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STATE OF WASHINGTON
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No. 97766-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

TIMOTHY HAAG,
Appellant.

BRIEF OF FRED T. KOREMATSU CENTER FOR LAW AND
EQUALITY AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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IDENTITY AND INTEREST OF AMICUS CURIAE

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

INTRODUCTION

Old habits are hard to break. Tasked with resentencing those children who had previously been sentenced to life-without-parole, courts have largely set minimum terms that are, or border on, de facto life. These new sentences, despite being legislatively permitted, are nevertheless cruel. This Court's mandate that sentencing courts must meaningfully consider youth, *State v. Ramos*, 187 Wn.2d 420, 434, 387 P.3d 650 (2017), to which this Court recently added emphasis, *State v. Delbosque*, 195 Wn.2d 106, 121, 456 P.3d 806 (2020) ("must *meaningfully* consider" youth), has proven ineffective in breaking old habits. More is needed. Directing sentencing courts to impose a sentence at or near the 25-year minimum allowed by the statute when the child is found to be less culpable and not irreparably corrupt would effectively and efficiently address this problem.

SUMMARY OF ARGUMENT

Despite finding that Mr. Haag was less culpable due to his youth at

the time of his crime, that he had rehabilitated in the 26 years since, and that he was not irreparably corrupt, the resentencing court imposed a maximum sentence of life and a minimum term sentence of 46 years solely on the basis of retribution. This sentence is nearly twice as long as the 25-year minimum allowed under the statute. *See* RCW 10.95.030(3)(a)(ii). Mr. Haag’s 46-year minimum sentence is unconstitutionally cruel under article I, section 14 because it will result in no meaningful opportunity for release before the end of his life, and because it subjects Mr. Haag to more years in prison than those the justice system has deemed the most culpable—those previously sentenced to death.

After *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018), some members of this Court called for a recalibration of Washington’s sentencing scheme in light of the elimination of the death penalty. *See State v. Moretti*, 193 Wn.2d 809, 835, 446 P.3d 609 (2019) (Yu, J., concurring) (“The gradation of sentences that once existed before *Gregory* have now been condensed. As a result, a serious reexamination of our mandatory sentencing practices is required to ensure a just and proportionate sentencing scheme.”). Now that life without the possibility of parole is the harshest sentence available, a revisiting of the spectrum of punishment based on penological goals is not only appropriate, but

necessary. That which used to be proportionate may no longer be so.

A review of cases subject to resentencing under RCW 10.95.035 demonstrates that old habits are hard to break. Trial courts routinely impose terms far in excess of the 25-year minimum term allowed by the statute. The observed practice upon resentencing suggests that courts are using life—the sentence in place before *Miller* and passage of RCW 10.95.035—as the starting point when setting the minimum, and then deciding whether and to what extent a downward departure is justified. This approach does not comply with the mandates this Court has issued in many cases in recent years, requiring sentencing courts to meaningfully consider youth and to refrain from imposing extreme sentences where the child is not the rare individual who is irreparably corrupt.

Amicus proposes that where a sentencing court finds a child to be both less culpable and not irreparably corrupt, the sentence imposed should be at or near the 25-year minimum term allowed by the statute. This guidance eliminates the risk of disproportionate sentencing for children who are both less culpable and more amenable to rehabilitation, while keeping intact the legislative safeguard of longer confinement in the event they are not ready for release when the minimum term comes to pass. By directing the lower courts to proceed in this way, the Court would avoid the nearly impossible task of defining “de facto life,” reducing the

need for case-by-case determination in each of these cases. Finally, application of this guidance would help to begin recalibration of the sentencing scheme in accordance with constitutional proportionality.

ARGUMENT

I. Sentencing Data Demonstrates that Resentencing Courts Are Not Adjusting to New Constitutional Norms When Exercising Their Discretion, and Therefore More Guidance Is Needed to Ensure That the Court’s Directives to Meaningfully Consider Youth Are Implemented.

