SUPREME COURT NO. 97766-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

TIMOTHY HAAG,

Defendant.

PETITION FOR REVIEW

Court of Appeals No. 51409-5-II
Appeal from the Superior Court of Cowlitz County,
Cause No. 94-1-00411-2
The Honorable Michael Evans, Presiding Judge

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APPENDIX A

TABLE OF AUTHORITIES

Washington Cases

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I. IDENTITY OF PETITIONER

Petitioner Timothy Haag asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II.

II. COURT OF APPEALS DECISION

Timothy Haag seeks review of the Opinion filed by Division II of the Court of Appeals on September 10, 2019, as amended September 17, 2019. Copies are attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Did the superior court comply with the requirements of the *Miller*-fix statute when it clearly understood what it was required to consider, but nonetheless abused its discretion and sentenced Haag to a de facto life sentence despite finding significant rehabilitation and remorse?
2. Did the Court of Appeals err when it affirmed a de facto life sentence for a person who is not "irredeemably depraved nor irreparably corrupt"?
3. Did the Court of Appeals Err when it found that Haag failed to provide authority that a 46-year sentence was a de facto life sentence, when Haag cited multiple scholarly articles and studies supporting the fact that a 46-year sentence is a life sentence?

IV. STATEMENT OF THE CASE

On August 17, 2018, Haag filed a brief alleging that the trial court had erred with regard to the above-indicated issues. Below are the facts pertaining to the issues upon which he seeks review. For a more comprehensive review, the opening appellate brief sets out facts and law relevant to this petition and is hereby incorporated herein by reference.

1. The *Miller* Re-Sentencing

After spending 24 years in prison, more than half his life, for a crime he committed when he was less than two months past his 17th birthday (CP 47), Timothy Haag was given hope for a new lease on life in January 2018. As part of the "*Miller* fix" statute passed in 2014, Haag was automatically entitled to a new sentencing hearing where the judge would be obligated to "take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S. Ct. 2455 (2012); RCW 10.95.030, 035.

He had reason to hope; Haag was no longer the same person he was back in 1994 and proved it daily in prison through his performance in his work and participation in various programs. CP 54-55, 61. At the hearing, two experts spoke at length about the trauma and deep emotional issues that preceded the murder and were unequivocal about his readiness

to return to the outside world. RPII 6-91, CP 61-95. Even the judge agreed that Haag "has reached a significant level of rehabilitation" and "has exhibited a stellar track record in prison and has been assessed as a low risk for violently re-offending." RPI 27. The court, even while discounting the uncontroverted expert testimony, found that Haag was "not irretrievably depraved nor irreparably corrupt." RPI 25. Unfortunately, this hope proved false when he was sentenced to an additional 22 years purely for retribution. RPI 25.

2. Haag in 1994

Twenty-four years ago, then just 17-year-old Timothy Haag was an emotionally fragile and immature teenager, isolated and without a healthy way to work through his emotions. He was the youngest of five children. CP 62, 87. At the age of five, his parents separated, and his mother was often forced to work two jobs and frequently had to move her family. CP 63. At various points during those years, Haag slept in a tent outside the trailer where the rest of the family stayed, lived with his brother on the dairy farm he lived and worked at, and then finally moved in to the home of his stepfather, Bob, in Longview, WA. *Id.* In the two years Bob lived with Haag's mother, Haag was berated, mocked, yelled at, and threatened with eviction and arrest if he ever acted up. CP 64. Haag moved to a new school where he was bullied for his weight and had few friends. *Id.*, CP 600. Haag realized that he was gay, but did not feel free to tell anyone,

even his mother. CP 71. Haag was confused and guilt-ridden over his attraction to men; he was ashamed of himself and felt alone. CP 71-73.

In the midst of this shame and isolation at school and at home, Haag found refuge in his friendship to his neighbor, Alex Dillard. Over the approximately two years they were neighbors, they saw each other almost every day: playing video games, play-fighting with wooden swords, and just hanging out together. CP 71. Haag began to have feelings for Alex but felt forced to hide it due to Alex's disparaging comments toward "queers" and "faggots." *Id.* On top of this, Haag grew increasingly angry at the physical abuse suffered by Alex at the hands of his family. CP 601. In May 1994, Alex ran away from home to escape his abusive stepfather, was placed in foster care, and then left the state. CP 53, 67.

Haag became a "volcano of emotion" but had no way of addressing it. CP 73. On July 9, 1994, Haag exploded and killed Alex's sister, 7-year-old Rachel Dillard. CP 53. Haag choked and drowned her. *Id.* To this day, Haag regrets those "horrible" actions that ended the life of the young girl and caused so much pain to her family. CP 75. Haag was ultimately convicted by the jury of aggravated first-degree murder. Per RCW 10.95.030, he was automatically given a life sentence without parole. CP 33, 34, 35-41.

3. Haag in Prison

When he was sentenced, Haag resigned himself to spending the rest of his life behind bars but resolved to be better than his worst act. RPII 63. In the past 21 years, **he has not received a single infraction**. CP 55. In his time spent at Walla Walla State Penitentiary and later Stafford Creek Corrections Center (where he transferred to be closer to his mom), Haag has taken advantage of the classes, programs, and work opportunities at the prison, along with the Jehovah's Witness faith community, to work continuously to be a better man. CP Exhibit 7, RPII 162-163. The first year in prison, he earned his high school diploma. CP 54, RPII 162. He then took additional college courses and participated in the anger/stress management program, computer courses, a dog-training program, a custodial certification program, and is currently enrolled in the redemption program which focuses on giving inmates the skills to successfully return to the outside world where he's training to be a facilitator so that he can help others. CP 54-55, Exhibit 7; RPII 163. He held several jobs in prison. CP 54, RPII 158-159, 162-163. He is noted to be "an excellent worker who gets along well with others, [who] has very good work ethic, is a self-starter, and is reliable." CP 54-55, 89. *See* Exhibit 7 – DOC certificates.

4. Character References

Everyone who has known Haag in prison have spoken highly of him. Lou Ann Anderson, his case worker at Stafford Creek, with whom he checks in daily, has stated that "I never use the word never except for Timothy Haag. He never gets in trouble, he's never disrespectful; he never gets write ups...Timothy is well-adjusted. He's easy to get along with; he follows rules; he speaks his mind appropriately." CP 54-55. She describes him as a mature person who is not deserving of a life sentence and is prepared to succeed on the outside. CP 54-55.

