NO. 100544-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

NGA NGOEUNG,

Respondent.

PETITION FOR REVIEW

STATE'S REPLY

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I. INTRODUCTION

Ngoeung raises two new claims in his Answer, both of which encourage the Court to accept review of the State's petition. Ngoeung disputes that consecutive sentences for serious violent offenses are standard sentences. If the Court accepts review of the State's petition, it should address this question as well.

Ngoeung argues that the judge did not meaningfully consider intellectual disability even though the judge imposed a mitigated sentence based on findings of intellectual disability. If the Court accepts review of the State's petition, it can address whether, contrary to *Jones v. Mississippi* and RCW 9.94A.585(1), a defendant may challenge a court's consideration of found mitigating factors in this way merely because the court did not impose the precise sentence the defendant requested.

II. RESTATEMENT OF NEW ISSUES RAISED IN ANSWER

A. Whether consecutive sentences for serious violent offenses is a standard versus an exceptional sentence when one of the serious violent offenses is an aggravated murder?

B. Whether Ngoeung's misrepresentation of the factual record, in which the sentencer considered and even over-stated evidence of intellectual disability, raises any consideration under RAP 13.4(b)?

III. STATEMENT OF THE CASE

A. The court entered findings in support of a mitigated downward sentence which imposed the aggravated murder sentences concurrently.

In 1995, a jury convicted 17-year-old Nga Ngoeung of:

I	aggravated first-degree murder
II	aggravated first-degree murder
III	first-degree assault
IV	first-degree assault
V	taking a motor vehicle

CP 10-11, 51-52, 482-83. Counts I-IV are serious violent offenses. RCW 9.94A.030(46)(a)(i). Serious, violent offenses do not score against each other, but their sentences presumptively run consecutively. RCW 9.94A.589(1)(b).

At the most recent resentencing, the court imposed a minimum term of 25 years to life on each of the aggravated murders, to be served concurrently to each other and consecutively to the assault sentences in counts III and IV. CP 485-86; 514-19; RP (9/6/19) at 95-96. Ngoeung drafted the court's written findings which the parties understood were required under RCW 9.94A.535 to support "an exceptional sentence of running counts one and two concurrently." CP 519. He now claims that this was not the exceptional portion of the sentence but rather that the court was required to justify the consecutive nature of the assault sentences. Ans. at 12, 23, 34-35.

B. The topic of Ngoeung's alleged intellectual disability was well considered below and offered in support of the mitigated sentence imposed.

Ngoeung had little to no education, having been expelled in the fourth grade after two years of truancy. CP 60, 570-71, 637-38. However, even as a very young child, he was demonstrably "smart about things he loved." CP 567-69, 715-

19 (training a stray dog with spoken commands, figuring out how to play at the arcade all day with smashed pennies or quarters on a string, and regularly breaking into cars at the age of ten to go joyriding, sometimes with his little sister in tow).

In 1990 when Ngoeung was 13, Dr. Kathleen Mayers tested his IQ for a disability application and concluded that he had "mild to moderate mental retardation." CP 574. However, an interpreter was only present for a "small portion" of the exam. CP 642. And Ngoeung's lack of trust in evaluators and refusal to engage with them would have impeded an accurate evaluation. CP 646-47. The social worker, who assisted Ngoeung in receiving that disability income and who interpreted for Ngoeung during his application, was later convicted of widespread public assistance fraud among the Cambodian community. CP 574, 639-40.

In 1991, Dr. Mark Whitehill diagnosed an adjustment disorder and emotional disability and opined that Ngoeung's failure to perform in school was due to his lack of motivation and

not any developmental or learning disability. CP 574-75, 644. In 1994, Dr. Irene Mazer diagnosed a personality disorder and reported Ngoeung was "extremely under-educated, but *not cognitively handicapped*." CP 575 (emphasis added).

In 2014, Dr. Terry Lee reviewed all previous evaluations and concluded that 17-year-old Ngoeung had been delayed relative to his peers. CP 588-89. The delay could have been attributed to any or *a multitude of factors* including: "his refugee and migrant experiences, acculturation problems, cognitive and language delays, developmental immaturity, growing up in poverty and around criminal behavior, limited education, exposure to domestic violence and harsh parenting practices at home, not having positive adult role models, socializing with antisocial and more assertive peers, and untreated mental health problems." *Id.* At the 2019 resentencing, Dr. Stanfill agreed that while 17-year-old Ngoeung had been less cognitively complex than his peers, the cause of the developmental delay could not be pinpointed. CP 256.

