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No. 51409-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

TIMOTHY HAAG, Appellant.

Appeal from the Superior Court of Cowlitz County
The Honorable Stephen M. Warning
The Honorable Michael Evans
The Honorable Marilyn Haan
No. 94-1-00411-2

BRIEF OF APPELLANT
TIMOTHY HAAG

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II. STATEMENT OF THE CASE

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 2 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) including, but 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 10.95.030-10.95.035.

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. 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 Mr. Haag was “not irretrievably depraved nor irreparably corrupt.” RPI 25. In contrast, the prosecutor focused exclusively on the original crime instead of the actual reasons for the re-sentencing: the possibility of rehabilitation and the diminished culpability because of youth. Unfortunately, this hope proved false when he was sentenced to an additional 22 years purely for retribution. RPI 25.

Haag in 1994

Twenty-four years ago, then just 17-year-old 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, the oldest of whom his mother had when she herself was just a teenager. CP 62, 87. At the age of five, his parents separated. CP 63. Apart from a brief return when Haag was 12, Haag's father was wholly absent from the lives of his five children and their mother. Id. Without a husband to help provide for her large family, Haag's 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.

When Haag's mother moved in with Bob and brought her children with her, she did so simply because he provided some desperately-needed financial security. CP 64. Unfortunately, that was all Bob provided. In the two years he lived there, Haag was berated, mocked, yelled at, and threatened with eviction and arrest if he ever acted up. CP 64. On top of this, Haag had to deal with the stress of moving to a new school where he was bullied for his weight and had few friends. Id. Although at trial he would claim to have friends at school, he admitted that he never brought them over and could not name a single one of these "friends." CP 600. Haag had also by this point realized that he was gay but did not feel free to tell anyone, even his mother. CP 71. Haag was confused as he was guilt-ridden over his attraction to men. Id. He was ashamed of himself and felt alone. CP 72-73,

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. This friendship, however, became complicated for Haag as he began to develop feelings for Alex but felt forced to hide it due to Alex's disparaging comments toward "queers" and "faggots." CP 71. On top of this was, 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 and older sister. He was eventually placed in a foster home where Haag would take the bus to visit him after school and on weekends. CP 67. Eventually, Alex left the state altogether for the Job Corps in Oregon. CP 53.

Haag now had no one and became even lonelier once school ended for the summer. CP 53. He had no one else to talk to and was scared to tell his mother about his feelings. Left alone for weeks to stew in his anger at Alex's family for the maltreatment of his best friend and depression from his stepfather's abuse and his self-hatred over his weight and sexuality, 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. She had often come over to his home, even without her parent's permission, and even though she had never hurt Alex, this time

she became the target of his irrational outburst. Haag choked and drowned her. To this day, Haag regrets those “horrible” actions that ended the life of the young girl and cause so much pain to her family. CP 75.

Later that same evening, Haag was discovered and arrested by the police. He was taken to the police station where, between 9:35 pm and 2 am, Haag was questioned by the police without his parents or a lawyer present. CP 314. No video or audio transcript was taken. CP 526. At some point between 1 and 2 am, Haag wrote a statement stating that he could not remember anything but that if he did it, a “possible reason was built-up rage towards the family.” CP 509. He also wrote that “[d]uring the interview, Detective McDaniel helped me remember that I was in the kitchen during the blackout.” Id. 509. The police officer later denied suggesting any information to Haag but did admit to simply persisting in questioning Haag until he got an answer that he believed was the truth. CP 514, 522.

Around 2 am, after more than 4 hours of questioning, Haag finally saw his parents and spent a half-hour with them before being taken to the hospital for samples. CP 473, 496 (Nurse began to take samples at 4:59 a.m.) He was finally allowed to sleep sometime after 6:15 am¹. CP 496,

¹ Officer McDaniel testified that Haag left the hospital around 6:15 am but did not say how long it took for Haag to be booked and brought to his cell when he was finally able to sleep.

498. That day he was left alone in the jail and had no contact with anyone else. CP 499. July 11, the police officer who had earlier interrogated him, came at 8:44 a.m. and took him to the interrogation room again. CP 498. Half-hour later, the officer came out with a written statement confessing to the crime and including language that was construed as evidence of kidnapping. CP 367. Again, neither parent nor lawyer were present and no audio or video transcript was taken. CP 525, 526.

At trial, the prosecutor pushed for findings of premeditation and kidnapping. In her closing argument, the prosecutor conflated the parent's lack of consent for Rachel to go next door with Rachel visiting unwillingly and heavily relied on Haag's second statement, along with the length of time needed for the strangulation to establish the premeditation and kidnapping. CP 665-671 (asks for 3 minutes of silence). She also suggested a sexual motive despite the fact that no semen was found by the crime lab. CP 681. 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.

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 ticket. 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.

That first year in Walla Walla, he worked for and earned his high school diploma. CP 54; RPII 162. He then took additional courses through Walla Walla Community College. CP54. He has 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 out in classes. CP 54-55, Exhibit 7; RPII 163.

Haag was also baptized as a Jehovah's Witness during his second year in prison and has been involved in the church ever since. In Walla Walla, he worked as a custodian in the chapel twice and as a clerk in the chapel twice. Now at Stafford Creek, he makes a point to attend a study group three times a week. His 22 years as a Jehovah's Witness have given him both comfort in prison as well as drive to grow as a person.

Outside of his faith and prison programs, Haag has kept busy through various employment opportunities. Aside from his work as a custodian and then clerk in the chapel, he has worked as a sales order data inventory clerk in the sign shop, as a server in the kitchen, and a custodian

in Stafford Creek. 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.” CP54-55, 89. See Exhibit 7 – DOC certificates.

Endorsements

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 inmates of Haag’s in Walla Walla spoke at the re-sentencing hearing where 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 p100, 104,106. He told the court Tim Haag was now a mature man and that he would be welcome in his home. RPII 107-109.

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 at 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 at 62. In her professional opinion, “[d]espite his intelligence, Timothy functioned younger than his chronological age emotionally. His tragic offense was the result of an unexpected explosion of his untreated grief, anger, and shame. His offense was an anomaly.” Id.

In addition to the SAVRY assessment tool, Dr. Ronald Roesch used the HCR-20 to assess Haag’s current risk of violence and recidivism. CP at 92. Consistent with the results of the SAVRY, the PREA (Prison

Rape Elimination Act) assessment,² and the Level of Service Inventory (LSI),³ Dr. Roesch scored Haag as having a low risk of reoffending. CP at 93. Similar to Dr. Beyer, he concluded that “his 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 at 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.

