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NO. 95814-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH JAMES GILBERT,

Appellant.

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. RCW 10.95.035 requires juveniles serving life without parole sentences to be returned to their sentencing courts “for sentencing consistent with RCW 10.95.030.” RCW 10.95.030 pertains exclusively to aggravated first-degree murder. Did Gilbert’s resentencing court properly decline to resentence him for offenses other than aggravated first-degree murder?

2. If the resentencing court had discretion to reconsider long-final sentences for crimes other than aggravated murder, did it act within its discretion by refusing to grant an exceptional sentence that would permit Gilbert’s release after 25 years, where Gilbert murdered two men and tried to murder a third?

3. This Court has held that an 85-year aggregate sentence for four homicides committed by a 14-year-old does not violate the Eighth Amendment where the sentencing court considers the mitigating aspects of youth. Does the Eighth Amendment also permit a 45-year aggregate sentence for two murders and other serious nonhomicide crimes committed by a 15-year-old?

**B. STATEMENT OF THE CASE**

In 1993, Jeremiah Gilbert was convicted by a jury of multiple offenses: aggravated first degree murder, (nonaggravated) first degree

murder, assault in the second degree, robbery in the first degree with a deadly weapon, burglary in the first degree with a deadly weapon, and theft in the first degree. CP 0-1. Gilbert was 15 years and 10 months old when he committed these crimes, the facts of which are set forth in the original unpublished Court of Appeals decision affirming his conviction. State v. Gilbert, No. 13366-4-III, 1996 WL 576774 (Wash. Ct. App. Oct. 8, 1996) (hereafter, "Gilbert I").

In brief, the evidence established that Gilbert and a friend were trying to steal a Jeep in the woods when they were confronted by the Jeep's owner. Gilbert used a stolen rifle to shoot at the man over and over, but did not hit him. Minutes later, Robert Gresham approached the scene and Gilbert shot him twice in the shoulder. As Gresham cried and asked why, Gilbert executed him with one rifle shot to the head. Loren Evans drove his truck to the area to investigate the gunshots. Gilbert shot Evans in the head through the windshield, killing him instantly, then dragged his body out of the truck and drove it away. Gilbert I, at \*1-2.

Upon Gilbert's conviction, the trial court imposed the statutorily-mandated sentence of life without parole (LWOP) for the aggravated murder. CP 4. The court imposed a sentence in the middle of the standard range—280 months—for the nonaggravated murder, to be served consecutive to the life sentence as required by law. CP 4; Former RCW

9.94A.400(1)(b) (1992)<sup>1</sup>; RCW 9.94A.589(1)(b). Gilbert's sentences for the assault (74.5 months), robbery (174 months), burglary (119.5 months), and theft (16 months) ran concurrent with the murder sentences. CP 4. All sentences were final as of March 17, 1997, when the Court of Appeals issued a mandate disposing of Gilbert's timely direct appeal. CP 10; RCW 10.73.090(3)(b).

In 2012, the Supreme Court of the United States decided Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), barring mandatory LWOP sentences for juveniles convicted of homicide under the Eighth Amendment. Gilbert filed a personal restraint petition seeking resentencing in light of Miller; the parties stipulated to dismissal of the petition so that Gilbert could be resentenced under legislation enacted in response to Miller. State v. Gilbert, 3 Wn. App. 2d 1007, 2018 WL 1611833 at \*1 (Wash. Ct. App. April 3, 2018) (hereafter, "Gilbert II"). The superior court conducted a Miller resentencing hearing in September 2015. RP 1. Gilbert submitted evidence that he had matured in prison and now had a low risk of reoffending. See CP 39-48. Gilbert addressed the court, stating that he was "not going to sit and – and ask for concurrent, not consecutive, that's beyond my means." RP 18. His

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<sup>1</sup> This section was recodified as RCW 9.94A.589(1)(b). Because the provisions do not differ in any way pertinent to this appeal, the State will refer to the current law.

counsel nevertheless argued that all of Gilbert's sentences should run concurrent to the new mandatory indeterminate sentence of 25 years to life for the aggravated murder. CP 33-37; RP 11-12. The surviving spouse of one of the murdered men also addressed the court. RP 8. She pointed out the injustice that while Gilbert enjoys the visits, love and support of his family while in prison, his callous actions forever deprived his victims' families of the same opportunity. RP 8. She concluded with her humble view that "[t]wenty-five years is not long enough for murder." RP 8.

