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STATE OF WASHINGTON
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No. 1005440

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

Nga Ngoeung,

Respondent.

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

ANSWER

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A. INTRODUCTION

Nga Ngoeung was twice sentenced to die in prison for driving a car from which another teenager shot and killed two teenagers and wounded two others. Nga was 17 years old at the time of the offense, but his cognitive functioning at the time was much lower than even the average teenager. Nga's life without parole sentences were invalidated first by *Miller v. Alabama,* 567 U.S. 460, 489, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and then by *State v. Bassett*, 192 Wn.2d 67, 91, 428 P.3d 343 (2018).

At Nga's third resentencing, the court found Nga's cognitive limitations at the time of the offense warranted the minimum sentence for the aggravated murder convictions —life with parole eligibility after 25 years. But without explanation, the court imposed an additional consecutive sentence for the assaults, increasing Nga's sentence to 41.25-life, even though

his culpability would have been reduced the same for all of the offenses.

Because the sentencing court failed to meaningfully consider all the *Miller* factors and explain its reasoning for imposing the standard range, consecutive sentence for the assault convictions, the Court of Appeals correctly reversed and ordered a new sentencing hearing. The State's claim that the Court of Appeals erred in its faithful application of this Court's case law or that its decision conflicts with federal law is without merit. The State's additional claims about the effect of the court's sentence are factually and legally wrong, or alternatively best resolved on remand; there is no need for review by this Court.

B. ISSUES PRESENTED

1. This Court has clarified that when sentencing juveniles under RCW 10.95.030(3), a court must meaningfully consider the *Miller* factors, provide factual support to substantiate its findings, reconcile mitigating evidence, and

thoroughly explain its reasoning. The State's claim that the Court of Appeals' decision conflicts with federal and state case law simply ignores this Court's robust jurisprudence on the sentencing of juveniles tried in adult court. The State's additional claims about the effect of the court's sentence in relation to statutes determining his parole eligibility are without merit or can be resolved on remand. This Court should deny review.

2. The *Miller* factors account for the transitory, diminished culpability of youth. However, these same factors that reduce a child's culpability may endure into adulthood when the person suffers an intellectual disability. Must the sentencing court explicitly account for intellectual disability when assessing a child's capacity for change and history of rehabilitation in an institutional setting? Did the trial court fail to account for this mitigating aspect in Nga's case, instead making only generalized findings about rehabilitation and

inaptly comparing Nga to other defendants without his limitations?

3. Did the sentencing court improperly place the burden on Nga to prove his offense was mitigated by youth and fail to include consideration of the standard range sentence in sentencing him under RCW 10.95.030(b)?

C. STATEMENT OF FACTS

1. Timid, quiet and cognitively delayed, Nga is susceptible to peer pressure and forced into gang life at a young age.

Nga's family fled the Khmer Rouge's genocide in 1975. CP 126. Their second son, Nga, was born in a refugee camp in Thailand. CP 126. Nga's mother was malnourished and received minimal prenatal care in the camp. CP 251. Nga did not receive medical care when he was born. CP 127. He suffered seizures as an infant, including one so severe when he was 8-9 months old that his parents thought he had died. CP 127.

His family relocated to Seattle in 1980, when Nga was about four years old. CP 128. They ultimately settled in low-income housing projects in Salishan, Tacoma. RP 15; CP 129. Their neighborhood riven by gang violence. *Id.* Nga's family had no money, spoke no English, and knew nothing about American culture. CP 129, 151.

Nga's family was unable to maintain a close connection during Nga's childhood. CP 133. His dad was an alcoholic and was violent towards his family. CP 151.

Nga lagged far behind his siblings in major milestones, including not talking until he was around two years old, and even then, communicating through incomprehensible words and grunts. CP 128. He played mostly by himself rather than with his siblings, did not speak much, and often did not understand when people spoke to him. CP 128. Nga's parents attributed his developmental delays to the seizures he experienced as an infant and toddler. CP 128. Nga's brother remembered him as a quiet, "good kid." RP 16. He was soft hearted, cried easily,

loved animals and nature, never got into fights, and was not violent. RP 16.