In contrast, prosecution did not introduce any contravening witnesses or evidence. In their closing argument, the prosecutor focused on the horrific nature of the crime and at no point addressed the claim of whether Haag was rehabilitated or not. RP1 at 113-22. He asked the court to “hold him accountable for the murder” despite Haag having served the entirety of his adult life in prison. Id. at 113. He incorrectly stated that the “the sentencing is about justice for an innocent little girl.” Id. at 114.

² Administered by the prison. CP at 89.

³ Also administered by the prison. CP at 89.

Finally, he questioned the ability of the two psychologists to give opinions on Haag without interviewing more people and to make statements about Haag at 17 despite presenting no evidence to support this argument. Id. at 116-17.

Judge Evans

Near the end of the hearing, Judge Evans remarked that the sentencing decision was “more than mere mortals can handle.” RP2 175. Nevertheless, one week later, he found a way to decide on a sentence of 46 years to life. RP1 27, CP 756-766. This appeal was timely filed. CP769,

The Judge opened his remarks at the sentencing hearing by expressing his “deepest sympathies” to the Dillard family “who have suffered indescribable pain and utter heartbreak.” RPI, p.16. In his decision, he expressed concern that “I’ve seen no report that tells me Mr. Haag has engaged in any mental health counseling or any type of counseling that has allowed him to address the underlying issues that led to the strangling of Miss Rachel. A prisoner can be a model prisoner for twenty-plus years but still have untreated, underlying issues.” RPI p.22. He went on to state that “One aspect of the HCR-20 that caused me some concern is that the relationship stability prong of the assessment, which forms nearly one-third of the assessment questions, was not administered because Mr. Haag did not have a measurable relationship as a youth or adult.” Id. at 23. According to Dr. Roesch, who administered the HCR-20, 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. CP at 92. Its omission did not affect Dr. Roesch's confidence in the assessment. Id. at 93-94. Dr. Roesch had also earlier stated that Haag "does not have any mental health issues or anger problems that would place him at risk for future offending." Id. at 94. This conclusion was mirrored by Dr. Beyer. Id. at 62. Haag has also participated in anger/stress management courses in prison. Id. at 89.

While arguing against the conclusions of both expert psychologists that Haag had likely not planned out the crime in advance, Judge Evans explicitly pointed to the victim impact statement of the victim's brother, Alex Anderson. He wrote "Mr. Alex Anderson indicated that Mr. Haag was fascinated with death and all things macabre. Mr. Alex reported that Mr. Haag enjoyed watching a show entitled Faces of Death that shows video footage of people being killed or sufferings some type of trauma that ends their life." RP1 at 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.” RPI at 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.

IV. ARGUMENT

Issue No 1 – The Court’s focus on retribution for the victim in setting a minimum sentence of 46 years re-imposed the functional equivalent of a life sentence and failed to provide a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation

h) The Court failed to provide a meaningful opportunity for release based on demonstrated maturity and rehabilitation by relying on retribution rather than rehabilitation in imposing a de facto life sentence in violation of the Eighth Amendment and article 1, section 14.

“Children are different”⁴ has been the theme of the recent string of Supreme Court decisions on juvenile⁵ sentencing cases. *Miller v. Alabama*, 567 U.S. 460, 471, 132 S. Ct.2455, 183 L. Ed 2d 407 (2012); *Roper v. Simmons*, 543U.S. 551,572, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), held that juveniles’ lack of maturity, susceptibility to negative influences and outside pressures, and their still-changing character made it

⁴ 132 S. Ct. 2455, 2470 (2012).

⁵ Note: By “juveniles,” I refer to persons under 18 years old.

clear that there was no constitutional justification for the imposition of the death penalty on juvenile offenders. 125 S. Ct. 1183, 1196 (2005).

Relying on empirical data and scientific studies, the *Roper* Court specifically found that juveniles are less capable of mature judgement, are less capable of self-regulation, are unable to foresee and take into account courses of behavior.

As the U.S. Supreme Court noted in *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) “Youth is more than a chronological fact. It is a time and condition of life when a person maybe most susceptible to influence and psychological damage.” “The characteristic of a juvenile is not as well formed as that of an adult,” and [the] personality traits of a juvenile are more transitory, less fixed.” *Roper*, 543 U.S. at 540.

Accordingly, ‘juveniles are more capable of change than are adults, and their actions are less likely to be evidence of “irretrievably depraved character.”’ *Graham*, 130 S. Ct at 2026.

Defendant Graham was 16 years old when he committed armed burglary but was sentenced to probation under a plea agreement. 560 U.S. 48, 130 S.Ct. 2011, 176 L. Ed 2d 825 (2010). Further crimes violated the terms of his parole leading to a conviction and sentencing of life in prison with no possibility of parole. *Id* at 2018-20.

The Supreme Court held that the imposition of a life without parole sentence for a nonhomicide crime to a juvenile offender violated the Eighth Amendment, *Id.* at 2034. explaining that “[defendant’s]

sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as teenager are not representative of his true character.” *Id.* at 2033. Supported by national and international consensus, as well as continued research showing continuing to show the fundamental differences between adult and juvenile brains, the *Graham* Court found no penological justification for life sentences for juveniles convicted of nonhomicide offenses. *Id.* at 2030.

The special characteristics of juveniles the Supreme Court identified in *Graham*, and that are supported by a growing body of research, apply equally to juveniles convicted of homicide offenses. *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct.2455, 183 L. Ed 2d 407 (2012). In *Miller*, 132 S. Ct. 2455 (2012), two separate cases were consolidated before the court, the defendants were 14 when they committed capital murder and were given the mandatory sentence for such crimes of life without parole. *Miller*, at 2475.

The Court ultimately held that the mandatory sentencing of juveniles to life without parole sentences violated the Eight Amendment’s cruel and unusual ban. *Id.* at 2475. Such practice violates the principle of proportionality by treating adults and children alike in meting out punishment. *Id.* Juveniles must be treated differently. Before imposing a sentence that amounts to a lifetime in prison, *Miller* requires sentencing courts to evaluate the juvenile’s individual circumstances and impose a

sentence proportional to his culpability. *Miller*, 132 S. Ct. at 2468.

Culpability is not defined by the juvenile’s participation in the offense, Instead the Court then laid out a nonexhaustive list of considerations that distinguishes youth. *Id.*

“Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys and the possibility of rehabilitation. *Miller*, 132 S.Ct. at 2468, See, e.g., *Graham*, 560 U.S., at 78, 130 S.Ct., at 2032 (“[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings”); *J.D.B. v. North Carolina*, 564 U.S. 261, 269, 131 S.Ct. 2394, 2400–2401, 180 L.Ed.2d 310 (2011) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.”⁶

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

⁶ *Id.* at 2468.