Dorcy Lang, a former fellow inmate of Haag's, spoke at the re-sentencing hearing, describing Haag as a caring person who reached out to him and other inmates to help them adjust to life in prison. RPII 153, 155. He described him as a mature person who has learned to control his anger: "I've never seen an angry moment of him in prison...He knows how to work out his – his anger, his frustrations." RPII 157.

Kenneth Pierson, a prison chaplain who has known Haag almost his entire time in prison, now describes Haag as a "man of value and integrity" RPII 100-104, with whom he has built a friendship over the years and even trusts with his personal cell phone number. RPII 103-107. He describes Haag as a man who works and always treats others with respect. RPII 100-06. He told the court Timothy Haag was now a mature man, who would be welcome in his home. RPII 107-109.

5. Re-Sentencing

At the *Miller* re-sentencing hearing, Haag presented the testimony of Kenneth Pierson, Dorcy Lang, and his mother, along with the expert testimony of Dr. Ronald Roesch and Dr. Marty Beyer. Both psychologists concluded that, had Haag been assessed in 1994 using the SAVRY (Structured Assessment of Violence Risk in Youth), he would have been given a low risk score. CP 77, 92.

Dr. Marty Beyer detailed in her report how Haag "was traumatized by the combination of losing his father, living in poverty, being picked on for years at school, psychological maltreatment by his stepfather, the sudden loss of his best friend and his fears about the rejection he would experience if his sexual orientation was revealed." CP 62. He functioned younger than his chronological age emotionally, and "His tragic offense was the result of an unexpected explosion of his untreated grief, anger, and shame. His offense was an anomaly." *Id.*

Dr. Ronald Roesch also used the HCR-20 to assess Haag's current risk of violence and recidivism. CP 92. Consistent with the results of the SAVRY, the PREA (Prison Rape Elimination Act) assessment,[1] and the Level of Service Inventory (LSI),[2] Dr. Roesch scored Haag as having a low risk of reoffending. CP 93. Like Dr. Beyer, he concluded that,

[1] Administered by the prison. CP 89.
[2] Also administered by the prison. CP 89.

> [H]is offense appears to have been a highly impulsive one, made in response to anger toward the victim's family that had been building up for some time. In his adolescent mind, this was a way to take revenge for what he perceived as abusive treatment of his friend Alex, with whom he was strongly attracted but had never spoken to him about his feelings toward him. He did not consider alternative ways to cope with his feelings, in large part because he was embarrassed about his homosexuality and was unable to disclose it to anyone.

CP 94. He concluded that Haag "has matured and has become a responsible adult" who "does not have any mental health issues or anger problems that would place him at risk for future offending." *Id.*

The prosecution did not introduce any contravening witnesses or evidence, but instead focusedon the nature of the crime. RP1 113-22.

6. Judge Evans

At sentencing, the Judge expressed sympathy for the victim's family. RPI 16. He expressed concern that Haag had not had counseling, RPI 22, although he completed anger management in prison, RPI 89, and both experts said that he did not have any anger or mental health issues that that would put him at risk of offending. *Id.* at 62, 94. The Judge expressed concern that the stability prong of the HCR-20 was not administered, *Id.* at 23, although Dr. Roesch, stated that the relationship stability factor is only one of ten factors of the Historical prong of the assessment which is itself only one-third of the entire assessment and it's

omission did not affect the doctor's confidence in the result. CP 92-94. Judge Evans also relied on a statement by the victim's brother, Alex Anderson regarding Haag's interest in death. RP1 24. These allegations were never substantiated or presented in any other context.

Further, despite the uncontested and unquestioned reports of actual trauma when he was a child, Judge Evans generically described Haag's young life as a "mixed bag of positive and challenging circumstances, not unlike others" and made a point of rhetorically aging Haag. CP 62, RP1 20. He twice called Haag a "man" at the time of the murder and made repeated references to Haag's large weight at the time and the difference in ages between Haag and the victim. RP1 18, 27.

Judge Evans accepted that Haag "has reached a significant level of rehabilitation," "has likely aged out of what is called adolescent-limited delinquency," and "is not irretrievably depraved nor irreparably corrupt." RP1 25. He also noted that "Haag has expressed what I judge to be sincere remorse and sorrow for his actions." RPI 25. Nevertheless, he went on to say that "rehabilitation is not the sole measure in sentencing. Retribution holds that punishment is a necessary and deserved consequence for one's criminal act. Under the retributive theory, severity of the punishment is calculated by the gravity of the wrong committed." RPI 25. In this case the wrong was the single murder of a young white girl.

Although he concluded by listing the factors he had to "weigh," his earlier statements about the rehabilitation of Haag and the retributive nature of sentencing made it clear that the only consideration was how much more to punish a person who, by all accounts, has been rehabilitated.

> So the Court is faced with the daunting task of properly weighing a multiplicity of factors, which include a vile, cowardly, and particularly heinous multi-step strangulation and drowning of a defenseless, sixty-five pound little girl committed by a three hundred pound seventeen-year-old young man that resulted in a convicted for aggravated murder in the first degree. I'm also to consider the then-youthful brain of Mr. Haag with diminished decision-making capacity, who simultaneously lived through some very difficult circumstances while still enjoying a supportive relationship and activities. And also, a man convicted of murder who has exhibited a stellar track record in prison and has been assessed as a low-risk for violently re-offending.

RPI 27.

The court sentenced Timothy Haag to a minimum sentence of 46 years to life. RP1 27, CP 756-766. With his current sentence, Haag will only be eligible for parole at the age of 63 at which point he'll have lived almost three-quarters of his life in prison. Life expectancy in the prison system makes this sentence another life sentence.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

It is submitted that the issues raised by this petition should be addressed by this Court because the decision of the Court of Appeals is in conflict with Supreme Court and Court of Appeals decisions and raises significant questions under the Constitution of the State of Washington and the Constitution of the United States, as well as in the public interest, as set forth in RAP 13.4(b)(1), (2), (3) and (4). Significantly, this Court has recently accepted review in *State v. Delbosque*, 193 Wn.2d 1008 (2019), a decision in direct conflict with this case.

