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NO. 97890-5

THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

v.

TONELLI ANDERSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

REPLY BRIEF

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A. INTRODUCTION

Unlike almost every other youth sentenced to life in Washington, Tonelli will never have the opportunity for release. At a minimum, this Court must provide Tonelli with the same relief afforded to those convicted of aggravated first-degree murder. His aberrational sentence requires correction and entitles Tonelli to a new sentencing hearing.

B. ARGUMENT IN REPLY

1. This Court correctly decided *State v. Bassett* and *State v. Haag*.

The government asks this Court to abandon its analysis of juvenile sentencing, arguing this Court incorrectly decided *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018), and *State v. Haag*, 198 Wn.2d 309, 495 P.3d 241 (2021). The government makes no alternative argument for providing a fair sentencing

structure in making this argument. The government's argument must be rejected.¹

This Court's analysis that "children are different" is well established. *State v. Houston-Sconiers*, 188 Wn.2d 1, 18, 391 P.3d 409 (2017). When a child commits a serious offense, even aggravated first-degree murder, "the federal and state constitutions, the enactments of our legislature, and our case law demand that such a child be treated differently from an adult." *Haag*, 198 Wn.2d at 312.

This Court's analysis in *Haag* arises from cases and statutes that control juvenile sentencing in Washington. In *Roper v. Simmons*, the U.S. Supreme Court found the death penalty unconstitutional for

¹ The government improperly asks to incorporate its briefing from a separate case. BOR at 14. The rules of appellate procedure do not allow a party to incorporate arguments from unconsolidated cases. RAP 10.1(g).

juvenile offenders. 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). The Court extended this analysis in *Graham v. Florida*, where it found unconstitutional life without parole sentences for juvenile offenders who did not commit homicide. 560 U.S. 48, 82, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

In *Miller v. Alabama*, the U.S. Supreme Court recognized *Roper* and *Graham* established children are constitutionally different from adults for sentencing purposes and that “mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.” 567 U.S. 460, 470-71, 132 S. Ct. 2455, 183 L. Ed. 2d (2012). When a court considers a life-without-parole sentence, it must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 480.

Miller did more than prohibit mandatory life without parole for juveniles. It also “determined that sentencing a child to life without parole is excessive for all but ‘the rare juvenile offender whose crime reflects irreparable corruption.’” *Montgomery v. Louisiana*, 577 U.S. 190, 208, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016) (internal quotation marks omitted) (*quoting Miller*, 567 U.S. at 479-80). Under *Miller*, it is not enough for a sentencing court to merely consider how children are different. *Id.* “Even if a court considers a child’s age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects ‘unfortunate yet transient immaturity.’” *Id.*

The principles espoused in *Miller* were affirmed in *Jones v. Mississippi*, 593 U.S. ___, 141 S. Ct. 1307, 1321, 209 L. Ed. 2d 390 (2021). The U.S. Supreme

Court also recognized the sovereign power of the states to create structures for the criminal legal system. *Id.* at 1323. *Jones* does not disturb the principle that states must give juveniles a “realistic opportunity” for release within their lifetime. *Graham*, 560 U.S. at 82.

Washington’s legislature followed a similar path, passing RCW 10.95.030 and RCW 9.94A.730. Under RCW 10.95.030, juveniles convicted of aggravated first-degree murder no longer face mandatory life without parole. When setting a minimum term, the court must account for the mitigating factors of youth, including age, the youth’s childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth’s chances for rehabilitation. The only youth that may still be incarcerated for the rest of their lives are those who commit new crimes as adults, no matter how minor. RCW 9.94A.730.

This Court also addressed youth sentencing, holding “*Miller* ... appl[ies] to juvenile homicide offenders facing de facto life-without-parole sentences,” not just “literal” life-without-parole sentences. *State v. Ramos*, 187 Wn.2d 420, 437, 387 P.3d 650 (2017). In *Bassett*, this Court held article I, § 14 categorically prohibits sentencing juveniles to life without parole. 192 Wn.2d at 91. In addition, courts must meaningfully consider how juveniles are different from adults and how those differences apply in cases. *State v. Delbosque*, 195 Wn.2d 106, 120, 456 P.3d 806 (2020).