“irreparable corruption.” *Miller*, 132 S.Ct. at 2469. Four years after *Miller* was decided, the U.S. Supreme Court held that *Miller* announced a substantive rule of constitutional law and is retroactively applicable. *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718, 193 L.Ed. 2d 599 (2016). [P]risoners like Montgomery 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 736.⁷ In *Iowa v. Null*, 836 N.W.2d 41 (Iowa 2013), defendant was sentenced to 52.5 to 75 years for second-degree murder and first-degree robbery for a 2010 crime committed when he was 16. He was thus not eligible for parole until he was 69 years old. *Id.* at 45.

The Iowa Supreme Court decided that, although the sentence was technically not a life without parole sentence, it was sufficient to trigger *Miller* protections: “Even if lesser sentences than life without parole might be less problematic, we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*. The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not

⁷ 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.

provide a ‘meaningful opportunity’ to demonstrate the ‘maturity and rehabilitation’ required to obtain release and reenter society as required by *Graham*.” *Id.* at 71. Our case is similar, the prospect of geriatric release does not provide a meaningful opportunity to reenter society.

Similarly, in *Bear Cloud v. Wyoming*, 334 P.3d 132 (Wyo. 2014), Bear Cloud was sentenced to 45 years to life for his 2009 conviction for robbery and murder. This case was at the tail end of 5 years of appeals and remands that went up and down the state courts and even to the U.S. Supreme Court regarding the conviction, what matters here is that defendant was given an aggregate sentence of 45 years to life for aggravated burglary, first-degree murder, and conspiracy to commit aggravated burglary. *Id.* at 135-36.

Citing *Null*, The Wyoming Supreme Court remanded for resentencing. *Id.* at 142-46 “As a practical matter, a juvenile offender sentenced to a lengthy-term-years sentence will not have a ‘meaningful opportunity for release....On remand the district court should weigh the entire sentencing package, and in doing so it must consider the practical result of lengthy consecutive sentences, in light of the mitigating factors of youth.” *Id.* at 142-44

In *Casiano v. Commissioner of Corrections*, 317 Conn 52, 115 A.3d 1031 (Conn. 2015), defendant was 16 in 1995 when he robbed a Subway store and shot an employee. He was sentenced to 50 years in prison for felony murder and 20 years each on attempted robbery in the

first degree and conspiracy to commit robbery in the first degree. *Casiano*, 115 A.3d at 1033-34. He was not eligible for parole on the 50-year felony murder conviction. *Id.* Following *Miller*, he filed a writ of habeas corpus on the issue of his sentence. 115 A.3d at 1034.

The Connecticut Supreme Court remanded for resentencing, holding that geriatric release for juvenile offenders was enough to be covered by *Miller*. “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.” 115 A.3d at 1047.

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, 176 L. Ed 2d 825 (2010). *Graham* concluded that, because it denies juvenile offenders the opportunity to demonstrate growth and maturity, life-without-parole sentences for non-homicide offenses was unconstitutionally cruel. 130 S. Ct. 2011, 2029 (2011). This logic was extended in *Miller v. Alabama* to all juvenile offenders; no juvenile can be sentenced to life without parole, regardless of offense. 132 S. Ct. at 2481. Children are less blameworthy because they are less capable of making

reasoned decisions. *Miller*, 567 U.S. at 471. These decisions were based on the growing amount of scientific research confirming what most people already know: that children are different and cannot be held to the same standard as adults. *Miller*, 567 U.S. at 471.

Here, Mr. Haag presented evidence of his life when he was only 17, immature, lonely, confused, taunted and living in poverty and contrasted his juvenile condition with demonstrations of growth, maturity, and rehabilitation in every facet of his life. CP 57 He held all of his prison jobs for the full 4 years permitted by DOC policy CP 54-55, he obtained an education and became a mentor to other entering the system. CP 121-125 He had but a single infraction in DOC CP 62-95, and that more than 20 years before his re-sentencing. If Mr Haag is not permitted to have an opportunity to truly re-enter society or have any meaningful life outside of prison, one wonders what he would have had to do in addition to be afforded such an opportunity.

b. As Directed By RCW 10.95.030(a)(ii) and (b)(The Miller “fix”) The Court Was Obligated To Meaningfully Weigh The Diminished Culpability Of Youth In Setting The Minimum Term.

Second Substitute Senate Bill 5064 has been commonly called “the *Miller* fix” attempted to resolve the issue of sentencing for offenses committed by persons before their eighteenth birthday.

Under the provision applicable in this case, RCW 10.95.030(3)(a)(ii) those who are at least sixteen but younger than eighteen convicted of the crime of aggravated first degree murder can be sentenced to no less than 25 years. And a maximum term of life. The offender is not be eligible for parole or early release until their minimum sentence is served. In setting the minimum term, courts must “take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*.” RCW 10.95.030(b). The juvenile offender must serve the full minimum term before they can petition for release. RCW 10.95.030(c). After the service of the minimum term, the indeterminate sentence review board will determine the person’s risk of re-offense using a preponderance of the evidence standard. RCW 10.95.030(f). The next hearing following denial of release can be no more than five years from the date of denial. RCW 10.95.030(f).

Thus, under our legislative scheme, RCW 10.95.030(3)(a)(ii) requires the court resentence in accordance with *Miller*. Here, the court had written reports and heard expert testimony from Dr. Marty Beyer and Dr. Ronald Roesch. CP 62-120, RPII 6-93, both eminently qualified to render opinions.

Dr. Beyer summarized her findings at CP 62, in which she addressed 17 year old Haag’s immaturity, isolation, grief and shame as he realized he was gay. He was traumatized by the loss of his father, poverty, constantly being bullied and ridiculed for being overweight,

psychologically maltreated by his step-father. Despite his intelligence he functioned younger than his chronological age. She described his offense as an anomaly and summarized his maturity over the past 20 plus years in prison that is marked by employment, good behavior, programming and education. He received the lowest possible risk to re-offend rating on the SAVRY's 24 risk items. CP 77.

Dr. Roesch also testified and evaluated Haag as having a low risk to reoffend. The court also had information from his prison counselor, Mary Lou Anderson, (CP 54-55) a prison volunteer chaplain, Kenneth Pearson (RPII 96-109 and a former inmate, Dorcy Long. RPII 152-157, His mother, Sharon Owens and Aunt Janice Beatty also addressed the court. RP II 158-160. All evidence presented was undisputed, Timothy Haag is not the immature, isolated youth he was when he committed his one only crime. He amply demonstrated that he is not irreparably corrupt.

