No. 102295-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT OF
CHARLES SCOTT FRAZIER,

Petitioner.

BRIEF OF AMICI CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AND ACLU OF WASHINGTON IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. IDENTITY AND INTEREST OF AMICI

The identity and interest of amici is set forth in the Motion for Leave to File, submitted contemporaneously with this brief.

II. INTRODUCTION

In 1989, when Charles Frazier received a 50-year sentence at the age of 18, he was doubly prejudiced by the explicit—incorrect—consideration of his youth and by the implicit—incorrect—consideration of his race. Charles's age and race mattered at sentencing where they combined in the form of a racialized stereotype of the superpredator, leading the court to view his youth explicitly, with race operating implicitly, as an aggravator.

On direct appeal Charles's sentence would be illegal because his youth was not appropriately considered. This Court could, as urged by the State and as held by the court below, avoid acknowledging this illegal sentence on procedural grounds; or it could acknowledge the illegality and agree that

procedural grounds prevent relief; or it could acknowledge illegality, find the procedural barriers are overcome, and order resentencing. Amici urge the last. Evidence related to adolescent brain science, newly discovered since Charles's sentencing and direct appeal, provides the procedural pathway to consider how he was prejudiced at sentencing.

This prejudice analysis should consider how his youth was entangled with race and gender and how this may have impacted consideration of other aggravators. Consistent with the superpredator myth prevailing during this time, the sentencing court saw before it a young Black man and concluded that he was so dangerous and blameworthy that it sentenced him to an exceptional sentence, 50 years.

Amici urge the Court to determine that the sentencing outcome more likely than not would have been different with consideration of adolescent brain science. The Court's prejudice analysis should account for the substantial likelihood that even the other aggravators cannot be considered in isolation from the

improper consideration of youth and its entanglement with race and gender, and therefore do not support the conclusion that Charles is not prejudiced by the failure to have the new evidence considered. Relying upon a procedural bar would leave in place the disproportionate sentence that resulted from the improper consideration of youth and its entanglement with race and gender. It would leave in place a sentence that is a relic of this state's troubled history of disparate treatment of Black people in its criminal legal system.[1]

[1] Research Working Group of the Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 35 Seattle U. L. Rev. 623, 627 (2012) ("In 1980, of all states, Washington had the highest rate of disproportionate minority representation in its prisons.").

III. ARGUMENT

A. Newly discovered evidence related to adolescent brain development suggests the court's decision to impose an exceptional sentence was based on the incorrect assumption that Charles's youth aggravated his culpability.

The sentencing court explicitly and wrongly found youth to be an aggravator in Charles's case, contrary to what is now widely accepted and understood about the neurological and emotional development of youthful defendants. App. 56.[2] By imposing an exceptional sentence, the sentencing court concluded not only that Charles was fully culpable, but that his youth actually exacerbated his blameworthiness. If the court had the benefit of current brain science showing "many youthful defendants older than 18 share the same developing brains and impulsive behavioral attributes as those under 18," it is more likely than not that Charles's sentence would be different. *In re Monschke*, 197 Wn.2d 305, 313, 482 P.3d 276

[2] The Appendix was filed in the Court of Appeals with the January 10, 2023 Brief of Petitioner.

(2021); *see In re Domingo-Cornelio*, 196 Wn.2d 255, 267, 474 P.3d 524 (2020) ("A petitioner must demonstrate by a preponderance of the evidence that he was actually and substantially prejudiced by the constitutional error in order to obtain relief on collateral review."). The unavailability of this brain science at Charles's sentencing likely had a material effect on the length of the sentence imposed. *See In re Kennedy*, 200 Wn.2d 1,13, 513 P.3d 769 (2022) (newly discovered evidence exception to time bar requires showing, in part, that the evidence is material and "will probably change the result" of the proceeding).

