NO. 92471-6

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOEL RODRIGUEZ RAMOS,

Petitioner.

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

PETITIONER'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

United States Constitution

Washington Constitution

Statutes

Other Authorities

A. ISSUES FOR WHICH REVIEW HAS BEEN GRANTED.

1. The United States Supreme Court has fundamentally changed the legal landscape for sentencing children. It is now unconstitutional to order children to spend life in prison without determining they are irredeemably corrupt. Sentencing courts must meaningfully consider how the transitory neurological deficiencies and vulnerable life circumstances of youth undercut the justification for a life sentence. When evidence shows a child offender is not irredeemably corrupt, does imposing a sentence of lifetime incarceration constitute cruel and unusual punishment?

2. Despite undisputed evidence of his capacity for positive change, Joel Ramos was sentenced under the adult-based sentencing guidelines to life in prison for offenses he committed at 14 years old. The judge believed a sentence below the standard range must be based on mitigating behavior displayed during the incident. Does the sentencing scheme permit courts to impose lesser sentence based on a child's personal circumstances and potential for rehabilitation?

3. The prosecution promised to recommend a sentence at the low end of the standard range, but told the court it must weigh aggravating factors justifying a far lengthier sentence. Did the

prosecution's argument that Mr. Ramos's behavior merited a higher sentence than its promised recommendation breach the plea agreement?

B. STATEMENT OF THE CASE.

In 1993, twenty-five days after Joel Ramos' 14th birthday, he and another 14-year-old committed a robbery which turned into the horrific killing of four members of a family. CP 574-77, 588, 984.

Mr. Ramos waived his right to have the court consider keeping his case in juvenile court. CP 574, 971. Treated as an adult, he pled guilty to three counts of felony murder and one count of premeditated murder. CP 5. The court imposed a determinate standard range sentence of 80 years in prison. CP 13-15. In 2013, he received a full resentencing hearing due to legal errors in his original sentence. *See State v. Ramos*, 174 Wn.App.1042 (2013) (unpublished). The resentencing judge imposed an even longer sentence of 85 years in prison. CP 989.

At the 2013 sentencing hearing, Mr. Ramos submitted volumes of records documenting the difficult circumstances of his life at 14: he lived in an "unstable, chaotic" home described as a "rundown" "hovel" by the probation department; was routinely abandoned when his mother went to Mexico for months at a time; was sexually abused by several relatives but too ashamed to disclose it; was "the dumb kid" who

repeated second grade; when entering seventh grade he had the reading level of a beginning third grader; was "devastated" by his sister's unexpected death; and felt he was an "outcast" after years of "racism and school bullying." CP 672-76, 969-70. Psychologist Terry Lee also testified that neurological deficiencies in a teenager's brain which limit its capacity for reasoned decision-making are further eroded by traumatic childhood experiences such as those Mr. Ramos experienced. RP 83-86.

Mr. Ramos matured in a juvenile prison facility, where he dutifully washed dirty uniforms in a laundry job, reconciled with his mother, and got a basic education. CP 703-04. He cemented his rehabilitation as an adult, holding a job of skill and responsibility with Correctional Industries, mentoring younger inmates, and earning praise from prison staff for being hardworking, affable, and trustworthy. *See* CP 574-982; Opening Brief at 5-8.

The State did not contest Mr. Ramos's unstable and dysfunctional childhood, substantial immaturity when 14 years old, or later rehabilitation. But it argued there was no legal basis for a sentence below the standard range and said an aggravated exceptional sentence would be appropriate. RP 134-46. The court refused to impose a lower

sentence based on case law limiting its consideration of age, personal circumstances, or later rehabilitation. RP 175-76; Opening Brief at 10-11. The Court of Appeals affirmed the constitutionality and rationality of the life sentence. *State v. Ramos*, 189 Wn.App 431, 357 P.3d 680 (2015), *rev. granted*, 185 Wn.2d 1009 (2016).

