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NO. 97890-5

IN THE SUPREME COURT
OF WASHINGTON STATE

STATE OF WASHINGTON,

Respondent,

v.

TONELLI ANDERSON,

Appellant.

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

AMENDED FIRST
SUPPLEMENTAL BRIEF

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A. INTRODUCTION

Tonelli Anderson was a child in 1994 when he participated in the murders resulting in his 61-year sentence. Tonelli had been abandoned by his family and sought support on the streets. Predictably, especially for youth of color, this path led to tragedy for him and the victims. Since his incarceration, Tonelli has done everything to show he is a reformed person who will not commit new crimes if released.

Both the U.S. Supreme Court and this Court recognize children are “constitutionally different from adults in their levels of culpability.” These protections require this Court to order resentencing. Tonelli also asks this Court to find unconstitutional the provisions of RCW 9.94A.730 that prohibit him from petitioning for early release from confinement.

B. ISSUES¹

1. Is the 61-year de-facto life sentence the court imposed for a crime Tonelli committed as a child unconstitutional?

2. Did the court apply improper standards when it determined Tonelli was the “uncommon” youth who should serve a de-facto life sentence?

3. Did the court fail to properly weigh mitigation when it refused to provide Tonelli with an opportunity for a meaningful life outside prison?

4. Must the impact of racial injustice be considered when sentencing youths of color?

C. STATEMENT OF THE CASE

Tonelli was 17 when he participated in the murder of two people. CP 300. The court sentenced him

¹ This brief incorporates the assignments of error raised in the Court of Appeals. This brief focuses on the relief Tonelli should receive.

to over 61 years. CP 164. This sentence provides no opportunity for release, as Tonelli falls outside the provisions of RCW 9.94A.730.

At Tonelli's original sentencing, the legal system did not account for the inherent differences between youth and adults. CP 300. Since then, the legislature created parole for youths serving long sentences, except in limited circumstances. *See* RCW 9.94A.730. Because Tonelli committed a new crime as an emerging adult, he is not eligible for parole. *Id.*²

Tonelli experienced a hard childhood. RP 21, 25. He had little parental support. His mother was drug-addicted, and his father was unavailable. RP 21-22, 25. His aunt, who tried to care for him, had troubles of her

² "Emerging adult" is the phase of life between adolescence and full-fledged adulthood. Jeffrey Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens through the Twenties*, *American Psychologist*, vol. 55 (no. 5), 470-71 (2000).

own and had resorted to prostitution. RP 22. For most of his childhood, Tonelli was on his own. “He was a dumb kid. He was young. And he was a follower. He was never a leader.” RP 24.

Like many poor youths, Tonelli turned to the only support he could find. “Seeing the drug traffic in and out of the house, the prostitution in and out of the house, and to get away from that, I stayed in the streets.” RP 25. He became involved with street gangs. RP 24-25. He was the youngest in his crowd. RP 25. Tonelli looked up to his older peers, and when asked to take part in a dangerous activity, he did. *Id.* This decision to engage in risky and dangerous behavior resulted in the deaths of two persons when Tonelli and an older person robbed and killed a drug dealer. RP 25-26. Two others were also shot, one of whom died. *Id.*

Tonelli was not initially suspected of the murders. Remaining in the community, Tonelli committed a robbery and assault as an emerging adult. CP 163. The government then charged Tonelli with these murders. CP 100. In a non-jury trial, the Court found Tonelli guilty as charged. CP 162.

Courts did not appreciate the transitory nature of youthfulness at Tonelli's sentencing hearing. CP 300. The court sentenced him to the high end of the range of 763 months, which is over 61 years. CP 164.

After the landmark decisions in *Miller v. Alabama*,³ Tonelli asked to be resentenced. CP 30. Tonelli took immediate responsibility for his actions, expressing regret to his victim's families. RP 24. He explained how his lack of family forced him into the

³ 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

streets. RP 25. He recognized his decisions as a child resulted in tragedy: “people lost lives and people’s lives were changed, including my own.” RP 26.

Tonelli also demonstrated his maturation. Tonelli involved himself in programs designed to make him better. CP 61-97. He was thankful for older prisoners who mentored him. RP 27. Department of Corrections staff described Tonelli as “level-headed and mature” and helpful to others. CP 96.

