7-29-2019

Brief of Fred T. Korematsu Center for Law and Equality, American Civil Liberties Union of Washington, Washington Association of Criminal Defense Lawyers, and Washington Defender Association as Amici Curiae in Support of Respondent

Robert S. Chang

Melissa Lee

Jessica Levin

Fred T. Korematsu Center for Law and Equality

Counsel for Amici Curiae

NO. 96709-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,
v.
CRISTIAN DELBOSQUE,
Respondent.

BRIEF OF FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND WASHINGTON DEFENDER ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

David A. Perez, WSBA No. 43959
Thomas W. Hillier, WSBA No. 5193
Sopen Shah, Wis. Bar No. 1105013
PERKINS COIE LLP

Robert S. Chang, WSBA #44083
Melissa Lee, WSBA #38808
Jessica Levin, WSBA #40837
RONALD A. PETERSON LAW CLINIC
SEATTLE UNIVERSITY SCHOOL OF LAW
1112 East Columbia St.
Seattle, WA 98122
Tel: (206) 398-4009
changro@seattleu.edu

Counsel for Amicus Curiae
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

Additional Counsel Listed on Next Page

Nancy Talner, WSBA # 11196
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Tel: (206) 624-2184
talner@aclu-wa.org

Counsel for Amicus Curiae
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Rita Griffith, WSBA # 14360
1511 Third Ave, Ste 503
Seattle, WA 98101
Tel: (206) 623-1302
griff1984@comcast.net

Counsel for Amicus Curiae
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Hillary Behrman, WSBA #22675
110 Prefontaine Pl. S. | Ste 610
Seattle, WA 98104
Tel: (206) 623-4321
hillary@defensenet.org

Counsel for Amicus Curiae
WASHINGTON DEFENDERS ASSOCIATION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Constitutional Provision

Washington Statutes

Washington State Cases

TABLE OF AUTHORITIES
(Continued)

Page(s)

Federal Cases

TABLE OF AUTHORITIES
(Continued)

Page(s)

Other Authorities

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

The statement of identity and interest of amici are set forth in the Motion for Leave to File that accompanies this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although this Court in *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018), categorically eliminated mandatory life-without-parole sentences for juveniles, it did not address indeterminate sentences under RCW 10.95.030. Unless the child is under 16 when the offense is committed, the sentencing court remains free to set the minimum term of years at anywhere between 25 years to something short of life. What this upper limit (de facto life) is remains undecided. But regardless of the minimum term of years set by the sentencing court, because there is no guarantee of release once that minimum term is served, a child sentenced under RCW 10.95.030 may still die in prison.

When a sentencing court sets the minimum term, it must determine whether the child is "the rare juvenile offender" who is "irreparabl[y] corrupt[ ]." *Miller v. Alabama*, 567 U.S. 460, 480, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Two problems immediately present themselves. First, how is the court to determine whether a child—who had the physiological and biological characteristics of youth at the time of the offense—does not

have the capacity to change? Social science suggests that it is extremely difficult to identify "the rarest of children[ ] . . . whose crimes reflect irreparable corruption." *Montgomery v. Louisiana*, 136 S. Ct. 718, 726, 193 L. Ed. 2d 599 (2016), *as revised* (Jan. 27, 2016). This situation presents an insurmountable risk of error.

Second, the juvenile bears the entire risk of any error the court might make. If the sentencing court believes that the child whom it is sentencing is capable of change, the sentencing court can set the minimum at 25 years. If the court gets it wrong and the child turns out to be one of the few who actually is incorrigible, the Indeterminate Sentence Review Board (ISRB) will have the facts before it and can prevent that person from being released. But if the court erroneously decides that the child is incorrigible and sets the minimum sentence at 48 years, the child has no reprieve. Although he could have been rehabilitated, he will never get a chance to be a productive member of society. A sentence of that length does not advance legitimate penological objectives. In addition, society misses out on someone who would have become a contributing member if given a meaningful opportunity for release.

This Court properly constrains sentencing courts' discretion, based on the constitution, within the limits set by the legislature. *See Bassett*, 192 Wn.2d at 91. As detailed below, sentencing courts are only giving the

minimum of 25 years when they have no discretion because the child was under 16 at the time of the offense; when courts have discretion, they are generally giving high-range minimum terms short of actual life—or what might be deemed de facto life—under the *Miller*-fix statute. These sentences ignore that the discretion sentencing courts exercise is in fact constrained by *Graham v. Florida*, 560 U.S. 48, 82, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), *Miller*, *Montgomery*, and by this Court's extra protections given to juveniles under article I, section 14 of the Washington Constitution, *see Bassett*, 192 Wn.2d at 73.

