No. 101611-5
COA NO. 55583-2-II

IN THE SUPRE COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RANDY LEE BRENNAN,

Appellant.

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

The Honorable Christine Pomeroy, Judge
Cause No. 04-1-00407-5

ANSWER TO PETITION FOR REVIEW

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B. STATEMENT OF THE CASE

The Appellant, Randy Lee Brennan, was charged with First Degree Murder while Armed with a Deadly Weapon –

Firearm, based on the death of Larry Craddock during a robbery. CP 1. Brennan pled guilty on September 27, 2004. CP 2-8. This guilty plea stemmed from an incident that occurred on February 24, 2004, when Brennan was only 19 years old. CP 1, 7; RP 7.

Brennan had no prior convictions which counted in his offender score and his standard range was 240-320 months, with an additional 60 months for the firearm enhancement. CP 3, 9-11. The parties presented an agreed recommendation of the low end of the standard range, 240 months followed by the 60-month firearm enhancement, for a total of 300 months, or 25 years. CP 4; RP 5, 7.

During the sentencing hearing, Thurston County Deputy Prosecuting Attorney, Phil Harju, laid out the facts of the case, specifically noting that Mr. Brennan "armed himself with a loaded firearm" after he had decided that he was going to rip off the victim, Larry Craddock, during a methamphetamine deal. RP 3. Mr. Harju also noted that "Mr. Brennan pulled a loaded firearm, pointed it directly at Mr. Craddock, and told him to

empty his pockets." RP 3. When Craddock attempted to pull out his own weapon, Brennan fired the gun three times: one of the shots struck the victim directly in the chest, killing him instantly. RP 3.

Defense Counsel, Samuel Meyer, also made a statement during the sentencing hearing, including, "He (Brennan) comes before the court at an extremely young age, only 20 years old…" RP 7. Mr. Meyer indicated, "Mr. Brennan is in agreement of the imposition of the low end of the standard range in this case, and I think it's appropriate." RP 7.

Thurston County Superior Court Judge Christine Pomeroy also discussed the young age of Brennan during this hearing, stating "you're 20 years old. That's 45 years old (when released from prison) … Will you be hardened?" RP 9. She also stated: "You could get a college degree. You could get a master's degree … I am hoping … you could finish your education …" RP 9-10.

The court sentenced Brennan to the agreed recommended

sentence of 240 months, followed by the 60-month firearm enhancement, for a total sentence of 300 months. RP 10.

Brennen filed his direct appeal on July 19, 2021, claiming that the mandatory minimum sentence imposed at sentencing is unconstitutional when applied to late adolescent defendants. State v. Randy Lee Brennan, (Unpublished Opinion) No. 55583-2-II. The Court of Appeals held that because Brennan negotiated his standard range sentence for his guilty plea, he could not now argue that his sentence is unconstitutional as applied to him. *Id*. at 4. The Court also held that the trial court was not required to consider Brennan's youth at his hearing because he was 19 years old at the time of the offense, and because he did not request an exceptional sentence. *Id*. at 6. His sentence was affirmed.

Brennan now seeks review of the decision of the Court of Appeals.

C. ARGUMENT

A petition for review will be accepted by this Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

1. Whether review is appropriate under RAP 13.4 where the Court of Appeals correctly found that Brennan waived the issue by pleading guilty, consistent with the prior precedent of this Court and the Court of Appeals.

In State v. Moten, 95 Wn. App. 927, 976 P.2d 1286 (1999), the Court of Appeals found that the defendant was precluded from asserting a cruel and unusual punishment claim or equal protection claim for a standard range sentence that was negotiated as part of a plea agreement. The Court stated, "[The Defendant] specifically negotiated his standard range sentence as part of a plea agreement and cannot now choose to argue that the sentence is unconstitutional as applied to him." *Id*. at 934.

Brennan negotiated his standard range sentence in exchange for his guilty plea in this case and was given a low-end sentence after both Brennan and the State jointly recommended the low-end of the standard range. The Court of Appeals held correctly that Brennan received the benefit of his bargain and that he 'offers no contrary arguments as to why the waiver doctrine … should not apply …'. Brennan, at 4.

The Court of Appeals decision is also consistent with the ruling in State v. Osman, 157 Wn.2d 474, 139 P.3d 334 (2006).