C. ARGUMENT.

1. Sentencing a 14-year-old to spend his life in prison violates the 8th Amendment and article I, section 14 unless predicated on an express determination of irredeemable culpability.

a. Children are constitutionally different from adults for sentencing purposes

"Children are constitutionally different than adults for purposes of sentencing" as explained in *Miller v. Alabama*, _ U.S. _, 132 S.Ct 2455, 2460, 183 L.Ed.2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 74, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); and *Roper v. Simmons*, 543 U.S. 551, 578, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); U.S. Const. amend. 8; Const. art. I, § 14. Based on the evolving standards of decency underlying the Eighth Amendment prohibition on cruel and unusual punishment, social science, and pediatric brain research, the Court declared it impermissible to impose on children the severest sentences in our arsenal. In 2005, the Court banned execution as

punishment for crimes committed by children. *Roper*, 543 U.S. at 551. In 2010, the Court outlawed life without parole for children convicted of nonhomicide offenses. *Graham*, 560 U.S. at 48. In 2012, the Court prohibited juvenile life without parole sentences for homicide offenses except in the rarest case where the child is found irredeemable. *Miller*, 132 S.Ct. at 2455.

An "increasing body of settled research" in psychology and brain science show "fundamental differences" between the minds of children and adults that render lengthy sentences unconstitutional. *Id*. at 2464 n.5; *Graham*, 560 U.S. at 68.

Three traits are particularly relevant to sentencing. First, children are "irresponsib[le]," "immature" and "impetuous." *Roper*, 543 U.S. at 569. Second, children are susceptible to the harmful influences of family and peers. *Id.* Not only are they psychologically vulnerable, they lack power to extricate themselves from negative environments. *Id.* Third, children's personalities are in flux. *Id.* at 570. Portions of the brain regulating behavior develop through late adolescence. *Graham*, 560 U.S. at 68. This malleability means children are more likely to change than adults. *Id.* Only a small percentage of children who

"engage in illegal activity develop entrenched patterns of problem behavior." *Miller*, 132 S.Ct. at 2464 (internal quotations omitted).

Constitutionally proportional life sentences for juveniles must serve penological goals of retribution, deterrence, incapacitation, and rehabilitation. *Graham*, 560 U.S. at 68, 71. The "heart of the retribution rationale" is that the sentence is proportional to the "personal culpability" of the offender. *Id.* The "transient rashness, proclivity for risk, and inability to assess consequences" characteristic of youth lessen the moral culpability of a child offender, and thus weaken the retributive justification for life sentences. *Miller*, 132 S.Ct. at 2465.

Similarly, these traits undermine the rationale of deterrence, because children are "less likely to take a possible punishment into consideration when making decisions." *Graham*, 560 U.S. at 72.

The penal goal of incapacitation is served by incarceration where an offender presents an ongoing danger to society. Only the rare juvenile presents an ongoing danger due to a prior offense because "incorrigibility is inconsistent with youth." *Id.* (quoting *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968)). Even children who commit horrible crimes are rarely "irreparabl[y] corrupt." *Id.*

Life sentences are antithetical to rehabilitation. A child's immaturity, vulnerability, and capacity for change means that even a "heinous crime" is not necessarily "evidence of irretrievably depraved character," *Roper*, 543 U.S. at 570. The attributes of children undermine the justifications for imposing long sentences on children.

Miller requires sentencing authorities to consider the "mitigating qualities of youth." 132 S.Ct. at 2468. Recognizing that youth is "more than a chronological fact," the Court mandated consideration of the following hallmark characteristics that reduce culpability: immaturity, impetuosity, and failure to appreciate risks and consequences; family and home environment; circumstances of the offense, including the extent of participation and effect of familial or peer pressure; and the possibility of rehabilitation. *Id.* at 2467-68; *Montgomery v. Louisiana*, _ U.S. _, 136 S. Ct. 718, 735, 193 L. Ed. 2d 599 (2016). Children must be given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *Graham*, 560 U.S. at 75. The mere possibility of release—for instance, through executive clemency—is insufficient to ameliorate the harshness of a life sentence, *id.*, especially for a child.

b. Miller creates a new substantive rule for children facing lengthy, adult-based terms of imprisonment.

Miller "did more than require a sentencer to consider a juvenile offender's youth" before imposing a life sentence; "it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Montgomery*, 136 S.Ct. at 734, quoting *Miller*, 132 S.Ct. at 2465. As a substantive rule, *Miller* held the State lacks the power to impose a sentence of lifetime imprisonment upon a child unless found irredeemably corrupt. *Id*. at 729, 734.

c. Life in prison includes de facto life sentences and consecutively imposed terms.