The superior court considered the evidence and arguments, and ultimately agreed with the State that the only task for a Miller resentencing court is to change the sentence for aggravated murder from LWOP to life with a 25-year minimum term. RP 19-20; CP 26-32. Accordingly, the court amended Gilbert's judgment and sentence to impose the newly-mandated term for the aggravated murder, leaving all other terms unchanged. CP 86-92; RP 20.

Gilbert appealed from the resentencing, arguing that the consecutive sentences amount to a de facto life sentence inconsistent with Miller. Opening Brief of Appellant at 1. The Court of Appeals, Division III, rejected Gilbert's claim, holding that "the only issues presented on an appeal from a Miller fix resentencing are those related to the aggravated murder sentence(s) addressed by that statute." Gilbert II, 3 Wn. App. 2d

1007 at \*3. In other words, “[h]ow a revised sentence is ordered with respect to other sentences that are not being reviewed by the trial court is not within the scope of the Miller fix[.]” Id. at \*3. This Court granted Gilbert’s petition for review.<sup>2</sup>

**C. ARGUMENT**

**1. THE “MILLER FIX” ONLY AUTHORIZES RESENTENCING COURTS TO CHANGE THE SENTENCE IMPOSED FOR AGGRAVATED FIRST-DEGREE MURDER.**

The threshold question in this case is whether a superior court that is resentencing a defendant for aggravated murder pursuant to “Miller fix” legislation has authority to reconsider all of the sentences originally imposed, or only the previously-mandatory LWOP sentence for aggravated murder. The plain language of the relevant statutes is dispositive. The resentencing court correctly concluded that it lacked authority to alter Gilbert’s long-final sentences for crimes other than aggravated first-degree murder.

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<sup>2</sup> Gilbert included in his petition an undeveloped Equal Protection Clause challenge to RCW 9.94A.540(3)(b). Gilbert did not raise any Equal Protection claim until his supplemental brief in the Court of Appeals, and the Court of Appeals did not address it. In his supplemental brief to this Court, filed November 13, 2018, Gilbert does not mention it. Because Gilbert has abandoned the claim, the State does not address it.

a. Courts May Only Alter A Final Sentence To The  
Extent Authorized By The Legislature.

This Court has specifically rejected the notion that a trial court has authority to vacate or alter a final sentence at will. Such a notion “ignores the importance of finality in rendered judgments.” State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989). Accordingly, final judgments in both criminal and civil cases may be vacated or altered only in limited circumstances. Id. (citing inapplicable statutes concerning early release and clemency, and CrR 7.8(b), which pertains to mistakes, inadvertence, newly discovered evidence, fraud, or “[a]ny other reason justifying relief from the operation of the judgment”). “Modification of a judgment is not appropriate merely because it appears, wholly in retrospect, that a different decision might have been preferable.” Id. Rather, “SRA sentences may be modified only if they meet the requirements of the SRA provisions relating directly to the modification of sentences.” Id. at 89. Further, “the existence of express provisions within the SRA for modifying a sentence preclude[s] the implication of others.” State v. Harkness, 145 Wn. App. 678, 685, 186 P.3d 1182 (2008) (internal quotation omitted).

- b. The “Miller Fix” Legislation Only Authorizes The Superior Court To Reduce Sentences For Aggravated Murder From LWOP To Life With A Minimum Term.

In response to Miller, the Washington Legislature amended RCW 10.95.030—which until that point dictated an LWOP sentence for any juvenile convicted of aggravated murder in the first degree.<sup>3</sup> The “Miller fix” legislation eliminated LWOP for those convicted of an aggravated first degree murder committed prior to their 16<sup>th</sup> birthday, and required instead an indeterminate sentence of a minimum term of 25 years to a maximum term of life.<sup>4</sup> RCW 10.95.030(3)(a)(i). For those who had been sentenced to LWOP for aggravated murder as juveniles before June 1, 2014, the Legislature authorized automatic resentencing “consistent with RCW 10.95.030.” RCW 10.95.035(1).<sup>5</sup>

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<sup>3</sup> The statute at that time also permitted the death penalty for adults convicted of the crime. This Court recently held the death penalty unconstitutional as applied in Washington. State v. Gregory, \_\_ Wn.2d \_\_, 427 P.3d 621 (2018).

<sup>4</sup> If the offender was at least 16 years old but under 18 at the time of the aggravated first-degree murder, the resentencing court may impose a minimum term greater than 25 years. RCW 10.95.030(3)(a)(ii). Under this Court’s recent decision in State v. Bassett, \_\_ Wn.2d \_\_, 428 P.3d 343 (2018), the state constitution precludes the resentencing court from setting the minimum term at “life,” but it remains unclear whether any minimum sentence other than “life” is constitutionally permissible.