1. The Superior Court Abused its Discretion When it Sentenced Haag to a De Facto Life Sentence Despite Finding Significant Rehabilitation and Remorse, Failing to Comply With the Requirements of the Miller-Fix.

"Children are different"[3] has been the theme of the recent string of Supreme Court decisions on juvenile[4] sentencing cases. *Miller v. Alabama,* 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). A court conducting a *Miller* resentencing abuses its discretion when it "acts without consideration of and in disregard of the facts" or relies on speculation and conjecture in disregard of the evidence. *See Dyer*, 164 Wn.2d at 286 (quoting *In re Pers. Restraint of Dyer*, 157 Wn.2d 358, 363, 139 P.3d 320 (2006)) (explaining when the Indeterminate Sentence

[3] 132 S. Ct. 2455, 2470 (2012).

Review Board abuses its discretion in setting minimum terms). During a *Miller* resentencing hearing, the court must "fully explore the impact of the defendant's juvenility on the sentence rendered." *Ronquillo*, 187 Wn.2d at 443 (quoting *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572 (2014)).

The *Miller* Court required that sentencing courts consider the "mitigating qualities of youth," including an offender's youth and attendant characteristics, before imposing a particular penalty. 567 U.S. at 476, 132 S. Ct. 2455. These attendant circumstances include: chronological age, immaturity, failure to appreciate risks and consequences, the circumstances of the homicide offense, and the possibility of rehabilitation. *Delbosque*, 430 P. d at 1156. *Bassett*, 198 Wn. App.714, 725, 394 P.3d 430. (2017).

Before *Miller*, Washington law imposed a mandatory sentence of life without the possibility of release or parole for an offender convicted of aggravated first-degree murder, regardless of the offender's age. *Bassett*, 198 Wn. App. at 726, 394 P.3d 430. In response to *Miller*, our legislature enacted the *Miller*-fix statute, which, in part:

> In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in [*Miller*] including, but

[4] Note: By "juveniles," I refer to persons under 18 years old.

> not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

RCW 10.95.030(3)(b). [5] RCW 10.95.035(1) requires that juveniles sentenced to life without the possibility of parole be resentenced consistent with the *Miller*-fix statute. *See State v. Delbosque*, 6 Wash.App.2d 407, 413-16, 430 P.3d 1153, 1158–59 (2018), *review granted,* 193 Wn.2d 1008 (May 1, 2019).

The *Delbosque* opinion, also from Division Two of this court, addressed the same issue present here but reached a contrary conclusion. In *Delbosque*, a jury found Cristian Delbosque guilty of aggravated first-degree murder committed when he was 17 years old. *Id.* at 410. The superior court imposed a life sentence without the possibility of parole. *Id.* In 2016, under RCW 10.95.030 (the *Miller*-fix statute) and RCW 10.95.035, the superior court held an evidentiary hearing and entered an order imposing a minimum term of 48 years with a maximum term of life imprisonment. *Id.* at 409-10, 1155–56. The court held that the superior court's findings regarding Delbosque having an attitude towards others reflective of the underlying crime, and of Delbosque's permanent

[5] Our Supreme Court recently held that this subsection 3(a)(ii) of RCW 10.95.030, requiring a minimum 25 year sentence for juveniles over 16, but under 18, at the time of an aggravated murder charge is unconstitutional under the Washington Constitution

incorrigibility and irretrievable depravity were not supported by substantial evidence and the court failed to comply with the *Miller*-fix. *Id.* at 414, 1158. The sentence was reversed and remanded for resentencing. *Id.* at 409-10, 1155–56.

Miller held that because juveniles have diminished culpability and greater prospects for reform, "'they are less deserving of the most severe punishments.'" 567 U.S. at 471, 132 S. Ct. 2455 (*quoting Graham v. Florida,* 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)). In making this determination, the Court relied on three gaps between children and adults: children display a lack of maturity and an underdeveloped sense of responsibility, they are more vulnerable to outside pressures and negative influences, and their traits are less likely to be evidence of irretrievable depravity. *Miller*, 567 U.S. at 471. *Miller* also determined that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. 567 U.S. at 472. Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. *Miller*, 567 U.S. at 472. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults—

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because sentencing juvenile offenders to life without parole or early release constitutes

their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. *Id.* at 472. Similarly, deciding that a juvenile offender forever will be a danger to society would require making a judgment that the juvenile is incorrigible, but incorrigibility is inconsistent with youth. *Id.* at 472-73.

At Timothy Haag's *Miller* hearing, two experts spoke at length about the trauma and deep emotional issues that preceded the murder and were unequivocal about his readiness to return to the outside world. RPII 6-91, CP 61-95. Testimony from people who knew him in prison expanded on this and showed the court the efforts he went to be a better person and help others. RPII 96. Even the judge agreed that Haag "has reached a significant level of rehabilitation" and "has exhibited a stellar track record in prison and has been assessed as a low risk for violently re-offending." RPI 27. The court, even while discounting the uncontroverted expert testimony, found that Haag was "not irretrievably depraved nor irreparably corrupt." RPI 25.

Nonetheless, the court sentenced Timothy Haag to a minimum sentence of 46 years to life. RP1 27, CP 756-766. With his current sentence, Haag will only be eligible for parole at the age of 63 at which point he'll have lived almost three-quarters of his life in prison, if he is

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cruel punishment. *State v. Bassett*, 192 Wash.2d 67, 428 P.3d 343 (2018).

even given parole. Life expectancy in the prison system makes this sentence another life sentence. *See* Cummings, Adele & Nelson Colling, Stacie, *There is No Meaningful Opportunity in Meaningless Data: Why it is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences,* Vol.18:2; UC Davis Journal of Juvenile Law & Policy 268; *State v. Ronquillo*, 190 Wn. App. 765, 771-775, 361 P.3d 779 (2015). This sentence, and the sentencing court's statements make manifest its failure to comply with RCW 10.95.030, the Eight Amendment of the U.S. Constitution and Article 1 § 14 of the Washington State Constitution.

2. The Court of Appeals Committed the Same Mistake as the Trial Court When it Affirmed a De Facto Life Sentence When Haag Was Not "Irredeemably Depraved Nor Irreparably Corrupt".

