers, our Supreme Court held that courts have discretion to depart from mandatory sentences for firearm enhancements, remanding a juvenile offender’s convictions—which included a 31 year weapons enhancement—for resentencing. 188 Wn.2d 1,8, 21, 391 P.3d 409 (2017).

In 2018 this court held that the nearly 60 year sentence imposed on Saloy when he was age 22 was a de facto life sentence, requiring the sentence be vacated and a Miller hearing held before resentencing. Saloy, No. 72476-3-1, slip op. at 13. On resentencing, the trial court determined based on his criminal history and the nature of the offenses at issue, the standard range for the offenses was

612-776 months. The State initially asked in its resentencing memorandum for 612 months, the low-end of a standard sentence. It then revised its recommendation down to 41 years when the sentencing court reconvened for formal sentencing. In his resentencing memorandum, Saloy asked for a 20 year sentence, arguing this was close to the deal the State offered prior to trial.

The trial court determined after weighing the Miller factors that Saloy had demonstrated by a preponderance of the evidence that his crimes reflect transient immaturity and he was not in the rare category of incorrigible offenders. The court sentenced him to an exceptional range below the standard range, imposing a 41 year sentence. This sentence would entitle him to release about the age of 60.

In support of his argument that release at age 60 is a de facto life sentence, Saloy offers several studies demonstrating how his lifespan may be adversely impacted by demographic and environmental factors. He cites to a public health journal article arguing that the average Black man will live to the age of 72. Further, he cites another study arguing that individuals experiencing four or more adverse childhood experiences (ACEs) are more likely to die prematurely. His evidence does not demonstrate that he is likely to die before his release from prison. He argues that Ramos equates releasing a juvenile offender “after his most productive years” with a de facto life sentence. We do not agree. Instead, Ramos reasoned that de facto life sentences contradicted Miller because “[h]olding otherwise would effectively prohibit the sentencing court from considering the specific nature of the crime and the individual’s culpability before sentencing a juvenile homicide offender to die in prison.” 187 Wn.2d at 438-39.

We hold that Saloy's sentence does not constitute a de facto life sentence.

## II. Application of Miller Factors at Resentencing

When determining whether a trial court applied an incorrect legal standard, we review de novo the choice of law and its application to the facts in the case. Corona, 164 Wn. App. at 79.

In Ramos, our Supreme Court held that, while not automatically entitled to an exceptional sentence below the standard range, juveniles facing a de facto or literal life without parole sentence are entitled to a Miller hearing. Ramos, 187 Wn.2d at 442-443. Miller went beyond banning juvenile life sentencing schemes, establishing an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered. Id. at 443. Miller required that a sentencing court consider a juvenile offender's youth before determining that life without parole is a proportionate sentence. Montgomery v. Louisiana, \_\_\_ U.S. \_\_\_, 136 S. Ct. 718, 734, 193 L. Ed. 2d 599 (2016). Miller did not create highly specified requirements for how a sentencing court must consider the mitigating qualities of youth. Id. at 735.

The juvenile defendant has the burden of proving by the preponderance of evidence that their crimes demonstrate transient immaturity.<sup>1</sup> Ramos, 187 Wn. 2d

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<sup>1</sup> The trial court held that "Saloy has the burden to prove by a preponderance of evidence that mitigating circumstances justify an exceptional sentence in this case." Saloy argues the trial court erred in doing so because it relied on Ramos, which considered this question only under the Eighth Amendment and not article I, section 14. Ramos, 187 Wn.2d at 445. He argued the burden should be on the State to prove beyond a reasonable doubt. Gregg forecloses this argument. State v. Gregg, \_\_\_ Wn.2d \_\_\_, 474 P.3d 539 (2020)

After briefing, an opinion was released in Gregg. In that case, our Supreme Court ruled "RCW 9.94A.535(1) placing the burden on juvenile defendants in adult



at 435. If they meet this burden, a standard sentence is unconstitutional and an exceptional sentence below the standard range is justified. Id. Here, the sentencing court considered testimony of psychiatrist Dr. Tye Hunter related to Saloy's substance abuse issues, neurodevelopmental disorders, and emotional neglect and abuse. It also considered how "juveniles in general are different from adults, and how those differences apply to the facts of this specific case." It concluded Saloy had met the burden of proving his crimes reflect transient immaturity and he was not in the rare category of incorrigible offenders. It determined Saloy was entitled to an exceptional rather than standard range sentence. That determination is not at issue.

