No. 95578-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Personal Restraint Petition of

SAID OMER ALI,

Petitioner.

CORRECTED BRIEF OF AMICI CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, WASHINGTON DEFENDER ASSOCIATION, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, TEAMCHILD, AND CENTER FOR CHILDREN & YOUTH JUSTICE IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of amici are set forth in the Motion for Leave to File Brief of Amici Curiae in Support of Petitioner, submitted contemporaneously with this brief.[1]

INTRODUCTION

"[C]hildren are different." *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017) (quoting *Miller v. Alabama*, 567 U.S. 460, 481, 132 S. Ct. 2455, 183 L. Ed. 2d (2012)). This deceptively simple sentence sets forth a factual predicate with profound constitutional implications, which led this Court to declare that courts (1) "must consider mitigating circumstances associated with the youth of any juvenile defendant" and (2) "must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements." *Id.* at 21.

Though the question of retroactivity of these *Houston-Sconiers* rules was "save[d] . . . for another day," *In re Pers. Restraint of Meippen*, 193 Wn.2d 310, 313, 440 P.3d 978 (2019), this question can no longer be avoided. Once addressed, and retroactivity established, both the heightened protection of article I, section 14 afforded in the juvenile sentencing context, as well as fairness and judicial efficiency, call for a rebuttable presumption of a sentence below the standard range.

[1] Though this case has not been consolidated with *In re Pers. Restraint of Domingo-Cornelio*, No. 97205-2, because both present common questions regarding retroactivity of *Houston-Sconiers*, amici submit substantially the same brief in both matters.

SUMMARY OF ARGUMENT

Said Omer Ali and Endy Domingo-Cornelio present squarely to this Court the question of *Houston-Sconiers* retroactivity because both can demonstrate prejudice: neither of the respective sentencing courts applied both *Houston-Sconiers* rules. While the court considered Mr. Ali's youth at sentencing, it felt obligated to impose a standard range sentence and run the enhancements consecutively. Had the court understood the breadth of its discretion to sentence below the standard range, it is more probable than not that Mr. Ali would have received a mitigated sentence. At Mr. Domingo-Cornelio's sentencing, the court failed to consider the mitigating qualities of his youth and thus did not exercise discretion with respect to its sentencing authority. Nothing resembling a *Miller*-type hearing occurred, which constitutes per se prejudice. Petitioners therefore also present this Court an opportunity to clarify the different prejudice analyses that flow from distinct errors in the juvenile sentencing context.

Retroactivity has been established by Justice Wiggins's dissent in *Meippen*, which was joined by Justices González, Gordon McCloud, and Yu. None in the *Meippen* majority addressed, let alone rejected, the retroactivity analysis agreed upon by four members of this Court. Though the dual mandates of *Houston-Sconiers* are clear, the numerous cases before the intermediate appellate courts and before this Court

regarding the appropriate exercise of this discretion demonstrate that sentencing courts need further guidance. The observed practices of sentencing courts following *Houston-Sconiers*, described *infra* Part III, indicate strongly that sentencing courts still rarely give mitigated sentences to children tried in adult court. Determining on appeal or in a collateral challenge whether a sentencing court considered and gave sufficient weight to youthful characteristics requires appellate courts to either reweigh the evidence, or to rubber stamp sentences without meaningful review. The prudent course, guided by the heightened constitutional protection afforded to children sentenced in adult court, is to institute a presumption of mitigation, unless it is established that the child is in fact as culpable as an adult who commits a similar offense.

ARGUMENT

I. The Proper Evaluation of Prejudice Requires Different Prejudice Standards Depending on the Error Asserted.

In *Meippen*, this Court began and ended its analysis with prejudice. 193 Wn.2d at 315-17. Amici urge the Court to analyze retroactivity first, adopting Justice Wiggins's retroactivity analysis in *Meippen* before determining whether Mr. Domingo-Cornelio and Mr. Ali were prejudiced. However, should the Court begin with prejudice, it is imperative to clarify the applicable prejudice standards that flow from the different types of errors present in Mr. Domingo-Cornelio's case and in Mr. Ali's case.

(a) The Failure to Conduct a *Miller*-Compliant Hearing Constitutes Per Se Prejudice.

Per se prejudice exists whenever a court did not have the facts before it relating to mitigating circumstances that it is constitutionally required to consider under *Miller* and *Houston-Sconiers*. This Court has already made clear what must be considered. *See State v. Ramos*, 187 Wn.2d 420, 443–44, 387 P.3d 650 (2017), *as amended* (Feb. 22, 2017), *reconsideration denied* (Feb. 23, 2017), *cert. denied*, 138 S. Ct. 467, 199 L. Ed. 2d 355 (2017). Amici see no need to repeat these requirements.