<sup>5</sup> “A person, who was sentenced prior to June 1, 2014, under this chapter or any prior law, to a term of life without the possibility of parole for an offense committed prior to their eighteenth birthday, shall be returned to the sentencing court or the sentencing court’s successor for sentencing consistent with RCW 10.95.030. Release and supervision of a person who receives a minimum term of less than life will be governed by RCW 10.95.030.” RCW 10.95.035(1) (emphasis added).

The language “consistent with RCW 10.95.030” is important because RCW 10.95.030 pertains exclusively to sentences for aggravated first degree murder. RCW 10.95.030 (“Sentences for aggravated first degree murder”). With this plain language, the Legislature empowered a Miller resentencing court to alter the sentence for that crime alone. Indeed, the Legislature expressly provided that a Miller fix resentencing does not affect the finality of the original conviction and unaffected sentences. RCW 10.95.035(4).<sup>6</sup>

Instead of directing courts to resentence juveniles convicted of crimes other than aggravated murder in the first degree, the Legislature directed the Indeterminate Sentence Review Board (ISRB) to consider petitions for release after 20 years. RCW 9.94A.730(1). Any offender convicted of “one or more crimes” as a juvenile may petition the ISRB for release after 20 years, provided that he has not been convicted of a crime after age 18, has not committed a disqualifying infraction within a year before filing his petition, “and the current sentence was not imposed under RCW 10.95.030 [first-degree aggravated murder] or 9.94A.507 [sex offenses].” Id. This provision comes with a presumption of release unless

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<sup>6</sup> “A resentencing under this section shall not reopen the defendant’s conviction to challenges that would otherwise be barred by RCW 10.73.090 [establishing one-year time limit for collateral attacks on judgment and sentence], 10.73.100 [enumerating exceptions to one-year time limit for collateral attacks], 10.73.140 [governing subsequent personal restraint petitions], or other procedural barriers.” RCW 10.95.035(4).

the State proves by a preponderance of the evidence that “it is more likely than not that the person will commit new criminal law violations if released.” RCW 9.94A.730(3).

The Legislature thus provided two different remedies to correct juvenile life sentences. Where the juvenile was originally sentenced to mandatory LWOP for aggravated first-degree murder, he is resentenced to a minimum term of at least 25 years<sup>7</sup> and the ISRB later determines whether and when he is safe to release after 25 years. Where the juvenile committed “one or more” less serious crime(s), including nonaggravated first degree murder, the ISRB will consider release after 20 years. The opportunity for release after 20 years adequately remedies any Miller violation in final sentences. State v. Scott, 90 Wn.2d 586, 601, 416 P.3d 1182 (2018). The existence of an express provision for modifying previously-mandatory LWOP sentences for juvenile aggravated murder, and different relief for other crimes, precludes any implication that the Legislature also intended a Miller resentencing court to address sentences for nonaggravated murder. See Harkness, 145 Wn. App. at 685 (“existence of express provisions within the SRA for modifying a sentence precluded the implication of others”).

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<sup>7</sup> See n.4, supra.

c. The Resentencing Court Properly Refused To Alter Gilbert's Final Sentence For Nonaggravated First-Degree Murder.

At a Miller resentencing for a juvenile who was under 16 when he committed aggravated first-degree murder, the superior court has no discretion. By statute, the court must impose "a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years." RCW 10.95.030(3)(a)(i). A resentencing under RCW 10.95.035 "shall not reopen the defendant's conviction to challenges that would otherwise be barred" by procedural statutes governing collateral attacks on a judgment and sentence. Thus, a Miller resentencing court's authority is limited to correcting the sentence imposed for aggravated first-degree murder.

Gilbert's conviction and sentences were final in 1997. CP 10; RCW 10.73.090(3)(b). Except with respect to the aggravated murder, Gilbert has never filed a collateral attack and he has never identified any legal exception that would allow the superior court to reopen any other final sentence in a proceeding under RCW 10.95.035. The superior court's authority under RCW 10.95.035 is limited to changing the sentence associated with his aggravated first-degree murder from LWOP to a sentence of 25 years to life. Thus, at Gilbert's Miller resentencing, the superior court properly confined its action to the only thing it was

permitted to do: reduce the sentence for Gilbert's aggravated murder conviction from LWOP to 25 years to life. The court properly left all other final sentences undisturbed.

