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No. 52651-4

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

Aaron Ata Toleafoa,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Aaron Toleafoa's transformation in juvenile detention shows the purpose and promise of juvenile justice's rehabilitative goals and illustrates why courts have resoundingly determined that children are constitutionally different from adults for purposes of sentencing.

Aaron entered juvenile detention as a scared, lost 15-year-old child who had just committed a series of violent offenses, including a burglary, robbery, and a carjacking. He was declined to adult court where he pleaded guilty and received a high-end standard range sentence of nearly 22 years. As Aaron matured in youth detention, he changed his life. He completed high school and numerous programs to better himself. He reconnected with his family, including his young son who was born while Aaron was detained. He found purpose through contributing to his community and he became a valued mentor and leader at Green Hill and nationally.

Aaron's case was remanded for resentencing under *Houston-Sconiers*¹ about four years after he committed his offenses. The judge found Aaron's offenses were mitigated by youth but imposed an exceptional sentence down to 192 months under the adult sentencing

¹ *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017).

scheme, rather than the juvenile scheme that would have detained him until age 25. The court's failure to presumptively sentence Aaron as a child after determining his crimes were mitigated by youth violated the Eighth Amendment and Article I, section 14.

B. ASSIGNMENTS OF ERROR

1. The trial court failed to sentence Aaron like a child after determining his crimes were mitigated by youth in violation of the Eighth Amendment.

2. The trial court's exceptional sentence that presumed imposition of an adult sentence governed by the Sentencing Reform Act (SRA) rather than a juvenile sentence governed by the Juvenile Justice Act (JJA), violated Washington's protection against cruel punishment under article I, section 14.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Eighth Amendment recognizes that children are categorically less culpable, and have a greater capacity for change than adults who commit the same crimes. Does the Eighth Amendment require that a sentencing court sentence a child like a child, not an adult, when it finds the mitigating factors of youth for a child who is convicted in adult court?

2. Article I, § 14 is more protective than the Eighth Amendment and forbids all “cruel” punishment. Must this provision be independently interpreted to effectuate the constitutional rule that children are different, requiring that when the court finds the mitigating factor of youth for a child tried as an adult, the court must presumptively impose a sentence commensurate with the culpability of a child, not an adult?

D. STATEMENT OF THE CASE

1. Aaron’s young life.

Aaron was born into a large extended family and had a close connection to his grandparents, with whom Aaron’s family lived for much of his youth. CP 66-67. Aaron’s family is of Samoan descent. RP 66. They moved from Hawaii to Tacoma when Aaron was six months old. CP 67.

Growing up, Aaron was raised to be helpful and courteous to elders. RP 67. His family and friends knew him to be soft spoken, reserved, friendly, caring, funny and easy to get along with. CP 67, 88, 90. He was also known to stand up for others, and was a role model for younger family members. CP 67, 88, 93, 94, 95, 96. He was musical and motivated to learn as young child. RP 67.

Aaron’s parents used corporal punishment to discipline him as a child. CP 68. This involved “countless spankings” by his father. CP 68. Aaron’s mother explained that this is a traditional Samoan cultural

practice for childrearing. CP 68. Corporal punishment has been linked to increased aggressiveness in youth, and for Aaron, it resulted in feelings of low self-esteem, anger, and hopelessness. CP 69.

Aaron started using marijuana and alcohol at around nine years old, due to the availability of marijuana and alcohol in his home. CP 53, 315, FF #13. On one occasion when Aaron's parents suspected him of using marijuana, Aaron's father beat him with a belt all over his body. CP 70.

Aaron tried to be good at school, but he felt like his teachers expected him to be bad. CP 70. He felt like he and his friends were treated rudely by teachers and staff. CP 70. In ninth grade, he was suspended for an offense that he denied committing. CP 70. The school told him if he did not improve his behavior, he was not welcome back. CP 70. Aaron never went back to school. CP 70.

Also during this time, Aaron was caught having sex with his girlfriend at home. CP 70. His parents kicked him out of their house. CP 70. He moved in with his girlfriend and couch surfed at different friends' houses. CP 70. When his parents asked him to come back home, he refused. CP 70. He was arrested for driving his girlfriend's mother's car without permission and spent seven days in Remann Hall. CP 70-71. His mother visited him there and again asked him to come home. CP 71. He

returned home for a short while, but ended up leaving to live with a friend. CP 71. His girlfriend became pregnant with their child. CP 315, FF #15.

Aaron became surrounded by negative role models, including his older cousins, one of whom was in Remann Hall charged with murder. CP 316; RP 39. During the time he lived with friends, Aaron had a gun held to his head three times. This was the worst time of his life. CP 71.

In October of 2014, when he was 15 years old, he broke into the neighbor's house of where he was staying and stole an AR-15 rifle, liquor, and a pickup truck. Supp. CP ____Sub no. 73, p. 2 (declaration). The next day, Aaron and his friends, including his 17-year-old cousin, were walking around with the AR-15. Supp. CP ____Sub no. 73, p. 2; Supp. CP ____Sub no. 72, p.2 (sentencing memorandum). They saw a vehicle running in a driveway, and one of the kids hopped in, picked up the other boys, and drove away with it. Supp. CP ____Sub no. 73, p. 2. They followed another vehicle driven by Mia McDaniel. Supp. CP ____Sub no. 73, p. 2-3. Aaron's friend held Ms. McDaniel up at gunpoint and they took her Jeep and purse. Supp. CP ____Sub no. 73, p. 2-3.

