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A Cross-Clinic Collaboration: How an Amicus Brief Helped Create Judicial Recognition of Adultification Bias in Juvenile Sentencing

Jessica Levin

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*Assistant Director, Fred T. Korematsu Center for Law and Equality, Visiting Assistant Clinical Professor, Seattle University School of Law. I am grateful to my wonderful colleagues Professor Bob Chang and Melissa Lee, to Civil Rights Clinic students Jamie Wilson ‘21 and Alexander Hager-DeMyer ‘21 for their contributions to the Korematsu Center’s amicus brief, to Kim Ambrose at the University of Washington Race and Justice Clinic, and to the Race and Justice clinic students who represented Asaria Miller, including Alyssa Fairbanks, Lara Hengelbrok, Maddisson Alexander, Maddie Flood, Dashni Amin, Kathleen Edelheit, Eleana Stevens, Channing Reeves, Melanie Kray, Micah Moussbir, and Metta Girma. Finally, I am grateful to Asaria Miller for contributing her reflection for inclusion in this introduction, and for giving us permission to discuss her case in this symposium issue.

INTRODUCTION

In *In re Personal Restraint of Asaria Miller*,[1] at the urging of merits counsel from the University of Washington's Race and Justice Clinic, supported by amicus counsel from Seattle University School of Law's Civil Rights Clinic, the Washington State Court of Appeals took an important step in accounting for the ways that youth of color likely receive harsher punishment than their white counterparts—specifically due to adultification bias.

The cross-clinic collaboration resulted in judicial recognition of the operation of adultification bias in the criminal law context, as well as a mandate that sentencing courts consider adultification bias whenever sentencing a youth of color—the first time adultification bias has been incorporated into a legal standard in any American court.[2]

I. THE STORY OF THE CROSS-CLINIC COLLABORATION

A. CASE BACKGROUND[3]

Asaria Miller, a Black Girl, was just sixteen when her father recruited her to kill his ex-girlfriend in 2012.[4] In exchange for her guilty plea, the State amended her charges and recommended a midrange standard sentence for murder in the first-degree.[5] Even though the parties jointly recommended a sentence of 300 months plus 60 months for the firearm enhancement, the court imposed 390 months—a total of 32.5 years.[6] The sentencing court never considered the mitigating qualities of her youth.[7]

On behalf of Asaria, the Race and Justice Clinic filed her collateral attack in the Court of Appeals, arguing she was entitled to a new sentencing hearing under *In re Pers. Restraint of Domingo-Cornelio*.[8] The resentencing would allow Asaria to present a full picture of herself: who she was as a child and the difficult circumstances she experienced, and who she has become as an adult, resilient and deeply committed to transforming

1. *In re* Pers. Restraint of Miller, 505 P.3d 585, 589 (Wash. App. Ct. 2022).

2. As of Mar. 26, 2024, a search of both Westlaw and Lexis lists *Miller* as the first published case to invoke a standard of recognition of adultification bias.

3. For a more in-depth analysis of Asaria's case, see Jessica Levin, *A Path Toward Race-Conscious Standards for Youth: Translating Adultification Bias Theory into Doctrinal Interventions in Criminal Court*, 35 U.C. L. S.F. J. ON GENDER & JUST. 83 (2024).

4. *Miller*, 505 P.3d at 587.

5. *Id.*

6. *Id.*

7. *Id.* at 588.

8. *Id.* at 589; *In re* Pers. Restraint of Domingo-Cornelio, 474 P.3d 524, 531 (Wash. 2020) (holding that the dual mandates of *State v. Houston-Sconiers*, 391 P.3d 409, 414 (Wash. 2017), which requires a court to consider the mitigating qualities of youth when a child is prosecuted in adult court and allows sentencing courts complete discretion to depart from otherwise mandatory sentencing schemes, applies retroactively).

her life and the lives of those around her. Through consideration by the sentencing court of the mitigating qualities of her youth, she would receive, ideally, a new sentence that reflected her diminished culpability, recognized her capacity for change and rehabilitation, and met the evolving norms of proportionate punishment.

In an effort to ensure that resentencing would be granted, her counsel argued that instead of applying the usual "actual and substantial" prejudice test to determine her entitlement to relief on post-conviction review, a rule of *per se* prejudice was more appropriate to protect against the real risk that certain groups of youth, particularly Black girls, receive disparate treatment during sentencing due to adultification bias.[9]

B. CROSS-CLINIC OUTREACH

In late 2020, students from the Race and Justice Clinic at the University of Washington School of Law reached out to the Civil Rights Clinic at Seattle University School of Law's Civil Rights Clinic soliciting an amicus brief to address adultification bias in the context of Asaria's resentencing case. The advocates at the Race and Justice Clinic specifically sought support for the argument that showing prejudice—thus entitling Asaria to resentencing—would be doubly difficult if the original sentence was influenced by adultification bias.

The Civil Rights Clinic, as a project of Seattle University School of Law's Korematsu Center for Law and Equality, had participated robustly as amicus in the majority of Washington's key juvenile sentencing cases in the years that followed United States Supreme Court case, *Miller v. Alabama*,[10] as well as in the case that determined Washington's capital punishment statute was unconstitutional as administered under the state constitution based on racial arbitrariness.[11] The Civil Rights Clinic was well positioned to contribute an amicus brief in Asaria's case that expanded on the empirical literature regarding adultification at sentencing, having already established a reputation before Washington courts as a respected voice about both sentencing, and the impact of race in the criminal legal system. The Civil Rights Clinic decided to take on the amicus project, presenting an opportunity to continue educating courts about the operation of racial bias at sentencing.