To ensure sentences for aggravated first-degree murder are constitutional, a trial court must emphasize mitigation factors rather than retributive factors. *Haag*, 198 Wn.2d at 317. While Tonelli was not convicted of aggravated first-degree murder, he deserves no less consideration. Without proper

consideration of the mitigating factors of youth, Tonelli will never be released from prison, as he is not eligible for parole because of his adult conviction. CP 164.

Allowing Tonelli's sentence of life without parole to stand is cruel when those who committed more serious crimes are entitled to an opportunity for release for a meaningful life. *Bassett*, 192 Wn.2d at 91. Tonelli's 61-year sentence leaves him without a chance for a meaningful life outside prison. *Haag*, 198 Wn.2d at 327. The remedy for this error is remand. *Bassett*, 192 Wn.2d at 355.

2. The government provides no alternative solution to resentencing.

The government complains of the uncertainty this Court's analysis of juvenile sentencing has created. BOR at 15. Disappointingly, the government provides no framework other than to ask this Court to reverse all of its juvenile sentencing cases and revert to a pre-

Miller analysis. *Id.* at 19. This response is unhelpful and ensures continued uncertainty.

There are solutions. It is impossible to differentiate between “the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Roper*, 543 U.S. at 573. The legislature’s determination youth should have their sentences in non-aggravated first-degree murder cases reviewed after 20 years is critical to providing youth with an opportunity for a meaningful life outside prison. RCW 9.94A.730 provides the framework the government complains is missing.

Washington’s legislative determination of 20 years is consistent with the national median of 25 years for when youth can seek parole. Campaign for the Fair Sentencing of Youth, *Tipping Point: A*

Majority of States Abandon Life-Without Parole

Sentences for Children, 10 (December 2018)

(hereinafter “Campaign”).² Tonelli should be provided with this same opportunity to demonstrate he is not irreparably corrupt. *Roper*, 543 U.S. at 573. Allowing for review at 20 years solves the problems the government’s complaint of lack of guidance. BOR at 15.

“Life without parole is an especially harsh punishment for a juvenile.” *Graham*, 560 U.S. at 70. Even for more serious cases, setting 20 years as the time for review would help create fair sentences.

Ashley Nellis, *No End in Sight: America’s Enduring Reliance on Life Imprisonment*, The Sentencing Project, 34 (February 2021).³ A sentence this long gives

² <https://cfsy.org/wp-content/uploads/Tipping-Point.pdf>

³ <https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/>

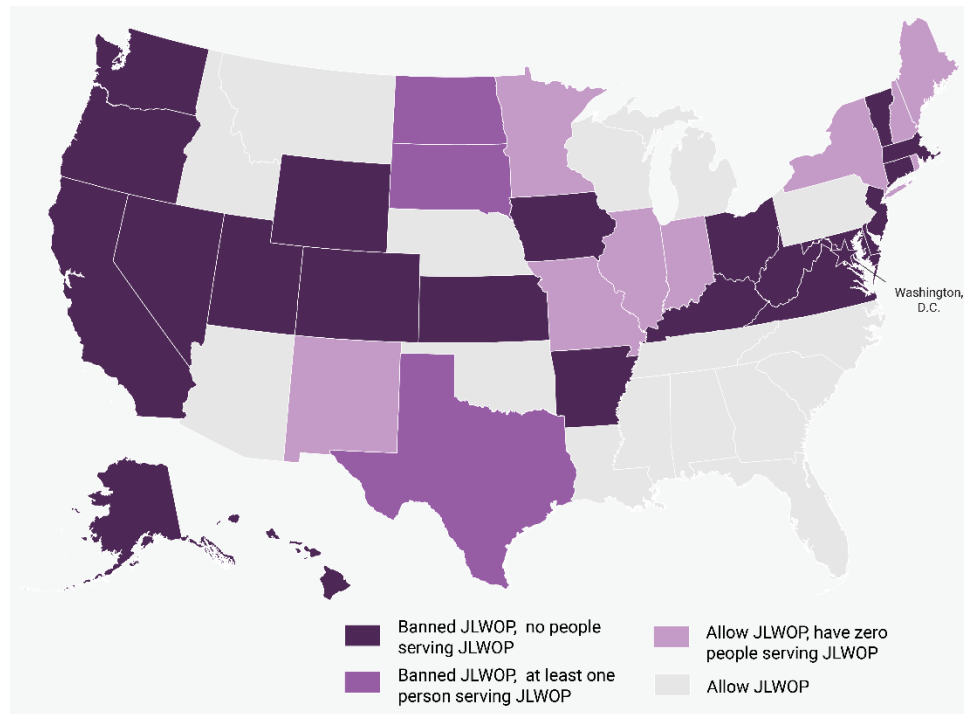
corrections ample time to work with youth to ensure they develop the tools needed to re-enter society. *Id.*