An emerging body of scientific research shows unequivocally that brain physiology and associated behavior continue to develop well past age 18 in legally significant ways. *See Monschke*, 197 Wn.2d at 321–25 ("objective scientific differences between 18- to 20-year-olds … on the one hand, and persons with fully developed brains on the other hand, [are] constitutionally significant") (summarizing research). The

Center for Law, Brain & Behavior, led by legal and medical experts based primarily at Harvard Law School, Mass General Hospital, and Harvard Medical School, has synthesized the scientific research demonstrating that the same mitigating qualities of youth recognized by courts as diminishing culpability and enhancing capacity for change for juveniles apply similarly to late adolescents. *See generally* Center for Law, Brain & Behavior, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers* (2022), https://clbb.mgh.harvard.edu/wp-content/uploads/CLBB-White-Paper-on-the-Science-of-Late-Adolescence-3.pdf (explaining adolescent brain science specific to 18- to 21-year-olds as it relates to sentencing of late adolescents under the framework established in *Miller v. Alabama*, 567 U.S. 460, 123 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)) ("*Science of Late Adolescence*"). While there is no bright line for when this development ends, it is now clear that behavior-shaping brain development continues into the

twenties. *See, e.g.*, Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Ann. N.Y. Acad. Sci. 77, 83 (2004); Nitin Gogtay et al., *Dynamic Mapping of the Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174, 8176–78 (2004); *see generally* MIT Young Adult Development Project, *Brain Changes* (2018), https://hr.mit.edu/static/worklife/youngadult/brain.html; *see also Monschke*, 197 Wn.2d at 321–23 (recognizing science establishing continued brain development into a person's twenties); *State v. O'Dell*, 183 Wn.2d 680, 691–92, 358 P.3d 359 (2015) (same).

It is now also understood that extreme sentences for behavior during these essential stages of development are inappropriate, even for the most violent crimes, because such sentences fail to consider the diminished culpability of youth. *See Monschke*, 197 Wn.2d at 321, 324–25 (acknowledging potential for diminished culpability of 18- to 20-year-olds in

cases of aggravated first-degree murder); *Roper v. Simmons*, 543 U.S. 551, 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (barring death penalty for juveniles in capital murder cases because of likelihood of diminished culpability). This is particularly so if the sentence is colored by now-discredited notions of a young offender's incorrigibility. *See Monschke*, 197 Wn.2d at 321 (finding "transitory and developing character" of late adolescents "weigh[s] in favor of offering similar constitutional protections" as are afforded to juveniles); *Science of Late Adolescence*, *supra*, at 36–41 (discussing scientific literature related to late adolescents' capacity for change).

In Charles's case, his age should have been recognized as a mitigating, not aggravating, factor at sentencing. Scholarship on brain science and the corresponding jurisprudence that has developed since Charles's sentencing demonstrate the materiality of the unique vulnerabilities and developmental differences inherent in youthful offenders. These include the

lack of fully formed cognitive faculties related to decision-making and impulse control, making late adolescents more susceptible to external influences and less capable of fully understanding and appreciating the consequences of their actions. *See Science of Late Adolescence*, *supra*, 10–16 (explaining science related to immaturity, impetuosity, and risk taking); *id*. at 24–26 (peer influence). This expanded understanding of the brains of late adolescents suggests a greater potential for rehabilitation and positive change because they are still in the process of maturing and developing their identities. *Id*. at 36–41 (explaining science related to capacity for rehabilitation). Had this body of research been available to the court at the time of Charles's sentencing, it likely would have materially affected the sentence imposed.

B. Implicit racial bias likely contributed to the sentencing court's decision to impose an exceptional sentence above the standard range and cannot be disentangled from the court's view of his youthfulness.