If no *Miller* hearing occurred, the child has been completely deprived of the underlying constitutional protections of these decisions. The prejudice inheres in the proof of the error itself: the lack of a *Miller* hearing consistent with the dual mandates of *Houston-Sconiers*. Because the error constitutes a complete deprivation of a constitutional right guaranteed to the petitioner at the trial level, the error is per se prejudicial. *See, e.g., In re Pers. Restraint of Crace*, 174 Wn.2d 835, 843, 280 P.3d 1102 (2012) (petitioner making successful ineffective assistance of counsel claim establishes per se prejudice because it is a complete deprivation of petitioner's constitutional right to counsel).

Mr. Domingo-Cornelio was sentenced to the bottom-end of the permissible SRA range. Unlike with Mr. Ali, there is no evidence that the court even considered the mitigating qualities that characterize youth or

thought it was constrained. The lack of record evidence that the court considered the mitigating qualities of youth, including the possibility that these mitigating qualities might permit a departure downwards, does not permit this Court to conclude, as it did in *Meippen*, that Mr. Domingo-Cornelio was not prejudiced. Instead, per se prejudice should be acknowledged whenever a court fails to do what this Court held a sentencing court must: consider the mitigating qualities of youth.

(b) Actual and Substantial Prejudice Exists Whenever a Court Fails to Understand Its Sentencing Discretion and the Sentence Imposed Is Not a Top-End Sentence.

The reason offered by this Court in *Meippen*,[2] that Mr. Meippen could not show actual and substantial prejudice, does not apply in the case of Mr. Ali, as the sentencing court expressed a desire to go below the standard range but felt it could not. A petition alleging constitutional error[3] has the prima facie burden of showing by a preponderance of the evidence that he was actually and substantially prejudiced by the alleged error, *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004), which is demonstrated if the outcome would more likely than not have been different had the alleged error not occurred. *In re Pers. Restraint of*

[2] The *Meippen* majority reasoned that the imposition of a top-end sentence meant necessarily that the sentencing court rejected the arguments that Mr. Meippen's youth mitigated his culpability and that therefore he could not prove by a preponderance of the evidence that he was prejudiced. 193 Wn.2d at 316-17.

[3] This standard applies when the error is not per se prejudicial, nor constitutes structural error. *See In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 607-09, 316 P.3d 1007 (2014) (Gordon McCloud, J., concurring).

Hagler, 97 Wn.2d 818, 825, 650 P.2d 1103 (1982).

Had Mr. Ali's sentencing court exercised its broad discretion under *Houston-Sconiers* to go below the standard range, it is quite likely that Mr. Ali would have received a mitigated sentence. The sentencing court imposed what it thought was the lowest permissible sentence, stating that "the law requires me to impose a sentence within the standard range." RP at 1431-32. This included three 24-month weapons enhancements that were run consecutively, again stating that "[t]he law requires" this. RP at 1432:10-12. Unlike in *Meippen*, where this Court drew a negative inference because a top-end sentence was given, Mr. Ali was given a low-end sentence and the court expressed that "the sentence that was imposed was the lowest sentence that I legally felt I had the option of imposing in this case." RP at 1436:1-5. Prejudice is shown because the court expressed that it had no choice but to stay within the SRA range and to add three enhancements run consecutively. When a sentencing court misunderstands the scope of its discretion and sentences near or at the bottom of the standard range, a petitioner establishes actual and substantial prejudice.

This Court should recognize that this treatment of low-end sentences and/or mandatory enhancements does not preclude that prejudice may also exist in *any* circumstance when constitutionally

required mitigating factors were not considered. The reason is simple: mitigation based on the diminished culpability of children should not be thought of as presenting a binary choice for a court—either a standard range sentence with mandatory enhancements *or* an exceptional sentence downward with all enhancements run concurrently. This Court suggested as much when it recognized that,

> [i]f, after considering such factors, the trial court does find an exceptional sentence is warranted, it may adjust the standard sentence to provide for a reduced term of years, for concurrent rather than consecutive sentences, or for both.

State v. Gilbert, 193 Wn.2d 169, 176–77, 438 P.3d 133 (2019).