Later the kids came upon an idling Subaru. Supp. CP ____Sub no. 73, p. 3. They planned to take it, but did not know if anyone was inside. When Aaron saw a man sitting in the driver's seat, he pointed the AR-15's laser at his head and told him not to move. *Id.* The driver, David

McCollaum, pulled out a handgun. *Id.* Aaron was not expecting this—he thought Mr. McCollaum would surrender his car just like Ms. McDaniel did. *Id.* Not knowing what to do, he fired in response, and hit Mr. McCollaum’s shoulder. *Id.* Aaron was drinking and doing marijuana at the time. Supp. CP ____Sub no. 73, p. 3. The damage to Mr. McCollaum’s arm resulted in chronic pain, and he is unable to use his arm or work as a nurse again. RP 15.

Aaron was arrested days later after neighbors called to report him shooting the AR-15 in the street. Supp. CP ____Sub no. 73, p. 4. Aaron’s mother, Leilani, remembers when she first saw him at Remann Hall: “[h]e held me so tight and cried. I thought to myself, he’s just a boy, a young kid, scared, lost and trying to understand how he even got there.” RP 29-30.

Aaron was interrogated by police and confessed. Supp. CP ____Sub no. 42. This confession resulted in ten criminal charges. CP 1-5. For Mr. McCollaum’s carjacking, Aaron was charged with attempted murder in the first degree and assault. CP 1-2, 313. For the carjacking of Ms. McDaniel he was charged with robbery in the first degree. CP 1-2; 313. Each of these offenses were charged with a firearm sentencing enhancement. CP 1-2; 313. He was also charged with burglary in the first degree, theft of a firearm, and theft of a motor vehicle for the theft of the

AR-15, and taking of a motor vehicle in the second degree for the vehicle they stole from the driveway. CP 3-5; 313. For Aaron's first brief effort to evade police, he was charged with obstructing law enforcement and making a false or misleading statement to a public servant. CP 4-5; 313.

Because he was 15 years old, Aaron was subject to discretionary decline to adult court. The juvenile court declined jurisdiction and transferred Aaron's case for adult criminal prosecution. CP 313.

Aaron pleaded guilty to an amended information charging five of the original ten counts which also amended attempted first degree murder to second degree attempted murder. CP 10-23; 313-314. Aaron faced a sentencing range of 146.25-221.25 months on the most serious charge, attempted second degree murder, in addition to a mandatory 60-month firearm sentencing enhancement. CP 314.

At sentencing in 2016, the prosecutor asked for the maximum sentence the court could impose. CP 314. Aaron asked the court to impose an exceptional sentence downward based on his youth and life circumstances. CP 41. The trial court refused, finding that Aaron's family was unable to control him, and that he engaged in "adult-like behavior" with "serious adult consequences." CP 41. The trial court imposed a standard range sentence of 200 months, with a consecutive 60-month firearm sentencing enhancement. CP 314.

2. Aaron's transformation in juvenile rehabilitation.

From the moment Aaron entered the juvenile justice system, he began the process of rehabilitation, healing, and growth. RP 35.

Aaron completed rehabilitative programming intended to better himself, including the “dynamic dads program,” and workplace training. CP 126-131. He completed his high school degree and met the state standards. CP 141-148. He was a youth mentor and gained work experience. CP 78.

Aaron was also an active participant with the Washington State Partnership Council on Juvenile Justice Youth Committee. CP 80. Aaron served as a leader on the group's youth sub-committee, working with youth across the state, providing strong leadership and a “voice for juvenile justice system improvement and legislative policy.” CP 80.

In 2017, Aaron's commitment to leadership at Green Hill led to his selection as one of 10 national young leaders for the 2018 Emerging Leaders Committee. CP 80, 101, 118. The Emerging Leaders Committee advises the National Coalition for Juvenile Justice's leadership and board in developing states' juvenile justice plans, and they organize an annual youth summit in which youth explore how they can collaborate and lead nationwide juvenile justice reform. CP 120. Participation in this committee is not considered a short term commitment. CP 120. The

Program is intended to build the next generation of leaders for juvenile justice advocacy at the national level. CP 120. In August of 2018, Aaron also spoke on a panel and performed spoken word poetry for the Coalition’s Youth Summit. CP 105.

Aaron has been very active in working for juvenile justice reform in Washington State. Aaron’s input on Senate Bill 6160, which allows minors to stay in the state juvenile corrections system until they turn 25 years old, stressed that such legislation is not just beneficial to him, but to the “future of our communities.” CP 110. At the bill’s signing, Governor Inslee stated the new legislation aligns with his priorities of “reducing recidivism and promoting equality in the juvenile justice system.” CP 111.



CP 57 (Aaron featured on right).

Aaron’s family and friends expressed how they too have witnessed Aaron’s growth and rehabilitation. CP 85-96. Because of the transformation they have seen in Aaron over the years, he has the support of both friends and family upon release. CP 85-96.

