NO. 98111-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RYAN WILLIAM MONTANEZ,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that review be denied. If review is nonetheless granted, the State asks the court to review the issue designated in part II.

II. ISSUE CONDITIONALLY RAISED BY RESPONDENT

After asking the court to impose a particular sentence within the standard range, and receiving that identical sentence, can a defendant claim on appeal that the sentence was an abuse of discretion?

III. STATEMENT OF THE CASE

The facts are accurately set out in the Court of Appeals' opinion. A more complete statement of facts is set out in the Brief of Respondent at 1-5. For purposes of this Answer, the following facts are particularly relevant:

In his plea statement, the defendant admitted that he and persons to whom he was an accomplice intentionally assaulted the victim with a firearm. CP 32. As a result of the shooting, the victim was paralyzed for life. Sent. RP 4.

The defendant was originally charged with first degree assault, committed while armed with a firearm. CP 50. As the result of a plea bargain, this charge was reduced to second degree

assault, also committed while armed with a firearm. CP 44. In the plea agreement, the defendant agreed to the prosecutor's sentencing recommendation of 45 months' confinement. CP 35. The court followed this recommendation. CP 10.

IV. ARGUMENT

A. SINCE THE PETITIONER WAS NOT A CHILD WHEN HE COMMITTED HIS CRIME, CONSTITUTIONAL RESTRICTIONS ON SENTENCING CHILDREN HAVE NO APPLICATION.

The petitioner claims that the application of the mandatory firearm enhancement violated the Eighth Amendment. PRV at 9. He bases this argument on State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017), and State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015). The Eighth Amendment, however, establishes a bright-line distinction between juveniles (persons under the age of 18) and adults (persons of that age or older). That age is "the point where society draws the line for many purposes between child and adulthood." Roper v. Simmons, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). The petitioner was 18 years old at the time of the shooting. CP 7.

For this reason, Houston-Sconiers is inapplicable to the present case. It holds that mandatory sentencing is unconstitutional

for children. Houston-Sconiers, 188 Wn.2d at 18-20 ¶¶ 30-36. The petitioner was an adult, not a child.

In O'Dell, this court construed the provisions of the Sentencing Reform Act relating to exceptional sentences. The court held that "a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant." O'Dell, 183 Wn.2d at 698. The case said nothing about constitutional rights and did not address mandatory sentences. O'Dell as well is inapplicable to the present case. Since the Court of Appeals decision does not conflict with any decision of this court, there is no basis for review.

B. THIS COURT SHOULD NOT CONSIDER A STATUTORY ARGUMENT THAT WAS RAISED FOR THE FIRST TIME IN THE PETITION FOR REVIEW.

Under the Sentencing Reform Act, firearm enhancements are mandatory "notwithstanding any other provision of law." RCW 9.94A.533(3)(e). The petitioner nonetheless claims that those enhancement are *not* mandatory whenever a court finds substantial and compelling reasons for disregarding them.

This argument is raised for the first time in the petition for review. In the trial court, the petitioner did not argue that the court was entitled to disregard the mandatory enhancement. Sent. RP

15. In the Court of Appeals, he raised only an Eighth Amendment argument. Brief of Respondent at 9. Non-constitutional sentencing issues can generally not be raised for the first time on appeal. State v. Blazina, 182 Wn.2d 827, 832-34 ¶¶7-9, 344 P.3d 680 (2015). The court should therefore refuse to consider this issue.

Moreover, the Court of Appeals decision is correct. This court has specifically held that an exceptional sentence cannot be used to override a mandatory weapon enhancement. State v. Brown, 139 Wn.2d 20, 29, 983 P.2d 608 (1999). The court has modified this rule only for juveniles. Houston-Sconiers, 188 Wn.2d at 21 ¶ 39. In over 20 years since Brown was decided, the Legislature has not changed the relevant provision of RCW 9.94A.533(3)(e). This lengthy silence indicates the legislature's approval of Brown. See In re Custody of A.F.J., 179 Wn.2d 179, 186 ¶ 8, 314 P.3d 373 (2013).

The petitioner claims that a weapons enhancement is only mandatory if there is no basis for an exceptional sentence. This interpretation would largely rob the statutory language of any meaning. Absent substantial and compelling circumstances (or some available sentencing alternative), *all* standard range sentences are mandatory. RCW 9.94A.505(2)(a)(i). There is no

basis for holding that RCW 9.94A.533(3)(e) means anything other than what it says — notwithstanding any other provision of law, weapon enhancements are mandatory.

C. IF THIS COURT ACCEPTS REVIEW, IT SHOULD HOLD THAT THE DEFENDANT CANNOT CHALLENGE IMPOSITION OF A SENTENCE THAT HE RECOMMENDED.

As part of a plea agreement, the defendant agreed to a sentencing recommendation of 45 months' confinement. CP 35. He got exactly the sentence that he had agreed to recommend. CP 10. He was nonetheless allowed to argue on appeal that this same sentence was an abuse of discretion. If this court decides to accept review, it should decide whether this issue can be raised at all.

When a defendant agrees to a particular sentencing condition in a plea bargain, the invited error doctrine precludes him from challenging that condition on appeal. This applies even if the sentence was constitutionally erroneous. State v. Phelps, 113 Wn. App. 347, 353, 57 P.3d 624 (2002). There is an exception to this doctrine: it does not apply if the condition was beyond the authority of the sentencing court. Id. at 353-54; State v. Mercado, 181 Wn. App. 624, 631 ¶ 13, 326 P.3d 154 (2014). Here, however, the court clearly had statutory authority to impose a sentence at the top end of the standard range. The exception is therefore inapplicable. The

invited error doctrine should prevent the defendant from challenging a sentence that he recommended.

The Court of Appeals believed that the invited error doctrine was inapplicable because the issue on appeal "involves *the trial court's* alleged failure to recognize its alleged discretion." Slip op. at 2 (court's emphasis). This is a distinction without a difference. A court is always free to disregard a party's erroneous concessions on legal issues. See, e.g., State v. Law, 110 Wn. App. 36, 38 P.3d 374 (2002). This does not mean, however, that if the trial court accepts the concession, the party can then challenge that decision on appeal.

In this case, the State agreed to a large reduction in the charges in exchange for (among other things) the defendant's agreement to recommend a sentence at the top of the standard range. Having received that sentence, he then challenged it on appeal. After accepting the benefits of the plea agreement, the defendant should not be allowed to complain that he received the agreed sentence. If the court accepts review, it should apply the invited error doctrine and refuse to consider the defendant's claims.

V. CONCLUSION

The petition for review should be denied.

Respectfully submitted on January 31, 2020.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, RYAN WILLIAM MONTANEZ, Petitioner.	No. 98111-6 DECLARATION OF DOCUMENT FILING AND E-SERVICE

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The undersigned certifies that on the 31st day of January, 2020, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

ANSWER TO PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and to the attorney(s) for the Petitioner; Nielsen, Broman & Koch; Sloanej@nwattorney.net; nielsene@nwattorney.net;

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

Dated this 31st day of January, 2020, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

January 31, 2020 - 3:34 PM

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Appellate Court Case Title:	State of Washington v. Ryan William Montanez
Superior Court Case Number:	17-1-01660-2

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