Courts have flexibility. Courts have discretion. An appropriate exercise of discretion might include a court deciding that although mitigating factors exist, they are not sufficient to justify an exceptional sentence downward; that same court might also decide that a sentence should nevertheless be lower than what the judge would have given an adult who committed the same crime. These are all things that a court is required to explain. *See Ramos*, 187 Wn.2d at 444. And though this Court did not see fit in *Ramos* to require formal written findings of fact and conclusions of law, though expressing that this would be preferred, *id.* ¶ 36, amici suggest that fairness and judicial efficiency mandate that the reasoning be expressed in writing.

(c) Even If a *Miller*-Compliant Hearing Occurred, Actual and Substantial Prejudice Is Established If the Judge Fails to Give Mitigating Weight to the Circumstances Related to the Defendant's Youth.

A petitioner also necessarily demonstrates actual and substantial prejudice when a sentencing court fails to give weight to the mitigating evidence concerning a child's diminished culpability. Because children's brains are still developing, a child's criminal acts are "not as morally reprehensible as that of an adult." *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (quotations omitted). This is true of *all* children.

Brain development is a dynamic process that follows a well-defined trajectory during childhood and adolescence, although it can be influenced by highly variable environmental factors. Adolescents' striking tendency to engage in risky and illegal behavior stems in part from their lesser capacity for mature judgment. Research has shown that adolescents' judgment and decision-making differ from adults' in several respects: Adolescents are less able to control their impulses; they weigh the risks and rewards of possible conduct differently; and they are less able to envision the future and apprehend the consequences of their actions. Even older adolescents who have developed general cognitive capacities similar to those of adults show deficits in these aspects of social and emotional maturity. Laurence Steinberg, *Adolescent Development and Juvenile*

Justice, 5 Ann. Rev. Clinical Psychol. 47, 55-56 (2008).

In *Miller*, *Roper*, and *Graham*, the United States Supreme Court recognized that these neurological differences make young offenders, categorically speaking, less culpable for their crimes. *Miller*, 567 U.S. at 465; *Roper v. Simmons*, 543 U.S. 551, 569-70, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *Graham*, 560 U.S. at 69-70. This Court's jurisprudence also acknowledges that the case for retribution is not as strong with a minor as with an adult. *State v. Bassett*, 192 Wn.2d 67, 88, 428 P.3d 343 (2018).

Despite the "scientific and technical nature of the studies" regarding brain development, "a defendant need not present expert testimony to establish that youth diminished his capacities for purposes of sentencing." *State v. O'Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2015). Expert testimony is not required because no child is an adult, neurodevelopmentally speaking. As a result, every crime involving a child (as well as a late adolescent) involves some degree of diminished culpability. A child's age is far "more than a chronological fact." *J.D.B. v. North Carolina*, 564 U.S. 261, 272, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)). The deficits of youth exist in every child and are always mitigating. A sentencing judge tasked with weighing a child's diminished culpability along with other factors cannot refuse to give

mitigating weight to these differences. Thus, when a sentencing court fails to give weight to the mitigating qualities of youth as mandated by *Houston-Sconiers*, a petitioner establishes actual and substantial prejudice.

This rule is consistent with this Court's pronouncement in *Ramos* that a sentencing court cannot comply with *Miller* by "simply recit[ing] the differences between juveniles and adults and mak[ing] conclusory statements that the offender has not shown an exceptional downward sentence is justified." *Ramos*, 187 Wn.2d at 443-44.

Because Mr. Domingo-Cornelio and Mr. Ali easily meet the prejudice bar, *Houston-Sconiers* retroactivity must be addressed.

II. Justice Wiggins Persuasively Set Forth the Basis for *Houston-Sconiers* Retroactivity.[4]

Houston-Sconiers is a significant change in the law because it "expressly overruled *State v. Brown*, 139 Wn.2d 20, 983 P.2d 608 (1999)." *Meippen*, 193 Wn.2d at 321 (Wiggins, J., dissenting) (citing *Houston-Sconiers*, 188 Wn.2d at 21 n.5). Second, it is a significant change in the law because, before *Houston-Sconiers*, a defendant "could not argue that a sentencing judge *must* consider youth." *Id.* at 322. Third, because *Houston-Sconiers* is a new, substantive rule of constitutional law, it must be given retroactive effect. *Id.* at 324–27. Just as the U.S. Supreme Court

[4] Amici present this in summary form so as not to unnecessarily repeat arguments made by petitioners Ali and Domingo-Cornelio and by Justice Wiggins in his *Meippen* dissent.

found *Miller* to be retroactive in application, *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 736-37, 193 L. Ed. 2d 599 (2016), *as revised* (Jan. 27, 2016), *Houston-Sconiers* is likewise retroactive.

