NO. 32027-8-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOEL RAMOS,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED BY REVIEW.

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2. Whether the sentencing court on remand abused its discretion in its decision not sentence the appellant to concurrent terms of 20 years for each of the first degree murder counts, after conducting an individualized sentencing considering all evidence presented by the appellant?
3. Whether the court's sentence of 85 years of confinement is unconstitutional?
4. Whether being candid with the sentencing court as required by RPC 3.3(a)(1) can be considered a breach of its obligation under the plea agreement by the State?
5. Assuming arguendo that the trial court erred, should the appellant be resentenced by a difference judge when the assigned judge conducted a thorough resentencing hearing and is familiar with all of the facts and issues?

II. ANSWERS TO ASSIGNMENTS OF ERROR.

1. This court should affirm the sentence in this matter since it was a standard range sentence following a full resentencing where the sentencing court considered whether to exercise its discretion and sentence the appellant to exceptional sentence below the standard range as ordered by this court.

2. The sentencing court did not abuse its discretion by sentencing the appellant to consecutive terms of 20 years for each felony murder charge, and 25 years for the count of premeditated first degree murder, after having conducted an individualized sentencing considering all evidence presented by the appellant.

3. The sentencing court's sentence of 85 years is not unconstitutional under United States or State of Washington constitutions..

4. The State did not breach its obligation under the plea agreement by being candid with the sentencing court as required by RPC 3.3(a)(1).

5. Even if the trial court erred the appellant should be resentenced by the same judge when who conducted a thorough

resentencing hearing and is familiar with all of the facts and issues in this case.

III. STATEMENT OF THE CASE

The facts regarding the murders can be found in the unpublished case involving the codefendant. State v. Gaitan, 1996 Wash. App. LEXIS 1159. The appellant's brief sets forth the facts and procedural posture sufficient for review of the issues presented in their brief.

IV. **ARGUMENT**

A. THE APPELLANT WAS SENTENCED TO A STANDARD RANGE SENTENCE FOLLOWING A FULL RESENTENCING HEARING WHERE THE SENTENCING COURT EXERCISED ITS DISCRETION IN CONSIDERING WHETHER TO SENTENCE THE APPELLANT TO AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE.

As noted by this court in its previous decision regarding this matter, "[i]f the court imposes a standard range sentence, the general rule is that it cannot be appealed. State v. Friederich-Tibbets, 123 Wn.2d 250, 252, 866 P.2d 1257 (1994). A standard range sentence can be challenged on the basis that the court refused to exercise discretion or relied on an improper basis for declining to consider the request. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). In such circumstance, it is the court's refusal to exercise discretion that is appealable rather than the sentence itself. Id. "Conversely, a trial court that

has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling." Id. State v. Ramos, 2013 Wash. App. LEXIS 816 (unpublished, COA No. 30279-2-III, Wash. Ct. App. Apr. 16, 2013).

The sentencing court imposed a standard range sentence following the remand by this court. The court was aware of its responsibilities and its discretion, and exercised the same. The appellant should not be allowed yet another bite at the apple.

B. **THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION BY SENTENCING THE APPELLANT TO CONSECUTIVE TERMS OF 20 YEARS FOR EACH FELONY MURDER CHARGE, AND 25 YEARS FOR THE COUNT OF PREMEDITATED FIRST DEGREE MURDER, AFTER HAVING CONDUCTED AN INDIVIDUALIZED SENTENCING CONSIDERING ALL EVIDENCE PRESENTED BY THE APPELLANT.**

Contrary to the appellant's assertion, the sentencing court meaningfully considered the appellant's youth, home environment, and rehabilitation pursuant to Miller v. Alabama, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). The sentencing court, as well as the parties, agreed that a full resentencing would take place. (10/14/2013 RP 6-7). The court set aside two days for the defense to present their case for an exceptional sentence. (10/14/2013 RP 7).

The defense presented their case. Testimony was received from the following:. Mark Dhaanens, a vocational instructor who taught upholstery at Airway Heights Corrections Center, (10/14/2013 RP 9-16); Anna Pulido Graciano, wife to appellant's nephew, (10/14/2013 RP 18-21); Natalio Pulido, appellant's brother-in-law, (10/14/2013 RP 22-30); Raul Sanchez, appellant's older brother, (10/14/2013 RP 32-37); Cuberto Sanchez, appellant's brother, (10/14/2013 RP 38-41); Dr. Terry Lee, expert witness on adolescent brain development, (10/14/2013 RP 79-97); Christopher Rogers, fellow inmate at Airway heights Correctional Facility, (10/14/2013 RP 116-123); and the appellant, (10/14/2013 RP 124-126). In addition, the defense provided the court with a report from Dr. Mark Mays and numerous documents relating to the appellant's life. (10/14/2013 RP 7; CP 653; CP 574-982).