Judge Evans accepted that Timothy Haag "has reached a significant level of rehabilitation," "has likely aged out of what is called adolescent-limited delinquency," and "is not irretrievably depraved nor irreparably corrupt." RP1 at 25. He also noted that "Haag has expressed what I judge to be sincere remorse and sorrow for his actions." RPI 25. Considering these findings, the trial court abused its discretion when it then sentenced Haag to 46 years, a de facto life sentence.

"The United States Supreme Court viewed the concept of "life" in *Miller* and *Graham* more broadly than biological survival; it implicitly

endorsed the notion that an individual is effectively incarcerated for "life" if he will have no opportunity to truly reenter society or have any meaningful life outside of prison." *Casiano v. Commissioner of Corrections,* 317 Conn 52, 115 A.3d 1031, 1047 (Conn. 2015).

Because juveniles effectively sentenced to spend their life in prison must have a meaningful opportunity for a resentencing hearing that comports with *Miller,* the principles underlying adult sentences – retribution, incapacitation, and deterrence – do not extend to juveniles in the same way. *Graham v. Florida,* 560 U.S. 48, 71, 130 S. Ct. 2011, 2029, 176 L. Ed. 2d 825 (2010). Potential release in a persons' late sixties is insufficient to address the concerns in *Graham* or *Miller*, as it does "not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham." Iowa v. Null*, 836 N.W.2d 41, 71 (Iowa 2013). Our case is similar, the prospect of geriatric release does not provide a meaningful opportunity for Haag to reenter society.

3. Haag Citations to Scholarly Studies and Cases in Haag's Opening Brief, the Court of Appeals Ruling Erroneously Faults Haag for Failing to Provide Authority That a Sentence Of 46 Years Sentences Haag to Spend The Rest of His Life in Prison.

Sections IV.1 (a) & (d) of Haag's opening brief specifically address the life expectancy of an individual serving a lengthy prison

sentence. A 46-year minimum sentence is tantamount to a life sentence. Only after serving 46 years would Haag be eligible for a review by the ISRB, which would then decide if he would be paroled. If the board decided not to release him, Haag would have to wait another 5 years before again petitioning for release. RCW 10.95.030(3)(f).

46 years is a life sentence. The United States Sentencing Commission defined a life sentence as 470 months (39.16 years) or more. US Sentencing Commission, "US Sentencing Commission Quarterly Data Report: Fiscal Year 2017", pg. 28, n. 1, A-7.[6] This definitions is based on the median age of sentencing of 25 years[7] and the life expectancy for a person in general prison population, which for a 25 year old, would equate to a life expectancy of 64 years old. *See id.* at A-7. The average life expectancy for men in the United States is 76.1, but prison accelerates the negative consequences of aging. *See* Mortality in the United States 2016, NCHS Data Brief, No. 293, December 2017.[8] There is substantial research on the negative effects of prison on life expectancy. *See* Pridemore, William Alex, *The Mortality Penalty of Incarceration: Evidence From A*

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[6] Available at available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2017_Quarterly_Report_Final.pdf.

[7] Of note, is Haag was only 17 years old and 39 days at the time of his offense, thus serving 8 more years than the median age of 25. He was incarcerated from July 9, 1994 onward.

[8] Available at https://www.cdc.gov/nchs/data/databriefs/db293.pdf.

Population-Based Case Control Study Of Working-Age Males, Journal of Health and Social Behavior, vol. 55, no. 2, (2014); Patterson, Evelyn PhD, *The Dose-Response of Time Served in Prison On Mortality: New York State, 1989-2003,* Am J Public Health, Vol. 103, No 3, Mar 2013; Chammah, Maurice, *Do You Age Faster in Prison?*, The Marshall Project, August 24, 2015.[9] A study in Michigan suggested that adjusting for the length of sentence and race resulted in a significant shortening of life expectancy; life expectancy for Michigan adults incarcerated for natural life sentences was 58.1 years. ACLU of Michigan Life Without Parole Initiative, Michigan *Life Expectancy Data for Youth Serving Natural Life Sentences.*[10] That number is even lower for those who began their sentences as children. *Id.* Michigan youth serving a natural life sentence were found to have an average life expectancy of 50.6 years. *Id.*

Although *Miller* did not categorically bar a sentence of life in prison for a juvenile convicted of homicide, it came close. It held that such a severe sentence, even for a horrible crime, is constitutionally permissible only in the rarest of circumstances where there is proof of "irreparable corruption." *Miller,* 567 U.S. at 478-79; *see also Montgomery v. Louisiana,* 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). "[P]risoners . . .

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[9] https://www.themarshallproject.org/2015/08/24/do-you-age-faster-in-prison.
[10] available at, https://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf.

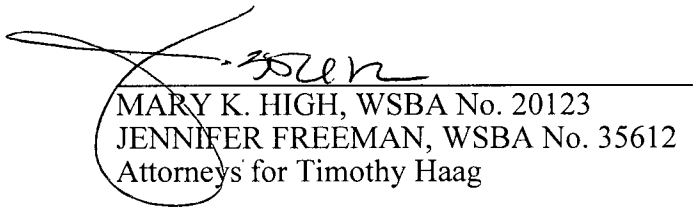
must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id* at 736.[11] And, the Washington constitution provides greater protections. *Bassett*, 192 Wn.2d 67.

This Court should accept review because the Court of Appeals decision is contrary to law, as argued above, and raises significant issues of due process and public interest.

VI. CONCLUSION

The sentencing court's fixation on retribution for the crime overshadowed its obligations to conduct a sentencing that meets the requirements of *Miller*, the Eighth Amendment of the United States Constitution, and Article 1 § 14 of the Washington State Constitution. This court should accept review for the reasons indicated in Part V and remand for resentencing.

RESPECTFULLY SUBMITTED this 10th day of October 2019.



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Attorneys for Timothy Haag

[11] The inconsistency with *Miller*'s ruling that youth, not just the lack of irreparable corruption, must be considered at sentencing, with *Montgomery*'s holding that the possibility of parole is an adequate remedy for disproportionate sentencing has not yet been addressed by the United States Supreme Court.

