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STATE OF WASHINGTON  
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No. 95814-9

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

Jeremiah Gilbert,

Petitioner

---

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR KLICKITAT COUNTY

---

BRIEF OF *AMICI CURIAE* WASHINGTON ASSOCIATION OF  
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A. INTRODUCTION

In *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), this Court concluded the Eighth Amendment did not permit imposition of a 26 year sentence without the court first considering the mitigating qualities of youthfulness. Yet in this case the State insists the trial court had no discretion to impose a sentence of less than 48.3 years. If a court must have discretion to impose less than a 26 year sentence, it must also have discretion to impose something other than the 48.3 years to life sentence here. The trial court did not understand nor exercise the discretion it possessed.

The Eighth Amendment and Article I, section 14 afford and require a trial court complete discretion to consider the mitigating qualities of youthfulness and to impose any sentence demanded by those qualities.

B. IDENTITY AND INTEREST OF AMICI CURIAE

The identity and interest of *amici curiae* are set forth in the accompanying Motion for Leave to File an *Amicus Curiae* Brief.

C. SUMMARY OF CASE

Jeremiah Gilbert began abusing alcohol at age 12. By the time he was 15, Jeremiah was homeless and living on his own.

In September 1992, Jeremiah and another juvenile were attempting to steal a truck. CP 40. When confronted by several person, the two shot at three men, killing two. *Id.* But for this crime, Jeremiah would have begun his sophomore year of high school in the fall of 1992. Instead, he was charged with one count of aggravated first degree murder, one count of first degree murder and several other charges.

At best, Jeremiah had the mental capacity of a typical 15 year-old at the time of his crime. Prior to his 1993 trial, a juvenile probation officer wrote a report on whether the court should transfer Jeremiah's case to adult court, noting Jeremiah was "not processing information nor making decisions in adult-like fashion." CP 41. At the decline hearing that same probation officer testified "I did not think [Jeremiah] was particularly sophisticated, and certainly not mature beyond his years." *Id.*

The case was transferred to adult court and a jury convicted Jeremiah as charged.

As required by then existing law, the trial court sentenced Jeremiah to die in prison, imposing a sentence of life without the possibility of parole. The court also imposed a sentence totaling over 28 years on the remaining counts.

Jeremiah's infraction history during confinement has followed a predictable arc, rising through his early 20's and then abruptly dropping. CP 42. Dr. Ronald Roesch explained this pattern is regularly observed in young offenders. *Id.* This correction of behavior and maturation in one's mid-20s also reflects what is now widely recognized.<sup>1</sup>

*Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), concluded a mandatory sentence of life without the possibility of parole for a crime committed as a child violated the Eighth Amendment. Because Washington mandated such a sentence for aggravated first degree murder even if the crime was committed by a child, the Legislature responded to

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<sup>1</sup> Neurological and physiological evidence suggests the "maturity of judgment" increases as a person progresses through adolescence to late-adolescence, young-adulthood and finally adulthood. Kathryn Lynn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 Law & Hum. Behav. 78, 89-90 (2008). "[P]hysiological research suggests that age-based brain maturation, which may be linked to maturity of judgment factors does not occur until the early twenties" *Id.* at 79.

*Miller* by requiring a new sentencing hearing for children such as Jeremiah. RCW 10.95.035. At that hearing, RCW 10.95.030 required the court to consider the mitigating qualities of Jeremiah's youthfulness.

At that new sentencing hearing, Jeremiah pointed to the Dr. Roesch's report and after analyzing the impact of *Miller*, defense counsel specifically asked the court to impose a sentence concurrent to the remaining counts. CP 36. The State argued the court lacked any authority to do so. CP 29-30.

Accepting the State's position that it lacked any authority to do anything else, the trial court imposed the present life sentence, with a possibility of release after 25 years, consecutive to the 28 year sentence imposed for the other counts in 1993.

#### D. ARGUMENT

- 1. The trial court failed to appreciate the complete discretion it possessed under the Sentencing Reform Act (SRA) to impose any mitigated sentence warranted by its consideration of the mitigating qualities of Jeremiah's youthfulness.**

Trial courts must consider mitigating qualities of youth **at sentencing** and must have discretion to impose any sentence below the otherwise applicable



SRA range and/or sentence enhancements.

*Houston-Sconiers*, 188 Wn.2d at 21 (emphasis added). If a court lacks any discretion other than to impose a 48 year minimum term *Miller* and *Houston-Sconiers* are meaningless.

The lesson of *Houston-Sconiers*, and this Court's more recent decision in *State v. Bassett*, \_\_ Wn.2d \_\_, 428 P.3d 343 (2018), is that the Eighth Amendment and Article I, section 14 do not permit a sentencing scheme which hamstring a sentencing judge's ability to consider all relevant mitigation when sentencing a child. The Court has found the Eighth Amendment and Article I, section 14 require the court to consider of all mitigation and vest the court with full authority to impose any mitigated sentence.