Most Americans believe punishment for the sake of incapacitation should not be the principal aim of prison. Nellis at 34. Instead, internal transformation, redemption, and victim restitution should be the central criminal legal response to harms done. *Id.* Sentencing a child to prison for the rest of their life achieves none of these goals or any meaningful penological goals. *Graham*, 560 U.S. at 71.

The United States stands alone as the only country that sentences people to life without parole for crimes committed before turning 18. Josh Rovner, *Juvenile Life Without Parole: An Overview*, 1 (May 2021).⁴ “The momentum to protect youth rights in the

⁴<https://www.sentencingproject.org/publications/juvenile-life-without-parole/>

criminal legal system is clear.” *Id.* When *Miller* was decided, 45 states allowed life without parole for youth. Campaign, at 5. Now, at least 25 states have banned life sentences without the possibility of parole for people under 18. Rovner, at 1. In nine additional states, no one is serving life without parole for offenses committed before age 18. *Id.*



Rovner, at 8.

The government's argument that this Court should abandon its analysis of how juveniles should be sentenced is at odds with what other states are doing. For youth like Tonelli, this Court should order resentencing so that a court can order a term of years that provides an opportunity for a meaningful life and allows him to seek parole, as allowed for almost every other child not convicted of aggravated first-degree murder.

3. Inadequate representation cannot be a basis for depriving Tonelli of an opportunity for release.

The government points out the infirmities in Tonelli's application for resentencing. BOR at 27-28. It recognizes his attorney did not provide the type of analysis this Court has come to expect when juveniles are resentenced, including failing to provide the court with an evaluation. *Id.* Tonelli's inadequate

representation is a reason for granting his request for resentencing, not for rejecting it.

In its opinion ordering resentencing, this Court can detail how courts should conduct sentencing hearings for youthful offenders. Tonelli agrees with the government that a hearing should include the factors the government highlights. BOR at 27-28. A hearing should examine age, childhood and life experience, the degree of responsibility the youth could exercise, and the likelihood of rehabilitation. *Bassett*, 192 Wn.2d at 74.

Unlike *Haag*, Tonelli's lawyer did not engage an expert to evaluate his likelihood to re-offend. 198 Wn.2d at 314. However, Tonelli demonstrated he was not the same person as when he was a youth or an emerging adult. Despite the government's argument to the contrary, Tonelli presented evidence of his journey

towards maturity and rehabilitation. The government argues much of Tonelli's evidence of rehabilitation was recent but ignores the restrictions placed on persons serving life sentences to engage in services by the DOC that RCW 9.94A.730 tried to remedy. BOR at 28.

This argument also ignores Tonelli's long-term achievements, including vocational degrees in bookkeeping and graphic design. RP 27. Tonelli started a non-violence program to help young people coming into prison have something to do with their time. RP 27. He trains dogs, discovering, "I have extreme love for giving back to something that is helpless." RP 27.