Off and on over the years, the DOC has treated Ngoeung for anxiety, depression, and social phobia.[1] CP 648-61, 665. In 2002, his depression manifested in moderate psychomotor retardation and hypersomnolence. CP 660-61. The judge interpreted these mood disorders as proof of longitudinal cognitive deficits. CP 518; RP (9/6/19) at 93. But, as Dr. Stanfill opined, the Defendant's behavior in prison may be situational and defensive, rather than indicative of psychopathy or a personality disorder. CP 256; RP (9/6/19) at 42.

The judge noted that, under the emerging case law, he should not impose a life sentence, nor focus on the "heinousness of the act," but rather "take into account the neuropsychological and physiological development of juvenile offenders." RP

[1] Incarceration is a significant stressful event producing significant changes in a prisoner's physical, psychological, and social functioning. O.E. Majekodunmi et al., *Depression in prison population: Demographic and clinical predictors*, J. Forensic. Sci. Med., vol. 3, issue 3, pp. 122-27 (Sept. 29, 2013) (available at https://bit.ly/3LJV3Yo). As many as 64% of incarcerated persons suffer from mental orders related to low education and long duration of stay, among other factors. *Id.*

(9/6/19) at 63, 67, 95 ("the cognitive and psychological forces that drive that behavior").

The judge made the following findings in support of the exceptional downward sentence imposed:

> 10. Julie Armijo's mitigation report on Mr. Ngoeung's family and social history detailed many instances and examples of seizures, head trauma, developmental delays, and difficulties in school [ ].
> 11. Dr. Stanfill's report and testimony indicat[ed] that Mr. Ngoeung was immature, less cognitively complex, overly compliant to antisocial peers, and directly impacted by numerous socioeconomic, geographic, and other social factors outside of his control.
> 12. Dr. Terry Lee's mental health report dated November 5th, 2014, was [ ] consistent with Dr. Stanfill's findings.
> 13. Dr. Kathleen Mayers's 1990 report found that Nga Ngoeung was disabled for the purposes of social security. Mr. Ngoeung's Wechsler Intelligence test for children [ ] yielded a full-scale IQ of 55, placing Mr. Ngoeung in the range of mildly retarded range of mental functioning.
> 14. At the time the crimes were committed in this case, Mr. Ngoeung was likely in a borderline range for mental retardation and certainly well below normal intellectual functioning.
> 15. Psychological treatment reports by the Department of Corrections (DOC) noted ongoing issues of the Defendant. On April 26, 2015, an assessment at the DOC noted mild anxiety

> disorders. Dr. Furst's report from July 10, 2002, noted psychomotor retardation, anxiety, and recurrent major depression.
> 16. Treatment was only sporadically received while Mr. Ngoeung was incarcerated at DOC. This was in part because [of] Mr. Ngoeung's choice to not engage in treatment.
> 17. The reports from DOC highlight that the deficits that were observed in 1995 have persisted longitudinally and add credibility to those initial findings.
> 18. There is considerable evidence of [ ] Mr. Ngoeung's psychological damage; it is likely some organic brain issue that is not behaviorally driving. It is unknown if the etiology is genetic or related to some earlier trauma to the brain.

CP 517. *See also* RP (9/6/19) at 92-93. Ngoeung drafted the findings and has not assigned error to any finding.

Notwithstanding this record, Ngoeung claims the court failed to consider his allegations of intellectual disability. Ans. at 27.

IV. ARGUMENT IN REPLY

A party may reply to new issues raised in the answer. RAP 13.4(d).

The State has raised two issues in its Petition for Review:

1. Whether requiring a sentencing court to make an on-the-record assessment of every mitigating fact is in direct conflict with *Jones v. Mississippi* and unjustifiable under *Delbosque* where the Defendant has not assigned error to any finding of fact ~~and where the Defendant was immediately parolable on the new sentence~~[2]?
2. Whether requiring the trial court to justify a standard range sentence is contrary to *Ammons* which holds that as a matter of law there can be no abuse of discretion in a standard range sentence?

Pet. at 2.

Ngoeung's Answer asks the Court to accept review in order to consider two other claims. Related to the State's second issue, Ngoeung alleges that consecutive sentences for serious violent offenses are aggravated, not standard, sentences if the serious violent offense is aggravated murder. Ans. at 12, 23, 34-35. Presuming, but not demonstrating, that they are, he asks:

> Did the sentencing court improperly place the burden on [Ngoeung] to prove his offense was mitigated by youth and fail to include consideration of the standard range sentence in sentencing him under RCW 10.95.030(b)?

[2] *See* Notice of Correction.

Ans. at 4.

And Ngoeung asks:

> Must the sentencing court explicitly account for intellectual disability when assessing a child's capacity for change and history of rehabilitation in an institutional setting? Did the trial court fail to account for this mitigating aspect?