C. THE AMICUS BRIEF

The Civil Rights Clinic filed an amicus brief, reproduced below, at the Court of Appeals supporting the request for a *per se* prejudice standard on collateral review. This standard would automatically entitle a young person to resentencing, rather than having to show by a preponderance that a

9. *Miller*, 505 P.3d at 265.
10. Miller v. Alabama, 567 U.S. 460 (2012).
11. State v. Gregory, 427 P.3d 621 (Wash. 2018).

different outcome would have occurred had youth been considered. Further, this rule would account for the very real possibility that the original sentence was impacted by adultification bias, as indicated by statements in the sentencing transcript, coupled with the judge's decision to add thirty months beyond the parties' agreed recommendation.

The amicus brief educated the court about the germinal adultification research,[12] arguing that being "[d]eprived of the benefit of being treated as children leaves a vacuum within which race can operate as an aggravator, leading to harsher punishment [of Black girls] than their white counterparts."[13]

Initial adultification scholarship by Dr. Phillip Atiba Goff and colleagues focused on Black children in general, and specifically on Black boys.[14] The brief argued, relying on both *Girlhood Interrupted*, an empirical study published by Georgetown Law Center on Poverty and Inequality, and other empirical literature, that Black girls also suffer from "adultification."[15] Specifically, the placement of harmful stereotypes of Black women onto Black girls compounds the adultification bias observed in Dr. Goff's study, negating the constitutional protections afforded to children.[16]

Further, the brief argued that when a reviewing court subjects a resentencing request to the actual and substantial prejudice standard (a preponderance standard), courts ignore the operation of race and remain complicit in devaluing Black lives.[17] Requiring a petitioner to show actual and substantial prejudice endorses an implicit judgment that the State's interest in finality is more important than correcting the constitutional error. Lastly, the brief stated: "Gatekeeping tests like the actual and substantial prejudice test—particularly in post-conviction settings where a significant

12. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. OF PERSONALITY & SOC. PSYCH. 526, 529, 539-40 (2014); REBECCA EPSTEIN, JAMILA J. BLAKE & THALIA GONZÁLEZ, GEO. L. CTR. ON POVERTY & INEQ., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 2, 4, 8 (2017), https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf [https://perma.cc/E8C7-E3ND]. For an in-depth discussion of how that empirical literature was leveraged in this case and other cases litigated by the Civil Rights Clinic, see Levin, *supra* note 3, at Section V.A.

13. Brief of Fred T. Korematsu Ctr. for L. and Equal. as Amicus Curiae in Support of Petitioner at 2, 11-12, *Miller*, 505 P.3d 585 (No. 52119-9-II) [hereinafter *Miller* Amicus Brief].

14. *See* Goff et al., *supra* note 12.

15. *Miller* Amicus Brief, *supra* note 13, at 3.

16. *Id.*

17. *Cf.* Letter from The Supreme Court of the State of Washington to Members of the Judiciary and the Legal Community (June 4, 2020), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf [https://perma.cc/8ZF8-U9WY] ("[W]e must recognize the role we have played in devaluing [B]lack lives.").

change in the law has been given retroactive effect—need to be scrutinized to ensure that they do not perpetuate the prior product of racial bias."[18]

II. THE OPINION

As a result of the advocacy on adultification bias—raised in the merits brief and explored in detail in the amicus brief—the court's opinion stated: "We agree that adultification may detrimentally affect children of color at criminal sentencings."[19] While the court declined to adopt the proposed *per se* prejudice standard advanced by both merits and amicus counsel that would be applicable to post-conviction claims seeking resentencing to account for youth, the court more broadly directed lower courts to consider adultification bias whenever sentencing a young person of color: "in the face of this convincing information about disparities in sentencing, trial courts should consider, in addition to issues common with all youths . . . , these potential biases when sentencing children of color."[20]

Notably, this direction is not limited to post-conviction claims or to any intersection of race and gender—but a broad directive to account for adultification bias *whenever* sentencing a youth of color.

III. RIPPLE EFFECTS

After the decision in *Miller* came down, Civil Rights Clinic faculty received emails from public defenders (trial and appellate alike) explaining the decision provided them a pathway to argue about the salience of race at sentencing when representing clients of color. One email thanked both merits and amicus counsel for the innovative arguments and predicted the opinion's utility: "Lots of good language for us to use. It will be widely cited! Thanks to you and your students for being so persuasive."