In Osman, the defendant pled guilty to three counts of incest in the second degree and was eligible for a requested SSOSA (Special Sex Offender Sentencing Alternative). *Id*. at 477. A presentence investigation report recommended a standard range sentence in opposition to a SSOSA due to Osman's likely deportation before receiving treatment. *Id*. at 477-78. After argument, the court sentenced Osman to the low end of the standard range. *Id*. at 479. The Court of Appeals affirmed the sentence, and this Court granted review. *Id*. at 479-480. On

review, this Court held that generally, a defendant cannot appeal a sentence within the standard range. *Id*. at 481. However, a defendant may appeal a standard range sentence if the sentencing court failed to comply with the procedural requirements of the Sentencing Reform Act of 1981, RCW 9.94A, or constitutional requirements. *Id*. at 481-482 (*citing*, State v. Mail, 121 Wn.2d 707, 711-13, 854 P.2d 1042 (1993); State v. Onefrey, 119 Wn.2d 572, 574, 835 P.2d 213 (1992); State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989); State v. McNeair, 88 Wn. App. 331, 336, 944 P.2d 1099 (1997)).

A court abuses its discretion if it categorically refuses to impose a particular sentence or if it denies a sentencing request on an impermissible basis. *Id*. (*citing,* State v. Khanteechit, 101 Wn. App. 137, 139, 5 P.3d 727 (2000)).

The trial court in this matter sentenced Brennan within the standard range, Brennan did not ask for an exceptional downward sentence, and the sentencing court did not fail to comply with the procedural requirements of the SRA. In this

case, Brennan entered a plea of guilty and the parties entered an agreed recommendation. As in Moten, he should not now be allowed to argue that the standard range sentence that he joined in recommending is unconstitutional as applied to him.

The decision of the Court of Appeals was correct, and the defendant does not meet the requirements of RAP 13.4 for review.

2. Whether review is appropriate under RAP 13.4 where the decision of the Court of Appeals does not conflict with the decisions in Houston-Sconiers and Monschke in relation to the 25-year mandatory minimum sentence when imposed on a 19-year-old defendant.

The Court of Appeals correctly found that the trial court did not have to take Brennan's youth into account at the sentencing hearing because he was 19 years old at the time of the offense and because he did not request an exceptional downward sentence. Brennan, at 6.

Brennan appears to argue that the rulings in Houston-Sconiers and Monschke, and Miller v. Alabama, 567 U.S. 460,

132 S. Ct. 2455 (2012), require this Court to strike his 25-year term. Houston-Sconiers, at 391; Monschke, at 482.

In Houston-Sconiers, this Court held that when sentencing juveniles in the adult criminal system, trial courts must have full discretion to depart from sentencing guidelines and mandatory sentencing enhancements, and that the trial court specifically take into account the defendant's youth. Houston-Sconiers, at 34.

In Monschke, this Court held that when it comes to mandatory life without parole sentences, trial courts must exercise discretion in taking youth into account when sentencing defendants who are 18-, 19-, or 20- years old. Monschke, at 329.

In Miller, our United States Supreme Court held that mandatory life without parole sentences for juveniles under the age of 18 are unconstitutional under the Eighth Amendment's prohibition on cruel and unusual punishment. Miller, at 465

The Court of Appeals addressed this issue as well in its opinion, relying on State v. Nevarez, 24 Wn. App. 2d 56, 519 P.3d 252 (2022), in discussing the impact of Houston-Sconiers

and Monschke on defendants over the age of 18 like Brennan. Brennan, 55583-2-II at 5. In Navarez, the defendant appealed his sentence following a guilty plea to first degree murder with a firearm enhancement, stemming from an incident in which Navarez shot and killed a bystander while shooting at someone else. Navarez, at 57. Navarez was given a sentence that was 36 months above the joint recommendation of the parties but was still within the standard range. *Id*. Navarez appealed in part on the basis that the trial court failed to consider the mitigating qualities of his youth. *Id*.

Like Brennan, "Navarez did not request an exceptional sentence below the standard range based on his youth. Rather, he and the State submitted a joint recommendation. The court was not *required*, on its own, to consider the mitigating qualities of youth because Nevarez was 18 years old at the time of the murder." *Id*. at 62.

Brennan relies on Houston-Sconiers for the proposition that sentencing courts must consider the mitigating qualities of

youth, and that courts have discretion to impose any sentence below the standard SRA range. Defendant's Brief, at 7; Houston-Sconiers, at 38.

Brennan also relies heavily on Monschke for the proposition that courts must exercise discretion when sentencing an 18-, 19-, or 20- year-old." Monschke, at 329. In Monschke, two petitioners were both convicted of life without parole for first degree murder when they were of late adolescence: 19 and 20 years old. *Id*. at 306. This Court held that not every 19- and 20-year-old will exhibit mitigating characteristics, just as not every 17-year-old will. *Id*. at 326. This Court left if "up to sentencing courts to determine which individual defendants merit lenience for these characteristics." *Id*.