And while the government discounts statements made by Tonelli's family, it offers no reason why their observations are invalid. For example, Tonelli's brother did not pretend Tonelli had not done damage as a young person. RP 18. He described Tonelli's rough

childhood, but as an adult, Tonelli had grown into a “responsible” person who taught himself skills “free people” do not have the ambition or drive to achieve. RP 19. As an adult, Tonelli made the hard choice to be different, even inspiring those who are free. *Id.*

Further, the government discounts the statements from DOC officers, who affirmed Tonelli’s rehabilitation. Tonelli is “level-headed and mature” and has become a “leader” who demonstrates his willingness to help others. CP 95-96; RP 24. He is “reliable” and “dependable” and works “to the best of his ability without complaint.” CP 61. He has been “instrumental and consistent” in preparing for his release, along with preparing other prisoners for reentry. CP 62. The government’s argument that the record does not reflect Tonelli’s changed character is wrong.

Even after this Court's decision in *Haag* instructing parties to do otherwise, the government's focus in this brief is retribution. RP 29. Tonelli does not excuse his crimes. RP 24. He recognizes the impact of his decisions as a young person and offers no excuse for his actions. RP 26.

But Tonelli is not irretrievably depraved or irreparably corrupt. *See Haag*, 198 Wn.2d at 313. He spent his adulthood on a path to rehabilitation. Abandoned to the streets as a child, he sought help from the wrong people. RP 25. In custody, Tonelli has become a different person. Tonelli seeks a fair sentence, hoping this too will provide his victims forgiveness and closure. RP 28. Ordering resentencing that will provide Tonelli with the opportunity for release for a meaningful life will achieve that goal.

4. The government does not address the improper standard applied by the sentencing court in denying Tonelli the opportunity to be resentenced.

In his initial and supplemental briefing, Tonelli asked this Court to find that when the trial court determined Tonelli was the “uncommon” child who should remain forever imprisoned, it applied an erroneous standard. The government did not address this error in any of its briefs.

This Court should hold the sentencing court’s application of the wrong standard for determining when a juvenile should be resentenced was manifestly unreasonable because it was based on untenable grounds and an erroneous legal standard. *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012). The failure to determine Tonelli was the “rare” child who is irreparably depraved was error. *Haag*, 495 P.3d at 246; *Delbosque*, 195 Wn.2d at 118; *Bassett*, 192 Wn.2d at 89.

It is unclear why the government chose not to address this issue. The failure to apply the proper standard demonstrates that, like *Delbosque*, the trial court failed to meaningfully consider the appropriate context of the diminished culpability of youth. 195 Wn.2d at 118. Tonelli demonstrated he is not irreparably depraved. With decades of infraction-free behavior, no court could find he is. The trial court's use of a different standard provides independent grounds for resentencing.

5. The government fails to reconcile the racially disparate impact of juvenile sentencing with its argument.

The government chose not to address the racial disparity inherent in youth sentencing. After this Court's acknowledgment of the devaluation and degradation of Black lives, this "persistent and systemic injustice" cannot be ignored. Supreme Court,

Open Letter Calling on Judicial, Legal Community to Work Together on Racial Justice (June 4, 2020).

Permanent incarceration falls heavily on Black youth. While the number of youth serving life sentences has decreased dramatically, the proportion of Black youth serving a life sentence has increased. Campaign at 10. Of the cases tried nationally since *Miller*, 72% of youth sentenced to life without parole have been Black compared to 61% before *Miller*. *Id.*

Tonelli's sentence reflects how the legal system treated youth of color, especially in the 1990s. The reasons for these sentences were wrong and deeply racist. Jane Rutherford, *Juvenile Justice Caught between the Exorcist and A Clockwork Orange*, 51 DePaul L. Rev. 715, 721-22 (2002). The result of permanent incarceration for thousands of Black youth like Tonelli must be remedied. This Court must not

look past the racial injustice inherent in Tonelli's sentence. To remedy his sentence, this Court should hold Tonelli must be entitled to an opportunity for a meaningful life outside prison. *Haag*, 198 Wn.2d at 327.

C. CONCLUSION

It is cruel to sentence Tonelli to life without parole. This Court should order resentencing, providing a sentence that will allow Tonelli an opportunity for a meaningful life outside prison.

This brief is 2,499 words long and complies with RAP 18.17(c).

DATED this 13th day of December 2021.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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)
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)
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)
 Appellant.)

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