What is at issue is how the trial court decided the length of the exceptional sentence. Saloy argues that in this step the court misapplied the law in two ways. First, he argues the court incorrectly considered whether an adult defendant is entitled to an exceptional sentence instead of considering the incompetency associated with youth. Second, he argues the court did not consider impulsivity as a feature of youth, but instead, whether his actions demonstrated impulsivity.

To his first argument, Saloy asserts his refusal to consider a plea deal was evidence of his youthful incompetency. He argues the standard used by the trial court tracks RCW 10.77.010(15), the definition of competency. Saloy argues his Miller hearing should not have involved whether he was incompetent, but how the

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court to prove mitigating circumstances is constitutional under article I, section 14 of our state constitution." Id. at \*545.

We affirm the trial court's holding that Saloy had the burden to prove he was entitled to an exceptional sentence.

incompetency of youth applied. Whether Saloy was incompetent in his participation in proceedings was raised by Saloy in the evidence presented at the Miller hearing. In direct response to that testimony, the trial court's conclusions of law stated,

9. Neither Dr. Hunter's testimony and report nor any other evidence support a finding that the defendant was impaired by any cognitive or mental disorder to an extent that it rendered him incompetent to consider a plea, stand trial or to be sentenced. Dr. Hunter's testimony on this point was not credible.

The court simply did not find Dr. Hunter's testimony credible about whether Saloy was incompetent to accept or reject a plea. The competency standard applies in adult sentencing, and Saloy was sentenced as an adult. The case law does not preclude consideration of incompetency in a Miller hearing. And, application of the competency standard in a Miller hearing benefits a juvenile who is found incompetent under the standard. Consideration of competency under this statute does no harm. If the court determines, as it did here, that the juvenile is not incompetent under that statute, it is not the end of the inquiry. The consideration of Miller factors is unaffected and continues. The argument that this establishes, that the trial court applied the wrong standard, is without merit.

Saloy next argues the court erred in its consideration of his impulsivity as an inherent feature of his youth. He argues the standard used by the trial court tracks the language of RCW 9.94A.535(1)(e), which allows a trial court to consider capacity as a mitigating circumstance in sentencing. Saloy argues this constituted the court deciding his crimes were not impulsive. Instead, he asserts it should

have understood Miller to recognize juvenile brain science as concluding his actions were impulsive by the nature of his youthfulness.

He argues that “by focusing on the deliberateness with which [Saloy] acted, the trial court effectively created an exception under Miller for children who are convicted of any crime that requires planning or deliberation.” He contends that instead “[a]cting with deliberation to engage in risk-taking behavior was a ‘hallmark feature’ of [Saloy’s] youth, not a fact to be weighed against it.” The trial court’s failure to understand this he argues, constitutes a legal error requiring reversal.

The trial court’s conclusion of law stated,

8. Neither Dr. Hunter’s testimony and report nor other evidence support a finding that the defendant’s capacity to appreciate the wrongfulness of his actions or to conform his conduct to the requirements of the law was impaired at the time he committed these offenses. Dr. Hunter’s testimony on this point was not credible.

This language is similar to the language on mitigating circumstances in RCW 9.94A.535(1)(e). But, the language does not signal the trial court applied the wrong standard. Dr. Hunter’s testimony asserted he lacked capacity during the trial, at the time of evaluation, at a plea bargaining, and at sentencing. The trial court did not find the testimony on this point credible. Had the trial court concluded otherwise, the statutory standard might have provided an additional basis for leniency. Rejecting the evidence necessarily resulted in the standard of that statute having no application.

