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Brief of Fred T. Korematsu Center for Law and Equality as Amicus Curiae in Support of Petitioner

Fred T. Korematsu Center for Law and Equality

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NO. 95814-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH JAMES GILBERT,

Petitioner.

BRIEF OF FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The identity and interest of amicus is set forth in the Motion for Leave to File that accompanies this brief.

INTRODUCTION

This Court has made great strides in advancing juvenile justice under the Eighth Amendment, incorporating and expanding the central teachings of *Roper*, *Graham*, *Miller*, and *Montgomery* in *O'Dell, Ramos,* and *Houston-Sconiers*. In *Bassett*, this Court built upon those decisions to categorically bar juvenile life without parole, this time grounding its decision in article I, section 14 of the Washington constitution.

In *Houston-Sconiers*, this Court established that sentencing courts must consider the mitigating qualities of youth at the time of sentencing, and afforded trial courts ultimate discretion to depart from adult sentencing schemes when sentencing juveniles for any crime. However, *Houston-Sconiers* left open the possibility that the exercise of that discretion might result in a life equivalent sentence, because it did not address courts' duty to avoid such sentences. Mr. Gilbert's case is an opportunity for this Court to continue building our state's juvenile justice jurisprudence and to address what *Houston-Sconiers* left unaddressed—

the affirmative duty that Washington courts have under article I, section 14 to ensure that juveniles have a meaningful opportunity for release.

ARGUMENT

ARTICLE I, SECTION 14'S HEIGHTENED PROTECTION IN THE JUVENILE SENTENCING CONTEXT GUARANTEES A MEANINGFUL OPPORTUNITY FOR RELEASE.

Federal juvenile sentencing jurisprudence, and this Court's decisions applying and extending that jurisprudence under the Eighth Amendment, require sentencing procedures that both account for the diminished culpability of youth *and* ensure a meaningful opportunity for release. *See Miller v. Alabama*, 567 U.S. 460, 489, 132 S. Ct. 2455, 138 L. Ed. 2d 407 (2012) (prohibiting mandatory life without parole and requiring individual consideration of mitigating qualities of youth for juveniles sentenced for homicide crimes); *Graham v. Florida*, 560 U.S. 48, 82, 67 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (holding Eighth Amendment requires meaningful opportunity for release for juveniles sentenced for non-homicide crimes); *State v. Ramos*, 187 Wn.2d 420, 434-35, 387 P.3d 650 (2017), *as amended* (Feb. 22, 2017), *reconsideration denied* (Feb. 23, 2017), *cert. denied*, – U.S. –, 138 S. Ct. 467, 199 L. Ed. 2d (2017) (holding juveniles sentenced to de facto life sentences entitled to individual consideration of youth at sentencing); *State v. Houston-*

Sconiers, 188 Wn.2d 1, 21, 391 P.3d 409 (2017) (holding all youth entitled to consideration of mitigating qualities of youth). The trial court's failure to consider Mr. Gilbert's total term of incarceration at resentencing under RCW 10.95.030(3)(a)(i) denied him his constitutional right to a meaningful opportunity for release. *See Miller*, 567 U.S. at 479 (citing *Graham*, 560 U.S. at 75).

This Court has not addressed the specific nature of the heightened protection of article I, section 14 as it relates to the requirement of a meaningful opportunity for release in the face of a life equivalent sentence. However, it has already established the necessary foundation to articulate the heightened protection afforded by the state constitution.

In *Ramos*, this 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.

In *Bassett*, this Court recently placed its juvenile sentencing jurisprudence under the umbrella of the state constitution, holding that "in the context of juvenile sentencing, article I, section 14 provides greater protection than the Eighth Amendment." *State v. Bassett*, – Wn.2d –, 428 P.3d 343, 350 (2018). This Court then applied a categorical bar analysis to hold that "sentencing juvenile offenders to life without parole or early release constitutes cruel punishment and therefore is unconstitutional under article I, section 14 of the Washington Constitution." *Id.* at 346.

The synthesis of this Court's decisions in *Bassett* and *Ramos*—that our state constitution affords heightened protection against cruel punishment in the juvenile sentencing context and categorically bars life without parole, and that Washington recognizes that a de facto life sentence is treated the same as life without parole—raises a red flag as to the constitutionality of Mr. Gilbert's sentence. However, neither independently nor together do these two decisions define the precise nature of the heightened protection required in this context—where a life equivalent sentence imposed on a juvenile obviates a meaningful opportunity for release.