In accordance with *Miller*, we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of **any** juvenile defendant.

*Houston-Sconiers*, 188 Wn.2d at 21 (emphasis added.) Not only does *Houston-Sconiers* permit the court to exercise discretion, it requires it.

[I]n exercising full discretion in juvenile sentencing, the court **must consider** mitigating

circumstances related to the defendant's youth—including age and its hallmark features, such as the juvenile's immaturity, impetuosity, and failure to appreciate risks and consequences. It **must also consider** factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and the way familial and peer pressures may have affected him [or her]. And it **must consider** how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated.

*Id.* at 23. (Internal quotations and citations omitted, emphasis added.) There is no reason to believe that when the Court said “any juvenile defendant” it meant anything other than “every” juvenile defendant.

Similarly, RCW 10.95.030 requires:

In setting a minimum term, the court **must take into account** mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

(Emphasis added.) The statute requires meaningful consideration of the juvenile’s personal characteristics in order to determine the appropriate sentence. *In re the Personal*

*Restraint of Delbosque*, \_\_ Wn. App. 2d \_\_ (49792-1-II, Dec. 4, 2018).

Nothing in the trial record suggests the court took into account the mitigating qualities of youth as required by RCW 10.95.030. In its ruling, the trial court does not mention *Miller*, much less the criteria the Supreme Court highlighted. Instead, the court treated its role largely as ministerial, simply imposing a life sentence with a minimum term of 25 years, consecutive to the previously imposed 28 year sentence.

The trial court's belief that it lacked any authority to even consider concurrent sentences is directly contrary to this Court's holding in *Houston-Sconiers*.

Having argued throughout this case, including in its briefing to this Court, that the court lacked any discretion to anything other than it did, the State now reverses course and concedes *Houston-Sconiers* did permit the court to impose a lesser sentence. Brief of Respondent at 14-15. However, the State contends, Jeremiah never asked. *Id.* But Jeremiah did ask.

In his resentencing memorandum Jeremiah specifically asked the court to impose a sentence concurrent to the sentence on the remaining counts. CP 36. It was in response to that specific request that the State argued the court lacked any discretion to consider the request or to impose such a sentence. CP 29-30. As the State now agrees, the trial court did have discretion to impose the sentence Jeremiah requested. The court did not appreciate and certainly did not exercise that discretion.

**2. RCW 10.95.030 does not require a sentence imposed under its provisions be consecutive to other sentences.**

a. *RCW 10.95.030 does not require consecutive sentences.*

Nothing in RCW 10.95.030(3) mandates consecutive sentences for multiple counts.

A court determines “legislative intent from the statute’s plain language, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole.” *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015) (Internal quotations and citations omitted).

“Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself.” *HomeStreet, Inc. v. State, Dep’t of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009).

The language of RCW 10.95.030(3) is plain. While the statute requires a court set a minimum term of no less than 25 years, nowhere in its terms does the statute require separate consecutive sentences for multiple convictions.

Where the legislature has intended consecutive sentences or separate punishment for offenses it has explicitly said so. For example, RCW 9.41.040(6) explicitly permits separate convictions for various firearm offenses and requires consecutive sentences. As another example RCW 9A.52.050 specifically permits separate prosecutions and punishment for both a charge of burglary as well as the predicate felony. In RCW 9.94A.589, the Legislature expressly delineates when multiple felony sentences must be served consecutively and when they must be concurrent. In each of these statutes the legislature actually used the terms “separate” or “consecutive.”

In contrast to the explicit mandates of those statutes, RCW 10.95.030(3) never uses the word “consecutive.” The statute does not direct each offense be punished “separately.” In short, nowhere in the statute’s language did the legislature hint that consecutive sentences are required. The fact that the Legislature explicitly directed separate convictions and consecutive punishments in several other statutes and yet did not do so in RCW 10.95.030 demonstrates the legislature did not intend separate and consecutive sentences. *See State v. Slattum*, 173 Wn. App. 640, 656, 295 P.3d 788 (2013) (use of particular language in other statutes demonstrates legislature “knew how to say it” when it intended to and thus did not intend same meaning when it did not use that language).

