No. 97890-5

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TONELLI ANDERSON,

Petitioner.

MEMORANDUM OF AMICI CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, JUVENILE LAW CENTER, AND HUY IN SUPPORT OF PETITIONER'S MOTION TO RECONSIDER

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IDENTITY AND INTEREST OF AMICI

The identity and interest of amici are set forth in the Motion for Leave to File.

INTRODUCTION

This Court should reconsider its decision so that sentencing courts do not misinterpret *State v. Anderson*, No. 97890-5 (Wash. Sept. 8, 2022), to permit a narrowing of the *Miller*[1] analysis that would obviate a full inquiry into whether a sentence is disproportionate. The opinion's exclusive focus on whether the crime reflects youthful immaturity, impetuosity, and failure to appreciate risks and consequences overlooks the United States Supreme Court's repeated requirement that sentencers consider both a young person's capacity for change

[1] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

and diminished culpability—regardless of the circumstances of the crime.[2]

Without reconsideration, *Anderson* suggests that Washington's constitution permits a sentencing procedure under article I, section 14 that is *less* protective than the Eighth Amendment. "Supreme Court application of the United States Constitution establishes a floor below which state courts cannot go." *State v. Sieyes*, 168 Wn.2d 276, 292, 225 P.3d 995 (2010). To avoid this conflict with the Eighth Amendment, this Court should amend its opinion to reaffirm its prior decisions that all *Miller* factors must be considered any time a child is sentenced in adult court.

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[2] *See Jones v. Mississippi*, __ U.S. __, 141 S. Ct. 1307, 1316, 209 L. Ed. 2d 390 (2021) (sentencing procedure for children convicted of homicide requires consideration of youth's "'diminished culpability and heightened capacity for change'" (quoting *Miller*, 567 U.S. at 479)); *Miller*, 567 U.S. at 471-72 ("distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes").

Because *Miller* applies to any child sentenced in adult court, *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), confusion about the appropriate constitutional standard among sentencing courts could result in increasingly disproportionate sentences for children. If the past is any indication, this burden will fall more heavily on children of color.

This Court should also reconsider its mischaracterization of *State v. Haag*, 198 Wn.2d 309, 495 P.3d 241 (2021), because it ignores the foundation of *Haag*'s article I, section 14 de facto life analysis, which is explicitly based on opportunity for release.

ARGUMENT

I. *Anderson*'s Article I, Section 14 *Miller* Analysis Restricts the Scope of the Inquiry into Diminished Culpability, Providing Less Protection than the Eighth Amendment.

Despite this Court's repeated extension of *Miller* beyond the life without parole context, and despite *Miller*'s mandate

that sentencers consider *all* the mitigating factors, the *Miller* analysis in *Anderson* suggests that article I, section 14 requires a less searching inquiry than *Miller* requires.

In *Miller*, the United States Supreme Court required sentencing courts to give individualized consideration to the mitigating qualities of youth when determining whether to impose a sentence of life without parole on a child. *Id.* at 483. The mitigating factors that courts must consider include: (1) "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; (3) "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"; (4) "that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth"; and (5) "the possibility

of rehabilitation." *Id*. at 477-78. Only factor three focuses specifically on the crime, while the others have a much broader focus on the child's life circumstances and character.

This Court has consistently interpreted *Miller* to extend beyond life without parole. *See Haag*, 198 Wn.2d 309 (de facto life); *Houston-Sconiers*, 188 Wn.2d 1 (any sentence for child in adult court); *State v. Ramos*, 187 Wn.2d 420, 387 P.3d 650 (2017) (de facto life). Most importantly, in *Houston-Sconiers*, this Court held that sentencing courts must consider the mitigating qualities of youth whenever a child is sentenced in adult court, and that courts have the discretion to depart as far below the standard range as necessary to account for the diminished culpability of youth. 188 Wn.2d at 21; *id.* at 23 (listing *Miller* factors as mitigating qualities of youth that must be considered in all juvenile sentencings).

Anderson's "constitutional inquiry" under article I, section 14 focuses on the "'hallmark features [of youth, including] immaturity, impetuosity, and failure to appreciate

risks and consequences,'" *Anderson*, slip op. at 17, n.8 (quoting *Miller*, 567 U.S. at 477), with the "central question" being "whether and to what extent an offender's youthful characteristics were a factor in the commission of their crime(s)," *id.* The Court's revisions to the inquiry create two risks: (1) that sentencing courts will apply only the "hallmark features of youth" factor; and (2) that they will improperly restrict that factor to focus narrowly on whether those hallmark features impacted the commission of the crime, rather than how they reduce culpability generally. *Id.*; *see also id.* at 28, n.9 (instructing "Washington courts [to] consider the extent to which a juvenile offender's crime reflects youthful immaturity, impetuosity, or failure to appreciate risk and consequences"). *Contra Miller*, 567 U.S. at 477 (recognizing importance of "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences" *without* connecting it to the crime); *Haag*, 198 Wn.2d at 318-21 (this Court's Eighth Amendment

jurisprudence requires "*meaningful*" consideration of the mitigating qualities of youth, including both "the circumstances of the offense and the culpability of the offender" (citations omitted)).