RCW 10.95.030(3)(b) requires the court to apply the Miller factors and as the *Montgomery* court stated: “[P]risoners like Montgomery 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.” *Montgomery*, 136 S. Ct. at 736. It is at a resentencing years later, as here, the court had the opportunity to review 24 years of change and rehabilitation, that a court can make the most informed decision. The United States Supreme Court has recognized that

post-sentencing rehabilitation can inform an intelligent resentencing decision. *United States v. Pepper*, 131 S.Ct 1229, 1242, 179 L.Ed.3d 196 (2011). The Supreme Court has also applied that holding about the differences between children and adults in several specific contexts, including confessions, *J.D.B. v. North Carolina*, 564 U.S. 261, 277, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011).; *State v. Houston-Sconiers*, 188 Wash. 2d 1, 18–19, 391 P.3d 409, 418 (2017). In this case, Mr. Haag was interrogated for hours through the night and again the following day after being left alone for a day in jail with not contact with family or an attorney. CP 473, 496-499, 525-526.

Here, Mr. Haag presented evidence regarding his immaturity when he was 17. Dr. Beyer opined he was less mature than other his age. He also demonstrated his rehabilitation and maturation and under our sentencing scheme devised to meet the mandates of a constitutionally permissible sentencing review, the court was required to give meaningful application to the factors underpinning a constitutionally permissible life sentence.

c. The Court Abused Its Discretion When It Failed To Comply With The Constitutional Mandates Of Miller

A trial court has abused its discretion if its decision "is manifestly unreasonable or 'rests on facts unsupported in the record or was reached by applying the wrong legal standard.'" *State v. Rohrich*, 149 Wn.2d 647,

654, 71 P.3d 638 (2003). A trial judge afforded discretion is not free to act at whim or in boundless fashion, and discretion does not allow the trial judge to make any decision he or she is inclined to make:

"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains."

Coggle v. Snow, 56 Wn. App. 499, 504-05, 784 P.2d 554 (1990) (quoting Benjamin Cardozo, *The Nature of the Judicial Process* 141 (1921)). But, within bounds set by case law and statute, the grant of discretion is broad: "Affording discretion to a trial court allows the trial court to operate within a 'range of acceptable choices.'" *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (internal quotation marks omitted) (quoting *Rohrich*, 149 Wn.2d at 654).

The *Roper*, *Graham*, and *Miller* line of cases require sentencing to be based on individual characteristics of the juvenile defendant. Given these principles, it is clear that in order to give effect to *Miller's* substantive holding, every case where a juvenile offender faces a standard range sentence of life without parole (or its functional equivalent) necessarily requires a *Miller* hearing. *State v. Ramos*, 187 Wash. 2d 420,

443, 387 P.3d 650, 662, as amended (Feb. 22, 2017), reconsideration denied (Feb. 23, 2017), cert. denied, 138 S. Ct. 467, 199 L. Ed. 2d 355 (2017)(de facto life sentence reviewed). As discussed in *Ramos*,

The required *Miller* hearing is not an ordinary sentencing proceeding. *Miller* “establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered.” *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572 (2014). Therefore, a court conducting a *Miller* hearing must do far more than simply recite the differences between juveniles and adults and make conclusory statements that the offender has not shown an exceptional downward sentence is justified.

The court must receive and consider relevant mitigation evidence bearing on the circumstances of the offense and the culpability of the offender, including both expert and lay testimony as appropriate. The court and counsel have an affirmative duty to ensure that proper consideration is given to the juvenile's “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” *Miller*, 132 S.Ct. at 2468. It is also necessary to consider the juvenile's “family and home environment” and “the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.” *Id.* And where appropriate, the court should account for “incompetencies associated with youth” that may have had an impact on the proceedings, such as the juvenile's “inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.” *Id.*

When making its decision, the court must be mindful that a life-without-parole sentence is constitutionally prohibited for juvenile homicide offenders whose crimes reflect “ ‘unfortunate yet transient immaturity’ ” rather than “ ‘irreparable corruption.’ ” *Id.* at 2469 (quoting *Roper*, 543 U.S. at 573, 125 S.Ct. 1183). Moreover, due to “children's diminished culpability and heightened capacity for change ... appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” *Id.* The sentencing court must thoroughly explain its

reasoning, specifically considering the differences between juveniles and adults identified by the *Miller* Court and how those differences apply to the case presented. While formal written findings of fact and conclusions of law are not strictly required, they are always preferable to ensure that the relevant considerations have been made and to facilitate appellate review.

State v. Ramos, 187 Wash. 2d 420, 443–44, 387 P.3d 650, 662–63, *as amended* (Feb. 22, 2017), *reconsideration denied* (Feb. 23, 2017), *cert. denied*, 138 S. Ct. 467, 199 L. Ed. 2d 355 (2017)

For Eighth Amendment purposes, a sentence of life without the possibility of parole is the harshest penalty that may be imposed on a juvenile. *Miller*, 132 S.Ct at 2475. This penalty is reserved for only the rarest case involving a juvenile offender who is irredeemable corrupt. *Id.* At 2469. Mr. Haag’s undisputed record of caring and responsible behavior as he matured, despite being in prison, demonstrates he is not irredeemable. RPI 25, 27

In *Graham* the Court reiterated the critical differences between juveniles and adults that it set out in *Roper v. Simmons*, 543 U.S. 551 (2005) differences that do not absolve juveniles of responsibility for their crimes, but do reduce their culpability and undermine any justification for ending their free lives. The *Graham* Court noted that juveniles lack adult capacity for mature judgment, *Graham*, 130 S. Ct. at 2026-27. Consequently, the juvenile should not be deprived of the opportunity to achieve “maturity of judgment and self-recognition of human worth and

potential” with “no chance to leave prison before life’s end” because maturity can lead to that considered reflection which is the foundation for remorse, renewal and rehabilitation. *Graham*, 130 S. Ct. at 2032.

This is the situation presented in this case and rather than embrace Haag’s demonstration of maturity, remorse and rehabilitation the sentencing court defaulted to retribution as the overriding consideration guiding its decision. The emotional appeal of such an approach cannot be overstated and is demonstrated by the sentencing judge’s expressed sympathy for the Dillard family (RPI 16), the use of inflammatory language to describe the crime as “monstrous” (RPI 19), and the comment that the killing of the young neighbor girl was worse than a store clerk being shot in a “robbery gone bad”, or the death of a rival gang member from a single gunshot or a vehicular homicide from a head on collision from driving too fast. RPI 18. As an aside, none of these comparisons appear to be crimes that would have been prosecuted as aggravated murder and thus, would not be in the same posture. The court’s true motivation in fashioning a sentence is found in the statement that “Retribution holds that punishment is a necessary and deserved consequence for one’s criminal act. Under the retributive theory the severity of the punishment is calculated by the gravity of the wrong committed.” RPI 25 and his comment, “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.” RPI 27.