Justice Wiggins points out that *Houston-Sconiers* "all but stated that it also announced a substantive rule of constitutional law applicable retroactively on collateral review." *Meippen*, 193 Wn.2d at 326 (Wiggins, J., dissenting) (citing *Houston-Sconiers*, 188 Wn.2d at 19 n.4). Justice Wiggins was joined in dissent by Justices González, Gordon-McCloud, and Yu. *Id.* at 329. The lengthy footnote discussing *Roper*, *Graham*, and *Miller* concludes:

> These cases make two substantive rules of law clear: first, "that a sentencing rule permissible for adults may not be so for children," [*Miller*, 567 U.S. at 481] . . ., rendering certain sentences that are routinely imposed on adults disproportionately too harsh when applied to youth, and second, that the Eighth Amendment requires another protection, besides numerical proportionality, in juvenile sentencings—the exercise of discretion.

Houston-Sconiers, 188 Wn.2d at 19 n.4. This characterization of U.S. Supreme Court precedent applies with equal force to the substantive rules announced in *Houston-Sconiers*, *id*. at 21, that sentencing courts must consider the mitigating qualities associated with the youth of the juvenile defendant and must have discretion to depart below the SRA range and may override what were previously considered *mandatory* enhancements.

Joining Justice Gordon-McCloud in *Houston-Sconiers* were Chief

Justice Fairhurst and Justices Owens, Stephens, Wiggins, and Yu. *Id.* at 34. Unless at least two are willing to disavow footnote 4 as well as much of *Houston-Sconiers*, the retroactivity of *Houston-Sconiers* ought already to be clear, as Justice Wiggins notes. *Meippen*, 193 Wn.2d at 326.

However, even with retroactivity established and prejudice demonstrated, there are larger challenges remaining with respect to review of sentencing (or resentencing) decisions given pursuant to *Houston-Sconiers*. Absent the adoption of further procedural safeguards by this Court, review of juvenile sentences will follow one of two paths. The first is that appellate courts will have to carefully consider mitigation evidence to determine whether the exercise of discretion under *Houston-Sconiers* amounted to lip service or constitutionally sound judgment, stepping out of role to functionally reweigh evidence. *See Ramos*, 187 Wn.2d ¶ 58 ("we cannot reweigh the evidence on review"). The second is that appellate courts will be forced to uphold sentences under a deferential review standard, rubber stamping disproportionately cruel juvenile sentences.

III. The Small Percentage of Children Receiving Mitigated Sentences Based on Age During the Two Fiscal Years Since *Houston-Sconiers* Suggests Strongly that Sentencing Courts Need Further Guidance to Effectuate the *Houston-Sconiers* Mandates.

Mr. Domingo-Cornelio and Mr. Ali are entitled to resentencing, and the procedural safeguards that attach to that resentencing should be

informed by what appears to be occurring at the initial sentencing of children tried as adults after *Houston-Sconiers*. Even after *Houston-Sconiers,* courts appear to be continuing to treat children consistent with what led to auto-decline, "adult crime, adult time."[5] It is incumbent on this Court to provide guidance to lower courts to break this habit.

Children are inherently less culpable than adults. *Bassett,* 192 Wn.2d ¶ 35. Courts must consider the mitigating qualities associated with youth. *Houston-Sconiers,* 188 Wn.2d at 21. In the context of juvenile homicide offenders, this Court noted that "most juvenile homicide offenders…will be able to meet their burden of proving an exceptional sentence below the standard range is justified." *Ramos,* 187 Wn.2d at 443. Nothing indicates that this Court's observation would not also apply to juvenile non-homicide offenders; yet it appears that the vast majority of children declined and sentenced in adult court since *Houston-Sconiers* have not received exceptional sentences below the standard range.

