Supreme Court No. 101165-2
Court of Appeals No. 82677-8-I

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THOMAS SUSNIOS,

Petitioner.

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

PETITION FOR REVIEW

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A. INTRODUCTION

Thomas Susnios, a young Black man, was a law-abiding student when his struggles with schizophrenia began. On his way to pray at mosque one morning, Mr. Susnios experienced a psychotic episode and ran his car into a police vehicle.

Mr. Susnios pled guilty to several counts and requested a mitigated sentence of 60 months on the basis of his youth and mental illness. The judge stated he didn't have time to fully consider the request, but reassured Mr. Susnios he imposed sentences that were "more lenient for people of color" to account for his own "biases" as a white judge. The judge then imposed a standard range sentence of 102 months.

This Court should take review to clarify judges must reflect on their implicit bias to ensure that race does *not* drive judicial outcomes. This Court should also take review to hold that the invocation of racial bias at sentencing requires automatic reversal pursuant to *Zamora*.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Thomas Susnios asks this Court to review the opinion of the Court of Appeals in *State v. Susnios*, No. 82677-8-I (filed June 13, 2022), pursuant to RAP 13.4(b). A motion for reconsideration was denied on July 12, 2022.

C. ISSUES PRESENTED FOR REVIEW

1. This Court has called upon members of the judiciary to "develop greater awareness of our own conscious and unconscious biases" and to "administer justice" "in a way that brings greater racial justice to our system as whole."[1] Here, Snohomish Superior Court Judge Bruce Weiss acknowledged racial bias in the criminal legal system as well as his own biases as a white judge at sentencing. However, Judge Weiss then informed Mr. Susnios, a young Black man, that it was his practice to impose more lenient sentences on defendants of

[1] Letter from Wash. State Supreme Court to Members of Judiciary & Legal Cmt. (June 4, 2020), *available at* https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.

color than on white defendants in order to "account" for his biases. This explicit consideration of race at sentencing was unconstitutional and turns this Court's directive on its head. *Buck v. Davis*, 137 S. Ct. 759, 778, 197 L. Ed. 2d 1 (2017); U.S. Const. XIV. This Court should take review in order to clarify that the purpose of reflecting on implicit bias is to ensure that race *does not* drive judicial outcomes. RAP 13.4(b)(3), (4).

2. This Court recently held in *State v. Zamora*, 512 P.3d 512 (2022), that any invocation of racial bias by a prosecutor in a criminal proceeding is structural error requiring reversal, and that no showing of prejudice is required. Here, the Court of Appeals held Mr. Susnios could not challenge Judge Weiss' race-based sentencing scheme because Mr. Susnios could not "show that the court sentenced *him* based on race in violation of equal protection." Op. at 6. This Court should take review to clarify that *Zamora*'s automatic reversal rule applies to all invocations of racial bias in a criminal proceeding. RAP 13.4(b)(1), (3).

3. Defendants are entitled to ask for a mitigated sentence and have that request meaningfully considered. Here, Mr. Susnios asked for a mitigated sentence of five years based on the combined impact of his schizophrenia and youth on his culpability. The court did not properly consider the request for a mitigated sentence before imposing a standard range sentence. Instead, the court encouraged Mr. Susnios to seek appellate review. This Court should accept review to impress upon lower courts that an appeal is not a replacement for a sentencing court's meaningful consideration of a mitigated sentence in the first instance. RAP 13.4(b)(1).

4. On appeal, the Court of Appeals held a 60-month mandatory minimum must be stricken from Mr. Susnios' sentence. Yet the Court refused to remand for a full resentencing, stating it was "confident" the sentencing court would impose the same standard range sentence of 102 months on remand. This Court should take review to clarify a full resentencing is always required when the sentencing court

misunderstands the legal parameters of its sentencing discretion. RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

Mr. Susnios was raised by East African immigrant parents. CP 73. Mr. Susnios never had any run-ins with the law. CP 38. He is also a devout Muslim and attended mosque every morning. CP 75, 98.

In his late teens, Mr. Susnios began developing symptoms of schizophrenia. CP 72, 74. He experienced paranoia and felt like people were talking about him or being disrespectful towards him. CP 72. Due to his increasing symptoms, Mr. Susnios dropped out of college and moved home with his parents. CP 73.

Mr. Susnios' family discouraged him from seeking treatment because they didn't want him to "depend" on medication and because of the stigma of mental illness in East African culture. CP 74–75. Mr. Susnios tried to cope with his illness by isolating himself from family and friends. CP 74.

On January 25, 2019, Mr. Susnios texted his mother as usual that he was going to the mosque. CP 63, 75. On the way there, Mr. Susnios had a psychotic episode and drove to the Everett Police Station. CP 63, 72. When an officer got into his car, Mr. Susnios drove his car into the officer's car. CP 63. Mr. Susnios and the officer then exited their cars, and Mr. Susnios yelled "I'm going to fucking kill you!" CP 63. A second officer intervened and got into a physical fight with Mr. Susnios. CP 63.

