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No. 97517-5

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
Respondent,

v.

SEBASTIAN GREGG,
Appellant.

# MEMORANDUM OF AMICUS CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF PETITION FOR REVIEW

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## IDENTITY AND INTEREST OF AMICUS CURIAE

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

## INTRODUCTION

Children sentenced in adult court must not bear the burden to prove what is already accepted: that they are inherently less culpable than their adult counterparts.[1] But a child who is charged, tried, and convicted as an adult is sentenced with the presumption that children should receive the same punishment as adults. Though *State v. Houston-Sconiers* was an important step in ensuring that sentencing courts exercise their discretion to treat children differently than adults,[2] it stopped short of requiring youth to be presumptively mitigating. The possibility of different treatment based on youth does not alter the statutory presumption of adult-equivalent culpability. Before and after *Houston-Sconiers*, children continue to receive sentences similar to what adults receive for similar crimes. This

[1] *State v. Bassett*, 192 Wn.2d 67, ¶ 35, 428 P.3d 343 (2018) ("Because children have 'lessened culpability they are less deserving of the most severe punishments.'") (quoting *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)).
[2] 188 Wn.2d 1, 21, 391 P.3d 409 (2017) (requiring that "[t]rial courts . . . consider mitigating qualities of youth at sentencing and . . . have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements.")

case presents an opportunity for the Court to further define the heightened protection that article I, section 14 provides to children by establishing that their diminished culpability entitles them to a presumption of an exceptional sentence.

## SUMMARY OF ARGUMENT

Sebastian Gregg was 17 years old when he was charged, convicted, and sentenced for his crimes. Pet. for Review at 4. Without full consideration of Mr. Gregg's particular circumstances, he was automatically declined into adult court and subjected to adult punishment under the Sentencing Reform Act (SRA). Under RCW 9.94A.530(1), Mr. Gregg bore the burden of proving his own diminished culpability to receive an exceptional sentence below the standard range. This statute violates article I, section 14 as applied to Mr. Gregg. He, like any other child, is inherently less culpable than his adult counterparts. For a standard range sentence to meet the strictures of article I, section 14, the State must prove beyond a reasonable doubt that a child's culpability is equivalent to an adult's. Review is warranted under RAP 13.4(b)(3) and (4) to ensure that the procedures governing the sentencing of children in adult court manifest the heightened protection of article I, section 14.

## ARGUMENT

I. This Court Should Accept Review Because Article I, Section 14 Requires a Presumption of Mitigation for Juvenile Offenders to Account for Their Inherently Diminished Culpability.

A. Children who are automatically declined to adult court are presumed equally culpable to adults and are subjected to adult punishment as a matter of course.

Review is mandated to determine how the following insight, "that children are less criminally culpable than adults," *State v. Bassett*, 192 Wn.2d 67, 87, 428 P.3d 343 (2018),[3] affects how children are sentenced when they are declined, automatically or not, and convicted in adult court. In recognition of children's diminished culpability, this Court has continued to develop its juvenile justice jurisprudence to enhance protections for juveniles beyond the floor of the Eighth Amendment. *See State v. Gilbert*, 193 Wn.2d 169, 175-76, 438 P.3d 133 (2019) (any sentencing scheme that precludes consideration of youth is constitutionally infirm, regardless of the type of sentencing hearing or the mandatory nature of the sentencing scheme); *Bassett*, 192 Wn.2d at 82 (determining

[3] The three most significant gaps between adults and children that diminish the culpability of youth are: 1) juveniles' lack of maturity and underdeveloped sense of responsibility which leads to recklessness, impulsivity, and needless risk-taking; 2) juveniles' increased vulnerability to negative influences and outside pressures, limited control over their environment, and lack the ability to extricate themselves from horrific and crime producing settings; and 3) juveniles' less-fixed character traits which lead to actions that are less likely to be evidence of irretrievable depravity. *Roper v. Simmons*, 543 U.S. 551, 553, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). Due to that lessened culpability, children are categorically "less deserving of the most severe punishments." *Id.* at 569-70.

that article I, section 14 affords heightened protection in the juvenile sentencing context and categorically barring juvenile life without parole under article I, section 14); *Houston-Sconiers*, 188 Wn.2d ¶ 39 ("Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements."); *cf. State v. O'Dell*, 183 Wn.2d 680, 691-96, 358 P.3d 359 (2015) (relying on psychological and neurological studies to hold that age may be a mitigating factor even for defendants over 18). Auto-decline, however, remains a procedure that does not recognize this diminished culpability, counteracting the many safeguards this Court has created at the sentencing phase for juvenile offenders.