This Court should acknowledge that the high risk of error and the asymmetric consequences of error require a sentencing court to set the minimum term at the statutory minimum unless the State, by clear and convincing evidence, establishes that a particular juvenile belongs in the category of those rare youth who are incorrigible. Anything else flies in the face of this Court's jurisprudence that recognizes that children are different and that Washington's Constitution gives greater protection to children, even when they are sentenced as adults.

ARGUMENT

I. A sentencing court must set the minimum sentence at the bottom of the *Miller*-fix statutory range unless the State proves by clear and convincing evidence that the juvenile offender does not have the hallmark features of youth.

Both the Supreme Court and this Court have held that juveniles constitutionally and categorically differ from adult offenders for sentencing purposes due to their lessened culpability and greater potential for reform. As a result, the Supreme Court requires that courts give juvenile offenders a meaningful opportunity for release. A meaningful opportunity for release under the Washington Constitution means that courts must set the minimum sentence under the *Miller*-fix statute at 25 years because (1) identification of the rare incorrigible youth is extremely difficult and (2) the youth bears the risk of the court's error. Indeed, the ISRB fail-safe means that the rare irredeemable youth would spend the rest of his life in prison no matter his minimum sentence. Thus, for these compelling reasons, courts must set the minimum sentence at the bottom of the *Miller*-fix statutory range unless the State can prove by clear and convincing evidence that a juvenile does not have the characteristics that define youth.

A. Courts must provide juvenile offenders with a meaningful opportunity for release based on maturity and rehabilitation.

This Court and the United States Supreme Court have held that "children are constitutionally different from adults for purposes of

sentencing" because of their diminished culpability and potential for reform. *Miller*, 567 U.S. at 471; *Bassett*, 192 Wn.2d at 81 ("children are different" (quoting *Miller*, 567 U.S. at 481)). Juveniles differ from adults in three major ways: their "'lack of maturity and [ ] underdeveloped sense of responsibility' lead[ ] to recklessness, impulsivity, and heedless risk-taking," they are more vulnerable to negative peer pressure and "brutal or dysfunctional" family situations, and their personality traits "are 'less fixed.'" *Id.* at 477-78 (quoting *Roper v. Simmons*, 543 U.S. 551, 569–70, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)). As a result, the actions of juvenile offenders are "less likely to be 'evidence of irretrievabl[e] deprav[ity].'" *Id.* (alterations in original) (quoting *Roper*, 543 U.S. at 570).

Long prison sentences do not serve the goals of sentencing for children who have the "hallmark features" of youth. *Miller*, 567 U.S. at 477. The "distinctive attributes" that separate children from adults "diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* at 472. Because "'[t]he heart of the retribution rationale' relates to an offender's blameworthiness, 'the case for retribution is not as strong with a minor as with an adult.'" *Id.* (quoting *Graham*, 560 U.S. at 71). Juvenile offenders are less deterred by harsh sentences because "they are less likely to take a possible punishment into consideration when making decisions." *Graham*,

560 U.S. at 72. Incapacitation is also less compelling because courts must believe "that the juvenile is incorrigible" for the length of the sentence, whereas "incorrigibility is inconsistent with youth." *Id*. at 72–73 (internal quotations omitted). Finally, imposing harsh sentences on juvenile offenders does not serve the goal of rehabilitation because "the juvenile justice system's structure impedes rehabilitation, making that change more likely to be regressive." Aaron Sussman, *The Paradox of* Graham v. Florida *and the Juvenile Justice System*, 37 Vt. L. Rev. 381, 405 (2012); *see also Graham*, 560 U.S. at 79 ("In some prisons, moreover, the system itself becomes complicit in the lack of development.").

Sentencing courts must take those differences into account when sentencing all juvenile offenders. *Miller*, 567 U.S. at 479; *United States v. Briones*, No. 16-10150, 2019 WL 2943490, at *4 (9th Cir. July 9, 2019) (en banc) ("even when terribly serious and depraved crimes are at issue"). The requirement to treat juvenile offenders differently does not apply only to life or de facto life sentences. In *State v. Houston-Sconiers*, this Court applied the Eighth Amendment requirement to "treat children differently" to juvenile offenders with 26- and 31-year sentences. 188 Wn.2d 1, 20, 391 P.3d 409 (2017). Indeed, the sentencing court must consider the "juvenile's immaturity, impetuosity, and failure to appreciate risks and consequences," the effect of family and "peer pressures," and "any factors suggesting that

the juvenile might be successfully rehabilitated" anytime that it sentences a juvenile offender. *State v. Gilbert*, 193 Wn.2d 169, 176, 438 P.3d 133 (2019).

