No. 97517-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEBASTIAN GREGG,

Petitioner.

AMICUS CURIAE BRIEF OF JUVENILE LAW CENTER IN SUPPORT OF PETITIONER SEBASTIAN GREGG

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IDENTITY AND INTEREST OF AMICUS CURIAE

The identity and interest of *amicus curiae* are set forth in the preceding Motion for Leave to File an *Amicus Curiae* Brief Out of Time.

STATEMENT OF THE CASE

Amicus curiae adopts the Statement of the Case as set forth by Petitioner.

ARGUMENT

As both this Court and the U.S. Supreme Court have repeatedly recognized, when a child is being sentenced in adult criminal court, the mitigating effects of age matter on a constitutional level. *See State v. Ramos,* 187 Wn.2d 420, 428, 387 P.3d 650 (2017) ("When a juvenile offender is sentenced in adult court, youth matters on a constitutional level."); *see also Miller v. Alabama*, 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017). These cases clearly establish, under both the Federal and Washington Constitutions, a presumption that age and its attendant characteristics are mitigating factors when a child faces sentencing in the adult criminal justice system. Indeed, state courts around the country have agreed that such a presumption exists, and that the burden is on the state to disprove the mitigating effect of a juvenile defendant's age.

To place the burden of proof on the juvenile defendant to establish youthfulness as a mitigating circumstance contravenes this constitutional principle and treats children in adult court "simply as miniature adults." *See Miller*, 567 U.S. at 481 (quoting *J.D.B. v. North Carolina*, 564 U.S. 261, 274, 131 S. Ct. 2394 (2011)). It also poses an unacceptable risk that an unconstitutional sentence will be imposed, particularly for Black juvenile defendants, who confront pervasive overt and implicit bias that heightens the risk that their age and its attendant characteristics will be improperly considered. Accordingly, for the reasons set forth herein, *amicus curiae* respectfully requests that this Court hold that children sentenced in adult criminal court are entitled to a presumption that age is a mitigating circumstance, which the state has the burden to disprove.

I. UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS, THERE IS A PRESUMPTION THAT AGE IS A MITIGATING FACTOR IN SENTENCING WHEN CHILDREN ARE TRIED AS ADULTS

The United States Supreme Court has consistently recognized that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471; relying on *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), and *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)); *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). Beginning in *Roper*

v. Simmons, the Court has identified three traits of adolescents that render them categorically less culpable than adults: (1) their immaturity, recklessness, and impetuosity; (2) their vulnerability to peer pressures, especially negative peer pressure; and (3) their unique capacity for rehabilitation. *Roper*, 543 U.S. at 569-70. These "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. at 472. Indeed, *Miller* emphasized that these findings about children's distinct attributes are not crime-specific, noting that they "are evident in the same way, and to the same degree," no matter the offense. *Id.* at 473.

The U.S. Supreme Court has applied this principle that "children are different" categorically, outlawing the death penalty for juvenile offenders and life without parole for children convicted of non-homicide offenses. *Roper*, 543 U.S. at 573-74; *Graham*, 560 U.S. at 74. Although the Court has acknowledged that individuals mature at different rates, and that "some under 18 have already attained a level of maturity some adults will never reach," *Roper*, 543 U.S. at 574, the Court nonetheless concluded that a clear rule abolishing those penalties was "necessary to prevent the possibility" that such harsh sentences might be imposed on juvenile offenders "who are not sufficiently culpable," *Graham*, 560 U.S. at 74.

Then, in *Miller v. Alabama*, the Court went further, eliminating life without parole for "all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 136 S. Ct. at 734 (interpreting *Miller*, 567 U.S. 460). Although the Court did not categorically bar the penalty for all juvenile offenders, it mandated that courts consider "the mitigating qualities of youth" before imposing a life without parole sentence on a child, *Miller*, 567 U.S. at 476 (internal citation and quotation marks omitted), and predicted that such sentences would be "uncommon," *id.* at 479. In other words, the Court applied a presumption that age and its attendant characteristics would have a mitigating effect on a child's sentence, even in situations where the sentence is not categorically unconstitutional.

