NO. 102879-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARVIN LOFI LEO,

Petitioner.

Pierce County Superior Court Cause No. 98-1-03161-3
Court of Appeals Cause No. 85902-1-I

ANSWER TO PETITION FOR REVIEW

MARY E. ROBNETT
Pierce County Prosecuting Attorney

BRITTA ANN HALVERSON
Deputy Prosecuting Attorney
WSB # 44108 / OID #91121
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-2912

TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF THE ISSUES 2

III. STATEMENT OF THE CASE 3

A. Leo and His Accomplices Victimized Ten People and Murdered Half of Them. 3

B. The Trial Court Resentenced Leo to a Minimum Term of 40 Years. 5

C. The Court of Appeals Affirmed Leo's 40-Year Minimum Term Sentence. 7

IV. ARGUMENT 8

A. The Court of Appeals' Decision Affirming Leo's Sentence Adheres to *Haag* 8

B. The Court of Appeals' Decision Aligns With Multiple Other Jurisdictions Which Have Determined That 40 Years Does Not Amount to De Facto Life. 14

V. CONCLUSION 17

TABLE OF AUTHORITIES

State Cases

DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122,
372 P.2d 193 (1962)..... 16

Helmbreck v. McPhee, 15 Wn. App. 2d 41,
476 P.3d 589 (2020)..... 16

State v. Anderson, 200 Wn.2d 266,
516 P.3d 1213 (2022)..... 10

State v. Haag, 198 Wn.2d 309,
495 P.3d 241 (2021)..... 1, 2, 7, 8, 10, 11, 12, 13, 14, 15, 16

State v. Houston-Sconiers, 188 Wn.2d 1,
391 P.3d 409 (2017)..... 9

State v. Leo, No. 85902-1-I,
(Wash. Ct. App. Feb. 5, 2024) (unpublished)..... 7, 13

State v. Phet, No. 29027-8-II, 2005 WL 1023100,
(Wash. Ct. App. May 3, 2005) (unpublished) 3

Federal and Other Jurisdictions

Bear Cloud v. State, 2014 WY 113,
334 P.3d 132 (2014)..... 11

Casiano v. Comm'r of Corr., 317 Conn. 52,
115 A.3d 1031 (2015)..... 11, 13

Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455,
183 L. Ed. 2d 407 (2012)..... 5, 9, 10, 11, 12, 16

Pedroza v. State,
291 So.3d 541 (Fla. 2020) 15

People v. Buffer, 2019 IL 122327,
137 N.E.3d 763, 434 Ill. Dec. 691 (2019) 14

People v. Dorsey, 2021 IL 123010,
183 N.E.3d 715, 451 Ill. Dec. 258 (2021) 14

State v. Conner, 381 N.C. 643,
873 S.E.2d 339 (2022) 14

State v. Kelliher, 381 N.C. 558,
873 S.Ed.2d 366 (2022) 13, 15

State v. Null,
836 N.W.2d 41 (Iowa 2013) 12

State v. Zuber, 227 N.J. 422,
152 A.3d 197 (2017) 11

Constitutional Provisions

Wash. Const. art. I, § 14 ..... 10, 16

Statutes

Former RCW 9.94A.320 (1998)……8

Former RCW 10.95.030(3)(a)(ii) (2016) 9

Former RCW 10.95.030(3)(b) (2016) 9

Former RCW 29A.08.520 12

Laws of 2021, ch. 10, §1 12

RCW 9.94A.515……8

RCW 10.95.030 8

RCW 10.95.030(2)(a)(ii) 8

RCW 10.95.030(2)(b) 9

RCW 10.95.030(2)(f) 9, 10

RCW 10.95.030(3) 5

RCW 10.95.035 5

RCW 29A.08.520(1) 12

Rules and Regulations

RAP 13.4 ..... 1, 2, 8, 17

Other Authorities

Social Security Administration, *Normal Retirement Age*, https://www.ssa.gov/oact/progdata/nra.html (last visited April 10, 2024) 13

I. INTRODUCTION

Pierce County remembers the 1998 "Trang Dai Massacre" as one of area's worst mass shootings. Marvin Leo and his accomplices opened fire inside a café in Tacoma, killing five customers and wounding five others. Leo, for his part, fired his gun into the café until he ran out of bullets. He was 17 years old at the time he committed the aggravated murders. After taking into consideration the mitigating qualities of Leo's youth, the trial court resentenced Leo to a minimum term of 40 years to life in prison. The Court of Appeals affirmed Leo's sentence in an unpublished opinion.

