11-6-2017

Motion of Fred T. Korematsu Center for Law and Equality, Columbia Legal Services, and Washington Defender Association for Leave to File Amicus Curiae Brief in Support of Respondent

Fred T. Korematsu Center for Law and Equality

Washington Defender Association

Columbia Legal Services

NO. 49863-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

MARVIN LEO,

Respondent.

MOTION OF FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, COLUMBIA LEGAL SERVICES, AND WASHINGTON DEFENDER ASSOCIATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The identity and interest of *Amici* are described in the Motion for Leave to File that accompanies this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *State v. Bassett*, this Court advanced article I, section 14 jurisprudence by adopting a categorical bar analysis to determine that this state's robust protection against cruel punishment led to but one conclusion: juvenile life without parole is *never* constitutional. 198 Wn. App. 714, 394 P.3d 430 (2017), *review granted*, 189 Wn.2d 1008 (2017). Because the Washington Supreme Court requires Washington courts to treat *de facto* juvenile life without parole sentences as they do actual life without parole sentences, *State v. Ramos*, 187 Wn.2d 420, 438–39, 387 P.3d 650 (2017), it follows both naturally and necessarily that *de facto* life without parole is also categorically barred.

Even if this Court declines to apply the categorical bar analysis to *de facto* life without parole, article I, section 14 is more protective than the Eighth Amendment in the juvenile sentencing context and mandates concurrent sentencing in Mr. Leo's case. Under the Eighth Amendment, life without the possibility of parole for a juvenile offender is constitutional only in the "rarest" of cases. *Montgomery v. Louisiana*, 577

U.S. __, 136 S. Ct. 718, 726, 193 L. Ed. 2d 599 (2016). Thus, if the heightened protection of article I, section 14 is to have continuing vitality, article I, section 14 must never permit mandatory consecutive minimum sentences that result in imposition of an effective life without parole sentence on a juvenile offender under RCW 10.95.030(3)(a)(ii). Employing the *Gunwall*[1] factors as interpretive tools to determine the specific nature of the heightened protection in this juvenile sentencing context reaffirms that *de facto* juvenile life without parole sentences—whether through mandatory consecutive minimum sentences or otherwise—violate article I, section 14.

Because this Court must adopt a reading of the statute that is constitutional, *amici* urge this Court to affirm Mr. Leo's sentence by applying *Bassett*'s categorical bar on juvenile life without parole under RCW 10.95.030(3)(a)(ii) to *de facto* life without parole sentences under the same statute. Alternatively, *amici* urge this Court to recognize that the heightened protection of article I, section 14 forecloses any reading of the statute that would permit mandatory consecutive minimum sentencing resulting in an effective life sentence for a juvenile.[2]

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[1] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

[2] In addition to violating article I, section 14, such a reading of the statute would create two classifications of juvenile offenders that would fail rational basis review under

I. THIS COURT'S OPINION IN *STATE V. BASSETT*, WHICH CATEGORICALLY BARRED JUVENILE LIFE WITHOUT PAROLE, APPLIES TO BOTH ACTUAL AND *DE FACTO* LIFE WITHOUT PAROLE AND THUS REQUIRES AFFIRMING THE TRIAL COURT'S SENTENCE.

In *Bassett*, this Court held that "under a categorical bar analysis, the statutory *Miller*-fix provision [RCW 10.95.030(3)(a)(ii)] that allows 16- to 18-year old offenders convicted of aggravated first degree murder to be sentenced to life without parole or early release violates article I, section 14 of the state constitution."[3, 4] 198 Wn. App. at 716. Thus, Mr. Bassett's resentencing to three life without parole sentences (for three counts of aggravated first-degree murder) pursuant to RCW 10.95.030(3)(a)(ii) was unconstitutional. *Id.* Nevertheless, the State's

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an equal protection challenge. *In re Knapp*, 102 Wn.2d 466, 687 P.2d 1145 (1984) (holding that a violation of the equal protection of the laws guaranteed by the federal and state constitutions requires dissimilar treatment of persons similarly situated with respect to the legitimate purposes of the law). Given that *Ramos* holds that *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 138 L. Ed. 2d 407 (2012), applies with equal force to both literal and *de facto* life without parole sentence, *Ramos*, 187 Wn.2d at 438–39, there would be no legitimate purpose in depriving juvenile offenders who have committed multiple counts of aggravated murder of the opportunity for release. *See Ramos*, 187 Wn.2d at 439.