Even if it had authority to revisit the final sentences for first-degree murder and lesser crimes, the resentencing court declined to exercise it, so those final sentences remain unappealable. See State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993) ("Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question."); accord, State v. Kilgore, 167 Wn.2d 28, 39-41, 216 P.3d 393 (2009).

**2. THE RESENTENCING COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO GRANT AN EXCEPTIONAL CONCURRENT SENTENCE.**

Even if the Miller resentencing court had discretion to address Gilbert's nonaggravated murder sentence, it could not run the two murder sentences concurrently under applicable law unless Gilbert demonstrated by a preponderance of the evidence that an exceptional mitigated sentence was warranted. Gilbert has not demonstrated that it is unjust for him to serve separate sentences for each life he took.

Under the SRA, sentences for two or more current offenses generally must be served at the same time. RCW 9.94A.589(1)(a). The Legislature made an exception where "a person is convicted of two or

more serious violent offenses arising from separate and distinct criminal conduct.” RCW 9.94A.589(1)(b). In that circumstance, the sentence for each distinct serious violent offense generally must be served consecutively. *Id.* A sentencing court may only depart from these general rules when it finds substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. A court may impose an exceptional sentence downward if, among other things, it finds by a preponderance of the evidence that the “operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.” RCW 9.94A.535(1)(g).

Under RCW 9.94A.589(1)(b), the terms imposed for Gilbert’s aggravated first-degree murder and nonaggravated first-degree murder presumptively run consecutively because both crimes are “serious violent offenses” and the two convictions involved separate and distinct criminal conduct.<sup>8</sup> RCW 9.94A.030(46). For the resentencing court to impose concurrent sentences instead, Gilbert would have had to persuade the court that the minimum term of 45 years was “clearly excessive” in light of the

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<sup>8</sup> If crimes involve separate victims, they necessarily arise from separate and distinct conduct. *State v. Cubias*, 155 Wn.2d 549, 552, 120 P.3d 929 (2005).

purposes of the SRA. RCW 9.94A.535(1)(g). He did not make this argument,<sup>9</sup> which fails in any event.

While RCW 10.95.030 is silent as to whether a sentence imposed for aggravated murder must run concurrently or consecutively to other sentences, there is no indication that the Legislature intended that multiple counts of murder be punished the same as only one count, even when the killer is under 18. Such a conclusion would fly in the face of the purposes of the SRA, the first of which is to “ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense.” RCW 9.94A.010. Imposing greater punishment for multiple counts of murder than for one count is clearly consistent with the goals of the SRA, even as to juveniles. This Court recognized as much in State v. Ramos, where, in upholding an aggregated 85-year sentence for a 14-year-old who killed

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<sup>9</sup> Gilbert did not request an exceptional sentence under RCW 9.94A.535 at resentencing. Rather, Gilbert argued that RCW 9.94A.589 does not apply to aggravated first-degree murder because that crime is outside of the SRA. That is not so. Aggravated murder is included in the SRA’s table of offense seriousness levels, RCW 9.94A.515, and in the SRA’s sentencing grid, RCW 9.94A.510, and the SRA establishes a mandatory minimum for that crime, RCW 9.94A.540. The argument that RCW 9.94A.589(1)(b) does not apply to aggravated murder just because that crime carries the same consequences regardless of offender score is unpersuasive and illogical. It would create a sentencing scheme in which one convicted of two nonaggravated first-degree murders would face greater punishment than one convicted of two more serious aggravated first-degree murders. The mandatory minimum sentence for nonaggravated first degree murder is 20 years. RCW 9.94A.540(1)(a). Under Gilbert’s theory, RCW 9.94A.589(1)(b)’s consecutive sentence requirement would apply, resulting in a sentence of not less than 40 years for two first-degree murders. The mandatory minimum sentence for aggravated murder is 25 years. RCW 9.94A.540(1)(e). Under Gilbert’s theory, RCW 9.94A.589(1)(b) does not apply, so a person who commits two aggravated murders would face a concurrent sentence of as little as 25 years.

four people, the Court noted that “a properly conducted Miller hearing does not in any way permit sentencing courts to disregard the number of victims in determining an appropriate sentence.” 187 Wn.2d 420, 438, 387 P.3d 650 (2017).