This Court is one of many around the country that have applied *Miller* and the principle that "children are different" in circumstances beyond those specifically addressed by the U.S. Supreme Court. In *State v. Ramos*, this Court rejected the argument that *Miller* applies only to literal life without parole sentences, concluding that consideration of the distinctive attributes of youth is also required when children face *de facto* life sentences. 187 Wn.2d at 437-38. Shortly thereafter, in *State v. Houston-Sconiers*, this Court held that *Miller*'s sentencing requirements apply to *all* children being sentenced in adult criminal court, not just those facing the

possibility of life without parole. 188 Wn.2d at 21. The Court explained that, in accordance with *Miller*, "[t]rial courts must consider mitigating qualities of youth at sentencing" and be able to impose a sentence that takes those qualities into account, irrespective of any statutory minimums in the Sentencing Reform Act that would otherwise be applicable. *Id.* In *State v. Gilbert*, this Court further reinforced that holding, emphasizing that the sentencing court is "required to consider [the defendant's] youth as a mitigating factor" regardless of any statute suggesting the contrary. 193 Wn.2d 169, 176, 438 P.3d 133 (2019).

In addition to these rulings based upon the Federal Constitution, this Court has held that the Washington Constitution "provides greater protection than the Eighth Amendment" in the context of juvenile sentencing. *State v. Bassett*, 192 Wn.2d 67, 82, 428 P.3d 343 (2018). Using that more protective standard, the Court struck down the state's "*Miller*-fix" statute, which required a hearing to consider the *Miller* factors before a court could impose a life without parole sentence on a child, because the statute still allowed for the *possibility* that life without parole could be imposed. *Id.* at 74, 90. Reiterating the categorical principle that "children are less criminally culpable than adults," this Court concluded that "the characteristics of youth do not support the penological goals of a life without parole sentence" under any circumstances. *Id.* at 90.

When these cases are read in combination, a clear rule emerges: because children are categorically different from adults, whenever a child is being sentenced in adult court—regardless of the crime, possible sentence, or any provision of the Sentencing Reform Act—the "sentencing court[] must account for the mitigating qualities of youth" when crafting an appropriate sentence. *See Gilbert*, 193 Wn.2d at 175 (citing *Houston-Sconiers*, 188 Wn.2d at 21). In other words, there is a presumption when sentencing a child in adult court that the defendant's age and its attendant characteristics will have a mitigating effect—that the sentencing court will not view the child simply as a "miniature adult[]." *See Miller*, 567 U.S. at 481 (quoting *J.D.B.*, 564 U.S. at 274). Although the extent of that mitigating effect may depend upon the particular circumstances, and in some instances a court may ultimately arrive at a sentence within the standard range, this Court's precedent requires sentencing courts to start from the proposition that "children are less criminally culpable than adults." *See Bassett*, 192 Wn.2d at 90.

The Sentencing Reform Act's requirement that a juvenile defendant bears the burden of proving that youth is a mitigating factor cannot be squared with this precedent. Under that statute, a sentencing court "may impose an exceptional sentence below the standard range" for adult offenders if the defendant proves by a preponderance of the evidence that

mitigating circumstances exist.[1] RCW § 9.94A.535(1). The State asserts, and the lower court found, that under this statute a child being sentenced in adult court must affirmatively prove that youthfulness is a mitigating factor in order to potentially qualify for a sentence below the standard range. *See State v. Gregg*, 9 Wn.App. 2d 569, 580, 444 P.3d 1219 (2019). Such a burden of proof directly conflicts with this Court's constitutional holdings that children are categorically "less criminally culpable than adults," *Bassett*, 192 Wn.2d at 90, and that sentencing courts are "required to consider [the defendant's] youth as a mitigating factor," *Gilbert*, 193 Wn.2d at 176.

This Court's decision in *Ramos* is not to the contrary.[2] In *Ramos*, this Court declined to adopt a presumption against life without parole for juvenile offenders—a sentence this Court has since found categorically

[1] As discussed in more depth in Section III, a defendant's youth and other factors described in *Miller* are not among the enumerated list of possible mitigating circumstances. Gregg and others in his situation must allege that his "capacity to appreciate the wrongfulness of his . . . conduct, or to conform his . . . conduct to the requirements of the law, was significantly impaired," RCW § 9.94A.535(1)(e), and then prove that youthfulness has such an effect.