The sentencing court determined that it must weigh the Miller factors against the “deliberate, not impulsive” nature of his acts. Saloy argues that this is

error because impulsivity is a hallmark of youthful actions and implies that a finding to the contrary is impermissible. But, Miller and its progeny do not stand for the proposition that a juvenile cannot be sentenced as an adult. They do not hold that a juvenile cannot commit an intentional act. Nor do they assert that traditional notions of degrees of culpability based on mental state do not apply to sentencing of juveniles. Miller requires an inquiry into how certain facts and factors affected the juvenile and should be taken into account in mitigating a sentence, but it does not require the sentencing court to ignore the facts of the crimes. 567 U.S. at 489. It was not error for the trial court to consider the deliberate nature of Saloy's crimes.

The court expressly considered Saloy's youthfulness in its deliberation. Indeed, the court held that his crimes were related to his transient immaturity, reducing his sentence. The sentencing court directly indicated it had considered the evidence related to juvenile neuroscience. It found the psychological factors detailed by Dr. Hunter "contributed to his developmental immaturity that contributed to his criminal acts." It determined an exceptional sentence was warranted.

The trial court was aware of the low end of the standard range for Saloy's offenses. It was aware of the plea offer of 20 years that Saloy had rejected. It was aware of Saloy's ACE factors. It was also aware of the facts of the crime and postcrime behavior. It knew Saloy was recorded claiming to have come up with the plan for the drive-by shooting and bragging about the crime, he disposed of the weapon in Lake Washington, and harassed victim Clark on social media. The court did not find Dr. Hunter credible when he testified that Saloy's capacity to

appreciate the wrongfulness of his actions or to conform his conduct to the requirements of the law was impaired at the time he committed these offenses. The sentence imposed was near the middle of the range between the low end of the standard range sentence and the plea offer Saloy rejected.

The record does not support the claim that the trial court applied the wrong legal standards in determining the length of sentence. The record does not establish an abuse of discretion in how the Miller factors were applied in determining the length of sentence.

We affirm the trial court's sentence.

### III. Constitutionality of RCW 9.94A.730(1)

In response to Miller, our legislature enacted second substitute senate bill (SSSB) 5064, which created an indeterminate aggravated first degree murder sentence for juveniles along with other statutes including RCW 9.94A.730. LAWS OF 2014, ch. 130, § 10; In re Pers. Restraint of McNeil, 181 Wn.2d 582, 586, 334 P.3d 548 (2014) (referring to SSSB 5065 as “the Miller fix”). The Miller court did not specify whether the ruling should apply retroactively. But, by 2014 Washington had passed Miller compliance legislation providing means to retroactively apply Miller through resentencing. See RCW 9.94A.730(1).).

RCW 9.94A.730(1) provides “[a]ny person convicted of one or more crimes committed prior to the person’s eighteenth birthday may petition the indeterminate sentence review board for early release after serving no less than twenty years of total confinement.” RCW 94A.9730 created a means for the State to remedy a

Miller violation by granting juvenile offenders parole eligibility. State v. Scott, 190 Wn. 2d 586, 596-97, 416 P.3d 1182 (2018).

Two years after the adoption of the Miller fix, the Supreme Court in Montgomery, announced that Miller was retroactive on state collateral review. Montgomery, 136 S. Ct. at 736. However, it held life without parole sentences imposed without Miller hearings may be remedied “by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.” Id. at 736. But, in Ramos, our Supreme Court held that the availability of parole under RCW 9.94A.730(1) did not render the defendant’s pending appeal moot. Ramos, 187 Wn.2d at 435-36. At the time of Ramos’s second resentencing, RCW 9.94A.730 hadn’t been enacted, and he was facing a de facto life sentence. Id. at 435. Thus, at that time, he would have been entitled to resentencing. Id.

However, a minor offender is disqualified from petitioning under RCW 9.94A.730(1) if “‘convicted for any crime committed subsequent to the person’s eighteenth birthday.’” Id. (quoting RCW 9.94A.730(1)). Saloy asserts for the first time on appeal that this exception to eligibility under RCW 9.94A.730(1) is unconstitutional.

This court reviews a statute’s constitutionality de novo. State v. Hunley, 175 Wn.2d 901, 908, 287 P.3d 584 (2012). Statutes are presumed constitutional, and the party challenging the statute has the burden to prove otherwise beyond a reasonable doubt. Bassett, 192 Wn.2d at 77.