Unlike Houston-Sconiers, Brennan was not a juvenile at the time of he committed murder in the first degree. He was also not subjected to an unconstitutional life without the possibility of parole sentence as was the defendant in Monschke. Also, unlike Monschke, the trial court took into account Brennan's youth in

imposing its sentence. Finally, unlike Miller, Brennan is not subject to life without parole as a juvenile under the age of 18, as he was 19 at the time of the homicide.

Nothing in any of those cases suggests that RCW 9.94A.540(1)(a) is unconstitutional as applied to a 19-year-old defendant being sentenced for murder in the first-degree. Brennan was sentenced to the low end of the standard range for the offense that he committed, not the "law's most serious punishment." Miller, at 483.

Brennan has not demonstrated that the Court of Appeals ruling is in contrast with any decisions of this Court and thus does not meet the burden for review.

3. Whether review is appropriate under RAP 13.4 were the mandatory minimum 25-year sentence when imposed on a 19-year-old defendant is presumed constitutional.

Statutes are presumed constitutional. State v. Pauling, 149 Wn.2d 381, 386, 69 P.3d 331 (2003). The burden of proving a statute unconstitutional is on the party challenging its

constitutional validity. Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998). The challenging party must prove beyond a reasonable doubt that the statute is unconstitutional. Island County v. State, 135 Wn.2d 141, 146, 955 P.2d 377 (1998).

In 1997, this Court considered whether the youth of a defendant constituted a basis for an exceptional sentence under the sentencing reform act. State v. Ha'mim, 132 Wn.2d 834, 940 P.2d 633 (1997). The Court discussed immaturity as it related to State v. Scott, 72 Wn. App. 207, 866 P.2d 1258 (1993), where a 17-year-old defendant had argued that he lacked the capacity to appreciate the wrongness of his conduct. The Ha'mim Court stated, "granted, teenagers are more impulsive than adults and lack mature judgment." Ha'mim, at 846-847, *citing*, Scott, at 219-219. The Ha'mim Court held that "age is not alone a substantial and compelling reason to impose an exceptional sentence." *Id*. at 847.

In State v. O'Dell, 183 Wn.2d 680, 358 P 3d. 359 (2015), this Court discussed Ha'mim and found that the decision did not preclude a defendant from arguing that youth was a mitigating factor. O'Dell. at 335. The Court noted that Ha'mim "did not preclude a defendant from arguing youth as a mitigating factor, but rather, it held that the defendant must show that his youthfulness relates to the commission of the crime." O'Dell, at 336.

Brennan's case is distinguishable from O'Dell as no party at the sentencing hearing for Brennan asked for an exceptional sentence, down or upward: it was an agreed recommendation. David Boerner, et al., The *2004 Adult Sentencing Guidelines Manual – State of Washington, Sentencing Guidelines Commission,*[1], discuss exceptional sentences as the law stated at that time. It states: In the case of the five crimes with statutory

[1] Sentencing Guidelines available at https://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2004.pdf Last viewed 2/27/23.

mandatory minimum sentences (…, First Degree Murder …), an exceptional sentence cannot include a term less than the mandatory minimum term of confinement (RCW 10.95.30 and RCW 9.94A.540). *Id*. at I-23.

A trial court does not commit error by not addressing a request for an exceptional sentence that is not properly made. Under the Sentencing Reform Act of 1981, a standard range sentence is generally not appealable. RCW 9.94A.585(1).

"While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence." State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). However, a trial court does not abuse its discretion by not considering an exceptional sentence that is not properly requested. State v. Williams, 2021 Wash.App.LEXIS 1947 *10, 18 Wn.App.2d 1053 (2021).[2]

[2] Unpublished opinion offered under GR 14.1.

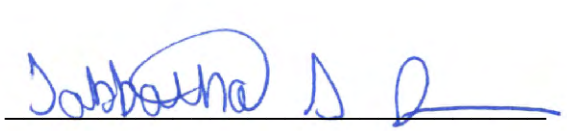
Unlike the defendant in O'Dell, Brennan did not request a downward exceptional sentence. It's clear from the record that no party asked for an exceptional sentence down or upward at the sentencing hearing. The parties presented the court with an agreed recommendation, the parties recognized Brennan's age, and the court sentenced Brennan as presented: to the mandatory minimum term required by law. The sentence of 25 years for 19-year-old Brennan was legally appropriate and the statutes relied upon are not unconstitutional.

D. CONCLUSION

Brennan has not demonstrated that review is appropriate under RAP 13.4. The State respectfully requests that this Court deny review.

I certify that this document contains 2614 words, not including those portions exempted from the word count, as counted by word processing software, in compliance with RAP 18.17.

Respectfully submitted this 27th day of February 2023.



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I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, in The Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: February 27, 2023.

Signature: Stephanie Johnson

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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