In addition to Tonelli, the court heard from his family and the family of his victims. Defense counsel did not provide the court with any scientific or social data other than an article on how youth change. RP 43. Tonelli was not evaluated or examined by experts.

After the hearing, the trial court held Tonelli’s case presented “the uncommon situation where life without parole for a juvenile homicide offender is

constitutionally permitted.” RP 55. The court denied Tonelli’s request for a new sentence. CP 306.

D. ARGUMENT

Children are different. *Miller*, 567 U.S. at 480; *State v. Haag*, ___ Wn.2d ___, 495 P.3d 241, 243 (2021); *State v. Bassett*, 192 Wn.2d 67, 81-82, 428 P.3d 343 (2018); Const. art. I, § 14; U.S. Const. amend. VIII. Children are less culpable and have greater capacity for change. *Miller*, 567 U.S. at 472-73 (citing *Graham v. Florida*, 560 U.S. 48, 72-74, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)). As such, children “warrant special protections in sentencing.” *Bassett*, 192 Wn.2d at 81.

Courts should rarely sentence juveniles to die in prison. *See Montgomery v. Louisiana*, 577 U.S. 190, 208, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016); *Jones v. Mississippi*, 593 U.S. ___, 141 S. Ct. 1307, 209 L. Ed. 2d 390 (2021); *Miller*, 567 U.S. at 479; *Graham*, 560

U.S. at 74-75. Further, sentencing juveniles to life without parole or early release is cruel because youths must be given a meaningful opportunity to obtain release. *Bassett*, 192 Wn.2d at 90.

1. Tonelli’s 61-year sentence with no possibility of parole is unconstitutional.

Bassett holds life without parole for a juvenile is unconstitutional under article I, § 14. 192 Wn.2d at 91. This rule “applies not only to literal juvenile life without parole sentences but also to de-facto juvenile life without parole sentences.” *Id.* at 81 (citing *State v. Ramos*, 187 Wn.2d 420, 437-39, 387 P.3d 650 (2017)).

Haag holds a 46-year sentence for a juvenile is a de-facto life sentence. *Haag*, 495 P.3d at 245. “A sentence of 46 years to life amounts to a de-facto life sentence for a juvenile offender because it leaves the incarcerated individual without a meaningful life

outside of prison.” *Id.* at 250. Haag’s sentence violated article I, § 14, and the Eighth Amendment. *Id.* at 251.

Tonelli is serving a 61-year sentence with no possibility of parole for a juvenile crime. CP 164. The remedy is remand for resentencing that provides him with an opportunity for a meaningful life. *Bassett*, 192 Wn.2d at 355; *Haag* 495 P.3d at 252; *see also*, *State v. Bassett*, 53721-4-II, 2021 WL 4859840, at *1 (Wash. Ct. App. Oct. 19, 2021); *State v. Gilbert*, 37121-2-III, 2021 WL 5086395, at *6 (Wash. Ct. App. Nov. 2, 2021).⁴

2. Tonelli must be provided with a meaningful opportunity to demonstrate his capacity for change.

“Like the death penalty, a life sentence without the possibility of parole is the deprivation of hope. It is the forfeiture of liberty for life.” *State v. Moretti*, 193 Wn.2d 809, 836, 446 P.3d 609 (2019) (Yu, J.,

⁴ Both cases are cited as per GR 14.1(a).

concurring). Juvenile life without parole and de-facto life sentences are unconstitutional. *Haag*, 495 P.3d at 251. Because Tonelli is serving a sentence of 61 years, resentencing is required. *Id.* at 252. Like those who committed aggravated murder, resentencing must provide Tonelli with an opportunity for a meaningful life outside of prison. *Id.* at 250 (citing *Casiano v. Comm’r of Corr.*, 317 Conn. 52, 78, 115 A.3d 1031 (2015)).

a. The court applied the wrong standard when it determined “uncommon” life sentences for juveniles were permissible.

This Court will reverse a sentencing court if it finds a clear abuse of discretion or misapplication of the law. *State v. Blair*, 191 Wn.2d 155, 159, 421 P.3d 937 (2018). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon

untenable grounds or an erroneous legal standard.

State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2012).