In State v. Graham, this Court held that a sentencing court has discretion to impose an exceptional sentence downward on multiple serious violent offenses by running the terms concurrently, if the multiple offense policy results in a presumptive sentence that is clearly excessive in light of the purposes of the SRA. 181 Wn.2d 878, 883-85, 337 P.3d 319 (2014) (affirming In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 329-30, 166 P.3d 677 (2007)). And in State v. Houston-Sconiers, this Court held that when sentencing juveniles to very lengthy sentences, the court must consider the mitigating qualities of youth and have the discretion to impose a sentence below the otherwise applicable SRA range and/or sentence enhancements. 188 Wn.2d 1, 21, 391 P.3d 409 (2017).<sup>10</sup> Still, youth does not automatically entitle every youthful offender to an exceptional sentence; rather, “the sentencing court must exercise its discretion to decide” when it does. State v. O’Dell, 183 Wn.2d 680, 698-99, 358 P.3d 359 (2015). And even where a sentencing court determines

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<sup>10</sup> Houston-Sconiers was published only after the resentencing in Gilbert’s case.

that a defendant's youth is a mitigating circumstance, the offender must still persuade the court that the qualities of youth justify an exceptional sentence in his particular case. Ramos, 187 Wn.2d at 445-46; State v. Ronquillo, 190 Wn. App. 765, 782, 361 P.3d 779 (2015) (citing State v Ha'mim, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)).

If the resentencing court had authority to reopen all of Gilbert's sentences, which it did not, and if Gilbert had asked it to consider an exceptional sentence under RCW 9.94A.535, which he did not,<sup>11</sup> then the court could have imposed an exceptional concurrent sentence on grounds that his youth-related diminished capacity made a 45-year sentence for two first-degree murders clearly excessive. Because it was not asked to, the resentencing court made no such finding. Nor would it be likely to do so. In this case, Gilbert "gratuitously and senselessly" executed Robert Gresham, a man who posed no threat after Gilbert disabled him with two shots to the shoulder, by shooting him in the head. Gilbert I at \*1-2. Then, to avoid discovery and facilitate his escape, he shot Loren Evans in the head and stole his truck. Id. Under these circumstances, Mr. Evans'

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<sup>11</sup> In State v. McFarland, this Court concluded that a defendant was entitled to resentencing with consideration of an exceptional mitigated sentence even though she had not requested an exceptional sentence in the first instance, because the trial court was unaware of its discretion "and the record demonstrates that it might have done so had it recognized its discretion." 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). That is distinguishable from this case, where there is no such record.

widow's statement that "[t]wenty-five years is not long enough for murder" is a significant understatement.

**3. A 45-YEAR AGGREGATE SENTENCE IS NOT CRUEL AND UNUSUAL PUNISHMENT FOR TWO PREMEDITATED MURDERS.**

Gilbert's amended judgment and sentence imposes a mandatory term of 25 years and maximum term of life for the aggravated murder, consecutive to a 23.3-year (280-month) sentence for nonaggravated first-degree murder, with all other lesser sentences served concurrently. CP 97. Although this adds up to 48.3 years, Gilbert's total minimum sentence is effectively only 45 years, because the ISRB may release him on the nonaggravated murder count after 20 years. RCW 9.94A.730(1). Accordingly, Gilbert will be eligible for release when he is 60 years old. Gilbert II at \*10 (Fearing, J., dissenting). By the time this Court hears oral argument, Gilbert will be 42 years old.

The question is whether Gilbert's sentence violates the Eighth Amendment.<sup>12</sup> Plainly, it does not. For one, the Eighth Amendment does not preclude even literal life sentences for juvenile homicide defendants whose crimes do not reflect transient immaturity. Montgomery v.

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<sup>12</sup> Gilbert has never challenged his sentence under the state constitution.

Louisiana, \_\_\_ U.S. \_\_\_, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). Gilbert's 45-year sentence is not a life sentence.

Gilbert contends his sentence is a de facto life sentence. The weight of authority is against him. Only two states have concluded that sentences shorter than 50 years constitute LWOP.<sup>13</sup> Most courts to consider the matter have concluded that sentences precluding release for 50 years or more are the functional equivalent of LWOP.<sup>14</sup>

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<sup>13</sup> See Bear Cloud v. State, 334 P.3d 132 (Wyo. 2014) (aggregate 45-year sentence is de facto LWOP for juvenile convicted of felony murder and other crimes as accomplice); Ira v. Janecka, 419 P.3d 161 (NM 2018) (for 15 year old convicted of a number of nonhomicide crimes, 46-year minimum is not de facto LWOP, but is "certainly ... the outer limit of what is constitutionally acceptable").