[2] Nor are this Court's decisions in *In re Pers. Restraint of Light-Roth*, 191 Wn.2d 328, 422 P.3d 444 (2018), and *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015) (en banc), to the contrary. Those cases involved youthfulness as a mitigating factor in situations where the defendant was *over* age 18. Citing developmental research demonstrating that young adults share many of the same characteristics as their younger peers, this Court allowed age to be considered as a mitigating factor for young people over age 18, but noted that "age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence." *O'Dell*, 183 Wn.2d at 695. This conclusion has no bearing on juvenile defendants, nor does Gregg argue that every youthful defendant is entitled to an exceptional sentence; he simply argues that, when the defendant is a child, the state bears the burden of proving that age is not in fact mitigating.

unconstitutional under the Washington Constitution. 187 Wn.2d at 437. The Court agreed with the "logical appeal" of such a presumption, *id.* at 445, but concluded that the U.S. Supreme Court had left determination of the appropriate process for imposing life without parole to state legislatures, and Washington's had reacted by passing the state's *Miller*-fix statute, *id.* at 445-46. The Court expressly left open the question of whether the state Constitution might offer greater protections, *id.* at 455, as well as the question of the appropriate sentencing procedures "for juvenile offenders facing less-than-life sentences," although it noted "that consideration of a defendant's youthfulness where a juvenile offender is sentenced in adult court is fully consistent with federal and state law," *id.* at 434 n.2.

Since that decision, this Court has squarely faced the question of whether the Washington Constitution is more protective than the Federal Constitution, and found that it is, *Bassett*, 192 Wn.2d at 82; it has struck down the *Miller*-fix statute that constrained the *Ramos* Court, *id.* at 90; and it has interpreted *Miller* to require that age and age-related characteristics be considered whenever a child is being sentenced in adult court, regardless of the offense or possible sentence, *Houston-Sconiers*, 188 Wn.2d at 21. The *Ramos* Court's deference to a now-invalid statute therefore poses no obstacle to this Court's applying the well-established constitutional presumption that age is a mitigating factor in sentencing when children are

tried as adults.

II. COURTS AROUND THE COUNTRY HAVE INTERPRETED *MILLER V. ALABAMA* AS PLACING THE BURDEN OF PROOF ON THE PROSECUTION TO DISPROVE THE MITIGATING EFFECT OF AGE

Confronting similar questions regarding the procedures required to uphold the constitutional requirements of *Miller*, at least six state supreme courts have placed the burden on the state to disprove the mitigating effect of age and its attendant characteristics when sentencing juvenile defendants in adult criminal court.

In *Commonwealth v. Batts*, the Pennsylvania Supreme Court rejected the argument that a "juvenile offender bears the burden of proving that he or she is not eligible for a life-without-parole sentence." 163 A.3d 410, 451 (Pa. 2017). The court reasoned that "any suggestion of placing the burden on the juvenile offender is belied by the central premise of *Roper*, *Graham*, *Miller* and *Montgomery*—that as a matter of law, juveniles are categorically less culpable than adults." *Id.* at 452. The court explained that this "central premise" is based on the well-established conclusion that "the vast majority of adolescents change as they age and, despite their involvement in illegal activity, do not develop entrenched patterns of problem behavior." *Id.* (quoting *Miller*, 567 U.S. at 471 (internal quotation marks omitted)). Accordingly, the court adopted a presumption against the

imposition of a life without parole sentence on a juvenile offender, which can be overcome only if the state proves beyond a reasonable doubt that the defendant is constitutionally eligible for that sentence, based on the factors articulated in *Miller*. *Id.* at 455.

Other state supreme courts have reached similar conclusions in the life without parole context—reasoning that *Miller* established a presumption against the imposition of that sentence that the state has the burden to overcome. In *Davis v. State*, the Wyoming Supreme Court adopted the reasoning of *Batts* in its entirety, agreeing that "the State bears the burden of overcoming" the presumption underpinning the "central premise" in *Miller*: that "juveniles are categorically less culpable than adults," and permitting the state to overcome that presumption only with evidence establishing beyond a reasonable doubt that the juvenile offender is irreparably corrupt. 415 P.3d 666, 681-82 (Wyo. 2018) (quoting *Batts*, 163 A.3d at 452). In reaching the same conclusion, the Connecticut Supreme Court State emphasized:

> *Miller* does not stand solely for the proposition that the eighth amendment demands that the sentencer have discretion to impose a lesser punishment than life without parole on a juvenile homicide offender. Rather, *Miller* logically indicates that, if a sentencing scheme permits the imposition of that punishment on a juvenile homicide offender, the trial court *must* consider the offender's "chronological age and its hallmark features" as mitigating against such a severe sentence.