In 1989, Charles, a young Black man, stood before a non-Black judge in Kitsap County when only 1.8 percent of the county's population identified as Black.[3] University of Washington Civil Rights & Labor History Consortium, *Mapping Race and Segregation in Kitsap County, Washington 1980-2020*, https://depts.washington.edu/labhist/maps-race-kitsap.shtml (last visited Apr. 11, 2024) (in 1980, out of a total population of 147,152 in Kitsap County, 2,683 were Black). Empirical research shows that Black men, including young Black men like Charles, experience significant implicit bias and

[3] The first Black judge in Kitsap County, Hon. Ted Spearman, was appointed in 2004, 15 years after Charles's sentencing. *See* Nathan Pilling, *Bainbridge Island Police-court Center to Honor Kitsap Court's First African-American Judge*, Kitsap Sun (June 1, 2023), https://www.kitsapsun.com/story/news/local/communities/bainbridge-islander/2023/06/01/ted-spearman-justice-center-bainbridge-island-washington-police-municipal-court/70275492007/.

are heavily stereotyped in the United States as threatening, aggressive, and violent. Multiple studies have linked stereotypes and implicit bias held against Black people with an increased likelihood of a lengthier sentence. In Washington, these findings are evident in disproportionately imposed life and long sentences on Black men and on those aged 18-25. Given Charles's identity as a young Black man in Kitsap County in 1989, it is likely that implicit racial bias, in addition to his age and gender, influenced the court's decision to impose an exceptional sentence.

1. Young Black men are often viewed as being more dangerous and violent than their white counterparts resulting in increased sentence lengths.

Studies show that Black men are "the most visibly stereotyped racial group in the USA," facing stereotypes associated with aggression, anger, and criminality. Evi Taylor et al., *The Historical Perspectives of Stereotypes on African-American Males*, 4 J. Hum. Rts. Soc. Work 213, 213, 217–18

(2019); *see* Shervin Assari, *Interaction Between Race and Gender on Implicit Racial Bias Against Blacks*, 5 Int'l J. Epidemiologic Rsch. 43, 46 (2018). These stereotypes date back to slavery and stem from the need of slaveowners to rationalize their oppression of enslaved persons, including through dehumanizing treatment such as violence and racist comparisons of Black men to wild animals. *See* Taylor et al., *Historical Perspectives*, *supra*, at 214; Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. Davis L. Rev. 745, 773 (2018) (relating dangerousness and criminality stereotypes to conceptions held by white people during slavery that Black people were more animalistic).

There is "overwhelming evidence" that these stereotypes extend to and are exacerbated for young Black men like Charles. *See* Sophie Trawalter et al., *Attending to Threat: Race-based Patterns of Selective Attention*, 44 J. Experimental Soc.

Psych. 1322, 1322 (2008). Young Black men are commonly viewed as aggressive, hostile, and "posing an imminent threat to the physical safety of those they encounter." Gustav J. W. Lundberg et al., *Racial Bias in Implicit Danger Associations Generalizes to Older Male Targets*, PLOS ONE, 2 (June 2018), https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0197398&type=printable.

A 2018 study analyzing the intersectionality of stereotypes against race and gender using data from Harvard University's "Project Implicit" found that white men hold the highest level of implicit bias against Black men. Assari, *Interaction Between Race and Gender*, *supra*, at 45. Black men specifically are more likely than white men to be viewed as "threatening" or "aggressive." John Paul Wilson et al., *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. Personality Soc. Psych. 59, 60 (2017). And at least one study testing biases held between Black and white faces has shown that implicit bias associating Black men

with crime runs so deep and is so automatic that the association exists in the opposite direction: "[n]ot only are Blacks thought of as criminal, but also crime is thought of as Black." Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality Soc. Psych. 876, 883 (2004). In other words, just "thinking of crime can trigger thoughts of Black people." *Id.* at 876.

Stereotypes related to criminality held against Black men extend with equal force to Black adolescent males. In one study on implicit bias involving the use of 90 photos of Black youth aged 16-19, the results showed that non-Black people consistently perceive Black youth as "taller, heavier, stronger, more muscular, and more capable of causing physical harm than young White men." Wilson et al., *Racial Bias in Judgments of Physical Size and Formidability*, *supra*, at 74. A similar study involving testing responses of white viewers to photos of Black males aged approximately late teens to mid-twenties found that young Black males elicit a reaction similar

to that which people have when processing other "perceived threats." Trawalter et al., *Attending to Threat*, *supra*, at 1323, 1326 (comparing with responses to perceived threats such as spiders, snakes, and angry faces, and finding similar response when eye gaze in the photo was direct).