At Green Hill School, the Superintendent described that Aaron “has grown as a positive leader in both his unit and campus; advocating for himself, youth, and staff.” CP 78. He maintained the highest level honor status, “held by only a few young people” and “far exceeded our expectations of any young person here at GHS and he continues to seek out other learning opportunities to continue his personal growth.” CP 79.

3. Aaron was resentenced based on the mitigating factors of youth, but the court’s new sentence was guided by the principles of the Sentencing Reform Act.

After Aaron was sentenced in 2016, the Supreme Court decided *State v. Houston-Sconiers*, which requires the court to consider the mitigating qualities of youth at sentencing. CP 4. Aaron’s case was remanded for the sentencing court to consider whether the required mitigating factors of youth articulated in *Houston-Sconiers* justified an exceptional sentence downward.² CP 40-45.

² *State v. Toleafoa*, 1 Wn. App. 2d 1002, 2017 WL 4786994 (October 24, 2017)

Judge Orlando resentenced Aaron in August of 2018. CP 312. The trial court heard evidence of Aaron's extensive rehabilitation during his four years of confinement in juvenile detention. The court heard about his leadership, and the purpose he has derived from his participation in youth programs at Green Hill and nationally. Vazaskia Crockrell, the director of the Office of Juvenile Justice and a representative from the Washington State Partnership Council on Juvenile Justice, described Aaron's recent participation at the Global Youth Summit:

Aaron was the last one to speak, and he shared his story with over 276 juveniles – youth that have been involved in the juvenile justice system—and he shared so much passion that not only did they shake, but the whole room shook (sic). We were at a law school. He is a powerful speaker. He is a motivator. He's a leader, and it's all sincere from the depth of his being. I've seen a change in him, and I do this work today in part for Aaron and what he inspired to me.

RP 33. Aaron's mother described the change she has seen in him over the years:

He has matured in a way where his values are defined and reflected, values of faith, respect, thoughtfulness, forgiveness and service. Aaron understands how foolish he was in his teen years. He's very sorry and has so much regret for all those he's hurt. Whenever he talks with his sisters and his cousin, he expresses openly how he loves them and wants them to learn from his mistakes and do better.

At Green Hill School, he strives to make the best of his situation—working, studying, and helping others to be better than what brought them there. He gets so excited when he tells me about the different initiatives that he's been involved in. Sometimes even the

simple things like setting up chairs or clean up after the activities, I can hear how happy he is to help.

He's been quite the thinker, taking the time to listen while he processes how to apply my advice or sharing counsel he's learned from others. I find myself so encouraged and motivated to see how his heart and character are becoming good and worthy. Aaron has shared with me that he wants to tell his story to other teenagers to hopefully prevent another child, victim or family from experiencing all this.

RP 30-31.

Evelyn Maddox, also with the Washington State Partnership Council of Juvenile Justice and Washington Healthcare Authority, worked with Aaron since he first arrived at Remann Hall at age 15. RP 35. She described Aaron's transformation:

I was able to witness healing and growth within Aaron's times that he spent there [sic]. Aaron led groups while he was in custody at Remann Hall. He was a model to other youth, and it wasn't long before Aaron understood what had happened, and he had remorse and he wanted to ride the journey of hope and healing.

RP 35. Ms. Maddox asked the court to seek "fair justice," which is to understand that what Aaron "did at 15 years old is not who he is now, and that with the proper supports that he has changed, and he will continue to be who he is today." RP 36.

The court also heard from Aaron, who expressed sincere remorse for the harm he had done to Mr. McCollaum and all the people he hurt, describing, "there's not one day that goes by where that doesn't replay in

my mind, where I don't think about it, why I don't ask God just to take me back in time so I cannot do that [sic]." RP 36.

Mr. McCollaum and his friend also testified, asking for the court to impose the maximum possible sentence as requested by the prosecutor due to the ongoing pain and loss of Mr. McCollaum's ability to work caused by the gunshot wound he suffered. RP 15-18.

The prosecutor argued for the high end of the sentencing range that the court declined to impose at Aaron's first sentencing. RP 9. The prosecutor argued that Aaron could have been charged with more crimes had he not plead guilty, and compared Aaron to a hypothetical adult who committed a hypothetical, more serious crime that could have been punished by death or life in prison. RP 9-10.

Aaron asked the Court to sentence him in accordance with the maximum term he could stay in a juvenile detention, to age 21 or 25, or a "juvenile life" sentence, citing the harm of exposure to an adult prison and Aaron's successful rehabilitation in juvenile detention. RP 27; CP 315.

The Court agreed with Aaron that there were "substantial and compelling reasons" justifying an exceptional sentence. CP 316. Under the factors adopted in *Houston-Sconiers*, Judge Orlando determined that Aaron's "age, immaturity, and impetuosity affected his ability to fully

appreciate the risks and consequences of his actions.” CP 316. However, the court looked to the purposes of the Sentencing Reform Act (SRA) when considering the sentence to impose, and used Aaron’s previous adult sentence as its benchmark for resentencing. RP 43-45. The trial court imposed an exceptional downward, running the 60-month firearm sentencing enhancement concurrent to the standard range sentence of 192 months of total confinement, or 16 years. CP 316.