Harsh sentences should be "uncommon" because nearly all juveniles' crimes "reflect[ ] unfortunate yet transient immaturity." *Miller*, 567 U.S. at 479-80. As the Supreme Court has repeatedly said, "rare" is the juvenile offender "whose crime reflects irreparable corruption." *Id.* (quoting *Roper* and *Graham*). In fact, a rule "forbid[s] psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others." *Roper*, 543 U.S. at 573.

As the United States Supreme Court said in *Graham v. Florida*, the Eighth Amendment requires courts to provide each juvenile offender with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," regardless of their crime. 560 U.S. 48, 79. The Court did not define such an opportunity. Instead, *Graham* left it to the states, "in the first instance, to explore the means and mechanisms for compliance." *Id.* This State has already decided that the Washington Constitution provides greater protection to juvenile offenders than the Eighth Amendment, *Bassett*, 192 Wn.2d at 82; *see also id.* at 81 (*Miller* applies to

de facto life without parole sentences). And this Court held that youth alone can support a sentence *below* the statutory range. *See State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015).

This Court has yet to address indeterminate sentences under RCW 10.95.030.

B. Sentencing courts should set the minimum sentence under RCW 10.95.030 at 25 years to provide juvenile offenders a "meaningful opportunity for release" under the Washington Constitution.

Because the "hallmark features" of youth reduce the penological justifications for imposing harsh sentences on juveniles and create a high risk of error, sentences beyond the bottom of the *Miller*-fix statutory range do not truly provide juveniles with a "meaningful opportunity to obtain release." *Miller*, 567 U.S. at 477; *Graham*, 560 U.S. at 79.

1. Sentencing courts cannot identify with certainty those rare juveniles who cannot be rehabilitated within 25 years.

Miller's central inquiry "reorients the sentencing analysis to a forward-looking assessment of the defendant's capacity for change or propensity for incorrigibility." *Briones*, 2019 WL 2943490 at *6. But a court cannot "with sufficient accuracy distinguish the [rare] incorrigible juvenile offenders from the many that have the capacity for change." *Graham*, 560 U.S. at 77; *Montgomery*, 136 S. Ct. at 735. As this Court

acknowledged, "even expert psychologists have" difficulty "in determining whether a [juvenile] is irreparably corrupt." *Bassett*, 192 Wn.2d at 90; *see also Roper*, 543 U.S. at 573 (referencing the rule against diagnosing those under 18 with antisocial personality disorder). As a result, there is an "unacceptable risk that children undeserving" of a life-equivalent or near life-equivalent sentence "will receive one." *Bassett*, 192 Wn.2d at 90. The desire to incapacitate juvenile offenders "cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity." *Graham*, 560 U.S. at 73.

A recent Ninth Circuit case demonstrates that a juvenile offender can demonstrate the capacity for change within 25 years of his offense. In *Briones*, the defendant was convicted and resentenced, post-*Miller*, to life without parole for first degree felony murder, arson, assault, and witness tampering. 2019 WL 2943490, at *2. The Ninth Circuit held that the district court ran afoul of *Miller* because it failed to take into account the evidence of "Briones's efforts to rehabilitate himself" between the "eighteen years that passed between the" two sentencing hearings. *Id.* at *7. During that time, he "maintain[ed] a perfect disciplinary record, [ ] held a job in food service; volunteered to speak with young inmates about how to change their lives; completed his GED; and, in 1999," married his high-school sweetheart and the mother of his daughter. *Id.* at *3.