Miller's recognition of adultification bias was relied upon by Justice Yu in another juvenile sentencing case, *State v. Anderson*.[21] In *Anderson*, Justice Yu's concurrence in dissent highlighted how consideration of the mitigating qualities of youth can be unevenly applied based on the defendant's race—i.e., the same set of facts can be a mitigator for one individual and an aggravator for another.[22] In this analysis, Justice Yu noted: "[I]t is well established by empirical literature and has been acknowledged by [this court] that Black children are prejudiced by, in

18. *Miller* Amicus Brief, *supra* note 13, at 2.
19. *In re* Pers. Restraint of Miller, 505 P.3d 585, 589 (Wash. App. Ct. 2022).
20. *Id.* at 590.
21. State v. Anderson, 516 P.3d 1213 (Wash. 2022).
22. *Id*. at 1236 (Yu, J., concurring in dissent) (discussing how differing evaluations of Mr. Anderson's mitigating qualities of youth were seen as aggravators, whereas very similar mitigating qualities of youth were appropriately treated as mitigating for white defendants).

addition to other stereotypes, 'adultification,' or the tendency of society to view Black children as older than similarly aged youths."[23]

CONCLUSION

The thread from *Miller* to *Anderson* demonstrates how amicus advocacy can leverage empirical literature regarding adultification bias and other forms of implicit bias to craft doctrinal interventions that recognize and remedy the disproportionately harsh treatment of Black people and other people of color in the juvenile and adult criminal legal system. The amicus brief reproduced below provides an example of one way to educate criminal legal system stakeholders about the risk of adultification bias and other forms of implicit bias. It is also an example of a litigation strategy designed to obtain outcomes that account for the role of race in prosecutorial and judicial decision making, a problem which is clear in the aggregate but has historically evaded remedy in individual cases. And it is a concrete example of how law school clinics can put theory into practice to produce doctrinal interventions that advance racial justice.

Most importantly, Asaria was entitled to a resentencing hearing. On remand from the Court of Appeals for resentencing, the superior court sentenced Asaria to 168 months (14 years),[24] down from the original 32.5 year sentence. The resentencing hearing provided Asaria the opportunity to advocate for herself, to tell her story, and to demonstrate the need for a fair and constitutional sentence. She also had the opportunity to hear other people testify about who she is as a whole person. Through her counsel, Asaria provided the following reflection:

> As a Black child at sentencing, I was automatically determined to be fully aware and capable of the crime allegedly committed. They don't care to look into your childhood, your past, or other events that may have created space for such behaviors and actions.
>
> As a 28 year old Black woman, who has been behind bars and involved in the justice system since the age of 10, I am now motivated to bring awareness about the role of race in courtroom proceedings. Holding individuals accountable for their actions is just, but punishing on the basis of skin tone is heinous. Just because our race has endured more trials and tribulations over generations

23. *Anderson*, 516 P.3d at 1236 (Yu, J., concurring in dissent) (quoting *Miller*, 505 P.3d at 589-90); *see also id.* (quoting *Miller*, 505 P.3d at 590) ("There can be no doubt that 'adultification is real and can lead to harsher sentences for children of color if care is not taken to consciously avoid biased outcomes.'"). Justice Yu also noted "[t]he majority today fails to take such care, leading to a harsh result for a former juvenile offender who is Black, which is irreconcilable with more lenient results obtained by former juvenile offenders who are white." *Id*.

24. Felony Judgment and Sentence at 6, *Miller*, 505 P.3d 585 (No. 52119-9-II).

> and continues to overcome them does not mean we should have to continue overcoming yet another form of slavery in the form of unfair sentences for African Americans.
>
> At age 17, I was sentenced to 32 years. That's a life sentence to a child. To be given that sentence knowing my African American roots played a role in the length is disgusting. But to be able to speak out about it, and to get a reduced sentence that clearly points to the prejudice I suffered, speaks volumes for the future of African American youth, and especially African American girls in the justice system.

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION II

In re the Personal Restraint Petition of

ASARIA MILLER

Petitioner.

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

Jessica Levin
Robert S. Chang
Melissa R. Lee

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

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

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

INTRODUCTION AND SUMMARY OF ARGUMENT

A child, when tried as an adult, has a right to have the mitigating qualities of their youth considered by a court that is fully informed of its absolute discretion to impose a lower sentence. *State v. Houston-Sconiers*, 188 Wn.2d 1, 9, 391 P.3d 409 (2017); *In re Pers. Restraint of Domingo-Cornelio*, 196 Wn.2d 255, 269, 474 P.3d 524 (2020) (*Houston-Sconiers* applies retroactively). When courts act inconsistent with this right, the burden likely falls more heavily upon Black children. Empirical literature demonstrates that Black children tend to be regarded and treated as older than they actually are, a process called "adultification." Deprived of the benefit of being treated as children leaves a vacuum within which race can operate as an aggravator, leading to harsher punishment than their white counterparts. These disproportionate outcomes in sentencing are left intact if courts fail to appreciate this dynamic when deciding if resentencing is required for petitioners like Asaria Miller,[1] who is Black and was a child when she committed her crime.

Though Asaria demonstrates actual and substantial prejudice, any child who did not receive a *Miller*[2]-compliant sentencing hearing and who now seeks resentencing under *Domingo-Cornelio* should receive the benefit of a conclusive presumption of prejudice. By subjecting collateral claims that no *Miller* hearing occurred to the actual and substantial prejudice standard, reviewing courts ignore the operation of race and remain complicit in devaluing Black lives. *Cf.* Letter from The Supreme Court of the State of Washington to Members of the Judiciary and the Legal Community (June 4, 2020) ("[W]e must recognize the role we have played in devaluing [B]lack lives."). Requiring a petitioner to show actual and substantial prejudice endorses an implicit judgment that the State's interest in finality is more important than correcting the constitutional error. Gatekeeping tests like the actual and substantial prejudice test—particularly in post-conviction settings where a significant change in the law has been given retroactive effect—need to be carefully scrutinized to ensure that they do not perpetuate the prior product of racial bias.

1. We refer to petitioner by her first name, because referring to her as "Ms. Miller" could lead the reader to unthinkingly consider her to have been an adult at the time of the crime.