These harmful stereotypes and corresponding implicit bias lead to negative outcomes in the criminal legal system. At least one study has shown a strong association between being "Black and guilty," pointing toward a "presumption of dangerousness" for Black defendants. Bennett et al., *Looking Criminal*, *supra*, at 793–97, 802. Multiple studies on the relationship between implicit bias, racial stereotyping, and sentencing have demonstrated that having Afrocentric facial features was "a significant predictor of sentence length.… [T]he stronger the Afrocentric facial features, the longer the sentence." *Id.* at 775–86, 780, 783–84 (footnotes omitted); Wilson et al., *Racial Bias in Judgments of Physical Size and Formidability*, *supra*, at 60; *see also* Michael Tonry, *The*

Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System, 39 Crime & Just. 273, 283 (2010) (discussing research on negative stereotypes that are "deeply embedded" in American culture "to the detriment of [B]lacks in the criminal justice system," causing Black people to be punished "more severely" than white people).

Sentencing data agrees. Young, Black, unemployed men like Charles specifically have a "greater likelihood of incarceration and longer sentences than comparable White offenders" at both the federal and state level. Bennett et al., *Looking Criminal*, *supra*, at 774. At the federal level, Black men receive sentences that are 13.4 percent longer than white men. U.S. Sent'g Comm'n, *Demographic Differences in Federal Sentencing*, 8 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20231114_Demographic-Differences.pdf. And those in the 18- to 24-year-old age group are

overrepresented in the criminal legal system, particularly for murder and robbery arrests. *See* Just. Policy Inst., *Improving Approaches to Serving Young Adults in the Justice System*, 5–7 (2016), https://justicepolicy.org/research/reports-2016-improving-approaches-to-serving-young-adults-in-the-justice-system/ (documenting that young people of color are overrepresented within the 18- to 24-year-old age group across eight reporting jurisdictions).

These patterns persist in Washington, where Black men are grossly overrepresented among those serving long and life sentences, with disparities increasing as sentences get longer. Katherine Beckett & Heather D. Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State, a Report for ACLU of Washington*, 27–28 (Feb. 2020), https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state ("an average of 3.5% of the state population identified as black …, but 19% of those sentenced to prison, and 28% of those

sentenced to life in prison, were black"). Similarly, the proportion of individuals serving long and life sentences in Washington who were under age 25 at the time of their sentencing is very high—approximately one-fourth of the total. Beckett, *About Time*, *supra*, at 28–29. Taken together, the sentencing data and empirical research support that Charles's sentence was likely influenced by harmful stereotypes of young Black men as more violent, more aggressive, and more guilty.

2. Historical attitudes toward young Black men prevalent at the time of sentencing increase the likelihood that implicit bias affected Charles's sentence.

Examining Charles's sentencing in light of the historical context magnifies the prejudicial effect his youth and race likely had on his sentence. Charles was sentenced in 1989, during the height of the tough-on-crime era and the country's focus on Black criminality. In 1988, the National Security PAC famously aired a 30-second ad in support of George H.W. Bush's presidential campaign to instill panic in voters about

Black crime. Erin Blakemore, *How the Willie Horton Ad Played on Racism and Fear*, History (Nov. 2, 2018, updated Oct. 29, 2023), https://www.history.com/news/george-bush-willie-horton-racist-ad. Just months before Charles's sentencing in August 1989, the Central Park Five incident occurred and dominated the news cycle, introducing the terms "wilding" and "wolf pack[]" to describe crimes committed by Black youth. Vincent M. Southerland, *Youth Matters: The Need to Treat Children Like Children*, 27 J. C.R. & Econ. Dev. 765, 772 (2015). The five youth of color who were convicted in association with that incident and demonized in the national press were later exonerated. *Id.*