Mr. Susnios sustained a concussion during the altercation and was arrested and taken to the hospital. CP 63. There, he informed a nurse that his head hurt and expressed confusion about why he was in the hospital, telling the nurse that he had just been driving to prayer. CP 63. Mr. Susnios has no memory of the incident or why he drove to the Everett Police Station. CP 72.

Mr. Susnios was charged with first degree assault, third degree assault, and malicious mischief. CP 67. He was

released on bail and lived with his parents for the next two years as his case was pending. CP 75–76.

During this period, Mr. Susnios focused on his personal well-being, including taking medication. CP 76. His family eventually recognized the importance of treating Mr. Susnios' mental health and supported his taking medication. CP 75. Mr. Susnios was able to finish his college degree and began applying to graduate schools while working part time. CP 73, 75–76.

Two years after his arrest, Mr. Susnios pled guilty to the charges of first degree assault and third degree assault. CP 39–56. In exchange, the State dropped the malicious mischief charge and agreed to recommend a low-end standard range sentence of 102 months. CP 53, 56. However, if Mr. Susnios asked for a mitigated sentence, the State reserved the right to ask for a higher sentence of 120 months. CP 53.

Mr. Susnios elected to ask for a mitigated sentence of 60 months on the combined basis of his mental illness and youth.

CP 70–83. He submitted a report by clinical psychologist that he met the criteria for schizophrenia and it was "highly likely" this mental illness "markedly interfered with his capacity to form the requisite mental state for the charges." CP 86; *see also* CP 85–113 (full report, filed under seal). Mr. Susnios also presented research that "[s]tudies of adolescent brains with and without schizophrenia revealed that people with the disorder exhibit a disruption of brain development, in that certain brain chemicals that control thinking, behavior, and emotions are either too active or not active enough." CP 83.

In response to Mr. Susnios' request for a mitigated sentence, the State requested a sentence of 120 months. 5/5/21 RP 4.

Mr. Susnios' defense attorney raised concerns about the case being overcharged and the implications of racial disparity when compared to similar cases with white defendants. 5/5/21 RP 14–15. Judge Weiss acknowledged that "there's racial bias throughout the entire system." 5/5/21 RP 24. He then indicated

he accounted for his own biases as a "white judge" by giving more lenient sentences to people of color:

> And I'd say if anything my sentences probably have been more lenient for people of color than perhaps other people might think they should be because I understand there could be the biases and I take that into account.

Id.

Judge Weiss ultimately denied the request for a mitigated sentence, stating, "I'm not evaluating that today. Frankly, your case is too complex for me in the short time that I had today to review for sentencing to make that determination." 5/5/21 RP 25. Judge Weiss then imposed a standard range sentence of 102 months. *Id.* at 27.

In handing down the sentence, Judge Weiss informed Mr. Susnios:

> I think that prison is probably the worst place for you . . . I don't like that. I don't like the position I'm in. I don't think it's best for you.

5/5/21 RP 26.

Following the imposition of the sentence, Judge Weiss realized he "didn't address *ODell* [sic]"[2] and the arguments related to youth. *Id.* at 34. Having already pronounced the sentence, he quickly dismissed the arguments:

> This is not impulsive behavior that is done by a child. This was, like I said, if anything, it was related to your mental health issues. There's certainly nothing to do with your age . . . . And I am taking into consideration all the factors that are necessary although I've not set all of them forth here in my sentencing related to the factors related to youthfulness.

Id. at 34–35.

Judge Weiss informed Mr. Susnios that if he appealed the sentence and "the Court of Appeals tells me that I'm wrong, then I'll reevaluate [the request for a mitigated sentence] and actually focus in on that specific issue." 5/5/21 RP 33.

The Court of Appeals rejected Mr. Susnios' arguments that the sentencing court improperly commented on race and failed to meaningfully consider his request for a mitigated

[2] *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015).

sentence. Op. 1. The Court of Appeals reasoned "[Mr.] Susnios fails to show that the court sentenced *him* based on race." Op. at 6 (emphasis added).

The Court of Appeals did accept the State's concession that a 60-month mandatory minimum provision was improperly imposed, and remanded to strike that provision only. Op at 8–9. But the Court denied Mr. Susnios' request for a full resentencing on this basis, because it was "confident that the trial court would impose the same sentence without the error." Op. at 10.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The court's discussion of race at sentencing demonstrated bias and requires this Court's review.

a. Consideration of race at sentencing is unconstitutional and violates the SRA.

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Buck v. Davis*, 137 S. Ct. 759, 778, 197 L. Ed. 2d 1 (2017) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct.

2993, 61 L. Ed. 2d 739 (1979)). "Relying on race to impose a criminal sanction 'poisons public confidence' in the judicial process." *Id.* (quoting *Davis v. Ayala*, 576 U.S. 257, 285, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015)).

The imposition of a particular sentence based on a defendant's race serves no compelling governmental interest and thus violates equal protection. U.S. Const. amend. XIV; *McCleskey v. Kemp*, 481 U.S. 279, 291 n.8, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987); *see also Zant v. Stephens*, 462 U.S. 862, 885, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) (consideration of race is "constitutionally impermissible or totally irrelevant to the sentencing process.").