The *Miller* factors ensure that courts consider the whole person, and not only how the crime occurred, in assessing culpability. *Jones*, 141 S. Ct. at 1315-16 ("*Miller*…required a sentencing procedure similar to…individualized consideration of mitigating circumstances in capital cases," which "require sentencers to consider relevant mitigating circumstances when deciding whether to impose the death penalty." (internal citations omitted)); *Miller*, 567 U.S. at 478-79 (applying the factors in petitioners' cases, including discussion of life circumstances having nothing to do with the crimes). The culpability assessment, deriving directly from the capital

mitigation context,[3] includes, broadly, consideration of "an offender's youth and attendant characteristics," during which the sentencer will consider "diminished culpability and heightened capacity for change." *Jones*, 141 S. Ct. at 1316 (quoting *Miller*, 567 U.S. at 479, 483).

As the *Miller* Court warned, absent a broad universe of mitigation evidence, sentencers will impose punishments that violate the Eighth Amendment's proportionality guarantee. *Miller*, 567 U.S. at 476-77 (absent consideration of "an offender's age and the wealth of characteristics and circumstances attendant to it…every juvenile will receive the same sentence as every other").

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[3] Individualized sentencing must account for "'the character and record of the individual'…and 'the possibility of compassionate or mitigating factors.'" *Miller*, 567 U.S. at 476 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976)); *id.* ("'[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered'" (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110–12, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)).

This Court's singular focus on whether the crime reflects youthful immaturity, impetuosity, and failure to appreciate risks and consequences is contrary to *Miller*'s comprehensive mitigation requirement. Without clarification of *Anderson*'s treatment of *Miller*, any child sentenced in Washington will have an increased risk of receiving a disproportionate sentence due to courts' failure to consider all relevant mitigation.

This restricted reading of *Miller* conflicts with the plain language of the *Miller* fix statute. RCW 10.95.030(3)(b) (in setting a minimum term, a court must take into account all the *Miller* factors). This could mean that children facing long and life-equivalent sentences under the SRA will not have the same protections as children charged with aggravated murder.

II. *Anderson*'s Article I, Section 14 *Miller* Analysis Ignores the Seminal Supreme Court Decisions Requiring Consideration of a Child's Capacity for Change, Providing Less Protection than the Eighth Amendment.

The dual focus of the Eighth Amendment's juvenile life without parole proportionality analysis is on a child's

"'diminished culpability *and heightened capacity for change*.'" *Jones*, 141 S. Ct. at 1316 (quoting *Miller*, 567 U.S. at 479) (emphasis added). By focusing the state constitutional inquiry solely on whether the "juvenile offender's crime reflects youthful immaturity, impetuosity, or failure to appreciate risks and consequences," *Anderson,* slip op. at 28, n.9, the Court fails to incorporate the capacity for change recognized as central to what makes children different.

This Court has stressed that in conducting *Miller*-compliant hearings, "'[t]he key question is whether the [juvenile] defendant is capable of change,'" *State v. Delbosque*, 195 Wn.2d 106, 122, 456 P.3d 806 (2020) (quoting *United States v. Briones*, 929 F.3d 1057, 1067 (9th Cir. 2019)), and that "*Miller*-fix hearings must be forward looking, not backward looking," *Haag*, 198 Wn.2d at 322 (citing *Delbosque*, 195 Wn.2d at 122). While a finding of irreparable corruption is not required, *Ramos*, 187 Wn.2d at 450; *Jones* 141 S. Ct. at 1320-21, the Eighth Amendment and Washington law

unquestionably require sentencing courts to consider a child's heightened capacity for change. *Haag*, 198 Wn.2d at 322; *Jones*, 141 S. Ct. at 1316; RCW 10.95.030(3)(b); *see also Haag*, 198 Wn.2d at 431 (Stephens, J., concurring) (*Miller* requires that "the court give[] due weight to the mitigating qualities of youth described by *Miller*, including…*capacity for rehabilitation*.").

In modernizing the language of the *Miller* inquiry, *Anderson*, slip op. at 17, n.8, this Court removed an important requirement of the seminal Eighth Amendment cases— that it is the transience of youth that makes children inherently less culpable. *Roper v. Simmons*, 543 U.S. 551, 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) ("'[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.'" (quoting *Johnson v. Texas*, 509 U.S. 350, 368, 113 S. Ct. 2726, 33 L. Ed. 2d 290 (1993))).