When Nga reached school age it became clear he had difficulty learning. RP 16. Nga's older brother, Ngoun, learned English more quickly despite coming to the United States at an older age. CP 132. Due to language and cultural barriers, Nga's parents could not help him with school and he was frequently absent. CP 132-33, 151.

Nga was in first grade for three years in a row. CP 132. By fourth grade, testing revealed that he still read at a first or second grade level. CP 133. He was teased for being so much older than his classmates. CP 133. Nga's school records indicate no aggressive behaviors. CP 151. However, he was expelled for truancy shortly after he began fifth grade. CP 133.

Where Nga grew up, children ended up joining gangs either on their own or by force, as both a means of protection and a lack of choice. RP 17, 34, 36, 134. When Nga was 16 years old, a group of young men "jumped" him into a gang—

punching, kicking and beating him as a form of initiation. RP 17; CP 139.

Nga was gullible and easily convinced to do things by his peers. CP 135. One night in 1995, when Nga was 17 years old, he was hanging out at a gang house when four teenagers drove by and egged the house. CP 57. Believing this was a gang attack, 15-year-old fellow gang member Oloth Insyxiengmay took a rifle from the house. CP 57. Oloth and two other boys got into a car with Nga driving and they pursued the car. CP 57. Oloth aimed the rifle out the window and shot at the other boys' car. CP 57-58. Two of the boys were killed. CP 58; CP 493 FF 1. Nga was arrested soon after and confessed to police that he drove the car during the shooting. CP 58.

2. Nga was twice sentenced to die in prison for driving a car from which another child shot at four other children and tragically killed two of them.

Nga was tried as an adult in 1995, and convicted as Oloth's accomplice for two counts of aggravated murder, two counts of first degree assault and taking a motor vehicle without

permission. CP 56. Nga received two mandatory life without parole sentences for the aggravated murder convictions, and an additional 267 months on the other convictions. CP 56.

Oloth, the shooter, was convicted of two counts of the lesser charge of murder in the first degree based upon the element of extreme indifference to human life, and two counts of first degree assault. CP 405-06, 412-13. He was sentenced to 886 months in prison. CP 119. Unlike for Nga, Oloth's convictions made him parole eligible under RCW 9.94A.730(1), and he was released by the Indeterminate Sentence Review Board (ISRB) after serving 271 months. CP 119; CP 493 FF 4.

In 2012, the Supreme Court declared mandatory life sentences for juveniles unconstitutional. CP 58. The legislature amended the aggravated murder statute —Ch. 10.95 RCW—to no longer mandate life without parole. CP 58.

In 2015 Nga had a new sentencing hearing in front of a different judge. CP 59, 71. His mitigation evidence included

three psychological evaluations from the 1990s with different diagnoses, ranging from mildly mentally retarded, emotionally disabled, to extremely uneducated. CP 60.

An updated 2014 mental health report confirmed that at the time of Nga's offense, his cognitive and psychosocial functioning was different from an adult's and delayed even relative to other 17-year-olds. CP 60.

Despite reviewing the evidence of Nga's limited capacity, and though it was undisputed that Nga only drove the car and shot no one, the court again imposed two consecutive life without parole sentences for the aggravated first degree murder convictions and ran the remaining counts consecutive to the life without parole sentences. CP 62; CP 494 FF 6.

3. Nga's youth, cognitive limitations, and status as a racial minority make prison life particularly perilous.

Due to his life without parole sentence, Nga was classified as "close custody" and housed at the penitentiary in

Walla Walla, a maximum security facility then notorious for high rates of violence. RP 39-40; CP 253.