The SRA must similarly be applied "without discrimination as to any element that does not relate to the crime or the previous record of the defendant." RCW 9.94A.340. Accordingly, a defendant's race "must not enter into the selection of the appropriate sentence" under the SRA. *State v. Osman*, 126 Wn. App. 575, 580, 108 P.3d 1287 (2005)

(quoting *State v. Roberts*, 77 Wn. App. 678, 683, 894 P.2d 1340 (1995)).

The trial court candidly violated these provisions.

b. <u>This Court should take review to clarify judges must acknowledge their bias to ensure that a defendant's race is *not* a factor in the administration of justice.</u>

In sentencing Mr. Susnios, Judge Weiss, "a white judge," acknowledged "there's racial bias throughout the entire system." 5/5/21 RP 24. Judge Weiss informed Mr. Susnios that "when anybody appears in front of me I try as best I can to handle the case appropriately, not taking into consideration the color of somebody's skin." 5/5/21 RP 24. However, Judge Weiss then stated the opposite:

> And I'd say if anything **my sentences probably have been more lenient for people of color** than perhaps other people might think they should be because I understand **there could be the biases and I take that into account.**

Id. (emphasis added). In short, Judge Weiss indicated he imposed more lenient sentences for people of color to

"account" for his own biases. This practice is patently unconstitutional and violates the SRA. *See, e.g.*, *Zant*, 462 U.S. at 885; *Osman*, 126 Wn. App. at 580.

To be clear, Judge Weiss correctly acknowledged the pervasive racial inequities of our criminal justice system as well as his own implicit biases. *See State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018) (taking "judicial notice of implicit and overt bias against black defendants in this state" and collecting cases); *State v. Saintcalle*, 178 Wn.2d 34, 36, 49, 309 P.3d 326 (2013) (racial discrimination is "often unintentional, institutional, or unconscious" but this "does not make it any less pernicious."), *abrogated on other grounds by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017).

This Court has specifically urged jurists to engage in this kind of reflection: "As judges, we must recognize the role we have played in devaluing black lives . . . . We can develop a greater awareness of our own conscious and unconscious biases in order to make just decisions in individual cases." Letter from

Wash. State Supreme Court to Members of Judiciary & Legal Cmt. (June 4, 2020).[3]

However, Judge Weiss' conclusion that he must impose sentences that are "more lenient for people of color" misconstrues the purpose of this reflection. Jurists should acknowledge their bias to ensure that a defendant's race is *not* a factor in the administration of justice. *See McCleskey*, 481 U.S. at 291 n.8; *Zant*, 462 U.S. at 885. Imposing more lenient sentences for people of color is an unconstitutional race-based classification that undermines this goal. *Id.*

Despite Judge Weiss's best intentions to correct for his own biases, his consideration of race at sentencing violates both equal protection and state statute. *McCleskey*, 481 U.S. at 291 n.8; *Zant*, 462 U.S. at 885; *Osman*, 126 Wn. App. at 580; RCW 9.94A.340. This Court should take review to clarify the intent

[3] Available at: https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf

of its June 2020 letter was not to encourage such discrimination, but prevent it.

c. This Court should take review to apply *Zamora*'s automatic reversal rule to sentencing.

The consideration of race at sentencing "casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt." *See Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) (citations and quotation marks omitted). Accordingly, it "invites cynicism" of the sentencing court's "obligation to adhere to the law" on other issues and results in a "cognizable injury" to the defendant. *See id.* at 411–12. Here, the consideration of race at Mr. Susnios' sentencing calls into question the propriety of all grounds upon which the sentence was imposed.

The Court of Appeals erroneously held Mr. Susnios' claims failed because he did not show the sentencing court's admitted bias affected his sentence. Op. at 5. "Indeed," the Court of Appeals reasoned, "the court ultimately rejected [Mr.]

Susnios' request for an exceptional sentence downward in favor of a sentence within the standard range." Op at 5. Accordingly, this Court held "[Mr.] Susnios fails to show that the court sentenced *him* based on race in violation of equal protection or the SRA." Op. at 6 (emphasis added).

However, Mr. Susnios need not show his sentence was specifically impacted by the court's announced race-based sentencing practices in order to obtain relief. As this Court recently held, any invocation of racial bias in a criminal proceeding is structural error requiring reversal – no showing of prejudice is required. *State v. Zamora*, 512 P.3d 512, 525 (2022).

Zamora addressed "the inherent and grave prejudicial nature of state-sanctioned invocation of racial bias in the administration of justice." *Id.* Assessing a prosecutor's harmful and irrelevant appeals to racial stereotypes during *voir dire*, the *Zamora* Court held that "when a prosecutor flagrantly or apparently intentionally appeals to a juror's potential racial or

ethnic prejudice, bias, or stereotypes," "the defendant need not establish prejudice." *Id.* at 524–25. Rather, "the resulting prejudice is *incurable and requires reversal*." *Id.* at 525 (emphasis added).

The same rule should apply when a sentencing judge explicitly declares he engages in a race-based sentencing scheme. Under these circumstances, the defendant should be entitled to an automatic resentencing – regardless of the actual sentence imposed. *See Gregory*, 192 Wn.2d at 5 (imposing punishment in an "arbitrary and racially biased manner" is unconstitutional).