E. ARGUMENT

In violation of the state and federal prohibitions on cruel and unusual punishment, the sentencing court erred in not sentencing Aaron commensurate with the culpability of a 15-year-child after the court determined his offenses were mitigated by youth.

a. The Eighth Amendment categorically bars a court from imposing the harshest adult sentence on a less culpable child.

This Court should adopt a categorical bar on presumptively sentencing a juvenile under the adult sentencing scheme when the court determines the mitigating factors of youth require an exceptional sentence

The Eighth Amendment guarantees the right to be free from “cruel and unusual punishments.” U.S. Const. amend. VIII. Eighth Amendment jurisprudence is derived “from the evolving standards of decency that mark the progress of a maturing society.” *Atkins v. Virginia*, 536 U.S. 304, 311-312, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (internal citation omitted). The central question in a given case is whether, in light of

evolving standards of decency, the punishment is disproportional to either the crime or class of offender. *Graham v. Florida*, 560 U.S. 48, 59-62, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

The Eighth Amendment “categorically” bars certain sentencing practices for a particular class of offenders, “based on mismatches between the culpability of [the] class of offenders and the severity of [the] penalty. *Miller v. Alabama*, 567 U.S. 460, 470, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

In deciding whether a given punishment is disproportional for a class of offenders, the Court asks whether a national consensus exists against the sentencing practice, looking at “objective indicia,” including legislative enactments. *Graham*, 560 U.S. at 62.

The court must also exercise its independent judgment, considering “the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.” *Graham*, 560 U.S. at 67. This includes inquiry into whether the challenged sentencing practice serves legitimate penological goals. *Id.*

Under this approach, the United States Supreme Court has barred the most serious punishment for juvenile offenders. *Roper v. Simmons*, 543 U.S. 551, 568-73, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (barring execution of all juveniles under the age of 18); *Graham*, 560 U.S. at 74-75

(barring life without parole for all juveniles who did not commit homicide); *Miller*, 567 U.S. at 479-80 (barring life without parole for all juveniles except “the rare juvenile offender whose crime reflects irreparable corruption”).

Graham recognized that the principles underlying adult sentences—retribution, incapacitation, and deterrence—do not rationally lead to the same sentences for children. *Graham*, 560 U.S. at 71-73.

i. Because of their diminished culpability, children must be sentenced differently than adults, even when tried as adults for serious offenses.

A sentencing court must consider the diminished culpability of young offenders, regardless of whether they are tried in adult or juvenile court.

The Supreme Court has long recognized “that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.” *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988); *Graham*, 560 U.S. at 92 (Roberts, J., concurring) (There is a “general presumption of diminished culpability that . . . should apply to juvenile offenders”). Unlike adult crime, youth crime “is not exclusively the offender’s fault,” as it represents “a failure of family, school, and the social system, which share responsibility for the development of America's youth.” *Thompson*, 487

U.S. at 834 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 116, n. 11, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)).

Children are deemed to “characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.” *J.D.B. v. North Carolina*, 564 U.S. 261, 273, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011).

Eighth Amendment jurisprudence presumes the diminished culpability of children requires separate sentencing considerations even when children are tried as adults. When sentencing youth to the harshest sentences, courts may not “proceed as though they were not children.” *Miller*, 567 U.S. at 474.

The general rule that children are treated as children, not adults under the law reflects “the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult.” *Thompson*, 487 U.S. at 824-25. The prosecution of children as adults is the rare exception to this rule. *See Id.* at 823-24 (“Other than the special certification procedure that was used to authorize petitioner’s trial in this case as an ‘adult,’ [...] there are no Oklahoma statutes, either civil or criminal, that treat a person under 16 years of age as anything but a ‘child’”); *see also Roper*, 543 U.S. at 569 (“in recognition of the comparative immaturity and irresponsibility of

juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent”).

The Supreme Court consistently recognizes that just because state statutes allow children to be tried as adults does not mean that the adult punishment is presumed to follow:

[T]he transfer laws show ‘that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), *but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders.*’

Graham, 560 U.S. at 66 (citing *Thompson*, 487 U.S. at 826, n. 24)

(emphasis in original).

Graham addressed this distinction in the context of juveniles who face life without parole when sentenced in adult court: “the fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences.” *Graham*, 560 U.S. at 67.

Even though children may be tried as adults through transfer laws, there is a national consensus that children are far more amenable to rehabilitation, and every state has a juvenile justice system premised on protection and rehabilitation. Cynthia Soohoo, *You Have the Right to Remain a Child: The Right to Juvenile Treatment for Youth in Conflict*

with the Law, 48 Colum. Hum. Rts. L. Rev. 1, 3 (2017). The courts' longstanding emphasis on rehabilitation rather than punishment for children who commit crimes is bolstered by developments in psychology and brain science that continue to "show fundamental differences between juvenile and adult minds." *Miller*, 567 U.S. at 471-72. What is recognized to be a child's "transient rashness, proclivity for risk, and inability to assess consequences—both lesse[n] a child's 'moral culpability'" and "enhance[s] the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Miller*, 567 U.S. at 472 (quoting *Graham*, 560 U.S. at 68) (quoting *Roper*, 543 U.S. at 570)).