In deciding whether to grant Tonelli a new sentencing hearing, the trial court focused on whether Tonelli was the “uncommon” child who should remain in prison for life. RP 55. This is the wrong standard. This Court has consistently stated life sentences should be for the “rare” child who is irreparably depraved and not simply “uncommon.” *Haag*, 495 P.3d at 246; *State v. Delbosque*, 195 Wn.2d 106, 118, 456 P.3d 806 (2020); *Bassett*, 192 Wn.2d at 89.

The difference between these two words is not merely semantic.⁵ “Uncommon” is defined as “not

⁵ An excellent example of the differences is found in Pokémon, which has separate categories for “uncommon” and “rare” playing cards. Adam Newell, *Here Are the Different Pokémon TCG Card Rarities* (April 27, 2020) <https://dotesports.com/news/pokemon-tcg-card-rarity-explained>

ordinarily encountered.” Merriam-Webster, *Merriam-Webster.com Dictionary* (2021).⁶ “Rare” is defined as “seldom occurring or found.” *Id.*⁷

For something to be “rare,” it must almost never happen. On the other hand, “uncommon” is something that does not occur often. When the court analyzed whether its sentencing decision was “uncommon,” it applied the lower standard. This decision was manifestly unreasonable and based on untenable grounds. *Lamb*, 175 Wn.2d at 127.

b. The factors demonstrating Tonelli’s capacity for change must be given greater weight than those in favor of retribution.

At a *Miller*-fix hearing, Washington’s statutory scheme requires courts to “meaningfully consider” how

⁶ <https://www.merriam-webster.com/dictionary/uncommon>

⁷ <https://www.merriam-webster.com/dictionary/rare>

juveniles differ from adults and how those differences apply to the facts of the case. *Delbosque*, 195 Wn.2d at 121 (quoting *Ramos*, 187 Wn.2d at 434-35). A resentencing court “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.” *Id.* (quoting *Ramos*, 187 Wn.2d at 443).

“Instead, 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.’” *Delbosque*, 195 Wn.2d at 121 (quoting *Ramos*, 187 Wn.2d at 443). “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.” *Haag*, 495 P.3d at 247 (quoting *Ramos*, 187 Wn.2d at 444).

When Tonelli applied for resentencing, the trial court did not properly consider Tonelli’s youth or capacity for change. *Delbosque*, 195 Wn.2d at 121. Instead, the Court found Tonelli’s was the “uncommon” case deserving of a life sentence. RP 55.

This mistake of law requires resentencing. The trial court must consider “mitigating qualities of youth.” *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017). RCW 10.95.030, which instructs courts on how to conduct new sentencing hearings, only applies to aggravated murders, which Tonelli did not commit. However, trial courts can use its tests for youth serving de-facto life sentences to ensure they do not emphasize retribution over mitigation. *Haag*, 495 P.3d at 243; *Ramos*, 187 Wn.2d at 429.

The trial court erred by not focusing on Tonelli's immaturity or the transient qualities of youth when it denied him the opportunity for resentencing. CP 300. Instead, the court attempted to distinguish *Miller*, focusing on Tonelli being three years older than Miller when he committed his crime, and that his conviction was for a premeditated crime, even though Miller was convicted of a similar murder. CP 300-01; *Miller*, 567 U.S. at 465.

The court looked past Tonelli's hard childhood, stating it was unaware of how he suffered as a child. CP 300. To make this finding, the court disregarded the evidence of Tonelli's lack of childhood support. RP 36. Indeed, the court highlighted Tonelli's lack of parental support as a factor supporting retribution. *Compare*, CP 302, *Bassett*, 192 Wn.2d at 73.

To make these findings, the court had to disbelieve the victim's family, who described how Tonelli started from "horrible beginnings." RP 36. Tonelli's parents were drug-addicted, and he had to "survive in the streets." RP 36. His aunt, who tried to care for him, used prostitution to support herself. RP 22. Tonelli had nothing.