[3] The categorical bar analysis determines whether a certain form of punishment against a certain class of people is barred based on 1) the consensus against a punishment and 2) the independent judgement of the court. *See Bassett*, 198 Wn. App. at 729–30; *see also Atkins v. Virginia*, 536 U.S. 304, 312–17, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). In *Bassett*, Washington adopted a distilled version of the *Atkins* standard. 198 Wn. App. at 732–38.

[4] The portion of RCW 10.95.030(3)(a)(ii) in question states: "Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years."

interpretation of RCW 10.95.030(3)(a)(ii) would subject juvenile offenders who commit multiple counts of aggravated murder, like Mr. Leo, to *de facto* life without parole through mandatory consecutive minimum sentences. Such a reading of the statute would result, at a minimum, in a 125-year sentence for Mr. Leo—a result that is both illogical and unconstitutional.

The State's reading of the statute ignores *Ramos*, in which our Supreme Court counseled that "*Miller*'s reasoning clearly shows that it applies to any juvenile homicide offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation." 187 Wn.2d at 438. The *Ramos* court specifically stated that *Miller* applies with equal force to both multiple homicides and single homicides, *id.*, and rejected the artificial distinction between actual and *de facto* life without parole: "[W]e also reject the notion that *Miller* applies only to literal, not de facto, life-without-parole sentences. . . . Whether that sentence is for a single crime or an aggregated sentence for multiple crimes, we cannot ignore that the practical result is the same." *Id.* at 438–39.

Failure to apply *Bassett*'s categorical bar to foreclose mandatory consecutive minimum sentences under RCW 10.95.030(3)(a)(ii) would ignore precisely what the *Ramos* court recognized: that the practical result

of a *de facto* life without parole sentence is a sentence of death in prison.[5] *Amici* urge this Court to reject the State's reading of the statute as unconstitutional and explicitly hold that its decision in *Bassett* encompasses *de facto* life without parole.

Further, as *amici* explain below, even if this Court does not conclude that *Bassett*'s categorical bar encompasses *de facto* life without parole sentences, it should nevertheless conclude that RCW 10.95.030(3)(a)(ii) would violate article I, section 14 to the extent it could be read to require mandatory consecutive minimum sentences. *See also* Br. of Resp't. at 19–21 (arguing that such a reading of the statute would violate article I, section 14 as well as the Eighth Amendment).

II. ARTICLE I, SECTION 14 IS MORE PROTECTIVE THAN THE EIGHTH AMENDMENT IN A VARIETY OF CONTEXTS, AND THE *GUNWALL* FACTORS ASSIST IN ARTICULATING THE NATURE OF THIS HEIGHTENED PROTECTION IN THE JUVENILE SENTENCING CONTEXT.

Washington courts routinely hold that article I, section 14 is more protective than its federal counterpart, and those few cases that determine article I, section 14 to be coextensive with the Eighth Amendment are

[5] While there is no consensus on exactly what term of years amounts to a *de facto* life without parole sentence as a general proposition, it is beyond dispute that the sentence the State advocates—five consecutive 25-year terms for a total of 125 years—sentences Mr. Leo to die in prison.

products of the narrow contexts in which the claims arose. Thus, when article I, section 14 is invoked in a new context, the material inquiry is not *whether* the provision affords broader protection than the Eighth Amendment, but *how* the provision affords broader protection in this new context. *See Blomstrom v. Tripp*, __Wn.2d__, 402 P.3d 831, 842–43 (2017) (noting that article I, section 7 provides more robust protection than the Fourth Amendment and then utilizing the *Gunwall* factors to establish the nature of the heightened protection in the new context of privacy rights of pretrial detainees).

A. Washington Courts Have Determined that Article I, Section 14 Is More Protective than the Eighth Amendment in a Variety of Contexts.