In light of scientific advances and the Supreme Court's holding in *Miller* and related cases, there is now no question that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. at 472.

Research also confirms the harsh sentences imposed on children tried in adult court are not beneficial to society or the child: children who receive adult criminal sentences are more likely to reoffend, to reoffend quickly, or to reoffend violently than children who receive supervision, treatment, and rehabilitative services as offered by juvenile courts.

Jennifer S. Breen and John R. Mills, *Mandating Discretion: Juvenile Sentencing Schemes after Miller v. Alabama*, 52 Am. Crim. L. Rev. 293, 300 (2015).

The trend of harshly punishing children like adults reached its peak in the “superpredator” era of the late 1980s and 1990s, but it is now recognized to be an ineffective, racist political response to juvenile crime, where “racial stereotypes taint culpability assessments, reduce the mitigating value of youthfulness for children of color, and contribute to disproportionate numbers of minority youths tried and sentenced as adults.” Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 Law & Ineq. 263, 270-271 (2013); see also Elizabeth Becker, *An Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, N.Y. Times, Feb. 9, 2001, at A19; Brief of Creative Justice, Community Passageways, and Glover Empower-Mentoring Program as Amici Curiae, *State v. Watkins*, __ Wn.2d __, 423 P.3d 830, 839 (2018) (providing historical backdrop of the racially disproportionate treatment of youth in the criminal justice system based on the “superpredator” myth).

Research also confirms the categorical distinction between youth and adult culpability is especially true for children age 15 and under, as younger teens are even more impulsive than their older peers or adults.

Feld, *supra*, at 284-85. Nationally, transfer laws distinguish between a 15-year-old and older teens, with nearly every state setting the upper age of juvenile court jurisdiction at age 16 or 17. Patrick Griggin et. Al., U.S. Dept. of Justice, Office of Juvenile Justice & Delinquency Prevention, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, 21 (2011), <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf>. Thus nationally, presumptively treating a 15-year-old child as an adult offender is the exception, not the rule.

Children, especially 15-year-olds, are categorically presumed to be less culpable than adults, and this presumption still applies when a child is tried and sentenced in adult court. Where it is ineffective to punish children as adults, and discretionary decline procedures that expose children to adult sentences are racially biased and unevenly imposed, a 15-year-old child should presumptively be sentenced as a child when the court finds the mitigating factors of youth require an exceptional sentence downward in adult court.

ii. When the court determined that the mitigating factors of youth diminished Aaron's culpability, the court should have presumptively sentenced Aaron as a child, not an adult.

Because “children are different” under the Eighth Amendment and “criminal procedure laws” must take the defendant’s youthfulness into account, the Eighth Amendment requires courts to consider the mitigating

qualities of youth when sentencing children tried as adults. *Houston-Sconiers*, 188 Wn.2d at 8, 20-21.

Though *Houston-Sconiers* requires a trial court to consider the *Miller* factors in determining whether an exceptional sentence is required, neither *Miller* nor *Houston-Sconiers* instructs the court on what standard to use or what presumption applies once it finds the crime is mitigated by youth. See *State v. Ramos*, 187 Wn.2d 420, 445, 387 P.3d 650 (2017).³ However, other states have applied a “presumption against sentencing a juvenile offender to life in prison without the possibility of parole” after *Miller*. *Commonwealth v. Batts*, 640 Pa. 401, 472, 163 A.3d 410 (2017). This is based on the categorical nature of a child’s diminished capacity: “any suggestion of placing the burden on the juvenile offender is belied by the central premise of *Roper*, *Graham*, *Miller* and *Montgomery*—that as a matter of law, juveniles are categorically less culpable than adults.” *Id.* at 471. See also *Davis v. State*, 415 P.3d 666, 681-82 (Wyo. 2018) (prosecution bears the burden of overcoming the presumption against life without parole); *State v. Riley*, 315 Conn. 637, 655, 110 A.3d 1205 (2015) (*Miller*’s language suggests that the mitigating factors of youth establish,

³ *Ramos* addressed whether the prosecution had the burden of proving whether the *Miller* factors justified a life without parole sentence. This holding as limited to the record presented. *Ramos*, 187 Wn.2d at 436-437.

in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances); *State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2013) (a juvenile offender cannot be sentenced to life without parole for first-degree murder unless the State persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances).

This presumption that the child should not be sentenced as if he were an adult is in line with other areas of law that presumptively treat children as children until the State meets its burden to prove otherwise. In transfer hearings, the burden “is on the government to establish that transfer to adult status is warranted, since there is a presumption in favor of juvenile adjudication.” *United States v. Nelson*, 68 F.3d 583, 588 (2d Cir. 1995); *State v. Massey*, 60 Wn. App. 131, 137, 803 P.2d 340 (1990); *State v. Jacobson*, 33 Wn. App. 529, 531, 656 P.2d 1103 (1982). Children between the age of eight and 12 years old are presumed to be incapable of committing crimes. RCW 9A.04.050. The presumption is only overcome by proof of their capacity to understand the act or neglect, and to know that it was wrong. *Id.*; *State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004).