The State argues that RCW 10.95.030 together with RCW 10.95.035, which requires return of persons previously sentenced, indicates the court can only address a sentence imposed on a count of aggravated murder. Brief of Respondent at 8. The State contends this is so because it insists RCW 10.95.030 pertains “exclusively to sentences for aggravated murder.” Respondent at 8. But the statute’s plain language

makes clear it is broader than that, it applies to “A **person**, who was sentenced prior to June 1, 2014.” RCW 10.95.035. This is a critical point as the very basis for *Miller*, *Houston-Sconiers*, and *Bassett*, is that when sentencing children as adults, courts must consider the offender and not merely the offense. “To exclusively focus on the nature of the crime and ignore the nature of the offender conflicts with *Miller’s* principles.” *State v. Bassett*, 198 Wn. App. 714, 738, 394 P.3d 430 (2017). A “*Miller* sentencing” requires the trial court have the ability to impose a sentence that takes into account who the child is and not merely the crime he committed. The State’s position does not permit.

In *State v. Ramos*, 187 Wn.2d 420, 387 P.3d 650 (2017), the Court made clear that an aggregate sentence from multiple convictions raises the same Eighth Amendment concerns as a single lengthy sentence. The Court concluded “[h]olding otherwise would effectively prohibit the sentencing court from considering the specific nature of the crimes and the individual’s culpability before sentencing a juvenile homicide offender to die in prison in direct contradiction of *Miller*.” *Ramos*, 187 Wn.2d at 438-39.

Indeed, the sentences of 26 and 31 years sentence which this Court reversed in *Houston-Sconiers* were not the product of a single offense. Instead each was the product of aggregated weapon enhancements from multiple convictions. 188 Wn.2d at 416. When in that case this Court said courts “must” exercise discretion when sentencing children as adults, it was specifically speaking of a scenario involving aggregated consecutive sentences. Total time a child will spend in prison must be relevant to that consideration.

The State’s argument that RCW 10.95.030 does not permit a court to even consider the length of combined incarceration is contrary to the statute itself, is contrary to *Houston-Sconiers*, and erects a roadblock to proper application of the Eighth Amendment and Article 1, section 14. By the State’s logic, rather than “fix” anything, RCW 10.95.030, the “*Miller*-fix,” actually prevents trial courts from exercising the very discretion that *Miller*, *Ramos*, and *Houston-Sconiers* require. The “*Miller*-fix” would be no fix at all.

In *Houston-Sconiers* the Court concluded the Eighth Amendment did not permit imposition of even a 26 year



sentence for multiple offenses without the court first considering the mitigating qualities of youthfulness. A court cannot meaningfully exercise that discretion if other current sentences cannot be considered at sentencing.

*b. The availability of parole for any of the offenses cannot preclude the trial court from exercising its discretion.*

The State argues that the availability of parole under RCW 9.94A.730, illustrates the Legislature did not intend for courts to consider the impact of sentences imposed for other offenses when sentencing a person under RCW 10.95.030. Brief of Respondent at 8. This Court squarely rejected a very similar argument in *Houston-Sconiers*. There, the State contended that a sentencing court need not consider the mitigating qualities of youth because RCW 9.94A.730 created the possibility of parole. 188 Wn.2d at 22. The Court rejected that argument. First, the Court noted there was no indication the legislature intended that be the exclusive remedy. *Id.* Second, that statute conditions release on factors other than the factors set forth in *Miller*. *Id.* Finally, because *Miller* was most concerned with the proper consideration of the mitigating qualities of youth at sentencing,

a statute providing a possibility of release at a latter point could not meet that constitutional requirement. *Id.*

*c. Whenever multiple sentences are involved a court must consider whether the sentences shall be served concurrently or consecutively.*

The State also argues that had the trial court considered the question of whether the sentences should be consecutive or concurrent it would have been improperly reopening the sentence on other offenses. Brief of Respondent at 8. But, determining whether a sentence should be consecutive or concurrent to a preexisting sentence on another offense is not revisiting the sentence on that other offense. Indeed, the SRA specifically contemplates that scenario and directs how a court should proceed. RCW 9.94A.589. That statute specifically requires a court address that question whenever a person is sentenced.<sup>2</sup>

Moreover, the Court **did** consider whether the sentences should be consecutive or concurrent. It simply concluded the sentences must be consecutive without explaining why.

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<sup>2</sup> Because the current sentence was for an offense committed while Jeramiah was not under sentence for another offense, RCW 9.94A.589(3) seems to require that sentence be concurrent to the existing sentence unless the court expressly directed otherwise.

Regardless of any sentence mandated by statute, the trial court was required to consider the mitigating qualities of Jeremiah's youthfulness and had complete discretion to impose any mitigated sentence it deemed appropriate. *Houston-Sconiers*, 188 Wn.2d at 21.

**3. "Complete discretion" is inconsistent with a requirement that a defendant must prove his case is sufficiently exceptional to merit a mitigated sentence.**

*Houston-Sconiers* did not impose a threshold requirement to a court's exercise of its discretion or the court's obligation to consider the mitigating qualities of youthfulness. The Court made clear that discretion and obligation exist whenever sentencing a juvenile in adult court.