Sentencing courts continue to impose sentences that demonstrate their belief that the cases before them are the “rare exception” in which a life or de facto life sentence is appropriate, despite this Court’s clear direction that children be given lesser sentences in accordance with their diminished culpability and greater capacity for reform. *See Delbosque*, 195 Wn.2d at 121 (reemphasizing need for meaningful consideration of youth and cautioning that findings of irreparable corruption should be rare); *State v. Bassett*, 192 Wn.2d 67, 89–90, 428 P.3d 343 (2018) (describing the “unacceptable risk” of imposing life-without-parole given difficulty in determining whether individual is irreparably corrupt); *Ramos*, 187 Wn.2d at 442–43 (noting that children “necessarily prove[]” justification for a lesser sentence when they show that crimes reflect “transient immaturity” and that life sentences for children should be rare). The result is that sentencing courts continually fail to appropriately weigh

the youthful characteristics of the people they are sentencing, disregard evidence of successful rehabilitation, and place undue emphasis on the facts of the crime. In light of this Court’s recent reiteration of *Ramos*’s charge to sentencing courts to *meaningfully* consider youth, *Delbosque*, 195 Wn.2d at 121, and its acknowledgment of the importance of looking forward toward whether the offender is capable of changing, *id.* at 122, an evaluation of whether trial courts are implementing this Court’s mandates in these cases is essential. *See id.* at 121–22 (emphasizing need to meaningfully consider youth and approving of Ninth Circuit’s call to reorient sentencing inquiry to look to the future capacity for rehabilitation (citing *United States v. Briones*, 929 F.3d 1057, 1066–67 (9th Cir. 2019) (en banc)).

A review of resentencings under RCW 10.95.035 reveals that courts very rarely give effect to diminished culpability and rehabilitation in setting minimum terms. At least 22 juvenile offenders convicted of aggravated murder have been resentenced under RCW 10.95.035 and RCW 10.95.030 since the *Miller-fix* statute was passed.¹ When

¹ Of these 22, six will have, or have already had, an opportunity to seek release after they serve 25 years. *See State v. Bourgeois*, No. 92-1-06444-4 (King Cty. Sup. Ct. June 20, 2014); *State v. Comeslast*, No. 95-1-02260-1 (Spokane Cty. Sup. Ct. Jan. 28, 2016); *State v. Harris*, No. 87-1-01354-7 (Pierce Cty. Sup. Ct. Aug. 22, 2014); *State v. Lambert*, No. 97-1-00415-5 (Grant Cty. Sup. Ct. April 10, 2015); *State v. Massey*, No. 87-1-01354-7 (Pierce Cty. Sup. Ct. June 6, 2014); and *State v. Munguia*, No. 02-1-00960-7 (Benton Cty. Sup. Ct. Mar. 3, 2015). These six were all under the age of 16 when they committed their crimes, so the resentencing courts had no discretion and were required to set the

resentencing courts have had discretion in setting the minimum term, they generally have set it much higher than the 25-year minimum contemplated by the legislature. Fourteen of the 22 individuals were between the ages of 16 and 18 when they committed their crimes, and upon resentencing received minimum sentences of 42, 50, 48, 38, 48, 38, 48, 46, 40, 26, 125, 32, and 35 years,² with three receiving minimum sentences of life-without-parole before it was declared unconstitutional in *Bassett*, 192 Wn.2d 67.³ After *Bassett*, two of those three returned for a second resentencing, at which point they received 41.25 and 60 years respectively.⁴ Two other

minimum term at 25 years. See RCW 10.95.030(3)(a)(i). Eight others, apart from the 22, are eligible for resentencing under the statute but are awaiting hearings. See *State v. Alexander*, No. 02-1-00527-9 (Whatcom Cty. Sup. Ct.); *State v. Anderson*, No. 97-1-00421-3 (King Cty. Sup. Ct.); *State v. Baranyi*, No. 97-1-00343-8 (King Cty. Sup. Ct.); *State v. Gaitan*, No. 93-1-01018-0 (Yakima Cty. Sup. Ct.); *State v. Lembke*, No. 01-1-00001-7 (Stevens Cty. Sup. Ct.); *State v. McNeil*, No. 88-1-00428-1 (Yakima Cty. Sup. Ct.); *State v. Rice*, No. 88-1-00427-2 (Yakima Cty. Sup. Ct.); and *State v. Weaver*, No. 96-1-00123-9 (Whatcom Cty. Sup. Ct.).