According to Dr. Michael Stanfill, a psychologist and former psychiatric services clinical director for the King County Jail System, RP 31, Nga had to contend with older, more aggressive and more physically mature adults. RP 39. When Nga was first housed at Walla Walla it was known that unless the inmate was willing to participate in violence, he would become a victim. CP 253.

Nga's "young age, relative immaturity and poor cognition" placed him at a high risk for being victimized. CP 255. Due to these risks, he needed the support of and protection from older inmates in positions of authority to avoid being abused. CP 255. Prison gangs provide the same kind of protection as they did in Nga's neighborhood. RP 39. Nga sought this known source of protection where he had been condemned to spend the rest of his life. RP 39; CP 253-55.

Nga was also targeted for violence because of his race: ethnic Asian gangs made up a relatively small number of inmates in Washington prisons and were targeted by other majority groups. CP 253.

Due to his youth and cognitive limitations when he entered prison, it is likely that "more antisocial and sophisticated men" offered Nga protection and support while using him for their own ends. CP 255. Nga was never a gang leader and defers to younger members, which Dr. Stanfill noted is unusual given his age and length of gang involvement. RP 44; CP 254.

The violence of Nga's surroundings was the "social and environmental influence[ ]" that defined the availability of decisions available to him in prison. RP 40. Receiving protection from this group affiliation requires adherence to a strict code: if someone protects you, you must be willing to protect them in return, including by fighting. CP 254. Over the nearly 25 years that Nga spent in prison, he accrued a number

of infractions that reflect the dictates of the gang code that protected him. RP 8-9; CP 253-56.

Since 2001 Nga was involved in five separate incidents that resulted in sanctions, including nine months in administrative segregation. CP 253. Nga's history of institutional violence was based on "reciprocity and mutual protection" that was "situation and location specific," not any sociopathic tendencies or propensity for violence. CP 255-56; RP 43. The two biggest factors in Nga's prison infraction history are his arrested development and the high rate of violence in the prison that he had to negotiate. RP 43-44; CP 255-56.

4. The third resentencing court finds Nga's youth and personal attributes warrant an exceptional, minimum sentence for the aggravated murders, but an aggravated sentence for the assault convictions.

In 2018, after Nga had served nearly 25 years, this Court declared that life without parole for juvenile offenders violated

the State Constitution, and Nga's sentence was reversed and remanded for a third sentencing hearing. CP 63-64.

At his resentencing, Nga presented updated mitigation evidence that specifically addressed his diminished culpability under each of the *Miller* factors. He argued that circumstances beyond his control, including suffering in refugee camps, malnourishment, trauma, low cognition, immaturity, his need to conform, and "a crime-filled environment of American gangs that his culture had to adapt to" created the circumstances of the tragic shooting. RP 71, 81-82; CP 85-322.

Dr. Stanfill conducted an updated forensic psychological evaluation of Nga as a 41-year-old man. RP 36; CP 249-63. This report supported previous evaluations that Nga had borderline intellectual functioning and limited decision-making ability then and now, due to the violence in his home and neighborhood growing up and later in prison. RP 32-44; CP 259-63.

Nga's family members testified about their current stable lives and love for Nga. RP 13-29. His older brother, Ngoun, left gang life in his late twenties and has a stable job and family. RP 18, 20. If not deported to Cambodia upon his release, Nga has a home with Ngoun's family who could offer him the emotional and financial support Nga needs but has never had. RP 18.

Nga expressed his heartfelt apology to the victims and his deep understanding of the harm he had done. RP 83-86. Nga asked the court to impose a sentence of concurrent terms for each offense, for a total sentence of 25 years, reminding the court the shooter had already been released: "Nga's role in the deaths and the shooting is smaller than those who already have received 25 and 26 years to life." RP 77, 82.

In response, the prosecutor only obliquely referred to the *Miller* factors and instead urged the court to "take into account the experience of these victims' families and the two boys who were shot and, as I say, arrive at a sentence in which each of

these crimes is punished for what it was, a very serious violent crime." RP 66.