Juveniles’ immaturity and vulnerability mean that “the case for retribution is not as strong with a minor as an adult.” *Roper*, 543 U.S. at 547. Most significantly, juveniles’ immaturity or failure to appreciate risk or consequence are temporary deficits. *Miller*, 132 S. Ct. at 2464. The *Miller* Court’s reasoning draws from the evolving science of brain development and sociological studies, but its resulting rule of law is grounded in the fundamental constitutional principle prohibiting excessive sanctions under the Eighth Amendment. Juveniles profound difference from adults undermine the possible penological justification for punishing juvenile offenders with a sentence that “guarantees he will die in prison without any meaningful opportunity to obtain release.” *Graham*, 130 S. Ct. at 2033. Nor can a sentencing court justify a life sentence for a juvenile simply because a child has committed a serious or shocking offense. *Adams v. Alabama*, 136 S.Ct, 1796, 1800 (2016) (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)). “The gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption: ‘the reality that juvenile’s still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”

The court had undisputed evidence regarding his individual characteristics that supported a sentence that would have afforded meaningful opportunity for release. The 46 year minimum sentence does not provide a meaningful opportunity for release. RPI 27, CP 756-766 The court abused its discretion by failing to appreciate the differences between juvenile and adult culpability and the limited justification of sentence premised primarily on retribution.

The Court's focus on "retribution" rather than the Haag's immaturity at the time of the offense, his utter lack of any other criminal offenses, his stellar record in prison and demonstration of maturity and rehabilitation, violates *Miller* and our statutory "fix". The court's disregard for the uncontroverted testimony presented by the defense, and the repeated references to Haag as a man and to his size while imposing a minimum sentence of 46 years "contravenes *Graham's* foundational principle" that a judge may not impose such penalties on juveniles "as though they were not children." *Miller*, 132 S.Ct. at 2466. See also, *Roper v. Simmons*, 543 U.S. 551, 569-74, 125 S.Ct. 1183, 161 L.Ed2d 1 (2005).

- d. Mr. Haag's remarkable rehabilitation, overcoming child hood trauma, poverty and emotional abuse, establishes that he has not received the constitutionally mandated meaningful opportunity for release.**

The sentence in this case does not allow a parole board hearing until after Haag has served 46 years, and does not provide Haag with a meaningful opportunity for release. *Miller* demonstrates that the prior

rules requiring a sentencing judge to impose an adult based sentence upon a juvenile, without accounting for his age and its attributes violates the fundamental principle barring cruel and unusual punishment. Further, the *Graham* Court found that a sentence lacking any legitimate penological justification is by its nature disproportionate to the offense, in violation of the Eighth Amendment.

Incarcerating a child for the rest of his life is rarely justifiable when a juvenile’s developmental immaturity is temporary and his capacity for change is substantial.⁸ *Miller*, at 2464-65, see M. Levick, et al, “The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood Adolescence,” U. Pa. J.L. & Soc. Change, 297 (2012). The scientific research does not provide any reason to distinguish between homicide and non-homicide convictions in this regard. In either case, the signature qualities of adolescence reduce a juvenile’s culpability and increase their capacity for change. Condemning an immature, vulnerable and not yet fully formed adolescent to live every remaining day of their life in prison, no matter what the crime, is thus constitutionally disproportionate sentence.

⁸ As a juvenile homicide offender facing a de facto life-without-parole sentence, petitioner Joel Rodriguez Ramos was entitled to a *Miller* hearing, just as a juvenile homicide offender facing a literal life-without-parole sentence would be. *State v. Ramos*, 187 Wn.2d 420, 429, 387 P.3d 650, 656, as amended (Feb. 22, 2017), reconsideration denied (Feb. 23, 2017), cert. denied, 138 S. Ct. 467, 199 L. Ed. 2d 355 (2017)

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 he not to release him, Haag would have to wait another 5 years before again petitioning for release. RCW 10.95. 030(3)(f). The average life expectancy for men who are not in prison is approximately 78 years, and prison accelerates the negative consequences of aging. There is substantial research on the negative effects of prison on life expectancy. Pridemore, William Alex, *The Mortality Penalty of Incarceration: Evidence From A Population-Based Case Control Study Of Working-Age Males*, Journal of Health and Social Behavior, Vol 55(2)(215-233 (2014); Patterson, Evelyn PhD, *The Dose-Response of Time Served in Prison On Mortality: New York State 1989-2003*. American Journal of Public Health Vol. 103, No,3 March 2013; Chammah, Maurice, *Do you Age Faster in Prison? The Marshall Project August 24, 2015* <https://www.themarshallproject.org/2015/08/24/15/do-you-age-faster-in-prison>. The actual extent of the diminished life expectancy resulting from imprisonment was addressed by the United States Sentencing Commission which defines a life sentence as 470 months, just over 39 years. US Sentencing Commission, "US Sentencing Commission Quarterly Data Report: Fiscal Year 2017", pg. 28, n. 1. Based on the

median age of sentencing of 25 years⁹, the life expectancy for a person in general prison population is 64 years of age. 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 adult 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*, available on line at: <https://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf>. That number is even lower for those who began their sentences as children, thus serving more years in prison than their adult counterparts with the same sentence. Michigan youth serving a natural life sentence were found to have an average life expectancy of 50.6 years. *Id.* Thus, the court's re-imposition of a sentence that does not provide for even the possibility of release until age 64 again imposed a life sentence.

Issue No 2 - Imposition of A Sentence That Results In A Juvenile Who Is Not Irredeemably Corrupt or Depraved To Die In Prison Violates Not Only The Eighth Amendment But Also The More Protective Washington State Constitution Prohibition Against Cruel Punishment.

Our Supreme Court recognized our repeated recognition "that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment." *State v. Roberts*, 142

⁹ Of note, is Mr. 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.

Wn.2d 471, 506, 14 P.3d 713 (2000); Wash. Const. art I, Section 14. This “established principle” does not require analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). *Id.* at 506 n.11. Given *Miller’s* almost categorical prohibition on sentences of lifetime incarceration for a juvenile, article I, section 14 further bars the imposition of a de facto life sentence lasting the rest of a 17 year old offender’s life when that sentence was imposed without meaningful application of the *Graham* and *Miller* factors.

In *State v. Bassett*, 198 Wn. App. 714, 394 P.3d 430, *review granted*, 189 Wn.2d 1008 (2017), this Court examined imposition of life without possibility of parole on a juvenile offender under RCW 10.95.030(3), in light of the state constitutional prohibition against “cruel” punishment. *Bassett*, *supra*. Article I, § 14 provides, in relevant part, that “[e]xcessive bail shall not be required. . .nor cruel punishment inflicted.” This provision provides greater protection to our citizens than the Eighth Amendment, which prohibits only those punishments which are both cruel and unusual. *See, e.g., State v. Manussier*, 129 Wn.2d 652, 674, 677, 921 P.2d 473 (1996); *see also, State v. Rivers*, 129 Wn.2d 697, 921 P.2d 495 (1996). As a result, by definition, because the federal constitution has been interpreted as providing less protection than our state provision, anything which violates the federal provision will be deemed to have violated our state constitution as well. *See Manussier*, 129 Wn.2d at 674. But further, the fact that our state constitution is focused solely on “cruel”

punishment without requiring that punishment to be “unusual” supports the conclusion that our state clause is more protective in this regard than is the federal constitution. *Id.*

In *Bassett*, this Court found that Article 1, § 14 creates a “categorical bar” against imposing life without the possibility of parole for even the most heinous of juvenile crimes. 198 Wn. App. at 716, 727-732. The court cited with approval the Iowa case of *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016). In that case, 17-year-old Isaiah Sweet in 2012 killed his grandparents who had raised him. 879 N.W.2d at 812-813. He was sentenced to life in prison without parole. *Sweet*, at 816.