This Court recognized that the auto-decline statute requires children to "face[] very adult consequences….with no opportunity for a judge to exercise discretion about the appropriateness of such transfers." *Houston-Sconiers*, 188 Wn.2d at 8. If a juvenile age 16 or older is charged with murder, or a number of other serious violent offenses, his case is automatically transferred into the adult court system where the imbedded protections of the juvenile justice system are no longer available. RCW 13.34.030(e)(i)(V)(A). Children sentenced in juvenile court have the benefit of a system designed to "respond to the needs of youthful

offenders …by providing punishment commensurate with the age, crime, and criminal history." RCW 13.34.010(2)(d). This system is specifically geared to provide rehabilitation and necessary treatment of and for juvenile offenders. RCW 13.34.010(2)(d), (f)-(g).

The auto-decline statute and its presumption of adult-equivalent culpability based solely on the crime and the age of the defendant stands in tension with what this Court has repeatedly recognized: that youth matters on a constitutional level and that "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Houston-Sconiers*, 188 Wn.2d at 8 (quoting *Graham*, 560 U.S. at 76). While *Houston-Sconiers* and *Gilbert* give sentencing courts discretion to depart from adult sentencing schemes, significant barriers to robust consideration of youthfulness at sentencing remain. This includes the burden RCW 9.94A.535(1) places on the child to establish "mitigating circumstances…by a preponderance of the evidence."

B. A presumption at sentencing that youth mitigates culpability is necessary to counterbalance both the presumption of adult-equivalent culpability created by auto-decline and the continuing risk of over-punishment.

The paradigm of exceptional sentencing imbedded in RCW 9.94A.535(1) is inconsistent with the diminished culpability of children, as mitigation based on youth should be the rule, not the exception. RCW

9.94A.535(1) is designed for the exceptional adult who may deserve a sentence below the standard range—and who *should* bear the burden to show that they are, in fact, an outlier. But it is the exceptional child who will be deemed as equally culpable as an adult, thereby deserving a standard range sentence. A presumption that all children sentenced in adult court are entitled to a mitigated sentence due to their inherently diminished culpability is therefore necessary to avoid the imposition of cruel punishment prohibited by article I, section 14. *Bassett*, 192 Wn.2d at 82 (holding that article I, section 14 affords heightened protection in the juvenile sentencing context).[4]

The presumption that a child should receive an exceptional sentence, unless proven otherwise, is necessary to counterbalance the risk of over-punishment created by auto-decline. A presumption of adult-equivalent culpability is imposed whenever a case is transferred to adult court. Placing the burden to establish mitigating circumstances related to youthfulness on the child allocates the entire risk of sentencing error to the child, *see* RCW 9.94A.535(1), subjecting the child to a sentence that does not advance legitimate penological objectives.

The presumption that a child should receive an exceptional

[4] Any additional mitigating evidence would be the basis for additional downward departures.

sentence also accounts for the risk that trial courts will view mitigating evidence in disparate ways. *See Roper*, 543 U.S. at 558-59. This Court has recognized that sentencing courts may erroneously view mitigating factors as aggravators. *Bassett*, 192 Wn.2d at 89. This risk manifests in different ways. Sentencing courts sometimes make "imprecise and subjective judgements regarding transient immaturity." *Id.* In *Bassett*, the judge concluded that Mr. Bassett's homelessness at the time of his crime was evidence of advanced maturity, rather than evidence that the "instability and insecurity of homelessness caused [him] to have less control over his emotions and actions." *Id*. And when presented with evidence of rehabilitation—reflecting children's greater capacity for change—the judge concluded that Mr. Bassett's infraction-free record from the last twelve years "did not carry much weight" because "prisoners have some incentive to follow the rules." *Id.*

Finally, the presumption that a child should receive an exceptional sentence is also required to counteract the risk that a child's effort to obtain that exceptional sentence can be negated by a trial court's unrelenting focus on the facts of the crime. The Supreme Court recognized the "unacceptable likelihood" that the inevitably heinous nature of any particular crime would swallow whole any mitigating arguments based on the youth of the offender, necessitating categorical protections. *Roper*, 543

U.S. at 553-54. Stated differently, the U.S. Supreme Court in *Roper* and *Graham* decided that it could not leave it to the discretion of a sentencing court to impose on children, respectively, the death penalty or life without parole for non-homicide crimes. *See Roper*, 543 U.S. at 572-73; *Graham*, 560 U.S. at 74-75. And this Court in *Bassett* held that article I, section 14 did not permit sentencing courts, though explicitly authorized to do so by the legislature, to exercise their discretion and impose on children a sentence of life without parole. *Bassett*, 192 Wn.2d at 89-90. Whenever a child is sentenced, the sentence—whether it involves a maximum, minimum, or a mandatory term—must conform to the heightened protection afforded children under article I, section 14. *Cf. id.* ¶ 44 (sentencing of juvenile offenders must conform to article I, section 14).