In the watershed case of *State v. Fain*, 94 Wn.2d 387, 392–93, 617 P.2d 720 (1980), our Supreme Court held that article I, section 14 is more protective than the Eighth Amendment.[6] Since *Fain*, Washington courts have continued to so hold in a variety of sentencing contexts. For the juvenile sentencing context, see *Bassett*, 198 Wn. App. at 723. For

[6] The *Fain* court noted that it previously held a variety of Washington constitutional provisions to be more protective than their federal counterparts. 94 Wn.2d at 392. Then, for the first time, the court used a four-factor proportionality analysis to determine whether the defendant's sentence violated article I, section 14, even though the sentence did not violate the Eighth Amendment. *Id.* at 397–401. However, for the reasons discussed in note 8, proportionality analysis is ill-suited to assessing the constitutionality of juvenile sentences.

persistent offender cases, see *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014); *State v. Manussier*, 129 Wn.2d 652, 674, 921 P.2d 473 (1996); *State v. Rivers*, 129 Wn.2d 697, 712, 921 P.2d 495 (1996); *State v. Thorne*, 129 Wn.2d 736, 772, 921 P.2d 514 (1996). For death penalty cases, see *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713 (2000); *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984). For consecutive sentences, see *Wahleithner v. Thompson*, 134 Wn. App. 931, 936, 143 P.3d 321 (Div. I 2006). For cases indirectly supporting the conclusion that article I, section 14 provides greater protection than the Eighth Amendment, see *In re Rupe*, 115 Wn.2d 379, 396 n.5, 798 P.2d 780 (1990) (in the death penalty context, noting article I, section 14's greater protection); *In re Johnston*, 99 Wn.2d 466, 478, 663 P.2d 457 (1983) (in a medical license denial case, citing *Fain* as an example of article I, section 14 providing broader protection than the Eighth Amendment); *State v. Grenning*, 142 Wn. App. 518, 545–46, 174 P.3d 706 (Div. II 2008) (performing a *Fain* analysis in the consecutive and concurrent sentencing context to determine whether the sentence violated article I, section 14 and the Eighth Amendment); *In re Haynes*, 100 Wn. App. 366, 375–76, 996 P.2d 637 (Div. I 2000) (in the exceptional sentencing context, indirectly affirming the proposition by performing a

Fain analysis to determine whether the sentence violated both article I, section 14 and the Eighth Amendment).

The second watershed moment in article I, section 14 jurisprudence is the triad of *Manussier*, *Rivers*, and *Thorne*, which together crystallized *Fain*'s holding.[7] *Manussier*, 129 Wn.2d at 674; *Rivers*, 129 Wn.2d at 712; *Thorne*, 129 Wn.2d at 772. These cases reinforced that article I, section 14 is more protective than the Eighth Amendment and more specifically reinforced that the *Fain* proportionality analysis is the proper way to determine whether a particular sentence is

[7] Immediately post-*Fain*, the Washington Court of Appeals inconsistently or improperly applied the *Fain* analysis, occasionally construing article I, section 14 as coextensive with the Eighth Amendment. *See, e.g.*, *State v. Bowen*, 51 Wn. App. 42, 47–48, 751 P.2d 1226 (1988) (equating proportionality analysis under article I, section 14 with proportionality analysis under the Eighth Amendment); *see also State v. Creekmore*, 55 Wn. App. 852, 870–72, 783 P.2d 1068 (1989) (citing *Bowen*, 51 Wn. App. at 47) (stating that article I, section 14 and the Eighth Amendment are given essentially identical treatment). However, the clarity of our Supreme Court's holdings in *Manussier*, *Rivers*, and *Thorne* cast doubt upon the Court of Appeals' analysis in *Bowen* and *Creekmore*.

Furthermore, the Court of Appeals since *Bowen* and *Creekmore* has articulated article I, section 14's heightened protection and applied the *Fain* analysis. *State v. Hart*, 188 Wn. App. 453, 461, 353 P.3d 253 (Div. III 2015); *State v. Flores*, 114 Wn. App. 218, 223, 56 P.3d 622 (Div. I 2002); *State v. Gimarelli*, 105 Wn. App. 370, 380, 20 P.3d 430 (Div. II 2001); *State v. Morin*, 100 Wn. App. 25, 29, 995 P.2d 113 (Div. I 2000); *State v. Ames*, 89 Wn. App. 702, 709 n.8, 950 P.2d 514 (Div. I 1998).

proportionate to the crime.[8] *Bassett*, 198 Wn. App. at 734 (citing *Graham v. Florida*, 560 U.S. 48, 61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)). After these three cases, Washington courts have overwhelmingly affirmed that article I, section 14 is more protective than the Eighth Amendment, whether in the persistent offender context or other contexts.[9]

Although persistent offender cases are the most common context in which article I, section 14's greater protection arises,[10] its broader protections also extend to the death penalty and consecutive sentencing contexts. *See, e.g.*, *Roberts*, 142 Wn.2d 471 (death penalty); *Wahleithner*, 134 Wn. App. 931 (consecutive sentences).