CERTIFICATE OF SERVICE

The undersigned certifies that on this day correct copies of this petition for review were delivered electronically to the following:

Clerk, Washington State Supreme Court

David Phelan, Deputy Prosecuting Attorney
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The undersigned certifies that on this day correct copies of this petition for review were delivered by U.S. mail to the following:

Timothy Haag, DOC #731136
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

This statement is certified to be true and correct under penalty of perjury of the laws of the state of Washington.

Dated this 10th day of October 2019 at Tacoma, Washington.

Lissa Flannigan, Legal Assistant

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

September 17, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TIMOTHY E. HAAG, Appellant.	No. 51409-5-II ORDER AMENDING OPINION

The published opinion in this matter was filed on September 10, 2019. Upon review an error in the synopsis will be corrected as follows:

On page 1-2, paragraph 2, the opinion states:

> He also contends that the imposed 46-month minimum term was the functional equivalent of a life sentence without a meaningful opportunity for release in violation of the Eighth Amendment of the United States Constitution and article I, section 14 of the Washington Constitution.

We replace that sentence with the following:

> He also contends that the imposed 46-year minimum term was the functional equivalent of a life sentence without a meaningful opportunity for release in violation of the Eighth Amendment of the United States Constitution and article I, section 14 of the Washington Constitution.

IT IS SO ORDERED.

Glasgow, J.

We concur:

Melnick, J.

Melnick, P.J.

Sutton, J.

Sutton, J.

Filed
Washington State
Court of Appeals
Division Two

September 10, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TIMOTHY E. HAAG, Appellant.	No. 51409-5-II UNPUBLISHED OPINION

GLASGOW, J. — In 1995, a jury found Timothy Haag guilty of aggravated first degree murder for the death of seven-year-old Rachel Dillard, Haag's next door neighbor. Haag committed the crime when he was 17 years old. The trial court imposed a life sentence without the possibility of early release. In 2018, the trial court conducted a *Miller*[1] resentencing hearing as required under RCW 10.95.030 and RCW 10.95.035, after which it sentenced Haag to a minimum term of 46 years and a maximum term of life. Under this sentence, Haag would first be eligible for release at age 63.

Haag appeals from his sentence, asserting that the trial court's sentencing decision failed to comply with RCW 10.95.030 and the constitutional requirements of *Miller*. He also contends that the imposed 46-month minimum term was the functional equivalent of a life sentence

[1] *Miller v. Alabama*, 567 U.S. 460, 487, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

without a meaningful opportunity for release in violation of the Eighth Amendment of the United States Constitution and article I, section 14 of the Washington Constitution. Finally, he argues that the jury did not find facts to support the minimum sentence imposed on resentencing.

We hold that the trial court took into account the factors that *Miller* and the relevant statutes required. Haag has failed to show that his new sentence is the functional equivalent of a life sentence. His sentence was within the range that the legislature has set, so the jury was not required to find facts to support his minimum sentence. We therefore affirm.

FACTS

I. BACKGROUND

In 1994, Rachel Dillard went missing from her backyard while her family was preparing to attend a barbeque. Haag was at his home alone when Dillard went missing. Later that day, Haag gave police permission to search his house. The police found Dillard's body under Haag's bed, naked, ankles bound, and with a plastic bag over her head. The State charged Haag with aggravated first degree murder.

At trial, Haag admitted that he had strangled Dillard with his hands. Haag then stopped and retrieved a belt from his closet while Dillard cried on his bed. Haag looped the belt around Dillard's throat and pulled it tight. Haag said that he choked Dillard with the belt for about three to five minutes. Haag then held Dillard underwater in his bathtub to make sure she was dead. Haag explained that he put a plastic bag over Dillard's head because there was stuff coming out of her mouth. Testimony at trial established that this indicated she was likely still alive when Haag put her in the bathtub.

The jury returned a verdict finding Haag guilty of first degree murder. The jury also returned a special verdict finding the aggravating circumstance that Haag committed the murder in the course of, in furtherance of, or in immediate flight from the crime of first degree kidnapping. The trial court sentenced Haag to life without the possibility of early release.

II. RESENTENCING HEARING

While Haag was serving his life sentence, the United States Supreme Court issued its decision in *Miller*, which held that a mandatory life sentence without parole for an offender who was under 18 years old at the time of the offense was unconstitutional. 567 U.S. at 487. The Washington Legislature responded by adopting the "*Miller*-fix" in 2014. LAWS OF 2014, ch. 130, § 9(3)(b). The new statute amended RCW 10.95.030 to establish new guidelines for sentencing juveniles convicted of aggravated first degree murder. LAWS OF 2014, ch. 130; *see also In re Pers. Restraint of McNeil*, 181 Wn.2d 582, 588-89, 334 P.3d 548 (2014).

Under the new guidelines, sentencing courts are required to "take into account mitigating factors that account for the diminished culpability of youth" when setting the minimum term of confinement for juveniles convicted of aggravated first degree murder. RCW 10.95.030(3)(b). The Legislature also enacted RCW 10.95.035, which requires that juvenile offenders like Haag, who were sentenced prior to June 1, 2014, to life without the possibility of parole, be resentenced consistent with RCW 10.95.030.

In 2018, Haag was resentenced under RCW 10.95.030 and RCW 10.95.035. At his resentencing hearing, Haag presented the expert testimony of Dr. Marty Beyer, Ph.D. and Dr.

Ronald Roesch, Ph.D. Beyer and Roesch submitted reports detailing Haag's childhood history based on their interviews with Haag and Haag's family members.

According to Beyer's and Roesch's reports, Haag was the youngest of five children and had a happy childhood prior to his father leaving the family when Haag was around 5 years old. Haag's family struggled financially after his father left. Haag did not have many friends in school, and his peers often made fun of him because he was obese. Haag had a difficult relationship with his stepfather, who he described as a "jerk" and "totally self-absorbed." Clerk's Papers (CP) at 64. Haag's mother reported that Haag's stepfather was not physically abusive but that he emotionally abused Haag.

