

NO. 47535-9-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

JOHN PHET,

Petitioner.

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**MEMORANDUM OF *AMICI* WASHINGTON DEFENDER  
ASSOCIATION and COLUMBIA LEGAL SERVICES  
IN SUPPORT OF PETITIONER'S  
MOTION FOR DISCRETIONARY REVIEW**

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## I. INTRODUCTION

Petitioner John Phet has filed a *Motion for Discretionary Review*, seeking review of a trial court decision finding that: (1) the Sentencing Reform Act (SRA) requires consecutive mandatory minimum terms that, when aggregated, will exceed Mr. Phet's lifespan; and (2) a statutorily mandated life-equivalent sentence only offends the constitution when the juvenile is sentenced for one crime. Because the trial court's decision is clearly erroneous on both points and because numerous pending cases also present this issue, *amici curiae* urge this court to accept review. There is a growing urgency for resolution of these issues not just for this case, but for the numerous other pending cases. A ruling by this Court at this time will reduce the likelihood of inconsistent results, the need for multiple appellate reviews, and the necessity of requiring a third sentencing hearing in these cases.

## II. INTEREST OF *AMICI CURIAE*

The Washington Defender Association ("WDA") is a statewide non-profit organization whose membership is comprised of public defender agencies, attorneys who represent indigent defendants and those who are committed to seeing improvements in indigent defense.

Columbia Legal Services ("CLS") is a statewide non-profit law firm that represents people living on low incomes in a variety of legal areas. For many years, CLS has worked to mitigate the harsh consequences of

extreme criminal sentences meted out to children. CLS has represented clients in many different courts, before the legislature and in other fora in pursuit of this goal. CLS appears as *amicus* in this case on behalf of clients

### III. FACTS

The material facts appear to be undisputed.

Mr. Phet was convicted in 2002 of multiple murders and assaults committed when he was 16. He has been incarcerated for 13 years. He is now pending a resentencing as a result of the so-called *Miller* fix legislation. The sentencing court has ruled that the statute requires the court to run the five aggravated murder minimum terms consecutive to each other; consecutive to the assault sentences; and consecutive to the firearm enhancements. As a result, Mr. Phet is not able to request or receive less than a life equivalent sentence. If the trial court ruling is allowed to stand, Mr. Phet will be sentenced to a life-equivalent sentence not because the judge concludes that is the correct sentence, but because he has concluded the law does not permit a lesser sentence.

### IV. ARGUMENT

- A. There is a Need for a Prompt Determination of Whether the Relevant Statutory Provisions Require Consecutive Minimum Terms and, if so, Whether the Constitution Permits a Statutory Scheme that Deprives Judges of the Discretion to Impose a Sentence of Less than Life for Multiple Murders.

“Children have a very special place in life which law should reflect.”

~*May v. Anderson*, 345 U.S. 528, 536 (1953)(Frankfurter, J. concurring);

“[C]hildren are constitutionally different from adults for purposes of sentencing.” ~*Miller v. Alabama*, 567 U.S. \_\_\_, 132 S. Ct. 2455, 2464 (2012)

### Introduction

In the last decade the United States Supreme Court has handed down four landmark decisions which profoundly alter the treatment of children in the criminal justice system. In 2005, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Court relied on the Eighth Amendment’s evolving standards of decency when it abolished the death penalty for all children.<sup>1</sup> Five years later in 2010, in *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court again relied on the Eighth Amendment when it struck down mandatory life sentences for children who commit non-homicide crimes. Then, in June 2011, the Supreme Court decided *J.D.B. v. North Carolina*, 564 U.S. \_\_\_, 131 S.Ct. 2394 (2011), that held age relevant when determining police custody for *Miranda* purposes. Most recently, in June 2012, the Court decided *Miller v. Alabama*, 567 U.S. \_\_\_, 132 S.Ct. 2455 (2012), that struck down mandatory life without parole sentences for juveniles convicted of homicides.

Each of these cases reaffirmed the principle that children are different from adults. As the *Miller* Court stated:

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<sup>1</sup> The Court abolished the death penalty for children under 16 in *Thompson v. Oklahoma*, 487 US 815 (1998).

[Y]outh is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuosity, and recklessness. It is a moment and condition of life when a person may be most susceptible to influence and to psychological damage. And its signature qualities are all transient.