The same presumption should apply here, where the court found that Aaron was entitled to an exceptional sentence based on “all the other

factors identified in *Houston-Sconiers*, including diminished capacity and heightened capacity for change, which I think is demonstrated in this case.” RP 45.

Despite the trial court determining that Aaron’s offense was mitigated by youth, the court specifically cited to the SRA’s sentencing goals for adults when imposing Aaron’s sentence, finding all of the requirements in the SRA “apply in this particular case.” RP 43-44

But the goals of the SRA do not account for the diminished culpability and amenability to rehabilitation of children like the Juvenile Justice Act does, thus the SRA should not govern the sentencing of an offense reflecting the attributes of youth intended to be addressed by the JJA. The JJA’s purpose is to create a “system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders and their victims.” RCW 13.40.010(2). This includes the following equally important purposes:

- Protect the citizenry from criminal behavior;
- Provide for determining whether accused juveniles have committed offenses as defined by this chapter;
- Make the juvenile offender accountable for his or her criminal behavior;
- Provide for punishment commensurate with the age, crime, and criminal history of the juvenile offender;

- Provide due process for juveniles alleged to have committed an offense;
- Provide for the rehabilitation and reintegration of juvenile offenders;
- Provide necessary treatment, supervision, and custody for juvenile offenders;
- Provide for the handling of juvenile offenders by communities whenever consistent with public safety;
- Provide for restitution to victims of crime;

RCW 13.40.010(2)(a)-(i).

The SRA’s purpose, by contrast, is primarily “to make the criminal justice system accountable to the public” and structure judicial discretion with the goal to:

- Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender’s criminal history;
- Promote respect for the law by providing punishment which is just;
- Be commensurate with the punishment imposed on others committing similar offenses;
- Protect the public;
- Offer the offender an opportunity to improve himself or herself;
- Make frugal use of the state’s and local governments’ resources; and

- Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010(1)-(7).

The goals of the two sentencing schemes could not be more distinct. Where the JJA presumes careful consideration of the child's very specific circumstances, imposing punishment commensurate with the child's specific culpability, the SRA seeks proportionality with other offenders, taking into account the offender's prior criminal history and the seriousness of the offense. The SRA does not contemplate preparing a person for reentry through treatment and rehabilitation as the JJA does—rather it seeks to conserve financial resources. Though both strive for protection and accountability, the JJA integrates the needs of the child in this aim: although “the JJA shares with the adult system the purposes of rendering a child accountable for his acts, punishing him and exacting retribution from him, such purposes are tempered by, and in some cases must give way to, purposes of responding to the needs of the child.” *State v. T.C.*, 99 Wn. App. 701, 707, 995 P.2d 98 (2000) (citing *State v. Rice*, 98 Wn.2d 384, 393, 655 P.2d 1145 (1982)). And where the JJA “attempts to tread an equatorial line somewhere midway between the poles of rehabilitation and retribution” the SRA’s “paramount purpose” is punishment. *Id.*

Because Aaron’s diminished culpability so squarely falls within the purpose and intent for sentencing children as specifically contemplated by the Juvenile Justice Act, his case illustrates why the Eighth Amendment should require the sentencing court to presumptively sentence a child as a child, not an adult, when the court determines his crime is mitigated by youth.

b. Article I, §14 independently requires the presumption that a child should be sentenced like a child, not an adult, when the court finds the mitigating factors of youth justify an exceptional sentence.

Even if this Court finds the Eighth Amendment does not require the presumption that a child should be sentenced like a child when the court finds the crime is mitigated by youth, it should so find under Article I, section 14’s broader protections of children from cruel punishment.

i. Article I, § 14 requires a sentencing court to presumptively sentence a child as a child when the child’s offense is mitigated by youth.

Article I, section 14 prohibits “cruel” punishment. Washington courts have consistently held that this provision is broader than its Eighth Amendment counterpart, and should be interpreted independently. *State v. Fain*, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980); *State v. Bassett*, 192 Wn.2d 67, 78, 428 P.3d 343 (2018).

An article I, §14 claim that a sentence is “categorically unconstitutional based on the nature of the juvenile offender class” is subject to the categorical bar analysis. *Bassett*, 192 Wn.2d at 82-83. This categorical approach “requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question” and whether the sentence “serves legitimate penological goals.” *Id.* at 83. Issues of culpability, the severity of the punishment, and whether penological goals are served all allow the court to include youth-specific reasoning in its analysis. *Id.* at 83-84.

An independent state constitutional analysis indicates that a more protective rule is required when sentencing children in adult court. *See State v. Gunwall*, 106 Wn.2d 54, 59-61, 720 P.2d 808 (1986) (state constitutional provisions may be more protective than their federal constitutional analogs). The six *Gunwall* factors to consider are (1) the textual language of the state constitution; (2) differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state and local concern. *Bassett*, 192 Wn.2d at 79 (citing *Gunwall*, 106 Wn.2d at 61-62).