Tonelli fled his home because of the drugs and prostitution. RP 25. His only escape was the streets, where he was the youngest of his peers. RP 24-25. According to his aunt, "[Tonelli] did some really stupid things. He made a lot of bad decisions." *Id.* "He was a dumb kid. He was young. And he was a follower. He was never a leader." *Id.*

The trial court's analysis of Tonelli's childhood as a factor supporting a life sentence conflicts with this Court's other decisions. In *Bassett*, this Court

repudiated a similar analysis. Bassett lived in a “shack” when he returned home to kill his family. *Bassett*, 192 Wn.2d at 73. The trial court treated Bassett’s ability to survive while homeless as evidence of maturity rather than instability and insecurity. *Id.* at 89. Given the difficulty in determining whether a person is irreparably corrupt, this Court ruled it was unacceptable to impose a life sentence on a child based on facts such as the teen’s need to care for himself, as both Bassett and Tonelli demonstrated. *Id.*

In its findings, Tonelli’s sentencing court also minimized Tonelli’s capacity for change. *Delbosque*, 195 Wn.2d at 119. Tonelli demonstrated his maturation. Even without hope of early release, Tonelli involved himself in rehabilitative programs. CP 61-97. Tonelli earned vocational degrees in bookkeeping and graphic design. RP 27. He started a non-violence program to

help young prisoners. RP 27. He trained dogs, discovering “I have extreme love for giving back to something that is helpless.” RP 27. He learned even those who “created disharmony in the communities” they came from by “committing atrocious acts” such as his could be redeemed. RP 28.

Tonelli was thankful for mentorship by older prisoners. RP 27. Department of Corrections staff described Tonelli as “level-headed and mature” and helpful. CP 96. His counselor said Tonelli became a “leader” who showed a willingness to help others. CP 95; RP 24. According to another counselor, Tonelli was “a reliable and dependable worker” with “good communication skills” who did “whatever job was asked of him to the best of his ability without complaint.” CP 61. Not only had Tonelli been “instrumental and consistent” with preparing for

release, but assisted in the “preparation for reentry for fellow prisoners by providing tutoring.” CP 62.

In disregarding Tonelli’s changes, the trial court focused on retribution. *Haag*, 495 P.3d at 247. Like *Delbosque*, it took time for Tonelli to mature.

Delbosque received many infractions in prison, including fighting, extortion, weapon possession, tattoo paraphernalia possession, and taking another inmate’s property. *Delbosque*, 195 Wn.2d at 113. Until he was 29, corrections repeatedly investigated Delbosque for gang-related violence. *Id.* Delbosque then became infraction-free. *Id.*

Like *Delbosque*, the trial court here failed to meaningfully consider the evidence with the proper context of the diminished culpability of youth. 195 Wn.2d at 118. While the court here examined the factors listed in *Miller*, it did not consider how the

diminished culpability and greater prospects for reform have shaped Tonelli's life. *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68).

Haag also instructs. In *Haag*, the trial court focused on retribution rather than mitigation. 495 P.3d at 245. Like Tonelli, Haag was 17 when he committed his crime, which was aggravated murder. *Id.* at 243. Both men experienced child hardship but demonstrated their reform while in prison. Haag received his high school diploma and worked. *Id.* at 244. Tonelli earned advanced vocational degrees in bookkeeping and graphic design. RP 27. Both men spent time trying to help others. 495 P.3d at 244; CP 95; RP 24. In contrast, in both cases, the only evidence the government presented were victim statements. 495 P.3d at 244; RP 29-41. Like with *Haag*, the court here

also emphasized retribution over mitigation, which requires resentencing. 495 P.3d at 247.

This Court’s opinions establish that even for the most serious crime a juvenile can commit, there must be an opportunity to meaningfully reenter society. *Haag*, 495 P.3d at 250; *Delbosque*, 195 Wn.2d at 118; *Bassett*, 192 Wn.2d at 73. Substantial evidence did not support the trial court’s determination Tonelli was not entitled to the same relief. This error requires remand so Tonelli can receive “meaningful opportunities to reenter society and to have a meaningful life.” *Haag*, 495 P.3d at 250.

c. The court must consider the role race plays in sentencing youth of color.