The Iowa Supreme Court ruled that the state constitution created a categorical bar against the imposition of life without parole sentences on juvenile offenders. *Id.* at 839. It reasoned that Miller essentially requires the sentencing judge to decide that a youth is irredeemably corrupt before sentencing them for life. The problem is that this kind of speculation when the offender is still a juvenile is inherently unreliable. *Id.* It therefore imposed a categorical ban on such sentences under the Iowa constitution. *Id.*

The *Bassett* Court likewise examined the sentencing practice itself, rather than using a proportionality analysis specific to the defendant’s case. *Id.* at 732-733. Citing *Ramos*, 187 Wn.2d 420-455, 387 P.3d 650 (2017), and *Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), this Court noted that our state’s highest Court has extended *Miller’s*

protections even beyond its holding in federal courts. *Bassett*, 198 Wn. App. At 737. In *Ramos*, the *Bassett* Court noted, the Supreme Court extended application of *Miller* “to juveniles sentenced for multiple homicides or to de facto life sentences.” *Bassett* at 736.

In *Houston-Sconiers*, the Supreme Court extended the reasoning of *Miller*, holding that, under the Eighth Amendment prohibition against cruel and unusual punishment, “sentencing courts must have absolute discretion to depart as far as they want below the otherwise applicable ranges and/or sentencing enhancements when sentencing juveniles in adult court, regardless of how the juvenile got there.” *Houston-Sconiers*, 188 Wn.2d at 9, 18. Just as in *Ramos*, the extension occurred even though the U.S. Supreme Court had yet to reach this conclusion. *Houston-Sconiers*, 188 Wn.2d 1, 9. Of special note for this case, our Supreme Court applied *Miller* and found a right to an individualized *Miller* hearing for crimes not involving murder - even though the sentences in that case were 26 and 31 years - far less than “life without parole.” *Houston-Sconiers*, 188 Wn.2d at 19-20.

In *Bassett*, this Court relied on these recent high court decisions, and the greater protections of our state constitution, to find that “societal standards of decency favor banning life without parole” for juvenile crimes. *Bassett*, 198 Wn. App. at 741. The Court detailed the recent building of “national consensus against juvenile life without parole sentences,” then turned to the difficulties in determining what very few

juvenile homicides justified such a sentence. *Bassett*, 198 Wn. App. at 741-742. Even under the Eighth Amendment, the U.S. Supreme Court had admitted the serious difficulty even expert psychologists had in making the required distinction “between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Bassett*, 198 Wn. App. at 741, quoting, *Roper v. Simmons*, 543 U.S. 551, 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

As discussed by the *Bassett* Court, the “fundamental problem with our Miller-fix statute” - that the sentencing court is required to make a distinction which even expert psychologists have serious trouble making. *Bassett*, 198 Wn. App. at 742. The Court stated: “The sentencing court must separate the irretrievably corrupt juveniles from those whose crimes reflect transient immaturity - a task even expert psychologists cannot complete with certainty. Thus, the Miller-fix statute results in an unacceptable risk that juvenile offenders whose crimes reflect transient immaturity will be sentenced to life without parole or early release because the sentencing court mistakenly identifies the juvenile as one of the uncommon, irretrievably corrupt juveniles.” *Id.* at 742.

This risk is even more unacceptable given the different - and greater - protections in the constitution of our state. As noted by the *Bassett* Court, even under the less-protective Eighth Amendment, life without parole for juvenile homicide offenders is supposed to be

“uncommon” and “rare.” *Bassett*, 198 Wn. App. at 742-743. This leads to a logical conundrum - how can Washington’s greater protections be enforced under our state constitution when to comport with those protections, life without parole sentences must be limited to “only the most uncommon and rarest of offenders?” The Court held that this is “an impossible determination for the sentencing court to make when faced with a juvenile offender,” given all the revelations of *Miller* regarding the transient immaturities and weaknesses of youth. *Bassett*, 198 Wn. App. at 743.

Moreover, the Court noted that the *Miller* factors themselves “provide little guidance for a sentencing court and do not alleviate the unacceptable risk” of unconstitutional sentencing, noting that the analysis asked for under those factors is “fraught with risks.” *Bassett*, 198 Wn. App. at 743. For example, this Court noted, how should a sentencing court consider either having a stable family and home or a history of horrendous abuse and no such home? Does the lack of such a stabilizing influence indicate profound wounds so great that hope of rehabilitation should be deemed minimal? Or should a court view the lack of such a home as proof that no chances were given and rehabilitation could be more likely? *Bassett*, 198 Wn. App. at 743. In light of the speculative and uncertain nature of the *Miller* analysis, the Miller-fix statute creates a risk of misidentifying juveniles with hope of rehabilitation for those who are irretrievably corrupt. That is unacceptable under our State’s cruel

punishment proscription. For those reasons, life sentences without parole or early release for juvenile offenders as allowed under RCW 10.95.030(3)(a)(ii) are unconstitutional. *Bassett*, 198 Wn. App. at 743.

Further, under *Bassett*, such a sentence is arguably categorically unconstitutional under the state constitution, regardless of the circumstances of the crime. Even so, the circumstances here cannot be deemed the “worst of the worst” - nor can Mr. Haag.

In *Bassett*, the 16-year-old defendant got revenge after being kicked out by his parents by stealing a rifle, creating a makeshift “silencer,” waiting a few days, then breaking into his home and shooting them dead. Bassett’s friend, who was a year older, disabled the phone line before the attack and afterwards came in and shot Bassett’s father in the head a second time when the man appeared to still be alive. After the shooting, Bassett or his friend then drowned Bassett’s five-year-old brother in a bathtub to conceal their crime, and hid the bodies in various places, then cleaned the home. *Bassett*, 198 Wn. App. at 717. Here, Mr. Haag killed a young neighbor in his own home and hid her body under his bed, the very kind of impetuous, ill-thought out and rash violence which is exactly what *Miller* recognizes are the transient weaknesses of youth.