2. *See Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 138 L. Ed. 2d 407 (2012).

Instead, this Court can participate in developing Washington jurisprudence to find that prejudice is established "when a sentencing court fails to consider mitigating factors relating to the youthfulness of a juvenile tried as an adult and/or does not appreciate its discretion to impose any exceptional sentence in light of that consideration." *Domingo-Cornel*io, 196 Wn.2d at 268. This approach is consistent with our Supreme Court's mandate to "administer justice…in a way that brings greater racial justice to our system as a whole." Letter from the Supreme Court, *supra*.

ARGUMENT

I. RACE OPERATES AS A SILENT AGGRAVATOR AND LIKELY LEADS TO BLACK CHILDREN BEING MORE HARSHLY PUNISHED.

Washington courts have consistently acknowledged the existence and impact of implicit bias in legal proceedings,[3] and juvenile sentencing is no different. Empirical literature demonstrates that, depending on the context, Black youth are both dehumanized and seen as older in the eyes of adult decision-makers. While initial adultification scholarship focused on Black children in general and specifically on Black boys, Black girls also suffer from "adultification." Coupled with the mapping of harmful stereotypes of Black women onto Black girls, adultification bias negates the constitutional protections afforded to children, leaving race to operate as an aggravator. As a result, Black girls like Asaria are not only deprived of the constitutionally-mandated consideration of their youth, they end up being punished more harshly based on their race.

A. EMPIRICAL LITERATURE DEMONSTRATES THAT BLACK YOUTH ARE DEHUMANIZED AND PERCEIVED AS MORE ADULT-LIKE, WHICH LEADS TO MORE FREQUENT AND MORE SEVERE PUNISHMENTS.

In a seminal study on adultification of Black youth, researchers demonstrated that Black children do not receive the same presumption of childhood innocence as their white peers. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 539-540 (2014), https://www.apa.org/pubs/journals/releases/psp-a0035663.pdf. In the first

3. *State v. Saintcalle*, 178 Wn.2d 34, 46, 309 P.3d 326, 335 (2013) (in addressing race discrimination in jury selection, acknowledging "we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them"); *see also* GR 37 (an objective observer is "aware that implicit, institutional, and unconscious bias…have all contributed to the unfair exclusion of jurors."); *State v. Jefferson*, 192 Wn.2d 225, 242, 429 P.3d 467, 476 (2018); *State v. Berhe*, 193 Wn.2d 647, 657, 444 P.3d 1172, 1178 (2019) ("[I]mplicit racial bias exists at the unconscious level, where it can influence our decisions without our awareness."); Letter from the Supreme Court, *supra* ("We can develop a greater awareness of our own conscious and unconscious biases in order to make just decisions").

part of the study, participants consistently perceived Black children over the age of 10 to be less innocent than their peers. *Id.* at 529. In the second part of the study, participants deemed Black boys more culpable for their actions than any other racial group, especially when those targets were accused of serious crimes. *Id.* at 532. Black boy felony suspects were seen as 4.53 years older than they actually were; boys would be misperceived as legal adults at roughly the age of 13 and a half. *Id.* Finally, the study primed participants with dehumanizing associations for Black people; that priming reduced participants' belief in the essential distinction between Black children and Black adults. *Id.* at 539-540. This "loss of essentialism" led to decreased perceptions of innocence. *Id.* at 540. A "context that provokes consideration of a child as an adult should be particularly susceptible to the effects of dehumanization," *id.* at 528—i.e., when children are prosecuted in adult court.

The viewing of Black children as more adult, more culpable, and less human has the potential to negate the protections of youth for juvenile defendants prosecuted and sentenced in the adult criminal legal system. In one study, a researcher surveyed 735 white Americans divided into two groups, giving them a factual scenario involving a 14-year-old defendant with prior juvenile convictions who was convicted of rape and being considered for a life sentence without the possibility of parole. Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults,* 7 PLOS ONE at 2 (2012), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.003668. In one group, a male defendant was described as white; in the other, Black. *Id.* Those in the group where the defendant was described as Black expressed significantly more support for life without parole sentences for juveniles and perceived juvenile defendants overall as more similar to adults in blameworthiness. *Id.* at 2-3. Sentencing data from both the United States as a whole and in Washington confirm that juvenile status may be "more fragile than previously considered," and particularly vulnerable to implicit racial bias on both the individual and systemic level. *Id.* at 4.[4]

4. Nationally, there are large differences between white and Black youth incarceration rates. *See generally* The Sentencing Project, *Black Disparities in Youth Incarceration* (2015), https://www.sentencingproject.org/publications/black-disparities-youth-incarceration/. Washington in particular had a 27% increase in Black/white racial disparity between 2001 and 2015. *Id.* at 2. The same is true in the juvenile system. Nationally, Black youth are 4 times as likely to be committed than white youth. The Sentencing Project, *Racial Disparities in Youth Commitments and Arrests* (2013), https://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/. Between 2001 and 2013, the racial gap between white and Black youth in secure commitment increased by 15%. *Id.*

B. BLACK GIRLS RECEIVE HARSHER PUNISHMENT IN BOTH THE EDUCATION AND CRIMINAL LEGAL SYSTEMS THAN THEIR WHITE FEMALE COUNTERPARTS DUE TO THE COMBINATION OF ADULTIFICATION AND GENDER BIAS.