In the eight years that followed, New York newspapers alone would use the term "wilding" 156 times to describe Black or Latino males. *Id*. This intense media attention drove the public to dissociate young Black males from their youth and focus on their criminality. *Id.* at 773. Numerous states had already started implementing legislation to overhaul their

juvenile court systems after the media sensationalized Willie Bosket's case—a young Black male who killed two people on the subway in 1978. Carroll Bogert & LynNell Hancock, *Analysis: How the Media Created a "Superpredator" Myth That Harmed a Generation of Black Youth*, NBC News (Nov. 20, 2020), https://www.nbcnews.com/news/us-news/analysis-how-media-created-superpredator-myth-harmed-generation-black-youth-n1248101. By the end of the 1990s, "virtually every state had toughened its laws on juveniles," including by allowing life sentences without parole. *Id.*

Within six years of Charles's sentencing, the media started referring to Black youth accused of crimes as "super-predators." Ahmed Lavalais, *Monetizing the Super-Predator*, 81 Ohio State L.J. 983, 993 (2020). This term, coined by

criminologist John DiIulio, named the prevalent myth of young, violent, Black criminals.[4] *Id*.

Members of this Court have recognized that the "fears of juvenile superpredators [that] gripped the nation in the 1990s" were "unfounded." *State v. Watkins*, 191 Wn.2d 530, 550, 423 P.3d 830 (2018) (Yu, J., dissenting). Indeed, as Chief Justice González recognized, "Black or brown children … were demonized by the war on crime social panic, racialized fears, and discredited science" and "were explicitly or tacitly classified as 'juvenile superpredators' and treated as irredeemable monsters." *State v. Anderson*, 200 Wn.2d 266, 293–94, 516 P.3d 1213 (2022) (González, J., dissenting).

The cultural criminalization of Black teenagers in the 1980s combined with implicit bias and the unavailability of adolescent brain science research compel the conclusion that it

[4] DiIulio has since apologized and recognized the harm the "super-predator" term has caused. Br. of Jeffrey Fagan et al., as Amici Curiae in Supp. of Petrs. at 18–19 & n.26, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9647).

is more likely than not that these factors influenced Charles's sentence.

C. To determine actual and substantial prejudice, the Court cannot ignore the likelihood that the entanglement of racial bias and misperceptions about adolescent culpability influenced the imposition of the other aggravators.

The sentencing court's consideration of Charles's age as an aggravating rather than mitigating factor, as is supported by the now-available evidence he should be allowed to present at resentencing, results in actual and substantial prejudice. A court in possession of current brain science would likely not impose an exceptional sentence. This is true even though the sentencing court applied other aggravating factors—violating a position of trust and deliberate cruelty—to this case. App. 56–57, 72–75. In light of the now-available science and jurisprudence recognizing the mitigating qualities of youth, the Court should consider how youthfulness and implicit bias influenced the underlying findings related to position of trust and deliberate cruelty and should not rely on those aggravators to conclude

that the sentencing outcome would have been the same notwithstanding the new evidence.

1. Precedent does not support applying the position-of-trust aggravator to a youthful offender and Charles's race and age likely influenced the court's findings.

In imposing an exceptional sentence, the court found Charles had violated a position of trust in relation to his father's death because of their relationship and because Charles lived in the family home. App. 57. This finding was atypical—courts almost never apply this aggravator to a child who commits a crime against a parent or other trusted adult. This aggravator "refers primarily to the trust relationship between the perpetrator and the victim which renders the victim particularly vulnerable to the crime." *State v. Russell*, 69 Wn. App. 237, 252, 848 P.2d 743 (1993). It is most commonly found to support exceptional sentences where the defendant violates a professional or fiduciary duty, or where an adult who is in a position to care for a younger child commits a crime against