Nevertheless, Washington courts have been resentencing juvenile offenders to life-equivalent or near life-equivalent terms so that the offender can be released, at earliest, around the age of retirement, 65. Of the 22 juvenile offenders resentenced under Washington's *Miller*-fix statute, only seven will have an opportunity for release after serving 25 years in prison. Importantly, each of the seven who received the bottom range minimum sentence of 25 years were all under the age of 16 when they committed their crimes; because they were each under 16, RCW 10.95.030(3)(a)(i) mandated that the minimum term be set at 25 years. Stated differently, the minimum, 25 years, has only been given when sentencing courts had no discretion to set it any higher. When sentencing courts have had the discretion to set it higher, they generally have set it much higher. Of those who were between the ages of 16 and 18 when they committed their crimes, upon resentencing, they received minimum sentences of 42,[1] 50,[2] 48,[3] 38,[4]

[1] *State v. Backstrom*, No. 97-1-01993-6 (Snohomish Cty. Sup. Ct. June 27, 2017).
[2] *State v. Boot*, No. 95-1-00310-0 (Spokane Cty. Sup. Ct. Mar. 30, 2017).
[3] *State v. Delbosque*, No. 93-1-00256-4 (Mason Cty. Sup. Ct. Nov. 23, 2016) (this case).
[4] *State v. Forrester*, No. 1-25095 (1978) (Spokane Cty. Sup. Ct. Nov. 12, 2015).

48,[5] 46,[6] 40,[7] 189,[8] 26,[9] 125,[10] 32,[11] and 35,[12] with three receiving LWOP.[13] As a practical matter, their first opportunities for release will occur around their retirement age. A chance for release at retirement age is not a "meaningful opportunity." The reason that we grant offenders release is so that they will contribute to society, professionally and personally. It will be difficult for an individual to reintegrate into society when he is eligible to take his first job at the age that most Americans retire.

Given the extreme difficulty in distinguishing juvenile offenders who are incorrigible at the time of sentencing from those whose crimes reflect transient immaturity, there is a high risk of error in applying disproportionately harsh sentences to juvenile offenders.

---

[5] *State v. Furman*, No. 89-1-00304-8 (Kitsap Cty. Sup. Ct. Mar. 26, 2018).
[6] *State v. Haag*, No. 94-1-00411-2 (Cowlitz Cty. Sup. Ct. Jan. 19, 2018).
[7] *State v. Leo*, No. 98-1-03161-3 (Pierce Cty. Sup. Ct. Nov. 16, 2016).
[8] The resentencing court in 2017 set a term of 189 years, even though this person was 14 when he committed the crimes. *State v. Loukaitis*, No. 96-1-00548-0 (Grant Cty. Sup. Ct. Apr. 19, 2017).
[9] *State v. Hofstetter*, No. 91-1-02993-0 (Pierce Cty. Sup. Ct. Oct. 18, 2013).
[10] The initial resentencing court set a minimum term of 25 years for each of the 5 counts to run consecutively, resulting in a minimum term of 125 years. *State v. Phet*, No. 98-1-03162-1 (Pierce Cty. Sup. Ct. Mar. 10, 2016). Mr. Phet's Personal Restraint Petition was stayed pending *Bassett* and *Gilbert*. That stay was lifted on May 21, 2019, but re-resentencing has yet to occur.
[11] *State v. Skay*, No. 95-1-01942-5 (Snohomish Cty. Sup. Ct. June 1, 2016).
[12] *State v. Thang*, No. 98-1-00278-7 (Spokane Cty. Sup. Ct. Sept. 23, 2015).
[13] *State v. Ngoeung*, No. 94-1-03719-8 (Pierce Cty. Sup. Ct. Jan. 23, 2015 & July 12, 2019); *State v. Stevenson*, No. 87-1-00011-5 (Skamania Cty. Sup. Ct. Mar. 17, 2017); *State v. Bassett*, No. 95-1-00415-9 (Grays Harbor Cty. Sup. Ct. Jan. 30, 2015). One of these was Brian Bassett, and following this Court's decision last year, his and the other two minimum LWOP sentences became invalid. The point remains, however, that the resentencing courts, exercising their discretion, set the minimum sentence at the maximum.

2. The juvenile offender bears the entire risk of the sentencing court's error.

Under Washington's indeterminate sentencing scheme, a life-without-parole sentence is always a possibility for a juvenile offender. Even if the sentencing court sets the minimum sentence earlier than life, the minimum sentence represents only the earliest point at which the offender might be released. RCW 10.95.030(3)(f). There is no guarantee of release. In fact, the ISRB will not release the individual at his minimum term if it determines, by a preponderance of the evidence, that "it is more likely than not that the person will commit new criminal law violations if released." *Id.* The ISRB can incarcerate the individual for another five years before it must review his case again. *Id.*

The defendant bears the *entire* risk of any error the court makes in setting the minimum sentence. If the court overestimates the juvenile offender's capacity for rehabilitation and sets the minimum sentence too low, the ISRB will have the appropriate evidence before it and can simply deny his release every five years until the end of his life. If the court underestimates a juvenile's capacity for rehabilitation, however, there is no chance that the ISRB can correct that decision. *Cf. Briones*, 2019 WL 2943490, at *3. For example, if the court sets the minimum sentence at 48 years, a 17-year-old juvenile offender will be in prison until he is at least

65, of retirement age. As discussed above, the reason that this Court and the Supreme Court held that juveniles should be sentenced differently is because they can be rehabilitated and become productive, contributing members of society. *See Graham*, 560 U.S. at 75. That purpose is undermined if an offender has no option for release until most of his peers are ending their professional lives.