The first three factors “provide cogent grounds for finding article I, section 14 more protective than the Eighth Amendment” and weigh in favor of interpreting the state clause as providing broader rights. *Bassett*, 192 Wn.2d at 80. Likewise, the fifth and sixth factors weigh in favor of interpreting the state clause more broadly. *Id.* at 82. The fourth factor, our states’ established bodies of law, especially the juvenile justice laws, provide grounds for requiring the presumption that a child should be sentenced as a child when the court finds their conduct reflects the diminished culpability of youth. *Id.* at 80.

Preexisting state law heavily weighs in favor of interpreting our state constitutional provision as more protective in this context. Recognizing the developments in science that demonstrate juveniles are less psychologically mature than adults and less criminally culpable, our courts have consistently applied broader protections to juveniles at sentencing than the Eighth Amendment specifically requires. *See Bassett*, 192 Wn.2d at 90 (holding sentence of life without parole categorically barred for juveniles); *Houston-Sconiers*, 188 Wn.2d at 20-21 (requiring individualized consideration of mitigating factors related to youthfulness when sentencing any juvenile); *Ramos*, 187 Wn.2d at 437 (extending requirement for “*Miller* hearing” to “de facto life-without-parole sentences” for juveniles); *State v. O’Dell*, 183 Wn.2d 680, 683, 358 P.3d

359 (2017) (permitting 18-year-old offender to seek exceptional sentence downward on basis of youth).

In addition, our legislature has also demonstrated its “ongoing concern for juvenile justice issues.” *Bassett*, 192 Wn.2d at 81 (quoting *Ramos*, 187 Wn.2d at 446) (citing RCW 9.94A.540(3) (eliminating mandatory minimum sentences for juvenile offenders tried as adults)) (internal quotations omitted).

More specifically, Washington courts and the legislature have recognized a child as young as 15 is entitled to special protections in terms of the length of a sentence imposed. After *Miller*, our legislature eliminated life without parole sentences for children age 15 and under. *Bassett*, 192 Wn.2d at 81 (citing RCW 10.95.030(3)(a)(i)).

Our legislature also specifically distinguishes between 15-year-olds and older teens for purposes of criminal punishment. Only 16 and 17 year-old-teens are subject to auto decline to adult court. RCW 13.40.110; RCW 13.04.030(1)(e)(v).

Even when a child is tried in juvenile court, the legislature presumes that a 15-year-old should be punished less than an older teen in many instances, including for several of Aarons’ offenses. The legislature increases the seriousness level of the offense of Burglary if committed by a 16 or 17 year old (B+ if 15 or under, A- if 16-17). RCW 13.40.0357.

Robbery in the first degree is juvenile Class A offense if committed at age 15 or younger, but it is elevated to a class A++ offense, the most serious juvenile offense, if committed by a youth of 16 to 17 years old. RCW 13.40.0357. Likewise, the legislature's recent juvenile mandatory firearm enhancements distinguish between a 15-year-old, who may be required to serve an additional 6 months incarceration, versus a mandatory 12 month sentence for a 16-17-year-old child who commits a violent offense with a firearm. RCW 13.40.193(3).

Our legislature has increasingly recognized the harm of exposing children to the adult criminal justice system. In 2018, the automatic decline statute was amended to remove first degree burglary and first degree robbery from the list of offenses that result in automatic decline. Laws of 2018, ch. 162, §1 (1)(e)(v)(B-E).

In 2019, our legislature again announced that children must be treated differently in the criminal justice system, even up to age 25, preventing their exposure to the adult criminal system by keeping them in juvenile facilities, regardless of whether they are tried as children or adults:

The legislature recognizes state and national efforts to reform policies that incarcerate youth and young adults in the adult criminal justice system. The legislature acknowledges that transferring youth and young adults to the adult criminal justice system is not effective in reducing future criminal behavior. Youth

and young adults incarcerated in the adult criminal justice system are more likely to recidivate than their counterparts housed in juvenile facilities.

The legislature intends to enhance community safety by emphasizing rehabilitation of juveniles convicted even of the most serious violent offenses under the adult criminal justice system. Juveniles adjudicated as adults should be served and housed within the facilities of the juvenile rehabilitation administration up until age twenty-five...

Laws of 2019, ch. 322, § 1.

Preexisting Washington state law firmly establishes that our state constitution should provide broader protections than its federal counterpart in this context, requiring that a 15-year-old child whose adult conviction is mitigated by youth should presumptively be treated as a child at sentencing.

ii. When the court finds a fifteen-year-old's conviction was mitigated by youth, the court's failure to presume a juvenile sentence when imposing an exceptional sentence constitutes cruel punishment under Article I, section 14.

Alternatively, this Court should hold that a combination of factors renders the court's sentence unconstitutional as applied to Aaron.

Fain provides four factors a court should consider in deciding if a sentence is proportional under article I, section 14: (1) the nature of the offense; (2) the legislative purpose behind the sentencing statute; (3) the punishment imposed in other jurisdictions for the same offense; and (4)

the punishment imposed for other offenses in the same jurisdiction. *Fain*, 94 Wn.2d at 397.