There is no basis for review under RAP 13.4. The Court of Appeals adhered to this Court's opinion in *State v. Haag*, 198 Wn.2d 309, 327, 495 P.3d 241 (2021), and properly considered whether Leo's sentence "results in his losing meaningful opportunities to reenter society and to have a meaningful life." It does not.

A minimum term of 40 years is not a de facto life sentence, and multiple sister states have explicitly held the same. Leo offers no legal authority to support his position otherwise and fails to articulate specific grounds for review under RAP 13.4. His silence speaks volumes as to the merit of his claims.

Leo will presumptively reenter society while in his 50s. As the Court of Appeals properly found, while Leo's deliberate actions cut short the lives of five innocent people, Leo's sentence still provides him the opportunity to reenter society and have a meaningful life outside of prison. This Court should deny Leo's petition for review.

II. RESTATEMENT OF THE ISSUES

A. Is review warranted under RAP 13.4, where the Court of Appeals' decision affirming Leo's sentence for multiple counts of aggravated first degree murder (1) adheres to this Court's opinion in *Haag* and (2) is entirely consistent with case law which holds that 40 years does not amount to de facto life?

/ / /

/ / /

/ / /

III. STATEMENT OF THE CASE

A. Leo and His Accomplices Victimized Ten People and Murdered Half of Them.

On July 5, 1998, Marvin Leo and several accomplices orchestrated a mass shooting at the Trang Dai café in Tacoma's International District. CP 24, 421-22, 442. The gang members wanted to "make a statement by shooting up everybody." CP 324. Leo held open the front door of the café and fired his gun until he ran out of bullets.[1] CP 388, 400-08. Four people were shot and killed as they sat at a table near the front door, and a fifth victim was shot and killed as she attempted to flee out the back. CP 12-15, 422-23. Five others were injured as a result of

[1] This distinguishes Leo's case from his co-defendant's, John Phet's. *See* Pet. Rev. at 6 (referencing Phet). Leo and two others went to the front door of the Trang Dang café where the primary shooting took place. *See* CP 422-23. Four people lost their lives and four others sustained gunshot wounds from the front-door shooting. CP 422-23. Leo was one of the primary shooters. CP 423. Phet, on other hand, remained in the alleyway. CP 14, 388; *see State v. Phet*, No. 29027-8-II, 2005 WL 1023100, *1 n.7, *3 (Wash. Ct. App. May 3, 2005) (unpublished). Phet was also younger than Leo at the time of the murders. CP 12, 425.

the gunfire. CP 12-15, 24, 422-23. The murder victims ranged in age from 21-33 years old. CP 12, 422-23.

This was not Leo's first violent act. Leo characterized his teenage years as involving "violence… assaults… beating up people… shooting up houses… [and] stealing cars" with other gang members and targeting "random people" to "pick a fight and steal their wallet." CP 339-40, 342. Leo would arm himself with a knife or firearm. CP 340.

Leo eventually admitted his involvement in the murders to police. CP 388; (12/5/16) RP 27. He said those involved were "excited" and "[p]umped-up" after the shooting. CP 389, 410. Leo was 17 years old at the time he murdered the victims. CP 442.

The State charged Leo with five counts of aggravated first degree murder and five counts of first degree assault, all firearm enhanced, for his part in the mass murder. CP 1-11. In 2000, Leo pleaded guilty as charged and was sentenced to then mandatory

life without the possibility of parole, plus 1,100 months to run consecutive to his life sentence.[2] CP 16-27, 30-33, 37, 442.

B. The Trial Court Resentenced Leo to a Minimum Term of 40 Years.

In 2016, Leo was resentenced under our state's *Miller*[3]-fix statutes, RCW 10.95.030(3) and RCW 10.95.035, for consideration of the mitigating qualities of his youth. *See* (12/5/16) RP *generally*. The resentencing court heard from forensic psychologist Dr. Nathan Henry, who testified Leo presented a low to moderate risk of future dangerousness based on his assessment. CP 443; (11/28/16) RP 45, 55-56; *see also* CP 338-48. The court also heard evidence regarding Leo's upbringing, family life, and eventual gang involvement, as well as his efforts towards rehabilitation while incarcerated. *See* (11/28/16) RP 11-19, 29-31, 44, 47; CP 338-48.