For Black girls, gender stereotypes compound the harmful effects of adultification bias. Rebecca Epstein, Jamila J. Blake & Thalia González, *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, GEO. LAW, CTR. ON POVERTY & INEQ. 2, 4, 8 (2017), https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf [hereinafter *Girlhood Interrupted*]. Adults see Black girls as needing less nurturing, less support, and less protection than other groups. *Id.* at 1, 4, 7-8. Simultaneously, they see Black girls as being far more mature than their age, knowing more about sex and adult topics, and being overly independent. *Id.* at 7-8. This combination can lead to a view that Black girls have greater culpability for their actions and deserve greater punishments to match. *Id.* at 8. In both the education system and the criminal legal system, adultification likely contributes to the disproportionate punishment of Black girls. *Id.* at 1, 8-12.

Numerous studies have demonstrated that adultification bias manifests consistently in the school discipline context, resulting in significant disparities in punishment rates and ratios between Black girls and their peers. In prospective teachers' racialized emotional understanding of children's facial displays, Black girls were less accurately identified than their white peers. Amy G. Halberstadt et al., *Racialized Emotion Recognition Accuracy and Anger Bias of Children's Faces*, EMOTION, 2020, at 1, 10, https://www.apa.org/pubs/journals/releases/emo-emo0000756.pdf. Black girls were also falsely seen as angry more often than white girls. *Id.* at 1, 10.

These inaccurate perceptions of Black girls lead to the disciplinary discrepancies between Black girls and their peers. Data from the U.S. Department of Education's Office of Civil Rights, Civil Rights Data Collection shows that despite being only 15.6% of the enrolled population of K-12 public schools across the country in 2013-14, Black girls constituted 36.6% of in-school suspensions, 41.6% of single suspensions, and 52% of multiple suspensions. *Girlhood Interrupted*, *supra* at 9 (citing Nat'l Women's Law Ctr., *Let Her Learn - Stopping School Pushout for Girls of Color* 15, fig. 6 (2017), https://nwlc.org/wp-content/uploads/2017/04/final_nwlc_Gates_GirlsofColor.pdf [hereinafter *Let Her Learn*]);[5]

5. *Let Her Learn* analyzed data from Off. for Civ. Rts., U.S. Dep't of Ed., Civil Rights Data Collection, https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2013-14.html. The data analyzed includes 99.2% of all school districts in the country. Off. for Civ. Rts., U.S. Dep't of Ed., *Civil Rights Data Collection: A First Look: Key Data Highlights on Equity &*

see also Kimberlé Williams Crenshaw et al., *Black Girls Matter: Pushed Out, Overpoliced and Underprotected*, CTR. FOR INTERSECTIONALITY & SOC. POL'Y REFORM 18-24 (2015), http://schottfoundation.org/resources/black-girls-matter-pushed-out-overpoliced-and-underprotected (analyzing disparities in discipline, suspension and expulsion rates in New York and Boston public schools from 2011-12 school year). Analysis of the same data shows that despite being only 15.6% of the enrolled population of K-12 schools in 2013-14, Black girls constituted 26.2% of all girls referred to law enforcement, and 37.3% of all girls arrested. *Girlhood Interrupted*, *supra* at 9 (citing analysis of Civil Rights Data Collection data in *Let Her Learn*, *supra* at 13, fig. 5). Black girls were more likely to experience these disciplinary measures for subjective reasons, such as disobedience and detrimental behavior, hinging on the subjective judgment of school officials. *Id.* at 10 (citing Edward W. Morris & Brea L. Perry, *Girls Behaving Badly? Race, Gender, & Subjective Evaluation in the Discipline of African American Girls*, 90 SOC. ED. 127 (2017) (discipline data from Kentucky)).

Adultification bias similarly impacts the way that Black girls are treated in the juvenile and adult criminal legal systems. *See generally* Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502 (2012), https://www.uclalawreview.org/blind-discretion-girls-of-color-delinquency-in-the-juvenile-justice-system/ (discretion at virtually every point in the criminal legal system exercised without sensitivity to implicit racial bias dictates Black girls' futures). Police and security officers' actions towards Black girls have already proven to be excessive and far beyond what other children are subjected to in practice. In Seattle, a 7-year-old Black girl wandered out of class and into the hall of her building during the school day. She was met by a security guard who put his knee into her back and his arm across her neck until she said "I can't breathe." When she dropped to the floor, he then dragged her by the leg and put his knee into her back.[6]

Opportunity Gaps in Our Nation's Public Schools 1 (2016), https://www2.ed.gov/about/offices/list/ocr/docs/CRDC2013-14-first-look.pdf.