² See, respectively, *State v. Backstrom*, No. 97-1-01993-6 (Snohomish Cty. Sup. Ct. June 27, 2017), *State v. Boot*, No. 95-1-00310-0 (Spokane Cty. Sup. Ct. Mar. 30, 2017), *State v. Delbosque*, No. 93-1-00256-4 (Mason Cty. Sup. Ct. Nov. 23, 2016), *State v. Forrester*, No. 1-25095 (1978) (Spokane Cty. Sup. Ct. Nov. 12, 2015), *State v. Furman*, No. 89-1-00304-8 (Kitsap Cty. Sup. Ct. Mar. 26, 2018), *State v. Haag*, No. 94-1-00411-2 (Cowlitz Cty. Sup. Ct. Jan. 19, 2018), *State v. Leo*, No. 98-1-03161-3 (Pierce Cty. Sup. Ct. Nov. 16, 2016), *State v. Hofstetter*, No. 91-1-02993-0 (Pierce Cty. Sup. Ct. Oct. 18, 2013), *State v. Phet*, No. 98-1-03162-1 (Pierce Cty. Sup. Ct. Mar. 10, 2016), *State v. Skay*, No. 95-1-01942-5 (Snohomish Cty. Sup. Ct. June 1, 2016), and *State v. Thang*, No. 98-1-00278-7 (Spokane Cty. Sup. Ct. Sept. 23, 2015).

³ See *State v. Ngoeung*, No. 94-1-03719-8 (Pierce Cty. Sup. Ct. Jan. 23, 2015), *State v. Stevenson*, No. 87-1-00011-5 (Skamania Cty. Sup. Ct. Mar. 17, 2017), and *State v. Bassett*, No. 95-1-00415-9 (Grays Harbor Cty. Sup. Ct. Jan. 30, 2015). Mr. Ngoeung received concurrent 25-year minimum terms on two counts of aggravated murder, with 195 consecutive months imposed on other charges.

⁴ See *State v. Ngoeung*, No. 94-1-03719-8 (Pierce Cty. Sup. Ct. July 12, 2019) (concurrent 25-year minimum terms on two counts of aggravated murder, with consecutive 195 months imposed on other charges); and *State v. Bassett*, No. 95-1-

individuals, who were under the age of 16 when they committed their crimes received the mandatory minimum term of 25 years pursuant to RCW 10.95.030(3)(a)(i), but also received consecutive sentences on other counts, such that they will serve 45 years and 189 years before they are eligible for review.⁵

Resentencing courts, for the most part, are not setting the minimum near the bottom of the statutory range. Instead, the observed practice is that courts set the minimum term at a point in the range approaching a de facto life sentence. The result is that those under 16 get a minimum term of 25 years. For those past the age 16 threshold, there is a dramatic ratchet upward where these children receive life equivalent sentences. This raises important constitutional concerns as to whether judges are properly exercising their discretion when they sentence children between the ages of 16 and 18 to much harsher sentences than those under age 16.

00415-9 (Grays Harbor Cty. Sup. Ct. June 6, 2019). Mr. Stevenson's second resentencing has not yet occurred.

⁵ See, respectively, *State v. Gilbert*, No. 92-1-00108-1 (Klickitat Cty. Sup. Ct. Sept. 21, 2015 & Sept. 24, 2019) and *State v. Loukaitis*, No. 96-1-00548-0 (Grant Cty. Sup. Ct. Apr. 19, 2017). At his first resentencing, Mr. Gilbert was sentenced to a 25-year minimum term on one count of aggravated murder and 280 months on all other counts, to run consecutive to the aggravated murder term. *State v. Gilbert*, No. 92-1-00108-1 (Klickitat Cty. Sup. Ct. Sept. 21, 2015). After this Court's decision holding that the sentencing court had discretion to impose an exceptional sentence and to run the sentences concurrently, *State v. Gilbert*, 193 Wn.2d 169, 177, 438 P.3d 133 (2019), he was resentenced to a 25-year minimum on the aggravated murder count, and 240 months on all others, to run consecutive to the aggravated murder term. *State v. Gilbert*, No. 92-1-00108-1 (Klickitat Cty. Sup. Ct. Sept. 24, 2019).

Sentences that far exceed the 25-year minimum term allowed under the statute are disproportionate under article I, section 14 because they result in longer sentences for people who were children at the time of their crimes than for those adults deemed most culpable. After this Court’s decision in *Gregory*, all death sentences were converted to life-without-parole. The average age of these individuals at the time of the commission of their crimes—those deemed the “worst of the worst”—is 37.63 years old.⁶ It is quite likely that Mr. Haag, who faces a minimum term of incarceration of 46 years, will serve far more time than those formerly sentenced to death. *See Bassett*, 192 Wn.2d at 88 (discussing life-without-parole sentences for children and noting “[t]he sentence is ‘especially harsh’ for children, who will ‘on average serve more years and a greater percentage of [their] li[ves] in prison than an adult offender.’” (quoting *Graham v. Florida*, 560 U.S. 48, 70, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), *as modified* (July 6, 2010) (alterations in *Bassett*)). This raises important constitutional concerns as to whether Mr. Haag’s 46-year minimum term is constitutional in light of the fact that the “worst of the