Since *Houston-Sconiers*, in fiscal years 2018 and 2019 (July 1, 2017 – June 30, 2019), 109 children were declined to adult court.[6] Though

[5] This was the mantra that led to auto-decline in 1994 and its expansion in 1997. *See* RCW 13.04.030(1)(e)(iv) (1994) (establishing auto-decline—exclusive jurisdiction of adult court for enumerated offenses committed by 16- and 17-year-olds); RCW 13.04.030(1)(e)(iv) (1997) (expanding list of offenses subject to auto-decline).
[6] Washington Caseload Forecast Council, Statistical Summary of Adult Felony Sentencing Fiscal Year 2018, 71 (2018) (71 children declined to adult court); Washington Caseload Forecast Council, Statistical Summary of Adult Felony Sentencing Fiscal Year 2019, 71 (2019) (38 children declined to adult court).

declination is tracked by the Washington Caseload Forecast Council, the Council does not report on whether these children received standard-range sentences or exceptional sentences below or above the standard range. The Council separately tracks exceptional sentences and reports that during this same period, 22 individuals received mitigated sentences based on their age.[7] This reported figure could include children, young adults (following *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015)), or elderly offenders. Even if all were children, the most conservative assumption (that all receiving mitigated sentences based on age were children), less than a quarter of declined youth have received exceptional sentences downward based on age since *Houston-Sconiers* was decided.

The observed results following *Houston-Sconiers* suggest strongly that lower courts are struggling to conform their sentencing practices to the new constitutional requirements resulting from the factual predicate that children are different from adults and have inherently diminished culpability. Even with the caveats noted above, the most conservative reading of the data, that all 22 receiving mitigated sentences were children, the vast majority of children are not receiving mitigated

[7] Washington Caseload Forecast Council, Statistical Summary of Adult Felony Sentencing Fiscal Year 2018, at 62 (2018) (8 received mitigated sentences based on age); Washington Caseload Forecast Council, Statistical Summary of Adult Felony Sentencing Fiscal Year 2019, at 63 (2019) (14 received mitigated sentences based on age). It is not possible, though, to make a perfect comparison of the data sets because declination and sentencing may not take place during the same fiscal year.

sentences, and the results are nowhere near the "most" who would receive exceptional sentences below the SRA as predicted by the *Ramos* Court. *See* 187 Wn.2d at 443.

IV. A Rebuttable Presumption of a Mitigated Sentence Is Constitutionally Required.[8]

A presumption of mitigation is constitutionally required notwithstanding *Ramos*, 187 Wn.2d 420, not only because the outcomes of *Miller* hearings predicted by the Court in *Ramos* have not occurred, *see supra* Part III, but also because of recent advances in this Court's juvenile sentencing jurisprudence under article I, section 14.

Whether a presumption of mitigation on the basis of youth is constitutionally required under article I, section 14 is an open question. While in *Ramos* this Court considered whether the state should bear the burden of proving that a standard range sentence is justified in juvenile sentencing, it held—provisionally—only that Mr. Ramos had not established that the Eighth Amendment requires the burden to shift to the

[8] Whether article I, section 14 of the Washington Constitution requires this rebuttable presumption is squarely before this Court in *State v. Gregg*, No. 97517-5, scheduled for argument Feb. 25, 2020. The Korematsu Center in its amicus filing in *Gregg* notes that courts impose or modify procedural safeguards when previous decisions have failed to fix the problem. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1985) (setting as a floor certain procedural safeguards after recognizing that its pronouncement 105 years earlier in *Strauder v. West Virginia*, 100 U.S. 303, 10 Otto 303, 25 L. Ed. 664 (1880), that race discrimination in jury selection violated the Constitution, had failed to halt the practice even after numerous later court decisions); GR 37 (revising procedures to govern the exercise of peremptory challenges when this Court recognized that the *Batson* framework was inadequate); *State v. Jefferson*, 192 Wn.2d 225, 249-50, 429 P.3d 467 (2018) (revising third step of *Batson* framework, recognizing that that framework failed to eradicate the "evil of racial discrimination" in jury selection).

State, not that the defendant is constitutionally required to carry the burden. 187 Wn.2d at 445 ("[*A*]*t this time* we cannot hold that the SRA's allocation of the burden of proof for exceptional sentencing is constitutionally impermissible as applied to juvenile homicide offenders[.]" (emphasis added)).

Even if *Ramos* is viewed as having considered and decided this question, the legal landscape in this area has changed dramatically in the interim. Since *Ramos* was decided, this Court has expanded the protections afforded to youth in a number of contexts beyond the narrow issue presented in that case. *Compare id.* at 434 (holding *Miller* hearing is required before imposing de facto life sentence), *with Houston-Sconiers*, 188 Wn.2d at 21 (holding courts *must* consider mitigating qualities of youth in all juvenile sentencing cases and that courts have complete discretion to depart from standard ranges and mandatory enhancements), *Gilbert*, 193 Wn.2d at 176 (holding that the complete discretion to depart from mandatory sentencing provisions is not confined to, and does not exclude, certain types of sentencing hearings), and *Bassett*, 192 Wn.2d at 82 (holding article I, section 14 provides heightened protection in the juvenile sentencing context). Given these changes, the question the Court now faces is necessarily different than in *Ramos*. The intervening precedent compels a conclusion that a presumption of mitigation is now

constitutionally required under both the Eighth Amendment, as applied in the juvenile sentencing context by this Court, and even if not under the Eighth Amendment, then under article I, section 14.