Although our State Supreme Court has accepted review, the rationale of *Bassett* is compelling. As the U.S. Supreme Court has held, “failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional

adjudication.” *Griffith v. Kentucky*, 479 U.S. 314, 322, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). Once a new constitutional rule is announced, the nation’s highest court held, “the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review.” *Id.*

In the wake of *Miller* and *Montgomery*, twenty states along with the District of Columbia have outright banned life-without-parole sentences for juveniles.¹⁰¹¹ In addition, several state supreme courts have interpreted *Miller* to address the issue of effective life without parole cases (where a term-of-years sentence guarantee a death behind bars) and sentences that do not provide a meaningful opportunity for release (where an offender’s only hope for release is when they are geriatric). The Bassett court concluded that a RCW 10.95.030(a)(ii), was unconstitutional. 198 Wn.2d at 445-46. Even though Mr. Haag was not resentenced to life without the possibility of parole, he was in fact sentenced to a life sentence that does not provide a realistic opportunity

¹⁰ Parole as an adequate remedy when a juvenile is serving a de facto life sentence was recently addressed by our State Supreme Court in *State v. Scott*, 190 Wn.2d 586, 416 P.3d 1182. *Scott* construe RCW 9.94A .730 and found that the right to petition for review and release after 20 years was constitutionally adequate, however, this provision is not at issue in this case.

¹¹ Rovner, Josh., “Juvenile Life Without Parole: An Overview,” The Sentencing Project (Oct. 2017 (Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kansas, Kentucky, Massachusetts, Nevada, New Jersey, North Dakota, South Dakota, Texas, Utah, Vermont, West Virginia, Wyoming). *See also* Associated Press, “A State-By-State Look at Juvenile Life Without Parole,” U.S. News & World Report (July 31, 2017). <https://www.usnews.com/news/best-states/utah/articles/2017-07-31/a-state-by-state-look-at-juvenile-life-without-parole>.

for release, and is in fact another life sentence. His sentence should be reversed as a violation of our State's prohibition against cruel punishment.

Issue No 3 - Mr. Haag Was Deprived Of His Rights To Trial By Jury And Due Process When The Resentencing Court Imposed A Greater Sentence Than Authorized By The Jury's Verdicts ; RCW 10.95.030(3) Is Unconstitutional Under Alleyne

In *Miller*, supra, the U.S. Supreme Court held that it was a violation of the 8th Amendment prohibitions against cruel and unusual punishment to allow automatic or mandatory imposition of a sentence of life without the possibility of parole on a person who was a juvenile when the crime or crimes occurred. 132 S. Ct. at 2468. In response, the Washington legislature has amended our state's sentencing statutes to try to ensure that our laws comply with the constitutional mandates of Miller. See Laws of 2014, ch. 130 (the "Miller fix"); Laws of 2015, ch. 134 (the "Miller fix 2.0"). Those statutes were not applied consistent with those mandates below. But as an initial matter, the entire procedure below was flawed and reversal and remand is required, because RCW 10.95.030 violates the state and federal due process clauses and the 6th Amendment and Article I, §§ 21, 22, rights to trial by jury.

Both the state and federal constitutions guarantee the right to due process and jury trial, both of which "requires that a sentence be authorized by the jury's verdict." *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010); see, *Blakely v. Washington*, 542 U.S. 296,

303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Under these rights, 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); see *Williams-Walker*, 167 W.2d at 896. Since 2004 it has been well-settled that the statutory maximum in question is “the maximum a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant” rather than the statutory maximum authorized for the crime. See *Blakely*, 542 U.S. at 303 (emphasis in original). Our state constitution provides greater protection for jury trials than does the federal clause. See *Williams-Walker*, 167 Wn.2d at 896. Under both, however, the rights are violated if the sentencing court imposes greater punishment than that authorized solely based on the facts actually found by a jury, beyond a reasonable doubt. See *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (*Recuenco III*); *Blakely*, 542 U.S. at 303. Thus, when the prosecution seeks to have a court impose a sentence above the standard range (an “exceptional” sentence), the relevant facts must be proven to and found by a jury, beyond a reasonable doubt. See, *State v. Ortega*, 131 Wn. App. 591, 594-95, 128 P.3d 146 (2006), review denied, 160 Wn.2d 1002 (2007); see RCW 9.94A.537; *Blakely*, 542 U.S. at 303. Further, these rules

apply to “circumstances in aggravation or mitigation,” if the relevant facts “expose a defendant to a greater potential sentence.” *Cunningham v. California*, 549 U.S. 270, 281, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007). In *Alleyne*, decided in 2013, the U.S. Supreme Court reversed its own decision from 11 years before, in *Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), overruled by *Alleyne*, supra. *Alleyne*, 133 S. Ct. at 2159-63. In *Harris*, the Court had found that the principles of *Apprendi* did not apply and the Sixth Amendment and due process did not require that facts relied on to set a higher mandatory minimum sentence had to be proven to a jury, beyond a reasonable doubt. See *Harris*, 536 U.S. at 557-58; see also, *Alleyne*, 133 S. Ct. at 2159-63. Revisiting the issue in *Alleyne*, the Court rejected the reasoning of *Harris*, finding it inconsistent not only with prior caselaw but with “the original meaning of the Sixth Amendment.” 133 S.Ct. at 2155-56. The *Alleyne* Court declared: In *Apprendi*, we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. While *Harris* declined to extend this principle to facts increasing mandatory minimum sentences, *Apprendi*’s definition of “elements” necessarily includes not only fact that increase the ceiling, but also those that increase the floor. Both kinds of facts 9 alter the prescribed range of sentences to which a

defendant is exposed and do so in a manner that aggravates the punishment. Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt. *Alleyne*, 133 S. Ct. at 2158 (emphasis added). *Alleyne* recognized the “obvious truth” that the floor of the mandatory term a defendant must serve was as important as its ceiling. *Alleyne*, 133 S. Ct. at 2160-61.