that child. *See, e.g.*, *State v. Grewe*, 117 Wn.2d 211, 220–21, 813 P.2d 1238 (1991) (affirming use of aggravator where defendant lured child victim "into his house to play with his piano and computer"); *State v. Oxborrow*, 106 Wn.2d 525, 527, 533, 723 P.2d 1123 (1986) (holding trial court "justified in relying on" this aggravator where investment manager stole investors' funds); *State v. Harp*, 43 Wn. App. 340, 342, 717 P.2d 282 (1986) (affirming use of aggravator where "defendant used his position of trust as the caretaker for the children to facilitate the molestations"). Looking more specifically at cases involving murders of a family member, this aggravator is almost exclusively imposed where a parent kills a young child entrusted to their care. *E.g.*, *Russell*, 69 Wn. App. at 252; *State v. Sao*, 156 Wn. App. 67, 81–82, 230 P.3d 277 (2010); *State v. Creekmore*, 55 Wn. App. 852, 862, 783 P.2d 1068 (1989). *But see State v. Lake*, 98 Wn. App. 1020, 1999 WL 1084307, at *10–11 (1999) (unpublished) (affirming use of aggravator in

sentencing 16-year-old convicted of murdering her adoptive parents, who were also her biological grandparents).

But the sentencing court here ignored that Charles was the child and was not caring for his father and imposed this aggravator simply because Charles, like most teenagers, lived with his father. Teenaged children who are living with their parents do not hold special duties in that relationship that are elevated from others in society. Parents and guardians have a special duty to care for their dependents, but the converse is not true. *See In re Hudson*, 13 Wn.2d 673, 711–12, 126 P.2d 765 (1942) ("Parents are the natural guardians of their minor children and entitled to their custody and control. Their right is in the nature of a trust reposed in them, is subject to their correlative duty to care for and protect their children ….").

Research into adolescent brain development supports this assumption and the corresponding legal framework because adolescents do not have the same level of cognitive or emotional maturity to fully understand and fulfill a duty of care

to their parents during their formative years. The determination of whether a defendant is in a position of trust depends on several factors, including the length of the relationship with the victim, *State v. Fisher*, 108 Wn.2d 419, 426–27, 739 P.2d 683 (1987), the vulnerability of the victim to trust because of young age, *Grewe*, 117 Wn.2d at 216–17, and the degree of the defendant's culpability, *Creekmore*, 55 Wn. App. at 863. Typically, an adolescent cannot be said to be in a position of trust with his parent or adult caregiver when a lengthy relationship between them is not unusual, the adult is not vulnerable because of young or advanced age, and the adolescent is not fully culpable. *See Grewe*, 117 Wn.2d at 220 ("It is the trust between the perpetrator and the victim which renders the victim particularly vulnerable to the crime."); *Monschke*, 197 Wn.2d at 312–13; *O'Dell*, 183 Wn.2d at 692.

Implicit bias may also have played an important role in the court's finding this aggravating circumstance. Black youth are consistently viewed as older and less innocent compared to

their same-age white peers. *See supra* Section III.B.; *see also* Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality Soc. Psych. 526, 529 (2014) (containing a study demonstrating that Black youth in every age group from age 10 through 25 were "rated as significantly less innocent than White children and adults or children and adults generally," supporting the hypothesis that Black youth are perceived as more responsible for their actions); Wilson et al., *Racial Bias in Judgments of Physical Size and Formidability, supra*, at 59–60, 67–70 (discussing study showing that white people perceive young Black men as bigger (taller, heavier, more muscular) and more physically threatening (stronger, more capable of harm) than young white men). In Charles's case, the sentencing court made multiple references to his prior juvenile court involvement, and stated that he was "not amenable to change" as demonstrated by his "incarceration at Green Hill." App. 57. This conclusory statement reflected the court's logic that

Charles had already grown beyond the point of change, reflecting the common assumption that Black youth are older and less innocent than their white peers. In stark contrast to the court's conclusion, Charles was at a point in his life where brain development research has proven the exact opposite: that adolescents absolutely possess the capacity to change. *See supra* Section III.A.; *see also Monschke*, 197 Wn.2d at 322 (stating adolescent neurological development studies are "clear" that psychological development continues beyond the age of 18); *Science of Late Adolescence*, *supra*, at 36–41.