C. The State must have the burden to prove by clear and convincing evidence that the child is incorrigible to justify a minimum sentence over 25 years.

The defense need only prove an individual's biological age to show that he possesses the "hallmark features" of youth. *See Miller*, 567 U.S. at 471. The differences between adults and juveniles that make juveniles "special" for the purpose of sentencing are biological and physiological. *See, e.g.*, *Briones*, 2019 WL 2943490, at *4 n.3 (citing *Graham* and *Miller*). As this Court observed in *O'Dell*, "parts of the brain involved in behavior control continue to develop well into a person's 20s." 183 Wn.2d at 691–92. The State then has the burden to show that the juvenile does not have these biological and physiological characteristics or that, despite these physiological characteristics, the juvenile is incapable of being rehabilitated within 25 years.

The State must prove that the juvenile does not have the hallmarks of youth by clear and convincing evidence. The general rule is that the State

can prove facts supporting a sentence within a statutory range by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148, 149 (1997) (per curiam). But in special or extreme circumstances, due process requires that facts that "increase [a defendant's] sentence [within a range] must be based on clear and convincing evidence." *See Watts*, 519 U.S. at 156 & n.2; *see generally United States v. Jordan*, 256 F.3d 922, 930 (9th Cir. 2001). Here, special circumstances justify the higher burden: namely, (1) the high risk of error given how difficult it is to predict whether a child is capable of being rehabilitated and (2) the asymmetric consequences of the error: the offender bears all of the risk of an incorrect decision. Unlike the determinate federal scheme in *Watts* and *Jordan*, the Washington statute has a fail-safe: the rare juvenile who cannot be rehabilitated will not be released, presenting no risk to society. In the federal scheme, the offender will be released based on the sentence that the court ultimately selects. There is no fail-safe.

This holding is entirely consistent with Washington's statutes and case law.

The State argues that every youthful offender is not entitled to an exceptional sentence because of *O'Dell*. State's Supp. Br. at 2-3. But even if *O'Dell* stood for that proposition, that proposition has no effect here. A minimum sentence *within* the statutory range—25 years—is not an

"exceptional sentence." And, as discussed above, *O'Dell* actually supports the Amici's argument. If youth alone can justify an exceptional sentence below the statutory range, *O'Dell*, 183 Wn.2d at 695-96 (overruling this Court's previous conclusion that "youth alone could not be a nonstatutory mitigating factor under the SRA"); *cf. id.* at 693 n.10, then youth certainly can justify a minimum sentence at the bottom of the statutory range.

The Amici's position is also consistent with *State v. Ramos*, 187 Wn.2d 420, 429, 387 P.3d 650, *as amended* (Feb. 22, 2017). First, to the extent that *Ramos* held that a juvenile offender has the burden of proof to justify a sentence, that holding applies only to juveniles who seek sentences *below* the statutory range. Here, a 25-year sentence is within the statutory range. *See* RCW 10.95.030(3). Moreover, *Ramos* did not consider the Washington Constitution, which provides greater protection in this context than the United States Constitution. *Ramos*, 187 Wn.2d 420; *see Bassett*, 192 Wn.2d 67.

Nor should *State v. Gregg*, No. 77913-3-I, 2019 WL 2912599 (Wash. Ct. App. July 8, 2019), affect the Court's decision here. The *Gregg* defendant argued that the State had to prove beyond a reasonable doubt that a juvenile's youth was not a mitigating factor in order to justify a sentence *within* the statutory range. *Id.* at *4-5. The Court of Appeals disagreed. Like *Ramos* and *O'Dell*, *Gregg* is distinguishable. Gregg argued for a

sentence below, not *within*, the statutory range. In addition, the court relied heavily on the "Sentencing Reform Act of 1981," which explicitly "places the burden of proving mitigating factors on the defendant." *Id.* at 1; *see* RCW 9.94A.535(1). But the SRA does not apply to Mr. Delbosque's situation. The aggravated-murder statute, passed in 2014, is not part of the Sentencing Reform Act. *Compare* RCW 9.94A, *with* RCW 10.95.030(3); *see also* Second Substitute Senate Bill 5064, 63d Leg. Reg. Sess. (Wash. 2014). Thus, the SRA does not prevent the Amici's proposed holding here.