This conclusion is also compelled by information now available suggesting that courts are not giving adequate consideration to the mitigating qualities of youth. *Cf. State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018) (new facts permitted reconsideration of the death penalty). The Court in *Ramos* concluded that through the course of a *Miller* hearing, most youth would be able to establish that a mitigated sentence is appropriate. *Ramos,* 187 Wn.2d at 443. Operating under this assumption, the Court declined to find that placing the burden on the defendant to prove mitigation created an unacceptable risk of unconstitutional sentences. *Id.* at 445. However, as suggested by Caseload Forecast Council data, discussed *supra* Part III at 13-15, the predicted outcomes have not materialized. Instead, it appears most juveniles sentenced in adult court are not treated as inherently less culpable at sentencing.

Finally, this Court implicitly endorsed the necessity of a presumption in *Ramos*, reasoning that "where a juvenile offender…proves that his or her crimes reflect transient immaturity, the juvenile has necessarily proved that there are substantial and compelling reasons for an exceptional sentence downward." 187 Wn.2d at 436. Because all children

are inherently less culpable than their adult counterparts, *Bassett*, 192 Wn.2d at 87, their crimes also necessarily reflect the transient immaturity that *Ramos* recognized as forming the basis of entitlement to mitigation.

The only viable way to address sentencing courts' failure to fully embrace this Court's mandate to provide greater protection under article I, section 14 is to find that youth is presumptively mitigating, unless the Court determines that the child is equally culpable to a similarly situated adult. This procedural safeguard is consistent with "the States' sovereign administration of their criminal justice systems." *Montgomery*, 136 S. Ct. at 735 (internal citation omitted). A presumption of mitigation is required to correct sentencing courts' failure to carry out this Court's intent.

V. A Rebuttable Presumption Strongly Promotes Judicial Efficiency.

A presumption that a juvenile sentenced in adult court merits a departure below the standard range and/or minimum also ensures that this Court will not be the ultimate arbiter of the sufficiency of mitigation evidence. In *Ramos*, this Court explicitly acknowledged that it "cannot reweigh the [mitigation] evidence on review," 187 Wn.2d at 453. But this Court's docket is filled with cases asking this Court to do precisely that. The promise of *Houston-Sconiers*—that sentencing courts would exercise their discretion in favor of children and consistently sentence children in according with their diminished culpability—has not been realized.

Absent a presumption that children are entitled to a mitigated sentence, this Court will continually have to examine individualized mitigation evidence on a case-by-case basis. This will require the Court to step out of its role as a reviewer to weigh the evidence to determine whether a sentencing court erred in declining to give a mitigated sentence.

Inherently diminished culpability means just that—diminished culpability. If courts fail to recognize this and continue sentencing children as if they were as culpable as adults, and justify the adult sentences through conclusory statements that youth was considered and weighed, this Court must, if it chooses not to be the final arbiter on a case-by-case basis as to whether youth was properly considered, put into place presumptions as additional procedural safeguards. As discussed previously, this would not be the first time this Court has done this when the previous procedural safeguards proved unable to adequately safeguard constitutional rights. *See Jefferson*, 192 Wn.2d at 249-50 (modifying *Batson's* step 3). The constitutional right of children to be protected from cruel punishment, brought to the fore when children in adult court are presumed to be as culpable as adults, requires a recalibration of procedures when children are sentenced in adult court. Or, this Court can decide to address the legality of children's incarceration sentences on a case-by-case basis. Prudence suggests that a procedural safeguard is the wiser course;

fairness and the U.S. and Washington Constitutions demand it.

CONCLUSION

Amici urge the Court not only to declare that *Houston-Sconiers* is retroactive in application, but also to institute a presumption that children sentenced in adult court are entitled to a mitigated sentence. The consistent and persistent overpunishment of children is cruel.

DATED this 13th day of January 2020.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on January 13th, 2020, 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 13th day of January, 2020.

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Comments:

The corrected motion and corrected brief are filed to replace the filings from earlier today, as we inadvertently left off one of the amici, CCYJ. Thank you.

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