The sentencing judge stated he had "an open field to run on" in determining Nga' sentence. RP 10. The court considered the evidence of Nga's low cognitive functioning and found that "in this case there is considerable evidence of psychological damage, something not behaviorally driven, but indeed part of an organic brain issue, whether that is genetic, related to earlier brain trauma." RP 92; CP 496 FF 18. This was based on evidence of "many instances and examples of seizures, head trauma, developmental delays, and difficulties in school." CP 495 FF 10. The trial court also found that Dr. Stanfill's testimony and report established that these cognitive deficiencies meant Nga was more "immature, less cognitively complex, overly compliant to antisocial peers, and directly impacted by socioeconomic and geographic and other social factors" that were beyond his control. CP 495 FF 11.

The sentencing court found that at the time of the offense, Nga was "likely in a borderline range for mental retardation and certainly well below normal functioning." CP 495 FF 14. Nga's mental disabilities continued in prison, where a 2002 report noted "psychomotor retardation, anxiety, and recurrent major depression." CP 496 FF 15. Thus, the deficits present at the time of the crime "persisted" into the present and support the earlier findings of low cognitive functioning. CP 496 FF 17; RP 93. The court's findings also reflected Nga only "sporadically" received treatment in DOC. CP 496 FF 16. However, the court attributed this to Nga's "choice." CP 496 FF 16.

Though the court never cited the *Miller* factors, it did find "substantial and compelling reasons involving the attributes of youth and Mr. Ngoeung's personal attributes in this case to justify an exceptional sentence." CP 497. The sentencing court ran the two aggravated murder convictions concurrent to each another. CP 518. Despite finding Nga's

youth and personal attributes merited a life sentence with a 25-year minimum under RCW 10.95.030, the lowest term available, the court ordered this to run consecutive to a 195-month sentence for the assault convictions as urged by the prosecutor. CP 497; RP 96-97. This resulted in a minimum sentence of 495 months, or 41.25 years. *Id.*

The Court of Appeals faithfully applied this Court's case law in remanding for a new sentencing hearing. The sentencing court's findings as to Nga's reduced culpability for aggravated murder would necessarily be the same for the assault convictions because his conduct of driving the car was the same for all four charges. The Court of Appeals properly concluded the sentencing court failed "to explain its reasoning in imposing a sentence seemingly inconsistent with its findings of fact" that justified minimum terms for the aggravated murder convictions. Op. at 22.

D. ARGUMENT

1. The Court of Appeals correctly applied this Court's case law in *Delbosque* and *Gilbert*; there is no conflict with State or federal law.

The State's petition for review reflects a fundamental misunderstanding of the purpose and requirements of a *Miller*-hearing, especially in light of recent clarification provided by *Delbosque*[1] *and Gilbert*.[2] The Court of Appeals correctly applied this Court's case law in requiring the sentencing court consider the *Miller* factors, thoroughly explain its reasoning and reconcile the mitigating evidence. Neither federal nor state case law regarding the sentencing of adult offenders requires a different result.

The purpose of the *Miller*-fix statute "is to correct unconstitutional mandatory life without parole sentences in accordance with *Miller*." *Delbosque*, 195 Wn.2d at 127. At a *Miller* sentencing hearing, "the court must take into account

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[1] 195 Wn.2d 106, 456 P.3d 806 (2020).
[2] 193 Wn.2d 169, 438 P.3d 133 (2019).

mitigating factors that account for the diminished culpability of youth as provided in *Miller*." RCW 10.95.030(3)(b).

In Washington, when sentencing children for adult crimes, the sentencing court must consider the mitigating differences between children and adults in *all* cases. *State v. Houston-Sconiers,* 188 Wn.2d 1, 21, 391 P.3d 409 (2017). Any provision in the Sentencing Reform Act limiting this discretion, including the mandatory provision of RCW 9.94A.589(1)(b), does not control, because courts have absolute "discretion to consider downward sentences for juvenile offenders regardless of any sentencing provision to the contrary." *Gilbert,* 193 Wn.2d at 175.