State v. Riley, 110 A.3d 1205, 1216 (Conn. 2015) (quoting *Miller*, 567 U.S. at 477). State supreme courts in Missouri and Iowa have reached similar conclusions, placing the burden on the state to overcome the presumption that a juvenile defendant's age has a mitigating effect. *See State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2013) (en banc) ("[A] juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances."); *State v. Seats*, 865 N.W.2d 545, 555 (Iowa 2015) ("[T]he presumption for any sentencing judge is that the judge should sentence juveniles to life in prison with the possibility of parole for murder unless the other factors require a different sentence.").[3]

Although these cases specifically discuss the burden of proof to impose a life without parole sentence on a child, they each interpret the requirements of *Miller*, which this Court has held apply *whenever* a child is sentenced in adult court. *See Houston-Sconiers*, 188 Wn.2d at 21. Indeed, in *Houston-Sconiers*, this Court mandated that the same factors *Miller* required to be considered before imposing life without parole be considered in *all* juvenile sentencings. *See id.* at 23. This Court explained:

[3] As this Court noted in *Bassett*, 192 Wn.2d at 76, since its decision in *Seats*, the Iowa Supreme Court has expanded its decision and held that juvenile life without parole sentences are always unconstitutional pursuant to their state constitution. *See State v. Sweet*, 879 N.W.2d 811, 836-37 (Iowa 2016).

> [*Miller*] holds that in exercising full discretion in juvenile sentencing, the court must consider mitigating circumstances related to the defendant's youth—including age and its "hallmark features," such as the juvenile's "immaturity, impetuosity, and failure to appreciate risks and consequences." It must also consider factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and "the way familial and peer pressures may have affected him [or her]." And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated.

Id. (quoting *Miller*, 567 U.S. at 477) (internal citations omitted) (second alteration in original). Further, although this case does not involve life without parole—a sentence that could not have been constitutionally imposed—it involves first-degree homicide and the imposition of a sentence close to the maximum permissible for an adult under state law (and two years longer than the sentence Gregg's adult co-defendant received). (*See* Supp. Br. Respondent at 5 (stating that the outer limit of the standard range sentence is 494 months, or 41 years)); Robert Whale, *Judge Sentences Man to 35 Years in Prison for 2016 Auburn Murder, Arson*, AUBURN REPORTER (Feb. 14, 2019), https://www.auburn-reporter.com/news/judge-sentences-man-to-35-years-in-prison-for-2016-auburn-murder-arson/.

Thus, *Miller*'s basic precept that the "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes," *Miller*, 567

U.S. at 472—and other state supreme courts' interpretations of that precept—apply with equal measure to the facts of this case.

Additionally, the Massachusetts Supreme Court—which, like this Court, has categorically banned juvenile life without parole under their state constitution, *see Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 283-85 (Mass. 2013)—has placed the burden of proof on the state to disprove the mitigating effects of age in cases beyond just life without parole. In *Commonwealth v. Perez*, the court placed the burden on the state in a non-homicide case to "prove that the juvenile's personal characteristics make it necessary" to impose the requested sentence, which exceeded the sentence available under the state statute for juveniles convicted of homicide. 106 N.E.3d 620, 630 (Mass. 2018).

In sum, state supreme courts around the country have agreed that the precepts of *Miller* place the burden of proof on the state to disprove the mitigating effects of age. As this Court has applied *Miller* to all instances in which a child is sentenced in adult court, it logically follows that the state must bear the burden to show that the "mitigating qualities of youth" do not apply under the specific circumstances at hand. *See Miller*, 567 U.S. at 476 (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1990)).