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[8] *Amici* discuss *Fain* and its progeny to highlight the development of article I, section 14 jurisprudence, although the proportionality test itself is not well-suited to analyzing whether Mr. Leo's sentence is constitutional. Proportionality analysis considers the crime and the sentence, but does not take into account the characteristics of the *offender*. *Bassett*, 198 Wn. App. at 738; *State v. Thompson*, 194 Wn. App. 1031, 2016 WL 3264369 at *5 (2016) (Bjorgen, J., dissenting) (unpublished) ("If, consistently with *Witherspoon*, article I, section 14 is more protective than the Eighth Amendment, then it should be interpreted parallel to *O'Dell* to require consideration of an offender's youth during the years in which the scientific studies tell us the characteristics of youth may persist. Without this, article I, section 14 is diminished to the reach of *Miller*.").

[9] *See Witherspoon*, 180 Wn.2d at 887; *Roberts*, 142 Wn.2d at 506; *Bassett*, 198 Wn. App. at 723; *Hart*, 188 Wn. App. at 461; *Grenning*, 142 Wn. App. at 545–46; *Wahleithner*, 134 Wn. App. at 936; *Flores*, 114 Wn. App. at 223; *Gimarelli*, 105 Wn. App. at 380; *Morin*, 100 Wn. App. at 29; *In re Haynes*, 100 Wn. App. at 375–76; *Ames*, 89 Wn. App. at 709 n.8.

[10] While *Witherspoon* might be read to suggest that article I, section 14 is more protective only in the persistent offender context, *see* 180 Wn.2d at 887 ("This court has held that the state constitutional provision is more protective than the Eighth Amendment in this context"), a survey of both persistent offender and non-persistent offender cases reveal that this is not the case, *see* pages 6–9, *supra*.

Rarely has article I, section 14 been held to be merely coextensive with the Eighth Amendment. In *State v. Dodd*, the court determined that article I, section 14 did not extend greater protection than the Eighth Amendment within the narrow context of whether a capital defendant can waive general appellate review. 120 Wn.2d 1, 21, 838 P.2d 86 (1992). Thus, the handful of cases citing *Dodd* for the general proposition that article I, section 14 does not provide greater protection than the Eighth Amendment are flawed.[11] In addition, our Supreme Court decided *Manussier*, *Rivers*, and *Thorne* after *Dodd*. *Rivers* and *Thorne* ignore *Dodd*. *See Rivers*, 129 Wn.2d at 712–15; *Thorne*, 129 Wn.2d at 772–76. *Manussier* explicitly holds *Dodd* as applicable only to its narrow context. *Manussier*; 129 Wn.2d at 674 n.89. When courts consider *Dodd*'s limited holding alongside post-*Dodd* death penalty cases that hold article I, section 14 to be more protective, *see, e.g.*, *Roberts*, 142 Wn.2d 471, it is beyond dispute that *Dodd* and the few cases that rely on *Dodd* are outliers.

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[11] *See State v. Yates*, 161 Wn.2d 714, 792, 168 P.3d 359 (2007) (relying on *Dodd*'s statement that article I, section 14 does not necessarily extend greater protection to dismiss *Yates*'s argument that the death penalty statute is arbitrary, when *Dodd* examined only whether article I, section 14 extended greater protection for waiver of appeal); *In re Cross*, 180 Wn.2d 664, 731, 327 P.3d 660 (2014) (despite *Dodd*'s narrow context, similarly relying on *Dodd*'s claim that article I, section 14 is not necessarily more protective when dismissing the plaintiff's argument that the death penalty statute is unconstitutional); *see also State v. Gentry*, 125 Wn.2d 570, 631–32, 888 P.2d 1105 (1995) (relying on *Dodd* in determining article I, section 14 did not bar victim impact evidence in capital cases).