The sentencing court must consider the *Miller* factors and impose a new minimum term consistent with them. *Delbosque,* 195 Wn.2d at 128-29. The guiding principle is that the harshest adult-like sentences are reserved for only a few individuals, *Miller*, 567 U.S. at 479— "the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is

impossible." *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 733, 193 L. Ed. 2d 599 (2016) (Emphasis added). In applying the *Miller* factors, courts "must *meaningfully* consider how juveniles are different from adults, and how those differences apply to the facts of the case." *Delbosque*, 195 Wn.2d at 121.

The central inquiry turns on the "relevant mitigation evidence bearing on the circumstances of the offense and the culpability of the offender, including both expert and lay testimony as appropriate." *Id.* The court must "thoroughly explain its reasoning*"* in determining whether to impose an exceptional sentence. *Gilbert,* 193 Wn.2d at 176.

The sentencing court in Nga's case noted, "after reading *State vs. Gilbert* and *State v. Houston-Sconiers,*" it had complete discretion, or an "open field to run on" in sentencing Nga. RP 10. No statute required the court to impose the assault convictions consecutive to the aggravated murder convictions. However, the trial court separately considered the consecutive

sentencing provisions of the SRA and ordered a consecutive, standard range sentence for the assaults, despite entering findings that Nga's reduced culpability justified a minimum term for the related murders. *Gilbert,* 193 Wn.2d at 176. The sentencing court made no written findings that justified anything but the mitigated sentence it imposed for the aggravated murders.

The Court of Appeals correctly found the sentencing court failed to consider each of the *Miller* factors, reconcile the mitigating evidence and thoroughly explain its reasoning on the record. Op. at 15-18. The Court of Appeals also correctly determined this Court's requirements for the sentencing of juvenile offenders applies "regardless of whether the child is being sentenced under RCW 10.95.035 or title 9.94A RCW." Op at 15. The sentencing court's failure to incorporate its consideration of the standard sentencing range for the assaults in imposing its sentence under RCW 10.95.030 ignored *Gilbert's* command that the court consider this standard range

sentence when determining whether to impose an exceptional sentence, "taking care to thoroughly explain its reasoning." 193 Wn.2d at 176.

Contrary to this Court's case law governing the sentencing of juveniles, the State claims that case law governing standard-range sentencing for adults applies. Pet. for Rev. at 16-17. This is wrong. The Court of Appeals correctly required the sentencing court to comply with this Court's requirements for the sentencing of juvenile offenders.

The State also claims that the Court of Appeals decision "conflicts" with the Supreme Court's decision in *Jones v. Mississippi*, 141 S. Ct. 1307, 1321, 209 L. Ed. 2d 390 (2021). Pet for Rev. at 8. *Jones* held the "Court's precedents do not require an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility." *Id*. at 1321. The State does not explain how this controls Washington's case law interpreting the requirements for sentencing a juvenile under RCW 10.95.030 at issue here. The Court of Appeals correctly

applied this Court's case law and the State's claims do not meet the criteria for review by this Court. And because the sentencing court ordered a consecutive sentence for the aggravated murder offenses and the assaults, where no statute required it, this was an aggravated, not a mitigated sentence, which required findings to support it. *See Gilbert,* 193 Wn.2d at 176. This court should deny review.

2. Even if the State's claims about Nga's parole eligibility were correct, which they are not, there is no need for review by this Court. On remand, the State can agree to amend the judgment and sentence to reflect the sentence it claims the court intended to impose.

The State insisted on appeal and continues to claim in its petition to this Court, that the court's 41-year minimum sentence was "symbolic" because Nga is parole eligible after 25 years. The Court of Appeals correctly rejected the State's specious contention on both the law and the facts.