---

[2] The court imposed 100 months on each assault conviction, plus 60 months for each firearm enhancement, for a total of 1,100 months. CP 37.

[3] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

Leo requested a 30-year minimum term for his five aggravated murder convictions, with all counts and sentencing enhancements to be served concurrently. CP 383; (12/5/16) RP 17, 26, 34. The State asked the court to impose five consecutive terms of 25 years to life. CP 432; (12/5/16) RP 23.

The resentencing court found Leo's "youth and brain development contributed to his poor decision making and susceptibility to peer pressure," he was "particularly vulnerable" due to his family situation and living environment, and his gang association affected his adolescent identity and personality development. CP 443-45. The court determined Leo's youth mitigated his crimes, and he "should have a chance to get out at some point in his life." CP 445-47; (12/5/16) RP 37-39. The court imposed a minimum term of 40 years to life in prison, with all counts and sentencing enhancements to be served concurrently. CP 437-40, 447-48; (12/5/16) RP 38-39.

/ / /

/ / /

C. The Court of Appeals Affirmed Leo's 40-Year Minimum Term Sentence.

Leo appealed, claiming his new sentence amounts to an unconstitutional de facto life sentence. The Court of Appeals disagreed in an unpublished opinion, holding "the resentencing court properly focused on Leo's youth as a mitigating factor" and "the new sentence allows Leo a meaningful opportunity for life outside of prison." *See State v. Leo*, No. 85902-1-I, unpublished slip op. at 1 (Wash. Ct. App. Feb. 5, 2024). In support of its holding, the Court of Appeals looked to this Court's opinion in *Haag* and examined the distinguishing features between Leo's 40-year minimum term sentence and Haag's 46-year minimum term. *Leo*, slip op. at 5-7. Leo moved for reconsideration of the Court of Appeals' opinion. The court summarily denied his motion.

/ / /

/ / /

/ / /

/ / /

IV. ARGUMENT

A. The Court of Appeals' Decision Affirming Leo's Sentence Adheres to *Haag*.

There is no basis for review under RAP 13.4. The Court of Appeals carefully examined this Court's opinion in *Haag* and adhered to *Haag*'s holding and principal concerns when it determined that Leo's 40-year minimum term does not constitute a de facto life sentence. Leo's sentence provides him the opportunity for a meaningful life outside of prison upon his release from confinement. The Court of Appeals correctly rejected Leo's claim which is wholly unsupported by legal authority.

Aggravated first degree murder is the most serious criminal offense in our state. *See* RCW 9.94A.515; former RCW 9.94A.320 (1998). Juvenile offenders, such as Leo, convicted of aggravated first degree murder are subject to the sentencing provisions of RCW 10.95.030. RCW 10.95.030(2)(a)(ii) provides, "Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at

least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years." *See also* former RCW 10.95.030(3)(a)(ii) (2016).

In setting the minimum term of confinement, "the court must take into account mitigating factors that account for the diminished culpability of youth" as provided in *Miller,* 567 U.S. 460. *See* RCW 10.95.030(2)(b); former RCW 10.95.030(3)(b) (2016); *see also State v. Houston-Sconiers*, 188 Wn.2d 1, 23, 391 P.3d 409 (2017). The resentencing court properly did so here. Leo does not claim otherwise.

Prior to the expiration of their minimum term, the juvenile offender receives a parole hearing before the indeterminate sentence review board (ISRB). RCW 10.95.030(2)(f). At the hearing, the offender is entitled to a presumption of release. *Id.* If the ISRB determines the offender should not be released, then the offender is entitled to another parole hearing after five years

or less. *Id.* Leo will be eligible for release after serving his 40-year minimum term, when he is 57 years old.

While article I, section 14 of the Washington Constitution categorically bars de facto life without parole (LWOP) sentences for juvenile offenders whose crimes reflect the mitigating qualities of youth, it does not prohibit a term-of-years sentence less than de facto life. *See State v. Anderson*, 200 Wn.2d 266, 281-82, 284, 516 P.3d 1213 (2022) (citing *Haag*, 198 Wn.2d at 329-30). A 40-year minimum term is not a de facto life sentence. The Court of Appeals carefully examined this Court's opinion in *Haag* before finding the same.