*Miller*, 132 S.Ct. at 2467 (internal quotations, citations, and brackets omitted). This decision built upon the earlier cases and rested on over ten years of well-established scientific research into adolescent brain development. Based upon the recognition that youth are both categorically less culpable and more amenable to rehabilitation than adults, the Court held that even juveniles who commit the most serious crimes must be treated differently by the justice system.

#### *The Washington Legislative Response*

The Washington Legislature responded to *Miller* and *Graham* in 2014, when it passed SSB 5064,<sup>2</sup> and in 2015 when it passed HB 1319.<sup>3</sup> These bills amended portions of RCW 10.95 and RCW 9.94A and created a new sentencing scheme for youth convicted of aggravated murder and other serious crimes resulting in prison terms in excess of 20 years. Prior to passage of this legislation, juveniles convicted as adults of aggravated murder in Washington received the only sentence available –mandatory life without parole.<sup>4</sup>

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<sup>2</sup> The final bill can be found at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5064&year=2013>

<sup>3</sup> The final bill can be found at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1319&year=2015>

<sup>4</sup> Former RCW 10.95.030(1)



The revised sentencing scheme for juveniles convicted of aggravated murder creates two categories of defendants. Individuals under 16 at the time of their crime(s) receive a mandatory indeterminate life sentence with a minimum term of 25 years. RCW 10.95.030(3)(a)(i). Juveniles who are 16 or older at the time of the offense face a minimum term of at least 25 years and a maximum term of life. RCW 10.95.030(3)(a)(ii).

The law applies retroactively. RCW 10.95.035. When the legislature passed SSB 5064 in 2014, there were 29 individuals in Washington serving life without parole for aggravated murder crimes committed when they were children.<sup>5</sup> Mr. Phet is one of these individuals.

*There Are Numerous Similar Cases Pending Resentencing*

Columbia Legal Services has been collecting and organizing information regarding the individuals impacted by SSB 5064 since 2009, and has continued to do so since the Washington Legislature passed the law. *See Appendix A.* As of this writing, seven individuals have been resentenced and 23 men still await resentencing. Of these 23, 11 were convicted of multiple counts of aggravated murder and eight were convicted of aggravated murder and at least one separate serious violent offense.

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<sup>5</sup> There were 30 individuals serving life without parole in Washington impacted by the *Miller* decision, one had been re-sentenced prior to the legislature's response.

This Court should accept review and decide the proper application of the mandate of *Miller* and SSB 5064 and HB 1319 to cases involving multiple convictions.

B. The Constitutional Requirement of Sentencing Discretion Applies to All Children Regardless of the Number of Crimes of Conviction.

*Miller* recognizes that “children are different,” and mandates that sentencing schemes allow a judge to take youth into consideration during sentencing. 132 S.Ct. at 2464. *Miller* demands meaningful, individualized consideration of a child’s age at sentencing. States may no longer treat a juvenile defendant as an adult without any opportunity to consider the impact of youth upon the defendant; *i.e.*, the fact that children’s culpability and potential for rehabilitation is categorically different than adults’. *Id.* The key category in *Miller* is age, not the crime. *Miller* mandates meaningful sentencing discretion to impose a less than life sentence because of age and regardless of crime.

*Miller Mandates Discretion for Juvenile Sentences*

*Miller* explained the constitutional problem with a sentencing scheme that fails to include the discretion to impose a sentence less than life is that it requires that a child “die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with

the possibility of parole) more appropriate.” *Id.* at 2460. Such a scheme “prevents those meting out punishment” from considering a child’s “lessened culpability” and greater “capacity for change,” *Id.* (citing *Graham*, 560 U.S. at 67-74). *Miller* mandates “individualized sentencing” for all children “facing the most serious penalties.” *Id.* *Roper*, *Graham*, and especially *Miller* emphasize that 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 2465. Most fundamentally, those cases insist that “youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.” *Id.* “By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender.” *Id.* at 2466.

*The State Misreads Miller and the Juvenile Resentencing Legislation*

In response, the State posits that *Miller* prohibits only a sentencing scheme that requires a life sentence for a *single* murder committed by a child unaccompanied by any other crime. One of the two consolidated cases in *Miller* involves multiple crimes and there is no suggestion that *Miller* would allow mandatory life without parole if imposed under state

consecutive sentencing rules. *Miller*, 132 S.Ct. at 2461 (Kuntrell Jackson convicted of capital felony murder and aggravated robbery).