First, the State's claim is factually inaccurate. As cited in the Court of Appeals' opinion, the sentencing court explicitly

sentenced Nga to serve 41.25 years before he will become parole eligible:

> [T]wo 25 year to life terms of imprisonment that will be served concurrently. And then they will be followed consecutively on Counts III and IV by 102 months on Count III and 93 months on Count IV. By my rough calculation, that comes to 195 months that will be consecutive to the 25 years to life sentence for the murders. After all of that time is done, then the ISRB will be able to make its determinations.

Op. at 8 (citing 9/6/19 RP 94-97).

Because the court did not comply with *Gilbert's* direction to include any considerations about the standard range for the total sentence imposed under 10.95.035, *Gilbert,* 193 Wn.2d at 176, these sentences will be served separately. This means that Nga will not be parole eligible after 25 years as the State claims. To the contrary, by sentencing Nga to consecutive terms under RCW 10.95.030 and title 9.94A RCW, Nga is ineligible to even begin serving the consecutive term until he is released on the 25-life sentence imposed under RCW 10.95.030. This means that Nga potentially faces a *greater* sentence than 41.25

years if the ISRB does not release him on the 25-life sentence. Because Nga has not served 20 years for the assault convictions, which run consecutive to the court's sentence imposed under RCW 10.95.030, he is not eligible for parole under RCW 9.94A.730(3) as the State claims he is. The Supreme Court emphasized that after *Miller,* "our legislature plainly intended to provide a meaningful opportunity for early release." *Matter of Brooks*, 197 Wn.2d 94, 102, 480 P.3d 399 (2021). The trial court's consecutive sentence here directly contradicts this intent.

Regardless, the Court of Appeals correctly cited to this Court's case law establishing that the question of parole eligibility is separate from the constitutionality of the court's sentence: "the fact that a recently enacted statute may offer the possibility of another remedy in the future, or on collateral review, does not resolve whether petitioners' sentences are unconstitutional and in need of correction now." Op. at 22 (citing *Houston-Sconiers*, 188 Wn.2d at 22–23).

Nga made clear throughout his appeal that if the sentencing court's consecutive terms were "purely symbolic," this symbolism must be achieved in a way that will not imprison him beyond the minimum term the State claims the court intended to impose. Nga requested the minimum sentence the court could impose: 25 years to life. If the 41.25 year sentence is "symbolic" and not an actual term of confinement before he becomes parole eligible, his judgment and sentence must be changed to reflect this. The State could simply agree to this on remand since it believes this was the court's intention. This would also address the State's concern about the victims having to endure a fourth sentencing hearing. Pet for Rev. at 19-20.

Even if the State's claims were correct, the Court of Appeals' decision remanding for a new sentencing hearing allows the parties to ensure the court's judgment and sentence accurately reflects the sentence the State claims the court intended to impose. There is no need for review by this Court.

3. This Court should accept review to consider whether a sentencing court must account for a child's intellectual disability when assessing his capacity for rehabilitation.

Because the sentencing court did not meaningfully consider all of the *Miller* factors or explain its reasoning for imposing consecutive sentences under the SRA despite finding leniency was warranted, it is impossible to know why the court sentenced Nga to a term of 41.25 years to life, rather than the minimum sentence 25 years to life after finding his youth and personal characteristics warranted such a sentence. The sentencing court also failed to consider the fact of Nga's intellectual disability in light of all of the *Miller* factors. This Court should grant review to clarify the state and federal constitutions require consideration of a child's intellectual disability when assessing their capacity for change and rehabilitation.

The court's oral ruling reflected the court perceived Nga's DOC history showed a lack of rehabilitation. RP 8, 95-96; *see also* CP 496 FF 16. Insofar as these statements can be

construed as findings in respect to capacity for rehabilitation, they are not supported by substantial evidence and establish the court failed to meaningfully consider the mitigating evidence of Nga's cognitive limitations. *See Delbosque*, 195 Wn.2d at 120.