In *Haag*, the defendant was convicted of aggravated first degree murder after killing his 7-year-old neighbor. 198 Wn.2d at 313. He was 17 years old at the time of the offense. *Id.* The trial court originally sentenced Haag to mandatory LWOP, but at his *Miller* resentencing in 2018, the court imposed a 46-year minimum term after finding he was " 'not irretrievably depraved nor irreparably corrupt.' " *Id.* This Court reversed and remanded

for resentencing, holding Haag's de facto life sentence was unconstitutional when his crimes reflected the mitigating qualities of youth. *Id.* at 313, 329-30.

For Haag, 46 years amounted to a de facto life sentence, because it resulted in him "losing meaningful opportunities to reenter society and to have a meaningful life" outside of prison. *Id.* at 327. The Court made this determination by considering Haag's age when released from confinement – 63 – and the fact his ability to work, raise a family, and vote would essentially be lost. *Id.* at 327, 329. The Court also relied, in part, on case law from other jurisdictions which collectively held that sentences of 45 years or more functioned as the equivalent of LWOP.[4] *Id.* at 328.

[4] *See Haag*, 198 Wn.2d at 328 (citing *Casiano v. Comm'r of Corr.*, 317 Conn. 52, 54, 76-80, 115 A.3d 1031 (2015) (holding that a 50-year minimum term "may be deemed a life sentence for purposes of *Miller*"); *State v. Zuber*, 227 N.J. 422, 448, 152 A.3d 197 (2017) (55-year minimum sentence for juvenile is the "practical equivalent of life without parole"); *Bear Cloud v. State*, 2014 WY 113, ¶¶ 11, 33, 334 P.3d 132, 136, 141-42 (2014) (*Miller* applied to what was effectively a 45-year minimum

As the Court of Appeals properly observed, Leo's case is distinguishable from *Haag*. First, Leo's 40-year minimum term is less than the sentence imposed in *Haag* and less than the sentences imposed in the out-of-state cases cited in *Haag*. Second, when Leo is eligible for release from confinement at 57 years old, he will still have a meaningful opportunity to return to society and have a meaningful life.

Leo will be able to vote upon release from confinement.[5] *See* RCW 29A.08.520(1) ("For a felony conviction in a Washington state court, the right to vote is automatically restored as long as the person is not serving a sentence of total confinement under the jurisdiction of the department of corrections."). He will have the ability to work and establish a career for perhaps a decade or more. *See* Social Security

---

sentence, which was the "functional equivalent of life without parole"); *State v. Null*, 836 N.W.2d 41, 70-71 (Iowa 2013) (52.5-year minimum term "is sufficient to trigger *Miller*-type protections")).

[5] This was not the case when Haag was resentenced in 2018. *See* former RCW 29A.08.520; Laws of 2021, ch. 10, §1.

Administration, *Normal Retirement Age*, https://www.ssa.gov/oact/progdata/nra.html (last visited April 10, 2024) (normal retirement age is 67 for those born after 1960); *State v. Kelliher*, 381 N.C. 558, 593, 873 S.Ed.2d 366, 389 (2022) ("Although they will face significant barriers, juvenile offenders who have the opportunity for parole eligibility after forty years nevertheless may maintain a realistic hope that they may be able to engage in gainful employment (and enjoy its subsequent fruits) upon release from incarceration, as two existing employment legal frameworks—social security and state retirement benefits—illustrate."). He can marry and raise a family if he so chooses. In short, Leo will have years to " 'exercise the rights and responsibilities of adulthood.' " *Haag*, 198 Wn.2d at 327 (quoting *Casiano*, 317 Conn. at 77).

"[T]he new sentence allows Leo a meaningful opportunity for life outside of prison." *Leo*, slip op. at 1.

/ / /

/ / /

B. The Court of Appeals' Decision Aligns With Multiple Other Jurisdictions Which Have Determined That 40 Years Does Not Amount to De Facto Life.