The Court of Appeals opinion condones the sentencing court's admitted practice of imposing "more lenient sentences for people of color." This unconstitutional result cannot stand. This Court should take review to clarify the intention of its June 4, 2022 letter regarding implicit bias and to apply *Zamora's* standard of review to sentencing.

2. The sentencing court did not meaningfully consider Mr. Susnios' request for a mitigated sentence, deferring to the Court of Appeals to correct its error. This Court should condemn this practice.

a. A sentencing court must meaningfully consider a request for a mitigated sentence.

"The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1). Every defendant is entitled to ask for a mitigated sentence and have that request "actually considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). Failure to "meaningfully consider" a mitigating factor raised by the defense at sentencing is reversible error. *See State v. O'Dell*, 183 Wn.2d 680, 696–67, 358 P.3d 359 (2015).

b. Mr. Susnios requested a mitigated sentence based on the combined impact of his mental illness and youth on his culpability.

Youth and people with mental illness have "lessened culpability" and are thus "less deserving of the most severe

punishments." *See Graham v. Florida*, 560 U.S. 48, 61, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). Youth and mental illness are thus properly raised as mitigating factors at sentencing. *O'Dell*, 183 Wn.2d at 692; *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 312, 482 P.3d 276 (2021); *State v. Schloredt*, 97 Wn. App. 789, 802, 987 P.2d 647 (1999).

Research has conclusively demonstrated that the parts of the brain that control behavior continue to develop "well into a person's 20s." *O'Dell*, 183 Wn.2d at 692; *accord Monschke*, 197 Wn.2d at 322. Studies show that "[u]ntil full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their *late twenties* and beyond." *O'Dell*, 183 Wn.2d at 672 (citations and quotation marks omitted) (emphasis added).

Similar to youth, mental disability diminishes personal culpability. *Atkins*, 536 U.S. at 318. Although individuals with mental disabilities are often found competent to stand trial, "by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* Indeed, cases holding that youthfulness mitigates culpability drew first on cases which recognize the mitigating qualities of mental disabilities. *Monschke*, 197 Wn.2d at 316–17.

Here, Mr. Susnios requested that the court impose a mitigated sentence due to the combined impact of schizophrenia and youth on his culpability. CP 79–83. He submitted an expert opinion that he suffered from schizophrenia, was unmedicated at the time of the crime, and that it was "highly likely that the level of illness he was experiencing at the time of his alleged offense markedly interfered with his capacity to

form the requisite mental state for the charges." CP 85–86, 109.

Although Mr. Susnios was 24 years old at the time of the offense, he further argued that his brain "wasn't that of a normally developed 25-year old[4] due to his mental illness." CP 82. In support of this argument, Mr. Susnios presented research that schizophrenia impacts adolescent brain development "in that certain brain chemicals that control thinking, behavior, and emotions are either too active or not active enough." CP 83 (citing Lewis DA, Levitt P., *Schizophrenia as a disorder of neurodevelopment*, 25 Ann. Rev. Neurosci. 409 (2002)[5] and Paul M. Thompson, et. al., *Mapping adolescent brain change*

[4] Mr. Susnios had actually turned 24 just two months before the offense. CP 60, 69 (listing date of birth as November 24, 1994).
[5] Available for download at: https://www.researchgate.net/publication/11320657_Lewis_DA_Levitt_P_Schizophrenia_as_a_disorder_of_neurodevelopment_Ann_Rev_Neurosci_25_409-432.

reveals dynamic wave of accelerated gray matter loss in very early onset schizophrenia (2001)[6]).

At sentencing, defense counsel explained that a mitigated sentence was warranted because schizophrenia "does stunt the growth of your brain, which would then mean that [Mr. Susnios] does not have a brain of a 25-year-old. His brain is that of somebody under 25." 5/5/21 RP at 19.

In light of Mr. Susnios' youth and mental illness, he requested a mitigated sentence of 60 months.[7] CP 83. The sentencing court was required to meaningfully consider this request. *O'Dell*, 183 Wn.2d at 696–97; *Monschke*, 197 Wn.2d at 311; *Schloredt*, 97 Wn. App. at 802. The court did not.

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[6] Available at: https://www.pnas.org/content/pnas/98/20/11650.full.pdf.

[7] Defense counsel requested a 60 month sentence based on a misunderstanding that this was the mandatory minimum. CP 83.

c. The court did not meaningfully consider Mr. Susnios' request for a mitigated sentence, deferring to the Court of Appeals to correct its errors.

Although Mr. Susnios requested a mitigated sentence based on his mental illness and youth, the sentencing court did not meaningfully consider the request as required. *O'Dell*, 183 Wn.2d at 696. Instead, the court explicitly stated it was "not evaluating that today" because the request was "too complex for me in the short time that I had today to review it for sentencing to make that determination." 5/5/21 RP 26. The court then imposed a standard range sentence instead. 5/5/21 RP 26. Because the court failed to meaningfully consider Mr. Susnios' request for a mitigated sentence, resentencing is required. *O'Dell*, 183 Wn.2d at 696.