This Court has long recognized that it must, where feasible, "resolve constitutional questions first under the provisions of our own state constitution before turning to federal law." *State v. Gregory*, – Wn.2d –, 427 P.3d 621, 631 (2018) (quoting *Collier v. City of Tacoma*, 121 Wn.2d 737, 745, 854 P.2d 1046 (1993)). Amicus advocates for a decision from this Court articulating that the heightened protection of article I, section 14 requires sentencing courts to ensure a juvenile a meaningful opportunity for release. This necessarily encompasses the rule of ultimate discretion articulated in *Houston-Sconiers*—including discretion to decline to impose a certain sentence or sentence enhancement, and to run sentences concurrently rather than consecutively.[1]

However, *Houston-Sconiers* stops short of affirmatively requiring what is undoubtedly mandated by *Miller*, and even more by article I, section 14—that courts review the entire sentence imposed to ensure a meaningful opportunity for release, whether by declining to impose a particular punishment or by imposing concurrent, rather than consecutive sentences. *Houston-Sconiers* is thus only a partial answer to *Miller*'s call.

[1] This Court's decision in *Houston-Sconiers* recognized the necessity of sentencing procedures that account for the diminished culpability of youth, and afforded trial courts ultimate discretion in sentencing youth. 188 Wn.2d at 21 ("we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant"). The Court also gave sentencing courts wide latitude to depart from any mandatory sentencing guidelines, after the required consideration of youth, holding that courts "must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements." *Id.*

Thus, a decision from this Court orienting the discretion toward a meaningful opportunity for release will give courts needed guidance on how to impose sentences consistent with the heightened protection of article I, section 14.

The lack of a decision clarifying this duty permits through other means what *Bassett* logically precludes. It leaves open the possibility, through the exercise of an individual judge's discretion, that life equivalent sentences[2] will continue to be imposed in different sentencing contexts. In Mr. Gilbert's case, the absence of a decision from this Court led the sentencing court to believe it had no discretion to change the structure of his sentence, leaving in place the original decision to run the first degree murder sentence consecutive to his sentence under RCW 10.95.030(3)(a). Mr. Gilbert now faces a minimum of 45 years of incarceration. By refusing to consider the impact of the additional charges on the total length of Mr. Gilbert's sentence, the sentencing court failed to

[2] To date, there is no consensus on exactly what term of years amounts to a life-equivalent or de facto life without parole sentence. *See Ramos*, 187 Wn.2d at 439 n.6 (reserving ruling as to how long a sentence must be to trigger *Miller*'s requirements). However, given the known impacts of prison on individual health outcomes and aging, and that Mr. Gilbert will not have a chance at release until he is 60 years old at the very earliest, it is arguable that his combined sentence qualifies as de facto life. *See* Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States* 17 (2012), https://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf; *cf. State v. Ronquillo*, 190 Wn. App. 765, 775, 361 P.3d 779 (2015) (holding 51 year sentence qualifies as de facto life sentence).

ensure the constitutionality of his sentence. Furthermore, to impose a life equivalent sentence here, where Mr. Gilbert has been found releasable by the Indeterminate Sentence Review Board (ISRB), and therefore impliedly *not* incorrigible, further undermines the constitutionality of this sentence.[3] *See Montgomery v. Louisiana*, 577 U.S. __, 136 S. Ct. 718, 736-37, 193 L. Ed. 2d 599 (2016), *as revised* (Jan. 27, 2016) ("prisoners … must be given the opportunity to show their crime did not reflect irreparable corruption; and if it did not, their hope for some years of life outside prison walls must be restored").

Ensuring a meaningful opportunity for release in Mr. Gilbert's case does not require the court on remand to change the sentence for first degree murder or otherwise open it to any form of collateral attack. It simply requires the Court to run the sentences concurrently rather than consecutively, a ministerial duty courts perform every day.[4]

This Court should conclude that interpreting RCW 10.95.030(3)(a) to require mandatory consecutive minimum sentences would violate article I, section 14. If the heightened protection of article I, section 14 in

[3] *See* Brief of Respondent at 18 (noting that Mr. Gilbert found releasable to consecutive count by ISRB in March 2018); *Bassett*, 428 P.3d at 353-54 (finding risk of disproportionate sentences due to higher chances that youth will rehabilitate).
[4] *See* Brief of Amici Curiae Washington Association of Criminal Defense Lawyers, Washington Defender Association, and ACLU of Washington for a full analysis of this issue.

the juvenile sentencing context declared by this Court in *Bassett* is to have continuing vitality, it imposes an affirmative duty on sentencing courts to ensure a juvenile has a meaningful opportunity for release. In Mr. Gilbert's case, it does not permit 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)(i). Amicus urges this Court to explicitly hold that article I, section 14 requires courts to ensure that the sentence imposed provides the juvenile a chance at life outside the prison walls.

CONCLUSION

For the forgoing reasons, amicus respectfully requests that the Court grant the Petitioner's request and remand this case for resentencing.

RESPECTFULLY SUBMITTED this 6th day of December, 2018.

s/ Melissa R. Lee

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on December 6, 2018, 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 6th day of December, 2018.

s/ Melissa R. Lee

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