<sup>14</sup> See, e.g., People v. Contreras, 411 P.3d 445 (Cal. 2018) (sentence of 50 years to life is functionally equivalent to LWOP); Casiano v. Comm'r of Corr., 115 A.3d 1031 (Conn. 2015) (50-year sentence without possibility of release triggers Miller protections); People v. Reyes, 63 NE 3d 884 (Ill. 2016) (mandatory sentence confining juvenile until age 105 is de facto LWOP, but mandatory term of 32 years is not); People v. Buffer, 75 NE3d 470 (Ill. App. 2017) (50-year minimum is de facto life sentence); State v. Null, 836 NW2d 41 (Iowa 2013) (mandatory 52.5-year sentence triggered Miller protections); Carter v. State, 192 A.3d 695 (Md. Ct. App. 2018) (50 year-minimum is de facto LWOP); State v. Boston, 363 P.3d 453 (Nev. 2015) (aggregated 100-year minimum is "without a doubt" de facto life; declines to say at what point a lengthy sentence becomes functional equivalent of LWOP); State v. Zuber, 152 A.3d 197 (NJ 2017) (55 year-minimum triggers Miller protections); **but see** State v. Collins, 2018 WL 1876333 (Tenn. 2018) (51-year minimum is not LWOP); Williams v. State, 197 So.2d 569 (Fla. 2016) (20-year minimum not LWOP); Ellmaker v. State, 329 P.3d 1253 (Kan. Ct. App. 2014) (unpublished) ("Hard 50" sentence not de facto LWOP when imposed on juvenile); People v. Bryant, 2018 WL 4603890 (Mich. Ct. App. 2018) (unpublished) (35-year minimum not de facto LWOP); Mason v. State, 235 So.3d 129 (Miss. Ct. App. 2017) (50-year sentence not de facto LWOP); People v. Aponte, 981 N.Y.S.2d (NY Sup. Ct. 2013) (30-year minimum not cruel and unusual punishment); State v. Jefferson, 798 SE2d 121 (NC Ct. App. 2017) (25-year minimum not de facto LWOP); Commonwealth v. Bebout, 186 A.3d 462 (Penn. 2018) (45-year minimum not de facto life); State v. Diaz, 887 NW2d 751 (S.D. 2016) (40-year minimum not de facto LWOP); McCardle v. State, 550 SW3d 265 (Tex. Ct. App. 2018) (40-year minimum not de facto LWOP).

Washington courts that have considered whether certain sentences amount to de facto LWOP are in accord with the majority of other states. In State v. Ronquillo, Division One held that a 51.3-year sentence for a juvenile homicide defendant is a de facto life sentence for purposes of Miller. 190 Wn. App. 765, 768, 361 P.3d 779 (2015). This Court recently denied review of an unpublished opinion from Division One that concluded that a 40-year sentence was not a de facto life sentence. State v. Keodara, 3 Wn. App. 1050, 2018 WL 2095683 at \*4 (May 7, 2018), rev. denied, 2018 WL 5668539 (Oct. 31, 2018).

It appears that Gilbert has already been released from his indeterminate sentence for the aggravated first-degree murder of Loren Evans and is now serving his sentence for the first-degree murder of Robert Gresham (concurrent with his sentences for the second-degree assault, robbery, burglary, and theft).<sup>15</sup> Gilbert will be eligible for release less than 20 years from now, when he has served 45 years. This is less than the 50 years that other state courts deem the functional equivalent of LWOP. It is less than Ronquillo's 51.3-year sentence for a single murder. It is far less than the 85 years this Court unanimously upheld against an

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<sup>15</sup> Results of ISRB hearings are available as a downloadable spreadsheet entitled "Prison Release Hearings Schedule" on its website. <https://www.doc.wa.gov/corrections/isrb/default.htm> (last visited Nov. 11, 2018). This document indicates that the ISRB deemed Gilbert "releasable to consecutive count" after a hearing on March 20, 2018. The ISRB's written decision is not part of the record.

Eighth Amendment challenge for the 14-year-old who committed multiple murders in Ramos. 187 Wn.2d at 458-59. This Court should hold that the Eighth Amendment permits an aggregate 45-year sentence for a juvenile who intentionally murdered two innocent men and tried to kill a third.

**D. CONCLUSION**

The State respectfully asks this Court to affirm.

DATED this 16<sup>th</sup> day of November, 2018.

Respectfully submitted,

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