The court asserted it couldn't find a "legal basis" to impose a mitigated sentence due to Mr. Susnios' mental illness, while simultaneously acknowledging it did not give the request adequate consideration due to time constraints. 5/5/21 RP at

26. Further, the court imposed the sentence without considering Mr. Susnios' youth. It wasn't until *after* imposing the sentence that the court realized it "didn't address *ODell* [sic]" and the arguments related to youth. *Id.* at 34. The court summarily dismissed the arguments. *Id.* at 34–35. In doing so, the court not only failed to consider the mitigating qualities of youth, it also failed to consider the combined impact of Mr. Susnios' mental illness and age on his culpability. The sentencing court's failure to "meaningfully consider" the request for a mitigated sentence requires resentencing. *O'Dell*, 183 Wn.2d at 696; *Grayson*, 154 Wn.2d at 342.

The sentencing court referenced several times that it would consider the request for an exceptional sentence if reversed by the appellate courts. Specifically, the sentencing court stated:

> Ordinarily, what I do in cases often like this, because you'll have the right to appeal this decision, is I will indicate generally, well, even if I could give an exceptional sentence, I wouldn't do it and here's why I wouldn't do it, I'm not doing that in your case today . . . .

> [I]f I'm wrong that there's a legal basis for this, then it will be resentenced and I'll have to consider it at that time. I'm not evaluating that today . . . .
>
> And like I said, if I'm wrong, your case should come back before me before you would serve the minimum amount of time and we can readdress it . . .
>
> And like I said, if you appeal it and the Court of Appeals tells me that I'm wrong, then I'll reevaluate it and actually focus in on that specific issue.

5/5/21 RP 26–27, 33. In doing so, the sentencing court explicitly acknowledged that it expected to be reversed.

Rushed judgments are not acceptable simply because a defendant has a right to appeal. This Court should take review to impress upon lower courts that they must *meaningfully* consider a defendant's request for a mitigated sentence in the first instance, rather than shift that obligation onto the appellate courts.

3. This Court should take review to hold a court's misunderstanding of the legally available sentence always requires full resentencing.

Prior to sentencing, Mr. Susnios requested an exceptional sentence of 60 months based on defense counsel's misunderstanding that this was the mandatory minimum sentence. CP 83. However, Mr. Susnios never pled to facts that would support a 60-month minimum sentence. *See* CP 39–66. The court nevertheless imposed a 60-month mandatory minimum. CP 15. As the Court of Appeals acknowledged, this error requires resentencing. Op. at 8–10; *see also State v. Dyson*, 189 Wn. App. 215, 228, 360 P.3d 25 (2015).

However, the Court of Appeals denied Mr. Susnios' request for a *full* resentencing on remand. Op. at 9–10. The Court expressed it was "confident that the trial court would impose the same sentence without the error," and simply ordered the mandatory minimum stricken from the sentence. Op. at 10 (citing *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002)).

In sum: the sentencing court gave short shrift to Mr. Susnios' request for a mitigated sentence, yet deferred to the Court of Appeals to correct its mistakes. The Court of Appeals, on the other hand, expressed absolute "confidence" in the sentencing court's selection of an appropriate sentence – despite the sentencing court's misgivings about the sentence it imposed.

Contrary to the Court of Appeals' holding, the record is replete with the court's express statements that it would *not* impose the same sentence on remand. *See* 5/5/2021 RP 26–27, 33. The court instead promised Mr. Susnios it would "consider" the request for an exceptional sentence if the case was remanded, because "prison is probably the worst place for you." *Id.* at 26.

The court's comments also indicate it regarded the 60-month minimum as the sentencing "floor." In pronouncing the sentence, the court stated, "your minimum term's going to be the five years." *Id.* The court further stated any potential

resentencing would occur "before you would serve the minimum amount of time." *Id.* at 27 (emphasis added). However, the actual "minimum" was zero, with a maximum of 136 months. *See State v. Houston-Sconiers*, 188 Wn.2d 1, 24, 391 P.3d 409 (2017) ("zero incarceration" is a lawful exceptional sentence). The court thus not only misunderstood the legal parameters of the available sentence, but expressly relied on the 60-month minimum as an outer limit.

There does not appear to be any definitive authority from this Court as to whether a full resentencing is required when a mandatory minimum is stricken from a sentence within the standard range, thus inherently expanding the sentencing court's discretion. However, this Court's decision in *State v. Parker*, 132 Wn.2d 182, 937 P2d 575 (1997) provides some guidance.

The *Parker* Court held the Sentencing Reform Act (SRA) "imposes a regime of structured discretion" and that the "end sentence [must] be the result of "principled discretion.'" *Id.* at

190. Accordingly, when a sentencing court misunderstands the strictures of a particular sentence, "[a]ffirming such would uphold a sentence which the sentencing judge might not have imposed given correct information and would defeat the purpose of the SRA." *Id.* The *Parker* Court held "remand is the remedy," but allowed one exception: "the record clearly indicates the sentencing court would have imposed the same sentence anyway." *Id.*

As already explained, the sentencing court repeatedly expressed it would consider a more lenient sentence on remand. However, even had the sentencing court indicated a steadfastness to a particular sentence – which the Court of Appeals erroneously concluded it did – Mr. Susnios should still receive a full resentencing.