Miller's substantive standard applies when a court sentences a child to "a lifetime in prison." *Montgomery*, 136 S.Ct. at 734. This, by its nature, includes a juvenile who received a *de facto* life sentence, whether for a single offense or for several offenses committed during the same incident based on consecutively imposed terms. *State v. Ronquillo*, 190 Wn.App. 765, 768, 361 P.3d 779 (2015) (severity of 51.3-year aggregated sentence for 16 year-old requires resentencing under *Miller*); *State v. Solis-Diaz*, _Wn. App. _, 2016 WL 2866398, *5-6 (2016) (*Miller, Graham, and Roper* criteria control resentencing for teen who received life equivalent term for six consecutive offenses). A

life sentence includes a person expected to spend his natural life expectancy incarcerated. *See* United States Sentencing Commission, *Life Sentences in the Federal System,* 10 & n.52, 16-17 (2015) (deeming 470 months as life sentence due to average life expectancy).

The Court of Appeals refused to characterize Mr. Ramos' sentence as a life sentence, labelling it four lesser terms of confinement consecutively imposed, with no Eighth Amendment implications. 189 Wn.App. at 452. This artificial approach is contrary to "the teachings of *Miller* and its predecessors." *Ronquillo,* 190 Wn.App. at 775-76.

"*Miller*'s principles are fully applicable to a lengthy term-of-years sentence" where the juvenile offender would otherwise face "the prospect of geriatric release." *State v. Null,* 836 N.W.2d 41, 73-74 (Iowa 2013). "The juvenile who will likely die in prison is entitled to the Eighth Amendment's presumption 'that children are constitutionally different from adults for sentencing purposes,' and that they 'have diminished culpability and greater prospects for reform.'" *Bear Cloud v. State,* 334 P.3d 132, 142 (Wy. 2014), *quoting Miller,* 132 S.Ct. at 2458; *see also Casiano v. Comm'r of Correction,* 115 A.3d 1031 (Conn. 2015), *State's cert. petition denied, sub nom. Semple v. Casiano,* 136 S. Ct. 1364 (2016) (50-year sentence without the possibility of

parole on a juvenile offender subject to the sentencing requirements of *Miller*); *Henry v. State*, 175 So. 3d 675, 680 (Fla. 2015), *State's cert. petition denied*, 136 S. Ct. 1455 (2016) (term-of-years sentences trigger same constitutional concerns as life sentence for juvenile); *State v. Boston*, 363 P.3d 453, 458 (Nev. 2015) (viewing sentences as "functional-equivalent" of life in prison "best addresses" Supreme Court's rulings).

Mr. Ramos' sentence mandates his lifetime incarceration for crimes committed when 14 years old. CP 986. The Department of Corrections classifies him as "de facto life without parole" because his early release date is past his life expectancy. CP 582. The State may not evade *Miller*'s constitutional rule by artificially construing a sentence that amounts to life in prison.

2. The adult-based sentencing scheme must be modified when a child faces a presumptive life sentence.

a. The SRA presumes a standard range sentence will be imposed.

Youth is irrelevant under the presumptive guideline range constructed by the Sentencing Reform Act. RCW 9.94A.510; *State v. O'Dell*, 183 Wn.2d 680, 691-93, 358 P.3d 359 (2015). The SRA structures the court's sentencing authority for any defendant in adult

court. *Ronquillo*, 190 Wn.App. at 781-82; RCW 9.94A.340; RCW 9.94A.505.

The legislature enacted the SRA to provide uniform sentences for people convicted of the same offense. *State v. Barber*, 170 Wn.2d 854, 871, 248 P.3d 494 (2011); RCW 9.94A.010(3). While children's cases may be transferred to adult court, standard range sentences were intended for adults. *O'Dell*, 183 Wn.2d at 691; RCW 13.04.030(1)(e).

b. Case law has narrowly limited a court's sentencing discretion based on personal circumstances.

By statute, the court may not depart from the standard range unless it finds legally applicable mitigating factors that are a substantial and compelling reason to impose less than the presumptive range. RCW 9.94A.535; *see* Former RCW 9.94A.390 (1993).[1]

The SRA does not limit mitigating factors, but case law has construed certain facts as impermissible reasons to depart from the standard range. A mitigating factor may not be something considered in setting the standard range. RCW 9.94A.010 (explaining factors used to

[1] The SRA was reorganized numerically in 2000, without significant changes to the court's authority to impose a sentence below the standard range. Laws 2000, ch. 28, §1. Laws in effect at the time of the offense typically control sentencing. *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004).

set standard range); *see State v. Allert*, 117 Wn.2d 156, 164, 815 P.2d 752 (1991). It may not be a factor personal to the defendant or based on circumstances outside the offense itself, because only conduct at the time of the offense may be considered when imposing a sentence. *State v. Law*, 154 Wn.2d 85, 95, 103, 110 P.3d 717 (2005).