6. Ann Dorfield, KUOW-NPR, *'I can't breathe': A 2nd-grader. A security guard. A Seattle school.*, Jun. 25, 2020, https://www.kuow.org/stories/i-can-t-breathe-a-2nd-grader-a-security-guard-a-seattle-school?fbclid=IwAR2KGoZtN7rA-Opjot3s9PSSkO4vhFjVDjpJtqEomUYikgEznBJ-IxNCyYw. In Florida, a Black high school girl made a volcano for her science project. When the volcano's chemicals accidentally popped the lid off a bottle and released smoke in class, the school had her arrested. Danica Lawrence, *Teen arrested for explosive science project graduates*, USA TODAY, Jun. 4, 2014, https://www.usatoday.com/story/news/nation/2014/06/04/florida-student-arrested-science-experiment-blast/9947139/. In Alabama, a Black high school girl with diabetes, dyslexia, and sleep apnea fell asleep while forced to read Huckleberry Finn during her in-school suspension. On her way to the principal's office, a school security officer slapped her backpack and shoved her face-first into a filing cabinet. *Avery v. City of Hoover*, No. 2:13-cv-00826-MHH, 2015 WL 4411765, at *1, *2 (N.D. Ala. July 17, 2015). In New York, a 9-

After initial contact with law enforcement, Black girls are three times more likely to be referred to juvenile court than cases involving their white and Latina peers. U.S. Dep't of Justice, Off. of Juvenile Justice and Delinquency Prevention, *Juvenile Justice Statistics – National Report Series Bulletin* 13 (April 2019), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/251486.pdf. Once referred, more than half of cases were petitioned for formal processing, compared with approximately 44% of cases involving their white or Latina peers. *Id.*[7] Girls of color make up a disproportionate percentage of the female juvenile justice population. Kim Taylor-Thompson, *Girl Talk-Examining Racial and Gender Lines in Juvenile Justice*, 6 NEV. L.J. 1137, 1138 (2006), https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1396&context=nlj. And Black girls receive more severe dispositions than their white peers after controlling for the seriousness of the offense, prior record, and age. Lori D. Moore & Irene Padavic, *Racial and Ethnic Disparities in Girls' Sentencing in the Juvenile Justice System*, 5 FEMINIST CRIMINOLOGY 263, 269, 279-80 (2010) (analyzing comprehensive data from Florida Dep't of Juvenile Justice for FY 2006, containing entire population of juveniles referred).[8]

Indeed, adultification bias was likely operating at Asaria's sentencing hearing, in a system that did not yet require her youth to be considered, leaving race to operate as an aggravator. The court declined to sentence Asaria according to the agreed recommendation and instead added 30 months, stating the sentence should be "beyond the midpoint of the range, based on the culpability of her conduct." Supp. Br. of Pet'r, App. A. at 22. The court recalled that Asaria's father sought her out to carry out his plan to murder his ex-girlfriend due to her past criminal record and remarked: "when she said that, yes, it was rather matter of fact, and yes, there may have even been a hint of pride in that." *Id.* at 20. In light of the significant statistics of people misinterpreting Black children's expressions as angry, this comment calls into question the operation of bias in the court's sentencing decision. The court also told Asaria that "most young people's lives aren't set in stone by the time they are 17 years old. Yours is." *Id.* at

year-old Black girl had mental health breakdown. Police handcuffed her, and when she resisted being put in the back of the cop car, they pepper sprayed her face. Justin Murphy & Victoria Freile, USA TODAY, *A 9-year-old was pepper-sprayed by police. Here's what should have happened instead*, Feb. 2, 2021, https://www.usatoday.com/story/news/nation/2021/02/02/9-year-old-pepper-sprayed-police-what-should-have-been-done-instead/4351586001/.

7. Similar data is also explored in a video produced by the authors. Georgetown Law, *End Adultification Bias (Full Version)*, YouTube, 0:27-0:32 (May 17, 2019), https://www.youtube.com/watch?v=L3Xc08anZAE.

8. Most research data compiled centers around the experiences of Black girls within the juvenile legal system. However, there is no reason to assume that this bias does not follow Black girls into adult court. As Goff notes, contexts that provoke consideration of a child as an adult, like when children are declined to adult court, are particularly susceptible to the effects of dehumanization. Goff, *supra*, at 528.

21. Not only did the court fail to consider the mitigating factors of Asaria's youth and her capacity for rehabilitation, but it disregarded her age as not worthy of the same benefits "most young people" would be afforded.

II. A CONCLUSIVE PRESUMPTION OF PREJUDICE ARISES WHERE NO MILLER HEARING OCCURRED, AS FAILURE TO CONSIDER YOUTH AFFECTS THE FUNDAMENTAL FAIRNESS OF THE PROCEEDING AND LEAVES RACE TO OPERATE AS AN AGGRAVATOR.

On collateral review, the type of error asserted determines which of four possible prejudice standards may apply to a petitioner's claim. *See in re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 606-609, 316 P.3d 1007 (2014) (Gordon McCloud, J., concurring) (analyzing errors triggering nonconstitutional harmless error, actual and substantial prejudice, per se prejudice, and structural error). An error that implicates a core constitutional procedural right gives rise to a conclusive presumption of prejudice[9] on collateral review—that is, a petitioner is not required to establish that the outcome was impacted by the error once the error itself has been established. *E.g.*, *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 844-45, 230 P.3d 1102 (2012) (refusing to subject claim of ineffective assistance of counsel to additional prejudice requirement on collateral review, because ineffective assistance of counsel concerns the fundamental fairness of the proceeding). By contrast, actual and substantial prejudice is appropriate when a petitioner alleges a constitutional error of the trial type and requires the petitioner to establish both that an error occurred and that it impacted the outcome. *In re Pers. Restraint of Haverty*, 101 Wn.2d 498, 504, 681 P.2d 835 (1984).[10]

At the sentencing for Mr. Domingo-Cornelio, the only reference made to his youth was that he was under the age of 18 at the time of the crimes. *Domingo-Cornelio*, 196 Wn.2d at 260. The Court found no evidence to suggest that the sentencing court considered any mitigating factors of youth. *Id*. at 267. Here, Asaria's sentencing hearing mirrors that of Mr. Domingo-Cornelio in that the mitigating qualities of youth were never