## II. This Court Should Grant Review to Address Inefficiencies and Fundamental Unfairness Created by the Existing Burdens Youth Still Face at Sentencing.

This case presents an issue of public interest because it impacts judicial efficiency and fundamental fairness in the sentencing of children in adult court. While this Court has made great strides in advancing juvenile justice, the grant of total discretion to impose a sentence below the standard SRA range established in *Houston-Sconiers*, 188 Wn.2d ¶ 39, left open the question of who bears the burden of proving whether a mitigated sentence is justified, or unjustified, in a particular case.

As is the case in the context of *Miller*-fix resentencings under RCW 10.95.035, where the exercise of discretion has proven not to benefit the child,[5] the similar inquiry under *Houston-Sconiers* is likely leading to disparate sentencing decisions in other juvenile sentencing contexts, and a correspondingly high number of challenges to those sentences. To avoid this outcome, trial courts need further guidance regarding mitigation.

The inconsistent consideration of mitigating circumstances associated with youth also results in unfair imposition of sentences across the state, where some children receive sentences that account for diminished culpability and others do not. This case presents an opportunity for this Court to address the inefficiencies and unfairness that

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[5] Of the 22 juvenile offenders resentenced under Washington's *Miller*-fix statute, the seven who will have an opportunity for release after serving 25 years in prison are those who were all under the age of 16 when they committed their crimes, where judges were required to set the minimum term as 25 years. When sentencing courts have had the discretion to set it higher, they generally have set it much higher. Of those who were between the ages of 16 and 18 when they committed their crimes, upon resentencing, they received minimum sentences of 42, 50, 48, 38, 48, 38, 48, 46, 40, 189, 26, 125, 32, and 35 years. *See, respectively*, *State v. Backstrom*, No. 97-1-01993-6 (Snohomish Cty. Sup. Ct. June 27, 2017)), *State v. Boot*, No. 95-1-00310-0 (Spokane Cty. Sup. Ct. Mar. 30, 2017), *State v. Delbosque*, No. 93-1-00256-4 (Mason Cty. Sup. Ct. Nov. 23, 2016), *State v. Forrester*, No. 1-25095 (1978) (Spokane Cty. Sup. Ct. Nov. 12, 2015), *State v. Furman*, No. 89-1-00304-8 (Kitsap Cty. Sup. Ct. Mar. 26, 2018), *State v. Haag*, No. 94-1-00411-2 (Cowlitz Cty. Sup. Ct. Jan. 19, 2018), *State v. Leo*, No. 98-1-03161-3 (Pierce Cty. Sup. Ct. Nov. 16, 2016), *State v. Loukaitis*, No. 96-1-00548-0 (Grant Cty. Sup. Ct. Apr. 19, 2017), *State v. Hofstetter*, No. 91-1-02993-0 (Pierce Cty. Sup. Ct. Oct. 18, 2013), *State v. Phet*, No. 98-1-03162-1 (Pierce Cty. Sup. Ct. Mar. 10, 2016), *State v. Skay*, No. 95-1-01942-5 (Snohomish Cty. Sup. Ct. June 1, 2016), and *State v. Thang*, No. 98-1-00278-7 (Spokane Cty. Sup. Ct. Sept. 23, 2015). Before juvenile life without parole was declared unconstitutional in *Bassett*, 192 Wn.2d 67, three received LWOP. *See State v. Ngoeung*, No. 94-1-03719-8 (Pierce Cty. Sup. Ct. Jan. 23, 2015 & July 12, 2019), *State v. Stevenson*, No. 87-1-00011-5 (Skamania Cty. Sup. Ct. Mar. 17, 2017), and *State v. Bassett*, No. 95-1-00415-9 (Grays Harbor Cty. Sup. Ct. Jan. 30, 2015).

exist under the current standards by providing guidance to the lower courts and by clarifying that the mitigating qualities of youth are presumptively the basis for an exceptional sentence.

## CONCLUSION

Amicus respectfully requests that the Court accept review of this case as an opportunity to continue to build on the state's juvenile justice jurisprudence and to address what *Houston-Sconiers* left unaddressed. Doing so will result in fewer appeals and a lower risk of unconstitutional sentencing of children in Washington State.

DATED this 7th day of October 2019.

Respectfully Submitted: [6]

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[6] We acknowledge the contributions of Catherine Bentley, Shelby Bowden, and Kristen Schmit, students in the Korematsu Center Civil Rights Clinic.

## DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on October 7th, 2019, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 7th day of October, 2019.

*/s/ Jessica Levin*
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FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

## KOREMATSU CENTER FOR LAW AND EQUALITY

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