In deciding to reject the appellant's request for a mitigated sentence, the court took into account the adolescent brain science considerations set forth in Miller v. Alabama, Graham v. Florida, and Roper v. Simmons, as well as considerations under the 8th Amendment and the corresponding Washington State Constitutional protections. The sentencing judge took into consideration the testimony of the appellant's expert on adolescent brain development, Dr. Lee. In analyzing the gaps between juveniles and adults the court found that the acts of the defendant did not indicate

impulsivity, recklessness or heedless risk taking. Instead he found that the acts were planned, that the killing the Bryan Skelton was for the purpose of eliminating a witness. All evidence of a clear, cold, calculating decision of a mind fully cognizant of future consequences. (10/15/2013 RP 173-74).

Further, the court noted that a juvenile's actions are less likely to be evidence of irretrievable depravity. However, the actions of the defendant were monstrous. The court ruled that, weighing the factors set forth in Miller v. Alabama and the stated purposes of the Washington Sentencing Reform Act, in balance they do not create a substantial and compelling reason to run the sentences concurrent. (10/15/2013 RP 174).

Also, the court noted that in Miller the court was faced with but one murder. But here, the court was faced with the death of four, one a six year old boy. Murdered in their own home. The court concluded that the meaningful opportunity for release referenced in Graham cannot logically be extended to situations of multiple murders that present themselves here. (10/15/2013 RP 174).

As recently stated by the Washington State Supreme Court,

> The Miller decision holds "that *mandatory* life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 132 S. Ct. at 2460. In order to comply with the Eighth Amendment, n2 sentencing bodies must engage in "individualized consideration" of

> juvenile offenders facing life in prison without the possibility of parole, and specifically to "take into account how children are different [from adults], and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 2469-70. at 2469-70. Thus, the Miller decision does not categorically bar a penalty for a class of offenders or type of crime--as, for example, we did in Roper [v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005),] or Graham [v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)]. Instead, it mandates only that a sentencer follow a certain process--considering an offender's youth and attendant characteristics--before imposing a particular penalty. (emphasis added).

In re Pers. Restraint of Russell Duane McNeil, 2014 Wash. LEXIS 770, 4-5 (Wash. Sept. 25, 2014)

The sentencing court herein did just what the court in Miller required, an individualized consideration of the offender's youth and attendant characteristics before it imposed rejected the exceptional sentence.

The appellant claims that the sentencing court followed the court's opinion in State v. Law, 154 Wn.2d 85, 94, 110 P.3d 717 (2005). [Appellant's Opening Brief, pg. 15-20]. However, the court was quite aware of this court's decision remanding the matter for a full resentencing. [State v. Ramos, No. 30279-2, slip opinion pg. 33, fn 12]. Also, one of the things that the court considered was that Mr. Ramos was 14 years old at the time of the crimes. (10/15/2013 RP 169).

The appellant also asserts that a presumptive sentence of a term of life in prison for a juvenile violates the 8th Amendment per Miller, 132 S.Ct. at 2469. [Appellant's Opening Brief, pg. 20-22]. The appellant cites to the

California case of People v. Gutierrez, 58 Cal. 4th 1354; 324 P.3d 245; 171 Cal. Rptr. 3d 421; (2014), for the proposition that a statutory presumption of consecutive sentences for first degree murder runs afoul of the court's decision in Miller v. Alabama, infra.

In Gutierrez the court held that Pen. Code, § 190.5, subd. (b), properly construed, conferred discretion on a trial court to sentence a 16- or 17-year-old juvenile convicted of special circumstance murder to life without parole or to 25 years to life, with no presumption in favor of life without parole. Pen. Code, § 190.5, subd. (b), states:

> (b) The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.

Clearly the California Penal Code § 190.5, subd. (b), as does the Washington Statute, RCW 9.94A.535, provides the courts with discretion in imposing sentences. Contrary to the appellant's argument, RCW 9.94A.535 allows for a multitude of factors to justify an exceptional sentence, and that list is nonexclusive. RCW 9.94A.535(1).

C. THE COURT'S SENTENCE OF 85 YEARS DOES NOT VIOLATE THE CONSTITUTION OF THE UNITED STATES OR THE STATE OF WASHINGTON.

The appellant claims that the court's sentence of 85 years is contrary to Miller and violative of the 8th Amendment. [Appellant's Opening Brief, pg. 29]. However, Miller merely prohibits mandatory life without parole sentences for juveniles. The appellant has received the individualized sentencing hearing required by Miller, where the court considered his youth and upbringing. This should not be another opportunity for a new round of appeals.