In a dissenting opinion in *State v. Chambers*, Justice Wiggins underscored the inherent limitations in *Parker's* exception. 176 Wn.2d 573, 293 P.3d 1185 (2013) (Wiggins, J., dissenting). Justice Wiggins argued that "where the trial court

has imposed a sentence not authorized by the SRA, the appropriate remedy is remand to the trial court to impose a sentence that is authorized by the SRA." *Id*. at 596–97. As Justice Wiggins noted, appellate courts are otherwise required to engage in "guesswork" about "what the trial court would have done or could have done had it followed the SRA's requirements." *Id*. at 597.

This Court should remove the guesswork from its review of erroneous sentencing decisions on direct appeal. Review should be granted to clarify that a sentencing court's misunderstanding of the parameters of a legally available sentence always requires full resentencing.

F. CONCLUSION

For the reasons stated above, this Court should accept review.

G. CERTIFICATE OF COMPLIANCE

In compliance with RAP 18.17(b), counsel certifies that this brief is proportionately spaced using 14-point font

equivalent to Times New Roman and contains 4,988 words (word count by Microsoft Word).

DATED this 11th day of August.

Respectfully submitted,

/s Jessica Wolfe

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. SUSNIOS, THOMAS, DOB: 11/24/1994, Appellant.	)	No. 82677-8-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Thomas Susnios filed a motion for reconsideration of the opinion filed on June 13, 2022. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

Sincerely,

Lea Ennis
Court Administrator/Clerk

law

c: The Honorable Bruce Weiss
Thomas Susnios

FILED
6/13/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SUSNIOS, THOMAS, DOB: 11/24/1994, Appellant.	)	No. 82677-8-I DIVISION ONE UNPUBLISHED OPINION

BOWMAN, J. — Thomas Susnios appeals his standard-range sentence, arguing the court improperly commented on race and failed to consider meaningfully his request for an exceptional sentence down. The record does not support his claims. Susnios also argues the sentencing court erroneously imposed a 60-month mandatory minimum term of confinement and supervision fees. We agree and remand for the court to strike those provisions from Susnios' judgment and sentence.

FACTS

Susnios is a young Black man who suffers from schizophrenia. One morning in January 2019, Susnios texted his mother like he did most days to tell her that he was driving to attend a prayer service. But, instead, he drove to the Everett Police Department South Precinct parking lot and purposefully crashed into a patrol car driven by Officer Jared Corson. After the collision, Officer Corson and Susnios got out of their cars and Susnios started screaming at Officer Corson.

Officer Ryan Greely was in his patrol car directly in front of the collision. He also got out of his car and approached Susnios. Susnios struck Officer Greely and repeatedly yelled, " 'I'm going to kill you.' " Officer Greely tackled and arrested Susnios. Police took Susnios to the hospital where he told a nurse he was driving to attend prayer service, but he said nothing about the collision. Susnios did not recall events before the crash or anything about the crash itself.

The State charged 24-year-old Susnios with first degree assault of Officer Corson, first degree malicious mischief, and third degree assault of Officer Greely. Susnios pleaded guilty to both assault charges. His standard-range sentence for the first degree assault was 102 to 136 months. The third degree assault had a standard range of 3 to 8 months.

At sentencing, the State asked the court to impose 120 months. Susnios requested an exceptional sentence below the standard range of 60 months. He asked the court to consider the effect of implicit racial bias, raising concerns that because he is Black, he would receive a longer sentence than a white defendant would in his position. He then argued that his mental illness and his youth were mitigating factors that warranted an exceptional sentence as they significantly impaired his capacity to appreciate the wrongfulness of his conduct. In support of his argument, Susnios submitted a psychological report detailing his mental health history.

The court first addressed Susnios' concern about implicit racial bias. It noted that "when anybody appears in front of me I try as best I can to handle the

case appropriately, not taking into consideration the color of somebody's skin."

The court then stated:

> I'd say if anything my sentences probably have been more lenient for people of color than perhaps other people might think they should be because I understand there could be the biases and I take that into account.

The court denied Susnios' request for an exceptional sentence downward. It determined that neither Susnios' mental health nor his youth amounted to mitigating factors. The court imposed a 102-month sentence with a 60-month mandatory minimum term of confinement for first degree assault and a concurrent 8-month sentence for third degree assault. The court found Susnios indigent and waived discretionary fees.

Susnios appeals.

ANALYSIS

Comment on Race

Susnios claims the trial court improperly considered race at sentencing, "demonstrat[ing] bias" and violating his constitutional right to equal protection and the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. We disagree.