Beyer's and Roesch's reports describe Haag's close friendship with Dillard's older brother Alex Dillard.[2] Haag considered Alex to be his best friend and saw him nearly every day that they lived next door to each other. According to Haag, Alex's stepfather and older sister physically and emotionally abused Alex. Haag said that he was devastated and became enraged at Alex's family after Alex was removed from the home and placed in foster care. Haag described himself as "a closeted homosexual when he was an adolescent" and said that he had never had a romantic relationship or confided with anyone about his sexual orientation. CP at 87. Haag said that he was secretly attracted to Alex.

Roesch's report also describes Haag's conduct while in prison. Haag had only one major infraction, which occurred in 1997. Haag's prison counselor reported that Haag "is a compliant offender who is respectful to staff, has not been aggressive toward staff or other inmates, and . . .

[2] We refer to Alex Dillard by his first name for clarity.

has never presented any management problems at all during his confinement." CP at 88-89. Haag has participated in programs and held several jobs while in prison.

Beyer testified that Haag was less emotionally mature as a teenager than other people at that age. Beyer opined that Haag had been unable to identify or express his emotions, which resulted in a "volcano of unexpressed feelings [that] came from trauma that he had experienced earlier in his life and . . . as a teenager." Verbatim Report of Proceedings (VRP) (Jan. 12, 2018) at 15-17, 20. Beyer concluded that Haag's past trauma and emotional immaturity manifested in a brief psychotic episode at the time he killed Dillard. Beyer further testified:

> I concluded that this tragedy was the result of an unplanned explosion of a volcano of feelings inside of [Haag]. He was not aware of the strength of those feelings or their complexities, nor did he anticipate the explosion.
>
> He had, for years, been accumulating feelings from trauma that he experienced from the abandonment by his father and from being picked on in elementary and middle school and from psychological maltreatment by his stepfather. In addition, as a teenager he was living with shame and fear about the rejection he would likely experience if anyone were to find out about his sexual orientation.
>
> The loss of his best friend overwhelmed his capacity to contain all of these feelings of grief, outrage, shame, and loneliness. He was an immature 17-year old, particularly emotionally immature, and could not give names to his feelings nor did he have anyone he could share his feelings with so they were stored up.
>
> And their explosion was unanticipated and completely out of character with this young person who did well in school, who had no delinquency indicators and no history of aggression.

VRP (Jan. 12, 2018) at 12-13. Beyer concluded that Haag would have been deemed an "extremely low risk for future re-offending" after he committed his offense based on his retrospective score on the Structured Assessment of Violence in Youth assessment tool. VRP (Jan. 12, 2018) at 36-37.

Roesch similarly testified that Haag would have been deemed a low risk for reoffending. Roesch also opined that Haag continued to have a low risk for reoffending as an adult, based on Haag's results on the HCR-20 assessment tool and other standardized risk assessment instruments. Roesch said that Haag did not currently have any serious mental health issues that would require treatment.

A video of defense counsel's interview with prison minister Kenneth Pearson was played at the resentencing hearing. Pearson stated that he had developed a friendship with Haag while working as the prison minister. Pearson described Haag as a "man of integrity" who tried to stay out of trouble while in prison and who was willing to help others. RP at 104. Several of Dillard's and Haag's family members also provided statements at the resentencing hearing.

The trial court issued its resentencing decision the following week. The court began its verbal ruling by extending its "deepest sympathies to the Dillard family and friends who have suffered indescribable pain and utter heartbreak for the murder of Miss Rachel." VRP (Jan. 19, 2018) at 16. The court recounted the facts underlying Haag's crime, noting that Dillard's death was "ferociously brutal and unrestrained and it was a multi-stage killing, not a single act of impulsivity." VRP (Jan. 19, 2018) at 18.

The trial court acknowledged that Haag had a decreased culpability for his offense because as a teenager, he "was in a stage where his rational thinking process was based more in the primitive amygdala versus the sophisticated frontal cortex, where fully-developed adult brains consider and make decisions." VRP (Jan. 19, 2018) at 19. The trial court noted:

> Indicative of a teenager's brain is impulsivity, lack of regulation when making judgments and decisions, failure to adequately—adequately assess long-term consequences of choices, and a compromised ability to properly weigh and perceive risk. I have nothing to dispute that Mr. Haag's brain development as a seventeen-year-old young man was any different than any other teen and as recognized by the higher courts.

VRP (Jan. 19, 2018) at 19-20. The trial court described Haag's childhood as a "mixed bag of positive and challenging circumstances, not unlike others." VRP (Jan. 19, 2018) at 20. Specifically, the court noted Haag's positive childhood circumstances in having a loving and nurturing mother, a strong academic performance in school, and participation in extracurricular activities, such as the marching band. The court also noted Haag's negative circumstances in having a father who had abandoned the family, having a stepfather who was emotionally abusive, being teased for his weight, living in poverty, and having to hide his sexual orientation. The trial court expressed concern that Haag had not engaged in any counseling to address the underlying issues leading to his crime.

The trial court commented that Haag has shown "significant change and growth while in prison," has not received an infraction in over 20 years, and has "reached a significant level of rehabilitation." VRP (Jan. 19, 2018) at 24-25. The court concluded that Haag "is not irretrievably depraved nor irreparably corrupt," and that he had expressed "sincere remorse and sorrow for his actions." VRP (Jan. 19, 2018) at 25. The court explained, however, that "rehabilitation is not the sole measure in sentencing" and that it must consider "the gravity of the wrong committed" when determining the severity of Haag's punishment. VRP (Jan. 19, 2018) at 25. Thereafter, the court issued its ruling, stating:

> The Legislature states that in setting the minimum term the Court must take into account mitigating factors that account for the diminished capacity of youth and further requires the Court to take into account the age of the murderer, the murderer's childhood and life experiences, the degree of responsibility that the youth was capable of exercising, and the youth's chances for becoming rehabilitated.
>
> I believe I have considered those factors in my comments above and the information that was presented to me last week at the sentencing hearing.
>
> So the Court is faced with the daunting task of properly weighing a multiplicity of factors, which include a vile, cowardly, and particularly heinous multi-step strangulation and drowning of a defenseless, sixty-five pound little girl committed by a three hundred pound seventeen-year-old young man that resulted in a convict[ion] for aggravated murder in the first degree. I'm also to consider the then-youthful brain of Mr. Haag with diminished decision-making capacity, who simultaneously lived through some very difficult circumstances while still enjoying a supportive relationship and activities. And also, a man convicted of murder who has exhibited a stellar track record in prison and has been assessed as a low risk for violently re-offending.
>
> In balancing these pieces of the puzzle, the *Miller* court and the statutory factors, and all the other factors that I mentioned earlier, the Court does now hereby impose a sentence—a minimum sentence of forty-six years in prison and a maximum of life in prison.