While the Court may be correct that "irreparable corruption" and "irretrievably depraved" are outdated phrases, they capture the assumption that almost all children are in their very nature changeable. The concept of children's capacity for change, and its importance in determining whether extremely long sentences are constitutional, is virtually absent from this Court's analysis in *Anderson*.[4] The unintended consequence is that sentencing courts may forgo this consideration when sentencing children, undercutting *Miller*, and creating the risk of a disproportionate sentence for any child sentenced in adult court.

[4] This Court recognized *Miller*'s warning that LWOP would be uncommon "given all we have said…about children's diminished culpability and capacity for change." *Anderson*, slip op. at 28 (quoting *Miller*, 567 U.S. at 479-80). While the Court discussed Mr. Anderson's rehabilitation, *Anderson*, slip op. at 30-31, the Court does not even mention the importance of capacity for change in articulating how sentencing courts should determine proportionate sentences under article I, section 14.

III. Left Unclarified, *Anderson*'s Analysis Creates the Risk that a Child Could Receive a Term-of-Years Sentence Longer than Their Natural Life Span, Undermining *Bassett* and *Haag*.

This Court characterized its holding in *Haag* to bar only de facto life sentences for juveniles "whose crimes reflect youthful immaturity, impetuosity, or failure to appreciate risks and consequences." *Anderson*, slip op. at 18. This Court recognized that the risk of disproportionate punishment was the reason behind *Bassett*'s categorical bar of life without parole sentences for juveniles, but reasoned that *Bassett*'s analysis does not translate to term-of-years sentences. *Id*. at 19.

Anderson's characterization of *Haag* undercuts *Haag*'s legacy by improperly synthesizing the case into one holding, when in fact *Haag* established two separate rules. *Haag* first held that mitigation must be more heavily weighed than retribution, 198 Wn.2d at 325. Separately, *Haag* explicitly extended *State v. Bassett* to hold de facto life sentences unconstitutional under article I, section 14—not because of

anything particular to Mr. Haag or his crime,[5] but because a de facto life sentence would deprive him "of a meaningful opportunity to return to society" and "a meaningful life." *id.* at 329; *id.* at 327-30 (sole basis on which Court found de facto life sentences unconstitutional was the failure to provide a meaningful life outside of prison).

Anderson's mischaracterization of *Haag* may also allow sentencing courts to circumvent *Bassett*'s categorical bar by imposing a term that exceeds the child's natural life span. Under RCW 10.95.030(3)(a)(ii), a court could theoretically sentence a 16-year-old defendant to a minimum term of 100 years and a maximum term of life, with the result that the individual would not be eligible for release until the age of 116. *See* RCW 10.95.030(3)(a)(ii) (providing sentencing courts discretion to set minimum term for 16- and 17-year-old

[5] *Haag* separately concluded that the 46-year sentence was "unconstitutional under the Eighth Amendment because the resentencing court expressly found Haag was 'not irretrievably depraved nor irreparably corrupt.'" *Id.* at 329.

defendants convicted of aggravated murder "to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years"). A similar result could occur for people, like Mr. Anderson, who were sentenced as children under the SRA to a determinate sentence exceeding their natural lifespan, but who will not benefit from review after 20-years due to a subsequent adult conviction. *See* RCW 9.94A.730(1).

So long as the court does not find that the crime reflected "youthful immaturity, impetuosity, or failure to appreciate risks or consequences," *Anderson*, slip op. at 17, such sentences will presumably withstand constitutional muster under article I, section 14, notwithstanding the holding in *Bassett* and reaffirmed in *Haag*, that all life without parole sentences constitute cruel punishment under the Washington Constitution. *State v. Bassett*, 192 Wn.2d 67, 91, 428 P.3d 343 (2018) ("We hold that sentencing juvenile offenders to life without parole or

early release constitutes cruel punishment[.]"); *Haag*, 198 Wn.2d at 330.

Allowing courts to impose de facto life sentences without the possibility of parole simply by assigning it a specific term rather than calling it life without parole strips *Bassett* and *Haag* of their meanings, and strips article I, section 14 of the heightened protection afforded to children sentenced in adult court that this Court recently recognized. *Bassett*, 192 Wn.2d at 82; *Haag*, 198 Wn.2d at 327-30.

CONCLUSION

Amici urge this Court to amend its opinion to make clear that a full *Miller* analysis is required when a child is sentenced in adult court. Amici also urge this Court to clarify that its holding in *Haag* was based upon both diminished culpability and capacity for change; that *Haag* does not undo *Bassett*'s bar on sentences for youth that do not allow for parole or early release; and that reaffirms *Haag*'s separate article, section 14 analysis barring de facto life sentences.

RAP 18.17 Certification

Undersigned counsel certifies that, pursuant to RAP 18.17(b), this memorandum contains 2,492 words, exclusive of words contained in the appendices, title sheet, table of contents, table of authorities, certificates of compliance and signature blocks, and pictorial images, and meets the word count limitation of 2,500 words for under RAP 18.17(c)(9).

DATED this 3rd day of October, 2022.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on October 3, 2022, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 3rd day of October, 2022.

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