III. REQUIRING CHILDREN TO PROVE THE MITIGATING EFFECTS OF AGE CREATES AN UNACCEPTABLE RISK THAT AN UNCONSTITUTIONAL SENTENCE WILL BE IMPOSED

Finally, the position advocated by the State—that the burden of proving that youthfulness has a mitigating effect lies with the juvenile defendant—"creates an unacceptable risk" that an unconstitutional sentence will be imposed. *Ramos*, 187 Wn.2d at 442 (quoting *Hall v. Florida*, 572 U.S. 701, 704, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014)). This risk is particularly high (and unacceptable) given the "implicit and overt racial bias against black defendants in this state" and across the country. *See State v. Gregory*, 192 Wn.2d 1, 22, 427 P.3d 621 (2018).

The plain language of the Sentencing Reform Act provides no guidance on how a sentencing court should assess the effect of age and its attendant characteristics when sentencing a juvenile defendant. In fact, a defendant's youthfulness is not among the enumerated list of possible mitigating circumstances. To trigger the examination of the potential "mitigating qualities of youth" required by *Houston-Sconiers*, juvenile defendants must allege that their "capacity to appreciate the wrongfulness of [their] conduct, or to conform [their] conduct to the requirements of the law, was significantly impaired," RCW § 9.94A.535(1)(e), and then prove that youthfulness has such an effect. Thus, despite *Houston-Sconiers*'s

mandate that sentencing courts consider a juvenile defendant's "age and its 'hallmark features,'" including "factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and 'the way familial and peer pressures may have affected him [or her],'" 188 Wn.2d at 23 (quoting *Miller*, 567 U.S. at 477) (internal citations omitted) (alteration in original), the onus is on the child both to allege that these factors are present and demonstrate that they significantly impaired his or her ability to "appreciate the wrongfulness of his or her conduct" or "conform his or her conduct to the requirements of the law," *see* RCW § 9.94A.535(1)(e).

The combination of this lack of statutory guidance with the burden of proof placed on the child creates a high likelihood that a judge in a particular case might weigh the *Miller* factors incorrectly and impose an unconstitutional sentence. This Court described in *Bassett* the "imprecise and subjective judgments a sentencing court could make regarding transient immaturity and irreparable corruption," noting examples such as the sentencing court's conclusion that "Bassett's homelessness was evidence that he was more mature than 'kids who are not in that situation'"—a conclusion that "could have easily gone the other way." 192 Wn.2d at 89. This case presents similar subjective determinations, with the sentencing court assessing facts such as the impact of Gregg's propensity for lying—a

fact the court determined showed he knew right from wrong, but that could be viewed as evidence of adolescent immaturity. (*See* Supp. Br. Respondent at 7.) Given the absence of any statutory guidance on how age and its attendant characteristics should be assessed, placing the burden of proof on the juvenile defendant to proffer evidence of youthfulness and immaturity creates an unacceptable risk that a court may impose a sentence contrary to the precepts in *Miller* and *Houston-Sconiers.*

This risk is further heightened due to the racial discrimination that Black defendants face in Washington and throughout the country. In striking down the death penalty due to its unconstitutional application, this Court took "judicial notice of implicit and overt racial bias against black defendants in this state." 192 Wn.2d at 22. The Court cited numerous court cases exhibiting the long history of racial discrimination, and referenced studies such as the *Preliminary Report on Race and Washington's Criminal Justice System*, which found that "[t]he fact of racial and ethnic disproportionality in [Washington's] criminal justice system is indisputable." *Id.* at 22-23 (quoting Research Working Group, Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 47 GONZ. L. REV. 251, 254 (2012)) (second alteration in original).

This overt and implicit racial discrimination has a profound impact on children in the justice system. According to one study, Black boys are "more likely to be seen as older and more responsible for their actions relative to [w]hite boys." Phillip Goff, *et al.*, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 539 (2014). Specifically, "Black boys are seen as more culpable for their actions (i.e., less innocent) within a criminal justice context than are their peers of other races." *Id.* at 540. This evidence of the impact of racial bias demonstrates the high risk that a sentencing judge may inaccurately assess maturity and culpability, and confirms the importance of the presumption that age is a mitigating factor for all juvenile defendants.

CONCLUSION

Because the burden of proof in Washington's Sentencing Reform Act as applied by the Court of Appeals in this case violates the constitutional presumption that age is a mitigating factor when a child is sentenced in adult criminal court, and creates an unacceptable risk that an unconstitutional sentence will be imposed, *amicus curiae* urges this Court to vacate Gregg's sentence and remand for a resentencing.

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