VRP (Jan. 19, 2018) at 26-27. Haag appeals.

ANALYSIS

I. PROPER REVIEW OF HAAG'S CLAIMS

As an initial matter, the State asserts that Haag was required to raise his claims in a personal restraint petition rather than in a direct appeal, but the State acknowledges that we may disregard this procedural defect and review the merits of Haag's appeal as a personal restraint petition. We agree that the proper method to seek review of a *Miller* resentencing decision is through a personal restraint petition.

RCW 10.95.035(3) provides: "The court's order setting a [new] minimum term is subject

to review to the same extent as a minimum term decision by the parole board before July 1, 1986." Before July 1, 1986, defendants could seek review of a parole board's minimum term decision only through a personal restraint petition. *See, e.g.*, *In re Pers. Restraint of Rolston*, 46 Wn. App. 622, 623, 732 P.2d 166 (1987). Therefore, the proper method to seek review of a resentencing decision under RCW 10.95.035 is through a personal restraint petition. Nevertheless, to facilitate review of Haag's resentencing claims on the merits, we disregard this procedural defect and review his appeal as a personal restraint petition. *State v. Bassett*, 198 Wn. App. 714, 721-22, 394 P.3d 430 (2017), *aff'd*, 192 Wn.2d 67, 428 P.3d 343 (2018).

When a petitioner has not had a prior opportunity for judicial review, the heightened standard for relief though a personal restraint petition does not apply. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 299, 88 P.3d 390 (2004). Instead, the petitioner need only show that they are under restraint under RAP 16.4(b) and that the restraint is unlawful under RAP 16.4(c). *Id.*; RAP 16.4. Under RAP 16.4(c), restraint is unlawful if an offender's sentence was imposed in violation of the state or federal constitution or Washington law. RAP 16.4(c)(2).

Because Haag has had no prior opportunity for judicial review of the trial court's resentencing decision, to obtain relief he must meet only these requirements. Haag is restrained pursuant to the trial court's imposed sentence. RAP 16.4(b). Accordingly, we must determine whether Haag's restraint is unlawful.

Our Supreme Court has determined that, in the context of sentencing juveniles in compliance with *Miller*, "'sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant.'" *Bassett*, 192 Wn.2d at 81 (quoting *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017)). Thus,

even where we cannot say that "every reasonable judge would necessarily [have made] the same decisions as the [sentencing] court did . . . , we cannot reweigh the evidence on review" of a post-*Miller* resentencing. *State v. Ramos,* 187 Wn.2d 420, 453, 387 P.3d 650, *cert. denied*, 138 S. Ct. 467 (2017). We do not substitute our discretion for that of the resentencing court.

II. COMPLIANCE WITH RCW 10.95.030 AND *MILLER*

Haag first contends that his restraint is unlawful because the trial court abused its discretion by failing to comply with the requirements of RCW 10.95.030 and *Miller* when setting his minimum term of confinement. We disagree.

Under RCW 10.95.030(3)(a)(ii), offenders who committed aggravated first degree murder when they were at least 16 years old but less than 18 years old are subject to an indeterminate sentence with a minimum term of no less than 25 years. When setting the minimum term, sentencing courts must comply with *Miller* by accounting for the offender's diminished culpability stemming from their youth. RCW 10.95.030(3)(b).

The United States Supreme Court held in *Miller* that mandatory life sentences without the possibility of parole violate the Eighth Amendment's prohibition on cruel and unusual punishment when imposed on an offender who committed their crime before the age of 18. 567 U.S. at 487. In so holding, the *Miller* Court recognized that "children are constitutionally different from adults for purposes of sentencing." *Id.* at 471. Juvenile offenders are "'less deserving of the most severe punishments'" because they "have diminished culpability and greater prospects for reform." *Id.* (quoting *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)). Juvenile offenders are less culpable than adults due in part to their

lack of maturity, underdeveloped sense of responsibility, impulsivity, heedless risk taking, and increased vulnerability to negative influences and outside pressures. *Id.*

In light of the diminished culpability of juvenile offenders, *Miller* requires sentencing courts to consider the "'mitigating qualities of youth'" before imposing a particular penalty. *Id.* at 476 (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). When evaluating the mitigating qualities of youth the court must consider that

> "chronological age, 'immaturity,' 'impetuosity,' 'failure to appreciate risks and consequences,' the surrounding family and home environment, 'the circumstances of the homicide offense, including the extent of his participation in the conduct' and any pressures from friends or family affecting him, the inability to deal with police officers and prosecutors, incapacity to assist an attorney in his defense, and the possibility of rehabilitation."

Bassett, 198 Wn. App. at 725 (quoting *Miller*, 567 U.S. at 477).

In accordance with the *Miller* requirements, RCW 10.95.030(3)(b) provides that when setting the minimum term, the court must consider mitigating factors "that account for the diminished culpability of youth as provided in *Miller*." These factors include, but are not limited to, "the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated." RCW 10.95.030(3)(b).

Haag does not contend that the trial court failed to consider the mitigating qualities of youth or that it disregarded relevant mitigating evidence when resentencing him as required under RCW 10.95.030(3) and *Miller*. Instead, Haag contends that the trial court abused its discretion by failing to "meaningfully weigh" his diminished culpability and by applying principles of retribution that improperly focused on the circumstances of his crime. Br. of Appellant at 22.

Regarding Haag's claim that the trial court did not "meaningfully weigh" evidence of his diminished culpability, *Miller* resentencing courts have "complete discretion" when weighing mitigating factors related to the offender's youth. *Houston-Sconiers*, 188 Wn.2d at 21. Appellate courts cannot reweigh mitigating evidence when reviewing a trial court's *Miller* resentencing decision. *Ramos*, 187 Wn.2d at 453. In *Ramos*, our Supreme Court determined that the defendant could not show a *Miller* violation where the resentencing court considered the mitigation evidence, was aware of its sentencing authority, and reasonably considered the issues identified in *Miller* when imposing its sentence. *Id.*

Here, in its extensive verbal ruling, the trial court expressly considered Haag's mitigation evidence, was aware of its sentencing authority, and reasonably considered the factors identified in *Miller* and in RCW 10.95.030 when imposing its sentence. Because we lack authority to reweigh such evidence on review, Haag fails to show that he is unlawfully restrained on this basis.