The State's argument also overlooks the fact that the statute contains the constitutionally allowable sentencing discretion that permits a court to impose a greater penalty for multiple crimes (whether by imposing an increased mandatory minimum or by running minimum terms consecutive to each other). Meaningful discretion is the key—whether the juvenile is convicted of one or multiple crimes.

It is for this exact reason that the following courts have held that the constitution does not allow a non-discretionary life-equivalent sentence even where the juvenile-defendant is being sentenced for multiple crimes, including murders. *See Casiano v. Comm'r of Correction*, \_\_\_ A.3d \_\_\_, 317 Conn. 52 (Conn. 2015) (50 year mandatory minimum term for murder and other crimes constituted de facto life without parole sentence and so individualized sentencing hearing required); *Bear Cloud v. State*, 334 P.3d 132, 144 (Wyo. 2014) (mandatory minimum term of 45 years to life for murder and other crimes constituted de facto life without parole term and so court must hold an individualized sentencing hearing as required by *Miller*); *People v. Thomas*, 211 Cal. App. 4th 987, 1014, 150 Cal. Rptr. 3d 361, 381 (2012) (multiple stacked term of years sentences, including a 25 to life sentence for first degree murder, that amount to an aggregated 196 year term can

only be imposed following *Miller* mandated individualized hearing); *cf.*, *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013)(52.5 year aggregate minimum prison term for murder conviction and other crimes violates Iowa Constitution unless *Miller* individualized sentencing hearing held).

A number of other courts have held that *Graham*'s prohibition on life without parole sentences for non-homicide offenses applies to long aggregated sentences for multiple non-homicide crimes. *See e.g., Henry v. State* \_\_\_So.3d \_\_\_, 2015 WL 1239696 (Fla Sup. Ct. Mar. 19, 2015) (aggregate sentence of 90 years for child convicted of multiple crimes unconstitutional); *Moore v. Biter*, 725 F.3d 1184, 1186 (9th Cir. 2013) (127 year aggregated mandatory minimum term for 24 non-homicide related charges was *de facto* life without parole sentence and therefore violated constitutional rule announced in *Graham*); *People v. Caballero*, 55 Cal. 4th 262, 265, 282 P.3d 291, 293 (2012) (aggregate sentence of 110 years to life for multiple crimes violates *Graham*); *but see, Bunch v. Smith*, 685 F.3d 546, 551 (6th Cir. 2012) (*Graham* does not apply to eighty-nine year aggregate sentence), *cert. denied*, \_\_\_U.S. \_\_\_, 133 S.Ct. 1996 (2013); *State v. Kasic*, 2655 P.3d 410, 415-16 (Ariz. App. Div. 2 2011) (139 year aggregate sentence for non-homicide offenses does not violate *Graham*). The weight of relevant authority supports Mr. Phet's argument that the sentencing court must have the discretion to run his sentences concurrently.

C. The Miller-fix Legislation Complies with Miller.

The Washington Legislature correctly understood *Miller*. RCW 10.95.030 provides: “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.” The statute goes on to advise a sentencing court that “[i]n setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.” *Id.*

If the Washington Legislature also intended to require non-discretionary consecutive minimum terms, then only some children will be eligible to receive 25 year minimum terms and, for those convicted of two or more counts, the mandate to consider youth and its attendant circumstances will become illusory.

Indeed, if the Legislature had intended to require consecutive minimum terms, it could have easily said so. It need only amend the “consecutive or concurrent sentences” provision to require consecutive

“minimum terms.” Instead, the Legislature left RCW 9.94A.589 undisturbed. As currently written, applying the consecutive sentence rules to minimum terms renders portions of that statute irrelevant, absurd, or both. For example, the setting of a “minimum term” does not involve the calculation of an offender score or standard sentence range, which are integral to the operation of the consecutive standard range sentence calculation.

D. If the Statute is Ambiguous, the Rule of Lenity Applies.

Given that the words “minimum term” are not used in RCW 9.94A.589, at best the rule of lenity requires this Court to construe the statute in Mr. Phet’s favor. Statutes are construed as a whole to harmonize and give effect to all provisions when possible. *State v. Young*, 125 Wash.2d 688, 696, 888 P.2d 142 (1995). “A statute is ambiguous if it can be reasonably interpreted in more than one way.” *State v. Mullins*, 128 Wn.App. 633, 642, 116 P.3d 441 (2005). “If the language of a penal statute is ambiguous, the courts apply the rule of lenity and resolve the issue in a defendant's favor.” *State v. Knutson*, 64 Wn.App. 76, 80, 823 P.2d 513 (1991).