⁶ The age at the time of the commission of their respective crimes was: Jonathan Lee Gentry, 32 years old; Clark Richard Elmore, 44 years old; Cecil Emile Davis, 38 years old; Davya Michael Cross, 38 years old; Robert Lee Yates Jr., 45 and 46 years old; Conner Michael Schierman, 25 years old; Allen Eugene Gregory, 24 years old; Byron Eugene Scherf, 53 years old. Wash. State Dep’t of Corrs., *Inmates Sentenced to Capital Punishment 1* (rev. 2017), <https://www.doc.wa.gov/docs/publications/reports/100-SR001.pdf>.

worst” will likely serve less time.

II. Mr. Haag’s Sentence Is Unconstitutionally Disproportionate Because It Amounts to De Facto Life and the Trial Court Found Him to Be Both Less Culpable and Rehabilitated.

The resentencing court reviewed the mitigation evidence presented by Mr. Haag and acknowledged that he was both less culpable due to youth and largely rehabilitated since his crime was committed. *State v. Haag*, 10 Wn. App. 2d 1014, *3–4 (2019) (unpublished opinion). Based on this, the court found that Mr. Haag was “not irretrievably depraved nor irreparably corrupt.” *Id.* at *4 (internal quotations omitted). However, the trial court determined that it must consider the gravity of the crime in addition to the mitigating circumstances and imposed a disproportionate sentence of 46 years to life by relying solely on the retributive rationale for punishment, *see* Supp. Br. of Appellant. at 4, 7–8, disregarding Mr. Haag’s demonstration of diminished culpability and capacity for change—factors that trial courts must weigh heavily when sentencing juvenile offenders. *See Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *Bassett*, 192 Wn.2d at 87–89.

Mr. Haag’s 46-year minimum sentence is disproportionate given his reduced culpability and proven rehabilitation; in addition, it is unconstitutional because it is a de facto life sentence and the court found Mr. Haag is not irreparably corrupt. This Court has committed to

providing the same constitutional protections to children before imposition of either life without the possibility of parole or de facto life sentences. *See Ramos*, 187 Wn.2d at 437 (holding that *Miller* applies equally to de facto life sentences imposed on children). That commitment to equal treatment, along with *Bassett*'s categorical bar on life-without-parole sentences, 192 Wn.2d at 90, renders de facto life sentences constitutionally infirm.

Just as the reasoning from *Miller* “applies to any juvenile homicide offender who might be sentenced to die in prison,” *id.*, *Bassett*'s independent judgment analysis applies with equal force to the question of whether de facto life sentences for children are unconstitutional. *See Bassett*, 192 Wn.2d at 87–90. The recognition that children's inherently diminished culpability renders life-without-parole disproportionate, *id.* at 87, applies equally to children sentenced to de facto life. And just as the Court recognized the “harsh nature of sentencing a juvenile to die in prison” when considering life-without-parole sentences, de facto life is no less harsh. *Id.* at 88. These children will also serve a greater portion of their lives and more cumulative years in prison than similarly situated adult offenders, with no meaningful opportunity for release. *Id.* Nor are the penological goals underlying imposition of severe punishments served by sentencing children to de facto life sentences. Just as a life-without-

parole sentence for a child cannot be justified by the four rationales for punishment—retribution, deterrence, rehabilitation, or incapacitation—neither can a de facto life sentence be justified. *Id.* Where the same reasoning applies, it should necessarily lead to the same result. Like life-without-parole sentences, de facto life sentences for children must also be recognized as disproportionate under article I, section 14.

This Court has not yet defined what constitutes a de facto life sentence, and for good reason. *See Delbosque*, 195 Wn.2d at 122 (acknowledging that “trial court clearly intended to impose a life sentence” in imposing 48-year minimum term, but declining to address whether it amounted to de facto life because not squarely presented); *Ramos*, 187 Wn.2d at 439 n. 6 (finding 85-year aggregate sentence to be “undisputed” de facto life sentence and reserving ruling on “precisely how long a potential sentence must be in order to trigger *Miller*’s requirements” until squarely presented). Determination of an appropriate definition for “de facto life” is an immensely difficult task, and one subject to continual challenge with each new case presenting a minimum sentence slightly lower than the last. Any attempt to draw a bright line will require case-by-case analysis to determine whether the line should be moved given the circumstances of any given case. Proceeding in this fashion is an inefficient use of the Court’s resources, giving insufficient

guidance to sentencing courts and insufficient constitutional protection to the children subject to the sentences.