Haag's claim that the trial court abused its discretion by focusing on the circumstances of his crime and by applying principles of retribution to its sentencing decision also fails. Although the *Miller* Court noted that "'the case for retribution is not as strong with a minor as with an adult'" in light of a minor's diminished culpability, nothing within the *Miller* opinion suggests that retributive principles are improper considerations when evaluating a juvenile offender's culpability for the purpose of imposing a sentence. 567 U.S. at 472 (quoting *Graham*, 560 U.S. at 71). To the contrary, because "'the retribution rationale' relates to an offender's

blameworthiness," the *Miller* Court recognized that "'the circumstances of the homicide offense, including the extent of [the juvenile offender's] participation in the conduct'" are relevant considerations when evaluating a juvenile offender's diminished culpability. *Id.* at 472, 477 (quoting *Graham*, 560 U.S. at 71). Because the trial court properly considered the circumstances of Haag's crime when weighing the mitigation evidence, and because *Miller* does not prohibit a trial court from considering what punishment is appropriate in light of the nature of the crime, Haag fails to demonstrate that he is unlawfully restrained on this basis.

III. DE FACTO LIFE SENTENCE

Next, Haag contends that he is unlawfully restrained because the trial court's imposition of a 46-year minimum term of incarceration amounted to a de facto life sentence without a meaningful opportunity for release, which he asserts violates the Eighth Amendment and article I, section 14. Because Haag fails to demonstrate that his 46-year minimum term amounted to a de facto life sentence, we do not address whether a de facto life sentence is constitutionally prohibited.

In *Ramos*, our Supreme Court defined a de facto life sentence as "a total prison term exceeding the average human life-span." 187 Wn.2d at 434. Under the trial court's imposed 46-year minimum term, Haag will have an opportunity for release when he is 63 years old. Haag asserts, without any supporting evidence, that the average male lifespan is 78 years. Even by Haag's own assertion, his imposed minimum term does not constitute a de facto life sentence as defined in *Ramos*.

Haag argues that we should instead look to the average lifespan of someone who has been incarcerated. Haag cites to several studies that show the average life expectancy for certain incarcerated persons is less than the general population. But Haag provides no factual support that, apart from his incarceration, he shares the same characteristics as the subjects of these studies, and he provides no legal support for the proposition that the court should look to the average life expectancy of incarcerated people, which is not the standard that the Washington Supreme Court articulated in *Ramos*. 187 Wn.2d at 434 (considering "the average human life-span").

Haag relies on the Iowa Supreme Court's opinion in *State v. Null*, 836 N.W.2d 41 (2013), as persuasive authority that his 46-year minimum term constituted a de facto life sentence because the minimum term provided the possibility of only geriatric release. Because our Supreme Court defined a de facto life sentence in *Ramos*, Haag's reliance on *Null* is misplaced. Haag also relies on *State v. Ronquillo*, 190 Wn. App. 765, 361 P.3d 779 (2015) to support his claim that his 46-year minimum term constituted a de facto life sentence. In *Ronquillo*, Division One of this court determined that the juvenile offender's 51.3-year sentence providing for release at age 68 was a de facto life sentence. 190 Wn. App. at 768, 774-75. Again, Haag's reliance is misplaced because *Ronquillo* predated the *Ramos* opinion defining a de facto life sentence.

Because Haag fails to demonstrate that he has been subjected to a de facto life sentence, we do not reach whether such a sentence would violate the federal or state constitutions. *See State v. Hall*, 95 Wn.2d 536, 539, 627 P.2d 101 (1981) ("A reviewing court should not pass on

constitutional issues unless absolutely necessary to the determination of the case.")

IV. JURY TRIAL RIGHT

Finally, Haag contends that his restraint is unlawful because the trial court's imposed sentence exceeded that authorized by the jury's verdict in violation of his constitutional jury trial and due process rights. We disagree.

The Sixth Amendment of the United States Constitution guarantees criminal defendants the right to an impartial jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Similarly, any fact triggering or increasing a mandatory minimum sentence must also be submitted to a jury and proven beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 112-13, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

Haag argues that RCW 10.95.030 is unconstitutional insofar as it permitted the trial court to impose a minimum term of incarceration based on judicial factfinding regarding the mitigating circumstances of youth. We disagree.

Haag's argument fails to recognize the distinction between facts that increase a *mandatory* minimum sentence and facts relied upon by a trial court to impose a sentence within a prescribed statutory range. Here, the prescribed statutory range for Haag's crime of aggravated

first degree murder was a minimum of "no less than twenty-five years" and a maximum of life.[3] RCW 10.95.030(a)(ii). The trial court's factual findings with regard to the mitigating circumstances of youth did not increase the *mandatory* minimum sentence to which Haag was subjected for his aggravated first degree murder conviction, it remained at 25 years. Rather, the trial court's factual findings merely informed its discretion in sentencing Haag within the prescribed statutory range. The *Alleyne* Court clearly articulated this distinction and noted that its decision did not prohibit judicial fact finding in this context, stating:

> In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.

570 U.S. at 116.

Haag's imposed sentence did not violate his constitutional jury trial and due process rights, and he fails to show that he is unlawfully restrained on this basis. Accordingly, we affirm his sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW

[3] In *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018), our Supreme Court held that sentencing juvenile offenders to life imprisonment without the possibility of parole is unconstitutional under article I, section 14 of the Washington Constitution. Accordingly, Haag's prescribed sentencing range, within constitutional bounds, was a minimum term of no less than 25 years but less than a term of life, with some opportunity for release at the expiration of his minimum term and periodically thereafter.

2.06.040, it is so ordered.

Glasgow, J.

We concur:

Melnick, P.J.

Sutton, J.

PIERCE COUNTY ASSIGNED COUNSEL

October 10, 2019 - 4:48 PM

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