Lack of criminal history is not a basis for a lesser sentence because it is accounted for in the standard range. *State v. Fowle*r, 145 Wn.2d 400, 405, 38 P.3d 335 (2002). Neither the aberrational nature of the offending behavior nor being a low risk of re-offense is a permissible basis for a departure. *Id*. at 408-09. Similarly, "family support does not relate to the crime" and "does not distinguish the crime from other crimes in the same statutory category." *Id*. at 411.

This Court highlighted the restrictions on a sentencing judge's discretion to depart from the standard range in *Law*, ruling the SRA "explicit[ly] command[s]" a judge not to impose a lesser sentence for "any element that does not relate to the crime or the previous record of the defendant." 154 Wn.2d at 97.

In *Law*, the judge reduced a sentence based on the defendant's "genuine" rehabilitation from drug addiction and improved parenting skills after her arrest, where a prison sentence would negatively impact

her addiction recovery and ability to retain custody of her child. *Id*. at 90. This Court reversed, because a judge's belief that a person's rehabilitation or personal circumstances merits a lesser sentence "is not a substantial and compelling reason justifying a departure." *Id*. at 96.

Law further held that an improperly considered "personal factor" includes an offender's age, which may not be a reason for a sentence less than the standard range. *Id*. at 98. *Law* relied on *State v. Ha'mim*, 132 Wn.2d 834, 846-47, 940 P.2d 633 (1997), which reversed an exceptional sentence for an 18 year-old due to her relatively young age and lack of prior arrests. *Id*.

Ha'mim explained that while young adults tend to exercise bad judgment, age alone "may not be used as a factor" to justify a reduced sentence. 132 Wn.2d at 846. To receive a lesser sentence based on youth, a defendant must prove that age significantly impaired her ability to appreciate the wrongfulness of her conduct or conform to the law, which is a "stringent test." *Id*.; *State v. Rogers*, 112 Wn.2d 180, 185, 770 P.2d 180 (1989).

Ha'mim approvingly quoted a Court of Appeals case labeling it "absurd" for a teenager to get a reduced sentence based on age, because a young person's impulsivity and immaturity applies merely to

"common teenage vices," not serious offenses. *Id*. at 846-47 (relying on *State v. Scott*, 72 Wn.App. 207, 218-19, 866 P.2d 1258 (1993)).

O'Dell "significantly revised" *Ha'mim*, acknowledging that youth may be a mitigating factor even for young adults, if they meet the stringent test that age significantly impaired their ability to conform their conduct to the law. *Ronquillo*, 190 Wn.App. at 789. Because *O'Dell* involved an adult, and *Miller* drew a bright line at 18 years of age for its Eighth Amendment analysis, O'Dell's sentence did not raise the same constitutional issues present when sentencing a 14-year-old, who is closer in age to being presumed incapable of committing crime than to being an adult. *Id*. at 781; RCW 9A.04.050.

c. To comply with constitutional standards, the adult sentencing court must presume that youth constitutes a substantial and compelling basis to depart from the standard range when sentencing a child.

Because "children are constitutionally different from adults for purposes of sentencing" the sentencing court is substantively "required" to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S.Ct at 2469; *see Montgomery*, 136 S.Ct. at 733.

A sentencing scheme for children is constitutionally flawed if the court is not specifically required to consider, "let alone give mitigating weight to, the defendant's age at the time of the offense or the hallmarks of youth." *State v. Riley*, 110 A.3d 1205, 1217 (Conn. 2015). *Miller* "establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." *Aiken v. Byars*, 765 S.E.2d 572, 576-77 (S.C. 2014), *cert. denied*, 135 S. Ct. 2379 (2015). "The Court concluded that the status of juvenile offenders warrants different considerations by the states whenever such offenders face criminal punishment as if they are adults." *Henry*, 175 So.3d at 677.

RCW 9.94A.535 lists "illustrative" mitigating factors, and may be construed consistently with *Montgomery*, *Miller*, *Graham*, and *Roper*, if this Court interprets it to include age and its attributes as presumptive reasons to impose a sentence below the standard range.