9. The Washington Supreme Court uses "per se prejudice" interchangeably with "conclusive presumption of prejudice."

10. The two remaining errors are nonconstitutional error, requiring the petitioner to prove a fundamental defect resulting in a complete miscarriage of justice, *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005), *abrogated on other grounds by Carey v. Musladin*, 549 U.S. 70, 76, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006), and structural error, requiring petitioner to show the error so fundamentally undermines adversarial process that it defies harmless error analysis. *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 608, 316 P.3d 1007 (2014) (Gordon McCloud, J., concurring) (citing *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)).

considered.[11] Despite articulating what amounted to a per se prejudice rule, *Domingo-Cornelio*, 196 Wn.2d at 268, the Court made passing reference to the fact that Mr. Domingo-Cornelio had established actual and substantial prejudice because his sentence, which was near the bottom of the standard range, was evidence that the court would have imposed a lower sentence. *Id.* at 268. If the only way to demonstrate actual and substantial prejudice is reserved for those who happened to receive a sentence at or near the low end of the range, as in Mr. Domingo-Cornelio's case, the prejudice test becomes a mechanism to uphold structural racism rather than dismantle it.

Though the Supreme Court in *Domingo-Cornelio* utilized the actual and substantial prejudice test, the issue of implicit racial bias and its impact on initial sentencing decisions was not before the Court. Asaria has specifically raised the operation of race in her case, Supp. Br. of Pet'r at 9-14, and amicus asks this Court to consider the Supreme Court's call to consider the role of race in the development of Washington jurisprudence.

The only way to ensure that *all* children, no matter their race, receive individualized consideration of the mitigating qualities of youth is to hold that the failure to do so is per ser prejudicial. Otherwise, too much emphasis is placed on the initial sentencing decision, where, as set forth in Part I, race may have been an aggravator. This approach is consistent with the Supreme Court's decisions recognizing that a conclusive presumption of prejudice arises on collateral review where a petitioner establishes an error that undermines the fundamental fairness of the proceeding.

A. A CONCLUSIVE PRESUMPTION OF PREJUDICE ARISES WHEN NO *MILLER* HEARING OCCURRED, AS THIS ERROR VIOLATES A CORE PROCEDURAL RIGHT.

The deprivation of the right to individualized consideration of youth under *Houston-Sconiers* is as central to fundamental fairness as other errors that are considered per se prejudicial on collateral review—including ineffective assistance of counsel, *Brady*[12] violations, prosecutorial breach of plea agreements, and involuntary plea agreements—precisely because they concern the "fundamental fairness of the proceeding whose result is being challenged" and reflect a "breakdown in the adversarial process that our system counts on to produce just results." *Crace*, 174 Wn.2d at 844 (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

A conclusive presumption of prejudice arises on collateral review where petitioners successfully establish ineffective assistance of counsel and prosecutorial withholding of material exculpatory evidence. Once

11. Counsel simply noted that Asaria was 16 at the time of the crime and asked the court to consider, among other factors, her age. Supp. Br. of Pet'r, App. A at 20.

12. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

petitioners succeed in establishing that the error occurred under a reasonable probability standard,[13] these claims are not subjected to the heightened actual and substantial prejudice requirement that requires demonstrating by a preponderance that the outcome would have been different, *Haverty*, 101 Wn.2d at 504. Instead, Washington and federal courts alike recognize that these errors are presumptively prejudicial because they render the proceedings fundamentally unfair. *Crace*, 174 Wn.2d at 844 (quoting *Strickland*, 466 U.S. at 696) (ineffective assistance of counsel and *Brady* violations represent "a breakdown in the adversarial process that our system counts on to produce just results"; refusing to subject claim of ineffective assistance of counsel to additional prejudice requirement on collateral review, because the error implicates the fundamental fairness of the proceeding); *see also In re Pers. Restraint of Woods*, 154 Wn.2d 400, 429, 114 P.3d 607 (2005) (when addressing a *Brady* violation, the analysis is not whether the defendant would more likely than not have received a different verdict, because the error "undermines confidence in the verdict"), *abrogated on other grounds by Carey v. Musladin*, 549 U.S. 70, 76, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); *Kyles v. Whitley*, 514 U.S. 419, 435-6, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (in habeas review, once petitioner establishes *Brady* violation "there is no need for further harmless-error review").

A conclusive presumption of prejudice also arises in the context of prosecutorial breach of a plea agreement. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 189, 94 P.3d 952 (2004). The court has recognized that plea agreements "concern fundamental rights of the accused," and therefore due process rights apply. *Id.*[14] In *Lord*, the Court held that once a petitioner "show[s]the prosecutor has failed to adhere to the terms of the plea agreement, the petitioner [necessarily] establishes that he or she was actually and substantially prejudiced." 152 Wn.2d at 189. No additional prejudice is required because prejudice is inherent in proof of the error itself.[15] *Accord In re Pers. Restraint of Hews*, 99 Wn.2d 80, 87-8, 660 P.2d 263 (1983) (demonstrating guilty plea was invalid constituted prejudice sufficient for relief because constitutionality of a guilty plea is a core

13. *Strickland*, 466 U.S. at 687 (petitioner claiming ineffective assistance of counsel must prove a reasonable probability that the deficient performance affected the outcome); *see also Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (petitioner claiming prosecutorial withholding of material exculpatory evidence must show "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

14. *See also In re Pers. Restraint of James*, 96 Wn.2d 847, 850, 640 P.2d 18 (1982) ("if a defendant cannot rely upon an agreement made and accepted in open court, the fairness of the entire criminal justice system would be thrown into question" (citing *State v. Tourtellotte*, 88 Wn.2d 579, 584, 564 P.2d 799 (1997))).