As recognized in *Bassett*, the *Fain* framework does not include significant consideration of the characteristics of children as a class. *Bassett*, 192 Wn.2d at 83. Rather, this analysis “weighs the offense with the punishment,” which makes it ill suited to a categorical challenge based on the characteristics of children as an offender class. *Id.*

However, the *Fain* proportionality test may be useful here because it allows for comparison between the juvenile and adult sentencing schemes, which is a helpful framework for determining that an adult sentence governed by the SRA is grossly disproportionate when imposed for crimes committed by children. *See Id.* at 84-85.

The Washington legislature has established a standard sentencing range for a 15 year old who is tried in juvenile court for Aaron’s crimes. The standard range sentence Aaron would have faced if tried as a child in juvenile court is disproportionate to the standard range sentence Aaron faced in adult court for his charged crimes:

Convicted offense	Classification and standard range sentence under the JJA (based on one prior offense)	Classification and standard range sentence under the SRA (based on offender score of 6)
Attempted murder in the second degree	15-36 weeks as attempted murder 2;	146.25-221.25 months
Robbery in the first degree	103-129 weeks	77-102 months
Burglary in the first degree	15-36 weeks	57-75 months
Theft of a Motor Vehicle	Local sanctions (0-30 days)	12+-14 months
Taking a Motor Vehicle without Permission in the second degree	Local sanctions (0-30 days)	17-22 months
Firearm enhancement on Class A offense	6 months incarceration (26 weeks)	60 months (five years)
Total standard range sentence	233-293 weeks (53-67 months) or until age 21 or 25.	369-472 months (30-40 years)

RCW 13.40.0357; CP 14.

The disparity between the severity of an adult and juvenile sentence could not be more stark. Aaron faced a maximum ten year sentence in juvenile court versus a 40 year sentence. This is the difference between living his adult life in prison or out of prison. This difference

exists because, as discussed above in section 1(a)(ii), *supra*, the two sentencing schemes have entirely different purposes. The juvenile scheme seeks to rehabilitate and reintegrate youth into society based on their unique capacity for change and diminished culpability, whereas the SRA's primary purpose is punishment. *See e.g. T.C.*, 99 Wn. App. at 707.

Under either the categorical approach or *Fain's* proportionality test, Article I, section 14 requires that a child be sentenced commensurate with the diminished culpability of a child when the court finds the offense was committed with the diminished capacity of youth.

c. The trial court's error in not presumptively sentencing Aaron commensurate with the culpability of a child requires reversal for resentencing.

The Eighth Amendment and Article I, section 14 have repeatedly affirmed that children are constitutionally different from adults for purposes of sentencing. Children tried as adults should be presumptively sentenced as children, not adults, when their crimes reflect the unique attributes of youth. The legislature has created a specific juvenile sentencing scheme to address children's diminished culpability and great capacity for change, both of which clearly apply to Aaron. Aaron should have been presumptively sentenced according to the juvenile scheme designed for children who commit even the most serious crimes under the Eighth Amendment and Article I, section 14. Because this is a manifest

error affecting a constitutional right, Aaron's claim may be raised for the first time on appeal as a matter of right. RAP 2.5(a)(3)

Here, at Aaron's resentencing under *Houston-Sconiers*, the court determined that an exceptional sentence downward was justified because Aaron's offense exhibited the diminished capacity of youth. RP 44; CP 316. Aaron requested to be sentenced to the juvenile maximum of either age 21 or 25 years, which is the maximum sentence he would have faced, based on his originally charged crimes and criminal history in juvenile court. RP 13, 27; CP 1, 48-297; RCW 13.40.0357. This should have been the starting point for the court's consideration of an exceptional sentence downward based on Aaron's crime unless the prosecutor was able to prove the presumptive youth sentence was not commensurate with Aaron's diminished culpability.

Rather than disproving this, the prosecutor compared Aaron to an even more culpable adult offender, arguing that if his offenses had been committed by an "actual adult," this could have been a "death-penalty case or life in prison" had Aaron actually killed Mr. McCollaum rather than injure him. RP 10. Based on this hypothetical adult who committed a hypothetical, far more serious crime, the prosecutor requested the highest end of the adult sentencing range, 221.5 months. RP 9-10.

The trial court referenced Aaron's originally imposed adult standard range sentence as its benchmark. RP 45. The court resentenced Aaron to 192 months, noting this slightly reduced standard range sentence was eight months shorter than the court's original sentence. RP 45. The court also ran the firearm enhancement concurrently, which the court noted, reduced Aaron's original sentence by five years. RP 45.

In determining the term of the exceptional sentence, the court plainly stated that it was sentencing Aaron under the stated purposes of the SRA, which should not be the guide for sentencing an offense committed by a child. RP 43.

Aaron is entitled to reversal and remand for resentencing where the court should presumptively sentence him commensurate with the culpability of a child under the Eighth Amendment and Article I, section 14.

F. CONCLUSION

This Court should hold that the state and federal prohibitions against cruel punishment require that when the trial court determines an exceptional sentence is warranted based on application of the *Miller* factors, the court should presumptively impose a sentence commensurate with the culpability of a child, not an adult.

DATED this 31st day of May 2019.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 52651-4-II
)	
AARON TOLEAFOA,)	
)	
Appellant.)	

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