As a result, setting a minimum term is now within the ambit of *Apprendi* and *Blakely*, so that any fact relied on to increase the minimum must be proven to a jury, beyond a reasonable doubt. RCW 10.95.030 as amended by the so-called “Miller fix” and “Miller fix 2.0” laws runs afoul of these requirements and violates the Sixth Amendment, due process and our state’s right to trial by jury. As relevant here, RCW 10.95.030 sets forth the penalties for aggravated first degree murder as either life imprisonment without the possibility of parole or death, with specific provision for those whose crimes occurred when they were between 16 and 18 years of age: [a]ny person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life

may be imposed, in which case the person will be ineligible for parole or early release. RCW 10.95.030(3)(a)(ii). Thus, the presumptive sentence for an offender who was Haag's age at the time of the crime is a minimum term of "total confinement" of no less than 25 years and a maximum term of life with the possibility of parole. A higher minimum term may be imposed, apparently up to "life," which would amount to a sentence of life without the possibility of parole. Another new section set forth the factors which must be considered by the judge in deciding which sentence to impose: [i]n setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), including but 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). As a result, in considering whether to impose something other than the presumptive sentence of 25 years minimum and a maximum of life with the possibility of parole, the Legislature required the judge to consider not a balance of mitigating and aggravating factors but solely the mitigating factors of youth as discussed in *Miller*, including those specifically laid out in the statute. The statute improperly allows a judge - not a jury - to increase both the minimum and the maximum punishment

from what is presumed - up to life without the possibility of parole - upon consideration of “factors.” And further, the statute does not mandate that the judge’s findings regarding any facts which support his decision are made beyond a reasonable doubt - or even put in writing. RCW 10.95.030(3)(b). As a result, RCW 10.95.030 violates due process and the state and federal rights to trial by jury. *Apprendi* examined the role and purpose of the Sixth Amendment jury trial right in our country, noting it was “[t]o guard against a spirit of oppression and tyranny on the part of rulers,’ and ‘as the great bulwark of [our] civil and political liberties.” 2 J. Story, Commentaries on the Constitution of the United States 540541 (4th ed. 1873) (quoted in *Apprendi*, 530 U.S. at 477). Where the legislature creates a default sentence of less than life without the possibility of parole but allows an LWOP sentence to be imposed after consideration of the Miller factors, those factors must be proved beyond a reasonable doubt by a jury under *Alleyne*. RCW 10.95.030(3) improperly authorizes a procedure which violates the state and federal rights to trial 12 by jury and to due process. Because the statute authorized the judge to make the findings on the relevant facts required to impose the higher minimum and maximum terms, it runs afoul of *Alleyne*. And on remand, because there is no procedure to empanel a jury to make the required findings and no inherent authority for a court to create such a procedure, Haag must be

sentenced to the presumptive term - 25 years minimum with a maximum of life with parole, the only sentence supported by the existing jury verdicts. See, e.g., *State v. Pillatos*, 159 Wn.2d 459,

Issue No. 4 - The remedy is to order a new sentencing hearing before a different judge.

A new judge should be appointed on a case when either it is reasonable to expect the judge would have substantial difficulty putting out of his mind evidence that he should not consider or when reassignment “is advisable” to preserve the appearance of fairness. *In re Ellis*, 356 F.3d 1198, 1211 (9th Cir. 2004). Reassignment to a different sentencing judge is the appropriate remedy in the case at bar. When a judge makes a sentencing decision without factoring in all necessary information, the judge’s continued involvement creates an appearance of unfairness and the remedy is remand before a different judge. *City of Seattle v. Clewis*, 159 Wn.App. 842, 851, 247 P.3d 449 (2011); see *Harrison*, 148 Wn.2d 559 (remedy for prosecution’s breach of plea is “reversal of the original sentence and remand for a new sentencing, preferably before a different judge”); *Sledge*, 133 Wn.2d at 846 n.9 (we “provide for a new judge at the disposition hearing in light of the trial court’s already-expressed views on the disposition”); *Alcala Sanchez*, 666 F.3d at 577 (remanding for resentencing before a different judge – regardless of the prior judge’s

impartiality – because it is necessary “to eliminate the impact of the government’s prior mistake and breach”). In addition to cases where the court’s initial sentencing decision occurred at a time when the prosecution advocated for a sentence that was not part of the plea bargain promise, the appearance of fairness may require reassignment of a case. In *Clewis*, the defendant questioned the judge’s objectivity after the judge ordered a material witness warrant when the prosecution had not requested the order. 159 Wn. App. at 851. Although the issue became moot when the judge later recused himself, the Court of Appeals agreed that if the judge’s continued involvement in the case “created the appearance of a bias” against *Clewis*, the remedy would be a new trial before a different judge. *Id.* Similarly, when a judge pronounces a sentence before it has heard and considered all available information, the remedy is remand for further proceedings before a different judge. *State v. Aguilar-Rivera*, 83 Wn.App. 199, 203, 920 P.2d 623 (1996) (“the appearance of fairness requires that when the right of allocution is inadvertently omitted until after the court announced the sentence it intends to impose the remedy is to send the defendant before a different judge for a new sentencing hearing.”). As this Court held in *State v. Crider*, 78 Wn.App. 849, 899 P.2d 24 (1995), and affirmed in *Aguilar-Rivera*, 83 Wn.App. at 203, Even when the court stands ready and willing to alter the sentence when presented with new

information (and we assume this to be the case here), from the defendant's perspective, the opportunity comes too late. The decision has been announced, and the defendant is arguing from a disadvantaged position. *Crider*, 78 Wn.App. at 861. It is appropriate to reassign this case to a different judge who did not already announce a sentence, so that Mr. Haag is not disadvantaged in his request for a sentence that fully weighs the attributes of youth and his potential for rehabilitation.

V. CONCLUSION

Sentencing a juvenile to spend the rest of his life in prison is the harshest possible penalty available. *Miller*, 132 S.Ct. at 2469. It is a penalty reserved for those rare juveniles who are irredeemably corrupt, beyond redemption, and unfit to enter society despite the diminished capacity and greater prospects for reform that ordinarily distinguish juveniles from adults. *Id.*

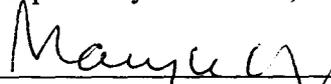
The minimum 46 years to life sentence imposed on Timothy Haag does not include an opportunity for release based on his rehabilitation and demonstrated maturity. Given the data concerning the lifespans of juveniles sentenced to lengthy prison terms, this sentence requires him to spend the rest of his life in prison. Even though the uncontested evidence before the court established that Mr. Haag's crime was the result of the diminished maturity associated with juvenile brain development, trauma

and poverty and that he is not irredeemably corrupt or beyond redemption. Sentencing a person who committed a crime when he was 39 days past his 17th birthday to a sentence that results in a de facto life term, when he is not beyond redemption, is contrary to the dictates of *Miller and Graham* and violates both the Eighth Amendment and Art1, section 14 of the Washington constitution and the dictates of RCW 19.95.030. Finally, the statute established a minimum sentence of 25 years, under *Alleyne, Blakely* and *Apprendi*, a finding above the 25 year minimum required a jury finding.

Mr. Haag has been a model prisoner, who embraced programing, employment and educational opportunities. The experts unanimously agree he is a low risk for re-offense. Timothy Haag requests this court remand to a different trial court with instructions to impose his requested minimum 25 year sentence.

Dated this 17 day of Aug, 2018.

Respectfully Submitted,



MARY K. HIGH, WSB# 20123
Attorney for Appellant, Timothy Haag

PIERCE COUNTY ASSIGNED COUNSEL

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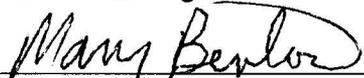
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