Ans. at 3.

A. If the Court Accepts Review of the State's Second Issue, It Should Also Decide Ngoeung's Claim that He Received an "Aggravated," Rather Than a Mitigated, Sentence.

Ngoeung argues that the court misallocated to him the burden of proving why the assault sentences should not be imposed consecutively to murder sentences. Ans. at 33-35. This Court recently decided that the proponent of a departure bears the burden of proof. *State v. Gregg*, 196 Wn.2d 473, 474 P.3d 539 (2020). The burden is small – a mere preponderance. *Gregg*, 196 Wn.2d at 478. And a downward departure based on a juvenile offender's youth is reviewable only for an abuse of

discretion. *State v. Rogers*, 17 Wn. App. 2d 466, 487 P.3d 177 (2021). That question does not need to be relitigated.

Ngoeung's actual question is **whether running a serious violent sentence consecutively to an aggravated murder sentence is standard versus exceptional**. Ngoeung claims "no statute required" the imposition of sentences consecutive to any sentence for aggravated murder. Ans. at 23.

RCW 10.95.030(3)(a)(ii) speaks in the singular about the sentence for "the crime of aggravated first degree murder for an offense," suggesting that when there are multiple counts, the sentences are considered individually. Ngoeung's two murders are serious violent offenses under RCW 9.94A.030(46)(a)(i); CP 526-29, 540-44; RP (1/23/15) at 5-33. Serious violent offenses are not scored against each other, but instead the sentences run consecutively to each other. RCW 9.94A.589(1)(b). In this way, each subsequent serious violent offense is not a free crime.

Ngoeung argues that for the assault sentences to run consecutively to the aggravated murder sentences, the court

would have to impose an exceptional upward sentence for which written findings would be required. Ans. at 12, 23, 34-35. But at the last sentencing, Ngoeung drafted and the court signed findings to support concurrent sentences on counts I and II as a downward departure. CP 514-19. This demonstrates Ngoeung's understanding that consecutive sentences were standard and that concurrent sentences would be exceptional. Ngoeung appears to now argues that those findings which he drafted were not required, but rather the court should have entered findings in support of the consecutive sentences in counts III and IV.

Precedent supports the judge's understanding that aggravated murder sentences presumptively run consecutively to each other and to other serious violent offenses. *See e.g., State v. Ng*, 104 Wn.2d 763, 770, 713 P.2d 63, 67 (1985) (upholding 13 consecutive life sentences); *State v. Stevenson*, 55 Wn. App. 725, 729, 780 P.2d 873, 875 (1989) (affirming life-without-parole sentence for aggravated murder imposed consecutive to two murder sentences); *State v. Phet*, 11 Wn. App. 2d 1081

(2020) (unpublished decision cited under GR 14.1) (sentencer imposed five life-without-parole sentences, expressing that the law required the sentences to run consecutively).

Most recently, in *State v. Gilbert*, 193 Wn.2d 169, 438 P.3d 133 (2019), this Court held that the sentencing court had authority under *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017) to impose the sentence for aggravated murder and premeditated murder concurrently notwithstanding RCW 9.94A.589(1)(b). In other words, this Court also understood that running the premeditated murder consecutively to the aggravated murder would have been standard.

While the precedent implies consecutive sentences are standard, no case has directly decided the question of whether RCW 9.94A.589(1)(b) applies to aggravated murder sentences. The question was academic before *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) when an aggravated murder resulted in no less than life without parole. *State v. McNeil*, 59 Wn. App. 478, 481, 798 P.2d 817, 818 (1990)

(holding "academic" the question of whether consecutive life sentences was excessive where no person can be incarcerated for more than one's life span).

The question continues to be academic for most juvenile offenders because the Indeterminate Sentencing Review Board will determine their release date after they have served the minimum term of their indeterminate life sentence. *See Matter of Brooks*, 197 Wn.2d 94, 480 P.3d 399 (2021) (holding that a pre-SRA juvenile offender is releasable under RCW 9.94A.730 regardless of the consecutive nature of his sentences).

The question, however, will matter in two highly limited circumstances where offenders are convicted of both aggravated murder and other serious violent offenses. First, there are juvenile offenders like Ngoeung, who reoffend as adults and therefore cannot benefit from RCW 9.94A.730. *See* Notice of Correction. And second, there are offenders who were 18, 19, or 20. *Matter of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021). In both cases, the sentencing court will have discretion under the

Sentencing Reform Act to impose exceptional sentences. The point to clarify is which sentence is standard and which exceptional such that it requires justification through written findings.

If the Court accepts review of the State's second issue, it should consider Ngoeung's related question.