In addition to *Haag*, the Court of Appeals' decision is further bolstered by case law from other jurisdictions. Multiple courts have held that 40 years does not amount to de facto life for juvenile offenders. *See, e.g., State v. Conner*, 381 N.C. 643, 677-78, 680-81, 873 S.E.2d 339 (2022) (establishing 40 years as a reasonable maximum duration of imprisonment before parole eligibility for juvenile offenders deemed neither incorrigible nor irredeemable); *State v. Diaz*, 2016 S.D. 78, ¶ 58, 887 N.W.2d 751, 768 (2016) (concluding 40 years in prison before parole eligibility was not a de facto life sentence); *People v. Buffer*, 2019 IL 122327, ¶ 41, 137 N.E.3d 763, 434 Ill. Dec. 691 (2019) ("We hereby conclude that a prison sentence of 40 years or less imposed on a juvenile offender does not constitute a de facto life sentence in violation of the eighth amendment."); *People v. Dorsey*, 2021 IL 123010, ¶¶ 1, 62-65, 183 N.E.3d 715, 451 Ill. Dec. 258 (2021) (modifying *Buffer* and holding a juvenile's

sentence of more than 40 years is not a de facto life sentence if the defendant has the opportunity to earn enough good-conduct credit against his sentence to be released from prison before serving more than 40 years); *Pedroza v. State*, 291 So.3d 541, 549 (Fla. 2020) (upholding juvenile offender's 40-year murder sentence as neither a life sentence nor the functional equivalent of a life sentence); *State v. Kelliher*, 381 N.C. 558, 590, 873 S.Ed.2d 366, 389 (2022) (holding "any sentence or sentences which, individually or collectively, require a juvenile to serve *more* than forty years in prison before becoming eligible for parole is a de facto sentence of life without parole") (emphasis added).

Just as the Court in *Haag* looked to cases from our sister states to affirm that a 46-year minimum term amounts to de facto life, *see Haag*, 198 Wn.2d at 328, the same consideration affirms that a 40-year minimum term does not. Leo, for his part, fails to cite to a *single* court opinion which holds that a minimum term of 40 years equals de facto life. "Where no authorities are cited

in support of a proposition, [the reviewing court is] not required to search out authorities, but may assume that counsel, after diligent search, has found none." *Helmbreck v. McPhee*, 15 Wn. App. 2d 41, 57, 476 P.3d 589 (2020) (citing *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). Leo's failure to support his argument with legal authority speaks volumes and highlights the correctness of the Court of Appeals' decision.

A 40-year minimum term for juvenile offenders whose egregious crimes reflect the mitigating qualities of youth, such as Leo, complies with article I, section 14, and the requirements of *Miller*. The Court of Appeals properly found the same.

To be sure, Leo's sentence is lengthy as befits offenses which are numerous and horrific. Leo and his accomplices trapped ten people, slaughtering five. But his 40-year minimum term does not amount to an unconstitutional de facto life sentence. Rather, under *Haag* and the sister state cases cited above, it affords him the opportunity to reenter society and have

a meaningful life outside of prison. This Court must deny Leo's petition for review.

V. CONCLUSION

Leo has not shown that review is warranted under RAP 13.4. For the foregoing reasons, the State respectfully requests this Court deny Leo's petition for review.

This document is in 14 point font and contains 2,824 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 12th day of April, 2024.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

/s/ Britta Ann Halverson
BRITTA ANN HALVERSON
Deputy Prosecuting Attorney
WSB # 44108 / OID #91121
Pierce County Prosecutor's Office
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-2912
Britta.halverson@piercecountywa.gov

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

4/12/2024	*s/ Kimberly Hale*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

April 12, 2024 - 1:02 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,879-2
Appellate Court Case Title:	State of Washington v. Marvin Lofi Leo
Superior Court Case Number:	98-1-03161-3

The following documents have been uploaded:

- 1028792_Answer_Reply_20240412125620SC936158_5199.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was States Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- greg@washapp.org
- pcpatcecf@piercecountywa.gov
- wapofficemai@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Kimberly Hale - Email: kimberly.hale@piercecountywa.gov
Filing on Behalf of: Britta Ann Halverson - Email: britta.halverson@piercecountywa.gov (Alternate Email: PCpatcecf@piercecountywa.gov)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

Note: The Filing Id is 20240412125620SC936158