The devaluation and degradation of Black lives is a persistent and systemic injustice. Washington Supreme Court, *Open Letter Calling on Judicial, Legal Community to Work Together on Racial Justice* (June

4, 2020); see *Garfield Cty. Transp. Auth. v. State*, 196 Wn.2d 378, 390, fn.1, 473 P.3d 1205 (2020). “[B]ias pervades the entire legal system in general and hence [minorities] do not trust the court system to resolve their disputes or administer justice evenhandedly.” *State v. Walker*, 182 Wn.2d 463, 488, 341 P.3d 976 (2015) (quoting Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington’s Criminal Justice System*, 6 (2011) (alteration in original)⁸ (quoting Wash. St. Minority & Justice Comm’n, 1990 *Final Report*, xxi (1990))).⁹ This disparity results in significantly longer sentences for persons of color, especially youth. Fred T. Korematsu Center for Law and Equality, *Race and Washington’s*

⁸http://www.law.washington.edu/About/RaceTaskForce/preliminary_report_race_criminal_justice_030111.pdf.

⁹<http://www.courts.wa.gov/committee/pdf/TaskForce.pdf>

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Washington Supreme Court, 4 (2021).¹⁰

Racial bias is antithetical to a fair and impartial proceeding and violates due process and equal protection. *State v. Dhaliwal*, 150 Wn.2d 559, 581-83, 79 P.3d 432 (2003) (Chambers, J., concurring). Due process and equal protection concerns are raised where racial bias influences a proceeding. *State v. Quijas*, 12 Wn. App. 2d 363, 373, 457 P.3d 1241 (2020). “[I]t is essential that once a claim of racial bias is raised, investigations into allegations of racial bias are conducted on the record and with the oversight of the court.” *State v. Berhe*, 193 Wn.2d 647, 661, 444 P.3d 1172 (2019).

¹⁰https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1116&context=korematsu_center

As a youth who committed crimes during the “super-predator” era, Tonelli’s sentence reflects how the government treated youth, especially persons of color, during this time. Perry Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. Gender Race & Just. 281, 282 (2012). At resentencing, the trial court must consider how its new sentence accounts for the bias of the laws that resulted in increased incarceration for youth of color.

Tonelli’s crimes in 1994 occurred during a sharp juvenile crime increase. Jeffrey Butts & Jeremy Travis, Urban Institute Justice Policy Center, *The Rise and Fall of American Youth Violence: 1980 to 2000*, 2 (2002).¹¹ States responded by enacting tough-on-crime laws targeting youth. David Tanenhaus & Steven

¹¹<https://www.urban.org/sites/default/files/publication/60381/410437-The-Rise-and-Fall-of-American-Youth-Violence.PDF>

Drizin, *Owing to the Extreme Youth of the Accused: The Changing Legal Response to Juvenile Homicide*, 92 J. Crim. L. & Criminology 641, 664 (2002).

This era gave rise to the term “super-predator.” John R. Mills et al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 Am. U. L. Rev. 535, 585 (2016). But by 2000, juvenile crime rates returned to 1980 levels. Butts & Travis, at 5. Nevertheless, super-predator laws enacted across Washington and elsewhere remained in effect. Matthew Razo, *Fair and Firm Sentencing for California's Youth: Rethinking Penal Code Section 190.5*, 41 W. St. U. L. Rev. 429, 430 (2014).

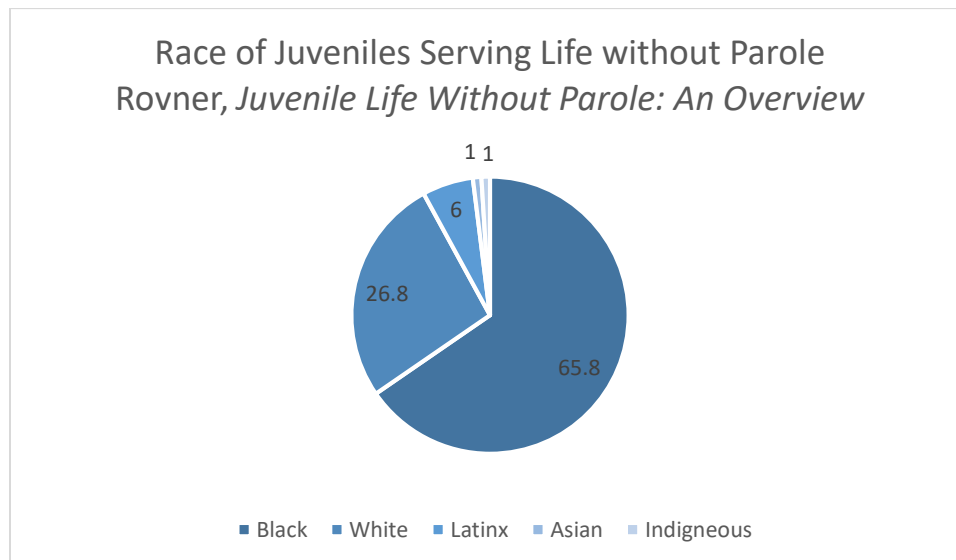
The “juvenile super-predator” theories that beset our nation were wrong and deeply racist. Jane Rutherford, *Juvenile Justice Caught between the Exorcist and A Clockwork Orange*, 51 DePaul L. Rev.