Roper's and *Miller's* focus on a child's reduced culpability due to neurological underdevelopment in relation to adults is premised on the Court's recognition in *Atkins* that adults with intellectual and cognitive disabilities are less culpable, and thus less deserving of the harshest punishment. *Roper v. Simmons,* 543 U.S. 551, 570-71, 125 S. Ct. 1183, 161 L. Ed.2d 1 (2005) (citing *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)).

Atkins determined that in the context of adult sentencing, persons with "disabilities in areas of reasoning, judgment, and control of their impulses…do not act with the same level of moral culpability that characterizes the most serious adult criminal conduct." 536 U.S. at 306.

Mental retardation as considered by *Atkins* applied to people with IQs in the 70 range. *Id.* at 318. IQ scores between 70 and 85 indicate a "'borderline intellectual functioning category,' which empirical research has shown significantly impacts an individual's ability to control impulses, develop analytical capabilities, problem-solve, and exercise higher-level reasoning skills." Adam Lamparello, *IQ, Culpability, and the Criminal Law's "Gray Area": Why the Rationale for Reducing the Culpability of Juveniles and Intellectually-Disabled Adults Should Apply to Low-IQ Adults,* 65 Loy. L. Rev. 305, 323 (2019).

Indeed, the reasons underlying the link between low IQ and crime are strikingly similar to those pertaining to juvenile delinquency: "low-IQ adults struggle with impulse control and the ability to appreciate the consequences of their actions." *Id.* at 314. This is why *Roper* borrowed so heavily from intellectual disability cases. Low-IQ adults, like juveniles and intellectually-disabled adults, suffer from impairments that

affect their ability to conform to the requirements of law or form a culpable mental state. *Id.* at 315.

Researchers have made the following observations of persons with intellectual disability as they progress through the criminal justice system: "In court, they confessed more readily, provided incriminating evidence, were less likely to plea-bargain, were more likely to have been convicted, and received longer sentences." Astrid Birgden, *Enabling the Disabled: A Proposed Framework to Reduce Discrimination Against Forensic Disability Clients Requiring Access to Programs in Prison,* 42 Mitchell Hamline L. Rev. 637, 646 (2016).

This is certainly true in Nga's case, where his co-defendant, the actual shooter, received a lesser sentence, and was released on parole after 22 years. The other co-defendant also took an advantageous plea deal. CP 493-94 FF 5. Nga confessed immediately and received the harshest sentence, despite having shot no one.

Nga pointed to the paradox of focusing on prison rehabilitation for people with reduced cognitive ability: "the reason why Nga struggled and struggles in DOC today is what makes him less culpable for the criminal activity as a juvenile." RP 74. Lower intellectual functioning inhibits rehabilitation in prison. Birgden, *supra,* at 646. Studies show that people with intellectual limits in prison "were more likely to have been abused or victimized and engaged in poorer institutional behavior. Therefore, they became over-classified with a higher security level." *Id.* Birgden observed programs in prison are not "generally accessible to offenders with an IQ lower than eighty points." *Id.* at 676.

And though prison certainly creates distress for most people, prisoners with cognitive disabilities "have been found, on psychometric measures, to suffer three times the depression and anxiety levels as general population prisoners." *Id.* at 687.

Nga's experience in prison reflects the experiences of those with lower intellectual functioning. In prison he suffers

from "anxiety" and "recurrent major depression." CP 496 FF 15. His prison infractions are not predatory, but show his need for group protection and are driven by vulnerabilities of youth, relative immaturity and "poor cognition." CP 255. Nga was unable to complete his general education requirements (GED) and he worked for only three months of his sentence. CP 61.

A person's intellectual disability must be accounted for in light of *Miller*'s consideration of "any factors suggesting that the child might be successfully rehabilitated." *Gilbert,* 193 Wn.2d at 176 (citing *Miller,* 567 U.S. at 477). A trial court's failure to account for intellectual disability would untether *Miller* from its moorings, since *Miller's* requirement that the sentencing judge consider the child's personal characteristics derives from the Court's same requirement regarding reduced culpability for those with intellectual disabilities. *See Graham,* 560 U.S. at 61; *Roper*, 543 U.S. 551; *Atkins*, 536 U.S. 304.