B. A *Gunwall* Analysis Is No Longer Necessary to Determine Whether Article I, Section 14 Affords Greater Protection than the Eighth Amendment, but Instead Assists Courts and Litigants in Determining How Article I, Section 14 Is More Protective in a Given Context.

Courts have consistently used a *Gunwall* analysis when first deciding whether a state constitutional provision provides greater protection than its federal counterpart.[12] *State v. White*, 135 Wn.2d 761, 769 n.7, 958 P.2d 982 (1998). Once state constitutional jurisprudence has established that a particular constitutional provision is more protective, *Gunwall* becomes an interpretive device, used to define the nature of the heightened protection in each new context. *See Tripp*, 402 P.3d at 842 (noting that state constitutional provisions provide protections which are "qualitatively different from, and in some cases broader" than their federal counterparts and that "this enhanced protection depends on the context in question," and then performing a *Gunwall* analysis to determine the nature of the protection in a new context) (internal citations omitted)).

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[12] The State criticizes Mr. Leo for not performing a *Gunwall* analysis to support his position that RCW 10.95.030 requires concurrent sentences for multiple convictions of aggravated murder. Br. of Appellant at 26–31, *State v. Leo*, No. 49863-4-II. However, while a *Gunwall* analysis provides helpful standards on briefing, it does not otherwise limit the duty of the courts to interpret and apply the state constitution. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 641–42, 211 P.3d 406 (2009) ("A strict rule that courts will not consider state constitutional claims without a complete *Gunwall* analysis could return briefing into an antiquated writ system where parties may lose their constitutional rights by failing to incant correctly. *Gunwall* is better understood to prescribe appropriate arguments: if the parties provide argument on state constitutional provisions and citation, a court may consider the issue.").

State v. White represents such a moment in the evolution of article I, section 7 jurisprudence. There, the court held that prior cases established, as a matter of state constitutional jurisprudence, that article I, section 7 differs from the Fourth Amendment. 135 Wn.2d at 769. The court traced the evolution of article I, section 7 and Fourth Amendment jurisprudence until it reached the conclusion that what would be permissible under the Fourth Amendment was no longer permissible under article I, section 7. *Id.* at 769–71. Then, with this general, heightened protection in mind, the court looked specifically at the context of inventory searches and held article I, section 7 to be more protective. *Id.* at 770–72.

Similarly, what would be permissible under the Eighth Amendment is no longer permissible under article I, section 14. The evolution of article I, section 14 jurisprudence establishes that it is consistently more protective than the Eighth Amendment. *See supra* II.A. Because the basis for article I, section 14's greater protection is well-established, *Gunwall*'s purpose of providing well-founded legal reasoning to establish a principled basis has already been achieved; a *Gunwall* analysis is therefore unnecessary to establish *whether* article I, section 14 is more protective. Instead, this Court must now examine *the nature* of the

heightened article I, section 14 protection in the juvenile sentencing context.

C. Both this Court and our Supreme Court Have Already Extended the Eighth Amendment's Protection of Juveniles in a Manner Consistent with the Heightened Protection of Article I, Section 14.

The fourth *Gunwall* factor, preexisting state law, includes consideration of how Washington has extended protection to juvenile defendants beyond what the Eighth Amendment requires, and the sixth *Gunwall* factor considers whether the matter is of particular state concern. Both factors support the conclusion that article I, section 14 affords heightened protection in the juvenile sentencing context.[13] With respect to factor 6, there can be no dispute that our state's juvenile justice system, along with the norms that system abides by, are matters of particular state interest or local concern.