The federal constitution prohibits states from making or enforcing any law that denies "to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. XIV, § 1. Similarly situated persons should receive like treatment under the law. State v. Osman, 126 Wn. App. 575, 581-82, 108 P.3d 1287 (2005), aff'd, 157 Wn.2d 474, 139 P.3d 334 (2006). As a result, courts must not impose sentences based on a defendant's race. Buck v. Davis, __ U.S. __, 137 S. Ct. 759, 778, 197 L. Ed. 2d 1 (2017). "Relying on race to impose a criminal

sanction 'poisons public confidence' in the judicial process" and "injures not just the defendant, but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.' " Buck, 137 S. Ct. at 778[1] (quoting Davis v. Ayala, 576 U.S. 257, 285, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015); Rose v. Mitchell, 443 U.S. 545, 556, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979)). There is no compelling governmental interest in enforcing criminal laws based on race, and doing so violates equal protection. McCleskey v. Kemp, 481 U.S. 279, 291 n.8, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

Similarly, a defendant's race " 'must not enter into the selection of the appropriate sentence' " under the SRA. Osman, 126 Wn. App. at 580 (quoting State v. Roberts, 77 Wn. App. 678, 683, 894 P.2d 1340 (1995)). Courts must apply the SRA "without discrimination as to any element that does not relate to the crime or the previous record of the defendant." RCW 9.94A.340. But neither equal protection nor the SRA prohibits courts from recognizing bias at an individual or systemic level. See State v. Scabbyrobe, 16 Wn. App. 2d 870, 878 n.3, 482 P.3d 301, review denied, 197 Wn.2d 1024, 492 P.3d 174 (2021) ("Implicit bias exists. Law enforcement, prosecutors, trial judges and appellate judges must be aware of this and guard against it."); State v. Gregory, 192 Wn.2d 1, 22, 427 P.3d 621 (2018) (taking "judicial notice of implicit and overt racial bias against [B]lack defendants in this state" in considering whether death penalty unconstitutional).

[1] Alterations in original.

Susnios argues that the trial court's discussion of race at sentencing " 'casts doubt' "[2] on his sentence and shows that the judge imposes "more lenient sentences for people of color in order to 'account' for . . . his own biases." He cites two per curiam opinions, State v. Black, No. 71368-0-I (Wash. Ct. App. Dec. 8, 2014) (unpublished), https://www.courts.wa.gov/opinions/pdf/713680.pdf, and State v. Richwine, No. 76807-7-I (Wash. Ct. App. Dec. 18, 2017) (unpublished), https://www.courts.wa.gov/opinions/pdf/768077.pdf, in support of his argument.[3] In each of those cases, the State conceded error because the court discussed perceived inequities in sentencing recommendations for different races and appeared to base its sentence on each defendant's race. Black, No. 71368-0-I, slip op. at 1; Richwine, No. 76807-7-I, slip op. at 2.

Unlike in Black and Richwine, the court here did not impose a sentence based on Susnios' race. Rather, the judge responded to defense counsel's concerns about implicit bias by assuring Susnios that "I understand there could be the biases and I take that into account," and that "when anybody appears in front of me I try as best I can to handle the case appropriately, not taking into consideration the color of somebody's skin." And nothing in the record supports Susnios' argument that the court's comment, "[M]y sentences probably have been more lenient for people of color," shows that it imposed a more lenient sentence in his case. Indeed, the court ultimately rejected Susnios' request for an exceptional sentence downward in favor of a sentence within the standard range.

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[2] Quoting Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

[3] "Unpublished opinions of the Court of Appeals have no precedential value and are not binding," but cases filed after March 1, 2013 "may be accorded such persuasive value as the court deems appropriate." GR 14.1(a).

Susnios fails to show that the court sentenced him based on race in violation of equal protection or the SRA.

Exceptional Sentence Request

Susnios argues that the court refused to consider meaningfully his request for an exceptional sentence below the standard range. We disagree.

Under the SRA, a trial court must impose a sentence within the standard range "unless it finds substantial and compelling reasons to justify a departure." State v. Smith, 82 Wn. App. 153, 160-61, 916 P.2d 960 (1996). A sentencing court "may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1). It is a mitigating circumstance if a defendant's "capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired." RCW 9.94A.535(1)(e).

When a defendant requests an exceptional sentence, our "review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). "A court refuses to exercise its discretion if it refuses categorically" to impose a sentence "below the standard range under any circumstances." Id. But a court that considered the facts of a case and found no basis for an exceptional sentence exercised its discretion, and the defendant may not appeal that ruling. Id.

Susnios claims that the court did not meaningfully consider whether his youth and mental illness significantly impaired his capacity to appreciate the wrongfulness of his conduct when he assaulted Officers Corson and Greely. According to Susnios, the court refused to consider his request for an exceptional sentence, telling him that "I'm not evaluating that today" and that his request was "too complex." But Susnios mischaracterizes the record.

At sentencing, Susnios argued that his mental illness and youth significantly impaired his capacity to appreciate the wrongfulness of his conduct. In support of his mental health argument, Susnios offered a psychological report detailing his mental health history. The court considered the report but rejected it as an adequate legal basis to support an exceptional sentence below the standard range. The court explained:

> I can't find what's required under the law that it's been proved by a preponderance that there's a connection between that mental health condition and significant impairment of your ability at that time to appreciate the wrongfulness of your conduct or to conform your conduct to the requirements of the law. I don't believe that the report, although your attorney's done a good job arguing for it, I don't believe that legally I can make the finding that that's established by a preponderance of the evidence.