Courts construe ambiguous statutory language to avoid serious constitutional doubts. *Almendarez-Torres v. United States*, 523 U.S. 224, 237-38, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998); *State v. Strong*, 167 Wn.App. 206, 212-13, 272 P.3d 281 (2012). Prior case law limiting a court's ability to faithfully apply *Montgomery*, *Miller* or

G*raham* may be deemed incorrect and harmful under evolving standards of decency. *See City of Federal Way v. Koenig*, 167 Wn.2d 341, 343, 217 P.3d 1172 (2009).

This Court has acknowledged "our repeated recognition that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment." *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713 (2000); Const. art. I, § 14. Given the Eighth Amendment's near categorical prohibition on sentences of lifetime incarceration for a juvenile, article I, section 14 further bars sentencing laws that presume a child should receive life in prison without accounting for youth's lessened blameworthiness and greater capacity for rehabilitation.

d. The court must give great weight to a child's personal circumstances.

Most offenses are committed by adults and the standard sentencing ranges were crafted for adult offenders. *Ronquillo*, 190 Wn.App. at 781. Being 14 years old makes a person less blameworthy than an adult in nearly all circumstances" the child's brain does not regulate decision-making and emotional control like an adult's, he cannot control his home life, his schooling is far from complete, and he

has capacity for positive behavioral change as he matures. RP 71-86; *Miller*, 132 S.Ct. at 2464-65.

The sentencing court must put "great weight" on considerations the Supreme Court "described as particularly important in evaluating the culpability of juveniles, such as intellectual disability, an abusive upbringing, and evidence of impulsivity and immaturity." *Adams v. Alabama*, 136 S. Ct. 1796, 1801 (2016) (Sotomayor, J., concurring in ruling granting, vacating, and remanding based on *Montgomery*).

Courts have listed factors a judge should consider when sentencing a youth: (1) the defendant's "chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences," (2) family and home environment, including abuse and neglect, lack of adequate parenting or education, and susceptibility to psychological damage or emotional disturbance, (3) the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected the juvenile; and (4) evidence bearing on "the possibility of rehabilitation," which includes the extent or lack of criminal history. *Miller*, 132 S.Ct. at 2468-69; *see Bear Cloud*, 294 P.3d at 47; *People v. Gutierrez*, 324 P.3d 245, 268-69 (Ca. 2014).

3. The sentencing judge did not meaningfully apply the dictate of *Miller* or the requirements articulated in *Montgomery*.

The sentencing court did not find Mr. Ramos irreparably corrupt. It would be untenable for the court to have made such a conclusion based on the abundant evidence showing his maturation into a hard-working, respectful, diligent, cooperative adult. Based on this evidence, the court lacked constitutional authority to sentence him to life in prison. *Montgomery*, 136 S.Ct. at 734.

The court believed it was constrained by the law in effect at the time of the offense, which would usually apply when imposing a sentence. It claimed to be "guided" and "restricted" by *Law*, which barred a sentence reduction based on post-offense rehabilitation or personal circumstances, including age. 154 Wn.2d at 103; RP 169, 171, 175. The court listed the attributes of youth found in *Miller*, but looked for evidence that they influenced Mr. Ramos solely from his behavior displayed during the incident. RP 173-74. It deemed him depraved and deliberate even though he was 14 years old, had never committed a crime before, was at a third grade reading level in school, lived in extreme poverty, had been horribly abused, lost his closest relative, and

despite being sent to prison for the rest of his life, had matured into a caring, remorseful, responsible adult.

The judge's unduly narrow approach to *Miller*, limiting consideration on the effect of youth to behavior during the incident, ignores its mandate and untenably undermines the constitutional imperative to treat a child differently from an adult at sentencing.

4. The possibility of parole eligibility does not cure the constitutional deficiency.

In 2014, the legislature enacted a law permitting some juveniles to petition for parole. RCW 9.94A.730. This new legislation was not in effect at the time of the sentencing hearing and does not rectify the court's unduly narrow assessment of the effect of youth on Mr. Ramos when ordering he spend the rest of his life in prison.

The now theoretical possibility of parole does not transform the sentence imposed. This Court accords a sentence "its literal meaning" as life term. *State v. Fain*, 94 Wn.2d 387, 394, 617 P.2d 720 (1980). It is "clear" that "parole is simply an act of executive grace." *Id*. There is no right to it and no judicial review of its denial. *Id*. The parole board's discretion is "virtually unfettered." *Id*. Because a person's "chances for

executive grace are not legally enforceable," this Court presumes a life sentence will be served as imposed. *Id*. at 395.