## V. CONCLUSION

For the reasons set forth above, *amici* urge the Court to accept discretionary review of the trial court’s decision. This matter raises important questions of constitutional and statutory interpretation and

implicates the liberty interests of numerous inmates awaiting resentencing. Intervention at this juncture is necessary to prevent conflicting outcomes and preserve judicial resources.

Respectfully submitted this 15 day of June, 2015.

A handwritten signature in black ink, appearing to read 'C. Arends Elsberry', with a long horizontal flourish extending to the right.

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## ***APPENDIX “A”***

**Individuals in Washington Impacted by *Miller v. Alabama* and SSB 5064**

APPENDIX A

Individuals Impacted by SSB 5064<sup>6</sup> Awaiting Re-Sentencing as of June 15, 2015

<b>NAME</b>	<b>Aggravated Murder (Number of Counts)</b>	<b>Serious Violent Offenses</b>	<b>Other Offenses</b>
<b><i>AGGRAVATED MURDER- MULTIPLE COUNTS (11)</i></b>			
David Anderson	Aggravated Murder (3 counts)	0	0
Brandon Backstrom,	Aggravated Murder (2 counts)	0	0
David Baranyi	Aggravated Murder (3 counts)	0	0
Miguel Guitan	Aggravated Murder (4 counts)	0	0
William Lemke	Aggravated Murder (4 counts)	0	0
Russell McNeil	Aggravated Murder (2 counts)	0	0
Herbert Rice	Aggravated Murder (2 counts)	0	0
Marvin Leo	Aggravated Murder (5 counts)	Assault 1 (5 counts)	0
Barry Loukaitis	Aggravated Murder (2 counts)	Murder 2, Assault 1 Kidnap 1 (16 counts)	Assault 2
John Phet	Aggravated Murder (5 counts)	Assault 1 (5 counts)	0
Kenneth Comeslast	Aggravated Murder (2 counts)	Att. Murder 1	0
<b><i>AGGRAVATED MURDER + OTHER OFFENSES (8)</i></b>			
Ryan Alexander	Aggravated Murder (1 count)	Kidnap 1 <sup>st</sup> degree	0
Kenneth Comeslast	Aggravated Murder (2 counts)	Att. Murder 1	0

<sup>6</sup> Data collected and maintained by Columbia Legal Services;

Jeremiah Gilbert	Aggravated Murder (1 count)	Murder 1	Assault 2, Theft 1 Robb 1
Marvin Leo	Aggravated Murder (5 counts)	Assault 1 (5 counts)	0
Barry Loukaitis	Aggravated Murder (2 counts)	Murder 2, Assault 1 Kidnap 1 (16 counts)	Assault 2
John Phet	Aggravated Murder (5 counts)	Assault 1 (5 counts)	0
Sean Stevenson	Aggravated Murder (1 count)	Murder 1 (2 counts)	0
Terrence Weaver	Aggravated Murder (1 count)	Rape 1	0
<b><i>ONE COUNT ONLY (7)</i></b>			
Kevin Boot	Aggravated Murder (1 count)	0	0
John Lee Forrester	Aggravated Murder (1 count)	0	0
Michael Fuhrman	Aggravated Murder (1 count)	0	0
Timothy Haag	Aggravated Murder (1 count)	0	0
Jose Munguia	Aggravated Murder (1 count)	0	0
Michael Skay	Aggravated Murder (1 count)	0	0
Vy Thang	Aggravated Murder (1 count)	0	0

**Individuals impacted but who have already been resentenced pursuant to HB 5064 (7 men):**

<b>NAME</b>	<b>Counts</b>
Brian Basset	Aggravated Murder (3 counts)
Jeremiah Bourgeois	Aggravated Murder (1 count) Assault 1 (1 count)
Barry Massey	Aggravated Murder (1 count)
Michael Harris	Aggravated Murder (1 count)
Ansel Hofstetter	Aggravated Murder (1 count)
Donald Lambert	Aggravated Murder (1 count)
Nga Ngoeung	Aggravated Murder (2 counts) Assault 1 (2 counts) Taking a Motor Vehicle