15. The evidence the Court considered was with respect to whether the prosecutor had breached the plea agreement, not to determine prejudice. *Id.* at 189-91.

procedural due process right; court refused to subject error to additional prejudice analysis). *Lord* and *Hews* support the proposition that a conclusive presumption of prejudice is not limited to cases where the error itself includes an imbedded prejudice test.

The court has long held that some errors carry a presumption of prejudice on collateral review. *In re Pers. Restraint of Richardson*, 100 Wn.2d 669, 679, 675 P.2d 209 (1983) (petitioner's burden to establish actual and substantial prejudice may be waived when the error gives rise to a conclusive presumption of prejudice), *abrogated on other grounds by State v. Dhaliwal*, 150 Wn.2d 559, 568, 79 P.3d 432 (2003) and *Stockwell*, 179 Wn.2d at 597-98; *see also In re Pers. Restraint of St. Pierre*, 188 Wn.2d 321, 328-29, 823 P.2d 492 (1992) (acknowledging per se prejudice standard but refusing to rule that per se prejudicial errors on direct review will always result in per se prejudice on collateral review).[16]

The *Domingo-Cornelio* Court in effect recognized the conclusive presumption of prejudice that arises where no *Miller*-compliant hearing occurred, stating that "a petitioner establishes actual and substantial prejudice when a sentencing court fails to consider mitigating factors relating to the youthfulness of a juvenile tried as an adult *and/or* does not appreciate its discretion to impose any exceptional sentence in light of that consideration." 196 Wn.2d at 268 (emphasis added). Stating the rule in the disjunctive indicates that failure to comply with only one of the two prongs of *Houston-Sconiers* is enough to constitute actual and substantial prejudice. The rule as articulated in *Domingo-Cornelio* is functionally equivalent to a per se prejudice rule. And while *Domingo-Cornelio* cites to *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004), for the proposition that actual and substantial prejudice applies by default, *Davis* recognizes that actual and substantial prejudice does not always apply; to the contrary, *Davis* states that "some errors that are per se prejudicial on direct appeal will also be per se prejudicial on collateral attack." *Id.* (quoting *St. Pierre*, 118 Wn.2d at 328-29).

B. ACTUAL AND SUBSTANTIAL PREJUDICE IS NOT APPROPRIATE FOR CONSTITUTIONAL ERRORS THAT IMPLICATE CORE PROCEDURAL RIGHTS.

Requiring Asaria to prove actual and substantial prejudice is inappropriate because a *Miller* violation is not of the trial type. A trial type error is amenable to harmless-error analysis because it "may…be

16. In *Stockwell*, the Court reaffirmed that some errors will be per se prejudicial on collateral review, though it subjected petitioner's challenge to actual and substantial prejudice. 179 Wn.2d at 600-01; *see also id.* at 604 (Gordon McCloud, J., concurring) ("[T]he rule established in *Richardson* and restated in *St. Pierre*—that errors which are presumptively prejudicial on direct appeal will *generally* be presumed prejudicial in a PRP—is still good law." (emphasis in original) (internal citations omitted)).

quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." *Arizona v. Fulminante*, 499 U.S. 279, 307-08, 111 S. Ct. 1246, 1263, 113 L. Ed. 2d 302 (1991). Examples of trial type errors include instructional error[17] and prosecutorial misconduct.[18] Unlike these errors, a *Miller/Houston-Sconiers* violation undermines a core procedural right that protects against disproportionate sentences for children. Further, because sentencing judges are not required to explain their sentencing decisions and lawyers are not expected "to make every conceivable argument on the possibility that it may someday be recognized as a basis for an exceptional sentence," *Domingo-Cornelio*, 196 Wn.2d at 267-68, there simply is no evidence to review in conjunction with the failure to comply with *Miller*/*Houston-Sconiers*.

Once a petitioner shows that a *Miller* hearing did not occur, as Asaria has done here, there is a conclusive presumption of prejudice. *See Houston-Sconiers*, 188 Wn.2d at 9 (Eighth Amendment requires courts to consider the mitigating qualities of youth when sentencing juveniles in adult court). Allowing Mr. Domingo-Cornelio to be resentenced while denying Asaria a resentencing hearing—based solely on discretionary sentencing decisions where race may operate as an aggravator—would severely undermine the fundamental fairness of our adversarial process, and would fail to take into account the operation of racial bias.

CONCLUSION

Amicus urges the Court to apply a per se prejudice standard where a *Miller* hearing has not occurred. Instead of creating barriers that prevent full consideration of youthfulness, courts should embrace the opportunity to ensure fairness through resentencing, especially when race may have operated as an aggravator through adultification bias.

17. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 827, 650 P.2d 1103 (1982) (instructional error stating intent could be presumed did not constitute actual and substantial prejudice).

18. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 481-82, 965 P.2d 593 (1998) ("prejudice is established only if there is a substantial likelihood the instances of misconduct affected the jury's verdict" (internal citations omitted)).

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