Montgomery held that consideration for parole was an appropriate substitute for resentencing, not that it was in addition to resentencing.

Montgomery, 136 S. Ct. at 736. No case has indicated to the contrary. This court previously acknowledged Saloy was de facto sentenced to life under his nearly 60 year sentence in part due to his ineligibility for review under RCW 9.94A.730(1). Saloy, no. 72467-3-1, slip. op. at 28 n.11. So, we granted him resentencing pursuant to a Miller hearing as a remedy. Id. Having been resentenced after his de facto life sentence was vacated, Saloy has no additional rights under RCW 9.94A.730(1).

Moreover, the statute restricts the ability of the indiscriminate sentencing review board to hear certain petitions. Id. It does not address the sentencing authority of the trial court. Id. The only manner in which that statute was implicated was that the court acknowledged “a standard range sentence in this case may be deemed unconstitutional” due to “the specific length of his standard range sentence based on his felony conviction history and his ineligibility to petition for early release pursuant to RCW 9.94A.730(1).” While he may have benefited from this observation, it cannot be fairly said that he was sentenced under RCW 9.94A.730(1).

An appellate court may refuse to entertain a claim of error not raised below. RAP 2.5(a). An exception exists for a claim of manifest error affecting a constitutional right, but the defendant must identify a constitutional error and show how the alleged error actually affected the defendant’s rights. State v. Grimes, 165 Wn. App. 172, 180, 267 P.3d 454 (2011).

Saloy has not demonstrated manifest error. We decline to reach the constitutionality of the statute.

IV. DNA Collection Fee Assessment

Saloy argues the \$100 DNA (deoxyribonucleic acid) collection fee should be stricken. RCW 43.43.754(1)(a) requires DNA collection from all individuals convicted of felonies or certain other crimes. Individuals sentenced for crimes specified in RCW 43.43.754 must pay a \$100 DNA collection fee, unless their DNA was previously collected as a result of a prior conviction. RCW 43.43.7541; State v. Catling, 193 Wn.2d 252, 257-58, 438 P.3d 1174 (2019).

Here, Saloy asserts as a result of previous adult felony charges, he would have been required to provide a DNA sample prior to being charged in this case. In addition to his prior convictions, Saloy was also found indigent by the court.

The State concedes that striking the fee is required under Ramirez, consistent with its own records indicating Saloy's DNA had previously been collected. State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

We affirm Saloy's sentence and remand to strike the DNA collection fee.

Appelwick, J.

WE CONCUR:

Smith, J.

Seach, J.  
Judge Pro Tempore



APPENDIX B

**COURT OF APPEALS, DIVISION ONE ORDER  
DENYING MOTION FOR RECONSIDERATION**

**February 4, 2021**

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

THE STATE OF WASHINGTON,	)	
	)	No. 79818-9-I
Respondent,	)	
	)	ORDER DENYING MOTION
v.	)	FOR RECONSIDERATION
	)	
D'ANGELO A. SALOY,	)	
	)	
Appellant.	)	
	)	
	)	

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The appellant, D'Angelo Saloy, has filed a motion for reconsideration. A majority of 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.

  
\_\_\_\_\_  
Judge

## CERTIFICATE OF SERVICE

I certify that on today's date, I filed this petition electronically with the Court of Appeals, Division One, and delivered an electronic version of this petition using the Court's filing portal, to:

King County Prosecuting Attorney

paoappellateunitmail@kingcounty.gov  
jessica.berliner@kingcounty.gov  
julie.kline@seattle.gov  
ian.ith@kingcounty.gov

Signed in Seattle, Washington, this 8th day of March, 2021.



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Kathleen A. Shea – WSBA 42634  
Attorney for Appellant

# LUMINATA, PLLC

March 08, 2021 - 3:43 PM

## Transmittal Information

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**Appellate Court Case Number:** 79818-9  
**Appellate Court Case Title:** State of Washington, Respondent v. D'Angelo A Saloy, Appellant

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