D. THE STATE DID NOT BREACH ITS OBLIGATION UNDER THE PLEA AGREEMENT BY BEING CANDID WITH THE SENTENCING COURT AS REQUIRED BY RPC 3.3(A)(1).

The appellant claims that the State violated its plea agreement by telling the court that Mr. Ramos could have received an exceptional sentence above the standard range for his conduct. [Appellant's Opening Brief, pg. 32-34]. Contrary to the appellant's claim, the State made it quite clear that it was not seeking an exceptional sentence, and made that quite clear to the court. As record reflects that the State was not advocating for an aggravating sentence based upon the death of Bryan Skelton. (10/15/2013 RP 141). The State recommended a sentence of 80 years pursuant to the plea agreement. (10/15/2013 RP 143). This was acknowledged by the sentencing court. (10/15/2013 RP 176).

In addressing questions posed by the court, the State explained the statutory authority of the court, fulfilling its obligation of being candid with the court pursuant to RPC 3.3(a)(1). In State v. Talley, 134 Wn.2d 176, (1978), the court stated that,

> The State is also obligated to adhere to the terms of a plea agreement by recommending the agreed-upon sentence. State v. Coppin, 57 Wn. App. 866, 791 P.2d 228, review denied, 115 Wn.2d 1011, 797 P.2d 512 (1990). Although the recommendation need not be made enthusiastically, the prosecutor is obliged to act in good faith, participate in the sentencing proceedings, answer the court's questions candidly in accordance with RPC 3.3 and, consistent with RCW 9.94A.460, not hold back relevant information regarding the plea agreement. State v. Sledge, 133 Wn.2d 828, 947 P.2d 1199 (1997). Although the State does not breach the agreement by not advocating for the sentence beyond making the bargained-for recommendation, it has an obligation not to undercut a plea bargain with a defendant. In re Palodichuk, 22 Wn. App. 107, 110, 589 P.2d 269 (1978).

Talley, 134 Wn.2d at 183.

In both Talley and Sledge, infra, the procedural posture of the cases where substantially different than what is presented here. In each of those cases, there was an agreement by the parties wherein each would be asking the court for a sentence within the standard. That was the procedural status of this case at the time the plea was entered and the original sentence on August 23, 1993. However, beginning in 2005, the defendant commenced his attempt at obtaining a full resentencing.

Statements made by the State were intended to maintain the status quo of an 80 year sentence in light of the appellant's attempt at resentencing of a sentence of 25 years. The facts of the case were well known to the trial court, it having reviewed this court's opinion. In particular, the appellant was warned in the concurring opinion, fn. 4, pg. 55, Judge Korsmo stated "There is nothing to prohibit the prosecutor from arguing against an exceptional sentence (while maintaining its 80-year recommendation), and Mr. Ramos's actions in slaughtering a young boy in order not to leave any witnesses seriously undercut his argument that he was a follower rather than an equally culpable actor. A full resentencing could just as easily result in a standard range sentence of 106 years rather than the 80 years recommended by the prosecutor."

The State at numerous times during the resentencing asked the court to follow the recommendation for 80 years from the previous sentencing hearing in 1993. (10/15/2013 RP 143, 144). The State even spoke to a middle ground sentence of 411 to 548 months (34.25 to 45.66 years), a period of time between the 320 months sought by the defense and the 80 years in the plea agreement. (10/15/2013 RP 143, 144). Clearly the State's arguments were

necessary to counter the attempt by the appellant to reduce his sentence to 1/3 of the original sentence.

E. EVEN IF THE TRIAL COURT ERRED, THE APPELLANT SHOULD BE RESENTENCED BY THE SAME JUDGE WHO CONDUCTED A THOROUGH RESENTENCING HEARING AND IS FAMILIAR WITH ALL OF THE FACTS AND ISSUES IN THIS CASE.

The State fully believes that there was no error on the part of the sentencing judge and even if this court were to find some error the Appellant has not set forth a basis to disallow this experienced jurist who explicitly followed the ruling of this court and current case law to continue to preside over this case.

V. CONCLUSION

Based upon the foregoing argument, this Court should affirm the sentence imposed by the sentencing court.

Respectfully submitted this 29th day of September, 2014.

s / Kenneth L. Ramm
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DECLARATION OF SERVICE

I, Kenneth L. Ramm, state that on October 2, 2014 a copy of Respondent's Brief was emailed, by agreement of the parties to: Nancy P. Collins, WAP, at wapofficemail@washapp.org and that a copy of said brief was mailed, first class United State Postal Service, to

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 2nd day of October, 2014 at Spokane, Washington.

s/_Kenneth L. Ramm_____
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