When as here, there is evidence a defendant's cognitive disability diminishes his opportunity for rehabilitation in prison,

this must be factored into the court's assessment under *Miller*'s required consideration of any factors "suggesting the juvenile might be rehabilitated." *Gilbert,* 193 Wn.2d at 176. This is an issue of substantial public interest and significant constitutional import. This Court should accept review. RAP 13.4(b)(3),(4).

4. This Court should also accept review to determine whether the sentencing court misallocated the burden of proof to Nga at the *Miller* resentencing and erred by failing to incorporate its consideration of the standard range into the sentence imposed under RCW 10.95.030.

If this Court accepts review of the State's petition, Nga asks this Court to also accept review of his claim that the court erroneously placed the burden of proof on him at the *Miller* resentencing by failing to follow *Gilbert*'s requirement that any consideration of the standard range sentence be included in the sentence it orders under RCW 10.95.030.

RCW 9.94A.535(1) requires the defendant to prove mitigating circumstances justifying an exceptional sentence by a preponderance of the evidence. This SRA provision does not control the sentencing of a child under RCW 10.95.030: "This

reasoning does not extend to sentencing hearings pursuant to the *Miller-fix* statute, which unlike the SRA, does not impose a burden of proof on either party." *Delbosque*, 195 Wn.2d at 123. The sentencing court here improperly relied on this SRA sentencing provisions, placing the burden on Nga to prove the court should not impose consecutive sentences for the assault convictions.

The sentencing court stated that Nga's personal attributes and youth justified imposing an "exceptional sentence" of concurrent terms for the aggravated murder convictions based on *Gilbert* and RCW 9.94A.535(1). CP 497. The court then ordered consecutive sentences for the assault convictions as urged by the prosecutor under RCW 9.94A.589(1)(b), but improperly directed those sentence be served consecutively to the sentences for the murders. CP 486.

This consecutive term was an aggravated sentence, not a mitigated sentence because RCW 9.94A.589(1)(b) only required the assaults run consecutive to each other, not

consecutive to the life sentence imposed under RCW 10.95.030. Because this was an exceptional aggravated sentence, the court would be required to enter findings, but it only entered findings for the 25-life sentence it imposed under RCW 10.95.030.

Nothing in RCW 10.95.030 says the court must impose consecutive terms for more than one offense unless it imposes an exceptional sentence. Nor could the statute be read to require this, because this would mandate de facto life sentences for any child charged with more than one count of aggravated murder, which is prohibited under the Eighth Amendment and Article I, section 14. RCW 10.95.030(3)(b); *State v. Haag*, 198 Wn.2d 309, 327, 495 P.3d 241 (2021) (a 46-year minimum sentence imposed on a child amounts to an unconstitutional de facto life sentence).

Thus the court's application of the SRA's "exceptional sentence" framework to RCW 10.95.030 reveals the court believed that in order to sentence Nga to concurrent terms, he had to prove an exceptional sentence was warranted where he

had no such burden. *Delbosque*, 195 Wn.2d at 123. The court's "exceptional sentence" was premised on the SRA's inapplicable framework, misallocating the burden of proof to Nga. *Id.* This Court should accept review of this issue if it accepts the State's petition for review.

C. CONCLUSION

The State's arguments in its petition for review reflect a fundamental misunderstanding of the purpose and requirements of a *Miller*-hearing. This Court should deny review. If this Court accepts review of the State's petition, Nga asks this Court to also accept review of the issues he raises in this answer.

Per RAP 18.17(c)(10), the undersigned certifies this answer contains 5,717 words.

DATED this the 4th day of February, 2022.

Respectfully submitted,

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 100544-0**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Paralegal — Date: February 4, 2022
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