While amicus agrees with petitioner's argument that his 46-year minimum term amounts to de facto life because it leaves him no meaningful opportunity for life outside of prison, Supp. Br. of Appellant at 17-20, the Court need not draw a bright line in this case. Instead, where a sentencing court finds a child to be both less culpable and not irreparably corrupt, the sentence imposed should be at or near the 25-year minimum term allowed by the statute.

III. To Protect Against Disproportionate Sentences, Article I, Section 14 Requires Sentences to Be Set at or Near the Statutory Minimum Where an Offender Is Found to Be Less Culpable and Not Irreparably Corrupt.

The Washington Constitution cannot tolerate imposition of a de facto life sentence for a crime committed as a child, particularly where there are findings of diminished culpability due to youth and of rehabilitation, and an explicit ruling that the offender is not irreparably corrupt. In cases where the sentencing court finds that the offender is less culpable and either "*has changed or is capable of changing,*" *Briones*, 929 F.3d at 1067 (emphasis in original), such that the offender is not irreparably corrupt, the sentence imposed should be at or near the 25-year statutory minimum. This framework ensures that the heightened protection

of article I, section 14 in the juvenile sentencing context, *Bassett*, 192 Wn.2d at 82, is afforded to children sentenced under RCW 10.95.030, and protects against the risk of disproportionate sentencing demonstrated by the resentencing data discussed in Part I, *supra*. Failure to set the minimum term near the low end of the range where all findings justify a lesser sentence is unconstitutionally cruel.

Tethering minimum sentences to the lower end of the range is required to ensure that diminished culpability and enhanced capacity for rehabilitation, and not the underlying crime, control the *Miller* inquiry. Any case heard for sentencing under RCW 10.95.030 will, by definition, involve extremely serious crimes—but the legislature’s 25-year minimum necessarily reflects a legislative judgment that this minimum is sufficient, in cases like Mr. Haag’s, to punish the seriousness of those crimes. This legislative judgment about the acceptable minimum term is consistent with the constitutional requirement that the focus be on the youthful characteristics of the child and the child’s capacity for reform, rather than on the facts and circumstances of the crime. *Miller*, 567 U.S. at 472 (“the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes”); *id.* at 477–78; *Delbosque*, 195 Wn.2d at 121–22 (reiterating that the focus must be on the characteristics of youth and

emphasizing the need to focus on rehabilitation and not the facts of the crime); *Briones*, 929 F.3d at 1066 (“[W]hen courts consider *Miller's* central inquiry, they must reorient the sentencing analysis to a forward-looking assessment of the defendant's capacity for change or propensity for incorrigibility, rather than a backward-focused review of the defendant's criminal history.”). While courts may consider retribution in imposing a sentence on a child, “[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.” *Graham*, 560 U.S. at 71 (internal quotations omitted). Therefore, retribution does not carry as much strength as a rationale for punishment when sentencing a juvenile who is less blameworthy due to his youth. *Roper v. Simmons*, 543 U.S. 551, 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (“Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”); *Bassett*, 192 Wn.2d at 88 (citing *Miller*, 567 U.S. at 472).

Aside from ensuring protection against disproportionate sentences, this framework also functionally addresses several inefficiencies that result from continuing to address these issues on a case-by-case basis. First, it obviates the task of defining de facto life, which, to a certain

extent, requires the Court to engage in arbitrary line drawing. Second, it makes concrete this Court's requirement that trial courts meaningfully consider youth by anchoring the constitutional principle to a minimum sentence that will ensure a meaningful opportunity for release. By doing so, it will avoid the need for piecemeal litigation of whether a court, in a particular case, has adequately considered the specific facts relating to characteristics of youth. Finally, it effectively recalibrates sentences for children to be proportionate in light of the years served on average by the "worst of the worst," to ensure that children are not serving more years than their fully culpable adult counterparts.

CONCLUSION

For the forgoing reasons, amicus respectfully requests that the Court hold that in cases in which the sentencing court finds that the offender is less culpable and has or is capable of change, and therefore not irreparably corrupt, the sentencing court must impose a minimum term sentence at or near the 25-year statutory minimum found in RCW 10.95.030(3)(a)(ii).

DATED this 3rd day of September 2020.

Respectfully Submitted:
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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on September 3, 2020, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 3rd day of September, 2020.

/s/ Melissa R. Lee

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