In addition, the recently enacted parole statute does not create a vested right to seek parole. The legislature is free to change the statute any time, as it has repeatedly modified the SRA. *See Piris v. Kitching*, 186 Wn.App. 265, 278, 345 P.3d 13, *rev. granted on other grounds*, 183 Wn.2d 1017 (2015) (noting abundance of changes to SRA enacted every year). The legislature changed this law the year after its enactment. Laws of 2015, ch. 134. It is unreasonable to assume the current parole eligibility criteria will remain unchanged, and its availability may not be presumed.

As presently written, the statute categorically and permanently excludes some juveniles from applying for parole, such as anyone convicted of any criminal offense after turning 18, even the most minor of crimes. RCW 9.94A.730(1). It also disqualifies any juvenile who has received a serious infraction in prison within 12 months prior to seeking parole. *Id*. Yet inmates may receive serious infractions despite their lack of purposeful involvement in a rule violation and based on a host of behavioral requirements far broader than penal laws. *See* WAC 137-25-030 (listing serious violations, such as: attempting to perform an

unauthorized marriage, failing to follow a medical directive, or acquiring an unauthorized piercing); WAC 137-25-020(3) (defining an attempted infraction as "putting forth an effort to commit a violation").

The statute directs the parole board give "highest priority" to "public safety considerations." RCW 9.94A.730(3). It has unfettered discretion to apply this amorphous standard. *Id*. Its decision is untethered from the criteria of *Miller* and does not give weight to the diminished culpability of youth. *Id*.

The arbitrariness of parole is being litigated in other states, where appellate courts have found the parole board failed to "adequately weigh what role [a defendant's] youth and immaturity played in his crime." Beth Schwartzapfel, The Marshall Project, *When Parole Boards Trump the Supreme Court*, (May 9, 2016).[2] This arbitrariness is already recognized in Washington, which has long treated parole as illusory and intangible, in addition to lacking judicial oversight or public accountability. *Fain*, 94 Wn.2d at 394. The potential for parole under RCW 9.94A.730 does not correct the sentence imposed

[2] Available at: https://www.themarshallproject.org/2016/05/19/when-parole-boards-trump-the-supreme-court#.zZsKU2ucP.

without meaningfully accounting for the effect of Mr. Ramos' youth and its attributes to reduce his culpability or his rehabilitative potential.

5. The prosecution breached the plea agreement when telling the court how Mr. Ramos qualified for an aggravated sentence greater than the standard range.

The government breaches a plea agreement when it undercuts its sentencing promise by offering reasons to impose a greater sentence or expressing reservations about the promised recommendation. *State v. Carreno-Maldonado,* 135 Wn.App. 77, 83, 143 P.3d 343 (2006).

It is well-established that the presence of an aggravating factor does not counter a mitigating factor and the lack of aggravating factor has no bearing on whether a mitigating factor exists. *State v. Alexander,* 125 Wn.2d 717, 724, 888 P.2d 1169 (1995), citing *State v. Armstrong,* 106 Wn.2d 547, 551, 723 P.2d 1111 (1986); *see State v. Creekmore*, 55 Wn.App. 852, 863, 783 P.2d 1068 (1989). The two categories are not legally tethered or logically correlated.

The prosecution promised to recommend the low end of the standard range but argued "the basis for an aggravating sentence" is "something you have to look at" when deciding the sentence to impose. RP 141. It said the incident was worthy of an exceptional sentence above the standard range, listed aggravating factors "you've got to

weigh," and claimed the standard range could be calculated as far higher. RP 141, 144, 161. These arguments went far beyond its response to the reduced sentence Mr. Ramos sought. RP 134-40.

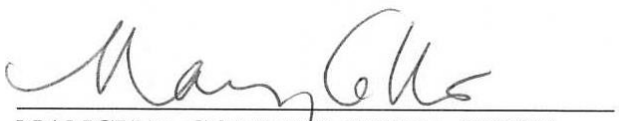
The prosecution was contractually prohibited from implying the court should impose a higher sentence than its promised recommendation, as explained in the Opening Brief, at 31-37. By insisting the court consider reasons favoring a longer sentence, the State breached the plea agreement, requiring resentencing before a different judge. *State v. Harrison*, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003).

D. CONCLUSION.

Mr. Ramos respectfully requests this Court order a new sentencing hearing, directing that his maturation and rehabilitation prohibits lifetime incarceration and requiring meaningful consideration of his youth and its attendant circumstances for a mitigated sentence.

DATED this 30th day of June 2016.

Respectfully submitted,



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