715, 721-22 (2002). Journalists described youth of color as animalistic, wild, and predatory. Michael Welch et al., *Youth Violence and Race in the Media: The Emergence of “Wilding” as an Invention of the Press*, 11 *Race, Gender & Class* 36, 37-38 (2004). “The result was incarceration of literally thousands of youth, the majority of whom were black males.” Moriearty, 15 *J. Gender Race & Just.* at 282.

Racial disparities still plague juvenile sentencing. From states where racial data is available, 62% of people serving juvenile life without parole are Black. Josh Rovner, *Juvenile Life without Parole: An Overview*, 4 (2021).¹² This outcome is not surprising when data shows Black children are more likely to be punished in schools, are 2.3 times more likely to be

¹²<https://www.sentencingproject.org/publications/juvenile-life-without-parole/>

referred to law enforcement, and three times more likely to be suspended or expelled than white children. Joshua Aiken, *Why Do We Lock Up Juveniles for Life and Throw Away the Key? Race Plays a Big Part, The Prison Policy Initiative* (September 15, 2016).¹³ More than twice as many Black youth serve life without parole as do white youth. Mills, 65 Am. U.L. Rev. at 575.



¹³https://www.prisonpolicy.org/blog/2016/09/15/juvenile_lwop/

These findings are consistent with how the legal system treats Black youth. When compared to the racial composition of juveniles aged 7 to 17, white and Asian children are underrepresented, and Black and Latinx children are overrepresented among juvenile convictions. Heather D. Evans & Steven Herbert, *Juveniles Sentenced as Adults in Washington State, 2009-2019*, University of Washington, 11 (June 14, 2021).¹⁴ The racial disparity between youth released and those detained continues to rise. *E.g.*, King County Government, *Zero Youth Detention Data Dashboard, Leading with Race Equity* (Updated May 21, 2021).¹⁵

These statistics bear out in which juveniles are declined to adult court. Evans & Herbert, at 32. Black

¹⁴ https://www.opd.wa.gov/documents/00866-2021_AOCreport.pdf

¹⁵ <https://kingcounty.gov/depts/health/zero-youth-detention/dashboard.aspx>

children are 11.4 times more likely to be declined at a discretionary hearing. *Id.* For automatic decline, the numbers are worse. Black children are convicted as adults after an auto decline at 25.8 times or 2,484% that of white children. *Id.* at 20.

Some of the disparity appears attributable to how justice officials frame the social circumstances from which juvenile delinquency emerges. Evans & Herbert, at 5. White children are seen as less threatening and more susceptible to treatment. *Id.* Minority youth are seen as products of broken families, more adult-like, less amenable to rehabilitation, and more threatening. *Id.* These cultural understandings appear resistant to change. *Id.* This persistence may explain the ongoing patterns of disproportionate juvenile minority contact. *Id.*

Tonelli's crimes result from tragic decisions he made as a youth, for which he makes no excuse. RP 24. His sentence, however, should not reflect the way the legal system treats children of color. At resentencing, the trial court should account for how race results in greater punishment for youth of color.

E. CONCLUSION

This Court should find Tonelli's 61-year sentence unconstitutional and order resentencing.

This amended brief is 3,842 words long and complies with RAP 18.7.

DATED this 7th 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.

TRAVIS STEARNS (WSBA 29335)
Washington Appellate Project (91052)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
) NO. 97890-5
 v.)
)
 TONELLI ANDERSON,)
)
 Appellant.)

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SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF DECEMBER, 2021.



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