II. The Court of Appeals properly determined that the State did not prove that Mr. Delbosque deserved a minimum sentence of 48 years by clear and convincing evidence.

The Court of Appeals properly remanded Mr. Delbosque's sentence for failing to comply with the *Miller*-fix statute in setting the minimum term at 48 years. The "*Miller* holding" and a doctor's testimony about Mr. Delbosque's brain was sufficient to establish that Mr. Delbosque had the hallmarks of youth. As the doctor testified to the sentencing court: "the major area in which youthfulness affects behavior is executive functioning because of the youth's underdeveloped frontal lobe." *State v. Delbosque*, 6 Wn. App. 2d 407, 411, 430 P.3d 1153 (2018), *as corrected* (Dec. 11, 2018).

The State did not present clear and convincing evidence to show that Mr. Delbosque did not have those biological characteristics or that, despite those biological characteristics, Mr. Delbosque is incapable of being

rehabilitated within a 25-year sentence after his offense. The State relied only on the crime itself and an infraction that occurred 15 years into his sentence to conclude that Mr. Delbosque was effectively "irreparabl[y] corrupt[ ]." *Id.* at 418. As discussed in the *Briones* case, *Miller* "reorients the sentencing analysis to a forward-looking assessment of the defendant's capacity for change or propensity for incorrigibility." *Briones*, 2019 WL 2943490 at *6. And a minor infraction after 15 years of incarceration is insufficient to prove that Mr. Delbosque is one of those rare juveniles who could not be rehabilitated.

Thus, this Court should affirm the Court of Appeals' decision and remand for resentencing with a 25-year minimum sentence.

CONCLUSION

It is extremely difficult for sentencing courts to identify youth who deserve sentences longer than 25 years, and the youth bears the entire risk of the court's error. These are compelling reasons to hold that courts must set the minimum sentence at the bottom of RCW 10.95.030(3)'s range. The "rare" incorrigible youth presents little to no risk to society because the ISRB can always deny their release every five years for the rest of their lives. Thus, this Court should hold that a sentencing court must always set the minimum sentence at 25 years unless the State can prove by clear and

convincing evidence that a particular juvenile does not have the "hallmark features" of youth.

RESPECTFULLY SUBMITTED this 29th day of July, 2019.

/s *David A. Perez*
David A. Perez, WSBA No. 43959
Thomas W. Hillier, WSBA No. 5193
Sopen Shah, Wis. Bar No. 1105013
PERKINS COIE LLP

Robert S. Chang, WSBA #44083
Melissa Lee, WSBA #38808
Jessica Levin, WSBA #40837

Counsel for Amicus Curiae
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

Nancy Talner, WSBA #11196
Counsel for Amicus Curiae
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Rita Griffith, WSBA #14360
Counsel for Amicus Curiae
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Hillary Behrman, WSBA #22675
Counsel for Amicus Curiae
WASHINGTON DEFENDER ASSOCIATION

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on July 29, 2019, the forgoing document was electronically filed with the Washington State Supreme Court Portal, which will effect service of such filing on all attorneys of record.

Signed in Seattle, Washington, this 29th day of July, 2019.

/s *David A. Perez*
David A. Perez
Counsel for Amicus Curiae
PERKINS COIE LLP

PERKINS COIE LLP

July 29, 2019 - 1:39 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96709-1
Appellate Court Case Title:	State of Washington v. Cristian Delbosque
Superior Court Case Number:	93-1-00256-4

The following documents have been uploaded:

- 967091_Briefs_20190729133717SC470817_4109.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was 2019-07-29 Amicus Brief.pdf
- 967091_Motion_20190729133717SC470817_5821.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was 2019-07-29 Motion for Leave to File Amicus Brief.pdf

A copy of the uploaded files will be sent to:

- Jim.Whisman@kingcounty.gov
- greg@washapp.org
- timh@co.mason.wa.us
- wapofficemail@washapp.org

Comments:

Sender Name: David Perez - Email: DPerez@perkinscoie.com
Address:
1201 3RD AVE STE 4900
SEATTLE, WA, 98101-3099
Phone: 206-359-8000

Note: The Filing Id is 20190729133717SC470817