Combined with the research demonstrating implicit associations of Black youth with anger, aggression, and criminality, the perception that Black youth are more responsible for their actions likely contributed to why Charles—a young man who was adopted out of foster care, spent his childhood in special education, did not complete high school, moved into his father's home from Green Hill juvenile rehabilitation less than one month before his father died in a

fire, and relied on his father for financial support—was improperly found by the sentencing court to hold a position of trust. Goff et al., *The Essence of Innocence*, *supra*, at 539; App. 4, 6, 11, 23, 36, 38–39. Given what is known today about adolescent brain development and implicit bias, it is unlikely that a sentencing court now would rely on this aggravating circumstance to support an exceptional sentence in this case.

2. The deliberate cruelty aggravator should not apply to a youth with a still-developing brain, especially in light of harmful stereotypes commonly associated with young Black males.

Viewed through the lens of modern understanding of adolescent brain development and implicit bias, at resentencing, a court considering Charles's mitigating qualities of youth would likely not reimpose an exceptional 50-year sentence, and may also not find support for the deliberate cruelty aggravator. *See Monschke*, 197 Wn.2d at 326 (requiring sentencing courts to conduct individualized inquiry into mitigating qualities of

youth before imposing LWOP on 18- to 20-year-old defendants).

Courts may impose an exceptional sentence where there is deliberately cruel conduct. RCW 9.94A.535(3)(a); *State v. Rotko*, 116 Wn. App. 230, 243, 67 P.3d 1098 (2003) (defining deliberate cruelty as "gratuitous violence, or other conduct which inflicts physical, psychological or emotional pain as an end in itself") (citation & internal quotation marks omitted), *as amended* (Mar. 18, 2003). This aggravator necessarily contemplates some degree of premeditation and recognition that one's actions were deliberately cruel. But the current brain science shows that impulse control and decision-making continue to develop into a person's twenties, calling into doubt whether Charles could have fully understood the cruelty of his action as such at only eighteen. *See* Staci A. Gruber & Deborah A. Yurgelun-Todd, *Neurobiology and the Law: A Role in Juvenile Justice?*, 3 Ohio St. J. Crim. L. 321, 331 (2006) ("[D]ata from recent investigations provide evidence that brain

maturation continues well past adolescence…. [T]he developmental factors which influence decision-making in adolescents may result in choices which are suggestive of cortical immaturity, poor judgment, and impulsivity."). The mitigating qualities of youth should have been considered in deciding whether to apply this aggravator. *See Roper*, 543 U.S. at 570 ("[I]t is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.").

This aggravator is particularly suspect in Charles's case given the role of implicit bias that could have infected his sentencing, coupled with stereotypes of young Black men as particularly dangerous and criminal. *See supra* Section III.B. Charles's presentencing report linked Charles's race and his prior juvenile court involvement in the same sentence: "[b]efore the Court for sentencing on what would appear to be his fourth felony conviction prior to the age of 21, we have a black male who has an extensive substance abuse history as well as a

substantial criminal history." App. 39. But criminal history is already factored into the computation of an offender's score and "should not be reconsidered in imposing a sentence outside the standard range." *State v. Barnes*, 117 Wn.2d 701, 706, 818 P.2d 1088 (1991). When considered in light of the prevailing refrain in the media at the time of Charles's sentencing that young men of color, particularly teenagers, were especially violent, uncontrollable, and to be feared, it becomes even less likely that the finding of deliberate cruelty would survive alongside mitigating evidence related to Charles's youth to support an exceptional sentence of 50 years.

The sentencing court's failure to consider Charles's youth as a mitigating factor—and to impose aggravating factors that are inconsistent with the current brain science showing Charles's brain was still developing in key aspects—likely substantially and actually prejudiced Charles.

IV. CONCLUSION

Amici urge this Court to grant Charles's request for a new sentencing hearing to consider new evidence related to late adolescent brain development, along with an examination of the role of implicit bias in the findings of the aggravating circumstances. If allowed to reexamine the findings that led to an exceptional sentence aggravated explicitly by Charles's age and implicitly by his race, it is likely that the resentencing court would impose a lesser sentence.

RAP 18.17 Certification

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RESPECTFULLY SUBMITTED this 12th day of April, 2024.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on April 12, 2024, the foregoing document was electronically filed with the Washington Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 12th day of April, 2024.

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