But, the State contends youthfulness does not necessarily "entitle" a person to an exceptional sentence. Brief of Respondent at 14 (citing *State v. O'Dell*, 183 Wn.2d 60, 698-99, 358 P.3d 359 (2015)). This claim is not particularly useful here. First, *O'Dell* concerned adult sentencing and not the sentencing of juveniles. Adults do not enjoy the same protections at sentencing under the Eighth Amendment and Article I, section

14. Second, and relatedly, this assertion presupposes that rules of sentencing apply equally to adults and children. *Houston-Sconiers* made clear they do not.

The legislature enacted the SRA to provide uniform sentences for people convicted of the same offense. *State v. Barber*, 170 Wn.2d 854, 871, 248 P.3d 494 (2011); RCW 9.94A.010(3). While children’s cases may be transferred to adult court, standard range sentences were intended for adults. *O’Dell*, 183 Wn.2d at 691; RCW 13.04.030(1)(e). Applying the procedural rules of the SRA to children in the same way as to adults assumes children are the same as adults and requires a child to prove they are different. Yet we already know children are different.

The normal child is not as culpable as an adult. *Miller*, 567 U.S. at 471-72. The probation officer in Jeremiah’s case made clear he did not believe Jeremiah was capable of thinking like an adult at the time of these offenses. CP 41. When a sentencing scheme is applied to a child in the same fashion as an older offender, the scheme is “the same in name only.” *Miller*, 567 U.S. at 475 (Internal citations and ellipses omitted.) *O’Dell*

addressed only the question whether the relative youthfulness of an adult offender could warrant a mitigated sentence. While *O'Dell* draws on much of the same science as *Houston-Sconiers* it is not a constitutional ruling and instead simply addresses the reach of the SRA when sentencing an adult.

To contend, as the State does, that *O'Dell* also provides the only avenue for a child to receive a mitigated sentence ignores what *O'Dell* was about. More importantly, to require a child to satisfy the same standard under the SRA as an adult ignores the observation in *Miller* that “a sentencer misses too much if he treats every child as an adult.” 567 U.S. at 477.

It is only the rare or “exceptional” child who is as culpable as an adult. *Graham v. Florida*, 560 U.S. 48, 72-73, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Normal is not exceptional. Requiring a child to prove their culpability lies within the norm - to prove their case is “exceptional” - turns the basic premise of the SRA on its head.

The SRA does not require an adult offender to prove they are a typical adult offender in order to receive a presumptive sentence. Yet the State contends the SRA must require children

to prove they fall within the norm, a typical child, in order to trigger the discretion that *Houston-Sconiers* requires. By the State's logic a child must prove they are a child in order to be treated as a child.

*Houston-Sconiers* and *Bassett* not only addressed the constitutionally permissible outcomes when sentencing children, they also defined the constitutionally required procedure. On their face the 26 year and 31 year sentences at issue in *Houston-Sconiers* do not by themselves raise the specter that they are impermissibly cruel under the Eighth Amendment or Article I, section 14. Instead, the Court reversed the sentences finding the sentencing scheme which prohibited the full exercise of discretion violated these constitutional protections.

There is no corollary in adult sentencing in which a court possesses and must exercise complete discretion to consider the personal characteristics of an offender. Indeed, the opposite is true.

In adult sentencing, this Court has previously interpreted RCW 9.94A.340 to prohibit exceptional sentences based on

factors personal to a particular defendant. *State v. Law*, 154

Wn.2d 85, 97, 110 P.3d 717 (2005). RCW 9.94A.340 provides:

The sentencing guidelines and prosecuting standards apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant.

Thus, in *State v. Freitag*, 127 Wn.2d 141, 145, 896 P.2d 1254 (1995) the Court found RCW 9.94A.340 barred reliance on a defendant's altruistic past and concern for others. In *State v. Fowler*, 145 Wn.2d 400, 38 P.3d 335 (2002), the Court rejected the defendant's strong family support as a mitigating factor because it related solely to the defendant and not the crime. Relying on the rule that mitigating factors must relate to the crime and not the defendant *Law* reversed a mitigated sentence based upon a defendant's post-crime response to treatment and strengthening family connections. *Id.* at 104.

While *O'Dell* does permit consideration of an adult offender's youthfulness that is a far cry from the complete discretion required when sentencing a juvenile. To cabin that discretion and apply the same procedure to adults and children "misses too much."

E. CONCLUSION

When sentencing a person under RCW 10.95.030 and RCW 10.95.035, the sentencing court has complete discretion to consider the mitigating qualities of youth and to impose an appropriate mitigated sentence.

Respectfully submitted this 6<sup>TH</sup> day of December, 2018.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )
RESPONDENT, )
v. ) NO. 95814-9
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PETITIONER. )

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# WASHINGTON APPELLATE PROJECT

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