B. The Sentencing Court Considered Ngoeung's Alleged Intellectual Disability When It Considered His Capacity for Rehabilitation and Imposed an Exceptional Downward Sentence.

Ngoeung argues that if the Court accepts review of the State's petition, it should consider "whether" intellectual disability is relevant to an offender's capacity for rehabilitation. Ans. at 27. But this is a decided issue upon which the parties agree. The "mitigating circumstances related to the defendant's youth" include "any factors suggesting that the juvenile might be successfully rehabilitated." *Gilbert*, 193 Wn.2d at 176. And in this case, the record is that the court fastidiously considered Ngoeung's intellect, even overstating the evidence for mitigation.

Because there is no dispute as to the law, but only a misrepresentation of the factual record, Ngoeung has not presented a RAP 13.4(b) consideration which would permit review.

Ngoeung argues that the judge failed to consider his intellectual disability and how that might diminish his opportunity for rehabilitation in prison. Ans. at 32. In fact, the court was inundated with information and argument regarding Ngoeung's intellect and adopted findings on the matter which were drafted by Ngoeung.

If anything, these findings overstate the evidence in the record. Ngoeung's delay was related to cultural, educational, and historical circumstances. There is scarce evidence to support the court's finding that developmental delays which existed at the age of 17 resulted from some "organic brain issue" or continue to this day. Rather, Ngoeung was delayed by circumstances which he can and has outgrown and to which he has adapted. Ngoeung's allocution demonstrates that. RP (9/6/19) at 83-86.

The judge would have been justified[3] if he had considered Ngoeung's uncommonly long infraction record as evidence that he had not been rehabilitated. 25 years of prison records demonstrate that Ngoeung has made little effort to improve himself whether through employment or education. CP 651. Ngoeung has had innumerable infractions[4] including assaults on correctional staff and inmates, weapons possessions, and continued gang ("security threat group") association. CP 655, 670, 673 (a new felony conviction under superior court cause number 10-1-00202-1), 674, 679, 685; RP (9/6/19) at 48.

But the judge characterized these infractions as mere "struggles," while choosing to focus on relatively minor achievements such as more communication with family

[3] The Legislative standard is considerably lower where his single new conviction is the reason that Ngoeung cannot be released early on the assaults. RCW 9.94A730(1)(prohibiting early release for juvenile offenders who commit "any" crime as adults).

[4] Ngoeung committed a new serious violation as recently as June 7, 2021.

members, enjoyment of science fiction, and a renewed attempt at GED classes. RP (9/6/19) at 73.

Ngoeung argues that alleged "oral rulings" reflecting "a lack of rehabilitation" are "not supported by substantial evidence." Ans. at 27-28 (citing CP 496 (FF 16) and RP (9/6/19) at 8, 95-96). First, Ngoeung can provide no authority requiring that every *oral* comment be supported by evidence the record. The rule is that written findings of fact, not oral comments, must be supported by substantial evidence. *State v. Hill,* 123 Wn.2d 641, 644–47, 870 P.2d 313 (1994). And written findings are required for exceptional sentences only. RCW 9.94A.535. Second, the passages Ngoeung cites do not reflect the existence of any ruling reflecting "a lack of rehabilitation." The actual written finding, which Ngoeung himself drafted and has not challenged, only says that Ngoeung availed himself of mental health treatment sporadically. CP 518 (FF 16).

The record does not support Ngoeung's allegation that the sentencer failed to consider his alleged intellectual disability.

Ngoeung complains about a judge who found mitigating factors and imposed a mitigated sentence. His attack is not upon the court's consideration, which is readily apparent in the record. His attack is upon the court's very sentencing discretion. Ngoeung believes that if mitigating factors are present, the court is required to give the Defendant the sentence he requests. This is not the law. The evolution of juvenile sentencing law is to give courts more discretion, not less.

This Court should accept review to make clear that "meaningful consideration" of youth does not require regurgitation of the defendant's argument in the language the defendant prefers, justification of a standard sentence, or granting defendants their choice of sentence. *Jones v. Mississippi*, -- U.S. --, 141 S. Ct. 1307, 1313-16, 209 L. Ed. 2d 390 (2021) (holding there is no formal factfinding requirement); RCW 9.94A.585(1) (determining that the length of a standard range sentence is unappealable).

V. CONCLUSION

The Court should accept review of the State's petition for review. In so doing, it will be able to address Ngoeung's related question regarding whether consecutive sentences are standard versus exceptional when one or more of the offenses is an aggravated murder.

This document contains 3,146 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 22nd day of February, 2022.

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2/22/2022	*s/ Kimberly Hale*
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PIERCE COUNTY PROSECUTING ATTORNEY

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