The trial court also considered and rejected Susnios' argument that his youth significantly impaired his capacity to appreciate the wrongfulness of his conduct. It concluded there was no sufficient basis for it to find Susnios' age impacted his behavior:

> This is not impulsive behavior that is done by a child. . . . [Y]ou were 25 years old at the time.[4] I don't disagree that that's a factor that

[4] Susnios' counsel, and later the court, inaccurately described Susnios as 25 years old at the time of the assaults. He was 24.

> can be taken into consideration. I just don't find that this is the type of behavior consistent with somebody's youthfulness which created the behavior, especially given the facts here that you're saying you don't even remember what happened on that day or how it happened because of your claim that it's related to your mental illness.

The record shows that the court considered Susnios' arguments, concluded they did not support an exceptional sentence, and exercised its discretion to deny the request.

Mandatory Minimum Sentence

Susnios argues that the court erred by imposing a 60-month mandatory minimum term of confinement for first degree assault and that the error warrants resentencing. The State agrees that the court erred but argues we need only remand to strike the 60-month mandatory minimum provision. We agree with the State.

Not all first degree assault convictions carry a 60-month mandatory minimum term of confinement. See In re Pers. Restraint of Huy Khac Tran, 154 Wn.2d 323, 332, 111 P.3d 1168 (2005) ("If the legislature had intended every violation of the first degree assault statute to result in a five-year mandatory minimum, it would have limited" the statute.). Washington's mandatory minimum sentencing statute provides:

> An offender convicted of the crime of assault in the first degree . . . where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years.

RCW 9.94A.540(1)(b).

The legislature intended the provision to "increase the punitive requirement for certain assaults that are characterized by unusually (within the world of assault)

violent acts or a particularly sinister intent." Huy Khac Tran, 154 Wn.2d at 329-30. An offender serving a mandatory minimum term is not "eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release." RCW 9.94A.540(2). Because mandatory minimum sentences increase the penalty of a crime, the defendant must admit to the facts supporting the mandatory minimum sentence or a jury must find the facts by special verdict. Alleyne v. United States, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

In his plea to first degree assault, Susnios admitted that he "intended to inflict great bodily harm . . . by using force or means to produce great bodily harm, to wit: a motor vehicle." But he did not admit to facts that he used force or means likely to result in death or that he intended to kill Officer Corson. As a result, we accept the State's concession that the trial court erred in imposing the mandatory minimum term of confinement for first degree assault.

Susnios argues that the court's error warrants a full resentencing. Remand for resentencing is often necessary when a sentence stems from a trial court's erroneous interpretation of or belief about the governing law. State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002). For example, we will remand for resentencing if an error affects a defendant's standard range. See State v. Argo, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996) (remand for resentencing unnecessary where miscalculation of offender score did not affect standard range). Or we will remand for resentencing where the court mistakenly believed it could not impose an exceptional sentence downward. See State v. Hale, 65 Wn.

App. 752, 757-58, 829 P.2d 802 (1992). But we need not remand for resentencing when we are confident that the trial court would impose the same sentence without the error. McGill, 112 Wn. App. at 100.

Here, the court's error did not affect Susnios' standard sentencing range for first degree assault. His standard range of 102 to 136 months remains the same, and the court sentenced him to the lowest sentence possible in that standard range. Nor did the court mistakenly believe the mandatory minimum term of confinement restricted its ability to impose an exceptional sentence downward. Susnios requested an exceptional sentence of 60 months—the same as the mandatory minimum. The court rejected his request for reasons unrelated to its mistaken belief that the mandatory minimum penalty applied.

We are confident that the trial court would impose the same sentence without the error. But because the mandatory minimum term of confinement affects Susnios' eligibility for early release, we remand with instructions to strike the provision from his judgment and sentence.[5]

Supervision Fees

Susnios argues that the court erred by imposing community custody supervision fees in his judgment and sentence. The State concedes the court should strike those fees. We agree.

[5] Susnios argues State v. Rusev, No. 47762-9-II (Wash. Ct. App. Apr. 18, 2017) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2047762-9-II%20Unpublished%20Opinion.pdf, compels us to reach a different result. In that unpublished opinion, Division Two remanded for a full resentencing after determining that the trial court erred in imposing a mandatory minimum sentence because "the trial court may have imposed a different sentence knowing assault in the first degree did not have a mandatory minimum." Rusev, No. 47762-9-II, slip op. at 13. But the record here does not support the same determination.

At sentencing, the court found Susnios indigent and waived financial obligations other than the mandatory victim penalty and biological sample assessments. Still, Susnios' judgment and sentence orders he "pay supervision fees as determined by" the Department of Corrections. Because the record shows that the trial court intended to waive those fees, we remand for the court to strike the supervision fees from Susnios' judgment and sentence. See State v. Bowman, 198 Wn.2d 609, 629, 498 P.3d 478 (2021) (when trial court intends to impose only mandatory legal financial obligations, community custody supervision fee should be stricken as procedural error).

The record does not support Susnios' claim that the trial court improperly considered race in determining his sentence or failed to consider meaningfully his youth and mental health as mitigating factors. However, we remand for the court to strike the 60-month mandatory minimum term of confinement and supervision fees from Susnios' judgment and sentence.

Bowman, J.

WE CONCUR:

Chung, J.

Andrus, C.J.

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 82677-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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