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[13] Factors four and six are the most salient in determining how article I, section 14 provides juveniles heightened protection. The other factors support the more general proposition that article I, section 14 is more protective than the Eighth Amendment. Factor two, differences in the texts of parallel provisions of the Federal and State constitutions, supports a broader reading as it forbids all cruel punishment, rather than punishment that is both cruel and unusual. *Dodd*, 120 Wn.2d at 21 (for a discussion of why *Dodd*'s larger conclusion that article I, section 14 is limited to that case, see page 10, *supra*). Factor three, state constitutional and common law history, counsels in favor of broad protection for juvenile offenders as well because Washington has recognized the unconstitutionality of certain practices against certain categories of offenders: "[A]rticle I, Section 14 of the state constitution, like the Eighth Amendment, proscribes disproportionate sentencing *in addition to certain modes of punishment*." *Bassett*, 198 Wn. App. at 733 (quoting *Manussier*, 129 Wn.2d at 676) (emphasis added in *Bassett*). Factor five, the difference in structure between the state and federal constitution, always supports broader protection. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

Washington courts have answered the question of *how* article I, section 14 is more protective in the juvenile context because they have extended the reasoning of *Miller* beyond its holding to ensure heightened protection of juvenile offenders. *Miller*, 567 U.S. at 471–79 (recognizing that juveniles have diminished culpability and greater prospects for reform, and therefore holding that mandatory life without parole for juveniles is unconstitutional because juveniles are constitutionally different from adults for purposes of sentencing). In *Montgomery v. Louisiana*, the Court determined *Miller* applied retroactively and held that juvenile life without parole is unconstitutional in all but the "rarest" of cases, reserved for those individuals "whose crimes reflect permanent incorrigibility." 136 S. Ct. at 734. Under *Miller* and *Montgomery*, the opportunity for release will be afforded to those who "demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are less culpable and capable of change." *Id.* at 736.

Post-*Miller and -Montgomery*, the Washington Supreme Court has expanded and better defined the protection afforded to juveniles. In *Ramos*, the court logically extended *Miller* to apply to *de facto* life sentences because "[w]hether that sentence is for a single crime or an aggregated sentence for multiple crimes, we cannot ignore that the practical result is the same." *Ramos*, 187 Wn.2d at 439. The *Ramos* court

also explicitly acknowledged that *Miller*'s reasoning applies with equal force to multiple homicides as it does to single homicides: "[N]othing about *Miller* suggests its individualized sentencing requirement is limited to single homicides because 'the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, *even when they commit terrible crimes*.'" *Id.* at 438 (citing *Miller*, 132 S. Ct. at 2465) (emphasis added in *Ramos*).

In *State v. O'Dell*, the court further extended *Miller* when it allowed the youth of an adult offender to be considered as a justification for departures below the standard sentencing range, in recognition that the juvenile brain is not fully developed by the age of eighteen. 183 Wn.2d 680, 688–98, 358 P.3d 359 (2015). In *State v. Houston-Sconiers*, the court expanded *Miller* even further when it declared that for courts to fully address the mitigating qualities of youth, courts need absolute discretion to depart from sentencing guidelines and any other mandatory sentencing enhancements when sentencing juveniles in adult court. 188 Wn.2d 1, 21–26, 391 P.3d 409 (2017).

While neither *Ramos*, *O'Dell*, nor *Houston-Sconiers* was explicitly based on article I, section 14, our Supreme Court has demonstrated its commitment to expand Eighth Amendment jurisprudence beyond its formal holdings. Thus, even though the Washington Supreme Court has

not explicitly addressed how article I, section 14 is more protective in the juvenile context, it has fully embraced the precept that "children are constitutionally different" and has articulated rules that counteract the significant risks of applying adult sentencing procedures to juveniles.

If the heightened protection of article I, section 14 is to mean anything, this Court should take the next step in ensuring that juvenile defendants are not sentenced to die in prison and hold that mandatory consecutive minimum sentences under 10.95.030(3)(a)(ii) resulting in *de facto* life without parole would violate article I, section 14.

CONCLUSION

Amici urge this Court to explicitly hold that the categorical bar against juvenile life without parole announced in *Bassett* encompasses both actual and *de facto* life without parole sentences. Should this Court decline to so hold, *amici* urge the Court to hold that RCW 10.95.030(3)(a)(ii) requires concurrent rather than consecutive minimum terms—the only reading of the statute consistent with the heightened protection of article I, section 14. For the foregoing reasons, *amici* respectfully request that this Court affirm the trial court's sentence.

RESPECTFULLY SUBMITTED this 6th day of November, 2017.

s/ Jessica Levin

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on November 6, 2017, the forgoing document was electronically filed with the Washington State Appellate Court Portal, which will effect service of such filing on all attorneys of record.

Signed in Seattle, Washington, this 6th day of November, 2017.

s/ Jessica Levin

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